Constitutional Issue of the Executional Power of Fiduciary Certificates as Equal to Court Decision

Permasalahan Konstitutionalitas Kekuatan Eksekutorial Sertifikat Fidusia yang disamakan dengan Putusan Pengadilan

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Abstrak

Berlakunya UU Jaminan Fidusia, diharapkan mampu menjawab permasalahan dalam usaha pembiayaan, namun menimbulkan kerugian hak konstitusional karena menyetarakan kekuatan eksekutorial putusan hakim yang sudah berkekuatan hukum tetap dengan sertifikat fidusia, oleh karena itu menarik untuk dianalisis sehingga dikentahui dasar normatif penyetaraannya, dan pertimbangan hakim Mahkamah untuk menyatakan inkonstitusional. Analisis dilakukan bahan hukum Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. Teknik pengumpulan data dilakukan dengan studi dokumen dan dianalisis secara preskriptif dan deskriptif. Hasil penelitian menunjukkan bahwa dasar normatif kekuatan eksekutorial pada sertifikat fidusia lahir dari kesepakatan yang didaftarkan untuk memperoleh kekuatan eksekutorial sehingga dapat digunakan sebagai bukti sempurna untuk membuktikan debitur cidera janji kecuali ditentukan lain oleh pengadilan, dan pertimbangan hukum hakim untuk menyatakan inkonsistensional ketentuan yang diuji didasarkan pada tidak adanya kepastian hukum dalam penentuan waktu cidera janji dan mekanisme pelaksanaan eksekusi Sertifikat Fidusia.

Kata kunci: Inkonstitusionil; Kekuasaan Eksekutif; Keputusan Hakim; Pemerataan; Sertifikat Fidusia.

Abstract

The enactment of the Fiduciary Guarantee Law is expected to be able to answer problems in the financing business, but it causes a loss of constitutional rights because it equalizes the executorial power of a judge's decision legally binding with fiduciary certificates. The analysis was carried out by Constitutional Court Decision Number 18/PUU-XVII/2019; the was carried out by document study and analyzed prescriptively and descriptively. The results showed that the normative basis of the executive power on the fiduciary certificate was born from an agreement registered. So that it can be used as perfect evidence to prove the debtor in breach of contract, and the judge's legal consideration to declare the inconsistent provisions tested are based on not the existence of legal certainty in determining the time of breach of contract (default) and the mechanism for the execution of the Fiduciary Certificate.

Keywords*:* Equalization; Executive Power; Fiduciary Certificate; Judge's Decision; Unconstitutional*.*

A. INTRODUCTION

1. Background

Based on Article 1131 jo. Article 1132 of the Civil Code, all existing and future debtor's assets, both movable and immovable, are guaranteed for the repayment of all debts they have made. This means that all creditors have the same right to get repayment of all of the debtor's assets unless there are valid reasons for repayment of other creditors. A valid reason for obtaining repayment is carried out by making a material guarantee agreement as specified in Article 1134 of the Civil Code.

A fiduciary agreement is a material guarantee agreement that was born from jurisprudence to meet the needs of a financing business that requires a debtor's material guarantee given to creditors in trust as a guarantee for repayment of debt in a financing agreement. Fiduciary as a guarantee institution is recognized by the enactment of Law Number 42 of 1999, which is expected to be able to answer problems in the financing business, but instead, it creates new problems because Article 15 paragraph (2) and paragraph (3) of the Law equates the Fiduciary Guarantee Certificate with a decision. A judge with permanent legal force has the power of execution so that if the debtor defaults, then the fiduciary holder has the right to sell the fiduciary object in his own power. The equalization of the executive power in the judge's decision which has permanent legal force through the case settlement process (due process) with a fiduciary guarantee certificate born on the basis of this agreement, can cause problems in its application because it often leads to arbitrary actions by fiduciary recipients (creditors) to collect loans. Debtor's debt is even often followed by vigilante

actions in the form of anarchic actions from the holder of the guarantee right to take the object of collateral forcibly so as to create fear and demean the debtor's dignity.

