

LEGAL REVIEW OF THE EXECUTION OF MOVABLE OBJECTS BASED ON FIDUCIARY GUARANTEES AGAINST DEFAULT DEBTORS FROM THE PERSPECTIVE OF ISLAMIC LAW

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Abstract: The institutions involved in fiduciary guarantee services are constantly and continuously developing due to the increasing and evolving needs of the surrounding community. This directly impacts the people defaulting on their fiduciary guarantees or unable to repay their debts. In this case, debt transfers are often observed, requiring a down payment or guarantee money for the first one or two months. Debtors also commonly struggle to make subsequent payments, as they prioritize new goods or other secondary needs. This leads to defaults on transactions initiated by the debtor, ultimately causing harm to the creditor institution in terms of transferring fiduciary guarantee objects. Therefore, this study aims to compare the regulation of fiduciary guarantee objects transfer from the perspective of Islamic law. In this case, a qualitative research approach was employed by conducting a normative juridical analysis. A comparison was also carried out between the doctrines of formal and Islamic law within the local community. The results obtained are expected to minimize instances of default by debtors and protect the interests of creditors when transferring the objects of fiduciary guarantees in the future.

Keywords: Fiduciary Guarantee, Default, Islamic Law

Abstrak: Kelembagaan yang bergerak di jasa jaminan fidusia setiap harinya terus bertambah, hal tersebut tidak lain karena kebutuhan masyarakat sekitar yang semakin hari semakin bertambah dan berkembang akan kebutuhan pokok ataupun kebutuhan sekundernya. Yang mempengaruhi orang wanprestasi ataupun tidak bisa membayar hutang akan jaminan fidusia yang telah dilaksanakan di awal, sehingga dilakukan suatu pengalihan utang membayar DP atau jaminan uang satu-dua bulan diawal atau pertamanya. Selanjutnya debitur tidak bisa membayar tagihan selanjutnya dengan alasan hanya merasakan barang atau kebutuhan sekunder lainnya yang baru sehingga hal tersebut menyebabkan lahirnya wanprestasi atas transaksi jaminan fidusia diawal yang dilakukan oleh pihak debitur, sehingga merugikan pihak lembaga (kreditor) yang ada dalam hal pengalihan obyek jaminan fidusia. Maka dalam penelitian ini bermaksud untuk membandingkan hukum

pengalihan objek jaminan fidusia perspektif hukum Islam. Penelitian ini merupakan penelitian kualitatif dengan pendekatan yuridis normative, yaitu membandingkan doktrin yang ada di dalam hukum formil dan hukum Islam yang ada di masyarakat sekitar. Dengan adanya penelitian ini akan bisa mengurangi terjadi wanprestasi yang dilakukan oleh pihak debitur dan merugikan pihak kreditor dalam hal pengalihan obyek jaminan fidusia tersebut di masa yang akan datang.

Kata Kunci: Jaminan Fidusia, Wanprestasi, Hukum Islam

Introduction

Fiduciary, as collateral, is one of the elements in the process of financing, credit, and receivables. In this process, firstly, a subject or parties is/are involved in a consumer financing legal relationship. Secondly, the objects or everything that the consumer requires and agrees upon are emphasized. In this case, the agreement contains contractual clauses and articles, as well as everything agreed upon by both parties with all rights and obligations. A guarantee is also considered and used in the engagement.¹ Among the four types of material guarantees recognized in Indonesia, the fiduciary guarantee is highly different. This difference is mainly because the debtor has control over the property and claims, credit agreements, or finances. The trust guarantee is also carried out based on the *constitutum possessorium* principle, where the object is transferred as collateral and physically under the control of the grantor for the benefit of the trustee. In a trust arrangement, the transfer of ownership typically enables the creditor to retain management of the collateral using the loan system for a specified duration, subsequently ceasing to be the owner.² From this context,

fiduciary guarantees practically have the rights and obligations that should be met by the principal. This shows that the obligations of Confidential Providers are prohibited from transferring, reloading, selling, renting, inspecting, or changing the use of the guaranteed goods. The creditor is also obliged to adequately and appropriately maintain and preserve the object of trust. This becomes the responsibility of the trustee for taxes and other obligations related to the trust securities. The trust also needs to provide coverage for third-party claims relating to the collateral items.³

