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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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The 5th PROCEEDING

“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

The 5th International Conference and Call for Paper Faculty of Law 2019 Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

| | |
|---|------------|
| <i>FRONT PAGE</i> | <i>I</i> |
| <i>Information of The International Seminar</i> | <i>III</i> |
| <i>Committee Composition</i> | <i>IV</i> |
| <i>PREFACE</i> | <i>V</i> |
| Fulfillment Of Teacher Protection Rights | |
| <i>Yenny AS, Rini Setiawati</i> | <i>1</i> |
| Legal Reconstruction Of Laws Regarding Human Rights Through Judicial Review To The Constitutional Court | |
| <i>Umar Ma'ruf</i> | <i>13</i> |
| Legal Analysis Of Social Security Transformation And The Reality Of Its Implementation In The Community In Indonesia | |
| <i>Siti Ummu Adillah, I Gusti Ayu Ketut Rachmi Handayani ,Adi Sulistiyono</i> | <i>29</i> |
| Increasing Voluntary Compliance Of Tax Payments In Micro Small And Medium Enterprises (Msmes) Post-Issuance Of Government Regulation Number 23 Of 2018 (Case Study In Semarang City) | |
| <i>Amin Purnawan, Akhmad Khisni, Aryani Witasari</i> | <i>40</i> |
| Legal Analysis Of Racist Exams In Surabaya Papua Dormitory | |
| <i>Ma'aruf Akib</i> | <i>49</i> |
| Reconstruction Of Misdemeanor Settlement Based On Pancasila Value | |
| <i>S. Andi Sutrasno</i> | <i>56</i> |
| Urgency Of Legal Assistance For Poor People As A Request Of Human Rights | |
| <i>Adhi Budi Susilo, Indra Yuliawan</i> | <i>62</i> |
| Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice | |
| <i>Rahmatsyah</i> | <i>66</i> |
| Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice | |
| <i>Widayati , Winanto</i> | <i>72</i> |

| | |
|--|-----|
| Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methodsbased On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Soponyono, Nuridin.....</i> | 81 |
| Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice <i>Carto Nuryanto, Gunarto, Anis Mashdurohatun.....</i> | 91 |
| Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP) <i>muhamad Iqbal al Hakiem,aryani witasari.....</i> | 96 |
| Reconstruction Completion Of The Crime Of Light On Value Pancasila <i>Andi S. Sutrasno.....</i> | 102 |
| Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value <i>Wieke Dewi Suryandari ; Gunarto; Amin Purnawan.....</i> | 108 |
| Reconstruction Of Transport Regulatory On Marine Toll To Support Sea Connectivity Based On Pancasila Justice <i>Hartanto, Gunarto, Anis Mashdurohatun.....</i> | 114 |
| Reconstruction Of Scientific Investigation In Indonesia Based On Justice <i>Teguh Prihmono; Gunarto, Sri Endah Wahyuningsih.....</i> | 120 |
| Legal Construction On Training Ship Management Belongs To Human Resources Development Of Transportation (Bpsdmp) Based On Dignity Justice Value <i>Wahyu Wibisono, Gunarto, Anis Mashdurohatun.....</i> | 126 |
| Protection Of Law Refugees/Asylum Seekers In Indonesia (As A Transit State) No Ratify 1951 Convention Of And The 1967 Protocol <i>Muhammad Djamir.....</i> | 133 |
| Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children) <i>Cucuk Kristiono, Gunarto, Anis Mashdurohatun; Suparji.....</i> | 144 |
| Legal Protection Against Indonesian Workers (Tki) In Abroad <i>Yaya Kareng (Sripatum UniversityOng Argo Victoria ,Sri Yulianingsih.....</i> | 149 |
| Reconstruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice <i>Moh Djarkasih**.....</i> | 158 |

