

TRANSFORMATION OF COLLATERAL *HIBAH* IN AMANAH RAYA BERHAD: ANALYSIS FROM THE SHARIAH PERSPECTIVE AND ITS IMPLEMENTATION IN MALAYSIA

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ABSTRACT

The importance of *hibah* instrument in estate planning, whether movable or immovable assets is gaining more attention among property owners. Thus, various forms of *hibah* offerings in the market have been introduced by various institutions and agencies to meet the needs of property owners. An example of a *hibah* product that gains a lot of attention is Collateral Hibah. However, the verification of Collateral Hibah still gives rise to different judgments in the Syariah High Courts in Malaysia. Thus, this study will analyse the transformation of the Collateral Hibah in Amanah Raya Berhad (ARB) from the shariah perspective. The product was first introduced as "Declaration of Hibah" in 2015 and subsequently transformed into what is known as "Hibahku" in 2023. This study is qualitative and applied research methods which examined statutory provisions, articles, and books. In addition, semi- structured interviews were conducted with two ARB officers from the Product Development Department (JPP), and a *hibah* officer from the ARB Melaka Branch. The results obtained were analysed descriptively. This study found that the transformation of the implementation of Collateral Hibah in the ARB has the potential to meet more systematic property planning.

Keywords: Transformation, Collateral Hibah, *Hibah*, AmanahRaya Berhad, Syariah High Court.

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TRANSFORMASI PELAKSANAAN HIBAH BERCAGAR DI AMANAH RAYA BERHAD: ANALISIS DARIPADA PERSPEKTIF SYARIAH DAN PELAKSANAANNYA DI MALAYSIA

ABSTRAK

Kepentingan instrumen hibah dalam perancangan harta sama ada harta alih dan harta tidak alih semakin mendapat perhatian dalam kalangan pemilik harta. Justeru, pelbagai bentuk penawaran hibah di pasaran telah diperkenalkan oleh pelbagai institusi dan agensi bagi memenuhi kehendak pemilik harta. Di antara contoh produk hibah yang semakin mendapat perhatian adalah Hibah Bercagar. Namun demikian, pengesahan Hibah Bercagar ini masih menimbulkan keputusan penghakiman yang berbeza di Mahkamah Tinggi Syariah di Malaysia. Justeru, kajian ini akan menganalisis transformasi pelaksanaan Hibah Bercagar di Amanah Raya Berhad (ARB) daripada perspektif syariah. Produk “Deklarasi Hibah” telah diperkenalkan pada tahun 2015 dan seterusnya pada tahun 2023 produk tersebut telah mengalami transformasi pelaksanaan yang kini dikenali sebagai “Hibahku”. Kajian ini adalah berbentuk kualitatif dengan menggunakan kaedah penyelidikan berasaskan penelitian kepada peruntukan berkanun, artikel jurnal, buku kes-kes mahkamah syariah. Selain itu, temu bual secara separa berstruktur turut dijalankan bersama dua orang pegawai ARB daripada Jabatan Pembangunan Produk (JPP), dan seorang pegawai hibah daripada ARB Cawangan Melaka. Hasil kajian yang diperoleh setelah itu dianalisis secara deskriptif. Kajian ini mendapati bahawa transformasi pelaksanaan Hibah Bercagar di ARB ini berpotensi untuk memenuhi perancangan harta yang lebih sistematik.

Kata Kunci: Transformasi, Harta Bercagar, Hibah, Amanah Raya Berhad, Mahkamah Tinggi Syariah.

INTRODUCTION

Hibah (gift) has its advantages as it can reduce the bureaucratic process of estate administration which takes a long period.¹ This is because the granting of a perfect *hibah* is the absolute right of the beneficiary of *hibah* during his lifetime and hence becomes difficult to challenge its validity in the Syariah High Court. Thus, *hibah* products began to be offered by some Islamic financial institutions such as banks, *takaful* companies, Amanah Saham Nasional Berhad (ASNB), estate planning industry such as Amanah Raya Berhad (ARB), Majlis Agama Islam Negeri (MAIN), lawyers and others².

To meet the lifestyle needs of the Muslim community in Malaysia, *hibah* products in Islamic estate planning have now been offered in various forms. Currently, there are three types of *hibah* being practiced in Malaysia, depending on the needs and suitability of the existing property, namely *Hibah Mutlak*³, *Hibah Amanah*⁴ and Conditional Hibah.⁵ Conditional Hibah means that the gift is made by

¹Nasrul Hisyam Nor Muhamad, “Umra Dan Ruqba : Analisis Mengenai Kesannya Terhadap Kontrak Hibah Dan Potensinya Sebagai Instrumen Agihan Harta”, *Jurnal Syariah* 20 no. 1 (2012): 1–46.

²Alias Azhar, “Amalan Hibah Di Syarikat Amanah: Satu Kajian Kes di as-Salihin Trustee Berhad”, *Jurnal Sultan Alauddin Sulaiman Shah* 5, no. 1 (2018): 11–29. Azizi Abu Bakar, Nur Syahira Md Fauz, and Hydzulkifli Hashim, “Hibah As A Way of Islamic Wealth Management”, *Webology* 17 no. 2 (2020): 896–903. Nasrul Hisyam Nor Muhammad, “Pemakaian Prinsip Hibah Dalam Sistem Kewangan Islam Di Malaysia: Tumpuan Kepada Industri Perbankan Islam Dan Takaful,” *Jurnal Teknologi* (2010): 69–81.

³Hibah Mutlak is a gift made without being bound by any condition. The contract is made during the lifetime of ownership and is transferred to the recipient immediately. As a result, if the recipient dies first, the property will be inherited by the next legal heirs according to the faraid.

⁴The formation of a Hibah Amanah involves the trustee (*al-wasi*). The right of ownership of property will be surrendered to the trustee and will be administered based on the trust deed. Usually, the property will be transferred to the recipient after the death of the donor. Nazrul Hazizi Noordin et al., “Re-Evaluating the Practice of Hibah Trust in Malaysia,” *Humanomics* 32 no. 4 (2016): 418–436.

⁵Ahmad Tarmizi Jusoh, Mohamad Abdul Hamid, and Samsudin Wahab, “Faktor Agama dan Sifat Keterbukaan Terhadap Niat dalam Melakukan

the donor (*al-wahib*) provided that the beneficiary (*al-mauhub lahu*) fulfills the conditions set by the donor by using the *sighah* on an *Idafah*⁶, *Tawqit*⁷ and *Ta'liq*^{8,9}. The Conditional Hibah is divided into three parts¹⁰ i.e. *Hibah 'Umra*¹¹, *Hibah Ruqba*¹² and *Hibah Takaful*.¹³

Meanwhile, the discussions on Collateral Hibah fall under the category of *Hibah Mutlak*. However, the transfer will only take place after the death of the donor. The implementation of Collateral Hibah product aims to help the community manage properties which are still under financing such as houses, lands and vehicles more effectively.

Amalan Hibah: Satu Kajian Sorotan,” *International Journal of Muamalat* 5 no. 1 (2021): 105–117.

⁶*Idafah* means futurity, for example, “I gift you this house at the end of this year”.

⁷*Tawqit* means timing, for example, “I gift you this house for three months”.

⁸*Ta'liq* means attachment, for example, “If I profit from the deal, I will gift you such amount”.

⁹Generally, contracts involving transfer of ownership (*'uqud al-tamlik*) are considered invalid when they include conditions of attachment (*ta'liq*), timing (*tawqit*), and futurity (*idafah*), except for *wasiyyah*. However, according to the Maliki madhab, this general rule is waived for *tabarru'* contract, including hibah. Nasrul Hisyam Nor Muhamad, Ahmad Che Yaacob, and Norazila Mat Hussain, “Konsep Hibah Bersyarat dan Aplikasinya Dalam Perancangan Harta,” *International Journal of Islamic and Civilizational Studies* 3 no. 1 (2017): 32–41.

¹⁰Nor Muhamad, Yaacob, and Mat Hussain, “Aplikasinya Dalam Perancangan Harta,” 32–41. Nurul Syahirah Othman et al., “Analisis Kes Amalan Hibah Bersyarat di Malaysia,” *Islamiyyat* 39 no. 2 (2018): 135–142.

¹¹*Hibah 'Umra* is a temporary gift which requires that the hibah be given to the surviving party if one of the parties (donor or recipient) dies. This type of hibah is termed as *'umra* because associated with a person's age.

¹²*Hibah Ruqba* is a gift from one person to another person. Then the property will be returned to the surviving party after one party dies. Named *'ruqba* because each of the two parties (donor or recipient) is waiting for the death of the other party to ensure that the property becomes to him.

¹³*Hibah Takaful* also uses the concept of *Hibah Ruqba*. When the *takaful* participant dies, all *takaful* benefits will be transferred to the nominee. However, if the *takaful* participant is still alive when the *takaful* certificate matures, the *takaful* benefit will be handed over to the *takaful* participant again.

This is because not everyone can buy an asset in cash. If this product can be realised, it can help property owners to make more systematic estate planning. It is also able to fulfill the wishes of the property owner after their death. This is because the property owner still wants to enjoy the benefits of the property (*al-mauhub*) during his lifetime.

