

STRENGTHENING LEGAL CERTAINTY ON THE ELECTRONIC REGISTRATION SYSTEM OF FIDUCIARY DEED IN INDONESIA

Maria Pranatia

Notary Office Dr Maria Pranatia, SH. MH, Jakarta
mariahelena886888@gmail.com

Abstract

Fiduciary guarantees constitute a type of guarantee commonly used by the business society to obtain loan from Banks or other financial institutions. As part of legal guarantee and for the sake of legal certainty, the document of fiduciary has to be registered. Administratively, since the government established an electronic fiduciary registration system, the system has in fact, not been fully supported by appropriate legal grounds. The prevailing law No 42/1999 silent on the registration system so that the registrar office conducts it manually up to year 2013. This research aims to explore and analyze regulations regarding the legal status of fiduciary agreements along with its electronic registration system and the role of Notary Public with the aim of providing recommendation to the ideal registration system supported by proper laws and regulations. Methodology of this study is based on normative legal research which carried out several approaches such as statutory approach, comparative approach and conceptual approach. In this paper, the normative legal research is also supported by empirical one. The results of the study essentially show potential problem on the legality of certificate of fiduciary notarial deed. In addition, legitimacy of registrar office is also questioned. Consequently, there is a need for amendment and harmonization of Law No. 45/1999 concerning Fiduciary Guarantee as well as its implementing regulations. Ultimately, the Indonesia fiduciary guarantee and its registration system will always be in harmony with the values of legal certainty, justice and usefulness.

Keywords: *Fiduciary Guarantee, Electronic Registration System, The Role of Notary*

1. INTRODUCTION

In the effort to support economic activities, particularly through the distribution of funds to the public, banks do this through their credit instruments, including through financing based on the principle of Sharia.¹ In essence, both activities are banking instruments functioned for provision of funds based on a loan agreement with a specified time period. Specifically, for credit lending, the basic elements considered for this bank credit are as follows:² (1) legal subject, (creditor and debtor);³ (2) value of credit⁴ (3) element of trust⁵ (4) element of time, and (5) element of reward.

These five basic elements of credit lending cannot be ruled out except with an agreement. However, in its practice, credit lending requires the need for collateral. It is

¹ Definition of credit that is stated refers to the provisions of Article 1(11) Law No. 10 of 1998 as an amendment to Law No. 7 of 1992 concerning Banking. Meanwhile, Financing based on Syariah principle refers to the regulation of Article 1 (12) of Law No. 10 of 1998 as an amendment to Law No. 7 of 1992 concerning Banking.

² Conceptually, the elements contained in the general debt-receivable relationship. See Gatot Supramono, *Debt Agreement 'Perjanjian Utang Piutang'*, Kencana, Jakarta, 2013, p. 13-17.

³ However, in practice this equal relationship often does not occur. See Gatot Supramono, *Ibid.*, p. 22-25.

⁴ In relation to the loan relationship, this element relates to the value of the debt. See *Ibid.*, p. 15-16.

⁵ This element relates to several things such as: (1) Character of the debtor (its character); (2) Debtor's ability; (3) Capital; (4) Guarantees; (5) Debtor's economic condition. Irma Devita Purnamasari, *Kiat-Kiat Cerdas, Mudah dan Bijak Memahami Masalah Hukum Jaminan Perbankan*, p.19-20; Compare with *ibid.*, p. 13-17

generally done by taking into consideration the business prospect, character, loyalty and reputation of the debtor for as long as the debtor is in business with the bank or other parties.⁶ In short, many factors are always considered to determine the size of the credit loan and the calculated value of collateral⁷ in order to protect the lending funds from proper and reasonable loss.⁸ This is to anticipate risk for non-performing loans that may happen.⁹

So far, efforts by banks to minimise risk of failing to pay eventually leads to financial institutions to oblige debtors to lend collateral which serves as a guarantee. In the case where the guarantee is in the form of collateral, then its value must be higher than the amount of credit agreed upon. Surely, the purpose of collateral is to protect credit from the threat of loss. In brief, the potential of loss must be anticipated with an instrument of guarantee. One form of this is collateral.¹⁰ Juridically, fiduciary guarantee is regulated under Law 42 of 1999 on Fiduciary Collateral (Fiduciary Law). However, for as long as 20 years of its implementation, the Fiduciary Law has highlighted various flaws. Among others are lack of legal clarity and certainty regarding who shall register the deed of fiduciary;¹¹ and its collateral registration.¹² Also, the existence of issues relating to the legal basis and mechanism of electronic registration of fiduciary collateral at the Fiduciary Registration Office¹³ and the legal certainty to creditors to execute the collateral.¹⁴ In addition, the absence of a Central Fiducia Database on a national scale which records all fiduciary collateral, fiduciary objects as well as fiduciary collateral certificate;

The flaws as such have led to the need for more study defined as the following research questions:

Firstly, how are the laws define the legal status and position of fiduciary deeds in loan agreements as well as the obligation to register it electronically in Indonesia?

Secondly, how is its implementation, particularly with respect to the recipient of the fiduciary to register the fiduciary deed electronically?

Thirdly, what are the ideal laws needed to support electronic fiduciary collateral registration systems?

⁶ Kasmir, *Dasar-Dasar Perbankan*, Jakarta, PT. Raja Grafindo Persada, 2005, p.7.

⁷ Widjanarko, *Hukum dan Ketentuan Perbankan di Indonesia*, Jakarta, Pustaka Utama Grafiti, 1994, p.26.

