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Execution of fiduciary guarantee in Sharia Banking after the court's decision number 18/PUU-XVII/2019

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ABSTRACT

Execution of a fiduciary guarantee is a transfer of control of an object of collateral based on agreed terms as a return of the loan value. Based on Law Number 42 of 1999, Islamic banks as holders of fiduciary guarantee certificates have the right to execute the actions of debtors who have breached their promises through the implementation of executive titles, auction sales and underhand sales. Constitutional Court Decision No. 18/2019 had a positive impact on various interested parties directly and indirectly. Thus creating a fair legal relationship between the creditor (fiduciary recipient) and the debtor (fiduciary giver). Execution conflicts over fiduciary guarantees arise due to debtors objecting to executions carried out without prior agreement, either in the form of notification or decision from the court. This research is juridical normative with a discussion of the conditions when the executive title cannot be carried out directly unless there is a decision on execution from the court. The results of this study indicate that the Constitutional Court Decision No. 18/2019 provides a new interpretation of several phrases in Article 15 and their explanations in the Fiduciary Law. The fiduciary recipient can execute if there is an agreement with the debtor.

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Introduction

Conflict is a natural event that can happen to anyone. Humans in an effort to fulfill their needs, interests, and rights can cause conflict. Likewise, conflicts in the field of sharia economy, conflicts in the execution of fiduciary guarantees often occur in line with the development of sharia economic sector business in Indonesia, especially in the field of sharia banking (Hotoya, 2020).

The Financial Services Authority explained that Islamic banks operate according to the principles of Islamic law. Sharia economic principles are implemented in every sharia banking product. Furthermore, in every product launched to the public, it is proven through the application of the sharia concept in it. Islamic banking products include deposits, loans and financial services.

Islamic banks do not charge interest on funds offered to consumers, but predict an increase in future funds, which is a result of the use of these funds. On the other hand, customers get their share of bank profits based on a predetermined ratio (Jahja & Iqbal, 2012). In addition, Islamic banks are supervised by the National Sharia Council – Indonesian Ulema Council, hereinafter referred to as DSN MUI, to protect transactions carried out in Islamic banks. So, people no longer need to worry about the halalness of every transaction made.

Islamic banks as distributors of funds in providing financing require guarantees but require a guarantee which is the implementation of the precautionary principle applied to every bank or financial institution. Article 2 of Law Number 10 of 1998 concerning Banking requires every bank to apply the principle of prudence in running its business, especially financing products. One of the acceptable financing guarantees is movable property. In the event of bad credit, the collateral can be used as credit repayment by selling the collateral. In the practice of sharia banking, movable property guarantees are burdened with fiduciary functions as legal protection for creditors if the debtor is in default/default.

The phenomenon of execution of fiduciary collateral by Islamic banks creates a conflict between debtors and creditors. The conflict is caused by the basis of the execution of the fiduciary guarantee is the executorial power granted by the Fiduciary Law to the fiduciary holder. The execution is a consequence of the difficulty of the debtor in settling the payment of obligations that causes financing problems.(Fauzi, 2018)

The execution of the fiduciary guarantee is carried out in accordance with the standard clauses contained in the credit agreement (Muaziz & Busro, 2015). The stated clause adopts the Fiduciary Guarantee Law (UUJF) Article 15 paragraph (3) which reads "If the debtor breaks his promise, the Fiduciary Recipient has the right to sell the object that is the object of the fiduciary guarantee on his own power". However, in reality, most debtors do not understand that they have agreed to the clause when they receive financing, so that conflicts arise when the execution is carried out.

The executive power granted by the Fiduciary Guarantee Act is interpreted by Islamic banks as power that can be used when financing debtors with problems. Islamic banks can carry out direct execution of the debtor's fiduciary guarantee because of the executorial power. (Harahap, 2013) The Fiduciary Guarantee Law in Article 29 has accommodated the procedures for the fiduciary recipient to be able to sell the object of the fiduciary guarantee. However, many irregularities were found when the execution was carried out, one of which was that the fiduciary recipient could not execute the guarantee but had to be approved by the debtor as evidenced by a written warning or notification letter.(Yasir, 2016)

The execution of fiduciary guarantee objects can be carried out in several ways, such as (Fuady, 2013): 1) Based on the nature of execution by using executive power, namely through a court order; 2) By parate execution, namely by selling through a public auction without the need for a court order; 3) Sold under the hand by the creditor himself.

