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THE 2ND INTERNATIONAL CONFERENCE AND CALL FOR PAPER



Our Speaker



Prof. Henning Glasser
 Thammasat University



Prof. Yuzuru Shimada
 Nagoya University



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 UNSW Australia



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Assoc. Prof. Dr. Hj. Sri Kusriyah
 Sultan Agung Islamic University

*Democracy In Digital Era : Law,
 Governance, Sosial And Economic
 Perspective In Asia, Australia And
 Dutch*



September 23-24, 2020
 Imam Assafel Buiding, Faculty of Law, Unissula
 Kaligawe Rd KM 4 Semarang, Central Java

THE 2ND INTERNATIONAL CONFERENCE AND CALL FOR PAPER

THEME : DEMOCRACY IN DIGITAL ERA: LAW, GOVERNANCE, SOCIAL AND ECONOMIC PERSPECTIVE IN ASIA, AUSTRALIA AND DUTCH

Keywords: *Digital Media, Political and Governance Institutions, Electoral Processes, People Representation, Digital Disinformation, Democracy, Digital Economic, Social issue*



Meet Our Speakers



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1. Seminars will be conducted using the Zoom application
2. The Committee will provide a Zoom ID 1 day before the seminar

OBJECTIVE

This agenda aims to provide insights in theory and practice:

1. To exchange and discuss views on the most important issues on Democracy in Digital Era: Law, Governance, Social and Economic Perspective in Asia, Australia and Dutch and its consequences to Law in countries.
2. To discuss the challenges and practical aspect of Democracy and Governance in a Digital Era.

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- **Abstract:** (150-word limit). This abstract will appear in the conference program.

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 selected article will be published in indexed International Journal.

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- Announcement September, 06th 2020
- Full Paper Submission and Transfer September, 07-22 2020
- Conference and Presentations September 24th 2020

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The 2nd

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*"Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor
: Comparative Review"*

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The Criminal Aspect Of Transfer Of Fidusia Securities As A Basis Of Rules In The Criminal Jurisdiction Process

Suwanto

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Abstract

The existence of a fiduciary guarantee provision makes it easy for credit seekers without having to hand over physically pledged goods such as in a pawn. In its implementation, fiduciary is not only used by entrepreneurs, but also by the general public. Initially, fiduciary objects were only moving objects, but in its development it can also be applied to fixed objects. After the issuance of Law Number 42 of 1999 concerning Fiduciary, it further emphasizes that if there are defaults such as examples of embezzlement, it has become a criminal jurisdiction. The approach method used in this research is normative juridical. This research specification is descriptive analytical. The data source used is secondary data. Secondary data with literature study and document study. Qualitative data analysis and problems were analyzed using guarantee theory, legal certainty theory, and punishment theory. Based on the results of the research it can be concluded that the criminal aspects that exist in the transfer of fiduciary security objects are contained in the criminal provisions of Law Number 42 of 1999 concerning Fiduciary Security and Articles of the Criminal Code which can ensnare the perpetrator if they fulfill the criminal elements in the Criminal Code, as well as obstacles in optimization. The criminal provisions of the fiduciary guarantee law come from internal factors of law enforcers and external faculty regarding the transfer of objects of fiduciary security and weaknesses in the substance of the criminal provisions of the fiduciary guarantee law

Keywords: *Criminal Aspects, Transfer of Fiduciary Guarantees, Criminal Justice*

A. Introduction

In the structure of the national economy, credit policy is an inseparable part of the macro development policy, credit policy is in line with the development goals, because the purpose of credit is to support the pace of development, credit distribution must be evenly distributed so that all levels of society participate in development. For entrepreneurs, both large, medium and small entrepreneurs, credit is the lifeblood for their business development. Credit here is a necessity that helps and is very useful in developing their business. In an effort to get additional capital through the provision of credit by banks for middle and upper class entrepreneurs, it is not a problem to get credit facilities, because they usually meet the requirements requested by the bank in their confidence in the bank's character, ability, and capital. Business prospects and guarantees, because these entrepreneurs have more abilities than small entrepreneurs plus middle and upper entrepreneurs have high abilities.¹

1. Djuhaedah Hasan, 1996, Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah Dalam Konsepsi Penerapan atas Pemisahan Horizontal, Citra Aditya Bakti, Bandung, P.184.

