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Construction of Implementation of Fiduciary Agreements Based on the Islamic Legal System in Indonesia

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Abstract
This study aims to explain the construction of the implementation of fiduciary agreements based on the Islamic legal system in Indonesia. The type of research used is Normative Empirical research. In its implementation there must be an agreement between the two parties, and the goods to be fiduciated. Goods that can be fiduciated are only movable objects. The concept of collateral in Islam has been introduced since the beginning of Islam. One of the factors that most influences the existence of this fiduciary agreement is the internal factor, the Bank does not want to take the risk of not returning the money, so every credit agreement must be accompanied by sufficient collateral and has been bound by applicable laws. With the enactment of the Fiduciary Guarantee Law, it means that there are definite, clear and complete legal provisions regarding the rights of creditors and debtors. The results of this study indicate that banks that use sharia principles in Indonesia have implemented a fiduciary guarantee system in accordance with applicable laws. In the view of Islamic law, fiduciary guarantees are agreements that do not harm either party, because in fiduciary the object of the guarantee remains with the owner of the goods.

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Introduction

The current economic development in Indonesia has resulted in an increasing level of economic needs. The needs of life with the income received by the community are sometimes very different. The income received by a person is sometimes not enough to meet daily needs, everyone always tries to find a way so that their economic needs can be met. In meeting daily needs, everyone always tries to find a way so that their economic needs can be met. Be it basic needs, or other needs. If at a certain time someone really needs additional funds or costs to meet other needs, then one way to obtain additional costs is by borrowing money or debt, economic development is also part of national development which is one of the efforts to realize the welfare of the people who are just and prosperous based on Pancasila and the 1945 UUDNRI. In order to maintain and continue sustainable development, development actors, both government and society, both individuals and legal entities, require very large funds. Along with increasing development, the need for funding also increases, most of the funds needed to meet these needs are obtained through borrowing and lending activities [1]. The definition of fiduciary is stated in Law No. 42 of 1999 concerning Fiduciary Guarantees, Article 1 number (1), "that fiduciary is the transfer of ownership rights of an object based on trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object". Meanwhile, the definition of fiduciary guarantee is contained in Article 1 number (2) of the UUJF which states that: "fiduciary

[1] Purwahid Patrik dan Kashadi, Hukum Jaminan, (Semarang: Fakultas Hukum, Universitas Diponegoro, 2008), hlm. 32.

guarantee is a guarantee right over movable objects, both tangible and intangible and immovable objects".

In particular, buildings that cannot be burdened with mortgage rights as referred to in Law No. 4 of 1999 concerning mortgage rights that remain in the possession of the fiduciary grantor, as collateral for the settlement of certain debts that provide a priority position to the fiduciary recipient over other creditors [2].

Problem Formulation

1. What is the concept of implementing fiduciary agreements according to Islamic Law,
2. How are fiduciary agreements implemented based on the Islamic Law system in Indonesia and what are the factors that influence the implementation of fiduciary agreements based on Islamic law in Indonesia.

Purpose

To describe and analyze the concept of implementing fiduciary agreements according to Islamic Law, and to find out the implementation of fiduciary agreements based on the Islamic Law system in Indonesia and what factors influence the implementation of fiduciary agreements based on Islamic law in Indonesia.

