



## Discourse on Fiduciary Guarantee Execution's Arrangement After the Constitutional Court Decision Number 18/PUU-XVII/2019: A Deterioration?

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### Abstract

This research has a goal in terms of knowing the arrangements for Fiduciary Guarantees as a national legal instrument, to find out the procedures for executing fiduciary guarantee objects, as well as those disclosed as a result of the issuance of the Constitutional Court Decision Number: 18/PUU-XVII/2019. This study uses a normative legal research method with a statutory approach and an analytic and conceptual approach. The results of this study indicate that fiduciary guarantees as national guarantee legal instruments have been regulated through the Fiduciary Guarantee Act as a legal umbrella in the procedure for implementing fiduciary guarantees. Regarding the procedure for executing fiduciary guarantees, it is specifically regulated in the Fiduciary Guarantee Law by using executorial titles, through public auctions, and also underhand or private sales. However, after the Decision of the Constitutional Court Number: 18/PUU-XVII/2019 raises a legal implication for the execution procedure in terms of buying a default based on an agreement with the debtor who voluntarily surrenders the object and the execution procedure must be based on an agreement and there is already legal remedies against fraudulent breach of contract actually imposed on the creditor's position.

### I. Introduction

Humans everlastingly live side by side, especially in the social environment. Humans need each other to achieve their welfare. To achieve that goal, they need to meet all of their life's needs. Especially as individual beings, everyone has different needs. On the other hand, the development of the era also affects these human needs, so as the era develops, human needs will be more numerous and varied. The economy is also the most critical aspect of fulfilling these needs. In this case, humans compete which is one of the toughest issues and challenges to be able to self-finance for the sake of their life.<sup>1</sup> This has legal implications for economic development in a country. The increase in self-financing

<sup>1</sup> Abdullah, Junaidi. "Jaminan Fidusia Di Indonesia (Tata Cara Pendaftaran Dan Eksekusi)." *BISNIS: Jurnal Bisnis dan Manajemen Islam* 4, no. 2 (2016): 115-132. doi: <http://dx.doi.org/10.21043/bisnis.v4i2.2693>

is accompanied by the development of a country in terms of fulfilling needs indubitably will increase day by day, which raises a new proposition for the community, that the income they get through their work is still lacking, so they are unable to meet their needs.<sup>2</sup>

Indonesia as a developing country is known as a country with abundant resources. The economic aspects of the country and its citizens are something that they consider the most. This will indirectly affect the increase in needs and economic growth which developing every day. This has implications for the price of an item that is a community need getting higher day by day.<sup>3</sup> In order to meet their varied needs, having sufficient funds is something they need to prepare. The answer to the problem of providing funds for the community generates a solution through the existence of a company or institution in providing capital. Companies or institutions that provide capital generally apply the credit system to provide capital for the community, this caused the development of credit companies in the provision of capital. The increase in daily needs along with the lack of income is also the basis of credit usage for fulfilling their necessity, which indirectly makes people own their necessities without doing the direct payment. The activity of providing capital to the community which will later give rise to a lending and borrowing activity as a credit will certainly be related to the existence of a guarantee. One of these activities is carried out by banks as capital providers. Banks in providing credit facilities to the public are obliged to use a guarantee in securing credit which is guided by the *Commanditerings Verbood* principle as a principle in the bank towards the responsibility of the debtor's business risk with the credit provided.<sup>4</sup> The credit agreement that occurred makes a guarantee in the form of a fiduciary guarantee with an emphasis on the object being funded to become collateral in repayment of the debt if later in its implementation there is a disavowal of what was promised.

Fiduciary Guarantee is a form of guaranteeing tangible or non-tangible moving objects in receivables activities carried out by creditors and debtors, which in this case is a fixed collateral by the debtor to creditors in guaranteeing debt. Fiduciary guarantees are made on trust between the creditor and the debtor.<sup>5</sup> According to that, it is known that the implementation procedure for fiduciary guarantees was born from the existence of a debt/loan agreement as the principal agreement made between the debtor and the creditor, in which case the creditor needs to ensure that the payment procedure for the installment is fulfilled. This causes a request from creditors to ensure this through fixed collateral. This also proves that the Fiduciary Collateral through the agreement is formed

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<sup>2</sup> Hidayat, Muhammad Taufich, and Martin Roestamy. "Pengembangan Model Fidusia Terhadap Penitipan Barang Dari Persero Pegadaian Kepada Debitur." *Jurnal Ilmiah Living Law* 11, no. 2 (2019): 160-171. doi: <https://doi.org/10.30997/jill.v11i2.2110>

<sup>3</sup> Ulfa, Hanisa, Devi Luviyanti, Alqarana Pitra Adhitiya, Intan Febbellia Rizqy, and Iva Khoiril Mala. "Parate Eksekusi: Implementasi Eksekusi Jaminan Fidusia Berdasarkan Undang-Undang No. 42 Tahun 1999 Tentang Jaminan Fidusia (Execution Parate: Implementation Of The Execution Of Fiduciary Guarantee Based On Law No. 42 Year 1999 About Fiduciary Guarantee)." *Qawānīn Journal of Economic Syaria Law* 5, no. 2 (2021): 181-196. doi: <https://doi.org/10.30762/qawanin.v5i2.3537>

