

Implication Juridical Decision of The Constitutional Court No. 18/PUU-XVII/2019 Concerning Wanprestasi In the Fiducia Agreement

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ABSTRACT

The purpose of this paper is to criticize the Constitutional Court Decision Number 18 / PUU-XVII / 2019, which determines that the phrases "executorial power" and "are the same as court decisions having permanent legal force" in Article 15 paragraph (2) of Law Number 42 of 1999 concerning The Fiduciary Guarantee contradicts the 1945 Constitution. From the norms contained in this article, there is a power of execution that the fiduciary security holder can carry out (creditors), which then causes many problems, both related to the constitutionality of norms and implementation. Thus, the authors question two things, first how is the juridical analysis of the Constitutional Court decision No. 18 / PUU-XVII / 2019 regarding breach of contract in the fiduciary agreement? Second, what is the juridical implication of MK Decision No. fiduciary? The writer's research type is library research, a literature study (library research) with a descriptive qualitative research type. The data collection technique used was documentation techniques, and the approach method used in this study was juridical normative. The results of this study conclude that 1) The Constitutional Court's decision has not provided a sense of justice as in Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, because in this Constitutional Court decision gives more exclusive rights to the debtor because in this case, the creditor does not get legal protection rights in the event of undesirable things (2) This decision has implications for various parties, namely the Court, which now often receives requests for execution and the process will be lengthy, for notaries must add and clarify default clauses in detail. For business people whose creditors (fiduciary recipients) cannot carry out unilateral execution of the object of fiduciary security but must submit a request for performance to the Court. There is a concern that lousy faith will occur from the community's debtor when the creditor is submitting a request for execution to the Court.

1. Introduction

In this regard, the development of national law is related to the development of guarantee law, particularly the development of guarantee institutions in Indonesia, which can be observed from changes through the formation of laws and regulations. This occurs due to the consideration of legal needs due to the acceleration of the economy. Former colonial countries have a high awareness of improving their legal systems so that legal guarantees are needed because they are related to economic aspects and legal certainty.²

On the other hand, the development of guarantee law when observed from the point of view of legal substance, there are times when regulations are more beneficial when adopting foreign models in the form of conceptions, processes, and legal institutions, on the other hand, there are also those that hinder because they are not by awareness the laws of the community in which they will be enforced. Therefore, it is necessary to adopt the original law from the community and make a combination of

² Marulak Pardede, Indonesia., and Badan Pembinaan Hukum Nasional., *Penelitian Hukum Tentang Implementasi Jaminan Fidusia dalam Pemberian Kredit di Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional, Departemen Hukum dan Hak Asasi Manusia RI, 2008), 27.

these concepts, procedures, and legal institutions, so that guarantee law in Indonesia can be accepted by indigenous people and balance international relations. Thus, the development of guarantee law, especially guarantees institutions in Indonesia, will theoretically include, among other things: the development of the legal substance, the development of the guarantee institution, the development of objects (objects) and their subjects, the development of procedures related to registration, validity period, deletion and execution. As well as relating to the development of guarantee law support institutions in Indonesia.³

In Indonesia, community needs, economic development, and credit development currently require new forms of guarantees and the forms of guarantees regulated in law. This need is in the form of collateral that can provide people with a credit facility with collateral for movable property, but they can still use it for their daily needs and business needs. Credit guarantees for movable property play an essential role in many modern countries, including Indonesia. Since Roman times under the name *Fiducia*, the guarantee institution has been known and was recognized in the Netherlands by Hoge Raad in Arrest on January 25, 1929 (*Bierbrouwerij Arrest*). Based on Arrest Hoogerechtshof in 1932 (*BPM-Clynett Arrest*), the first jurisprudence on fiduciary was born.⁴

Based on the provisions of Article 1 number 1 of Law No. 42 of 1999 concerning Fiduciary Security, the definition of fiduciary security is the right to guarantee for movable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights, who remains in the control of the fiduciary as collateral for the settlement of certain debts, which gives the fiduciary the central position to the other creditors. According to the provisions of Article 1 paragraph 1 of Law No. 42 of 1999 concerning Fiduciary Security, what is meant by fiduciary security is the transfer of ownership rights to an object based on belief provided that the object whose ownership rights are transferred remains in the control of the owner of the object. Many people are bound by fiduciary guarantees in today's conditions, especially people who make purchases of goods on credit. Over time, many problems have arisen in the execution of fiduciary guarantees in Indonesia.⁵

In this case, the development of guarantees in Indonesia, fiduciary security, is experiencing speedy growth. The factor is the high demand of the community. The procedure is more straightforward, more flexible, cheaper, more efficient, and includes movable and immovable objects. These conveniences also have an impact, one of which is that people experience difficulties when financial institutions suddenly execute collateral goods. As a result, institutions that use debt collector services often forcibly take collateral without a statement that they have committed default.

