




Good Faith Principle and Legal Protection over Parties Related to Fiduciary Certificate in the Constitutional Court Decision in Indonesia after the Constitutional Court Decision Number 18/PUU-XVII/2019

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Abstract: The Fiduciary Institution is regulated in Law Number 42 of 1999 on Fiduciary ('FL'). One of the ways to give legal certainty and protection in FL is the registration of the fiduciary so as to give the preferred rights to the fiduciary recipient over the other creditors; besides publishing the fiduciary certificate. Nevertheless, the Constitutional Court Decision No. 18/PUU-XVII/2019, brought some consequences to the creditors when they want to execute and sell the object that becomes the fiduciary object. The method used in this research is normative juridical. Besides, it is library research applying a descriptive analytical method with secondary data. The research result shows that after the publication of the Constitutional Court Decision, there are some changes in the mechanism of the execution of the fiduciary object. The execution of the court verdict based on the assessment of a default must be in line with the agreement between both parties, namely the creditor and debtor. The Constitutional Court in its decisions implies the importance of the good faith principle of the creditors and the need of legal protection for the debtors, especially related to the execution of the fiduciary object.


1 INTRODUCTION


Economic development is an essential thing in a country. This thing needs to be prioritized so that the social welfare in leading a good life in a country based on the Pancasila philosophy and the 1945 Constitution of the Republic of Indonesia can be fulfilled. At present, there are a lot of institutions facilitating this in order to make it easy for the society to meet their financial needs, which is in the form of borrowing related to financial institutions, both banks and nonbanks.


In line with the economic and trade development, financial institutions as well as guarantor agencies have given facilities about giving loans to the society for the purpose of simplifying and also reducing the payment of a thing desired, which is an object that is agreed on in a credit transaction.

According to Rachmadi Usman, there are some criteria for a good collateral which suits the purpose of the guarantee itself; they are 1. to easily help get the credit for those who need it; 2. not to weaken the potentiality (strength) of the debtors to do or continue the business; 3. to give certainty to the creditors, which means that the collateral can be executed at any time, if necessary, it can be easily cashed to pay off the debtors' loan. (Usman, 2008)

Therefore, this confirms that a guarantee should consider these two factors, namely: 1. secured, meaning that the credit guarantee is bound in a judicial and formal way so that in the event of defaults, (failure of a party to fulfil its obligations under a contract), the bank has the judicial power to do an executional action. 2. marketable, meaning that if the collateral is to be executed, it can be sold or cashed fast to pay off the debt that becomes the

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debtor's obligation. This must give assurance to all the parties in doing the agreement by following the procedures and knowing the limitations so that anything harmful for any party can be hindered.

After the guarantee is given by the related institution, the law should be responsible for balancing the speed of trade activities, supervising as well as controlling each action in doing the transactions that are continuously developing.

The Law of Guarantees is a legal area that is currently more popular with the term The Economic Law, which has the function of supporting the economic progress and development in general. Hence, the arrangement of the legal area needs to be prioritized. (Mulyadi,1972).

The guarantee itself in general is regulated in Article 1131 of the Civil Code, which states that any property of the debtor, both movable and immovable, whether it currently exists or will exist in the future, becomes a collateral for any agreement. As a result, any property of the debtor automatically will become a collateral whenever the person makes a loan agreement despite the fact that it is not explicitly stated as a guarantee. (Civil Code).

Salim HS formulates the economic law as the overall legal rules that arrange the relationship between the guarantee giver and receiver regarding the imposition of guarantee in order to get the credit facility. The aspects mentioned in the definition are: 1. The legal rule in the economic law, which can be distinguished into two types, namely the written economic law and the unwritten economic law. 2. A guarantee giver or guarantor and recipient. A guarantor is a person or institution that gives the collateral to the guarantee recipient. The guarantor refers to a person or a legal entity that needs a credit facility. 3. A collateral, which is a material or nonmaterial thing. A material collateral is a guarantee in the form of property rights of movable and immovable things. A nonmaterial collateral is a guarantee in the form of nonmaterial things. 4. A credit facility, which is the collateral imposition done by the guarantor with the aim of getting the credit facility from a bank or nonbank financial institution based on trust.

