

OWNERSHIP RIGHTS OBJECT TO FIDUCIARY GUARANTEE AS COLLATERAL FOR DEBT RESPONSIBILITY

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Abstract - Referring to Law No. 42/1999, the concept of the fiduciary is part of the guarantee (collateral) of debt that is material in nature, but with the condition that the ownership rights to the object of the fiduciary guarantee are transferred to the fiduciary recipient remain in the control of the owner of the thing. The concept of fiduciary as a guarantee creates contradictory norms because the property rights of the fiduciary object are with the fiduciary recipient. Still, control of the thing remains with the fiduciary giver, so it is not clear who the owner of the fiduciary object is as a legal consequence of transferring ownership rights to the fiduciary thing. Therefore, the owner of the fiduciary object as collateral for debt repayment needs to be investigated. This research is normative legal research using a statutory and historical approach. The study results stated that the transfer of ownership rights to the fiduciary object was carried out within the collateral framework to settle certain debts. It has implications for distinguishing property rights over fiduciary things, distinguished by juridical and economic property rights. The juridical property rights of the fiduciary object are in the hands of the fiduciary recipient, who owns the fiduciary thing. Meanwhile, the fiduciary object's economic rights remain in the fiduciary giver's control. The fiduciary recipient's juridical right is to sell the fiduciary thing when the fiduciary giver defaults. During the fiduciary assignment, the fiduciary giver has the position of the borrower to use the fiduciary object.

Keywords: fiduciary guarantee; fiduciary object owner; law; ownership

INTRODUCTION

The Republic of Indonesia's 1945 Constitution (now referred to as the 1945 Constitution) stipulates that everything must be founded on the law because Indonesia is a state of law.¹ It is said that Pancasila and the 1945 Constitution, which aims to provide certainty, order, and legal protection, are the well-known basis for Indonesia's legal system.²

Unlike mortgages and pawns, fiduciary guarantees guarantee institutions whose birth is based on jurisprudence, which is confirmed in laws and regulations. This fiduciary guarantee institution is widely used in lending and borrowing transactions, considering the loading process is simple, easy, and fast. Its existence was to meet the community's needs at that time, which required a new guarantee institution with a different legal construction from pawning.³ Both objects of the object are movable properties. Still, the fiduciary guarantee institution allows the fiduciary giver to keep control of the object guaranteed and to carry out business activities financed from loans using fiduciary guarantees.⁴ Currently, fiduciary guarantee institutions are fully and comprehensively regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889; after this referred to as Law No. 42/1999).⁵

¹ Petrus A. F. Tolang and Solomon D. Dibaba, *The Concept of Delegation of Local Government Authority (Study of Financial Supervision and Management)* (2020) 1 Protection: Journal of Land and Environmental Law 49 - 55

² Agung Irianto, *Position, Tenure, and Responsibility of The Notary in Carrying Out the Position of Notary* (2022) 1 Protection: Journal of Land and Environmental Law 97 - 105

³ I Gede R. Ramanda, Made Wiryani and Ni Luh M. Mahendrawati, *Legal Protection of Debtor in Credit Settlement with Fiduciary Guarantee* (2021) 8 Jurnal Hukum Prasada 101-106

⁴ Samuel L. Bray and Paul B. Miller, *Against Fiduciary Constitutionalism* (2020) 106 Virginia Law Review 1479-1532; M. Jamil, *Fiduciary Security Arrangements and Issues in Indonesia* (2021) 1 Journal of Human Rights, Culture and Legal System

⁵ T. Febri Ramadhan, Teuku A. Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object under the Hands of the Debtor without the Creditor's Consent in the Consumer Financing Agreement (Study at PT. Adira Dinamika Multifinance TBK Banda Aceh)* (2021) 8 International Journal of Multicultural and Multireligious Understanding 8 455-468



A fiduciary guarantee is a contract to satisfy the community's capital needs and fulfill life's necessities.⁶ Guarantee institutions in the form of mortgages are deemed insufficient to accommodate the capital needs of people who do not have collateral for immovable objects, such as land, as collateral objects for their debts.⁷ On the other hand, the existence of a pawn guarantee institution is also deemed insufficient to answer the limitations of the community because the object of collateral for movable pawns must be removed from the power of the pawnbroker and subsequently held by the creditor holding the instrument (waistband) or a third party carrying the puppet.⁸ It becomes a barrier for people who make loans intending to buy production goods (as working capital) and transportation.⁹ The community's needs then began the birth of "fiduciary guarantees".

UU No. 42/1999 named the new guarantee institution "fiduciary guarantee" in addition to "fiduciary". In the past, various names were attached to this fiduciary guarantee as a translation of the term "*fiduciaire eigendomsoverdracht*", namely: "buying and selling with repurchase rights", "pseudo buying and selling", "silent pawning", "pawning without control", "expanded pledge", "property rights as collateral", "agreement on the transfer of property rights based on trust", "agreement on the transfer of property rights in trust", or "agreement on the transfer of property rights as collateral". These terms are merged into two terms with different meanings, namely, fiduciary and fiduciary guarantees. Establishment of Law No. 42/1999 distinguishes between fiduciary and fiduciary guarantee. Referring to Article 1 point 1 of Law No. 42/1999, the fiduciary is an institution and a form of transfer of rights carried out in trust. As a result, the ownership of rights to an object is transferred.¹⁰

Meanwhile, referring to Article 1 point 2 of Law No. 42/1999, a fiduciary guarantee is a security right on an object as collateral for a debt. The thing here guarantees the repayment of a specific obligation, not intending to transfer ownership of the right to the object used as a debt guarantee.¹¹ If traced further, the construction of the essential legal relationship that gives birth to fiduciary and fiduciary contracts is different if the fiduciary legal relationship is basically through a sale and purchase agreement, exchange, or grant. In contrast, the essential legal relationship fiduciary guarantee is a debt agreement. Suppose the terms fiduciary and fiduciary guarantees are linked.¹² In that case, it can be interpreted that in fiduciary guarantees, there is a transfer or transfer of ownership rights to objects of fiduciary security from the fiduciary giver to the fiduciary recipient even though it is known that the essential legal relationship that is built in a fiduciary guarantee is a debt agreement, not a sale and purchases agreement, exchange or grant.¹³ Through a debt agreement, transferring ownership rights to the fiduciary object from the fiduciary giver to the fiduciary recipient will be possible. Even if it turns out that there is a transfer of ownership rights to a fiduciary object, Law No. 42/1999 does not explain when and how it occurs in the fiduciary charge.¹⁴ It is important concerning the momentum of the occurrence of ownership rights to an object determined at the time of the delivery of the object in question.¹⁵

If referring to Article 584 Burgerlijk Wetboek (Staatsblad Year 1847 Number 23; after this referred to as BW), there are five ways to obtain ownership rights to an object, one of which is through delivery (*levering or overdracht*), other than ownership (*claim*), attachment (*trekking*), inheritance

⁶ Max Schanzenbach and Nadav Shoked, *Reclaiming Fiduciary Law for the City* (2018) 20 Stan. L. Rev. 565

⁷ Jack M. Balkin, *The Fiduciary Model of Privacy* (2020) 134 Harv. L. Rev. F. 11

⁸ Seth Davis, *The False Promise of Fiduciary Government* (2013) 89 Notre Dame L. Rev. 89 1145; Paul B. Miller and Andrew S. Gold, *Fiduciary Governance* (2015) 57 Wm. & Mary L. Rev. 513