In the implementation of fiduciary, the guaranteed goods remain in the control of the debtor. There is no physical delivery of collateral to the creditor, so the creditor must refuse if the goods are delivered. As for what is submitted by the debtor is the ownership of the goods in trust to the creditor. Delivery of collateral will be submitted to the creditor if the debtor defaults on his debt for fiduciary execution.⁶

Fiduciary security is executed if the debtor or fiduciary breaches or fails to fulfil his / her performance on time to the fiduciary, even though they have been given a subpoena.⁷ To state that a debtor is wrong and defaults in an agreement is not easy. This problem is due to the lack of certainty about when a party is required to perform.

In a credit agreement with a fiduciary guarantee, the debtor's position is fragile because he only signs the agreement. In contrast, the terms of the agreement have been determined by the institution, which concerns the parties' rights and obligations to the fiduciary guarantee agreement.⁸

In the MK decision No.18 / PUU-XVII / 2019, consumers Aprilliani Dewi and Suri Agung Prabowo installed the 2004 Toyota Alphard V 2.4 A / T model metallic light grey, which was then suddenly withdrawn by the leasing party. Feeling unfairly treated, they sued using the Fiduciary Guarantee Law to the Constitutional Court (MK). From November 18 2016, to July 18 2017, applicants reliably paid their instalments. However, on November 10, 2017, the leasing party sent a representative with a power of attorney from the lease to retrieve the Petitioner's vehicle with the default argument. Aprilliani filed an objection regarding this treatment but was not responded to until several subsequent unpleasant treatments. Not accepting this, Aprilliani asked for justice to the Constitutional Court. In the Constitutional Court decision Number 18 / PUU-XVII / 2019 dated January 6, 2020, the

³ Pardede, Indonesia., and Nasional.

⁴ Resty Femi Lombogia, "Perkembangan Lembaga Jaminan Fidusia Di Indonesia," *Lex Privatum* 1, no. 4 (2013): 5–12.

⁵ Hendro Guntoro, "Permasalahan Dalam Eksekusi Jaminan Fidusia," www.kompasiana.com, 2020, <https://www.kompasiana.com/hendroguntoro/5acb8ab55e13733bc01681f3/permasalahan-dalam-eksekusi-jaminan-fidusia-dan-solusinya>.

⁶ Gatot Supramono, *Perbankan dan Masalah Kredit: Suatu Tinjauan Bidang Yuridis* (Jakarta: Rineka Cipta, 2009), 235.

⁷ Salim H. S., *Perkembangan Hukum Jaminan di Indonesia*, 89.

⁸ Asuan Asuan, "PENYELESAIAN DEBITUR WANPRESTASI DALAM PERJANJIAN KREDIT JAMINAN FIDUSIA MENURUT UNDANG-UNDANG NO. 42 TAHUN 1999 TENTANG JAMINAN FIDUSIA," *solusi Solusi* 16, no. 3 (2018): 253–65.

Court stated that the recipient of fiduciary rights or creditors may not execute by themselves but must submit a request execution to the District Court.⁹

The articles petitioned for review in the case are Article 15 paragraph (2) and (3) of the Fiduciary Guarantee Law, which regulates the executorial power of fiduciary certificates and execution parts. In its decision, the Constitutional Court stated that Article 15 paragraph (2) of the Fiduciary Guarantee Law insofar as the phrase "executorial power" and the phrase "the same as a court decision having permanent legal force" contradicts the 1945 Constitution and has no binding legal force as long as it is not interpreted as "against guarantee. Fiduciary, where there is no agreement regarding default (default) and the debtor objected to voluntarily handing over the object which is the fiduciary guarantee. All legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force".

Not only that, but the Court also stated that the phrase "breach of promise" as stipulated in Article 15 paragraph (3) of the Fiduciary Security Law, contradicts the 1945 Constitution and has no binding legal force as long as it does not mean that "the existence of a breach of contract is not determined unilaterally by the creditor. But on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies which determine that a default has occurred".¹⁰

The Constitutional Court interprets the executorial power of the Fiduciary Guarantee Certificate depending on a situation; first, if there is a default agreement (default) and the debtor does not mind voluntarily surrendering the object which becomes a fiduciary guarantee, then the Fiduciary Guarantee Certificate has the same executorial power as the decision. The court has obtained permanent legal force. Second, suppose the debtor is in default. In that case, the recipient of the fiduciary has the right to sell the object, which is the object of fiduciary security under his power, as long as it is based on an agreement between the creditor and the debtor, or based on legal remedies which determine that the default has occurred.¹¹

The results of the Constitutional Court decision No. 18 / PUU-XVII / 2019 should provide a position between the parties so that they are balanced and not imbalanced in the fiduciary agreement. This decision means, "Protection and legal certainty" should not only be reserved for one party. Legal protection in the form of legal certainty and justice should be provided for the three elements: creditors, debtors, and mortgage rights objects. Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law are fundamental norms. From the norms contained in the article, there is a power of execution that the fiduciary security holder can carry out (Creditor), which then causes many problems, both related to the constitutionality of norms and implementation.

