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RESEARCH ARTICLE

IMPLEMENTATION OF COLLATERAL HIBAH IN MALAYSIA

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Abstract

Collateral hibah is among the hibah products that was created as an instrument for Islamic wealth management. The problem of Muslims' unclaimed property can be mitigated by implementing collateral hibah. This study examined several of current concerns regarding the implementation of collateral hibah in Malaysia by reviewing studies of the literature that previous researchers had written on the subject. This is pertinent since hibah is increasingly being employed by Muslims in Malaysia as a primary Islamic wealth management technique and today's community owns most intangible assets, including homes, land, and other properties, through loan financing from financial institutions. This concept paper attempted to analyse the problems from several perspectives as presented by earlier researchers. The results of the literature analysis indicated that a number of problems, including legality of collateral hibah both national and Islamic law, various rulings from Syariah courts regarding the validation of collateral hibah, conflict of jurisdiction between Shariah and civil court, lack of unified legislation regarding hibah procedure and many more, needed to be resolved to improve the collateral hibah's current implementation in Malaysia. Therefore, this concept paper addressed the problem of Islamic wealth management as it relates to collateral hibah and may serve as an outline for further research.

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Introduction:-

Generally, the practice of hibah (gift) in Malaysia is often associated with estate planning methods besides wills and endowments (wakaf). This is because hibah is seen as highly significant in ensuring the effectiveness of wealth distribution, especially for non-transferable assets, so that they can be utilized to their maximum potential. Hibah is believed to help resolve conflicts related to delayed inheritance in Malaysia, which are increasing due to misunderstandings among the public regarding the application of inheritance systems, particularly concerning real estate (Muda, Rosdi and Mohamed Said, 2022). The amount of unclaimed inheritance property belonging to Muslims in Malaysia increases annually (Ahmad, et.al, 2018). The increase of unclaimed property among Malaysian Muslims has turned into a serious issue. The estimated value of unclaimed property to date is RM90 billions in the year 2022 (MohdSafian, 2023) compared to RM40 billions in the year 2007 (Ahmad, et.al, 2018). There is great concern since a significant amount of immovable and moveable unclaimed property was recorded in Malaysia (Kamarudin and Abdul Basar, 2020). The majority of unclaimed property in this country is reported to be properties

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and funds from different financial organisations that Malaysians have not claimed (Abdullah, Othman and Mohamad, 2024).

If the current situation is allowed to continue, the nation would be depleted since the properties, which are worth billions of ringgit, have the potential to generate income and alleviate the community's poverty, also tarnish public perception of the Islamic system of wealth management and planning. These unclaimed properties or assets are the result of inheritance problems, such as complex bureaucratic procedures and processes, family disputes regarding who is entitled to the properties, the agency managing inheritance faces challenges in identifying the rightful heirs after the previous owners' death, complicated by the differing legal frameworks of the Civil and Shariah Courts (Muhamad, et.al, 2023).

These days, instead of using faraid to give their loved ones their wealth, people are more inclined to use hibah. This is due, there are too many problems with managing problem by faraid (Abu Bakar, Md Fauzi and Hashim, 2020). The failure of the community to understand and apply the faraid system has become a cause of many abandoned properties that cannot be effectively developed, especially after the owner's death. To avoid these unfavourable outcomes, people are choosing hibah over faraid when managing their wealth. The instrument of hibah is increasingly commercialized in estate planning institutions, trust companies, law firms, and the like. Because this method of estate planning is more flexible and permits assets to be inherited in accordance with the donor's preferences, it attracts the interest of the community. This is because receiving a perfect hibah is the beneficiary's inalienable right during his lifetime, making it challenging to contest its legality before the Syariah High Court. As a result, several Islamic financial organisations, including banks, takaful providers, Amanah Saham Nasional Berhad (ASNB), the estate planning sector, Amanah Raya Berhad (ARB), Majlis Agama Islam Negeri (MAIN), lawyers, and others, started to offer hibah products (Abdullah, Othman and Mohamad, 2024). Collateral hibah is one type of hibah product offered.