⁹ Tamar Frankel, *Fiduciary Law in the Twenty-First Century* (2011) 91 BUL Rev. 1289

¹⁰ Elisabeth N. Butarbutar, *Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision* (2022) 19 Jurnal Konstitusi 606-622; Sofyan W. A. Pradnyawan and others, *Execution of Fiduciary Collateral Based on the Decision of the Constitutional Court Number 18/PUU-XVIII/2019* (2020) 1 Indonesian Journal of Law and Policy Studies 142-151; Ramadhan, Teuku A. Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*

¹¹ Andrew S. Gold, *Reflections on the State as Fiduciary* (2013) 63 University of Toronto Law Journal 655 - 670

¹² Ethan Leib and Stephen Galoob, *Fiduciary Political Theory: A Critique* (2016) 125 Yale Law Journal; William L. Megginson and Veljko Fotak, *Rise of the Fiduciary State: A Survey of Sovereign Wealth Fund Research* (2016) A Collection of Reviews on Savings and Wealth Accumulation 163-212

¹³ Bo Becker and Per Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts* (2012) 25 The Review of Financial Studies 1931-1969; Butarbutar, *Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision*

¹⁴ Davis, *The False Promise of Fiduciary Government*; Miller and Gold, *Fiduciary Governance*

¹⁵ Balkin, *The Fiduciary Model of Privacy*



(*erfopvolging*), and expiration (*perjuring*). Ownership rights to an object can be obtained through submission based on an event or civil act for those whose purpose is to transfer property rights. In other words, ownership rights to an object can occur due to the surrender of the entity concerned by another person who has the right to act on the item to another person.¹⁶

In the civil law system, the surrender must be based on a title of transfer of rights from a person with the right to transfer his property rights to an object.¹⁷ The word surrender has two meanings: first, an act in the form of a mere transfer of power (*feitelijke levering*), and second, a legal action aimed at transferring property rights to another person (*juridische levering*).¹⁸ However, for the transfer of property rights from one hand to another, a reason is used as the basis for a title or civil event. It can be ascertained why a party is leveraging its property to another party. Of course, there is a title or civil event as the basis.¹⁹ The title or civil event that is commonly used as the basis for levering is a sale and purchase agreement, it can also be in the form of an exchange agreement, or it can be in the form of a grant agreement. It is only possible to leverage with a title. The title formed based on the contract initiates the will meet to transfer property rights to objects.²⁰

Ownership rights to an object can be transferred to another person at the time of delivery of the thing. The transfer of ownership rights to an object, according to Article 584 BW, requires the basis of fairness, title, or essential legal relationship, which in this case is "a civil event" or "a civil act".²¹ This civil event is the basis for the right to transfer ownership rights from an object to another person by buying, selling, exchanging, or granting.²² In the imposition of fiduciary guarantees, it is not clear the basis of the legal relationship, for example, whether the debt agreement, which is believed to have taken place, is considered to have transferred ownership rights to the object of the fiduciary guarantee from the fiduciary giver to the creditor or fiduciary recipient.²³ Internally, a fiduciary guarantee imposition is a debt and receivables guarantee. Still, externally it is essentially a transfer of ownership rights to the object of the fiduciary guarantee object from its owner to the creditor or fiduciary recipient. If so, it is questionable whether the creditor or fiduciary recipient is the owner of the object of the fiduciary security object during the imposition of the fiduciary guarantee as required by the provisions of Article 1 point 1 of Law No. 42/1999.²⁴ Even if the creditor or fiduciary recipient is considered the owner of the object of the fiduciary security object, it is often accused of committing a criminal act of confiscation of goods or violating the law when the fiduciary recipient wishes to take the object that is the object of the fiduciary in the context of executing the fiduciary guarantee.²⁵ It is not uncommon if the debtor or fiduciary giver commits a criminal act of corruption, the fiduciary object is confiscated or confiscated by the state, even though the fiduciary object is perceived to have transferred ownership rights to the fiduciary object to the creditor or fiduciary recipient. If so, it is necessary to study whether the creditor or fiduciary recipient becomes the owner of the object of the fiduciary object during the fiduciary charge.²⁶

¹⁶ Davis, *The False Promise of Fiduciary Government*; Gold, *Reflections on the State as Fiduciary*; Schanzenbach and Shoked, *Reclaiming Fiduciary Law for the City*

¹⁷ Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*; Leib and Galoob, *Fiduciary Political Theory: A Critique*

¹⁸ Butarbutar, *Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision*; Ramadhan, Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*

¹⁹ Heddy Kandou and Wiwik S. Widiarty, *Legal Protection for Creditors in Fiduciary Guarantee Agreements in Indonesia* (2022) 6 International Journal of Artificial Intelligence Research; Sofyan W. A. Pradnyawan and others, *Execution of Fiduciary Collateral*

²⁰ Ramadhan, Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*; Taufik H. Simatupang and others, *Choosing a Copyright Assessment Method in Evaluating a Fiduciary Guarantee Object in Indonesia* (2021) 1st International Conference on Law and Human Rights 2020 314-322

²¹ J. Andy Hartanto, *The Legal Development of Guarantee in Indonesia* (2015) 36 *JL Pol'y & Globalization* 57

²² Ahmad Y. Kosali, *Improving the Object of Fiduciary Guarantee According to Law Number 42 of 1999 on Fiduciary Guarantee* (2020) 2 *Journal of Sustainable Development Science* 30-39

²³ Siti M. Badriyah and others, *Implementation of the Constitutional Court Decision Regarding the Execution of Fiduciary Guarantees and Inclusion of Default Clauses in Indonesia* (2021) 10 *International Journal of Criminology and Sociology* 33-38; Kosali, *Improving the Object of Fiduciary Guarantee*

²⁴ Badriyah and others, *Implementation of the Constitutional Court Decision*; Hartanto, *The Legal Development of Guarantee in Indonesia*; Kosali, *Improving the Object of Fiduciary Guarantee*; Simatupang and others, *Choosing a Copyright Assessment Method in Evaluating a Fiduciary Guarantee Object in Indonesia*

²⁵ Erman Benli and Hande E. Benli, *Legal and Economic Considerations on the Efficacy of the Civil Law Fiduciary System Compared to the Common Law Trust under the Debates on the Dual Property System* (2015) 36 *Business Law Review* 5 - 9; Brandon D. Stewart, *Business as Usual?: The Limited Influence of Climate Change Disclosure and Fiduciary Duties on the Low-Carbon Investment Practices of Canada's Big 10 Public Pension Funds* (2020) *The Limited Influence of Climate Change Disclosure and Fiduciary Duties on the Low-Carbon Investment Practices of Canada's Big 10*

²⁶ Badriyah and others, *Implementation of the Constitutional Court Decision*; Butarbutar, *Constitutional Issue of the Executional Power*; Widya K. Sulistyowati, *Implementation of Legal Aid to Debtors due to Arrears in Motor Vehicle Installments Executed by Debt Collectors as Impact of the Covid19 Pandemic* (2021) 3 *The Indonesian Journal of International Clinical Legal Education* 445-464.



