

**PROCEDURE FOR TRANSFER OF FIDUCIARY OBJECTS  
IN INDONESIA POST THE DECISION OF THE  
CONSTITUTIONAL COURT  
NUMBER 18/PUU-XVII/2019**

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**ABSTRACT**

This research aims to examine whether the issuance of Constitutional Court Decision No. 18 / PUU-XVII / 2019 provides legal certainty to the parties to credit agreements. The results of this study indicate that the fiduciary collateral law does not guarantee legal certainty to the fiduciary givers and recipients because of the unequal position between fiduciary givers and fiduciary recipients. Because the creditor cannot execute by force himself but by asking for the help of the police, if there is a breach of promise (failure) of the credit right (the debtor) against the creditor which is still not recognized by the debtor and objections to the voluntary surrender of the things that are the subject of the credit agreement. So in essence it states that the assessment of default must be based on the debtor's agreement, including the credit guarantee that you want to enforce, and must also be submitted voluntarily. However, if the debtor objects, the creditor has no right to enforce except for legal remedies that provide for the debtor's default. The power of the police service is limited to ensuring execution if necessary, and not as part of the execution, unless there is a procedure containing criminal elements, the new police service has the power to enforce criminal law.

**Keywords:** legal certainty, implementation, fiduciary

**INTRODUCTION**

Along with the increase in development activities, the need for financing has also increased, and most of it is obtained from lending and borrowing activities. Fiduciare Eigendom Overdracht or what is commonly called Fiduciary comes from the word 'fides' which means trust. (Farida Hassanis Hasballah, 2005)

Fiduciary is one of the secured institutions, material rights that provide guarantees. The variety of types of things that can be collateralized in an agency adds to the flexibility of society in the use of credit. Article 1 No. 4 explains the things that can be charged to the fiduciary, that is, everything that can be owned and transferred, whether material or intangible, registered and unregistered, movable and immovable that cannot be encumbered with mortgage rights. or a mortgage. Material rights are related to things, that is absolute rights over a thing where the right gives direct power over the thing and is defensible against anyone. Material rights can be distinguished between material rights that provide enjoyment of the things themselves and things belonging to other people that are collateral, for example, mortgages, mortgages, and credit. (Mumek, Regita A, 2017)

Because the credit grantor or debtor believes that the receiver or credit creditor wants to return property rights to the goods that have been delivered to him after the debt has been paid. On the other hand, the fiduciary recipient or creditor believes that the fiduciary grantor or debtor will not abuse the extra thing which is in his power. (Gunawan Widjaya and Ahmad Yani, 2007) The promulgation of Constitutional Court Decision No. 18/PUU/XVII/2019 brought about new changes in the procedure for implementing collateral objects. On January 6, 2020, regarding the judicial review of Law No. 42 of 1999 Article 15, Paragraph (2) and Paragraph (3), the Credit Guarantee Law, because this article establishes the enforcement authority that can be executed by credit guarantee holders (creditors), which raises many problems, both about the constitutionality of the rules and the level of their implementation. In general, enforcement in the field of civil law is carried out through court institutions either due to a judge's decision having permanent legal force or other documents that have enforcement powers that can be executed through the order of the chief district court, such as a certificate of fiduciary guarantee. (DY Witanto, 2015) Executive power over certificates of credit guarantee As outlined in the Credit Guarantee Act before the Constitutional Court ruling, executive power over certificates of credit guarantee means that enforcement can be executed directly without going through a court and is final and binding on the parties to enforce a decision. (Dewi, R. P., Purwadi, H., & Saptanti, N, 2017)

Objects/objects encumbered with a fiduciary guarantee issued through a notarized instrument in the Indonesian language, and Article 11 Paragraph (1) states “Things encumbered with fiduciary collateral shall be registered”. Fiduciary guarantees can be used as a means of proof, and it is one of the means of proof that has a very strong evidentiary value. (Purwanto, 2012) Concerning problems in the form of the lack of legal certainty in the form of legal protection and justice, are related to the implementation of credit guarantee objects through the implementation of executive titles from the perspective of legal protection of credit grantors. The aim is to find out whether the decision of the Constitutional Court provides adequate protection to the trustee. These problems must receive serious attention, to increase the public's confidence as credit consumers in Indonesia. The benefit of this research is that it can be used as a consideration to improve the decision of the Constitutional Court in issuing a decision on the implementation of the elements of the credit guarantee through the implementation of the executive addresses so that they can provide adequate protection to the credit grantors.

## **METHODE**

This research uses the standard jurisprudential research methods. In conducting the research, the author uses a platform approach and a comparative approach. The legal approach is to examine all laws and regulations relevant to the matter being addressed. (Peter Mahmoud Marzouki, 2014) The birth of the Constitutional Court's decision provided legal certainty to the parties involved in the fiduciary agreement. Therefore, the author uses a comparative approach by comparing the implementation of fiduciary guarantees based on Law No. 42 of 1999 before and after the Constitutional Court's decision on judicial review of Law No. 42 of 1999. The collection method uses library research data, which is data collection done through written data to gain an understanding. Wanted, the results and analysis of this article will answer how the legal construction of the procedure for handing over credit guarantee objects after the decision of the Constitutional Court.