In order to understand the implementation of Collateral Hibah more conclusively, the implementation should be understood from the shariah law's theoretical perspective and the practicalities of its implementation in Malaysia. Thus, this study will analyse the transformation of the implementation of Collateral Hibah namely "Declaration of Hibah" in Amanah Raya Berhad (ARB) from the shariah perspective which was first introduced in 2015. Subsequently in 2023, the product has undergone an implementation transformation and is now known as "Hibahku".¹⁴ The selection of ARB is owing to its status as one of the government agencies wholly owned by the Ministry of Finance, Government of Malaysia and has long operated as an estate planning institution since its establishment in 1921.¹⁵

COLLATERAL HIBAH

Definition of Collateral

Collateral (*al-Rahn*) refers to a contract where a party, as pledgor (*al-rahin*) pledges an asset as collateral (*al-marhun*) to another party, and a pledgee (*al-murtahin*) to fulfil an obligor's liability or obligation (*al-marhun bih*) owing to the pledgee in the event of default of such obligor.¹⁶ The implementation of the collateral from the shariah

¹⁴Muhamad Mu'izz Abdullah, Abdul Bari Awang, Muhamad Sabri Zakaria, "Analysis of Trust Instrument in Islamic Estate Planning: a Study Case at Amanah Raya Berhad, Malaysia," *Journal of Islamic Accounting and Business Research* 14 no. 8 (2023): 1404 -1425.

¹⁵Amanah Raya Berhad, "About Amanah Raya Berhad", accessed on 17th May 2024., <https://www.amanahraya.my/about/about-us/>.

¹⁶Rahn, "Definition of Rahn," accessed on 19th February 2024, <https://www.bnm.gov.my/documents/20124/761682/Rahn> . Muhammad al-Khatib Asy-Syirbini, *Mughni al-Muhtaj* (Beirut: Dar al-Makrifah, 2016), 2, 159-160. "Cagaran", accessed November 19th, 2023. <https://prpm.dbp.gov.my/cari1?keyword=cagaran>.

perspective is based on the statement of Allah SWT in Surah al-Baqarah verse 283 which means:

"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."

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."¹⁷

The formation of a collateral contract on this property does not remove the property from the ownership of the owner. Hence, some pillars and conditions need to be fulfilled for this collateral contract.¹⁸ In the current context, collateral is often applied in Islamic banking sectors and Islamic institutions such as ar-Rahnu¹⁹. Through this collateral contract, it has the potential to provide financing facilities to all levels of society i.e. micro-women entrepreneurs, low-income and high-income earners to get cash immediately. In addition, it also provides financial facilities especially in the aspect of micro-credit financing in a syariah-compliant manner.²⁰ This collateral also applies a win-win situation between the pledgor and the pledgee. This is because the pledgee will hold the asset as collateral belonging to the pledgor. While the pledgor will get cash for a period agreed in accordance with the syariah rules.²¹

¹⁷ Al-Bukhari, *Sahih al-Bukhari*, Vol 3, (Almania: Jamiyah Al-Maknaz Al-Islami, 2000) hadith no 2107.

¹⁸ Ahmad Arafat Ahmad Yusuf, *Al-Ahkam al-Fiqhiyyah al-Mutaa'lliqah bi al-Ruhun al-Mustajaddah* (Dar at-Ta'lim al-Jamie, 2020), 46.

¹⁹ Ar-Rahnu is an Islamic pawnshop under the institution of the Yayasan Pembangunan Ekonomi Islam Malaysia (YaPEIM).

²⁰ Asiah Alkharib Shah and Salmy Edawati Yaacob, "Cabaran dan Alternatif Penyelesaian Bagi Penyedia Perkhidmatan Ar-Rahnu Di Malaysia," *International Journal of Islamic and Civilizational Studies* 5, no. 1 (2018): 31-43.

²¹ Hallieyana Sha'ari, Nurul Fazlina Mat Zin, and Azwan Abdullah, "Peranan dan Cabaran Institusi Ar-Rahnu dalam Membantu Usahawan Mikro Wanita," *Rabbanica* 2 no. 2 (2021): 29-48.

The terms of the asset to be used as collateral include having value such as gold, or a grant title and will be kept by the pledgee. There are several contracts involved in the collateral contract at this time such as *wadi'ah* or *amanah*, loan (*al-qard*), savings with a guarantee (*al-wadiah yad dhamanah*), collateral (*ar-rahn*), wages (*al-ujrah*) and *al-tawarruq*.²² For example, ar-Rahnu is an Islamic pawnshop under the institution of the Yayasan Pembangunan Ekonomi Islam Malaysia (YaPEIM), has introduced several new products and services involving gold collateral to provide microcredit loans to customers, such as *ar-Rahnu Bisnes*, *ar-Rahnu Emas*, *ar-Rahnu Didik*, *Ar-Rahnu Prestij*, and *ar-Rahnu Care*.²³

Collateral Hibah

Meanwhile, the Collateral Hibah discussed in this study combines two main contracts in the Islamic contract which are *hibah* contract and collateral contract. The Collateral Hibah can involve various types of assets such as movable or immovable property. The asset to be used as collateral still belongs to the pledgor and is still in the process of financing. The Collateral Hibah occurs when the pledgor has given his assets to the beneficiary (*al-mauhub lahu*). However, the transfer of ownership of the asset is only effective after the pledgor dies based on the conditions set during the pledgor's lifetime.²⁴

²²Noor Lizza Mohamed Said and Wan Amirul Adli Wan Ayub. "Pelaksanaan Hibah Harta Bercagar dalam Industri Perancangan dan Pengurusan Harta Orang Islam," *International Journal of Islamic Thought* 19 (2021): 89-101. Asmadi Mohamed Naim, "Sistem Gadaian Dalam Islam," *Islāmiyyat* 26 no. 2 (2004): 39-57. Nurul Huda Md Yusuff, Azila Abdul Razak, and Fidlizan Muhammad, "Kepatuhan Proses Gadaian Dalam Sistem Pajak Gadaian Islam Di Malaysia," *Labuan E-Journal of Muamalat and Society* 9 (2015): 57-74.

²³Wan Naimah Wan Daud, Murni Yusoff, & Zakaria Bahari, "Prospek Produk Baharu Ar-Rahnu Yapeim Sebagai Alternatif Mikro Kredit", *Journal of Islamic, Social, Economics and Development* 6 no. 39 (2021): 86-94.

²⁴Ahmad Termizi Abdullah, "Hibah Hartanah Bercagar; Prinsip, Aplikasi dan Pandangan Mahkamah" (paper presented at the Seminar Hibah Hartanah Bercagar Anjuran Hartagum, July, 15th, 2018): 1-19.

THE IMPLEMENTATION OF COLLATERAL HIBAH FROM THE SHARIAH PERSPECTIVE

Generally, the asset as collateral must be in perfect ownership (*milk at-tam*) of the pledgor based on the Islamic legal maxim "*Every item that is legally sold is valid for the implementation of hibah, sadaqah and collateral.*"²⁵ As such, the ownership of the asset remains even if the asset is used as a collateral until the debt is fully repaid. However, in this situation, when the collateral contract is executed, indirectly the right of the collateral has been formed as a debt and a guarantee of repayment. In general, the majority of the four *madhhabs* i.e. Hanafi²⁶, Maliki²⁷, Shafie²⁸ and Hambali²⁹, agreed that giving the asset as collateral is invalid unless it is approved by the pledgee. This is to protect the interests of both parties.

During the collateral contract period, the ownership and beneficiary rights are suspended until consent is obtained from the pledgee. The consent can be obtained during or after the contract is made.³⁰ Therefore, any form of transaction (*at-tasaruf*) involving an asset as collateral should refer to the conditions placed in this collateral contract. The conditions are the same with the sale and purchase contract. If the condition cannot be implemented and violates the shariah law, then the collateral contract will be voided. For example, the asset as collateral cannot be sold when the pledgor cannot pay off the debt, the asset as collateral in the ownership of the pledgor, or the asset as collateral cannot be given except with permission.³¹

²⁵Muhammad Sidqi Ahmad, *al-Wajiz fi Idhah Qawaid al-Fiqh al-Kulliyyah* (Beirut: Muassasah ar-Risalah al-Alamiah, 1996), 57.

²⁶Abu Bakar Masud Al-Kasani. *Badai' as-Sani' fi Tartib asy-Syarai'* (Beirut: Dar al-Kutub al-Ilmiah, 1986), 6, 119.

²⁷Muhammad Ahmad Ad-Dusuki, *Hashiah ad-Dusuki ala Syarh al-Kabir* (Beirut: Dar al-Fikr, N.D), 4, 98.

²⁸Ibrahim Ali Asy-Syirazai, *Al-Majmu' Syarah al-Muhazzab* (Beirut: Dar al-Kutub al-Ilmiah, 2011), 17, 203.

²⁹Abdullah bin Muhammad Qudamah, *Al-Mughni* (al-Qahirah: Maktabah al-Qahirah, 2019), 4, 104.

³⁰Majmu'ah al-Ulama, *Al-Mausu'ah al-Fiqhiah al-Kuwaitiah* (al-Kuwait: Wizarah al-Awqaf wa asy-Syuun al-Islamiah 1992), 23, 185.

³¹Majmu'ah al-Ulama, *Al-Mausu'ah al-Fiqhiah al-Kuwaitiah*, 23, 185.

