

## Effectiveness of Law Enforcement of Criminal Acts of Unauthorized Bail Transfer Based on Justice

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**Abstract.** *Fiduciary guarantees are part of the guarantee law which then gave birth to the Law as regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. This guarantee law gives birth to property rights where the rights of creditors must be prioritized and absolute, the object of the fiduciary guarantee is a movable object consisting of inventory objects. It is known that this movable object is dynamic and changing, so there is a great opportunity for the object of the guarantee to be transferred. This is certainly a big risk for creditors if the object of the guarantee has been misused by the fiduciary giver or debtor, so that later it will have an impact on the difficulty of the execution process of the object of the guarantee by the fiduciary recipient. In this case, the position of the fiduciary recipient must of course be protected by legal protection so that the position of the fiduciary recipient is not in a weak position.*

**Keywords:** *Fiduciary; Guarantee; Protection.*

### 1. Introduction

The Republic of Indonesia is a state based on law based on Pancasila and the 1945 Constitution of the Republic of Indonesia, which upholds Human Rights and guarantees all the rights of citizens together with their status in law and government, and is obliged to uphold the law and government without exception.<sup>1</sup>The State of Indonesia aims to realize a prosperous, just, prosperous, and equitable society materially and spiritually based on Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), law enforcement must be carried out firmly and consistently. The law is a collection of regulations (commandments and prohibitions) that regulate the order of a society and therefore must be obeyed by that society.<sup>2</sup>

Law cannot be separated from humans, because since humans were born there must have been interactions between other humans called society. Cicero stated

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<sup>1</sup>Rukmini Mien, Human Rights Protection Through the Principle of Presumption of Innocence and the Principle of Equal Status in Law in the Indonesian Criminal Justice System, Alumni, Bandung, p. 1.

<sup>2</sup>CST Kansil, 1989, Introduction to Indonesian Law and Legal System, Balai Pustaka, Jakarta, p. 38.

ubi societas ibi ius which means where there is society there is law. Therefore, law was created by humans to regulate every interaction between humans themselves. Basically, humans can only live in a society where humans are called Zoom Politicon or social creatures.<sup>3</sup>

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia explains that Indonesia is a country based on law, which means that everything related to society is regulated by law. So that every citizen who commits a violation will be held accountable according to applicable law.

Development activities in the economic sector as part of national development are one of the efforts to achieve a just and prosperous society based on Pancasila and the 1945 Constitution. The increase in development activities has an impact on increasing funding. Most of the funds needed to meet needs are obtained through borrowing and lending activities. In an effort to increase consumer needs or productivity, business entities or individuals really need funding from finance companies as a source of funds in the form of credit.<sup>4</sup>

Regarding the national economy, it has been explained in Article 33 paragraph (1) of the 1945 Republic of Indonesia Law which states that "The economy is structured as a joint effort based on the name of family." Along with all the basic laws and regulations in the article, which in their provisions require that the national economy is built from economic actors who are divided into three sectors, including the cooperative sector, the State sector or State-Owned Enterprises (BUMN), and the Private sector. Progress in the economic sector in Indonesia has made one to three sectors in Indonesia hold the spearhead for distributing credit to the community, such as business activities in the field of financing motor vehicle ownership, both two-wheeled and four-wheeled.

The purpose of establishing a criminal law policy as an effort to protect against crimes that cannot be resolved through civil law, because in general criminal law in theory is a last resort or ultimum remedium. However, in the formulation of criminal law, an act can be punished, convicted or tried must be based on the formulation of the Law that regulates it.

Criminal law policies to overcome criminal acts that often disturb the community have given rise to legislative policy formulations in the form of criminal law norms in the form of the Criminal Code and special criminal laws in the form of laws outside the Criminal Code which are divided into two types, namely laws that specifically regulate criminal provisions and administrative laws that contain criminal threats.

This creates injustice for creditors or parties who provide funds because creditors suffer losses on their rights that are not returned. Injustice for debtors

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<sup>3</sup>Sudikno Mertokusumo, 1991, *Understanding the Law (An Introduction)*, Liberty, Yogyakarta, p.3.

