PROTECTION AGAINST CREDITORS RIGHTS HOLDERS FIDUCIARY GUARANTEE POST CONSTITUTIONAL COURT’S NO. 18/PUU/XVII/2019

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Abstract: After the Constitutional Court Decision No. 18/PUU/XVII/2019 was issued, creditors can no longer forcibly withdraw the fiduciary guarantee without the result of the district court’s decision agreed by the creditors and debtors that a breach of promise occurred. The facts in the field are that debtors often make defaults. As a result, creditors must be more careful in executing fiduciary security. This study aims to determine what steps creditors must take to remain by legal corridors. Judges’ decisions must create justice, not only for the debtor but also for creditors’ interests. Creditor services are one of the factors. A large increase in the country’s economy, if creditors’ interests do not accommodate it, the judge’s decision is far from a sense of justice). This study also illustrates the creditor’s executorial power to the fiduciary guarantee deed. Based on normative legal studies, the researcher concludes that regulations to determine precise steps and simple mechanisms need to be established by creditors and the government as a guideline for the execution of guarantees. The executive power has the nature of justice for all parties.

Keywords: protection; creditor; fiduciary guarantee
INTRODUCTION

One of the material guarantee institutions currently in effect in Indonesian law is the Fiduciary Guarantee agency, as regulated in Law Number 42 of 1999 concerning Fiduciary Security. A fiduciary is a guarantee institution based on trust. Historically, this institution was born to meet the legal need for a practical guarantee institution for movable objects used as business facilities, called capital. In the fiduciary, the collateral object/object remains in the control of the debtor, so that if the object is a capital object, the debtor can still carry out his business properly. From the business results, it can be expected that the debtor will pay off his debt. One of the characteristics of a good material guarantee is when the execution process can be carried out quickly, efficiently, and contains legal certainty.¹

Credit as a term is no longer foreign to the public. Credit is not only recognized by highly educated people but also by those with low education. Based on history, it can be seen that the use of the term credit is taken from the Greek word “credere” which means trust, so it is not wrong if, in practice, the provision of accounts payable as a creditor’s achievement and contra-performance of the debtor in the future requires trust. Trust in the debtor’s ability to provide counter-performance (in accounts payable is understood as an achievement in the form of returning the money owed).²

Lending is the provision of money lending by banks to public members, which is generally accompanied by the delivery of credit guarantees by the debtor (borrower). The acceptance of the credit guarantee is related to various legal provisions of the guarantee.³ The provisions governing the legal principles of guarantees, guarantee bonds, guarantee institutions, guarantee execution and sale, debt guarantees, and others are fully obligatory and should be obeyed by the bank in the framework of its lending activities. As a business entity that must be managed based on prudential principles, banks cannot be separated from the applicable legal provisions to secure and protect their interests. Credit guarantees received by banks from debtors are included as one of the objects related to bank interests. The credit guarantee must be believed to be a good and valuable guarantee so that it will be able to fulfill its functions, among others, by taking into account related legal aspects, including legal aspects of guarantee.⁴

Guarantee law offered an alternative guarantee institution that can be chosen to accommodate the parties’ needs and interests. The security law has evolved to change following social changes. However, in practice, it is known that the problems arising from it, so that the guarantee institution as a legal product no longer provides certainty in particular to provide legal protection for creditors.

Fiduciary security itself is an extension due to the many shortcomings of the pawnshop institution in fulfilling society and not keeping up with developments in society. Fiduciary construction based on existing jurisprudence is the transfer of ownership rights over the trust, to movable objects or property (belonging to the debtor) to the creditor with

¹ Munir Fuady, Jaminan Fidusia, (Bandung: Citra Aditya Bakti, 2003), 57.
² Thamrin Abdullah, Bank dan Lembaga Pembiayaan, (Jakarta: RajaGrafindo Persada, 2002), 162.
³ M. Bahsan, Hukum Jaminan dan Jaminan Kredit Perbankan di Indonesia, (Jakarta: RajaGrafindo Persada, 2008), 70.
⁴ Ibid., 70.
physical control over the goods remains with the debtor.  

As one of the guarantees, the fiduciary is an element of bank credit protection, which was born preceded by a bank credit agreement. That shows that the fiduciary guarantee agreement has the character of the assessor adopted by Law Number 42 of 1999 concerning the Fiduciary Guarantee, in which the granting of a guarantee agreement is always followed by an agreement that precedes it, namely a debt agreement called the principal agreement. This guarantee agreement cannot stand alone but always follows the main agreement. When the principal agreement ends, the guarantee agreement also ends.