The majority of scholars (*fuqaha'*) agreed that the pledgor is prohibited from selling, making a *hibah* or performing a charity (*sadaqah*) on the asset as collateral until permission is obtained first from the pledgee.³² If the pledgee gives permission, then it can be done, and if the pledgee reclaims the property, it must be returned.³³ In addition, if the pledgor is someone who finds difficulty in settling the debt, then the implementation of the collateral contract is prohibited. However, if the pledgor is able to settle the debt easily, then the implementation of the Collateral Hibah is permissible.³⁴

However, the Hanafi and Maliki scholars gave more detail views. They argue that the pledgor transactions such as sale and purchase, *hibah*, rent, *sadaqah*, pledge (*iqrar*) and writing (*kitabah*) are transactions that can be revoked, but the right to revoke does not belong to the pledgee. This is because the transaction is made by a pledgor who has legal custody (*al-wilayah asy-syariyyah*) on the property. In addition, this transaction does not negate the ownership of the pledgee. It means that the right to hold the asset as collateral remains even if the property is given away or sold off.³⁵ Therefore, the Collateral Hibah does not directly invalidate the collateral contract but only requires permission from the pledgee to perform it, as in the matter of freeing up a slave.³⁶

However, there is also an opinion from an-Nawawi from the Shafie school which is so strict, that all forms of transaction such as sale and purchase, *hibah*, *sadaqah*, rental, collateral and endowment (*waqf*) on the asset as collateral are prohibited. The justification is that it will eliminate the meaning of the collateral contract, reduce the value of the property, and both parties (pledgor and pledgee) may no longer

³²Muhammad Ibrahim al-Mundhir al-Naysaburi, *Al-Isyraf 'ala Mazahib Ahli al-Ilmi* (Al-Imarat al-Arabiah al-Muttahidah: Maktabah Makkah at-Thaqafiah, 2004), 8, 126.

³³Muhammad Ahmad Ad-Dusuki, *Hashiah ad-Dusuki ala Syarh al-Kabir* (Beirut: Dar al-Fikr, N.D.), 98.

³⁴Ali Ahmad Said Hazam, *Al-Mahalli* (Dimasyq: Darul Fikr), 6, 371.

³⁵Mohamed Said and Wan Ayub, "Pengurusan Harta Orang Islam," 89-101.

³⁶Mohamed Said and Wan Ayub, "Pengurusan Harta Orang Islam, 89-101. Nasrul Hisyam Nor Muhammad, "Penyelesaian Pindah Milik Harta Bercagar di Institusi Kewangan: Dari Perspektif Undang-Undang Islam," *Kanun* 2 no. 23 (2011): 180-208.

be interested in pursuing the collateral contract.³⁷ From the shariah point of view, this debate is also termed as a *Fudhuli Transaction* in which someone makes a contract on the ownership of another person before getting permission from the owner.³⁸ This transaction is revoked and prohibited based on this opinion because it does not fulfil the jurisdiction of a legal custody. While the legal custody is one of the conditions and deemed compulsory for all contracts and not only in Collateral Hibah.³⁹

Looking at the current issue of unclaimed property every year, it is increasingly worrying. To date, the total unclaimed property recorded has reached RM90 billion.⁴⁰ Most of the unclaimed property is reported in the form of properties and money from various financial institutions not claimed by the Malaysians in this country. Many factors contribute to the occurrence of unclaimed property. Firstly, there is the awareness factor, where individuals do not systematically plan their assets. Secondly, there is the social factor, where heirs neglect the management of inheritance applications. Thirdly, there are the administrative and legislative factors, involving bureaucratic processes in the estate administration.⁴¹ Based on these three factors, this study examines the issue of unclaimed property, which is closely related to the awareness factor itself. When individuals are aware that their assets are still under financing, then it is necessary for proper planning to facilitate the transfer of ownership to heirs upon their death.

Thus, this study agreed with the majority of the four *madhhab* views i.e. Hanafi, Maliki, Shafie and Hambali that giving the asset as

³⁷Ibrahim Ali Asy-Syirazai, *Al-Majmu' Syarah al-Muhazzab* (Beirut: Dar al-Kutub al-Ilmiah, 2011), 17, 203. Yahya Syaraf an-Nawawi, *Raudhah al-Thalibin* (Beirut: Dar 'Alam al-Kutub, 2003), 3, 315-316.

³⁸Dubyan Muhammad Ad-Dubyani, *al-Muamalat al-Maaliah: Asolah wa Muasarah* (Riyadh: Maktabah Malik Fahd, 2011), 18, 458.

³⁹Mohamed Said and Wan Ayub, "Pengurusan Harta Orang Islam, 89-101. Nor Muhammad, "Perspektif Undang-Undang Islam." 180-208.

⁴⁰Yasmin Hanani Mohd Safian, "RM90 bilion harta faraid tak dituntut", accessed November 19th, 2023. <https://www.utusan.com.my/gaya/2023/09/rm90-bilion-harta-faraid-tak-dituntut/>

⁴¹Nik Rahim Bin Nik Wajis et al., "Harta Tidak Dituntut : Punca Dan Kaedah Penyelesaiannya", *Malaysian Journal of Syariah and Law* 7, (2018): 129–142.

collateral is invalid unless it is approved by the pledgee. This view is very accurate today to alleviate the matter. Meanwhile, the consent of the pledgee is important to safeguard the benefit (*maslahah*) of both contracting parties. This is because the asset is still owned by the bank, and the bank still has rights over the asset. If consent is not obtained, this can invalidate the Collateral Hibah in the Syariah High Court when estate administration is carried out later. As a result, the asset will be inherited through Islamic inheritance law (*faraid*).

Application Of *Qabd*

The discussion of Collateral Hibah has a close relationship with the application of possession (*qabd*). This is because the asset as collateral still belongs to the bank and how can the pledgor give the asset to the heirs? *Qabd* is not included in the pillars of *hibah* which are donor (*wahib*), beneficiary (*mawhub lahu*), property (*mawhub*) and formal exchange (*ijab* and *qabul*). On the other hand, *qabd* is a condition for a valid *hibah* (*syart as-sighah*). *Qabd* is defined as the act of the beneficiary of *hibah* to receive, hold and control of the property of *hibah*.⁴² Generally, there are two opinions of jurists on the issue of *qabd* which are:

First: Qabd is a Condition for a Valid Hibah Contract

The majority of jurists such as al-Nakha'i, al-Thawri, Hanafi *madhhab*, Syafie *madhhab* and Hambali *madhhab* agreed that *qabd* is a condition for a valid *hibah* contract. If a *hibah* occurs between the donor and the beneficiary through *ijab* and *qabul* only without transfer the asset, then the *hibah* cannot be enforced. This is because the existence of *qabd* is to enforce the *hibah* contract (*syart al-luzum*). If not, the property of *hibah* remains under the donor's ownership. Even, the donor is free to sell the property including to withdraw the *hibah* contract.⁴³

⁴²Al-Kasani, *Tartib asy-Syarai'* 104-105.

⁴³Nor Muhammad, "Perspektif Undang-Undang Islam," 180-208. Mohd Yazid Zulkepli and Tajul Aris Ahmad Bustami, "The Grey Side Of Hibah Amanah As Inheritance Instrument In Malaysia," *Al-Shajarah* 24 no. 2 (2019), 267-292.

The evidence related to *qabd* as a valid condition can be referred to the hadith of the Prophet S.A.W as narrated by Ummi Salamah RA:

"When Prophet S.A.W married Ummi Salamah, he said to her: "Indeed, I sent al-Najashi a gift in the form of cloth and several bottles of fragrance. I did not see al-Najashi until he died, and the gift I gave him will surely be returned. If it is returned to me, I will give it to you." Ummu Kulthum said: "It happened as told by the Prophet S.A.W (after al-Najashi died), and the gift was returned to the Prophet S.A.W."⁴⁴

According to the above hadith, an-Najashi is said not to have time to receive (*qabd*) the gift before he dies. Therefore, the property is then given to Ummu Salamah. The companions also agreed on the obligations of *qabd* such as Umar, Uthman, Ibn Umar, Ibn Abbas, Aishah, Muaz and Anas. In fact, this view is also applied in most Muslim countries such as Egyptian Civil Law, Shirian Civil Law, Kuwait Civil Law and UAE Civil Law.⁴⁵

⁴⁴This hadith is narrated by al-Hakim, Kitab al-Nikah, hadith no. 95: 2766, and Ahmad, Hadith ummu Kulthum binti 'Uqbah ummu 'Abd al-Rahman, hadith no. 27276, and Ibn Hibban, Kitab al-Hibban, hadith no. 5114. In the series of hadith narrators (*sanad*) narrated by al-Hakim and others, there is a Muslim bin Khalid. al-Zahabi claimed that Muslim bin Khalid is weak (*da'if*). However, al-Shawkani from his book *Nayl al-Awtar* said that Ibn Ma'in and some scholars consider Muslim bin Khalid is trustworthy (*thiqah*), and most other scholars consider him to be weak. Otherwise, Ibn Hajar in *Fath al-Bari* said that the series of hadith narrators is *hasan*. See: Muhammad Abdullah al-Hakim, *al-Mustadrak 'ala al-Sahihayn*, Vol. 2, (Beirut: Dar al-Kutub al-'Ilmiyyah, 2002), 205. Ahmad Hanbal, *Musnad al-Imam Ahmad bin Hanbal*, (Beirut: Mu'assasat al-Risalah, 2001), 45, 246-247. 'Ala' al-Din 'Ali Bilban, *Al-Ihsan fi Taqrib Sahih Ibn Hibban*, (Beirut: Dar al-Ma'rifah, 2004), 1384-1385. 'Umar 'Ali Ahmad, *Mukhtasar Istidrak al-Hafiz al-Dhahabi 'ala Mustadrak Abi 'Abd Allah al-Hakim* (Riyad: Dar al-'Asimah, 1414H), 2, 649. Muhammad 'Ali al-Shawkani, *Nayl al-Awtar Sharh Muntaha al-Akhbar* (Lubnan: Bayt al-Afkar al-Dawliyyah, 2004), 1111-1112. Ahmad Ali Hajar, *Fath al-Bari*, Vol 5 (al-Qahirah, Maktabah al-Salafiah, 2015), 273.

