

Prototype of Fiduciary Guarantee in Islamic Law (Study of Four Ulama Schools of Jurisprudence Perspectives)

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ABSTRACT

Fiduciary guarantees are material guarantees, which at first glance have similarities to pledge guarantees in Islamic law. This research will attempt to answer three main problems, what is the prototype of fiduciary guarantees in the thinking of scholars from the four schools of jurisprudence? What are the reasons and arguments put forward by these scholars regarding the four crucial factors related to fiduciary? Whose opinion is closer to fiduciary guarantees in Indonesia? The research results conclude that the prototype of fiduciary guarantees in Islamic economics already exists. This prototype can be seen from four crucial factors in the practice of fiduciary guarantees, namely the handover of collateral objects, control of collateral objects, use of collateral objects by the debtor and the creditor's rights if the debtor defaults when projected into the collateral. Of the four factors of fiduciary guarantees, the majority of ulama, namely Hanafiyah, Malikiyah, Syafi'iyah and Hanabilah, have the same opinion. They only differ regarding the execution of collateral if the debtor defaults. The reason they developed in relation to the four crucial factors in fiduciary guarantees is that the handover of marhun is an absolute characteristic of the existence of a rahn contract. While in control of the collateral or marhun, seeing that the marhun is rahin's property and then the control rights are transferred to the murtahin, rahin will be able to borrow the original marhun with the murtahin's permission. Including when borrowing marhun from the murtahin's custody rights, the rahin can also use the marhun with the murtahin's permission. In connection with the crucial factors that exist in the practice of fiduciary guarantees, it is the opinion of Syafi'iyah scholars that is closest to fiduciary guarantees.

Keywords : *Fiduciary Guarantee Prototype, Rahn, Islamic Law, School of Jurisprudence*

ABSTRAK

Jaminan fidusia merupakan jaminan kebendaan yang sekilas mempunyai kemiripan dengan jaminan gadai dalam hukum Islam. Penelitian ini akan mencoba menjawab tiga permasalahan pokok, bagaimanakah prototipe jaminan fidusia dalam pemikiran ulama empat mazhab? Apa alasan dan argumentasi yang dikemukakan para ulama tersebut mengenai empat faktor krusial terkait fidusia? Pendapat siapa yang lebih dekat dengan jaminan fidusia di Indonesia? Hasil penelitian menyimpulkan bahwa prototipe jaminan fidusia dalam ekonomi syariah sudah ada. Prototipe ini terlihat dari empat faktor krusial dalam praktik jaminan fidusia, yaitu penyerahan benda agunan, penguasaan benda agunan, penggunaan benda agunan oleh debitur dan hak kreditur jika debitur wanprestasi ketika diproyeksikan menjadi agunan. Dari keempat faktor jaminan fidusia, mayoritas ulama yaitu Hanafiyah, Malikiyah, Syafi'iyah dan Hanabilah mempunyai pendapat yang sama. Mereka hanya berbeda pendapat mengenai eksekusi agunan jika debitur wanprestasi. Alasan dikembangkannya kaitannya dengan empat faktor krusial dalam jaminan fidusia adalah karena penyerahan marhun merupakan ciri mutlak adanya akad rahn. Selama menguasai barang agunan atau marhun, mengingat marhun tersebut adalah milik rahin dan kemudian hak penguasaan dialihkan kepada murtahin, maka rahin dapat meminjam marhun yang asli dengan izin murtahin. Termasuk apabila meminjam marhun dari hak asuh murtahin, maka rahin juga dapat menggunakan marhun tersebut atas izin murtahin. Sehubungan dengan faktor-faktor krusial yang ada dalam praktik jaminan fidusia, maka pendapat ulama Syafi'iyahlah yang paling dekat dengan jaminan fidusia.

Kata Kunci : Prototipe Jaminan Fidusia, Rahn, Hukum Islam, Mazhab Fikih

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INTRODUCTION

As an effort to stimulate the dynamism of economic activity, the provision of both hardware and software is an inevitability that cannot be avoided in Indonesia. This includes credit institutions which are one of the many catalyst media in economic development efforts. One of the aims of banking in Indonesia for the above purposes is to distribute credit to parties who need it (Tiong, 1984)

In banking practice, the collateral institutions commonly used are mortgage, pawnshop, credit verband, guarantor, and fiduciary. In practice, a mortgage requires land as collateral to obtain credit, while a pawn requires collateral for objects with exchange value, according to the amount of credit granted. Thus, if someone wants to get credit, they must have an object that can be used as collateral. To mortgage, he must have land that can be mortgaged, and to pawn, he must hand over an object of exchange value.

