

*Original Paper*

## Ideal Legal Concept of Fidusia Guarantee Registration Obligations by Justice-Based Financing Companies

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### **Abstract**

*In lending and borrowing activities, there are legal products used by the community in the form of guaranteeing goods to obtain financing. This is where fiduciary security is present to meet legal needs in guaranteeing lending and borrowing activities. This study aims to (1) review and analyze the implementation of Fiduciary registration obligations by finance companies based on Law Number 42 year 1999 concerning Fiduciary Guarantees (hereinafter referred to as UUJF), (2) review and analyze law enforcement in finance companies that do not register guarantees and formulate the ideal legal concept of justice-based fiduciary registration obligations. This study used research on normative law which includes legal principles, legal systematics, legal synchronization, and legal history. The findings in this study are first, the implementation of Fiduciary registration obligations by finance companies, are not obeyed or ignored by finance companies, because UUJF does not regulate legal sanctions. Second, law enforcement in finance companies that do not register guarantees is not optimal, synchronization and disharmony occur in the UUJF with the Regulation of the Minister of Finance Number 130/PMK.010/2012, the provisions of UUJF have no forced efforts in terms of law enforcement of the obligations of finance companies to register fiduciary guarantees. Third, the ideal legal concept is the obligation to register fiduciary collateral based on justice through institutional reconstruction, structure and legal culture.*

### **Keywords**

*Fiduciary Registration, Finance Company, Justice*

## 1. Background

Fiduciary is a term that has long been known in Indonesian. The law specifically regulating this matter, namely Law No. 42 year 1999, also uses the term “Fiduciary”. Thus, the term fiduciary has become and is an official term in our legal world. However, sometimes in Indonesian fiduciary is also referred to as the term “Trusting Ownership of Property”. In its Dutch terminology it is often referred to as the full term in the form of “*Fiduciare Eigendom Overdracht*”, while in full English it is often referred to as “Fiduciare Transfer of Ownership”.

Since the birth of fiduciary guarantees, this is very thick with engineering (in the positive sense). Because in the old Dutch legal system, it was also in Indonesia, it is used to guarantee movable goods is only known as pawn (Pand). While for immovable goods known as Hypothek. However, there is a need in practice to guarantee movable property, but without physical delivery of goods. For this purpose, it cannot be used in a mortgage guarantee institution (which requires the delivery of objects from the pawnshop) and also cannot be used for hypotension (which is only intended for immovable property). Therefore, find a way to be able to guarantee movable goods without any physical delivery of the goods. Finally an engineering emerged that fulfilled the interests of such practices, by providing fiduciary guarantees, which were finally accepted in practice and recognized by jurisprudence in Indonesia.

The legal engineering is carried out through its global form called the “*Constitutum Possessorium*” (submission of ownership of objects without giving up physical objects at all). As is well known that the basis of fiduciary guarantees is an agreement, precisely a fiduciary agreement, while this fiduciary engagement has the following characteristics:

- 1) Between the fiduciary giver and the fiduciary recipient there is an engagement relationship, which issues the right for the creditor to request the delivery of collateral from the debtor in a *constitutum possession*.
- 2) The engagement is an agreement to give something, because the debtor hands over an item by the *Constitutum Possessorium* to the creditor.
- 3) Engagement in the framework of fiduciary giving is an agreement that is in the nature of an assessment, that is an agreement that follows the birth agreement (the main agreement is in the form of debt receivables).
- 4) Fiduciary engagement is classified into an agreement with the conditions canceled, because if the debt is repaid, then the fiduciary guarantee rights will be deleted.
- 5) Fiduciary engagement is classified into an agreement originating from an agreement, namely a fiduciary agreement.
- 6) The fiduciary agreement is an agreement that is not specifically mentioned in the Civil Code, therefore this agreement is classified as an unnamed agreement (*Onbenoemde Overeenkomst*).
- 7) However, of course the fiduciary agreement is still subject to the provisions of the general section of the engagement contained in the Civil Code (Note 1).

Before it was published in the form of a special law concerning fiduciary, in Indonesia it was the same as what happened in the Netherlands. The fiduciary institution initially developed through jurisprudence, as we have mentioned above. Indeed, since the days of the Dutch East Indies, in Indonesia it was felt the need for practice towards an institution such as fiduciary, because there were shortcomings found in the Civil Code or other Law pawn and hypotension institutions.

The current fiduciary guarantee agreement is very often used, especially in the field of finance business. Where is the finance company in running its business.

Guarantees as legal institutions give birth to legal principles regulated in civil law which have an important position in economic law. The guarantee institution in the form of a mortgage stipulated in Book II of the Civil Code is felt not to meet the needs of the community, especially small entrepreneurs, given the provisions contained in article 1152 of the Civil Code, which requires that tangible movable objects provided as collateral in the form of pawns must move and is in the possession of the creditor (Inbezitstelling), while the goods as collateral objects are still needed by those who are indebted in carrying out their business.

To overcome the provisions of article 1152 paragraph 2 of the Civil Code and fulfill the community's need for guarantee institutions, Law No. 42/1999 concerning Fiduciary Assurance was born. It is stated in article 1 that the purpose of fiduciary is the transfer of ownership rights on the basis of for objects whose ownership rights are transferred, they remain in the control of the owner of the object. The rules for fiduciary guarantees by Sri Rezeki Hartono are included in the economic law because Fiduciary guarantees according to him are commonly used and used in the practice of business or economics, because there are several reasons, including practical and safe, such guarantees are collateral for debt settlement, which gives the main position to fiduciary holders in this case as creditors to other creditors as regulated in Law No. 42 of 1999 concerning Fiduciary Guarantees (Note 2).