The Panel of Judges of the Constitutional Court pronounces a decision on the review of the legislation, namely Law Number 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law) against the 1945 Constitution of the Republic of Indonesia (UUD 1945). This decision "accepts the petition of the Petitioners in part" and further states that several phrases and their explanations contained in Article 15 paragraph (2) along with their explanations and paragraph (3) of the Fiduciary Law are contrary to the 1945 Constitution as long as they are not interpreted as interpreted by the Panel of Judges. Constitutional Court which is contained in the related Decision. The phrases referred to are, firstly, the phrase "executory power" and "the same as a court decision with permanent legal force" (along with an explanation) contained in Article 15 paragraph (2) and second, namely the phrase "breach of promise" contained in Article 15 paragraph (2). Article 15 paragraph (3) of the Fiduciary Law.

Based on research conducted by Sigit Nugraha, a default agreement must be made by creditors and debtors. Opportunities for disagreement arise when the debtor does not want to submit the object of the fiduciary guarantee or does not acknowledge a default. So the statement of breach of contract for which no agreement is found must be based on a legal remedy through a lawsuit to the Court (Nugraha & Rahmawati, 2021).

Ayu Wikha in her research argues that the Constitutional Court Decision Number 18/PUU-XVII/2019 has caused changes in the execution of fiduciary guarantees which were originally completed quickly to have to go through court. Creditors find it difficult to execute fiduciary guarantees against debtors who are in arrears, because the determination of default must take the agreement of the debtor and creditor (Noviyana et al., 2021).

The Constitutional Court's decision Number 18/PUU-XVII/2019 requires an execution order from the court before the creditor executes it directly. This decision has an impact on the creditor's obligation to request a religious court decision before the execution takes place. (Nasaruddin, 2020) Currently, there are no laws and regulations that specifically explain the rules related to Islamic banks as creditors can request the execution of fiduciary guarantees through religious courts. Even though it has been explained in Law No. 3 of 2006 concerning the Religious Courts that full authority is given to the Religious Courts to carry out the settlement of sharia economic disputes, banking, finance and insurance based on Islamic law. Thus, religious courts are expected to be able to issue fair decisions for the community to be able to resolve sharia disputes by applying legal principles according to Islamic sharia.(Harahap, 2019)

The expansion of the authority of the religious courts will bring legal consequences for district courts that are no longer authorized to resolve disputes originating from sharia economic activities. In terms of the legal basis, several times it was found that there was an overlap of authority between the Religious Courts and the District Courts. (Suadi, 2018)

Ronni Rahmani, a judge at the Sintang Religious Court, stated that the limitations of formal and material legal sources in the settlement of sharia economic disputes in the religious court were not the reason the judge rejected the case. The judge must continue to examine, hear and decide cases of fiduciary guarantee disputes and find the law against the case. Because as law enforcers, judges are obliged to explore knowledge and understand the legal values that exist in society. (Manan, 2016) It is almost certain that in the future each Head of the Religious Courts will receive a request for the execution of this fiduciary guarantee. His abilities and qualities will be tested to elevate his authority.

The facts on the ground show that the effectiveness of the settlement of sharia economic dispute cases until their execution in the Religious Courts is still low. This condition is ironic, seeing the hope that the Religious Courts will be able to function optimally in resolving sharia economic disputes completely to the issue of execution. (Al Hakim, 2014)

The Director General of Badilag's remarks at the National Seminar on Sharia Economics said that the Religious Courts under the Supreme Court are the executor of judicial power which are authorized by laws and regulations in Indonesia to resolve sharia economic disputes by litigation. For this reason, it is necessary to increase the capacity and professionalism of judges in examining and adjudicating sharia economic cases, to provide decisions that fulfill a sense of justice, certainty and benefit so that the level of trust of the sharia business community in the judiciary is higher, so that the climate of ease of doing business in the sharia economy in Indonesia is needed. more open, which in turn can support the acceleration of national economic growth.

This study aims to examine the laws and decisions of the Constitutional Court that are not in line with practice. The holder of fiduciary rights in accordance with the statement of the law has executive power to immediately execute the debtor's guarantee when the debtor is in default. However, the debtor's lack of understanding about the execution method was challenged so that the Constitutional Court Decision Number 18/2019 decided that the executive power granted to the fiduciary guarantee holder must include a court order at the time the execution takes place. The researcher finds the importance of debtors to understand that they agree to carry out voluntary executions if the debtor has violated one of the contents of the financing agreement which resulted in default. So that the decision of the Constitutional Court weakens the creditor because the debtor is given the opportunity to agree on the points of default which must be proven by the creditor.

