Analysis of Constitutional Court Decisions Regarding the Executorial Power of Fiduciary Guarantee Certificates

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Abstract

The executive power over Fiduciary Guarantee Certificates in its implementation creates many problems. According to the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law, which in essence states that the Fiduciary Guarantee Certificate has the same executive power as a court decision that has obtained permanent law, if the debtor defaults, the creditor as the fiduciary recipient has the right to sell the collateral object fiduciary. The fiduciary recipients have often used the statement as an excuse to sell collateral objects unilaterally without going through proper legal procedures to the detriment of the fiduciary giver. This research aims to analyze the legal reasons of the applicant and the ratio decidendi of the Constitutional Court's Decision. The research method is normative legal research through the use of primary data and secondary data, which is analyzed in a qualitative method and shown descriptively. Based on the results of the research, as regulated in Article 15 section (2) and section (3) of the Fiduciary Guarantee Law, the content should further restrict the execution procedure so that it can be carried out under the execution mechanism of a court decision with permanent legal force. Ratio decidendi Constitutional Court Decision No. 18/PUU-XVII/2019 is given conditions for fiduciary guarantees, that implementation of the Fiduciary Guarantee Certificate must be conducted and apply the same as executing court decisions that have permanent legal force.

A. Introduction

In conducting their business, Indonesian banking and financial institutions rely on economic democracy by using the principle of prudence. Its primary function is to collect and regulate public funds and aims to support the implementation of national development in the framework of increasing equity, economic growth, and national stability towards improving the welfare of the people at large.

The presence of various financial institutions is essential for the community. As we know that not everyone in society has enough funds to meet their needs, so financial institutions help run the wheels of this country's economy. Collateral has an essential function in economic activity in general because provision capital loans from financial institutions (both banks and non-banks) require the existence of a guarantee that must be fulfilled by the seeker of capital if he wants to get a loan/additional capital (in the form of credit) either for the long term or short term.

The Fiduciary Guarantee Institution is one of the institutions known in the guarantee legal system in the Republic of Indonesia. Transfer of property rights based on trust, known as Fiduciary, gives debtors a position that allows them to take possession of the collateral, even though their status is only as temporary borrowers and not as an owner.[1]

The guarantee of trust, known as the Fiduciary Guarantee, is born from a feeling of security in the relationship between one human being and another, so that trust arises in the opposite interaction. In practice, people have started using Fiduciary for immovable property. The difference between movable and immovable property, both tangible and intangible, is discussed in Law Number 42 of 1999 concerning Fiduciary Guarantees (from now on referred to as the Fiduciary Guarantee Law) Fiduciary Guarantee Objects.[2]

The constitutional guarantee for every Indonesian citizen to apply for a review of law against the 1945 Constitution is one of the parameters for the realization of the ideals of a rule of law state as well as a reflection of the recognition of the principle of people's sovereignty, in which laws as products of legislation between the DPR and the President can be tested for their constitutionality through judicial institutions, so that citizens can be involved and provide control over the implementation of the *checks and balances system* so that it runs well and effectively;

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[1]Daniel Romi Sihombing. "Legal Protection for Default Debtors in the Execution of Fiduciary Guarantees Based on Law Number 42 of 1999 concerning Fiduciary," *Journal of Law Media Justitia Nusantara* 6, no. 1 (2016).

[2] Hendri et al., "Juridical Review of the Creation Pawnshop Credit Agreement Using Fiduciary Guarantees (Study at PT. Pawnshop (Persero), Tbk. Kedaton Branch Office)," *Pactum Law Journal*, 2 (3) (2019): 779-793.

One can be seen in Aprilliani Dewi and Suri Agung Prabowo's request. This application is related to the application of the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law, which further reads as follows:

Article 15 paragraph (2):

> "The Fiduciary Guarantee Certificate, as referred in section (1), has the same executive power as a court decision that has obtained permanent legal force."

Article 15 section (3)

> "If the debtor defaults, the Fiduciary Recipient has the right to sell the object, which is the object of the Fiduciary Collateral on his power."