<sup>4</sup>Bambang Purwanto, 2018, *Investigation Process of Fiduciary Crimes at the Specific Crimes Unit of the Semarang City Police*, Unissula, Semarang, p.1

in the fiduciary agreement itself must be a consideration of the debtor's threat in the fiduciary decision. Fiduciary threats and injustice often occur because of unequal power, it can be said to be fair if the creditor's rights have been returned, and if it is known that the creditor's rights have not been returned, then there must be an additional aggravating article on the debtor who has defaulted.

While justice is an absolute thing that must be achieved by every individual without exception, but in fact justice itself is not given evenly between creditors and debtors, this is due to the difficulty of the settlement process carried out by the court. The first factor that influences is the high cost of the case and the length of the case settlement process from the court, another factor that shows the gap in position between creditors and debtors is the difficulty of the execution decision issued by the court, this is due to the news of the object of fiduciary guarantee at the time of execution.

Thus, the provisions of fiduciary execution as regulated in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees which have been interpreted by the Constitutional Court in decision Number 18/PUU-XVII/2019 concerning the Judicial Review of Law Number 42 of 1999 concerning Fiduciary Guarantees have resulted in unfair legal protection as guaranteed in Article 28D paragraph (1), for the capital financing industry. Because the large costs that have been incurred are not as large as the income from the fiduciary goods themselves. Based on the background above, the author is interested in conducting research entitled "Effectiveness of Law Enforcement of Criminal Acts of Transfer of Fiduciary Guarantees Without Permission Based on Justice".

## **2. Research Methods**

### **a. Approach Method**

In this study the author uses the normative legal method. Legal is used to analyze various laws and regulations related to theft. While normative is where the law is conceptualized as what is written in Government Regulations (PP) and Laws (UU), (law in books) or law is conceptualized as a rule or norm that is a benchmark for human behavior that is considered appropriate.<sup>5</sup>

### **b. Research Specifications**

The specification in this study uses a descriptive analysis method, with the intention of providing a description of what is happening, which is still related to the applicable Laws and Regulations and various relevant theories. Which is then compiled with the data that has been collected, and processed

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<sup>5</sup>Amiruddin & Zainal Asikin, 2012, Introduction to Legal Research Methods, Raja Grafindo Persada, Jakarta, p.118.

theoretically. In order to find problem solvers or solutions based on applicable provisions.

### **c. Data source**

This research chooses to use several types of data, including: primary data, secondary data and tertiary data, which will be explained as follows:

#### **a. Primary Data**

The research was conducted by going directly to the source location to obtain accurate and complete data, by means of interviews with the relevant parties, in this case the police at the Demak Police.

#### **b. Secondary data types**

- 1) The 1945 Constitution of the Republic of Indonesia;
- 2) Law Number 39 of 1999 concerning Human Rights (HAM Law);
- 3) Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF); and
- 4) Decision Number 18/PUU-XVII/2019 Concerning the Judicial Review of Law Number 42 of 1999 Concerning Fiduciary Guarantees.

#### **c. Tertiary data types**

Legal materials from tertiary data are materials that provide guidance and explanations of primary and secondary legal materials, such as legal dictionaries and the Great Dictionary of the Indonesian Language.

#### **d. Method of collecting data**

In data collection, researchers use several methods, namely:

##### **a. Library research**

Secondary data collection techniques are carried out by collecting data and literature related to the main problem to be discussed according to the proposed title. In this literature study, the researcher obtained data from the Central Library of Sultan Agung Islamic University Semarang, the Library of the Faculty of Law of Sultan Agung Islamic University Semarang, the Central Java Regional Library, and reference books.

##### **b. Document Study**

This is done by collecting data from written document studies, by analyzing the data that has been obtained from field sources provided by parties related to this research.

##### **c. Interview**

Interviews at this stage are conducted by interacting directly with respondents to obtain information in the form of dialogue, because this stage is the most important part in obtaining primary data in a study. Interviews can also be conducted in a directed manner by asking questions according to

the need to obtain information, in this case the researcher collaborates with the police at the Demak Police.

#### **d. Data Analysis Methods**

A process of analyzing data carried out with qualitative research procedures that are able to produce descriptive data both in writing and orally. Through this qualitative analysis step, researchers use deductive methods, namely thinking to analyze facts or events that often occur around them that have been considered common or commonplace events. From the results of the study, researchers then process data with editing techniques, by matching various data sources obtained, and summarizing or summarizing the data. Then researchers also use coding techniques such as summarizing data that has been obtained through interviews with parties or respondents related to this study, by grouping parts of the material into certain categories that have been applied.