Fiduciary guarantees when viewed from the legal aspect provide preferences (repayment rights) from other creditors (concurrent) as follows:

- a. The fiduciary has rights that take precedence over other creditors.
- b. The fiduciary holder has the right to take precedence over taking the repayment of the receivables for the results of the execution of the object which is the object of fiduciary guarantee.
- c. The fiduciary has rights that are not prioritized due to bankruptcy and or liquidation (Note 3).

Fiduciary guarantees with the principle of "Constitutum Possessorium" (deliver the ownership of objects without giving up physical objects at all), are currently suspected to be still based on jurisprudential practices and have not guaranteed legal certainty. In the era of democracy, the issue of legal certainty is one of the core values in the framework of the rule of law, which includes the principles that the State must pioneer obedience to the law, the existence of independent judiciary, access to justice (access to justice) must be opened as widely as possible, especially for those who are victims of "maladministration", the law must be enforced fairly and equally (just, equal) accompanied by legal certainty (Note 4).

Based on what has been described in the background, it is very interesting to examine in depth, the implementation of Fiduciary registration obligations by financing entrepreneurs, law enforcement is not complied with the obligation of registration of fiduciary guarantees by the Financing Company, and the ideal concept of fair value-based Fiduciary Guarantee registration obligations.

## 2. Research Methods

This study used Normative legal research which covers legal principles, legal systematics, legal synchronization, and legal history. The data source of this study was used secondary data. Secondary data included (1) primary legal materials, (2) secondary legal materials, and (3) tertiary legal materials (Note 5). The technique of collecting data through library research. The collected data will be analyzed descriptively analytically.

## 3. Theoretical Framework

### 3.1 Justice Theory and Legal Certainty of Gustav Radbruch

The legal philosopher and at the same time a German bureaucrat and politician from the Relativism school, Gustav Radbruch (1878-1949) was very influential in the world of law.

According to Gustav Radbruch, justice, legal certainty and usefulness (Gustav Radbruch: *Gerechtigkeit, Rechtssicherheit, Zweckmäßigkeit*) are three terminologies that are often sung in lecture halls and court rooms, but their nature or their meaning is not necessarily understood. Justice and legal certainty, for example. At a glance the two terms are opposite, but it may not be the same. The word justice can be an analog term, so it presents the terms procedural justice, legalist justice, commutative justice, distributive justice, vindicative justice, creative justice, substantive justice, and so on. Procedural justice, as termed by Nonet and Selznick to refer to one of the indicators of an autonomous legal type, for example, it turns out that after being examined it leads to legal certainty for the sake of the rule of law. So, in this context justice and legal certainty are not at odds, but rather side by side (Note 6).

Justice and Certainty are two axiological values in the law. The philosophy of law discourse often questions both of these values as if they are antinomies, so the philosophy of law is interpreted as the search for justice with certainty or just certainty (Note 7).

Gustav Radbruch's view generally means that legal certainty does not always have to be given priority in fulfilling every positive legal system, as if legal certainty must exist first, then justice and expediency. Gustav Radbruch then corrected his theory that the three legal objectives are equal (Note 8).

Gustav Radbruch, the originator of three basic legal values from Germany, once said that a good law is when the law contains the value of justice, legal certainty and usability. That is, even though all three are basic legal values, each value has different demands from each other, so that all three have the potential to contradict each other and cause tension between the three values (*Spannungsverhältnis*) (Note 9).

Therefore, law as the bearer of the value of justice, asserted Radbruch, could be a measure for the fairness of the rule of law. Therefore, the value of justice is also the basis of the law as law. Thus, justice has a normative and constitutive nature for the law. In this case, justice is a legal moral basis and a benchmark for a positive legal system. Therefore, to justice, positive law stems. While constitutive, because justice must be an absolute element of the law. That is, law without justice is a rule that does not deserve to be a law.

Justice is the glue of civilized social life. The law was created so that each individual member of the community and state administrators take action necessary to maintain social ties and achieve the goals of a shared life or vice versa so that they do not take actions that can damage the order of justice.

Justice is indeed an abstract conception. However, the concept of justice contains the meaning of protection of rights, equality of degree and position before the law, as well as the principle of proportionality between individual interests and social interests. The abstract nature of justice is because justice cannot always be born of rationality, but it is also determined by a social atmosphere that is influenced by other values and norms in society. Therefore justice also has a dynamic nature which sometimes cannot be contained in positive law (Note 10).

Fair in essence means putting things in place and giving to anyone what is their right, which is based on a principle that all people are equality before the law.

Legal certainty as one of the objectives of the law can be said as part of efforts to realize justice. The real form of legal certainty is the implementation or law enforcement of an action regardless of who does it. With the existence of legal certainty, everyone can estimate what will be experienced if they do certain legal actions. Certainty is needed to realize the principle of equality before the law without discrimination (Note 11). Certainty is a feature that cannot be separated from the law, especially for written legal norms. Law without the value of certainty will lose meaning because it can no longer be used as a guideline for everyone. Certainty itself is referred to as one of the objectives of the law (Note 12).

The word "certainty" is closely related to the principle of truth, that is, something that can be strictly legally formal. Through deductive logic, the rules of positive law are placed as a major premise, while concrete events become minor premises. Through a closed logic system, conclusions can be obtained immediately. The conclusion must be something that can be predicted, so that everyone must stick to it. With this handle the community becomes orderly. Therefore, certainty will direct society to order (Note 13).

Legal certainty will guarantee that someone conducts behavior in accordance with applicable legal provisions. Conversely, without legal certainty, a person does not have standard provisions in carrying out behavior.

