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## Fiduciary Guarantee in Banking Transactions: Positive Law and Sharia Law Perspective

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### Informasi Artikel

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### Abstrak

Proses peralihan hak dari debitur kepada kreditur semata-mata didasarkan atas kepercayaan. Jaminan fidusia merupakan kebutuhan masyarakat untuk menerapkan hukum jaminan sebagai pembelaan. pada pelaksanaan perjanjian pembiayaan konsumen perjanjian. Perjanjian konsumen yang tidak disertai dengan adanya perjanjian tambahan mengakibatkan pembebanan jaminannya menggunakan jaminan umum, sehingga tidak berlaku padanya hak-hak dari Jaminan kebendaan Artikel ini bertujuan untuk menganalisis kedudukan dan pelaksanaan jaminan fidusia dalam transaksi perbankan dari perspektif hukum Positif dan Syariah. Artikel menggunakan metode penelitian hukum normatif dengan menggunakan pendekatan perundang-undangan dan pendekatan kualitatif. Pasal 1132 KUHAPerdata menemukan bahwa jaminan fidusia dalam perspektif hukum positif memberikan kuasa kepada kreditur untuk meminta ganti rugi kepada debitur dengan mengambil hak milik atas jaminan yang dijanjikan dan dapat dilaksanakan secara langsung tanpa menunggu putusan pengadilan. Sementara dalam perspektif hukum syariah tidak mengenal istilah jaminan fidusia, namun dalam praktiknya bank syariah mengadopsi konsep jaminan fidusia dengan menggunakan istilah "rahn" yang berarti jaminan fidusia masuk ke dalam obyek jaminan dan tetap menjadi milik debitur dan kreditur mempunyai hak tanggung jawab atas benda itu sebagai jaminan pelunasan utang.

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### Abstract

The process of transferring rights from the debtor to the creditor is solely based on trust. Fiduciary guarantees are a public need to apply guarantee law as a defense. on the implementation of consumer financing agreement agreements. Consumer agreements that are not accompanied by additional agreements result in the imposition of guarantees using general guarantees, so that the rights from material guarantees do not apply to him. This article aims to analyze the position and implementation of fiduciary guarantees in banking transactions from the perspective of positive and sharia law. The article uses normative legal research methods using statutory approaches and qualitative approaches. Article 1132 of the Civil Code finds that fiduciary guarantees in a positive legal perspective empower creditors to ask for compensation from the

debtor by taking ownership of the promised guarantee and can be implemented directly without waiting for a court decision. While in words separated by.

the perspective of sharia law the term fiduciary guarantee is not recognized, in practice Islamic banks adopt the concept of fiduciary guarantee by using the term "rahn" which means that fiduciary guarantees enter into the collateral object and remain the property of the debtor and the creditor has the right of responsibility over the object as debt repayment guarantee

## INTRODUCTION

In banking activities involving of borrowing or providing credit, it cannot be separated from the existence of guarantee. In accordance with Article 131 dan 1132 of the Indonesian Civil Code, the existence of guarantee may be either a general or a special guarantee. If a bank does not ensure that there is sufficient guarantee, it is strictly forbidden from providing credit services to anyone. Customers' credit is deemed to be secured by guarantee in a highly effective manner. This adheres to the fundamental principle of banks in providing credit, known as the principal of Commanditerings Verbood, which declares that the bank is not liable for the debtor's business risk associated with bank-provided credit.<sup>1</sup>

In Article 1 para. 2 of the Law Number 42 of 1999 on Fiduciary Guarantees, it stipulates that tangible or intangible movable goods and immovable goods, notably buildings that cannot be encumbered with mortgage rights, can be object to fiduciary guarantees. Article 3 of the Fiduciary Guarantee Law explain further on the following objects that cannot serve as a fiduciary guarantee: (1) mortgage rights related to land and buildings, provided that the prevailing laws and regulations have guaranteed guarantees for the goods that must be registered; (2) mortgage on a registered ship with a gross volume of 20 m3 or more; (3) mortgage on airplanes; and (4) pawn.<sup>2</sup>

