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IOSR Journal Of Humanities And Social Science (IOSR-JHSS)
Volume 26, Issue 11, Series 5 (November. 2021) 29-34
e-ISSN: 2279-0837, p-ISSN: 2279-0845.
www.iosrjournals.org

The Essence of Law Enforcement of The Crime of Embezzlement of Goods That Are Still Bound by Credit as Fiduciary Guarantees

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Abstract
The purpose of this research is to analyze the nature of law enforcement of the crime of embezzlement of goods still tied to credit as fiduciary security: a case study in the jurisdiction of the South Sulawesi Regional Police. This study uses a juridical-empirical research method.This research will be carried out at the General Criminal Investigation Directorate of the South Sulawesi Regional Police with the consideration of the large number of criminal acts that occur in the South Sulawesi Regional Police area. The results of the study that the nature of law enforcement of the crime of embezzlement of goods that are still bound by credit as fiduciary guarantees with the principle of *"constitutum possessorium* (transfer of ownership of objects without giving up physical objects at all), is currently suspected to be still based on jurisprudential practice and does not guarantee legal certainty (legal certainty).

Keywords: Law Enforcement; Embezzlement; Fiduciary Guarantee

Date of Submission: 08-11-2021 Date of Acceptance: 24-11-2021

I. INTRODUCTION

The form of credit security in the practice of buying and selling between financing institutions and buyers (debtors) is carried out by binding guarantees.[1]Broadly speaking, there are two types of guarantees, namely personal guarantees and material guarantees. Collaterals that are often used by financial institutions (in this case are banks) are material guarantees. One of the material guarantees known in positive law is fiduciary guarantees.

Agreements with fiduciary guarantees are regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. In Article 1 point 2 it is explained that fiduciary guarantees are security rights over movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage which remains in place. in the control of the Fiduciary Giver, as collateral for the settlement of certain debts, which gives priority to the fiduciary recipient over other creditors. It should also be noted that with a fiduciary guarantee, what is guaranteed is the right of ownership of the object, while the object remains in the control of the owner.

In-vehicle loans, prospective debtors apply for vehicle financing loans to a bank. The bank will then process the credit application. If the bankagrees, then the bankwill enter into vehicle loan financing agreements with dealers and debtors.[2] The debtor pays the financing instalments to the bankthrough dealers. As long as the credit has not been paid off, objects that are guaranteed with fiduciary guarantees may not be transferred to third parties.

The assignment of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed. This is following what is stated in Article 5 of the Law on Fiduciary Guarantees. The reasons for the law stipulating the imposition of fiduciary guarantees with a notarial deed are:

1. Notary deed is authentic so that it has perfect proof power;
2. The object of the fiduciary guarantee, in general, is movable;
3. The law prohibits re-fiduciary.

The number of dealers who promote their products through credit programs provides a certain attraction to prospective debtors. The convenience provided by dealers who have collaborated with financing institutions can be seen in the lightness of the requirements proposed by dealers, especially on credit. Prospective debtors are only required to show their identity (KTP), Family Card Information, electricity bills and other information that can confirm the approval of vehicle ownership to the dealer. Furthermore, the dealer and his partner surveyed prospective debtors, if they are deemed to meet the criteria and conditions proposed, the prospective

debtor will in a relatively short time have the desired vehicle. One of the credit agreements between creditors and debtors is a four-wheeled vehicle credit agreement, namely a car.

The ease and lightness of the conditions used as criteria for prospective debtors by the dealer turned out to have a positive or negative impact.[3] The positive impact is the increase in vehicle buyers which can automatically increase the profitability of dealers and financing institutions, while the negative impact that often occurs is to provide opportunities or potential for some buyers to commit acts against the law, one of which is the crime of embezzlement which will be discussed in the study. this.