⁸ Salim HS, *Perkembangan Hukum Jaminan di Indonesia*, Jakarta, PT. Raja Grafindo Persada, 2014, p. 15.

⁹ Johannes Ibrahim, *Cross Default dan Cross Collateral sebagai upaya Penyelesaian Kredit Bermasalah*, Bandung, Refika Aditama, 2004, p. 27.

¹⁰ Tan Kamelo, *Hukum Jaminan Fidusia: Suatu Kebutuhan yang Didambakan*, Bandung, PT. Alumni, 2006 p. 4.

¹¹ This is because the fiduciary registration should be the obligation of the Notary and not an obligation of the fiduciary recipients or creditors. Because, as a state official, a Notary is the hand of the government to administer fiduciary registration in an orderly, safe, and legal manner. Law No. 30 of 2004 concerning Notary as amended by Law No. 2 2014.

¹² Fiduciary registration is basically a registration of deed and not a registration of fiduciary objects or collateral items. Consequently, any data changes to the fiduciary collateral data as recorded in the fiduciary certificate should be done by a notarial deed because it is an addendum to the contents of the fiduciary deed.

¹³ In the event that the online registration system is on a national scale, the provisions requiring registration by a Notary in the legal jurisdiction of the Law and Human Rights Regional Office become irrelevant and cannot be implemented. Therefore, the development of the information technology and online registration administration system which is only regulated in this Ministerial Regulation needs to be improved. The basis of regulation is in the Fiduciary Law. No. 42 of 1999.

¹⁴ D.Y. Witanto, *Hukum Jaminan Fidusia dalam Perjanjian Pembiayaan Konsumen: Aspek Perikatan, Pendaftaran dan Eksekusi*, Bandung. Mandar Maju, 2015 p. 57.

From a theoretical viewpoint, this legal research uses Gustav Radbruch's concept of the three fundamental pillars of law, which are justice, legal certainty and expedience.¹⁵ More specifically, it applies the justice theory by John Rawls¹⁶, and the theory of responsive law by Philippe Nonet.¹⁷ The ground to use Gustav Radbruch's theory is that culturally, the law cannot stand alone formally among society, instead it must be directed towards its purpose, which is to regulate life peacefully, by way of:¹⁸ (1) creating an organized society; (2) creating public order; and (3) creating equality within society.

2. RESEARCH METHODS

As indicated above, the focus of this research is the legality and legitimacy of the application of fiduciary collateral registration online in Indonesia. This matter is important as the Fiduciary Law does not mandate the use of electronic systems for registration, but it acknowledges registration through offline or manual means.

Considering that context, methodology used in this research is normative legal research¹⁹ with focus on reviewing the law and regulation supported by empirical legal research. It does apply historical approaches and comparative approaches²⁰ based on selected legal sources.

3. ANALYSIS AND DISCUSSION

3.1. Regulations Regarding Fiduciary Collateral Online Registration

As an economic instrument, fiduciary collateral institutions have been known since the Ancient Roman times. However, different to the concept of modern fiduciary, the old one was a legal institution with a wide range of slave or variety of objects which can be transferred to a third party.²¹ This collateral institution then died down and then appeared again during the modern civilization through a series of precedents or court decisions. Finally, this concept is obtaining a specific law in Indonesia called the Indonesian Fiduciary Law enacted in 1999.²²

So far, the existence of Indonesian Fiduciary Law can be considered to provide legal certainty to the public. Strengthening the aspect of legal certainty through the Fiduciary Law is not restricted in general fiduciary collateral institutions all this time. However, this has been further developed through the addition of new norms which impose a criminal sanction²³ for the violation as well as the administrative order which must be obeyed. Among others, the obligation to register fiduciary collateral so that the said collateral can officially serve as a legal foundation for fiduciary recipient to invoke their preferred right attached to fiduciary recipient

¹⁵ M. Muslih, "Negara Hukum Indonesia dalam Perspektif Teori Hukum Gustav Radbruch," *Legalitas*, Vol. IV No. 1, 2013, Faculty of Law Universitas Negeri Gorontalo, p.143

¹⁶ John Rawls, *Teori Keadilan : Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial dalam Negara*, Translation of Uzair Fauzan, Heru Prasetyo, Yogyakarta, Pustaka Pelayar, 2006.

¹⁷ Philippe Nonet and Philip Selznik, *Hukum Responsif*, Translation of Raisul Muttagien, Nusa Media (Bandung 2005).

¹⁸ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty, 2003), p. 77.

¹⁹ It means that legal research which places the law as a norm system. The norm system in question is about the principles, norms, rules of the laws and regulations, court decisions, agreements and doctrines (teachings) Salim HS., Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Desertasi*, PT. RajaGrafindo Persada, Jakarta, 2014, p. 13.

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum, Op. Cit.*, p. 93.

²¹ Herlien Boediono, *Third Book*, p. 202.

