

Original Article

Does Regulatory Forfeiture of Fiduciary Assurance Undermine Justice?

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Abstract

This study examines fiduciary security by emphasising the legal consequences arising from the seizure of fiduciary objects upon the rights of creditors and debtors, and by comparing fiduciary regulatory frameworks in Indonesia, Australia, and the United States. The research adopts a normative legal method utilising secondary data in the form of primary and secondary legal materials. The approaches employed include statutory, conceptual, and comparative approaches to analyse the norms, principles, and practices governing fiduciary law across different jurisdictions. The research is descriptive and analytical, and it applies qualitative juridical analysis. The findings indicate that the first, the seizure of fiduciary objects produces significant legal consequences for both creditors and debtors, particularly in relation to the enforcement of security rights and the protection of proprietary interests within fiduciary agreements. Second, the implementation of Law Number 42 of 1999 concerning Fiduciary Security has not yet provided balanced legal protection for the parties involved, as its practical application often creates legal uncertainty and generates tension between the interests of creditors and the rights of debtors. Third, a comparative examination of international legal frameworks highlights the necessity for clearer and more structured mechanisms governing the enforcement of fiduciary security. These findings therefore indicate the need to reconstruct the normative framework of fiduciary security regulation in order to strengthen legal protection, ensure certainty in execution procedures, and establish a fair balance of rights and obligations between creditors and debtors.

Keywords: Fiduciary; Justice; Regulation; Security;

Introduction

The seizure of evidential property within the sphere of criminal law constitutes a manifestation of state power, functioning as a crucial instrument in law enforcement and the recovery of financial losses.¹ The persistence of corruption, collusion, and nepotism in Indonesia necessitates the establishment of a rigorous accountability mechanism. In its development, the orientation of law enforcement has no longer been confined merely to the punishment of offenders (retributive justice), but has shifted towards the recovery of state financial losses (asset recovery) through the seizure of assets suspected to have been derived from, or utilised in, criminal offences.² A complex legal issue arises where assets subject to state seizure are encumbered by a security agreement, particularly a fiduciary security.³

¹ Tita Jiwanty Fitri, Djumikasih Djumikasih, and Herlindah Herlindah, 'Reconceptualizing Fiduciary Guarantee Execution After Indonesia's Constitutional Court Ruling', *International Journal On Language, Research And Education StudieS*, 9.2 (2025), 1–12 <<https://doi.org/10.47006/ijlres.v9i2.25054>>.

² Taufik Anang and Yudha Kusuma, 'Efektivitas Jaminan Perorangan Dan Fidusia Sebagai Instrumen Mitigasi Risiko Wanprestasi', *Journal Evidence Of Law*, 4.3 (2025), 1331–34 <<https://doi.org/10.59066/JEL.V4I3.1774>>.

³ Agung Nugraha Andi Wahyu, 'Prinsip-Prinsip Hukum Jaminan Fidusia Dalam Prespektif Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia', *Lex Privatum*, VI.10 (2018). <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/25850>



Fiduciary security constitutes an essential pillar within Indonesia's financing system, emerging from the exigencies of legal practice (jurisprudence) since the colonial era, notably through the Bierbrouwerij Arrest (1929) and BPM Clignet (1932). From a theoretical perspective, fiduciary security adopts the juridical construction of *yuridische* levering, whereby a transfer of proprietary rights occurs from the debtor (fiduciary grantor) to the creditor (fiduciary grantee) on the basis of trust, while possession of the object remains with the debtor as *detentor* or *bouder*.

Article 20 of Law Number 42 of 1999 concerning Fiduciary Security (Fiduciary Security Law) provides that such construction confers a proprietary right upon the creditor, giving rise to the principle of *droit de suite*, meaning that the security right continues to attach to the object in whosoever's possession it may be found.⁴ However, in its development, the privileged position of the creditor as a fiduciary owner frequently comes into conflict with the state's authority in the sphere of criminal law. In this context, a pronounced conflict of interests arises between the public interest of the state in suppressing crime and the private interests of creditors and debtors in protecting proprietary rights.⁵

A critical legal issue arises where the object of fiduciary security is confiscated by the state on the grounds that it constitutes evidential property or proceeds of crime.⁶ Judicial practice demonstrates inconsistency and, in certain instances, disregard for the rights of creditors (financing institutions) as lawful proprietors, as evidenced by, first, the public was recently confronted with the case of the Indosurya Savings and Loan Cooperative (Supreme Court Decision No. 2113K/Pid.Sus/2023). In this case, involving losses amounting to IDR 106 trillion, both movable and immovable assets were confiscated for the purpose of compensating victims pursuant to Article 30A of the Prosecutor's Office Law. The matter becomes complex where the confiscated assets remain encumbered by existing security or financing agreements. This situation sparks a conflict between the state's interest in enforcing criminal law and the protection of the proprietary rights of third parties acting in good faith.

Secondly, as reflected in the Decision of the Corruption Court at the District Court of Palangkaraya No. 35/Pid.Sus-TPK/2017/PNPlk in the case of the defendant Cornedy, A.Md Bin Salampak W Conrad, the court determined that certain assets constituting objects of fiduciary security were confiscated for the state as payment of substitute compensation for the criminal offence committed by the defendant. In this matter, the defendant acted as the fiduciary grantor in favour of the creditor. The confiscation of the fiduciary security objects causes a consequences detrimental to the fiduciary grantee, as the transfer of ownership of the secured assets effectively extinguished the creditor's right to execute such assets.⁷ Upon confiscation, the assets became state property and could no longer be utilised by any party. Consequently, the fiduciary security holder was unable to obtain satisfaction of its receivable.

Thirdly, in the case of PT Maybank Indonesia Finance (Decision No. 426/Pid.Sus/2017/PN DPK), assets subject to fiduciary security were auctioned without the creditor being a party to the proceedings. The court appeared to focus primarily on establishing the criminal offence without due consideration of the provenance of the assets

⁴ Politeknik Bisnis Kaltara, 'Tinjauan Yuridis Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Tentang Eksekusi Jaminan Fidusia Dan Perlindungan Hak Debitur', *Sanskara Hukum Dan HAM*, 4.02 (2025), 155–63 <<https://doi.org/10.58812/shh.v4.i02>>.

⁵ Anak Agung Sri Nari Ratih Pradnyawathi and Made Subawa, 'Akibat Hukum Atas Musnahnya Objek Jaminan Fidusia Yang Tidak Diasuransikan Terhadap Kreditor.', *Journal of Syntax Literate*, 10.4 (2025), 3703 <<https://doi.org/10.36418/syntax-literate.v10i4.58206>>.

⁶ I Wayan Novy Purwanto I Wayan Kharismawan, 'Kewajiban Pemberi Fidusia Dalam Hal Obyek Jaminan Fidusia Dirampas Untuk Negara', *Kertha Semaya: Journal Ilmu Hukum*, 2019. <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/51540>

⁷ Reza Zulfikar, 'Perlindungan Hukum Pemegang Jaminan Fidusia Atas Dirampasnya Objek Jaminan Dalam Perkara Korupsi', *JH Ius Quia Iustum*, 29.1 (2022), 47–69 <<https://doi.org/10.20885/iustum.vol29.iss1.art3>>.



and the status of the security encumbrance attached thereto. A similar pattern is evident in the decisions of the District Court of Rangkasbitung (No. 81/Pid.B/2022/PN Rks) and the District Court of Pekanbaru (No. 217/Pid.B/2022/PN Pbr), wherein fiduciary objects were confiscated in cases concerning fraud and narcotics offences without adequate protection of the economic rights of fiduciary grantees.

