



In Search of Forfeited Fiduciary Assurance: A Justice Approach

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Article	Abstract
Keywords: Assurance; Fiduciary; Forfeited; Justice; Article History Received: Apr 25, 2025; Reviewed: Apr 27, 2025; Accepted: Oct 20, 2025; Published: Oct 21, 2025.	<i>This study examines the legal consequences and proposes a fair model of confiscation that balances the interests of creditors, debtors, and the state. The research employs a normative legal approach, integrating John Rawls' theory of justice and progressive legal theory, and applies descriptive methods and deductive syllogistic analysis to examine relevant doctrines, legal principles, and judicial practices. The findings reveal significant gaps in current fiduciary regulations, particularly the absence of mechanisms to address the consequences of state confiscation, to provide compensation to affected parties, and to protect receivables rights in cases of loss or damage. In response, the study proposes a reconstructed legal framework that introduces a sanctioning scheme coupled with proportional compensation, explicitly incorporated into court judgments. This model upholds procedural justice and equality among parties, aligning with Rawls' difference principle. The study concludes that revising fiduciary regulations to include explicit provisions for state confiscation and associated compensation mechanisms should enhance legal certainty, ensure proportional protection of all parties, and promote a fair and effective enforcement system.</i>



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INTRODUCTION

Confiscation of evidence in criminal cases is a state instrument for recovering losses and enforcing the law. This circumstance is evidently attributable to the persistent prevalence of corruption, collusion, and nepotism in Indonesia (Risky et al., 2023). Corruption has caused substantial financial losses, underscoring the critical necessity of accountability procedures (Al-Fatih et al., 2025). The challenge of combating corruption lies in the concept of returning state finance (Alam et al., 2022). The application of fiduciary collateral to the state remains an issue, particularly when such assets are used in a criminal act or obtained through criminal activity. This issue

concerns not only the state's interest in law enforcement and in recovering losses caused by crime, but also the protection of the rights of creditors and debtors related to fiduciary collateral.

Security law recognises movable and immovable guarantees. In this context, movable assets are secured through fiduciary security, which falls under special guarantees. Fiduciary security has been applied in Indonesia since the Dutch colonial period, as a form of security arising from jurisprudence, namely the *Bierbrouwerij Arrest* of January 25, 1929. In Indonesia, fiduciary security was recognised based on the Arrest of the *Hooggerechtshof* (HGH) on August 18, 1932, in the BPM Clignet case (Sofwan, 1997).

In the fiduciary security process, the debtor is the owner of the asset or object being pledged, while the creditor is an individual or corporation holding a receivable secured by the fiduciary guarantee (Hidayah et al., 2023). This means that, in fiduciary security, the asset remains under the debtor's ownership, with only the rights transferred (Soegianto et al., 2019). Thus, the creditor holds the asset solely based on the principle of trust. This condition is congruent with the definition given by Hamzah and Manullang, who describe fiduciary security as a method of transferring ownership rights from the owner (the debtor) to the creditor under a principal agreement (a debt agreement), but only the rights are transferred legally (juridically leveraging) and held by the creditor in trust as collateral for the debtor's debt. The asset itself remains under the control of the debtor, not as an *eigenaar* (owner) or *bezitter* (possessor), but rather as a *detentor* or *bouder*, on behalf of the creditor (*eigenaar*). In fiduciary arrangements, the ownership of the pledged object is indeed transferred based on trust, while the asset itself remains under the original owner's control.

Several cases indicate that there is currently no clear guidance for law enforcement on tracing the origin of seized assets and the status of ownership of evidence, which may lead to other issues in judicial decisions regarding evidence. One such case is the Koperasi Simpan Pinjam (KSP) Indosurya, involving the convict, Henry Surya. The Attorney General stated that this was the largest fraud case in Indonesian history, involving the total losses of IDR 106 trillion and affecting approximately 23,000 clients of the cooperative. Initially, the West Jakarta District Court acquitted the defendant because the alleged acts were more appropriately categorised as civil matters. This judgment then sparked controversy, given that the assets controlled by the defendant from 2012 to 2020 originated from banking crimes and money laundering (Putusan Mahkamah Agung Nomor 2113K/Pid, Sus/2023 Dengan Terdakwa Henry Surya, 2023).

These assets, whether movable or immovable, were subsequently confiscated according to Article 46 of Law Number 10 of 1998 concerning Banking. The subsequent mechanism for asset confiscation and auction is performed by the Asset Recovery Agency of the Indonesian Attorney General's Office in coordination with

the Witness and Victim Protection Agency (LPSK), in accordance with Article 30A of Law Number 11 of 2021 concerning the Attorney General's Office.

A critical issue arising from this case is the legal status of assets that serve as fiduciary collateral. In banking and financing practices, many assets, including motor vehicles and real property, are pledged as fiduciary collateral, whereby ownership rights are transferred to the creditor in trust while physical control remains with the debtor. When the state confiscates these assets due to involvement in criminal activity, ambiguity arises regarding the protection of the rights of both creditors and debtors. On the one hand, the state has the authority to confiscate assets to compensate victims; on the other hand, creditors holding fiduciary rights risk losing their proprietary claims, while debtors simultaneously lose control over the pledged assets. The law enforcement practice confirms that determining the content of these concepts has always been a problem (Rustamovich et al., 2025).

Another illustrative case is reflected in Court Decision Number 1550/Pid.B/LH/2020/PN Plg, which raises legal issues regarding the confiscation of evidence in the form of motor vehicles. In this court decision, the defendant, Yosa Bin Nangcik, was found guilty of the criminal offence of "participating in the transportation of timber harvested in forest areas without authorisation." The panel of judges subsequently ordered that the evidence, consisting of two trucks and one vehicle registration certificate (hereinafter referred to as STNK), be confiscated by the state. Notably, one of the confiscated trucks was registered under the name of Herry, a third party who was not a defendant in the case.