The executive power of a fiduciary certificate is based on an agreement between the parties who made it, and to ensure the implementation of the agreement, a guarantee in the form of material is given by the debtor to the creditor as repayment. Thus, the guarantee is an additional agreement (*accessoir*) made by the parties to ensure the implementation of the agreement in the form of a debt agreement. The agreement is then stated in a notarial deed as stipulated in Article 5 of the Law on Fiduciary Guarantees, and furthermore, Article 11 requires that the registration of a guarantee deed to determine that objects burdened with Fiduciary Guarantees must be registered to obtain a Fiduciary Certificate which has a gross deed that has the power of a judge's decision is legally binding (*in kracht van gewijsde*).

The normative basis for the executorial power of the judge's decision, sourced from Article 1917 paragraph (1) in conjunction with Article 1920 of the Civil Code and Article 134 Rv, which contains the principle of *res judicata proveritate habetur,* meaning what is decided by the judge must be considered correct, related to the *similia similibus principle*, which means a case that is similar must be decided equally and the principle of *ne bis in idem*, meaning that the same case cannot be tried a second time. Violation of rights is the basis for civil cases to be resolved in Court. The Court is an effort to settle cases related to the main task of the judge to hear and resolve cases that are submitted to him. In the legal system itself, basically, there is justice (*Normgerechtigkeit*), and through the process of resolving cases, that justice is then translated/interpreted by the judge and applied to concrete events, which then produce a decision so that justice turns into justice according to the judge (*Einzalfallgerechtigkeit*).

In an effort to settle cases, the judge's decision becomes Law as well as a source of Law. In an effort to settle cases, the judge's decision becomes law as well as a source of law. The shift to accept judges' decisions as law is a manifestation of the behavior of judges who are active in the trial and play an active role in exploring and seeking the values of justice that exist in society so that the function of judges in Indonesia is no longer just applying the law according to the law (la bouche de la loi) but also serves to create laws. is made based on an agreement between the debtor who gives material rights to his wealth to the creditor to guarantee repayment through the sale of the object of collateral. At the same time, the decision is the final result of the process of resolving the case through the Court. The judge's decision is a law as well as a source of Law that has binding power to be implemented. The

implementation of the decision is carried out by order and under the leadership of the Chief Justice of the District Court, who decides the case.

The application for a judicial review of the provisions of Article 15, paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law relating to the attachment of an executive title to a fiduciary guarantee certificate so that it can be executed is the same as a decision based on a gross deed which reads "*For Justice Based on Belief in the one and only God*." With the executorial title, the judge's decision has the power to be implemented. This becomes the basis for the creditor to sell the object of collateral with his own power as the settlement of his receivables from the sale proceeds. It is even more potent because it is carried out without going through the execution process in the form of unilateral actions taken by the creditor that can harm the debtor. Based on Article 51 paragraph (1) of the Law on the Constitutional Court, there are two things that must be proven in the petition for judicial review of the 1945 Constitution, namely whether or not there is a constitutional position as an applicant (*legal standing*), namely the rights and/or authorities granted by the Constitution Court of the Republic of Indonesia, and whether or not there is a loss of rights and/or authority arising from the enactment of the Law for which judicial review is requested.

In his application, the petitioners. Postulated that there was a loss of constitutional rights as a result of the withdrawal of the fiduciary object by the fiduciary recipient by using the services of *a debt collector*. Withdrawal of a fiduciary object in the Fiduciary Guarantee Certificate Number W11.01617952.AH.05.01, which is based on the provisions of equalizing the gross power of the deed in the Fiduciary Certificate, which is based on the agreement of the parties with a decision as a case settlement in Court. As a result, the fiduciary holder can execute the fiduciary object with his own power to take over the controlled goods without going through the correct legal procedure.

Against this petition, the constitutional judges in Case Number 18/PUU-XVII/2019 decided that the constitutional rights of the Petitioners were proven to be impaired as a result of the enactment of Article 15 paragraph (2) of the Fiduciary Guarantee Law which gives executive powers to the Fiduciary Guarantee Certificate. The juridical consequence of the enactment of these provisions has an impact on Article 15 paragraph (3) which gives the Fiduciary Recipient the right to sell the fiduciary object in his own power if the debtor breaks his promise. Even the judges of the Court are of the opinion that although the Petitioners did not request a review of the Elucidation of Article 15 paragraph (2) of the Law, the Elucidation of the norms of Article 15 paragraph (2) must automatically be adjusted because it is considered

that the Court's considerations have an impact on the Elucidation of Article 15 paragraph (2). Therefore, it is interesting to examine in depth the normative basis for equating the judge's decision legally binding (*in kracht van gewijsde*) with a fiduciary certificate and to know the legal considerations of the judges of the Court to declare the inconsistency of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law.