However, the Fiduciary Security Law has not yet provided a definitive resolution to the divergent views on the nature, classification, and legal character of fiduciary rights, whether proprietary or personal rights.⁸ In circumstances where an object of fiduciary security is confiscated by the state and taken into account as substitute compensation in corruption proceedings committed by the debtor, the fiduciary object having been seized from the debtor (as fiduciary grantor) is not returned to the creditor (as fiduciary grantee) on the ground that the asset subject to fiduciary security was derived from property originating from a corruption offence.⁹ Such ambiguity has the potential to infringe the constitutional right to the protection of property as guaranteed under Articles 28G and 28H of the 1945 Constitution, as well as Articles 570 and 574 of the Indonesian Civil Code.¹⁰

The absence of provisions governing circumstances in which an object of fiduciary security is derived from, or utilised for, criminal activity and is consequently confiscated by the state gives rise to legal uncertainty concerning the status of such secured property, the subsequent obligations of the fiduciary grantor, and the ensuing rights of the fiduciary grantee.¹¹ This circumstance demonstrates the absence of clear provisions providing for the immediate granting of compensation to the fiduciary grantee, among other remedies, as a consequence of the unlawful conduct of the debtor as fiduciary grantor.¹² A seizure that disregards the rights of creditors results in the loss of the security right, the loss of rental or instalment income, and the erosion of legal certainty over property held in trust. Conversely, from the debtor's perspective, the debtor loses the asset while remaining burdened with the obligation of payment.¹³ This condition indicates that regulatory gaps or interpretative flexibility concerning fiduciary security in seizure practices have diminished the value of justice for rights holders acting in good faith.¹⁴

Several related studies have previously been conducted, including research by Muhammad Fahri Hidayat. His study generally explains that objects of fiduciary security confiscated by the state remain classified as fiduciary security under both positive law and Islamic law, and that the associated obligations continue to subsist. The study further asserts that justice for fiduciary security right holders must be accorded priority, and that creditors may pursue legal remedies by filing claims before the court. However, the research does not provide an in-

⁸ Adam D.Lomo, Fernando, Richard C, 'Perlindungan Hukum Bagi Debitor Terhadap Objek Jaminan Fidusia Yang Diambil Paksa Oleh Juru Taguh (Debt Collector)', *Syntax Literate : Jurnal Ilmiah Indonesia*, 7.11 (2022). <<https://doi.org/10.36418/syntax-literate.v7i11.12427>>

⁹ Daniel P Simangunsong, Joko Setiono, and Albertus Wahyu Rudhanto, 'Legal Protection for Creditors as Holders of Fiduciary Rights Against Unlawful Transfer of Motor Vehicles by Debtors in Financing Agreements', *Jurnal Greenation Sosial Dan Politik*, 3.3 (2025), 465–73 <<https://doi.org/10.38035/jgsp.v3i3.428>>.

¹⁰ Sri Soedewi Masjchoen Sofwan, *Beberapa Masalah Pelaksanaan Jaminan Khususnya Fidusia Di Dalam Praktek Dan Perkembangannya Di Indonesia* (Yogyakarta: Fakultas Hukum UGM, 1997).

¹¹ Maria Silvy E. Wangga and others, 'Periscope of Ideas Selective Criteria for the Application of Restorative Justice in Corruption Crimes', *Journal of Indonesian Legal Studies*, 9.1 (2024), 1–30 <<https://doi.org/10.15294/JILS.VOL9I1.4530>>.

¹² Topan A. Abdul, Hijrah lahaling, and Rusmulyadi, 'Reconstruction of Pacta Sunt Servanda in Fiduciary Execution after Constitutional Court Decision No. 18/2019', *Judge : Jurnal Hukum*, 6.05 (2025), 1682–95 <<https://doi.org/10.54209/judge.v6i05.1935>>.

¹³ Tantimin Tantimin, 'Penyitaan Hasil Korupsi Melalui Non-Conviction Based Asset Forfeiture Sebagai Upaya Pengembalian Kerugian Negara', *Jurnal Pembangunan Hukum Indonesia*, 5.1 (2023), 85–102 <<https://doi.org/10.14710/JPHI.V5I1.85-102>>.

¹⁴ Hutmi Amivia Ilma, 'Tantangan Mekanisme Non-Conviction Based Asset Forfeiture Dalam Rancangan Undang-Undang Perampasan Aset Di Indonesia', *Ma'mal: Jurnal Laboratorium Syariah Dan Hukum*, 5.4 (2024), 321–44 <<https://doi.org/10.15642/MAL.V5I4.373>>.



depth examination of the urgency of reformulating the regulatory norms governing justice for holders of fiduciary security rights.¹⁵

Fairuz Afra, in her research, examines the factors influencing the establishment of fiduciary security in credit receivable cases, the operational mechanism of fiduciary security, the effectiveness of its implementation in minimising non-performing financing, and the obstacles encountered in implementing such security within the credit-granting process.¹⁶ Research conducted by Reza Zulfikar analyses the legal status of fiduciary security objects confiscated by the state and the legal protection afforded to holders of fiduciary security rights. The study recommends that corruption courts endeavour to provide guarantees and legal protection for creditors acting in good-faith creditor to prevent the loss of their right of claim against debtors. It further proposes revising the Fiduciary Security Law to establish a clear legal framework for the process of legal protection for creditors in respect of fiduciary security objects confiscated by the state as substitute compensation in criminal proceedings, particularly in corruption cases.¹⁷

However, the three preceding studies do not propose a normative reconstruction of the relationship between criminal law and civil law in cases involving the confiscation of objects encumbered by fiduciary security, an issue that prior scholarship has not comprehensively addressed. Previous studies have been limited to examining legal status, creditor protection, or the effectiveness of fiduciary security. Accordingly, this research develops a model of state confiscation mechanisms that integrates with the protection of the rights of fiduciary holders, including the necessity for operational guidelines for law enforcement authorities to trace secured assets. Furthermore, this study employs a comparative analysis of fiduciary security regulation in Indonesia, Australia, and the United States, and applies John Rawls' theory of justice to formulate a framework that benefits the least advantaged, with the aim of achieving balanced protection of rights and obligations among fiduciary grantors, fiduciary grantees, and the interests of the state.

Method

This research employs a normative legal methodology to examine the legal norms, principles, and doctrines governing fiduciary security, including the legal consequences arising from the confiscation of fiduciary objects, and to conduct a comparative analysis of regulatory frameworks in Indonesia, Australia, and the United States.¹⁸ This research adopts a statutory approach, involving the identification, examination, and analysis of relevant legislation, including Law Number 42 of 1999 concerning Fiduciary Security, its implementing regulations, and criminal law instruments relating to the confiscation of fiduciary objects.¹⁹ Furthermore, this research adopts a conceptual approach to analyse theoretical perspectives on the rights of creditors and debtors, the role of fiduciary security, and the principle of Rawlsian justice in protecting the least advantaged parties. A comparative approach is also applied to assess the differences and similarities in fiduciary

¹⁵ Muhammad Fahri Hidayat, 'Perlindungan Hukum Bagi Pemegang Jaminan Fidusia Atas Dirampasnya Objek Jaminan Yang Digunakan Sebagai Alat Kejahatan', *Panitera: Jurnal Ilmu Hukum*, 2.2 (2024). <https://panitera.amiin.or.id/index.php/panitera/article/view/25>

¹⁶ Fairuz Afra and others, 'Analisis Hukum Konsep Jaminan Dalam Penyelesaian Kasus Kredit Jaminan Fidusia', *Diponegoro Private Law Review*, 9.1 (2022), 59–72. <https://ejournal2.undip.ac.id/index.php/dplr/article/view/18459>

¹⁷ Reza Zulfikar, 'Perlindungan Hukum Pemegang Jaminan Fidusia Atas Dirampasnya Objek Jaminan Dalam Perkara Korupsi', *Jurnal Hukum Ius Quia Iustum*, 29.1 (2022), 47–67 <<https://doi.org/10.20885/IUSTUM.VOL29.ISS1.ART3>>.

¹⁸ Sidi Ahyar Wiraguna, 'Metode Normatif Dan Empiris Dalam Penelitian Hukum: Studi Eksploratif Di Indonesia', *Public Sphere: Jurnal Sosial Politik, Pemerintahan Dan Hukum*, 3.3 (2024) <<https://doi.org/10.59818/jps.v3i3.1390>>.

¹⁹ Nataniel Rohi Bire and Sri Mulyani, 'Perlindungan Hukum Terhadap Debitur Dalam Eksekusi Jaminan Fidusia Berdasarkan Putusan Mahkamah Konstitusi Nomor: 2/PUU-XIX/2021', *Jurnal Akta Notaris*, 3.2 (2024), 210–20 <<https://doi.org/10.56444/aktanotaris.v3i2.2179>>.



regulation between Indonesia, Australia (through the PPSA/PPSR framework), and the United States (under UCC Article 9), thereby enabling an evaluation of best practices in the regulation of fiduciary security and mechanisms for the protection of interested parties.²⁰

This study utilises primary legal materials, including the Constitution of the Republic of Indonesia, Law Number 42 of 1999 concerning Fiduciary Security, its implementing regulations, and judicial decisions on the execution and confiscation of fiduciary security. Secondary legal materials comprise academic textbooks, scholarly journal articles, research reports, and doctrinal legal opinions addressing fiduciary security law, the execution of fiduciary security, and comparative international regulation. All data are collected through library research and analysed using qualitative juridical analysis, with the objective of interpreting legal norms, evaluating their implementation, comparing international practices, and formulating recommendations for the normative reconstruction of the Fiduciary Security Law to realise Rawlsian justice for all interested parties.²¹

Results and Discussions

Legal Consequences Arising from the Confiscation of Fiduciary Security Objects for the State