<sup>4</sup> Suparto, Nanang. "Prinsip kepemilikan hak pada pembebanan jaminan fidusia." *Jurnal Rechtsens* 4, no. 1 (2015): 35-52. doi: <https://doi.org/10.36835/rechtsens.v4i1.110>

<sup>5</sup> Sabir, Muhammad, and Rifka Tunnisa. "Jaminan Fidusia dalam Transaksi Perbankan; Studi Komparatif Hukum Positif dan Hukum Islam." *Mazahibuna* (2020). doi: <https://doi.org/10.24252/mh.v2i1.14284>

as a follow-up agreement or *accessoir* to the main credit agreement.<sup>6</sup> Fiduciary guarantees in practice, it is not uncommon for a problem to occur by a defaulting debtor. This results in the creditor having to settle it by means of settlement in an agreement which in positive law in Indonesia, all rules relating to credit can provide an offer regarding the method of settlement, such as the execution of a collateral object on the basis of its own strength based on a Fiduciary Guarantee Certificate in accordance with the provisions in Article 15 of Law no. 42 of 1999 concerning Fiduciary Guarantees or hereinafter referred to as the Fiduciary Guarantee Law or UUJF, which in this case the certificate gives the creditor an advantage to carry out executions without any court proceedings.<sup>7</sup>

The implementation procedure for the execution of the fiduciary guarantee object in fact causes a problem by the creditor which is carried out by using the services of a debt collector, which is often done by coercion or by means of violence. This problem induce a judicial review of the Fiduciary Guarantee Law against the 1945 Constitution of the Republic of Indonesia, which bears responsibility for debtors who feel that the execution by the creditor uses an element of coercion based on the execution *parate* as stipulated in Article 15 of the Fiduciary Guarantee Law so that they are given the authority to carry out the execution and carry out the judge's extra action, which ultimately resulted in a judicial review of the Constitutional Court Number: 18/PUU-XVII/2019. Based on the decision which considers that the provisions in Article 15 paragraphs (2) and (3) of the Fiduciary Guarantee Law are contrary to the 1945 Constitution of the Republic of Indonesia, in this case, the implementation procedure for the execution must have an agreement regarding default by being carried out willingly by the debtor and for default must go through legal remedies which determine that default has occurred. The verdict then reveals the direct law regarding the execution procedure for fiduciary guarantee objects.<sup>8</sup>

Based on the explanation of the background of the problem, there are 3 (three) problem formulations that can be studied, the first is how to regulate fiduciary guarantees as a national guarantee legal instrument?, the second is what is the procedure for carrying out the execution of fiduciary guarantee objects based on the Fiduciary Guarantee Law?, And the last is what are the legal implications for the procedure for executing fiduciary guarantees after the Constitutional Court decision Number: 18/PUU-XVII/2019. This article aims to find out the arrangements for fiduciary guarantees in Indonesia as one of the national legal instruments, to find out the procedures of the execution process for objects guaranteed by fiduciary as a way of performances fulfillment as stipulated in the Fiduciary Guarantee Law, as well as how big the implications are as a result of the stipulation of the Constitutional Court Decision Number: 18/PUU-XVII/2019 on the procedure for carrying out the execution of the fiduciary guarantee object, which in this

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<sup>6</sup> Nugraha, Sigit Nurhadi. "Cidera Janji (Wanprestasi) Dalam Perjanjian Fidusia Berdasarkan Pasal 15 Ayat (3) Uu Nomor 42 Tahun 1999 Pasca Putusan Mahkamah Konstitusi Nomor: 18/PUU-XVII/2019." *Al WASATH Jurnal Ilmu Hukum* 2, no. 2 (2021): 77-92. doi: <https://doi.org/10.47776/alwasath.v2i2.213>

<sup>7</sup> Rufaida, Khifni Kafa. "Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial Yang Sah." *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no. 1 (2019): 21-40. doi: <https://doi.org/10.24246/jrh.2019.v4.i1.p21-40>

<sup>8</sup> Syafrida, Syafrida, and Ralang Hartati. "Eksekusi Jaminan Fidusia Setelah Putusan Mahkamah Konstitusi Nomor 18/Puu/Xvii/2019." *ADIL: Jurnal Hukum* 11, no. 1 (2020): 107-127. doi: <https://doi.org/10.33476/ajl.v11i1.1447>

case becomes a discourse related to the decision which in procedural matters are beneficial or debilitating.

If compared with several previous studies, this research has similarities related to the procedure for executing fiduciary guarantee objects after the Constitutional Court Decision Number: 18/PUU-XVII/2019, but if substantially compared, there are differences. In 2022, Jefferson Hakim Manurung, through the writing of a journal entitled "Implementation of the Execution of Fiduciary Guarantees after the Constitutional Court Decision No: 18/PUU-XVII/2019 and MK Decision No: 2/PUU-XIX/2021".<sup>9</sup> The research focused on studying the rulings of the Constitutional Court Number: 18/PUU-XVII/2019 and the Constitutional Court Decisions Number: 2/PUU-XIX/2021 to provide an overview of the execution of fiduciary guarantee objects. The subsequent research through thesis written by Lunita Jawani, Notary Masters Study Program, Faculty of Law, Islamic University of Indonesia in 2022, through research with the title "Legal Protection of Holders of Fiduciary Guarantees After the Constitutional Court Decision Number: 18/PUU-XVII/2019".<sup>10</sup> The research emphasizes the analysis of legal protection for holders of fiduciary guarantees after the enactment of the Constitutional Court Decision Number: 18/PUU-XVII/2019. Based on previous studies that have been done related to fiduciary guarantees after the Constitutional Court Decision Number: 18/PUU-XVII/2019, the novelty of this article is an analysis of the implications of executing fiduciary guarantees after the Constitutional Court Decision Number: 18/PUU-XVII/2019 which actually becomes a discourse related to the procedures of implementation that are advantageous or debilitating.