Embezzlement is one type of criminal act, namely in the form of crimes against human assets which are regulated in the Criminal Code (KUHP), the main formulation of which is regulated in Article 372 which is formulated as follows

"Whoever intentionally and against the law owns an object which is wholly or partly belonging to another person, who is in his control not because of a crime, is threatened with embezzlement with a maximum imprisonment of four years or a maximum fine of Rp. 900.00".

From the formulation of embezzlement as mentioned above, if further examined the formulation consists of subjective and objective elements. The objectives include the act of possessing; something thing; which partly or wholly belongs to another person; who is in his power through no crime; and its subjective elements include intentional embezzlement (*opzettelijk*); and embezzlement against the law (*wederrechtelijk*).

The understanding of the meaning of embezzlement in the above formula is not interpreted as making something dark or not bright, like the true meaning of the word. The word *verduistering* which is translated into Indonesian literally as embezzlement, is interpreted broadly for the Dutch people *(figuurlijk)*, not interpreted as the actual meaning of the word as making something dark or not light.

For example, a person entrusts a bicycle to his friend, because he needs money, the friend then sells the bicycle to another party without the knowledge of the bicycle owner. The seller abuses the trust given by his friend and does not mean that the bicycle is made dark or not bright, but rather implies that the bicycle seller is abusing his rights as the owner of the object (the bicycle), that right must not exceed his rights as a person who is given the trust to control or hold the bicycle.

Likewise, what is illustrated in one of the cases of alleged criminal acts of embezzlement handled by the investigators of the Ditreskrimum Polda of South Sulawesi based on the Police Report Number: LP / 401 / XII / 2012 / SPKT, dated December 7, 2011, regarding the alleged crime of embezzlement, with the reporter AF representing the initials. PT. BII Finance, with the initials of the reported IR. The Reported Party applied for a credit purchase of 1 (one) unit of white Toyota Rush Type S for Rp. 223,000,000,- (two hundred and twenty-three million rupiah) to PT. BII FINANCE. The Reported Party submitted an advance to the showroom where the Reported Party purchased the car amounting to Rp. 60,000,000,- (sixty million rupiah) and the rest will be settled by PT. BII FINANCE of Rp. 163,000,000,- (one hundred and sixty-three million rupiah) so that the reported party is required to pay monthly instalments of Rp. 5.005.000,- (four million nine hundred sixty-one thousand rupiah) for 48 months and thereafter the car purchased by the reported party is registered as fiduciary security based on the Fiduciary Guarantee Deed No. 21 dated November 14, 2011, at Notary EL VINO A. MANDAGIE, SH, M.Kn and certificate of fiduciary guarantee number W15 – 7976 AH.05.01.TH.2011 / STD. The Reported Party paid instalments 5 (five) times and when the 6 (six) instalments were entered the Reported Party no longer made payments until the next instalment so that PT. BII FINANCE collects to the reported party but the reported party only promises and then PT. BII FINANCE asked the Reported Party about the whereabouts of the car, it turned out that the Reported Party had sold the car to a third party with the initials FM without written permission from PT. BII FINANCE as Fiduciary Recipient. Thus, the reported party has committed a criminal act of embezzlement because the car that has been sold to FM is a car that is still in a credit status that has been charged with fiduciary guarantees as regulated in Article 372 of the Subsidiary Criminal Code Article 36 of Law Number 42 of 1999 concerning Fiduciary Guarantees.

Observing the case, it can be interpreted that the crime of embezzlement is a problem that will never end, this is because embezzlement is very closely related to social interaction between humans in everyday life which will also never end, which arises from good and bad intentions. a person interacting with others.

The embezzlement of a car that is still in the process of being credited from a finance company or *leasing* by the public is very detrimental to the finance company. People make car loans at finance companies with an instalment payment system, the amount of which is following the agreement specified in the agreement and for a certain time.

The fact is that after the credit agreement runs, many people commit crimes by not carrying out their obligations to pay the instalments of the car, even then they sell, pawn, exchange, and or rent the car without the knowledge of the company. This act is certainly very detrimental to the company and is also a matter of criminal acts of embezzlement that must be jointly addressed by interested parties.