In Indonesia, fiduciary guarantees have obtained certainty and legal basis since 1999, when the Government passed the Trust Fund Act No. 42 known as the "Fiduciary Guarantee Law", This law was published in the State Gazette of the Republic of Indonesia in 1999, under Number 168. It also served as a supplement to the State Gazette of the Republic of Indonesia, under Number 3889. Furthermore, the establishment of a trustee in the country emphasized Hooggerechtshop jurisprudence on August 18, 1932, containing all the rules relating to trust guarantees. Based on these descriptions, the Fiduciary Guarantee Law is undergoing a legal review in its development stage. From this context, the

¹ Robert Bouzen, Ashibly, "Pelaksanaan Eksekusi Jaminan Fidusia Terhadap Debitur Yang Wanprestasi Setelah Keluarnya Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Jurnal Gagasan Hukum*, Vol. 3, No. 2 (2021): 137-148. DOI: <https://doi.org/10.31849/jgh.v3i02.8907>

² Made Bagus Ari Kusuma D., Komang Febrinayanti Dantes, Ni Ketut Sari Adnyani, "Perlindungan Hukum Bagi Debitur Yang Melakukan Wanprestasi Terhadap Objek Jaminan Fidusia Ditinjau Dari

Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia," *Jurnal Komunitas Yustisia*, Vol. 3, No. 3 (2020): 271-282.

DOI: <https://doi.org/10.23887/jatayu.v3i3.32873>

³ Cok Istri Dian Laksmi Dewi, "Pengikatan Jaminan Kebendaan Dengan Fidusia," *Jurnal Yustitia*, Vol. 13, No. 1 (2019): 15-25. <https://ojs.unr.ac.id/index.php/yustitia/article/view/265>

right to review is a process carried out by a judge to examine lower laws and regulations against higher policies. For instance, the Constitutional Court (MK) conducted a judicial review of the law against the 1945 Constitution. Meanwhile, the review of the Fiduciary Guarantee Law only prioritized the individual articles related to mandatory actions.

The emergence of the Fiduciary Guarantee Law is expected to ensure legal certainty, specifically for material agreements and creditors. This is because the Civil Code does not clearly regulate the fiduciary right. These conditions lead to the emergence of the Fiduciary Guarantee Act, which specifically and more clearly regulates trust towards appropriate implementation regarding clear laws. In this case, all relevant trust transactions are regulated in the Fiduciary Guarantee Law. This includes the settlement of all forms of disputes, specifically in breach of contract and default. Based on Article 4 of the Fiduciary Guarantee Act, a trust agreement (fiduciary guarantee) was an accessory (side contract) to the main contract. Therefore, this trust deed cannot solely exist as a contract without an underlying agreement, specifically a financial type. In this case, the status of the renewal agreement (trusteeship agreement) should always depend on the main contract. The validity of this agreement often complied with the viability of the principal contract.⁴ This explains that the accessory has a principal (debt guarantee) and follow-up (fiduciary guarantee) agreement serving as collateral.⁵

The disputes occurring in accounts receivable, credit, or financing agreements are only events of default. This is because the Fiduciary Guarantee Law regulates the default events between the related debtor and the creditor. When a breach of contract occurs, the Fiduciary Guarantee Law commonly regulates the procedure for executing the pledge, as outlined in the main and trust agreements. The Guarantee Law also regulates certificates in the fiduciary agreements having a legal nature requiring them to emulate a court decision with permanent legal force. This rule is contained in Article 15 paragraph (2) of the Fiduciary Guarantee Law, stating that "The fiduciary guarantee certificate emphasized in paragraph (1) had the same executive power as a court decision having permanent legal force". In this case, a permanent decision emphasizing *inkracht* is attained. This indicates that an *inkracht* case holds executive power, with its execution commonly prioritizing decisions. Therefore, the fiduciary guarantee certificate holds an equivalent level of legal force for its executive rights. This implies that the execution of a guarantee with a valid certificate does not necessitate awaiting a court decision, due to possessing similar authority as an *inkracht* verdict.