Collateral Hibah means the transfer of property that is still under a bank mortgage. Nowadays, Malaysians acquire both immovable and real properties through bank-financed loans. For Muslims with middle-class earnings, financing real estate purchases through financial institutions has been the norm, and this will continue into future generations (Wan Ayub and Mohamed Said, 2020). In general, any loan facility offered by an Islamic financial institution, regardless of whether it follows a sale-based model or another approach, will be secured by acceptable collateral (Bank Negara Malaysia, 2010).

The study's discussion of the collateral hibah combines the two primary Islamic contracts which are the collateral (al-Rahn) contract and the hibah contract into one. The term "al-Rahn" describes a contract in which one party, known as the pledgor (*al-rahin*), pledges an asset to another party as collateral (*al-marhun*), and the pledgee (*al-murtahin*) agrees to pay the pledgee's obligation (*al-marhunbi*) in the event that the pledgor defaults (Bank Negara Malaysia, 2018). While the term "hibah" refers to the voluntary transfer of asset ownership from a donor (*wahib*) to a beneficiary (*mawhublahu*). Hibah is a type charitable (*tabarru'*) contract. The fundamental character of a hibah is that the donor unilaterally transfers ownership of a hibah asset to the receiver without any consideration (Bank Negara Malaysia, 2016). Validity of al-Rahn and hibah has clearly stated in the Quran and Hadith:

"If you are on a journey and a scribe cannot be found, then security can be taken. If you trust one another, then there is no need for security, but the debtor should honour this trust by repaying the debt, and let them fear Allah, their Lord."

(Al-Baqarah, verse: 283)

While in the hadith narrated by Aisyah RA said:

"The Messenger of Allah S.A.W bought food from a Jew and pledged him his iron armour."

(Sahih al-Bukhari: hadith no. 2107)

"...but if they choose of their own accord to make over to you a part of it, then you may enjoy it with pleasure and good cheer."

(Al-Nisa', Verse:4)

Abu Hurairah narrated that Allah's Messenger (peace be upon him) said:

"Exchange gifts (among yourselves); you will love one another."

(Sunan al-Baihaqi: hadith no. 11726)

Nonetheless, current research provided by a few academics indicates that there are some disagreements in implementation of collateral hibah in Malaysia. In addition to providing findings from relevant studies, this study will analyse the literature review on collateral hibah's implementation that has been presented by several researchers.

Literature Review:-

This section will address pertinent and noteworthy research on collateral hibah as a method of Islamic wealth management that has been provided by earlier scholars in the field. The collateral hibah product is being implemented with the intention of assisting the community in better managing properties, including homes, lands, and automobiles, that are still financed (Abdullah, Othman and Mohamad, 2024). According to Mohamed Said, Mohamed Yusoff, Ahmed and Muda (2023), the introduction of collateral hibah has the potential to mitigate negative concerns related to Islamic estates and inheritance, specifically with regard to intangible assets. This might lead to an expansion of the solution and a decrease in the issue of unclaimed property for Muslims. This is because, according to Kamarudin, Nor Muhamad, and Abdul Karim (2018), hibah is given during the lifetime of the giver, and as a result, the property is not subject to inheritance distribution after death. However, there are certain problems with the implementation of collateral hibah in Malaysia.