2. Research Questions

In this research, the problem is:

a. *What is the normative basis for the executorial power of a fiduciary certificate so that it is equated with a judge's decision legally binding (in kracht van gewijsde)?*
b. *How are the judge's legal considerations for declaring the provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law contrary to constitutional rights?*

3. Research Method

In general, the purpose of research is to obtain answers to the problems posed.[1] To find out the normative basis of the executorial power of the fiduciary certificate so that it is equated with the judge's decision legally binding (*in kracht van gewijsde*) by analyzing the judge's legal considerations to state Article 15 paragraph (2) and paragraph (3) of the unconstitutional Fiduciary Guarantee Law, an analysis of secondary data in the form of the primary legal material is carried out, namely the Constitutional Court Decision Number 18/PUU-XVII/2019, relating to the executive power of the Fiduciary Guarantee Certificate. The application of Law for the settlement of a case is an attempt to find positive legal norms that are abstract to some instances as positive legal norms in concrete, which is carried out by analyzing the legal considerations of the panel of judges. Research on legal norms is often called doctrinal legal research.[2] In addition, it is carried out analytically-juridically to find the normative basis for equalizing fiduciary rights certificates with judge's decision in its implementation. In this study, the Law is conceptualized as a norm, which is contained in the Law as a product of certain sovereign powers.

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1 E. Nurhaini Butarbutar, *Metode Penelitian Hukum, Langkah-Langkah Untuk Menemukan Kebenaran Dalam Ilmu Hukum, Cetakan Kesatu* (Bandung: PT Refika Aditama, 2018), 122.
2 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Media Group, 2014), 35.

B. RESULTS & DISCUSSION

1. Normative Basis of Executive Power on Fiduciary Certificates

The petition for judicial review in this Constitutional Court Decision is related to Article 15, paragraph (2), and paragraph (3) of the Fiduciary Guarantee Law, which equalizes the executorial power of the Fiduciary Guarantee Certificate with the judge's decision legally binding (*in kracht van gewijsde*). As a result, if the debtor does not carry out its performance properly, the creditor can obtain repayment from the proceeds from the sale of the fiduciary object based on the gross deed contained in the Fiduciary Guarantee Certificate. In its consideration, the Court is of the opinion that the unconstitutionality of the provisions of Article 15 paragraph (3) of the Fiduciary Guarantee Law is a juridical consequence of the existence of norms in Article 15 paragraph (2). The substance of the norm in Article 15 paragraph (3) has a direct effect on the provisions of Article 15 paragraph (2), which determines the executive power of a fiduciary guarantee certificate so that there are the same constitutionality problems, namely the lack of certainty regarding the procedure for implementing decisions and uncertainty regarding the determination someone is said to be in default. To better understand the normative basis contained in the provisions of Article 15, paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law, the birth of the executive power of a fiduciary certificate which is equated with a judge's decision legally binding (*in kracht van gewijsde*), it must be understood the nature and legal system of guarantees and laws. The subsequent execution will be discussed one by one as follows:

a. The Nature and Legal System of Fiduciary Guarantees

Fiduciary guarantees are material rights (*zakelijk recht*) given by the debtor to the creditor for a specific item to get repayment. Fiduciary guarantees are born from jurisprudence which is then regulated in Law, to meet the needs of the community in the field of financing businesses that require collateral by means of transferring ownership rights of an object by the debtor to the creditor based on trust in the sense that ownership of the object is still physically controlled by the debtor. A fiduciary is a material guarantee so that material properties are attached as regulated in Book II of the Civil Code. Objects that are objects of collateral must be able to be submitted and must be registered as also stipulated in Article 11 of the Fiduciary Law, that objects that are burdened with fiduciary guarantees must be registered. If a fiduciary guarantee is not registered, the creditor does not have a fiduciary guarantee certificate and does not have the right of preference (right

of preference) to receive repayment from other creditors. As material security is said to violate the principle of inbezit stelling attached to the pawn because the pawn object that is used as collateral, which should be under the authority of the debtor, remains in the hands of the debtor.