⁴⁵Nor Muhammad, "Perspektif Undang-Undang Islam," 180-208.

Second: Qabd is Not a Valid Condition of Hibah

The second point of view contrasts with the initial one mentioned earlier. It comes from jurists of the Maliki *madhab*, Abu Thawr, Zahiri *madhab*, and Shafi'i *madhab* (*qaul qadim*). Based on this opinion, *qabd* is not a valid condition of the *hibah*. In fact, the existence of *qabd* only plays a role in further perfecting the *hibah* contract after the utterance of *ijab* and *qabul*.⁴⁶ *Hibah* is valid and effective as soon as the *qabul* is pronounced by the beneficiary of *hibah* even though the property of *hibah* has not yet been surrendered by the donor. The justification is that *hibah* is a voluntary contract (*at-tabarru'*) similar to will and *waqf*. The beneficiary of will and *waqf* is not required to receive (*qabd*) of the property during their lifetime. In addition, a *hibah* contract is also analogised to a sale and purchase contract.⁴⁷ The sale item belongs to the buyer even though it is not yet perfectly received (*qabd*) by the beneficiary.

This view also sees that once the *hibah* has completed its *ijab* and *qabul*, then it is irrevocable. Thus, it does not require *qabd*.⁴⁸ This opinion is also based on the statement of Allah SWT in the al-Quran through Surah al-Ma'idah verse 1:

“O you who have believed, fulfill [all] contracts..”

Even the withdrawal of *hibah* is prohibited. The Prophet S.A.W analogised the retraction of *hibah* by a donor to a dog licking back his vomit as narrated by Ibn Abbas RA:

"One who gets back his gift is like a dog which vomits and then swallows that vomit."⁴⁹

⁴⁶Nor Aini Abdullah et al., “Aplikasi Qabd dalam Hibah: Pandangan Fuqaha dan Pengamalan Dalam Perundangan di Malaysia”. *Journal of Contemporary Islamic Law*, 6(2), (2021): 12-21.

⁴⁷Abdullah et al., “*Perundangan di Malaysia*,” 12-21.

⁴⁸Abdullah et al., “*Perundangan di Malaysia*,” 12-21.

⁴⁹Al-Bukhari, *Sahih al-Bukhari*, Vol 3, hadith no 2659.

Selected Opinions

Based on the above two opinions, this study sees that the first opinion among the majority of jurists, i.e. Hanafi *madhhab*, Syafie *madhhab* and Hambali *madhhab* is preferred. This is to strengthen the validity of the *hibah* and avoid any disputes among the beneficiaries, especially after the death of the donor. *Qabd* is an important element, although it is not included in the pillars of *hibah* that must be fulfilled according to the majority of jurists. In the context of Collateral Hibah, the issue of the *qabd* implementation should be well understood to determine the validity of the *hibah* contract. In the shariah law, *qabd* can be done in various forms and there is no requirement to change the ownership in the document. It means that the transfer is perfect if all the pillars and conditions have been fulfilled. Below are the various forms of *qabd*:⁵⁰

- 1) Give up the keys.
- 2) Payment of bills and land tax.
- 3) The beneficiary of *hibah* is free to leave or enter the house.
- 4) If the subject matter of *hibah* is a land, the beneficiary is free/allowed to cultivate it.
- 5) The beneficiary manages the house and takes care of it.
- 6) For the movable property, *qabd* occurs by taking the property, transferring or isolating the property from other properties.

Although *qabd* is not explicitly mentioned in the shariah law, the Syariah High Court has ruled on various *hibah* issues. For example, the case of *Noraini Binti Abdul Hamid vs Saleha Binti Mohamed and 10 Other Defendants (10300-044-0228-2010)*. In this case, the deceased is the father of the plaintiff. Her father alleged to have given the apartment during his lifetime to the plaintiff and defendant 1. The Syariah Court Judge, in the case of the Selangor Syariah High Court, has confirmed that this *hibah* is valid with several factors. According to the Syariah Court Judge, the *hibah* contract has occurred through proof (*qarinah*) which is the Nomination Letter, and the Form 14A has

⁵⁰Mustofa Said al-Khin, Mustafa al-Bugha, Ali asy-Syarbiji, *Fiqh al-Manhaji 'ala Mazhab al-Imam asy-Syafie* (Damsyiq: Dar al-Qalam, 1992), 3, 16. Abdullah et al., "Perundangan di Malaysia," 12-21.

been signed by the plaintiff. In addition, there were also other documents namely the *Amanah Hibah* Application Form through the ARB and the *hibah* contract has been completed in front of witnesses. Thus, the Syariah Court Judge decided that the *hibah* made by the deceased is valid due to the existence of *qabd* elements in the documentation.⁵¹

While in the case of *Basa Bin Jaya vs Maliah Binti Wan and others* (10400-044-0340-2014), the Syariah Court Judge, in the case of the Selangor Syariah High Court, has decided that the verbal element of acceptance (*qabul*) does not apply. On the other hand, only the *qabul* element of the act has occurred when the beneficiary of a *hibah* manages the property (land) owned by the donor i.e. makes payment on the land, rents a trailer truck and brings the parts of the original house to the land. All of these acts are considered as *qarinah* and there is an element of *qabd* based on the judgment of the Syariah Court Judge.⁵²

Next, is the case of *Noor Zaleha binti Mohd Noor vs Fatimah Ibrahim & 14 Others* (11100-044-0001-2019) This is an appeal case that has been filed by the appellant because she is not satisfied with the whole decision decided by the Syariah Court Judge, in the case of the Kuala Terengganu Syariah High Court, on 18 April 2021. In the judgment, the Syariah High Court ruled that the ASNB *hibah* made by the deceased to the plaintiff amounting to RM355,334.86 is invalid because the *qabd* element does not fulfilled. Thus, the property should be divided between legal heirs according to the *faraid*. The appellant is not satisfied and has appealed to the Appeal Court. The Appeal Court has successfully proved that the decision of the Syariah High Court was incorrect (*khilaf*) and has decided that the *hibah* is valid. The beneficiary has received (*qabd*) the property through documentation as mentioned in the Trust Deed of Hibah Amanah (SIHA). In fact, the beneficiary also voluntarily allows the donor to take advantage of the ASNB's *hibah* property.⁵³

⁵¹ Abdullah et al., "Perundangan di Malaysia," 12-21.

⁵² Nurul Syuhadah Azalan and Noor Lizza Mohamed Said, "Keputusan Hakim Syarie Dalam Kes-Kes Pengesahan Hibah Mengenai Sighah," *Journal of Contemporary Islamic Law* 1 no. 1 (2016): 55-68.

⁵³ Mohd Izzat Amsyar Mohd Arif, Faezy Adenan, Shofiyah Moidin, "Analisis Perundangan Terhadap Pelaksanaan Akad Hibah Amanah

TRANSFORMATION OF COLLATERAL HIBAH APPLICATION AT ARB FROM YEAR 2015-2023

Two Collateral Hibah products have been introduced by ARB. The first is the Declaration of Hibah which was introduced in 2015 and the second is the Hibahku product which was launched in 2023. Therefore, in this section will analyse the transformation and see the difference between the two types of products in the implementation of Collateral Hibah.

Declaration of Hibah

The Declaration of Hibah is a Collateral Hibah product introduced by the ARB since 2015 as a solution to the community due to the problem of unclaimed property and unsystematic estate planning. The Declaration of Hibah was introduced to the Muslim community due to the following reasons:

1. In the Malaysian society, most of the property that is planned to be distributed is property that is not fully owned and is still held as collateral by banks and financial institutions. These properties, including houses, land and vehicles, are often of high value. This scenario mainly affects individuals aged between 20 and early 50 years.⁵⁴ This factor is also driven by the government by providing various intensives for the purchase of a first home at a young age and those with low incomes, especially for the B40 and M40.⁵⁵ For example, Skim Jaminan Kredit Perumahan - MADANI (SJKP-MADANI) and Rumah Mesra Rakyat (RMR) scheme as stated in the Malaysia Budget 2023.⁵⁶ While assets such as savings accounts, shares, and jewellery, there is

Dalam Industri Kewangan Islam Di Malaysia,” *Akademika* 93 no. 3 (2023), 197–211.

⁵⁴Nor Muhammad, “Perspektif Undang-Undang Islam”, 180-208.

⁵⁵Kementerian Belia dan Sukan, “*Kajian Keupayaan Pemilikan Rumah Dalam Kalangan Belia Malaysia*” Institut Penyelidikan Pembangunan Belia Malaysia (2021): 1-134.