II. RESEARCH METHODS

Researchin general can be classified into two types, namely empirical sociological (field) research, namely research conducted with an approach to the legal reality in society**.** This research will be carried out at the General Criminal Investigation Directorate of the South Sulawesi Regional Police with the consideration of the large number of criminal acts that occur in the South Sulawesi Regional Police area. For this reason, it can be representatively used as a suitable location for this research to see the quality of the implementation of handling criminal cases, especially the crime of embezzlement of cars that are still in the credit process which are registered as fiduciary guarantees.

III. RESEARCH RESULTS & DISCUSSION

In its development, the community also needs the existence of a fiduciary guarantee institution, because it is to make it easier for the community to obtain funds by mortgaging their collateral at the Sharia Pawnshop.[4] In the end, Sharia Pawn Shops require regulations regarding sharia fiduciary, so in this case, the Indonesian Ulema Council issued a Fatwa, namely the Fatwa of the National Sharia Council of the Indonesian Ulema Council No. 68/DSNMUI/III/2008 concerning rahn tasjily as an alternative fiduciary in the Sharia corridor.[5]

The definition of rahn tasjily itself is collateral in the form of goods for debt but the collateral (marhun) remains in the control (utilization) of rahin and proof of ownership is submitted to the murtahin.[6] While the fiduciary guarantee itself can be movable and immovable objects, but the debtor can still physically control the object. In addition, the creditor only has juridical control (property rights) over the object, therefore this guarantee is a guarantee institution based on trust so that if the debtor has paid his obligations, the creditor is obliged to return it.[7]

Meanwhile, rahn and fiduciary guarantees are financing products that are currently growing rapidly during people's lives, because in addition to facilitating the community in fulfilling the lives of both individuals and legal entities. Both financing products are through lending and borrowing activities in the form of borrowing goods. What is used as collateral is property to get the trust of a debt, where the property can be auctioned if the debtor cannot pay off his debt. In Islam, lending and borrowing activities that use collateral for goods can use a contract called rahn tasjili which is a form of rahn.

The Sharia economic fatwa that has been present technically presents a development model and even the renewal of muamalah maliyah fiqh (economic fiqh). Functionally, fatwas have tabyin and tarjih functions.[8]Tabyin means to explain the law which is a practice regulation for financial institutions, especially those requested by economic practitioners to the National Sharia Council (DSN), while tarjih is to provide guidance and enlightenment to the wider community about Sharia economic norms.[9]

This DSN Sharia economic fatwa is not only binding on practitioners of Sharia economic institutions but also for members of the Indonesian Islamic community, moreover, these fatwas have been made positive law through Bank Indonesia regulations (PBI).[10] The DPR has even amended Law No. 7/1989 on religious courts which explicitly includes sharia economic issues as the authority of religious courts.

It is interesting and important to study how the relevance of the implementation of fiduciary in financial institutions to Islamic business law which generally refers to the fatwa of the National Sharia Council because of the following reasons:

1. Most Indonesian people are Muslim
2. Several fatwas have been issued that bind the community. Indonesia from the MUI DSN which is now in the form of a compilation of Sharia economic law in which there are also regulations regarding financing companies.

In business activities, the most important type of engagement is an agreement born out of an agreement. An agreement is a legal relationship between two or more people, based on which one party has the right to demand something from the other party, and the other party is obliged to fulfil that claim.

With this understanding, three elements can be concluded, namely:

a) some people sue, or who in business terms are usually called creditors.
b) some people are sued, or in business, terms commonly called debtors.
c) There is something that is required, namely achievement

Achievement generally consists of three types, namely: doing something, not doing something, or giving up something. The party that does not perform the achievement is called that the party has defaulted. This default can occur in the event of:

a). Not doing something that has been agreed
b) Not giving up something that has been agreed
c) Doing something or submitting something but late or not following what was agreed upon
d) Doing something that requires the agreement should not be done.