## **2. Research Methodology**

This research is normative, so the method used in this research is the normative legal research method, which aims to find the truth based on the scientific logic of law, especially from a normative perspective.<sup>11</sup> This article uses several forms of approach in terms of supporting information on research credibility, namely with a statutory approach, analytical and conceptual approach. Several legal materials were also used in writing this article, which includes primary laws, which are related to corresponding laws and regulations, then secondary legal material, which is related to literature and any supporting reading materials, as well as tertiary legal material, which is associated with the results in the survey that can improve the quality of the research. The writing in this article is descriptive with the use of qualitative analysis methods.

## **3. Results and Discussion**

### **3.1. Arrangement of Fiduciary Guarantee in Indonesia as a National Guarantee Instrument**

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<sup>9</sup> Manurung, Jefferson Hakim. "Pelaksanaan Eksekusi Jaminan Fidusia Pasca Putusan MK NO: 18/PUU-XVII/2019 dan PUTUSAN MK NO: 2/PUU-XIX/2021." *Jurnal Hukum Bisnis Bonum Commune* 5, No. 2 (2022): 181-193. doi: <https://doi.org/10.30996/hukum%20bisnis%20bon.v5i2.6661>

<sup>10</sup> Jawani, Lunita. "Perlindungan Hukum Pemegang Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor. 18/Puu-Xvii/2019." (2022). Tesis. Universitas Islam Indonesia.

<sup>11</sup> Irman, Syahriar. *Penegakan Hukum Pers.* (Yogyakarta: Aswaja Pressindo, 2014). h. 25.

The word "Guarantee" is actually a word that is commonly heard, not often in everyday life the word "guarantee" is usually used in terms of convincing someone in fulfilling obligations. Basically, there is no unsecured debtor's debt, in this case if someone is worried about unpaid debts by another person, thus a form of confidence is actually given upon the debt to avoid losses.<sup>12</sup> As a result of translating Dutch, coming from the word "Zakerheid" or "Cautie" which refers to creditor's way in fulfilling creditor's bill in addition to general liability by the debtor for the goods owned. The word "guarantee" etymologically derived from the word "assure" as a "bear" or interpreted as a "dependent".<sup>13</sup> Juridically, definition regarding guarantee is determined in the Civil Code Article 1311, that, "All movable and immovable objects belong to the debtor, both existing and future, serve as collateral for the debtor's individual agreements." That Article indeed related to creditors who can be given guarantee without specifically going through an agreement in form of debtor's assets, so that both existing and future assets of the debtor will directly be used as a collateral when people make a debt agreement even though it is not strictly regulated in the agreement. Regarding the guarantee law, there are opinions from experts towards the definition. J. Satrio defines guarantee law as a regulation that contains regulation towards creditor's collateral to the debtor.<sup>14</sup> Furthermore, M. Bahsan gave his opinion about the definition of guarantee law as provision regarding guarantees stipulated in laws and regulations.<sup>15</sup>

Guarantees in Indonesia can generally be classified into several types of guarantees regarding their function in terms of national economic activities. The guarantee is divided into 2 (two) forms, namely general guarantee which in this case was born due to the law as a general guarantee as specified in Articles 1131 and 1132 of Civil Code. The next form is a guarantee that is born based on a special agreement. This guarantee is specifically made in an agreement with material or individual guarantees. Forms of special guarantees such as mortgages, pledges, fiduciaries, guarantees, and dependent rights. Especially in this case the Fiduciary Guarantee is included in the guarantee that is born through a special agreement as a material guarantee.<sup>16</sup> The development of guarantee law, especially guarantees for movable objects, is then enforced by a Fiduciary with regulation as the basis for implementation, namely through Law Number 42 of 1999 concerning Fiduciary Guarantees, or hereinafter referred to as the Fiduciary Guarantee Law. Fiduciary terminology comes from "fides" that is "trust", in which case the trust lies in the legal relationship between the debtor and the creditor.<sup>17</sup> The definition of fiduciary has actually been determined in Article 1 number 1 of the Fiduciary Guarantee Law as an activity towards the transfer of ownership rights to objects, but the control of said objects remains

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<sup>12</sup> Harahap, M. Yahya. *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*. (Jakarta: Sinar Grafika, 2019). h. 180.

<sup>13</sup> Suyatno, HRM Anton, and M. Sh. *Kepastian Hukum Dalam Penyelesaian Kredit Macet: Melalui Eksekusi Jaminan Hak Tanggungan Tanpa Proses Gugatan Pengadilan*. (Jakarta: Prenada Media, 2018). h. 81.

<sup>14</sup> Suadi, H. Amran, and M. SH. *Eksekusi Jaminan Dalam Penyelesaian Sengketa Ekonomi Syariah*. (Jakarta: Prenada Media, 2019.) h. 3.