Discussion

A. The concept of implementing a fiduciary agreement based on the Islamic legal system

The concept of collateral in Islam has been introduced since the beginning of Islam. The Prophet Muhammad himself practiced debt collateral. Collateral can be in the form of objects or people. Collateral in the form of objects is often called rahn, and collateral in the form of people is called kafalah. Although some scholars include various forms of collateral, objects or people, included in kafalah [3]. From Anas. He said, "The Messenger of Allah (SAW) shed his armor on the Jews in Medina, when he borrowed sya'ir (wheat) from a Jew for the members of his house." (Narrated by Ahmad, Bukhari, Nasai, and Ibnu Majah). According to information in another hadith, the amount of wheat that the Prophet SAW owed from a Jew was thirty sa", approximately 90 liters, with the guarantee of his armor. Based on the verses of the Qur'an and the hadith, it can be concluded that Islam in matters of muamalat does not differentiate between its adherents and others. It is obligatory for Muslims to pay for the rights of adherents of other religions as well as towards their neighbors. Likewise, it is not halal for their property other than to do it in a halal way towards fellow Muslims [4]. From the hadith it can be concluded that the goods are handed over to the creditor as collateral for the debt. So, the concept of collateral in Islam has been introduced since the beginning of Islam. The Prophet Muhammad SAW himself practiced debt collateral. Collateral can be in the form of objects or people. Collateral in the form of objects is often called rahn, and collateral in the form of people is called kafalah. Although some scholars include various forms of collateral for objects or people, including in kafalah. Collateral in the form of kafalah can be done with a model of property collateral (kafalah bi al-man), and collateral for people/institutions (kafalah bi al-nafs). Financially or institutionally, the bank guarantees the party submitting the guarantee service [5]. Fiduciary guarantees are more similar to guarantees in the form of rahn. In terms of language, rahn means fixed, lasting, and holding. In terms, rahn is holding something in the right way with the aim of fulfilling debt payment obligations for the party in debt. Al-subki from Syafi'iyah defines rahn as making an asset as collateral for financing or loans, so that the financing or loan can be paid off with the value of the financing asset or collateral when the recipient of the fee or borrower is unable to pay off his obligations. The guarantee is enforced in order to ensure and provide encouragement to customers who are in debt to pay off their debts according to the specified time period and avoid actions that can harm the party providing the debt.[6] In the agreement, this fiduciary agreement is an accessory or follow-up. That the agreement letter regarding the transfer of ownership (collateral) in this fiduciary is a guarantee for every amount of money, which currently exists or will still occur in the future, by the borrower to the Bank, in order to further guarantee the repayment of all or part of the debtor's debt to the creditor, both principal debt, interest on the debt, the fiduciary giver hereby submits and transfers to the Bank. This means that the provision of this fiduciary guarantee is associated with the existence of a credit agreement as the main agreement to be guaranteed. The transfer of ownership rights through trust (fiduciary) as described in this agreement is carried out with the provision that if the debtor is late in paying back all (settling) as it should be to the creditor, then the ownership rights to the collateral will automatically be transferred back to the debtor. In accordance with the nature of the agreement which is an accessory, it will automatically be canceled if the main agreement is canceled [7]. The elimination of fiduciary guarantees if certain things happen, then the fiduciary guarantee is considered to have been canceled by law. These events are as follows:

1. The elimination of debts guaranteed by Fiduciary guarantees

The elimination of fiduciary due to the extinction of debts guaranteed by fiduciary is a logical consequence of the character of the Fiduciary guarantee agreement which is a follow-up agreement (accessoir). Namely an accessoir to the main agreement in the form of a debt agreement (credit). So, if the debt agreement or receivables disappear for any reason, the Fiduciary Guarantee as a follow-up also disappears.

2. Release of Rights to Fiduciary Guarantee by the Fiduciary recipient.

The elimination of fiduciary due to the release of rights to fiduciary guarantees by the fiduciary recipient is also

[2] Sutarno.Aspek-aspekHukumPerkreditanPadaBank,(Bandung:Alpabeta,2009), hlm 212-213
[3] Al-Shakhanabah,al-Damanat al-‘Ayniyahal-Rahn, 134-135
[4] Sulaiman Rasjid,Fiqh Islam, (Bandung:SinarBaruAlgesindo,1994),hal. 309-311
[5] Ali al-Khafif,al-Damanfial-Fiqhal-Islami(al-Qahirah:Daral-Fikral-‘Arabi,2000),hal 193-194
[6] Sahib‘ Abdullah Basiral-Shakhanabah, al-Damanatal-Ayniyahal-rahnwamada Mashru’iyyatIstithmarihafial-Masarifal-Islamiyah, (Yordania:Daral-Nafais, 2011)
[7] Imamal-Ghazali, Halal dan haram, hal :375

reasonable, considering that the fiduciary recipient as the party who has the right to the fiduciary is free to maintain or release his rights.

3. Destruction of the object that is the Fiduciary guarantee

The elimination of the fiduciary due to the destruction of the Fiduciary Guarantee goods is of course also reasonable, considering that it is impossible for the fiduciary to be maintained if the Fiduciary Guarantee Object goods no longer exist. However, in this case, if there is an insurance payment for the destruction of the goods (for example fire insurance, then the insurance payment becomes the right of the fiduciary recipient (Article 25 paragraph (2) of the Fiduciary Law No. 42 of 1999).