The Indonesian Civil Code lacks any provisions concerning the establishment of fiduciary guarantees. Due to the distinction between movable and immovable goods, the Indonesian Civil Code's regulation of guarantees only applies to pawns and mortgages. A pawn controls a security with movable property as its object, while a mortgage controls a security with immovable property as its object. In a pawn institution, the pawned goods must be understood by the holder of the pawned object. When the pawn has been released from the pawn, the pawn will be removed. However, this issue is inseparable from the shortcomings of pawn requirements for small and medium-sized businesses that still require guarantee objects to support daily business operations.<sup>3</sup>

With Roman society's need for applying the law of guarantees as a defiance, fiduciary guarantees were known and implemented during the Roman era. The process of transferring rights

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<sup>1</sup> Erich Kurniawan Widjaja and William Tandya Putra, "Characteristics of Property Rights in Fiduciary Guarantee Objects in the Form of Inventory Objects," *Mercatoria Journal* 12, No. 1 (2019): 14, <https://doi.org/10.31289/mercatoria.v12i1.2316>

<sup>2</sup> Nina Nurani, Cherry Citra, and Idham Budiman, "Copyright As a Guarantee of Fidusia in the Efforts to Accelerate Indonesia's Creative Economic Growth," *PalArch's Journal of Archaeology of Egypt* 17, No. 5 (2020): 700.

<sup>3</sup> Yunial Laili Mutiari, Muhammad Syahri Ramadhan, and Irsan Irsan, "Legal Analysis of the Role of Financing Institutions in Applying Law Fidusia Guarantee in Indonesia," *International Journal of Research in Law, Economic and Social Sciences* 1, No. 1 (2019): 4, <https://doi.org/10.32501/injuriless.v1i1.50>.

from debtors to creditors is founded solely on trust, so the debtor cannot do anything to harm the creditor if the creditor refuses to return the rights that have been transferred to the debtor as a guarantee. The obstruction of credit is at least caused by two factors, namely the lack of accuracy of the bank in analyzing that what should be intertwined cannot be predicted and the intention of the debtor not to pay their obligations or problems with the debtor having the willingness to pay but being unable to pay; however, this is generally intertwined due to force majeure factors such as debtors facing a fire, flooding, failure in the business sector, ongoing illness, or death.<sup>4</sup>

Legal subjects consist of individuals (humans) and legal entities and all of them can participate in economic activities. Economic activity is an activity that is carried out continuously and constantly. Economic activity is an activity that is carried out transparently and does not violate legal provisions, and its activities are carried out to obtain benefits for individuals or groups. Along with the development of society economic activity, there is more the need for sources of funds to finance these activities. And the only way to meet these needs is through a system of borrowing and lending, which in this case can be accomplished through formal or informal institutions or other financial institutions. Almost every aspect of modern life, including economic activities, saving, borrowing, and carrying out financial transactions, is inseparably connected to the banking industry. Banks are considered industries whose goods are only distributed to societies. The bank as an economic dynamization indicates that the bank is the centre of the economy, the source of payment or funds, the application of payments, the productivity of savings, and the engine of national and international trade development. In Sharia Law, the fiduciary guarantee is known by the name of Rahn. Rahn is the detention of something using a method that does not violate any provisions of the debtor's obligation to repay the debt. Some Islamic jurists share interpretations of Rahn, including al-Subki, who explained that Rahn is the use of a good or relic as guarantee for financing or borrowings, so that the financing or borrowing can be repaid with the same amount of value if the debtor is unable to pay it.<sup>5</sup> In light of the previous background information, the authors seek to analyze the position and implementation of fiduciary guarantees in banking transactions from the perspectives of Positive and Sharia law.

## RESEARCH METHOD

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<sup>4</sup> Philip Mccann and Frank van Oort, "Theories of Agglomeration and Regional Economic Growth: A Historical Review," *Handbook of Regional Growth and Development Theories: Revised and Extended Second Edition*, 2019, 10–11, <https://doi.org/10.4337/9781788970020.00007>.

<sup>5</sup> Achmad Busro, Dewi Sulistianingsih, and Muhammad Shidqon Prabowo, "Legal Protection For Creditors in Fidusia Agreements in Indonesia" 140, (2019): 53, <https://doi.org/10.2991/iscogi-17.2019.13>.