<sup>15</sup> Bahsan, M. *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia*. (Jakarta; RajaGrafindo Persada, 2015). h. 3.

<sup>16</sup> Khoidin, M. *Hukum Jaminan: Hak-hak Jaminan, Hak Tanggungan, dan Eksekusi Hak Tanggungan*. (Surabaya: laksbang Yustisia, 2017). h. 12.

<sup>17</sup> Winarno, Jatmiko. "Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia." *Jurnal Independent* 1, no. 1 (2013): 44-55. doi: <https://doi.org/10.30736/ji.v1i1.5>

with the owner of the object. Furthermore, regarding to fiduciary guarantees, further explanation is also given in Article 1 number 2 of the Fiduciary Guarantee Law which in this case is a guarantee right against a tangible or intangible movable object as well as immovable objects specifically for buildings without imposing dependent rights as determined in Law no. 4 of 1996 with control over the said objects remains with the owner of the object used in repayment of a debt with priority over other creditors.<sup>18</sup> Based on this understanding, J. Satrio then gave his opinion regarding the elements in fiduciary, namely:

a. Debtor Trust

- This belief refers to the debtor that the object as collateral is indeed only as a guarantee by the creditor, so that the debtor has trust in the asset that is not really controlled by the creditor.
- The debtor in this case also believes in the creditor who receives the fiduciary, that the debtor certainly has the authority obtained over the collateral object that is only used as a protector against the creditor's interests.
- Furthermore, the debtor in this case also believes that the collateral object will later be repaid so that it returns to the debtor.

b. Creditor Trust

This trust is interpreted towards creditors who believe that the debtor surrenders goods as collateral objects that will later be cared for by the debtor

c. Mastery Element

This refers to the collateral object that remains with the debtor.

d. Preferences Element

This element refers to the position of the right towards repayment of debt which takes precedence over other debts.

e. *Accessoir* Agreement Element

The element in this case is related to the nature of the agreement that was born as an additional agreement that has a main agreement, namely debts.<sup>19</sup>

The subject in a fiduciary guarantee based on the arrangement in the Fiduciary Guarantee Law is the existence of a financing institution or creditor as a fiduciary recipient and a debtor, namely the fiduciary giver as the owner of the object that is guaranteed. Objects in fiduciary guarantees have actually been determined before the enactment of the Fiduciary Guarantee Law, that is only movable objects which are divided into objects in

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<sup>18</sup> Anggun, Windy Permata. "Perlindungan Hukum Bagi Penerima Fidusia Atas Jaminan Berupa Piutang Berdasarkan Surat Daftar Piutang Yang Dibuat Oleh Pemberi Fidusia (Studi Terhadap Pasal 9 Undang-Undang Nomor 42 Tahun 1999 tentang Jaminan Fidusia)." PhD diss., Brawijaya University, 2019. h. 3.

<sup>19</sup> Tanjung, Vivi Lia Falini. "Implementasi Asas-Asas Umum Hukum Kebendaan Dalam Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia." DE LEGA LATA: Jurnal Ilmu Hukum 2, no. 1 (2017): 213-235. doi: <https://doi.org/10.30596/dll.v2i1.1147>

inventories, merchandise, receivables, machine tools, and motorized vehicles. However, after the enactment of the Fiduciary Guarantee Law, the object in this case is given a broad meaning, which is divided into:

- a. Moveable objects, that is included in it are both tangible and intangible.
- b. Immovable objects, which include buildings that are not burdened with a dependent right.<sup>20</sup>

The occurrence of a fiduciary guarantee is then through a process of imposition which is regulated through Article 4 to Article 10 of the Fiduciary Guarantee Law. The imposition of the fiduciary guarantee as an additional agreement is carried out with a Notary Deed as a Fiduciary Guarantee Deed. The imposition is intended for existing debt, which will arise by obtaining an agreement and which at the time of execution is based on the principal agreement. The implementation of fiduciary guarantees can then be given to more than one fiduciary recipient, in this case for consortium credit financing.<sup>21</sup> Fiduciary guarantees as national guarantee legal instruments are also required to be registered for objects guaranteed by fiduciaries in accordance with the provisions in Article 11 of the Fiduciary Guarantee Law which are carried out at the place of the debtor's position as fulfillment of the principle of publicity with several requirements specified in Article 12 of the Fiduciary Guarantee Law, namely by:

- a. Letter of application for registration of fiduciary guarantees which in this case submits to the Minister of Law and Human Rights.
- b. A Copy of the Notary deed as a fiduciary guarantee deed.
- c. A Power of attorney or letter of delegation of authority or representative with a fiduciary guarantee statement attached
- d. Proof of payment of state revenue, whis in this case what is meant is non-tax.<sup>22</sup>

The fiduciary guarantee can then be transferred towards the rights to credit which results in the transfer by law of all the rights and obligations of the old creditor to the new creditor, as stipulated in Article 19 of the Fiduciary Guarantee Law. The transition furthermore to fiduciary guarantees continues to follow the object in the hands of whoever the object is in, exception to weapons of inventory as collateral objects, which in this case is in accordance with the provisions of Article 20 of the Fiduciary Guarantee Law.<sup>23</sup> Fiduciary guarantees can also be lost or deleted because the debt as guarantee by using fiduciary is deleted, a right to the fiduciary guarantee is released by the creditor and the object of the fiduciary guarantee is destroyed, as stipulated in Article 25 of the