Some things need to be considered and must be done so that the fiduciary guarantee can provide legal protection and rights for the parties (debtors and creditors) and information for third parties. For example, registration problems, such as registration of fiduciary security objects, stipulate that objects subject to fiduciary security must be registered. Because the essence of registration is legal protection for creditors. To create legal certainty, registration of fiduciary guarantees causes the fiduciary guarantee to fulfill the publicity element, making it easy to control.

In the Fiduciary Guarantee Law, as stipulated in the mortgage rights, the fiduciary guarantee certificate has the same executive power as court decisions with permanent legal force. Based on the executorial title, the fiduciary recipient (the creditor) can immediately execute through a public auction of fiduciary security object without going through a court. The law also provides easy execution for fiduciary recipients (creditors) through an execution parate institution.

However, in 2019, the Constitutional Court of the Republic of Indonesia issued decision Number 18/PUU-XVII/2019 relating to the Fiduciary Guarantee Law review. In this decision, the conclusion is that the fiduciary guarantee deed is no longer the same as a court decision. So that in the execution process, there is a change in procedure, and the power of execution is no longer the same as the court decision.

Source: Indonesian Consumers Foundation, 2019

The problem of financing loan companies is very large in the arrears or bad credit factor. These arrears, of course, impact the development of the progress of the financing business. If the Constitutional Court’s decision only supports one party, in this case, the consumer is more superior regarding the fiduciary guar-
antee process, then the debtor will be more difficult for how then to avoid irresponsible consumers.

The constitutional authority possessed by the Constitutional Court is an embodiment of the principle of checks and balances, which means that every state institution has an equal position so that there are supervision and balance in state administration. To its authority to examine laws against the Constitution, the Constitutional Court is based on Article 24 C paragraph (1) of the 1945 Constitution, then rearranged with its derivative products, namely Article 10 paragraph (1) and paragraph (2) Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court. The technical implementation is further regulated in the Constitutional Court Regulation Number 6 of 2005 concerning Guidelines for Proceedings in Judicial Review Cases. The statutory review application can be classified into 2 (two) types, namely testing of the content of statutory material or legal norms, commonly known as material testing, and testing procedures for the formation of statutory products are commonly referred to as formal testing.8

Based on the background that the researchers put forward, the problem formulations in this study are as follows how is the legal protection for creditors holding fiduciary rights after the Constitutional Court decision Number 18/PUU-XVII/2019 and what is the executorial power of the fiduciary deed after the Constitutional Court decision Number 18/PUU-XVII/2019?

METHOD

Research Object
The object of this research is the creditor who holds the fiduciary right.

Types of Research
Library research aims to study, research, and trace secondary data in the form of primary, secondary, and tertiary legal materials.

1) Primary legal materials, including:
   a) 1945 Constitution;
   b) Code of Civil law; Kitab Undang-Undang Hukum Pidana;
   c) Fiduciary Guarantee Act;
   d) Constitutional Court Law;
   e) The decision of the Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019.

2) Secondary legal materials, including books, journals, dissertations, research reports, and papers.

Data Analysis
Drawing conclusions from the research results that have been collected is carried out using qualitative and juridical methods because the research departs from existing laws and regulations as positive law. Qualitative, namely, analyzing data based on efforts to find principles and information and other information obtained from literature studies to determine their relationship to the main problem.

Research Methods
They are using a normative juridical approach, which is an approach that focuses on aspects of norms or rules. In addition to the normative approach, this article is supported by an analysis of the conceptual approach, that fiduciary guarantees must be fair between all parties or

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what is commonly referred to as John Bordin Rawls, the famous American philosopher as “Justice as Fairness” so that the problem will be studied and analyzed guided by legislation. Applicable and relating to legal issues of guarantee in Indonesia.

ANALYSIS AND DISCUSSION
Creditors’ Status Quo Before and After the Court’s Decision

Fiduciary security is a material guarantee known in positive law, which can provide economic benefits to business actors compared to other guarantee institutions. This advantage can be seen from the control over collateral objects so that the business that is being carried out can still run, and the credit loan can be returned smoothly. Fiducia Eigendom Overdracht (feo), from now on, referred to as fiduciary, is a transfer of ownership rights to an object based on trust and provided that the object whose ownership rights are transferred in the control of the owner of the object.