Then the question arises, what if someone, especially a small entrepreneur, wants to get credit, while he doesn't have land that can be mortgaged or objects that can be mortgaged? The solution to this problem is the existence of a fiduciary guarantee institution (Salindeho, 1994: 4). Why? Because in this fiduciary institution the debtor is not required to physically hand over the collateral object to the creditor, apart from that the debtor can still benefit from the object pledged as collateral to the creditor. Thus, on the one hand, the debtor can obtain credit as business capital from the creditor, on the other hand he can still continue his business by taking advantage of the object used as collateral..

Considering the importance of this fiduciary institution, in 1999 Law no. 42 of 1999 concerning Fiduciary Guarantees. Before the issuance of this Law, fiduciaries were only regulated in the form of jurisprudence. The existence of this law means that the practice of fiduciary guarantees has a strong juridical basis.

Quantitatively, the author has not yet obtained definite comparison figures between debtors who use mortgage, pawn and fiduciary collateral. Apart from these problems, what is clear is that the legalization of this fiduciary institution is a concrete effort to ensure continuity of production for small entrepreneurs. Efforts to provide equal opportunities for large and small entrepreneurs bring positive value and implications for anyone who wants to obtain credit.

Fiduciary guarantees in Islamic law, in their comprehensive and systemic form, cannot be found. However, this does not mean that efforts to trace the principles of fiduciary guarantees to the Islamic legal system are impossible. Furthermore, academically, efforts to identify prototypes of fiduciary guarantees are a practice of *ijtihad* which is always required in the dynamic process of Islamic law (Suryandari, 2021). This dynamism of Islamic law provides a system of different principles that can be used to explain various socio-economic problems in modern Muslim countries, to solve problems in a way that is justified by Islam. In relation to this effort, we will examine what the fiduciary guarantee prototype actually is in the Islamic economic system, and what reasons underlie the existence of this fiduciary guarantee prototype.

Fiduciary guarantees are material guarantees, which at first glance have similarities to pawn guarantees or *rahn* in Islamic law. However, the main difference between the two collateral institutions is that if they are pledged, the collateral is physically in the hands of the creditor, while fiduciary collateral is physically in the hands of the debtor (Nurjihad, 2023). This element is not the only difference between *rahn* and fiduciary. There are at least three other crucial elements that can differentiate them, namely: handover of collateral; utilization of collateral; and creditor rights if the debtor defaults. Therefore, in looking for a prototype of fiduciary guarantees in Islamic law, it will be linked to pawning guarantees. Bank Mu'amalat

Indonesia also practices fiduciary guarantees, where the implementation is developed from the basic concept of *rahn* (Yasin, 2001).

Based on this background, the author intends to conduct further research regarding the prototype of fiduciary guarantees in the thinking of scholars from four schools of jurisprudence, with the title: "Prototype of fiduciary guarantees in Islamic Law". What is meant by "Fiduciary guarantee prototype" is the theory and principles of guarantee institutions in Islamic Law which lead or if developed lead to fiduciary guarantee institutions. Meanwhile, what is meant by "Islamic law" in the title refers to the thinking among scholars of the four schools of jurisprudence.

This research focuses on the concept of pawn or *rahn* among scholars of the four imam schools, which is limited to crucial factors related to fiduciary guarantees, namely the process of handing over collateral objects, control of collateral objects, utilization of collateral objects, and the creditor's rights if the debtor defaults. performance. And of these four factors, the reasons and arguments of the scholars related to the four factors above will also be examined. After that, we will examine whose opinion is closest to the concept of fiduciary guarantees in Indonesia.

Therefore, this research will attempt to answer the following three main problems, what is the prototype of fiduciary guarantees in the thinking of scholars from the four schools of jurisprudence? What are the reasons and arguments put forward by these scholars regarding the four crucial factors related to fiduciary? Whose opinion is closer to fiduciary guarantees in Indonesia?

RESEARCH METHOD

This type of research is library research as a type of qualitative research where the location or place of research is carried out in libraries, documents, archives and the like (Prastowo, 2011). Literature research produces conclusions with content analysis (Moleong, 2012). The literature that is the source for this research is writings that originate from literature that is related to guarantees, both fiduciary guarantees and personal guarantees.

This research is descriptive-analytical in nature to provide as precise data as possible about people, conditions or other symptoms. The aim is primarily to confirm hypotheses, so that they can help in strengthening old theories, or in order to develop new theories (Creswell, 2014). In this context, it describes the concept of *rahn* in the thinking of scholars from four schools of jurisprudence, then analyzed and developed with the concept of fiduciary guarantees.