In this case, based on the constitutionality of the norms in Article 15 paragraphs (1), (2), and (3) and their implementation, the authors try to briefly analyze the Juridical Implications of the Post-Constitutional Court Decision No.18 / PUU XVII / 2019 Regarding Injury Promise in the Fiduciary Agreement, so that it can be seen that the result of the decision is by the prevailing norms or not and whether there are implications of this decision on other business sectors/actors. From the above background, the authors formulate the following: How is the juridical analysis of the Constitutional Court Decision No.18 / PUU-XVII / 2019 regarding breach of promise in the fiduciary agreement?

2. Literature Review

In a study conducted by Yuniail Laili Mutiari, et al., fiduciary security is an institution that is currently overgrowing. As stipulated in Law Number 42 of 1999 concerning Fiduciary Security and OJK Regulation Number 29 / POJK.05 / 2014 concerning Business Operation of Financing Companies, fiduciary insurance institutions' role as one of the potential alternative sources of funding to support national economic growth must be accommodated. Well. As a result of a misunderstanding in elaborating the provisions regarding fiduciary collateral collection as stipulated in Law Number 42 of 1999 concerning Fiduciary Security and OJK Regulation Number 29 / POJK.05 / 2014 concerning Financing Company Business Operations and Regulation of the Minister of Finance. The majority of finance companies have not registered fiduciary security deeds.¹²

⁹ Ridwan Arifin, "Bermula Alphard Ditarik, MK Putuskan Leasing Tak Boleh Sepihak," *detik.com*, 2020, <https://oto.detik.com/berita/d-4858379/bermula-alphard-ditarik-mk-putuskan-leasing-tak-boleh-sepihak>.

¹⁰ HIMAKUM UNAS, "Kekuatan Eksekutorial Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *kompasiana.com*, 2020, <https://www.kompasiana.com/himakum92183/5e5bf46b097f36732c70f8d2/kekuatan-eksekutorial-jaminan-fidusia-pasca-putusan-mahkamah-konstitusi-nomor-18-puu-xvii-2019>.

¹¹ James Ridwan Efferin, "Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Yuriska: Jurnal Ilmiah Hukum* 12, no. 1 (April 2, 2020): 39–49, <https://doi.org/10.24903/yrs.v12i1.789>.

¹² Yuniail Laili Mutiari, Muhammad Syahri Ramadhan, and Irsan Irsan, "LEGAL ANALYSIS OF THE ROLE OF FINANCING INSTITUTIONS IN APPLYING LAW FIDUCIARY GUARANTEE IN INDONESIA," *INTERNATIONAL JOURNAL OF RESEARCH IN LAW, ECONOMIC AND SOCIAL SCIENCES* 1, no. 1 (May 28, 2019): 1–8, <https://doi.org/10.32501/injures.v1i1.50>.

Furthermore, concerning property rights under fiduciary security, according to the findings of Rahmat Datau et al., conclude that the material rights in the fiduciary guarantee lie in the matter of "Delivery" and "Control" of the guaranteed goods.¹³ The results show that the meaning of property rights in nature is permanently attached to the owner. On the other hand, according to customary law, the definition of property rights is essentially communal/collective (family/community) as the basis of their rights, both for their movable and immovable objects. In essence, fiduciary property rights are transferred from the hands of the debtor to the creditor, with the belief that the property rights will be handed back if the debtor has paid off his debt, however in the submission process, control and debt often create legal problems even though the Fiduciary Guarantee Institution has been established.¹⁴

One problem that often occurs is the complicated process of executing fiduciary guarantees. This problem is as stated by Arie Sukanti that seen from the current lending practice; there are difficulties on the part of the Fiduciary Guarantee to carry out the fiduciary execution if the Fiduciary Giver defaults because the goods that are the object of fiduciary are still in possession of the Fiduciary or Debtor, then in line with the provisions of the article 1977 Civil Code known as the principle of best *geldt als volkomen* title.¹⁵

Furthermore, according to R. Suharto et al., From the results of the study, it was found that the existence of the Constitutional Court's decision caused various interpretations. It is assumed that fiduciary recipients can no longer carry out executions based on their power because they have to go through a court. On the other hand, if the fiduciary recipient does not have the right to carry out the execution based on the fiduciary's authority and has to go through a court, this is contrary to the material security. These differences in interpretation can lead to legal uncertainty and a lack of legal protection for fiduciary recipients who should have a strong position. Among other things, in cases of defaulting debtors, the execution must be carried out without having to go through the court.¹⁶

At this point, it can be seen that, based on several previous findings, the execution of fiduciary bonds is often problematic. However, the problem that occurs lies in the imbalance of position; sometimes, the creditors are weak; sometimes, the debtors are weak. The Constitutional Court Decision No. 18 / PUU-XVII / 2019 is also considered unable to solve the existing problems because it is considered to be still multiple interpretations.