With the enactment of Law Number 42 of 1999 concerning Fiduciary Security, our legislators have chosen to regulate fiduciary in written form. The issuance of the Fiduciary Guarantee Law is an official recognition from lawmakers of the fiduciary guarantee institution, which so far has only received recognition through jurisprudence. The guarantee institution arises based on the desire to demand legal certainty over the debt arising from the credit agreement with the banking institution as the creditor and give confidence in the ability to repay the loan even in conditions of the debtor’s incapacity. The guarantee coverage mentioned above is indeed required by the creditor because, in an agreement between the creditor and the debtor, the creditor is interested that the debtor fulfills its obligations in the engagement.

The debtor who still controls the fiduciary collateral, the general public assumes that the collateral object is the debtor’s property by Article 1977 of the Civil Code (KUH Perdata), which states that possession (bezit) is the perfect basis for rights. In banking, fiduciary guarantees are widely used, but they do not protect creditors, especially creditors whose positions are concurrent creditors who do not know that the objects pledged to them have been subject to the fiduciary burden on other creditors.

In the Civil Code, Article 1131 states that all assets of the debtor, whether in the form of movable objects or fixed objects (immovable objects), both existing and new ones, will be collateral for all the engagements made. By debtors and creditors. In other words, Article 1131 of the Civil Code provides a provision that if the debtor fails to pay off the debt he received from his creditors, the proceeds from the sale of all the debtor’s assets, without exception, will be a source of repayment for the debt.

The provisions in Article 1131 of the Civil Code are provisions that protect creditors. If the provisions referred to in Article 1131 of the Civil Code do not exist, it will be difficult to imagine a creditor willing to provide debt to the debtor. The provisions of Article 1131 of the Civil Code are universal principles in every country’s legal system. The transfer of the object of the fiduciary guarantee that was previously encumbered cannot be justified because this is by the provisions in Article 17 of the Fiduciary Guarantee Law. So basically,

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the fiduciary’s grantor is prohibited from diverting or refusing objects that are registered objects of fiduciary security.

In consideration of the judges of the Constitutional Court, the author’s point of view is that, in essence, it is very simple for the Constitutional Court Judges to accept and grant the petitioner’s petition related to the judicial review of the fiduciary guarantee law against the 1945 Constitution of the Republic of Indonesia. Petitioners are the actualization of the rule of law, which is characteristic of the Indonesian nation, which agreed upon after the 1998 reformation. The meaning of Indonesia as a “rule of law,” as stated in Article 1, paragraph 3 of the 1945 RI Constitution, should manifest in every practice of the life of nation and state on earth. This is no exception to the practice of debtors who unilaterally commit arbitrariness to forcibly take the object of fiduciary security or perform fiduciary execution. Even though it already has a guarantee certificate. Therefore, the practice of promise-breaking, which is not accompanied by legal force, is still considered unconstitutional, and the legal mechanism needs to be regulated in advance. So that every action, both debtor and creditor, is by applicable legal corridors.

However, after the Constitutional Court decision Number 18/PUU-XVII/2019, legal protection for creditors has undergone several changes, especially in terms of execution. Judges’ considerations in Constitutional Court Decision Number 18/PUU/XVII/2019 which state the conditional constitutionality of Article 15 paragraph (2), Elucidation of Article 15 paragraph (2), and Article 15 paragraph (3) of Law Number 42 of 1999 on Fiduciary Guarantee (Fiduciary Law), it was found that in practice the conditions of default as regulated by the Fiduciary Law cannot be determined unilaterally by the creditor.

It can be ascertained that creditors (Fiduciary Giver) must be very careful in providing loans to debtors (Fiduciary Giver). However, it also needs to be understood that the Constitutional Court’s decision does not imperatively state that every execution of mandatory fiduciary guarantees through the court.

According to the Constitutional Court in its consideration that it does not want to eliminate the characteristics of the implementation of the execution of the fiduciary guarantee, which can be carried out utilizing execution itself (parate execution). Therefore, the Constitutional Court said there were 2 (two) conditions that must be met by the fiduciary recipient (the creditor) to execute by themselves, namely:

1. Giver fiduciary (the debtor) had to admit she had tort (breach of contract), and
2. The fiduciary (the debtor) must voluntarily hand over the object, which is the fiduciary agreement’s object.

