

## INDONESIAN FIDUCIARY GUARANTEE IN THE ERA OF EASE OF DOING BUSINESS: QOU VADIS?

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### Abstract

The formation or renewal of laws is always accompanied by legal politics. Legal politics has two dimensions. The first dimension is the basic policy and the second dimension is the enactment policy. In developing countries, enactment policies often predominate. This dominance has both positive and negative sides. The renewal of the UUJF in the era of ease of doing business also has legal politics that can be studied in the two dimensions of legal politics. This normative study discusses the political direction of the Fiduciary Guarantee law in the context of the legal politics of movable property guarantees in Indonesia in the current era of ease of doing business. The results of this study found the importance of changing the UUJF immediately because of the weakness in the substance of the law. The renewal of the UUJF in the study of legal politics found that the political direction of fiduciary guarantee law in the future is directed at the unification of all movable property guarantee regimes into a special arrangement. The dimension of the enactment policy that dominates in the renewal of the fiduciary guarantee rules is the same as at the time of the formation of the UUJF. With the background to support the government's economic policy through regulation, the change in the nomenclature of the Fiduciary Guarantee Bill was changed to the Movable Property Bill. For this reason, the legislators must be able to provide a balance in the legal politics of renewing this fiduciary guarantee rule in the Movable Property Guarantee Act. The problem of legal certainty and legal protection as the basic policy of law reform must be prioritized to be able to create the law that is aspired to

**Keyword:** Fiduciary Guarantee, EoDB (Easy Doing of Business), Indonesia.

### INTRODUCTION

The existence of various weaknesses and developments in the practice of fiduciary guarantees is the reason for the renewal of Law Number 42 of 1999 concerning Fiduciary Guarantees (UUJF). Weaknesses in the substance of the UUJF such as the absence of a sanction article in the rules that are facultative (forcing) rules for the abolition of guarantees, there is no supervisory agency for the implementation of fiduciary guarantees, the unregulated several objects of fiduciary guarantees that should be objects of fiduciary guarantees such as copyrights and aircraft and other weaknesses including the issuance of the Constitutional Court Decision No.18/PUU-XVII/2019 which enforces conditional executive rights and the presence of online fiduciaries that have not been regulated in UUJF requires the government to immediately renew UUJF. In 2018, UUJF was included in the National Legislation Program (Prolegnas) to be changed. However, for 3 years the Fiduciary Guarantee Bill has not been approved by the House of Representatives (DPR).

In the formation or renewal of the law, there is always legal politics that accompanies it. Legal politics (legal policy) is the purpose and reason behind the formation of laws and regulations. Legal politics is the purpose and reason behind the formation of statutory regulation. Legal

politics is important to know the background of the formation of a statutory regulation and determine what will be formulated in the articles of the legislation. Hikmahanto Juana distinguishes legal politics in two dimensions. The first dimension is Basic Policy. The basic policy is the basic reason or purpose for enacting statutory regulation. The second dimension is the Enactment Policy. Enactment Policy is the purpose or reason behind the enactment of a statutory regulation.<sup>1</sup> The basic policy or the basic reason for the enactment of a statutory regulation can later be seen in the considerations for considering a law. Meanwhile, the implementation policy can be traced from the factual situation that was taking place in society at that time.

At the beginning of the formation of the UUJF, from the two dimensions of legal politics above, legal certainty and legal protection were the basic policy in the form of UUJF, and as a policy implementation was motivated by the need for economic improvement during the monetary crisis in 1999. At this time the Draft Fiduciary Security Law which has been prepared by the legislators has not yet been ratified. The draft even underwent a change in nomenclature to the Movable Property Guarantee Bill. This change is certainly related to the legal politics that accompanies the renewal of the fiduciary guarantee law. The implementation of the government's legal politics in the economic field is the issuance of Law No. 11 of 2020, known as the Job Creation Act (UUCK). UUCK supports the EoDB (Easy of Doing Business) ranking improvement program which is given the slogan "Era of Ease of Doing Business" launched by the government, which affects the renewal of various laws including fiduciary guarantees.