According to the law, a Fiduciary Guarantee is a transfer of ownership rights to an object based on trust, provided that the thing whose ownership rights are transferred remains in possession of the object owner. The owner of the thing acts as a fiduciary giver (the debtor), while the fiduciary recipient (the creditor) is a party that has receivables whose payments are guaranteed by a fiduciary guarantee. A fiduciary guarantee certificate containing the identities of the fiduciary giver and recipient, a description of the object, the value of the warranty, up to the value of the object, includes the sentence "For the sake of Justice Based on Belief in One Almighty God" as stated in the court's decision. Initially, Article 15 section (2) of the Fiduciary Guarantee Law stipulates that a fiduciary guarantee certificate has the same executive power as a court decision that has obtained permanent legal force. Furthermore, Article 15 section (3) of the Fiduciary Guarantee Law states that the fiduciary recipient has the right to sell objects that are objects of fiduciary guarantees on his power if the debtor defaults.

Constitutional Justice Suhartoyo explained that because the position of the creditor can carry out execution actions without a court execution mechanism, the position of the debtor who objects to handing over the object of fiduciary guarantees is weak.[3]

Because of these provisions, the Petitioner in the Constitutional Court Decision Number 18/PUU-XVII/2019, felt disadvantaged and submitted a request for a judicial review of Article 15 section (2) and section

[3] "Constitutional Court Decides Execution of Fiduciary Guarantees Follow Court Procedures," Directorate General of General Legal Administration, 7 January 2020, https://portal.ahu.go.id/id/detail/75-berita-lainnya/2460-mahkamah-konstitute-decide-execute-fiduciary-guarantee-follow-court-procedures .

(3) of the Fiduciary Guarantee Law against the 1945 Constitution. As for the ruling in the Decision of the Constitutional Court Number 18/PUU-XVII/2019, namely:

Judging:

1. Granted the petition of the Petitioners in part;
2. Stating Article 15 article (2) of Constitution Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" and "same as a court decision that has permanent law" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not construed "against fiduciary guarantees where there is no agreement regarding breach of contract (default), and the debtor objects to voluntarily surrendering objects that are fiduciary guarantees, all legal mechanisms and procedures in the implementation of the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the implementation of the execution of court decisions that have permanent legal force";
3. Declare Article 15 section (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "default" is contrary to the Constitution of the Republic of Indonesia 1945 and does not have binding legal force as long as it is not interpreted to "the existence of a default is not determined unilaterally by the creditor but based on an agreement between the creditor and the debtor or based on a legal remedy that determines that a default has occurred."
4. Stating the Elucidation of Article 15 section (2) of Constitution Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executive power" is contrary to the Constitution of the Republic of Indonesia Indonesia of 1945 and does not have binding legal force as long as it does not mean "for fiduciary guarantees where there is no agreement regarding default and the debtor objects to voluntarily surrendering objects that are fiduciary guarantees, all mechanisms and legal procedures in executing the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of a court decision that has permanent legal force";

5. Ordering the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate;
6. Rejecting the petition of the Petitioners for other than and the rest.

The decision of Constitutional Court Number 18/PUU-XVII/2019, which interprets Article 15 section (2) and section (3) of the Fiduciary Guarantee Law, has had several impacts. Not only for financial institutions that can no longer carry out instant execution of movable property guarantees based on a fiduciary deed if one day the debtor defaults, but this also has the potential to create a new case burden for the district court.

Deputy Chairperson of the Indonesian Advocates Association (Peradi), Ricardo Simanjuntak, expressed several influences that might arise due to Consitutional Court decision. Then, Ricardo saw that many financing institutions in the community that had the potential to dispute in court as the impact of the Constitutional Court's decision caused new problems. Are the court's resources sufficient to regulate this dispute between the debtor and the creditor? He also doubts the efficiency of handling disputes between debtors and creditors in court if the value of the fiduciary guarantee is not large enough. Instantaneous execution can no longer be carried out by creditors when there is a breach of contract which will disrupt the business climate in the financial sector with movable property guarantees such as fiduciaries. Ricardo said that one of the reasons for the existence of the concept of executorial confiscation for collateral for movable property was the uncertainty in the execution of civil decisions in Indonesia. He also mentioned the latest findings from LeIP, which stated that in Indonesia the mechanism for executing material guarantees is somewhat tricky. Furthermore, Ricardo considers that there are several financial institutions in the community and have the potential for disputes in court that arise because the Constitutional Court's decision presents new problems. Are there sufficient court resources to resolve this dispute between the debtor and the creditor? He also doubts the efficiency of dispute resolution between debtors and creditors in court if there is no substantial fiduciary guarantee value.[4]

B. Research Methods

The method used in this scientific journal is normative legal research. Normative legal research is legal research that is conducted through research on library materials and secondary legal materials, which are used

[4] Moh. Dani Pratama Huzaini, "This Advocate Talks About the Impact of the Constitutional Court's Decision on the Execution of Fiduciary Guarantees, " Hukumonline.com, January 17, 2020, https://www. impact-of-mk-ruling-on-execution-of-fiduciary-guarantee/ .

as research base materials through the provision of searches for regulations and literature related to the problem under study. [5]Secondary data consists of primary legal materials and secondary legal materials. Then the data is analyzed using qualitative methods, namely analyzing data related to the problem under study, then is selected based on a logical mind to avoid errors in the data analysis process. The results are presented descriptively by describing, explaining, and describing according to the problems in this study.