LITERATURE REVIEW

1. The Nature of Fiduciary Guarantee and the Difference with Fiduciary

The term "guarantee" can be found in some legislation. Among them, Article 1131 and Article 1132 BW state as follows: Article 1131 "All the debtor's property, both movable and immovable, both existing and new in the future, become collateral for all individual engagements." Article 1132 "The object is a mutual guarantee for all those who owe it; The income from the sale of the objects is divided according to the balance, that is, according to the size of the receivables of each, unless there are valid reasons for the creditors to take precedence."²⁷

Then in the Elucidation of Article 8 of Law Number 7 of 1992 concerning Banking (State Gazette of the Republic of Indonesia of 1992 Number 31, Supplement to the State Gazette of the Republic of Indonesia Number 3472; after this, referred to as Law No. 7/1992) as amended by Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (State Gazette of the Republic of Indonesia of 1998 Number 182, Supplement to the State Gazette of the Republic of Indonesia Number 3790; after this referred to as Law No. 10/1998), which among other things states as following: Explanation of Article 8, "Credit or financing based on Sharia Principles provided by banks contains risks so that in its implementation, banks must pay attention to the principles of credit or financing based on sound Sharia Principle."²⁸ To reduce this risk, guarantees for providing credit or financing based on Sharia Principles in the sense of confidence in the Debtor Customer's ability to pay off their obligations following the agreement are important factors that the bank must consider.²⁹

2. Owner of Fiduciary Collateral Objects in Fiduciary Burden

The imposition of fiduciary objects is carried out through a fiduciary guarantee deed (AJF), which means that since then, the fiduciary thing has become collateral for the settlement of certain debts.³⁰ Then it is constructed that in the fiduciary agreement (AJF), ownership rights have been transferred to the fiduciary object, so whether the creditor or fiduciary recipient will become the owner by itself of the fiduciary thing. The imposition of fiduciary objects provides legal protection to creditors or recipients if the debtor or fiduciary giver misuses the fiduciary object. If the debtor or fiduciary provider defaults, the execution is easy and specific. For this reason, the creditor or fiduciary recipient is given the right to sell the fiduciary object when the debtor or fiduciary giver is declared in default.³¹

Judging from its history, the fiduciary guarantee institution was not born immediately, meaning that its birth was based on the following considerations:³²

- a. The fiduciary is held from the inability of pawning and mortgage institutions to accommodate the wishes of the parties;
- b. Initially, the objects of fiduciary security were only capital objects or debtor investment objects which included movable objects, not immovable objects, so that if the objects of fiduciary protection were handed over to the creditor, the debtor could no longer run his business, which means it will be increasingly difficult to fulfill his obligations to the creditor. The object of fiduciary security has now overgrown that all objects that have economic value (not only capital goods) can be used as objects of fiduciary guarantees;
- c. Initially, the object of a fiduciary guarantee did not have a document of rights or proof of ownership, such as proof of rights or proof of ownership of a mortgage object, so if it has a composition of requests or a document of demands, it is sufficient that the record of rights or proof

²⁷ Benli and Benli, *Legal and Economic Considerations on the Efficacy of the Civil Law Fiduciary System Compared to the Common Law Trust Under the Debates on the Dual Property System* (2015) 36 Business Law Review; Simatupang and others, *Choosing a Copyright Assessment Method in Evaluating a Fiduciary Guarantee Object in Indonesia*; Stewart, *Business as Usual?: The Limited Influence of Climate Change Disclosure and Fiduciary Duties on the Low-Carbon Investment Practices of Canada's Big 10 Public Pension Funds*

²⁸ Butarbutar, *Constitutional Issue of the Executional Power*; Kandou and Widiarty, *Legal Protection for Creditors*; Pradnyawan and others, *Execution of Fiduciary Collateral Based on the Decision of the Constitutional Court Number 18/PUU-XVIII/2019*; Ramadhan, Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*

²⁹ Hartanto, *The Legal Development of Guarantee in Indonesia*; Kosali, *Improving the Object of Fiduciary Guarantee*; Simatupang and others, *Choosing a Copyright Assessment Method*

³⁰ Badriyah and others, *Implementation of the Constitutional Court Decision*; Benli and Benli, *Legal and Economic Considerations on the Efficacy of the Civil Law Fiduciary System Compared to the Common Law Trust under the Debates on the Dual Property System*

³¹ Stewart, *Business as Usual?: The Limited Influence of Climate Change Disclosure and Fiduciary Duties on the Low-Carbon Investment Practices of Canada's Big 10 Public Pension Funds*; Sulistyowati, *Implementation of Legal Aid to Debtors due to Arrears in Motor Vehicle Installments Executed by Debt Collectors as Impact of the Covid19 Pandemic*

³² Erna D. Putriyanti, *Legal Status of Credit Bank Guarantee in Indonesia's Legal Guarantee* (2017) 1 Sriwijaya Law Review 128-141



of ownership of the object of the fiduciary security is submitted to the creditor, such as BPKB for existing motorized vehicles. Inventory objects or capital objects such as benches and tables (*Heineken's versus Pieter Bos*) do not have proof of title or ownership documents, so what is handed over is the object. The development and practice of fiduciary guarantee agreements show that banks currently will only accept fiduciary collateral if only capital objects have rights or ownership documents or have economic value in the sense of being quickly sold. Currently, what is a fiduciary object according to the fiduciary guarantee agreement made by a notary is dominated by movable objects, namely motorized vehicles;

d. Initially, the fiduciary agreement was not required to be registered, so the creditor needed a handle to secure his rights to the object of the fiduciary guarantee. Likewise, debtors who surrender their property rights in trust currently have legal security for their property, which is the object of fiduciary protection. With the fiduciary registration, the creditor's right to obtain payment is more secure, either because of the price made by the debtor or from the sale of the object of the fiduciary guarantee.

So, the birth of a fiduciary guarantee was inseparable from the legal needs of the community at that time, which required a legal breakthrough to bridge the debtor's desire so that the collateral object remained in his control, considering that the debtor still needed the object being guaranteed in the context of doing business.³³ It is constructed to be protected if the creditor or fiduciary recipient has ownership rights to the object in question. Meanwhile, the right to control the fiduciary object is placed on the debtor or fiduciary giver.³⁴ Juridically the ownership rights to the fiduciary object have been transferred to the creditor or fiduciary recipient. Still, physically the object remains in the control of the debtor or fiduciary giver, So the creditor or fiduciary recipient holds the ownership rights to fiduciary things. However, the physical control rights to fiduciary objects remain in the hands of the debtor. If so, the fiduciary agreement (AJF) means the creditor or fiduciary recipient is the owner of the collateral object.³⁵

RESEARCH METHOD

This research is normative and empirical legal research, conducted by examining literature or secondary data and combined with the results of interviews with experts.³⁶ In this type of legal research, law is often conceptualized as what is written in statutory regulations, or law is conceptualized as rules or norms, which are standards for human behavior that are considered appropriate and receive responses from experts to strengthen or weaken legal norms. Empirical legal research is a research method that examines the function of a law or regulation in terms of its application in the scope public.³⁷ This research method is also called sociological research law; this is due to the method in this study also researching people in a relationship related to other people or societies.³⁸

This type of research is often referred to as mixed-method research. The data collection method is done by collecting secondary data through libraries and relevant government documents. Then do a review of things that are relevant to the research topic for coding.³⁹ After the problems or complicated things in the existing books or references are collected, confirmation is made to the legal experts who take their opinion to validate the literature review results.⁴⁰

