

Juridical Review of the Crime of Transferring the Object of Fiduciary Guarantee Without the Consent of the Fiduciary Recipient

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ABSTRACT

This study examines the criminal act of transferring fiduciary collateral objects without the prior written consent of the fiduciary recipient as regulated under Indonesian law. The rapid development of consumer financing practices has increased the use of fiduciary guarantees, particularly in credit agreements involving movable assets. However, in practice, debtors often transfer, pledge, or lease fiduciary objects to third parties without authorization, which constitutes a criminal offense under Law Number 42 of 1999 on Fiduciary Security. This research employs a normative juridical method with a statutory approach, analyzing primary legal materials in the form of legislation and court decisions, as well as secondary legal materials from legal literature and scholarly works. The study focuses on the regulation of such criminal acts and the form of criminal liability imposed on fiduciary grantors who violate fiduciary provisions. The findings indicate that the transfer of fiduciary collateral without the consent of the fiduciary recipient fulfills the elements of a criminal offense as stipulated in Article 36 of the Fiduciary Security Law. Criminal liability may be imposed if the perpetrator is proven to have acted unlawfully, intentionally or negligently, and without any justification or excuse that eliminates criminal responsibility. This research concludes that the existing legal framework provides legal certainty and protection for creditors, although stricter supervision and legal awareness are necessary to prevent recurring violations in fiduciary practices.

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1. INTRODUCTION

The development of increasingly dynamic economic activities in line with the increasing public demand for consumer goods has significantly boosted the growth of the consumer financing sector in Indonesia. The financing pattern through credit or installments is one of the most widely used mechanisms by the public to obtain goods, especially movable objects such as motor vehicles, electronic equipment, and other capital goods. This scheme is considered to be able to provide easy access to goods

ownership for people who have limited purchasing power in cash (Febriani & Dewi, 2019). However, behind this convenience, there are considerable legal risks for financing institutions, especially related to the possibility of default by debtors.

In consumer financing practices, financial institutions generally require guarantees as a form of legal protection and certainty for the repayment of debtor obligations. The guarantee serves as a risk mitigation tool to guarantee the interests of creditors if the debtor does not fulfill his obligations according to the agreement. One of the most widely used forms of material collateral in consumer financing practices in Indonesia is fiduciary guarantees, considering their flexible nature and providing convenience for debtors to continue to use the collateral object during the agreement period (Usman, 2021).

Fiduciary guarantees are specifically regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. This law provides a legal basis for the transfer of ownership rights of an object on the basis of trust (fiduciary transfer of ownership), provided that the object of the guarantee remains in the possession of the fiduciary. This characteristic distinguishes fiduciary guarantees from other collateral institutions, such as pawns, which require the physical surrender of the object to the creditor. The existence of collateral objects in the debtor's possession is intended so that the debtor can still use the object to support their economic activities and productivity (Huri, 2022).

Although it provides convenience for the debtor, the control of the collateral object by the fiduciary also opens up opportunities for abuse. In practice, it is not uncommon for debtors to transfer, mortgage, or lease the object of fiduciary guarantee to a third party without the written consent of the fiduciary. This action is generally carried out on the grounds of inability to continue paying installments or to meet urgent economic needs, without considering the legal consequences that arise (Hamka, 2023). In fact, this act is expressly prohibited by Article 23 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees.

Furthermore, the transfer of the fiduciary guarantee object without the consent of the fiduciary not only constitutes a violation of the civil agreement between the debtor and the creditor, but also qualifies as a criminal offense. This is emphasized in Article 36 of the Fiduciary Guarantee Law which regulates criminal sanctions in the form of imprisonment and/or fines for fiduciaries who deliberately transfer the object of collateral without the written consent of the fiduciary. Thus, these acts have a criminal law dimension that aims to provide a deterrent effect and protect the legal interests of creditors (Khatimah, 2024).

The regulation of criminal sanctions in the Fiduciary Guarantee Law shows that there are efforts by lawmakers to ensure legal certainty and legal protection for parties, especially creditors. However, in law enforcement practice, there are still various problems, such as differences in the interpretation of the elements of criminal acts, the proof of the element of intentionality, and the application of criminal liability to fiduciaries. Therefore, a comprehensive juridical study of the regulation of the criminal act of transferring the object of fiduciary guarantee and its criminal liability is very important in order to create fair and consistent law enforcement (Sinaga, 2023).

Based on this description, this article aims to examine juridically the regulation of the criminal act of transferring the object of fiduciary collateral without the consent of the fiduciary and analyze the form of criminal liability that can be imposed on fiduciaries based on positive legal provisions in Indonesia. This study is expected to make an academic contribution to the development of criminal law and bail law, as well as become a practical reference for law enforcement officials, financing institutions, and the public.