3. Methodology

The type of research to be carried out is descriptive qualitative research, in which the data collected is in the form of words, not numbers. Specifically, this research is library research, a literature study (library research), namely by studying, studying, and examining several in-depth literature related to the problem.¹⁷ This study will focus on decisions, namely the Constitutional Court Decision No. 18 / PUU-XVII / 2019 regarding Promise Injury in the Fiduciary Agreement, not on the judge as to the decision-maker. The approach used in this research is juridical, namely the approach to the problem under study based on the order of the laws in force in Indonesia, namely the law used as the basis of social life adopted and adhered to as citizens.

The approach used in this research is juridical normative, which refers to the legal norms contained in statutory regulations and court decisions and legal norms that exist in society, and by looking at the synchronization of a rule with other rules hierarchically.¹⁸

In this study, researchers used data regarding all information about the decision's results in the Constitutional Court case No. 18 / PUU-XVII / 2019, which was sourced from a copy of the decision issued by the Directory of the Constitutional Court. Data sources come from primary data sources and secondary data sources. *Primary data sources* are the main data sources obtained directly from the research object,¹⁹ namely obtained from a copy of the decision issued by the Directory of the Constitutional Court of the Republic of Indonesia No. 18 / PUU-XVII / 2019 concerning Promise Injury. *Secondary data sources* are data sources obtained from other sources such as books, Islamic law, writings, articles, and legal journals related to the research object to complement and strengthen these primary data sources.

¹³ Rahmat Datau et al., "The Meaning of Indigenous Rights in Fiducian Guarantee in the Perspective of Law Number 42 of 1999 Concerning Fiducian Guarantee," *International Journal of Multicultural and Multireligious Understanding* 7, no. 8 (September 3, 2020): 187, <https://doi.org/10.18415/ijmmu.v7i8.1837>.

¹⁴ Datau et al.

¹⁵ Arie Sukanti, "Execution of Fiduciary Guarantee Under Law No. 42 of 1999 on Fiduciary Guarantee (A Socio-Juridical Analysis to Anticipate Its Effectiveness)," *Indonesia Law Review* 3, no. 3 (September 1, 2014): 204, <https://doi.org/10.15742/ilrev.v3n3.38>.

¹⁶ R. Suharto et al., "Fiduciary Security Execution after Constitutional Court Decision," *Indian Journal of Forensic Medicine & Toxicology*, October 7, 2020, <https://doi.org/10.37506/ijfmt.v14i4.12055>.

¹⁷ Mukti. Fajar ND., Yulianto Achmad, and Dualisme penelitian hukum: normatif dan empiris., *Dualisme penelitian hukum: normatif & empiris* (Yogyakarta: Pustaka Pelajar, 2010),52.

¹⁸ Fajar ND., Achmad, and empiris.

¹⁹ Fajar ND., Achmad, and empiris.

4. Results and Discussion

Juridical Analysis of the Constitutional Court Decision No.18 / PUU-XVII / 2019 concerning Default in the Fiduciary Agreement

The rule of law has died along with the running of the democratic system in Indonesia. The most underlying thing is the magnitude of friction between the power interests of power from several points of state power holders. In the implementation of democracy, it is necessary to have the rule of law, namely upholding applicable regulations, to develop a legal culture at all levels of society to create legal awareness and legal compliance.²⁰ The theory and concept of Equality before the law, as adopted by Article 27 paragraph (1) of the amendments to the 1945 Constitution, are the basis of protection for citizens to be treated equally before the law and government. This concept means that all people are treated equally before the law. One of the elements of human rights recognized in Indonesia is equal standing before the law. The constitutional mandate as referred to in Article 28 D paragraph (1) and Article 27 paragraph (1) must have an equal position before the law, including in the context of law enforcement.²¹

According to Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security, the definition of fiduciary is: "Transfer of ownership rights to an object based on belief provided that the object whose ownership rights are transferred remains under the control of the owner of the object". What is meant by the transfer of ownership rights is the transfer of ownership rights from the fiduciary to the fiduciary based on trust. The object that becomes the object remains in the hands of the fiduciary.²²

Before enacting Law Number 42 of 1999 concerning Fiduciary Security, fiduciary security objects were movable objects consisting of items in inventory, merchandise receivables, machine tools, and motorized vehicles. However, after the enactment of Law Number 42 of 1999 concerning Fiduciary Security, it is divided into two types, namely: "(a) movable objects, both tangible and intangible; and; (b) immovable objects, especially buildings that are not encumbered with mortgages".

On 18 November 2016, Petitioner I and PT. Astra Sedaya Finance has agreed to enter into a Multipurpose Financing Agreement with Registration Number 01100191001653145 where PT. Astra Sedaya Finance provided financing facilities to Petitioner I to provide funds for the purchase of 1 (one) unit of 2004 Toyota Type Alphard V Model 2.4 A / T vehicle, light grey metallic colour No. ANH100081947 frame, No. 2AZ1570674 engine. Petitioner has a debt payment obligation to PT by the multipurpose financing agreement. Astra Sedaya Finance, amounting to Rp 222,696,000, - (two hundred twenty-two million six hundred ninety-six thousand rupiah) paid in instalments for 35 (thirty-five) months, starting from 18 November 2016. on 10 November 2017 representative from PT. Astra Sedaya Finance claims to be the representative of PT. Astra Sedaya Finance by bringing power of attorney signed by an official from PT. Astra Sedaya Finance came to Plaintiff's house to take the Toyota Type Alphard V Model 2.4 A / T 2004 vehicle belonging to Petitioner I on the pretext that Petitioner I had defaulted.