### *3.2 Legal System Theory*

In accordance with the research title and the things that will be discussed in this study, in essence, is about the Legal Reconstruction of Guarantees. Reconstruction is a renewal, a question that arises, why

should it be updated? Because it feels there is a discrepancy, as we know that the Legal Purpose at its core is legal certainty, benefit and justice. The occurrence of reconstruction because the purpose of law is not yet fully achieved. Therefore, there is what is called legal renewal or reconstruction so that legal objectives can be achieved. According to Lawrence Friedman. Friedman divides the legal system into three (3) components, namely (Note 14):

- 1) The substance rule of the law, which covers all written and unwritten rules, both material law and formal law.
- 2) Structure of the law, covering legal institutions, legal apparatus and law enforcement systems. Legal structures are closely related to the justice system carried out by law enforcement officials, in the criminal justice system, the application of law enforcement is carried out by investigators, prosecutors, judges and advocates.
- 3) Legal culture, is an emphasis in terms of culture in general, habits, opinions, ways of acting and thinking, which direct social power in society.

The three components of the legal system according to Lawrence M Friedman above are the soul or spirit that moves the law as a social system that has special character and technique in its study.

### *3.3 Law Enforcement Theory*

Legal compliance of the community is one of the reasons for legal culture, in the legal culture can be seen from the reality of their daily daily life and reflecting the wishes of lawmakers which are subject to legal issues. The emergence of compliance with the law of community awareness. Legal awareness can grow because of the fear of the sanctions being dropped.

According to Robert Biersted in his book *The Social Order*, the process of one's compliance with the law may occur due to several factors, namely:

- 1) Indoctrination (intentional obedience planting), that is, a legal regulation becomes a doctrine that is deliberately planted in the community. This is done so that the application of the law is evenly distributed to all levels of society, so that the desired legal compliance can be realized.
- 2) Habituation (Habitual Behavior), that is, someone obeys the rule of law because of their routine, such as someone wearing a helmet when driving a motorcycle.
- 3) Utility (Utilization of the obeyed method), that is, someone obeys the law because it can substantially utilize the regulation.
- 4) Group Identification (Identifying in certain groups), i.e., someone will obey the law when seeing or referring to a group that has implemented the law (Note 15).

However, it should also be noted that even though a norm has been socialized in such a way and has been institutionalized, it is not necessarily the norm that has truly been absorbed (internalized) in each member of the community.

The problem above identifies that a legal product that is made is solely for the common good, in this case the process of socializing legal regulations plays an important role so that its implementation can run well. Especially at this time, the legal compliance of fiduciary collaterals is not yet fully aware of

the applicable law. Thus, there are still many of people who have not complied with the law to do fiduciary registration in accordance with what has been mandated by fiduciary law. The law has been applied as a positive law governing fiduciary as a whole in theory and practice. So from this point, the author is interested in examining the level of compliance of financing business players, especially financing motor vehicles in the city and surrounding areas in carrying out fiduciary registration of fiduciary guarantee agreements that have been made against debtors who have been regulated in fiduciary insurance law (Law No. 42 year 1999).

The definition of law enforcement can also be interpreted as administering law by law enforcement officers and by anyone who has an interest in accordance with their respective authorities according to the applicable legal rules. According to Soerjono Soekanto, law enforcement is an activity that harmonizes the relationship of the values described in the rules of solid and action as the series of translation of the final stages. To create, maintain and maintain the peace of life (Note 16).

In other words, law enforcement is the implementation of regulations. Thus, law enforcement is a system that involves harmonizing values with real human rules and behaviors. These rules then become guidelines or benchmarks for behavior or actions that are deemed appropriate or appropriate. The behavior or attitude of action is aimed at creating, maintaining and maintaining peace.

In terms of law enforcement factors, it makes the law rule truly function, according to Soerjono Soekanto, the factors are:

a. Legal factors

It can be seen from the existence of laws and regulations, which are made by the government hoping for a positive impact that will be obtained from law enforcement. Run according to the laws and regulations, so as to achieve effective goals. In the law itself there are still problems that can hinder law enforcement, namely:

- (1) Not followed by the principles of the enactment of the law.
- (2) The absence of implementing regulations is needed to implement the law.
- (3) The ambiguity of the meaning of the words in the law which results in confusion in the interpretation and application.

b. Factors in law enforcement, namely those who form and enforce the law, the term law enforcement includes those who directly or indirectly engage in law enforcement, such as in the field of justice, police, law and social affairs.

c. Factor facilities or facilities that support law enforcement.

Certainty of handling a case always depends on the input of resources given in prevention programs. It is impossible for law enforcement to run smoothly without the availability of certain facilities or facilities that support the implementation.

d. Community factors, namely environmental factors where the law is applied or enforced.

Law enforcement comes from the community and aims to achieve peace within the community itself. Directly the community can influence law enforcement.

e. Cultural Factor.

Namely as a result of work, creativity and a sense that is based on human intention in life.

#### **4. Research Results and Discussion**

##### *4.1 Obligation of Fiduciary Registration by a Financing Company Based on Law Number 42 of 1999 concerning Fiduciary Guarantees*

Guarantees as legal institutions give birth to legal principles regulated in civil law which have an important position in economic law. The guarantee institution in the form of a mortgage stipulated in Book II of the Civil Code is felt not to meet the needs of the community, especially small entrepreneurs. Given the provisions contained in article 1152 of the Civil Code, it requires tangible movable objects provided as collateral in the form of pawns must move and is in the possession of the creditor (Inbezitstelling). On the other hand, the goods as objects of security guarantee are needed by those who are indebted in carrying out their business.

To overcome the provisions of article 1152 paragraph 2 of the Civil Code and fulfill the community's need for a guarantee institution, Law No. 42 year 1999 concerning Fiduciary Assurance, which states in Article 1 that the purpose of a fiduciary is the transfer of ownership rights on the basis of trust for objects whose ownership rights are transferred. They remain in the control of the owner of the object. The rules for fiduciary guarantees by Sri Rezeki Hartono are included in the economic law because Fiduciary guarantees according to him are commonly used and used in the practice of business or economics, because there are several reasons, including practical and safe, such guarantees are collateral for debt repayment, which gives the main position to fiduciary holders in this case as creditors to other creditors as regulated in Law No. 42 of 1999 concerning Fiduciary Guarantees (Note 17).