³³ Achmad Busro, Dewi Sulistianingsih and Muhammad S. Prabowo, *Legal Protection for Creditors in Fidusia Agreements in Indonesia* (2019) 3rd Annual International Seminar and Conference on Global Issues (ISCoGI 2017) 51-56; Guoqing Liu, *Trusts without Fiduciary Duty: the Commercial Nature of Chinese Trust Business* (2016) 22 *Trusts & Trustees* 1104-1117

³⁴ Bambang Suprabowo, Anis Mashdurohaturun, and Eman Suparman, *The Inhibiting Factors on Legal Protection for Recipients of Fiduciary Warranties with Inventory Guaranteed Objects* (2017) 13 *South East Asia Journal of Contemporary Business, Economics, and Law* 1560-2289; Palmawati Tahir, *Legal Protection for Creditors towards Credit Guarantee in Indonesia* (2017) 5 *Scientific Research Journal (SCIRJ)* 12-16

³⁵ Busro, Sulistianingsih, and Prabowo, *Legal Protection For Creditors in Fidusia Agreements in Indonesia* (2021) 3rd Annual International Seminar and Conference on Global Issues (ISCoGI 2017) 51-56; Johannes I. Kosasih, *Lawsuit for Unlawful Acts of Execution of Fiduciary Guarantees in Lease Activities* (2021) 1 *Journal Equity of Law and Governance* 109-118

³⁶ Rusdi Akbar, Robyn Pilcher, and Brian Perrin, *Performance Measurement in Indonesia: The Case of Local Government* (2012) 24 *Pacific Accounting Review*

³⁷ Maria J. B. Priego, Juan J. Najera and Xavier Font, *Environmental Management Decision-Making in Certified Hotels* (2011) 19 *Journal of Sustainable Tourism* 361-381

³⁸ James L. Gibson, Gregory A. Caldeira, and Lester K. Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment* (2005) 58 *Political Research Quarterly* 187-201

³⁹ Saputra and others, *Combining the Concept of Green Accounting with the Regulation of Prohibition of Disposable Plastic Use* (2021) 11 *International Journal of Energy Economics and Policy* 84-90

⁴⁰ Komang A. K. Saputra, A. A. Ketut Jayawarsa and NiMade I. Prihandani, *Antonio Gramsci Hegemonical Theory Critical Study: Accounting Fraud*



The data collected includes reference books, laws, government regulations, and other supporting documents. Research informants are law lecturers at well-known universities in Indonesia, legal experts, formulators, and legislators.⁴¹ This research has no conflict with any party. Research discussions were carried out securely, which was only known by the researchers, the assisting team, and the resource persons.⁴² The sources asked to remain anonymous so as not to create other perceptions in interpreting laws or other state documents. It will be fine for researchers and research results because they already have validation evidence from each source. The research results are excerpts from statements from the literature (laws, government regulations, and other state documents) and the results of interviews with informants.

RESULT AND DISCUSSION

1. The Concept of Fiduciary as a Guarantee Creates Contradictory Norms

The BW and Law No. 7/1992, amended by Law No. 10/1998, do not explain what a guarantee means. However, it can be seen that collateral is closely related to the problem of debt and receivables.⁴³ Usually, in a money-lending agreement, for example, the creditor asks the debtor to provide collateral in the form of a number of his assets to pay off the debt if, after the agreed period, it turns out that the debtor does not pay it off.⁴⁴ Comments from well-known university law experts in Indonesia as sources:

"The term "collateral" is a translation of the time "zekerheid" or "caution", namely the debtor's ability to fulfill or pay off his debts to creditors, which is carried out by holding particular objects of economic value as collateral for loans or debts received by the debtor against his creditor. The Decision of the Collateral Law Seminar, which the National Legal Development Agency organized in collaboration with the Faculty of Law, Gadjah Mada University in 1978 in Yogyakarta, meant that the so-called "guarantee" was "guaranteeing the fulfillment of obligations that can be valued in money arising from a legal engagement."

In contrast to BW, which defines collateral as goods or objects that are specifically intended as a means to bear the repayment of a loan or credit, Law no. 7/1992, as amended by Law No. 10/1998, defines guarantees not solely in terms of "collateral", but includes a broad term, namely "belief in the ability and ability of the debtor customer to pay off his obligations following the agreement".⁴⁵ Previously, this was confirmed in the Decree of the Board of Directors of Bank Indonesia Number 23/69/KEP/DIR of 1991 concerning Credit Guarantees and Bank Indonesia Circular Letter Number 23/6/UKU concerning Credit Guarantees, each dated February 28, 1991. According to this provision, banks are not allowed to extend credit to anyone without credit guarantees, namely the bank's confidence in the debtor's ability to repay the credit following the agreements.⁴⁶ In banking, "collateral" is synonymous with "collateral" in civil law. Collateral assessment is part of the assessment of credit guarantees, in addition to assessing the debtor's character, ability, capital, and business prospects. In Article 1 letter b Decree of the Board of Directors of Bank Indonesia No. 23/69/KEP/DIR dated February 28, 1991, it is emphasized that collateral is the material guarantee, securities, and risk guarantee provided by the debtor to bear the repayment of credit if the debtor cannot repay the credit following the agreements.⁴⁷

of Hindu - Bali (2022) 27 International Journal of Business 1-11

⁴¹ *Id.*

⁴² Xixiong Xu and others, *Does Religion Matter to Corruption? Evidence from China* (2017) 42 China Economic Review

⁴³ Nina Nurani, Cherry Citra N. H., and Idham Budiman, *Copyright as a Guarantee of Fidusia in The Efforts to Accelerate Indonesia's Creative Economic Growth* (2020) 1 PalArch's Journal of Archaeology of Egypt/Egyptology 691-704; Iwan Riswandie and others, *Legal Protection Regarding Debtor Rights with Productive Credit Against Execution of Fiduciary Guarantees by Justice-Based Creditors* (2019) 83 JL Pol'y & Globalization 60

⁴⁴ Rusdianto Sesung and Rina, *Legal Consequence for Notary Regard to Late Fiduciary Registration by Online* (2018) 69 JL Pol'y & Globalization 222

⁴⁵ AlFath Anggara, Herwastoeti, and Fitriya Esfandiari, *Harmonization of Legal Decision Number 18/PUU-XVII/2019 by The Constitutional Court Concerning Fiduciary Guarantee* (2021) 2nd International Conference on Law Reform (INCLAR 2021) 109-112

⁴⁶ Suprabowo, Mashdurohaturun, and Suparman, *The Inhibiting Factors on Legal Protection for Recipients of Fiduciary Warranties with Inventory Guaranteed Objects*; Supriyadi, *Reconstruction of the Guarantee's Objects in the Fiduciary Agreement in Indonesia* (2020) 1 Utopia y Praxis Latinoamericana: Revista Internacional de Filosofía Iberoamericana y Teoría Social 260-271

⁴⁷ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision Number 18/PUU-XVII/2019 by The Constitutional Court Concerning Fiduciary Guarantee*; Rosyidi Hamzah and Fadhel A. Adinda, *The Existence of a Norm Regarding the Execution of Fiduciary Guarantees after the Issuance of the Constitutional Court Decision Number 18/Puu/Xvii/2019* (2022) 22 J. Penelit. Huk. Jure 81; Iwan Riswandie and others, *Legal Protection Regarding Debtor Rights with Productive Credit Against Execution of Fiduciary Guarantees by Justice-Based Creditors*