According to Wan Ayud and Mohamed Said (2020), the validity of collateral hibah still in debate among the scholars. This is because one of the requirements for hibah is not met: the property must be fully owned by the giver and free from any obligations associated with serving as collateral for financial institutions. A financial institution will receive a mortgage on the funded property through the registration of Form 16A of the National Land Code (NLC) 1965, which serves as documentation of the assignment of rights to ensure debt repayment. For this reason, while the loan is still in arrears, borrowers are unable to transfer ownership of real estate (Muda, Rosdi, and Mohamed Said, 2022). As a result, once a property has been picked as collateral, it is no longer entirely owned because neither the giver nor the owner is able to conduct transactions pertaining to the property freely. Nor Muhammad (2011) and Mohamed said et al. (2023), in their article stated the collateral hibah merely needs the pledgee's consent to be carried out, such as in the case of liberating a slave, and does not fundamentally nullify the collateral contract. This is because, ownership and beneficiary rights are suspended during the collateral contract time until the pledgee gives their assent. The consent may be acquired before to, during, or after the signing of the contract. The majority of scholars agreed that unless the pledgee grants permission, the pledgor is not allowed to sell, make a hibah, or carry out a charitable act (*sadaqah*) on the asset used as security. Failure to get consent may render the collateral hibah void in the Syariah Court. The asset will therefore be inherited in accordance with Islamic inheritance law (Abdullah et al., 2024). However, in practice, to date, no bank or financial institution has any policies or procedures regarding this matter. Nor Muhammad (2011) mentioned that hibah of property mortgaged to the bank cannot occur because, based on current practices, the bank as the mortgagee is not yet prepared to do so. Thus, the validity of collateral hibah depends on the consent of the financial institution.

A study provided Muhamad Asni and Sulong (2016) mentioned that, to validate the collateral hibah, *qabd* (possession) is a crucial component. The majority of jurists state that *qabd* is a requirement for hibah. The requirement of *qabd* in hibah means that for a hibah to be enforce, the gifted property (*mawhub*) must be held, received, or controlled by the recipient, enabling the recipient to manage or at least have the capability to control and deal with the *mawhub* (Nor Muhamad, 2009). Many methods can be used for *qabd* and it is not required to change the document's ownership. In *Tengku Muda Hj Jaafar & Others vs. Pahang Government* (1987) 2 MLJ 74, the court ruled that the occurrence of *qabd* is one of three requirements that must be met for hibah to be valid in Shariah. The same ruling also appeared in *Awang bin Abdul Rahman vs. Shamsuddin bin Awang & Others* (1998) 6 MLJ 231. However, in case collateral hibah *qabd* cannot occur if the financial institution, as the mortgagee, does not agree to relinquish its rights to a third party (Nor Muhamad, 2011). On the other hand, *qabd* is a prerequisite for a legitimate hibah.

In another study provided Hasan and Mohamad Zaizi (2020) found that there is a jurisdictional issue between the Syariah Court and the Civil Court, regarding the collateral hibah. Despite this, the federal court's ruling in *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Ors* [2007] 5 CLJ 253 affirms the Syariah court's jurisdiction in hibah, a

jurisdictional conflict may occur when a disputed matter appears to be governed by two applicable laws—one related to Islamic family law and another to Islamic contract law in banking transactions, or under the law of probate and administration. Furthermore, collateral hibah will involve financial and banking institutions because the property is not yet fully owned by the donor.

In study conducted by Azalanand Mohamed Said (2023) and Abdullah et al., (2024) mentioned that the verification of collateral hibah continues to result in varying judgments in the Syariah High Courts of Malaysia. In the case *MurshidabteMustakimlwn Hassim bin Abdullah* [2006] 4 SHLR 43 dan *Awang bin Abdul Rahman lwn. Shamsuddin bin Awang & lain-lain* [2004] CLJ (Sya) 139, the collateral hibah is categorically rejected by the Syariah Court since it does not satisfy the conditions for property ownership, i.e., full ownership. In the Terengganu Syariah High Court case *RaihanahMohd Ali v. KamaruddinMohdNor & others* [2008] 26(2) JH 253, the judge came to the conclusion that collateral hibah is acceptable as long as the mortgage holder (bank) gives permission. Rather, in the case of *Yati Suraya v. Supiah Binti Abu* (an unreported case), the Negeri Sembilan Syariah Court allowed the transfer of the charged property even without the mortgagee's approval as long as the charged property was fully covered by takaful or insurance (Kambol, 2019). Furthermore, there is no uniform law governing hibah procedures between the states in Malaysia. As a result, collateral hibah products offered by estate planning institutions, trust companies, and law firms may vary and cause confusion among the public. To date, there is still no specific law regarding hibah. Although, the need for laws or acts related to hibah has been widely proposed.