With the binding of the parties to an agreement, the parties must implement it because every agreement made legally applies to the law for those who make it. Theoretically, there are two types of agreements, namely

nominative agreements and innominate agreements. Nominative agreements are types of agreements that have been regulated in law (KUHPerdata), while nominative agreements are types of agreements that are not regulated in law (KUHPerdata) but are born automatically because of the principle of freedom of contract.[11]

There is a close relationship between agreement and engagement. An agreement is a legal relationship between two people or two parties in which one has the right to demand something from the other party, who is obliged to fulfil the claim. The party who demands something is called the creditor or the debtor, while the one who is obliged to fulfil the claim is called the debtor or the debtor.[12] Engagement is an act by which one or more people bind themselves to one or more other people (Article 1313 of the Civil Code).[13]From these two definitions, it can be concluded that the engagement is an abstract meaning, namely rights and obligations, while the agreement is a concrete meaning, namely actions. Therefore, it can be compared that the event is an agreement while the effect is an engagement.[14]

A security right arises because of a guarantee agreement that follows a debt agreement. Therefore, it can be said that the loan agreement is the main agreement while the guarantee agreement is an accessory agreement.[15] So actually this issue of guarantee is closely related to agreements and engagements. According to Sri Radjeki Hartono, it is stated that: "Guarantee as a legal institution gives birth to legal principles regulated in civil law which has an important position in economic law".[16]

The guarantee institution in the form of pawns regulated in Book II of the Civil Code is felt to not meet the needs of the community, especially small entrepreneurs, considering the provisions in Article 1152 paragraph (2) of the Civil Code, which requires that collateral in the form of a pledge must move and be in the hands of the creditor (inbezitstelling), while the goods as collateral objects are still needed by the debtor to run his business. To overcome the provisions of Article 1152 paragraph 2 of the Civil Code and meet the community's need for a guarantee institution, the UUJF was born. In Article 1 point 1 UUJF it is stated that: "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 owner of the object.

Fiduciary guarantees seen from the legal aspect give preference (rights to be paid first) from other creditors (concurrent) as follows:

a. Fiduciary holders have priority rights over other creditors;
b. The fiduciary holder has the right to take precedence in terms of taking the settlement of receivables on the results of the execution of objects that are the object of the fiduciary guarantee;
c. Fiduciary holders have rights that take precedence without being removed due to bankruptcy and or liquidation. (see Article 27 UUJF).

Fiduciary guarantees with the principle of *"constitutum possessorium* (transfer of ownership of objects without giving up physical objects at all), are currently still believed to be based on jurisprudential practice and do not guarantee *legal certainty.*[17] 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 take the lead in obedience to the law, the existence of an independent *judiciary*, access to obtaining justice *(access to justice)* must be opened as wide as possible, especially for those who are victims of "maladministration", the law must be enforced fairly and equally (just, equal) accompanied by *legal certainty.*[18]

"In reviewing the renewal of the national legal system, there are major problems in the national legal system, namely the ius constitutum (*"Law Enforcement" problem*) and the ius constituent (*law reform/ development problem*").[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 the guarantee institution, the structure of the fiduciary institution which is not in favour of SMEs (Small and Medium Enterprises), the unfairness of judges in deciding cases of fiduciary guarantees causes this law to be ineffective.[20]

From a theoretical/conceptual point of view, the renewal of the National Fiduciary Guarantee Legal System is a series of subsystems of the National Fiduciary Guarantee Law into the legal substance of fiduciary guarantees, the legal structure of fiduciary guarantees, and the legal culture of fiduciary guarantees. The National Legal System that will be built requires a foundation of values/ideas as guidelines that are following the outlook on life and ideology of the Indonesian nation so that the knowledge of the law can be applied nationally. From a theoretical/conceptual point of view, the renewal of the National Fiduciary Guarantee Law System is a series of subsystems of the National Fiduciary Guarantee Law into the legal substance of fiduciary guarantees, the legal structure of fiduciary guarantees, and the legal culture of fiduciary guarantees.[21] The National Law System to be built requires a foundation of values/ideas as guidelines that are following the outlook on life and ideology of the Indonesian nation so that legal knowledge can be applied nationally. Law (and its enforcement) undergoes close and intensive exchanges with the political environment and economy. What happens in the legal field is a function of the processes that occur in both fields.