Fiduciary guarantees with the principle of "Constitutum Possessorium" (delivery of ownership of objects without giving up physical objects at all), are currently suspected to be still based on jurisprudential practices and have not guaranteed legal certainty. In the era of democracy, the issue of legal certainty is one of the core values in the framework of the rule of law, which includes the principles that the State must pioneer obedience to the law, the existence of independent judiciary, access to justice (access to justice) must be opened as widely as possible, especially for those who are victims of "maladministration", the law must be enforced fairly and equally (just, equal) accompanied by legal certainty (Note 18).

Examining the renewal of the national legal system there are major problems in the national legal system, *ius constitutum* ("Law Enforcement" problem) & *Ius Constituendum* ("Law reform/development" problem) (Note 19). Likewise with fiduciary guarantees, as one of the national laws in practice raises various legal problems including the absence of legal certainty and legal protection. The inconsistency of the substance of a fiduciary guarantee institution, the structure of a fiduciary institution that is not in favor of SMEs (Small and Medium Enterprises), the unfairness of the



Judge in deciding cases of fiduciary guarantees makes this law ineffective.

From the theoretical/conceptual point of view, the renewal of the National fiduciary guarantee legal system is a unit of the legal sub-system of Fiduciary Security into the legal substance of Fiduciary Guarantee and legal culture of fiduciary guarantees. The National Legal System that will be built requires a foundation of values/ideas as guidelines that are in accordance with the views of life and ideology of the Indonesian Nation so that the legal knowledge can apply nationally. Its law and enforcement experienced a close and intensive exchange with the political and economic environment. Before the issuance of Law No. 42 year 1999, legal experts still disagreed regarding the nature of the fiduciary agreement. The first opinion says that the fiduciary guarantee agreement is independent (Zelfstanding). The results of the study indicate that the fiduciary guarantee agreement is an agreement that was born and inseparable from the Bank's credit agreement or debt agreement. This means that the fiduciary guarantee agreement cannot exist without being preceded by another agreement which is referred to as the principal agreement.

In the Bank's practice, the relationship between the nature of the fiduciary guarantee agreement and the loan agreement can be seen from the contents of the fiduciary guarantee agreement both before and after the birth of fiduciary guarantee law No. 42 year 1999. Before the issuance of the fiduciary guarantee law, the fiduciary guarantee agreement was carried out in the form of deed under the hands and deeds in the form of authentic (notary deed). The results of this study still show a similarity with the 1989 fiduciary research report, which said that in the practice of binding fiduciary guarantees on movable objects can be done by Notary deed (58.6%) and underhanded deeds (41.4%) (Note 20).

The description shows that there is no certainty about the form of a fiduciary guarantee agreement. This is because there are no provisions governing it, but it has become a habit among banks that a fiduciary guarantee agreement must be made in writing.

In contrast to the situation after the issuance of the fiduciary guarantee law, the form of a fiduciary guarantee agreement is explicitly determined which is made by a notary deed (Note 21). One of the reasons for establishing a law stipulates that a Notary deed is an authentic deed, so that it has the power of perfect proof, the same reason is also stated by Notaries (Note 22). Confirmation of the form of fiduciary guarantee agreement with a notary deed by the Fiduciary guarantee law must be interpreted as a compelling legal norm. This will become increasingly clear if it is associated with the process of fiduciary collateral when registering at the fiduciary registration office in this case the Ministry of Law and Human Rights. Applicants for fiduciary guarantee registration must be accompanied by a copy of the notary deed concerning the imposition of fiduciary guarantees (Note 23). The next juridical consequence is very important series and determines the birth of fiduciary guarantees (Note 24).

With the results of this study it can be concluded that, doubts about the nature of the fiduciary guarantee agreement are not in question anymore because the empirical juridical facts have supported the opinion that fiduciary guarantee agreements are agreements that are not independent agreements.

Registration has juridical meaning as a series that is not separate from the process of the occurrence of a fiduciary guarantee agreement. In addition, registration of fiduciary guarantees is a manifestation of the principle of publicity and legal certainty.

Although registration of fiduciary guarantees is so important, in the practice of credit within the Bank there are still fiduciary collateral agreements that are not registered (Note 25). Similarly, what happens to fiduciary collateral agreements within financial institutions. The legal effect of the fiduciary guarantee agreement that is not registered is that it does not give birth to material agreements for fiduciary guarantees, so material characteristics such as *droit de suite* and preference rights are not attached to fiduciary guarantors. In practice there are still doubts regarding the registration of fiduciary guarantees. The doubt is the lack of clarity in the Fiduciary Guarantee Law to determine what is registered.

To provide legal certainty, Article 11 The Fiduciary guarantee law requires that objects loaded with fiduciary collateral be registered with the fiduciary registration office located throughout Indonesia. This obligation even applies even though the material burdened with fiduciary guarantees is outside the territory of the unitary state of the Republic of Indonesia. The registration of objects loaded with fiduciary guarantees is carried out at the place of the fiduciary provider and their registration includes objects both inside and outside the territory of the Republic of Indonesia. To fulfill the principle of publicity, it is also a guarantee of certainty for other creditors regarding objects that have been burdened with fiduciary guarantees.