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<sup>20</sup> Nasution, Adawiyah. "Pelunasan Hutang Terhadap Jaminan Fidusia." *Jurnal Hukum Kaidah: Media Komunikasi dan Informasi Hukum dan Masyarakat* 17, no. 3 (2018): 112-120. doi: <https://doi.org/10.30743/jhk.v17i3.594>

<sup>21</sup> Yasir, Muhammad. "Aspek Hukum Jaminan Fidusia." *SALAM: Jurnal Sosial Dan Budaya Syar-I* 3 (2016): 75-92. doi: <https://doi.org/10.15408/sjsbs.v3i1.3307>

<sup>22</sup> Abdullah, Junaidi. "Jaminan Fidusia Di Indonesia (Tata Cara Pendaftaran Dan Eksekusi)." *BISNIS: Jurnal Bisnis dan Manajemen Islam* 4, no. 2 (2016): 115-132. doi: <http://dx.doi.org/10.21043/bisnis.v4i2.2693>

<sup>23</sup> Harahap, M. Yadi. "Pengaturan Lembaga Jaminan Fidusia Di Indonesia Perspektif Undang-Undang No. 42 Tahun 1999 Tentang Jaminan Fidusia." *Al-Ushrah: Jurnal Al Ahwal As Syakhshiyah* 5, no. 1 (2017): 108-128. doi: <http://dx.doi.org/10.30821/al-usrah.v5i1.1347>

Fiduciary Guarantee Law.<sup>24</sup> Regarding the procedure for implementing a fiduciary guarantee that is in default, then an execution can be carried out on the object of the fiduciary guarantee as specified in Article 29 to Article 31 of the Fiduciary Guarantee Law relating to the mechanism and handover of fiduciary objects.<sup>25</sup>

### 3.2. Procedure of Executing Fiduciary Guarantee Objects in Indonesia

The procedure for executing the object of fiduciary guarantees is done in terms of the thing as a fiduciary guaranteed object is requested by the creditor as a fiduciary recipient as a repayment of a debt owned by the debtor. Execution is a process of confiscating or later selling the object, which in this case is as stipulated in Articles 29 to 34 of the Fiduciary Guarantee Law.<sup>26</sup> In this case, execution can occur in the case of the fiduciary guarantor as the debtor commits a default on what was agreed with the creditor as the fiduciary recipient. The default is against obligations that are not fulfilled by the debtor which occurs due to the debtor's mistake either intentional or due to the negligence of the debtor himself and can also occur due to coercive circumstances. Default to this agreement applies between creditors and debtors relating to the rights and obligations of each party.<sup>27</sup> A fiduciary guarantee is a distinctive guarantee, indeed the creditor as a fiduciary recipient has a special right. This special right is different from other creditors who do not have objects specifically designated as collateral. The specificity of this right is granted by law in terms of ease of execution if the fiduciary giver or debtor defaults. The convenience provided by law for execution is specified in Article 15 of Law no. 42 of 1999 concerning Fiduciary Guarantees, namely the inclusion of The head of verdict "FOR JUSTICE BASED ON THE ALMIGHTY GOD" in accordance with the provisions of Article (15) Paragraph (1) Fiduciary Guarantee Law, so it has executive powers that can be reconciled with court decisions that have the permanent legal force, as specified in Article 15 Paragraph (2) of the Fiduciary Guarantee Law. This provision means that the execution process can be carried out without a trial and is absolute and indubitably binding on the parties concerned to carry out the decision if the debtor default.<sup>28</sup>

Execution of fiduciary guarantee objects which is conducted by creditors against debtors in the execution procedure is determined by Article 29 of the Fiduciary Guarantee Law, that is the execution of fiduciary guarantee objects is carried out if the debtor commits a default, so the execution of fiduciary guarantee objects is carried out by:

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<sup>24</sup> Alfitra, Diva Paris. "Kepastian Hukum Penghapusan Objek Jaminan Fidusia Secara Elektronik." *Recital Review* 3, no. 1 (2021): 122-149. doi: <https://doi.org/10.22437/rr.v3i1.10049>

<sup>25</sup> Alizon, Joni. "Rekonstruksi Pelaksanaan Eksekusi Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019." *EKSEKUSI* 2, no. 1 (2020): 58-82. doi: <http://dx.doi.org/10.24014/je.v2i1.9741>

<sup>26</sup> Kurniawan, Rizki. "Dampak Pelaksanaan Eksekusi Terhadap Obyek Jaminan Fidusia Berdasarkan Pasal 29 Undang Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia." (2017): 38-43. doi: <https://doi.org/10.55129/jph.v6i1.471>

<sup>27</sup> Mahendra, Lidya, RA Retno Murni, and Putu Gede Arya Sumertayasa. "Perlindungan Hak-Hak Kreditur Dalam Hal Adanya Pengalihan Benda Jaminan Oleh Pihak Debitur." *Acta Comitas: Jurnal Hukum Kenotariatan* 1, No. 2 (2016): 267-280. doi: <https://doi.org/10.24843/AC.2016.v01.i02.p13>

