Degradation of Executorial Rights and Execution Parate Institutions on Fiduciary Security After the Decision of the Konstitution Court Number 18/Puu-Xvii/2019

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Abstract
Constitutional Court decision Number 18/PUU-XVII/2019 degrades the existence of executorial rights and execution parate institutions in the UUJF. Melements of the substance of the law in rangka this execution resulted in the purpose of the law can not be met. PeneThis research is a normative juridical research that will answer several questions. First, what is the essence of the position of eksekutorial rights, execution parate, promise injury clause in fiduciary security rules. Second, how the juridical analysis of the Constitutional konstitusi tersebutCourt decision. This study produced several results, first the decision of the Constitutional Court contradicts the essence of the existence of executorial rights and the institution of Parate execution. executorial rights and execution parate institutions arise from the existence of special guarantees granted privileges through executorial rights institutions and execution parate institutions. The article of promise injury in the main agreement essentially serves as clause naturalia. The naturalia clause means that althoughthis clause is not expressly stated, theinjury clause promises to remain. The nature pelaksanaanof execution is because there is no voluntary act of implementing a decision that has permanent legal force. Thus, establishing the validity of the executorial right when there is a voluntary surrender is contrary to the nature of the execution itself. Second, in making a decision, the judge should put forward the principle of legal mind, namely legal certainty, justice and usefulness. In the Constitutional Court ruling amar judge's decision does not reflect the certainty, justice and kemanfaatn

I. Introduction

The existence of fiudusia as material security has existed since colonial Btimes. However, only in 1999 it was legislated in Law Number 42 of 1999 on fiduciary security. Fiduciarydevelopment is relatively slow but a very important development occurred during the entry into force of online registration in 2013 and the issuance of Constitutional Court decision Number Number 18/PUU-XVII/2019 (Constitutional Court decision). This Constitutional Court decision is a test of Article 15 Paragraph (2) and Paragraph (3) of Law Number 42 of 1999 concerning fiduciary security (UUJF).

Material test Pasal 15 Paragraph (2) of the UUJF regarding the right of eksekutiorial and parate and Paragraph (3) regarding klausulthe promise injury clause. The applicant assumes that the phrase reads :

(2)" ... an executorial power equal to that of a filing judgment which has acquired permanent legal force; and"

(3) " If the debtor's pledge is injured, the fiduciary recipient has the right to sell the object that is the object of fiduciary security on his own power."

The applicant considers that the two phrases above are not in accordance with the applicant's constitutional rights listed in "Article 1 Paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), Article 28g paragraph (1) and Article 28h paragraph (4) of the 1945Constitution". Mahkamah KonstiThe Konsti tusi court in its decision granted the applicant's claim for part and made a redefinition of "Article 15 paragraphs (2) and (3)". From the decision of the Constitutional Court there are two juridical implications, namely:

1. The Executorial nature of the fiduciary certificate may apply if :
   a. The existence of an agreement on the injury of promises between creditors and debtors
   b. The willingness of the debtor or the fiduciary to hand over the object of fiduciary security at the time of execution.
2. If there is a default of the debtor, then the fiduciary recipient does not have the right to Parate the execution which means the fiduciary recipient cannot auction on his own power unless the two conditions above are met.

In the legal consideration of the judge there is an imbalance of position between the debtor and the creditor. Thus, according to the judge, it injures the debtor's constitutional rights in obtaining justice based on the 1945 Constitution. This Constitutional Court decision makes it difficult for creditors to execute through *an execution*Parate. Meanwhile, execution through judicial proceedings takes longer and costs more. Kondisi This condition will also affect growth in the financing sector which generally uses fiduciary security institutions.