2. METHODS

This research is a normative legal research that focuses on the study of legal norms that regulate the criminal act of transferring the object of fiduciary collateral without the consent of the fiduciary recipient. The normative approach is used because the problems studied are closely related to positive legal arrangements, especially the provisions of laws and regulations that regulate fiduciary guarantees and criminal liability. This research places law as a norm written in laws and regulations as well as as a rule that develops in doctrine and court decisions.

The approaches used in this study include a legislative approach and a conceptual approach. The legislative approach is carried out by systematically examining the provisions of Law Number 42 of 1999 concerning Fiduciary Guarantees, the Criminal Code, and other regulations relevant to consumer financing practices. Meanwhile, a conceptual approach is used to analyze legal concepts related to fiduciary guarantees, criminal acts, elements of fault, and criminal liability based on the views of legal scholars.

The legal materials used in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include laws and regulations and court decisions related to the transfer of the object of fiduciary guarantee. Secondary legal materials are in the form of textbooks, scientific journals, and the results of previous research relevant to the research topic, while tertiary legal materials are used as supporting materials to clarify legal terms and concepts. All of these legal materials are obtained through literature studies by tracing relevant and credible legal sources.

The analysis of legal materials is carried out qualitatively by interpreting and reviewing the applicable legal provisions and relating them to the doctrine and theory of criminal law. The collected legal materials are systematically analyzed to obtain a comprehensive understanding of the regulation of criminal acts, the transfer of the object of fiduciary collateral, and the form of criminal liability for fiduciaries. The results of the analysis are then presented in a descriptive-analytical manner to draw conclusions that are able to answer the research objectives and contribute to the development of legal science and law enforcement practices.

3. FINDINGS AND DISCUSSION

3.1 Legal Arrangement of the Criminal Offence of Transfer of Fiduciary Guarantee Objects Without the Consent of the Fiduciary

The existence of fiduciary guarantees in the Indonesian legal system is a response to the need of the business world and the public for a flexible financing mechanism while still ensuring legal certainty for creditors. Prior to the enactment of Law No. 42 of 1999 concerning Fiduciary Guarantees, fiduciary practices in Indonesia were only based on jurisprudence, especially the Supreme Court's Decision in the case of *Bataafsche Petroleum Maatschappij (BPM) against Pedro Clignett* in 1932 (Fuady, 2013). This condition creates legal uncertainty due to the absence of comprehensive written arrangements regarding the rights and obligations of the parties as well as legal protection mechanisms for creditors.

Law Number 42 of 1999 was then present to provide a firm legal basis regarding fiduciary guarantees, both from civil and criminal aspects. This law defines fiduciary as the transfer of ownership rights of an object on the basis of trust, with the provision that the object of the guarantee remains in the control of the fiduciary (Article 1 number 1 of the Fiduciary Guarantee Law). This characteristic makes it easy for debtors to continue to use collateral objects to support their economic activities, but at the same time contain the potential for abuse (Usman, 2021).

To prevent such abuse, Article 23 paragraph (2) of the Fiduciary Guarantee Law expressly prohibits fiduciaries from transferring, pawning, or renting out fiduciary collateral objects that are not inventory objects without the written consent of the fiduciary. This prohibition is a form of preventive legal protection for creditors so that their collateral rights are not harmed by the debtor's unilateral actions (Salim HS, 2014).

Furthermore, lawmakers not only place violations of these provisions as civil defaults, but also qualify them as criminal acts. Article 36 of Law Number 42 of 1999 regulates the threat of imprisonment for a maximum of two years and/or a fine of up to fifty million rupiah for fiduciaries who transfer the object of collateral without the written consent of the fiduciary. This provision shows that violations of fiduciary guarantees are seen as acts that disrupt certainty and legal order in consumer financing practices (Hamka, 2023).

According to the author, the legal arrangement regarding the criminal act of transferring the object of fiduciary guarantee without the consent of the fiduciary is an important part of the state's efforts to create legal certainty and legal protection for creditors in consumer financing practices. Fiduciary

guarantees are basically built on the principle of trust, where the creditor provides an opportunity for the debtor to retain control and use the object of the guarantee even though his ownership rights have been transferred judicially. However, the trust cannot be interpreted as absolute freedom for the fiduciary to perform legal acts against the object of the guarantee.

