

Criminalizing Unauthorized Motor Vehicle Debt Transfers in Fiduciary Agreements

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Article History:

Submitted:

06-11-2024

Received:

20-11-2024

Accepted:

25-12-2024

Keywords:

guarantee; fiduciary;

criminalization;

criminal act; creditor

Abstract

The fiduciary system in Indonesia is a legal mechanism to protect the rights of creditors over objects that remain in the debtor's control. The basic principle of fiduciary transfer is trust, where the debtor gives ownership rights to an object, for example, a motor vehicle, to the creditor as collateral for debt repayment. Problems arise when debtors transfer debt obligations involving motor vehicles without the approval of fiduciary creditors. Criminalizing the transfer of debt without fiduciary approval provides legal protection for creditors, increases legal certainty in civil transactions, and prevents fraud or evasion of debt obligations. Criminalization applies criminal penalties for certain actions that are detrimental to others or society. This research aims to examine the causes and rationale behind the criminalization of transferring fiduciary collateral without the fiduciary holder's consent. The methodology used is a normative juridical approach, which focuses on the analysis of the legal regulations that apply in Indonesia. The research results show that transferring motor vehicle debt without written approval from the fiduciary creditor is an act punishable by crime. This research also recommends strengthening fiduciary regulations by providing stricter administrative or civil sanctions for debtors who commit violations. It is hoped that applying criminal sanctions in the context of criminalization can be an effective preventive measure to protect creditors' rights and prevent violations of fiduciary agreements, thereby providing better legal certainty in the fiduciary system in Indonesia.

1. Introduction

The fiduciary system in Indonesia is a legal mechanism used to secure the creditor's rights over an object that remains physically within the debtor's possession. Fiduciary originates from the principle of trust, whereby the debtor receiving credit or financing facilities transfers ownership rights of an object, such as a motor vehicle, to the creditor or financing institution as collateral for debt repayment, even though the object remains under the debtor's control. A fiduciary agreement serves as one of the key security instruments in the business and banking law sectors. Fiduciary collateral represents an important form of real security in Indonesia's economic activities, especially in the context of credit and financing. Fiduciary security is governed by Law Number 42 of 1999 on Fiduciary Security (hereinafter referred to as Law No. 42/1999), which provides legal protection for both the creditor (fiduciary recipient) and the debtor (fiduciary grantor). This security becomes highly relevant in business transactions because it allows the fiduciary grantor (debtor) to maintain control and use of the pledged object, despite the legal transfer of ownership to the fiduciary recipient (creditor). This principle offers flexibility for the debtor to carry out business activities; however, on the other

hand, it also opens up the potential risk of misuse of the collateralized object, which could harm the creditor¹.

The transfer of debt (debt transfer or cession of debt) is a legal mechanism commonly used in banking and financial practices, whereby a creditor's rights over a debtor may be transferred to a third party. Debt transfer in civil law is generally conducted through mechanisms such as assignment (*cessie*), subrogation, or novation, each of which has distinct characteristics and specific requirements as stipulated in the Indonesian Civil Code (hereinafter referred to as the "Civil Code"). In practice, there are legal loopholes that are often exploited by certain parties to carry out unauthorized debt transfers, such as transfers made without the creditor's consent or to avoid debt repayment obligations. Such actions can be categorized as unlawful acts and have the potential to lead to disputes between the creditor and the substitute debtor². If a debt transfer is conducted without following proper legal procedures, the new debtor cannot lawfully assume the position of the original debtor. A unilateral transfer or one without the creditor's consent also poses significant risks to the creditor, who may face a new debtor lacking credibility or with lower financial capacity. Furthermore, unauthorized debt transfer is often misused as a means to evade debt repayment obligations, ultimately harming the creditor as well as other related parties, such as guarantors or third parties³.

One of the common violations associated with fiduciary collateral is the transfer of motor vehicle debt without the written consent of the fiduciary recipient, which frequently occurs in fiduciary agreements. This action violates the fundamental principles of fiduciary agreements, namely the principles of trust and legal certainty between the fiduciary provider and the fiduciary recipient. Such a transfer can result in a change of ownership over the fiduciary collateral object without the knowledge of the fiduciary recipient, potentially endangering their rights and interests as the primary right holder of the object. Consequently, the fiduciary recipient may lose the right to execute the collateral if the fiduciary provider defaults on their debt repayment obligations. Moreover, the transfer of motor vehicle debt without written consent is often undertaken to evade debt repayment obligations or to achieve unlawful personal gain. This is detrimental to the fiduciary recipient, as the value of the collateral may depreciate or even disappear, thereby reducing the creditor's security for debt repayment. Such actions also undermine the integrity of the fiduciary agreement and create legal uncertainty, ultimately weakening trust in the fiduciary financing mechanism in Indonesia⁴.

