

Determination Methodology of the Fiduciary Law and Critic Towards Sharia Fiduciary Institutional Dualism and its Legislation

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Abstract

The Qur'an's verse, Al-Baqarah: 283, explains rahn in a trip condition, however, the fact that the enforcement of rahn also occurs in muqim condition. Syar'ah fiduciary needs to be included into law as Muslims in Indonesia are the majority and based on the decision of OKI (Islamic Conference Organization), Indonesia is as an Islamic country. Therefore, by being supported by Pancasila, it generates God Sovereignty theory. The research method used is normative juridical method: that is the law research method done by researching literature. The research shows that: 1) the fiduciary truth (rahn) in Islamic law is (syara') making a thing having value of property in the view of Syara' as a debt guarantee, which enables to take the whole or part of the debt of the thing. Method of *istinbath al-hukmi* is related to the fiduciary done by the fiduciary institution using *qiyas* (metaphor), 2) the emergence of dualism of sharia fiduciary institution and sharia banking was caused by the existence of fatwa of National Sharia Board MUI (Indonesian Council of Religious Scholars) No: 25/DSN-MUI/III/2002, and Fatwa of National Sharia Board MUI No: 26/DSN-MUI/II/2002, in which sharia financial institution is allowed to produce the product which accords with syariah principles, 3) critic towards law No. 21, 2008 and governmental regulations No. 51, 2011 are not directly clarified, but has similarities and explanations concerning a product that must accord with sharia principles.

Keywords: Sharia Fiduciary, National Sharia Board, Sharia Pawnshop

A. INTRODUCTION

Islam is a religion, which was established on the principles of tawhid or oneness of God the almighty, *khilafah* or *vicegerency* and *al-adl* or justice. The three basic principles from Islamic world view are manifested in their observers' daily life. A Muslim needs to strictly obey the Islamic ethics code in his all activities both in ritual or secular business (Al-Habshi & Ghazali, 1994).

Fiqh muamalah (social jurisprudence) is divided into: firstly, *fiqh muamalah* in the expansive and narrow meaning. *Fiqh muamalah* in the expansive understanding encompasses all the rules out of *ibadat* (religious activities). Therefore, marriage, divorce, *iddat*, inheritance, politics, *jarimat*, and *uqubat* belong to coverage of *fiqh muamalah* (Al-Zuhaily, 1989).

The understanding of *fiqh muamalah* in the narrow meaning is put forward by fiqh scholars. Firstly, a set of rules regarding the acts and relationship between human beings about property, the rights, and conflict settlement (Bakri, n.d.); secondly, the laws related to the humans' acts

involving interaction among them in material business, material rights as well as the way of settling the conflict among them (Al-Zarqa, n.d.).

Some concepts of *fiqh muamalah* have now changed and moved to another position. They are not only written in the books of classic *fiqh*, but they have also become basic material in legislation rules of a country as occurred in Indonesia. These change and shift affect the nature change and character of *fiqh muamalah*. It is not *ijtihad*, *mukhtalaf fih* (differences within), and bound, but it becomes *ijma'iy and muttafaq 'alaih* (the result of agreement) and has binding power and compulsion power. This change of nature and character is as a result of transformation process of *fiqh muamalah* in law (*qanun*) after passing legislation process (*taqnin*).

In Indonesia, implementation endeavour of *fiqh muamalah* into national legislation rules have been done, as seen in bill of Indonesian Republic No. 7 1992 about banking (Anon, 1992), bill of Indonesian Republic No.10 1998 about change (Anon, 1998), bill of Indonesian Republic No. 7 1992 about banking (Anon, 1992), bill No. 21 2008 about sharia Sharia banking (Anon, 2008), and governmental regulations No. 51 about PERUM (the change of public corporation), the fiduciary becomes PERSERO (company) (Anon, 2011) and several Indonesian bank regulations from 1992 to 2013. The regulation is popular demand, because many sharia sharia financial institutions have been established in Indonesia up to 2013.

The growth and development of sharia-based¹ economic institutions in Indonesia also support the development of real sector in society (Prajna, 2004). Sharia business concept² demonstrates among other to balance liberal economic³ strength which really dominates people's economic (Naqvi, 2003) fundamental sectors. It seems to be dominant towards the effect of corporation⁴ business dominating almost all elements of real sectors like retail commerce and service.