Normative legal research uses normative legal case studies in the form of legal behavior products, for example reviewing draft laws. The main subject of study is law which is conceptualized as a norm or rule that applies in society and becomes a reference for everyone's behavior so that normative legal research focuses on inventorying positive law, legal principles and doctrine, legal discovery in in concreto cases, legal systematics, the degree of synchronization of comparative law , and legal history.

## DISCUSSION AND ANALYSIS

### 1. The Position of Fiduciary Guarantee in Banking Transactions

#### a. Positive Law Perspective

According to Sudikno, a fiduciary guarantee is a form of guarantee in which the debtor transfers the ownership of movable or immovable goods to the creditor.<sup>6</sup> In positive law, the Fiduciary Guarantee Law defines fiduciary guarantee: "In fiduciary guarantee, objects whose ownership rights are transferred to creditors remain in the possession of the object's owner, based on the trust given. Physically, the object remains in the debtor's possession for the debtor's benefit. The purpose of a fiduciary transfer of ownership rights is not to create enduring rights to property, but rather to guarantee the payment of debts to creditors".

A fiduciary guarantee is a system or product generally used in the conventional scope to protect creditors in banking transactions. The main purpose of fiduciary guarantees is to avoid default actions from the debtor, which is when the debtor cannot fulfill the agreed payment obligations. In this context, a fiduciary guarantee gives the creditor the power to seek compensation from the debtor by taking ownership of the promised guarantee. The guarantee can be in the form of assets owned by the debtor, such as property, vehicles, or other assets that have economic value. With a fiduciary guarantee, the creditor has guarantee used as a substitute in case of default. And what constitutes a fiduciary guarantee is its administrative executability. In other words, if the fiduciary guarantee has been regulated and written in a valid document, the creditor can assume the guarantee without waiting for a court decision. This provides an advantage for financial institutions such as banks and pawned institutions, as they can quickly take ownership of guarantee or get reimbursed for loans that have been given. Fiduciary guarantees must also be registered or recorded administratively which must go through various stages, such as registration of fiduciary guarantees, assessment of the value of guarantee assets, and execution in case of default. All these stages are governed by prevailing laws and regulations, aimed at protecting the rights of all parties involved in a fiduciary agreement.<sup>7</sup>

The use of fiduciary guarantees must also be in accordance with applicable legal principles and values. Among them are the principle of *droit de preference*, the principle of publication, the principle of *droit de suite*. Overall, fiduciary guarantees are an important mechanism for protecting creditors' interests in banking transactions. With fiduciary guarantees, financial institutions can have protection and the means to take action in the event of default. However, it is also important to ensure that the use of fiduciary guarantees

<sup>6</sup> Ismail Koto and Faisal Faisal, "Application of Execution of Fiduciary Guarantees on Movable Objects against Default Debtors," *Journal of Education, Humaniora and Social Sciences (JEHSS)* 4, No. 2 (2021): 776, <https://doi.org/10.34007/jehss.v4i2.739>.

<sup>7</sup> Adhitya Wardhono, Mohamad Ikhsan Modjo, and Eka Wahyu Utami, *Role of Credit Guarantee for Financing MSMEs: Evidence from Rural and Urban Areas in Indonesia*, *Unlocking SME Finance in Asia: Roles of Credit Rating and Credit Guarantee Schemes*, 2019: 20-22, <https://doi.org/10.4324/9780429401060-9>.

is by the prevailing legal framework.<sup>8</sup> The objects in fiduciary guarantees are divided into two types, including tangible or intangible movable goods and immovable goods, notably buildings that cannot be encumbered with mortgage rights, can be object to fiduciary guarantees. Whoever provides or receives a fiduciary guarantee is the subject of a fiduciary guarantee. A fiduciary is a corporation or an individual who is the owner of the object of a fiduciary guarantee.<sup>9</sup>

#### **b. Sharia Law Perspective**

Concept of a guarantee is still employed in Sharia banking. Sharia banks also implement guarantee mechanisms in their financing. Formally, Sharia-based banking activities do not contradict positive laws in Indonesia. However, the problem arises when we try to base the concept of guarantee on fiduciary guarantees that are not well known in the concept of Sharia law. In Sharia law, the term often used for the concept of assurance is "Rahn". Linguistically, Rahn has the meaning of fixed, restraint, or lasting. Rahn means to withhold something using appropriate means and Sharia principles. This principle aims to fulfill one's debt repayment obligations. In terms denotes holding something using appropriate means and not contradicting the principles of Sharia which aims to fulfill one's debt payment obligations.