The judge's decision is the result of the elaboration of legal thought with the facts obtained by the judge in the trial. The judge's decision should have been guided by the ideals of the law. The goal of law is defined as the purpose of law. In the formation of law by the judge through the decision of the legal mind becomes a basic reject in the preparation of the construction of the judge's thinking. Gustaf Radbruch said that the idea of law not only serves as a benchmark that is regulative but also

contitutive. That is, the mind of law not only serves to test whether the positive law in question is fair or not but to ensure that the law meets the legal mind because without the legal mind the law will lose its meaningas the next law[1] gustav also states that legal certainty *(rechtssicherkeit)*, Justice *(gerechtingkeit)*and expediency *(zweckmasigkeit)* it is an element that the legal mind must exist proportionally.[2]

II. Research Method

Unlike theprevious research which focused on the exposure of the juridical implications of the Constitutional Court decision Number 18/PUU-XVII/2019, in this study will show the degradation of executorial rights and executive parate institutionssi and the promise injury clause in fiduciary security to see their respective positions in fiduciary security to be analyzed based on the cita hukum approach (idee des recht) or legal purposes. With the approach of cita hukum, it will be seen whether the decision has fulfilled the legal certainty, justice and expediency. These three goals of law are the general principles in the formation of legislation. therefore, this study will be able to add material for the renewal of fiduciary security in Indonesia.

III. Results and Discussion

Degradation of Executorial rights and execution Parate institutions on fiduciary security after Constitutional Court decision Number 18/Puu-Xvii/2019

1. The Nature Of The Position Of Executorial Rights, Execution Parate And Promise Injury Clause In Aturan Fiduciary Security Rules

Execution means carrying out a judgment. Yahya harahap said that execution means forcibly executing a court decision with general power if the losing party (executed) does not execute voluntarily *(vrijwilling)*.[3] In essence, the execution of meris the realization of the obligations of the defeated party in a judge's decision that has permanent legal force to fulfill the achievement. The winning party may request a charge to enforce the judgment by force (*execution force*).[4]

Execution is generally regulated in HIR or RBG which is a provision that is not separate from the provisions of the proceedings. The regulationis contained in Article ut 195 to Article 208 and Article 224 HIR or article 206 to Article 240 and Article 258 RBG. In our national law the execution regulation has been regulated in general 33 paragraphs (3) and (4) of Law No. 14 of 1970 jo Law Number 4 of 2004 on Judicial Power. Execution rules are also associated with other rules that are scattered in special rules that contain the authority of execution as in law no.4 of 1996 on mortgage Rights, Law No.49 Prp/1960 on PUPN and Law No.42 of 1999 on fiduciary security.

Neither the actual execution nor the execution of carrying out an act has any

[1] Attamimi, A. Hamid, S, , *Pancasila Cita Hukum Dalam Kehidupan Hukum Bangsa Indonesia", dalam Pancasila Sebagai Ideologi: Dalam Berbagai Bidang Kehidupan Bermasyarakat, Berbangsa Dan Bernegara*, (Jakarta:BP-7 Pusat , 1992) p. 68

[2] Tata Wijayanta, "Asas Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga", *Jurnal Dinamika Hukum* Vol. 14 No. 2 Mei 2014, p.219

[3] M.Yahya Harahap, *Ruang lingkup Permasalahan Eksekusi Bidang Perdata (edisi kedua*), (Jakarta:Sinar Grafika, 2010), p.6

[4] BPHN, *Naskah Akademik Rancangan Undang –Undang Acara Perdata*, p.5

difference. This means that the execution of carrying out an act is also a real execution. The execution of riil can only occur based on a court decision that has permanent legal force and is immediate, in the form of provisions and in the form of a peace deed at the trial while the execution of a payment of a certain amount of money can be based on a court decision and can also be based on a certain deed. The deed is a deed that is equated with a court decision that has permanent legal force.[5]

Execution can only be carried out when the court decision has acquired permanent legal force *(inkracht van gewijsde*). This is the*general rule*of exception. The verdict is also condemnatory. The decision of the condemnator is a decision that is "punitive". The judgment of the condemnator has a characteristic feature in thestatement of condemnation to commit one of the following acts:[6]

1. Handing over an item
2. Vacate a plot of land or a house
3. Doing a certain act
4. Stopping an act or situation
5. Pay some money.

Each decision of this condemnator by itself has executorial power (it can be implemented by force by the general power). In addition to the two things above, the third condition is that the decision must not be carried out voluntarily. A new execution will appear if the defendant does not execute the verdict voluntarily.