Moreover, Sri Soedewi Masjchoen Sofwan claims that the economic law is law that regulates the juridical construction which makes it possible to give a credit facility by making the things bought as collaterals. (Sofwan, 2003). One of the guarantor agencies which accommodate this is fiduciary. Fiduciary has been applied in Indonesia since the Dutch colonialization as a form of guarantee that originates from jurisprudence. Fiduciary is still

applied because the process of imposition is considered simple, easy and fast. The rules concerning fiduciary are regulated in Law Number 42 of 1999 on Fiduciary (hereafter abbreviated as 'FL'). Article 1 Section 1 of FL gives an understanding that fiduciary is "a transfer of ownership of an object on trust with the provision that transferred ownership of the object remains in the control of the owner".

The word *fiduciary* comes from Latin, which is "*fides*", meaning trust; hence, fiduciary refers to a legal relationship between a debtor who gives fiduciary and a creditor who receives fiduciary. This relationship is based on trust. The transfer of ownership which is based on trust in fiduciary is commonly called a transfer of *constitutum possessorium* (a transfer by continuing the authority).

A guarantor agency, more specifically fiduciary, has the main purpose of enabling the society to meet the needs which are felt higher and higher day by day. Nevertheless, there must be some absolute things to do in fulfilling the fiduciary agreement, one of which is the fiduciary certificate made in front of a notary and registered to the fiduciary registration office. All the parties, both the debtor and creditor, must understand how the fiduciary agreement is made. The process of fiduciary attachment must be done meticulously and elaborately so as not to create a hole that can be exploited by irresponsible parties. Besides, this is also done so that, if a default done by one party takes place, the solution can be executed in a clear way and it can be obeyed by the two parties having the agreement. Fiduciary gives a legal protection as well for both parties and it gives legal certainty that is written in the approved agreement by having the fiduciary certificate or *grosse akte*.

Then the Constitutional Court Decision No. 18/PUU-XVII/2019 was issued, which definitely influences the characteristic of absoluteness of a fiduciary certificate, which has so far given the legal assurance because it contains a specific characteristic. This certainly has impacts on some interested parties, both directly and indirectly. Creditors will meet a quite significant obstacle, considering that the process of executing and selling the fiduciary object changes, and it is not as simple as before the Constitutional Court Decision was issued.

2 METHODS

The research is done using the normative juridical method, by analysis Law Number 42 of 1999 concerning Fiduciary and also the Constitutional Court Decision. Next, a careful analysis is done

regarding the legal standing of the fiduciary certificate after the Constitutional Court Decision No. 18/PUU-XVII/2019, the role of the good faith in the process of the fiduciary object after the Constitutional Court Decision No. 18/PUU-XVII/2019, and whether the application of the Constitutional Court Decision is immediate or it has to be legislated first.

The research is descriptive analytical and it describes the legal standing of a fiduciary certificate after the issuance of the Constitutional Court Decision No. 18/PUU-XVII/2019 and the role of good faith in the execution of the fiduciary object and also the application of the Constitutional Court Decision. In addition, the research contains an analysis of the facts in the practice of whether the Constitutional Court Decision is immediate or it has to be legislated first.

The data collection technique uses a secondary data as the main data and the primary data is used in support of the secondary data.

3 RESULTS AND DISCUSSION

A fiduciary certificate becomes the base of the execution of the fiduciary object; however, the issuance of the Constitutional Court Decision No. 18/PUU-XVII/2019 causes some changes in the execution of the fiduciary object. Therefore, in the next part there will be a further elaboration of the execution of the fiduciary object in practice.