Subsequent executorial information is presented in paragraph (3) of the Fiduciary Guarantee Law, stating that "when the debtor defaults, the fiduciary recipient has the right to willingly sell trust agreement objects". This proves that the creditor does not need to file a lawsuit and wait for a court decision to execute the guarantee during a breach of contract or default in the main agreement. It also stated that a default event on the promise of the debtor is determined by the creditor. This is because the creditor has the right to willingly execute and sell fiduciary guarantee objects. In this case, a legal review of several

⁴ Sigit Nurhadi Nugraha, Nurlaili Rahmawati, "Cidera Janji (Wanprestasi) Dalam Perjanjian Fidusia Berdasarkan Pasal 15 Ayat (3) UU Nomor 42 Tahun 1999 Pasca Putusan Mahkamah Konstitusi Nomor: 18/PUU-XVII/2019 Dan Putusan Mahkamah Konstitusi Nomor: /PUU-XIX/2021," *AL WASATH Jurnal Ilmu Hukum*, Vol. 2 No. 2 (2021): 77-92. <https://doi.org/10.47776/alwasath.v2i2.213>

⁵ Gunawan Widjaja, Karunia Ilham Karim, Dheas Syahreza Muslim, "Perjanjian Penyerahan Sebagai

Perjanjian Ikutan Atau Kewajiban?," *Jurnal Cakrawala Ilmiah*, Vol. 1, No. 6 (2022): 1383-1391. <https://www.bajangjournal.com/index.php/JCI/article/view/1505>

important articles emphasizing the Trust Guarantee Law is submitted to the Constitutional Court. After termination, this act was confirmed by Decision Number 18/PUU-XVII/2019 on January 6, 2020. From this context, the Constitutional Court interpreted § 15 paragraphs 2 and 3 of Law Number 42 of 1999, which pertained to Fiduciary Guarantees. This interpretation established that the right to enforce a fiduciary guarantee certificate was no longer absolute, as emphasized in a standing court. In this case, the exercise of power was subject to prompt cessation when the debtor voluntarily surrendered the collateral. During the objection of the collateral transfer by the debtor, the implementation should proceed with a court decision of permanent legal force. According to the subsequent rules, the party deemed negligent needs to either adhere to the agreement reached by the parties or have the determination of negligence confirmed through a court decision.

Default originates from the Dutch word "wanprestatie," meaning poor performance. This is an attitude where a person is negligent in carrying out the obligations outlined in the signed agreement between creditors and debtors. Since no consensus is found on the default definition, various terms are often related to mistakes, namely "Interview, broken promises, etc. According to Article 1238 of the Indonesian Civil Code, a debtor was declared bankrupt when they were incapacitated by the power of attorney or their engagement. This occurred when the debtors mandated their involvement in default at the end of the specified period.⁶ In this case, the debtors were not subject to sanctions due to the following possibilities:

1. Decisions made intentionally or through negligence.
2. The observation of a very compelling situation, such as an emergency.

In Islamic law, a concept of fiduciary guarantees known as *rahn* is observed. This involves the holding of assets as collateral, to ensure the fulfillment of a debtor payment obligations. Several scholars have also provided various definitions of *Rahn*, such as the proposition by al-Subki. This stated that *rahn* was collateral for finance or loan, enabling the lender to recover the granted amount through the value of the pledged asset during the repayment failure of the borrower. Moreover, default always carries legal consequences for the party in violation and grants the aggrieved party the right to seek compensation. This ensures that no party suffers harm due to the violation incurred. The determination of a violation or negligence occurrence is also very difficult because the person required to meet the engagement is often not specifically agreed upon. Based on these descriptions, the main problem is derived, emphasizing the patterns by which the provisions of Indonesian national law regulate the legal review of trust collateral implementation for debtors unable to pay their debts.