Methodology:-

This section presents the study's methodology and relevant literature findings in summary form. We will evaluate the approaches employed and talk about the results considering the problems in collateral hibah.

In Abdullah et al., (2024) carried out their investigation by closely examining a case study pertaining to the use of collateral hibah in ARB. This study analyse the changes made to the collateral hibah at ARB from the standpoint of Shariah. To better grasp the application, pertinent books, articles, and legislative provisions were also brought in for revision. Additionally, the researcher held semi-structured interviews with a hibah officer from the ARB Melaka Branch and officer from the Product Development Department (JPP). The researchers discovered that there is a chance for more systematic property planning with the change in the way collateral hibah is implemented in the ARB. The authors recommend making sure the hibah documentation is perfect and satisfies all requirements, particularly with relation to *qabd* concerns. This will help to prevent issues and disagreements in the future.

As for Mohamed Said and Wan Ayub (2021), an extensive and critical analysis of the way in which fuqaha's perspective has been employed to the implementation of hibah charged property, along with an observation of the product's implementation under Malaysian law, is carried out. This study employs a qualitative methodology, with document analysis serving as the basis for the research design. In light of the analysis that was conducted, some Fuqaha hold that the hibah of charged property is valid under certain conditions. However, the disparities in the Syariah Courts' rulings regarding the hibah cases demonstrated that hibah is acknowledged in establishments. The researchers recommend that, in order to ensure a successful product implementation, the loan provider and the provider of hibah documents work out their differences as soon as possible.

Research was conducted by Azalan and Mohamed Said (2023) to learn the judge's ruling and the tendency of the ruling in applying the opinions of scholars to settle cases of hibah confirmation over the matter of collateral hibah in the Syariah Court. This study examined a number of collateral hibah cases in order to gain insight into contemporary legal concerns and procedures. The authors concluded that certain hibah case rulings permit the implementation of collateral Hibah subject to specific restrictions.

Implication and Recommendation:-

The afore mentioned historical studies help us to realise that there is ongoing discussion and controversy in Malaysia regarding the legitimacy of collateral hibah and legal verification of it. When tackling these problems, the most crucial thing to take into account is:

Specific legislation on hibah

According to the Federal Constitution, the legality of hibah in Malaysia falls under the purview of state matters. Specifically, Item 1 under List II of the 9th Schedule states that Islamic law and self and family laws of Muslims

cover various aspects, including inheritance, marriage, divorce, dowry, maintenance, adoption, child custody, and gifts. Notably, this jurisdiction extends to all states except the Federal Territory of Kuala Lumpur, Labuan, and Putrajaya. The Syariah High Court, operating within the civil jurisdiction, handles cases related to Muslims. These cases involve wills, gifts (referred to as “*alang*”), and settlements made without adequate compensation during the *marad-al-maut* (deathbed) of a Muslim individual. The term “*alang*” is commonly used to denote hibah in various states, including Malacca, Selangor, Johor, Perak, Penang, Terengganu, Kedah, Sarawak, and Sabah. Pahang and Perlis use the term “grant,” while Kelantan uses “*alanghayat*.” Negeri Sembilan uniquely employs the term “Hibah.” Despite the legal provisions, there are limitations. The definition of hibah, essential elements, guidelines, and procedures for executing hibah remain inadequately addressed. Additionally, hibah is not restricted to a donor’s lifetime; it can also occur during *marad al-mawt* (death illness). However, specific rulings govern its validity, and these details are absent from the provisions, potentially leading to inadvertent invalid hibah transactions.

In others word, there are no particular guidelines that the general public, legal professionals, and agencies involved may refer to. Individuals may be interested in transferring property through collateral hibah, but they are unsure of where to turn for guidance. If people merely depend on the brief provisions, it could cause conflict later. The Syariah Court will hear any matters pertaining to Hibah. In resolving disputes, the Syariah Court considers the views and thoughts of Muslim scholars; nevertheless, in the absence of a specific law, this could make decision-making more challenging for the judges (Mohd Yusof & Ahmad, 2013). Therefore, establishing clear laws and guidelines for hibah can prevent confusion and disputes. This includes defining essential elements, procedures, and the validity of collateral hibah.

