



## Legal reconstruction of the fiduciary fraud crime based on justice value

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### Abstract

The purpose of this research is to analyze and find weaknesses in the regulation of criminal sanctions for embezzlement of fiduciary guarantees in the Indonesian legal system and how to reconstruct the law based on Pancasila justice value. This study uses a constructivist paradigm with a sociological juridical approach to solving research problems by examining secondary data and primary data by finding legal realities experienced in the field as well as qualitative descriptive methods, namely where the data obtained is then arranged systematically so that a comprehensive picture will be obtained. where later the data will be presented descriptively.

Based on the research, it was found that the Weaknesses in the regulation of criminal sanctions for embezzlement of fiduciary guarantees in the Indonesian legal system consist of; First, the legal structure factor includes fiduciary institutions that do not register fiduciary guarantees. Police investigators encountered several obstacles in uncovering criminal acts of embezzlement of fiduciary collateral. Courts, where judges apply the fiduciary embezzlement article, are often wrong and neglect the principle of *lex specialis derogat legi generali*. The two factors of legal substance, namely the criminal sanctions contained in Article 36 of Law No. 42 of 1999, are lighter than the provisions of Article 327 of the Criminal Code. This provision is a *lex specialist*, but the criminal sanction is even lighter than the provisions of Article 372 of the Criminal Code. The three legal cultures, the crime of embezzlement which is a crime that starts with the existence of a belief in another person, and that trust is lost because of a lack of honesty. Therefore, The legal reconstruction of the Fiduciary Guarantee Law, namely Article 36, is that it changed to punishable by imprisonment for a maximum of 5 (five) years and compensation for a maximum of Rp. 1,000,000,000.

**Keywords:** legal reconstruction, death penalty, corruptor, justice value

### Introduction

Fiduciary guarantees are specifically regulated in Law number 42 of 1999 concerning Fiduciary Guarantees, hereinafter referred to as the Fiduciary Guarantee Law. The background to the emergence of Law No. 42 of 1999 concerning Fiduciary Guarantees was the interest in development in the economic field, especially in supporting credit activities, and intended as a means of creating a legal entity for Fiduciary guarantees in particular.

A fiduciary guarantee is an assessor agreement/follow-up agreement. Just as the science of law distinguishes agreements into basic agreements/main agreements (basic agreements) and accessory agreements/follow-up agreements. An agreement is called a basic agreement or main agreement if the agreement is an agreement that stands alone, and does not have "*dependencies*", either in the form of its implementation or its validity with other agreements<sup>[1]</sup>. This basic agreement is sometimes followed by an accessory agreement or follow-up agreement, the implementation of which depends on a term or condition as specified in the basic agreement. In this case, the fiduciary agreement is a follow-up agreement to the main agreement, namely the debt agreement.

When an agreement has been agreed, in this case, a loan agreement followed by a fiduciary guarantee, the parties involved are bound by the agreed agreement. As Article 1338 of the Civil Code states that "All agreements made are under the laws that apply as laws to those who make them. This agreement cannot be withdrawn other than by

agreement of both parties or for reasons determined by law, The agreement must be carried out in good faith".

The statement of this article implies that an agreement made by the parties applies to the parties as a law. Which law must be obeyed in good faith and if it is violated there will be sanctions imposed on those who violate it.

The binding of an agreement will generally give birth to rights and obligations to the parties involved in the agreement. Likewise, fiduciary guarantees give birth to rights and obligations for fiduciary givers and recipients. The fiduciary giver has the right to money or credit facilities that have been agreed upon as contained in the principal agreement, while the fiduciary recipient has the right to receive interest from his receivables and to take compensation for losses from the collateral in the event of default on the part of the fiduciary giver. What is meant by default is not fulfilling or failing to carry out obligations as specified in the agreement made between the creditor and the debtor. In this case, the creditor is the fiduciary recipient and the debtor is the fiduciary giver.

Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees stipulates that fiduciary givers are prohibited from transferring, pawning, or renting to other parties objects which are Fiduciary Guarantee Objects which are supply objects, except with prior written approval from the fiduciary recipient.

Finance companies in practice that apply fiduciary guarantees often experience problems in the field. Sometimes the debtor intentionally commits embezzlement,

embezzlement is interpreted as an act of using (money, goods, etc.) illegally. The objective elements of embezzlement include the act of possessing an object which partly or wholly belongs to another person who is in his power not because of a crime.<sup>[2]</sup>

Examination of the problem of embezzlement of fiduciary guarantees from the perspective of losses to finance companies due to the transfer of objects of fiduciary guarantees by debtors where the settlement of fiduciary cases through legal channels does not seem to solve the problem. The threat of punishment specified in the Fiduciary Law does not create a deterrent effect. Because the company still feels disadvantaged. Because collateral items are usually not found and their whereabouts are unknown.

The criminal sanctions contained in Article 36 of Law no. 42 of 1999 concerning Fiduciary Guarantees, namely being punished with imprisonment for a maximum of 2 (two) years and a fine of up to Rp. 50,000,000 (fifty million rupiahs), the sentence imposed does not reflect the value of justice and does not provide a deterrent effect.