Method

Normative juridical study and legislation are combined in this research using a juridical approach. Research conducted normatively is to place the law, which is conceptualized as what is written in the legislation, or is a rule in which human behavior is used as a benchmark that is considered appropriate.(Amiruddin, 2018) This normative legal research is found in primary and secondary law, namely research that refers to the rules or norms contained in the legislation. A primary legal material can also be defined as the national legal rules sorted by hierarchy, starting with the 1945 Constitution, laws, government regulations, and other regulations under the law. Secondary legal materials are legal materials obtained from textbooks, foreign journals, and the opinions of scholars.(Soekanto, 2014) A variety of legal cases, as well as expert-led symposiums.

Results and Discussions

One type of collateral is fiduciary. The term fiduciary comes from the Dutch language – *fiduce* and in Dutch terminology is *fiduciare eigendom overdracht* while in English it is called *fiduciary transfer of ownership.* In Indonesia the explanation of fiduciary guarantee has been stated in the law on fiduciary guarantees number 42 of 1999 article paragraph 2.(Salim, 2017)

The construction of collateral in this definition was put forward by Hartono Hadisoeprapto and M. Bahsan. Hartono Soeprapto argues that Collateral is "something that increase the creditor's confidence that the debtor has the ability to fulfill obligations that have been stated in an engagement." M. Bahsan argues that Collateral is everything that is received by the creditor and submitted by the debtor to guarantee debt in the community. The two definitions of collateral presented by Hartono Hadisoeprapto and M. Bahsan are: 1) Focused on fulfilling obligations to creditors (banks); 2) The form is in a collateral that can be valued in money; 3) The emergence of collateral is an engagement between the creditor and the debtor (Salim, 2017).

According to A Hamzah and Senjun Manulang, a fiduciary is a way of transferring property rights from the owner (the debtor), based on the main agreement to the creditor. However, only the rights are submitted legally and are only owned by the creditor in trust, while the goods are still controlled by the debtor, but no longer as *eigennar* or *bezitter*, but only as a *detentor* or *houder* and on behalf of the creditor of *eigenaar*. The elements listed in the definition of A Hamzah and Senjun Manulang are; 1) There is a transfer; 2) From the owner to the creditor; 3) There is a main agreement; 4) Submission based on trust; 5) Act as a detentor or houder.(Salim, 2017)

An agreement with fiduciary guarantee as settlement of certain loans provides a primary position for fiduciary recipients than other creditors. This is effective in providing protection to creditors. The right of the creditor to execute the object of the fiduciary guarantee as the settlement of his receivables. The elements of fiduciary guarantee are: 1) There is a collateral right; 2) The existence of objects, both movable and immovable objects, tangible and intangible objects, especially objects that cannot be encumbered with mortgage rights; 4) The asset being the object of the fiduciary guarantees remains in the control of the fiduciary giver; 5) Creditors have the main position.(Bahsan, 2020)

Objects and Subjects of Fiduciary Guarantee

Objects of Fiduciary Guarantee

The category of objects are fiduciary objects has been included in the law on fiduciary numbers 42 of 1999. The objects of fiduciary guarantee are as follows: 1) The object must able to be legally owned and transferred.; 2) Can be on tangible objects; 3) Can also include intangibles, including receivables; 4) Moving objects; 5) Immovable property that cannot be tied up to a mortgage; 6) Immovable object that cannot be tied up to a mortgage; 7) Both on objects that already exist and on objects that are obtained later. In the case of objects to be obtained later, a separate fiduciary deed is not required; 8) Can be on one unit or type of object; 9) It can also be on more than one object; 9) Including the assets that have become fiduciary objects; 10) Including insurance claims from assets that are the object of fiduciary guarantee; 11) Inventory objects (inventory, trading stock), can also be the object of fiduciary guarantee.(Fuady, 2013)

The legality of an object that has been used as the object of a fiduciary guarantee is the signing of a fiduciary guarantee deed. The notary as the authorized official will register the object of the guarantee so that a fiduciary guarantee certificate is born.(Kamello, 2014). The fiduciary guarantee certificate has executive power for the holder. Where the executive power has permanent legal force so that the recipient of the fiduciary guarantee certificate can carry out the execution of the fiduciary guarantee object directly or in a public auction. (Irvan, 2017)