The transfer raises significant legal issues as it violates agreements and laws governing fiduciary guarantees, resulting in losses for the fiduciary recipient. The regulation on the transfer of fiduciary collateral objects is explicitly stipulated in Article 36 of Law No. 42/1999

¹ J Satrio, *Hukum Jaminan, Hak-Hak Jaminan Kebendaan* (Bandung: Citra Aditya Bakti, 2002).

² Baiq Ermayanti, "Legal Protection Of Creditors And Debtors According To Law Number 21 Of 2008 Concerning Sharia Banking," *Juridica Jurnal Fakultas Hukum Universitas Gunung Rinjani* 5, no. 1 (November 2023). <https://doi.org/10.46601/juridicaugr.v5i1.312>.

³ Besta Irdillah, "Analisis Mengenai Pengalihan Utang Dari Debitur Kepada Pihak Ketiga Tanpa Persetujuan Kreditur" (Skripsi, Universitas Sriwijaya, 2018).

⁴ Nazma Husna, "Pengalihan Objek Jaminan Fidusia Tanpa Perjanjian Tertulis Dari Perspektif Hukum Pidana Di Indonesia (Studi Putusan Pn Sleman No.330/Pid.Sus/2015/Pn.Snm Dan Putusan Pn Purworejo No.15/Pid.Sus/2015/Pn.Pwr)" (Universitas Sumatera Utara, 2017).

as referred to in Article 23, paragraph (2). This article states that the fiduciary grantor is prohibited from transferring, pledging, or leasing fiduciary collateral objects under their control without the written consent of the fiduciary recipient. The imposition of criminal sanctions on fiduciary grantors who transfer debts and collateral objects without written consent from the fiduciary recipient aims to provide legal protection to creditors as fiduciary recipients.

The criminalization of debt transfer is based on the interest of maintaining legal certainty in civil transactions, protecting the rights of creditors, and preventing fraud or evasion of debt obligations. Several legal theories, such as the theory of legal protection for creditors and the theory of economic criminal law, argue that the act of transferring debt with bad faith or that causes significant harm to creditors should be classified as an economic criminal offense. This approach aims to create a deterrent effect and increase caution in financial transactions. The concept of criminalizing debt transfers is grounded in the need to strengthen legal protection for creditors and uphold legal certainty in financial interactions. A debt transfer carried out to evade obligations, or one based on bad faith, may be considered detrimental to creditors and threaten overall economic stability. The criminalization of such debt transfers aligns with the principle of legal protection for creditors, which demands that creditors' rights in debt transactions be safeguarded. It is hoped that this criminalization will create a deterrent effect for parties seeking to avoid debt obligations and encourage compliance with applicable regulations. Therefore, this measure is expected to minimize the opportunities for practices contrary to the principles of justice and legal certainty in civil transactions⁵.

There are 3 (three) comparisons from researchers who study similar issues, namely, the first with the title "Criminal Policy Against Victims of the Crime of Embezzlement in the Guarantee Services Sector (Finance)"⁶. This research discusses how policies and concepts of criminal ideals apply to victims of criminal acts of embezzlement in guarantee services (finance). Second, with the title "Judicial Analysis of the Transfer of Fiduciary Collateral to a Third Party Without the Knowledge of the Creditor"⁷. This research discusses the transfer of fiduciary collateral to a third party without the creditor's knowledge and the debtor's responsibility for this action. Third, with the title "Legal Protection for Creditors in Fiduciary Guarantee Agreements"⁸. This research discusses ensuring that there is legal protection for creditors in fiduciary guarantee agreements. It is necessary to understand fiduciary guarantees, fiduciary guarantee objects and the background to the emergence of fiduciary guarantee agreements. In this study, the researcher examines and analyzes the root causes

⁵ Muhammad Affandi, "Perlindungan Hukum Bagi Kreditur Dalam Eksekusi Perjanjian Kredit Dengan Jaminan Hak Tanggungan," *Lex Patrimonium* 1, no. 1 (November 10, 2022): 1–20, <https://scholarhub.ui.ac.id/lexpatri/vol1/iss1/10>.

⁶ Nanda Saputra, "Kebijakan Kriminal Terhadap Korban Tindak Pidana Penggelapan Dalam Bidang Jasa Penjaminan (Finance)" (Universitas Islam Riau, 2020), <http://repository.uir.ac.id/id/eprint/13885>.