²² *Ibid.*

²³ This provision could be found under Article 35 and Article 36 of Fiduciary Law."

towards other creditors.²⁴ In brief, the enactment of the Indonesian Fiduciary Law indirectly causes the transfer of authority to execute collateral from the deed of fiduciary issued by the state. Consequently, the fiduciary collateral certificate holds executorial power, similar to a court decision that holds legal force.²⁵

To support the implementation of the Fiduciary Law, the government has issued some regulations regarding the implementation in accordance with its delegation of authority as stipulated in its Article 5(2) and Article 13²⁶. Among others, Government Regulation No. 21 of 2015 concerning Fiduciary Collateral Registration Procedure and Deed of Fiduciary Collateral Fee. This regulation was enforced to replace Government Regulation No. 86 of 2000 on the same subject. From a substantial standpoint, there is no significant difference between the two²⁷. However, the drafting of Government Regulation No. 21 of 2015 was a step to harmonize some technical regulations relating the fiduciary collateral. Among these regulations were The Decree of Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral; and No. 10 of 2013 concerning The Procedure of Electronic Registration of Fiduciary Collateral.²⁸

The efforts to harmonize these regulations must be done as Government Regulation No. 86 of 2000 did not accommodate electronic registration of fiduciary collateral. This meant there is an absence of law which underlies the practice of electronic registration for fiduciary collateral. The problem is, this deficiency was not followed by amending Fiduciary Law up until this point. As a legal consequence, there exists flaws in the legality of the electronic registration of fiduciary collateral²⁹. Surely, there is exists weakness from the aspect of legal certainty. From a normative aspect, there is no harmony between of the Fiduciary Law and the provisions in Article 3 of the Decree of The Ministry of Law and Human Rights No. 9 of 2013³⁰. In other words, there is an inconsistency in the Ministerial Decree towards the Fiduciary Law.

3.2. Implementation of Provision on Electronic Registration of Fiduciary Collateral Deed

The enactment of an instrument to regulate electronic registration of fiduciary collateral is based on Government Regulation No 21 of 2015³¹, this essentially is a policy which cannot wholly resolve the issue relating to the deviations towards the hierarchy of law³² and the principles of good governance. The Fiduciary Law yet to be revised is clearly the main

²⁴ Number 3 Paragraph 4 General Explanation of Fiduciary Law.

²⁵ Article 15(2) Fiduciary Law.

²⁶ Article 5(2) Fiduciary Law reads as follows: *“The preparation of the Fiducia Security deed as referred to in section (1) is subject to any cost whose amount is regulated further under Government Regulation.”* Meanwhile, Article 13 paragraph (3) of Fiduciary Law reads *“Further provisions on the procedures of Fiducia Security registration and the registration fee are regulated in Government Regulation.”*

²⁷ See the second paragraph in General Explanation of Government Regulation Number 21 of 2015.

²⁸ This regulation revokes the Decree of the Minister of Law and Human Rights No. M.01.UM.01.06 of 2000 concerning Forms and Procedures for Registration of Fiduciary Guarantees.

²⁹ Compared with the thesis of Dita Sabila, Faculty of Law, Universitas Sumatera Utara, 2018, *Perkembangan Pendaftaran Jaminan Fidusia dari Sistem Manual ke Sistem Online serta Hambatan-hambatannya.*

³⁰ The Article reads: *“Electronic Fiduciary Guarantee Registration as referred to in Article 2 can be done through the Electronic Fiduciary Guarantee Registration service kiosk in all fiduciary registration offices.”*

³¹ This Government Regulation amends Government Regulation No. 86/2000 concerning the same rules.

³² Read, Jeremy Bentham. *Teori Perundang-undangan : Prinsip-prinsip Legislasi Hukum Perdata dan Hukum Pidana*, 2006 translation by Nurhadi,

weakness in the implementation of online registration of fiduciary collateral. Mean time, the Fiduciary Law alone has different issues which must be resolved through clear regulations. Some problems include: a. The growth of privately made fiduciary collateral deeds; b. Many notaries still include a clause concerning the transfer of ownership from the owner of the fiduciary collateral to the recipient of the fiduciary collateral;³³ and c. There exists a guarantee for legal certainty, specifically the authority for the registration of fiduciary collateral deeds. In an ideal legal perspective, the application of the fiduciary collateral online registration system should be done based off of the Fiducary Law. This means, the registration of fiduciary collateral deeds should be done by still requiring the fiduciary recipient to visit to the Fiduciary Registration Office³⁴ which is located at the residence of the fiduciary giver³⁵. However, in practice, since the implementation of online registration, then the registration of the deed can be made without restriction to the territory or region. This legal reality has become reason for the emergence in disharmony between the Fiduciary Law and the Decree of The Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral. However, this matter does not lessen the meaning and benefit of the aforementioned registration system which has successfully optimized the benefits of the fiduciary collateral systems for the business of banking in Indonesia.³⁶

It needs to be noted that data on objects as fiduciary collateral that has been recorded in the Ministry of Law and Human Rights of 2017³⁷, shows the urgent need to provide a strong and clear legal basis to enact an online registration system for fiduciary collateral. To strengthen the said legal basis, it must start by revising the Fiduciary Law which is to be followed up with an improvement towards government regulations and other regulations below it. By amending the said law then inconsistent norms in other regulations relating to the enactment of electronic registration of fiduciary collateral in Indonsia can be removed. These various legal steps require complete and clear mapping so the legislative agenda can be done completely and properly. This legal research certainly shows that the Fiduciary Law naturally has its weaknesses, especially in regard to³⁸ the legal substance on:

- a. The position and level of priority of fiduciary collateral in comparison to other objects of guarantee;
- b. The possible online registration system for fiduciary collateral; and
- c. The time period for registration.³⁹

The whole problems identification can be approached from a normative aspect and evaluation from an empirical perspective at once, in the sense of by doing a comparative study.

³³ Normatively, this raises problems regarding the ownership status of objects that are the object of collateral. Therefore, the fiduciary recipient is not the real owner. Fiduciary recipients are only holders of material security guarantees as well as other material guarantees such as mortgages, mortgages and mortgage rights.

³⁴ See Article 12 paragraph (1) Fiduciary Law.

³⁵ See Explanation Article 11 Fiduciary Law.

