JURNAL KONSTATERING
published by
Master of Notary Law, Faculty of Law
Sultan Agung Islamic University
ISSN:2828-4836

The Enforcement of Criminal Law Against Transfer of Fiduciary Guarantee Objects based on Justice Values

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Abstract. *Everyone has the right to recognition, guarantee, protection and legal certainty that is fair and treated equally before the law. Law No. 42 of 1999 concerning Fiduciary Guarantees has regulated criminal sanctions and fines, but in practice there are several problems regarding law enforcement, including police investigators being unable to charge third parties who have received pledges from fiduciary recipients. Keywords: Land, Ownership Certificate, Overlapping. The purpose of this study is to provide suggestions and recommendations regarding criminal law enforcement regarding the transfer of fiduciary guarantee objects based on the value of justice. This study usessocio-legal approachas well as the legislative approach and case approach. The results of this study are law enforcement according to current regulations that the regulation of criminal sanctions against the transfer of fiduciary collateral objects as regulated in Article 36 of Law No. 42 of 1999 does not reflect the value of justice, because criminal sanctions are only imposed on debtors, while parties who enjoy the benefits of the transfer cannot be held criminally responsible. In addition, there are weaknesses in the legal substance aspect in the form of a vacuum in regulations regarding the reception of fiduciary objects, from the legal structure aspect in the form of a lack of selectivity of financing institutions and weak synergy of law enforcement officers, as well as from the legal culture aspect in the form of low public legal awareness and economic pressure.*

Keywords: *Fiduciary; Guarantee; Reconstruction; Transfer.*

1. Introduction

The Republic of Indonesia is a country of law, as stipulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. One of the principles of a country of law is the guarantee of legal certainty, legal order and legal protection that contains the values of truth and justice by providing guarantees and protection for the rights of citizens, especially related to fiduciary guarantees. Fiduciary guarantees are a special form of guarantee that was born after the issuance of Law No. 42 of 1999 concerning Fiduciary Guarantees. The background to the birth of the Fiduciary Guarantee Law was the conditions after the 1998 economic crisis, at that time the business world needed a flexible guarantee institution for debtors but still provided legal certainty for creditors.[1]

Fiduciary guarantee agreement is a criminal law domain, however as a form of legal protection for the parties who enter into a fiduciary guarantee agreement who have good faith, because in the fiduciary guarantee agreement the object of the guarantee is in the control of the debtor, so it is very possible that the transfer of the fiduciary guarantee object to a third party, then Law No. 42 of 1999 concerning Fiduciary Guarantee regulates criminal provisions and fines. With the existence of Law No. 42 of 1999 concerning Fiduciary Guarantee, in accordance with the legal principle of Lex Specialis Derogat Legi Generalis, the provisions in the Criminal Code as long as they relate to fiduciary are no longer valid. The Fiduciary Giver can transfer inventory items that are the object of Fiduciary guarantee in the manner and procedures commonly carried out in trade businesses, however this does not apply if the debtor or third party fiduciary giver commits a default (breach of promise) and if the fiduciary guarantee object is transferred to another person then it must be replaced with an equivalent object by the fiduciary giver. However, if the fiduciary provider commits a default, then the results of the transfer or the resulting bill will by law become the object of the replacement fiduciary guarantee and the object of the transferred fiduciary guarantee, as regulated in Article 21 of Law No. 42 of 1999 concerning Fiduciary Guarantees.

Violations of the provisions of Article 23 paragraph (2) of Law No. 42 of 1999 concerning Fiduciary Guarantees may be subject to criminal sanctions as regulated in Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees, that the Fiduciary Provider who transfers, pawns or rents out the Goods which are the object of Fiduciary Guarantees as referred to in Article 23 paragraph (2) of Law No. 42 of 1999 concerning Fiduciary Guarantees which is carried out without prior written consent from the Fiduciary Recipient, shall be punished with imprisonment for a maximum of 2 (two) years and a maximum fine of Rp. 50,000,000.00 (fifty million rupiah).4 If a person intentionally falsifies, changes, removes or in any way provides misleading information, which if known by one of the parties would not give rise to a Fiduciary Guarantee agreement, shall be punished with imprisonment for a minimum of 1 (one) year.