Within fiduciary security arrangements, the creditor occupies the position of fiduciary grantee and is vested with specific rights under Law Number 42 of 1999 concerning Fiduciary Security.²² Ownership of the secured property is transferred from the fiduciary grantor to the fiduciary grantee as a transfer of proprietary rights based on trust, as affirmed in Article 1 paragraph (1) of the said Law, notwithstanding that physical possession of the object remains with the fiduciary grantor. The fiduciary grantee is entitled to execute or sell the secured object in the event of the debtor's default, as provided under Article 15 paragraph (2), which stipulates that the fiduciary security certificate possesses executorial force.²³ However, this provision was subsequently reinterpreted by the Constitutional Court through Decision Number 18/PUU-XVII/2019. This decision affirms that if there is no agreement concerning default and the debtor does not voluntarily surrender the secured object, enforcement must be carried out through mechanisms and procedures equivalent to the execution of a court judgment that has obtained final and binding legal force. The authority to execute such enforcement rests with the district court, as reaffirmed in Decision Number 2/PUU-XIX/2021.²⁴ Furthermore, the fiduciary grantee is vested with a preferential right, namely the right to priority in the satisfaction of its receivable from the proceeds of the sale of the secured property pursuant to Article 27 of Law Number 42 of 1999, with the obligation to remit any surplus of the sale proceeds to the debtor where an excess exists, as provided under Article 34.²⁵

In addition to these rights, the fiduciary grantee is also subject to certain legal obligations. Pursuant to Article 11 of Law Number 42 of 1999, every object encumbered by fiduciary security must be registered, and the obligation of registration is imposed upon the fiduciary

²⁰ Hari Sutra Disemadi, 'Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies', *Journal of Judicial Review*, 24.2 (2022), 289–304 <<https://doi.org/10.37253/jjr.v24i2.7280>>.

²¹ Aina Maryam Siregar and others, 'Analisis Hukum Jaminan Fidusia Dalam Pemberian Modal Usaha Oleh Kreditur Menurut Perspektif Undang-Undang Nomor 42 Tahun 1999', *Jurnal Sahabat ISNU SU*, 2.1 (2025), 23–32 <<https://journal.isnu-sumut.org/index.php/jsisnu/article/view/732>>

²² Soegianto, Diah Sulistiyani, and Muhammad Junaidi, 'Eksekusi Jaminan Fidusia Dalam Kajian Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia', *Jurnal Ins Constituentum*, 4.2 (2019), 210.

²³ Afra and others.

²⁴ Kaltara.

²⁵ Kerenina Sunny Halim and Endang Suprapti, 'Perlindungan Hukum Bagi Kreditur Terhadap Pelaksanaan Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi No. 18/PUU-XVII/2019 (Studi Kasus Putusan Nomor 36/Pdt.G.S/2023/PN Pdg)', *Ranah Research : Journal of Multidisciplinary Research and Development*, 8.1 (2025), 682–99 <<https://doi.org/10.38035/rrj.v8i1.1890>>.



grantee as expressly stipulated in Article 13, paragraph (1).²⁶ Notwithstanding that legal ownership resides with the fiduciary grantee, the secured property remains in the possession of the fiduciary grantor as a consequence of the fiduciary character as a transfer of ownership based on trust, which permits the asset to continue to be utilised for economic activities.²⁷ Furthermore, the fiduciary grantee is obliged to return any surplus arising from the sale of the secured object after the debtor's obligation has been satisfied, as provided under Article 34 paragraph (1). Accordingly, the fiduciary grantee is a creditor who, as a matter of law, becomes the owner of the fiduciary security object, vested with preferential rights and enforcement rights exercisable through legal mechanisms, while simultaneously bearing administrative and restitutive obligations intended to ensure legal certainty and to maintain a balanced protection of the parties within the fiduciary agreement.²⁸

The legal consequences arising from the confiscation of fiduciary security objects for the state must be analysed within the framework of proprietary legal relations between the creditor as fiduciary grantee, the debtor as fiduciary grantor, and the state's authority under criminal law.²⁹ In accordance with Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees, fiduciary guarantees are the transfer of ownership of an object based on a mandate, on the condition that the object remains in the control of the fiduciary trustee.³⁰ The juridical consequence of this construction is the separation between juridical ownership and physical possession. The creditor acquires a proprietary right over the secured object, whereas the debtor retains only the right of possession (*bezit*).³¹ Accordingly, where an object of fiduciary security is utilised in the commission of a criminal offence and is subsequently seized and confiscated by the state pursuant to a court decision, such an occurrence must not be regarded solely as an act within the domain of criminal law, but also as a proprietary legal event affecting the civil legal relationship between the parties.³²

From the perspective of property law, the right of the fiduciary grantee constitutes an absolute proprietary right, adheres to the object, and confers a position of priority. Article 27 of Law Number 42 of 1999 affirms that the fiduciary grantee enjoys a right of priority over other creditors as from the date of registration of the fiduciary security.³³ This right places the creditor in the position of both a preferential and a secured creditor, in accordance with the principle embodied in Article 1133 of the Indonesian Civil Code, which recognises creditors holding proprietary security with a right of priority in satisfaction. Accordingly, the confiscation of a fiduciary object by the state does not, in itself, extinguish the creditor's proprietary right, as such right arises from a registered fiduciary agreement and possesses legal force *erga omnes*.³⁴ The characteristic of *droit de suite*, whereby the right follows the

²⁶ Ryamizard Haritzidane Kasyfi Aditya and Yunanto, 'Eksekutorial Jaminan Fidusia Terhadap Debitur Yang Cidera Janji (Wanprestasi) Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019', *Jurnal Hukum Lex Generalis*, 6.4 (2025) <<https://doi.org/10.56370/JHLG.V6I4.891>>.

²⁷ Lisyta Jatasiri Christy and Ramzy Muhammad Basyarahl, 'Perbandingan Hukum Jaminan Fidusia Antara Indonesia Dan Belanda Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019', *JURNAL MINUTA*, 7.2 (2025), 123–32 <<https://doi.org/10.24123/minuta.v7i2.7637>>.

²⁸ Anang and Kusuma.

²⁹ Fitri, Djumikasih, and Herlindah.

³⁰ Kajian Hukum and others, 'Kajian Hukum Tentang Pengalihan Benda Jaminan Fidusia Tanpa Persetujuan Tertulis Dari Penerima Fidusia', *Jurnal Hukum Lex Generalis*, 6.4 (2025) <<https://doi.org/10.56370/jhlg.v6i4.1678>>.

³¹ Irwan Hafid, 'Perampasan Aset Tanpa Pemidanaan Dalam Perspektif Economic Analysis Of Law', *Lex Renaissance*, 1.6 (2021). <<https://doi.org/10.20885/JLR.vol6.iss3.art3>>

³² A.A. Gede Agung Dharmakusuma A.A. Ngurah Duta Putra Adnyana, 'Perlindungan Hukum Terhadap Kreditur Dalam Hal Benda Jaminan Fidusia Dirampas Negara', *Jurnal Fakultas Hukum Universitas Udayana*, 2.6 (2018). <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/39032>

³³ Sidik Sunaryo and others, 'Narasi Ontologi Moralitas Hukum Korupsi Di Indonesia Berdasarkan Nilai Islam', *Jurnal Hukum Unissula*, 2025 <<https://doi.org/10.26532/jh.v4i1i.37154>>.

³⁴ Eko Budhi Harto, Nahdiya Sabrina, and Hatarto Pakpahan, 'Legal Analysis of the Status of Evidence Proceeds of Money Laundering Crimes Encumbered by Fiduciary Guarantee', *International Journal of Research in*



object, results in the creditor's right remaining attached to the secured property, notwithstanding that the object is in the possession of another party, including the state.³⁵ Consequently, in effecting confiscation, the state is required to take into account the rights of third parties acting in good faith, including fiduciary grantees, as proprietary rights cannot be extinguished unilaterally without a lawful legal basis.³⁶

In practice, the confiscation of fiduciary security objects generally occurs where such property constitutes an instrument or proceeds of a criminal offence. Criminal procedural law permits the seizure and confiscation of evidential property in the public interest; however, such measures must be grounded in a court decision that has final and binding legal force. This is consistent with the principles of property protection and legal certainty within the Indonesian legal system.³⁷ Accordingly, the state cannot confiscate an object of fiduciary security without due judicial process. Where confiscation is effected pursuant to a court decision that has obtained final and binding legal force, the creditor, as a matter of fact, loses control over the secured object and is unable to exercise proprietary enforcement.³⁸ However, from a juridical perspective, the creditor's preferential right remains attached, as confiscation does not extinguish the civil legal relationship that constitutes the basis for the creation of the fiduciary security. In this context, the creditor retains the right to demand repayment of the debt from the debtor pursuant to the principal agreement.³⁹

The legal status of the fiduciary security certificate as an instrument of enforcement has undergone significant development following Constitutional Court Decisions Number 18/PUU-XVII/2019 and 2/PUU-XIX/2021. The Constitutional Court reinterpreted Article 15 paragraphs (2) and (3) of Law Number 42 of 1999 by affirming that the executive force of a fiduciary certificate cannot be exercised unilaterally by the creditor where no agreement exists regarding default or where the debtor refuses to surrender the secured object voluntarily.⁴⁰ In such circumstances, enforcement must be carried out through judicial mechanisms. This interpretation carries significant implications where the fiduciary object has been confiscated by the state, as the creditor can no longer rely upon *parate execution*, but must instead pursue legal remedies in accordance with judicial procedures.⁴¹ In other words, state confiscation reinforces the factual impediments to the exercise of the creditor's enforcement rights, yet it does not extinguish the proprietary right itself.