³⁶ Read, HA Chalik, Marhainis Abdul Hay, *Beberapa Segi Hukum Dibidang Perkreditan*, Jakarta, Yayasan Pembinaan Keluarga UPN Veteran, 1982. Compare it to Muhamad Djumhana, *Hukum Perbankan di Indonesia*, Citra Aditya Bakti, Bandung 2014.

³⁷ Source from Directorate General of Legal Administrative Affairs Ministry of Law and Human Rights, 2017

³⁸ This view is based on the comparison of guarantee laws to a number of other countries such as the Philippines, New Zealand, Singapore and South Korea.

³⁹ Compare it with the provision in *Bill of Sale Act (Chapter 24)* Singapore which stated that the registration will only be valid for a period of one calendar year and can be extended.

Comparison between the registration system of fiduciary collateral with other countries cannot always done apple to apple. Apart from the difference between civil law and common law, the background and *ratio legis* of forming the law also differs. The same applies to the legal culture which exist in each individual country. The following results of the comparative study regarding fiduciary collateral is important to be considered.

- (1) In the Phillipines, the concept of fiduciary collateral is known as the term ‘chattel mortgage’. However, since the enactment of the Republic Act No. 11057, the term ‘chattel mortgage’ has been replaced with ‘security interest’ which covers a wider scope as it refers to all types of moveable property. In relation to the registration of fiduciary collateral, the Republic Act No. 11057 has developed an online registration system. However, the position of a fiduciary collateral certificate is not intended as legal product which holds execution power similar to a court decision which holds legal power. The certificate serves as evidence to signify that the fiduciary collateral has been registered⁴⁰.
- (2) In New Zealand, the provision concerning fiduciary collateral is found in the Personal Property Securities Act 1999 which regulates moveable property. However, unlike Indonesia’s Fiduciary Law which does not regulate the online registration system for fiduciary collateral, Section 139 Part 10 of the Personal Property Securities Act 1999 states that an online registration system is the system which applies in New Zealand. Even so, the urgency to register fiduciary collateral deeds does not aim to obtain a fiduciary collateral certificate. This means, the executorial authority over collateral is still attached to the fiduciary collateral deed as the registration is only intended as a notice to the state in order to guarantee legal certainty and protection towards the parties involved.
- (3) In Singapore, fiduciary collateral is regulated in the Bill of Sale Act (Chapter 24). Juridically, the Bill of Sale Act is a document which underlies the collateral guarantee between the giver and recipient of the collateral. The concept of fiduciary collateral in the Bill of Sale (Chapter 24) is also acknowledges an online registration system for fiduciary collateral deeds. However, unlike the Indonesian legal system which requires the registration to be done by a notary public within a time period of 30 days since the making of the fiduciary collateral deed⁴¹, Article 4 (1) of the Bill of Sale Act (Chapter 24) requires the deed to be registered within the time span of three days since the making of the deed.⁴² The mechanism and system of registration used is not specifically regulated. In other words, it is not emphasized which system applies for online registration of fiduciary collateral.
- (4) Generally, legal systems in East Asian countries such as Japan, South Korea and Taiwan acknowledge the legal concept which resembles a fiduciary collateral system⁴³. At first, the South Korean legal system did not specifically regulate

⁴⁰ SyCip Salazar Hernandez & Sailmaitan. “The New Personal Property Security Act and It’s Impact on Security Financing.” 2018.

⁴¹ Article 4 Government Regulation Number 21 Year 2005 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantees Deed.

⁴² Read the conditions *Article 4 Bill of Sale Act (Chapter 24)*.

⁴³ See Ying-Chieh Wu, “East Asian Trust at the Crossroads,” *National Taiwan University Law Review*, Vol. 10, No. 1, National Taiwan University, 2015, p. 95-108.

fiduciary collateral⁴⁴ until it enacted the Act on Security over Moveable Property, Claims, etc on June 10, 2010 (Act No. 10366). Similar to the Indonesian Fiduciary Law, the Korean Act on Security also requires registration of collateral. Article 7 and Article 35 of the Korean Act on Security states that the obligation is a condition in order for the collateral to be legally effective, so the creditor has the right of preference towards the collateral concerned⁴⁵. Moreover, based on Article 39, administrative authority to arrange registration of the fiduciary collateral rests on the Supreme Court. Interestingly, the registration system in South Korea is evidence that registration systems of fiduciary collateral can exist in both a manual form and electronic system.

3.3. The Development of an Ideal Fiduciary Collateral Deed Registration System for Indonesia

(1) Evaluation of Current Registration System

Basically, the obligation to register fiduciary collateral online is not regulated under Indonesian Fiduciary Law. This causes the problem of legality of the registration procedures and legitimacy of the fiduciary collateral certificate issued.⁴⁶ The problem being, since the beginning, the government did not have a legal basis to carry out electronic systems to register fiduciary collateral. Moreover, the change in laws concerning the system and procedure of fiduciary collateral registration has gone beyond the authority of the House of Representatives in the process of legislation.⁴⁷ Constitutionally, the government along with the House of Representatives must amend the Fiduciary Law first to serve as a legal foundation for fiduciary collateral registration online.⁴⁸

It must be acknowledged that changing the fiduciary collateral registration to an online system does have its benefits as its implementation is really more effective and efficient. However, as it is not regulated under the Indonesian Fiduciary Law, therefore procedures like issuing certificates can potentially have its legality questioned. This means that its legal certainty is not guaranteed. If this policy is contested for a judicial review at the Supreme Court, then there may be a possibility that government regulations and ministerial decrees which have been the foundation for the online registration of fiduciary collateral to be null and void. Therefore, the normative solution must still be thought out thoroughly in order for the online

⁴⁴ Blake Dawson Waldron Lawyers, *Draft Country Report for Singapore Conference Intersection of Secured Transactions and Insolvency Law Regimes*, Asian Development Bank, Manila, without year, p. 25.