<sup>28</sup> Supianto, Supianto, and Rumawi Rumawi. "Implikasi Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 terhadap Pelaksanaan Eksekusi Jaminan Fidusia." *DIVERSI: Jurnal Hukum* 8, no. 1 (2022): 78-110. doi: <https://doi.org/10.32503/diversi.v8i1.1181>



a. Use of executorial or grosse titles

The execution procedure is done based on the creditor's own power which in this case has the force of law as a court decision that has permanent legal force, as stipulated in Article 15 paragraph (2) of the Fiduciary Guarantee Law. Article 15 paragraph (2) of the Fiduciary Guarantee Law states that a fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force, however, a fiduciary guarantee certificate is not a substitute for a court decision. The fiduciary guarantee certificate itself can execute without waiting for the execute fiat from the court. The fiduciary recipient or creditor can automatically execute the object of the fiduciary guarantee if the debtor defaults without waiting for a decision from the district court, in this case, there is no need for an agreement regarding the breach of contract, and regardless of whether the execution procedure is carried out by force or not, but must go through a procedure which has been set. This results in the fact that the true force of the Fiduciary Guarantee Certificate can be equated with a court decision that has obtained permanent legal force.<sup>29</sup> The procedure for executing a fiduciary guarantee object with an executorial title is the same as under article 196 HIR/207 Rbg, which begins with the procedure for executing an application for execution by the creditor to the Head of the District Court concerned to carry out the execution of the fiduciary guarantee object. The Head of the District Court will summon the debtor and order the debtor to fulfill his obligations as soon as possible within 8 days. If within 8 days the debtor does not fulfill his obligations, then in accordance with the provisions of article 197 HIR/209 Rbg. The head of the District Court will later order the bailiff to carry out the execution process for objects as objects of fiduciary guarantees.<sup>30</sup>

b. Through Public Auction

Execution in this case is by selling the fiduciary guarantee object through an auction so that it can collect the settlement of receivables from the auction results. Execution through this auction is determined in Article 15 paragraph (3) which relates to the right to sell the object on its own authority. This provision is then explained again regarding "self-selling" through a public auction as stipulated in Article 29 paragraph (1) letter b of the Fiduciary Guarantee Law, which in this situation the sale is made if the debtor defaults and is carried out through the Auction Office without going through the debtor's approval. The proceeds from the sale through the auction are used by the creditor to repay the debt by the debtor, in which the proceeds have previously been deducted by the state's preferential rights. The creditor, in other words, can execute the fiduciary guaranteed object by asking the auction office for help in selling the object.<sup>31</sup>

c. Through Underhand or Private Sales

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<sup>29</sup> Nofianti, Ila Nabilla. "Pelaksanaan Eksekusi Objek Jaminan Fidusia Apabila Debitur Cidera Janji." *Supremasi: Jurnal Hukum* 3, no. 2 (2021): 144-159. doi: <https://doi.org/10.36441/supremasi.v3i2.218>

<sup>30</sup> Harahap, M. Yahya, *loc.cit.*

<sup>31</sup> Usman, Rachmadi. *Hukum Jaminan Kepredataan*. (Jakarta: Sinar Grafika, 2009). h. 233.

Underhand selling is done based on the agreement of the parties, namely at the highest price which is beneficial for both parties. Execution in this case is referred to parate execution which does not go through a public auction.<sup>32</sup> The procedure for executing fiduciary guarantees through this is very much made possible by the Fiduciary Guarantee Law which is carried out based on the agreement of the fiduciary giver and recipient using the highest price that benefits the parties, in accordance with what is specified in Article 29 paragraph (1) letter c of the Fiduciary Guarantee Law. Underhand selling actually gives meaning to the parties that can carry out the sales process without using a public auction procedure, if indeed the sale is desired by the parties to the agreement being made. However, if the agreement is not desired, the creditor may not make a sale without going through an auction procedure. The provisions in Article 29 paragraph (1) letter c of the Fiduciary Guarantee Law are actually an attempt by legislators to fulfill the interests of the parties to the agreement. Based on this, the conditions for conducting a sale underhanded are as follows:

- The implementation procedure is based on the agreement of the debtor and creditor
- Sales results reach the highest price as an element that benefits all parties
- Carry out written announcements made by all parties to those concerned
- Announcement of the sale is made by at least 2 (two) newspapers within the scope of the area concerned
- The implementation procedure for private sales is carried out 1 (one) month after the announcement was made.<sup>33</sup>

### **3.3. The Legal Implications for The Procedure for Executing Fiduciary Guarantees After the Constitutional Court Decision Number: 18/PUU-XVII/2019**

The process of executing Fiduciary Guarantee in its implementation procedures in society raises a legal issue. The process of executing fiduciary guarantee objects is carried out arbitrarily on the premise that this is a special right granted by law as an executorial right that can be equated with a court decision that has permanent legal force. Actually this creates a consequence related to Fiduciary Guarantee's characteristics by providing convenience in the execution process. In practice, creditors as fiduciary recipients in carrying out executions often use debt collectors services as executors of debt collector services. The existence of this service is also a problem that occurs in a society which is considered troubling because in the withdrawal process, violence is used either physically or psychologically.<sup>34</sup> The public's unrest actually became the basis for an application for a material review of the applicability of the provisions of Article 15 paragraph (2) and paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees. The applicants argue that the provisions of Article 15 paragraph (2) and paragraph (3) are contrary to the 1945 Constitution of the Republic of Indonesia, particularly in Article 1

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<sup>32</sup> *Ibid*, h. 236.