This research uses a normative-judicial approach. The purpose is to explain the main issues based on principles, norms and rules in both positive law and Islamic law.

Data sources in this qualitative research include words, documents (Moleong, 2012). To obtain data and information on the thoughts of the scholars of the four schools of jurisprudence, the research data will refer to the jurisprudence books of the scholars in question. For Hanafiyah, it refers to the book *al-Bada'i' ash-Shana'i fi at-Tartib asy-Syara'i*. For Malikiyah use book *Bidayah al-Mujtahid*, Hanabilah use book *al-Mughni* and for Syafi'iyah use book *Mughni al-Muhtaj*. Apart from the four books from each school of thought, several books are also used which discuss the thoughts of scholars from the four schools of jurisprudence such as the Book *al-Fiqh ala al-Mazahib al-Arba'ah*, *Bidayah al-Mujtahid wa Nihayat al-Muqtashid*, *Fiqh as-Sunnah* and *Fiqh al-Islam wa Adillatuh*.

The data collection method is carried out using documentation techniques, namely looking for data regarding things in the form of notes, books, newspapers, magazines, meeting minutes, regulations, photos, and so on (Arikunto, 2007; Sugiyono, 2012). The documents used

in this research are divided into primary data sources and secondary sources, namely books and writings as explained in the data sources above.

The data analysis technique is content analysis in the form of discourse analysis which tries to provide more meaning than just the words or groups of words written by the author (Krippendorff, 2004). In this case, the concept of *rahn* according to the ulama is analyzed, then a conclusion is drawn and then connected to the Fiduciary Guarantee, what is the real fiduciary prototype in the thinking of the ulama of the four schools of jurisprudence?

RESULTS AND DISCUSSION

Prototype of Fiduciary Guarantee in Islamic Law

In this section, it is explained how the prototype of fiduciary guarantees in Indonesia is projected into Islamic law. If the prototype of fiduciary guarantees in Indonesia is projected into Islamic law, then the related theme is *rahn* guarantees. Several matters related to fiduciary guarantees that are projected into the *rahn* guarantee are the handover of the collateral object, control of the collateral object, use of the collateral object by the debtor and the creditor's rights if the debtor defaults.

a. Delivery and Control of Collateral Objects

The discussion regarding the handover of collateral objects can be found in the fiduciary guarantee registration section which is regulated in Article 11 to Article 18 of the Fiduciary Guarantee Law. The Fiduciary Guarantee Law requires that objects encumbered with fiduciary guarantees be registered at a fiduciary registration office located in Indonesia. This obligation even remains in effect even though the objects encumbered with fiduciary guarantees are outside the territory of the Republic of Indonesia (Indonesia, 2022). The purpose of registering this fiduciary guarantee is: (a) to provide legal certainty to interested parties; (b) giving priority rights (*freferent*) to the fiduciary recipient over other creditors. This is because fiduciary guarantees give the fiduciary recipient the right to remain in control of the object that is the object of the fiduciary guarantee based on trust (Salim, 2000).

As proof for the creditor that he is a fiduciary security holder is a fiduciary security certificate issued by the fiduciary registration office on the same date as the date of receipt of the fiduciary security registration application. The delivery of this certificate to the fiduciary recipient is also carried out on the same date as the date of receipt of the registration application. This fiduciary guarantee certificate is actually a copy of the fiduciary registration book which contains notes about the same things as the data and information that existed during the registration statement (Indonesia, 2022)

The provisions regarding the obligation to register fiduciary guarantees can be said to be an important breakthrough considering that in general the objects of fiduciary guarantees are movable objects that are not registered so it is difficult to know who the owner is. This breakthrough will be more meaningful if we relate it to the provisions of Article 1977 of the Civil Code which states that whoever controls a movable object will be considered the owner. That is why FEO and collateral concessions provide less protection for creditors who hold them, namely because there is no registration such as a fiduciary institution. In this way, Fiduciary Guarantee fulfills the principle of publicity as one of the very important principles in material guarantee law (Widjaja & Yani, 2000).

From the explanation above, it can be understood that proof that the collateral has been handed over from the debtor to the creditor is the handing over of a fiduciary guarantee certificate by the fiduciary giver as debtor to the fiduciary recipient as creditor. Collateral objects are not physically distributed by the debtor to the creditor.