⁷ Yafiz Arya Dharma and Syaddan Dintara Lubis, "Analisis Yuridis Peralihan Jaminan Fidusia Kepada Pihak Ketiga Tanpa Sepengetahuan Kreditur," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam* 16, no. 2 (August 15, 2024): 354–67, <https://doi.org/10.32505/jurisprudensi.v16i2.8555>.

⁸ Jatmiko Winarno, "Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia," *Jurnal Independent Fakultas Hukum*, 2013, 44–54, <https://doi.org/https://doi.org/10.30736/ji.v1i1.5>.

behind the criminalization of debt transfers carried out without consent or with the motive of evading payment obligations, an issue that has become increasingly relevant due to the high number of debt transfers that do not comply with applicable legal provisions. The urgency of this research lies in the importance of understanding the legal consequences of such actions, both for the creditors who are harmed and for the civil legal system in Indonesia as a whole. By clarifying the definition and boundaries of debt transfers, and providing recommendations regarding legal protection for creditors, this study aims to contribute to strengthening legal certainty and justice in debt transactions.

2. Methods

This writing employs a normative juridical method, which is an approach in legal science aimed at analyzing legal rules theoretically. This method involves a conceptual approach and an approach to legislation. In this research, secondary data is used as the primary source, meaning the author does not conduct field research such as interviews or observations, but instead obtains information through library research. The sources of information utilized include books, scholarly journals, articles, and other relevant documents related to the topic. Library research allows the author to gain a comprehensive understanding of the application of criminal sanctions within the legal system through previous research and studies that support the writing topic⁹.

3. Results and Discussion

3.1. The Root Cause of the Fiduciary Grantor's Act of Transferring the Secured Debt in a Fiduciary Guarantee Without the Written Consent of the Fiduciary Recipient

In legal practice, fiduciary agreements are an important instrument used to provide security for debts incurred by the debtor. Fiduciary provides the grantor with the right to transfer ownership of a movable asset to the fiduciary recipient as collateral for a debt, with the condition that the asset remains under the control of the grantor. Although this mechanism offers legal protection to the fiduciary recipient, issues arise when the grantor transfers the secured debt under the fiduciary agreement without the written consent of the fiduciary recipient. Such a transfer of debt without consent may potentially violate the principle of contractual freedom and disregard the rights of the fiduciary recipient. In the context of law, this act could be seen as detrimental to the fiduciary recipient, who has made an investment and placed trust in the grantor based on the agreement that was made¹⁰.

Fiduciary originates from the Latin term "fides," which means trust. In this context, the legal relationship between the debtor and the creditor is based on the principle of trust. The parties in a fiduciary security agreement consist of two subjects: the fiduciary giver and the fiduciary recipient. According to the Fiduciary Security Law, the fiduciary giver can be an individual or a corporation that owns the object of the fiduciary security. On the other hand, the fiduciary recipient is an individual or corporation that holds a debt secured by the fiduciary security. The objects of fiduciary security, according to the provisions of the Fiduciary Security Law, are classified into two categories: objects that can be owned and transferred. These objects may be tangible or intangible, whether registered or unregistered,

⁹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Group, 2016).

¹⁰ Nadya Dewi Kumala and Widhi Handoko, "Perlindungan Hukum Terhadap Kreditor Pada Jaminan Fidusia Yang Tidak Terdaftar Di Kantor Pendaftaran Fidusia," *Notarius* 15, no. 1 (2022): 324–35.

as well as movable or immovable property that cannot be encumbered by mortgage or hypothec¹¹.

The principle of freedom of contract, as stipulated in Article 1338 of the Indonesian Civil Code (hereinafter referred to as KUHPerdara), grants parties the autonomy to determine the content, form, and conditions of an agreement. However, this principle is not absolute as it is restricted by applicable laws, morality, and public order. Agreements must not conflict with statutory provisions, such as Law No. 42 of 1999, and must align with social norms and legal standards. Furthermore, this principle is subject to the doctrine of *pacta sunt servanda*, which holds that a valid agreement binds the parties as if it were law. In the context of fiduciary security, a breach by the fiduciary grantor, such as the transfer of fiduciary objects without consent, violates this principle, undermines trust as the basis of the fiduciary relationship, and may result in the termination of the agreement or other legal liabilities.