The consideration of the application of fiduciary as a material guarantee is based on the need for legal traffic in providing financing facilities for debtor with collateral in the form of goods financed by consumer financing institutions which are controlled directly by the debtor.[3] Guarantee rights are accesoir in the sense that they cannot stand alone but depends entirely on the main agreement, namely the loan agreement, because what is guaranteed is the repayment of the debt or the debtor's achievement that was born because of the agreement, as also confirmed in Article 4 of the Fiduciary Law. Article 1 of the Fiduciary Guarantee Law stipulates that fiduciary is the transfer of ownership rights to an object in trust with the condition that the transfer of material rights to the creditor remains in the physical possession of the owner of the object.

Fiduciary objects are collateral rights to movable objects, both tangible and intangible and immovable, especially buildings that cannot be encumbered with mortgage rights which are handed over to the debtor to the creditor as a guarantee of repayment of the debt with a priority position. The surrender of collateral rights to the debtor's property that is given to the creditor creates confidence in the creditor as a guarantee for the settlement of his receivables which creates confidence in the certainty of the repayment of his receivables by the debtor.[4] The guarantee agreement is an agreement that does not stand alone but is an additional from the main agreement, namely a debt agreement that aims to obtain repayment of receivables. Therefore, the basis for the occurrence of collateral rights is a debt agreement between the debtor and the creditor, so based on Article 1338 paragraph (1) jo. Article 1320 of the Civil Code, the agreement made by the debtor with the creditor becomes Law for those who make it so that the basis for binding the debt agreement and fiduciary guarantee agreement is the agreement of the parties. A contract between two parties raises the rights of one party and its obligations to the other party, which can be assessed with money, so

[3] Arista Setyorini and Agus Muwarto, "Akibat Hukum Perjanjian Pembiayaan Konsumen dengan Pembebanan Jaminan Fidusia yang Tidak Didaftarkan," Mimbar Keadilan, August 1 (2017): 119, https://doi.org/10.30996/mk.v0i0.2187.

[4] E. Nurhaini Butarbutar, *Hukum Harta Kekayaan, Menurut Sistematika KUH Perdata Dan Perkembangannya* (Bandung: PT Refika Aditama, 2012), 69.

in the context of a credit contract, it is a business activity that raises rights and obligations between creditor and consumer that the recipient of the credit facility.[5]

In accordance with the principle of agreement in Article 1338 paragraph (1) of the Civil Code, which contains norms, binding agreements for those who make them are then concreted through the Fiduciary Guarantee Law. Fulfilment of achievements/agreements is a consequence arising from the agreement; if one of the parties does not carry out the achievement, it will cause legal problems called a breach of contract or default. The occurrence of default is the basis for the occurrence of a case that reaches the front of the trial due to a dispute or violation of rights committed by one party against another party that results in loss to the person being violated.[6]

The provisions of Article 15 paragraph (3) of the Fiduciary Guarantee Law only mention that in the event the debtor defaults, the fiduciary holder has the right to sell the object of the guarantee without further explaining when the debtor is considered to be in default and who has the right to determine the default? This ambiguity brings juridical consequences in the form of the absence of legal certainty regarding the two issues, thus bringing juridical consequences to the absolute authority of the fiduciary holder to determine for himself that the debtor has defaulted, which gives birth to the right of the fiduciary holder (the creditor) to take repayment of his receivables from the proceeds of the sale of the object itself..