For the perpetrators of the crime of receiving fiduciary collateral objects, the cause of the crime of receiving fiduciary collateral objects is more directed towards the

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[1]Rio Christiawan, Januar AgungSaputera, 2022, *Perkembangan dan Praktik Jaminan Fidusia*, Rajawali Pers, Depok, p.1

benefit for him or others by means of "evil assistance" however the meaning of "evil assistance" does not mean helping to commit crimes as referred to in Article 55 of the Criminal Code (KUHP). The receiving of fiduciary collateral objects as one of the triggers for committing crimes is because the goods-For the perpetrators of the crime of receiving fiduciary collateral objects, the cause of the crime of receiving fiduciary collateral objects is more directed towards the benefit for him or others by means of "evil assistance" however the meaning of "evil assistance" does not mean helping to commit crimes as referred to in Article 55 of the Criminal Code (KUHP). The receiving of fiduciary collateral objects as one of the triggers for committing crimes is because the goods resulting from embezzlement of fiduciary collateral objects are easier to resell with the aim of gaining profit for oneself.[2]Cases of fiduciary collateral fraud arise due to the debtor's lack of cooperation with the creditor holding the collateral, and the various pressures often experienced by the debtor to fulfill his obligations to the creditor. These factors cause the debtor to be unaware that the fiduciary collateral is bound by an agreement, in which the creditor also has rights and authority over the collateral.

In practice, creditors who feel aggrieved by debtors report their actions to the authorities, namely the police. In these reports, the police often take action against debtors who transfer fiduciary collateral, resulting in many debtors receiving criminal sanctions for their actions. However, in this case, the police only process the criminal act committed by the debtor, while the perpetrators of the crime of receiving funds often escape investigation. However, the police can charge the perpetrators of receiving funds under Article 480 of the Criminal Code, as the elements in that article have been met.

On this basis, the researcher conducted research to find out and analyze the enforcement of criminal law regarding the transfer of fiduciary guarantee objects based on the value of justice."

2. Research Methods

This research uses a socio-legal approach to understand law as a social construct that emerges from societal interactions and practices, as well as a legislative approach and a case approach. This study was conducted through library research in the form of books, journals, regulations, and court records related to criminal sanctions for the surrender of fiduciary collateral objects. The analysis was conducted qualitatively and inductively through descriptive analysis to build a theoretical understanding of the application of these criminal sanctions based on the value of justice.

[2]Yohana Puspitasari Wardoyo, dan Fery Kusnaini Afandi, “Studi Terhadap Tindakan Penyidik dalam Menangani Sindikat Penadahan atas Objek Jaminan Hasil Transaksi Fidusia di Polresta Malang”, *Jurnal Legality*, Volume 27 Nomor 1, March-August 2019, p. 140-141.

3. Results and Discussion

Fiduciary guarantee is a form of material guarantee institution that provides guarantee rights to creditors over certain movable or immovable objects, with the characteristic that the object of the guarantee remains in the control of the fiduciary provider. Article 1 number 1 of Law No. 42 of 1999 concerning Fiduciary Guarantees states that fiduciary is the transfer of ownership rights to an object as collateral for debt repayment, with the provision that the object remains in the control of the fiduciary provider. The transfer of ownership rights is carried out based on the principle of trust, so it requires strong legal protection for creditors so that the guarantee can function effectively.[3]

Normatively, the encumbrance and registration of fiduciary guarantees are essential elements to ensure legal certainty. Encumbrances must be made in a notarial deed and must be registered with the Fiduciary Registration Office as stipulated in Articles 11–18 of Law No. 42 of 1999 concerning Fiduciary Guarantees. This registration embodies the principle of publicity, which legitimizes the creditor to obtain preferential rights and makes the fiduciary guarantee a property right with the characteristics of droit de suite and droit de préférence. Without registration, the fiduciary guarantee has no executorial power and cannot bind third parties.[4]

However, in practice, many creditors fail to register fiduciary guarantees, citing cost efficiency. However, a registered fiduciary guarantee deed does not lose its public force and constitutes a simple civil agreement. This situation opens up the possibility of unlawful practices such as re-fiduciary agreements, concealment of collateral, and concentration of fiduciary assets without the creditor's knowledge. This regulatory weakness is apparent because the fiduciary guarantee law does not impose sanctions on creditors or notaries who fail to register, resulting in unequal and unfair legal protection.[5]

The criminal provisions in Law No. 42 of 1999 concerning Fiduciary Guarantees only regulate two types of crimes: falsification of information (Article 35) and transfer of fiduciary guarantee objects without the consent of the fiduciary recipient (Article 36). These narrow provisions fail to cover the variety of violations in modern financing practices. For example, Law No. 42 of 1999 concerning Fiduciary Guarantees does not explicitly regulate sanctions against debtors who manipulate the identity of the collateral object, change the vehicle's chassis or engine number, or intentionally remove the collateral object to hinder execution.

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[3]Gunawan Widjaja & Ahmad Yani, *Seri Hukum Bisnis: Jaminan Fidusia* , RajaGrafindo Persada, Jakarta, 2007, p. 134.
[4]Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, RajaGrafindo Persada, Jakarta, 2016, p. 89–91.
[5]M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*, RajaGrafindo Persada, Jakarta, 2008, p. 64–65.