Credit facilities may be extended to individuals or entities that meet the requisite financial qualifications. This process is formalized through a loan or credit agreement between the creditor (lender) and the debtor (borrower). In the context of credit facilities, creditors, including banking institutions, typically require the debtor to provide collateral to secure the fulfillment of their obligations. The Indonesian legal system recognizes various forms of security interests that guarantee debt repayment or fulfillment of obligations. One such security is fiduciary security, which is widely used in financial transactions, both by banking institutions and other financing entities. Fiduciary security is a form of transfer of ownership rights over an object from the fiduciary grantor to the fiduciary recipient, while physical control of the object remains with the grantor.

The act of a debtor transferring fiduciary objects without approval is often categorized as *default* (breach of contract) under Article 1238 of the Indonesian Civil Code, as it violates contractual clauses. However, this act may also be deemed a legal violation or even a criminal offense, depending on the circumstances. Legally, such transfers are governed by Law No. 42 of 1999, which serves as the legal foundation for the implementation of fiduciary security in Indonesia. If a debtor deliberately transfers fiduciary objects to evade legal obligations or to harm the creditor, such actions fall under the category of criminal offenses. The law provides that transferring fiduciary objects without the creditor's consent constitutes an offense punishable by imprisonment or fines¹². Financing institutions or creditors are required to request the Vehicle Ownership Book (BPKB) as collateral, along with other conditions that must be fulfilled by the debtor. In practice, problems often arise that can disadvantage the financing institution, particularly about violations of the financing agreement. Some debtors fail to meet their credit obligations (default) and even transfer the collateral to third parties without the consent of the fiduciary recipient. To anticipate such risks, financing institutions register the fiduciary security through a notary to create a fiduciary security deed and arrange

¹¹ Median Dwi Raharjo, "Criminal Liability in Transferring Fiduciary Security Objects Without the Consent of the Fiduciary," *Ius Poenale* 1, no. 2 (October 8, 2020): 119-34, <https://doi.org/10.25041/ip.v1i2.2050>.

¹² Sriono Sriono, "Tanggung Jawab Pemberi Fidusia Terhadap Benda Jaminan Fidusia Dalam Perjanjian Kredit," *JURNAL ILMIAH ADVOKASI* 7, no. 2 (September 15, 2019): 149-59, <https://doi.org/10.36987/jiad.v7i2.1563>.

for the issuance of a fiduciary security certificate from the Ministry of Law and Human Rights¹³.

Fiduciary security, from a legal perspective, arises from an agreement between the debtor, as the fiduciary grantor, and the creditor, as the fiduciary grantee, followed by the transfer of ownership of the asset from the debtor to the creditor as collateral for a debt. Under this agreement, the creditor promises to transfer the ownership of the asset back to the debtor once the debt is settled. The transfer of debt, executed by the fiduciary grantor (debtor), refers to the process by which the debtor transfers the collateralized object to another party¹⁴. This action typically occurs for certain reasons and must be carried out by the prevailing laws and regulations in Indonesia, particularly Law No. 42/1999. The following are the factors that drive the fiduciary grantor to transfer the object of fiduciary security:

1. Internal Factors

An internal factor refers to the factors originating from the debtor's internal condition, whether individual or corporate, that drive the transfer of fiduciary collateral.

a. Factors of Lack of Awareness in the Actor and Neglect of the Contents of the Agreement

The perpetrators tend to be unaware that their actions constitute a criminal offense. They disregard the provisions of the fiduciary guarantee agreement that has been mutually agreed upon by the parties involved. The debtor, despite understanding that the fiduciary collateral object cannot be transferred without the creditor's consent, proceeds with transferring it to a third party. This action violates the terms of the fiduciary agreement as well as Law No. 42/1999 on Fiduciary Guarantees, which stipulates that the object used as fiduciary collateral may not be transferred or sold without the creditor's consent.

b. Liquidity Needs

The debtor may require additional funds or liquidity and thus decides to sell or transfer the object of the fiduciary security to another party. This transfer can be carried out with the approval of the fiduciary beneficiary (creditor), as the object essentially serves as collateral for the debtor's debt.

c. Replacement or Renewal of Guarantee Objects

The debtor may wish to replace an existing fiduciary collateral with a newer or higher-value item. This typically occurs if the original collateral no longer meets the needs or has depreciated. In the case of collateral substitution, by Article 1, paragraph 2 of Law No. 42/1999, fiduciary collateral may consist of movable property, whether tangible or intangible, that can legally be replaced. However, the substitution must also be approved by the fiduciary recipient and carried out through a legally valid process.

d. Bankruptcy or Financial Difficulties

When a debtor experiences bankruptcy or financial difficulties, one solution to settle debts is by transferring the fiduciary collateral. In this situation, the fiduciary grantor may be required to sell or transfer the collateral to another party to fulfill the obligation. According to Article

¹³ Zulfi Diane Zaini and Rudi Irawan, "Liability Of Criminal Actions Transferring Objects Of Fiduciary Security Without Approval From The Fiduciary Recipient," *Jurnal Gagasan Hukum* 4, no. 01 (June 30, 2022): 62–70, <https://doi.org/10.31849/jgh.v4i01.8656>.