Since 2000 sharia economic system⁵ had gone through acceleration and support, which were larger and larger. The involvement of Muslim scholars (ulama), professional, academician, and the

¹ Islamic business institution (sharia) is one of instruments used to manage Islamic economic rules. As part of economic system, the institution is part of the whole social system. Therefore, its existence should be viewed from the context of the whole existence of people (human), and the valid values in the society. Islam rejects the view which states that economic science is the value-neutral science; whereas, economic science is value-oriented science. See Muhamad, *Accounting Principles in Al-Quran*, page 5 (Muhamad 2000). Sharia business institution is business act or activity which is done according to syaria principles, among other things; a. Sharia Bank; b. sharia insurance; c. sharia reinsurance d. reksadana sharia; e. sharia obligation and sharia mid-term valuable letter; f. sharia security; g. sharia funding; h. sharia pawnshop; i. pension fund of sharia financial institution; j. sharia business; and k. sharia micro financial institution.

² As a matter of fact, sharia business is not just related to business which has relationship to with, such as alcoholic matter, pornography, gambling, and other activities which are amoral and antisocial according to Islam. However, sharia business is shown to provide positive contribution towards achieving of society's better economic-social goals. Sharia business is executed to create the good business climate and free from fraud practice. Herwanan Kartajaya and Syakir Sula define that sharia business is well-mannered business, business which is full of togetherness and respect over the respective rights. See Muamalah Institut., *Bisnis Sharia Sebagai Tonggak Ekonomi Ala Muslim* (Muamalah Institut n.d.).

³ Liberal economy is economic theory clarified by classic economic inventors such as Adam Smith or French Physiocrats. The classic economic system has relationship to do with "natural (process) freedom" understood by economic figures as classic liberal economy. Even so, Smith never used the view, while policy concept from liberal (globalization) economy is the economic system leading to free market economic system with free commerce view in globalization era aiming to omit protectionism economic policy. See Jude Wanniski., *The Way the World Works*. (Wanniski 1998), and John Maynard Keynes, *A Treatise on Probability* (Keynes 1921).

⁴ Corporation is an organization becoming corporation and was formed based on law to execute such a business, so that it becomes corporation which is separated from individuals that own and administer it. *kamusbisnis.com/arti/korporasi/* retrieved on 24th September 2013.

⁵ Study about Islamic economy has existed for a long time. It is as old as Islam itself. The basis about sharia economy was mostly found in Islamic literature such as Al-Quran interpretation, Hadits rules, and the books of fiqh written by well-known Muslim intellectuals, among other things: Abu Yusuf, Abu Hanifah, Ibnu Khaldun, Ibnu Taimiyah and so on. Islam is as the religion

government from legislation⁶ aspect, growth or socialization and people's awareness concerning economic system instrument (monetary, fiscal, and real sector) began to act out in Indonesian economic activities. Now nearly all Islamic economic system instruments have obtained stable position in Indonesia such as: *reksadana*⁷ *sharia*, sharia banks, sharia money market⁸, and sharia fiduciary (Antonio, 2008).

Islam allows anyone to borrow from both individuals and financial institutions. One of the financial institutions is like LKS (sharia financial⁹ institution) both bank institution and non-bank. One of the sharia financial institution products is the funding¹⁰, where in Islamic law, creditor interest¹¹ is carefully paid attention in order not to be adverse. It is, therefore, allowed to demand an item from debtor¹² as his debt guarantee. In financial world, this guarantee item is usually known as collateral¹³ object or fiduciary item in sharia fiduciary.

embraced by majority of Indonesian population, it, of course, influences Indonesians' life style. The adherents' behavior does not escape from Islamic syariat. Thereby, the enforcement of religion syariat which is like laws constitutes one of parameters of someone's adherence in carrying out his religion. See Muchsin, SH, "*Masa Depan Hukum Islam di Indonesia*" (Muchsin 2004) page. 2. The term of sharia economy is just recognized in Indonesia; whereas, the term in other countries is known as Islamic economy (*Islamic economy, al-iqtishad al-Islami*) and it is called Islamic economic science (*Islamic economics' ilm ai-iqtishad al-Islami*).

⁶ Legislation has two different understandings; first, formation process of the state regulations, both in central level and in district level; second, all the state regulations are the result of forming the regulations, both in central level and in district level. See Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan Dasar-dasar Pembentukannya* (Soeprapto 1998, p.3).