Therefore, Based on this description, the author is interested in conducting research and examining the problem in a scientific paper titled "Legal Reconstruction Of The Fiduciary Fraud Crime Based On Justice Value" where the main problem discussed in this article is as follows:

1. What are the weaknesses of The Fiduciary Fraud Crime in Indonesia currently?
2. How is the Legal reconstruction of The Fiduciary Fraud Crime Based On Justice Value?

### Method of Research

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables<sup>[3]</sup>.

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of<sup>[4]</sup>:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

### Research result and discussion

#### 1. Weaknesses of the fiduciary fraud crime in Indonesia currently

Weaknesses, as meant by the author based on the results of field research, are that judges often make mistakes when applying the fiduciary guarantee embezzlement article and neglect the principle of *Lex Specialis Derogat Legi Generali*. In that decision, the principle of *Lex Specialis Derogat Legi Generali* should still be applied and is absolute so that judges should prioritize using Article 36 of the Fiduciary Guarantee Law as a *lex specialis* rather than Article 372 of the Criminal Code which is a *lex generalis*.

Studying the problem of embezzlement of fiduciary guarantees from the perspective of losses to finance companies due to the transfer of objects of fiduciary guarantees by debtors where the settlement of fiduciary cases through legal channels does not solve the problem. The threat of punishment specified in the Fiduciary Law does not create a deterrent effect. Because the company still feels disadvantaged. Because collateral items are usually not found and their whereabouts are unknown.<sup>[5]</sup>

The criminal sanctions contained in Article 36 of Law no. 42 of 1999 concerning Fiduciary Guarantees, namely being punished with imprisonment for a maximum of 2 (two) years and a fine of up to Rp. 50,000,000 (fifty million rupiahs), the sentence imposed does not reflect the value of justice and does not provide a deterrent effect.

With these related articles, it is necessary to harmonize standards in imposing criminal sanctions. Article 36 of Law 42 of 1999 regulates criminal provisions for fiduciary givers who pawn or transfer fiduciary guarantee objects, namely the threat of imprisonment for a maximum of two years and a maximum of Rp. 50 million. Unfortunately, these rules are lighter than the provisions of Article 327 of the Criminal Code. This provision is a *lex specialist*, but the criminal sanction is even lighter than the provisions of Article 372 of the Criminal Code.

Then, concerning community legal awareness, it influences legal compliance, both directly and indirectly. In an advanced society, the factor of legal awareness influences the legal compliance of the community. People obey the law because their soul is aware that they need the law and the law has good intentions and has regulated society in a good, right, and fair manner.<sup>[6]</sup>

In a traditional society, people's legal awareness indirectly influences their legal compliance. They obey the law not because of their direct belief that the law is good or because they need the law, but they obey the law more because they are asked, even forced by their leaders (formal or informal), or because of their religious orders or beliefs. So in terms of indirect influence, the legal awareness of the people is more to obey their leaders, religion, beliefs, and so on.

It cannot be ignored that one of the factors that follow the development of community law is legal awareness and legal compliance of the community itself. The legal awareness factor plays an important role in society because this factor

has a direct correlation with the strong and weak factors of community law compliance. The weaker the level of public legal awareness, the weaker the legal compliance. Conversely, the stronger the legal awareness, the stronger the compliance factor. So that the process of development and effectiveness of law can be felt directly by the community.

Today's society is braver to disobey the law for personal gain because they value the law in enforcing it as having no authority anymore, because their interests are no longer being good law enforcers, law enforcement is felt to be discriminatory. In this case, loyalty to personal interests is the starting point for why people do not obey the law.<sup>[7]</sup>

## 2. Legal reconstruction of the fiduciary fraud crime based on justice value

Based on the legal principle of *Lex Specialis Derogat Legi Generalis*, namely provisions that are more specific/specific cover the application of general/general legal norms. So regarding the Fiduciary Guarantee case, remember:

- a. Article 372 of the Criminal Code regarding embezzlement (with a maximum penalty of 4 years) has been specifically regulated in Article 36 of the Fiduciary Guarantee Law (with a maximum penalty of 2 years).
- b. Article 378 of the Criminal Code regarding fraud (with a maximum penalty of 4 years imprisonment) has been specifically regulated in Article 35 of the Fiduciary Guarantee Law (with a minimum criminal penalty of 1 (one) year and a maximum of 5 (five) years).

Based on this comparison, the legal sanctions in the Fiduciary Guarantee Law are lower than the penalties stated in Article 372 of the Criminal Code.

In practice, in cases decided under Article 36 of the Fiduciary Guarantee Law, the sentences imposed range from 2 (two) months to 1 (one) year 3 (three) months, and fines ranging from IDR 2,500,000.00 to IDR 25,000,000.00.