Then regarding the control of collateral objects in the practice of fiduciary guarantees, it can be seen in article 1 of the fiduciary law. This article explains that fiduciary is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object. Meanwhile, fiduciary guarantees are security rights over movable objects, both tangible and intangible, and immovable objects, especially buildings which cannot be encumbered with mortgage rights as intended in Law Number 4 of 1996 concerning Mortgage Rights which remain in the control of the fiduciary, as collateral for the repayment of certain debts, which gives the fiduciary recipient a preferred position over other creditors.

From the above definition, there are several elements of fiduciary guarantees, namely: (a) the existence of security rights; (b) the existence of objects, namely movable objects, both tangible and intangible, and immovable objects, especially buildings that are not encumbered with mortgage rights. This relates to the burden of collateral on flats; (c) the object that is the object of collateral remains in the control of the fiduciary; (d) giving priority position to creditors (Salim, 2000). In the elements of a fiduciary guarantee, it is stated that the object that is the object of the guarantee remains in the control of the fiduciary. The existence of objects with the fiduciary is intended so that the fiduciary can make use of these objects.

In the practice of *rahn*, fiqh scholars agree that holding or receiving *marhun* (objects that are collateral) is a condition in *rahn*, which is based on the word of Allah SWT. Surah al-Baqarah verse 283 which means "if you are on a journey (and don't pay in cash) and you don't have a writer, you should have dependents with you." However, there are differences of opinion among scholars as to whether holding *marhun* is a normal requirement or a requirement of perfection. Hanafiyah, Syafi'iyah and Hanabilah scholars are of the opinion that holding (al-qabdhu) is not a valid condition for *rahn*, but a normal condition. Thus, if the *marhun* has not been held by the *murtahin* (the person who received the *marhun*), the contract can be developed again. On the other hand, if the *rahin* (the person who handed over the *marhun*) has already handed over the *marhun*, then the contract becomes customary, and the *rahin* cannot cancel it unilaterally. This group bases their opinion on the verse above. They argue, if *rahn* is perfect without mastering *marhun*, then the existence of taqyid (strengthening) with *farihanun maqbudhah*, is meaningless. Apart from that, *rahn* is a contract that requires qabul, which automatically requires holding *marhun* (Kasani, 1996). However, Malikiyah scholars are of the opinion that holding *marhun* is a condition for perfection, but not a legal or customary condition. According to them, contracts are seen as normal with consent and qabul. However, the *murtahin* must ask the *rahin*, the pawned *marhun*, if he does not ask for it or leaves the *marhun* in the *rahin's* hands, the *rahn* will be invalidated. They base their opinion on the *aufu bi al-'uqud* verse (Ibnu Rusyd, n.d.)

From the explanation above, it can be understood that the principle issue, namely that there must be a handover of *marhun* from the *rahin* to the *murtahin* in the *rahn* contract, is not disputed among the scholars of the four schools of thought. They only differ whether the submission of *marhun* is a normal condition or a condition of perfection. From the statement that among the ulama of the four schools of thought have agreed to make the transfer of *marhun* from *rahin* to *murtahin*, it is clear that there are similarities with what happens in the practice of fiduciary guarantees. It's just that the surrender of *marhun* in the practice of fiduciary guarantees is realized in the form of a certificate which is considered commensurate with the surrender of *marhun*.

Regarding the control of *marhun*, whether actually or through intermediaries, the essence is to provide security to the *murtahin*. Among the conditions for mastering *marhun*

are; (a) with *rahin's* permission. The scholars of the four schools of thought agree that *murtahin* are allowed to control *marhun* with the *rahin's* permission, either by *sarih* (clear) or *dilalah* (instruction) (Ibnu Rusyd, n.d.). (b) *rahin* and *murtahin* must be experts in contracts, (c) *murtahin* must still control *marhun*. Hanafiyah, Malikiyah, and Hanabilah scholars are of the opinion that among the conditions for control, the *murtahin* must hold the *marhun* for a long time. Thus, according to Hanafiyah and Malikiyah scholars, the *rahn* is invalid if the *murtahin* lends or entrusts the *marhun* to the *rahin*. According to the Hanabilah ulama, the *rahn* contract is not invalidated, but has lost its normality and will become common again if the *rahin* returns it to the *murtahin*. These scholars base their opinion on Surah al-Baqarah verse 283 which means "then there should be dependents who are held" (Kasani, 1996). In contrast to the three scholars above, Syafi'iyah scholars are of the opinion that the *rahn* contract is not invalid if the *murtahin* entrusts or lends the *marhun* to the *rahn*, for example, to use it. This is based on the hadith narrated by ad-Daruquthni and Hakim which means "*rahn* is ridden and milked", as well as the hadith of al-Bukhari which means "the back is ridden by giving his living if he is pawned" (Syarbini, 1958).