<sup>33</sup> Nofianti, Ila Nabilla, *loc.cit*.

<sup>34</sup> Sushanty, Vera Rimbawani. "Tinjauan Yuridis Terhadap Debt Collector Dan Leasing Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019." *Gorontalo Law Review* 3, no. 1 (2020): 59-75. doi: <https://doi.org/10.32662/golrev.v3i1.896>

paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), and Article 28H paragraph (4). Related to Article 15 Paragraph (2) of the Fiduciary Guarantee Law which contains the phrase "executive power" and the phrase "same as a court decision" it becomes an argument that creates legal uncertainty because it is contrary to Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The phrase is felt to be interpreted or interpreted differently, namely in the first meaning it can be interpreted to give a power or legitimacy to the fiduciary recipient or creditor to directly carry out an execution of a fiduciary object in the terms that it has been deemed valid in default through an immediate mechanism without going through correct legal procedures oriented towards taking over fiduciary objects.

The meaning of this article makes an arbitrary act of the fiduciary recipient or creditor in carrying out an execution because the creditor will use all kinds of methods to confiscate the fiduciary object. In addition, the following meaning is related to these phrases in terms of whether the phrase is interpreted as a procedure for executing a Fiduciary Guarantee Certificate which is carried out in the same way as the procedure and mechanism for execution as in executing a court decision. Meaning like this also affects in terms of what should be between "Fiduciary Certificate" and "Court decisions that have obtained permanent legal force" in the execution procedure for executing fiduciary guarantee objects that should be equated or similar to the procedure for executing court decisions that have permanent legal force (*inrucht van gewijde*), that is by submitting a request for execution beforehand to the Chief Justice as stipulated in Article 196 HIR. The next meaning that can arise based on these phrases is in terms of the meaning of the Fiduciary Guarantee Certificate, it can override the court's decision on the derivative agreement and the main agreement even though it does not yet have binding legal force.<sup>35</sup>

This problem received a response related to the existence of these phrases which were considered by the public to be a procedure's basis for carrying out free executions by creditors which disturbed the community. This response was through the acceptance of the review of these articles to the Constitutional Court, which in turn gave birth to the Constitutional Court Decision Number: 18/PUU-XVII/2019. The decision resulted in a verdict stating that as long as the phrase "executive power" and the phrase "same as a court decision that has permanent legal force" are contrary to the 1945 Constitution of the Republic of Indonesia and do not have binding legal force as long as they are not interpreted as having an agreement in default and the debtor objects to handing over fiduciary object, so that all mechanisms for the execution procedure are carried out and apply the same as the procedure for executing a court decision that has permanent legal force. This determines that the creditor can carry out an execution against the object of the guarantee using an executorial title in terms of the debtor voluntarily handing over the object which is the object of fiduciary guarantees. However, if the debtor objects, then it must go through a court decision mechanism in the execution of fiduciary guarantee objects. Regarding Article 15 paragraph (3), the verdict further determines that with regard to the provision of "default" that states Article 15 paragraph (3) of the Fiduciary Guarantee Law, the phrase "default" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted that the

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<sup>35</sup> Feryantini, Ni Kadek Diah, Komang Febrinayanti Dantes, and Muhamad Jodi Setianto. "Tinjauan Yuridis Terhadap Pelaksanaan Eksekusi Jaminan Fidusia Menurut Undang-Undang Fidusia Nomor 42 Tahun 1999." *Jurnal Komunitas Yustisia* 5, no. 1 (2022): 220-229. doi: <https://doi.org/10.23887/jatayu.v5i1.45944>

existence of a default is not determined unilaterally by the creditor but rather on the basis of an agreement between the creditor and the debtor or on the basis of a legal remedy which determines that there has been a default. Based on the verdict, the parties must go through a mechanism for an agreement to default beforehand. If this already exists, then the creditor can carry out an execution of the fiduciary guarantee object.<sup>36</sup> Based on this decision, it can be interpreted that Article 15 paragraph (2) and paragraph (3) of the Fiduciary Law were not deleted, but there are other meanings, that:

- a. If between the creditor and the debtor there is an in default agreement and the debtor has no objection to handing over the object of the fiduciary guarantee, then the execution procedure is carried out as the executorial title of the fiduciary guarantee certificate is the same as a court decision that has permanent legal force.
- b. If the debtor defaults, the creditor has the right to sell the object of the guarantee on his own power as long as there is an agreement between the creditor and the debtor and there are legal remedies stating that the debtor has defaulted.<sup>37</sup>

After the Constitutional Court Decision Number: 18/PUU-XVII/2019, it has implications for the existence of an execution process for fiduciary guarantees that change because they have to go through a court process which is considered to weaken the procedure in implementation and become a weakness towards the essence of the existence of parate execution as instructed in the Guarantee Law Fiduciary, as well as weakening the creditor's position, as a consequence of a verdict that causes a change in the meaning of default which does not carry out its own meaning by the creditor and the debtor must voluntarily hand over the object, only then can the parate execution be carried out. Default must be determined based on the agreement as stated in the verdict, which in fact this situation will make it difficult for the creditor in terms of obtaining the rights to carry out collection of obligations that should be fulfilled by the debtor. This makes it difficult with regard to the execution procedure because the post decision has implications towards when the execution is carried out, the naughty debtor will evade and of course take cover behind this decision. In fact, the implementation procedure of the pre-decision execution, even the implementation procedure of execution through the court is rarely happening and the creditor prefers to go through parate execution because there are several additional costs in carrying it out to obtain rights and the process takes a lot of time.<sup>38</sup> This is actually still a discourse which will later have implications for the existence of new procedures towards carrying out executions that are profitable or even debilitating.