That the action of PT. Astra Sedaya Finance on November 15, 2018, which repeatedly tried to take Petitioner I's vehicle at Petitioner I's house, was also specific because his party was taking refuge in Article 15 paragraph (1) and paragraph (2) of Law 42/1999. That the action of PT. Astra Sedaya Finance on January 11, 2019, seriously injured the spirit of Article 27 paragraph (1) of the 1945 Constitution because: (a) Whereas, in a state of law, the position of the judge/court's decision as the executor of the judicial power (in Indonesia) is higher than the law. (in casu: Article 15 of Law 42/1999), It is proven that the judge/court can cancel a specific (article or paragraph/chapter in) law; (b) Whereas the petitioner's efforts through the civil court, in case Civil Case Number 345 / PDT.G / 2018 / PN.Jkt.Sel is legal and legal juridical efforts, which the Petitioners made to correct the defendants' actions in the case. The; (c) Whereas in addition to correcting the actions of the defendants, the efforts through the civil lawsuit mentioned above were also intended to test whether the applicants had good intentions in building a civil relationship, or whether the defendants had smuggled their interests and bad faith and using accordingly, it has used the provisions of Article 15 of Law 42/1999 as lacuna iuris which harm Petitioner I as the Plaintiff;

As the South Jakarta District Court Number 345 / Pdt.G / 2018 / PN decision.Jkt.Sel, on page 87, where the Panel of Judges rejected Petition for the Reconvention Defendant (Petitioner), but PT Astra Sedaya Finance on 11 January 2019 continued to withdraw Petitioner I's vehicle, on the pretext that the fiduciary deed had permanent legal force and had the power of execution. That what PT Astra Sedaya Finance has done seriously injures the ongoing legal process, case Number 345 / Pdt.G / 2018 / PN. Jkt. Sel still has no permanent legal force, so it is only natural that the Petitioner filed a judicial review of Article 15 of Law 42/1999 because it is very contrary to the 1945 Constitution;

²⁰ Winarno., *Paradigma Baru Pendidikan Kewarganegaraan: Panduan Kuliah di Perguruan Tinggi* (Jakarta: Bumi Aksara, 2010),127.

²¹ Lilik Mulyadi, *Hukum Acara Pidana: Normatif, Teoretis, Praktik, dan Permasalahannya* (Bandung: Alumni, 2007),20.

²² Lihat Pasal 1 ayat (2) UU No.42 Tahun 1999 tentang Jaminan Fidusia

On 6 January 2020, the Constitutional Court Panel of Justices pronounced a Decision on the Judicial Review of Legislation, namely Law Number 42 of 1999 concerning Fiduciary Guarantee (Fiduciary Law) against the 1945 Constitution of the Republic of Indonesia (UUD 1945). The verdict was as follows:

- a. Partially granted the Petitioners' petition;
- b. State Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Security (State Gazette of the Republic of Indonesia Number 3889) insofar as the phrase "executorial power" and the phrase "are the same as court decisions having permanent legal force" are contrary to the Basic Law of the State The Republic of Indonesia in 1945 and does not have binding legal force as long as it is not interpreted "against fiduciary guarantees where there is no agreement on default (default) and the debtor objects to hand over the object which becomes fiduciary guarantee voluntarily, then all legal mechanisms and procedures in the execution of the Guarantee Certificate Fiduciary must be carried out and apply the same as the execution of court decisions that have permanent legal force";
- c. State Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Security (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) insofar as the phrase "default of promise" contradicts the Constitution of the Republic of Indonesia Year 1945 and does not have binding legal force as long as it does not mean that "the existence of a breach of contract is not determined unilaterally by the creditor but based on an agreement between the creditor and the debtor or on the basis of legal remedies which determine the failure of the promise".
- d. Declare the Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantee (State Institution of the Republic of Indonesia of 1999 Number 168, Supplement to the State Institution of the Republic of Indonesia Number 3889) as long as the phrase "escort power" is contrary to the Constitution of the Republic of Indonesia In 1945. It does not have binding legal force as long as it is not interpreted "against fiduciary security where there is no agreement on default, and the debtor objected to voluntarily handing over the object which is a fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and valid the same as the execution of court decisions that have permanent legal force";

Researchers tried to see and analyze which on January 6, 2020, the Constitutional Court of the Republic of Indonesia issued Decision No.18 / PUU-XVII / 2019, namely regarding breach of contract in the fiduciary agreement where there was a change in Article 15 paragraph (2) and (3). From the norms in the article, there is a power of execution that the fiduciary security holder can carry out (the creditor), which then causes many problems, both related to the constitutionality of norms and implementation.