⁵⁶Belanjawan 2023, “Skim Jaminan Kredit Perumahan - MADANI (SJKP-MADANI)”, accessed May 4th, 2024, <https://manfaat.mof.gov.my/2024/individu/sjkp-madani>.

no issue in terms of the owner being able to make good estate planning.⁵⁷

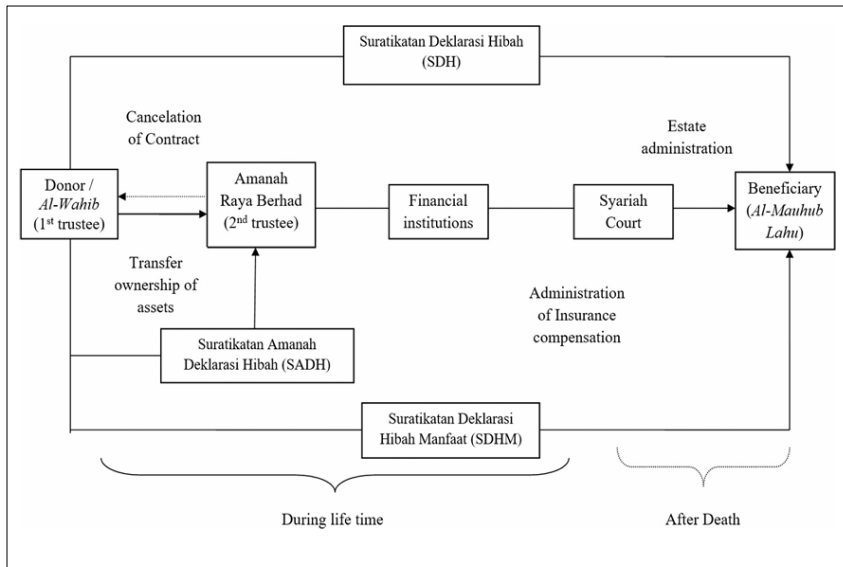
2. It was recognised by the Syariah Supervisory Council of Amanah Raya Berhad (MPS ARB) on 7 October 2015.⁵⁸
3. As an alternative to existing Islamic estate planning instruments such as will. The execution of a will only occurs upon the death of the property owner (*al-musi*) and the property (*al-musa bihi*) can only be given to non-beneficiaries at the maximum rate of 1/3 portion. While the remaining 2/3 portion of the property will be inherited based on the *faraid* basis.
4. As an alternative to *Hibah Mutlak* as its the implementation only occurs during the lifetime. This will prevent the property owner from enjoying the benefits of the *hibah* property such as rental and living rights.
5. As an alternative to *Hibah Amanah* as the property requires full ownership.

The concept of the Declaration of Hibah implemented by the ARB uses a trust instrument and involves several Trust Deed in the process of *ijab*, *qabul* and *qabd*. The property will be transferred to the ARB as a second trustee, while the donor as the first trustee as shown in Figure 1 below:⁵⁹

⁵⁷Nor Muhammad, "Perspektif Undang-Undang Islam", 180-208.

⁵⁸Abdullah, Awang, Zakaria, " Amanah Raya Berhad, Malaysia," 1404 -1425.

⁵⁹Abdullah, Awang, Zakaria, " Amanah Raya Berhad, Malaysia," 1404 -1425.

Figure 1: Declaration of Hibah process⁶⁰

Referring to Figure 1 above, there are four processes involved⁶¹:

1. After the completion of the contract, the donor becomes the first trustee, while the ARB becomes the second trustee. This is because the *hibah* property still belongs to the financial institution.
2. After that, the ARB will seek approval from the lender for the Collateral Hibah contract. If it gets permission, then it will proceed to further proceedings. Otherwise, the process will be cancelled.
3. Upon obtaining permission from the lender, there are three Trust Deeds to be sealed. The first is the Suratikan Deklarasi Hibah (SDH) which is a contract between the donor and the beneficiary. The second is the Suratikan Amanah Deklarasi Hibah (SADH) which is a contract between the donor and the

⁶⁰ Abdullah, Awang, Zakaria, " Amanah Raya Berhad, Malaysia," 1404 -1425.

⁶¹ Abdullah, Awang, Zakaria, " Amanah Raya Berhad, Malaysia," 1404 -1425.

trustee (ARB). Third, the Suratikatan Deklarasi Hibah Manfaat (SDHM) which is between the donor and the beneficiary.

4. Lastly, the ARB will get confirmation of this *hibah* contract from the Syariah High Court during the lifetime of the donor. In addition, a Comprehensive Will is also attached to facilitate the transfer of ownership after death. ARB also will be listed as the second trustee in the Comprehensive Will.

Hibahku

Hibahku is an improved product from the Declaration of Hibah. This Hibahku product was approved by the Syariah Supervisory Council (MPS) on 23rd October 2023, specifically involving collateral and uncollateral property. This Hibahku product meets all the pillars and conditions of *hibah* discussed earlier.⁶² The main factor why Hibahku was introduced is due to several obstacles of the Declaration of Hibah processes such as⁶³:

1. Expensive Ad-Valerom Tax charged by Inland Revenue Board of Malaysia (LHDN) to each existing Trust Deed and its burdens on the donor/customer.
2. The documentation of the Declaration of Hibah is diverse and more complicated. As a result, this makes it difficult for the Syariah Court Judge to verify and endorse the Collateral Hibah.
3. The existing fees charged by ARB are among the highest in the market.

Through the transformation of the Hibahku product, the ARB will act as a representative. Therefore, the ARB will manage the verification of the Collateral Hibah at the Syariah High Court either

⁶²Mohd Khairuddin Harun, Head of Product Development Department, Amanah Raya Berhad. Interviewed on November 25, 2023.

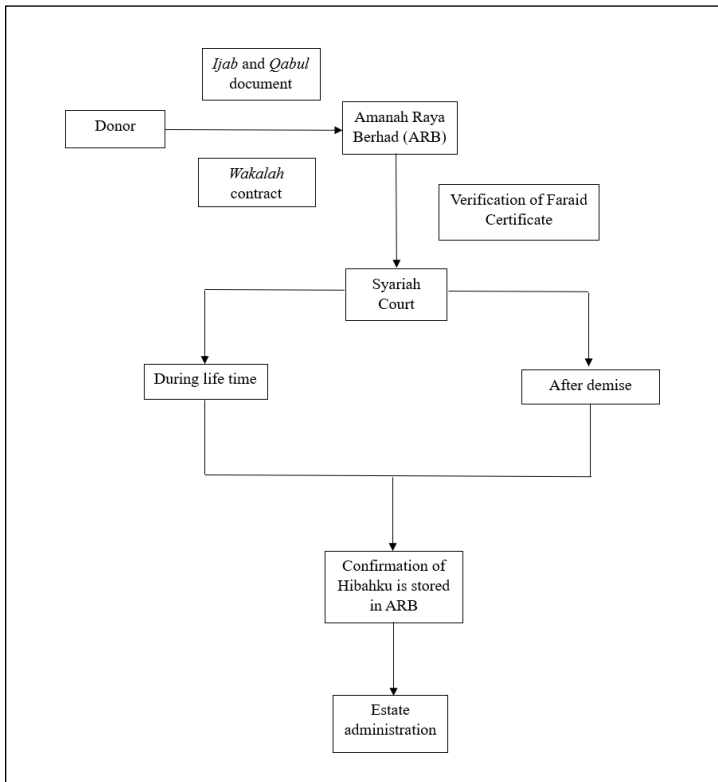
⁶³Harun, interview.

during the lifetime or after the death of the donor. The ARB authority can be referred to in Sec. 11(1) Public Trust Corporation Act 1995:

"If a Court, the Government of Malaysia or a person within or outside Malaysia has power to appoint a trustee, executor, administrator, guardian, next friend, agent, attorney, receiver, receiver and manager or liquidator or make any other appointment of a fiduciary nature, the Corporation may be so appointed."

The Hibahku process can be referred to as follows:

Figure 2: Hibahku Process⁶⁴



⁶⁴ Harun, interview.

Based on Figure 2 above, the current Hibahku process is simpler as compared to the previous Declaration of Hibah process. Hibahku uses the concept of *wakalah* with reference to Sec. 11(1) Public Trust Corporation Act 1995 above. The donor delegates to the ARB to manage the documentation process starting from the preparation of *ijab* and *qabul*. Next, ARB will obtain verification of Collateral Hibah at the Syariah High Court either during the lifetime or after the death of the donor. The preparation of the documentation of Hibahku contract is important to avoid any dispute after the death of the donor. Through the documentation, the beneficiary's name is clearly mentioned and will receive the property after the death of the donor. The main difference is that the ARB is not appointed as a second trustee and no longer uses various Trust Deed compared to the Declaration of Hibah.⁶⁵

Furthermore, based on Figure 2 above, it is clear that the verification of Collateral Hibah can be done during the lifetime or after the death of the donor. However, the best choice for the verification of Collateral Hibah to be done is during the lifetime. This is because it can shorten the duration of the estate administration process after the death of the donor. The property will be transferred more easily to the beneficiary during the estate administration process. Even, the cost of the estate administration process can also be saved. If the verification of Collateral Hibah is done after the death of the donor, all the legal heirs will be called during the estate administration process at the Syariah High Court. This will delay the transfer of the property to the beneficiary later.⁶⁶ However, the difference in the verification of Collateral Hibah either during the lifetime or after the death of the donor is subject to the decision of the Syariah High Court in a state. Based on the courtesy visit of the ARB to several Syariah High Courts in Peninsular Malaysia, it was found that the process of verification of Collateral Hibah is different as per Table 1 below⁶⁷:

⁶⁵Nursuhaila Meera Tambi, Manager of Product Development Department, Amanah Raya Berhad. Interviewed on November 25, 2023.

⁶⁶Tambi, Interview.

⁶⁷Tambi, Interview.