Herry subsequently filed a *derdenverzet* (third-party opposition), as reflected in Court Decision Number 37/Pdt.Bth/2021/PN Plg. He argued that he was the lawful owner of a HINO Fuso truck with license plate BG 8745 IL, based on the vehicle registration certificate (STNK) issued under his name. His ownership claim was based on a hire purchase agreement with PT Indo Mobil Finance Indonesia, although the instalment payments were still ongoing. The Public Prosecutor rejected this argument for the following reasons: (1) the opposing party lacked legal standing, as ownership of a motor vehicle can only be proven through the Vehicle Ownership Document (hereinafter referred to as *Buku Pemilik Kendaraan Bermotor* or BPKB), not the STNK; and (2) under the hire purchase agreement, legal ownership of the vehicle remains with the financing company until the final installment is paid. Ownership of the object transfers only from the seller to the buyer once the final instalment has been paid (Suharnoko, 2004). From a legal standpoint, Herry's status as the party listed on the STNK is insufficient to establish ownership. According to the Indonesian National Police Regulation Number 5 of 2012 concerning Motor Vehicle Registration, the Identification and the Vehicle Ownership Document constitutes the sole legal instrument that legitimises vehicle ownership. Accordingly, the lawful owner of the

vehicle was PT Indo Mobil Finance, since it held the BPKB. Therefore, the party entitled to file a legal challenge should have been PT Indo Mobil Finance, not Herry.

The problem arose because the judge, through the court decision, failed to consider the financing institution's position as the lawful owner of the truck. As a result of the seizure, PT Indo Mobil Finance suffered a financial loss, with monthly lease payments suspended, totalling IDR 26,000,000. Meanwhile, Herry incurred multiple losses: (1) the forfeiture of the down payment already made; (2) continued obligation to pay instalments despite the truck being confiscated by the state; and (3) loss of potential income from the truck rental business.

From the perspective of positive law, Law Number 42 of 1999 concerning Fiduciary Security does not explicitly regulate the mechanism by which the state may confiscate fiduciary objects. In this case, Law Number 42 of 1999 has a strong position, because the stronger the binding power of a law or regulation, the higher its policy or position will be (Al-Fatih, Safaat, Widiarto, Uyun, et al., 2023). This normative gap generates legal uncertainty and the potential for violations of constitutional rights guaranteed under Articles 28G and 28H of the 1945 Constitution, as well as of property rights regulated under the Civil Code. The government and law enforcement officers play an essential and crucial role (Al-Fatih & Aditya, 2024). However, the issue is further complicated by the *droit de suite* principle in fiduciary law, which stipulates that the right to an object follows the object, regardless of its possessor (Kamelo, 2014). In realising the state of law, a legal order has been drafted and enacted in the legislation, which serves as a guide for the nation (Siboy, Al-Fatih, Nur, et al., 2022).

Furthermore, the regulation on ownership rights and the prohibition on arbitrary seizure are set out in the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata, or *Burgerlijke Wetboek*), particularly in Articles 570 and 574. These articles establish that the owner of an object has the right to protect objects under their control from unlawful appropriation by any party, the right to enjoy the object even though the right may be revoked for public interest under the law with compensation, and the right to demand from anyone who possesses the object that it be returned in its existing condition. The confiscation of fiduciary objects simultaneously harms both the fiduciary grantor and the fiduciary holder. The grantor suffers a loss due to the inability to control and utilise the fiduciary object without transferring ownership, while the fiduciary holder suffers a loss because they cannot transfer ownership while unable to receive payment obligations from the grantor (Hafid, 2021). In this case, corruption cases in Indonesia's legal system have always had different meanings under the old order, the new order, and the reform era, leading to different punishments being imposed across orders. (Sunaryo & Al-Fatih, 2022).

Based on an analysis of several court decisions related to the confiscation of evidence, fundamental issues have been identified regarding fiduciary objects confiscated by the state. To date, no comprehensive guidelines have been provided to

law enforcement officers for tracing the origin of evidence and determining lawful ownership status before the issuance of a confiscation order. This gap often leads to other issues, such as legal opposition (*derdenverzet*) or claims from aggrieved parties. Consequently, remodelling the confiscation mechanism is necessary to ensure it provides legal certainty and protection for both creditors and debtors, rather than being solely oriented toward the interests of the state.

Several studies have examined the legal protection of fiduciary security in cases of corruption. A study conducted by Zulfikar (2022), entitled *Legal Protection of Fiduciary Security Holders Against the Confiscation of Collateral Objects in Corruption Cases*, analyses the legal status of fiduciary security objects confiscated by the state and counted as substitute payment penalties under court decisions in corruption cases committed by debtors. The novelty of this study lies in the use of John Rawls' theory of justice as the analytical approach. This theory emphasises the principle of justice as fairness, applied in this context to assess the position of parties adversely affected by the confiscation of fiduciary security assets. Furthermore, this approach offers a more comprehensive perspective, considering that it not only focuses on the legal status of the fiduciary security object, but also takes into account the substantive dimension of justice in balancing the state's interest in recovering losses from corruption and the protection of private parties' rights within fiduciary arrangements.

Another relevant study, entitled *Reconstruction of Regulatory Legitimacy in Asset Seizure by the Corruption Eradication Commission (KPK) Based on Justice* (Irianto, 2022), proposes a reconstruction highlighting the fulfilment of human rights and adopting a restorative paradigm to replace the retributive paradigm in asset seizure practices. The novelty of this article lies in its application of John Rawls' theory, which prioritises justice for the least advantaged. Accordingly, the proposed reconstruction is aimed at revising provisions that fail to provide legal protection for the most disadvantaged parties.