On the other hand, if the fiduciary (the debtor) does not recognize that he has committed default (breach of contract) and objects to voluntarily handing over the object of the fiduciary guarantee to the creditor, then the execution of the object of guarantee can only be carried out through the execution procedure in the district court.

Consideration of Constitutional Court:

«Whereas thus it is clear and bright as long as the fiduciary right giver (the debtor) has acknowledged the existence of» default «(default) and voluntarily surrenders the object which is the object of the fiduciary agreement, then it becomes the full authority of the fiduciary recipient (the creditor) to be able to perform the execution itself (parate execution).
However, if the opposite happens, where the giver of fiduciary rights (the debtor) does not recognize the existence of «default» (default) and object to voluntarily surrendering the object, which is the object of the fiduciary agreement, the fiduciary right recipient (the creditor) may not carry out the execution. Itself but must submit a request for execution to the district court. Thus the constitutional rights of the fiduciary rights giver (the debtor) and the fiduciary right (the creditor) are equally protected.

From the description of the considerations as mentioned above, it can be concluded that the execution of fiduciary guarantees can only be carried out through a district court if the fiduciary (the debtor) admits that he has defaulted and voluntarily hands over objects that are the object of fiduciary security. Meanwhile, suppose the fiduciary (the debtor) does not want to admit that he is in default and does not want the object, which is the object of fiduciary security, to be given to the fiduciary recipient (the creditor). In that case, the fiduciary recipient (the creditor) can only execute the fiduciary guarantee object through court procedures.

According to Satjipto Rahardjo, legal protection is to protect human rights that others have harmed by others, and this protection is given to the community to enjoy all the rights provided by law. Human interest is a fundamental right to be accommodated by the government, which means that from Soedjono Dirjosiworo’s view, the purpose of law emphasizes one goal: protecting human interests.

Executive Power of Fiduciary Guarantee
Deed Post-Constitutional Court Decision Number 18/PUU-XVII/2019

Based on civil law, execution is the last resort provided for the creditor if the debtor does not fulfill his / her performance or, in other words, is the default. About the Fiduciary Guarantee, execution is also the last resort for the object of guarantee in implementing the agreement related to the consumer financing agreement. In the fiduciary guarantee, there are two conditions that are characteristic of the imposition of the Fiduciary Guarantee, namely the payment of debts from the debtor or the Fiduciary Guarantee, which means that the debtor has executed the agreement in good faith. Whereas the second condition, namely the debtor in default by not paying the debt

11 Soedjono Dirjosiworo, *Pengantar Ilmu Hukum*, (Jakarta: Raja Grafindo Persada, 1983), 11
12 Ibid.
payment until the due date is due even though a summons or warning has been given, resulting in an action taken by the creditor as a recipient of fiduciary security. In the form of execution of fiduciary security, the final stage is defined as the confiscation and sale of objects that become Fiduciary Security.

The decision of the Constitutional Court Number 18/PUU-XVII/2019 regarding the interpretation of the provisions of Article 15 paragraph (2) and (3) of Law (UU) Number 42 of 1999 concerning Fiduciary Security has a very significant effect in the making of the Fiduciary Security Deed (AJF). In the future, there will be changes in the Fiduciary Guarantee Deed, in which the notary must add and clarify the default clause in detail.

The default or default issue is not a problem of guarantee law, but a problem with contract law. If, in an agreement, it is very clear that the default criteria are determined, then the issue of default does not need to be determined by the court. An impossible thing if both parties must agree to the default condition. No party wants to be accused of default. This MK decision is a setback in the guarantee law when the government is actively implementing EoDB (Ease of Doing Business), including guarantee execution.

The Constitutional Court Decision Number 18/PUU-XVII/2019 has given meaning to Article 15 Paragraph (2) and Paragraph (3) of Law No. 42/1999, as mentioned in the introduction paper. Accordingly, based on the decision of the Constitutional Court, Article 15 Paragraph (2) and Paragraph (3) are declared still valid and have legal force, but the meaning or meaning of these articles is limited by the execution of the execution in the field, namely:

1. Has there been an agreement regarding default (default) between the parties?
2. Does the debtor have no objection to voluntarily handing over the object that is guaranteed to be fiduciary?