From the explanation above, it can be understood that regarding the control of collateral objects by *rahin* or creditors, there are differences of opinion among the ulama of the four schools of thought. The majority of ulama, namely from the Hanafiyah, Malikiyah and Hanabilah circles, state that if a *murtahin* or debtor lends or entrusts *marhun* to the *rahin* then the *rahn* will be invalidated. Their reason is that in the *rahn* contract, the *marhun* must be in the control of the *murtahin*, it cannot be transferred to the *rahin* even if it is only a loan. If it is related to the practice of fiduciary guarantees, where the collateral or *marhun* remains in the hands of the debtor or *rahin* for use, then of the four schools of thought scholars, only the Shafi'iyah scholars are appropriate. Shafi'iyah scholars expressed their opinions based on the hadith of the Prophet PBUH. which allows the *rahin* or debtor to use collateral or *marhun*.

b. Utilization of Collateral Objects

The discussion on the use of collateral objects by debtors can be found in the section on fiduciary transfers regulated in Article 19 to Article 24 of the Fiduciary Guarantee Law. In the Fiduciary Guarantee Law, it is stated without prejudice to the provisions as intended in Article 21, if the fiduciary recipient agrees that the fiduciary giver can use, combine, mix or transfer objects or results from objects that are the object of the fiduciary guarantee, or agree to collect or carry out compromise of receivables, then the agreement does not mean that the fiduciary recipient releases fiduciary guarantees. Fiduciary givers are prohibited from transferring, pawning or renting to other parties objects that are the object of Fiduciary Guarantee which are not inventory items, except with prior written approval from the fiduciary recipient. The fiduciary recipient does not bear any liability for the consequences of the actions or negligence of the fiduciary provider, whether arising from contractual relationships or arising from unlawful acts in connection with the use and transfer of objects that are the object of Fiduciary Guarantee as stated in Article 23 of the Fiduciary Guarantee Law (Indonesia, 2022)

In the sound of this article, it can be understood that with the approval of the fiduciary recipient, the fiduciary giver can use, combine, mix or transfer objects or results from objects that are the object of fiduciary collateral, or agree to collect or compromise receivables. Giving permission from the fiduciary recipient to the fiduciary provider to do the things above does not mean that the fiduciary recipient releases fiduciary guarantees.

This means that even though the collateral is used or utilized by the fiduciary, the fiduciary still has the right to control the collateral.

In the *rahn* contract, the status of the *rahin* in the pawn contract transaction is the owner of the *marhun*. However, ownership is limited by the *murtahin's* right of *habsu* (right to retain *marhun*). Therefore, in the *Rahn* agreement, *rahin* does not have full rights to use his goods that have been pawned. Regarding the use of *rahin* for *marhun*, the scholars have different opinions as follows.

- 1) Hanafiyah ulama are of the opinion that the *rahin*, as the party who pawns the *marhun*, is not permitted to use the *marhun*, whether driving, wearing clothes, occupying a house or cultivating the land that becomes the *marhun* except with the permission of the *murtahin*. They prohibit use like this because the right to retain the *marhun* rests with the *murtahin*, so he has permanent rights until the *rahn* contract ends. So, when *rahin* uses *marhun* without *murtahin's* permission, it means he has committed an act that is against the law (*ghashab*). If the matter in question is done by the *rahin* and then damage occurs to the *marhun*, then the *rahin* must be responsible for the damage while the obligation to pay the debt remains with the *rahin* even though the *marhun* is damaged or lost. If *marhun* is an item that must be continuously used, while the *murtahin* does not have time to use it, such as motorbikes, cars, and sewing machines or other production equipment, then the *murtahin* can rent it out to parties who can use it. The results or wages obtained from these goods become the rights of the *rahin*. Because the results and benefits of *marhun* are based on the hadith of the Prophet SAW. is *rahin's* right (Kasani, 1996).
- 2) Hanabilah ulama have the same opinion as Hanafiyah ulama, namely that the *rahin*, as the party who pawns the *marhun*, cannot use the *marhun* except with the *murtahin's* permission. Abandoning *Marhun* is against the Sharia'. Therefore, *rahin* and *murtahin* must make agreements regarding the use of *marhun*. According to them, the *rahin* does not have the right to use the *marhun*, such as driving, occupying the house, taking the milk of livestock, and so on which are still under the agreement without the *murtahin's* permission. When the *rahin* and *murtahin* do not reach an agreement in determining the limits of permitted utilization, the *marhun* must be left because it is an item that is held back from utilization until the *rahin* pays off its debt. The view of the Hanabilah ulama referred to is based on the paradigm that *marhun* and all its benefits are retained assets (*mahbusah*) (Ibnu Qudamah al-Maqdisi, n.d.).
- 3) Malikiyah ulama have an opinion regarding the prohibition of the use of *marhun* by *rahin*, even if the *murtahin* allow the use of *marhun*, its legal status is still prohibited. If the *murtahin* gives permission for the *rahin* to use the *marhun*, then according to them the *murtahin's* contract will be void because the conditions for *marhun's* detention are not fulfilled. To utilize *marhun*, according to Malikiyyah scholars, *murtahin* as representatives of *rahin* can do this (al-Zuhaili, 2006).
- 4) Shafi'iyah ulama have a different view from the majority of ulama. According to them, *rahin* can use *marhun* as long as it does not reduce or damage the material value of *marhun* such as driving a vehicle, occupying a house, wearing clothes and so on. This ability is based on the legal argument that the benefits and proceeds from the *marhun* belong to the *rahin* and cannot be linked to the debt he bears. They strengthen their opinion based on the hadith of the Prophet PBUH. narrated by ad-Daruquthni and al-Hakim, which means "pawned mounts or vehicles may be ridden for the cost and pawned livestock can be milked for the cost." The person who uses the vehicle and milks the milk is obliged to bear the maintenance and maintenance costs." Also the hadith of