Table 1: Time of verification of Collateral Hibah at the Syariah High Court in Peninsular Malaysia⁶⁸

No.	State	Verification of Collateral Hibah at Syariah High Court	
		During lifetime	After the death of the donor
1.	Perlis		√
2.	Perak	√	
3.	Kedah		√
4.	Penang		√
5.	Selangor	√	
6.	Federal Territory	√	
7.	Negeri Sembilan	√	
8.	Melaka	√	
9.	Johor		√
10.	Pahang	√	√
11.	Kelantan		√
12.	Terengganu	√	

Once the donor dies and the estate administration process is completed, the ARB will act as an administrator. There are two institutions involved in the issuance of Letter of Administration which are the Estate Distribution Unit through Section 8, Small Estates (Distribution) Act 1955, and the Civil High Court through Section 13, Probate and Administration Act 1959. For Section 8, Small Estates (Distribution) Act 1955, the ARB will assist in the transfer to the beneficiary in accordance with Section 348 of the National Land Code Act 56 of 1965. While for Section 13, Probate and Administration Act

⁶⁸Tambi, Interview.

1959, the ARB will assist in obtaining a Vesting Order through the registration of the Vesting Order based on Section 420(1) and (2) of the National Land Code Act 56 of 1965 as follows:

- (1) Notwithstanding anything in any other written law, no order of the Court vesting any alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.
- (2) The Court shall, accordingly, cause a copy of any such order to be served on the Registrar or, as the case may be, Land Administrator forthwith after the making thereof; and the Registrar or Land Administrator, upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates

The Vesting Order is important. This is because no Ad-Valerom Tax will be charged by LHDN for the transfer of property through this application. Thus, during the presentation of the transfer, the Letter of Administration only needs to be attached with other supporting documents without 14A Form.⁶⁹ Meanwhile, if the Vesting Order is not attached, then the next action continued under Section 215 of the National Land Code Act 56 of 1965, in which is the preparation of 14A Form and Ad Valerom Tax will be imposed as per the existing estate administration process. This will burden the beneficiary as the cost of the transfer is expensive based on the current valuation of the asset.

⁶⁹ Harun, interview.

Differences between the Declaration of Hibah and Hibahku

There are several main differences between the implementation of the Declaration of Hibah and Hibahku as follows:

Table 2: Differences between the Declaration of Hibah and Hibahku⁷⁰

No.	Items	Declaration of Hibah	Hibahku
1.	Concept	The donor is appointed as the first trustee of the <i>hibah</i> property, and ARB is appointed as a second trustee to manage the transfer of <i>hibah</i> property after the death of the donor.	ARB is responsible for managing the <i>hibah</i> documents before and after the death of the donor.
2.	Hibah Property	<p>Immovable property:</p> <p>Full settlement or still in loan but covered with full <i>takaful</i> protection such as MRTA / MRTT.</p>	<p>Immovable Property:</p> <p>Full settlement or still in loan but covered with full <i>takaful</i> protection such as MRTA / MRTT.</p> <p>Movable Property:</p> <p>1. Car, motorcycle: full settlement or still in loan but covered with full <i>takaful</i> protection.</p> <p>2. Cash, unit trust, a bank account with the beneficiary as joint account holder (except for ASNB</p>

⁷⁰ Tambi, Interview.

			& Tabung Haji saving account) ⁷¹ .
3.	Legal Document	1. Application Form 2. Suratikatan Deklarasi Hibah 3. Suratikatan Amanah Deklarasi Hibah 4. Suratikatan Deklarasi Hibah Manfaat	1. Application Form 2. <i>Ijab</i> and <i>Qabul</i> Document
4.	Contribution to <i>Waqf</i>	No	A total of RM 10 of the fees collected by ARB will be donated to Tabung Wakaf Yayasan AmanahRaya.
5.	Will Document	Comprehensive Will	<i>Ijab</i> and <i>Qabul</i> Document
6.	Instrument	Trust	Wakalah
7.	Fee	- First asset: RM 3,500, - Second asset: RM 5,000 *Limited for two assets for each contract.	- First asset: RM1,500 *For each additional asset: RM 500.00 (maximum 8 assets). - Ninth asset: a new account needs to be created with a payment of RM1,500 again.

⁷¹The reason why ASNB & Tabung Haji savings accounts are not included in Hibahku products is because they both have their own Amanah Hibah products.

THE CHALLENGES OF THE IMPLEMENTATION OF HIBAHKU

It cannot be denied, that the transformation to Hibahku can help Muslim communities to plan their property in a better manner and more systematically. However, this study has found that there are three main challenges to the implementation of Hibahku at this time, to be noted⁷²:

1) No Hibah Enactment in Every State in Malaysia

In Malaysia there is no specific legislation on *hibah* other than the specific provisions in Item 1, List II, Ninth Schedule of the Federal Constitution. The provision mentions the term of 'gift'/'*alang*'. Furthermore, the provision also indicates that *hibah* is placed under the administration of the Islamic religion in each state, and involves the jurisdiction of the Syariah Court. Referring to the provisions contained in the Administration of the Religion of Islam in every state in Malaysia, there are different terms used that refer to *hibah*. Most states use the term 'Alang semasa hidup' such as Penang, Federal Territory, Johor, Kedah, Melaka, Perak and Selangor. While the 'Pemberian semasa hidup' term is used by Negeri Sembilan and Pahang. While for Kelantan, Sabah and Sarawak, there is a word "*hibah*" in the state enactment. However, the term before '*hibah*' is different for Kelantan which is used 'Alang hayat', and Sabah and Sarawak are 'Alang semasa hidup'.⁷³

⁷² Harun, interview.

⁷³ Alias Azhar et.al, "Pengurusan Harta Dalam Islam: Perspektif Hibah Di Malaysia," *Journal of Human Development and Communication* 3 (2014): 115–128. Mohd Khairy Kamarudin, Norlela Zamani, and Rosamiza Meor Razak. Analisis Tema Terhadap Keperluan Undang-Undang Hibah Di Malaysia. *Al-Qanatir International Journal of Islamic Studies* 16 no. 1, (2019): 1–13.

Table 3: Enactments for each state and summary of terms used

State	Statute	Provisions	Hibah Term
Kedah	Syariah Courts (Kedah Darul Aman) Enactment 2008	Section 13(3)(b)(vi)	Alang Semasa Hidup
Federal Territory	Administration of Islamic Law (Federal Territories) Act 1993	Section 46(2)(b)(iv) Enactment	
Johor	Administration of The Religion of Islam (State of Johor) Enactment 2003	Section 61(3)(b)(iv) Section	
Malacca	Administration of the Religion of Islam (State of Malacca) Enactment 2002	Section 49(3)(b)(iv)	
Penang	Administration of the Religion of Islam (State of Penang) Enactment 2004	Section 61(3)(b)(iv)	
Perak	Administration of the Religion of Islam (Perak) Enactment 2004	Section 50(3)(b)(vi)	
Selangor	Administration of the Religion of Islam (State of Selangor) Enactment 2003	Section 61(3)(b)(iv)	
Terengganu	Syariah Court (Terengganu) Enactment 2001	Section 11(3)(b)(vi)	
Kelantan	Administration of The Syariah Court Enactment 1982	Section 9(2)(vi)	Alang hayat (hibah)

Negeri Sembilan	Administration Of The Religion Of Islam (Negeri Sembilan) Enactment 2003	Section 61(3)(b)(iv)	Pemberian semasa hidup
Pahang	Administration of Islamic Law Enactment (Pahang) 1991	Section 47(2)(b)	
Sabah	Syariah Court Enactment 2004	Section 11(3)(b)(iv)	Alang semasa hidup (hibah)
Sarawak	Syariah Court Ordinance 2001	Section 10(3)(b)(iv)	

Source: Author's analysis

Although there is a term for the use of *hibah* at the state level in Malaysia, there has been no *hibah* enactment except in the state of Kelantan, that was introduced in 2022. This is completely different from the two instruments of will and *waqf*. Both of these have specific enactments in each state as described in Table 4. Hence, when any dispute arises regarding will and *waqf*, it becomes easy for the Syariah Court Judge to decide.

Table 4: State enactments related to the administration and management of will

State	Will Enactment
Malacca	Muslim Will (Malacca) Enactment 2005
Negeri Sembilan	Muslim Will (Negeri Sembilan) Enactment 2004
Selangor	Muslim Will (Selangor) (Amendment) Enactment 2016
Perak	Muslim Will (Perak) Enactment 2023
Kelantan	Muslim Will (Kelantan) Enactment 2009
Sabah	Muslim Will (Sabah) Enactment 2018

Source: Author's analysis

Table 5: State enactments related to the administration and management of *waqf*

State	Waqf Enactment
Pahang	Administration of Islamic Law Enactment 1991. Pahang Wakaf Fund Rules 2015.
Terengganu	Enactment 1 of 2016, Wakaf Enactment (Terengganu) 2016
Malacca	Enactment No. 5 of 2005, Wakaf (Malacca) Enactment 2005
Negeri Sembilan	Enactment No. 2, Wakaf (Negeri Sembilan) Enactment 2005
Sabah	i. Enactment 7 of 2018, Wakaf (Sabah) Enactment 2018 ii. Waqf Enactment (Sabah) (Amendment) 2023
Selangor	i. Establishment Order of Perbadanan Wakaf Selangor 2011 ii. Enactment 15, Wakaf (Selangor) Enactment 2015
Perak	Enactment 9, Waqf Enactment (Perak) 2015
Johor	Waqf Rules 1983

Source: Yayasan Wakaf Malaysia⁷⁴

⁷⁴Wakaf di Malaysia, “Enakmen Wakaf,” accessed February 28th, 2024.
<https://www.ywm.gov.my/pengenalan-wakaf>

2) The Gazetting of *Hibah Fatwa* is Not Comprehensive Throughout Malaysia

It is even more complicated when no specific Islamic ruling (*fatwa*) has been gazetted on the rulings of *hibah* throughout Malaysia. Based on the author's analysis, only the state of Selangor at this time has gazetted the *fatwa* of *hibah* in detail on 8 April 2021 (Vol. 74, No. 7). The state of Johor also issued a *fatwa* of *hibah* but not gazetted. In contrast, to the states of Kedah and the Federal Territory, these two states only issue *Irsyad al-Fatwa*⁷⁵ on the rulings of *hibah* as a guideline. Meanwhile, the other states to date have no specific *fatwa* on the rulings of *hibah*.