In relation to fiduciary security, the execution of fiduciary security is an exception to the general principle of execution. that is, there are times when executions are carried out not in order to implement a court decision but to carry out the implementation of the form of a product that is "equated" by law with a decision that has gained permanent legal force.[7] The forms of such exceptions are:

1. Execution of the verdict "first"
2. Implementation Of Provision Decision
3. peace act
4. execution grosee deed
5. execution of mortgage and fiduciary guarantees

The decision that is equated with the judge's decision has the same characteristics as the court's decision which has the titles "for the sake of Justice based on the Supreme God". On this irah irah fiduciary security contained in the certificate of fiduciary security. The order for the existence of irah irah in the fiduciary certificate is contained in Article 15 Paragraph (1) of the UUJF. With this irah irah, the fiduciary certificate is considered "equated " with the decision of a judge who has permanent legal force.

When classified in the execution krateria, the fiduciary certificate is a decision

[5] Ibid p.115

[6] M.Yahya Harahap, *Ruang LIngkup Permasalahan Eksekusi Bidang Perdata (Edisi Kedua)*, (Jakarta:Sinar Grafika,2010), p. 23-24

[7] *Ibid* p. 9

that is a condensator because the function of material security is to provide security for the repayment of a debt. Thus, the form of punishment is in the form of paying a sum of money as repayment of the debt to the creditor. The decision of the condemnator of course memiliki eksekutorial power. Thisexecutorial power is affirmed in Article 15 Paragraph (2) of the UUJF which states that the fiduciary certificate has the same executorial power as a court decision that already has permanent legal power. That is, it can be directly implemented without going to court and is final and binding on the parties to implement the decision.[8]

On special guarantees in the form of material guarantees including liens, mortgages, fiduciaries and mortgage rights, excutorial rights are equipped with execution parate institutions. Execution Parate is the right of the creditor to make a sale on his own power without having the permission (fiat) execution from the judge. P.A Stein referred to this institution as "simplified execution" whereas a Pitlo referred to it as "*zonder omslang*" or no twists and turns.[9] This institution of execution parate arises from the presence of privileges on special guarantees in the Civil Code. In special guarantees, including fiduciary, the position of the creditor is in a special place, namely as a preferred creditor. Preferred creditors are given the right to obtain repayment that takes precedence over other creditors. The execution Parate is expressly stated in Article 15 Paragraph (3) of the UUJF which states that if the debtor is injured by a promise, the fiduciary recipient (creditor) has the right to make a sale on his own power.

From the above regulation of executorial rights and execution parate institutions, it appears that the nature of both positions, both executorial rights and executionParate institutions, arehak special rights arising from the consequences of the existence of special material security institutions inthe law. Ease in the return of receivables and position in the first place for creditors is a characteristic of the special guarantee institution. this characteristic is also stated firmly inam the explanation of Article 15 Paragraph (3) of the UUJF, namely :

"One of the characteristics of fiduciary security is the ease of execution, namely if the fiduciary injured the promise. Therefore, in this law it is deemed necessary to specifically regulate the execution of fiduciary guarantees through the executionparate institution"

Execution is the ultimate goal of the debtor's pledge injury. injury to a promise or default is interpreted as an act of non-fulfillment of achievements. Mariam Darus Badrulzaman said that default occurs when the debtor due to his fault does not carry out what was agreed.[10] The element of error here is very important to distinguish *it from force majeure*.

The fiduciary agreement is an Accessoir agreement that is an agreement that follows the main agreement. The fiduciary agreement as a follow-up agreement (accessoir) is affirmed in Article 4 of the UUJF . J.Satrio said that the characteristics of

[8] Penjelasan Pasal 15 Ayat (2) UUJF

[9] Teddy Anggoro, "Parate eksekusi: Hak Kreditur Yang Menderogasi Hukum Formal (suatu pemahaman dasar dan mendalam", *Jurnal Hukum dan Pembangunan* Tahun Ke 3 No. 4 Oktober-desember Tahun 2007, p. 553

[10] R. Subekti, *Hukum Perjanjian, Cetakan IV* (Jakarta:Pembimbing masa,2013), p.59

the agreement that are accesoir are the birth and transfer as well as the deletion depending on the principal agreement. Thus, the fiduciary guarantee agreement cannot be separated from the credit or financing agreement, the principle of which is the debt and debt agreement which is the main agreement. Thus, the promise injury referred to in Article 15 Paragraph (3) of the UUJF is a promise injury from the principal agreement not from the fiduciary guarantee agreement as its accessory.