B. Implementation of fiduciary agreements based on the Islamic legal system and factors influencing the implementation of fiduciary agreements based on Islamic law

In Islam, every time a guarantee is given, it means that the goods and benefits may no longer be used by the actual owner. This is in accordance with the following hadith: From Anas who said: "The Messenger of Allah SAW has given his armor to a Jew in Medina when he owed poetry (wheat) from the Jew for his family" (HR. Ahmad Bukhari Nasaidan Ibn Majah). Syafi'iyah scholars are of the opinion that the delivery of a guarantee is valid if 3 conditions are met, namely:

- Must be in the form of goods
- Determination of ownership of the goods used as collateral is not obstructed
- The goods used as collateral can be sold when the repayment period comes.

Of the three conditions, there are no more detailed limitations on whether the pawned goods are movable or not, as long as they can be sold and the price can cover the debt, then it is permissible. So, the practice of fiduciary guarantees in the form of handing over ownership of assets without handing over ownership of the benefits of the assets has never happened in the time of the Prophet SAW. In relation to this, one of the largest Fatwa institutions in Indonesia, the National Sharia Council, Indonesian Ulema Council (DSN-MUI) has issued a fatwa whose contents are almost similar to the practice of fiduciary guarantees. This is stated in the provisions of the National Sharia Council Fatwa Number 68/Dsn-Mui/III/2018 Concerning Rahn Tasjily (Collateral) as follows:

a. General Provisions

Rahn Tasjily is also called rahn Ta'mini, Rahn Rasmi, or Rahn Hukmi which is collateral in the form of goods for debt, with the agreement that what is submitted to the recipient of the guarantee (murtahin) is only legal proof of ownership, while the physical collateral (marhun) remains in the possession and use of the guarantor (rahin).

b. Special Provisions

Rahn Tasjily may be carried out with the following provisions:

- Rahn submits legal proof of ownership or a certificate of the goods used as collateral (marhun) to the murtahin
- Submission of collateral in the form of legal proof of ownership or a certificate does not transfer ownership of the goods to the Murtahin.
- Rahn gives the authority (power) to the murtahin to sell the marhun, either through auction or sold to another party according to sharia principles, if there is a default or the debt cannot be paid off
- The use of marhun goods by the rahn must be within reasonable limits according to the agreement
- The murtahin can charge maintenance and storage costs for the marhun goods (in the form of legal proof of ownership or a certificate) which are borne by the rahin, based on the ijarah agreement
- The amount of the costs as referred to cannot be linked to the amount
- In addition to maintenance costs, the murtahin can also charge other costs required for real needs
- Rahn Tasjily insurance costs are borne by the Rahin [8].

According to Law Number 4 of 1999 concerning Fiduciary, specifically Article 1 paragraph (4) emphasizes that what is meant by objects is: "Everything that can be owned and transferred, both tangible and intangible, registered and unregistered, movable and immovable that can be burdened with mortgage or hypnosis". So, objects that can be the object of fiduciary guarantee are contained in the provisions of Article 1 paragraph (4), Article 9, Article 10, and Article 20 of Law Number 42 of 1999. The objects that are the objects of fiduciary are as follows:

- The object must be legally owned and transferred
- Tangible and intangible objects
- Movable and immovable objects that cannot be burdened with mortgage or hypnosis
- Registered or unregistered
- Objects whose ownership rights can be owned and transferred. Basically, the implementation of this fiduciary guarantee agreement is valid if both parties have fulfilled the requirements stipulated in the fiduciary guarantee law. For the validity of this fiduciary guarantee agreement, the object used as collateral must also meet the following requirements:

1. The collateral must be an object that has value according to the provisions of Islamic law. The object used as collateral must be a movable or immovable object, tangible or intangible.
2. The item must be able to be bought and sold and its value must be balanced with the amount of debt
3. The item is legally owned by the guarantor
4. The item is a complete asset [9]
5. There are certain procedures that must be followed when a fiduciary guarantee is removed. Namely, the Fiduciary Guarantee must be crossed out. The Fiduciary Registration Office issues a certificate stating that the relevant fiduciary guarantee certificate is declared no longer valid. In this case, the fiduciary guarantee is crossed out from the Fiduciary Register Book at the

[8] http://www..snotarisdanppat.com/fidusia-dalam-persfektif-hukum-islam/diakses tanggal 01 april 2025 jam 10.00 wib.