Thus, the registration of fiduciary guarantees in the fiduciary register is constitutive action which gives birth to fiduciary guarantees. We can see further confirmation in the provisions of Article 28 of the fiduciary guarantee law which states that if the same object becomes an object of fiduciary guarantee more than 1 (one) fiduciary guarantee agreement, the creditor who first registers is a fiduciary recipient. This is important to note by creditors who are parties to the fiduciary guarantee agreement, because only the fiduciary recipient, the power of attorney or his representative may register fiduciary guarantees. Further provisions regarding the procedure for registration of fiduciary guarantees and registration fees will be governed by government regulations. As evidence for the creditor that he is the holder of a fiduciary guarantee, a fiduciary guarantee certificate issued by the fiduciary registration office on the same date as the date of receipt of the application for registration. This fiduciary guarantee certificate is actually a copy of the fiduciary list book that contains the same things as the data and information that existed during the registration statement. Provisions regarding the existence of fiduciary collateral registration obligations can be said to be an important breakthrough, given that in general the object of fiduciary collateral is an unregistered movable object so that it is difficult to know who the owner is.

This breakthrough will be more meaningful if we associate it with the provisions of article 1977 of the Civil Code which states that whoever controls a moving object is considered the owner (*bezit als volkome title*) (Note 26). Therefore, why FEO and Cessi are said to be guarantees that do not provide

protection for the creditor holders, namely because there is no registration like a fiduciary guarantee institution. Thus fiduciary guarantees fulfill the principle of publicity as one of the very important principles in the material guarantee law.

Because the fiduciary guarantee certificate is issued by the authorized agency in this case the fiduciary registration office, then the certificate has very strong evidentiary power as an authentic certificate. Only the fiduciary registration office is the only one authorized to issue the fiduciary guarantee certificate, because, if there is a proof of fiduciary certificate, the certificate will be said valid. So if there is other evidence in any form must be rejected. The parties are not enough, for example, only to prove the existence of a fiduciary by only showing a fiduciary deed made by a Notary. According to Article 14 paragraph 3 of the Fiduciary Guarantee Law No. 42 year 1999, then with a fiduciary deed, the fiduciary institution is deemed not born, the birth of the fiduciary is when registered at the fiduciary registration office (Note 27). Based on the provisions of article 14 paragraph 3 of the Fiduciary Guarantee Act, it can be concluded here that the registration of a fiduciary guarantee deed is an absolute one and is a necessity so that a fiduciary deed has a permanent and legal power as a fiduciary guarantee deed.

The registration philosophy of Fiduciary Guarantees in UUJF is to provide legal certainty to interested parties and registration Fiduciary guarantees give preferential rights to Fiduciary Recipients to other creditors Because Fiduciary Guarantees give rights to the Fiduciary Giver to keep control of the Objects that are objects of Fiduciary Assurance based on trust, it is expected that the registration system regulated in this Act can provide a guarantee to the Fiduciary Recipient and parties who have an interest in the object. In UUJF it does not regulate legal sanctions for financing entrepreneurs who do not carry out the obligation to register fiduciary guarantees in the local fiduciary office, including the provisions of Government Regulation Number 21 year 2015 concerning online fiduciary registration. Only in PMK Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for finance companies that conduct consumer financing for motorized vehicles. Regulation of the Head of the Indonesian National Police Number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees.

#### *4.2 Law Enforcement in Financing Companies That Do Not Register for Fiduciary Guarantees*

The background of the birth of a fiduciary institution is because of the need in practice. These needs are based on the facts that according to our legal system if the object of collateral is a moving object, then the guarantee is bound in the form of a mortgage, where the object of the guarantee must be submitted to the party receiving the mortgage (creditor). Conversely, if the object of collateral is an immovable object, then the guarantee must be hypothetical (there are now mortgage rights), where the object of the guarantee is not handed over to the creditor, but remains within the authority of the debtor.

However, there are cases where the object of collateral debt is still classified as a movable item, but the debtor is reluctant to give up power over the item to the creditor, while the creditor does not have an interest or even hassle if the item is handed over to him. Therefore, there is a need for a form of debt

security whose object is still classified as a movable object but without giving power to the object to the creditor.

Finally comes the new guarantee form where the object is moving objects, but the power over the object does not switch from the debtor to the creditor. This is called Fiduciary guarantee.

With the rapid growth of the automotive industry with the sale of new motor vehicles which is quite high where 70% with credit facilities, therefore to protect the financial industry, especially multifinance companies, the Government and Parliament create new legal institutions by giving birth to legal codes called Fiduciary guarantee which is marked by the birth of Fiduciary Guarantee Law No. 42 year 1999. This Regulation aims to regulate and provide legal certainty for parties in material guarantees by guaranteeing non-land objects which so far cannot be accommodated by hypotheses, mortgages or pawn. Fiduciary guarantee is different from fiduciary before the birth of the Fiduciary Guarantee Law, because fiduciary guarantees must be made in the form of authentic certificates (Notaril) and given new rights in the form of executorial titles, where the execution parate can be carried out immediately by the creditor without going through court decisions which is permanent without going through the court judge.

For this reason, fiduciary guarantees can be valid and have a permanent legal force. The fiduciary guarantee deed must be registered and issued by a fiduciary guarantee certificate with the rationale "For the sake of justice based on the One Godhead", so that the fiduciary guarantee can be carried out immediately by parate execution.

Finance companies generally only proceed with making fiduciary deeds and registering them for the issuance of fiduciary guarantee certificates if it is deemed necessary, i.e., if the debtor has manifested defaults by not paying or delinquent payments for installments on the purchase of motorized vehicles. Even if the withdrawals made by multifinance companies do not get into trouble or the debtors are willing to give up their motorized vehicles voluntarily, multifinance companies will not make fiduciary deeds and register them.