the Prophet SAW. Another story from Imam Bukhari which means "if a camel is pawned it can be ridden based on its income". According to them, the type of use of *marhun* that is prohibited is use that reduces the value of *marhun*, such as building buildings or cultivating land that is still in pawn status. However, according to them, even this type of use is permissible if the *murtahin* allows it. For Shafi'iyah scholars, if *marhun* is something that is very meaningful to the *rahin's* life, such as a house or vehicle that is used every day, then the *rahin* is allowed to use these items until his needs are met (Syarbini, 1958).

From the explanation above, it appears that one group of sectarian ulama, namely the Malikiyah ulama, prohibits the use of *marhun* or pawned goods by *rahin* or debtors even though *murtahin* or creditors are permitted, because this will invalidate the *rahn* contract. Then two groups of sectarian ulama, namely the Hanafiyah and Hanabilah ulama, prohibit the use of *marhun* or pawned goods by *rahin* or debtors unless permitted by the *murtahin* or creditor. Meanwhile, one group of school of thought scholars, namely the Syafi'iyah scholars, allow the use of *marhun* or pawned goods by *rahin* or debtors as long as it does not reduce the value of the *marhun*. For use that reduces the value of the *marhun*, a *murtahin* permit must be obtained. Even if the *marhun* is something that is very meaningful to the *rahin's* life, such as a house or vehicle or work tools that are used every day, then the *rahin* can use these items until his needs are met. However, from the differences of opinion of the *murtahin* scholars above, it turns out that the majority say that the use of *marhun* or pawned goods by *rahin* or debtors is permissible as long as the permission of the *murtahin* or creditor is permitted, except for the Malikiyah clerics who absolutely prohibit it whether the *murtahin* has permission or not.

If it is related to the practice of fiduciary guarantees where the use of collateral occurs, then the opinion of the majority of ulama, namely Hanafiyah, Syafi'iyah and Hanabilah, is in accordance with what happens in the practice of fiduciary guarantees. Even Syafi'iyah scholars stated that *marhun* which has important value for the *rahin* or debtor can be used until the completion of the *rahn* contract.

c. Creditor's Rights If the Debtor Defaults

The creditor's rights if the debtor defaults are explained in the collateral execution section of the Fiduciary Guarantee Law. As previously discussed, a fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force. So, based on this executorial title, fiduciary recipients can directly carry out executions through public auctions for fiduciary collateral objects without going to court. In the Fiduciary Guarantee Law, it is stated that each mortgage certificate must contain the instructions "For the sake of justice based on belief in the Almighty God" which will give it executorial power as in the case of a court decision which has permanent and definite legal force (Mashdurohatun et al., 2016).

The Fiduciary Guarantee Law also states that if the debtor or fiduciary fails, execution of the object that is the object of the fiduciary guarantee can be carried out by: (a) executing the executorial title by the fiduciary recipient. (b) sale of objects that are the object of fiduciary security under the recipient's own authority through a public auction and repayment of the receivables from the sale proceeds; (c) private sales carried out based on an agreement between the giver and the fiduciary recipient if in this way the highest price that benefits the parties can be obtained as stated in Article 29 of the Fiduciary Guarantee Law (Indonesia, 2022).