### **3. Results And Discussion**

#### **3.1. Current Law Enforcement Against Criminal Acts of Transfer of Fiduciary Guarantee Without Permission**

Talking about the application of criminal sanctions against the act of transferring fiduciary collateral objects carried out by debtors at this time, of course it cannot be separated from the weak supervision carried out by the creditor on the fiduciary collateral object so that it is easy for the debtor to transfer the collateral object to another party. So that until the term of the agreement has expired, the creditor does not get the right to pay off the debt by the debtor and suffers a loss.

If a debtor is found to have transferred the object of fiduciary collateral without the knowledge and consent of the creditor without replacing the equivalent inventory, the debtor is considered to have committed a breach of contract. So in this case, the parties who feel aggrieved can file a lawsuit as follows:

- a. Fulfillment of obligations;
- b. Fulfillment of the promise with compensation;
- c. Revocation of reciprocal agreement; and
- d. Cancellation with compensation.

Debtors who have transferred, mortgaged or rented objects that are fiduciary objects without written consent from the creditor can be subject to criminal sanctions. So that for this violation the debtor not only violates the credit agreement but also the applicable laws and regulations in this case is Law Number 42 of 1999. The provisions in Law Number 42 of 1999 are a form of legal protection for creditors. Repressive legal protection provides criminal sanctions for acts that violate the law.

However, if the settlement only adheres to the applicable legal basis as explained above, there will be no element of justice for the creditor, because it is often found that the punishment for the debtor is not in proportion to the violation he has committed, with the creditor's rights not being fulfilled, such as a complicated execution process if the collateral object has been lost or the auction sale price is not commensurate with the loan that must be paid off.

On the other hand, if the debtor transfers the fiduciary object to another party without permission, the debtor also cannot be ensnared by the rules explained in the Fiduciary Law because the fiduciary agreement is invalid. So that the debtor can be reported on charges of embezzlement as regulated in Article 372 of the Criminal Code by the creditor. However, this right can weaken the creditor's position in exercising his execution rights.

The provisions in Article 36 of Law Number 42 of 1999 are almost the same as Article 372 of the Criminal Code concerning Embezzlement which states that "Anyone who intentionally and unlawfully owns something that is wholly or partly owned by another person, but is in his control not because of a crime, is threatened with embezzlement with a maximum imprisonment of four years or a maximum fine of nine hundred rupiah". The meaning of "owning" as explained can be exemplified in the form of actions such as "pawning" or "renting" and "selling" or "transferring" someone else's goods in his control not because of a crime.

Meanwhile, in dealing with criminal acts today, the justice system in Indonesia almost always ends in prison. While imprisonment is not the only best solution in resolving a criminal act, especially a crime that has been damaged. So that it is necessary for state apparatus such as the police, prosecutors, judges and every post-criminal agency to carry out their performance by fully following the existing rules so that the law can create order. However, such a life will be felt really heavy, difficult and uncomfortable, as a result of there being no room for tolerance at all, where all actions or movements are threatened to be subject to sanctions according to the rules, so that optimal alternative actions are needed from the applicable rules, namely in the form of discretionary actions.<sup>6</sup>

Discretion is a decision/action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in the case of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation.<sup>7</sup>

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<sup>6</sup>M. Faal, *Screening of Criminal Cases by the Police (Police Discretion)*, Pradnya Paramita, Jakarta, 1991, p.3.

<sup>7</sup><https://news.detik.com/berita/d-6891133/diskresi-hadap-pengertian-besar-dan-cepatnya> accessed on August 23, 2023, at 11:42 WIB.

### **3.2. Weaknesses and Solutions of Law Enforcement Against the Criminal Act of Transferring Fiduciary Guarantees Without Permission**

When viewed from the legal structure that is often occurring, cases like this are often reported to the police where it is found that many financial institutions or creditors are unable to attach fiduciary certificates, this has an impact on the status of property from the application of the articles regulated in the Criminal Code.