Rahn in Sharia is known as a form of guarantee given based on trust either given physically or only ownership rights over objects intended by debtors to creditors in order to facilitate and smooth the stipulation of time in debt payments. In Islam, Rahn is known as rain or mutation. Article 1 para. 26 of the Sharia Banking Law refers to it as a guarantee, which is an additional guarantee in the form of movable and immovable goods given by the owner of the guarantee to a Sharia Bank or Sharia Business Unit to guarantee the repayment of the beneficiary debtor's obligations.

In the context of Sharia banking, the Rahn-based guarantee mechanism does not involve the transfer of assets' ownership or ownership rights. Instead, the assets are used as a guarantee and remain in the debtor's possession. If debtors are unable to meet their payment obligations, Islamic institutions use these assets as a guarantee for debt repayment. In practice, Sharia borrowers and banks agree to Rahn agreements governing the use of assets as a guarantee. This agreement ensures that the assets remain in the debtor's possession and can be used in accordance with Sharia law principles. Sharia banks have the authority to use guarantee assets to obtain debt payments if the debtor defaults. Despite distinctions in terminology and mechanisms, the concept of guarantee in Sharia banking continues to serve the same purpose, namely protecting creditors and ensuring debt repayment. By employing Rahn, Sharia banking can conduct its operations in accordance with the underlying Sharia principles.<sup>10</sup>

## **2. The Implementation of Fiduciary Guarantee in Banking Transactions**

To understand the implementation of fiduciary guarantees in the sector of banking transactions, two main classifications distinguish the basic principles from the sustainability of fiduciary guarantees themselves. The classification in question is a separation from two distinction regulations related to the regulation of the implementation of fiduciary

<sup>8</sup> I M Baldwin, "Implementation of Credit Agreement with Fiduciary Guarantee in Pd Bpr Bkk Sayung" Thesis: Unissula, (2017): 519, <http://repository.unissula.ac.id/9390/>.

<sup>9</sup> Asmaniar, Asmaniar and Fiter, Jonson Sitorus, "Registration of Fiduciary Objects as Debt Security," Justice Voice 1, No. 1 (2022): 15–16, <https://doi.org/10.37893/jv.v1i1.32>.

<sup>10</sup> M Mariyanti, T Septiani, and N Dolan, "Factor Affecting Employee Motivation to Increase Performance of Sharia Bank in Indonesia on Islamic Perspective," APTISI Transactions on Management (ATM) 7, No. 2 (2023): 135, <https://doi.org/10.33050/atm.v7i2.1860>.

guarantees. The basic principles classified include the implementation of fiduciary guarantees according to positive legal principles or prevailing laws and regulations in Indonesia and to Sharia Law principles.

**a. Positive Law Perspective**

In driving the economy, sustainable growth and development require the availability of sufficient funds. The need for funds must increase along with the development and complexity of a country's economy. This does not always run smoothly as it should, because it often happens and there is a shortage of funds in the market that can hinder economic growth.<sup>11</sup> Economic growth will never be separated from the use of credit carried out by banks or related institutions. Credit can be given and distributed to anyone who can cane credit. There is also something that must be known the process of applying for working capital credit between creditors and debtors must meet the agreement of both parties, where if both parties agree to the agreed agreement, an agreement will arise between the debtor and creditor. There must be an understanding between the debtor and the creditor in the form of an agreement on the loan amount, term, interest rate, and other terms, which if met, will result in the creditor providing the debtor with the funds it requires.<sup>12</sup>

In providing credit to debtors, several stages must be taken so that the intended credit can be distributed to the debtor. The stages of lending also have several distinction variations, depending on the financial institution or creditor involved in carrying out the credit. However, it can be understood in general, several stages are generally carried out when carrying out the crediting process, as follows:

- **Credit Application:** the debtor submits a credit application to the creditor by submitting information about the purpose of using the relevant funds, the amount of the loan desired by the debtor, and the time of credit repayment, as well as relevant financial and business information. The debtor is also stated to fill out a credit application form and attach documents that are required to be able to make credit;
- **Credit Assessment:** an assessment or review activity to evaluate the debtor's feasibility in obtaining the desired credit, this assessment involves the creditor's analysis in analyzing the debtor's financial condition, credit history, repayment ability, and other risk factors;
- **Risk Analysis:** the creditor will conduct analysis activities related to the risks that will be obtained related to the extent to which the credit can be given to the debtor and the potential for the return of the credit borrowed by the debtor. This involves assessing credit risk, market risk, liquidity risk, and operational risk, as well as determining the level of interest rates that are appropriate to the risk faced. Especially in providing bank credit, the bank will conduct an assessment analysis which includes:
  - 1) Character assessment;
  - 2) Assessment of ability;
  - 3) Assessment of wealth and capital;
  - 4) Assessment of warranties;
  - 5) Assessment of the business prospects of debtor customers.
- **Credit Offer:** the creditor will provide a credit offer to the debtor. Offers made by creditors to debtors, including the amount of the loan approved, payment terms, interest rates, and other applicable terms and conditions. In this case, the debtor has the right to

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<sup>11</sup> Syarifuddin Tri Haditya, "The Mechanism for the Use of Property Guarantees (RahnTasjily) in Sharia Bank Financing in Indonesia and Malaysia," Nurani 18, (2018): 164.

<sup>12</sup> Riedel Wawointana, "Benefits of Fiduciary Guarantees in the Execution of Bank Credit Agreements," Lex Privatum 1, (2013): 101.



refuse and accept the creditor's offer against the nominal amount of credit offered by him;

- **Signing of the Guarantee:** the debtor accepts the offer from the creditor, which by signing the agreement, there will be an agreement that gives rise to the rights and obligations of each party;
- **Disbursement of Funds:** the process of disbursing these funds is carried out according to a previously agreed agreement so that funds can be transferred or given directly to the debtor;
- **Repayment of Creditors:** the debtor must pay off the loan by the payment agreed in the creditor agreement. The form of payment can be made with various payment methods, ranging from monthly installments or similar things.<sup>13</sup>

In carrying out the repayment stage, several obstacles often occur and are experienced by debtors, namely the difficulty of debtors in making repayments or accomplishments to creditors caused because the object to be pawned is one of the objects used daily in seeking income to meet their accomplishments against creditors. Starting from the provisions contained in Article 1152 of the Indonesian Civil Code which states that the pawned object must be in the power of the creditors as the creditor of the pawn.<sup>14</sup> This will be a problem when the debtor has no other objects to pawn other than objects that are daily used to generate income, where the proceeds will be intended to carry out accomplishments as agreed with creditors. If the object that is the source of the debtor's livelihood is withdrawn and used as a guarantee by the creditor, it will have an impact on hampering the debtor's efforts in completing existing performances, so it will make it difficult for him to pay off his debts. From the guarantee problem, a solution is taken regarding the difficulty of debtors who only have one object that is a source of income as well as an object of guarantee for the debt agreement they have, namely the use of a form of guarantee called fiduciary agendas overdacht or known as a fiduciary guarantee.<sup>15</sup>

In carrying out fiduciary guarantees, it is regulated in the provisions of Articles 11 to Article 18 of the Fiduciary Guarantees Law and Article 2 of the Government Regulation No. 86 of 2000 on Procedures for Registration of Fiduciary Guarantees and the Cost of Making a Fiduciary Guarantee Deed. The fiduciary guarantee fee includes: First, an application for registration of fiduciary guarantee is submitted to the minister. Second, the application shall be submitted in writing in Indonesian through the Office by the Fiduciary Beneficiary, his attorney, or representative by attaching a statement of registration of the Fiduciary Guarantee. Third, the applications for registration are subject to a fee, the amount of which is determined by a separate Government Regulation regarding Non-Tax State Revenue. Fourth, the application for registration is completed with:

- a) a copy of the notarial deed on the imposition of fiduciary guarantee;
- b) power of attorney or delegation of authority to register for fiduciary guarantee;
- c) proof of payment of the registration fee.