3.1 The Legal Standing of the Fiduciary Certificate after the Constitutional Court Decision No. 18/PUU-XVII/2019

An authentic deed clearly distinguishes between the rights and duties, assures the legal certainty, and also gives the legal protection to all the parties. The agreement that is contained in an authentic deed is also expected to be able to avoid a continuous dispute. An authentic deed is a written proof that is strong enough to really contribute to the problem solution in a cheap and fast way. (Akhmad, 2019).

A fiduciary certificate is a proof of an agreement between two parties, namely the creditor and debtor, which arranges the transfer of the ownership of an object based on trust, which is the copy of the fiduciary list book containing some notes regarding the agreement made in front of a notary in accordance with the Act (*Vide Act Number 42 of 1999 concerning Fiduciary*). A fiduciary certificate is an evidence tool;

on the other hand, it also has the immediate characteristic which becomes the base of doing an execution without having to go to court.

A fiduciary certificate also regulates the transfer of ownership of an object based on trust; in other words, a fiduciary certificate is the copy of the fiduciary list book which contains the things about the agreement made in front of a notary in accordance with Law Number 42 of 1999 concerning Fiduciary. (HS, Salim 2017) A fiduciary certificate has the characteristic of *grosse akte*, which is an official duplicate copy of a deed for a debt declaration with the head of deed "In the Name of Justice Based on the Divinity of the One God". This oath makes a fiduciary certificate have a strong legal certainty to be the foundation of being able to do an immediate execution without having to go to court. The execution can be done if the debtor does a default.

A fiduciary certificate is a step for making an agreement done by the two parties as a strong evidence tool in the ownership evidence; moreover, it is also used to prevent a conflict with the other party. A fiduciary certificate must be done in front of a notary and registered to the fiduciary registration office. The making of the fiduciary agreement which becomes the fiduciary deed must be attended by all the parties. In addition, the redaction of the deed has to be done in a meticulous way so that there will not be a hole that can be exploited by irresponsible parties. This is also done so that when the parties do a default, the solution can be clear and obeyed by the two parties having the agreement.

Basically, the fiduciary certificate has the function of making it easier for creditors to do the execution because they have the executional power regulated in Law Number 42 of 1999 concerning Fiduciary. It is further emphasized that fiduciary is also a parate execution, which is described by Bachtiar Sibarani that "a parate execution can do the execution itself without the help or intervention from the court or judges" (Sibarani, 2001). R. Subekti explains that a parate execution means "doing it itself and taking what becomes the rights" (Subekti, 1989) Hence, in this explanation, it is obvious that a fiduciary certificate is immediate.

Then the Constitutional Court Decision Number 18/PUU-XVII/2019 was issued. This decision makes the mechanism that refers to Article 15 Sections (2) and (3) of the Fiduciary Law obstructed in practice.

This has an impact on the creditor who will execute the fiduciary object because after the Constitutional Court Decision, the legal standing of the fiduciary certificate which has been made by the parties becomes unclear. Besides, the certificate also

loses the immediate characteristic of its function as *grosse akte* to do the execution immediately. This will lead to the fact that the legal certainty for the creditor is reduced. If the debtor does not willingly give the fiduciary object, an obstruction for the execution of the fiduciary will occur.

3.2 Mechanism of the Fiduciary Object Execution after the Constitutional Court Decision No. 18/PUU-XVII/2019 based on Good Faith

The Fiduciary Law guarantees the practical solution mechanism of the execution of the fiduciary object. If the debtor is considered to do a default, the creditor can execute the fiduciary object immediately. The execution of the fiduciary object is based on the fiduciary certificate which has the *grosse akte* characteristic with the executorial power so that the immediate execution of the fiduciary object can be done without the help of the court, on condition that a default occurs.

After the issuance of the Constitutional Court Decision Number 15/PUU-XVII/2019, in which it is stated that the creditor cannot execute the fiduciary object unilaterally just based on the fiduciary certificate.

The Constitutional Court decides that a creditor who wants to do the execution must file a request to the District Court first although it is still possible for the creditor to be able to do the immediate execution as long as the debtor admits having done a default and willingly gives the fiduciary object.