¹⁴ Husnul Khatimah, M Syukuri Akub, and Marwah, "Penerapan Sanksi Pidana Terhadap Debitor Sebagai Pelaku Tindak Pidana Pengalihan Objek Jaminan Fidusia," *UNES Law Review* 6, no. 1 (September 4, 2023): 474–83, <https://doi.org/https://doi.org/10.31933/unesrev.v6i1.866>.

27 of Law No. 42 of 1999, in the case of bankruptcy, the fiduciary creditor has the right to reclaim the collateral if the debtor fails to meet the obligations. The fiduciary creditor also enjoys priority over other creditors in the settlement of debts secured by fiduciary collateral.

2. External Factors

An external factor refers to circumstances triggered by external conditions beyond the direct control of the debtor, such as company policies, agreements with creditors, or legal situations.

a. Unstable economy

The increasing economic pressure, coupled with the rising cost of living, often drives individuals to seek quick solutions, even if it means violating the law. In such situations, it is not uncommon for debtors facing financial difficulties to engage in unlawful actions, such as transferring fiduciary collateral without the creditor's consent. Such actions violate the provisions of Law No. 42/1999, where the unauthorized transfer or misuse of fiduciary collateral may be considered a criminal offense, as stipulated in Article 36 of Law No. 42/1999, which imposes criminal sanctions on the perpetrators.

b. Debt Restructuring

The transfer of fiduciary collateral may occur as part of debt restructuring between the debtor and creditor. In this context, the debtor may transfer the collateral to a third party to improve their financial condition and settle part or all of the debt. Debt restructuring often requires the transfer or division of rights over fiduciary collateral. This must be carried out under the fiduciary agreement that has been made and reported to the Fiduciary Registration Office as stipulated in Article 11 of Law No. 42/1999, for the transfer to be legally valid.

c. Debt Settlement or Repayment

After the debt secured by a fiduciary guarantee is paid off, the fiduciary grantor may transfer the object of the guarantee because, by law, the object is no longer encumbered by the fiduciary right. In this case, the transfer is made because the obligation to the creditor has been fulfilled. According to Article 25 of Law No. 42/1999, after the debt is settled, the fiduciary recipient is obliged to return the fiduciary guarantee certificate to the debtor. This provision allows the debtor to transfer or dispose of the object without the creditor's consent, as the fiduciary right has been terminated.

d. Adjustment to Company Policy

The transfer of fiduciary collateral may occur due to changes in business policies, such as mergers, acquisitions, or corporate restructuring. In such cases, the fiduciary collateral may be transferred to another party as part of the structural adjustments. In the event of a merger or acquisition, fiduciary collateral may be transferred as part of the company's assets. Article 16 of Law No. 42/1999 stipulates that fiduciary rights follow the collateral object, meaning that the fiduciary rights remain attached despite changes in ownership.

The transfer of fiduciary collateral must be carried out by the provisions outlined in Law No. 42/1999. One crucial aspect that must be observed is the approval of the creditor, as without such approval, the transfer of the fiduciary collateral will be invalid and may result in legal disputes. Furthermore, the transfer must also be registered with the Fiduciary Registration Office to ensure legal certainty for the interested parties. By adhering to these

procedures, the transfer of fiduciary collateral can proceed under the applicable legal provisions and ensure the protection of the rights of the fiduciary beneficiary¹⁵.

3.2. The Rationale for Criminalizing the Act of Transferring Motor Vehicle Debt Secured by Fiduciary Guarantee Without the Approval of the Fiduciary Beneficiary

The transfer of debt related to a motor vehicle without written consent from the fiduciary recipient in Indonesia can be categorized as an unlawful act and may fall within the scope of criminal law. Under the provisions of Law No. 42/1999, any transfer of ownership or rights to a collateralized object without the consent of the fiduciary recipient is considered a legal violation, as it contravenes the principles of trust and the security of the collateralized object. The transfer of debt without the approval of the fiduciary recipient, particularly concerning motor vehicles, constitutes a violation of the fiduciary recipient's rights. This act reflects the perpetrator's awareness of the legal risks involved, driven by motives to gain economic benefits or escape liability for the debt. Therefore, this conduct should be defined as a criminal offense to provide stronger protection for fiduciary agreements in safeguarding trust in contracts, as well as offering firm legal protection to the fiduciary holder¹⁶.