The absence of a gazetted *hibah fatwa* has major implications. In fact, it also makes it difficult for the Syariah Court Judge in the Syariah High Court to verify the *hibah* and resolve any disputes involving the estate administration.⁷⁶

⁷⁵Referring to the legal practice in Malaysia about *fatwas* is subject to the provisions of the Administration of Islamic Law of each state. The Gazetted Fatwa is binding on each party under the jurisdiction of that state and has legal implications. While Fatwa Not Gazetted is also decided by the Mufti and the Islamic Legal Consultative Committee. Therefore, every *fatwa* has no legal implications and it is just a legal explanation of the matter in question. While *Irsyad Fatwa* is a legal explanation published through articles that have been published as a guide to the public and not gazetted.

Jabatan Mufti Wilayah Persekutuan, "Irsyad Al-Fatwa Siri Ke-669: Perbezaan Fatwa Warta Dan Fatwa Tidak Warta," accessed February 26th, 2024, <https://muftiwp.gov.my/en/artikel/irsyad-fatwa/irsyad-fatwa-umum-cat/5139-irsyad-al-fatwa-siri-ke-669-perbezaan-fatwa-warta-dan-fatwa-tidak-warta>

⁷⁶Muhammad Fathullah Al Haq bin Muhamad Asni & Jasni bin Sulong, "Fatwa Concerning Qabd in Hibah and the Insertion of Qabd Element in States Fatwa in Malaysia", *Journal of Islamic Studies and Culture* 4 no. 1, (2016): 143-154.

Table 6: Analysis of *Hibah Fatwa* and *Irsyad Al-Fatwa* in every state in Malaysia

	Fatwa		<i>Irsyad Fatwa</i>	Description of <i>Fatwa</i> / <i>Irsyad Fatwa</i>
	Gazetted	Not Gazetted		
Kedah⁷⁷	-	√	√	<ol style="list-style-type: none"> 1. <i>Fatwa</i> on the application to surrender part of the land that has been given to Masjid Kariah Permatang Buloh, Alor Setar 2. <i>Fatwa</i> on the Colleteral Hibah. It is invalid according to Shafie <i>madhab</i>. 3. Verification of <i>hibah</i> for the process of preparing <i>hibah</i> documents via online (E-Hibah).
Selangor⁷⁸	√	-	-	<p>The <i>fatwa</i> of <i>hibah</i> is gazetted about:</p> <ol style="list-style-type: none"> 1. Implementation of <i>hibah</i> after the death of the donor. 2. Enjoying the benefits of the

⁷⁷Jabatan Mufti Negeri Kedah: Irsyad Al-Fatwa, “Fatwa Mengenai Permohonan Menyerah Balik Sebahagian Tanah Yang Telah D hibah Kepada Masjid Kariah Permatang Buloh, Alor Setar”, “Pengesahan Rukun Hibah Bagi Proses Penyediaan Dokumen Hibah Secara Atas Talian (E-Hibah)” accessed February 25th, 2024, <https://ifatwa.kedah.gov.my/index.php/Irsyad-Al-Fatwa/>

⁷⁸Jabatan Mufti Negeri Selangor, “Fatwa Hibah Di Negeri Selangor,” accessed February 25th, 2024, <https://www.muftiselangor.gov.my/fatwa-selangor/>

				<p>property (<i>hibah al-manfaah</i>)</p> <p>3. Hibah for a certain period (<i>hibah al-mu'qqat</i>).</p> <p>4. <i>Hibah 'umra</i>.</p> <p>5. <i>Hibah ruqba</i>.</p> <p>6. <i>Hibah</i> in <i>takaful</i> products.</p> <p>7. Collateral Hibah.</p> <p>8. <i>Hibah Amanah</i>.</p> <p>9. <i>Hibah</i> land under the Land Act (Group Settlement Areas), 1960.</p> <p>10. <i>Hibah</i> between joint account holders.</p> <p>11. <i>Hibah</i> for the movable property without a specified rate.</p> <p>12. Form of <i>qabd</i>.</p> <p>13. The method of cancellation of the <i>hibah</i>.</p>
Federal Territory ⁷⁹	-	-	√	<p>1. Consent of other legal heirs to implement the <i>hibah</i>.</p> <p>2. Inheritance law if the donor dies</p>

⁷⁹Jabatan Mufti Wilayah Persekutuan, “Al-Kafi 1365: Adakah Hibah Memerlukan Persetujuan Ahli Waris Yang Lain,” accessed February 25th, 2024, “Irsyad Al-Fatwa Siri Ke-798: Pemberi Hadiah Meninggal Sebelum Hadiah Diterima. Adakah Menjadi Harta Pusaka?” <https://muftiwp.gov.my/ms/artikel/al-kafi-li-al-fatawi/3680-al-kafi-1365-adakah-hibah-memerlukan-persetujuan-ahli-waris-yang-lain>, <https://muftiwp.gov.my/en/artikel/irsyad-fatwa/irsyad-fatwa-umum-cat/5750-irsyad-al-fatwa-siri-ke-798-pemberi-hadiah-meninggal-sebelum-hadiah-diterima-adakah-menjadi-harta-pusaka>

				before the property is received by the beneficiary.
Johor ⁸⁰	-	√	-	<ol style="list-style-type: none">1. Application to give back the <i>hibah</i> property, No. Title: Lot 465 GM 1305. Mukim Perserai.2. <i>Hibah</i> from an individual to a company.3. The ruling of conditional <i>hibah</i> through the use of <i>sighah hibah umra</i> and <i>ruqba</i> in the case of: Asiah binti Abdullah (K/P: 500831-01-5432) in the case of Wasiyyah Shoppe.4. Verbally <i>hibah</i> without evidence.

Referring to Table 6 above, there is a difference in *fatwa* between the State of Kedah and Selangor regarding the implementation of Collateral Hibah. The Kedah *fatwa* explicitly disallows it compared to the Selangor *fatwa*. Based on this difference, this study views that the State of Kedah might adhere to the strict opinion of Imam Nawawi to safeguard the interests of the pledgee. However, the study argues that Selangor's *fatwa* allowing Collateral Hibah implementation is more appropriate in the current context to ensure systematic estate planning. Moreover, this *fatwa* is also more detailed and refers to the majority of the four *madhhabs* i.e. Hanafi, Maliki, Shafie and Hambali, agreed that giving the asset as collateral is invalid unless it is approved by the pledgee.

⁸⁰Jabatan Mufti Negeri Johor, “Fatwa Negeri Johor,” accessed February 25th, 2024, https://Said.Johor.Gov.My/Perkhidmatan/Paparan_Fatwa.Php

3) Differences in the Judgments in The Syariah High Court in Malaysia

As a result of the absence of *hibah* enactment and *hibah fatwa* in each state, there are different judgments in the Syariah High Court in Malaysia. This difference occurs because the decision of the judgment is dependent on the interpretation (*ijtihad*) of the Syariah Court Judge at that time. The judgment in the Syariah High Court is not like in the Civil Court which is to practice the binding precedent. Although the ARB has tried to ensure that all the pillars and conditions of Hibahku meet the syariah rules, the issue of the confirmation of Hibahku will be completely subjected to the decision and *ijtihad* of the Syariah Court Judge. In this issue of the judgment, there are three forms of decision by the Syariah Court Judge in the Syariah High Court⁸¹:

a) Rejecting Collateral Hibah absolutely

For example, *the case of Murshida bte Mustakim vs Hassim bin Abdullah [2006] 4 SHLR 43*, and *Awang Bin Abdul Rahman vs Shamsuddin Bin Awang and Another [1998] 6 MLJ 231*. In these cases, the Selangor State Syariah High Court and the Terengganu State Syariah High Court respectively ruled that the asset as collateral belongs to the pledgee. It means that the transfer of ownership can only be done when the payment is completed. Therefore, the condition of the property given is not fulfilled and invalid from Islamic law, as they are not yet properly owned by the pledgor and are still under the responsibility of the pledgee. Based on this case, the Syariah Court Judge is more inclined toward the previous opinion of an-Nawawi who rejected the Collateral Hibah.

b) Allow Collateral Hibah subject to the pledgee permission

For example, *the case of Raihanah Binti Mohd Ali vs Kamaruddin bin Mohd Nor & Others [2008] 26(2) JH 253*. In this case, the Kuala Terengganu Syariah High Court rejected the plaintiff's application to verify the *hibah* made by his brother (the deceased) to her. The main reason is that there was no evidence to prove that the deceased had obtained permission from the financier (pledgee) of the BBA (*bai' bi thaman ajil*) scheme to enable him to give the property to the plaintiff.

⁸¹Ruzian Markom and Mohd Izzat Amsyar Mohd Ari, "Status Quo Hibah dalam Penyelesaian Pertikaian Harta di Mahkamah Malaysia", *Kanun* 34 no. 2 (2022): 277-300.