So the principle is that the sale of objects that are the object of a fiduciary guarantee must go through a public auction, because in this way it is hoped that the highest price can be obtained. However, in the event that a sale through a public auction is not expected to produce the highest price that is profitable for either the fiduciary or the fiduciary recipient, it is possible to sell privately as long as this is agreed upon by the fiduciary or the fiduciary recipient and the terms of the sales implementation period are met.

The Fiduciary Guarantee Law also requires fiduciary givers to hand over objects that are the object of fiduciary guarantees in order to carry out the execution of fiduciary guarantees. In the event that the fiduciary does not hand over the object that is the object of the fiduciary guarantee at the time the execution is carried out, the fiduciary recipient has the right to take the object that is the object of the fiduciary guarantee and, if necessary, can ask for assistance from the authorities as stated in Article 30 of the Fiduciary Guarantee Law (Indonesia, 2022).

Furthermore, remembering that a fiduciary guarantee is a security institution and that the transfer of ownership rights by means of a *constitutum possessorium* is intended solely to provide collateral with priority rights to the fiduciary recipient, it is in accordance with the Fiduciary Guarantee Law that every promise that gives authority to the fiduciary recipient to own objects that are the object of fiduciary guarantees if the debtor breaks the promise, it is null and void as stated in Article 33 of the Fiduciary Guarantee Law (Indonesia, 2022). These provisions are made to protect fiduciary providers, especially if the value of the fiduciary collateral object exceeds the amount of the guaranteed debt. In the event that the execution proceeds exceed the guarantee value, the fiduciary recipient is obliged to return the excess to the fiduciary provider. However, if the results of the execution are insufficient to pay off the debt, the debtor remains responsible for the unpaid debt as stated in Article 34 of the Fiduciary Guarantee Law (Indonesia, 2022).

From the explanation of the articles above, it can be understood that if the debtor or *murtahin* defaults or breaks a promise to repay the debt, the creditor or *murtahin* can immediately sell the collateral or *marhun* through a public auction to cover the debtor's debt. This can be done because *murtahin* holds a fiduciary guarantee certificate which has the same executorial power as the result of a court decision. Likewise, the debtor must be willing to hand over the collateral to be sold by the creditor, even if he does not want to hand it over, the creditor can ask the authorities to assist with the execution.

In the practice of *rahn*, it has been explained that *rahn* is a means of guaranteeing debts and the aim is to pay off the debt at a markup price if *rahn* is unable to pay off the debt after the time to return it. This sale is perfect if carried out by *rahn* or his representative because he is the owner of *marhun*. According to the consensus of the ulama, in principle, if the time has come to repay the debt, the *murtahin* can ask the *rahn* to pay off the debt.

Ulama agree that the *marhun* remains the property of the *rahn* even though it has been handed over to the *murtahin* as explained in the hadith that the *marhun* cannot be separated from its owner, therefore the power to sell the *marhun* rests with the *rahn*. However, because *marhun* is related to the right of detention in the hands of the *murtahin*, according to Hanafiyah and Malikiyah, the sale of *marhun* still depends on the *murtahin's* willingness and permission. Thus, the ulama agree that the power to sell *marhun* is in the hands of the *rahn* due to the willingness of the *murtahin* (al-Zuhaili, 2006). Malikiyah scholars are of the opinion that *murtahin* or third parties do not have the right to sell *marhun* except with the *rahn's* permission, because the power to sell is in his hands, whether his permission is absolute or conditional. If the permission is conditioned by the inability to pay off the debt within the specified time, then both of them may not sell the *marhun* before the

required time arrives, but must be taken to a judge to find out whether the debt has been paid off or not. However, if permission is not required, if the *marhun* is with a third party, then he is free to sell the *marhun* without having to go to a judge first. If the *marhun* is with the *murtahin* and permission appears after the contract, then he can sell the *marhun* without going to the judge. If it appears at the time of the contract, then he cannot sell it before going to the judge so that the reason for *rahin's* reluctance to give permission is clear (al-Zuhaili, 2006).

Syafi'iyah and Hanabilah scholars are of the opinion that the power to sell *marhun* lies with the *rahin* with the permission of the *murtahin*. He cannot sell it without the *murtahin's* permission, unless he refuses to give permission then he can submit it to the judge and then the judge orders him to sell it to eliminate the difficulty, if not, then the judge allows the *rahin* to sell the *marhun* in order to pay his debt (Syarbini, 1958).