C. Discussion

1. The Petitioner's Legal Reasons for the Constitutional Court Decision No. 18/PUU_XVII/2019

Parties who view their constitutional rights and, or authorities as being harmed by the enactment of law obtain the right to judicial review or formal review. This is regulated in Article 51 paragraph (1) of Law no. 24 of 2003 concerning the Constitutional Court.[6] According to Jimly Asshiddiqie, the theory of testing (toetsing) is distinguished by material toetsing and formal toetsing. This distinction is usually associated with differences in understanding between wet in materiel zin (laws in the material sense) and wet in formele zin (laws in the formal meaning). Based on Law no. 24 Tahuna 2003 concerning the Constitutional Court, the two forms of review are separated using the terms material content of the law and the formation of the law. Material testing is testing the material content of the law, while formal testing is testing its construction. [7]

The request for a judicia; review of the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law against the 1945 Constitution is based on the legal reasons that the applicant has the rights as an Indonesian citizen in submitting a request for judicial review at the Constitutional Court, as a manifestation of the *checks* and *balances* system. The applicant is a Fiduciary Giver in the Fiduciary Guarantee Certificate (Fiduciary Giver) Number W11. 01617952.AH.05.01 who feels directly disadvantaged as a result of the withdrawal of the fiduciary guarantee object carried out by the Fiduciary Recipient.

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[5] [5]Soerjo no Soekanto, *Normative Legal Research : A Brief Overview* (Jakarta: Rajawali Pers, 2001), h . 13-14.

[6] Erika Permatasari, " Review of judicial review vs. material test rights, " Hukumonline.com, 20 December 2021, https://www.Hukumonline.com/klinik/detail/ulasan/cl4257/judicial-review-vs-hak-uji-materii .

[7] Jimly Asshiddiqie, *Procedural Laws on Examining the Act (Jakarta:* Konpres 2006), h. 57

Fiduciary recipients hire *debt collector* services by force to take arbitrary action to take possession of the property controlled by the Applicant without going through proper legal procedures. This was done without showing evidence and official documents, without authority, by attacking personal self, and dignity, and threatening to kill the Petitioner. For these actions, there is a South Jakarta District Court Decision Number 345/PDT.G/2018/PN. Jkt.Sel, which decides that the Fiduciary Recipient's actions, as described above, constitute an unlawful act.

The Fiduciary Recipient ignores the South Jakarta District Court Decision Number 345/PDT.G/2018/PN. Jkt.Sel, based on the Fiduciary Agreement which is considered to have permanent legal force based on *a quo provision,* so it continued to withdraw the Fiduciary collateral object on January 11, 2019. The Petitioner believes that there has been a violation of the protection of private property rights, honor, and dignity that has been guaranteed by the 1945 Constitution with the enactment of the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law. As for the legal reasons for the Petitioner's Application regarding the enforceability of the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law, namely:[8]

Article 15 section (2):

> "The Fiduciary Guarantee Certificate, as referred in article (1), has the same executive power as a court decision that has obtained permanent legal force."

Article 15 section (3):

> "If the debtor defaults, the Fiduciary Recipient has the right to sell things, which is the object of the Fiduciary Collateral in his power."

According to the Petitioner, the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law are contrary to the 1945 Constitution, in particular Article 1 paragraph (3), Article 27 paragraph (1), Article 28D section (1), Article 28G section (1)
Article 1, section (3):

> "Indonesia is a state of law."

Article 27 section (1):

[8] Constitutional Court Decision No.18/PUU_XVII/2019

> "All citizens have the same position before law and government and are obliged to uphold that law and government without exception."

Article 28D section (1):

> "All citizens have the right to recognition, guarantees, protection, and legal certainty that is just and equal treatment before the law."

Article 28G section (1):

> "All citizens have the right to protection for himself/herself, family, honor, dignity, and property under their control, and has the right to feel safe and protected from threats of fear to do or not do somethings which is a human right."