Method

In this study, a qualitative research method was employed, by analyzing data without involving numerical calculations. The comparative analysis of two legal theories was also emphasized, on the issue of Debtors against Fiduciary Guarantees of Default. Moreover, a normative research method was implemented since the data were obtained from the literature sources related to the analyzed problem, namely the perspective of Islamic law.⁷

⁶ Abdul R. Saliman, *Esensi Hukum Bisnis Indonesia*, (Jakarta: Kencana, 2004), 12

⁷ Joenaidi Efendi & Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 2nd Ed. (Depok: Prenadamedia Group, 2018), 23

Results and Discussion

1. Legal Review of the Execution of Movable Objects Based on Fiduciary Guarantees

In the event of default, the execution of guarantees imposed in the existing agreement was regulated by the Fiduciary Guarantee Law. This indicated that Law No. 42 of 1999 regulated the execution of guarantees in Articles 29 to 34. In this case, the execution of fiduciary guarantees was the confiscation and sale of trust agreement objects, as promised in the contract. This condition was caused by the default or failure of the debtor to meet the required achievements within the specified timeframe. During a breach of contract, the fiduciary recipient issued a subpoena, although the debtor was yet to meet their obligations.⁸ Furthermore, the default was emphasized when the fiduciary provider (the debtor) failed to meet the obligations as stipulated in the mutually agreed-upon agreement. The non-fulfillment of obligations in an agreement was also attributed to two factors, namely (1) the intentional and negligent mistake of the debtor, and (2) force majeure or overmatch. These conditions encompassed instances such as the failure to achieve the agreed-upon targets, delayed achievement, inadequate fulfillment of the obligations, or engaging in actions prohibited by the agreement.

The Fiduciary Guarantee Law also regulated the execution in Article 29 through the following patterns:

- a) Execution of trustee administration title, where coercive reputation was an order containing the implementation of a court decision. This formed the basis for confiscation auction (administrative varoom) without the intervention of a judge.
- b) Sale of collateralized goods with the trustee approval in a public auction. This was

accompanied by the arrangement of claims through the sales revenue collection.

- c) Secret sales and purchases carried out based on a confidential agreement between the provider and the recipient. This was conducted when the highest price achieved benefitted both parties.

Based on paragraph 2 of Article 29, the implementation of private sales was effective 1 (one) month after the trustee provider and/or recipient provided written notice to the parties and notified at least two present newspapers. Territory Section 30 of the *Treuhandgarantiegesetz* also regulated the transfer of a pledged object to a beneficiary of trustee protection. This was carried out with the application of fiduciary guarantees during bankruptcy. For goods encumbered with a fiduciary guarantee, such as marketable merchandise or securities, sales were also conducted according to the relevant laws and regulations. In addition, the majority of items used as collateral were practically movable assets, specifically motorized vehicles.

According to the law, any execution of a fiduciary guarantee object in violation of the aforementioned provisions was automatically rendered null and void. This was in line with any commitment provided to the recipient of a fiduciary guarantee, specifically regarding ownership of the objects considered trust agreement subject. In this case, a null and void verdict was observed for the defaults of the debtor. During the execution where the item surpassed the initial value of the guarantor, the fiduciary recipient was also obligated to return the excess amount to the trust provider. However, when the proceeds from the execution were insufficient to settle the debt, the debtor remained responsible for the outstanding amount. When implementing the execution of fiduciary motorcycle taxi objects, an operational pattern was observed with executorial titles. This supported Article 15 paragraph (2) of the Fiduciary Guarantee Law, where trust agreement objects should be

⁸ Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, (Jakarta: PT. Raja. Grafindo Persada, 2005), 90.

provided to recipients regarding the execution of fiduciary guarantees. In this study, the following interpretations were observed in carrying out guarantee execution:⁹

- a) Execution using an executorial title,
- b) Execution characterized by material guarantees.

The executorial title was directly carried out under the leadership of the district court chairman, through an execution fiat. In the previous Fiduciary Guarantee Act, the certificate produced by a fiduciary guarantee had permanent legal force (*in kracht van gewijsde*) and was the final binding between the two parties concerned. Subsequent explanations were regulated in Article 15 paragraph (2), where "executive power" was directly implemented without passing through a court. It was also a final binding on the parties implementing the decision. In this case, the existence of *irah-irah* was one of the similarities with court decisions. Moreover, the fiduciary certificate contained an *irah-irah*, namely "For the sake of Justice Based on Belief in the One and Only God", which was similar and true for all court decisions. Execution also used *parate* enforcement (execution), a constituent in a fiduciary guarantee situation, where the creditor (fiduciary recipient) exercised the personal right to freely sell collateral objects. *Parate* execution was also a designation for the right to sell in an agreement. This was because the legal basis for the existence of the economic *parate* was in the Fiduciary Guarantee Law, containing all the conditions that should be initially met for the execution of fiduciary guarantees. However, the implementation was conducted before the issuance of a new ruling on the Fiduciary Law by the Constitutional Court.