The guarantee is dependent that can be valued in money in the form of particular objects that the debtor hands over to the creditor due to a debt agreement or other agreement.⁴⁸ The debtor hands over specific things to the creditor intended as collateral for the loan or credit facilities provided by the creditor to the debtor until the debtor repays the loan. If the debtor defaults, particular objects will be valued in money, which will then be used to pay off all or part of the debtor's loan or debt to the creditor. In other words, the guarantee serves as a means or guarantees the fulfillment of a loan or debtor's obligation in case of default before the loan's maturity or the debt ends.⁴⁹ The following are comments from well-known university law experts in Indonesia as sources:

"One of the guarantee institutions regulated in the legislation is a fiduciary guarantee which is the development of a pawn without the possession of the object of the collateral, which in Dutch terminology is called "fiduciary *eigendom* overdraft", or in English, it is called "fiduciary transfer of ownership". Law No. 42/1999 introduced the term fiduciary guarantee and the term fiduciary short for fiduciary *eigendom* overdraft. The origin of "fiduciary" comes from the word "finds", which means trust. It follows the principle in fiduciary guarantees that the legal relationship between creditors and debtors is based on faith. Creditors or fiduciary recipients have confidence that the debtor or fiduciary giver can pay off their debts and not abuse the object as collateral, for example, by transferring it to a third party. On the other hand, the debtor or fiduciary provider believes that the creditor or fiduciary recipient will submit proof of ownership of the object as collateral after the debtor has paid off his debt. This fiduciary trust is aimed at reciprocal trust by the parties that what comes out is seen as a transfer of property rights. Inside (internally) is only a guarantee to repay certain debts."

The fiduciary is a term derived from Roman law, which has two meanings: as a verb and an adjective.⁵⁰ As a noun, the term fiduciary means a person given the mandate to take care of the interests of third parties in good faith, full of accuracy, being careful and frank. People are entrusted with the obligation to perform actions for the benefit of others. As an adjective, the term fiduciary shows an understanding of matters relating to the trust.⁵¹ Fiduciary as an institution is known by various designations, names, or terms. In Roman times this institution was known as Fiducia-cum creditor. As known in Roman times, it was known that there were two types of guarantee institutions, namely Fiducia-cum creditor contracts and Fiducia cum Amico contracts. Both contain a promise of trust, a promise of faith made with creditors, and a pledge of trust made with friends.⁵² The difference is that Fiducia cum creditor contract is a debt guarantee institution, containing the meaning of collecting a debtor's promise to his creditor, who promises to transfer ownership rights to an object to the creditor as collateral for the debt he has given on the other hand, the creditor also agrees to return the ownership rights to the thing handed over to him. to the debtor again when the debt has been paid in full. It can be distinguished from a pawn. In a Fiducia cum creditor contract, the guarantee object remains in the debtor's control.⁵³

Meanwhile, the Fiducia cum Amico contract is more like trust. Because it is different from the Fiducia cum creditor contracts, the Fiducia cum Amico contract contains a promise that someone (*Amico*) will return the ownership of assets entrusted to him by someone (*pater familias*) when the owner of the object has born from traveling.⁵⁴ In the Fiducia cum Amico contracts, a person trusts the person to hand over the thing to the person as a deposit with an agreement that the deposited item is stored, cared for, and taken care of properly, then returned after the person who entrusted it returns home from traveling.⁵⁵ The current fiduciary concept refers to the fiduciary cum creditor contract concept, where there is a transfer of ownership in trust to creditors.⁵⁶ It can be seen from the sound of the provisions of Article 1 point 1 of Law No. 42/1999, which provides fiduciary limits, namely:

⁴⁸ Kandou and Widiarty, *Legal Protection for Creditors*; Simatupang and others, *Choosing a Copyright Assessment Method*

⁴⁹ Benli and Benli, *Legal and Economic Considerations on the Efficacy*; Kosali, *Improving the Object of Fiduciary Guarantee*

⁵⁰ Schanzenbach and Shoked, *Reclaiming Fiduciary Law for the City*

⁵¹ Davis, *The False Promise of Fiduciary Government*; Miller and Gold, *Fiduciary Governance*

⁵² Gold, *Reflections on the State as Fiduciary*; Megginson and Fotak, *Rise of the Fiduciary State: A Survey of Sovereign Wealth Fund Research*

⁵³ Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder*; Davis, *The False Promise of Fiduciary Government*; Leib and Galoob, *Fiduciary Political Theory: A Critique*

⁵⁴ Megginson and Fotak, *Rise of the Fiduciary State*

⁵⁵ Leib and Galoob, *Fiduciary Political Theory: A Critique*

⁵⁶ Ramanda, Wiryani and Mahendrawati, *Legal Protection of Debtor*



"Fiducia is the transfer of ownership rights to an object based on trust provided that the object whose ownership rights are transferred remains in the control of the object's owner."

UU No. 42/1999 uses the term fiduciary, which can be presumed to be an abbreviation of a term that was also sometimes used, namely *fiduciary eigendomsoverdracht* or an abbreviation of words in fiduciary indicating the existence of a fiduciary relationship, which is of a trusting nature. If traced further, the term *Fiducia cum creditoribus* are known in Roman laws.⁵⁷ The term fiduciary was also used in previous legislation, namely Law Number 16 of 1985 concerning Flats (State Gazette of the Republic of Indonesia of 1985 Number 16, Supplement to the State Gazette of the Republic of Indonesia Number 3318) and Law Number 4 of 1992 concerning Housing and Settlements (State Gazette of the Republic of Indonesia of 1992 Number 23, Supplement to the State Gazette of the Republic of Indonesia Number 3469).⁵⁸

2. The Fiduciary Object was Carried Out Within the Collateral Framework for the Settlement of Certain Debts

The introduction of the term fiduciary in Law No. 42/1999 means that the fiduciary concept becomes part of the collateral law and functions as a debt guarantee, thus giving rise to collateral rights over objects used as fiduciary guarantees. From the sound of Article 1 point 2 of Law No. 42/1999, it can be seen that fiduciary is part of the right of material security.⁵⁹ From this provision, it is clear that a fiduciary guarantee is a guarantee (collateral) for certain material debts by surrendering movable objects, both tangible and intangible, even including immovable objects, especially buildings that cannot be burdened with mortgage rights.⁶⁰ The ownership right of a fiduciary thing is transferred based on trust with an agreement that the object whose ownership rights are transferred remains in the "control" of the creditor or fiduciary giver.⁶¹ The transfer of ownership rights to a fiduciary object is carried out utilizing *constitutum possessorium (verklaring van houderschap)*, meaning that the fiduciary object remains controlled by the owner of the object (the debtor or fiduciary giver), the transfer of ownership rights to a fiduciary object by continuing its control by the debtor or fiduciary giver, in trust.⁶² As a guarantee institution, fiduciary guarantees give priority to fiduciary recipients over other creditors so that fiduciary recipients have priority rights over other creditors.⁶³ The necessary right in question is the right of the fiduciary recipient to take payment of his receivables on the results of the execution of objects that are the object of the fiduciary guarantee. The priority rights of the fiduciary recipient are not nullified due to bankruptcy or liquidation of the fiduciary giver.⁶⁴

Furthermore, when the debt guaranteed by the fiduciary guarantee has been paid in full according to the agreement, the title of ownership of the object is handed back by the creditor to the debtor.⁶⁵ On the other hand, if the debt is not paid in full, the fiduciary thing must be sold, and from the sale price, it will be taken for and in the amount of the debt settlement according to the agreement, while the excess (if any) must be returned to the debtor.⁶⁶ If the proceeds from the sale of the object of the fiduciary guarantee do not cover the existing debt, the debtor is still obliged to pay the