Article 28H section (4)

> "All citizens have the right to have private property rights and these property rights may not be taken over arbitrarily by anyone."

The Fiduciary Guarantee Certificate includes the sentence "FOR JUSTICE BASED ON THE ALMIGHTY GOD" like a court decision as a form of protection of legal certainty and for creditors in providing credit to debtors. Therefore, the executive power of a fiduciary guarantee certificate with a legally enforceable court decision still has the same power in the relationship between creditors and debtors regarding credit or guarantees. Then, it becomes the main principle in the provisions of Article 15 section (2) and section (3) of the Fiduciary Guarantee Law.

Along the phrase "executive power" and "same as a court decision", which are regulated in Article 15 paragraph (2) of the Fiduciary Guarantee Law, give rise to the result of legal uncertainty, which is undoubtedly contrary to Article 28 D section (1) of the 1945 Constitution of the Republic of Indonesia, interpreting the phrase "executive power" and "same as a court decision" can be seen differently:

First, *a quo provision* will become a tool for creditor legitimacy. The creditors can directly execute fiduciary objects without going through legal procedures, so it seems that there has been an act of arbitrariness in taking over fiduciary objects which in their position consider the debtor to have defaulted.

Second, there is a tendency to ignore the principle of *legal certainty* and the principle of *legal justice* in the content regulated in Article 15 section (2) of the Fiduciary Guarantee Law, which should not stop at provisions that equate "fiduciary certificates" with "a court decision that has permanent legal force" so that it seems to protect the interests of creditors. Therefore, there is a need for further regulation on how the execution

procedure can be conducted to adapt to the execution mechanism for court decisions with permanent legal force, namely by first submitting a request for execution to the Chief Justice as stipulated in Article 196 Herzien *Inlandsch Reglement* (HIR), that is:

> "If the defeated party is unwilling or negligent to comply with the contents of the decision peacefully, then the winning party submits a request, either orally or by letter, to the chairman of the district court. Referred to in the first section of article 195, the chairman of the district court order and warn to summon the defeated party, so that they fulfill the decision within the time determined by the chairman, which is a maximum of eight days."

Third, if there is legal certainty, if the phrase "executive power" and the phrase "same as a court decision" can be interpreted as a Fiduciary Guarantee Certificate overriding the court's decision on the derivative agreement and the primary agreement even though it does not yet have binding legal force. Regarding the question as the third model of meaning, the case which befell the Petitioners should not have occurred.

A *quo provisions* are mainly related to the phrase "executive power" in the context of executing a fiduciary object and the phrase "same as a court decision" when confronted Fiduciary Guarantee Certificate with a Court decision, has shown the absence of a clear concept and mechanism thus it is not compatible with legal procedures which exist. Even in practice, it shows that there is no clear procedure and no legal mechanism that is standard. When there is a court decision stating that the fiduciary recipient's actions are "contrary to the law" and include acts against the law. Responding to the explanation of the Petitioner's reasons, according to Agus Yudha Hernoko, there are times when under certain conditions to show the presence of a debtor's default no longer requires a statement of negligence, such as: for the completion of achievements a fatal deadline applies, the debtor refuses completion or the debtor admits his negligence.[9]

In addition to the Constitutional Court Decision No. 18/PUU_XVII/2019, which was submitted by the debtor as a fiduciary giver, a material test of the Fiduciary Guarantee Law also contained Constitutional Court Decision No. 19/PUU-XVIII/2020, which was actually submitted by the creditor as the recipient of the fiduciary guarantee. The requested judicial review in the Constitutional Court Decision No. 19/PUU-XVIII/2020, namely:

[9] Agus Yudha Hernoko, *Agreement Law: The Principle of Proportionality in Commercial Contracts* (Jakarta: Prenada Media, 2014)

Article 30 of the Fiduciary Law:

> "The Fiduciary Giver is obliged to hand over the Things which are the object of the Fiduciary Guarantee in the context of executing the Fiduciary Guarantee."

Explanation of Article 30 of the Fiduciary Law:

> "If the Fiduciary Giver does not hand over the Things which is the object of the Fiduciary Collateral at the time the execution is carried out, the Fiduciary Recipient has the right to take the Things which is the object of the Fiduciary Guarantee and if necessary may request assistance from the authorities."