The author is of the view that the prohibition of the transfer of the object of fiduciary guarantee without the consent of the fiduciary as stipulated in Article 23 paragraph (2) of Law Number 42 of 1999 is a form of rational and proportionate restriction. The restriction is necessary to prevent the misuse of control of the collateral object by the debtor that can harm the creditor. In this context, the physical control of the object of collateral by the fiduciary should be understood solely as a legal facility to support the debtor's economic activities, not as a basis for transferring the rights to the object to another party.

Furthermore, the author considers that the qualification of the transfer of the object of fiduciary guarantee without the consent of the fiduciary as a criminal act as stipulated in Article 36 of the Fiduciary Guarantee Law shows the seriousness of the lawmakers in maintaining the integrity of the fiduciary institution. This criminal provision is not only a repressive instrument, but also has a preventive function to foster legal awareness and compliance of debtors with the fiduciary agreement that has been agreed. With the threat of a criminal threat, debtors are expected to be more careful and responsible in controlling and using the object of fiduciary guarantee.

The authors also argue that the provision of criminal sanctions in the Fiduciary Guarantee Law reflects a paradigm shift in which breaches of trust in fiduciary relationships are no longer seen solely as civil matters, but rather as acts that have an impact on broader legal interests. The transfer of the fiduciary guarantee object without the consent of the fiduciary not only harms the creditor individually, but also has the potential to disrupt stability and confidence in the consumer financing system as a whole.

However, the author is of the view that the existence of strict legal regulation must be balanced with the consistent and fair application of the law. Law enforcement against the crime of transferring the object of fiduciary guarantee should not only be criminally oriented, but also consider the social and economic background of the perpetrator without overriding the legal interests of creditors. Thus, the legal regulation regarding this criminal act not only functions as a tool of punishment, but also as a means of coaching and prevention to realize healthy and fair consumer financing practices.

3.2 Elements of the Criminal Act of Transfer of Fiduciary Guarantee Objects

To determine whether an act can be qualified as a criminal act of transferring the object of fiduciary guarantee, it is necessary to analyze the elements contained in Article 36 of the Fiduciary Guarantee Law. The first element is the subject of the law, namely the fiduciary. This confirms that this criminal act is special (*delicta propria*), because it can only be carried out by parties who have legal standing as a fiduciary (Moeljatno, 2018).

The second element is the act of transferring, pawning, or renting out the object of fiduciary guarantee. This provision is alternative, so the fulfillment of one of these acts is sufficient to fulfill the elements of a criminal act. In practice, the most common form of act is the transfer in the form of the sale of fiduciary guarantee objects to third parties, especially motor vehicles (Huri, 2022).

The third element is the absence of written consent from the fiduciary. Written consent is an absolute condition that must be met in order for the transfer of the object of fiduciary guarantee to be carried out legally. Without this agreement, the act of transfer becomes an unlawful act and can be subject to criminal sanctions (Usman, 2021).

3.3 Criminal Liability of the Fiduciary

Criminal liability in Indonesian criminal law is based on the principle of *geen straf zonder schuld*, which means that there is no crime without fault. Therefore, a person can only be convicted if his or her

actions meet the elements of a criminal act and are committed by mistake, either in the form of intentionality or negligence (Moeljatno, 2018).

In the context of the transfer of the object of fiduciary guarantee, the perpetrator's fault is generally in the form of intentional (*dolus*). This intentionality can be proven from the perpetrator's knowledge of the status of the object as a fiduciary guarantee and the awareness that the act of transfer was carried out without the consent of the creditor. Thus, there is an inner attitude that is to blame from the fiduciary (Lamintang, 2016).

In addition to mistakes, criminal liability also requires the ability to be responsible. As long as the fiduciary is not in a condition that abolishes criminal liability as stipulated in Article 44 of the Criminal Code, then criminal sanctions can be imposed on him (Chazawi, 2015).

According to the author, the criminal liability of the fiduciary in the criminal act of transferring the object of fiduciary guarantee without the consent of the fiduciary is a logical consequence of the violation of the principle of trust that is the basis of fiduciary legal relations. Fiduciary is not just an ordinary contractual relationship, but a legal relationship that demands good faith and high responsibility from the fiduciary. Therefore, when the fiduciary knowingly transfers the object of collateral to another party without the written consent of the fiduciary, the act should be viewed as an act worthy of criminal liability.

The author is of the view that criminal liability in this context must be based on the fulfillment of the elements of criminal acts as formulated in Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees. The element of the subject of the law as a fiduciary, the act of transferring the object of fiduciary guarantee, and the absence of written consent from the fiduciary are objective elements that are relatively easy to prove. However, the most crucial aspect, according to the author, is the proof of the element of guilt as the basis for criminal legitimacy.