In 2019, the Constitutional Court handled a lawsuit for judicial review of the Fiduciary Guarantee Law. From this context, the Petitioner conducted a judicial review of several Articles in the Guarantee Law, which were contrary to the Constitution. In this case, the petitioners were a husband and wife named Suri Agung Prabowo and Apriliani Dewi, which previously had dealings with leasing and an eagle eye (debt collector). This was because their unit was forcibly withdrawn based on the Fiduciary Guarantee Act, leading to both parties filing a lawsuit against the law at the South Jakarta District Court (PN).

In this case, the South Jakarta District Court examiner won the plaintiff, Suri Agung Prabowo and Apriliani Dewi, by ruling that the creditor and debt collector had committed an unlawful act. Under the decision register Number 345/PDT.G/2018/PN.Jkt.Sel, the panel of judges also sentenced Defendant to be jointly and severally responsible for the existence of material and immaterial losses to the debtor. Furthermore, the Defendant, namely the creditor, attempted to forcibly obtain a vehicle used as an object of fiduciary guarantees in 2019, due to the debtor committing an act of default. This was because creditors often used Article 15 paragraphs (2) and (3) of the Fiduciary Guarantee Act as a legal basis, to forcefully withdraw a vehicle controlled by the debtor. The pretext of this Article implicitly stated that the Fiduciary Agreement had permanent legal force and the power of execution. In this case, the debtor then conducted a judicial review at the Constitutional Court since the article was contrary to the 1945 Constitution of the Republic of Indonesia. The Constitutional Court also decided this lawsuit in 2020, under the Constitutional Court Decision Number 18/PUU-XVII/2019. Based on the panel of judges, part of the applicant request was accepted, with several publications contained in Article 15(2) of the Trustee Guarantee Law submitted with explanations and explanations, including paragraph (3). These publications

⁹ Yeyen Wahyuni, "Parate Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Republik Indonesia Nomor 18/PUU-XVII/2019," *Interdisciplinary Journal on Law, Social Sciences and Humanities*, Volume 02, Issue 1 (2021), 65-84. DOI: <https://doi.org/10.19184/ijl.v2i1.22760>

were considered violations of the 1945 Constitution unless interpreted according to the meaning provided by the jury of the Constitutional Court in the decision concerned. This decision adhered to the initial words stated in Article 15 (2), namely "executive authority" and "as a judicial decision having permanent legal force," with their respective explanations. In addition, Article 15, paragraph 3, employed "presumption" to clarify its intent.

According to the ruling in Article 15 paragraph (2), all mechanisms and legal procedures in executing the Fiduciary Guarantee Certificate should be carried out and similarly applied as a court decision execution having permanent legal force. This should be implemented when the phrases, "executive power" and "same as a court decision with permanent legal force", contradicted the 1945 Constitution without having binding lawful validity due to being uninterpreted "against the fiduciary guarantees not existing on breach of contract (default)". It should also be applied when "the debtor voluntarily objected toward surrendering the trust agreement object."

Article 15 paragraph (3) of the Fiduciary Guarantee Law also stated that when the phrase, "default," contradicted the 1945 Constitution and did not have binding legal force due to being uninterpreted, "its existence was not unilaterally determined by the creditor." However, "default was determined regarding an agreement between the creditor and the debtor or concerning the legal remedies responsible for detecting the occurrence of a contract breach." Furthermore, the elucidation of Article 15 paragraph (2) proved that all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate should be carried out and applied according to a court decision execution with permanent lawful validity. This was conducted when the phrase, "executive power," contradicted the 1945

Constitution without having binding legal force "where no agreement was observed regarding default, with the debtor voluntarily objecting to surrender the fiduciary guarantee object."