The execution process is carried out by filing a lawsuit with the District Court through the normal legal process until it has permanent legal force.<sup>8</sup> However, the weakness in law enforcement against the transfer of fiduciary guarantees without permission itself in the process requires a lot of money and a lot of time which includes the stages of investigation, prosecution, trial and ends in a correctional institution in order to maintain its material law. As in article 24 of Law Number 42 of 1999 concerning Fiduciary Guarantees, that "the recipient of the fiduciary does not bear the obligation for the consequences of the actions or negligence of the fiduciary giver, whether arising from a contractual relationship or arising from an unlawful act in connection with the use and transfer of objects that are the objects of fiduciary guarantees". However, the debtor is not certain that he will return his credit debt to the creditor, so that many debtors eventually end up in the criminal process for embezzlement.

However, several criminal cases of transfer of fiduciary collateral objects or embezzlement of fiduciary collateral objects that have been processed through the judicial system will usually only add to the burden or even pile up of cases in the courts.

Legal settlement of the crime of transferring fiduciary collateral objects or embezzlement of fiduciary collateral objects through the judicial process will go through a long process because it includes several stages including investigation, prosecution, trial and ending in a correctional institution.

Handling of criminal cases regarding acts of transferring collateral can also be done in two ways, namely:

1. Penal facilities (repressive activities after a crime has occurred)

Penal facilities can be interpreted as actions after a report from the reporter (creditor) which includes following up on the report on the transfer of the fiduciary guarantee object, and continuing with the police who act to conduct an investigation related to the report and issue a summons or arrest the perpetrator (debtor).

2. Non-penal means

There is counseling from the police for preventive measures, namely educating the public regarding what sanctions will be given if they are caught

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<sup>8</sup>Ibid, p. 75.

in a case of the Criminal Act of Transferring Fiduciary Guarantee Objects, so that the public is able to understand the consequences of what is done and is aware of the law.

### **3.3. Effectiveness of Law Enforcement of Criminal Acts of Transfer of Fiduciary Guarantee Based on Justice**

In a further context in justice, the obligation is in accordance with the established institution. Social justice wants to return to the original human dignity without being tainted by free competition in a liberal economy that often stems from unfair situations.<sup>9</sup>

Munir Fuadi as quoted by Rahmadi Usman in his book stated that before the issuance of the Fiduciary Guarantee Law, there was no clarity on how to execute the object of the fiduciary guarantee. Because there were no provisions governing it, many interpreted the execution of the fiduciary guarantee using the ordinary lawsuit procedure (through the court using ordinary procedures) which was very long and also tiring. Although since the enactment of Law No. 16 of 1985, there has been an easier procedure through underhand execution. In addition to the heavy requirements, the execution of the fiduciary guarantee object underhand of course only applies to fiduciaries related to flats. Therefore, in practice, underhand execution of the fiduciary guarantee is very rarely used. The provisions of Article 29 paragraph (1) of the Fiduciary Guarantee Law do not mention how to execute the fiduciary through an ordinary lawsuit. Although it is not mentioned, of course the creditor can take the ordinary execution procedure through an ordinary lawsuit to the Court. Because the existence of the Fiduciary Guarantee Law with a special execution model is not to eliminate the general procedure law, but to add provisions that exist in general procedural law. There is no indication whatsoever in the provisions of the Fiduciary Guarantee Law, especially regarding the method of execution, which aims to eliminate the provisions of general procedural law regarding general execution regarding ordinary lawsuits to the Court. Furthermore, the existence of these special execution models does not make it easier and help creditors to collect their debts that have fiduciary guarantees by executing the fiduciary guarantee. One thing and another is caused by the execution of fiduciary through ordinary lawsuits taking a long time and with complicated procedures. This is said to be very impractical and inefficient for debts with fiduciary guarantees.<sup>10</sup>

The Constitutional Court's decision that grants the executorial power of the fiduciary guarantee certificate certainly weakens the creditor's position. So that justice that can be done if the credit has been approved and implemented will certainly side with the creditor for the sake of justice, creditors in the category that are not profitable, the possibility of injury or default by the debtor can be returned in balance so that the guarantee based on the Fiduciary Guarantee Law

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<sup>9</sup>Surajiyo, 'Justice in the Pancasila Legal System', IKRAITH-Humanira, 2.3 (2018), p.22.

<sup>10</sup>Munir Fuadi, *Fiduciary Guarantee* (Bandung: Citra Aditya Bhaksit, 2000).



can function properly in order to fulfill the fiduciary agreement clause. This is certainly encouraged by the existence of legal certainty for creditors in carrying out execution as well as a legal framework that must be fulfilled by creditors if they want to get protection from the provisions of the Fiduciary Guarantee Law.