Selling *marhun* as above is when the *rahin* freely wishes to sell the *marhun* as a fee to pay off his debt to the *murtahin*. However, if you are unable to pay your debts because it is difficult or you don't have any, the judge can force you to sell the *marhun*. According to Hanafiyah and Malikiyah, the judge can order the *rahin* representative to sell the *marhun*. However, according to Syafi'iyah and Hanabilah, the judge may not give the power to sell *marhun* to the *rahin's* representative either because the *rahin* is not there or because he refuses to sell, but the power to sell *marhun* is given to the judge. As a first step, the judge must ask *rahin* to sell the *marhun*, if he is willing then the problem is over. If he refuses then according to Malikiyah, Syafi'iyah, Hanabilah and some Hanafiyah, the judge can immediately sell it without forcing or punishing the *rahin* (al-Zuhaili, 2006). Hanafiyah is of the opinion that the judge has no right to sell the *marhun* for the *murtahin's* debt without the *rahin's* permission, but the judge only holds the *rahin* so that he will sell the *marhun* (Kasani, 1996).

From the explanation above, it can be understood that if the debtor fails to perform, then according to the majority of ulama, namely Malikiyah, Syafi'iyah and Hanabilah, the judge can immediately sell the *marhun* without forcing or punishing the *rahin*. In contrast to the three groups of ulama above, the Hanafiyah say that the judge only has the right to detain the *rahin* until he is willing to sell the *marhun*.

If it is related to the practice of fiduciary guarantees where the execution of collateral can be carried out directly by the creditor, then in *rahn* practice, according to Malikiyah, Syafi'iyah and Hanabilah, the execution of collateral or *marhun* is carried out by a judge. Hanafiyah said that the judge only had the right to detain the *rahin* until he was willing to sell the *marhun*. In this case, it turns out that there is a difference between the execution of collateral if the debtor fails to perform in fiduciary guarantee practices and *rahn* practices.

From the entire description above, the prototype of fiduciary guarantees in Islamic law actually already exists. This prototype can be seen from four crucial factors in the practice of fiduciary guarantees, namely the handover of the collateral object, control of the collateral object, use of the collateral object by the debtor and the creditor's rights if the debtor defaults. Of the four crucial factors of fiduciary guarantees, only one does not have similarities in Islamic law, namely regarding the execution of collateral if the debtor defaults.

The reason they developed in relation to the four crucial factors in fiduciary guarantees is that the handover of *marhun* is an absolute characteristic of the existence of a *rahn* contract. Without the handover of *marhun*, the *rahn* contract has not occurred or is not yet complete. While he is in possession of the *marhun*, seeing that the *marhun* is *rahin's* property and then the control rights are transferred to the *murtahin*, the *rahin* will be able to

borrow the original *marhun* with the *murtahin's* permission. Including when borrowing *marhun* from the *murtahin's* right of detention, the *rahin* can also use the *marhun* with the *murtahin's* permission.

By examining several thoughts of the scholars of the four schools of thought, in relation to several crucial factors that exist in the practice of fiduciary guarantees, it is the opinion of the Syafi'iyah scholars that is closest to fiduciary guarantees.

CONCLUSION

From the description previously explained, the following conclusions can be drawn:

1. The prototype of fiduciary guarantees in Islamic economics already exists. This prototype can be seen from four crucial factors in the practice of fiduciary guarantees, namely the handover of the collateral object, control of the collateral object, use of the collateral object by the debtor and the creditor's rights if the debtor defaults when projected into the collateral. Of the four crucial factors of fiduciary guarantees, the majority of ulama, namely Hanafiyah, Malikiyah, Syafi'iyah and Hanabilah, found the same opinion. There is only one thing that is not found in common in the opinions of the scholars of the four schools of thought, namely regarding the execution of collateral if the debtor defaults.
2. The reason they build in relation to the four crucial factors in fiduciary guarantees is that the handover of *marhun* is an absolute characteristic of the existence of a *rahn* contract. Without the handover of *marhun*, the *rahn* contract has not occurred or is not yet complete. While in control of the collateral or *marhun*, seeing that the *marhun* is *rahin's* property and then the control rights are transferred to the *murtahin*, *rahin* will be able to borrow the original *Marhun* with the *murtahin's* permission. Including when borrowing *marhun* from the *murtahin's* custody rights, the *rahin* can also use the *marhun* as long as he has the *murtahin's* permission.
3. By examining several statements by the scholars of the four schools of thought, in relation to several crucial factors that exist in the practice of fiduciary guarantees, it is the opinion of the Shafi'iyah scholars that is closest to fiduciary guarantees.

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