The decision of the Constitutional Court on the Fiduciary Guarantee Law, despite being limited to three phrases in one article and two paragraphs, had significant direct and indirect implications for various stakeholders. This indicated that financial institutions, including banks, leasing organizations, and cooperatives, experienced a direct impact. Before the decision of the Court, these institutions were able to promptly execute movable property guarantees when the fiduciary provider defaulted. However, the immediate execution of the guarantees emphasizing a fiduciary deed in debtor default was not observed after the decision of the Court. Other parties potentially obtaining an overflow of impact from this decision were the district and religious courts for conventional and Sharia-based financial institutions, respectively. This was often observed when the party filed a lawsuit due to the inability to determine a midpoint for contract breach, which was mutually agreed upon between the creditor-debtor and management-members for banking and cooperatives, respectively. Lawsuits were also the final resort in a dispute, which presently applied to fiduciary agreements. In addition, the *parate* execution that was previously a specialty in these agreements was revoked by the decision of the Constitutional Court.

2. Fiduciary Guarantees Against Default Debtors from the Perspective of Islamic Law

The concept of Islamic law had historically encountered challenges and was unable to ensure property rights. However, an association with guaranteeing civil law materials was observed in the present practice of Islamic banking, involving the financing

activities conducted by Islamic banks. From a legal perspective, the financial activities conducted under Sharia law were not considered illegal, as issues primarily emanated from trust guarantee matters. In this case, the matters were not well-defined within the context of Sharia finance.¹⁰

Based on the Islamic perspective, fiduciary was considered *rahn*, which indicated fixed, perpetuity, and withholding, according to Indonesians. It also emphasized the appropriate upholding of an obligation as a guarantor regarding Islamic law, to pay the debt of the debtor to the creditor. Moreover, some scholars provided various perceptions of the definition of *rahn*, specifically cleric Al-Subki. This scholar argued that *rahn* prioritized the consideration of assets as collateral for financing or lending institutions, allowing finance or loans to be repaid at the value of financial properties when repayment was impossible for the borrower in the future.¹¹ In this case, material rights provided direct power over an object, while individual obligation regulated the straightforward relationship between one person and another.¹² One of the natural guarantees known in positive law was also fiduciary guarantees, which were often found in commercial life. The following emphasized the applicable provisions of the Fiduciary Responsibility Act:

- a. Priority position for fiduciary creditors.

- b. Observation of collateral for existing or future debt.
- c. Fiduciary should be registered.
- d. Certificates on fiduciary guarantees need to be executable.
- e. The burden on fiduciary guarantees should not be used as a reimbursement.
- f. Objects in fiduciary guarantees need to always follow the people involved.

A consumer financing contract was essentially an amorphous agreement, due to prioritizing the principle of contractual freedom. However, a trust bond contract should be drafted in writing with a notarial deed. From this context, the Civil Code did not systematically state the form of the agreement since each party entering into a contract had oral and orthographic contractual freedom. Agreement law should also be properly enforced because its non-implementation often caused null and void legal actions, indicating that the contract between the two parties was invalid and not deemed to exist. In addition, a creditor with a debtor emphasized a party that ensured the payment of the fiduciary provider obligations during default. From this context, the debtor retained the ability to manage the assets deposited and reap profits, under the condition of entrusting the assets for safekeeping.

Rahn was a guarantee that emphasized an item provided by the debtor to the creditor, granting them both physical possession and property rights. This was to enhance the assurance of smooth and timely debt repayment from the debtor (*rahn*) to the creditor (*murtahin*), providing an alternative to settle outstanding loans. The concept of *rahn* was also mentioned in Article 1, Paragraph 26 of the Sharia Banking Law, where it was considered an additional guarantee involving movable or immovable property submitted by the owner of the agreement to a Sharia-compliant entity. This guarantee ensured the fulfillment of obligations by the client availing the facility. In Islam, the concept of *rahn* also

¹⁰ Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, 68

¹¹ Muhammad Sabir & Rifka Tunnisa, "Jaminan Fidusia Dalam Transaksi Perbankan (Studi Komparatif Hukum Positif dan Hukum Islam," *Mazahibuna: Jurnal Perbandingan Mazhab*, Vol. 2 No. 1 (2020): 80-82.
<https://doi.org/10.24252/mh.v2i1.14284>