For small entrepreneurs it is rather difficult to fulfill these requirements, because usually their position is weak, the company is not well known, the collateral is inadequate and so on and the bank itself as a creditor based on the principle of prudence always considers the safety of the funds that have been distributed and for security usually the party the bank will ask for additional guarantees which in practice are in the form of material guarantees. In practice, there are frequent violations committed by the recipient of credit, whether it is a delay in payment of deposits or the inability of the debtor to pay off his debt. However, there are those who intentionally do not pay, because they think that the engagement made by the creditor is only an ordinary agreement, not an agreement that arises because of law. The amount of credit extension depends on the amount of material collateral provided by the debtor. This is an obstacle for small entrepreneurs who, although their business prospects are considered good and productive and have been given conditions for obtaining simpler credit and low interest rates, they often stumble upon material guarantees requested by the bank. As a result, small entrepreneurs in obtaining credit sometimes do not receive adequate funds, so that government efforts to provide assistance to small entrepreneurs often do not achieve their targets due to obstacles in the material guarantee requirements.

This situation is a very dilemma for both the bank and the customers of the small business community, because banks in channeling or issuing credit based on the principle of prudence ask for additional guarantees in the form of materials, on the other hand, small entrepreneurs do not have enough material guarantees desired by the bank. Whereas a bank is an institution that plays an important role in the national economy, bank business activities as an intermediary which includes the collection and distribution of funds to the public, in fact it is very supportive of the implementation of economic development because through these activities the bank acts as an intermediary institution between people who have excess funds and people who have excess funds. need funds. To overcome the material guarantees experienced by both parties, it is necessary to have a fiduciary institution that can guarantee that both parties are not harmed by the take and give principle.²

Every development policy by the government is required to be able to accommodate legal needs and be able to direct public legal awareness towards modernization so as to achieve legal order and certainty.³ In connection with economic and credit development, the emergence of fiduciary forms of guarantee (such as trust) that responds to community needs in credit as a means of obtaining capital and consumptive needs such as vehicles. The existence of a fiduciary guarantee provision makes it easy for credit seekers without having to hand over physically pledged goods such as in a pawn. In its implementation, fiduciary is not only used by entrepreneurs, but also by the general public. Initially, fiduciary objects were only moving objects, but in its development it can also be applied to fixed objects.

The fiduciary guarantee is an individual guarantee, where the fiduciary giver and the fiduciary give mutual trust, the fiduciary gives his ownership rights to the fiduciary recipient, but the fiduciary recipient does not directly have the object that becomes the fiduciary guarantee submitted by the fiduciary, so that the fiduciary guarantee is a theory. guarantee. Fiduciary security is a material guarantee for movable objects, both tangible and intangible, in connection with the accounts payable between creditors and debtors. Fiduciary is used for both moving and immovable objects. Fiduciary guarantees are born because in practice there are things that cannot be accommodated. As for immovable objects, objects that are not objects of mortgages are objects.⁴

2. Yurizal, 2003, *Aspek Pidana Dalam Undang-Undang No.42 Tahun 1999 tentang Jaminan Fidusia*, Tesis, Program Pasca Sarjana, Universitas Airlangga, Surabaya, P.3.

3. Sri Soedewi M, 1977, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia di Dalam Praktek dan Pelaksanaannya di Indonesia*, Fakultas Hukum UGM, Yogyakarta, P.1

4. J. Satrio, 2002, *Hukum Jaminan Hak Jaminan Kebendaan Fidusia*, Citra Aditya Bakti, Bandung, P.130.

In the Civil Code or *Burgerlijk Wetboek (BW)*, the fiduciary guarantee is a special form of guarantee in which the object of this special guarantee is also the object of the debtor, it's just that it has been designated in a certain manner and is intended for certain creditors as well. Because the object is an object, the provisions of this special guarantee are grouped together into the law of objects regulated in book II BW. Material collateral in BW is divided into two, namely pawning and mortgage. The main difference is that the object is a movable object, whereas a mortgage is an immovable object. It is often said that pawns and mortgages were born as a consequence of the sharing of movable and immovable objects.