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³⁵ Sholahuddin Al-Fatih and Sayed Khalid Shahzad, 'Rethinking How Laws Are Made: Indonesia's Legal Method Dilemma', *Journal of Sustainable Development and Regulatory Issues (JSDERI)*, 3.2 (2025), 170–90 <<https://doi.org/10.53955/JSDERI.V3I2.32>>.

³⁶ Saiful Risky and others, 'Political Configuration of Electoral System Law in Indonesia from State Administration Perspective', *Volksggeist: Jurnal Ilmu Hukum Dan Konstitusi*, 6.1 (2023), 119–30 <<https://doi.org/10.24090/VOLKSGEIST.V6I1.7940>>.

³⁷ Muchamad Iksan and others, 'Fulfilling the Restitution Rights of Crime Victims: The Legal Practice in Indonesia', *Academic Journal of Interdisciplinary Studies*, 12.4 (2023), 152 <<https://doi.org/10.36941/ajis-2023-0101>>.

³⁸ Azarella Suryani and Wirdhayanti Sriyono, 'Perlindungan Hukum Terhadap Pemanfaatan Hak Cipta Konten Digital Sebagai Objek Jaminan Fidusia Dalam Ekonomi Kreatif', *Locus: Jurnal Konsep Ilmu Hukum*, 5.3 (2025), 535–42 <<https://doi.org/10.56128/jkih.v5i3.718>>.

³⁹ Ahmad Siboy and others, 'Legal Social Justice in Appointment Non-Definitive Regional Heads toward Welfare State', *BESTUUR*, 11.1 (2023), 144–70 <<https://doi.org/10.20961/BESTUUR.V11I1.71055>>.

⁴⁰ Fikry Latukau, 'Pengadopsian UNCAC Mengenai Pengembalian Aset Hasil Korupsi Yang Dibawa Atau Disimpan Ke Luar Negeri Dalam Penegakan Hukum Indonesia', *Jurnal Belo*, 5.1 (2019), 10–31 <<https://doi.org/10.30598/BELOVOL5ISSUE1PAGE10-31>>.

⁴¹ Janpatar Simamora and Risma Elfrida Esther Manik, 'Legal Politics in Combating Corruption During Indonesia's Era of Regional Autonomy', *Journal of Indonesian Legal Studies*, 10.1 (2025), 135–64 <<https://doi.org/10.15294/JILS.V10I1.3885>>.



In fiduciary security, the debtor is referred to as the fiduciary grantor, who retains possession and use of the pledged property, because fiduciary security fundamentally entails only a juridical transfer of ownership from the fiduciary grantor to the fiduciary grantee, while physical control remains with the debtor.⁴² Under Law Number 42 of 1999 concerning Fiduciary Security, the debtor is entitled to use and benefit from the secured object so long as no default occurs, as stipulated in Article 15 paragraph (3). The debtor is also entitled to legal protection during the execution process, which includes, inter alia, the existence of agreements between the parties, the obligation to achieve the highest price in private sales, written notice to interested parties, the publication of the sale in at least two newspapers, and the execution of the sale only after one month has elapsed from the date of notification, as provided under Article 29 paragraph (2).⁴³ Furthermore, once all debt obligations have been satisfied, the debtor is entitled to regain ownership of the secured property, including the related ownership documents previously held by the creditor. The debtor is also entitled to receive prior notification if the secured object is to be executed because of default.⁴⁴

Law Number 42 of 1999 also imposes obligations on the debtor as a fiduciary grantor. The debtor is required to properly care for and maintain the secured object while it remains in their possession and is prohibited from transferring or re-encumbering the property that has been designated as a fiduciary security object, as expressly stipulated in Article 17, which prohibits re-fiduciary of registered objects.⁴⁵ In the event of any changes to the data or transfer of possession related to the secured object, the debtor is obliged to notify the fiduciary grantee. The debtor is also required to use the secured property in a reasonable manner and without excess, so as not to diminish its value or cause damage to the secured object.⁴⁶ Ultimately, the debtor is obliged to repay the debt in accordance with the credit agreement that serves as the basis for the fiduciary security, because, in the event of default, the secured object may be executed through the enforcement mechanisms provided by law. Accordingly, the debtor, as fiduciary grantor, is fundamentally entitled only to possess and utilise the secured property within the limits permitted by law, while any transfer or act that diminishes the value of the property is restricted to protect the interests of the creditor.⁴⁷

For the debtor as fiduciary grantor, the confiscation of the secured object gives rise to distinct legal consequences. Under the fiduciary system, the debtor holds only a right of possession over the property, in accordance with the concept of *bezit* under Article 529 of the Indonesian Civil Code, which denotes the condition of a person possessing an object as if it were their own.⁴⁸ This right of possession is legally protected so long as it is exercised in good faith and in accordance with the agreement. However, when the secured object is

⁴² Orin Gusta Andini, Nilasari, and Andreas Avelino Eurian, 'Restorative Justice in Indonesia Corruption Crime: A Utopia?', *Legality: Jurnal Ilmiah Hukum*, 31.1 (2023), 72–90 <<https://doi.org/10.22219/LJIH.V31I1.24247>>.

⁴³ Joko Setiyono and others, 'Enhancing Cross-Border Justice: Facilitating Asset Recovery from Corruption Between Indonesia and Australia Through Mutual Legal Assistance', *Journal of Indonesian Legal Studies*, 9.2 (2024), 537–70 <<https://doi.org/10.15294/JILS.V9I2.877>>.

⁴⁴ Sidik Sunaryo and Sholahuddin Al-Fatih, 'How Corruptor Should Be Punished? A Comparative Study Between Criminal Law, Islamic Law, and Customary Law', *International Journal Of Criminal Justice Sciences*, 17.2 (2022), 91–100 <<https://doi.org/10.5281/zenodo.4756112>>.

⁴⁵ Syariful Alam and others, 'Islamic Criminal Law Study on The Seizure of Corruptor Assets as an Indonesian's Criminal Sanction in The Future', *JURIS (Jurnal Ilmiah Syariah)*, 21.2 (2022), 143–56 <<https://doi.org/10.31958/JURIS.V21I2.6722>>.

⁴⁶ Lutfiatul Hasanah, 'Upaya Pengembalian Aset Negara Tindak Pidana Korupsi (Dalam Perspektif Undang-Undang Pemberantasan Tindak Pidana Korupsi Dan Undang-Undang Nomor 7 Tahun 2006)', *JURNAL ANTI KORUPSI*, 11.2 (2021), 41–55 <<https://doi.org/10.19184/JAK.V3I2.28922>>.

⁴⁷ Zulfikar, 'Perlindungan Hukum Pemegang Jaminan Fidusia Atas Dirampasnya Objek Jaminan Dalam Perkara Korupsi?'

⁴⁸ Erma Rusdiana and others, 'Preventing the Politicisation of Corruption Crime Law Enforcement Based on Local Wisdom', *Legality: Jurnal Ilmiah Hukum*, 33.1 (2025), 110–31 <<https://doi.org/10.22219/LJIH.V33I1.37429>>.



confiscated by the state, the debtor loses this right of possession, as the state assumes control of the property pursuant to a court decision.⁴⁹ The loss of the object from the debtor's possession fundamentally constitutes a breach of the obligation to safeguard and maintain the secured property, as a consequence of the fiduciary relationship. Accordingly, under civil law, the debtor may be considered to have committed a default for failing to fulfil the duty to preserve the secured object, which underpins the creditor's protection.⁵⁰

Even though the secured object has been confiscated, the debtor's obligation to repay the debt does not cease. Under the property security law, the principle applies that the security serves solely as a means of debt satisfaction and does not replace the primary obligation itself.⁵¹ Thus, the loss of the secured object does not extinguish the debt; it merely removes the creditor's proprietary means of satisfaction. The debtor remains personally liable for repaying their credit obligation.⁵² Under certain circumstances, the creditor may even claim compensation if the loss of the secured object results from the debtor's negligence or unlawful conduct, including instances where the debtor transfers or leases the object without the creditor's written consent, as prohibited under Article 23 paragraph (2) of Law Number 42 of 1999, and punishable under Article 36 of the same Law.⁵³