¹² Muhammad Ikhsan Awaljon Putra, Maryati Bachtiar, Riska Fitriani, "Eksekusi Terhadap Benda Jaminan Fidusia Yang Tidak Didaftarkan Pada PT. Capella Multidana," *JOM Fakultas Hukum* 3 (1) (2016): 2. <https://jom.unri.ac.id/index.php/JOM-FHUKUM/article/view/10182>

prioritized security provisions and the motivation of debtors to repay their debts within a predetermined timeframe. This led to the discouragement of the actions causing harm to the party obtaining the debt payment.

The purpose of providing guarantees in consumer financial contracts was to establish trustworthy arrangements according to UUJF provisions, based on valid reasons and without contradicting the law, morality, or public order. These contracts, involving creditors and debtors, were deemed legally valid, as previously analyzed and explained. In this case, the consumer financing contracts containing fiduciary obligations between creditors and debtors aligned with UUJF requirements. The arrangement and registration of fiduciary guarantees were also important in the financing contracts, serving as the media for protecting creditors and ensuring legal certainty. This emphasized the substantive rights associated with fiduciary collateral objects during debtor default. From the perspective of the fiduciary guarantee holder, registration also provided protection against arbitrary actions by creditors, during the execution of guarantees.¹³ Moreover, fiduciary was the transfer of property rights to an item based on trust. This indicated that the item remained the property of a party regardless of its fiduciary guarantee nature. It was also supported by a provision, where the goods whose ownership rights were transferred remained the property of the owner, according to Article 1 Law No. 42 of 1999 concerning Fiduciary Guarantees. Meanwhile, a fiduciary guarantee highlighted a tangible or intangible movable object, specifically in cases where buildings were unable to be insured according to Mortgage Law No. 4 of 1996. These objects, owned by the principal, served as collateral for the

repayment of specific debts, granting priority to the beneficiaries over other creditors.

In the practice of *rahn*, *murtahin* (recipient of goods) was obligated to hold the goods until all debts of the commodity provider (*rahin*) were paid off. However, *marhun* and its benefits belonged to *rahin*, indicating that *murtahin* were not allowed to use *marhun* without permission from *rahin*. This was carried out by not reducing the value of *marhun* and using it to only offset maintenance costs. In this case, the maintenance and storage of *marhun* were basically and partially the responsibility of *rahin* and *murtahin*, respectively. From these descriptions, the costs and maintenance of proper storage were the responsibility of *rahin*, with the prices of sustaining *marhun* unable to be determined from the loan amount.¹⁴ The sale of *marhun* also supported the provisions according to Islamic law as follows:

- a) When it is due, the creditor should warn the debtor regarding their dependents.
- b) When *rahin* did not pay off the debt, then *marhun* should sell/execute.
- c) The fund obtained from the sale of *marhun* should be used to pay debts, unpaid maintenance and storage, as well as selling costs.
- d) Excess sales proceeds belonged to *rahin*, with shortages being the responsibility of *rahin*.¹⁵

In banking practice, the *rahn* contract, according to the law, was an additional agreement emphasizing the financial situation when the debtor repaid the resulting debt. As an accessory agreement, the *rahn* contract was also capable of termination. Furthermore, Islamic banks provided the contracts as Sharia-compliant products, serving as additional financing agreements with the main

¹³ Achmad Yusuf Sutarjo, "Akibat Hukum Debitur Wanprestasi Pada Perjanjian Pembiayaan Konsumen Dengan Obyek Jaminan Fidusia Yang Disita Pihak Ketiga," *Jurnal Privat Law* 6 (1) (2018): 95-96. DOI: <https://doi.org/10.20961/privat.v6i1.19240>

¹⁴ Wahbah al-Zuhaili, *Al-Fiqh al Islami wa Adillatuhu*, terj, Abdul Hayyie al-Kattani, 155