| | |
|---|-----|
| Reconstruction Policy Of Sanctions Against Destruction Of Evidence Illegal Fishing Based Small Fishing Welfare Values <i>R. Juli Moertiyono</i> | 165 |
| Reconstruction Of Legal Policy Interfaith Marriage In Indonesia <i>Moh. Zeinudin, Dian Novita</i> | 179 |
| Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia <i>Nana Ruhyana</i> | 186 |
| Legal Protection Against Disability In Getting Work <i>Oktavianto Setyo Nugroho</i> | 193 |
| Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice <i>Agus Sugiarto</i> | 203 |
| Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws <i>Yanto Irianto</i> | 208 |
| Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice <i>Asep Hermawan</i> | 220 |
| Reconstruction Of Performance Assessment Of Drinking Water Companies (Pdam) Based On Consumer Protection <i>Bustaman</i> | 225 |
| Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt <i>Euislistianti</i> | 229 |
| Reconstruction Of Operational System As A Community Economic System Based On Welfare <i>Abbas Ibrahim Idris</i> | 234 |
| Reconstruction Of Criminal Responsibility For Actors Prostitutorial Criminal Justice In The Criminal Justice Based On Value <i>Iwan Rasiwan</i> | 242 |
| Reconstruction Of Legal Drinking Water Management Company (Pdam) Based On Justice <i>Suharyadi</i> | 248 |

Reconstruction Of Private Criminal System Implementation In The Commitment Values In Indonesia Justice

Sumanto 252

Reconstruction Of Justice Law Protection Law Protection

Wamyani 260

Criminal Code Draft Law And Development In Indonesia

Nany Pujianti Suwigjo 265

Deconstruction of the Principle of Legal Thinking

Sriyati 270

Development Of The Law Of Complete Systematic Land Registration (Ptl) And Effect Of Conduct Values of Land Based On Dignify Justice In The District Of Kendal, Central Java

Desy Dwi Nurhayati Hartanti 279

Interpretation Teaching Of Human Rights Laws Against Material In Corruption Provisions

Burham Pranawa, Hartiwiningsih, Hari Purwadi 293

Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice

Rahmatsyah 301

Law Due To Delay The Registration Under Fiduciary Guarantee Pmk No 130 / Pmk.010 / 2012

Jaenudin Umar 307

The Effectiveness Of The Handling Of The Criminal Acts Of Light Tend To Be Settled Judicial Custom

Supena Diansah 313

Urgency Of Legal Assistance For Poor People As A Request Of Human Rights

Adhi Budi Susilo, Indra Yuliawan 327

Independence Institute Of Justice And Judge In Perspective Judicial Reform Blueprint 2010 - 2035

Ahmad Agus Bahauddin 331

Policies Against Crime Criminal Law Made By Children

Achmad Arifulloh 340

Law Enforcement Of Law Number 23 Of 2004 In Preventing Efforts Human Rights Violations In Indonesia

Andri Winjaya Laksana , Lathifah Hanim 350

Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value

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ABSTRACT

Fiduciary term that has long been known in the Indonesian language. Similarly, the term is used in Act No. 42 of 1999 regarding Fiduciary. In the terminology of the Dutch term is often referred to in full, namely Fiduciare Eigendom Overdracht (FEO), namely the delivery of property rights in the trust. While the English term is called Fiduciary Transfer of Ownership. Background onset of fiduciary institutions, as set out by the experts is because the statutory provisions governing the institution pawn contains many flaws, does not meet based on developments in its history. Fiduciary originated from an agreement that only is based on trust. But over time in practice the necessary legal certainty to protect the interests of the parties and the needs of society.

Keywords: Fiduciary; Notary Public; Justice value.

A. INTRODUCTION

Fiduciary is security interests in the moving objects both tangible and non movable⁹⁷ and immovable in particular building can not be encumbered as to which referred to in Act No. 4 of 1996 on Mortgage which remain in control of the Giver Fiduciary (debtors), as collateral for the repayment of certain amount of money, which gives the position preferred to fiduciary recipient (creditor) against another creditors. Fiduciary obligation accounts payable treaty creditor to the debtor that involves underwriting. The collateral position still in control of the owner of the guarantee. But in order to ensure legal certainty for creditors then made a deed made by the notary

and registered with the Registry Office fiduciary. Later creditor will obtain a certificate of fiduciary titled, "Based On Justice Based on God". From the definition given clear to us that the fiduciary is distinguished from Fiduciary, where the fiduciary is a process of transferring titles and Fiduciary is the guarantee provided in the form of a fiduciary⁹⁸.