A debtor who willingly gives the fiduciary object usually has good faith. This good faith originates from the relationship between human beings of dignity, which is a relationship that is free but does not harm each other.

Article 1313 of the Civil Code (hereafter abbreviated as CC) formulates a contract as follows: “A contract is an action to which one or more individuals bind themselves to one another”. From this definition of Article 1313 of CC, it can be concluded that a contract referred to in the article is a contract that causes an agreement (*overenkomst*). Therefore, the relationship between an agreement and a contract is that a contract leads to an agreement. A contract is one of the sources of an agreement, besides the law as another source.

A contract is formed because of the agreement with declaration of intent as stipulated in the first part of Article 1320 of CC regarding one of the

requirements for the contract to be considered valid, namely the consent of the individuals who are bound.

In general, an agreement takes place because there is a declaration from one party to bind himself, and then the other party makes a declaration to accept the offer.

Herlien Budiono is of the opinion that at least there are three main principles covering the law of contract, which are:

- a. “Consensual Principle, in which a contract is made because of the consensus of the parties. In principle, a contract can be made freely and not bound to a certain form and it is not fulfilled formally, but only based on consensus.
- b. Binding Legal Force Principle (*verbindende kracht der overeenkomst*) – all the parties must fulfil what have been agreed on.
- c. Freedom of Contract Principle (*contractsvrijheid*) – all the parties have the free will to make a contract and each person is free to attach themselves to whoever they want. The parties are also free to determine the content scope as well as the conditions of the contract, as long as the contract is not in conflict with the mandatory laws, both in public order and decency”.

Besides the 3 (three) main principles which base the law of contract, in the writers’ opinion, there is one very important and fundamental principle which develops the law of contract, namely the good faith principle.

Good faith is a principle in a contract; basically a contract must be made based on good faith (vide Article 1338 section (1) CC), while in the context of Article 1338 section (3) CC, good faith must be based on rationality and propriety.

The arrangement of Article 1338 (3) CC stipulates that a contract must be done with good faith (*contractus bonafidei* – a contract based on good faith). This means that the contract is done according to propriety and justice. The understanding of good faith in law has a wider scope than it is in everyday use. Hoge Raad in his decision on 9 February 1923 formulates that a contract must be done “*volgens de eisen van redelijkheid en billijkheid*”, meaning that good faith must be done with propriety and decency. P. L. Werry translates this using the terms virtue and propriety. Good faith becomes an important principle in the system of the contract law in Indonesia. Good faith must be done since the pre-contract stage.

The changes of the mechanism of the fiduciary object execution due to the Constitutional Court Decision are divided into:

1. Execution Mechanism of the Fiduciary Object before the Constitutional Court Decision No. 18/PUU-XVII/2019

Basically, before the Constitutional Court Decision, the practice of the fiduciary execution refers to Article 15 section (1) and section (2) of the Fiduciary Law. In principle the creditor can immediately do the execution if there is a default done by the debtor as long as it meets the condition, namely having the fiduciary certificate. A creditor can sell the thing that becomes the fiduciary object due to the authority of the fiduciary recipient through a public auction and he can take the repayment of the debt from the sales results of the execution based on the parate execution.

Therefore, it should be noticed that in Article 29 section (1) of the Fiduciary Law, this is a conditional provision, which will be applied if the condition mentioned is met, namely if the debtor has done a default. Hence, before the Constitutional Court Decision, the mechanism process of the execution of the fiduciary is simpler, faster, and straight to the point. Besides, the object can be auctioned directly, which becomes the characteristic of fiduciary, namely the ease of executing the object, if a default occurs.

This also means that before the constitutional court decision, the execution mechanism refers to *Tittle Eksekutorial*, which does not have to be done through a court decision, but which can be in the form of an authentic deed that is made by the parties concerning the debt agreement that has *Tittle Eksekutorial*, which is equal to a court decision. Furthermore, it also has the oath on the binding head of the deed which is made by a notary who has high integrity (Satrio, 1993).