⁷ Reksadana sharia has the understanding as reksadana the management and the investment policy of refer to Islamic syariat. For example, reksadana sharia is not invested to stocks or obligation from company the management or product of which goes against Islamic syariat. Besides conventional reksadana, there has emerged reksadana sharia. Reksadana sharia is reksadana which operates based on Islamic sharia determination and principle, both in the form of contract between investor as the owner of property (*sahib al maal/raab al mal*) and investment manager as representative of sahibul al mal, and between investment manager as the representative of sahibul mal and the use of investment. See Fatwa National Sharia Board No.20/DSN-MUI/IX/2000 About investment enforcement guide for Reksadana Sharia, *Himpunan Fatwa Dewan Sharia Nasional*, (DSN MUI 2003, p.121).

⁸ Sharia Money Market can generally be defined as Money Market in its operation applies sharia principles. And syariah principles in operation of Money Market are the principles based on Islamic tenets the determination of which is executed by DSN-MUI. See Fatwa of National Sharia Board No: 40/DSN-MUI/X/2003 About Money Market and General Guide of Sharia Principle Application in Money Market.

⁹ Sharia financial institution is a corporation or institution the wealth of which is based on sharia concepts, especially in both financial assets and non-financial assets or real assets. According to law about sharia banking in Indonesia, that sharia financial institution is corporation or institution the activity of which is to draw the fund from people and conduct it to sharia principle-based people. It is also stated that sharia financial institution is all corporations the activity of which in sharia financial field makes the fund collection and fund conduction to people, especially in funding construction investment. Sharia financial institution can be distinguished into two, namely; sharia depository financial institution which is called sharia financial institution, and non-depository sharia financial institution which is called non-bank sharia financial institution. The roles of two sayri'ah financial institutions are as financial media between the party who has excessive fund or surplus unit (*ultimate lenders*) and the party who has lack of fund or deficit unit (*ultimate borrowers*).

¹⁰ Article 1 : 25 No. 21, 2008 About sharia banking (Anon 2008);

Funding is fund supply or bill which is equalized with that is like:

- a. profit sharing transaction in the form of *mudharabah* and *musyarakah*;
- b. hiring transaction in the form of *ijarah* or hiring and purchasing in the form of *ijarah muntahiya bittamlik*;
- c. trade transaction in the form of *murabahah*, *salam*, and *istishna* debt¹;
- d. loan transaction in the form of *qardh* debt; and

e. service hiring transaction in the form of *ijarah* for multi-service based on contract or agreement between Sharia Bank and/or UUS (Sharia law) and other parties that oblige the funded parties and/or those who are given the fund facility to return the fund after certain term with *ujrah* reward, without reward, or profit sahring.

¹¹ Creditor is the party (individual, organization, company or government) that possesses the bill to other parties (the second party) over property or the service it gives (usually in the form of contract or agreement), where it is promised that the second party will bring back the property which has the same value or service. The second party is called borrower or debtor.

¹² Debtor is the party that owes another party, usually by receiving something from creditor who is promised by debtor to be re-paid in the future.

¹³ Article 1 : 26 No. 21, 2008 About Sharia Banking;

Agunan is additional guarantee, both in the form of movable goods and immovable ones which are given by *Agunan* owner to Sharia Bank and/or UUS to guarantee obligation payment of the Facility Receiver Customer.

This article will discuss: 1) finding out the fiduciary truth and methodology of sharia fiduciary validity; 2) finding out the causes of sharia fiduciary operational dualism on sharia pawnshop and sharia banking; 3) critic towards law No. 21 2008 and governmental regulations No. 51 2011 (Anon 2011); 4) finding out the people's interest towards sharia fiduciary product on sharia pawnshop and sharia banking.

B. METHODS

This research explores more about analytical descriptive empirical data and fiduciary fiqh becomes study object; therefore, this research focuses on empirical evidence of the sharia fiduciary law implementation on the qualitative sharia banking and pawnshop. Thus, the most appropriate approach is normative juridical approach.

Normative juridical approach¹⁴ is a law research method done by researching mere literature or secondary data (Soekanto & Mamudji, 2001). This research is done to identify concepts and bases as well as sharia principles, which are done to manage the sharia banking, especially *rahn* funding system. The method of thinking which is used is deductive method (the way of thinking in drawing conclusion which is drawn from something general which has been proven that it is true and the conclusion is shown for something particular) (Sedarmayanti & Hidayat, 2002).