¹⁵ Nurul Huda & Mohamad Heykal, *Lembaga Keuangan Islam: Tinjauan Teoritis dan Praktis* (Jakarta: Kencana, 2013), Cet. ke-2, 278-279

guarantee. Under the *rahn* contract mechanism, customers also requested a specific loan amount, with the Islamic bank agreeing to the demand. As collateral for the loan, customers pledged goods to the religious financial institution, including real estates such as gold and jewelry. The practice of pawning gold also served as an alternative investment, as customers purchased and used the commodity as collateral with the Islamic bank. In this case, the gold was sold at the end of the mortgage period. From this context, customers commonly benefitted from the difference in the price of gold, which typically increased over time.¹⁶ In addition, the practice of *rahn* in Islamic financial institutions was stated as follows:

- a) The customer provided guarantees (*marhun*) to Islamic banks (*murtahin*), with the warranty being tangible property.
- b) The payment contract was carried out between *rahin* (customer) and *murtahin* (Sharia bank).
- c) After the financing agreement was signed and the Islamic Bank had obtained the guarantee, the financing was disbursed by the financial institution.
- d) *Rahn* was repaid with the agreed payment, as the fee emphasized land rent and depot maintenance costs.¹⁷

Based on the form of the agreement between the collateral in the trust and *rahn tasjiliy*, several similarities were observed. This indicated that the guarantee in the trust agreement was an attachment emphasizing a continuation of the main contract (debt and credit) conducted by the obliging parties. Its fulfillment was also explained in Article 4 UUJF 35, with *rahn tasjiliy* being a basic contract (debt and credit). In the realization of a guarantee in a reliable agreement, Article 29-34 UUJF subsequently stated that the sale of

collateral was carried out during an excess debt and when the debtor was unable to repay the loans. Any surplus amount was also returned to the debtor during the sale of the property. Regarding the implementation of *Rahn Tasjil* bonds, the DSN-MUI fatwa provided the following explanation, "*During default or inability to repay the debts, the pledged asset (Marhun) should be sold through auction or to other parties according to Sharia principles, with the proceeds returned to the Rahn provider*".

Conclusion

In conclusion, the decision of the Constitutional Court on the Fiduciary Guarantee Law, despite being limited to three phrases in one article and two paragraphs, had significant direct and indirect implications for various stakeholders. This indicated that financial institutions, including banks, leasing organizations, and cooperatives, experienced a direct impact. Before the decision of the Court, these institutions were able to promptly execute movable property guarantees when the fiduciary provider defaulted. However, the immediate execution of the guarantees emphasizing a fiduciary deed in debtor default was not observed after the decision of the Court. Other parties potentially obtaining an overflow of impact from this decision were the district and religious courts for conventional and Sharia-based financial institutions, respectively. This was often observed when the party filed a lawsuit due to the inability to determine a midpoint for contract breach, which was mutually agreed upon between the creditor-debtor and management-members for banking and cooperatives, respectively. Lawsuits were also the final resort in a dispute, which presently applied to fiduciary agreements. In addition, the *parate* execution that was previously a specialty in these agreements was revoked by the decision of the Constitutional Court.

¹⁶ Wahbah az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, Vol. VI (Beirut: Dar Al-Fikr, 2002), 4231.

¹⁷ Imam Mustofa, *Fiqh Muamalah Kontemporer*, (Jakarta: RajaGrafindo, Persada, 2016), 202

Based on the form of the agreement between the collateral in the trust and *rahn tasjiliy*, several similarities were observed. This indicated that the guarantee in the trust agreement was an attachment emphasizing a continuation of the main contract (debt and credit) conducted by the obliging parties. Its fulfillment was also explained in Article 4 UUJF35, with *rahn tasjiliy* being a basic contract (debt and credit). In the realization of a guarantee in a reliable guarantee, Article 29-34 UUJF subsequently stated that the sale of collateral was carried out during an excess debt and when the debtor was unable to repay the loans. Any surplus amount was also returned to the debtor during the sale of the property. Regarding the implementation of *rahn tasjiliy* bonds, the DSN-MUI fatwa provided the following explanation, "during default or inability to repay the debts, the pledged asset (*marhun*) should be sold through auction or to other parties according to Sharia principles, with the proceeds returned to the *rahn* provider."

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