However, the Syariah Court Judge in his judgment stated that this *hibah* can be valid if permission from the pledgee is obtained. The Syariah High Court does not accept the fact of the existence of *takaful* which protects the debt of the pledgor. The consent of the pledgee shall be clearly proved, and the pledgor in this case has failed to prove this element. Based on this case, the Syariah Court Judge is inclined towards the majority of four *madhhabs* i.e. Hanafi, Maliki, Shafie and Hambali who allow Collateral Hibah on the condition of obtaining the consent of the pledgee. In fact, the Syariah Court Judge also does not accept any proof of the existence of *takaful*.

The next case was *Shahirah Aimi binti Shahrudin vs Siti Hawa binti Abu Talib and Shamimi Aqilah binti Shahrudin (05000-044-0002-2014)*. The case was filed at the Seremban Court of Appeal. The plaintiff in this case was not satisfied with the decision of the Seremban Syariah High Court for not verifying the *hibah* in the form of immovable property which is a house made to her. In this case, the Syariah Court Judge found that the house that was still in Maybank financing when the *hibah* was made through the *Bay' bi Thaman 'Ajil* (BBA) contract, and is expected to expire in 2017. Therefore, the Seremban Syariah High Court ruled that the Collateral Hibah is invalid, as the pledgor still did not have the property properly when it was made. However, the decision was different when appealed to the Syariah Appeal Court and the judgement overcame the decision of the Seremban Syariah High Court. The reason is that the pledgor has obtained permission from the pledgee (Maybank). However, in this case, *takaful* coverage such as MRTT and MLTT is not required.

c) Allowing Collateral Hibah with a *takaful* coverage⁸²

An example can be found in the unreported case of *Yati Suraya vs Supiah Binti Abu*.⁸³ In this case, the Negeri Sembilan Syariah High Court allows the Collateral Hibah even without the permission of the pledgee, as long as the asset as collateral is fully covered by *takaful*.

⁸² Abdullah, "Pandangan Mahkamah", 1-19. Noor Lizza Mohamed Said et al., "Hibah of Collateral Property in Islamic Perspective and the Implementation in Malaysia," *International Journal of Academic Research in Business and Social Sciences* 13 no. 7 (2023): 1625 – 1635.

⁸³ Markom and Mohd Ari, "Mahkamah Malaysia", 277-300.

Arguments Allowing the Collateral Hibah with a *Takaful* Coverage

Referring to the three types of judgments in the Syariah High Court above, the Syariah Court judges have different views on any dispute involving Collateral Hibah. However, this study views that the third form of judgment which is to allow Collateral Hibah with a *takaful* coverage is preferred. This is in accordance with the *fatwa* of *hibah* in the State of Selangor on items (8) and (9), which requires the *qabd* and allow Collateral Hibah if covered by a full *takaful*⁸⁴:

8. *Hibah* between joint account holders is valid if there is *ijab* and *qabul*, and full ownership of the beneficiary of *hibah* on the property given.

9. The Collateral Hibah is valid if the asset as collateral is covered by *takaful* such as MRTT and MLTT, OR obtained permission from the pledgee.

Looking at the *fatwa* of *hibah* in the State of Selangor above, the implementation of the Collateral Hibah is in line with the opinion of the majority of four *madhhabs* i.e. Hanafi, Maliki, Shafie and Hambali that agreed with giving the asset as collateral is invalid unless it is approved by the pledgee. Next, referring to the term "OR" in the *fatwa* of the *hibah*, will literally make it easier for pledgor to make a Collateral Hibah. This is because:

- i. The practice of most financial institutions today has required the taking of *takaful* such as MRTT / MLTT as a method of redeeming the debt if the pledgor dies or has an accident.⁸⁵ The acquisition of this *takaful* is guaranteed as it is regulated by Bank Negara Malaysia.⁸⁶

⁸⁴Jabatan Mufti Negeri Selangor, "Fatwa Hibah Di Negeri Selangor," accessed February 25th, 2024, <https://Www.Muftiselangor.Gov.My/Fatwa-Selangor/>

⁸⁵Mohd Zamro Muda, Nurnazirah Rosdi and Noor Lizza Mohamed Said, "Hibah Amanah Hartanah dan Kekangan Perundangan dalam Perancangan Harta Orang Islam di Malaysia," *International Journal of Islamic and Civilizational Studies* 9 no. 3 (2022): 31-40.

⁸⁶At this time, applications for this Hibahku product can only be accepted for full coverage. If there is an outstanding loan or only covers part of the

- ii. The policy of obtaining permission letter from financial institutions to make a Collateral Hibah is not uniform and unstandardised. Some of them are very difficult to issue the permission letter. In fact, if the permission letter is issued, it is only administratively without relinquishing the rights of the pledgee to the asset as collateral.

Hence, the use of "OR" is more comprehensive and relevant nowadays especially involving the Collateral Hibah. This study sees that the difference in judgments of the Syariah High Court can be harmonised. This is because, there is a strict view of the Syariah Court Judge by only requiring permission from the pledgee for the Collateral Hibah contract. Therefore, the use of "OR" will be the second option and can help the owner in planning their property. There is no doubt that the Syariah Court Judge is cautious in the implementation of Collateral Hibah as the property is still under the ownership of the financial institution.⁸⁷ However, the reality is that nowadays any purchase of a house requires *takaful* coverage. Furthermore, the payment for the *takaful* insurance fees such as MRTT / MLTT is made at the time of purchase and usually part or full amount can be paid using the housing loan. In the case of death, the *takaful* coverage can be used to pay the balance of the buyer's housing loan amount and paid directly to the financial institution that provided the loan. This means that any risk of permanent disability, accident and death affecting the property owner has been guaranteed by the *takaful* coverage.⁸⁸

In addition, referring to the statistics on the verification of *hibah* at the Melaka Syariah High Court applied by Amanah Raya Berhad Melaka Branch from 2018-2023, to date there are almost 70 verified cases of Collateral Hibah applications with only the MRTT *takaful*

loan, then the application is not accepted. This is to avoid verification of hibah being rejected by the Syariah Court Judge. Harun, interview.

⁸⁷ Markom and Mohd Arif. "Mahkamah Malaysia", 277-300.

⁸⁸ Property Guru, "MRTT vs MLTT: Apakah 4 Perbezaannya Di Malaysia?", accessed November 15th, 2023. <https://www.propertyguru.com.my/bm/panduan-hartanah/apa-perbezaan-insurans-mrtt-dan-mltt-24928>

coverage included.⁸⁹ The Syariah Court Judge does not require a permission letter from financial institutions. However, if the permission letter is obtained, then it will also be accepted and will strengthen the confirmation of the Collateral Hibah.⁹⁰ Thus, this study sees that the shariah law is flexible and elastic. The permissibility of the implementation of Collateral Hibah with the guarantee of the *takaful* coverage is seen in time for the benefit of the beneficiary based on the legal maxims of "*Difficulty calls for facilitation*"⁹¹, "*When in a predicament, facilitation (rukhsah) is given*"⁹², and "*avoiding damages (al-mafasid) is more important than obtaining goods (al-masalih)*."⁹³

CONCLUSION

The discussion of Collateral Hibah from the shariah perspective and its implementation in the estate planning industry is important to note. Its implementation that meets the pillars and conditions will avoid any invalidity of the Collateral Hibah. This study found that the transformation of the implementation of Collateral Hibah in the ARB from Declaration of Hibah to Hibahku has the potential to meet more systematic property planning. Therefore, this study suggests several actions to be considered to ensure that the implementation of the Collateral Hibah is more comprehensive in the future.

First, the ARB needs to enhance cooperation and pay tribute to every Syariah High Court Judge in every state throughout Malaysia. The main objective is to explain the implementation of Collateral Hibah products to facilitate the verification of *hibah*, either during the pledgor lifetime or after his death.

Second, pay a courtesy visit to the Department of Syariah Judiciary Malaysia (JKSM) to explain the functions and roles of the

⁸⁹ Nur Aimi Liyana Jamal, Executive of Amanah Raya Berhad, Melaka Branch. Interviewed on November 28th, 2023.

⁹⁰ Jamal, Interview.

⁹¹ Abdur Rahman Abdullah as-Saqqaf, *Durus al-Qawaid al-Fiqhiyyah*, (2015): 237-235.

⁹² Wahbah az-Zuhailly, *Al-Wajiz fi Usul Fiqh*, (Dar al-Fikr, 1999): 230.

⁹³ Ahmad az-Zarqa, *Syarah al-Qawaid al-Fiqhiyyah*, (Dar al-Qalam, 1989): 205.

ARB as a trustee and administrator for the estate and intestate for Muslim.

Thirdly, always ensure the *hibah* documentation is perfect and meets the pillars and conditions especially involving *qabd* issues. This is to avoid any problems and disputes in the future.

Fourth, the ARB can act as an independent body to propose paperwork on the application of *hibah fatwa* to the Fatwa Committee Members in every state throughout Malaysia. Courtesy visits can also be done to the Selangor State Mufti Department to consult the *fatwa hibah* paper that has been produced. This is to facilitate the Syariah Court Judge makes a judgment in the event of a dispute among the beneficiaries regarding the *hibah* that has been implemented during the lifetime of the pledgor.

Fifth, the ARB is also proposed to apply for a *fatwa* related to the Collateral Hibah to the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia (MKI). Although the *fatwa* is not binding on the implementation of the states in Malaysia, the *fatwa* can resolve many issues regarding the Collateral Hibah.

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