⁴⁵ Provisions of Article 7 *Act on Security over Movable Property, Claims, etc* reads: “(1) Any acquisition, loss, or alteration of a security interest in movable property by an agreement shall become effective only when the acquisition, loss, or alteration is registered in the collateral security register. (2) The order of priority of security interests created in one and the same movable property shall be determined by the order of registration. (3) Except as otherwise provided in any Act, if registration in the collateral security register and delivery (including summary delivery, agreement on possession, and assignment of a claim to return subject matter as provided for the Civil Act have been completed with respect to one and the same movable property, the order of priority vis-a-vis the interests and rights in such cases shall be determined by the order of such events.”

⁴⁶ A Hamzah dan Senjun Manullang, *Lembaga Fidusia dan Penerapan di Indonesia*, Jakarta, Ind-Hill 10, 1987.

⁴⁷ M. Mahmud MD, *Politik Hukum di Indonesia*, Depok, PT. RajaGrafindo Persada, 2018, p. 7

⁴⁸ This norm is referred to by Friedman as an element of Legal Substance which also determines the effectiveness of law enforcement. Read Lawrence M Friedman, *Sistem Hukum : Perspektif Ilmu Sosial*, terjemahan. M. Khozim. Bandung, Nusa Media, 2013.

registration system which has been carried out all this time can obtain a clear and legitimate legal foundation as well as guarantee of legal certainty.

(2) Strengthening the Juridical Function of Fiduciary Collateral

The emphasis of the position of fiduciary collateral deeds requires the consideration of other consequences from the nature of an *accessoir* fiduciary collateral deed. This occurs when the principal debt which is guaranteed by fiduciary collateral is transferred to another party by way of *cessie* or subrogation.⁴⁹ When the principal/basic debt is transferred, then the status of the recipient of fiduciary collateral is also transferred. For that, a regulation concerning the position of the fiduciary collateral deeds as a mandatory agreement is required to guarantee more safety in credit transactions. That matter is not only important for parties of the bank to guarantee the credit given but also to guarantee a complete economic order, keeping in mind Indonesian Banking's functions is to push for economic growth and for social welfare.⁵⁰

It must be noted that the application of the online registration of fiduciary collateral deeds in Indonesia is behind in comparison to countries such as Phillipines, South Korea and New Zealand.⁵¹ The three countries has clear legal instruments, which are:

- a. *Republic Act No. 11057* in the Phillipines Legal System;⁵²
- b. *Act on Security Over Movable Property, Claims, etc* in the South Korean legal system;⁵³ and
- c. *Personal Property Securities Act 1999* in the New Zealand legal system.

The set of rules mentioned above explicitly states that the system of registration for collateral is a system that is acknowledged and officially used. In this regard, the Republic Act No. 11057 as well as Personal Property Securities Act 1999 states that an online registration sytem is one the systems applied for collateral registration in its respective country. On the other hand, Act on Security Over Movable Property, Claims, etc still applies a dualist system of registration, both offline and online. Therefore, in a juridically normative view, the South Korean government did not confront any obstacles concerning the legality and legal certainty aspect of the registered deeds.

From the aspect of purposiveness, efficiency and effectivity, the government have responded properly to the global changes and needs of society by implementing an electronic registration system.⁵⁴ The seriousness of the Indonesian Government can also be seen through various advancements and developments in online deed registration systems since its

⁴⁹ Article of Indonesian Civil Code,

⁵⁰ Iskandar Simorangkir, *Pusat Riset dan Edukasi Bank Sentral Indonesia, Pengantar Kebank Sentralan: Teori dan Praktek di Indonesia*, Jakarta, PT. Raja Grafindo Persada, 2014, p.5.

⁵¹ This comparative study is purposively made based on consideration of similarity under the Civil Law system like Indonesia, (Filipina dan Korea Selatan) and Common Law System represented by Selandia Baru. Further reading, Peter de Cruz, *Perbandingan Sistem Hukum*, translated by Narulita Yusoon, Bandung Nasamedia & Diadit Media 2014

⁵² Sylip Salazar Hernandez & Sailmaitan, *The New Personal Property Security Act and Its Impact on Security Financing*, Manila, 2018.

⁵³ Yully Kang, *Introduction to Act on Security Over Moveable Assets and Receivable*, Seoul, Jipyong Jisung, 2012.

⁵⁴ Windy Permata Anggun, *Kepastian Hukum dalam Pemberlakuan Sistem Administrasi Pendaftaran Jaminan Fidusia secara Elektronik terkait dengan Larangan Fidusia Ulang*. Artikel Ilmiah, Faculty of Law Universitas Brawijaya Malang, 2014.

enactment in 2013. Many changes have been made from only handling the registration of deeds to handling changes for fiduciary collateral certificates as well as removal of fiduciary collateral from the recordation book. Moreover, there is a plan to strengthen the system by integrating data with the Police institution as the issuing document of property ownership. Even so, the prevailing laws clearly does not explain the problem of the legal foundation of the registration system. Harmonisation between the Fiduciary Law and the laws beneath it is still needed, especially in order to emphasize the legality and legitimacy of the existing system of online registration.