⁵⁷ Hamzah and Adinda, *The Existence of a Norm Regarding the Execution of Fiduciary Guarantees after the Issuance of the Constitutional Court Decision Number 18/Puu/Xvii/2019*; Supriyadi, *Reconstruction of the Guarantee's Objects in the Fiduciary Agreement in Indonesia*

⁵⁸ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision*; Nurani, N. H., and Budiman, *Copyright as a Guarantee of Fidusia in The Efforts to Accelerate Indonesia's Creative Economic Growth*; Wieke D. Suryandari, *Reconstruction of Legal Liability of Registration by Notary Fiduciary Based on PP No. 21 of 2015 (2017) 7 Policy 9-15*

⁵⁹ Kamsilaniah and others, *The Existence of Stage House as Fiduciary Guarantee: Perspective of Horizontal Separation Principle (2018) 75 JL Pol'y & Globalization 116*

⁶⁰ Hamzah and Adinda, *The Existence of a Norm*; Maria Pranatia, *Strengthening Legal Certainty on the Electronic Registration System of Fiduciary Deed in Indonesia (2021) 1 Global Legal Review 53-67*; Suryandari, *Reconstruction of Legal Liability of Registration by Notary Fiduciary Based on PP No. 21 of 2015*

⁶¹ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision*; Mezi O. Yolanda, Busyra Azheri, and Wetria Fauzi, *Strength of Fiduciary Deed in the Implementation of Bad Credit Execution by Financial Institutions (2020) 7 International Journal of Multicultural and Multireligious Understanding 7 593-605*

⁶² Badriyah and others, *Implementation of the Constitutional Court Decision*; Benli and Benli, *Legal and Economic Considerations on the Efficacy*

⁶³ Liu, *Trusts without Fiduciary Duty: the Commercial Nature of Chinese Trust Business*; Tahir, *Legal Protection for Creditors towards Credit Guarantee in Indonesia*

⁶⁴ Busro, Sulistianingsih and Prabowo, *Legal Protection for Creditors in Fidusia Agreements in Indonesia*; Putriyanti, *Legal Status of Credit Bank Guarantee in Indonesia's Legal Guarantee*

⁶⁵ Suryandari, *Reconstruction of Legal Liability*; Yolanda, Azheri, and Fauzi, *Strength of Fiduciary Deed*

⁶⁶ Ni Luh P. G. S. Kusuma, Putu E. T. Dewi, and Ni P. R. K. Sari, *Regulation of Copyright Certificate as a Material Guarantee and Bankrupt Estate/Beodel in Indonesia (2021) 2 ADI Journal on Recent Innovation 186-200*; Maria Pranatia, *Strengthening Legal Certainty on the Electronic Registration System of Fiduciary Deed in Indonesia*



remaining outstanding debt. Although our positive law adheres to the title theory, the guarantee theory (lien theory) elements are still applied. In some cases, in real terms, the fiduciary recipient only functions as a guarantee holder, not as the actual owner.⁶⁷ The following is a statement from legal experts on the fiduciary law in force in Indonesia:

"This means that the current fiduciary institution is a guarantee institution. The transfer or transfer of property rights in trust in the concept of fiduciary guarantees aims to create collateral rights for creditors. The transfer of property rights is not the actual transfer of property rights. Creditors are not justified in retaining transferred property ownership, as in Roman times. As a guaranteed concept, Fiduciary prohibits creditors from owning objects used as collateral if the debtor defaults. The creditor is only entitled to execute the thing of the guarantee and get the debt repaid on the proceeds from the sale of the object that is the object of the fiduciary guarantee."

Transferring ownership rights to fiduciary objects introduced by Law No. 42/1999 is carried out temporarily until the debtor or fiduciary pays off the debt following the agreement.⁶⁸ The legal consequence is that juridical property rights to objects that become fiduciary objects are in the hands of creditors or fiduciary recipients. In contrast, economic property rights to fiduciary things remain in the hands of the debtor or fiduciary giver.⁶⁹ It is a legal consequence of the phrase "objects whose ownership is transferred remain in the control of the object's owner. In the concept of fiduciary guarantee based on Law No. 42/1999, only juridical property rights over the fiduciary object are transferred to the creditor or fiduciary recipient, which only lasts until the debtor or fiduciary giver pays off the debt.⁷⁰ The creditor or fiduciary recipient acts as if acting as the owner of the object of the fiduciary object, intended to protect his interests as the holder of the collateral right to preserve and guarantee if the debtor or fiduciary giver is unable to pay it off at the agreed time.⁷¹ In other words, in the fiduciary concept as a debt guarantee, juridical property rights over objects pass to the creditor or fiduciary recipient.⁷² Still, control over the fiduciary object remains with the debtor or fiduciary giver. The following is a statement on fiduciary law in Indonesia.

"The fiduciary limit formulated in Article 1 point, 1 of Law No. 42/1999 shows that fiduciary is "a process of transferring ownership rights", while fiduciary guarantees are "security rights granted in the form of fiduciary". Transferring ownership rights in a fiduciary guarantee from the debtor or fiduciary giver to the creditor or fiduciary recipient, whether by itself, the creditor or fiduciary recipient will become the owner of the fiduciary guarantee object."

Herein lies the difficulty of construction because with the surrender of the property rights to the collateral object, the creditor has become the owner, but if it is remembered that the purpose is only as/to provide guarantees, the creditor, after the delivery of the collateral object, does not become the owner in the true sense.⁷³ Since the thing whose fiduciary entity is still controlled by the debtor, to secure the creditor's position, the object is handed over "in trust" in the creditor's possession.⁷⁴ Trust means not to be owned but only as collateral, only to take payment for the payment of a debt. Both parties trust each other, and what comes out is seen as a transfer of property, but inside (internally) is only a guarantee for a debt. Opinion on fiduciary law:

"Some argue that the creditor receiving the fiduciary (fiduciary) with the submission has become the owner of the collateral object with the rights that an owner owns. However, another opinion is that the fiduciary to a third party has the position of an owner. In contrast, the fiduciary giver only has the status of a pledge holder who does not hold the collateral object (*bezitloos pandect*) because the parties do not intend to transfer the ownership rights to the collateral thing. In practice, the

⁶⁷ Hernando Ariawan and Maryanto Maryanto, *Consumer Protection against Forced Withdrawal by Leasing Parties in Fiduciary Guarantee* (2021) 3 Law Development Journal 505-512; Suwanto Suwanto, Sri K. Kusriyah, and Bambang T. Bawono, *Criminal Aspects of the Fiduciary Guarantee Transfer as Decision Basis on Criminal Justice Process* (2020) 3 Jurnal Daulat Hukum 93-100

⁶⁸ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision*; Supriyadi, *Reconstruction of the Guarantee's Objects*

⁶⁹ Nurani, N. H., and Budiman, *Copyright as a Guarantee of Fidusia*

⁷⁰ Suprabowo, Mashdurohaturun, and Suparman, *The Inhibiting Factors on Legal Protection*

⁷¹ Sesung and Rina, *Legal Consequence for Notary Regard to Late Fiduciary Registration by Online*

⁷² Kosasih, *Lawsuit for Unlawful Acts of Execution of Fiduciary Guarantees in Lease Activities*

⁷³ Liu, *Trusts without Fiduciary Duty*; Sesung and Rina, *Legal Consequence for Notary*; Tahir, *Legal Protection*

⁷⁴ Riswandie and others, *Legal Protection Regarding Debtor Rights*; Suprabowo, Mashdurohaturun, and Suparman, *The Inhibiting Factors on Legal Protection*



parties enter into an agreement that limits the rights of creditors to the extent of the rights of a fiduciary guarantee recipient.”

