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### RESEARCH ARTICLE

#### CONCEPT OF HIBAH CHARGED PROPERTY AS A PROPERTY PLANNING AND MANAGING INSTRUMENT IN MALASIA'S PRACTICE

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#### Abstract

Concept of transferring charged property through hibah has been practised as one of instruments during someone's lifetime. However, the concept becomes the debate among scholars as the property still in refund period and has liabilities which need to be cleared first. Bank as the chargor will not allowed the asset being transferred. Therefore, problems regarding how far the concept will be permitted arise because it effects the rights of the receiver and the bank as the holder of the collateral. The purpose of this research is to analyse the concept of hibah charged property and the effects on ownerships if the transaction is permitted. The data required from primary and secondary sources such as scriptures, past articles which are related to the concept of hibah charged property. The outcome of this research claims that hibah charged property is legal among some scholar opinions under certain conditions. The concept of hibah charged property can be considered as one method of effective planning but with supervision from the authority, through legal ways and such.

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#### Introduction:-

Apart from the solutions commended by law transaction can be done through inheritance instruments such as wills, hibah also a productive alternative as an instrument in property management, in addition of helping in overcoming the problems relating to inheritances. giving concept which contains a few advantages compare to other instruments has been practised since the era until today, suitable to be practised especially during the times where situations and changes in community customs that caused various of new problems to arise. It is not aimed to outshine the inheritance system but to complete the distribution of property system especially in Islam (Nasrul 2013).

Even more so when the property includes immovable such as houses and real estates which without a doubt, are high in values. If no prior planning is done to make sure the upcoming generations will able to enjoy, it will be a major lose that can devastate not only an individual's economy but also, the country's, indirectly. Hence, hibah charged property being introduced as an alternative solution.

Nowdays, Malaysians own real estates nor movable property through financing loans by the banks. It is hard to find house buyers paying in cash to the housing development company. Real estate purchases through financing of financial institutions have become a normal custom among Islam practitioners with average incomes and the

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situation will go on even to new generations. Thus, the implementation of hibah charged property needs to be expanded and until it is said to become a need for a long period of time.

However, the real standing of hibah charged property is still in debate among the scholars which needs to be settled because one of the conditions of hibah property is the property must be fully-owned by the giver. It includes the goods are free from any burdens of being collaterals of financial institutes (Farahwaheda 2015).

#### **Concept of transferring charged property through hibah:**

Hibah charged property adopts two contracts in Islam which is the hibah contract and the collateral contract. The utilization of these two contract concepts indirectly affects different laws. In general, based on the method of each property that is legally traded then it is valid for hibah (Suyuti 2003). Among the major conditions of hibah, the property must be owned by the giver and free from any burdens, including collaterals, (Hisni 2013). In other words, the giver must have the full ownership on the hibah property.

Fully ownership implies that someone with the absolute power on the corpus of the property and the benefits of the property at the same time (Zuhayli 2014). Absolute power enables the owner or the giver to make any kinds of transactions that anyone from any sides could touch unless the laws permit it. Therefore, when a property is picked as a collateral, it is no longer under fully ownership because the owner or the giver can no longer freely execute transaction towards the property. Collateral is defined as a transaction from an owner gives his/her ownership or lease hands it over to someone else as a refund security of a loan, annuity or any term payments. As long as the property remains as the collateral of a bank, it is not under fully ownership by the giver (Nasrul 2011).

Fundamentally, when the transaction contract is done by fulfilling all the commandments and conditions that have been placed by the legal and Islam, the transaction real estate or house is allowed and can be enforced right away even if there are no name changes on the ownership document. However, it raises questions on the transaction that has been done to change the ownership legally because it has become a practice and policy of the financing institutes especially the banks that do not allow any transactions to be done on the property or the houses which are still under collaterals unless have been paid in full, (Mujani;Rusnadewi et al 2012). This as well raises questions about the effects of the Syariah Court's decision if the institute confirms the hibah charged property however, according to local laws, it can't be implemented because of this kind of gap exists.