The transfer of debt without fiduciary consent can be viewed as an act that violates legal and social norms, necessitating criminal sanctions to provide a deterrent effect and protect the interests of the harmed parties. The process of criminalization aims to identify this act as an unlawful act that threatens the integrity of fiduciary agreements and the protection of assets. This action is not only considered a civil violation but also classified as a criminal offense subject to strict penalties¹⁷. The approach of criminalization aims to deter similar actions by imposing a deterrent effect on the perpetrators, while also ensuring that the object of fiduciary security remains under strong legal protection. There are several reasons underlying the importance of studying this criminalization, including the negative economic impact, the injustice faced by creditors, and the need for legal certainty in financial agreements. The unlawful transfer of debt undermines the trust system in economic transactions and has the potential to create a domino effect on the banking system and other financial institutions¹⁸.

According to Soerjono Soekanto, criminalization is the designation by authorities of certain acts that are regarded by society or specific groups as actions deserving of criminal penalties. Consequently, such acts are classified as criminal offenses and can be subject to punishment by the government based on its authority¹⁹. Prof. Sudarto, S.H. presents three definitions regarding criminal policy. First, in a narrow sense, criminal policy encompasses all principles and methods that form the foundation for reactions to legal violations in the form of criminal acts. Second, in a broader sense, criminal policy involves the entire function of law

¹⁵ M Handri Nur, Elly Sudarty, and Dheny Wahyudi, "Faktor Penyebab Dan Upaya Penanggulangan Tindak Pidana Pengalihan Objek Jaminan Fidusia," *PAMPAS Journal of CRIMINAL LAW* 1, no. 2 (December 2, 2020): 106–19, <https://doi.org/https://doi.org/10.22437/pampas.v1i3.11074>.

¹⁶ Husnul Hamka, "'Conviction of Transfer of Objects of Fiduciary Guarantees Without the Consent of the Fiduciary Beneficiary,'" *Philosophia Law Review* 3, no. 1 (2023): 1–13, <https://doi.org/https://doi.org/10.56591/pilar.v3i1.19320>.

¹⁷ Prof. Dr. Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Kencana, 2017).

¹⁸ Esther Cheren Laolan, "Pemberi Fidusia Yang Mengalihkan Jaminan Fidusia Tanpa Persetujuan Penerima Fidusia Menurut Pasal 36 Undang-Undang Jaminan Fidusia (Kajian Putusan Ma No. 698 K/Pid.Sus/2023)," *Lex Administratum* 12, no. 05 (September 2024): 1–13.

¹⁹ Soekanto Soejorno, *Kriminologi: Suatu Pengantar* (Jakarta: Ghalia Indonesia, 1981).

enforcement agencies, including the operations of the judiciary and the police. Third, in the broadest sense, drawing from Jorgen Jepsen, criminal policy covers all actions taken through legislation and official institutions aimed at upholding important norms within society²⁰. In this regard, the theory of criminalization explains that to declare an act as a criminal offense, it must meet certain criteria or requirements. According to Sudarto, the criteria or requirements for criminalization are as follows:

- a. The use of criminal law must create a just and prosperous society based on Pancasila. At least criminal law aims to prevent and overcome crime for the welfare and protection of society. The use of criminal law in the context of the transfer of motor vehicle debt aims to protect the interests of creditors or fiduciary beneficiaries. By imposing criminal sanctions on the act of transferring debt without consent, it is expected to foster trust in fiduciary transactions. This will ensure that society feels safer and more protected from harmful actions, ultimately contributing to the creation of a just and prosperous community by the principles of Pancasila.
- b. The act that is prevented must be an act that causes harm (material or spiritual) to members of the community. The transfer of motor vehicle debt without written consent results in both material and spiritual losses for the fiduciary receiver. Material losses occur when the fiduciary receiver is unable to execute the collateral object they have paid for, thereby losing their right to the installment payments. Additionally, spiritual losses may include the erosion of public trust in the legal system and the fiduciary transactions in force, which can disrupt economic stability.
- c. The principle of using criminal law takes into account costs and results (cost-benefit principle). The imposition of criminal sanctions for debt transfer without approval is a strategic measure to prevent greater losses in the future. By enforcing the law, the costs incurred for law enforcement will be proportional to the benefits gained, namely preventing similar actions and maintaining trust in fiduciary transactions. The effectiveness of law enforcement can also reduce the risk of broader losses for other creditors.
- d. The use of criminal law must also pay attention to the capacity or working capacity of law enforcement agencies (*overembling*). This criterion emphasizes that law enforcement must consider the capacity of law enforcement agencies in handling existing cases. The criminalization of debt transfer without consent aims to provide legal certainty and prevent overload within law enforcement institutions. As a result, law enforcement can be carried out effectively without overburdening the legal system, allowing cases that harm certain parties to be resolved more quickly and efficiently.