Determining the political direction of statutory law needs to be done as well as possible. The two dimensions of legal politics, namely the Basic Policy and the Enforcement Policy, really need to be considered because between the existence of laws and the formulation of articles, they become a liaison between the legal politics that have been established and the implementation of the legal politics in the implementation of laws and regulations. This means that there must be a correlation and consistency between the implementation of the law and what is defined as legal politics.

Legal politics has a close relationship with statutory politics. Legislative politics is a sub-system of legal politics. Legislative politics is a policy regarding the determination of the side or object of the formation or renewal of legislation. Both the Basic Policy and the enforcement policy will certainly affect the process of its formation and the content of the legislative regulations. The dominance of one of these dimensions will bring problems in the future. For example, the hasty formation of laws due to political needs causes defects in the mechanism for forming the laws and regulations and results in the imperfect formulation of articles so that there will be substantial problems with these norms. Therefore, legislators really need to pay attention to legal politics which is the goal of reforming and forming the law. From the explanation above, this paper wants to see what will be the legal politics of renewing the fiduciary guarantee rules and answer the question of where is the legal political direction for the renewal of the Fiduciary Guarantee Law in the era of ease of doing business in Indonesia.

## METHODOLOGY

This study uses a normative juridical method that focuses on the use of secondary data research materials, namely materials that are supported by library data. In addition, this research also uses a statutory approach as well as a historical approach.

## RESULTS AND DISCUSSIONS

A fiduciary is a material guarantee for movable and immovable objects that cannot be guaranteed by mortgage in Indonesia. Fidusia is a guarantee institution that has been known for a very long time in Rome. At first it grew and developed from a customary law. Fiduciary was then accepted as a guarantee institution that answered the needs of the community at that time. In the history of its development in European countries, fiduciaries are famous and synonymous with civil law countries, which mostly develop in European countries.

In Indonesia, the fiduciary existence is related to the Dutch colonization of Indonesia. In the Netherlands, the decisions of the Hoge Raad: Bierbrouwerij Arrest, dated January 25, 1929, N.J.1929,616, and the Hakkers-van Tilburg arrest (Decision HR.21-6-1929 N.J.29-1096) became the jurisprudence underlying the implementation of fiduciary there.<sup>2</sup> In Indonesia, the first fiduciary guarantee institution received recognition in the Supreme Court Decision dated August 18, 1932, in the case of Battafsche Petroleum Maatschappij (BPM) cs Pedro Clignett.<sup>3</sup> Since 1999 fiduciary law has been enacted in Law No. 42 of 1999 concerning Fiduciary Guarantees (UUJF). Over the past 10 years, fiduciary guarantees have experienced significant developments. Weaknesses in substance and implementation appear along the way UUJF. Both the weaknesses and the developments that have occurred indicate that there is a need to reform the UUJF as soon as possible.

Some of the weaknesses of UUJF can be described as follows:

1. Some of the formulations of articles in this law are only facultative. Every article which means mandatory must be imperative (coercion). The absence of sanctions makes these articles facultative. These articles consist of Article 5 which requires the imposition of a fiduciary with a notarial deed, Article 11 concerning the obligation to register a fiduciary and Article 25 paragraph (3) concerning the obligation to notify the cancellation of a fiduciary guarantee (roya fiduciary). The absence of sanctions causes the implementation of the article to be ineffective so that it does not achieve the purpose of its formation. Appendix II of Law Number 12 of 2011 CHAPTER III concerning Language Variety of Legislation Part B concerning Choice of Words or Terms Number 268 has provided guidelines for the formation of a law. In the appendix, it is stated that to express the existence of a predetermined obligation, the word obligatory is used. If these obligations are not fulfilled, then the person concerned will be subject to sanctions.
2. Some objects that have been declared as objects of fiduciary guarantee by other laws have not been regulated in UUJF. These objects such as airplanes and Intellectual Property Rights.