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<sup>36</sup> Riskawati, Shanti. "Rasio Decidendi Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 dan Perubahan Konstruksi Norma Eksekusi dan Wanprestasi Dalam Sistem Hukum Indonesia." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 5, no. 1 (2021): 33-48. doi: <https://doi.org/10.23920/acta.v5i1.613>

<sup>37</sup> Efferin, James Ridwan. 2020. "Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/Puu-Xvii/2019". *Yuriska: Jurnal Ilmiah Hukum* 12 (1):39-49. doi: <https://doi.org/10.24903/yrs.v12i1.789>

<sup>38</sup> Ma'rifah, Nurul. 2022. "Kepastian Hukum Terhadap Kreditur Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 Dan Nomor 2/PUU-XIX/2021". *Notary Law Journal* 1 (2):204-226. doi: <https://doi.org/10.32801/nolaj.v1i2.23>

Determination of default post-Constitutional Court Decision Number: 18/PUU-XVII/2019 which cannot be set by the creditor, whose decision has not clearly regulated the determination of a person can be said to be in default, because the verdict has not stipulated the mechanism even though it is determined that the creditor did not unilaterally set the default debtor. This is a problem related to legal certainty regarding the mechanism of default, which makes there are 2 (two) possible procedures in determining the default debtor, namely through an agreement on default which is determined at the time of the agreement, and also default which is determined through the court the state in order to be able to execute fiduciary guarantee objects. This actually makes the Constitutional Court Decision Number 18/PUU-XVII/2019 incapable of providing legal certainty regarding the procedure for executing fiduciary guarantee objects, while actually bringing the position of the creditor who is harmed and this procedure weakens the execution of fiduciary guarantee objects. This happened because the decision did not provide guidelines or procedures as well as a definite mechanism for the execution procedure. In addition, with regard to the execution procedure for fiduciary guarantee objects, it is also a problem. Post-decision changes were made which at first could be completed quickly, but in fact the procedure weakened the creditor's position and there was a potential for disagreements to occur between the creditor and the debtor. Such disagreements can arise resulting in the creditor, in this case, supposed to be able to execute the fiduciary guarantee object because the debtor's default makes the creditor unable to execute and the object becomes the property of the debtor, which actually weakens the creditor's economic growth as well as weakens the creditor's position, as happened in Jombang through the Decision of the Jombang District Court Number 3/Pdt.G.S./2021/PN.<sup>39</sup>

Based on that, in fact, after the Constitutional Court Decision Number 18/PUU-XVII/2019, it actually has legal implications for creditors as fiduciary recipients of the actual procedure, in this case, having the right to collect performance that have been damaged by fiduciary givers. This legal implication relates to authority not being given to the creditor to determine that the debtor is in default in the procedural terms, when in fact a person can be said to be in default or breach of contract as stipulated in Article 1238 of the Civil Code. In addition, related to the weakening of the execution procedure, which previously could be carried out quickly, now it has to go through the courts with additional time and costs for its implementation. So that in this case actually post-Constitutional Court Decision Number: 18/PUU-XVII/2019 it can be said to have brought a setback related to the procedure for carrying out the execution of fiduciary guarantees.

#### **4. Conclusion**

Arrangements for fiduciary guarantees in Indonesia as one of the national legal instruments, especially in terms of guarantee law, namely through Law no. 42 of 1999 concerning Fiduciary Guarantees. The Fiduciary Guarantee was born based on a special agreement as a material guarantee based on a belief. Regarding the execution procedure, if a breach of contract occurs related to the fulfillment of the achievement of the fiduciary guarantee object, execution can be carried out on the fiduciary guarantee object, as stipulated in Article 29 to Article 31 of the Fiduciary Guarantee Law, which in this case can be carried out in three ways of execution, namely with the use of executorial title,

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<sup>39</sup> *Ibid.*

through public auctions, and also underhand or private sales. After the Constitutional Court Decision Number: 18/PUU-XVII/2019, the execution procedure must be based on the agreement of the parties regarding the determination of default and the debtor voluntarily surrendering the fiduciary object. In addition, the sale of fiduciary objects is also carried out if there has been a previous agreement and there are legal remedies that prove that the debtor has defaulted. The verdict regarding the procedure is considered to weaken the implementation of the execution of the fiduciary which was initially an easy and fast execution procedure, but it required a lengthy process at a higher cost than the legal remedies that had to be taken. Whereas previously, default was determined based on Article 1238 of the Civil Code. The ruling also does not provide a solution related to determining the debtor is said to be in default so that it does not provide legal certainty for the creditor which actually weakens the creditor's position by weakening the creditor's economic growth.

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## **Laws and Regulations**

The Civil Code

The Constitutional Court Decision Number: 18/PUU-XVII/2019

Law Number 42 of 1999 concerning Fiduciary Guarantees