According to Moeljanto, there are three essential criteria in the process of criminalization during the reform of criminal law. First, there must be a determination that a certain act constitutes an unlawful act or a criminal offense. Second, there must be a threat of punishment and the imposition of sanctions to prevent violations of these prohibitions. Third, the government, through the relevant state institutions, must genuinely have the capacity to enforce criminal sanctions when a violation of these prohibitions occurs²¹. The illegal transfer of debt often involves manipulation or misuse of contractual relationships between debtors

²⁰ Prof. Sudarto, *Kapita Selektta Hukum Pidana* (Bandung, 1986).

²¹ Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Bina Aksara, 1999).

and creditors. Such practices are carried out by parties acting in bad faith to evade financial responsibilities, resulting in financial losses for the creditors²². This situation raises questions about the urgency of criminalizing debt transfers as a preventive measure against more significant societal harm. The criminalization of debt transfers without written consent aims to:

1. Prevent moral hazard, criminal sanctions serve as a deterrent against opportunistic behavior by fiduciary providers.
2. Protect creditors' interests, as the rightful holders of security objects, creditors must be afforded clear legal protection.
3. Preserve economic stability, actions that harm creditors may undermine public trust in the financial system, necessitating strict sanctions.

With the imposition of criminal penalties, it is expected that debtors contemplating the transfer of their debts will reconsider, thereby minimizing behavior that circumvents obligations. The prohibition against fiduciary providers transferring or leasing security objects without the written consent of fiduciary recipients is essential. The transfer of motor vehicle debt without the written consent of the fiduciary recipient, as regulated under Article 23(2) in conjunction with Article 36 of Law No. 42/1999, can be categorized as an unlawful act with implications in both civil and criminal domains, demonstrating that: Article 23 Paragraph (2) of Law No. 42/1999, "The Fiduciary Grantor is prohibited from transferring, pledging, or leasing the object of the Fiduciary Guarantee to another party, except for inventory goods, unless with prior written consent from the Fiduciary Recipient".

This article aims to uphold the principle of creditor protection by ensuring that the collateral object is not transferred without the consent of the fiduciary recipient. This provision is intended to prevent moral hazard, wherein the fiduciary grantor acts without regard to the rights of the creditor. Written consent serves as a primary mechanism to safeguard trust between the parties involved. Article 36 of Law No. 42/1999, "The Fiduciary Grantor who transfers, pledges, or leases the object of the Fiduciary Guarantee as referred to in Article 23 Paragraph (2), without prior written consent from the Fiduciary Recipient, shall be subject to a criminal penalty of imprisonment for a maximum of 2 (two) years and a fine of up to IDR 50,000,000 (fifty million rupiahs)."

In the context of criminal law, the element of *mens rea* or malicious intent serves as a distinguishing criterion. The act of unauthorized transfer is considered a criminal offense. The elements of criminality that must be fulfilled for the perpetrator to be prosecuted under this provision include the element of intent, manifesting as the deliberate avoidance of responsibility, which constitutes a fundamental component in fiduciary arrangements. Such intent is frequently underpinned by an economic motive, wherein the fiduciary grantor aims to derive pecuniary gain or circumvent the rights of creditors. In the fiduciary relationship, the fiduciary grantor conveys an object as collateral to the fiduciary recipient, thereby creating a legal nexus predicated on trust and fiduciary obligations. Nonetheless, legal complexities emerge when the fiduciary grantor engages in acts of transfer, pledging,

²² Ridwan Ridwan, "Efektivitas Penegakan Hukum Tindak Pidana Fidusia Dalam Proses Penyidikan (Studi Di Polres Banyumas)," *Jurnal Idea Hukum* 5, no. 2 (October 18, 2019), <https://doi.org/10.20884/1.jih.2019.5.2.124>.

or leasing the collateral object to a third party. Where such actions are undertaken absent the express and prior written consent of the fiduciary recipient, they may be deemed violative of fiduciary principles and the governing legal framework. The fiduciary recipient, as the beneficiary of the fiduciary arrangement, possesses the prerogative to approve or withhold consent regarding the disposition or utilization of the collateral object. Written consent serves as an indispensable condition precedent to any transfer, ensuring the protection of the fiduciary recipient's proprietary and legal interests while preserving clarity concerning the collateral's legal status. Unauthorized dispositions effected in contravention of this requirement may constitute actionable breaches, potentially resulting in legal liabilities and pecuniary detriment to the fiduciary recipient.