Theoretically, the absence of arrangements for determining the debtor in a state of default in the Fiduciary Guarantee Law can be overcome by the implementation of the principle of *lex specialist derogate lex generalis*. Article 1238 of the Civil Code has regulated in such a way when a person is said to have defaulted; namely, the debtor is declared negligent by a warrant or with a similar deed, so that although the Fiduciary Guarantee Law as a special provision does not clearly regulate it, the determination of a person's breach of contract must be preceded by a lawsuit to the Court to find out. A person in a state of default as required by Article 1238 of the Civil Code. In the civil law system, the authority to determine a person's breach of contract must be by a court decision, unless the agreement that has been made is not denied by one of the parties because based on *the principle*

[5] E. Nurhaini Butarbutar, "Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes," *Journal of Advanced Research in Law and Economics* 11, no. 4 (2020): 1131–36, .https://doi.org/10.14505//jarle.v11.4(50).07

[6] Hazar Kusmayanti, "Tindakan Hakim Dalam Perkara Gugatan Wanprestasi Akta Perdamaian," *Jurnal Yudisial* 14, no. 1 (2021): 99–116, https://doi.org/http://dx.doi.org/10.29123/jy.v14i1.

of freedom of contract contained in the agreement, an agreement made together cannot be unilaterally revoked.

Basically, the norms contained in the provisions of the article require the parties to fulfil their achievements/agreements, and if a dispute arises over the agreement that causes default, it must be proven through the trial process. Through the proceedings at the trial, the judge will determine the existence of a default or an event of a violation of the agreement made by both parties, because the purpose of proof is to provide certainty to the judge of the truth of the disputed concrete events..[7] The excellent and robust quality of evidence has a close relationship with the proof of the arguments so that it can convince the judge, and convincing the judge correlates with the granting of an application.[8]

A Fiduciary Guarantee Certificate that has evidentiary power can be used as perfect evidence that there has been a violation of the rights of the fiduciary recipient to get the payment of his receivables. Article 165 HIR/Article 285 Rbg stipulates that an authentic deed is perfect proof of what is stated in it. This means that the authentic deed has a high probability of approaching the truth because it has been confirmed by the authorized official. It is said to be perfect evidence because the truth of the contents of the deed is determined by the parties and recognized by the official who explains and fulfils the form determined by Law, which is made by or before a public official as referred to in Article 1868 of the Civil Code.

With there is Fiduciary Guarantee Certificate, the fiduciary recipient has perfect evidence, just like a judge's decision legally binding (*in kracht van gewijsde*), so that his right to get repayment of his receivables is guaranteed through the sale of the fiduciary object in accordance with the nature of the guarantee to get repayment, not to own. As a norm contained in the provisions of the article, the debtor must fulfil his achievements/obligations in accordance with the agreement guaranteed by the sale of fiduciary objects. However, if a dispute arises over the existence of a default, then it should be resolved in Court to obtain certainty that a default has occurred, which in turn gives the fiduciary holder the right to carry out the execution on their own power. The decision of the Panel of Judges relates to the norms contained in the Fiduciary Guarantee Certificate when the parties

[7] E. Nurhaini Butarbutar, "Arti Pentingnya Pembuktian dalam Proses Penemuan Hukum" *Mimbar Hukum*, Volume 22, nomor 2, Juni (2010) : 347 https://doi.org/10.22146/jmh.16225

[8] Retno Widiastuti and Ahmad Ilham Wibowo, "Pola Pembuktian Dalam Putusan Pengujian Formil Undang-Undang Di Mahkamah Konstitusi," *Jurnal Konstitusi* 18, no. 4 (February 17, 2022): 803, https://doi.org/10.31078/jk1844.

do not find an agreement regarding the occurrence of a default and the fiduciary provider is not willing to release the object for sale as repayment of his debt. Therefore, the Panel of Judges is of the opinion that the determination of default must first be resolved based on the judge's determination, and the execution of the Fiduciary Guarantee Certificate must be based on procedural Law as applicable to the implementation of court decisions that already have legal force, considering the nature of the procedural law system which is public Law, as a sub-system of the civil procedural Law that is coercive.

b. Normative Basis of Executive Power

As a material law, the Fiduciary Guarantee Law only regulates the rights and obligations of the fiduciary giver and recipient as legal subjects who have an interest in the Law. However, according to the petitioners, the Law only guarantees the implementation of the creditor's right to obtain repayment of his receivables from the sale of objects that are burdened by a fiduciary. Even the regulation of the strength of the Fiduciary Guarantee Certificate includes the words "*For Justice based on Belief in the one and only God*," just as the judge's decision is considered unable to provide justice and tends to provide different treatment between creditors and debtors so that they are considered unable to provide protection for the debtor's ownership that is burdened with a fiduciary guarantee. The executive power of the decision is related to the strength of evidence so that certainty is obtained about the occurrence of an event.