3. Enforcement of online fiduciary guarantee registration has not been regulated in the law. Online registration is only regulated by several government regulations and ministerial regulations.
4. Decision of the Constitutional Court no. 18/PUU-XVII/2019 causes the weakness of the direct execution institution (parate execution) which is the hallmark of the execution of fiduciary guarantees. This decision of the Constitutional Court provides a condition for the enforcement of executorial rights, namely if there is a breach of contract clause and there is a willingness from the debtor to submit the object of guarantee. This of course makes it difficult for creditors to execute the object of fiduciary guarantees, while the ease of execution is important to pay off creditors' receivables. This decision also resulted in the inconsistency of norms between the Constitutional Court's Decision and Article 30 of the UUJF which required the voluntary surrender of the Guarantee Object in the context of carrying out executions.

In 2018 the government completed the Academic Paper on the Draft Law concerning the amendments to the UUJF. Prior to the ratification of the draft, in 2021, the nomenclature was changed to the Movable Property Guarantee Bill and included in the priority Prolegnas (National Legislation Program). This change is of course influenced by the government's legal politics over material guarantees.

Law and politics are inseparable entities. Mahfud MD said that the law is formalization or crystallization of the political wills of the rulers which are interrelated and interconnected.<sup>4</sup> Legal politics (legal policy) is the purpose and reason behind the formation of statutory regulation. Legal politics is important in order to understand the reasons for the formation of the law and determine the things that will be included in the articles of the law.

Legal politics is the official policy of the state towards the law that will be stipulated in the formation of a new law or the replacement of an old law in order to achieve the will of the state. That is, the law as a tool to achieve the goals of the state.<sup>5</sup> In order to achieve this goal, the state has the absolute right to form laws. Based on the delegation of authority granted by the 1945 Constitution, the DPR and the President as legislators can determine a rule, prohibition, obligation, or limitation contained in the law that is being made. This is a policy choice for legislators (open legal policy). However, this authority must be in accordance with the goals of the Indonesian nation, Pancasila as the source of all sources of law and Constitutional Norms that are human rights or non-human rights as stated in the body of the 1945 Constitution. If the policies taken are not in accordance with these parameters, the Court can cancel Constitution as an examiner of laws that are not in accordance with the 1945 Constitution.<sup>6</sup>

Indonesia as a country based on the law (*rechtstaat*), not on power (*machstaat*) makes law a means to achieve the country's aspired goals.<sup>7</sup> Determining the objectives and reasons for the formation of laws and regulations is part of the process of forming the law itself. Like other laws, UUJF is a political product that has a purpose and reason for its formation. Legal politics can be categorized into two dimensions, namely Basic Policy, namely legal politics which is the basic reason for the formation of a statutory regulation, and Enforcement Policy, which is

the purpose or reason behind the enactment of statutory regulation. Legal certainty and protection are basic policies that were the goals to be achieved by UUJF at the beginning of its formation. This objective is stated in the preamble considering the UUJF which states:

That in order to fulfill legal needs that can further spur national development and guarantee legal certainty and be able to provide legal protection for interested parties, it is necessary to establish complete provisions regarding fiduciary guarantees and such guarantees need to be registered at the Fiduciary Registration Office.

Meanwhile, behind legal certainty and legal protection, the basic policy of UUJF itself cannot be separated from the government's legal politics in the economic field. The background of the monetary crisis in 1998 prompted the government to form policies that could increase economic growth. For this reason, several laws were formed to overcome these problems, one of which was UUJF. This was the enactment policy of the UUJF at that time.

In the formation of the UUJF, the policy dimension of enforcement dominated the presence of the law more than the basic policy dimension. Efforts to increase economic growth became the background for the formation of the UUJF as well as several other laws during the monetary crisis that occurred in 1998. At that time the government had to immediately issue policies that could spur economic growth. Attracting investors to invest in Indonesia requires policies that can support government programs. Several laws in the economic sector were presented to regulate it. The dominance of such enforcement policies is common in developing countries considering that laws are often used as a political tool for the government in achieving its goals, whether positive or negative.