Accordingly, this study presents a legal reconstruction of fiduciary security in the context of evidence confiscation. This reconstruction is expected to set a balance between the rights and obligations of the parties, thereby minimising potential post-seizure disputes. Using John Rawls' theory of justice, the study suggests that the confiscation of evidence must prioritise the protection of the most adversely affected parties, including creditors, debtors, and the state, particularly when the criminal act causes financial losses to the state

METHODS

This study employs normative legal research, which seeks to understand the law as it exists (*das sein*). It examines how the law should be applied to achieve justice, legal certainty, and benefits. Information supporting the research data was gathered through

a literature review, including library materials and other relevant references (Warsito, 1997). These library materials were then examined, and the secondary data were used as legal sources (Soekanto & Mamudji, 2003). This legal research also employed philosophical, statutory, case, comparative, and conceptual approaches. The philosophical approach concerns the regulation of the ideal model for the state's confiscation of fiduciary objects to ensure justice. The statutory approach involves examining all statutory laws and regulations addressing the legal issues in this study to determine the optimal and equitable model of fiduciary object confiscation for the state, the fiduciary grantor, and the fiduciary holder (Marzuki, 2010). The case approach focuses on the *ratio decidendi*, which refers to the legal reasoning employed by judges. The *ratio decidendi* can be observed in the “considerations” section of judicial decisions. It represents the judge’s effort to achieve justice through well-founded arguments. Furthermore, a comparative approach examines the confiscation of fiduciary assets by analysing the regulatory frameworks in both criminal and civil law. With this method, the study seeks to highlight the similarities and differences in how each legal domain governs the confiscation of fiduciary collateral, particularly with respect to the balance between state interests in asset recovery and the protection of private parties’ rights. Last but not least, a conceptual approach deeply conceptualises the underlying principles for constructing an equitable model of asset confiscation involving fiduciary objects for the state.

RESULTS AND DISCUSSION

Regulation of Fiduciary Security Objects in Indonesia

In legal literature, the term *fiducia* derives from the concept of a *fiduciary transfer of ownership and*, etymologically, refers to “trust.” In Dutch, this legal term is referred to as *fiduciare eigendom overdracht* (FEO), meaning the transfer of ownership based on trust. Generally, *fiducia* is understood as a legal relationship between the creditor and the debtor, grounded in the principle of trust. Within this principle, the debtor holds the conviction that, upon the full settlement of his obligations, the creditor is legally bound to return the collateral previously transferred. Conversely, from the creditor’s perspective, the principle of trust implies reliance on the debtor not to misuse the object of collateral. It entails both a moral and legal obligation to preserve the collateral appropriately (Latukau, 2019). Thus, the principle of trust in fiduciary arrangements may be regarded as a fundamental element of contractual relations, signifying the belief that the parties will duly fulfil their agreed-upon obligations at the designated time (Muhtarom, 2014).

Fiduciary security essentially entails the transfer of ownership rights over an object, yet such a transfer is not absolute. This is due to the application of the *constitutum possessorium* mechanism, in which only the ownership title is transferred. At the same time, the physical possession of the object remains with the debtor or fiduciary grantor.

Such a legal construction is intended to allow the debtor to continue utilising the secured object for economic purposes (Juliani & Lubis, n.d.). However, in the event of default or failure to fulfil contractual obligations, the creditor is entitled to assume control of the collateral. Under Indonesian law, fiduciary security is governed by Law Number 42 of 1999. Article 1, paragraph 2 of this law defines fiduciary security as a security right over movable objects, both tangible and intangible, as well as buildings that cannot be encumbered with a mortgage right (Hayati, 2016). In arranging fiduciary security, the physical possession of the secured object does not need to be transferred from the debtor to the creditor. What is transferred is only the legal ownership title of the object, while its actual possession remains under the control of the debtor. The essential characteristic of fiduciary security is that the collateralised object remains in the possession of the debtor as the fiduciary grantor, thereby allowing the debtor to continue using and benefiting from the object for economic purposes as long as the contractual obligations to the creditor are duly fulfilled (Nugraha, 2018).

In the event of default, the creditor retains the full right to repossess the collateral, amidst the fact that the physical object remains under the debtor's control. However, problems arise when the debtor engages in fraudulent acts, such as pledging or transferring the fiduciary object to a third party. Similarly, there are cases in which creditors misuse collateral for unlawful purposes. In such circumstances, the debtor may be subject to sanctions based on the fiduciary agreement or applicable laws. The state holds the authority to confiscate fiduciary objects when they are used in the commission of criminal offences. For instance, fiduciary collateral may be confiscated by the state when the debtor uses it for criminal purposes, such as illegally collecting funds from the public.

According to Law Number 42 of 1999 concerning Fiduciary Security (UUJF), fiduciary objects remain under the ownership of the fiduciary grantor, namely the debtor, regardless of the transfer of legal title to the creditor. This condition sparks the potential for misuse, as the debtor retains the ability to use the fiduciary object in various unlawful activities, such as economic criminal acts and narcotics offences. Although Fiduciary Security Law explicitly regulates the ownership status of fiduciary objects, law enforcement practice demonstrates a tendency among judicial authorities, particularly judges and prosecutors, to disregard these provisions. Such an approach implicitly undermines the legal force of the Fiduciary Security Law itself, consequently undermining the legal protection afforded to fiduciary recipients as creditors. This issue is further exacerbated by the absence of specific provisions within the Fiduciary Security Law regarding the legal consequences of fiduciary objects confiscated by the state. The lack of explicit statutory regulation in this regard results in inadequate protection of creditors' rights (Aneta Indriya Sari, 2021).