One form of this special guarantee is the fiduciary guarantee which is regulated in Law Number 42 of 1999 concerning Fiduciary Security. In Article 1 paragraph 1 of Law Number 42 of 1999 concerning Fiduciary Security, fiduciary is the transfer of ownership rights to an object on the basis of belief provided that the object whose ownership rights are transferred remains under the control of the owner of the object.

In Article 1 paragraph 2 of Law Number 42 of 1999 concerning Fiduciary Security, it states that fiduciary security is the right to guarantee for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in the 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 give priority to fiduciary recipients over other creditors. Providing financing with the imposition of fiduciary guarantees makes it easy for the debtor, because in addition to getting a loan, the sidebitor still controls the collateral.

Considering the purpose of fiduciary is to provide collateral for creditors 'claims against debtors or reversed by guaranteeing debtors' debts against creditors. In addition to providing protection to debtors who provide fiduciaries, it also intends to provide a strong position to creditors, then after the debtor defaults, the creditors must provide equivalent rights with an owner considering that the collateral is in the hands of the guarantor, namely to terminate his agreement to borrow and use the collateral object and demand it back, as evident in Articles 30 and 15 paragraph (3), which gives Execution Parate Rights to creditors.

Fiduciary security is an absolute right that can be defended against anyone. If the debtor continues to fulfill his obligations, then he can still control the object, also against third parties, namely the creditors of the fiduciary holder, in case of confiscation of the fiduciary holder. Even debtors can retain their rights against creditors in the event of creditor bankruptcy. Fiduciary security also follows the object that is guaranteed in the hands of whoever the object is in. This means that the transfer of rights to the receivables secured by fiduciary results in the transfer of all rights from the obligations of the fiduciary to the new creditors. The fiduciary guarantee also guarantees the position that precedes the creditor of the recipient in taking the payment of the debt and is not canceled due to bankruptcy and / or liquidation of the fiduciary.

In accordance with the principles of *sunt servanda*, the promise must be kept, so what is the obligation of a party which means the rights of the opposing party must be fulfilled. When some of them break their promises or defaults, the defaults of a debtor can take four forms, namely: Not doing what is promised to do, doing what was promised, but not as promised, doing what was promised but too late, doing something according to the agreement shouldn't be done. Thus it is clear that his contract partner will suffer losses. Yet according to human nature in general, it will always try to avoid these losses.⁵

One of the important provisions in regulating fiduciary is the registration of fiduciary security. After being registered, they will receive a certificate, the right of executorial power which is equivalent to a court decision having permanent legal force, which means that this fiduciary guarantee certificate can be

5. Moch.Isnaeni, 1996, *Hipotek Pesawat Udara Di Indonesia*, CV Dharma Muda, Surabaya, P. 30-32

immediately executed or implemented without going through a trial process and examination by court, and is final and binding on the parties to carry out the decision. .

However, even though creditors have fortified themselves with various regulations, there are still debtors who are still taking actions that are contrary to the contents of the agreement they made. Problems that often arise in consumer financing agreements are generally when the debtor is negligent in fulfilling his performance, apart from neglecting to comply achievements, the problem that often arises in four-wheeled vehicle consumer financing agreements is that after the debtor is no longer able to carry out his performance, the debtor tends to transfer, mortgage, lease the object of fiduciary collateral to other parties, without written permission from the creditor.

After the issuance of Law Number 42 of 1999 concerning Fiduciary, it further emphasizes that if there are defaults such as examples of embezzlement, it has become a criminal jurisdiction. In Article 23 paragraph (2) Law Number 42 of 1999 concerning Fiduciary Security regulates that the fiduciary is prohibited from transferring, pawning, or renting to other parties objects that are objects of Fiduciary Security which are inventory objects, except with the prior written consent of the recipient. fiduciary.

In practice, leasing as a finance company that implements fiduciary security often experiences problems in the field, where the object of the fiduciary guarantee itself is often transferred by the debtor to a third party without the approval of the creditor. This study aims to identify and analyze the criminal aspects of the transfer that occurs in fiduciary security as the basis for decisions in the judicial process, as well as obstacles in the optimization of criminal law in its implementation in the criminal justice process in cases of transfer of fiduciary guarantees so that the value of justice in the handling of fiduciary cases can be achieved.