Originally, collateral is made to guarantee the return money by the borrower with the bank (Asmadi 2014). When the hibah transaction is done on the property that is still in collateral of the financial institutes, it jeopardizes the collateral holder's rights, that is the banks as the guarantee to their debt payments. This matter is further strengthened in the statements by Farawaheda (2015) who claims that the financial institutes can insert caveat to protect their interests as the collateral holders. Caveat registration by financiers is to prevent the property from transferring whether through hibah or other contracts, even any kinds of business during the period is obstructed.

This matter is also supported by other scholars such asMujani;Rusnadewi et. al. (2012) said that when a property is used as collateral by the financial institutes for loan financing repayment purposes, someone who does not have any access on the property and any kinds of devolution on the property is voided unless he/she has approval from the banks. The banks, too, still cannot allow any transactions of ownership transfer to be done as long as the debt or the annuity balance has yet to be completely settled. It gives perspectives that the practised policy of the banks still has not offered products related to collateral ownerships transfer (Mujani; Rusnadewi et al. 2012).

Syuhada (2018) also asserts that there are some issues that need to be addressed related to the implementation of hibah charged property when the banking institutes are involved. According to the research, the institutes have placed rules of not allowing ownerships transfer to happen as long as an asset is still in the loan financing period. This matter is reinforced with a research by Naziree(2011) that claimed any assets which are still in financing whether movable property or not cannot be used as for hibah.

Until today, there is no banking institute that allows property that is still in collateral to transfer ownership whether through hibah instrument or otherwise. This is to protect the interests of the banks as the collateral holders to claim loan repayment. Though some parties argue that the interests can be overcome with takaful protection, the banks have rights not to practise the collateral property ownership transfer policy because there are risks of unpaid debts.

Even so, this issue only involves the proses of local legal. In other words, the hibah property does not need to go through ownership transfer legally for confirming the rights of ownership of the hibah receiver on the paper according to the laws. Even succession is one subjective thing that can happen in various forms such as property monopolization.

Apart from that, to overcome the banks' desire issue, conditional hibah concept can be applied with additions of conditions in hibah. One of the conditions that can be included are the receivers need to pay the remaining debts as the banks do not concern themselves with the hibah property as long as they received the remain payments.

#### **Conflict of validity of hibah charged property:**

Debate among scholars regarding the hibah charged property's position can be seen in the issue of collateral holder's transactions or buyer towards the collateral property. This is because even if the collateral property basically belongs to the buyer, the rights of the collateral holder formed when it is used as collateral, thereafter, hindering the any kinds of transactions that can threaten the interests of the collateral holder including hibah.

According to Shafii scholars, the buyer who drops the ownership rights and ownership transfers happen is annulled if they are done without the collateral holder such as purchase and any kind of transaction (Nawawi 2012). This is because if the transaction is legal, the binding rights and the importance of the collateral holder will be at risk. If the holder approves the property to be transferred or to endow the collateral property, the transaction is legal though the collateral contract is annulled, (Sharbini 2009). The approval must be obtained during the transaction. The forms of transaction include the things that annul the collateral contract even though it is done with the approval of the collateral holder, (Wizarah 2002). The holder also has the rights to nullify or to take back the approval as long as the collateral property has yet to have the ownership transferred because the rights are still belongs to him/her, (Sharbini 2009).

Similarly, Hanbali scholars has the same opinion if the buyer did transaction on collateral property without consent of the collateral holder like purchases, rents, any transactions, collaterals and such, the transaction is nullified (Qudamah.d.). This is because the forms of transactions drop the rights of ownership and also, nullify the binding rights of collateral holder. However, if the transaction is done with consent from the collateral holder during the process, the transaction is legal but the collateral contract is annulled (Qudamah.d.).

The basis reason of this scholars is transaction which is done by the buyer can bring harms to the collateral holder. According to Nawawi (1995), buyer does not have rights to make transaction that can bring harm to the collateral holder whether by selling, hibah, using the property as wedding dowry or using it to pay rent. This is because the transaction nullifies the guarentee's rights of collateral holder and brings harm to get back the debt guarantee. The right of debt binding in collateral contexts will distinctly drop when the collateral property is sold, hibah, wakaf and such. Therefore, to preserve the collateral holder's interests, the group has nullified the collateral contract if the hibah is done even with consent from collateral holder.