On the other hand, in regard to credit loans with banks, there are provisions which must be fulfilled relating to collateral in the form of money or property⁵⁵, which must be stipulated in a fiduciary collateral deed. In accordance with Article 13 of the Fiduciary Law, fiduciary collateral deeds must be registered by the recipient of fiduciary collateral, or someone authorized by a power of attorney or a competent representative. This shows that the registering subject is of optional nature which means that it does not strictly apply only to the fiduciary recipient, such as a bank or a creditor, but also someone appointed. This signifies that the Fiduciary Law does not explicitly state a notary public as one of the parties that may apply for registration of a fiduciary collateral deed. For the purpose of administrative order and for data accuracy, the deed is done by a notary. The reason being notaries are considered to be more knowledgeable and understanding towards what has to be properly done. All are right in accordance with the fiduciary law and law on the notary public.

(3) An Ideal System for Fiduciary Collateral Registration

a. The Developments System of Information Technology for Registration of Fiduciary Collateral Deeds

Up until this point, the legal basis concerning the online registration of fiduciary collateral deeds have not been legitimized adequately. Due to the fiduciary law, being a legal reference, was not prepared for an online registration model. From a regulatory standpoint, there is an inconsistency between Article 3 of the Ministerial Decree No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral and the elucidation of Article 11 of the Fiduciary Law. The Fiduciary Law does not delegate authority to the Minister to formulate regulations concerning the administrative procedures of fiduciary collateral deed registration electronically. The policy makes fiduciary collateral certificates issued by the Fiduciary Registration Office becomes weak in its legality. It also poses a serious problem it relates to the binding force of the deed towards the third party. Although, so far in its practice it has not been questioned. However, a critical academic study has found legal flaws that must be fixed and strengthened.

In general, the regulations regarding the online registration system of fiduciary collateral deeds have changed in terms of format and mechanism of deed registration as regulated under the Fiduciary Law. From the form of the regulation itself, the change can be seen as a step to simplify the procedure and increase effectivity and efficiency to the public.

⁵⁵ If the credit guarantee is in the form of goods, the law regulates it by requiring the debtor to make a fiduciary guarantee agreement. Such an agreement must be legally registered with a special institution, the Fiduciary Registration Office. The problem is, after the fiduciary agreement was made, who should register it with the Fiduciary Registration Office. This problem needs to get a clear and firm arrangement.

Such policy is reflected in laws regulating fiduciary collateral registration procedure, including provisions of the fiduciary collateral deed fees. In relation to this, principles of this law is not very different to the provisions of the Fiduciary Law, except for the online registration system of fiduciary collateral deeds, which is only based on Government Regulation No. 21 of 2015. From the perspective of purposiveness, the concept of fiduciary collateral deed online registration clearly helps the society provide ease in registering their deeds. However, for its legal certainty, the online system still needs the support of a strong legal foundation.

Furthermore, taking into account that the scale and coverage of the regulations on fiduciary collateral registration deeds covers all of Indonesia, then there are steps to be taken to strengthen the reliability and accuracy of information technology systems. It means that from a technical angle, it must be formulated with a system that is modern and supported with advanced technology. Moreover, also taking into account the online registration system of deeds requires accuracy and reliability, therefore this system must be designed and developed in order to avoid the system broken or experiencing any unnecessary technical difficulties. Besides that, notaries should also be educated to fully understand and to carry out the online system properly. This means the Fiduciary Registration Office as the online system operator as well as the fiduciary recipient, including the person authorized by a power of attorney, specifically a notary should all possess expertise and ability to make use of the system.

b. The Development of the National Record of Fiduciary Collateral

Pursuant to the publicity principle which means to disseminate information to a wide society, the implementation of the publicity principle in deed registration⁵⁶, revision of fiduciary collateral certificate⁵⁷, change in certificate, and removal of fiduciary collateral are essentially actualization of the principle of transparency in a credit agreement. This statement is not without basis. Transparency and accountability are principles of every administrative system. In fact, without these principles, the administrative system cannot be reliable. In many cases, the society needs access to information quickly and accurately. Therefore, the state's initiative to formulate a database of fiduciary collateral deeds on a national scale became important and urgent. The implementation of the publicity principle shows the role of the state in guaranteeing the validity of a deed as well as acknowledging the rights of the creditor towards the debtor. Apart from that, the principle of publicity also gives ease to accessibility to data and information of credit loans to third parties concerned. Surely, such information is important if the third party decided to make a credit agreement with the debtor. Easily accessed data and information will ensure that the future debtor is bound to the credit agreement with the creditor and using his property as a collateral. Furthermore, the legible data about the size of credit and time span for the obligation to repay. Valid and complete information and data will be a consideration for the third party to decide plans for business with the future creditor concerned.

⁵⁶ The application appears in the obligation to register for fiduciary guarantee in order to contain several things such as: identity of the fiduciary giver and recipient; as well as date, fiduciary collateral number, name and domicile of the notary who made the fiduciary collateral certificate.

⁵⁷ The application appears in the obligation to repair the certificate to contain at least several things such as: (1) number and date of the fiduciary guarantee certificate to be repaired; (2) improvement data; and (3) remedial information.