In fact, this phenomenon is one of the main causes of execution failures in practice.[6]

Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees, which regulates the unlawful transfer of fiduciary guarantee objects, is also deemed incapable of providing a deterrent effect because the threat of a maximum prison sentence of two years and a fine of fifty million rupiah is not commensurate with the economic value of the fiduciary guarantee object.WhichIn practice, the penalties can reach billions of rupiah. Compare this to the penalty under Article 480 of the Criminal Code on receiving stolen goods, which carries a maximum penalty of four years in prison, making it more severe than the provisions of the UUJF. This disparity creates substantive injustice, as acts that significantly harm creditors are subject to lighter penalties.[7]

The criminal regulations in Law No. 42 of 1999 concerning Fiduciary Guarantees do not fully reflect the principle of proportionality. That criminal sanctions must be commensurate with the level of culpability of the perpetrator, the extent of the losses incurred, and their impact on protected legal interests. However, in reality, the value of losses in fiduciary cases often far exceeds the criminal penalties imposed, giving the impression that the law protects the perpetrator more than the creditor.[8]

Another problem is the unclear deadline for registering fiduciary guarantees. Law No. 42 of 1999 concerning Fiduciary Guarantees only states that registration. This is done after the signing of the fiduciary deed, but does not provide a clear time limit. As a result, many creditors register fiduciaries after the debtor has defaulted, rendering the principle of publicity meaningless. In some court decisions, fiduciaries registered late are still considered valid, thereby harming the debtor or a good-faith third party. This contradicts the theory of third-party protection, which requires transparency regarding the status of the collateral.[9]

Problems related to criminal sanctions for fiduciary duties are also evident in the law enforcement aspect. Many investigator and prosecutors who do not use Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees because the criminal threat is considered too light, then choose to apply articles in the Criminal Code such as Article 372 (embezzlement) or Article 378 (fraud). However, the application of the Criminal Code often encounters evidentiary obstacles because its elements are stricter than Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees. On the other hand, debtors exploit this weakness by arguing that their relationship with the creditor is civil and therefore cannot be criminalized. This lack of

[6]Andreas Albertus Andi Prajitno, *Hukum Fidusia*, Setara Press, Malang, 2010, p. 128.
[7]R. Soesilo, *KUHP dan Komentar-komentarnya*, Politeia, Bogor, 1996, 318.
[8]Tan Kamello, *Hukum Jaminan Fidusia*, Alumni, Bandung, 2003, p. 170.
[9]Sri Soedewi Masjchoen Sofyan, *Hukum Benda*, Liberty, Yogyakarta, 1981, p. 24–26.

synchronization between civil and criminal law creates legal threats that hinder the effectiveness of creditor protection.[10]

From a legal theory perspective, the unfairness of fiduciary regulations can also be seen from the aspect of the balance of legal relations between creditors and debtors. The law should provide equal protection for both parties. However, in reality, creditors do not receive adequate protection when debtors illegally transfer collateral. This is even when the creditor has registered...fiduciary, their right to enforce is often hampered by the presence of a good-faith third party. Although the nature of droit de suite requires that the collateral object remains exercisable by anyone, judicial practice often protects such third parties, to the detriment of creditors.[11]

Thus, the criminal sanctions for fiduciary offenses show that Law No. 42 of 1999regarding Fiduciary GuaranteeIt still has fundamental weaknesses that lead to unfair implementation. Updating fiduciary law is crucial, not only to stiffen criminal sanctions but also to expand the scope of punishable offenses, clarify registration limits, strengthen legal protection for creditors, and maintain a balance of rights and obligations between creditors and debtors.

According to Lawrence M. Friedman's legal system theoretical framework, the weakness of the regulation of criminal sanctions against the transfer of fiduciary guarantee objects can be analyzed through three components, namely legal structure, legal substance, and legal culture.[12]Misalignment among the three aspects. This is what causes Law No. 42 of 1999 concerning Fiduciary Guarantees to not function optimally and to fail to provide proportional legal protection for all parties. Numerous studies confirm that the effectiveness of the Fiduciary Guarantee Law depends not only on written legal provisions, but also on the quality of law enforcement officials, guarantees from financing institutions, and public legal awareness.[13]

Substantially, the most significant weakness in Law No. 42 of 1999 concerning Fiduciary Guarantees is the lightness of the criminal threat regulated in Article 36. The maximum criminal threat of two years in prison and a maximum fine of fifty million rupiah is seen as disproportionate to the large value of the collateral object which often reaches hundreds of millions or even billions of rupiah.[14]Research in