On the other hand, according to Mazhab Hanafi, when a buyer makes a transaction such as purchase, loan, rent, collateral or hibah on the collateral property, transaction is not nullified right away but the transaction status is halted until permitted by the holder (Zuhayli 2014). Transaction can not be done until the holder allows it. Ibn Abidin (1992) quoted that transaction by buyer on the collateral property is not implemented if the form of the transaction nullifies the rights of collateral holder. However, transaction is capable of implementing with the permission from the holder of the collateral property. This permission is either obtained when or after the contract has been done (Abidin 1992).

This group debates that transaction of buyer such as purchase, hibah, rent, donation, pledge and writting is a type of transaction that can be confirmed but the right for confirming it does not belong to the collateral holder. This is because the transaction is done by the buyer who has the requirements and the territory over the property. On the other hand, this transaction does not deny the right to hold of the collateral holder (Abidin 1992). In other words, the right over the collateral property still remains even if the property has already been granted through hibah or sold. Therefore, the contract does not annul the contract over the collateral but it requires permission from the holder to do it as in the matter to release a collateral property in form of slaves (Abidin 1992).

Researcher argues even if the right to confirm the contract belongs to the buyer as the original owner of the property, the position of the property as debt binding needs to be accounted for. The right to hold as if has no function when the collateral is excluded from the collateral contract through hibah, purchase or otherwise. The right and importance of the collateral holder as if are abandoned, even if the matter is the original purpose of collateral contract.

From scholar's opinions which have been submitted, it can be conclude that there are two opinions on the validity of hibah charged property. Firstly, the view of mazhabShafi'ie, Hanbali and a part of mazhab Maliki that said hibah charged property is illegal, even if the hibah is done with consent from the holder of the collateral property, hibah is considered legal even if the contract is annulled. This is because the action of the collateral holder in giving consent can be considered as backing down from collateral because he or she knows the right will be dropped when the collateral property is transferred to third party through hibah.

The second view is mazhab Hanafi's view that said hibah charged property is legal but the transaction is considered halted until the holder of the collateral gives consent to it. The truth can be obtained whether during or after hibah contract is done. According to this view, it is understandable that if the giver has surrendered the hibah property to the receiver, the receiver still is not allowed to make any kinds of transactions or take advantage as their right is still halted until consent is given by the holder. If the holder gives consent for hibah, then, the hibah is legal and if otherwise, the receiver of the hibah must return the property back.

The differences of views among the scholar is one blessing to the Muslims. Acquiring the suitable views must be considered to avoid any kinds of hardships that can deny the concept of completeness in Islam itself. Additionally, becomes a habit among the Muslims today purchasing real estates or assets through bank loans, therefore, from the author's opinion, mazhab Hanafi's view is more practical and it can prevent losses in the Muslims' economy when involving the issue of frozen property.

### **Conclusion:-**

Hibah charged property uses two main concepts in Islamic laws and they are hibah concept and collateral concept. The difference between the views among scholar involves hibah on other people's property or hibah on property that does not owned completely is based on the position of the condition among mazhab themselves. Scholar has view that it is condition to implement contract so hibah on third party's property or incomplete ownership is legal with condition, it receives permission from the original owner. If someone make hibah on other's property without the owner's knowledge, the hibah is mawquf or halted until the original owner permits it.

The dispute among scholars involving collateral property hibah is to preserve the benefit of the banks which is its right of loan guarantee. If seen from the scholar discussion, the main issue highlighted is the position of the collateral holder's right, as long as the right is guaranteed, the hibah charged property is allowed. However, the hibah's contract is included as a transaction that can threaten the right of the holder. This is because the concept of hibah is granting ownership without any arguments. The granting of hibah causes the collateral property to be excluded from (buyer)'s ownership, thus, denying the guarantee right of the collateral holder. Therefore, to protect the benefit, scholar does not allow hibah charged property, so hibah is legal based on scholarmazhab Hanafi.

In current context, the opinion of scholar which allows hibah charged property is more suitable to be practised, even more so when it involves high valued property. If the hibah charged property is not allowed, it will cause more conflicts and hardships to the community.

The products implementation of Muslims' property planning able to reuse the concept of hibah charged property. It is more profitable and more advantageous because most of the assets owned by the community today is through loans. The laws enacted needs to account proper views to apply to protect benefit of the community, thus, becomes a guide to all parties.

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