From the perspective of administration, the Fiduciary Law should have avoided the practice of fraud by minimizing the potential of multiple registrations. The Fiduciary Law also has to clearly regulate the norms to avoid practices that may threaten the interests of the creditor, especially in order to guarantee the repayment of credit given. It must be noted that the position of a fiduciary collateral deed which is considered to be a formal requirement to obtain a fiduciary collateral certificate⁵⁸, has made it possible for multiple registrations. Moreover, according to the Fiduciary Law⁵⁹, the Fiduciary Registration Office is not obliged to carry out an assessment towards the correctness of the information included in the deed of fiduciary collateral. The Fiduciary Registration Office only checks the data⁶⁰. This means that the Fiduciary Collateral Office only carries out the function of registration, but it cannot prevent the occurrence of multiple registrations of property as previous fiduciary collateral. In this issue, the phrase “not doing an evaluation towards the validity” is not continued with an explanation about the meaning of “validity” (of data) indicates that the Fiduciary Registration Office can easily not carry out complete and thorough validity checking.

The Fiduciary Registration Office can easily record a plea without evaluating the possibility of the collateral being fluidized to previous creditor. The Fiduciary Registration Office can make records as a part of its administrative job, considering the recording process solely as a requirement for the fiduciary recipient to obtain a fiduciary collateral certificate. Such circumstances clearly do not align with the publicity principle in Fiduciary Law, which is expected to be able to guarantee legal certainty in the fiduciary collateral registration system. One of the steps that needs to be taken by the government is to develop a national database, which contains, in particular, information relating to fiduciary collateral from all fiduciary registration offices which operates online and in real time. This is not a difficult task due to the support of advanced information technology. Learning from experiences of building a database in the field of trademark and patents, which can even be connected to a database abroad, presumably the design and development of such data should not be difficult to be realized. Data base on Patent and Trademark could be used as a benchmark.

4. CONCLUSION

Considering the above discourse analysis, it can be drawn some conclusions as follows:

- 4.1. Substantially, there is legal disharmony and inconsistency between the Decree of Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral as that regulation does not have a basis neither is it mandated under the Fiduciary Law to establish online registration system.
- 4.2. There is a vagueness regarding who, by law, is obliged to register the fiduciary collateral deed. Article 13 (1) of the Fiduciary Law states that the obligation to register fiduciary collateral is attached to the fiduciary recipient. In its implementation, the registration can be authorized to a third party. As there exists no obligation for a notary public to create a fiduciary deed, the provision has potential to cause legal uncertainty, especially if such registration is done by a third party, besides the notary who made the

⁵⁸ Read Explanation Article 13 paragraph (3) Fiduciary Law.

⁵⁹ Explanation Article 13 paragraph (3) Fiduciary Law.

⁶⁰ Checking Data is regulated in Article 13 paragraph (2) Fiduciary Law.

deed. In such a case, such provisions will increasingly open up more potential problem due to weak of legal certainty.

4.3.Revision of Fiduciary Law is an urgent necessity that must done. Because, although there is no judicial review of the Fiduciary Law or its regulations on implementation, the Fiduciary Law has several weaknesses and shortcomings. Among them, is the absence of a legal basis for the implementation of an online registration system for fiduciary collateral deeds. Similarly, there is a weakness in the legal aspect of issuing fiduciary collateral certificates. Along with that, revisions are also needed to eliminate potential problems such as the registration of multiple fiduciary deeds, and the negligence of a fiduciary recipient's obligation to register a fiduciary deed.

In connection to the aforementioned conclusion, it is advisable to do as follows:

4.4.Prepare a draft bill of amending Fiduciary Law, in accordance to global needs and needs of the business world. The main points of substance that need to be refined, among others are:

- (1) to establish that registration of a fiduciary collateral deed is mandatory and carried out with a nationally integrated online system (electronic);
- (2) to emphasize the provisions regarding role of Notary to register the fiduciary collateral deed at the Fiduciary Registration Office.
- (3) to affirm the legal status of a fiduciary collateral deed certificate as a document which hold full executorial power.

4.5.Strengthen and develop a national fiduciary collateral deed database administered by the Fiduciary Registration Office, Ministry of Law and Human Rights, and to integrate the database system with the police force, as it often requires proof of ownership of property used as collateral.

4.6.Conducting socialization and educating the society after the amendment of the Fiduciary Law to business actors, banks and notaries as parties who play an important role in the implementation of Indonesian Fiduciary Law, particularly in making deeds and processing online registration of fiduciary collateral deeds to the Fiduciary Registration Office.

REFERENCES

- Anggun, Windy Permata. 2014. "Kepastian Hukum Dalam Pemberlakuan Sistem Administrasi Pendaftaran Jaminan Fidusia Secara Elektronik Terkait Dengan Larangan Fidusia Ulang." Universitas Brawijaya.
- Bentham, Jeremy. 2006. *Teori Perundang-Undangan: Prinsip-Prinsip Legislasi Hukum Perdata Dan Hukum Pidana*. Bandung: Nusa Media.
- Black Dawson Waldron Lawyers. n.d. "Draft Country Report for Singapore Conference Intersection of Secured Transactions and Insolvency Law Regimes." Manila.
- Budiono, Herlien. 2018. *Kumpulan Tulisan Hukum Perdata Di Bidang Kenotariatan*. Ke-2. Bandung: P.T. Citra Aditya Bakti.