Taking into account the criminal threats contained in the Fiduciary Guarantee Law, both imprisonment and fines, these threats are very disproportionate to the current credit development which has reached trillions of rupiah<sup>[8]</sup>. Therefore, it is necessary to expand the scope of action and increase the threat of imprisonment and fines so that the debtor is more careful if he wants/intends to transfer Fiduciary Collateral objects. Arrangements regarding changes to sanctions in the Fiduciary Guarantee Law should refer to the Criminal Code Bill, which is currently being discussed for amendments in the DPR.<sup>[9]</sup>

Therefore the author will carry out an idea in the form of a Reconstruction of Regulations concerning Sanctions for the Crime of Fiduciary Embezzlement, in Law No. 42 of 1999 concerning Fiduciary Guarantees, namely as follows:

- a. Philosophical foundation, national development is sustainable development which covers the entire life of the community, nation, and state as stated in the opening of the 1945 Constitution of the Republic of Indonesia, namely protecting the entire nation and all of Indonesia's bloodshed, advancing public welfare, educating the nation's life and participating in carrying out world order based on freedom, eternal peace, and social justice. State objectives as stated in the constitution must be embodied in tandem with realizing

legal objectives. Related to this, Gustaf Radbruch has stated three basic legal values which include: justice, legal certainty, and finality/benefit. From the aspect of legal benefits, this reconstruction of the Fiduciary Guarantee Law is carried out to open opportunities for everyone to obtain guaranteed rights easily and efficiently. Fiduciary as a financing instrument with movable property collateral must be able to increase its role so that it can be used more widely by the public.

- b. Sociological Basis, Fiduciary is a material guarantee instrument, providing convenience for the debtor because of its broad scope covering movable objects, however, this guarantee instrument has not been widely used by the public. Currently, fiduciaries are still focused on motorized vehicle guarantees even though the potential economic value is enormous. Fiduciary renewal is needed so that it is easier for the community to use to move the wheels of the economy. fiduciary characteristics whose objects are movable objects, the renewal of the Fiduciary Guarantee procedure will greatly assist the growth of the business world, especially for MSME business actors and the creative economy. The MSME sector and the creative economy have limited immovable assets (land, buildings, etc.) or basically only have movable assets as collateral for credit (vehicles, inventory items, intellectual property, etc.). Fiduciary guarantees as an instrument for registering movable property guarantees will play a very vital role in filling this need and will further encourage the growth of movable collateral-based funding. Fiduciary instruments which are basically based on trust from the creditor to the debtor to control the object are also prone to abuse. This can be seen from the various deviations that have occurred in society, for example, the transfer of Fiduciary Guarantee objects by debtors without the creditor's knowledge, double imposition of the same Fiduciary Guarantee object, the difficulty of executing Fiduciary Guarantee objects even though the debtor has defaulted, and others. The existence of legal uncertainty and the absence of strict sanctions will reduce the trust of business people because of the nature of specialization and publicity as well as preferential rights to other creditors has the potential to experience problems when default occurs. The renewal of Fiduciary Guarantees is also aimed at increasing legal protection for both debtors and creditors so that they can provide more legal certainty for the public or the business world.
- c. Juridical Basis, The legal aspect of fiduciary guarantees has been growing compared to 1999 when this law was promulgated. Based on article 14 paragraph (3) of Law no. 42 of 1999 concerning Fiduciary Guarantees, the birth of the fiduciary is when it is registered at the Fiduciary Registration Office so that a fiduciary giver makes a transfer of a fiduciary guarantee object without first agreeing with the fiduciary recipient whose deed has not been registered with the Fiduciary Guarantee Registration Office, Ministry of Law and Rights Human Rights should comply with the provisions of Article 327 of the Criminal Code. the application of the principle of *Lex Specialis Derogat Legi Generalis* must be carefully considered by the judge in legal considerations of the defendant's actions, the crime of transferring fiduciary objects is inherent in civil law so

that the legal consequences of not carrying out the procedure for registering fiduciary guarantees result in fulfilling the elements of a crime in criminal provisions in Law no. 42 of 1999 concerning Fiduciary Guarantees.

### Conclusion

Based on the results of the research, the following conclusions can be drawn:

1. The Weaknesses in the regulation of criminal sanctions for embezzlement of fiduciary guarantees in the Indonesian legal system consist of; First, the legal structure factor includes fiduciary institutions that do not register fiduciary guarantees. Police investigators encountered several obstacles in uncovering criminal acts of embezzlement of fiduciary collateral. Courts, where judges apply the fiduciary embezzlement article, are often wrong and neglect the principle of *lex specialis derogat legi generali*. The two factors of legal substance, namely the criminal sanctions contained in Article 36 of Law No. 42 of 1999, are lighter than the provisions of Article 327 of the Criminal Code. This provision is a *lex specialist*, but the criminal sanction is even lighter than the provisions of Article 372 of the Criminal Code. The three legal cultures, the crime of embezzlement which is a crime that starts with the existence of a belief in another person, and that trust is lost because of a lack of honesty.
2. The Legal Reconstruction of the Law on Fiduciary Fraud Based on Pancasila Justice is, namely, in Article 36 of the Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees, namely: as referred to in Article 23 paragraph (2) which is carried out without prior written approval from the Fiduciary Recipient, shall be subject to imprisonment for a maximum of 5 (five) years and compensation for a maximum of Rp. 1,000,000,000.- (one billion rupiah).

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