C. DISCUSSION

Fiduciary,¹⁵ as one of the categories from debt contract, for reliability from creditor, debtor pawns his item as guarantee towards his debt. The guarantee item remains the possession of the person who pawns it, but the pawnbroker dominates it. Such practice has existed since Prophet Muhammad's age, and he even used to do it. As Rasulullah SAW said:

حَدَّثَنَا إِسْحَاقُ بْنُ إِبْرَاهِيمَ الْحَنْظَلِيُّ وَعَلِيُّ بْنُ خَشْرَمٍ قَالَا أَخْبَرَنَا عَيْسَى بْنُ يُونُسَ عَنِ الْأَعْمَشِ عَنْ إِبْرَاهِيمَ عَنِ الْأَسْوَدِ عَنْ عَائِشَةَ قَالَتْ اشْتَرَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مِنْ يَهُودِيٍّ طَعَامًا وَرَهْنَهُ دِرْعًا مِنْ حَدِيدٍ (رواه مسلم)

There had told to us Ishaq bin Ibrahim Al-Hanzhali and Ali bin Khasyram said: Both informed us Isa bin Yunus bin 'Amasy from Ibrahim from Aswad from 'Aisyah said: that Rasulullah SAW bought some food from a Jew by fiduciary his armor (Muslim Haidths). (Al-Naisaburi, 1993)

Operational mechanism of the sharia fiduciary can technically be done through the sharia banking and sharia pawnshops. The presence of the sharia banks and sharia pawnshops is as a sharia financial institution, among other things, it works to conduct the funding in the form of loan to the society that needs it based on sharia fiduciary in order to obtain positive welcome. In sharia fiduciary, the most important thing is to be able to provide the advantages in accordance with the

¹⁴ Regarding the term of normative law research, there is no similarity among law experts. Among the law experts' opinions, namely: Soerjono Soekanto & Sri Mamudji, cite the term of normative law research method or literature law research method (Soekanto & Mamudji 2001); Soetandyo Wignjosoebroto, cites the term of doctrinal law research method (Wignjosoebroto 2002); Sunaryati Hartono, cites the term of normative law research method (Hartono 1994); and Ronny Hanitijo Soemitro (Almarhum), cites the term of normative law research method doctrinal law research method (Soemitro 1994).

¹⁵ The basis of law concerning fiduciary is ruled from article 1150 to article 1160 KUHP. The understanding of fiduciary by article 1150 KUHP is the right which is obtained by debtor/creditor over some movable thing given to him by debtor/creditor or by someone else in the name of him and giving the authority to the debtor/creditor to take the payment from the thing earlier than other debtors/creditors, on one condition, the cost to auction the thing and the cost that has been spent to save it after the thing was pawned, which cost should be spent in advance.

people's hope and stay away from practicing *riba* (usury), *qimar* (speculation), or *gharar* (not transparent) that results from injustice and evil to the society and customers.

Sharia fiduciary in its operation can be used as social function¹⁶ (consumptive), which is urgent apart from commercial function (productive). However, in its implementation level, there is sharia fiduciary indication which is still dominated by productive commercial function although when thinking over the background of this fiduciary scheme both implicitly and explicitly sides with and refers to the social function interest (daily needs).

Islam views that humans are as individuals having primary life need such as foods, clothing, and housings that must be fulfilled and cannot be postponed. The fiduciary has been done since Rasulullah PBUH's time, as we can see in the *h*Hadith narrated by Bukhori:

حَدَّثَنَا مُعَلَّى بْنُ أَسَدٍ، حَدَّثَنَا عَبْدُ الْوَّاحِدِ، حَدَّثَنَا الْأَعْمَشُ، قَالَ: ذَكَرْنَا عِنْدَ إِبْرَاهِيمَ الرَّهْنِ فِي السَّلْمِ، فَقَالَ: حَدَّثَنِي الْأَسْوَدُ، عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، " أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اشْتَرَى طَعَامًا مِنْ يَهُودِيٍّ إِلَى أَجَلٍ، وَرَهْنَهُ دِرْعًا مِنْ حَدِيدٍ (رواه البخاري) "

There had told us Mu'ala bin Asad, had told us 'Abdul Karim, had told us Al-A'masy, he said: there hasd told us beside Ibrahim concerning al-rahn in al-salam, so he said; there had told me Al-Asad, from 'Aisyah ra: in fact, prophet Muhammada SAW had bought some food from a Jew with no cash and pawned his armor" (*Hadith* of Bukhori). (Al-Bukhari, n.d.)