The confiscation of fiduciary security objects also gives rise to a legal relationship between the state and the creditor as a third party acting in good faith. Under the doctrine of property law, the state cannot disregard the rights of third parties that arose prior to the confiscation.⁵⁴ Accordingly, the creditor's preferential right must continue to be considered in any act of confiscation. The position of the fiduciary creditor, equivalent to that of other holders of proprietary security, places them in a legally protected status, meaning that state confiscation may not extinguish this right without a legal mechanism that provides balanced protection.⁵⁵

Thus, the legal consequences of the confiscation of fiduciary security objects are dualistic. From the creditor's perspective, proprietary rights and preferential rights remain intact, but the ability to exercise proprietary remedies is impeded, and the risk of loss is increased.⁵⁶ From the debtor's perspective, confiscation eliminates the right of possession and may give rise to default, yet it does not extinguish the debt obligation. The fiduciary legal relationship remains in effect even though the secured object is no longer in the possession of the parties. The Indonesian legal system, through Law Number 42 of 1999, the Civil Code, and Constitutional Court decisions, establishes a balanced framework for creditor protection,

⁴⁹ Rika Dwi Juliani and Syofiaty Lubis, 'Pengembalian Aset Hasil Korupsi Dan Penanggulangan Korupsi Melalui Penyitaan Non-Conviction Based Asset Forfeiture: Tinjauan Hukum Indonesia Dan United Nations Convention against Corruption (UNCAC) 2003', *Jurnal Educatio: Jurnal Pendidikan Indonesia* <<https://doi.org/https://doi.org/10.29210/1202322846>>.

⁵⁰ Abdul, lahaling, and Rasmulyadi.

⁵¹ Hufron and Sultoni Fikri, 'The Urgency of Regulating Forfeiture of Assets Gained from Corruption in Indonesia', *Legality: Jurnal Ilmiah Hukum*, 32.2 (2024), 292–310 <<https://doi.org/10.22219/LJIH.V32I2.35243>>.

⁵² Rona Jingga Putri Pratama and Endang Prasetyawati, 'Pelindungan Hukum Bagi Penerima Fidusia Apabila Objek Jaminan Berupa Barang Persediaan Dialihkan Oleh Debitur Tanpa Persetujuan', *RIGGS: Journal of Artificial Intelligence and Digital Business*, 4.4 (2026), 10738–45 <<https://doi.org/10.31004/riggs.v4i4.4177>>.

⁵³ Ganna Sobko and others, 'Characteristics of Punishment for Property Embezzlement and Appropriation by Military Personnel through Abuse of Office', *Legality: Jurnal Ilmiah Hukum*, 31.1 (2023), 157–80 <<https://doi.org/10.22219/LJIH.V31I1.25933>>.

⁵⁴ Andi Wahyu Agung Nugraha, 'Prinsip-Prinsip Hukum Jaminan Fidusia Dalam Prespektif Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia', *Lex Privatum*, VI.10 (2018), 116.

⁵⁵ Avila Rizky and others, 'Perlindungan Hukum Bagi Debitur Terhadap Penarikan Objek Jaminan Fidusia Oleh Kreditor Secara Sewenang-Wenang', *Al-Zayn: Jurnal Ilmu Sosial & Hukum*, 4.1 (2026), 5482–88 <<https://doi.org/10.61104/alz.v4i1>>.

⁵⁶ Irwan Hafid, 'Perampasan Aset Tanpa Pidanaan Dalam Perspektif Economic Analysis Of Law', *Lex Renaissance*, 6.3 (2021), 465–80 <<https://doi.org/10.20885/JLR.VOL6.ISS3.ART3>>.



debtor obligations, and state authority to ensure legal certainty and justice for all interested parties.⁵⁷

Fiduciary Guarantee Regulations in Indonesia, Australia, and the United States

In various legal literatures, fiduciary security originates from the term fiduciary transfer of ownership, which denotes trust, or *Fiduciare Eigendom Overdracht* (FEO), which means the transfer of ownership based on confidence or trust.⁵⁸ Generally, fiduciary security, as understood in this literature, refers to the legal relationship between creditor and debtor founded on the principle of trust. Under this principle, the debtor trusts that, upon fulfilling their obligations, the creditor will return the collateral delivered to them. Conversely, for the creditor, this principle entails a trust that the debtor will not misuse the pledged property and carries an obligation to maintain the secured object in the best possible condition.⁵⁹

In Indonesia, during the development of national contract law, the principle of trust was introduced at the Obligations Law Workshop organised by the National Legal Development Agency in 1985. This principle affirms that the parties to an agreement are expected to fulfil the obligations they have undertaken.⁶⁰ This principle is closely related to the principles of balance and protection, which require that agreements be performed properly, in good faith, and provide legal protection, particularly for the party in a weaker position. Fiduciary security, in essence, constitutes an imperfect transfer of ownership, as it transfers legal title (*constitutum possessorium*) without transferring physical possession, which remains with the debtor.⁶¹ This provision is intended to allow the debtor to continue utilising the property for economic activities, with the consequence that, in the event of default, the creditor is entitled to execute the secured object.⁶² Law Number 42 of 1999 concerning Fiduciary Security stipulates in Article 1 paragraph (2) that fiduciary security constitutes a security right over both tangible and intangible movable property, as well as certain buildings that cannot be encumbered with a mortgage, whereby possession of the property need not be transferred even though ownership rights are transferred to the fiduciary grantee.⁶³

The main characteristic of fiduciary security is that it remains in the debtor's possession, which ontologically demonstrates the distinction between ownership and possession rights, epistemologically affirms the function of fiduciary security as a means of debt satisfaction with a preferential position for the creditor, and axiology wise aims to balance the creditor's interest in securing their claim with the debtor's interest in continuing to use the property as a productive instrument.⁶⁴ The debtor's possession of the secured property also gives rise to various legal consequences, including the emergence of rights and obligations for the parties,

⁵⁷ Zulfikar, 'Perlindungan Hukum Pemegang Jaminan Fidusia Atas Dirampasnya Objek Jaminan Dalam Perkara Korupsi'.

⁵⁸ Fitri, Djumikasih, and Herlindah.

⁵⁹ Daniel Christopel Purba, 'Tinjauan Yuridis Penguasaan Tanah Hak Milik Orang Lain Secara Melawan Hukum Dikaitkan Dengan Asas Perlindungan Hukum', 2025 <<https://repository.uhn.ac.id/handle/123456789/11982>>.

⁶⁰ Catur Budi Dianawati and Amin Purnawan, 'Kajian Hukum Jaminan Hak Tanggungan Yang Dilelang Tanpa Proses Permohonan Lelang Eksekusi Ke Ketua Pengadilan Negeri', *Jurnal Akta*, 4.2 (2017), 125 <<https://doi.org/10.30659/akta.v4i2.1755>>.

⁶¹ Katarina Zein Angelica Janwarin, Etty Mulyati, and Aam Suryamah, 'Eksekusi Jaminan Fidusia Tanpa Melalui Putusan Pengadilan Pasca Putusan Mahkamah Konstitusi Nomor 2/Puu-Xix/2021', *Syntax Literate ; Jurnal Ilmiah Indonesia*, 8.2 (2023), 1002–15 <<https://doi.org/10.36418/syntax-literate.v8i2.11379>>.

⁶² Siti Malikhathun Badriyah, R. Suharto, and H. Kashadi, 'Legal Protection for Creditor in the Online Registration of Fiduciary Guarantee in Consumer Finance', *IOP Conference Series: Earth and Environmental Science*, 175.1 (2018) <<https://doi.org/10.1088/1755-1315/175/1/012215>>.

⁶³ Simangunsong, Setiono, and Rudhanto.

⁶⁴ Jolanda Marlien Korua and others, 'Perlindungan Hukum Terhadap Kreditur: Tinjauan Komparatif Undang-Undang Tentang Fidusia Dan Hak Tanggungan', *Nuansa Akademik: Jurnal Pembangunan Masyarakat*, 10.2 (2025), 625–38 <<https://doi.org/10.47200/jnajpm.v10i2.3211>>.



as well as the authority of law enforcement officials should the property be used to commit a criminal offence.