At this time, the direction of the legal policy for reforming the UUJF is still dominated by the policy dimension of implementation. Although basic policy issues such as legal certainty and legal protection are still the reasons for the renewal of the UUJF, the issue of the country's political economy remains the main issue in the renewal of the UUJF. The need to increase the rank of EoDB (Easy of Doing Business) is a political-economic target that must be supported by various legal regulations to strengthen the program. This is as shown in the news on the official portal of the Directorate General of General Legal Administration (Ditjen AHU) stating that they are moving quickly to support the National Priority Program by rearranging the draft law which is entering the stage of changing the nomenclature, namely the Fiduciary Guarantee Law into the Movable Property Guarantee Law. This effort is important to accommodate all forms of guarantees that exist in Indonesia and protect the community. This is expected to increase Indonesia's rating in terms of ease of doing business.<sup>8</sup>

The EoDB Index is an index used to assess how a country provides ease of doing business for business actors in that country. From 2001 until now, this ranking has become a guideline for investors to invest in a certain area in the country. Indonesia is ranked 73rd in 2021. The effort to increase this ranking later became the political economy in Indonesia. Economic politics has a harmonious relationship with legal politics.

This means that the implementation of the economic system in Indonesia requires a harmonious arrangement. According to Fauzi Aziz, this is caused by: <sup>9</sup>

1. Indonesia adheres to a constitutional economic system
2. The implementation of the economic and business system requires guarantees of legal certainty
3. Indonesia also adheres to a managed market system that requires regulation and under certain conditions also requires deregulation
4. The implementation of macro- economic policies requires conducive regulations

In the political economy, regulations must be designed to facilitate the running of the political economy built by the government.

Indonesia's current economic policy is to absorb as many investors as possible by providing convenience for investors to be able to invest in Indonesia in order to improve the Indonesian economy. For this reason, the government forms regulations that support Indonesia's economic goals. Through Law Number 11 of 2020 concerning Job Creation (UUCK), the government seeks to simplify and harmonize business permits and encourage investment that can accelerate economic transformation. This is the dimension of policy enforcement in the legal politics of the UUCK. In this case, UUCK was formed solely to carry out the government's political economy in addition to its basic policy of providing legal certainty for the community.

UUCK carries the concept of omnibus law. Omnibus law comes from Latin which starts with the word omnibus which means for all. When juxtaposed with the word Law, it has a legal meaning for all.<sup>10</sup> The concept of omnibus law is found in America, Australia and other countries. According to Fahri Bachmid, the concept of omnibus law is the concept of a legal product whose function is to unify various themes, subjects, materials, and laws and regulations that have differences to become one holistic legal product.<sup>11</sup> In UUCK, there are 11 clusters of legislation that regulate several themes. In general, these themes are related to investment and the economy.

The existence of UUCK underlies the renewal and formation of other laws and regulations, including changes to the Fiduciary Guarantee Bill. In order to harmonize material guarantees, especially movable property guarantees, the legislators made changes to the nomenclature of the Fiduciary Guarantee Bill into the Movable Property Guarantee Bill. Of course, this is not only a change in nomenclature but also the Movable Property Guarantee Bill also carries the Omnibus concept by unifying the collateral rules, namely Pawn, Mortgage, Fiduciary in one unified law.

The drafting of the movable property guarantee bill needs to be done carefully. Several problems from the old law have not been resolved, such as several objects of fiduciary security that have not been regulated in the law, the absence of sanctions in facultative articles, problems with the effectiveness of Royalty, and problems with the execution of fiduciary guarantees which are increasingly difficult with the decision of the constitutional court to get a solution.



Not only that, legislators must also be careful in choosing the name of the Movable Property Bill because fiduciary guarantees also apply to immovable objects that cannot be guaranteed by mortgage.