As long as the fiduciary object is not transferred into inventory, the object that is subject to fiduciary security remains in the possession of the debtor as the fiduciary

grantor and the owner of the collateralised object. This provision affirms that the fiduciary security ownership transfer does not instantly remove the debtor's physical control over the object. Within the framework of property law, the principle of *droit de suite*, or the right to follow, which constitutes an inherent characteristic of absolute property rights (*in rem*), is expressly recognised under Indonesian statutory law. This principle ensures that property rights attached to an object remain enforceable against any party in possession of the object (Dewi, 2019). If a bus or truck, for example, is transferred or sold to a third party as a fiduciary object, the debtor is deemed to be in default against the creditor as the fiduciary recipient. In such circumstances, the creditor retains the right to enforce the fiduciary object under the *droit de suite* principle inherent in property rights.

Furthermore, Article 24 of Law Number 42 of 1999 concerning Fiduciary Security explicitly stipulates that the fiduciary recipient shall not be held liable for any actions or negligence of the fiduciary grantor arising from contractual relations or unlawful acts connected with the use or transfer of the fiduciary object. Consequently, the creditor as the fiduciary recipient is exempt from any legal consequences arising from the debtor's misuse of the collateral. This principle equally applies to consumer financing practices, which inherently involve risks associated with the use and transfer of fiduciary objects and, thus, cannot be eliminated within such financial activities.

Legal Consequences of Confiscation of Fiduciary Collateral by the State

In fiduciary security arrangements, the creditor acts as the fiduciary recipient, exercises specific rights, and fulfils obligations to secure repayment of the debtor's obligations (Asmaniar, 2022). The fiduciary recipient retains ownership of the fiduciary security while allowing the debtor to maintain physical possession (Sinaga, 2018). When the debtor defaults, the fiduciary recipient may sell the collateral and apply the proceeds to repay the outstanding debt. The fiduciary recipient has priority in accessing the proceeds, with any remaining amount returned to the debtor. In cases of default, the fiduciary recipient can initiate execution through the judicial system, ensuring lawful, fair, and legally certain enforcement of rights (Hidayat, 2024).

Fiduciary recipients bear essential obligations that support the validity and fairness of fiduciary arrangements, including registering the fiduciary collateral to obtain legal protection and recognition. In this case, the fiduciary recipient returns the fiduciary object to the debtor after fulfilling the underlying obligations while ensuring the debtor retains physical possession during the security period. Additionally, any remaining proceeds from the sale of the collateral are returned to the ownership of the collateral, thereby safeguarding the debtor's financial interests and ensuring equitable treatment. By actively exercising these rights and fulfilling these obligations, the fiduciary recipient balances the interests between creditors and debtors, strengthens legal certainty, and promotes procedural justice within fiduciary transactions.

The explanation above implies that a fiduciary recipient is the creditor who simultaneously holds control over the ownership of the fiduciary collateral, together with all rights and obligations attached thereto (Kamello, 2014). Since the physical object is not under its direct possession, it is difficult for the fiduciary recipient to ascertain how the fiduciary provider utilises the fiduciary collateral. As previously discussed, fiduciary security emphasises flexibility, allowing the fiduciary provider to retain possession of the object to continue economic activities aimed at repaying loans to the fiduciary recipient (Hasanah, 2021). In such a condition, while under the possession of the fiduciary provider, the collateralised object may, on economic grounds, be leased to a third party. In this case, the lessee may potentially misuse the object to commit criminal acts. The risk borne by the creditor is that law enforcement authorities may confiscate the fiduciary collateral for investigation and prosecution. Consequently, the fiduciary recipient may lose ownership rights over the collateral or suffer from the cessation or suspension of repayment by the fiduciary provider. There is no legal clarity regarding immediate compensation for the fiduciary recipient or any alternative remedies arising from the fiduciary provider's unlawful conduct (Zulfikar, 2022a).

Another significant risk faced by the fiduciary recipient is the challenge when executing the fiduciary collateral once it has been seized as evidence in a criminal case (Tantimin, 2023). This risk may further escalate once the criminal act is proven, as the fiduciary collateral may not only be seized but also confiscated by a court or appropriated by the state. Confiscation by the state exacerbates the problem, hampering the fiduciary recipient's ability to reclaim or enforce rights over the collateral object (Afra et al., 2022). To safeguard its position as the holder of ownership rights over the fiduciary object, the fiduciary recipient may rely on two legal norms. First, fiduciary security grants the creditor a preferential right. Second, fiduciary security upholds the principle of *droit de suite*, which ensures that the creditor's rights remain attached to the collateral regardless of its transfer or possession by other parties.

First, a preferential right (*droit de préférence*) can be granted for the creditor in the event that the debtor commits a breach of contract or defaults on debt repayment, thereby entitling the fiduciary recipient to sell or execute the collateralized object. This provision is set out in Article 1, point 2 and Article 27 of Law Number 42 of 1999 concerning Fiduciary Security. Article 1, point 2 stipulates that the fiduciary recipient shall be prioritised in comparison with other creditors. Furthermore, Article 27, paragraphs (1) and (2) affirm that the fiduciary recipient is entitled to precedence over other creditors and is prioritised in obtaining repayment from the proceeds of execution. Thus, the preferential right reinforces the legal standing of the fiduciary recipient in securing repayment and in resolving disputes concerning fiduciary security.

The second normative principle in fiduciary security is the doctrine of *droit de suite*, meaning that the creditor as fiduciary recipient retains the right to pursue the collateral object regardless of its possession by any party. However, this principle is subject to exceptions, particularly with respect to collateral objects classified as inventory. While Law Number 42 of 1999 concerning Fiduciary Security does not define inventory, it enumerates objects considered as such, including all goods, except production machinery, private vehicles, and private residences used as fiduciary security. This regulatory framework appears to expand the categories of assets eligible for fiduciary collateral, as previously defined, to include inventory goods, merchandise, receivables, machinery, and motor vehicles.