The unauthorized transfer of collateral objects without written consent constitutes a serious legal breach, exposing the fiduciary grantor to potential imprisonment and fines. Such actions also entitle the fiduciary recipient to pursue legal remedies, including claims for damages to recover losses, demands for the return of the collateral object, and the filing of criminal charges for the violation. The necessity of obtaining written consent from the fiduciary recipient is an unequivocal legal requirement, safeguarding their rights and ensuring clarity over the collateral's legal status. Any transfer executed without such consent may result in substantial legal consequences for the grantor.

The transfer of fiduciary collateral objects without written consent as stipulated in a fiduciary agreement also violates fundamental principles of contract law, namely *pacta sunt servanda* (agreements must be honored) and good faith. The principle of *pacta sunt servanda* underscores the obligation of the parties to adhere to the terms of the agreement they have entered into, including the requirement for written consent for the transfer of collateral objects. The violation of this requirement not only breaches the contractual agreement but also represents a breach of trust and mutual respect between the parties involved. The principle of good faith mandates that all parties act with transparency, respect each other's rights, and fulfill their obligations appropriately. The transfer of collateral objects without authorization demonstrates a lack of good faith on the part of the fiduciary grantor, which can undermine the stability of the contract and erode trust in economic transactions.

Moreover, the transfer of motor vehicle debt without written consent from the fiduciary grantee may also be categorized as an unlawful act (*perbuatan melawan hukum*) as stipulated under Article 1365 of the Indonesian Civil Code. Such an action has the potential to cause harm to the fiduciary grantee, stemming from a causal relationship between the transfer and the resulting damage. This harm may include material losses, such as the loss of the fiduciary grantee's right to execute the collateral object, as well as immaterial losses, such as disruptions to the contractual relationship that damage trust between the parties. In the context of civil law, the primary focus of dispute resolution in such cases is the provision of compensation to restore the fiduciary grantee's legal standing to its rightful position.

This agreement provides legal protection to the fiduciary recipient over the collateral object. If the fiduciary grantor transfers the collateral object without obtaining written consent, such an act may be considered a violation of the applicable legal provisions. Consequently, the fiduciary grantor may not only face criminal sanctions but also risk being

subject to claims for damages from the fiduciary recipient who suffers losses due to the unlawful transfer. In addition to criminal sanctions, the fiduciary recipient has the right to initiate various legal actions as a form of recovery. One such action is filing for compensation to recover the losses caused by the unlawful transfer of the collateral object. Furthermore, the fiduciary recipient is also entitled to demand the return of the collateral object to restore possession. Criminal charges may also be filed against the fiduciary grantor for the violation committed, as a measure to enforce the law and impose a deterrent effect against similar actions in the future. Therefore, this provision underscores the importance of obtaining written consent from the fiduciary recipient as an essential requirement in every transaction involving collateral objects²³.

4. Conclusions

The imposition of criminal sanctions for the transfer of motor vehicle debt without the written consent of the fiduciary recipient constitutes an act of criminalization that violates the provisions of Law No. 42/1999. This action may occur due to various reasons, such as urgent financial needs or administrative errors; however, it remains a serious legal violation. Stronger and more consistent law enforcement is necessary to enhance legal certainty in cases of fiduciary violations. Additionally, efforts to strengthen regulations related to fiduciary security, including the possibility of adding provisions to Law No. 42/1999, are essential to improve supervision and legal enforcement mechanisms. For example, the implementation of stricter administrative or civil sanctions against debtors who violate the law could be considered. Criminal sanctions can serve as an effective alternative to prevent violations. The application of criminal sanctions for the transfer of motor vehicle debt without the written consent of the fiduciary recipient is an important step in protecting the rights of creditors and preventing breaches of fiduciary agreements.

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²³ Richrard Leonard Jinata, "Tinjauan Yuridis Mengenai Peran Dan Tanggung Jawab Notaris Dalam Pembebanan Jaminan Fidusia," *Lex Privatum* 6, No. 8 (February 4, 2019), <https://ejournal.unsrat.ac.id/index.php/Lexprivatum/Article/View/22867>.

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