The Petitioner in the Constitutional Court Decision No. 19/PUU-XVIII/2020 outlines the reason for submitting the *a quo application*, that the Petitioner has carried out his work as an internal collector to carry out a series of Fiduciary Guarantee execution processes for default debtors in accordance with the provisions of Article 30 of the Fiduciary Guarantee Law, until then the Fiduciary Guarantee object is taken from physical possession the debtor concerned by the Petitioners as mandated in the Elucidation of Article 30 of the Fiduciary Guarantee Law, but it turns out that special provisions which are privileges of the Fiduciary Guarantee Law in an effort to provide convenience to support the development of the financing business are challenging to implement in practice executing Fiduciary Guarantees in the area where the applicant carries out his work, what actually happened was that the applicants as internal collectors were reported by the fiduciary giver to the police on suspicion of criminal acts of theft and/or vandalism (Article 363 and/or 406 of the Criminal Code), related to the taking of fiduciary collateral objects done. So that based on the decision that has permanent legal force, the applicant is declared legally and convincingly proven guilty of committing the crime of theft and must undergo a sentence that takes away his freedom as a human being who deserves to live independently.

With the enactment of Article 30 and the Elucidation of Article 30 of the Fiduciary Guarantee Law, according to the applicant, creates injustice and law uncertainty for the applicant as an internal collector, where if the fiduciary giver does not hand over the object that is the object of the Fiduciary Guarantee at the time the execution is conducted, the fiduciary recipient has the right to take the object to become the object of the Fiduciary Guarantee and if necessary may request assistance from the authorities.

As a result of the application of Article 30 and the Elucidation of Article 30 of the Fiduciary Guarantee Law as it is (*original intent*), which

does not provide an explicit interpretation regarding the taking of objects that are objects of Fiduciary guarantees following the essence of the form of Fiduciary guarantees, the applicant's rights have been violated constitutionally, namely that the applicant in carrying out his duties and work as an internal collector of a finance company feels that he does not receive recognition, does not receive guarantees, does not receive protection, and does not obtain fair legal certainty and does not receive equal treatment before the law as referred to in Article 28D section (1) The 1945 Constitution, as follows:

> "Everyone has the right of recognition, guarantees, protection, and legal certainty and equal treatment in law."

At the request of the applicant, Constitutional Court Decision No. 19/PUU-XVIII/2020 states adjudicating: the applicant's application cannot be accepted. As for the consideration of the Constitutional Court is that the court has found no evidence to support that the applicant meets the criteria as stipulated in the relevant provisions, particularly evidence in the form of a professional certificate in the field of billing from a Professional Certification Institution in the area of financing registered with the Financial Services Authority. Therefore, the applicant has no legal standing in submitting *a quo petition.*

Regarding the judicial review of the Fiduciary Guarantee Law, J. Satrio stated that the elements of Fiduciary formulation include:[10]

a. The Element of Ownership Rights to Fiduciary Transfer that is diverted is the owner's authority over particular objects belonging to them, which also includes acts of ownership (*beschikkingsdaden*).
b. The elements of trust from the point of view of the Fiduciary Giver based on existing practices can be interpreted in terms of trust:
   - The guarantee-giving debtor believes that the fiduciary object handed over by him will not be owned by the collateral-receiving creditor, but only as collateral;
   - The guaranteeing debtor believes that the creditor for the collateral object will only use the authority obtained merely to protect his interests as a creditor;
   - The guarantor debtor believes that the ownership of the collateral object will return to the guarantor debtor if the debtor's debt for which the Fiduciary guarantee is repaid.

[10] J. Satrio, *Guarantee Law: Fiduciary Material Guarantee Rights* (Bandung: Citra Aditya Bakti, 2002), h. 160 – 165.

The basic of a Fiduciary guarantee is an agreement, namely a Fiduciary agreement that has specific characteristics. The Fiduciary Giver and the Fiduciary Recipient have an engagement relationship, namely the creditor's right to request delivery of collateral from the debtor in a *constitutum posessorium manner.* The engagement is an agreement to give something because the debtor submits the goods *constitutum possessorium* to the creditor.