B. Research Methods

The research method used is a normative juridical approach. Normative research or also known as literature law research is legal research carried out by examining library materials or secondary data, then to be applied to research problems, namely the elements of pornographic crimes and investigations of pornographic crimes so that their presentation is based on principles and theories. -theories and doctrines as well as applicable laws. The specification of this research is descriptive in accordance with the problems and objectives in the study. Research by describing a number of variables relating to the problem being researched.⁶

C. Results and Discussion

1. Criminal Aspects of Transfers that occur in the Fiduciary Guarantee as the basis for decisions in the judicial process

Generally, guarantees are always associated with providing credit for both bank and non-bank financial institutions, including finance companies. The guarantee referred to here can be a material guarantee or an individual guarantee. This guarantee generally includes the ways the creditor guarantees the fulfillment of the bill, in addition to the debtor's general liability for his debts.

In Indonesia's positive law, there are laws and regulations that fully regulate matters related to guaranteeing the debt. Some of these provisions are contained in the Civil Code and the Commercial Code, in addition there are separate laws, namely Law No. 4/1996 and Law No. 42/1999, each of which regulates guarantee institutions for guaranteeing debt.

6. Andri Winjaya Laksana, Suratman, Analisis Yuridis Penyidikan Tindak Pidana Pornografi Berdasarkan Undang-Undang Nomor 44 Tahun 2008 Di Era Digitalisasi, Jurnal Pembaharuan Hukum, Volume I No. 2 Mei-Agustus 2014, P.169-177

Guarantee is to guarantee the fulfillment of obligations that can be valued in money arising from a legal engagement. Therefore, the law of guarantee is closely related to the law of property. In principle, every credit extension must be guaranteed, be it collateral in the form of objects or personal guarantees.⁷

Fiduciary as a guarantee institution that has long been known in Roman society, it originated and grew in customary law. This institution originates from the western civil law system whose existence and development are always associated with the civil law system. Mahadi explained that the word “fiduciary” comes from Latin. The word is a noun that means trust in someone or something, big expectations. In addition, there is the word “fido” which is a verb which means to believe in someone or something.⁸

Fiduciary security as a material guarantee has the main characteristics that the fiduciary guarantee still follows the object which is the object of the fiduciary security in the hands of whomever the object is in, except for the transfer of supplies which are the object of the fiduciary guarantee (Article 20 UUJF). This provision is the nature of the *droit de suite* of fiduciary guarantees and the granting of this characteristic is based on and implies an intention to give a strong position to its right holders. In Article 19 of the Fiduciary Security Law stipulates that the transfer of rights over receivables secured by fiduciary guarantees results in the transfer of all rights and obligations of the fiduciary recipient to new creditors or other parties by law. The transfer of the object of the fiduciary guarantee must be with the creditor’s knowledge, otherwise the action is not justified by law. This is in accordance with Article 23 paragraph (3) UUJF which prohibits the fiduciary from transferring, pawning, or renting to other parties objects that are objects of fiduciary security which are not stock items, except with the prior written consent of the fiduciary recipient.

The government, in an effort to overcome violations in the Fiduciary Guarantee that could result in losses to creditors, has issued a criminal law policy in the form of Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Security. Although the fiduciary agreement is a private act in civil terms, the Fiduciary Guarantee Act also regulates criminal acts and regulates criminal sanctions as contained in Article 35 and Article 36 of the UUJF. This means that criminal sanctions are still needed in private matters even to regulate public order and public safety.

The transfer of objects of fiduciary security objects by the debtor without the knowledge and consent of the creditor includes activities that violate the creditor’s rights as fiduciary recipients which are protected by the Fiduciary Guarantee Law in particular Article 36 of Law Number 42 of 1999 concerning Fiduciary Security regulates as follows:

1. The fiduciary (debtor) pawns, transfers or leases the object of the fiduciary guarantee without the consent of the fiduciary receiver (creditor).

If the Fiduciary Giver is proven to have committed an act, namely pawning, transferring or renting the object of the fiduciary security without the consent of the fiduciary recipient, for that act, Article 36 of Law Number 42 Year 1999 has regulated the criminal threat for the Fiduciary who pawned or transferred the fiduciary security object without the consent of the recipient. Fiduciary, namely: “Fiduciary giver who transfers, pawns, or rents out objects which are the object of fiduciary security as referred to in Article 23 paragraph (2) which is carried out without prior written consent from the fiduciary recipient, shall be punished with imprisonment of 2 (two) years. and a maximum fine of Rp. 50,000,000 (Fifty Million Rupiah)”.