In the provisions of Hukum, the injury of promise is regulated in the construction of Book III of the Civil Code regarding the agreement. That is, the terms of the pledge injury can be agreed upon by both parties. However, in the contract law system, there are three classifications of agreement elements, namely :

1. Element Essensialia is an element that must exist in an agreement. If this element is not in the agreement then the agreement will be null and void (no agreement)
2. An element of Naturalia is an element of an agreement that by law is regulated but can be waived by the parties.
3. The element of Accidentalia is an element of the agreement that has a firm Nature agreed upon by the parties. If you want to be promised, it must be stated explicitly.[11]

The promise injury clause is a clause that goes to the element of naturalia. This means that the absence of an agreed-upon injunction arrangement does not cause the injunction rule itself to be non-existent. If there is a promise injury, the parties will rely on the rules to the Civil Code. The nature of Book III of the civil code is generally a governing law (anvullen recht) not a compelling law (dwigent recht). The nature of anvullen recht gives the parties the discretion to self-regulate their agreement. Likewise, if the parties do not regulate, it will be the provisions of the Civil Code Book III that appear to complement it.

In fact, a promise injury is an article that can be agreed upon by both parties. However, the absence of a pledge injury clause in a written agreement does not render an agreement invalid and unenforceable

2. Juridical Analysis Of Constitutional Court Decision Number 18/Puu-Xvii/2019

The formation of law carried out by the judge should bebased on the consideration of the legal mind. The ideal of law according to Rudolf Stemmler is a construction of thought which is a necessity to direct the law to the ideals thatinsociety *wants (IUs constituendum).* Law without a legal mind akanloses its meaning as law. In the theory of legal mind *(idee das recht)* proposed by Gutav Radbruch. This teaching of the legal mind states that the elements of the legal mind that must exist proportionally are legal certainty (*rechtssicherkeit)*, Justice *(gerechtingkeit)* and expediency *(zweckmasigkeit)*.

The decision of the Constitutional Court determines the validity of the executorial right if it haspemenuhbeen fulfilled the conditions of the agreement of promise injury and voluntary surrender. The legal consideration of the judge in

[11] Ridwan khairandy, *Hukum Kontrak Indonesia (Dalam Perspektif Perbandingan),* (Yogyakarta:FH UII Press, 2014), p.66

placing the requirement is due to the unclear momentum of the promise injury from the case against the background of the Article 15 uujf judicial review so that there is a waiver of the debtor's rights because the debtor does not get the right to self- defense whether he commits a promise injury or not.

In contract law, Klausul cidera janji the promise injury clauseklausul is included in the naturalia clauses. Callusa naturalia means that the clause should be present in an agreement. However, the absenceof naturalia clauses does not invalidate an alliance. The parameters of the promise injury became a question in the view of the Constitutional Court Judge. Under the Civil Code, the parameters of a person injury pledge or not are based on the provisions of Article 1238 of the Civil Code which states:

"The debtor is negligent, if he By warrant or by a deed of the like has been declared negligent, or by his own bond, is if this stipulates, that the debtor shall be deemed negligent by the lapse of the prescribed time."

The understanding of promise injury based on Article 1238 above becomes the general understanding of Jurists. Just like J.Satrio argues that the default parameters are determined based on Article 1238 of the civil code, namely if the debtor is negligent and has been subpoenaed (reprimanded) face to face does not carry out its obligations or for its own sake is considered negligent due to the lapse of a predetermined time.[12]

Based on Article 1238 of the Civil Code, of course the creditor is obliged to make a warning (subpoena) first to be able to declare it has been injured or set a deadline for the implementation of obligations in the agreement. In practice the placement of the deadline for execution of obligations is characterized by a limit on installment payments or debt. With the observance of this time, if the debtor passes it, based on Article 1238 of the Civil Code, it is considered to be in a state of default.