Concerning the ownership of objects as Fiduciary collateral objects, according to Fred BG Tumbuan that the transfer of property rights to a Fiduciary is a transfer of ownership rights to an object based on a sense of trust with an agreement that the ownership rights to the said object remain in possession of the Fiduciary guarantee provider. Delegation of ownership rights to an object as an object of fiduciary guarantee is carried out constitutum possessorium (verklaring van houderschap), meaning that the transfer of ownership rights to an object is carried out by continuing to control the object so that the Fiduciary Giver will control the object onwards for the benefit of the recipient of the Fiduciary guarantee.[11]

The execution provisions, as stipulated in Article 15 section (2) and section (3), can only be carried out if the debtor defaults, namely the debtor does not fulfill his obligations due to the debtor's mistakes, either intentional or due to negligence, and force majeure (Overmacht/ *Forcemajeur*). [12]There are four situations where the debtor is considered in default, namely:

1. Not doing what the debtors were promised to do;
2. Conducted what it promises, but not as promised;
3. Fulfilling what has been promised but was too late;
4. Doing something according to the agreement is not allowed to do.

So as stipulated in the Fiduciary Guarantee Law, the execution of objects that are objects of Fiduciary Guarantees can be carried out by:[13]

a. The implementation of executorial title by the Fiduciary Recipient is following the provisions of Article 15 section (2), namely if the debtor

[11] Fred BG Tumbuan, *Examining the Fundamentals of the Fiduciary Law, in the Association of Studies Concerning Several Legislative Products and Civil Law Issues*, (Jakarta: PT. Gramedia Pustaka Utama, 2017), h. 49-50

[12] Djaja S. Meliala, *Development of Civil Law regarding Objects and Contract Law, Cet.1*, (Bandung: Nuansa Mulia, 2015), h. 75.

[13] Firda Rizqika, "An Analysis of the Execution of Fiduciary Guarantees After the Constitutional Court Decision Number 8/PUU-XVII/2019," *Journal of Legal Studies* vol 11, no. 1 (2022): 53-66. https://jih.ejournal.unri.ac.id/index.php/JIH/article/view/8156.

or fiduciary giver defaults, then the fiduciary certificate containing the irah-irah "For the sake of Justice Based on Belief in One Almighty God" can be executed by force;

b. Sales of objects that are the object of the Fiduciary Collateral on the Fiduciary Recipient's authority through a public auction and taking the settlement of the receivables from the proceeds of the sale;
c. Underhand sales are carried out based on the agreement of the Fiduciary Giver and Recipient if, in this way, the highest price that benefits the parties can be obtained.

2. *Ratio Decidenci* Constitutional Court Decision No. 18/PUU-XVII/2019

According to Peter Mahmud Marzuki, *ratio decidendi* are the reasons and arguments used as legal considerations as the basis for deciding cases by judges. Legal considerations are generally obtained from "weighing" or "subject matters."[14] The *ratio decidendi* in the Constitutional Court Decision No. 18/PUU-XVII/2019 can be explained as follows:[15]

The court considers that enacting a statute norm has fundamental requirements, namely the principles of legal certainty and justice. In the context of the Fiduciary Guarantee Law, as a form of legal protection for the parties who are legal subjects and objects that are collateral in the Fiduciary Guarantee agreement. One of the characteristics of a fiduciary agreement is the transfer of property rights to goods which are collateral from the debtor to the creditor so that juridically it is as if the goods under the control of the debtor have been transferred to become the property of the creditor. In contrast, physical possession of the collateral remains with the debtor based on the principle of trust.

To get a complete description in assessing whether or not there are problems related to forms of legal protection, both legal certainty and justice for parties bound in fiduciary agreements, including objects that become Fiduciary Guarantees, it cannot be separated from the fundamental essence of the norms governing the nature of the Fiduciary Guarantee agreement, especially regarding the norms of the article that is being questioned by the Petitioner, namely Article 15 section (2) and section (3) of the Fiduciary Guarantee Law. The norms contained in the article are fundamental because the norms contained in the article issue the power of execution which can be conducted by the fiduciary guarantee holder (the creditor),

[14] Peter Mahmud Marzuki, Legal Research (Jakarta: Kencana, 2006), p.119.
[15] Constitutional Court Decision No.18/PUU_XVII/2019

which then creates many problems, both related to the constitutionality of norms and implementation.

Associated with the issue of the constitutionality of Article 15 section (2) of the Fiduciary Guarantee Law, which gives "executive title" to a fiduciary certificate and "equalizes it with a court decision that has permanent legal force", it implies that a fiduciary certificate has the power of execution without requiring a court decision preceded by a civil lawsuit and the execution is treated the same as a court decision that has permanent legal force. The argument is ` because legally in the fiduciary agreement, material property rights have been transferred to the rights of the fiduciary recipient (the creditor) so that the creditor can ` at any time take the object of fiduciary guarantee ` from the debtor and then sell it to anyone with ` full authority rests with the creditor with reasons because the power of execution of the certificate has been equated with a court decision that has permanent legal force.