## **RESULTS**

In practice, not all loans issued by banks can be run and terminated smoothly. Things that lead to problem loans, for example, due to insolvency of the debtor or due to business decline and failure of business which leads to a decrease in the business income of the debtor or the debtor is not willing to pay deliberately because the character of the debtor is not good. The fiduciary legal relationship is not in the sense of an actual transfer of "ownership", as in "leverage", but what must be considered is the intention of the parties, in this case, the fiduciary grantor and receiver, the object is used as a security object, and the object is not intended to be transferred under a sale and purchase agreement. (James Ridwan Efferin, Yuriska, 2020)

If there is a transfer of title in the real sense, the creditor (recipient of credit) has no obligation to return what should be his. Therefore, the legal development in the field of guarantee law is a logical consequence and manifestation of the responsibility of legal development to keep pace with the speed of activities in trade, industry, companies, transportation, and activities in development projects in an economic context. development. (Irma Devita Purnamasari, 2011) Free translation of Parate-Execution is that the creditor exercises the right of his power to sell the ancillary things freely as his own if the debtor does not keep the promises or defaults on the payment. (Andreas Albertus Andi Prajitno, 2010) Executive power in a credit guarantee certificate means that direct enforcement can be executed without going through court and is final and binding on both parties to implement the decision. (Badria Haroon, 2010) Enforcement by creditors through the services of debt collectors sometimes leads to new problems between creditors and debtors. This is due to how the collectors enforce the credit guarantees using violence, intimidation, and even violence by seizing the credit guarantees in the street, and this is what causes resistance from the debtor.

The Constitutional Court responded to the debt collector, which has always been very disturbing to the public, by issuing this decision on January 6, 2020. Based on a request for judicial review of the Credit Guarantee Act. Based on the decision of the Constitutional Court, it is declared that paragraph (2) of Article 15 and

paragraph (3) are still valid and have legal force, but the understanding or meaning of these two articles is restricted to the implementation of executions in the field, namely: Was there an agreement regarding negligence?) between the parties to the credit agreement? Does the debtor have no objection to the delivery of things that are voluntary credit guarantees? Reconstruction in Article 15 Paragraph (2) confirms the presence of legitimacy on the part of the implementation that gives priority to the best solution for the parties to the fiduciary agreement. The phrase “executive power” is contrary to the 1945 Constitution and has no binding legal force as long as it does not mean “against fiduciary guarantees” where there is no agreement of default and the debtor objects to voluntarily surrendering things which are fiduciary guarantees, then all legal mechanisms and procedures shall be In the execution of the execution.

The credit guarantee certificate must be valid in the same way as the execution of a court decision that has permanent legal force. In the reconstruction of the execution of the executive property, it is implied that the creditor can take the credit guarantee to object himself as long as it occurs in an orderly manner without any disputes, which is A form of the creditor's sincerity to enforce execution when the debtor has defaulted. However, executions that are not subject to a court decision must be based on circumstances where there is no dispute. Moreover, Paragraph (3) of Article 15 of Law 42/1999 states that the credit recipient has the right to sell objects that are objects of credit guarantees on his authority if the debtor defaults. The phrase “default” does not explain the reasons that led to the negligence of the debtor or the retraction of the agreement with the creditor. The default must be explained not only from the point of view of the creditor but based on the agreement of the two or based on the existence of a legal remedy specifying that the "default" has occurred. Meanwhile, the expression “default” in paragraph (3) of Article 15 shall be interpreted to mean that the existence of 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 specifying the occurrence of a “default”.

Donald Black said that law is social control by the government (law is government social control), so the legal system is a system of social control in which the structures, institutions, and processes of social control are regulated. (Donald Black, 1976) This form of social control is not only analogous to a form of coercion but also a form of consensus consultation and is another form of the legal system as a tool of social engineering. With the provision of statutory security provisions, legislators required that a credit security should be secured or secured as security if one day the debtor fails to perform its obligations. Therefore, if the debt load is not executed, the legal consequences that can be presented to the debtor can be implemented based on the full evidence. (H Budy Untung, 2000)

## **DISCUSSION**

The implementation or withdrawal of the elements of the credit guarantee must take into account the moral sense, which was previously carried out with a direct approach, by explaining the main essence of the credit agreement to the debtor. (Kusumastuti Indri Hapsari, 2017) Thus two promises are prohibited in the execution of objects of credit guarantee, namely, promises to perform objects that

are objects of credit guarantees in a way that is contrary to law, and promises that give authority to credit recipients (creditors) to own objects that are the object of credit guarantees. (Andreas Albertus Andy Pragetnow, 2010)

## CONCLUSION

The purpose of the executive authority in the certificate of credit guarantee is to facilitate the withdrawal of the financing compensation granted to the debtors by the creditors. (Muhammad Maksum, 2010) Considering that the executive rights are exclusive rights owned by the credit beneficiaries immediately in a credit guarantee certificate which is considered a judicial decision having permanent legal force, this has created legal uncertainty and made the situation between the debtor and the creditor unequal or unequal equal. The problem that often occurs is resistance when taking side things from credit providers. If we pay attention to the sound of Article 15 of the Credit Law after the decision of the Constitutional Court, we can conclude that legislators want to provide guarantees and protect legal certainty for credit recipients (creditors) in extending credit to credit grantors (debtors). The implementation of the credit guarantee element organized after the decision of the Constitutional Court provides a legal interpretation that the executive power of the credit guarantee certificate cannot be applied immediately, but depends on certain circumstances, for example, an agreement on default by the creditor and the debtor, or the debtor's desire to Voluntarily assigning the subject matter of the credit guarantee. It is assumed that the position between the two parties is balanced or unequal in a credit agreement, which means that legal certainty is not intended only for one party with a strong position in the economy. The principles of legal certainty and justice are the basic requirements for the enactment of a legal standard because in reality the law is formed to create legal certainty, without neglecting aspects of utility and justice as other legal goals.

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