Based on the above understanding, the seharusnya problem should not be the absence of a promise injury clause in the main agreement but the debtor's ignorance akanof the debt payment deadline. This is possible because the standard agreement as the principal agreement proffered by the debtor is not read or not explained so that it is not understood by the debtor. For thisreason, the Financial Services Authority Regulation Number 35 of 2018 concerning the business operation of Finance Companies has ordered finance companies to explain the contents of the agreement to debtors so that misunderstanding of the contents of the agreement can no longer be used as a reason for a default dispute.

In the Amar decision, the Constitutional Court applies the executorial right if the voluntary surrender is contrary to the nature of the executorial right itself. executorial rights are provisions in the realm of execution. It has been previously explained that execution can be done if :

a. In order to carry out a court decision that already has a permanent legal power. At material guarantees the law provides for exceptions on this general basis. Execution is not to execute a court decision that has legal force but rather to carry out the implementation of the form of a product that is "equated" by law with a decision that has gained permanent legal force.

[12] J.Satrio, *Hukum Perikatan Pada Umumnya*, (Bandung:Alumni, 1993), p.105

b. The verdict is also condemnatory. The decision of the condemnator is a decision that is "punitive". Each decision of this condemnator by itself has executorial power (it can be implemented by force by the general power).
c. The decision must not be carried out voluntarily. A new execution will appear if the defendant does not execute the verdict voluntarily.

From the provisions of this execution, it appears that the decision of the Constitutional Court which ordered the voluntary surrender conditions contrary to the provisionsof the execution sanaan. That isrtinya, with the requirement of voluntary surrender in the execution, it actually negates the execution because the new execution will appear if the verdict is not executed voluntarily. With this contrary arrangement, the legal certainty that servedthe purpose of the establishment of the UUJF disappeared.

Satjipto Raharjo said that to really ensure legal certainty. peraturanlegislation in addition must meet the formal requirements. must meet other conditions. namely:[13]

a. Jelas dalam perumusannya (unambiguous).
b. Consistent in its formulation-both internally and externally.
Internally consistent implies that in the same legislation must be maintained siethematic relationship between the rules. order and language. Consistently eketern. is the existence of a relationship of "harmonization " between the various laws and regulations.
c. The use of appropriate language and easy to understand. The language of legislation must be the language commonly used by the community.

In the amar ruling, the Constitutional Court gave the argument that the legislator was too focused on legal protection for one party only, namely creditors, so that there was no balance in the regulation of the law. The fiduciary agreement is an accessoir agreement that follows the main agreement, namely a credit agreement or a debt-debt agreement. This type of agreement has a great risk of default / injury of the debtor's promise. The creditor is a party that is very disadvantaged if the debtor defaults. For this reason, the creditor must carry out the credit activity by paying attention to the principles of healthy credit, including:[14]

a Not allowed to provide credit facilities without a written agreement
b Not allowed to give credit to people / businesses that are considered unhealthy
c Not allowed to give credit for the purchase of shares and working capital in jula buy shares
d Not allowed to give credit beyond the maximum limit pebiayaan.

To reduce the risk of large losses that will be experienced by creditors, it is necessary to guarantee. Jaminan is generally regulated in Article 1131 of the Civil Code. The legislator realized that the general guarantee was not enough to protect creditors because of the great risk. UFor that, there needs to be a special guarantee that puts the creditor in the preferred creditor position. Preferred creditors are creditors who

[13] Satjipto Raharjo, *Ilmu Hukum,* (Bandung: Citra Aditya Bakti), 2000, p. 134
[14] Muhamad Djuhana, *Hukum Perbankan di Indonesia*, (Bandung:PT.Citra Aditya Bakti,2000), p.83

get the right of precedence in debt repayment. krediturthe preferred creditor is the creditor who holds the security rights.