The aspect of constitutionality contained in a quo norm does not reflect the provision of balanced legal protection between parties bound in a fiduciary agreement and also objects that become fiduciary guarantees, both legal protection in the form of legal certainty and justice. This is because the two fundamental elements contained in a quo article, namely "executive title" and "equated with a court decision that has permanent legal force", have implications for direct execution as if it were the same as a court decision has permanent legal force by the fiduciary recipient (the creditor) without asking for court assistance for execution. This shows that, on the one hand, there are exclusive rights granted to creditors, and on the other hand, there has been a neglect of the debtor's rights which should also receive the same legal protection.

Problems related to the constitutionality of a quo norm which gives "executive title" and "equates it to a court decision that has obtained permanent legal force" can have an impact on the existence of unilateral actions carried out by creditors, namely creditors carrying out their execution of objects fiduciary guarantees because the ownership rights of fiduciary objects have been transferred without going through the execution process which should be an implementation of a court decision already has permanent legal force, namely by first submitting an application to the district court. As a consequence, ` unilateral actions carried out by creditors can lead to arbitrary actions and are carried out ` in a way that is less "humane", both in the form of physical and ` psychological threats.

This lack of clarity brings ` juridical consequences' in the form of legal uncertainty ` regarding when the fiduciary giver (the debtor) has

actually defaulted, which results in the emergence of ` absolute authority on the part of the fiduciary recipient (the creditor) to sell objects which are the object of collateral fiduciaries who are in the power of the debtor. Thus, the substance of *a quo norm* also contains derivative constitutionality problems which cannot be separated from the same problems as the provisions whose substance is regulated in *a quo norm,* namely legal uncertainty related to the procedure for carrying out execution and certainty about the time when the fiduciary giver (the debtor) is declared "default" (default), whether there are installment stages that are late or not fulfilled by the debtor, or since the maturity of the debtor's loan must be repaid. Such uncertainty also results in the emergence of the interpretation that the right to determine the existence of a "default" is in the hands of the creditor (fiduciary recipient). Such legal uncertainty automatically results in the loss of the debtor's rights to defend himself and the opportunity to obtain the sale of fiduciary collateral objects at a reasonable price.

There is no legal certainty either concerning the execution procedures or the time when the fiduciary giver (the debtor) is declared "default" (default), a loss of opportunity for the debtor to obtain the sale of fiduciary collateral objects at a reasonable price. Apart from often causing acts of "coercion" and "violence" from people who claim to be parties who have the power to collect loans from debtors, this has given rise to arbitrary acts committed by fiduciary recipients (creditors) in humiliating the dignity of debtors. There is an issue of unconstitutionality in the norms regulated in Article 15 section (2) and section (3) of the Fiduciary Guarantee Law. Because even if a fiduciary certificate has an executorial title, it means that it can be implemented as a court decision with permanent legal effect. Therefore, the procedure for applying for a fiduciary certificate must follow the application of Article 196 or 208 of the RBg Program HIR. In other words, the fiduciary recipient cannot execute the execution but must submit an application to the district court.

The complete provisions of Article 196 HIR or Article 208 RBg are:

> "If the defeated party is unwilling or negligent to comply with the contents of the decision peacefully, then the winning party submits a request to the chairman of the district court either orally or by letter. Referred to the first section of Article 195, the chairman of the district court order and warn to summon the defeated party, so that he fulfills the decision within the time determined by the chairman, which is a maximum of eight days".

The Court believes that the exclusive authority possessed by the recipient of the fiduciary right (the creditor) can still be attached as long as

there are no problems with the certainty of the time regarding when the giver of the fiduciary right (the debtor) has "defaulted" (default). The debtor voluntarily surrenders the object which is the object of fiduciary agreements to creditors for self-sales. In this case, the fiduciary giver (the debtor) admits that he has "defaulted". Hence, there is no reason not to hand over the object, which is the object of the fiduciary agreement to the fiduciary recipient (the creditor) to be sold by the fiduciary recipient (the creditor). Therefore, as long as the giver of fiduciary rights (the debtor) has acknowledged that there is a "default" (default) and voluntarily surrenders objects that are the object of the fiduciary agreement, it becomes the full authority of the fiduciary recipient (the creditor) to be able to carry out his execution (para te execution). However, if the opposite happens, where the fiduciary right giver (the debtor) does not admit that there is a "default" (default) and objects to voluntarily handing over objects that are the object of the fiduciary agreement, the fiduciary right recipient (the creditor) may not carry out the execution himself. But, they must submit a request for execution to the district court. Thus, the constitutional rights of the fiduciary right giver (the debtor) and the fiduciary right recipient (the creditor) are equally protected.