The application of this principle entails that, even when the state confiscates the fiduciary collateral, its legal ownership remains with the fiduciary recipient rather than being transferred to the state. Consequently, the creditor retains the right to sell or transfer ownership of the collateral to another party, provided that applicable legal provisions are observed. In line with the decisions of the Constitutional Court, the state cannot confiscate fiduciary collateral amidst the absence of a final and binding court judgment.

From this explanation, the legal consequences for the fiduciary recipient, if the state confiscates fiduciary collateral, can be summarised as follows. First, the fiduciary creditor continues to hold ownership rights over the collateral, and such rights do not automatically transfer to the state (Andini et al., 2023). This ownership can be substantiated through documentary evidence, such as a motor vehicle ownership certificate in the creditor's possession. Second, if the fiduciary collateral is to be confiscated by the state, such confiscation must be based on a final and binding court decision. Third, even in the event of confiscation following a final court ruling, the fiduciary creditor does not lose the preferential right (*droit de préférence*) that the law has granted. This is because the creditor retains the fiduciary security certificate, which carries executorial force, reinforced further by the existence of a final and binding judicial decision (Cassela, 2015).

In fiduciary security arrangements, the debtor serves as the fiduciary grantor, actively exercises defined rights, and fulfils obligations, while the creditor functions as the fiduciary recipient. Although the legal ownership of the fiduciary collateral transfers to the creditor, the debtor maintains operational control and practical use of the object, reflecting the trust-based nature of fiduciary arrangements. The debtor's rights serve to protect their interests and ensure fair treatment throughout the fiduciary period.

The debtor possesses and utilises the fiduciary collateral to generate income or sustain livelihood, provided that such use does not reduce the object's value. The debtor retains legal protection in cases of default or dispute, requiring the creditor to conduct any sale of the collateral transparently at a fair price, notify relevant parties, and allow an appropriate interval before executing the collateral (Rusdiana et al., 2025).

The debtor also holds the right to reacquire ownership upon full repayment of obligations and to receive prior notification if the collateral is subject to execution (I Wayan Kharismawan, 2019).

In parallel, the debtor bears obligations that uphold the integrity of the fiduciary arrangement. The debtor must safeguard the collateral from damage, refrain from transferring ownership without the creditor's consent, and promptly inform the creditor of any changes in the collateral's possession or condition (Zulfikar, 2022b). The debtor must also use the collateral responsibly, avoiding excessive use that diminishes its value, and comply with the agreed repayment schedule. Noncompliance empowers the creditor to execute the collateral through lawful mechanisms, including public auction or private sale, thereby ensuring enforceability and protection of both parties' rights (Arifin et al., 2023).

The debtor, as the fiduciary provider, is entitled only to possess the fiduciary object and is prohibited from transferring its ownership to another party. The object remains under the debtor's control rather than a third party's, raising the legal question of the consequences if the object is confiscated by the state (Ilma, 2024). In civil law, possession (*bezit*) refers to the condition in which an individual exercises control over an object as if it were their own, regardless of their being the lawful owner. According to Prof. Subekti, *bezit* is nonetheless protected by law for two reasons: first, it is regulated under Article 529 of the Indonesian Civil Code, which defines possession as the condition of controlling or enjoying an object under one's authority or through another person as if it were one's own; second, if possession is exercised in good faith and continuously, it may serve as the basis for acquiring ownership rights over the object (Putri, 2020).

Within the fiduciary security system, the debtor is deemed to act in good faith if they do not re-pledge the fiduciary object (Article 17) and do not transfer the object without the prior consent of the creditor (Article 23, paragraph 2 of Law Number 42 of 1999 concerning Fiduciary Security). Should the fiduciary object be confiscated by the state, several legal consequences arise: the debtor may be considered in default due to the loss of possession of the object, yet they remain obliged to fully repay the debt, while the creditor retains the right to claim compensation. From the state's perspective, such confiscation must respect the rights of the creditor, as the law grants fiduciary recipients a priority right (Article 27, paragraph 1). The position of fiduciary creditors is equated with that of secured creditors holding rights such as mortgages and pledges, and in bankruptcy proceedings, fiduciary creditors are treated as separate creditors with the authority to execute their collateral independently outside the insolvency process (Soedirjo et al., 2023). In this case, creditors and debtors are also protected by law and the constitution (Aditya & Al-Fatih, 2023b). In the concept of a welfare state, the state has an obligation to extend its responsibilities to the social problems that society faces

(Siboy et al., 2023). According to (Iksan et al., 2023), Indonesian law is primarily aimed at providing prosperity, protection, assurance, and justice to all people.

Forfeited Fiduciary Assurance Based on Justice Approach

After understanding the legal consequences of the confiscation of fiduciary collateral for both creditors and debtors, as well as the positions of creditors and debtors in the context of Rawlsian justice, several articles in Law Number 42 of 1999 concerning Fiduciary Security require a reconstruction of norms. These articles, as related to the previous discussion, include those primarily concerned with execution norms based on a crucial type of statutory regulation, particularly the basic order of statutory regulations and the orderly formation of statutory regulation (Siboy & Al-Fatih, 2025). Furthermore, this reconstruction aims to apply the difference principle in Rawlsian justice, which prioritises the interests of the least advantaged. The analysis of this principle highlights the urgency of this reconstruction: fiduciary security serves as a low-cost, easily accessible financing instrument to support or improve the ease of doing business in Indonesia. This is because regulatory reform in Indonesia has not found common ground (Al-Fatih & Shahzad, 2025). The 2018 academic draft amendment to Law Number 42 of 1999 concerning Fiduciary Security specifies the scope of revisions, as elaborated below.