The strength of proof in the civil judge's decision is regulated in Article 1916 paragraph (2) of the Civil Code, by determining that the judge's decision is a truth because it contains an assumption that the judge's decision is correct in accordance with the principle of *res judicata proveritate habetur* so that it can be carried out based on the procedure stipulated in the procedural Law. The binding power of a judge's decision is based on the purpose of the judge's decision itself, namely to resolve or end a dispute and determine its rights or Law.

Norms are defined as values contained in regulations or decisions, which are value formulations that regulate how to behave or about actions that are prohibited or recommended to be carried out. In addition, the judge's decision is also often used by other judges as a basis for re-deciding similar cases so that the judge's decision is referred to as a source of Law. The judge's decision is also the justice obtained from the proceedings in the Court for the purpose of restoring the imbalance in society due to violations of the Law.

The basis of the binding power of the judge's decision is stated in Article 1917 of the Civil Code, which stipulates that the power of a judge's decision that has obtained absolute power is not broader than just the decision so that it has juridical consequences for the application of the *ne bis in idem* principle. The power of proof of the judge's decision is stated and made in an authentic form that can be used as documentary evidence as specified in the 1918 Civil Code, which is strengthened by Jurisprudence Number 101K/Sip/1955 dated August 19, 1955

The existence of executive power in the judge's decision is based on the provisions of Article 2 paragraph (1) of the Law on Judicial Power and its Elucidation by stipulating that the trial shall be conducted "*For Justice Based on Belief in the one and only God*." which is in accordance with Article 29 of the 1945 Constitution of the Republic of Indonesia. Therefore, all judiciary throughout the territory of the Republic of Indonesia is a state court to apply and enforce Law and justice based on Pancasila and the Republic of Indonesia Constitution of 1945. In addition, judges make decisions based on valid evidence through legal proceedings. This means that what the judge has decided is the truth so that it can be implemented.

In general, the Law can be divided between material Law and formal Law; material law (substantive Law) is a provision on human relations that stipulates actions that are required or prohibited or allowed, accompanied by sanctions for violators, while formal Law (procedural Law) regulates ways to implement and maintain material law. The relationship between the two, according to Paton[9] that "*between substantive and procedural law was difficult to draw a clear line distinguishes between them.*" On the other hand, procedural law cannot stand alone without material law. In contrast to the executorial power of the Fiduciary Certificate, which comes from an agreement that is based on Article 15 paragraph (1) of the Fiduciary Guarantee Law, the Fiduciary Guarantee Certificate contains the Grosse deed "*For Justice Based on Belief in the one and only God*." In accordance with the provisions of Article 224 HIR/258 Rbg, the Fiduciary Guarantee Certificate as a notarial deed can be implemented or executed as a court decision.

If the creditor does not get his rights as stated in the fiduciary guarantee certificate as material Law, then the fiduciary recipient has the right to sell the fiduciary object in his own power. Violation of these rights must be submitted to the head of the district court in advance, as the procedure for carrying out

[9] George, Whitecross, and Paton, *A Text Book of Jurisprudence* (Oxford: Clarendon Press, 1975), 45.

the execution according to HIR/Rbg to be carried out by force (*execution force*) is the same as the judge's decision legally binding (*in kracht van gewijsde*). The execution of the decision is an effort to realize the achievements required by the judge through his decision. The act of execution is carried out to maintain legal certainty in the decision and to fulfill a sense of justice for the party who has been won in the case.[10]

The implementation of a judge's decision legally binding (*in kracht van gewijsde*) must take place and be under the leadership of the Chief Justice of the District Court. As an achievement that was arising from the Court's decision legally binding (*in kracht van gewijsde*), it should still be carried out voluntarily, but the reality in society often cannot be carried out by the defeated party. Therefore, by aid State Tool, by order of the Chief Justice of the District Court, it can be carried out by force. Although it is not clearly regulated in the Fiduciary Guarantee Law regarding the process of carrying out the execution of fiduciary objects, the regulation in HIR/Rbg can be applied for the execution of a court's decision legally binding (*in kracht van gewijsde*). According to Article 196 HIR/Article 207 Rbg, if the defeated party is unwilling or negligent to fulfil the contents of the decision peacefully, then the winning party submits a request, either verbally or by letter, to the Chairman of the District Court to implement the decision, and by order of the Chief Justice of the District Court to summon the defeated party and warned him (*aanmaning*) that he should fulfil the decision within the time determined by the chairman, which is a maximum of eight days.