With the legal considerations described above, there are sufficient reasons for the Court to declare the norm of Article 15 section (2) of the Fiduciary Guarantee Law, in particular the phrase "executive power" and "equal to a court decision that has permanent legal force" can only be said to be constitutional as long as it means that "for fiduciary guarantees where there is no agreement regarding the occurrence of "default" (default) and the debtor objects to voluntarily surrendering the object that becomes a fiduciary guarantee, all legal mechanisms and procedures in executing the Fiduciary Guarantee Certificate must be carried out and apply the same as executing court decisions which has permanent legal force". Meanwhile, regarding the norms of Article 15 section (3) of the Fiduciary Guarantee Law, in particular the phrase "default" can only be said to be constitutional as long as it is interpreted that "the existence of a breach of contract is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal action" determining whether a breach of contract has occurred."

By declaring unconstitutional the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in the norm of Article 15 section (2) and the phrase "default" in the norm of Article 15 section (3) of the Fiduciary Guarantee Law, even though the Petitioner did not request a review of the Elucidation of Article 15 section (2) of the Fiduciary Guarantee Law, but because the Court's considerations had an

impact on the Elucidation of Article 15 section (2) of the Fiduciary Guarantee Law, the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" in Explanation of the norms of Article 15 section (2) by itself must be adjusted to the meaning that becomes the Court's stance on the norms contained in Article 15 article (2) of the Fiduciary Guarantee Law with the meaning "to fiduciary guarantees where there is no agreement regarding default and the debtor objects to handing over voluntary objects that become fiduciary guarantees, all legal mechanisms and procedures in the pel the execution of the Fiduciary Guarantee Certificate must be conducted and apply the same as the execution of a court decision that has permanent legal force".

Based on Constitutional Court Decision No 18/PUU-XVII/2019, fiduciary recipients or creditors may only carry out parate executions if there is an agreement regarding a predetermined default and the debtor is willing to surrender the fiduciary object voluntarily. If this is not fulfilled, the fiduciary recipient must first submit an application for the implementation of the execution to the District Court to carry out the execution. Regarding the execution of fiduciary guarantees after the Constitutional Court decision No 18/PUU-XVII/2019, at least two things have changed, namely:[16]

1. The reduction of executive power of fiduciary guarantee certificates. The provisions of Article 15 which are meant by executorial power are clarified, namely the power to be conducted by force with assistance and utilizing the tools of the state by asking permission from the Chairperson of the Court, then proceed with the aanmaning mechanism or efforts from the Head of the District Court such as warning the Defendant, until finally proceeding with seizure execution and sale.
2. The phrase "default" is deleted, as long as it does not mean "the existence of a default is not determined unilaterally by the creditor but based on an agreement between the creditor and the debtor or based on a legal remedy that determines that a breach of contract has occurred," the execution can be conducted by the Fiduciary Recipient (the creditor) if there are no objections and taking legal remedies, or at least in the case of legal remedies, a court decision with permanent legal force has the potential to eliminate the main characteristic of fiduciary guarantees, namely ease of execution.

[16] Firda Rizqika, loc. cit.

D. Conclusion

The legal reasons for the petitioner in the Constitutional Court Decision No. 18/PUU-XVII/2019, namely the content as regulated in Article 15 articles (2) of the Fiduciary Guarantee Law should not stop at provisions that equate "fiduciary certificates" with "court decisions that have obtained permanent legal power" without further regulating how the execution procedure can be conducted following the execution mechanism of a court decision with permanent legal power.

Ratio decidendi Constitutional Court Decision No. 18/PUU-XVII/2019, regarding Article 15 section (2) conditions are given, namely: First, for fiduciary guarantees where there is no agreement regarding breach of contract (default) and the debtor objects to surrendering objects voluntarily that are fiduciary guarantees, all legal mechanisms and procedures in the implementation of the execution of the Fiduciary Guarantee Certificate must be conducted and apply the same as the execution of court decisions that have permanent legal force. Second, Article 15 section (3) provides a condition that "the default is not determined unilaterally by the creditor but based on an agreement between the creditor and the debtor or based on a legal remedy that determines that a breach of contract or default has occurred."

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