Subjects of Fiduciary Guarantee

People or institutions that bind themselves in a fiduciary guarantee agreement are called fiduciary guarantee subjects. The subject of fiduciary guarantee itself consists two such as fiduciary giver and the fiduciary recipient. The person and or institution that owns the fiduciary guarantee objects called the fiduciary giver. And a person or institution that provides receivable to other parties whose payments are guarantee by fiduciary guarantees are known as fiduciary recipients.(Purwahid & Kashadi, 2018)

While the fiduciary recipient is an individual or corporation as a party who has a receivable, whose payment is guaranteed by fiduciary guarantee, a corporation here is an enterprise with a legal entity that has a business in the field of lending and borrowing money, such as banking. Therefore, the fiduciary recipient is a creditor, it can be a bank as a creditor or an individual or legal entity that provides a loan. The fiduciary recipient has the right to obtain repayment of the debt taken from the value of the fiduciary object by selling it themselves by the creditor or through a public auction.

The parties who are subject to fiduciary guarantee are fiduciary givers and recipients. Fiduciary givers are individuals or corporations who own assets that are part of the object of fiduciary guarantee, while fiduciary recipients are individuals or corporations that have receivables whose payments are guaranteed by fiduciary guarantee.(Salim, 2017)

In this case, the fiduciary giver does not have to be the debtor himself, it can be another party, in this case acting as a third party guarantor, those who are the owners of the object of the fiduciary guarantee who submit their property to serve as fiduciary guarantee. The most important thing is that the fiduciary giver must have ownership rights to the object that will become the object of the fiduciary guarantee at the time the fiduciary grant is given. Likewise with fiduciary guarantee recipients, in Law no. 42 of 1999 concerning Fiduciary Guarantee, there is no specific regulation relating to the requirements for fiduciary recipients, meaning that individuals or corporations acting as fiduciary recipients can be Indonesian citizens or foreign nationals, both domiciled at home and abroad as long as they are used for development purposes in Indonesian territory (Usman, 2013).

The following are the rights and obligations of the giver and recipient of the fiduciary guarantee namely: 1) The rights of the giver of fiduciary guarantee (Mastering fiduciary objects and can transfer inventory items; Receive the rest of the proceeds from the sale of fiduciary objects; Receiving ownership rights to fiduciary objects, if they have paid off their debts); 2) The obligations of the giver of fiduciary guarantee (Maintain and care for fiduciary objects so that they do not decrease in value; Reporting the condition of the fiduciary object to the fiduciary recipient; Pay off the debt); 3) The rights of the recipient of fiduciary guarantee (Supervise and control fiduciary property; Selling fiduciary objects if the debtor breaks the contract; Taking the receivables from the sale of fiduciary objects; Moving the fiduciary object, if the fiduciary object is not taken care of by the fiduciary owner); 4) The obligations of the recipient of fiduciary guarantee (Carry out registration of a fiduciary guarantee deed to the fiduciary registration office; Giving power to the fiduciary giver or fiduciary object by borrowing; Hand over the excess fund to the fiduciary giver; Return the ownership rights of the fiduciary object to the fiduciary giver, if the debt has been paid off by the debtor (Fuady, 2013).

Legal Basis of Fiduciary Guarantee

Initially, the arrangement of fiduciary guarantee was not in the form of laws, rather it grew and developed through jurisprudence. As to how it is in the Netherlands, the Dutch *Burgerlijk Wetboek* (BW) also does not regulate this fiduciary guarantee, the Civil Code also does not regulate fiduciary institutions. For the first time in 1985, the existence of a fiduciary institution was recognized through the law, which is in Law no. 16 of 1985 concerning Flats. This Law regulates the ownership rights to flat units that can be used as collateral for debts that can be burdened by a fiduciary institution. Then Law no. 4 of 1992 concerning Housing and Settlements, which also provides for the possibility of houses built on land owned by other parties that are burdened with fiduciary guarantee (Usman, 2013). Judging from the jurisprudence and laws and regulations, the basis of fiduciary law are as follow: 1) Arrest HogeRaad 1929, about Bierbrouwerij Arrest (Netherlands); 2) Arrest Hoggerechtshof on BPM-Clynet Arrest (Indonesia); 3) Law of Republic Indonesia number 42 of (1999) concerning Fiduciary Guarantee (Salim, 2017).