The Fiduciary Guarantee Certificate is interpreted the same as a court decision that has permanent legal force so that if the creditor feels that his rights have been violated due to a violation of the agreement, the creditor can apply to the Head of the District Court to carry out the execution of the Fiduciary Certificate without the need to file a lawsuit. Based on the Grosse deed, the creditor does not need to file a lawsuit to the Court, but it is enough to submit an application to carry out the contents of the Grosse deed. In contrast to other authentic deeds, in dealing with debtors who are in default, they are required to file a lawsuit to the Court to implement the contents of the deed.

The procedure for the request for execution is the same as applying for the execution of a decision because a fiduciary guarantee certificate arises from an agreement made in a formality that has been determined by Law so that it does

[10] Panusunan Harahap, "Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan," *Jurnal Hukum dan Peradilan*, 7, No 1 (2018) : 127, 10.25216/jhp.7.1.2018.127-150.

not need to be proven again through the trial process. Therefore, what is stated in it is considered correct unless there is evidence against it that determines otherwise. This is in line with the conclusion of the constitutional judges regarding the meaning of the phrase "with respect to fiduciary guarantees if there is no agreement on breach of contract and the debtor objected to voluntarily surrendering the object that is the fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out, and applies the same as the execution of court's decisions legally binding (*in kracht van gewijsde*)."

2. Legal Considerations

The applicants for a husband and wife, debtors in a fiduciary agreement based on the Fiduciary Guarantee Certificate Number W11.01617952.AH.05.01 postulate that one of the constitutional rights of the applicant is guaranteed legal protection and the principle of equality before the Law as regulated in Article 28D paragraph (1) of the Constitution of the Republic of Indonesia has been violated because of the enactment of legal norms contained in the Fiduciary Guarantee Law which gives creditors the right to sell fiduciary objects on their own power. One of the Constitutional Court Decision in Case 18/PUU-XVII/2019 is that the provisions of Article 15, paragraph (2) and paragraph (3) are declared to have no binding legal force because they are contrary to the 1945 Constitution of the Republic of Indonesia. In accordance with the principle of objectivity and accountability, then the decision must be accompanied by reasons or judge's considerations as the basis for judging, and these considerations become the basis for the judge's responsibility in his decision.

In their consideration, the panel of constitutional judges stated that the unconstitutional issue regarding the enactment of Article 15 paragraph (2 paragraph (3) of the Fiduciary Guarantee Law was based on the element of legal protection in the form of legal certainty and justice that should be given to creditors and debtors in a fiduciary guarantee agreement, as stated in one of the preambles for the formation of the Law. Justice, in general, is a fundamental problem for law enforcement, significantly when it is associated with the opinion that the purpose of Law is to create justice. The law must be fair and the perfect way to create justice, must have certainty, and must provide benefits to society.[11] Also aims to create legal certainty and benefit. These three elements are legal values or ideals (*Idee des Recht*) proposed by Radbruch

[11] Endang Pratiwi, "Teori Utilitarianisme Jeremy Bentham: Tujuan Hukum Atau Metode Pengujian Produk Hukum?" *Jurnal Konstitusi*, 19 No 2 (2022) : 268, 10.31078/jk1922

that Law contains the ideals/goals to create legal certainty (*Rechtssicherheit*), provide benefits (*Zweckmassigkeit*) and justice (*Gerechtigkeit*). The element of legal certainty guarantees that the Law must be carried out according to its sound. The application of this element is more directed to the implementation of the Law or legislation against every seeker of justice for a concrete event in the judge's decision. The emphasis on the principle of legal certainty has resulted in judges being more inclined to maintain written legal norms from existing favourable laws.[12]