The position of the debtor who is considered detrimental must certainly receive aggravating law because of the actions he has taken. The existence of the Constitutional Court's decision regarding breach of promise that cannot be determined unilaterally by the creditor on the basis of mutual agreement is certainly a decision that provides protection for the debtor but on the other hand also provides protection for the creditor by involving the court to try it. Moreover, with the requirement of a fiduciary guarantee certificate that is not fulfilled, it can indicate that the fiduciary institution does not provide full protection for the creditor and has full rights to fulfill the performance in the fiduciary agreement, both the main agreement and the additional agreement.

Therefore, the legal implications of this matter must also receive attention and technicalities related to the fiduciary guarantee instrument as well as improvements to the regulations of the Fiduciary Guarantee Law in the future so that it can provide maximum benefits for all levels of society.

However, fiduciary practices in several countries are very different from those in Indonesia. If in Indonesia fiduciary practices are identified with guarantees of goods, both fixed and movable, for a loan at a bank, then abroad fiduciary practices are more about investment guarantees which are responsible for helping public pension fund guarantees improve the long-term sustainability of investor companies that cooperate with certain banks. This will help these funds to increase their long-term financial returns and meet broader public obligations.<sup>11</sup>

In China, Malaysia, and Singapore there are national interest reasons that attract fiduciary systems for policy makers to promote environmental, social and investment practice factors. As well as ensuring long-term finance for citizens in old age to guarantee retirement funds and reduce inequality needed to meet economic growth targets in each country. A more detailed explanation will be explained as follows:

#### 1. China

Focusing on deep pension fund guarantees has made the Chinese government through organizations such as the People's Bank of China develop comprehensive policies to support the development of fiduciary guarantees in the Chinese financial system. The government of financial institutions is also useful for investment which in this case is strengthened and supported by the Department of Human Resources and Social Security, the People's Bank of China, the Stock Exchange and the Investment Industry.

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<sup>11</sup><https://www.fiduciaryduty21.org/explanatory-notes.html>, accessed on August 23, 2019.

## 2. Malaysia

Fiduciary guarantees in Malaysia are not only limited to bank loan guarantees, but developed countries have also masked in obligors and investment loans managed by corporations where funds are much larger than personal loans. In this case, the Malaysian government's fiduciary guarantee clarifies it in the Employees Provident Fund Act 1991, the Pension Fund Act 2007, the Financial Services Act 2013, the Act and Services 2007 to have all pension funds and investment managers take ESG issues into account, encourage high standards in investor companies and reports on how they do it.

## 3. Singapore

Singapore banking loans prioritize loans from colleagues such as Taiwan and Hong Kong, so the interest rate is not too high and the fiduciary guarantee for its liabilities is not too much of a concern. The Singapore government can better investigate the amendments to the effects and future regulations on the issue of fiduciary bank financial loans (Licensing and Business Conduct) to require all relevant investment managers and intermediaries to take ESG issues into account, encourage high standards in investor companies and reports on how they do it and are accountable for debt repayment with collateral or other valuables.<sup>12</sup>

## 4. Conclusion

Field facts are surprising with the existence of violation phenomena called fiduciary violations regarding the transfer of ownership rights, so that a legal product is formed that regulates fiduciary guarantees as explained in articles 35 and 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees. However, this cannot be said to be effective because the punishment of the perpetrator who transferred the fiduciary guarantee object is not commensurate with the actions he made, even in the applicable legal regulations there is no element of justice from one party, because only with a prison sentence and a fine the debtor still does not get his rights, and the provisions of fiduciary execution as regulated in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees which have been interpreted by the Constitutional Court in decision Number 18/PUU-XVII/2019 concerning the Judicial Review of Law Number 42 of 1999 concerning Fiduciary Guarantees have resulted in unfair legal protection as guaranteed in Article 28D paragraph (1), for the capital financing industry. Because the large costs that have been incurred are not as large as the income from the fiduciary goods themselves. As stated in Article 17 of Law No. 39 of 1999 concerning Human Rights (HAM Law), it includes several procedural and substantial rights, namely a free and impartial trial process (fair trial) that

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<sup>12</sup>T. n. Table of Differences in Fiduciary Guarantee Registration in Various Countries, p. 26.

upholds the principle of due process of law and the right to obtain a good and correct legal decision.

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