In general, to finance the purchase of a motorcycle whose credit is below Rp. 20,000,000 (twenty million rupiahs), the finance company only makes a power of attorney to charge the fiduciary under the hand with a stamp of Rp. 6,000 (six thousand rupiah) without any ratification (legalization) or registration (warmerking) Notary. Fiduciary deed will only be made and registered if the finance company has difficulties or resistance from the debtor when withdrawing collateral vehicles from defaulting debtors. However, so that fiduciary guarantees can provide legal certainty and protection for those concerned, fiduciary guarantees need to be registered at the fiduciary collateral registration office. The rapid growth of the automotive industry in Indonesia, which amounts to 11%/year from domestic gross income (Note 28). Where in 2015 for motorcycle sales reached 7,771,018 motorcycles (Note 29). In 2015 car sales had just reached 1,229,904 units, of which 70% were purchased on credit. That makes the market for motorized vehicle financing in Indonesia very large (Note 30). From the data it can be seen that the potential of Non-Tax State Revenues (PNBP) lost from fiduciary guarantees is very large

if the fiduciary guarantee is not registered.

At present, many finance institutions and banks (commercial banks and credit) carry out financing for consumers (consumer finance), leasing, factoring. They generally use agreement procedures that include fiduciary guarantees for objects of fiduciary collateral, but ironically it is not made in a notary deed and is not registered in the Fiduciary Registration Office to get a certificate. Such a deed can be called a fiduciary guarantee under the hand (Note 31).

The Financial Services Authority (in Indonesian term called as OJK) revealed the results of the examination of the Financial and Development Supervisory Board (BPKP) and the Corruption Eradication Commission (KPK) to find potential state losses carried out by motor vehicle financing companies. The state, because many fiduciary registrations have not been carried out by finance companies (Note 32). The findings of the BPKP and KPK which mention the potential loss of the State, forcing the Ministry of Finance to issue PMK number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for finance companies that conduct consumer financing for motorized vehicles by imposing Fiduciary Assurance that gives a one-month deadline must register (Note 33).

Then in order to improve service, starting on March 5, 2012, the Directorate General of Public Law Administration of the Ministry of Law and Human Rights (Kemenkumham) has launched an online fiduciary system (Note 34). Online Fiduciary is a breakthrough in the Directorate General of Law and Administration at Kemenkumham in providing services to the public. Through this new method by using Notary services, fiduciary legal services are expected to be faster, more accurate and free of extortion. other than that it encourages economic growth considering that services increase state revenues from the Non-Tax State Revenue sector.

However, finance companies still violate the Fiduciary Guarantee Law, among them they conduct fiduciary registration after default debtors or even creditors do not register fiduciary collateral objects at the fiduciary registration office on the grounds for efficiency in facing competition from other financing institutions. In this case the creditor is ready to bear the risk if there is a bad credit (Note 35).

In article 11 paragraph 1 the Fiduciary Guarantee Act states that:

“Items loaded with fiduciary guarantees for are obligatory registered”, however, there are no restrictions on registration time. This is the basis of why many finance companies do not register their fiduciary guarantees.

Fiduciary collateral is not registered is a violation that is often carried out by creditors, even though creditors are aware of the rules regarding the obligation to register fiduciary guarantees in Article 11 paragraph (1) of the Fiduciary Guarantee Act. The violations committed by creditors in the credit agreement using fiduciary collateral are: the creditor does not register the fiduciary guarantee at the Registration Office of the Fiduciary Guarantee and the creditor registers a fiduciary guarantee after the debtor is in default.

Minister of Finance Regulation Number 130/PMK.010/2012 Concerning Registration of Fiduciary Guarantees for Financing Companies Conducting Consumer Financing for Motorized Vehicles By

imposing Fiduciary Guarantees, it has prohibited finance companies from carrying out fiduciary collateral if they do not have a fiduciary guarantee certificate. There are several things set out in the PMK, including:

- 1) Registration of fiduciary guarantees at the Office of Fiduciary Registration no later than 30 calendar days after the date of the consumer financing agreement.
- 2) Financing companies are prohibited from withdrawing fiduciary collateral in the form of motorized vehicles if the Fiduciary Registration Office has not issued a fiduciary guarantee certificate and submitted it to the finance company.
- 3) Withdrawal of fiduciary collateral objects must fulfill the terms and conditions contained in the Law concerning fiduciary guarantees and parak parties have agreed to the consumer financing agreement.
- 4) These PMK violators will be subject to gradual sanctions in the form of warnings, freezing of business activities, or revocation of business licenses.
- 5) Warning sanctions are given in writing at most three times in a row with a validity period of 60 calendar days each.
- 6) If the validity period of the third warning sanction expires and the violation persists, the finance minister will impose a freeze on business activities that are valid for 30 calendar days.
- 7) If the validity period of business freezing sanctions expires and violations continue, violations will be given sanctions.

Based on the hierarchy of laws and regulations as stipulated in Article 7 Paragraph (1) of Law Number 12 Year 2011 concerning the establishment of legislation, the position of UUJF with Minister of Finance Regulation Number 130/PMK.010/2012 is higher than that of the PMK. The Minister of Finance Regulation Number 130/PMK.010/2012 only regulates motorized vehicles while the object of fiduciary collateral in UUJF is broader, where Fiduciary Guarantee is the guarantee right for movable objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with liability as referred to in Act Number 4 year 1996 concerning Mortgage Rights that remain in the control of Fiduciary Giver. It is as collateral for certain debt repayments, which give a priority position to Fiduciary Recipients against other creditors. Objects are anything that can be owned and transferred, both tangible and intangible, registered or unregistered, movable or immovable which cannot be burdened with mortgages or mortgages.

Basing the provisions of Article 29 UUJF.