Before exiting the Act 42 of 1999 which became the object of fiduciary assurance is moving objects comprising objects in the inventory, merchandise items, accounts receivable, machinery equipment and vehicles with the issuance of Act No. 42 of 1999 objects fiduciary mak given broader sense. Definition of Fiduciary accordance with Act No. 42 of 1999 on Fiduciary⁹⁹ is:

1. The transfer of ownership of an object

⁹⁵ Professor in law and the Promoter, Sultan Agung Islamic University in Semarang.

⁹⁶ Co-Promoter, Sultan Agung Islamic University in Semarang.

⁹⁷ Badruzaman. Mariam Darus. 1996. *Kitab Undang-Undang Hukum Perdata Buku III, Tentang Hukinit Perikatan Dengan Penjelasannya*. Alumni, Bandung, p. 36

⁹⁸ *Ibid.*

⁹⁹ Sjahdeini. Sutan Remy, 1993, *Kebebasan Berkontrak dan Perlindungan Yang Seimbang Bagi Para Pihak Dalam Perjanjian di Indonesia*, Institut Bankir Indonesia, Jakarta, p. 98

on the basis of trust with the provision that the object of the transferred ownership rights remain in the control of the owner of the object.

2. Fiduciary is the right collateral to the moving objects both tangible and intangible and immovable in particular building can not be burdened with security rights as stipulated in Act No. 4 of 1996 on Mortgage which remain in control of the Giver Fiduciary, as collateral for the repayment of certain debt, which gives precedence to the Receiver position Fiduciary against other creditors.

In a fiduciary guarantee registration there is a necessity to include objects that become the object of fiduciary. This is very important because it is exactly what objects can be sold for debt payments fiduciary. Object collateral should be understood as the right fiduciary is the right material attached to the object of fiduciary and will keep abreast of any object in the hands of the object is (*droit de suite*) for the fiduciary has not waived / strikethrough. Thus, bond guarantees and promises of fiduciary be registered and could therefore be the recipient of fiduciary, while legal protection against fiduciary recipient is given through a fiduciary obligation according bind third parties.¹⁰⁰ In an underwriting agreement, usually is between creditors and debtors agreed certain promises, which are generally intended to give a strong position for the creditors and will be registered after intended to also bind third parties. Therefore it can be interpreted herein that includes registration, both registration and bond collateral objects, then all the promises contained in the deed of fiduciary (which in Article 13 paragraph (2) b is recorded in the book list Fiduciary Registration Office) and binding third party¹⁰¹.

Weakness action practical applica-

tion of the fiduciary agreement in the field, including but not registration, with the object of fiduciary (only stop the manufacture of authentic deeds), for negotiations that provide additional costs for the recipient of fiduciary at the time of executing the object jamainan fiduciary, so the certificate of fiduciary does not provide legal education in community. Not surprisingly, due to such a peaceful practice, cases of slow and difficult execution of fiduciary become a problem, in prasurey writers do, eg in some Rural Bank fiduciary agreement is not effective because of difficult implementation of an execution paradigm.

B. RESEARCH METHODS

Research methods used is juridical-empirical approach. Juridical approach used to analyze various regulations and legislation governing the fiduciary agreement and fiduciary. While the empirical approach used to analyze the law not merely as a set of rules of law that are normative, but the law is seen as society implicated character and patterned in public life¹⁰².

C. RESULTS AND DISCUSSION

1. Fiduciary

According to Dr. A. Hamsah and Senjun Manulang, Fiduciary is: A way of transfer of property rights of the owner (the Borrower) based on their agreement in principal (loan agreement receivables) to creditors, but submitted only right course in Juridical Levering and solely owned by the creditor trust only (as collateral for the debtor) while the goods are still controlled by the debtor but not anymore as *eigenaar* (owner) and *beziter* (master) but only as Detentor or Holder and on behalf of the creditor *eigenaar*.