On the other hand, if the debtor transfers the object of fiduciary security which is

7. Badruzaman, Mariam Darus, 1987, Bab-Bab tentang Credietverband, Gadai dan Fiducia, Alumni, Bandung, P.227-265

8. Kamello Tan, 2014, Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan, Alumni, Bandung, P.139

carried out under his / her hands to another party, it cannot be charged under the Fiduciary Law, because the fiduciary guarantee agreement is not valid or legal, without the creditor's knowledge, it can be reported on charges of embezzlement in accordance with Article 372 of the Criminal Code by the creditor. Article 372 of the Criminal Code: "Anyone who deliberately and unlawfully owns property, wholly or partly belonging to another person, but which is in his / her power not because of a crime, is punished for embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah."

2. Giver of Fiduciary Deliberately Falsifies, Modifies, Eliminates or In Any Way Provides Misleading Information.

In order to guarantee the implementation of a good and correct and certain fiduciary guarantee, the Fiduciary Security Law regulates criminal provisions which are not only contained in Article 36 of the Fiduciary Guarantee Law but also contained in Article 35 which contains the following provisions: intentionally falsifying, changing, eliminating or in any way giving misleading information, which if it is found out by one of the parties that does not give birth to a fiduciary guarantee agreement, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp. 10,000,000 (ten million rupiah) and a maximum of Rp. 100,000,000, - (one hundred million rupiah) ”.

If the fiduciary guarantee is not burdened with registration at the fiduciary registration office, hereby a criminal act of fraud may be subject to Article 378 of the Criminal Code which reads: "Whoever with the intention of trying to benefit himself or another person violates his rights, either by using a false name or a false condition, either with reason and deceit, as well as with fabrications of false speech, inducing people to give up something, incurring a debt or writing off a debt, being punished for fraud, with a maximum imprisonment of four years. "

With the inclusion of the provisions of Article 36 contained in the UUJF, it can be concluded that it is clear that the transfer of the object of fiduciary security without prior agreement is a criminal offense according to the Fiduciary Security Law Number 42 of 1999, with the exception of this provision, is that the fiduciary may transfer on inventory objects that are the object of fiduciary security.⁹

In the theory of guarantees put forward by Hasanudin, guarantees are the coverage provided by the debtor and / or third party creditors because the debtor has an interest that the debtor must fulfill his obligations in an engagement. So that the party that has provided credit to the debtor, the debtor must return or fulfill his obligations as agreed, if the debtor cannot fulfill his obligations, the creditor can withhold the guarantee.¹⁰

Although individual and social morality and the purpose of protecting parties with good intentions, both for individuals and for corporations, contain criminal provisions in the Fiduciary Law. The criminal aspect described in the Article above in the Fiduciary Law is a legal certainty in the implementation of a civil relationship that causes losses to one party.

Regarding legal certainty, according to Kelsen, law is a system of norms. Norms are statements that emphasize the "should" or *das sollen* aspects, by including some rules about what to do. Norms are deliberative products and human action. Laws containing general rules serve as guidelines for individuals behaving in society, both in relationships with fellow individuals and in relation to society. These rules become a limitation for society in burdening

9. H.Salim HS, 2008, *Perkembangan Hukum Kontrak Innominat di Indonesia*, Sinar Grafika, Jakarta, P.88

10. Hasanuddin Rahman, 1995, *Aspek-aspek Hukum Pemberian Kredit Perbankan di Indonesia*, Citra Aditya Bakti, Bandung, P.175

or taking action against individuals. The existence of these rules and the implementation of these rules creates legal certainty.¹¹

Law Number 42 of 1999 concerning the Fiduciary Guarantee provides legal certainty for the Fiduciary recipient (creditor) to report the event of the transfer or transfer of the Fiduciary Object by the fiduciary (debtor) without the consent or knowledge of the Fiduciary recipient to the Police. So that the Fiduciary Giver (debtor) will think again about transferring the Fiduciary Security Object to someone else, because if this is done, it will be subject to criminal sanctions. And also with the existence of this criminal aspect, Fiduciary as one of the Guarantee Institutions is expected to function as an ideal Guarantee Institution that provides a sense of security and is the dream of everyone with an interest.