If the debtor or Fiduciary is injured, the execution of objects that are objects of Fiduciary Assurance can be done by:

- a. implementation of the executorial title as referred to in article 15 paragraph (2) by Fiduciary Recipients;
- b. sales of objects that are objects of Fiduciary Assurance for the power of the Fiduciary Recipient himself through public auction and taking payment of his receivables from the proceeds of sale;

c. underhand sales carried out based on the agreement of the Fiduciary Giver and Recipient if in this way the highest price can be obtained that benefits the parties (2). The sale as referred to in paragraph (1) letter c is carried out after the 1 month has passed since the written notification by the Fiduciary Giver and/or Recipient to interested parties and is announced in at least 2 newspapers circulating in the area concerned.

Thus, in law enforcement against financing entrepreneurs who do not register fiduciary collateral is not optimal, because in addition to the occurrence of norm conflicts including the Difference of objects of registration from Article 11 paragraph (1) of the Fiduciary Guarantee Law, determine “Items loaded with Fiduciary Guarantees must be registered”. Article 12 paragraph (1) of the Fiduciary Guarantee Law, determines “Registration of the fiduciary guarantee” as referred to in article 11 paragraph (1) is carried out at the Office of Fiduciary Registration. Provisions of Article 29 of the Fiduciary Guarantee Law paragraph (1) letters b and c give the choice to the public auction or under the hand. And 3. Indicators of destruction of goods as Article 25 of UUJF. As well as provisions in Article 16 paragraph (2) PP 21/2015, Fiduciary Guarantees must be notified within 14 days. Moreover, its enforcement structure has so far not been set up for a period of time from the stage of requesting police assistance to the security of the execution of fiduciary guarantees by the Police in accordance with the Regulation of the Head of the Indonesian National Police Number 8 year 2011 concerning Security of Execution of Fiduciary Guarantees. and the legal culture of the new financing businessman registers a fiduciary guarantee when there is a default.

#### *4.3 The Ideal Legal Concept of the Obligation of Fiduciary Registration by a Value-Based Finance Company*

Registration of a Fiduciary Guarantee is a very important thing to do in terms of obtaining a Fiduciary Guarantee Certificate. Therefore, the regulations governing the registration of fiduciary guarantees should be regulated in detail, firmly and clearly.

In the era of democracy, the issue of legal certainty is one of the core values in the context of the rule of law, which includes the principles that the state must pioneer obedience to the law, the existence of independent judiciary, is a way of obtaining justice (access to Justice) must be opened as widely as possible, especially for those who are victims of “maladministration” of the law must be upheld fairly and equally (just equal) accompanied by legal certainty (certainty legal) (Note 36).

Examining the renewal of the national legal system there are major problems in the national legal system, namely *Ius Constitutum* (Law Enforcement problem) and *Ius Constituendum* (Law Reform or Law Development problem) (Note 37). Likewise with fiduciary guarantees, as one of the national laws in practice raises various legal problems including no legal certainty and legal protection. The inconsistency of the substance of a fiduciary guarantee institution, the structure of a fiduciary institution that does not favor SMEs (Small and Medium Enterprises), the unfairness of judges in deciding cases of fiduciary guarantees causes this law to be ineffective (Note 38).

From the theoretical/conceptual point of view, the Renewal of the National Fiduciary Guarantee Legal

System is a series of national legal systems sub-system fiduciary guarantees into the legal substance of fiduciary guarantees, fiduciary guarantee legal structures and fiduciary guarantee legal culture. The national legal system that will be built requires a foundation of values/ideas as guidelines that are in accordance with the life view and ideology of the Indonesian nation so that legal knowledge can apply nationally.

Law and its enforcement experience a close and intensive exchange with the political and economic environment. What happens in the legal field is a function of the processes that occur in both fields. There is a thought that law in Indonesia can always be returned to the relationship of political power and community development. Ironically, this situation in the development of legal science in Indonesia is not budding and is dominated by the positivist paradigm. This paradigm is very dominating and even tradition in legal thoughts in Indonesia (Note 39).

In this study, we discuss how to reconstruct a fiduciary law system that focuses on the context of fiduciary registration in the context of reforming national law in a better direction, but before the discussion to the above, it is better to discuss first how the legal fiduciary guarantee according to Law No. 42 year 1999 concerning fiduciary guarantees.

Legal norms contained in Law No. 42 year 1999, must be a unit consisting of elements in a subsystem that interact with one another harmoniously to achieve what is the purpose of the law. The fiduciary guarantee unit as a material guarantee legal subsystem must be applied to juridical elements such as fiduciary legal regulations, legal principles and legal understandings (Note 40). Norms are interpreted as; First, regulations and provisions that bind citizens/communities; second, rules, measures or rules that are used as benchmarks for evaluating or comparing things (Note 41). Hans Kelsen describes the distinctive legal meaning of the action that comes from the norm whose contents refer to that action, so that it can be interpreted according to the norm. Norms function as a scheme of interpretation, therefore Kelsen interprets the norm as something that should be and should happen (Note 42).

Law as a norm system, Hans Kelsen argues, that a norm is made according to higher norms, and even higher norms are made according to higher norms as well, and so on until we stop at the highest norm which is not made by the norm anymore but rather its prior existence by the Community or the People (Note 43). The highest norms are Grundnorm or Basic Norm, and Grundnorm basically does not change. Through this Grundnorm all legal regulations are arranged in a single hierarchical unit and thus it is also a system. Grundnorm is a source of value for a legal system, so that it can be said that it is "gasoline" that drives the entire legal system. All products of the Act must be sourced from Pancasila as Grundnorm all legal regulations.

The National Legal System must be sourced from the philosophical values/philosophical ideas of the Pancasila law as national law, namely the pillars of Godhead (religious moral); legal science is worth/pillar/humanitarian oriented (humanistic); Law is valued/pillared/Community oriented (Nationalistic; Democratic; Social justice) (Note 44).