Some of the main principles and the fiduciary is as follows ¹⁰³:

¹⁰⁰ Sutopo. H.B. 1998. *Metodologi Penelitian Hukum Kualitatif Bagian II*, UNS Press, Surakarta, p. 247

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Op.cit.*, p. 76

- a. That in real terms, the fiduciary holder works only guarantee holder only, not as the owner of the truth.
- b. Fiduciary rights holders to execute a new guarantee product exists if there is a default of the debtor
- c. If the debt is paid, then the object fiduciary must be returned to the giver fiduciary.
- d. If the proceeds of sale (execution) fiduciary goods exceeds the amount of the debt, the remainder of the proceeds shall be returned to the giver fiduciary.

When examined above legal construction is the hallmark of a fiduciary agreement, that is the essence of a fiduciary agreement is an agreement of an object (material), title transfer of rights as a condition for agreement details at once to translate their legal guarantees. In a fiduciary agreement, the authority of the master objects, which referred to the delegation of authority to control objects assurance, but this needs to be underlined the authority of mastering not be the same as the will of the master, because the will to master a part which is prohibited in the fiduciary agreement, delegation of authority over a part of responsibility given to the recipient of fiduciary fiduciary giver to complete the loan by selling the collateral object, surrender is more symbolic as handover constitutum possessorium for moving tangible objects, or by cessie for accounts payable.

Against handover constitutum possessorium, note that known some form of handover is not real, that is¹⁰⁴ :

- a. *Traditio Brevi Manu*, a form submission where the goods are to be delivered because of something that is already in the possession of the parties will accept delivery, such as delivery of the lease-purchase. Tenant-purchase for the lease-purchase it already controlled

goods while the ownership remains in the seller, if the price of leasing, it was paid the then party seller delivers (*in traditio brevi manu*) goods to tenant-purchase and later became his

- b. *Longa traditio Manu*, a form submission where the goods are to be delivered in the possession of third parties.

For example, a buy a car from B on the condition that his car had turned over a week after the contract of sale was made. Before the one-week period had passed A sell more cars to C was B was told by a car that was later handed over to C only. Form of buying and selling these have been wont to do. for businesses, will be established fiduciary guarantee agreement.

Although the practice of a fiduciary is not new in Indonesia, but the provisions of the new laws being in 1999 with nnya UUJF on September 30, 1999 and on that day was also enacted in the state number 168. aran Lemb UUJF not appear out of nowhere, but is a reaction on the needs and the implementation of the fiduciary practices that had been running, then it would be easier for us to understand the provisions UUJF, if we understand the practice and practical problems which have ada¹⁰. The reaction is one of them is the slowing down of the economy at the time, where the need for high capital not dimbangi by providing sufficient capital, so in order to capital efficiency then the loan is only limited to the purchase of the means of production that does not exist, while the means existing production no longer need to be refurbished but still used at once as part of the collateral for the loan debt for a business, the concept is a reaction to the inefficiency of the security agreement a pledge that has been known in practice, where the object guarantee must be in possession perierima pledge, thereby inhibiting conditions for the business world, then dibentulah fiduciary agreement. Article 1 of Law fiduciary provide

¹⁰⁴ Mr. W.M. Klyn. *Ikhtisar Hukum Benda Belanda .Suatu Karangan dalam Compedum Hukum Belanda's--Graavenhage*. Yayasan Kerjasama Ilmu Hukum Indonesia-Belanda. 1978, p.31.

limits and understanding the following¹⁰⁵:

2. Fiduciary Procedures Based on Indonesian Government Regulation (PP) No. 21 of 2015

In Article 2 of the Indonesian Government Regulation No. 21 of 2015 About Registration Procedures And Cost Manufacture Fiduciary Fiduciary Deed states that “Fiduciary registration application, the application for a certificate improvements Fiduciary, request changes Fiduciary certificates and certificate takedown notice Fiduciary submitted by the Recipient Fiduciary, power of attorney or his deputy to the Minister”¹⁰⁶.

In this case the format of the petition must contain the elements as defined by the PP, the elements that should be included among others¹⁰⁷:

- a. The identity of the giver and the recipient of fiduciary Fiduciary;
- b. Date, Fiduciary deed number, the name and domicile of the notary who made the deed Fiduciary;
- c. Data principal agreement which guaranteed the fiduciary;
- d. A description of the object which is the object Fiduciary;
- e. The value of the guarantee; and
- f. Value objects into an object Fiduciary.