Likewise about the *hadith* which was narrated by Ibnu Majah, can be seen that the fiduciary had been done since Rasulullah PBUH's time,

حَدَّثَنَا نَصْرُ بْنُ عَلِيٍّ الْجَهْزَمِيُّ حَدَّثَنِي أَبِي حَدَّثَنَا هِشَامٌ عَنْ قَتَادَةَ عَنْ أَنَسٍ قَالَ لَقَدْ رَهَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ دِرْعَهُ عِنْدَ يَهُودِيٍّ بِالْمَدِينَةِ فَأَخَذَ لِأَهْلِهِ مِنْهُ شَعِيرًا (رواه ابن ماجه)

"There had told us Nashr bin Ali Al-Jahdami, my father had told me, told us Hisyam bin Qatadah from Anas said: 'in fact, Rasulullah SAW pawned his armor to a Jew in Madinah and exchanged it for wheat for his family (*Hadith* of Ibnu Majah)". (Al-Qazwiny, 1995)

Based on the *hadith* above, we can see the consumptive social function; it means that the sharia fiduciary is basically for urgent interest, like daily life needs (consumption, education and health) which are needed so much by middle and lower class. The sharia fiduciary is not for productive commercial business. This is relative for people in the middle and upper class.

¹⁶ Article 2, article 3, and article 4 verses (1), (2), (3) and (4) law No. 21 Year 2008 about Sharia Banking;

Article 2;

Sharia Banking in doing its business activities is base don sharia principles, economic democracy, and careful principles.

Article 3;

Sharia Banking aims to support the national construction enforcement in improving the justice, togetherness, and people's welfare generalization.

Article 4;

Sharia Bank and UUS obligate to execute the function of collecting and conducting people's fund.

Sharia Bank and UUS can execute social function in the form of *baitul mal* institution, that is to receive the fund deriving from tithe, donation, alms, grant or another social fund and give it to tithe management organization.

Sharia Bank and UUS can collect the social fund deriving from wakaf and give it to wakaf administrator (*nazhir*) in accordance with the wakaf giver's wish (*wakif*).

The social function enforcement as cited in the verses (2) and (3) in accordance with the decision of legislation regulation.

Operational mechanism of the sharia fiduciary tends to side with the interest of the middle and upper class¹⁷. Sharia banks will receive the fiduciary if the guarantee item is like gold and something like that (diamond), which enables the people in the lower economic class cannot afford to have it. So it needs making clear, what fiduciary item which can be a guarantee in Islamic law. In keeping with the Islamic economic concept, all items whether they are movable or immovable that have economic values can be guarantee items when making agreement of *rahn*. Unlike other products in sharia banks, BPRS (Bank of Sharia People Funding) or BMT (*Bait al-Maal wa al-Tamwil*)¹⁸, so the existence of sharia fiduciary is still limited, so that if the sharia fiduciary in its operation still works in such model, then it is in fact that sharia fiduciary as though it swerved from the purpose that it operates.

The sharia fiduciary tries to eliminate usurers, loan shark, illegal fiduciary where their ability to see the needs is weak to gain the quick fund and without guarantee. In spite of being charged from interest, it is sometimes beyond the clear reasoning, whose difficulty possibility of the return will run smoothly, all that is far from sharia principles. Therefore, it is probably not a mistake when people come back to usurers, *pengijon* and the illegal fiduciary. If sharia fiduciary has not yet been able to cover people's necessities in the lower economic social class, then what gives the decision is only gold and something like that which can be the fiduciary item.

Fiduciary transaction in Islamic law is known as *al-rahn*. From term side, fiduciary (*al-rahn*) is a kind of contract or *akad* of borrowing by giving an item as debt guarantee (Syafei, 1995). The fiduciary practice in Islamic law is justified according to sharia decisions as Rasulullah PBUH used to do an item fiduciary transaction (*armor*) to a Jew. The explanation in the story gives an illustration that fiduciary practice is allowed in Islam.