According to Agus Yudha Hernoko, there are times when under certain circumstances to prove the existence of a debtor’s default, a statement of negligence is no longer needed, among others: for the fulfillment of achievements, a fatal grace period (Fatale term) applies, the debtor refuses to comply, or the debtor admits his negligence. If some conditions are not fulfilled, then the execution with the title of executives, or the right to sell objects that are the object of fiduciary security, can only be done through the fiat executive.

The fiat executive legal step is interpreted as a court order to implement a court decision if the defeated party in the decision refuses to implement it voluntarily. Fiat executio is also defined as granting power of attorney to implement executorial decisions (enforceable). These court decisions have permanent legal force and documents whose legal force is equal to court decisions having permanent legal force or executorial, including Certificate of Mortgage and Fiduciary Guarantee Certificate.

Likewise, the actions of a debtor who refuses to be executed, either based on title execution or parate of execution, a creditor can submit a request to the court to:

1. Aanmaning determination; namely summoning the debtor for a warning;
2. Determination of the execution seizure

13 Salim HS, Perkembangan Hukum Jaminan di Indonesia, (Jakarta : Raja Grafindo Persada, 2004), 90.

and the execution auction of the fiduciary security object based on a previously registered fiduciary guarantee certificate.

In principle, the Constitutional Court Decision relating to Law Number 42 of 1999 concerning Fiduciary Security only has the meaning of Article 15 paragraphs 2 and 3 concerning administrative rights or parate executions and does not invalidate the Fiduciary Guarantee Law.

In point 3, paragraph 17, paragraph 2, the Constitutional Court thinks that the exclusive authority possessed by the recipient of fiduciary rights (creditors) can remain as long as there is no problem with the certainty of time regarding when the debtor’s fiduciary right has defaulted. The debtor voluntarily hands over objects that are the object of the fiduciary. So, the executorial rights of the fiduciary are not waived.

Furthermore, in point 3.18, paragraph 2, the ruling of the Constitutional Court reads, thus both the execution carried out by the creditor himself because there is an agreement with the debtor or the execution submitted through the district court, assistance from the police is still possible on the grounds of maintaining security and order in the execution process.

After the reading of the Constitutional Court decision regarding the interpretation of article 15 paragraph 2 and 3 of Law Number 42 of 1999 concerning Fiduciary Security, the Indonesian Financial Services Association (APPI) stated that leasing companies can still withdraw vehicles from debtors without going through the District Court (PN) decision. The head of APPI, Suwandi Wiratno, said that the Constitutional Court’s decision clarified the meaning of the phrase default or default between the debtor and creditor.

Suwandi also said that there was confusion in society after the Constitutional Court’s decision was read out, where it seemed as if the fiduciary right holder could not execute by himself (parate execution) because he had to submit a request for execution to the District Court (PN). So that even though there has been a Constitutional Court decision, leasing can still execute without going through the District Court’s decision on the condition that the debtor acknowledges that there is an injury of promise and voluntarily gives up the object that is guaranteed in the fiduciary agreement, the creditor can fully carry out the execution.

CONCLUSION

The Constitutional Court through Decision Number 18/PUU-XVII/2019, stated that Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Security, as long as the phrase “executive power” and the phrase “are the same as a court decision having permanent legal force” contradicts the 1945 Constitution and does not have binding legal force. After the reading of the Constitutional Court Decision regarding the Fiduciary Guarantee Act, there was any confusion regarding the executives’ power, so that the position of creditors was considered weak. However, if examined further, the creditor can still execute fiduciary guarantees to the debtor without going through the Constitutional Court decision first by taking into account several things that must be fulfilled by each party. The debtor must acknowledge the default and voluntarily hand over objects that are guaranteed in the fiduciary agreement. Thus, the creditors can still fully execute without having to apply to the District Court first.

The problem that has often occurred in
implementing the Fiduciary Guarantee Act is that it often creates legal uncertainty, and there is no balanced position between debtors and creditors. The financing agreement between the financing company and the creditor contains the parties’ rights and obligations, including what do in the event of default. Nevertheless, presumably, the debtor and creditor can enter a clause that contains regulations governing the mechanism so that the debtor can be declared in default. This can be pursued by both parties’ prior agreement so that the process can encourage voluntary debtors to surrender fiduciary objects to creditors.

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