From the various rules governing guarantees and credit, it seems that the law protects creditors more than debtors because it has a greater risk. However, of course the law should provide a balanced position. Article 27 paragraph (1) of the 1945 Constitutiongstates that people must be treated equally before the law. This provision is also reaffirmed in Article 6 paragraph (1) letter g regarding the establishment of laws and regulations[15] yang, which states that the content of laws and regulations must reflect the principles, one of which is the principle of Justice. In the explanationof Article 6 paragraph (1) letter g dinis stated :

What is meant by "the principle of justice" is that every material content of legislation must reflect justice proportionally for every citizen

Justice must be done proportionately. This means that justice cannot be carried out samaequally, let alone by violating the rights of others.

L.J Van Apeldoorn who said that the purpose of law is the arrangement of community life in a fair and peaceful manner by establishing a balance between protected interests so that everyone gets what is rightfully theirs as it should be. Proportional justice should appear in the decision of the Constitutional Court. On the one hand, the decision of the Constitutional Court wants to provide justice to the debtor with the enforcement of conditional executorial rights, but on the other hand, this decision actually makes injustice because it degrades the executorial rights and creditor execution parate institutions.

In practice, there are events of execution events that are not carried carout in a cara yang correct way to the detriment of the debtor. For this, it should carabe the execution procedure that must be disciplined and made in the form of implementing regulations and provide strict sanctions to creditors who carry out inappropriate collection events.

The law is all that is useful to the people. As part of the legal ideal (ideje des recht), justice and legal certainty require a complement that is expediency. Happiness can be defined as happiness. The good of the law depends on whether it gives happiness or not to man. Good law is a law that can benefit every subject of law.

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In essence, the main purpose of law is to create an orderly society, creating an order of balance. Any public relations must not conflict with the provisions of the provisions of the existing law and apply in society. Law serves as a regulator of the

[15] Undang undang ini telah dirubah dengan Undang-Undang No. 15 Tahun 2019 tentang Perubahan atas Undang Undang Nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang- undangan namun tidak merubah asas asas yang tercantum dalam Pasal 6 UU No 12 Tahun 2011.

[16] Tata Wijayanta, "Asas Kepastian Hukum, Keadilan dan Kemanfaatan Dalam Kaintannya dengan Putusan Kepailitan Pengadilan Niaga", *Jurnal Dinamika Hukum*, Vol.14 No.2 Tahun 2014, p.222.

balance between the rights and obligations of humans as social beings and realize justice in living together. This was stated by Jeremy Bentham who asserted: "the law is only recognized as a law if it provides for the greatest possible benefit to as many people as possible".[17] The community will obey the law without the need to be forced with sanctions if the community feels the benefits.[18] Thus, the existence of law not only seeks to create Justice of a general nature, but the law itself then brings benefits and therefore the law remains useful *(doelmatig)* for everyone, without exception.[19]

Because the bexecution arrangement in fiduciary security is no longer beneficial to the creditor or debtor, the purpose of the establishment of the law pun tidak cannot provide legal protection.

IV. Conclusion

The nature of the position of executorial rights and execution parate institutions are both privileged rights arising from the consequences of the existence of special material security institutions recognized by law. Providing a protected position with ease in the return of receivables and position in advance for creditors is a characteristic of the special guarantee institution. In its decision, the Constitutional Court also relies on the enforcement of executorial rights on the voluntary surrender of creditors. This provision seems to be contrary to the nature of the executorial right itself. Basically, executorial rights are provisions in the realm of execution. Meanwhile, the promise injury in the main agreement is a naturalia clause which, although not included, is considered to be a promise injury clause that still exists. There needs to be a renewal of fiduciary rules, especially on execution rules by bringing back the right of executorial and execution parate which is characteristic of special guarantees on material guarantees.

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[18] Fence M. Wantu, "Antinomi Dalam Penegakan Hukum Oleh Hakim", *Jurnal Berkala Mimbar Hukum*, Vol. 19 No. 3 Oktober 2007, p. 395.

[19] Ibnu Artadi, "Hukum : Antara Nilai-Nilai Kepastian, Kemanfaatan Dan Keadilan", *Jurnal Hukum Dan Dinamika Masyaraka,t* Edisi Oktober 2006, p.

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