Fiduciary in its practice demonstrates several things which are viewed to point to usurer matter, prohibited by *syara'* (canon law). All that happens when in the fiduciary found that a borrower must give some extra money or certain percentage from the main loan. Therefore, the fiduciary contract

¹⁷ It is marked with the used item (guaranteed) just for gold.

¹⁸ *Baitul maal wattamwil* (BMT) consists of two terms, namely: *baitul maal* and *baitut tamwil*. *Baitul maal* refer more to non-profit collection businesses and fund conduction such as, tithe, donation, and alms; whereas, *baitut tamwil* as commercial collection business and fund conduction. The businesses become part which is not separated from BMT as supporter institution for small society's economic activity based on sharia. Institutionally, BMT is accompanied or supported by PINBUK (Incubation Center for Small Business). PINBUK is as primer institution, for it executes the more expansive mission; that is to incubate the small business. In its practice, PINBUK incubates BMT, and in turn, BMT incubates the small business. The existence of BMT is representation of society life where BMT is, by this way BMT can accommodate society's economic interest. See *Islam dan Transformasi Sosial-Ekonomi* (Rahardjo 1999) h. 431. Definitely, the understanding of BMT is the integrated independent corporation in which there to be the concept of *batul maal wat tamwil*. BMT activity is to develop the productive businesses investment in improving the quality of economic activity for micro and macro entrepreneurs, among other things; to motivate the activity of saving and the funding for its economic activities. While the activity of *baitul maal* receives deposit of BAZIS from the fund of tithe, donation and alms and executes it in keeping with its rules and mandate. In operational definition, PINBUK BMT is the economic company for small folk with members of people or corporation based on sharia and corporative principles. BMT is expected to become the economic activity supporter institution for lower and small society based on sharia system.

By referring to the understanding, BMT constitutes the economic institution for small folk among to improve and develop the economic activities for the qualified micro and macro entrepreneurs by motivating the saving activity and supporting its economic activities.

In enforcing its activities, BMT has the bases and anvils, visions, missions, functions, and principles as well as typical features possessed by BMT as a non-bank sharia financial institution which has legality and corporation. BMT was gradually founded started from KSM (Society Self-supporting Group), and if it has qualified for members and administrators, it can be increased to become cooperative corporate institution. Next, if it has qualified for assets with certain amount, BMT must prepare administration process to become a good company, administered by sharia rules, featuring Islamic ethics and behavior.

in Islam does not allow to practice taking interest. Islam allows taking service cost (*ujrah*)¹⁹ as acceptance and profit. The service cost can at least cover the whole cost which is spent in its operation (Rais, 2006).

The interest system is the system used by banks and conventional pawnshops. In Indonesia, it is the only system becoming the basis of the banking business activities and taking place until 1992 or until law No. 7 1992 about the banking is decided. Law mentions two choices in returning the credit; with interest or reward of profit sharing (Anon, 1992). The business activity according to governmental regulations No. 51 2011 concerning PERUM, the pawnshop becomes a company.

The governmental regulation No. 51 2011 explains that in order to do the business in the pawning and fiduciary, we can apply conventional or sharia system and other services in financial field in accordance with the decisions of legislation regulations, especially for people in the middle and lower class, micro business, little business, and middle business as well as optimalization of utilizing company resource by applying Ltd principles (Anon, 2011). Interest is typical feature from conventional banking and pawnshop based on capitalistic economic system and viewed as the key to success of the banking and pawnshop business. Even so this system is always highlighted and inquired about its merits, since the phenomena showed a number of financial institutions went through decline, even bankruptcy.

There is another thing in sharia fiduciary operation, namely it does not apply the interest system, but uses *ijarah* contract. *Al-ijarah* is a copyright transfer contract over the item and service through rent payment, without followed by ownership transfer over the item itself²⁰ (Antonio, 2008). Fatwa MUI No. 25/DSN-MUI/III/2002 concerning the rahn explains that *marhun* maintenance may not be determined based on the number of loan, but from marhun estimation and as clarified above, the number of the available cost accords with the agreement of the both parties (MUI (Indonesian Council of Religious Scholars), 2002).

Fiduciary has become the habit and the law; however, how can the fiduciary be in accordance with syari'at of course it must accord with fiduciary genealogy, fiduciary construction in sharia economic law, fiduciary regulations, and fiduciary anatomy in theory as well as practice.