About constitutionality, it can be understood that the Constitutional Court Decision No.18 / PUU-XVII / 2019 in Article 15 paragraph (2) and (3) has granted exclusive rights to debtors, where the previous article gave more exclusive rights to creditors (Fiduciary Recipients). This Constitutional Court decision does not eliminate the debtor's rights (Fiduciary Recipient) in executing the fiduciary guarantee. However, it is strengthened by the agreement that the creditor has committed a breach of promise. Here, the debtor's rights do not just disappear, but only a limit is made that if there is no agreement on breach of contract by the creditor, all the mechanisms for execution are the same as a court decision with permanent legal force.

If seen in Article 15 paragraph (2) and (3), according to the author, it is not yet by Article 27 paragraph (1) of the 1945 Constitution and Article 28D paragraph (1) of the 1945 Constitution, which in these articles have not provided fair legal certainty and have not provided protection for debtors (Fiduciary Recipient). In the Constitutional Court Decision No.18 / PUU-XVII / 2019 Article 15 paragraph (2), the intention is that the debtor gets more protection rights which "if there is no agreement regarding the default and the debtor objected to submitting voluntarily" then it will result to the creditor in "all the legal execution mechanisms and procedures must submit a request to the Court". However, here the creditor does not get legal protection if there is bad faith from the debtor.

If a creditor submits a legal remedy for the court's execution, the vehicle has disappeared or has run away from the debtor's address; the debtor may even disappear. Anything can happen in the community because we do not know that there will be bad or good intentions from the debtor himself. Moreover, if the courts are flooded with reports on many cases' executions, that will be a very long process. Even though the concept of justice is simple, fast and low cost, if this happens, the process will take a long time.

Furthermore, in Article 15 paragraph (3), where "the existence of a breach of contract is not determined unilaterally by the creditor" as a result "but on the basis of an agreement between the creditor and the debtor", then the problem is if the debtor does not feel that he has committed a breach of promise, how will the creditor explain and notify that the debtor has failed his promise? This decision will allow the debtor to continue to be negligent with the agreement. So it is better if the fiduciary

guarantee certificate must include the completeness of the defaults clause to strengthen the evidence that the time/debtor has committed default. Suppose the debtor (fiduciary), after the parties agree on it, is deemed default (default). In that case, the execution of the fiduciary guarantee's object can be carried out in the manner contained in Article 29 paragraph (1) of Law 42/1999.

In the principle of Equality Before the Law (Equality before the law), as adopted by Article 27 paragraph (1) of the 1945 Constitution, it is the basis of protection for citizens to be treated equally before the law and government. In the Constitutional Court's decision No.18 / PUU-XVII / 2019, the Constitutional Court only formulated a practical solution related to the implementation of executions; it should have been sufficiently resolved through the general court the substance in question was related to legal technicalities. According to the author, it is necessary to ascertain whether the fiduciary guarantee reflects the principle of legal certainty and a sense of justice in the form of a balance of legal rights between the debtor (guarantor) and creditor (guarantor).

This interpretation of the Constitutional Court essentially clarifies protection measures and finds a balance point in the legal relationship between creditors and debtors. As in Article 28H paragraph (4) of the 1945 Constitution, where everyone has the right to have private property rights, these property rights cannot be taken arbitrarily. That way, the creditors (fiduciary recipients) in the future cannot execute fiduciary goods arbitrarily. However, they must comply with the Constitutional Court's provisions in Ruling No.18 / PUU-XVII / 2019. However, this makes sense of justice unbalanced for creditors (fiduciary recipients). So, from the author's explanation above, it can be concluded that in the Constitutional Court Decision No.18 / PUU-XVII / 2019, this is not following the principle of Equality Before The Law (equality before the law) adopted in Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution which must provide a sense of justice in every decision. Because the Constitutional Court decision No.18 / PUU-XVII / 2019 has not provided a sense of justice from both parties but still only one party, especially for the debtor (guarantee recipient), there is no legal protection when something undesirable from the creditor (guarantor). Even though the Constitutional Court decision has contributed, it still has an impact on various parties.

Implications of the Constitutional Court Decision No.18/PUU-XVII/2019 concerning breach of promises in fiduciary agreements on the practice of fiduciary agreements in society.

a. Implications of the Constitutional Court Decision No.18 / PUU-XVII / 2019 on the Fiduciary Guarantee Object Execution Practices

After the decision of the Constitutional Court No. 18 / PUU-XVII / 2019, creditor companies can still execute fiduciary objects as long as there are provisions for default or default in the agreement of the parties and the debtor's willingness to submit the object of guarantee. If not, then the creditor must submit a request for execution to the court. The Constitutional Court's decision can clarify the meaning of Article 15 of Law no. 42 of 1999 concerning default. Thus, the Constitutional Court decision related to fiduciary guarantees means that the application for the guarantee's execution can still withdraw the vehicle from the debtor who has been warned.²³