- Chalik, H. A., and Marhainis Abdul Hay. 1982. *Beberapa Segi Hukum Di Bidang Perkreditan*. Jakarta: Yayasan Pembinaan Keluarga UPN Veteran.
- Cruz, Peter de. 2014. *Perbandingan Sistem Hukum*. Bandung: Nusa Media.
- Djumhana, Muhamad. 2014. *Hukum Perbankan Di Indonesia*. Bandung: P.T. Citra Aditya Bakti.
- Friedman, Lawrence M. 2013. *Sistem Hukum: Perspektif Ilmu Sosial*. Bandung: Nusa Media.
- Hamzah, A., and Senjun Manullang. 1987. *Lembaga Fidusia Dan Penerapannya Di Indonesia*. Jakarta: Ind-Hill Co.
- Hernandez, SyCip Salazar, and Sailmaitan. 2018. *The New Personal Property Security Act and Its Impact on Security Financing*.
- Ibrahim, Johannes. 2004. *Cross Default Dan Cross Collateral Sebagai Upaya Penyelesaian Kredit Bermasalah*. Bandung: Refika Aditama.
- Indonesia. 1945. *The 1945 Constitution of the State of the Republic of Indonesia*.
- _____. 1992. *Law Number 7 Year 1992 Concerning Banking*.
- _____. 1998. *Law Number 10 Year 1998 as an Amendment to Law Number 7 Year 1992 Concerning Banking*.
- _____. 1999. *Law Number 23 Year 1999 Concerning Bank of Indonesia*.
- _____. 1999. *Law Number 42 Year 1999 Concerning Fiducary Law*.
- _____. 2000. *Government Regulation Number 86 Yer 2000 Concerning Fiduciary Collateral Registration Procedure and Deed of Fiduciary Collateral Fee*.
- _____. 2004. *Law Number 30 Year 2004 Concerning Notary*.
- _____. 2014. *Law Number 2 Year 2014 as an Amendment to Law Number 30 Year 2004 Concerning Notary*.
- _____. 2015. *Government Regulation Number 21 Yer 2015 Concerning Fiduciary Collateral Registration Procedure and Deed of Fiduciary Collateral Fee*.
- Kamelo, Tan. 2006. *Hukum Jaminan Fidusia: Suatu Kebutuhan Yang Didambakan*. Bandung: P.T. Alumni.
- Kang, Yully. 2012. *Introduction to Act on Security Over Movable Assets and Receivable*. Seoul: Jipyong Jisung.
- Kasmir. 2005. *Dasar-Dasar Perbankan*. Jakarta: P.T. Rajagrafindo Persada.

- Kelsen, Hans. 2007. *Teori Umum Hukum Dan Negara: Dasar-Dasar Ilmu Hukum Normatif Sebagai Ilmu Hukum Deskriptif-Empirik*. Jakarta: Bee Media Indonesia.
- Kriekhoff, Valerine J. L. 2015. *Metode Penelitian Hukum*. Jakarta.
- Language Centre Department of National Education. 2005. *Kamus Besar Bahasa Indonesia*. Jakarta: Balai Pustaka.
- Marzuki, Peter Mahmud. 2015. *Pengantar Ilmu Hukum*. Jakarta: Kencana.
- _____. 2010. *Penelitian Hukum*. Revisi. Jakarta: Kencana.
- MD, Mohammad Mahfud. 2018. *Politik Hukum Di Indonesia*. Depok: Rajagrafindo Persada.
- Mertokusumo, Sudikno. 2003. *Mengenal Hukum: Suatu Pengantar*. Yogyakarta: Liberty.
- _____. 1988. *Hukum Acara Perdata*. Yogyakarta: Liberty.
- Minister of Law and Human Rights of the Republic of Indonesia. 2013. *Ministerial Decree of Minister of Law and Human Rights Number 9 Year 2013 Concerning Enacmy of Fiduciary Collateral Electronically*.
- _____. 2013. *Ministerial Decree of Ministry of Law and Human Rights Number 10 Year 2013 Concerning Procedure to Register Fiduciary Collateral Electronically*.
- Mulyata, Jaka. 2015. "Keadilan, Kepastian Dan Akibat Hukum Putusan Mahkamah Konstitusi Republik Indonesia Nomor 100/PUU-X/2012 Tentang Judicial Review Pasal 96 Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan." Universitas Sebelas Maret.
- Muslih, M. 2013. "Negara Hukum Indonesia Dalam Perspektif Hukum Gustav Radbruch." *Legalitas IV*, no. 1: 130–52.
- Nonet, Phillippe, and Philip Selznick. 2015. *Hukum Responsif*. Bandung: Nusa Media.
- Purnamasari, Irma Devita. 2011. *Kita-Kita Cerdas, Mudah Dan Bijak Memahami Masalah Hukum Jaminan Perbankan*. Bandung: Kaifa.
- Sabila, Dita. 2018. "Teori Keadilan: Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara." Universitas Sumatera Utara.
- Salim, H. S. 2014. *Perkembangan Hukum Jaminan Di Indonesia*. Jakarta: P.T. Rajagrafindo Persada.
- Salim, H. S., and Erlies Septiana Nurbani. 2018. *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi*. Jakarta: Rajawali Press.
- Satrio, J. 2014. *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen: Aspek Perikatan, Pendaftaran Dan Eksekusi*. Bandung: Mandar Maju.

Simorangkir, Iskandar. 2014. *Pengantar Kebanksentralan: Teori Dan Praktik Di Indonesia*. Jakarta: P.T. Rajagrafindo Persada.

Supramono, Gatot. 2013. *Perjanjian Utang Piutang*. Jakarta: Kencana.

Widjanarko. 1994. *Hukum Dan Ketentuan Perbankan Di Indonesia*. Jakarta: Pustaka Utama Grafiti.

Witanto, D. Y. 2015. *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen: Aspek Perikatan, Pendaftaran Dan Eksekusi*. Bandung: Mandar Maju.

Wu, Ying-Chieh. 2015. "East Asian Trusts at the Crossroads." *SSRN Electronic Journal* 10, no. 1: 79–125. <https://doi.org/10.2139/ssrn.2694581>.