The dominance of enactment policies encourages the government to be responsive to problems that occur in the midst of society. Sometimes not only responding to problems that occur but also responsive to the need to realize the country's political goals. Responsiveness must be interpreted positively, namely responding to needs or interests in society. Philippe Nonet and Philip Selznick revealed that responsive law would act as a facilitator to respond to the social needs and aspirations of the general public.<sup>12</sup>

Responsive law has the characteristics of a flexible and political law. Forming a responsive law is actually a way of law that is full of risk (high risk). The law becomes too malleable, reduces the authority, and delegitimizes the law itself is a risk that will overshadow the formation of a responsive law.

This often happens in Indonesia. The act of legislators act responsively often tends to be reactive. This means that the government tends to form laws to respond quickly but with less in-depth considerations and studies. Of course, this has resulted in many laws that have been problematic since they were enacted and have resulted in not being able to achieve the goals of their formation philosophically.<sup>13</sup> Regarding this matter, Refly Harun said that the government's choice to use the omnibus law to form streamlined and harmonized regulations were very good. However, the problem is, it takes a special team to analyze any regulations that need harmonization, partially or completely removed because relying on inter-ministerial work can take quite a long time.<sup>14</sup>

In legal politics, the tendency of the government to act reactively shows that the formation or renewal of laws more often prioritizes enforcement policies than basic policies. Thus, this has an impact on the preparation of laws, which can result in haste in formulating articles of law so that there are legal substances that are not too careful in their formulation and can cause problems in the future. One example of a law that was born out of a reactive attitude is the Job Creation Act.

The haste to follow up the increase in Eodb's ranking by issuing a copyright law has caused the substance of the law to be imperfect, so this law was submitted for formal review at the Constitutional Court. On November 25, 2021 through Decision Number 91/PUU-XVIII/2020, the judges of the Constitutional Court decided that the establishment of copyright law is contrary to the 1945 Constitution and has no binding legal force if it is not corrected within 2 (two) years from the decision it was spoken.

This decision can be interpreted as that the Constitutional Court ordered the legislators to make changes within a period of 2 years and if it is not carried out then the UUCK is considered unconstitutional and no longer valid. The basis for its formation is the job creation law.

Based on developments in the course of reforming the Fiduciary Guarantee Law, it is very important for legislators to pay attention to the balance of basic policies and enforcement policies in order to realize the law that is aspired to (*ius constituendum*) in determining the political direction of fiduciary guarantee law in the current era of ease of doing business.

## CONCLUSION

Legal politics is needed in the formation of laws to see the reasons for their formation and what is included in the articles of the law. Therefore, determining the right direction of legal politics is very important. The balance between the basic policy dimensions and the enactment policy dimensions in the legal politics of law is very necessary so that the formation of the law can achieve the target as an aspired law (*ius constituendum*) and can also fulfill the government's political goals through regulations.

The political direction of fiduciary guarantee reform, which has been dominated by enforcement policies, is to support the ease of doing business program in Indonesia. This can be seen through the change in the nomenclature of the Fiduciary Guarantee Bill to the Movable Property Guarantee Bill. This aims to simplify the rules for guaranteeing movable goods in one law to support the ease of doing business in Indonesia. In carrying out this simplification concept, responsive legislators need to also pay attention to the basic policies of the formation of the movable property guarantee law, namely providing legal certainty and legal protection so that they can achieve the law that they aspire to (*ius constituendum*).

## Limitations and Future Studies

In the future, legislators in reforming fiduciary guarantee rules need to realize the importance of balance in determining the political direction of fiduciary guarantee law. By avoiding excessive domination of the enactment policy while still paying attention to the basic policy of the formation of the Movable Property Guarantee Law will be able to provide legal certainty and legal protection for the community. In responding to government politics through responsive law-making regulations, it must be able to carry out the reform or formation without haste and still adhere to the desire to provide the law that is aspired to (*ius Constituendum*).

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