Therefore, to accommodate the needs of the wider community, so as to guarantee legal certainty and provide legal protection for interrelated parties, clear and complete legal provisions regarding fiduciary guarantee and fiduciary institutions are regulated in law, which is stated in Law No. 1999 concerning Fiduciary Guarantee (then calles as UUJF), which came into force on September 30, 1999. Along with the promulgation of this UUJF henceforth there is no longer any opportunity for polemics about agreeing or disagreeing with the terms or conditions of fiduciary guarantee and fiduciary institutions as a form of material collateral institution that stands alone outside and is therefore different from pawning (Usman, 2013).

Iffaty and Asna in a study entitled Implementation of Sharia Principles on Confiscation of Fiduciary Guarantees stated that the process of confiscation of fiduciary guarantees has been regulated in UUJF. Starting from the obligation to obtain a fiduciary guarantee deed issued by a notary to the stage of registering a fiduciary guarantee object to the Fiduciary Registration Office and obtaining a fiduciary guarantee certificate.

This is supported by the research of Martha Eri Safira entitled Analysis of the Fiduciary Guarantee Agreement Against the Execution Parate and its Legal Protection for Creditors concluded that the parate executie, based on the fiduciary guarantee certificate (fiduciary guarantee deed), the execution of the parate executie is faster because it does not go through court fiat so the cost is lower and the process simpler. If the creditor has a financing agreement with a fiduciary guarantee, he is entitled to execute the collateral if the debtor defaults.

In contrast to the results of the research above, the research conducted by Nur Amin concluded that the Fiduciary Guarantee Law Number 42 of 1999 contained many shortcomings in Article 5 Paragraph (1), Article 11 Paragraph (1) and Article 17. As a result of the lack and synchrony with these articles, changes are needed so that the laws and regulations are adapted to the conditions and situations prevailing in society.

Execution of Fiduciary Guarantee

The guarantee that is most in demand and easily accepted by the recipients of the guarantee is a guarantee that is easily to execute because it is used as debt repayment. Of course, fiduciary as a type of debt collateral must also have the elements of being fast, cheap, and definite. Because so far there is no clarity on how to execute a fiduciary (Widjaya & Yani, 2012).

This execution can also be interpreted as "carrying out" a court that enforces a court decision with the help of general powers if the losing party does not want to carry it out voluntarily. The execution of the fiduciary guarantee can be carried out immediately because the fiduciary guarantee certificate and mortgage certificate is equivalent to a court decision that has permanent legal force (Fuady, 2013).

If the debtor is already in the category of default, in the sense that according to the legislation, the debtor has broken his promise, the certificate holder can immediately execute the fiduciary guarantee and mortgage guarantee. This is one of the characteristics of material guarantee, which is the ease of execution. In the Civil Procedure Code (HIR), every deed that has an executorial title can carry out fiat execution, which has the same power as a court judge's decision. Every certificate containing irah-irah for justice based on the one and only divinity has the same executorial power as a court decision that has permanent legal force. The Irah-irah makes the deed immediately executable (Fuady, 2013).

The guarantee of the object of fiduciary guarantee can be carried out with the conditions stipulated by the Regulation of the Head of the State Police of the Republic of Indonesia Number 8 of 2011 concerning Guarantee of the Execution of Fiduciary Guarantee in Article 6, as follow: 1) A request from a fiduciary recipient; 2) Attach fiduciary guarantee deed; 3) The fiduciary guarantee is already registered at the fiduciary registration office by notary; 4) Posses the fiduciary guarantee certificate; and 5) The fiduciary guarantee is in the territory of Indonesia.

According to the Regulation of the Head of the National Police of the Republic of Indonesia Number 8 of 2011 concerning Supervision of the Execution of Fiduciary Guarantee, Article 1 paragraph 12 explains that securing executions is a police activity,in order to provide guarantee and protection for the executioner, the applicant for execution, the respondent for execution (executed) at the time the execution is carried out.

The Fiduciary Guarantee Law specifically regulated the execution of fiduciary guarantee, in carrying out Parate Executie. Parate Executie is carrying out the execution yourself without court assistance or intervention. The Parate Executie in the law of collateral was originally only given to creditors who received mortgages and to recipients of pledges. In various collateral laws, there are several types of Parate Executie including Parate Executie of the first mortgage recipient, the Parate Executie of the first mortgagee, Parate Executie for the pawnee, Parate Executie for the fiduciary recipient, and Parate Executie of the state receivables affairs committee for state banks (Thamrin et al., 2020).

Constitutional Court and Court Decisions

The Constitutional Court become a new state institution that emerged from the reformation. This institution is a new member of the judicial power institution which previously only consisted of the Supreme Court and 4 (four) courts under it, including the general court, the state administrative court, the religious court, and the military court.