2. Constraints in Optimizing Criminal Law in the Implementation of the Criminal Court Process Against Fiduciary Assurance Transfer Cases

Based on the scope of the third criminology, namely the efforts to prevent the occurrence of crime (criminal prevention) in criminal acts of detention in which efforts to control the crime of holding goods resulting from theft are used in the form of penalties indirectly serve as a reminder to the public that the retention of stolen goods is a criminal act and the impact of criminal liability that must be faced when committing such acts.

Dispute settlement through court is a way to end disputes that arise between creditors and debtors, where the settlement is carried out in front of and before the court.

In the case of transfer of fiduciary guarantees, looking at the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Security, where there are criminal provisions for those who violate the fiduciary guarantee, making the case of transfer of fiduciary guarantees can be processed in a criminal court.

In today's legal developments, criminal law and civil law are contained in a statutory provision such as Law Number 42 of 1999 concerning Fiduciary also contains criminal sanctions, in accordance with the provisions in Article 35. Criminal sanctions in the provisions of civil and administrative law aims to frighten everyone from committing an evil deed, detrimental to the public interest or as a last resort if civil and administrative sanctions are not obeyed.

Criminal law as public law has a close relationship with civil and administrative law, even according to Hazewinkel-Suringga as quoted by Wirjono Prodjodikoro that "it can never be said precisely, where lies the boundary between criminal law and civil law, between criminal law and educational law, between criminal law and administrative law.

Based on Law Number 42 of 1999 concerning Fiduciary, there are several provisions in a transfer of fiduciary guarantees which include complaint offenses. One of the provisions of the Article which includes the complaint offense is Article 36 of Law Number 42 of 1999 concerning Fiduciary as follows: "The Fiduciary Giver who transfers, pawns, or leases Objects which are the object of the Fiduciary Guarantee as referred to in Article 23 paragraph (2) which is carried out without prior written approval from the Fiduciary Recipient, shall be punished with imprisonment of up to 2 (two) years and a maximum fine of Rp. 50,000,000, - (fifty million rupiah).

¹¹. Peter Mahmud Marzuki, 2008, Pengantar Ilmu Hukum, Kencana, Jakarta, P.158

Such violations can be charged under criminal provisions, and in this case the criminal justice process is carried out through the roles of law enforcers who are authorized to carry out criminal justice in accordance with the Criminal Procedure Code. However, in the criminal justice process for cases of transfer of fiduciary guarantees, problems arise in the handling, where these obstacles often occur in the investigation stage of the police in processing criminal cases on transfer of fiduciary guarantees. The case of transfer of fiduciary security has a variety of actions that fulfill criminal aspects, for example, the aspects of the crime of embezzlement, detention, and even fraud as criminal aspects in the previous discussion.

In reference to the author's research in literature, that the obstacles that arise in the criminal justice process towards the transfer of fiduciary guarantees during the investigation process by the Police are:

1. Internal factors

- a. Information Constraints

For the problem of proving a criminal act of transferring Fiduciary Security in the form of an example of a criminal act of detaining the object of fiduciary security from the lack of information obtained by the police on the circulation of goods that are objects of restraint circulating among the public. By all means, the perpetrator will usually change the object obtained which is known to have originated from the proceeds of the crime as the object of the Fiduciary Guarantee. It is not uncommon for each object of Fiduciary security that is traded in a form that has been dismantled so that it is only in the form of a spare part unit.

- b. Legal Enforcement Human Resources Constraints

The emergence of criminal provisions in the Fiduciary Guarantee Law in which fiduciary security is a general activity in which almost everyone carries out these activities as a demand for an item whose primaryity is the continuity of life is very necessary and it cannot be denied that there have been violations committed by the fiduciary (debtor) makes it easier for the fiduciary recipient (creditor) to retaliate through punishment for the losses they experience if it has entered into the criminal aspect in UUJF. This has resulted in an unsynchronized number of criminal reports concerning the transfer of fiduciary guarantees to the number of law enforcers who have to process these reports. As a result, it affects the performance of law enforcers, especially the police, as the first hand in the criminal justice process.