The petition shall be filed after 30 (thirty) days from the making of fiduciary warranty deed. If it fulfills the conditions, then the applicant would obtain evidence which contains elements signup¹⁰⁸:

- a. Registration number;

- b. Date of filling the application;
- c. Applicant’s name;
- d. Fiduciary registration office name;
- e. The type of application; and
- f. Fiduciary registration fee.

The petition will be recorded electronically after the applicant completed the administrative costs of registration. Fiduciary shall be deemed to have been born at the time of recording by the electronic media. If it has been recorded, then the applicant can print it online and be used as evidence that the Fiduciary has been registered.

Tekait at a cost of Creation Deed of Fiduciary as defined in Article 18 of the Indonesian Government Regulation No. 21 of 2015 About Registration Procedures Fiduciary And Cost Creation Deed of Fiduciary explained that the creation deed Fiduciary charged the amount determined by the value of the guarantee, with provisions following¹⁰⁹:

- a. Guarantee amount up to USD 100,000,000.00 (one hundred million), the cost of making the deed at most 2.5% (two point five percent);
- b. Guarantee amount over USD 100,000,000.00 (one hundred million rupiah) up to 1,000,000,000.00, (one billion rupiah), the cost of making the deed at most 1.5% (one point five percent); and
- c. Guarantee amount over USD 1,000,000,000.00 (one billion rupiah), the cost of making a notary deed by agreement between the parties, but not to exceed 1% (one percent) of the object that created the act.

¹⁰⁵ BP.Cipta Jaya. Peraturan Pelaksana Undang-Undang Jaminan Fidusia Tahun 2000, p. 84-85

¹⁰⁶ Satrio J., *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, PT. Citra Aditya Bakti, Bandung 2002, p. 76

¹⁰⁷ Tunggal. Amin Widjaya dan Arif Djohan Tunggal. 1994, *Aspek Yuridis dalam Leasing*, Rineka Cipta, Bandung, p. 25

¹⁰⁸ Widjaya, Gunawan dan Ahmad Yani, 2000, *Seri Hukum Bisnis: Jaminan Fidusia*. Rajawali Pers, Jakarta, p. 90

¹⁰⁹ *Ibid.*

3.Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value

Article 372 of the Criminal Code emphasizes: Whoever intentionally and unlawfully possession of something that is wholly or partly belonged to someone else, but it is in his power not because of crimes punishable as fraud, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah.

By creditors, but this could be a blunder because it can each report since most of the goods become the property were both debtors and creditors, it takes civil decisions by local courts to mendudukan portion of each owner of the item for both sides. If it is taken there will be a long legal process, laborious and not cost you a bit. Consequently, the company's margins to be achieved is not realized even possible loss, including loss of time and thought.

These financial institutions that do not register themselves fiduciary actual loss because they have no legal right to eksekutorial. Poblembusinesses that require speed and excellent customer service are not always in line with the logic of existing law. Perhaps because of a legal vacuum or the law is not always as fast as the times. Imagine, the fiduciary must be made before a notary public while making agreements and financing institutions in the field of fiduciary transactions in a relatively quick time.

Today many financial institutions to execute on the object that bears fiduciary goods that are not registered. Can be called remedial, rof coll, or remove. During this time the finance company they feel safe and smooth action alone. According to the authors, this is the case because it is still weak bargaining power of customers to creditors as the owner of the funds. Plus the legal knowledge society is still low. This weakness exploited by the financial industry businesses, especially financial institutions and bank sector practicing fiduciary with deed under the hand.

The author is also concerned about the alleged misappropriation of state non-tax revenues in accordance with Act No. 20 of 1997 on Non-Tax State Revenue, because millions of financing (consumption, manufacturing and industrial) with the fiduciary is not registered and has the greatest potential financial harm state revenues.

D.CONCLUSION

In order to ensure legal certainty for creditors then made a deed made by the notary and registered with the Registry Office fiduciary. Later creditor will obtain a certificate of fiduciary titled, "Based on Justice Based on God". Thus, it has the power immediately if the debtor executorial rights violations fiduciary agreement to creditors (parate execution), in accordance with Act No. 42 of 1999 About Fiduciary.

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