The constitutional court has obtained a mandate by the constitution of the Republic of Indonesia to carry out the functions of its authority. One of these powers is the judicial review of the state constitution (Asy'ari et al., 2013). From 2003 until 2012, information from the registrar's office recorded that 532 cases were handled by the constitutional court relating to judicial review. This reflects that the legal products made by legislators can be classified as not of good quality. The law that was born with its dominance is intended for the sake of political interests regardless of the appreciate elements (Fuady, 2012).

The Constitutional Court's decision, which is final and binding, results in no more legal remedies that can be taken against the decision other than implementing it. Efforts to change it are only possible when the Constitutional Court decides differently in the examination of the same law using different test stones and reasons for the petition. How extraordinary the Constitutional Court and its decision caused Satjipto Rahardjo to personify it with the parable that on the tongue of the judges of the Court there were coals of fire whose function was to suppress injustice if used properly or on the contrary burn human rights if used unwisely and wisely.

The Constitutional Court is not only the institution authorized to oversee the constitution (the guardian of the constitution) but the Constitutional Court is believed to be the only judicial institution that has the authority to interpret the provisions of the Constitution (the sole interpreter of the constitution). In deciding the case for judicial review of the Constitution, the Constitutional Court will essentially use 2 models of interpretation that are commonly used, such as interpretation according to the original intention of the legislator's will (the framers of the constitution). This interpretation is known as originalism. Otherwise, conversely, the Constitutional Court tries to find arguments in the legal needs of the community in interpreting a law against the Constitution. This type of interpretation is termed asnon-originalism.

Fiduciary Guarantee After Decision Number 18/PUU-XVII/2019

In testing the fiduciary law, the applicant wants a legal certainty and the certainty of the authority possessed by the creditor in the event of a breach of contract to be able to carry out the execution of the object of the fiduciary guarantee. In this article, the applicant argues that there is no legal protection that should be obtained by the debtor, but only focuses on the protection received by the creditor as the recipient of the fiduciary guarantee.

Because in reality, article 15 paragraph (2) and paragraph (3) which equates the position of a fiduciary guarantee certificate with a court decision. Giving rise to arbitrary actions by the creditor against the object of the fiduciary guarantee which is still in the control of the debtor.

If the fiduciary certificate is equated with a court decision, according to the logic of legal thinking the procedure for the execution of the object of fiduciary guarantee must go through the same steps. Article 196 of the HIR stipulates that the applicant first submits an application for execution to the head of state court. In fact, before the issuance of the decision of Constitutional Court, we often encounter creditors carrying out forcible executions of every object of fiduciary guarantee that is being controlled by the debtor. Actually, the fiduciary law provides convenience in the process of executing fiduciary guarantees so that execution process becomes simple, cheap, effective and efficient.

The creditor can execute the object of the fiduciary guarantee if two conditions has been a default and the debtor voluntarily submits the object of the fiduciary guarantee for execution by the creditor. "Executorial power" and equated with court decisions with permanent legal force on fiduciary certificates according to Article 15 paragraph (2) of the Fiduciary Guarantee Law so that it relates to constitutionality issues. It is understandable, if the debtor has breached his promise in carrying out his obligations, then this fiduciary certificate can be carried out immediately. Based on the considerations of the Constitutional Court, this shows the exclusive nature given to creditors and the debtor's rights are ignored because they do not create balanced legal protection in the form of legal certainty and justice, because they do not have the opportunity to defend themselves in the event of a contract breach and get a fair price from the sale of the collateral object. (Pratama, 2020) According to Article 29 of the Fiduciary Guarantee Act, it is possible to exercise executive powers without a court decision. However, the Constitutional Court's decision made the implementation of direct execution by creditors towards registered fiduciary guarantee no longer functioning.

Before this decision is issued, the creditor has exclusive executive power. When the creditor has stated that the debtor is in default, the creditor immediately executes the goods that are the object of the fiduciary guarantee. The existence of an unequal power relationship between creditors and debtors in fiduciary guarantee actually violates the concept of the rule of law. Where in a state of law one of the characteristics according to A.V. Dicey is the existence of equality before the law. Indonesia is one of the countries that declares itself as a state of law which is explicitly stated in Article 1 paragraph (3) of the 1945 Constitution. So the law must be the commander and enforcer of justice. This is also in line with the provisions in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads "all citizens have the same position in law and government and are obliged to uphold the law and government with no exceptions."