In practice, a fiduciary security object may be confiscated by the state if it is used in the commission of an unlawful act, thereby raising legal protection issues for the creditor, as the Fiduciary Security Law does not explicitly regulate the legal consequences regarding the ownership status of property seized by the state.⁶⁵ As long as the secured object is not converted into inventory, the property continues to follow the object under the principle of *droit de suite*, so that the security right remains attached even if the object passes to another party. Furthermore, Article 24 of Law Number 42 of 1999 affirms that the fiduciary grantee bears no legal consequences arising from the acts or omissions of the fiduciary grantor in the use or transfer of the secured object. In the context of state confiscated property, the Ministry of Justice of the Republic of Indonesia, through Ministerial Regulation Number M.05.UM.01.06, stipulates that confiscated goods with final and binding legal force may be destroyed, auctioned for the state, handed over to designated institutions for utilisation, or stored in the State Evidence Storage Facility.⁶⁶ Thus, the fiduciary security system, grounded in the principle of trust, functions not only as a debt security mechanism but also as a legal instrument designed to create balance and justice between the interests of the debtor, the creditor, and the state.⁶⁷

In the United States, the term “fiduciary” generally refers to a fiduciary duty, the legal obligation of corporate directors or officers to act honestly, prudently, and in the best interests of the company.⁶⁸ This principle is affirmed in the 2016 Model Business Corporation Act, which recognises two primary duties: the duty of care and the duty of loyalty, while providing protection for business decisions made with adequate information and good faith through the Business Judgment Rule. In the context of property security, the United States legal system also allows extensive use of intangible assets, including copyrights, as collateral for financing. This framework is supported by mechanisms for economic valuation, registration, and enforcement of security rights that are relatively clear and integrated, enabling copyrights holders to effectively use their rights as collateral in credit transactions.⁶⁹

The ease of securing movable property in the United States is largely influenced by the provisions of the Uniform Commercial Code (UCC) Article 9, which provides a streamlined procedure for creating and registering security interests through a valid agreement and an electronic filing system. Priority is determined according to the first-to-file or perfect principle, whereby the creditor who first registers their interest obtains a preferential position. This regulation also encompasses various types of movable property, both tangible and intangible, and supports the use of digital technology in the administration of security

⁶⁵ Annisa Puspita Azani and ' Suraji, 'Perlindungan Hukum Terhadap Kreditor Dalam Eksekusi Objek Hak Tanggungan Dari Sita Eksekusi Pihak Ketiga (Studi Putusan No. 61/Pdt.Plw/2017/Pn. Jmb)', *Jurnal Privat Law*, 12.1 (2024), 10 <<https://doi.org/10.20961/privat.v12i1.50092>>.

⁶⁶ Budi Junaedi, Merry Tjoanda, and Teng Berlianty, 'Perlindungan Hukum Pada Debitur Atas Penarikan Objek Jaminan Fidusia Melalui Parate Eksekusi', *PATTIMURA Legal Journal*, 1.2 (2022), 124–32 <<https://doi.org/10.47268/pela.v1i2.6433>>.

⁶⁷ Reghina Miftahuljannah Hambali, 'Perlindungan Hukum Terhadap Konsumen Dalam Parate Eksekusi Objek Jaminan Fidusia', *Iuris Studia: Jurnal Kajian Hukum*, 6.1 (2025), 98–102 <<https://doi.org/10.55357/is.v6i1.837>>.

⁶⁸ Michael Hagana Bangun, 'Analisis Komparatif Tanggung Jawab Fidusia Direksi Dan Perlindungan Pemegang Saham Minoritas: Studi Kritis Terhadap Hukum Perseroan Di Indonesia Dan Singapura', *Media Hukum Indonesia (MHI)*, 4.1 (2026), 434–47 <<https://doi.org/10.5281/zenodo.17873913>>.

⁶⁹ Bunga Dita and Rahma Cesaria, 'Memahami Fiduciary Duty Direksi Berdasarkan Hukum Indonesia: Studi Perbandingan Dengan Hukum Inggris', *Begawan Abioso*, 16.1 (2025), 11–22 <<https://doi.org/10.37893/abioso.v16i1.1167>>.



interests and the efficient enforcement of rights in the event of debtor default.⁷⁰ In contrast, in Indonesia, the regulation of fiduciary security continues to face challenges in registration systems, legal certainty, and the use of intangible assets as collateral. Although the Fiduciary Security Law provides a legal foundation, mechanisms for economic valuation and an integrated administrative system have yet to develop optimally, resulting in fiduciary security practices in Indonesia being less efficient than those in the United States.⁷¹

In Australia, the concept of fiduciary security is regulated under the Personal Property Securities Act 2009 (PPSA), which grants a security right to the creditor by debtor to secure the repayment of a specified debt. The system is characterised by the secured property remaining in the debtor's possession, while the creditor acquires a priority right over the property in the event of default. This framework allows various types of movable assets to be used as collateral without requiring physical transfer to the creditor, thereby supporting the debtor's economic flexibility while simultaneously providing legal protection for the creditor.⁷²

The registration of security interests in the Australian legal system is conducted through a centralised and electronic mechanism using the Personal Property Securities Register (PPSR). The process begins with a security agreement between the debtor and the creditor, which clearly specifies the secured object as well as the rights and obligations of the parties.⁷³ Once the agreement is concluded, the creditor electronically files a financing statement with the PPSR to perfect the security interest, specifying the identities of the parties, a description of the secured asset, and the details of the agreement. This registration system is open, readily accessible, and provides public notice of the security interest to prevent competing claims. Creditor priority is determined according to the first-to-file-or-perfect principle, whereby the creditor who first registers their interest obtains a preferential position. The registration may also be extended or amended as needed through the same electronic system, thereby providing legal certainty, transparency, and efficiency in the enforcement of security rights, including in the event of debtor default.⁷⁴

Compared to Indonesia, the regulation of fiduciary security in both countries similarly allows the secured property to remain in the debtor's possession and recognises both tangible and intangible movable assets as eligible collateral.⁷⁵ However, Australia has a fully integrated, electronic national registration system, whereas in Indonesia, the registration of fiduciary security under Law Number 42 of 1999 still faces administrative challenges and is not yet fully integrated like the PPSR system. Regarding creditor priority and the enforcement of security rights, the Australian system provides more consistent certainty through transparent public registration, whereas in Indonesia, although a legal foundation exists, implementation remains under development and often encounters bureaucratic obstacles and practical uncertainties.⁷⁶ Thus, the Australian model demonstrates a modern approach emphasising integrated registration systems, administrative efficiency, and legal certainty in the management of security over movable property. The differences in the

⁷⁰ Yafet Yosafet and Wilben Rissy, 'Ketentuan Dan Pelaksanaan Business Judgement Rule Di Amerika, Australia Dan Indonesia', *Masalah-Masalah Hukum*, 49.2 (2020), 160–71 <<https://doi.org/10.14710/mmh.49.2.2020.160-171>>.

⁷¹ Chatamarrasjid Ais, "Fiduciary Duty" Sebagai Standar Para Direksi Dalam Melaksanakan Tugasnya', *Jurnal Hukum & Pembangunan*, 31.1 (2017), 63 <<https://doi.org/10.21143/jhp.vol31.no1.1315>>.

⁷² Setiyono and others.

⁷³ Asti Inayah and others, 'Perbandingan Praktik Jaminan Gadai Di Indonesia Dan Australia: Perspektif Hukum Perdata', *Soedirman Law Review*, 6.3 (2024), 178–93 <<https://doi.org/10.20884/1.sr.2024.6.3.16078>>.

⁷⁴ Yosafet and Rissy.

⁷⁵ Ruth Anggilani Kaesmetan, Orpa Juliana Nubatonis, and Husni Kusuma Dinata, 'Penarikan Paksa Kredit Kendaraan Yang Macet Oleh Pihak Leasing Yang Tidak Mempunyai Sertifikat Fidusia', *Eksekusi: Jurnal Ilmu Hukum Dan Administrasi Negara*, 3.2 (2025), 84–97 <<https://doi.org/10.55606/eksekusi.v3i2.1838>>.

⁷⁶ Siboy and others.



regulation of fiduciary security in Indonesia, the United States, and Australia can be summarised in the following table:

Table.1 Differences in Fiduciary Security Regulations in Indonesia, the United States, and Australia

Aspect	Indonesia	United States	Australia
Legal Basis	Law on Fiduciary Security (UUJF) No. 42 of 1999, which regulates fiduciary security specifically.	Uniform Commercial Code (UCC) Article 9, which regulates security interests, including fiduciary security. Due to variations in each state, the legal system is not uniformly extensive.	Personal Property Securities Act 2009 (PPSA), which regulates fiduciary security in an integrated manner throughout the country. This system unifies various aspects of private ownership within a consistent legal framework.
Registration System	Registration is conducted manually at the fiduciary registrar's office located in the region of the fiduciary provider. The process is still highly dependent on the location.	There is no centralized national system; registration is conducted at the state level, with procedures and timing varying according to local requirements.	An electronic and transparent national registration system is enabled through the centralized Personal Property Securities Register (PPSR).
Subject of Fiduciary Grantor	Because registration must be done locally in Indonesia and deeds must be made before a notary in Indonesia, Indonesian citizens usually become the recipient or fiduciary creditor.	In accordance with state law, the fiduciary grantor may become a legal entity under state law.	Fiduciary security can be granted to individuals or legal entities, with clear rules and strong legal protection.
Legal Protection and Enforcement	Fiduciary enforcement depends on the legal process throughout the country, and the existing bureaucratic and technological limitations still affect legal protection.	Enforcement is conducted through state courts following procedure. The process of enforcement is more complex and depends on the jurisdiction.	The PPSR system facilitates the enforcement of fiduciary rights without state intervention. The National Consumer Credit Protection Act 2009 also regulates consumer protection.