Herlien Budiono further states that in principle, fiduciary is a material agreement, and not a consensual one, despite the fact the object is a movable one. The reason why it has to be in the form of a notarial deed is because it becomes the absolute condition of fiduciary. The reason why fiduciary has to be registered is because it becomes the publicity principle (Budiono, 2016).

2. Execution Mechanism of the Fiduciary Object before the Constitutional Court Decision No. 18/PUU-XVII/2019

After the Constitutional Court Decision, there is a change of the mechanism of the fiduciary object, referring to the written verdict which in essence explains that if a debtor does not willingly give or has

an objection to give the fiduciary object, the execution must be done based on the court decision, which then evaluates that the default cannot be judged by just one party, but there must be an agreement between the two parties, the creditor and debtor.

Thus, after the Constitutional Court Decision, the creditor can no longer do the immediate execution, but there must first be the debtor's willingness although the creditor has already got the fiduciary certificate.

On the one hand, this decision creates a legal protection to the debtor, but on the other hand, from the creditor's side, a creditor should also have equal legal protection. The mechanism of the fiduciary object, in which it must obtain an agreement from the court if a debtor does not willingly give the fiduciary object, will cause an impact of economic imposition on the creditor as it will be difficult to execute the fiduciary object.

3. Application of the Constitutional Court Decision No. 18/PUU-XVII/2019

A decision is a term used to refer to the end of a court case in the sense that each decision given by the judge must be obeyed by both parties. This is in line with the fact that a case must be ended through the judge's final decision (*in rachel*) so that it is known which side wins and which side loses in the decision. This final decision must be accepted and obeyed by both parties. Soeparmono states that a judge's decision is a statement made by a judge as a state official who is assigned the judicial power and given the authority for this. This is literally spoken in the court and has the purpose of ending a case. (Soeparmono, 2005). However, not infrequently does a judge's decision create new cases instead of ending a case.

The Constitutional Court reviews the Fiduciary Law towards the 1945 Constitution of the Republic of Indonesia, which starts with the creditor's filing a judicial review to the constitutional court regarding the execution problem because the debtor is considered to have done a default of the agreement.

The Constitutional Court, based on Law Number 24 of 2003 concerning the Constitutional Court, has the authority in doing a review of the law towards the 1945 Constitution of the Republic of Indonesia, on condition that one of the parties files a judicial review. The Constitutional Court does a judicial review on the law and the one filing the judicial review gives a proposition that Article 15 sections (2) and (3) contradicts the regulation in the Constitution so that the Constitutional Court can make a final decision that can change the mechanism of the

fiduciary object. The written verdict contains the followings:

1. the execution of the fiduciary object must be done through the court when the debtor does not willingly give the object.
2. the evaluation about the debtor's default cannot be done unilaterally, but it must be based on a mutual agreement between both parties

The Constitutional Court Decision has explained the meaning of Article 15 section (2) and section (3) of the Fiduciary Law and has put a new rule in it so that a new rule is applied. However, the question is whether the Constitutional Court has the authority to insert a new rule into a law in an immediate way or it is the Fiduciary Law that has to change and this change has to be legislated. As a result, the Constitutional Court's authority and its type of decision related to this need to be further analysed.

The Constitutional Court's review of the law towards the 1945 Constitution as regulated in Article 56 Law No. 24 of 2003 concerning the Constitutional Court are as follows:

1. stating that the application cannot be accepted if the applicant does not meet the condition
2. stating that the application is approved a. THE CONSTITUTIONAL COURT is of the opinion that the application is reasonable b. the law does not fulfil the rule of the forming of the 1945 Constitution
3. stating that the application is rejected because it is considered that the law does not contradict the 1945 Constitution.

Regarding the authority of the Constitutional Court, according to the rules stated in the law about the Constitutional Court above that it would be better if the Constitutional Court does not insert a new rule in the law in an immediate way, but it has to be legislated first so that it has the binding characteristic.