2. External Factors

- a. Performing Factors

Perpetrators of criminal acts of detention of motor vehicles as objects of fiduciary security are one of the significant obstacles in carrying out the investigation process. In this case, the status of the perpetrator is an obstacle to carrying out an investigation in the form of:

- a) the perpetrator is still a minor;

- b) perpetrators from the military apparatus;
 - c) The perpetrator who repeats his actions (residive);
 - d) The perpetrator who ran away.
- b. Factors of Evidence and Evidence (Evidence)

Obstacles experienced by the Police in the investigation process in proving a criminal act of transferring fiduciary guarantees in the process of proving that the investigator is getting information and calling witnesses, however it is more likely that the participation of witnesses who have been summoned is not there, many witnesses do not want to be present to testify even though summoning has been made . There are indications that the transfer of the object of fiduciary security in the form of letters or documents relating to evidence in general has been lost and deliberately destroyed. Letters or documents obtained are only photocopies, not original documents, cannot be read in their entirety. Apart from that, the obstacle in proving a criminal offense, for example the detention of a motorized vehicle as an object of fiduciary security, is that investigators only get recognition from the suspect.

c. Weaknesses of the Fiduciary Guarantee Act

In this case, the process in the court where the judge played a role in the process considered that the Money Law related to the case, namely Law Number 42 of 1999 concerning Fiduciary Security, was deemed to have a weakness, namely that it did not regulate creditors who did not have a fiduciary guarantee certificate. In other words, the special law can become a legal basis if the reporter has a fiduciary guarantee deed. This creates minimal legal certainty where the debtor will always be disadvantaged in the legal process with reference to the UUJF. The use of the Criminal Code will still have a criminal element if the scope of the violation of the fiduciary security committed by the debtor is full of punishment in accordance with the elements of the criminal act in the Criminal Code.¹²

Judging from the obstacles above, it shows that there are problems in the application of crimes to fiduciary security activities. Especially in related regulations, namely Law Number 42 of 1999 concerning Fiduciary Security which according to the author still causes weaknesses in various aspects. The effectiveness of criminal law in the application of crime to the transfer of fiduciary security as a consideration in its relevance to the purpose of punishment itself is a consideration for judges in Indonesia in deciding criminal cases. In the objective or relative theory (doeltheorien) this theory views as something that can be used to achieve utilization, both relating to the guilty person and relating to the outside world, for example by isolating and fixing criminals or preventing potential criminals, will make the world a place better.¹³

The basis for justifying the existence of a crime according to the theory is relative to its purpose. The sentence imposed is not quia peccatum est (because people make mistakes). To do ne peccetur (so that people do not commit crimes), it is quite clear that this objective theory seeks to bring about order in society. However, whether the measure of the crime referred to in the transfer of the object of fiduciary security is

12. Yohana Puspitasari Wardoyo, Fery Kusnaini Afandi, Studi Terhadap Tindakan Penyidik dalam Menangani Sindikat Penadahan Atas Objek Jaminan Hasil Transaksi Fidusia di Polresta Malang, Fakultas Hukum, Jurnal UM Malang, Vol. 27 No.1, Agustus 2019, P.138

13. Muladi, 2002, Lembaga Pidana Bersyarat, Alumni, Bandung, P.23

relevant to what is seen as a crime whose urgency deserves to be convicted.

Because according to H.L. Packer, as in his book “The Limits of Criminal Sanction”, states that the criminal sanction is at one time the “main or best guarantor” and one day the “main threat” of human freedom. He is a guarantor when used sparingly and humanely. He is a threat, if used carelessly and forcibly. (*The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely, it is guarantor. Used indiscriminately and coercively, it is threatener*).¹⁴

D. CONCLUSION

The criminal aspects that exist in the transfer of fiduciary security objects are contained in the criminal provisions of Act Number 42 of 1999 concerning Fiduciary Security and Articles of the Criminal Code which can ensnare the perpetrator if they fulfill the criminal elements in the Criminal Code, as well as obstacles in optimization. The criminal provisions of the fiduciary guarantee law come from internal factors of law enforcers and external faculty regarding the transfer of objects of fiduciary security and weaknesses in the substance of the criminal provisions of the fiduciary guarantee law

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