[10]Salim HS, *Hukum Jaminan*, RajaGrafindo Persada, Jakarta, 2014, p. 142.
[11]Adinda Crysanti Meyda dkk., “Analisis Regulasi Jaminan Fidusia untuk Perlindungan Kreditor,” *Diponegoro Private Law Review*, Vol. 8, 2021, p. 185–190.
[12]Lawrence M. Friedman, “Sistem Hukum dan Perspektif Ilmu Sosial,” *Jurnal Studi Hukum*, 1975.
[13]FR Situmorang, “Efektivitas Penegakan Hukum Jaminan Fidusia di Indonesia,” *Jurnal Ius*, Vol. 7 No. 1, 2020.
[14]H. Kurniawan, “Kebijakan Kriminal dalam UU Fidusia,” *Jurnal Legislasi Indonesia*, Vol. 15 Number 1 of 2018.

the Journal of Criminal Law Reform states that low criminal threats are unable to create a deterrent effect and tend to be ignored by society.[15]

Furthermore, Law No. 42 of 1999 concerning Fiduciary Guarantees does not stipulate a deadline for registering fiduciary guarantees. This often leads creditors to register after the debtor has defaulted. This provision clearly violates the principle of publicity and violates the principle of protecting third parties acting in good faith.[16]This ambiguity is often exploited by creditors to increase their bargaining position with debtors, even though legally this action is detrimental to the fiduciary guarantee system as a whole.

Another weak legal substance is the absence of sanctions for creditors or notaries who do not register fiduciaries.[17]Law No. 42 of 1999 concerning Fiduciary Guarantees only imposes criminal sanctions on debtors, while creditors who violate registration obligations are not subject to any sanctions. This lack of sanctions results in a high number of unregistered fiduciaries, rendering the implementation of the Fiduciary Guarantee Law ineffective. Registration is a key element in determining the validity of a fiduciary guarantee as a property right.

There is also a dualism of norms between Article 36 of Law No. 42 of 1999 concerning Fiduciary Guarantees and Article 480 of the Criminal Code. These two norms regulate similar acts, namely the transfer or assignment of property to which one is not entitled. However, the differences in criminal penalties and elements of the offense have led law enforcement officials to favor the Criminal Code over the Fiduciary Guarantee Law. This situation creates a conflict of norms that has never been comprehensively addressed by lawmakers.[18]When two norms overlap, the effectiveness of the law causes disruption because the authorities lose their guidelines.

Explained through Friedman's legal system theory, it is clear that the failure to enforce Article 36 of the Fiduciary Guarantee Law stems not from a single aspect, but rather from an accumulation of structural, substantial, and cultural weaknesses. These weaknesses reinforce each other and create conditions in which the Fiduciary Guarantee Law is unable to provide balanced and effective legal protection. Therefore, reform of criminal sanctions for fiduciary guarantees must be carried out not only by improving norms but also by strengthening institutions and increasing public legal awareness.

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[15]A. Nurhasanah, "Efektivitas Sanksi Pidana dalam Hukum Ekonomi," *Jurnal Reformasi Hukum Pidana*, 2020

[16]M. Wirawan, "Asas Publisitas dalam Jaminan Fidusia," *Jurnal Ilmu Hukum Lex Renaissance*, Vol. 4 Nomor 2, 2019.

[17]S. Susanti, "Tanggung Jawab Kreditur dalam Sistem Fidusia," *Jurnal De Lega Lata*, Vol. 5 Nomor 1, 2020.

[18] F. Aditya, "Konflik Norma dalam UU Jaminan Fidusia," *Jurnal Konstitusi*, Vol. 17 Nomor 4, 2020.

4. Conclusion

Criminal regulations regarding the transfer of fiduciary collateral objects as stipulated in Law No. 42 of 1999 have proven unable to provide optimal legal protection, either for creditors, debtors, or third parties, thus failing to fulfill the principles of justice, legal certainty, and benefit. The provisions in Article 35 and Article 36 of the Fiduciary Guarantee Law stipulate criminal threats that are too light and disproportionate to the value of economic losses incurred in modern financing practices. This weak criminal sanction results in the absence of deterrent power against criminal acts of unauthorized transfer of fiduciary objects, re-fiduciary, and other forms of fraud that are increasingly common. From the legal system aspect, weaknesses are seen in three main components as stated by Friedman, namely structure, substance, and legal culture. The legal structure still faces obstacles in law enforcement due to evidentiary constraints, inconsistent application of the principle of *lex specialis derogat legi generali*, and the difficulty of finding collateral objects that have been transferred. The legal substance shows disharmony between the Fiduciary Guarantee Law and the Criminal Code, especially when the criminal threat of Article 36 is much lower than Article 480 of the Criminal Code, thus creating ambiguity in ensnaring perpetrators. Meanwhile, the low legal culture of society, driven by economic motives, minimal legal awareness, and a permissive social environment, also triggers the increase in fiduciary crimes. The government is expected to reform the criminal regulations in the Fiduciary Guarantee Law. Comprehensive reform is needed to not only protect creditors' interests but also ensure a balance between the rights and obligations of the parties and ensure the achievement of substantive legal objectives.

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