Implementation of fiduciary product which is developed in sharia banks, there is golden *rahn* product at this moment. Although this gold *rahn* product has been adopted to be one of sharia banking products, the characteristic is just oriented to complement product, namely as additional contract, for example as guarantee or *agunan* of *al-murâbahat*²⁰ and *al-mudhârabat* funding product²¹.

Thereby, when the gold *rahn* product becomes a special product in banking sectors, it seems to be not yet effective and optimal²², because in sharia banking, the fiduciary product is just limited to

¹⁹ *Nominan ujarah* is usually determined based on calculation and estimation over *mahrum* which has been done by appraiser.

²⁰ *Murabahah* is the funding service in the form of trade transaction by installment. All the item prices are paid by customers in installment. Possession of the asset is proportionally transferred to customers in accordance with the paid installment. Thereby, the purchased item functions as *agunan* (additional guarantee) until Paid. See: *Perbankan Islam dan Keduakannya dalam Tata Hukum Perbankan Indonesia* (Sjahdeini 1999, pp.64–65).

²¹ *Mudharabah* is a funding transaction based on sharia, as well as used as Islamic banking funding transaction, which is done by the parties based on trust. See : *Islamic Versus Traditional Banking, Financial Innovation in Egyft* (Kazarian 1999, p.27).

²² At first around 2000, sharia fiduciary product was promoted by BMI (Indonesian Muamalat Bank), but it got lack of attention from people as its funding facility was less optimal, like lack of appraiser resources, the equipment for estimating and

the golden *rahn*²³ so that this product cannot yet afford to give the adequate contribution. Banks only obtain the benefits from administration cost and depositing service, as well as the guarantee item maintenance the value of which is limited. In modern perspective, the emergence of fiduciary becoming one of sharia banking products according to some people becomes ironical because it is worried to clash with sharia pawnshops (Mulazid, 2012). Incorporating the gold *rahn* product in sharia banking is oftentimes trapped between the both rules which competes each other between sharia banking and pawnshop.

Paying attention to operational phenomena of the sharia fiduciary above; attracts Muslim economists' attention to offer the banking and pawnshop alternative system which is free from interest; that is sharia fiduciary system. This offered system is dug from the values of Islamic tenets, especially Islamic law. It differs from interest system, since sharia fiduciary system covers justice norms, balance, sides with the poor, and rules out the economic monopoly. It is not always money-oriented; however, there are *ibadat* elements towards Allah SWT. Even so claim of interest system does not provide the justice, and sharia fiduciary system provides more justice for people who do the economic transaction and needs evidence supported by scientific data.

The launching of sharia fiduciary product on the sharia banking and the availability of sharia fiduciary business unit on the pawnshop prior to the availability of sharia fiduciary law constitutes something unique.

Featuring the sharia fiduciary product instead of deciding its rules is believed to be the existence of something urgent. The thing is like background motivating strongly so that the fiduciary without interest is immediately realized, while its rules follow later. Therefore, the background needs analyzing, both in theological-philosophical, sociological-anthropological and political way.

Although Indonesia is not an Islam-based country, but the country the population of which embraces Islam; therefore, according to version of Islamic Conference Organization (OKI), Indonesia is an Islamic country (Hakim, 2010). According to kredo theory²⁴, that every religious adherent is bound to obey and be subject to the religious law which he or she adheres. Thereby, Indonesian Muslim people have freedom to execute Islamic norms, including the rules of sharia fiduciary (Hakim, 2010). Even the 1945 constitution article 29 verse 2 guarantees the independence of each population to embrace religion and worship in accordance with the religious rules which he or she adheres.

storeroom for guarantee items. Hence, on Mei 14, 2002 BMI officially cooperated with Pawnshop Public Company when founding Syaria'ah pawnshop. The establishment of Sharia Pawnshop was based on *al-Musyarakah* agreement (profit sharing system). See: *Pegadaian Sharia: Konsep dan Sistem Operasional (Suatu Kajian Kontemporer)*, (Rais 2006, p.3).

²³ The law basis to allow golden *rahn* product in sharia banking accords with fatwa DSN No. 26/DSN-MUI/III/2002 tentang *rahn* Emas. See: *Himpunan Fatwa* (MUI (Indonesian Council of Religious Scholars) 2002, p.20).