The Constitutional Court, which requires an agreement of default and voluntary submission of fiduciary objects, can be used by the debtor to extend the execution process to take advantage of the fiduciary object still. The existence of differences of opinion regarding the default demands a lawsuit against the district court to obtain a default decision after a decision has been made of default or there is still a need for the debtor's volunteerism to fulfil the court's obligations' decision. If the debtor fails to fulfil this obligation, the creditor must submit a request to execute the court's decision. On the other hand, if the debtor has acknowledged a breach of contract but does not voluntarily hand over the object, which is the object of fiduciary duty, the creditor cannot immediately ask for assistance from the police but must apply for the execution of the fiduciary guarantee certificate. The mechanism for implementing fiduciary executions is protracted and requires additional costs to be incurred.²⁴

The District Court's lawsuit process requires a long process starting from registering the lawsuit, appointing a panel of judges, appointing a substitute clerk, determining trial time, trial process, answering answers, proving until a court verdict is obtained. The process of settlement of cases at the Court of First Instance according to the Supreme Court Circular (SEMA) Number 2 of 2014 concerning Settlement of Cases in First Level Courts and Appeals Levels in 4 (Four) Judicial Environments, a maximum of 5 (five) months. This time does not include the time required if an appeal and appeal is made. Referring to the same SEMA, the time given at the appeal level is no longer than 3 (three) months, while the maximum period for handling cassation cases and normative review according to the internal regulations of the Supreme Court from applying to the District Court until sending a copy of the decision to The Submission District Court is 250 days, even in practice the handling of cassation cases can be longer

²³ Eko Surya Prasetyo, "Implikasi Putusan Mahkamah Konsitusi Nomor 18/PUU-XVII/2019 Terhadap Pelaksanaan Eksekusi Lembaga Jaminan," *Refleksi Hukum: Jurnal Ilmu Hukum* 5, no. 1 (October 30, 2020): 43–62, <https://doi.org/10.24246/jrh.2020.v5.i1.p43-62>.

²⁴ Prasetyo.

than the period that the Supreme Court itself has determined. This regulation means that the execution process tends to take a long time and is not cost-effective.²⁵

Many creditors will submit many default cases by debtors, especially against debtors who do not recognize their defaults and refuse to submit fiduciary guarantees voluntarily. Creditors must pay many consequences in filing a lawsuit, including down payment fees, costs to be incurred during the trial process, costs of attorneys to use the services of a lawyer, as well as a long and complicated trial process.

b. Implications of the Constitutional Court Decision No.18/ PUU-XVII / 2019 Against the Fiduciary Guarantee Agreement Clause

The Court, in its decision, requires an agreement of default and the debtor's willingness to submit the collateral object before the creditor executes the guarantee. This fact shows that the notary deed's crucial position is binding for both parties. A notary deed must describe carefully and various matters related to fiduciary and its guarantees. Creditors and debtors must understand each clause's contents and agree on each part so that there are no differences in interpretation when problems occur. As an accommodation form of the Constitutional Court's decision, it is necessary to confirm the clause as mandated by the Constitutional Court's decision. In the future, the fiduciary agreement must have an additional / amendment clause. First, include a clause that clearly states the condition of "wan-achievement / breach of contract by the debtor"; second, if the debtor is in default as the conditions mentioned in point (1), then the debtor voluntarily or on his awareness to hand over the guarantee to the debtor to be sold by the creditor on his power; third, if the debtor does not carry out the provisions referred to in point (2) above, the plaintiff will file a complaint against the debtor in the district court.

Even though the agreement has stipulated the provision of default does not rule out the possibility to complicate the process of executing fiduciary debtors still refusing to submit fiduciary guarantees voluntarily, there is a need for a lawsuit clause in court. A lawsuit or request for execution will be an everyday thing faced by creditors in the future.

c. Implications of the Constitutional Court Decision No.18 / PUU-XVII / 2019 on the Implementation of the Auction

The birth of the Constitutional Court Decision No. 18/2019, which provides new interpretations of several phrases and their explanations in the Fiduciary Law, will undoubtedly have implications for the auction business process regulated by the DJKN c.q. KPKNL. Adjustments at a practical or normative level can be made to overcome these implications. Therefore, DJKN must re-examine all the consequences that have occurred and may occur in the auction business process by refining laws and regulations to create a better *ius constituendum* in the auction sector.²⁶

Let us look closely at the Constitutional Court Decision Number 18/2019. It is more related to the chronological execution process that can be carried out in the pre-auction or pre-auction era. This decision was motivated by the petitioners' petition to the Constitutional Court to review the fiduciary rule. The decision made by the Panel of Justices of the Constitutional Court also explains the process of applying fiduciary guarantees between creditors and debtors, which usually occurs before creditors submit a KPKNL auction application.²⁷

Although the Constitutional Court Decision is recognized as having more impact on events before the KPKNL auction submission, the events that occurred before the auction also became the basis for filing debtor legal proceedings against the auction. So that if it is not considered correctly, legal challenges will arise, such as the defeat of the KPKNL in the trial process.²⁸