[9] Imamal-Ghazali, Halal dan Haram. hal:375

Fiduciary Registration Office [10].

Confiscation of Fiduciary Guarantees that use movable goods as collateral is a form of mitigation of the risk of loss in the event of default. However, it should not ignore the sharia principles that exist in the implementation of confiscation if a default has occurred. The default that usually occurs is the inability of the debtor to pay off his debt to the creditor. Sometimes the creditor only thinks about his own fate without further reviewing the reasons why the debtor cannot pay off his debt by carrying out unilateral confiscation. As is well known, the principles of sharia in transactions in general are that they do not contain usury, do not contain gharar (elements of ambiguity), dharar (harming others), and must be transparent. Confiscation in Islam has existed since the time of the Prophet Muhammad SAW, at that time the Prophet confiscated Muadz's property, as in the hadith which means: "Indeed, the Prophet Muhammad SAW, once confiscated Mu'adz's property and sold it to pay his debt". (HR. ad-Daar al-Quthni).

Conclusion

Based on the research that has been conducted and analyzed, there are conclusions that can be drawn from the discussion of the problems related to the author's research, namely as follows:

1. The concept of collateral in Islam has been introduced since the beginning of Islam. The Prophet Muhammad himself practiced debt collateral. Collateral can be in the form of objects or people. Collateral in the form of objects is often referred to as rahn, and collateral in the form of people is called kafalah. Although some scholars include various forms of collateral, objects or people, included in kafalah.
2. In Islam, every time a guarantee is submitted, it means that the goods and benefits may no longer be used by the actual owner. This is in accordance with the following hadith: From Anas said: "The Messenger of Allah SAW has given his armor to a Jew in Medina when he owed poetry (wheat) from a Jew for his family" (HR. Ahmad Bukhari Nasaidan Ibn Majah). The factor that most influences the existence of this fiduciary agreement is the unstable economic conditions of the community and the increasing cost of living so that the community needs loans (credit), either for business capital or to meet their daily needs.

Suggestion

In this study, the author provides suggestions aimed at:

- The government needs to have a collaboration between fiduciary guarantees and Islamic sharia regulations in Indonesia, which can use the principle of profit sharing as the principle in national banking institutions.
- Islamic legal figures to be able to help encourage the introduction of fiduciary guarantees based on Islamic sharia principles, so that the practice of usury can be minimized considering that the majority of the Indonesian population is Muslim.The normative conflict between laws and regulations regarding land burning must be resolved immediately by using Lex superior derogatlegi inferior, namely the legal principle which states that the law is higher (lex superior) and overrides the lower law (lex inferior) to create legal certainty for the people public.

References

1. Ali al-Khafif. al-Daman fi al-Fiqh al-Islami. al-Qahirah: Dar al-Fikr al-‘Arabi; 2000.
2. al-Shakhanabah. al-Damanat al-‘Ayniyah al-Rahn.
3. Fuady M. Jaminan Fidusia. 2nd ed. Bandung: Citra Aditya Bakti; 2003.
4. Marzuki PM. Metode Penelitian Hukum. Jakarta: Revita Pustaka; 2016.
5. Patrik P, Kashadi. Hukum Jaminan. Semarang: Fakultas Hukum, Universitas Diponegoro; 2008.
6. al-Shakhanabah SA. al-Damanat al-Ayniyah al-Rahn wa Mada Mashru’iyyat Istithmariha fi al-Masarif al-Islamiyah. Yordania: Dar al-Nafais; 2011.
7. Rasjid S. Fiqh Islam. Bandung: Sinar Baru Algesindo; 1994.
8. Sutarno. Aspek-aspek Hukum Perkreditan pada Bank. Bandung: Alpabeta; 2009.
9. Fidusia dalam perspektif hukum Islam [Internet]. Available from: http://www.snotarisdanppat.com/fidusia-dalam-persfektif-hukum-islam/
10. Undang-Undang Republik Indonesia Nomor 42 Tahun 1999 tentang Jaminan Fidusia.

[10] Munir Fuady. Jaminan Fidusia Cetakan kedua Revisi. Bandung, Citra AdityaBakti, 2003. Hal : 50