According to Jimly Asshiddiqie, the legal standing of the Constitutional Court is as Negative Legislator, meaning that the Constitutional Court can only decide that a rule in a law contradicts the Constitution; it cannot insert, add or change a new rule that has already been in the law (Asshiddiqie, 2006).

The Constitutional Court Decision can be in the form of a negative decision (abolishing a law) and a positive decision (creating a new regulatory state of law). The Constitutional Court Decision is negative when a certain law is declared to be contradictory to the 1945 Constitution, considering that the

Constitutional Court decision is self-executing, final and binding, the executor of the Constitutional Court decision is the House of Representatives, as the embodiment of the principles of checks and balances, which immediately follows this up so as not to create the legal vacuum, which will also affect the implementation rules in the Government, if a law changes, automatically the implementation rules change. The Constitutional Court as the Negative Legislator in the Constitutional Law Enforcement (Bintari, 2013).

The formation of the Constitutional Court is intended to have the authority as a Negative Legislator. This means that the Constitutional Court can only abolish a law or rule. On the other hand, the parliament is called a positive legislator because it has an active authority to make laws. This doctrine then develops and is continuously used as one of the supporting theories in the context of power separation in Indonesia, especially between the Constitutional Court and House of Representatives. In other words, it is interpreted that the authority of the Constitutional Court is limited only to abolishing the laws, and not making the laws or other rules (Faiz, 2016).

Thus, the Constitutional Court cannot change the rule in a law in an immediate way, but it has to be legislated first by following the guidance of good law making principles in order to prevent any mistakes and faults in the rule making. After the decision of the constitutional court, things that happen in practice have an impact on creditors who have good faith, they can find it difficult to carry out executions when dealing with debtors with bad faith. It is necessary for the decision of the constitutional court to be followed up by the legislature to complete the applicable rules.

If the legislative body does not act proactively enough in adopting the decisions of the constitutional court, there will be obstacles in practice in the execution of guarantees.

4 CONCLUSIONS

Based on the result of the research done, the legal standing of the fiduciary certificate after the Constitutional Court Decision Number 18/PUU-XVII/2019 in practice has an executorial right as explained in Article 15 section (2) of the Fiduciary Law, which means that the execution of the fiduciary object can be done without the court and this is final and binding so that it must be obeyed by the two parties when the execution process is going on. After the Constitutional Court Decision, the process of the fiduciary execution is not immediate; an immediate

execution can be done as long as the debtor willingly gives the fiduciary object. If the debtor is not willing to give the fiduciary object, the execution of the fiduciary certificate must be done and must be the same as the execution decided by the court which has a permanent legal force. *The impact caused by the Constitutional Court Decision is the lack of the legal certainty of the execution of the fiduciary object if the debtor does not willingly give the object he owns and he does not admit the default.* However, if the debtor willingly gives the fiduciary object and admits the default, the creditor's executorial right can still be legally assured.

The Constitutional Court has changed the mechanism of the fiduciary certificate execution. In practice, this causes some difficulties for the creditor so that the legal protection cannot be fulfilled if the debtor is not willing to give the fiduciary object, although there is a fiduciary certificate (as the requirement of the fiduciary object execution).

Consequently, the Constitutional Court Decision Number 18 PUU-XVII 2019 cannot be immediately applied because the role of Constitutional Court is as Negative Legislator. As such, the Constitutional Court can only abolish a rule in a law which contradicts the Constitution.

Although the Constitutional Court Decision has a binding legal force right after it is read out. Yet, not all Constitutional Court decisions which approve of the applicant's applications are executable because there must be a process of making the new law or the law amendment. This is needed due to the fact that the values of legal norms in the society are formed through the laws and legislation which in general give the binding effects.

So this decision of the constitutional court needs to be followed up immediately by making legal rules that can answer legal certainty for the parties so that in the end legal protection for both creditors and debtors with good faith can still be fulfilled.

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