The auction can be classified into three main stages in PMK No. 27/2016: auction readiness, auction submission, and post-auction. As the stage most influenced by the Constitutional Court Decision, the auction preparation period can be understood as the stage or condition of the activities carried out or fulfilled before the auction, namely the auction application, the seller, the auction venue, the stipulation of the time for the auction, the Land Certificate / Land Registration Certificate.²⁹

The main objective of the auction preparation stage is to meet the formal legal conditions of the subject and object of the auction, namely the requirements for the vendor to fulfil the documents concerning the auction requirements. There are no inconsistencies in the data indicating the legal relationship between the vendor (auction subject) and the item being auctioned. After the issuance of the quo Constitutional Court decision, the KPKNL will conduct a review of each fiduciary guarantee offer if the formal subject's legal requirements and the auction object are met. To meet these criteria, the Directorate of Auction, DJKN,

²⁵ Indonesia. and Mahkamah Agung., *Keputusan Ketua Mahkamah Agung Republik Indonesia Nomor: 214/KMA/SK/XII/2014 tentang Jangka Waktu Penanganan Perkara Pada Mahkamah Agung Republik Indonesia*. (Jakarta: Mahkamah Agung Republik Indonesia, 2014).

²⁶ Aska Cardima and Hadyan Iman Prasetya, "Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019: Apa Implikasinya Bagi Proses Bisnis Lelang?," <https://www.djkn.kemenkeu.go.id/>, 2020, <https://www.djkn.kemenkeu.go.id/kpknl-bekasi/baca-artikel/12953/PUTUSAN-MAHKAMAH-KONSTITUSI-NOMOR-18PUU-XVII2019-APA-IMPLIKASINYA-BAGI-PROSES-BISNIS-LELANG.html>.

²⁷ Cardima and Iman Prasetya.

²⁸ Cardima and Iman Prasetya.

²⁹ Cardima and Iman Prasetya.

must confirm or meet the tender document specifications. In the quo Constitutional Court decision, it was determined that the determination of default (wanprestasi) was not decided arbitrarily by the borrower, but based on an agreement between the creditor and the debtor or based on legal remedies to ensure that a contract occurred, so that the KPKNL examiner KPKNL fiduciary protection auction submission must ensure that there is an agreement between the borrower and the debtor regarding the event of default or court order that occurs in default.³⁰

Furthermore, the quo Constitutional Court Decision means no compromise on default (default) for fiduciary guarantees. The debtor objected to voluntarily hand over the object, which became the fiduciary guarantee legal processes procedures in its implementation. The Fiduciary Guarantee Certificate must be followed and extended the same as implementing the Fiduciary Guarantee Certificate. In this situation, the official verifying the tender request documents at the KPKNL must ensure that the competent court has issued an executive order.³¹

Based on the explanation above, the consequences of the Constitutional Court Decision Number 18/2019 concerning the KPKNL auction process apply to the process before the auction takes place. This case must be taken seriously so that other legal problems do not arise in the future.

Furthermore, the issuance of the Constitutional Court's decision also left some concerns or legal issues in the auction sector, which the *Ius Constituendum* auction bill might handle.³² One of them is related to a misunderstanding with an item in the form of fiduciary security regarding the auction request. Current law distinguishes between the Fiduciary Guarantee Auction and the Court Execution Auction. Based on the Decision of the Constitutional Court Number 18 of 2019, it can be understood that in some circumstances, the right to execute cannot be immediately executed unless the court has been asked for execution order. Suppose the court order must precede the execution of the fiduciary collateral object. In that case, uncertainty arises for which category of the auction, whether the Fiduciary Guarantee Auction or the Court Execution Auction.³³

Of course, like the problems above, the issue of the Constitutional Court Decision No. 18/2019 has a direct impact on the tender document verification process at KPKNL and the prospect of a broad review of mortgage rights. Rights law must also be dealt with through bidding. The momentum for the birth of the Constitutional Court Decision Number 18/2019 must also be used to create a better constitutional auction.

5. Conclusion

Based on the explanation of the previous chapters and to end the discussion in this thesis, the authors conclude that the Constitutional Court Decision has not provided a sense of justice as in Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, because in this Constitutional Court decision it provides more exclusive rights to the Debtor. The Constitutional Court's decision did not provide a legal breakthrough that only changed the Fiduciary Guarantee principles. The Constitutional Court only formulated practical solutions related to execution when the Fiduciary Guarantee did not agree on the default, and the Debtor objected to handing over the collateral voluntarily. This decision has implications for various parties, namely the Court, which now often receives execution requests. The process will be lengthy, for the notary public must add and clarify the default clause in detail, for business people whose creditors (fiduciary recipients) cannot carry out unilateral execution of the object of fiduciary security but must submit a request for execution to the Court. For the community itself, there is a concern that lousy faith will occur from the Debtor when the creditor is submitting a request for execution to the Court.

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³⁰ Cardima and Iman Prasetya.

³¹ Cardima and Iman Prasetya.

³² Cardima and Iman Prasetya.

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