If examined in detail, the legal arguments formed in the decision of the Constitutional Court Number 18/PUU-XVII/2019 have provided a new legal understanding or paradigm in uncovering the veil of fiduciary implementation so far in Indonesia. Where one of the weaknesses of fiduciary implementation that creates unequal power relations starts from the standard clause in the standard contract formed between the creditor (fiduciary recipient) and the debtor (fiduciary giver).

According to Sutan Remy Sjahdeini, in the transfer of ownership rights on the basis of trust, legal ownership rights remain with the fiduciary giver. Therefore, the transfer of ownership rights is not a legal transfer of ownership. So the fiduciary recipient (the creditor) is not legally allowed to take any legal action against the goods whose ownership rights are transferred by the fiduciary giver to the fiduciary recipient. Thus, the fiduciary recipient is not allowed to sell the fiduciary object as long as the debtor has not been proven to be in breach of contract and the amount of debt in arrears is acknowledged voluntarily by the debtor. While the fear of the fiduciary recipient if the fiduciary giver has bad faith in the fiduciary collateral. So in fact Article 36 of Law No. 42 of 1999 has guaranteed the creditor's rights in full which reads:

"The fiduciary giver who transfers, pledges, or leases assets that are the object of the fiduciary guarantee as referred to in Article 23 paragraph (2) which is carried out without prior written approval from the fiduciary recipient, shall be punished with imprisonment for a maximum of 2 (two) years and fine for a maximum of IDR 50,000,000 (fifty million rupiah).”(Naja, 2018)

Therefore, the fiduciary recipient does not need to worry excessively when the fiduciary giver will transfer or eliminate the fiduciary object. So according to the author, one of the weaknesses in the rise of cases of seizure in fiduciary objects or forced execution of fiduciary objects could be stemming from the problem of standard contract arrangements that do not uphold equality of rights between debtors and creditors, not the arrangements in the Fiduciary Law an sich.

The executive power and word are the same as the court decision which has permanent legal force in Article 15 paragraph (2) and breach of contract in Article 15 paragraph (3) of the Fiduciary Guarantee Law is declared

unconstitutional according to the consideration of the Constitutional Court Judge. The impact of the considerations of the Constitutional Court, the meaning must be adjusted to the establishment of the Constitutional Court with the meaning "in the absence of an agreement regarding default by the debtor and the debtor does not voluntarily submit the object of collateral, so that all legal mechanisms and procedures in the implementation of the execution of the Fiduciary Guarantee Certificate must be carried out with the execution of the court."

Table 1. Article 15 paragraphs (2) and (3) After the Decision of the Constitutional Court Number 18/PUU-XVII/2019

Norms of Law No. 42 of 1999 concerning Fiduciary Guarantee before the Constitutional Court's Decision	**Norms of Law No. 42 of 1999 concerning Fiduciary Guarantee after the Constitutional Court's Decision**
Article 15 paragraph (1), (2), and (3) 1. The Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1) shall include the words: "FOR JUSTICE BASED ON THE ALMIGHTY GOD." 2. The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has obtained permanent legal force. 3. If the debtor is in breach of contract, the Fiduciary Recipient has the right to sell the asset which is the object of the Fiduciary Guarantee in their own power.	As long as the phrase "executory power" and the phrase "equal to a court decision with permanent legal force" are contrary to the Constitution and have no binding legal force, hereinafter could be interpreted as "towards a fiduciary guarantee in which there is no agreement on breach of contract (default) and the debtor objected to submitting voluntarily the object that becomes the fiduciary guarantee," then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and to be applied the same as the execution of court decisions that have permanent legal force. Article 15 paragraph (3), as long as the phrase "breach of promise" is contrary to the 1945 Constitution and has no binding legal force, and it is not interpreted that "the existence of a breach of contract is not determined unilaterally by the creditor but on the basis of the creditor's agreement with the debtor or on the basis of the law determines that a breach of contract has occurred." Article 15 paragraph (2), as long as the phrase "executory power" is contrary to the 1945 constitution and has no binding legal force, and as long as it is not interpreted as fiduciary guarantee in which there is no agreement on breach of contract and the debtor objected to voluntarily surrendering the object as fiduciary guarantee, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force.