If it is related to the birth of UUJF, UUJF can be analyzed based on Robert B. Seidman's theory as follows: 1) Rules or regulations, fiduciary guarantee regulations were born to be made clear and not multi-

interpreted, based on the formal requirements for the formation of UUJF are clear and not multiple interpretations, has even been promulgated in the state news and additional state news; 2) In terms of opportunity, because the nature of fiduciary is the giving of trust in the control of capital objects as fiduciary guarantees on the part of the debtor, it is feared that there is an opportunity to transfer the capital objects to third parties or other parties, even though there is an obligation for the recipient of the fiduciary collateral to register as a form of legal certainty; 3) In terms of capacity or ability, registration of fiduciary collateral objects will not provide opportunities for debtors to transfer capital objects as fiduciary collateral within a certain time to pay off their debts. can return the debt to the creditor following the agreed time; 4) In terms of communication or communication, with the regulation of fiduciary guarantees in UUJF, as the parent of all fiduciary arrangements, it is easy to recognize and socialize when compared to fiduciary arrangements which are based on the Jurisprudence of the Dutch Supreme Court Hoge Raad which produces FEO *(fiduciaire Eigendomsoverdracht);* 5) In terms of interest, the existence of a fiduciary guarantee as stipulated in the UUJF will provide benefits for business actors, especially micro, small and medium enterprises to obtain additional business capital, the community in the form of fulfilling the needs for food, clothing and housing and the state in the form of a form of national law has been produced in the form of legal unification in the field of fiduciary guarantees, as stated in the preamble of the UUJF; 6). From the side of the process, the formation of the UUJF through various considerations, including considerations from the legal side and outside the law. Fiduciary comes from the word files which means the belief that the owner of the capital object surrenders his ownership rights to the lender (the creditor).

The hope that will be desired by the creditor, by still giving the trust to release the fiduciary collateral object, is still controlled by the debtor. Debtors should also treat their capital objects as their own, which is the case, even though legally the ownership rights have been transferred to creditors. In addition, the debtor acts on this fiduciary security object as a good father of the house as stated in Article 1560 of the Civil Code which states that: The tenant must fulfil two main obligations, namely: given to the goods according to the rental agreement, or if there is an agreement regarding it, according to what is suspected to be related to the situation; 7) In terms of ideology or values, in reality since the promulgation of UUJF until now the existence of fiduciary laws and regulations has not encountered obstacles in its implementation, although if you look closely in the articles of UUJF there is a lack of clarity between one article and another, even the value of the substance of UUJF does not conflict with the philosophy and values contained in Pancasila as the basis of the state and as a way of life for the Indonesian people.

IV. CONCLUSION

Theessence of law enforcement of the crime of embezzlement of goods that are still bound by credit as fiduciary guarantees with the principle of *"constitutum possessorium* (transfer of ownership of objects without giving up physical objects at all), is currently believed to be still based on jurisprudential practice and have not guaranteed legal certainty (legal) certainty). The granting of a fiduciary transfer, mortgaging, or renting out objects that are the object of a fiduciary, in this case, are inventory items and without prior written approval from the fiduciary recipient, the act of the fiduciary giver is included in a criminal act and may be subject to criminal sanctions.

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TaswinZardi, et. al. "The Essence of Law Enforcement of The Crime of Embezzlement of Goods That Are Still Bound by Credit as Fiduciary Guarantees." *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 26(11), 2021, pp. 29-34.

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