And fifth, the registration statement of fiduciary guarantee is carried out by filling out a form whose form and content are determined by Ministerial Decree. In credit that uses a fiduciary guarantee, the regulated aspect is that all goods related to the fiduciary must be listed in the fiduciary guaranteed certificate, such as the amount, type, value, number,

<sup>13</sup> Rifka Tunnisa Muhammad Sabir, "Fiduciary Guarantee in Banking Transactions," *Mazahibuna: Journal of Comparative Schools* 2, (2020): 84.

<sup>14</sup> Olivia Nuralyza, Niluh Putu Dian Rosalina Handayani Narsa, and Dewi Sriani, "Bank Competition, Credit Risk, and Foreign Bank Penetration: Empirical Evidence from Indonesia," *JBMP (Journal of Business, Management and Banking)* 8, No. 1 (2022): 10, <https://doi.org/10.21070/jbmp.v8i1.1620>.

<sup>15</sup> *Ibid*, 12.

and date of purchase.<sup>16</sup>

Fiduciary guarantee certificates also have executory power equivalent to court decisions that have permanent legal force. Based on the fiduciary guarantee certificate, the fiduciary beneficiary or creditor who is the holder of the certificate can immediately execute the fiduciary guarantee object without having to go through court proceedings. In this case, the fiduciary guarantee certificate has an important role in the form of written evidence of the fiduciary recipient's rights and powers over the object of the fiduciary guarantee. This gives the fiduciary an advantage in executing fiduciary guarantees more efficiently. Fiduciary guarantee certificates possess the power of execution, which means they can be directly implemented. However, it is important to adhere to the relevant legal provisions and uphold the principles of fairness during the execution process.

The procedures and requirements for executing fiduciary guarantees must be conducted by the regulations and laws that apply to such transactions. These measures are put in place to safeguard the rights of all parties involved in the transaction. By ensuring compliance with legal provisions and fairness in execution, the interests and rights of both the debtor and creditor are protected. The debtor is provided with the opportunity to fulfill their obligations and avoid undue hardship, while the creditor is afforded a means to enforce their rights in the event of default. The execution process, when conducted properly, promotes transparency, accountability, and the equitable resolution of disputes between the parties. It is crucial for all parties involved, including the debtor, creditor, and any relevant authorities, to observe the legal requirements and follow the established procedures in executing fiduciary guarantees. This adherence to legal provisions not only safeguards the rights and interests of the parties but also promotes a fair and efficient financial system. Overall, the execution of fiduciary guarantees should be carried out by the law, ensuring fairness, and protecting the rights of all parties involved in the transaction.<sup>17</sup>

Article 29 of Fiduciary Guarantees Law regulates the execution of fiduciary guarantees. This article provides a legal basis governing the stages to be followed in the execution process, as follows:

- a) If the debtor or fiduciary defaults, the execution of the something that is the object of the fiduciary guarantee can be carried out by:
  - Implementation of the executory title by the creditor;
  - Sale of objects that are the object of the fiduciary guarantee on the creditor's power through public auction and take repayment of his receivables from the proceeds of the sale.
- b) The sale is carried out after the lapse of 1 (one) month since it is notified in writing by the Grantor and/or Fiduciary to the interested parties and announced in at least 2 (two) newspapers spread in the relevant area.<sup>18</sup>

#### **b. Sharia Law Perspective**

Fiduciary assurance or in discussions of Sharia law is often referred to as "Rahn", which means that it is a form of guarantee recognized in the Sharia legal system. This concept of

<sup>16</sup> Benny Krestian Heriawanto, "Execution of Fiduciary Guarantee Objects Based on Executory Title," *Legality: Journal of Legal Science* 27, No. 1 (2019): 54, <https://doi.org/10.22219/jihl.v27i1.8958>.

<sup>17</sup> Widayat Aris Prasetyo, "Notary Responsibility For Development And Registration Of Fidusia Warranties On Line Against Fidusian Recipients In Demak District," *Sultan Agung Notary Law Review* 2, No. 4 (2020): 9, <https://doi.org/DOI: http://dx.doi.org/10.30659/sanlar.2.4.772-780>.

<sup>18</sup> Ning Karna Wijaya, "Strategies of Pt. Pegadaian To Enhance Micro Fiduciary Syariah Credit Performance," *Al-Uqud : Journal of Islamic Economics* 3, No. 1 (2019): 70, <https://doi.org/10.26740/al-uqud.v3n1.p70-84>.