Implications of the Constitutional Court Decision: 1) The abolition of the executive power which has the same legal force as the court's decision in Article 15 paragraph (2) of the Fiduciary Guarantee Law. Implementation with the help of state instruments is the essence of an executive title. The execution of the executorial title is carried out through a request for permission to the local Chief Justice, then proceed with the guarantee mechanism, which ends with an execution and sale confiscation. The abolition of this article results in not being able to apply for execution, but rather through a lawsuit and obtaining a permanent legal decision; 2) Against the abolition of the execution parate mechanism. In the event that there is no objection by the debtor and admits "breach of promise," a Parate Executie can be carried out but it cannot be carried out if there is an objection, but through a court decision with permanent legal force. Until the potential loss of ease when carrying out executions which is the main characteristic of fiduciary guarantee. Therefore, it can only be reached through a default lawsuit, if there is a debate by the debtor regarding the breach of contract; 3) The right to precede (the

principle of droit de preference) of the fiduciary recipient is not lost but is no longer effective because, in terms of determining the default of a debtor, they must first go through a court lawsuit; 4) The harmonization of the provisions for the executorial title and execution parate in the Fiduciary Guarantee Law itself is spread in several articles. For example in Article 29 and Article 30. As a result of the cancellation of Article 15, it will cause the malfunctioning of several articles related to the mechanism for implementing fiduciary executions (Mertokusumo, 2013).

Then after the Constitutional Court Decision Number 18/PUU-XVII/2019 the legal norms of Article 15 paragraph (2) and paragraph (3) underwent a change, that is to become *conditionally constitutional*. In this way, these provisions will be considered in line with the breath of the constitution if they are interpreted as stated in the a quo decision. The changes that occur in Article 5 paragraph (2) and paragraph (3) can be seen in the table 1.

The interpretation of this Constitutional Court, in essence, clarifies protection efforts and to find a balance in the legal relationship between creditors (fiduciary recipients) and debtors (fiduciary givers). In this way, future fiduciary recipients (the creditors) cannot execute fiduciary collateral arbitrarily, but must comply with the provisions required by the Constitutional Court in decision number 18/PUU-XVII/(2019).

Conclusions

Fiduciary Guarantee is one of the guarantees regulated in the guarantee law in the Indonesian legal system. Prior to the enactment of Law No. 42 of 1999 concerning Fiduciary Guarantee. In the history of fiduciary law in Indonesia, it is started from the existence of Hoge Raad jurisprudence, that is Bierbrouwerij Arret 1929. Since the arrest of Hoogerechtshof 1932, then fiduciary guarantee are known in the Indonesian legal system. However, in order to meet legal needs that can further spur national development and to ensure legal certainty, and provide legal protection for interested parties, the 1999 Fiduciary Law was then formed.

In practice, it turns out that there are differences in interpreting the executorial meaning in fiduciary guarantee certificates which often lead to acts of vigilantism (eingerichting) or coercion in the execution of goods that are fiduciary objects. The Constitutional Court's decision Number 18/PUU-XVII/2019 on the review of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantee against the articles in the 1945 Constitution of the Republic of Indonesia has harmonized fairer legal relations between creditors (fiduciary recipient) and debtor (fiduciary giver). Along with the stipulation of this provision, Article 15 paragraph (2) means "as long as the phrase "executorial power"" and the phrase "the same as a court decision with permanent legal force" is contrary to the Constitution and has no binding legal force, as long as it is interpreted "towards fiduciary guarantee which there is no agreement on breach of contract (default) and the debtor objected to voluntarily surrendering the object as a fiduciary collateral, then all legal mechanisms and procedures in the execution of a fiduciary guarantee certificate must be carried out and apply the same as the execution of a court decision which has permanent legal force."

While Article 15 paragraph (3) of the Fiduciary Law means "Article 15 paragraph (3) as long as the phrase "breach of promise" is contrary to the 1945Constitution and has no binding legal force as long as it is not 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 remedies which determine that a breach of contract has occurred."

One of the causes of this difference in interpretation is the existence of provisions in standard contracts that create an imbalance in the legal relationship between creditors and debtors. So, the upstream of this problem is the conflict of execution of the fiduciary collateral due to the provisions in the standard contract which creates an imbalance in the power relations of the debtor vis a vis creditor.

Therefore, the Financial Services Authority as a state institution that aims to protect consumers needs to set standard agreements or standard contracts by making standard agreement templates, the contents of the agreement can be different, as such with the amount of interest and certain paragraphs are different. Since the template is the same, it will minimize the potential for fraud using clauses in the standard agreement which creates unfairness (unbalanced position of the parties).

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