Source: Compiled by the author based on any literature

From the table above, it can be understood that Australia has the most integrated and modern fiduciary system, featuring high digitalisation and uniform national regulation. Indonesia relies on the Fiduciary Security Law (UUJF), which is stricter in regulating fiduciary security, particularly concerning the debtor's nationality and registration procedures that remain largely manual. The United States, on the other hand, operates a highly flexible but decentralised system with numerous state-level regulations, making the registration and enforcement of fiduciary interests comparatively more complex.

The Regulation of Fiduciary Security Forfeiture and Its Consequences for Justice and Legal Certainty

From the perspective of John Rawls' theory of justice, the central debate concerns whether criminal confiscation of fiduciary security objects is fairer than civil seizure, and whether either mechanism is genuinely capable of protecting the interests of the least advantaged party.⁷⁷ Based on this framework, a civil seizure model has been developed to restructure state authority in confiscating fiduciary security objects while ensuring the

⁷⁷ M. Jamil, 'Fiduciary Security Arrangements and Issues in Indonesia', *Journal of Human Rights, Culture and Legal System*, 1.2 (2021) <<https://doi.org/10.53955/jhcls.v1i2.1>>.



fulfilment of the principles of liberty, equality, and the difference principle.⁷⁸ In this model, fiduciary security is regarded as the primary object of legal obligation, allowing the state to initiate the confiscation process through judicial mechanisms without awaiting a criminal conviction, while still ensuring the protection of property rights, equal access to legal remedies, and procedural oversight by the courts.⁷⁹ To prevent arbitrary actions, law enforcement authorities are mandated to conduct a comprehensive verification of identity, ownership status, vehicle documentation, fiduciary certificates, and the underlying financing agreements prior to any seizure, thereby ensuring that the rights of bona fide creditors remain protected.⁸⁰

To ensure equality, the State is required to provide notice to all interested parties through written notifications or public announcements, thereby granting all parties an equal opportunity to defend their rights. The commencement of civil litigation by the State reflects procedural fairness, as the State is mandated to adhere to formal legal mechanisms and obtain judicial authorisation prior to any seizure.⁸¹ The Court subsequently assesses whether the fiduciary collateral constitutes the proceeds or an instrument of a criminal offence, while concurrently evaluating the bona fides of the parties involved. This assessment allows for three potential judicial determinations: forfeiture with compensation for bona fide parties; forfeiture without compensation where mala fides is proven; or the refusal of seizure if the object is found to be unrelated to the criminal offence.⁸² Among these alternatives, forfeiture accompanied by compensation is regarded as the most profound reflection of Rawlsian justice; it simultaneously safeguards the interests of the State, upholds the rights of the parties, and protects the most disadvantaged participants.

This option simultaneously secures state interests, recognises the legal position of creditors and debtors acting in good faith and protects the most disadvantaged party in accordance with the difference principle. The implementation of John Rawls' theory of justice within a legal framework is characterised by three fundamental pillars: First, the principle of freedom dictates that the legal system must provide all parties with an equitable opportunity to defend and uphold their respective property rights. It ensures that individual autonomy over assets is recognised and protected against arbitrary interference. The second principle is equality. This principle ensures that all individuals have an equal opportunity to assert their rights or legitimate interests in a court of law. This structural equality guarantees that procedural justice is accessible to everyone, regardless of their socio-economic status. Third, the difference principle imposes a positive obligation upon the state to intervene in favour of the most disadvantaged party. In a legal context, this serves as a corrective mechanism to balance unequal bargaining positions, ensuring that the legal outcome achieves substantive fairness for those in the most vulnerable positions. If this civil seizure can be implemented, it would represent an innovation in civil lawsuits related to corruption. The differences between the two can be summarised in the following table 2.

⁷⁸ Irvan Maulana Maulana and Mario Agusta Agusta, 'Konsep Dan Implementasi Restorative Justice Di Indonesia', *Datin Law Jurnal*, 2.2 (2021) <<https://doi.org/10.36355/DLJ.V2I2.734>>.

⁷⁹ T. Muhammad Ali Bahar and others, 'Contractual Obligations in Financing with Fiduciary Security in Indonesia in the Context of Justice', *Lex Scientia Law Review*, 7.1 (2023), 215–48 <<https://doi.org/10.15294/lesrev.v7i1.69318>>.

⁸⁰ Purwanto Purwanto, 'Beberapa Permasalahan Perjanjian Pembiayaan Konsumen Dengan Jaminan Fidusia', *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 1.2 (2012), 199 <<https://doi.org/10.33331/rechtsvinding.v1i2.97>>.

⁸¹ Bahar and others.

⁸² Jamil.



Table 2. Comparative Analysis of Civil Seizure and Civil Lawsuits in Corruption Cases

Aspect	Civil Seizure	Civil Lawsuit in Corruption Cases
Action	Against the asset	Against the asset and the person
Timing	Can be filed before, during, or after a criminal ruling, even before the perpetrator is identified	Can only be filed after a court decision, particularly a criminal verdict
Proof of Conduct	The judge proves that the asset is related to the crime, either as proceeds or as an instrument of the offense	Requires a criminal conviction. The prosecutor must prove the asset without doubt or with full certainty
Seizure	Seizes the asset	Seizes assets related to the defendant

Source: Compiled by the author based on any literature

This civil forfeiture model is also regarded as more flexible than civil lawsuits in corruption cases, as it may be initiated before or in the absence of a criminal conviction, provided there is sufficient evidence linking the assets to a criminal offence.⁸³ Nevertheless, the primary challenge remains the protection and compensation of bona fide creditors and debtors. Consequently, the application of the principles of justice dictates that the proceeds of forfeiture must respect the preferential rights of fiduciary assignees over the sale proceeds of the collateral. In the context of criminal forfeiture, an equitable approach must transcend a mere focus on penalising the offender; it must also ensure proportional protection and compensation for parties uninvolved in the criminal offence. Thus, a fair model of forfeiture requires rigorous verification of ownership, procedural transparency, and the integration of compensation mechanisms into judicial determinations, thereby maintaining an equilibrium of interests among the State, the creditor, and the debtor in accordance with the principles of substantive justice.⁸⁴

The reconstruction of norms in Law Number 42 of 1999 concerning Fiduciary Security is a logical consequence of the legal analysis of the implications of seizing fiduciary collateral for the legal standing of both creditors and debtors. Based on a Rawlsian justice approach, specifically the difference principle, legal regulations ought to provide enhanced protection to parties who are structurally in the most vulnerable position.⁸⁵ In fiduciary security practice, contractual imbalances place the debtor in the most vulnerable position, particularly during the enforcement process.⁸⁶ Consequently, the reconstruction of norms is directed towards strengthening the principles of procedural fairness and the equilibrium of interests between the parties. Constitutionally, this notion aligns with Article 28D paragraph (1) of the 1945 Constitution, which guarantees fair legal certainty, as well as Article 28G paragraph (1), which protects the right to property and the right to feel secure.⁸⁷

The urgency of reconstruction is also related to the function of fiduciary security as an efficient financing instrument that is easily accessible to the public. A reformulation of the norms is necessary to ensure that fiduciary institutions continue to support a business-

⁸³ Runarianu Rachmat and Suherman Suherman, 'Perlindungan Hukum Terhadap Kreditor Pemegang Jaminan Fidusia Terhadap Harta Debitor Yang Dinyatakan Pailit', *ADIL: Jurnal Hukum*, 11.1 (2020) <<https://doi.org/10.33476/ajl.v11i1.1446>>.

⁸⁴ Carina Budi Siswani and Denis Bergkamps Wabia, 'Perlindungan Hukum Bagi Kreditor Pemegang Jaminan Fidusia Setelah Putusan Mahkamah Konstitusi nomor 18/Puu-Xvii/2019', *PATRIOT*, 18.1 (2025) <<https://jurnal.uncri.ac.id/index.php/patriot/article/view/6>>.

⁸⁵ Hambali.

⁸⁶ Saskia Fazrin Khoirunnisa, 'Pengaturan Hukum Eksekusi Objek Jaminan Fidusia Apabila Debitor Melakukan Tindakan Pelanggaran Perjanjian', *Court Review: Jurnal Penelitian Hukum (E-Issn: 2776-1916)*, 3.05 (2023), 12–23 <<https://doi.org/10.69957/cr.v3i05.1359>>.

⁸⁷ Junaedi, Tjoanda, and Berlianty.



friendly environment while simultaneously guaranteeing balanced legal protection.⁸⁸ The 2018 academic draft of the amendment to the Fiduciary Security Law has identified several aspects requiring reform, particularly regarding the creation, registration, execution, extinguishment, and legal sanctions of fiduciary rights.