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fiduciary guarantee is embodied in Sharia law. In Sharia, the fiduciary guarantee goes to the object of the guarantee and remains the property of the creditor, while the debtor holds the right of liability to the object as a guarantee for the repayment. If the debtor cannot pay off the debt, the creditor is entitled and allowed to use the guarantee object to pay off the debt. Some principles must be adhered to according to the context of Sharia law related to fiduciary guarantees, including:

- a) **Voluntary Participation:** the debtor must be given voluntarily by the creditor and there must be no element of coercion or abuse of power in the granting of guarantees. It ensures that the creditor willingly offers their commitment to act as a creditor, without any external pressures or influences. This voluntary nature of giving a fiduciary guarantee is essential to uphold the principles of fairness and justice in contractual relationships. By emphasizing voluntary participation, the integrity and credibility of the fiduciary guarantee are maintained. It prevents situations where individuals may be compelled to assume liability against their will or be subject to unfair terms and conditions. The absence of coercion or abuse of power helps establish a balanced and equitable relationship between the parties involved.
- b) **Know of the Guarantee's Object:** the object in the fiduciary guarantee must be known by both parties, in which case the creditor must know with certainty the object used as a guarantee. This principle ensures transparency and clarity in the fiduciary guarantee agreement. Both parties should have complete knowledge and awareness of the specific object or assets that are being offered as security for the guarantee. This includes understanding the nature, characteristics, and value of the object. By having a known object of guarantee, the creditor can accurately assess the adequacy and feasibility of the collateral in relation to the debt being secured. This knowledge enables the creditor to make informed decisions regarding the acceptance and execution of the fiduciary guarantee.
- c) **A written Agreement:** a fiduciary guarantee is generally written upon the agreement in the form of an agreement. The requirement for a written agreement serves multiple purposes within the context of fiduciary guarantees. Firstly, it ensures clarity and precision in the terms of the guarantee. The written agreement outlines the rights, obligations, and responsibilities of both the debtor and the creditor, leaving no room for ambiguity or misunderstandings. Secondly, a written agreement helps to establish the evidentiary value of the fiduciary guarantee. In the event of any disputes or disagreements between the parties, the written document serves as tangible evidence of the agreed-upon terms and can be used to resolve any potential conflicts.
- d) **Fixed Ownership:** the debtor remains the owner of the guaranteed object, and the creditor only has the right to bear on the object as a guarantee for the debt. This principle of fixed ownership reinforces the legal framework of fiduciary guarantees in which the ownership rights of the guaranteed object are not transferred to the creditor. The debtor maintains their ownership rights, including the ability to control, manage, and dispose of the guaranteed object, as long as the debt is duly repaid. By preserving the ownership with the debtor, the principle of fixed ownership ensures that the rights and responsibilities associated with the guaranteed object are clearly defined. The creditor is granted a limited right to utilize the object as a guarantee, but they do not acquire full ownership or control over it.

- e) **Protection of the Debtor's Right:** the creditor must ensure that the object of the guarantee is maintained and not misused.<sup>19</sup>

However, apart from the application of fiduciary guarantees according to Sharia law, there are various variations in the interpretation and practice of law applicable in each country, so the legal determination of the existence of its location is an important thing that must be considered, to create legal certainty amid society.

## CONCLUSION

Fiduciary guarantee in positive law perspective is a form of guarantee given by debtors to creditors to guarantee the repayment of their debts. The purpose of fiduciary guarantees is to protect creditors to avoid default actions from debtors. In the event of default, the creditor has the right to take over the ownership rights to the promised guarantee. In the context of it, when a fiduciary guarantee has been administratively registered, creditors can carry out administrative execution to take over the ownership rights of the security without having to go through court decisions. However, in Sharia Law perspective, the term "fiduciary guarantee" is not known. Nevertheless, in Sharia banking practice, a concept similar to fiduciary guarantee is still used with the term "Rahn". The concept of Rahn in Sharia banking refers to the act of withholding or providing something as a guarantee to fulfill debt payment obligations. Thus, although the terms and implementation mechanisms differ between Positive Law and Sharia Law, the desired purpose of using fiduciary guarantees or Rahn remains the same, which is to provide guarantees to creditors to protect their interests in debt repayment.