In consideration, the constitutional court stated that the norms regulated in Article 15, paragraph (2) and paragraph (3) have implications for the existence of legal uncertainty regarding the determination of a person; in this case, the fiduciary giver (the debtor) is declared to be in breach of achievement or default and the procedure or mechanism for carrying out the execution. The arrangement for granting powers to be executed is the same as a court's decision legally binding (*in kracht van gewijsde*), is not explained further apart from only providing an understanding of the executorial power in the Elucidation of Article 15 paragraph (2), namely an action can be carried out without going through a court because it is considered final. Moreover, bind the parties so that the decision can be implemented. This explanation shows that there is a dualism in the implementation of executions in the Indonesian legal system, which creates legal uncertainty. The Law of execution, which is a sub-system of procedural Law and is a coercive law, has clearly determined in Article 196 HIR/ Article 208 RBg that the execution of executorial titles such as Fiduciary Guarantee Certificates must be carried out in accordance with the execution of court decisions that have permanent legal force, namely must be carried out by the clerk and bailiff on the order of the chairman of the district court based on the request for execution by the party who won and must be included in the Minutes of Execution.

Uncertainty in the execution of the Fiduciary Guarantee Certificate, which has the title of execution, has the potential for arbitrary creditor actions from creditors; even in social reality, there are often acts of violence that are not "humane" from creditors or their proxies against the debtor to take fiduciary objects that are collateral forcibly. Payment of debts. Therefore, the judge's consideration stated that to provide legal certainty to the parties, the execution of the Fiduciary Guarantee Certificate should not be carried out by the fiduciary recipient himself but must be carried out according to legal mechanisms and procedures for the execution with a judge's decision legally

[12] Fence M Wantu, "Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata," *Jurnal Dinamika Hukum* 12, no. 3 (September 15, 2012): 479-489, http://dx.doi.org/10.20884/1.jdh.2012.12.3.121.

binding (*in kracht van gewijsde*). Furthermore, against the provisions of Article 15 paragraph (3), the constitutional judges argued that the exclusive authority granted by the article to creditors to sell fiduciary objects on their own power causes injustice and violations of debtor's rights. The debtor, as the owner of the object of collateral, must also be protected by giving him the right to defend himself from the alleged occurrence of default and also get the protection of the ownership of his property rights by getting the opportunity to participate in the sale and obtain the remaining proceeds from the sale of the object of the fiduciary guarantee at a reasonable price. Regarding the absence of balanced legal protection in a fiduciary agreement, the panel of constitutional judges relates to the absence of transfer of property rights to the fiduciary object from the debtor to the creditor as the fiduciary recipient, which reflects that the substance of such an agreement clearly shows an imbalance in bargaining position between the rights giver. Fiduciary (the debtor) with the recipient of fiduciary rights (the creditor) because the fiduciary giver (the debtor) is in a position as a party in need.

The imbalance in the bargaining position in an agreement triggers legal disputes in the implementation of the agreement. Article 1338 paragraph (3) of the Civil Code has determined that an agreement must be carried out in good faith. However, applying the principle of good faith in an agreement can prevent disputes by formulating the rights and obligations of the parties in a balanced manner.[13]

The approval of the substance of such an agreement, in the opinion of the panel of judges, is a hidden intention that the occurrence of the guarantee agreement is not based on an agreement because the agreement can only occur when both parties are free of will as an essential condition in determining the validity of an agreement. Therefore, based on Article 1321 of the Civil Code, it is determined that the will becomes defective if it is carried out because there are elements of coercion, fraud, and oversight, and in its development, it is due to abuse of circumstances.

C. CONCLUSION

Based on the analysis of the problems posed, it is known that the normative basis of the executive power in the fiduciary guarantee certificate was born from an agreement to provide material rights between the debtor to obtain repayment of their receivables. Made in the form of a notarial deed which is then registered

[13] E., Nurhaini Butarbutar, "Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes," 1136.

to obtain executive power so that it can be used as perfect evidence to prove the debtor is in breach of contract unless otherwise determined by the Court, and the judge's legal considerations to state the provisions of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law. Contrary to constitutional rights based on the absence of legal protection in the form of legal certainty in determining the time of the breach of contract and the mechanism for the execution of the Fiduciary Certificate, which is equated with a judge's decision legally binding (*in kracht van gewijsde*), which has the potential for arbitrary actions, and the granting of exclusive authority for creditors to sell fiduciary objects on their own power shows that there is no balanced legal protection between creditor and debtor.

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