First, regarding fiduciary encumbrance, Article 5 of the Fiduciary Security Law stipulates that an asset must be encumbered with fiduciary security through a notarial deed in Indonesian. To facilitate public access to fiduciary instruments and improve the efficiency of managing fiduciary security, the amendment should consider exemptions for assets of particular value (registered assets of low value and single-object assets), allowing them to be encumbered through private deeds.

Second, regarding registration of encumbered assets, Article 11, paragraph 1 of the Fiduciary Security Law states, “Assets encumbered with Fiduciary Security must be registered.” To avoid multiple interpretations, the law needs to clarify that registration is conducted on the Fiduciary Security Deed itself. Additionally, the amendment should set a registration deadline to prevent fiduciary recipients from neglecting their registration obligations, while a registration timeframe is necessary to provide legal certainty and protect the debtor.

Third, regarding the Fiduciary Registration Office, fiduciary procedures are currently carried out electronically, as administration no longer takes place at each regional office of the Ministry of Law and Human Rights but is relatively centralised at the Directorate General of General Legal Administration in Jakarta. Articles 12, paragraphs 2, 3, and 4 of the Fiduciary Security Law, along with their explanations, still regulate the establishment of Fiduciary Registration Offices in every provincial capital (regional offices of the Ministry of Law and Human Rights). The amendment will repeal these paragraphs and add a new paragraph (1a), stipulating that the

Fiduciary Registration Office, as referred to in Article 12, paragraph 1, is conducted at the Directorate General of General Legal Administration of the Ministry of Law and Human Rights.

Fourth, regarding fiduciary encumbrance, Article 17 of the Fiduciary Security Law seems to allow the interpretation that an asset already encumbered with fiduciary security may be re-encumbered as long as it has not been registered at the Fiduciary Registration Office. However, under the fiduciary concept, an asset that has already been used as fiduciary collateral cannot be re-encumbered.

Fifth, regarding the termination of fiduciary security, the current regulation governing fiduciary termination is ineffective; many fiduciary registrations remain on record even though the underlying agreements have ended. Such outdated fiduciary data fails to provide legal certainty for third parties. The termination of fiduciary security should be regulated by specifying its causes, including: 1) the extinction of the debt guaranteed by the fiduciary security, 2) the release of rights over the fiduciary security by the fiduciary recipient, or 3) the destruction of the asset serving as fiduciary security. The destruction of the asset, however, does not extinguish any insurance claims.

Sixth, regarding electronic fiduciary, in the Fiduciary Security Law, fiduciary procedures still take place manually. For example, the Fiduciary Register Book remains regulated in manual form, as stated in Article 13, paragraph 3, Article 14, paragraphs 2 and 3, Article 16, paragraph 2, and Article 26, paragraph 1. This Fiduciary Register Book needs to be understood as an Electronic Fiduciary Register Book. Therefore, the draft law should specify that the Fiduciary Register Book serves as a database that electronically records fiduciary security registrations, corrections to fiduciary certificates, modifications to fiduciary certificates, and the deletion of fiduciary certificates.

Seventh, regarding criminal provisions, the fines stipulated in the Fiduciary Security Law are no longer relevant to current economic values. Currently, the fines under the Fiduciary Security Law remain low given current economic conditions. As a reference, the draft Criminal Code (RUU KUHP) regulates that imprisonment of up to five years is equal to a fine of IDR 500,000,000. The transfer or pledge of an asset that becomes the object of fiduciary security may constitute embezzlement. Under the draft Criminal Code, the maximum fine for embezzlement is IDR 500,000,000. An alternative formulation of the criminal provision is as follows: a fiduciary provider who transfers or pledges an asset that is the object of fiduciary security shall be subject to a maximum term of imprisonment of two years or a maximum fine of IDR 500,000,000 (five hundred million rupiahs).

Based on the 2018 academic draft amendment to Law Number 42 of 1999, as published by the government, one of the goals is to facilitate the distribution of fiduciary credit. The author reconstructs fiduciary law by applying Rawlsian justice to

the positions of creditors and debtors, ensuring that each revision strengthens fairness and protects vulnerable parties. This reconstruction specifically targets amendments to Law Number 42 of 1999. Through legal protection, the State has fulfilled its obligation to protect and safeguard every right of its citizens who become the victims of justice (Siboy, Al-Fatih, Efendi, et al., 2022).

In Article 23, paragraph 2, the legislature currently prohibits the debtor from transferring, pledging, or leasing fiduciary security that is not inventory without the creditor's prior written consent. This rule burdens debtors because it prevents them from using movable assets to generate income. In a veil of ignorance, a rational debtor would claim the right to manage assets for income, while a rational creditor would demand regular instalment payments. By applying the difference principle, the author reconstructs this article to permit debtors to transfer, pledge, or lease collateral under clear conditions, including notification to creditors, prohibition of disguised fiduciary arrangements, and assurance that the transaction does not harm creditors. This revision allows debtors to continue operating while protecting creditors' interests (Sobko et al., 2023).

Under Article 24, creditors are exempt from liability for the debtor's actions or omissions. From the perspective of the original position, debtors would require creditors to share responsibility when they fail to provide warnings before executing collateral, while creditors would demand transparency in the agreement. The author proposes reconstructing Article 24 by imposing proportional liability on creditors when losses arise from misleading information, unbalanced contracts, or executions that disregard fairness principles. This revision compels creditors to act transparently and prevents them from exploiting incorrect information.