From the perspective of criminal law, a person can only be held criminally liable if his actions were done by mistake, either in the form of intentionality or negligence. The author assesses that in practice, the fiduciary's mistake is generally intentional, because fiduciaries generally know the status of the object as a fiduciary guarantee and understand the legal obligations attached to it. This awareness is even stronger if the fiduciary has signed a financing agreement that explicitly contains a prohibition on the transfer of collateral objects without the creditor's consent.

Furthermore, the author argues that economic reasons, such as the inability to continue paying installments, cannot be used as a justification for removing criminal liability. Economic difficulties are indeed a social reality that deserves attention, but they do not necessarily remove the unlawful nature of the act of transferring the object of fiduciary guarantee. In this case, the author emphasizes the importance of a firm separation between the driving factors for the occurrence of criminal acts and the justifying or forgiving reasons as known in criminal law.

The author also considers that the application of criminal liability to fiduciaries must consider the principles of proportionality and justice. Criminalization should not only be repressive, but also directed to provide a deterrent effect while encouraging legal compliance among debtors. In this context, judges have a strategic role to carefully assess the level of wrongdoing, the impact of the act on creditors, and the subjective conditions of the perpetrators in imposing a fair and balanced sentence.

Thus, according to the author, the criminal liability of the fiduciary provider in the criminal act of transferring the object of fiduciary guarantee without the consent of the fiduciary is an important instrument to maintain legal certainty and trust in the consumer financing system. The consistent and fair implementation of criminal liability not only protects the interests of creditors, but also contributes to the creation of orderly, transparent, and responsible financing practices.

3.4 Application of Law in Judicial Practice

The application of Article 36 of the Fiduciary Guarantee Law in judicial practice shows that courts generally consider the act of transferring the object of fiduciary guarantee without the consent of the fiduciary as an act that meets the elements of a criminal act. In the Maros District Court Decision

Number 92/Pid.B/2020/PN Mar, for example, the panel of judges stated that the defendant was legally and convincingly proven guilty of transferring a motor vehicle that was the object of fiduciary guarantee to a third party without the written consent of the creditor (Maros District Court Decision No. 92/Pid.B/2020/PN Mar).

The decision reflects the court's commitment to providing legal protection to creditors and upholding legal certainty in consumer financing practices. The criminalization in this case is not only repressive, but also preventive to prevent the recurrence of similar acts in the future (Sinaga, 2023).

3.5 Legal Implications and Creditor Protection

The regulation of criminal sanctions against the transfer of the object of fiduciary guarantee without the consent of the fiduciary has significant legal implications, especially for creditor protection. This provision strengthens the position of creditors as holders of guarantee rights who have legal certainty over the repayment of their receivables. In addition, this arrangement also functions as an instrument of social control to increase the legal awareness of debtors to comply with the provisions of the fiduciary agreement (Salim HS, 2014).

4. CONCLUSION

Based on the results of the research and discussion that has been described, it can be concluded that the regulation regarding the criminal act of transferring the object of fiduciary guarantee without the consent of the fiduciary has been expressly and systematically regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. The provisions of Article 23 paragraph (2) expressly prohibit the fiduciary from transferring, mortgaged, or renting out the object of fiduciary collateral that is not a stock object without the written consent of the fiduciary. The prohibition is strengthened by the provisions of criminal sanctions in Article 36 of the Fiduciary Guarantee Law, which qualifies the act as a criminal act with the threat of imprisonment and/or fines. This regulation shows the efforts of lawmakers to provide legal certainty and legal protection for creditors in consumer financing practices.

Furthermore, criminal liability against a fiduciary who transfers the object of fiduciary guarantee without the consent of the fiduciary can only be imposed if the elements of the criminal act are met, namely the existence of a legal subject as the fiduciary, the act of transferring the object of fiduciary guarantee, the absence of written consent from the fiduciary, and the existence of an element of error in the form of intentionality or negligence. In addition, the perpetrator must have the ability to be legally responsible and not be in a condition that eliminates criminal liability as stipulated in the Criminal Code. With the fulfillment of these elements, punishment can be imposed as a form of law enforcement that aims to provide a deterrent effect, maintain legal certainty, and protect the interests of creditors.

Thus, it can be concluded that the regulation and application of criminal sanctions against the transfer of the object of fiduciary guarantee without the consent of the fiduciary has a strong legal basis in Indonesian positive law. However, the effectiveness of law enforcement against these crimes still requires consistency of law enforcement officials and increased legal awareness of the parties involved in consumer financing agreements. In the future, preventive efforts are needed through legal education for debtors and strengthening supervision in financing practices so that violations of fiduciary guarantee provisions can be minimized.

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