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<sup>19</sup> Mushonnifun Faiz Sugihartanto and Nabila Silmina Hakim, Virtual International Halal Science Conference- PROCEEDINGS (2021), Challenges of Enhancing Halal Food Supply Chain Traceability Using Blockchain Technology: A Case Study From a Start-Up in Indonesia, 2021.



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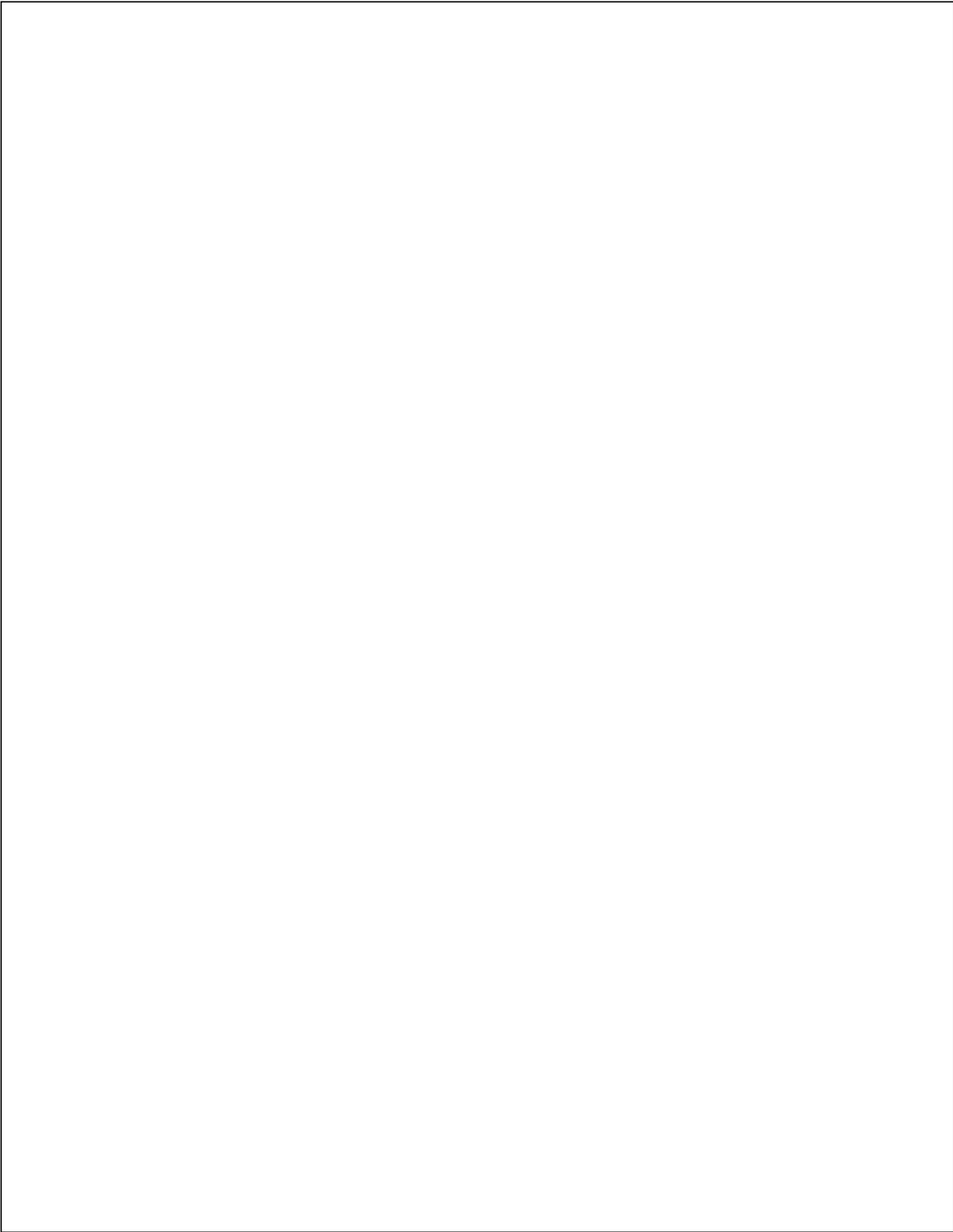
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