Reconstruction means "Reorganization" in terms of rearranging the building of the Indonesian legal



system, so the term restructuring is very close to the meaning of “Reconstruction”, namely “Rebuilding” the National legal system. So the two terms are very closely related to the problems of Law Reform and Law Development, especially with regard to “Legal System Development Reform” (Note 45). In accordance with the dynamics of the National and International economies followed by fast-moving cultural changes with increasingly complex and widespread challenges, Law No. 42 of 1999 concerning Fiduciary Guarantees needs to be rearranged by making reforms at the idealistic level of law so as to be able to respond to realistic laws.

Renewal of the legal system is seen as an integral juridical, constituting a unity of various sub-systems (components) consisting of Components of Legal Substance (Legal Substance), Legal Structure (Legal Structure) and Culture of Law (Legal Culture). Of the three components of the legal system above must be sourced and based on values/ideas that are based on and based on Pancasila as a national legal science oriented to the three pillars/balance of values of Pancasila, Namely: Legal value/pillar/oriented-Godhead (Religious moral); Law is valued/pillared/oriented-Humanity (Humanistic); Legal value/pillar/Community oriented (Nationalistic; Democratic; Social Justice) (Note 46).

Based on the opinions above, the framework of the legislators, in this case the Fiduciary Guarantee Law should be oriented to divinity (religious morality), Humanity (Humanistic), and Social (Social Justice), so that the product of the law that it produces it does not cause problems in its implementation in the field (practice) so that the sense of justice, humanity and divinity is truly felt by the community.

Legal culture functions as a bridge that connects legal regulations with the behavior of all members of the community. This legal culture component should be distinguished between the internal legal culture, namely the legal culture of lawyers and judges and external legal culture, namely the legal culture of the wider community (Note 47).

Legal culture Judges in the legal system of judicial power occupy a central position in upholding the law, in realizing the ideas contained in the law as a product of the political system. The independence of the judiciary is free to hold a court to uphold the law and justice as what has been mandated in article 24 paragraph (1) of the 1945 Constitution. The birth of Law No. 4 year 2004 concerning Judicial Power is expected to be a juridical basis for realizing an independent judicial power and can provide legal certainty and justice and ensure law enforcement (Law Enforcement) is well realized as aspired in the Indonesian constitution.

Justice is the main target of the law, then Reconstruction/Legal Reform must be directed among others to achieve justice both as individuals, as well as justice for the Community or social justice. Not only formal justice, but also substantial justice and even social justice. The role of judges is important in law enforcement efforts in this country, to pay attention to what is called the living law as one of the social facts that needs to be considered in deciding cases that fulfill the sense of justice of society. The living law can be said as a social pressure that can be considered by the judge in deciding the case (Note 48).

In connection with the matters mentioned above, it can be interpreted that a legal

reconstruction/renewal must be made immediately because the compliance and law enforcement must be upheld especially in regard to Law No. 42 of 1999 concerning Fiduciary Assurance, precisely in the context of fiduciary registration, this is closely related to compliance and law enforcement.

## **5. Conclusion**

### *5.1 Summary*

1) Fiduciary guarantee registration is an obligation by a finance company based on UUJF, that a fiduciary guarantee agreement is an agreement that is born and inseparable from the Bank's credit agreement or debt agreement. This means that the fiduciary guarantee agreement cannot exist without being preceded by another agreement which is referred to by its principal agreement. Article 11 The Fiduciary guarantee law requires that objects loaded with fiduciary guarantees must be registered with the fiduciary registration office located throughout Indonesia. This obligation even applies even though the material burdened with fiduciary guarantees is outside the territory of the unitary state of the Republic of Indonesia. Registration of objects loaded with fiduciary guarantee is carried out at the place of fiduciary service and the registration includes objects both inside and outside the territory of the Republic of Indonesia. To fulfill the principle of publicity, it is also a guarantee of certainty for other creditors regarding objects that have been burdened with fiduciary guarantees. Based on the provisions of article 14 paragraph 3 of the Fiduciary Guarantee Act, it can be concluded here that the registration of a fiduciary guarantee deed is an absolute the necessity that a fiduciary deed has permanent and legal legal force as a fiduciary guarantee deed.

2) Law enforcement in finance companies that do not register fully guarantees has not been optimal. Over the Fiduciary Guarantee Law specifically regarding Fiduciary Guarantees that are not or late registered primarily related to non-compliance with the obligation to register fiduciary, it has not been implemented properly as ordered by the Fiduciary Guarantee Act, finance companies assume that there is no legal risk for delays in conducting a fiduciary registration and do not even conduct fiduciary registration at all.

3) The Ideal Legal Concept of Fiduciary Registration obligation by fair value-based financing entrepreneurs in the Legal Substance of Fiduciary Guarantees and strongly needs to be amended in view of the inconsistencies in the articles and there must be strict sanctions assertion.

### *5.2 Suggestion*

1) The fiduciary guarantee law needs to be amended immediately by putting strict sanctions, especially in article 11 concerning the obligation of fiduciary registration for motor vehicle finance companies with fiduciary guarantees, this is very closely related to the legal culture of Indonesian people who are less concerned with legal compliance. So that it is expected that later sanctions for delays and even ignorance in carrying out fiduciary registration as well as criminal sanctions relating to the inclusion of Non-Tax State for payment of fiduciary registration fees, will increase legal compliance to the public, especially finance companies.

2) To realize law enforcement, the first thing to do is to realize legal certainty in the Fiduciary Guarantee Act. As already mentioned and alluded to earlier that it is necessary to immediately affirm sanctions for violations of the obligations of fiduciary registration, both in terms of delays and no fiduciary registration at all. Before the registration system on line.

3) A good guarantee legal system is a guarantee law that regulates principles and legal norms that do not overlap. The laws and regulations relating to fiduciary guarantees must be able to run harmoniously and not contain legal norms that are vague with each other, so that the inconsistency in the principles and legal norms of fiduciary guarantees will make it difficult to enforce the law.

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