Raising Awareness & Understanding of Hibah Instruments

One of the implications are enhancing the accessibility and utilization of hibah instruments via raising awareness and understanding among the Muslim population in Malaysia. It needs the education to the public what is the benefit and mechanisms of hibah as this is one of the strategies in managing the wealth. Shaiffe and Hassan (2019) pointed out that a good mechanism in place for wealth distribution will lead to a reduction in the amount of unclaimed property if followed the Islamic principles.

In addition, good financial planning and security will impacts to a better plan for financial futures if they have good understanding and knowledge. Security of the assets for heirs for example, will ensure that the wealth is distributed according to wishes as viewed by Shaiffe & Hassan (2019) that reducing the economic vulnerability of dependents after the benefactor’s death as well improve the financial planning and security. Furthermore, awareness and understanding can influence the demand for more refined and supportive legal and regulatory frameworks surrounding hibah. As more people utilize these instruments, policymakers may be compelled to address existing gaps and ambiguities in the law, leading to clearer guidelines and more robust protections for all parties involved (Shaiffe & Hassan, 2019).

Therefore, Bakar (2018) has recommended that a comprehensive public education campaigns via social media, seminars, workshops, and collaboration with mosques and community centers, to reach a wide audience can helps in enhancing the understanding and awareness. Also, incorporating information about hibah instruments into existing financial literacy programs by seeking to improve their financial knowledge as it will simultaneously learn about the benefits and processes of hibah. Likewise, specialized training should be provided for financial advisors, lawyers, and other relevant professionals on hibah instruments. This training will ensure that these professionals can offer informed guidance and support to their clients. Furthermore, creating a certification program for hibah expertise will help standardize the knowledge and skills required to advise on these instruments (Ismail & Sabri, 2020).

The study pointed out that there is a need to enhance the awareness and understanding of hibah instruments among Muslims in Malaysia to improve their use and reduce unclaimed property. By educating the public and incorporating hibah information into financial literacy programs, people can manage their wealth better and ensure financial security for their heirs. Specialized training for financial and legal professionals is also essential so they can offer informed advice and support. Moreover, the growing demand for hibah instruments means that legal and regulatory frameworks need to be refined to provide guidelines and stronger protections.

Creating an Information Centre Related to hibah, and Property Management (Estate Planning)

To help people efficiently handle and transfer their assets in accordance with their desires, an information centre pertaining to hibah, or inheritance planning and estate administration, is essential. According to Abdullah, Othman

and Mohamad (2024), hibah planning includes preparing hibah documentation and legal documents, such as a power of attorney, to handle and distribute assets in case of a person's mental or physical incapacity. Professional advisers, including as lawyers, financial planners, and tax experts, can be accessed through an estate planning information centre. These advisors can offer individuals specific guidance and assist in navigating intricate legal and financial matters especially in collateral hibah. Additionally, an information centre should develop an online platform for Islamic wealth management. A website with a user-friendly layout and simple navigation is necessary to guarantee that visitors can easily locate the information they seek.

Conclusion:-

In summary, collateral hibah in Muslim estate planning is a strategic tool used to manage and distribute assets in a way that aligns with Islamic principles, providing security and clarity for the beneficiaries and ensuring the donor's wishes are fulfilled. Financial planning that is comprehensive encompasses several important elements, including wealth creation, accumulation, protection, and distribution. The findings of this study indicate that more systematic estate planning can be achieved with proper documentation and adherence to Shariah principles. Furthermore, the inconsistency in Syaria Court decisions and the absence of specific hibah laws highlight the need for a comprehensive legal framework to support collateral hibah arrangements. The study also concludes that comprehensive laws and increased awareness are essential for effective management and planning of Islamic inheritance. By addressing legal gaps and educating the public, collateral hibah can be better utilized to reduce unclaimed estates and ensure the distribution of wealth in accordance with Islamic principles.

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