First, regarding the creation of fiduciary security, Article 5 of Law Number 42 of 1999 requires that a fiduciary security be created in a notarial deed in the Indonesian language. While this provision essentially ensures legal certainty, in practice it imposes an administrative burden on financing of lower value.⁸⁹ Based on the principles of legal utility and the right to economic justice, this provision could be reconstructed to allow a limited exception for low-value assets, permitting them to be encumbered through a private deed. This approach must still adhere to Articles 1320 and 1338 of the Civil Code concerning the validity of agreements and the execution of contracts in good faith.⁹⁰

Second, regarding the obligation to register fiduciary security, Article 11, paragraph (1) of Law Number 42 of 1999 states that any property encumbered by fiduciary security must be registered. To avoid multiple interpretations, the provision should be clarified to specify that the fiduciary security deed itself must be registered, with regulations establishing a definitive registration deadline.⁹¹ The certainty of registration timing is important as a form of protection for the debtor and third parties, and it aligns with the principle of legal certainty guaranteed under Article 28D, paragraph (1), of the 1945 Constitution. Third, regarding the institutional framework for fiduciary registration, Articles 12 paragraphs (2), (3), and (4) of Law Number 42 of 1999 still regulate regional Fiduciary Registration Offices. In modern administrative practice, registration is conducted electronically and centrally by the Directorate General of General Legal Administration. Therefore, these provisions need to be reconstructed by removing references to regional offices and establishing the national electronic registration system as the sole administrative mechanism.

Fourth, regarding the prohibition of re-fiduciary pledges, Article 17 of Law Number 42 of 1999 creates the potential interpretation that assets not yet registered may still be pledged again. To uphold the principle of specificity and ensure certainty of the secured object, the provision should be clarified to stipulate that any asset already encumbered by fiduciary security cannot be pledged again under any circumstances. Fifth, regarding the extinguishment of fiduciary security, the current statutory provisions on the termination of fiduciary rights do not adequately guarantee the effective updating of registration data. Norm reconstruction should clarify that fiduciary security is extinguished upon debt repayment, the creditor's release of rights, or the destruction of the secured asset, without affecting any insurance claims. This regulation is necessary to protect the interests of third parties and to strengthen legal certainty in administrative procedures.⁹²

Sixth, regarding the digitalisation of fiduciary administration, the provisions concerning the Fiduciary Register in Articles 13 paragraph (3), 14 paragraphs (2) and (3), 16 paragraph (2), and 26 paragraph (1) remain manual in orientation. Within the framework of modernising legal administration, these provisions should be interpreted as an electronic

⁸⁸ Azani and Suraji.

⁸⁹ Samuel Willem Simaela, Jenny Kristiana Matuankotta, and Sarah Selfina Kuahaty, 'Perlindungan Hukum Terhadap Hak Kepemilikan Objek Jaminan Fidusia Yang Telah Dialihkan Tanpa Sepengetahuan Kreditor', *TATOHI: Jurnal Ilmu Hukum*, 3.2 (2023), 140 <<https://doi.org/10.47268/tatohi.v3i2.1559>>.

⁹⁰ Hilaire Tegnan and others, 'Mining Corruption and Environmental Degradation in Indonesia: Critical Legal Issues', *Bestuur*, 9.2 (2021), 90–100 <<https://doi.org/10.20961/BESTUUR.V9I2.55219>>.

⁹¹ Anastasia Suhartati Lukito, 'Revealing the Unexplained Wealth in Indonesian Corporation A Revolutionary Pattern in Non-Conviction-Based Asset Forfeiture', *Journal of Financial Crime*, 27.1 (2020), 29–42 <<https://doi.org/10.1108/JFC-11-2018-0116>>.

⁹² Bekov Ikhtiyor Rustamovich, Madiev Fakhridin Khoshim Ugli, and Sholahuddin Al-Fatih, 'Right to Privacy in the Development of Digital Technologies', *International Journal of Law and Society (IJLS)*, 4.1 (2025), 131–40 <<https://doi.org/10.59683/IJLS.V4I1.171>>.



database system containing all information on fiduciary registration, modifications, and terminations. Seventh, regarding the updating of criminal provisions, the criminal sanctions under Law Number 42 of 1999 no longer reflect contemporary economic values. Therefore, sanction regulation needs to be adjusted in line with developments in national criminal policy and the principle of proportionality in criminal law.⁹³

In addition to these structural aspects, the reconstruction also addresses execution norms that directly affect the balance between the parties. Article 23, paragraph (2) of Law Number 42 of 1999, which prohibits the debtor from transferring or leasing fiduciary assets without the creditor's consent, imposes excessive economic restrictions. Based on the principle of good faith under Article 1338 paragraph (3) of the Civil Code and the principle of protecting the weaker party, this provision could be reformulated to permit the use of fiduciary assets, provided that it does not harm the creditor or result in a refiduciary pledge.⁹⁴ Furthermore, Article 24 of Law Number 42 of 1999, which exempts the creditor from liability for the consequences of the debtor's actions, should be reconstructed to incorporate the principle of proportional responsibility. The legal basis for this is Article 1365 of the Civil Code on unlawful acts and the principle of contractual balance in obligations law. Regarding the creditor's preferential rights under Article 27 of Law Number 42 of 1999, normative reconstruction is necessary to ensure that the exercise of priority rights does not disregard the debtor's fundamental rights. In the context of procedural justice, the outcome of execution should be based on an independent assessment, and any surplus proceeds must be returned transparently to the debtor.⁹⁵

The most fundamental reconstruction concerns execution under Article 29 of Law Number 42 of 1999. Unilateral execution by the creditor needs to be aligned with Constitutional Court Decision No. 18/PUU-XVII/2019, which emphasises that execution must be based on either an agreed default or a court determination. Accordingly, the execution provision should incorporate requirements for prior notification, an opportunity for amicable settlement, and mechanisms for judicial oversight.⁹⁶ Finally, Article 34 of Law Number 42 of 1999, concerning surplus proceeds from execution, needs to be supplemented with a clear mechanism for returning the excess, including specified deadlines and administrative sanctions. This provision reflects the principles of distributive justice and legal certainty. Overall, the reconstruction of the norms in Law Number 42 of 1999 aims to harmonise legal certainty in financing with constitutional protection for the most disadvantaged parties. This approach emphasises that the effectiveness of the fiduciary institution is not solely determined by the power of execution, but also by a balanced legal protection between creditors and debtors.

Conclusion

State confiscation of fiduciary collateral generates dualistic legal consequences. For creditors, proprietary rights and preferential claims remain normatively intact (*droit de suite*); however, the ability to enforce these rights is impeded, thereby undermining the collateral's effectiveness as a repayment instrument and increasing the risk of loss. For debtors, confiscation results in the loss of control over the property and may lead to default, yet it does not extinguish the underlying debt obligation. Consequently, practices of confiscation without recognition or compensation for bona fide third parties risk diminishing legal certainty and perceptions of justice. Comparative analysis indicates that priority certainty and protection of third parties are more effective in systems with integrated, transparent, and

⁹³ Setiyono and others.

⁹⁴ Muhamad Irwan Lating, Gatut Hendro Tri Widodo, and Roni Pandiyangan, 'Kepastian Hukum Terhadap Debitur Leasing Atas Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia', *Jurnal Sains, Ekonomi, Manajemen, Akuntansi Dan Hukum*, 2.3 (2025), 128–36 <<https://doi.org/10.60126/sainmikum.v2i3.964>>.

⁹⁵ Simaela, Matuankotta, and Kuahaty.

⁹⁶ Angelica Janwarin, Mulyati, and Suryamah.



electronically based registration. Australia, through the Personal Property Securities Act (PPSA) and Personal Property Securities Register (PPSR), and the United States, through Article 9 of the Uniform Commercial Code (UCC), provide clear mechanisms for registration, priority, and enforcement, facilitating the management of conflicting interests. Indonesia has established a legal basis under Law No. 42 of 1999; however, normative and administrative strengthening is still required regarding implementation, registration integration, and explicit protection for bona fide creditors in the context of criminal confiscation. Based on John Rawls' theory of justice, the analysis demonstrates that the aggrieved parties consist of bona fide creditors and non-defaulting debtors. Fiduciary regulation must therefore be reconstructed to protect the most disadvantaged parties through procedural justice and a balanced consideration of state, creditor, and debtor interests. Such reconstruction should encompass ownership verification prior to seizure, notification and participation of all relevant stakeholders, recognition of creditors' priority rights, and proportional compensation mechanisms for bona fide parties. Execution norms must also align with decisions of the Constitutional Court of the Republic of Indonesia, which emphasise judicial oversight and fair procedures.

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