Article 27 grants creditors absolute priority over other creditors during execution, yet this provision undermines debtors, who are often the most disadvantaged when collateral values cannot cover debts. By invoking the difference principle, the author proposes reconstructing Article 27 to include safeguards requiring creditors to respect debtors' rights to maintain a decent livelihood, to use independent appraisals for valuation, and to return surplus proceeds automatically and transparently. This reconstruction ensures that priority rights operate without eroding basic debtor protections. Naturally, every action may be challenged by the public before the court to ensure that it conforms to the rule of law and the principles of human rights (Aditya & Al-Fatih, 2023a).

Under Article 29, the current law authorises creditors to confiscate collateral directly upon debtors' default, thereby granting them an overwhelming procedural advantage. The author offers the reconstruction of this article by requiring court or independent body approval to issue written notice at least thirty days in advance and provide opportunities for amicable settlement before execution. The reconstructed procedure also requires proportionality, transparency, and protection of the debtor's

economic rights. This adjustment rebalances execution procedures and aligns them with Rawlsian fairness.

Article 34 obliges creditors to return the remaining proceeds from execution, but fails to regulate the mechanism or timeframe. The author suggests that the provision can be reconstructed by mandating that creditors return surplus proceeds within 14 working days based on independent financial reports and by imposing administrative sanctions and compensation for delays. This framework ensures that creditors fulfil their obligations promptly and that debtors receive timely restitution.

Through these reconstructions, Rawlsian justice can be applied —specifically the veil of ignorance, equality, and the difference principle—to correct imbalances in the Fiduciary Security Law. Each revision strengthens fairness, protects vulnerable parties, and institutionalises both procedural and substantive justice in the regulation of fiduciary security. Control determines what has been accomplished, evaluates and implements corrective actions, and ensures that the outcomes align with the established plan; George R. Terry uses the term “control” (Fatkhurohman et al., 2025).

Developing a Model for the Confiscation of Fiduciary Collateral For a Just State

This article employs John Rawls’ theory of justice as its analytical framework. The use of this theory is grounded in two main considerations. First, fiduciary security is established through an agreement between a creditor and a debtor. It is worth noting that Rawls’ theory of justice draws extensively on the tradition of social contract theory developed by Thomas Hobbes, John Locke, J. J. Rousseau, and Immanuel Kant. Second, in the event of default, fiduciary security entails repressive legal remedies through the execution of the collateral held by the fiduciary grantor or debtor. On this basis, it can be argued that the ultimate purpose of law is to ensure justice, and even to achieve a form of well-being, for both creditors and debtors.

From the perspective of John Rawls’ principles of justice, fundamental questions arise regarding whether criminal seizure of fiduciary collateral produces a more just outcome than civil seizure, and whether the mechanism sufficiently upholds fairness and secures benefits for the most disadvantaged party. Building on this inquiry, the author develops a civil seizure model that redefines the state’s authority to confiscate fiduciary collateral while ensuring adherence to Rawlsian equality, freedom, and the difference principle (Aidonojie et al., 2025).

Civil seizure treats the fiduciary collateral itself as the primary object of liability. The state may initiate the seizure process without awaiting a criminal ruling, provided it proceeds through judicial mechanisms (Hasanah, 2021). Unlike the United States model, which allows asset forfeiture without a criminal indictment against the owner, the Indonesian legal system requires confiscation to occur within court proceedings. Establishing equal freedom within civil seizure necessitates protecting fiduciary collateral as private property and guaranteeing equal access to legal protection for the

state, creditors, and debtors. This is because legal politics constitutes the policy of state authorities in determining the criteria for sanctioning conduct, encompassing the processes of lawmaking, implementation, and enforcement (S. Al Fatih & Nur, 2023). Therefore, law enforcement agencies must verify the identity and condition of fiduciary collateral during investigations, including examining ownership documents, such as BPKB and STNK, as stipulated in the Indonesian National Police Regulation Number 5 of 2012. Verification must also cover the fiduciary financing agreement, fiduciary certificate, ownership status, and the asset use. By inventorying fiduciary collateral in this manner, the police and prosecutors protect the rights of creditors acting in good faith and prevent arbitrary or unlawful seizures.

To maintain equality, the state must notify all relevant parties of its intention to confiscate fiduciary collateral. The legislation contains regulations and/or rules that the executive body should implement and monitor, in line with 'Trias Politica's doctrine (Al-Fatih, Safaat, Widiarto, Al Uyun, & Rahmat, 2023). Law enforcement officials should issue written notice through mass media or online platforms to ensure that creditors, debtors, and third parties remain informed (Hufron & Fikri, 2024). This procedural step reflects Rawlsian equality by placing all stakeholders on an equal footing in the law. The government and law enforcement officials are obliged to comply with the delegation of authority mandated by law in establishing and implementing laws and regulations (delegated laws) (Al-Fatih, Safaat, Widiarto, Al Uyun, & Nur, 2023). Once verification and notification take place, the state may file a civil lawsuit in court. Filing a lawsuit embodies Rawlsian procedural justice because it requires the state to follow established legal procedures and seek judicial authorisation rather than relying on unilateral action. The lawsuit should request the court to declare that the fiduciary collateral may be confiscated for state purposes, while also ensuring proportional justice by requiring compensation for the creditor as the disadvantaged party, considering that Indonesia, as a country with a civil law legal system, uses many laws and regulations to govern its society (Disemadi et al., 2024). The theory and concept of equality before the law, as set out in Article 27, paragraph 1, of the 1945 Constitution, serve as the basis for protecting citizens and guaranteeing them equal treatment before the law and the government (Korompot et al., 2021).