²⁴ The Creed Theory can also be called *syahadat*. It is continuation from *tauhid* principle in Islamic law philosophy. This principle teaches people in order that the people who have stated that they are the faithful towards oneness of Allah must be subject to the rules which have been determined by him. Kredo theory is the same as the law authority theory which was thought up by H.R. Gibb who explained that Islamic people who have accepted Islam as their religion means that they have accepted Islamic law authority over themselves. This theory is close to Abu Hanifah's territorial theory and non-territorial theory of al-Syafi'i. According to the territorial theory, a Muslim is bound to enforce the Islamic law as long as he is in a territory which applies the Islamic law. Non-territorial theory says that a Muslim is bound to enforce the Islamic law wherever he is. See *Filsafat Hukum Islam* (Praja 1995) page. 133-134. Kredo theory is also similar to theocracy theory (*theocratische theorien*). This theory is based on the Islamic law application over God's will. See, *Pengantar dalam Hukum Indonesia* (Utrecht 1959) page. 77. For Islamic people, the God is Allah SWT whose *iradah* (will) is in Al-Quran.

Transaction law of the sharia fiduciary has close relationship with the way people understand some law. Islamic law is not only understood as living norms and maintained in various dimensions of society life, but it also becomes the tool to control the society. It is based on the rules of *fiqih* which sounds:

تَغْيِيرُ الْفَتْوَى وَ اخْتِلَافُهَا بِحَسَبِ تَغْيِيرِ الْأَزْمَنَةِ وَالْأَمْكِنَةِ وَالْأَحْوَالِ وَالنِّيَّاتِ وَالْعَوَائِدِ

Fatwa (law) can change due to the change of age, place, circumstance and custom (*'urf*). (Al-Jauziyah, 1977; Al-Qardawi, 1985) This theory of Islamic law change is relevant to the theory of law change, that the good law is the law, which is made in accordance with the situation and condition of society for social change purpose (law as a toll of social engineering)²⁵.

D. CONCLUSION

1. Fiduciary truth (*rahn*) in Islamic law (*syara'*) is making an item, which has the value of property in the view of *syara* as debt guarantee, which enables to take the whole or part of the debt from the item. The method of *istinbath al-hukmi* has relationship to do with the fiduciary done by the fiduciary institution by using *qiyas*, namely; al-Ashlu (fiduciary is in Al-Baqarah 283 as well as in *Hadith*), al-Far'u (fiduciary is done by sharia pawnshop institutions and sharia banking), *hukum Ashal* (fiduciary origin law can be done in the trip), and *illat (matsaqah dan lahû qîmatun)*.
2. The emergence of dualism of sharia fiduciary institution on the sharia pawnshop and sharia banking is caused by fatwa of National Sharia Board MUI (Indonesian Council of Religious Scholars) No: 25/DSN-MUI/III/2002, regarding *Rahn* and fatwa of National Sharia Board MUI No: 26/DSN-MUI/II/2002, regarding golden *rahn* where sharia financial institution can give off the product which accords with sharia principles.
3. Critic to the law No. 21 2008 and Governmental Regulations No. 51 2011 concerning the pawnshop Public Corporation Reshuffle becoming the company is not directly explained; however, it has similarity and explanation about a product on the sharia banking and sharia pawnshop that must accord with the sharia principles.
4. People's interest towards sharia fiduciary product if viewed from its fiduciary object like gold and other kinds of gold tends more to the sharia banks. It is because the number of the sharia banks is more than the sharia pawnshops; whereas, if viewed from fiduciary object besides gold and other kinds of gold, it will tend to the sharia pawnshops. It is because the sharia banks do not accept the fiduciary except gold.
5. Contribution of Islamic law towards rule unification and fiduciary institutions has existed in Indonesia. It is related to the addition of *Ijarah* contract in gaining the benefits or income for fiduciary administrators.

Likewise the writer's finding with the existence of fiduciary institutional dualism and the law practically has negative and positive values. For the positive value, people have two choices, while for the negative value, Islam generates two institutions in fighting over sharia fiduciary customers. Therefore, it needs to have legislation synergy about its fiduciary and institution which is more beneficial for customers and pawnshop institutions. Since holder of *hakkullah* (sovereignty on earth) is the country that must cooperate with people's representatives in order to achieve the country's aim; that is to maintain religions and world.

²⁵ This law theory was adopted from the social change theory put forward by Rosque Pound. See *Filsafat Hukum Madzhab dan Refleksinya* (Rasjidi & Sidarta 1993) p. 13.

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