Suppose the first opinion is accepted that by handing over, the fiduciary owns the collateral object. In that case, the property right is independent, so the fiduciary can transfer the collateral without transferring the bill first, even without paying attention to the personal rights of the borrower using it.⁷⁵ If the creditor does not become the owner in the true sense, does the object still belong to the debtor because the agreement always states that the debtor will subsequently be the user or only the holder of the creditor as the owner? On the other hand, if we view it only as a guarantee of a type of pawn (a pledge without mastering the object of collateral), then the guarantee engagement is an accessory to the paramount engagement, namely an engagement whose fulfillment is guaranteed by the fiduciary, with the consequence that the object of the guarantee cannot be transferred without the transfer of the principal attention.⁷⁶

If we look at Law No. 42/1999, the legal construction that he wants to build places the creditor or fiduciary recipient as the owner of the collateral object, meaning that the ownership rights to the fiduciary thing are in the hands of the creditor or fiduciary recipient, but on the other hand it also places the debtor or fiduciary giver as a borrower to use, meaning the rights of the debtor or The fiduciary giver lends the ownership rights to the fiduciary object that is under his control to the debtor or fiduciary giver, so because the creditor or fiduciary recipient is considered the owner of the collateral thing, the debtor or fiduciary giver borrows back the fiduciary object.⁷⁷

3. Examine the Meaning of Fiduciary Before and After Law No. 42/1999

There is a change in legal terminology from surrender to transfer or transfer, from property rights to ownership rights. From a juridical point of view, the difference in the term has legal consequences that need to be handled carefully. The transfer of rights has a broader juridical meaning than the transfer of ownership.⁷⁸ The terms "transfer" and "levering" are known in Continental European legal terminology.⁷⁹ The word "transfer" is defined as "transfer"; while "leveraging" is defined not only as a transfer but also includes delivery and transfer. In Anglo-Saxon legal terminology, "transfer" is defined as an act of the parties, by which the title to property is conveyed from one person to another.⁸⁰ It can be concluded that the transfer of rights is a legal action to give rights in trust. In contrast, the transfer of ownership is a legal action to transfer rights or change rights from one particular situation/person to another situation/another person.⁸¹ The rights transfer may include legal acts of selling, renting, pledging, and others. Based on historical studies:

"Suppose it is associated with a fiduciary guarantee that the ownership rights of the object used as collateral have been transferred to the creditor or fiduciary recipient. It means that the title (title) of the thing is handed over to the creditor, but physical possession of the object is with the debtor or fiduciary giver. Therefore, the creditor of the fiduciary thing is the owner of the right, not the holder of the guaranteed right. As the owner of the request, it must be interpreted as the owner of the guarantee for the object, not the complete owner in the sense of a sale and purchase agreement." If guided by Article 1 point 1 of Law No. 42/1999, it can be seen as a method of transfer of rights that relies on two elements, namely: first, the transfer of ownership rights to an object, and secondly, the transferred thing remains in the control of the object owner/fiduciary giver.⁸² The transfer of ownership rights to an entity in a fiduciary agreement (AJF) is carried out as collateral for settling certain debts. The transfer is ownership rights to fiduciary objects, which function as collateral for debts whose repayment is guaranteed by a fiduciary.⁸³ In other words, what is transferred by the debtor or fiduciary giver to the creditor or fiduciary recipient is the basis of the

⁷⁵ Liu, *Trusts without Fiduciary Duty*; Nurani, N. H., and Budiman, *Copyright as a Guarantee of Fidusia*; Sesung and Rina, *Legal Consequence for Notary*

⁷⁶ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision*; Ramadhan, Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*

⁷⁷ Kandou and Widiarty, *Legal Protection*; Pradnyawan and others, *Execution of Fiduciary Collateral*

⁷⁸ Hartanto, *The Legal Development of Guarantee in Indonesia*; Simatupang and others, *Choosing a Copyright Assessment Method*

⁷⁹ Leib and Galoob, *Fiduciary Political Theory: A Critique*

⁸⁰ Kosali, *Improving the Object of Fiduciary Guarantee*

⁸¹ Badriyah and others, *Implementation of the Constitutional Court Decision*; Stewart, *Business as Usual?: The Limited Influence*

⁸² Simatupang and others, *Choosing a Copyright Assessment Method*

⁸³ Stewart, *Business as Usual?: The Limited Influence*



rights of the fiduciary object.⁸⁴ Between the fiduciary giver and the fiduciary recipient, an abstract transfer of ownership of the fiduciary object is carried out with the title of assumption, where the submission is carried out constituted *possessorium*, that the fiduciary thing remains in the control of the debtor or fiduciary giver so that the debtor or fiduciary giver can use the fiduciary object according to their needs. In other words, in the fiduciary agreement (AJF), the rights that are transferred or handed over are only juridical-levering and are only owned by the creditor or fiduciary recipient in the trust of the fiduciary object.⁸⁵

Meanwhile, the fiduciary object remains controlled by the debtor or fiduciary giver. With the transfer of ownership rights to a fiduciary thing by the debtor or fiduciary giver to the creditor or fiduciary recipient, the debtor's property rights are no longer intact until the debt is declared paid off.⁸⁶ Physically the right of control over the fiduciary object is in the hands of the debtor or fiduciary giver. Therefore, an agreement is made that the owner of the collateral thing lends and uses the property rights of the fiduciary object, which is already under the authority of the debtor or fiduciary giver to the debtor or fiduciary giver so that the capacity of the debtor or fiduciary giver not as the owner of the fiduciary object, but as the borrower (detention or holder) of the thing that is guaranteed by the fiduciary.⁸⁷

The transfer of property rights to creditors or fiduciary recipients in this fiduciary is not a transfer of property rights in the true sense, as is the case in buying and selling and others so that creditors or fiduciary recipients will not become total owners (*volle eigenaar*), creditors or fiduciary recipients are only a *bezitloos eigenaar* over collateral goods. Because it follows the intent and purpose of the agreement concerning the collateral itself, the creditor's authority is only equivalent to the power possessed by a person entitled to the collateral goods.⁸⁸ The position of the creditor or fiduciary recipient is the holder of the guarantee. At the same time, the authority the owner has is the authority that is still related to the contract itself. Therefore, it is also said that his control as the owner is limited.⁸⁹

4. Differentiation of Property Rights Over Fiduciary Things, which are Distinguished by Juridical and Economic Property Rights

Elucidation of Article 17 of Law No. 42/1999, among other things, states that "the right of ownership of the object has been transferred to the fiduciary recipient", meaning that as long as the fiduciary guarantee lasts, during that time, the fiduciary guarantee object becomes the property of the creditor or fiduciary recipient. However, on the other hand, as long as the fiduciary guarantee takes place, according to Article 1 point 1 of Law No. 42/1999, the fiduciary object "remains in possession of the owner" as a consequence of the surrender of property rights in a *constitutum possessorium*.⁹⁰ In this regard, the fiduciary thing is legally in the hands of the creditor or fiduciary recipient, but economically the fiduciary object is in the hands of the debtor or fiduciary giver; both of them have limited authority over fiduciary things that have been transferred in trust as the title of transfer of property rights which the submission is constituted *possessorium*.⁹¹ Statements based on a literature review that received opinions from legal experts:

"In connection with the recognition of the transfer of property rights in trust as the title of the transfer of property rights with the submission of *constitutum possessorium*, it is indirectly recognized that the ownership rights to fiduciary objects during the fiduciary guarantee are divided into two, namely: "economic property rights" remain with the giver. Fiduciary, while the "juridical property rights" are with the creditor or fiduciary recipient. The word "whose ownership rights are transferred in the control of the owner of the object" means that the "economic property right" still exists with the fiduciary giver who remains domiciled as the owner, even though now only as the

⁸⁴ Badriyah and others, *Implementation of the Constitutional Court Decision*

⁸⁵ *Id.*; Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*; Benli and Benli, *Legal and Economic Considerations on the Efficacy*; Kandou and Widiarty, *Legal Protection for Creditors*

⁸⁶ Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*; Butarbutar, *Constitutional Issue of the Executorial Power*

⁸⁷ Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*; Leib and Galoob, *Fiduciary Political Theory: A Critique*

⁸⁸ Frankel, *Fiduciary Law in the Twenty-First Century*; Gold, *Reflections on the State as Fiduciary*

⁸⁹ Becker and Strömberg, *Fiduciary Duties and Equity-Debtholder Conflicts*; Megginson and Fotak, *Rise of the Fiduciary State*

⁹⁰ Bray and Miller, *Against Fiduciary Constitutionalism*; Butarbutar, *Constitutional Issue of the Executorial Power*

⁹¹ Gold, *Reflections on the State as Fiduciary*; Miller and Gold, *Fiduciary Governance*



holder of the "economic owner's right". In contrast, the "ownership right" in the Explanation on Article 17 of Law No. 42/1992 refers to "juridical property rights."

Considering the purpose of the fiduciary is to provide guarantees for creditors' claims against debtors or reverse guaranteeing debtors' debts to creditors, in addition to offering protection to debtors or fiduciary providers, it also intends to provide a strong position for creditors.⁹² After the debtor defaults, the creditor must be given the right - rights equivalent to an "owner", considering that the collateral is in the hands of the guarantor, namely to terminate his agreement to "borrow" the collateral object and demand it back, which gives the creditor the right of execution parade.⁹³ The person who carries out the execution *parade sells collateral*, just as he sells his property. Following are the results of discussions with legal experts:

"Following the fiduciary function in guaranteeing the repayment of debts, the object that becomes the fiduciary object is domiciled as "collateral goods". Therefore, by automatically transferring ownership rights to fiduciary things to creditors or fiduciary recipients, the creditors or fiduciary recipients also have some ownership rights to fiduciary objects. The creditor or fiduciary recipient has the power to sell the fiduciary thing and then take repayment of his receivables from the sale proceeds. So, it is clear that the authority of the creditor or fiduciary recipient as the holder of the juridical property rights of the fiduciary object is limited, as described above."

Although the fiduciary object remains in the power of the fiduciary giver, after the transfer of ownership of the fiduciary thing concerned, its current position is at least according to the construction that used to be only as a use-borrower.⁹⁴ An owner, who lends movable objects not on behalf of, bears the risk that his loaned property is transferred to another person, so the ownership rights to the thing will be transferred to a third party who transfers it in good faith. Suppose the creditor allows the fiduciary guarantee object to be borrowed and used by the fiduciary giver.⁹⁵ In that case, there should also be an element of trust in the creditor in good faith of the fiduciary giver, namely that the object borrowed and used will not be transferred to another person.⁹⁶

With the guarantee of fiduciary property rights as debt repayment, the authority of the debtor or fiduciary giver as the owner of the collateral property rights of the fiduciary object is no longer intact.⁹⁷ As a result, his head over fiduciary things is limited as if he were a borrower to use the fiduciary something that has been pledged. It is because juridical property rights are in the hands of creditors or fiduciary recipients. In contrast, debtors or fiduciary givers only have economic property rights to fiduciary objects that have been pledged, so their position is no longer as "*eigenaar* over fiduciary objects but is domiciled as detectors", considering that from the start, the fiduciary object remains in the control of the debtor or fiduciary giver.⁹⁸ With the transfer of juridical property rights to fiduciary things to creditors or fiduciary recipients, the juridical property rights of debtors or fiduciary recipients to fiduciary objects are incomplete.⁹⁹ As a result, the legal actions that debtors or fiduciary givers can carry out regarding ownership of the fiduciary object are also limited.¹⁰⁰

CONCLUSION

The imposition of a fiduciary trust gives birth to a legal relationship in the object guarantee agreement as outlined in the AJF so that the fiduciary object that has been transferred to the creditor or fiduciary recipient functions as collateral, therefore the creditor or fiduciary recipient is the owner of the collateral object with limited authority. as long as it is in the context of protecting its legal interests as a creditor or fiduciary recipients.¹⁰¹ Juridical property rights over fiduciary objects are

⁹² Kosali, *Improving the Object of Fiduciary Guarantee*; Megginson and Fotak, *Rise of the Fiduciary State*; Sulistyowati, *Implementation of Legal Aid to Debtors*

⁹³ Benli and Benli, *Legal and Economic Considerations on the Efficacy*

⁹⁴ Putriyanti, *Legal Status of Credit Bank Guarantee*

⁹⁵ Stewart, *Business as Usual?: The Limited Influence*; Sulistyowati, *Implementation of Legal Aid to Debtors*

⁹⁶ Pradnyawan and others, *Execution of Fiduciary Collateral*; Ramadhan, Yani, and Suhaimi, *Transfer of Fiduciary Guarantee Object*

⁹⁷ Busro, Sulistianingsih and Prabowo, *Legal Protection for Creditors in Fidusia Agreements in Indonesia*; Simatupang and others, *Choosing a Copyright Assessment Method*

⁹⁸ Liu, *Trusts without Fiduciary Duty*; Tahir, *Legal Protection for Creditors*

⁹⁹ Anggara, Herwastoeti, and Esfandiari, *Harmonization of Legal Decision*; Sesung and Rina, *Legal Consequence for Notary*

¹⁰⁰ Riswandie and Bakrie, *Legal Protection Regarding Debtor Rights*

¹⁰¹ Putriyanti, *Legal Status of Credit Bank Guarantee*; Sulistyowati, *Implementation of Legal Aid to Debtors*

in the hands of creditors or fiduciary recipients. In contrast, economic property rights (rights of control) over fiduciary things remain in the hands of the debtor or fiduciary giver. During a fiduciary assignment, the authority of the debtor or fiduciary giver is no longer intact.¹⁰² Therefore the debtor or fiduciary giver is placed as a debtor (detention/holder) on fiduciary objects whose juridical property rights have been transferred to creditors or fiduciary recipients. As a debtor, the authority of the debtor or fiduciary giver in carrying out actions against fiduciary objects is also limited. Therefore, to create harmony in the meaning of ownership of the object of the guarantee object in the fiduciary assignment, it is necessary to formulate the existence of the object of the guarantee object in the fiduciary position in the amendment of Law No. 42/1999.


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