The court examines the state's lawsuit by assessing whether the fiduciary collateral qualifies for confiscation. Judges evaluate whether the collateral has been misused, whether it constitutes proceeds of crime, and whether the creditor acted in good or bad faith (Hidayah & Al-Fatih, 2019). This judicial assessment aligns with Rawls' equality principle by ensuring that all parties receive equal consideration before the law. The debtor also retains the opportunity to demonstrate the legality of their possession or acquisition of the collateral. The state may only claim a legitimate interest in fiduciary collateral when the asset serves as proceeds or an instrument

involving crime, since the state itself is not a party to the fiduciary agreement between creditor and debtor (Lukito, 2020).

Based on trial evidence, judges may render three potential outcomes. They may order a seizure of the state's property, with compensation to the creditor and the debtor, if both act in good faith. They may order seizure without compensation if either party acts in bad faith, such as when collateral is transferred to conceal a crime. Alternatively, they may deny the state’s claim entirely if the collateral does not constitute proceeds of crime or an instrument used in its commission (Wangga et al., 2024). Among these possibilities, the first outcome of a seizure with state compensation best embodies Rawlsian justice. 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 merits of this option can be summarised in the following table.

Table 1 Principle of Rawlsian Justice

No	Aspect	Explanation
1.	Principle of Freedom	All parties are given the opportunity to defend their property rights.
2.	Principle of Equality	All parties are given the opportunity to assert their rights or interests before the court
3.	Difference Principle	The state has an obligation to favour the most disadvantaged party.

Source: Authors, 2025

The successful implementation of civil seizure represents an innovation in civil lawsuits related to corruption crimes. The differences between the two can be summarised in the following table:

Table 2 Comparison Between 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	It can be filed before, during, or after a criminal ruling, even before the perpetrator is identified	It 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,	It requires a criminal conviction, and the prosecutor must prove the

	either as proceeds or as an instrument of the offence	asset without doubt or with complete certainty
Seizure	Seizing asset	Seizing assets related to the defendant

Source: Authors, 2025

The table above indicates that civil seizure in Indonesia bears similarities to the non-conviction-based model practised in the United States and Australia (Setiyono et al., 2024). However, in Indonesia, civil seizure is carried out procedurally through a civil lawsuit in court. Its effectiveness and efficiency, compared to civil actions in corruption cases (Sunaryo et al., 2025), is higher because civil seizure can be filed at any time if the police and/or prosecutors find irregularities in evidence, particularly movable assets involved in a crime. Both the police and the prosecutor can file a civil lawsuit directly to request the seizure of fiduciary collateral.

The main issue in civil seizure is the compensation owed to the least advantaged party. The first option in a civil seizure is to confiscate the asset and provide compensation if the creditor acts in good faith and has not been involved in any criminal offences (Tegnan et al., 2021). One of the best measures is to grant the fiduciary recipient priority rights to the proceeds from the sale or auction of the fiduciary collateral.

The development of a criminal confiscation model for fiduciary collateral must assert that, in addition to focusing on offenders, confiscation should also address compensation for disadvantaged parties (S. A. Fatih et al., 2025). Creditors acting in good faith and debtors who are unaware of the use of fiduciary collateral in criminal acts are often in the most disadvantaged position, while court decisions frequently neglect their rights. Therefore, a just criminal seizure model must confiscate fiduciary security while ensuring balanced protection of the interests of creditors, debtors, and the state in accordance with John Rawls’ theory of justice.

In practice, investigators are required to carry out confiscation under Article 38 of the Criminal Procedure Code (KUHAP) by verifying the ownership status of fiduciary collateral from the outset, including through official data verification and lawful summons of relevant parties. The principle of procedural justice demands that each stage of the process be transparent and accountable (Simamora & Manik, 2025). Subsequently, the public prosecutor must actively prove the criminal elements and verify ownership of the fiduciary security. By incorporating specific claims regarding fiduciary security and the compensation scheme into the indictment, the prosecutor can encourage the court to impose a judgment that not only punishes the offender but also provides proportional compensation to good-faith parties.

CONCLUSION

The study of the legal consequences arising from the state's confiscation of fiduciary security objects reveals direct implications for the rights and obligations of both creditors and debtors, as regulated under Law Number 42 of 1999 concerning Fiduciary Security. Although creditors hold preferential rights, in practice, such rights cannot be enforced when the state confiscates the fiduciary security object. In such a case, the debtor also loses the right to exercise control over the fiduciary object. In response to this issue, a normative reconstruction of relevant provisions of Law Number 42 of 1999 can be considered by applying John Rawls's theory of justice, encompassing the principles of liberty, equality, and difference. The reconstruction suggests a solution in which the debtor, as the fiduciary grantor, may transfer or lease the fiduciary object, provided it serves the purpose of maintaining business continuity or meeting urgent needs and does not prejudice the legal interests of the creditor, as the fiduciary recipient. The debtor's obligations to the creditor can continue to be fulfilled until settled in full. Furthermore, the creditor is expected to bear proportional responsibility when financing agreements are imbalanced or disregard principles of fairness and protection for the debtor.

Moreover, a just model of confiscation of fiduciary security objects can be designed using Rawls's theory of justice, particularly by prioritising the most disadvantaged parties. The analysis indicates that the disadvantaged parties consist of good-faith creditors and non-offending debtors. Good-faith creditors are disadvantaged, as they recover the fiduciary object without compensation, while non-offending debtors lose control of the object without any redress. Therefore, the proposed model is criminal confiscation accompanied by a compensation scheme explicitly incorporated into the court's ruling. Such a scheme is deemed just, as it accords with the principles of procedural justice, equality of parties, and the difference principle articulated in John Rawls's theory of justice. The proposed reconstruction of Law Number 42 of 1999 is directed at the following provisions: Article 23, paragraph 2, Article 24, Article 27, Article 29, and Article 34.

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