



## THE EXISTENCE OF A NORM REGARDING THE EXECUTION OF FIDUCIARY GUARANTEES AFTER THE ISSUANCE OF THE CONSTITUTIONAL COURT DECISION NUMBER 18/PUU/XVII/2019

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### ABSTRACT

The issuance of the decision of the Constitutional Court Number 18/PUU-XVII/2019 on January 6, 2020, caused a change in the execution pattern of Fiduciary Guarantee objects. The issuance of this Constitutional Court decision was not accompanied by creating a new norm regarding the execution pattern of Fiduciary Guarantee objects. It brings legal uncertainty and ambiguity in executing Fiduciary Guarantee objects. Therefore, the statements of the problem in this paper are how is the pattern of execution after the issuance of the Constitutional Court Decision Number 18/PUU-XVII/2019? And how is the existence of new norms after the Constitutional Court Decision Number 18/PUU-XVII/2019? The research method used is the normative legal research method. The pattern of execution of Fiduciary Guarantee objects after the issuance of the Constitutional Court Decision Number 18/PUU-XVII/2019 experienced ambiguity and obscurity because the contents of the Constitutional Court's decision were only general norms. The existence of new norms after the Constitutional Court Decision Number 18/PUU-XVII/2019 is necessary to support legal certainty in executing objects of Fiduciary Guarantee.

**Keywords:** Execution; Fiduciary; Guarantee; New Norm; Effectiveness

### INTRODUCTION

Norms in social life are absolute. The interests of the parties are protected by the norms. With norms, society can realize the goals of the values that have been agreed upon. Norms in people's lives should interact with developments and patterns of social change. Changes in the pattern of community interaction theoretically should also change the pattern of norms that govern society. Within the framework of legal science, norms are a reflection of society. The conformity of the norms with the development of society must be realized so that the application of these norms automatically runs well. The longer the lifespan of a norm, the more weaknesses it has.

Norms provide legal certainty in business transactions. The role of norms is very dominant in realizing business transactions which are safe, fair, and have legal certainty. Therefore, the pattern of creating effective and efficient norms in the business world must be applied. To

provide legal certainty in the field of guarantees, the government issued Law Number 42 of 1999 concerning Fiduciary Guarantees. In various literature, a fiduciary is usually referred to as fiduciare eigendom overdracht tot zekerheid (FEO) which means submission of ownership title based on trust<sup>1</sup>. The birth of this law provides a new color in the guarantee law regime. There is a balance in the economy for creditors and debtors and there is legal certainty if one day the principal agreement does not run well because the debtors has high-quality collateral which is easy to be cashed<sup>2</sup>.

<sup>1</sup> Lili Naili Hidayah Ageng Triganda Sayuti, Yenni Erwita, "Parate Eksekusi Jaminan Fidusia: Urgensi Dan Rekonstruksi Hukum Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Sumatera Law Review* 3, no. 2 (2020): 194.

<sup>2</sup> Henry Donald Lbn. Toruan, "Quo Vadis Resi Gudang Surat Berharga Jaminan Kredit (Warehouse Receipt As Loan Security-Quo Vadis?)," *Jurnal Penelitian Hukum De Jure* 19, no. 4 (2019): 558.

In Indonesia, a fiduciary is an answer to the community's needs regarding guarantee agency. This is considering that prior to the birth of the law on fiduciary guarantees, the Civil Code only regulates pledges and mortgages and has a separate section of the object of the guarantee in the pledge of guarantee objects in the form of movable assets and mortgages regarding guarantee for immovable assets<sup>3</sup>. On the other hand, the Civil Code, through article 1131, makes a person's assets, both present, and will be exist in future, become a guarantee for all engagements he has made<sup>4</sup>.

One form of guarantee execution under this law adheres to a *parate* execution pattern where creditors can execute fiduciary guarantee objects without a court intermediary because the fiduciary certificate has *irah-irah* (words which has the meaning of Oath), namely "for the sake of justice based on the one and only God" which is the same as a decision which has permanent legal force. In practice, this *parate* execution facility has caused a lot of resistance in the community. In fact, the purpose of this *parate* execution is to resolve debt disputes in a short and efficient time. After being enforced, and then being auctioned off, the proceeds of the auction are then notified to the debtor. If there is any remaining money from the auction proceeds remain after payment has been made for the remaining outstanding indebtedness, they must be returned to the debtor.

The peak of public resistance to the pattern of executions carried out by financial institutions against the object of fiduciary guarantees is the submission of petition for review of Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees. With decision of the Constitutional Court Number 18/PUU-XVII/2019, on the pattern of execution of the object of fiduciary guarantee, if the debtor does not accept the execution, all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply as the same as the execution of court decisions that already have permanent legal force.

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<sup>3</sup> Henry Donald Lbn. Toruan, "Problematika Implementasi Pembiayaan Dengan Perjanjian Jaminan Fidusia," *Jurnal Penelitian Hukum De Jure* 18, no. 2 (2018): 184.

<sup>4</sup> Henry Donald Lbn. Toruan, "Implikasi Hukum Pemberian Kredit Bank Menjadi Tindak Pidana Korupsi," *Jurnal Penelitian Hukum De Jure* 16, no. 1 (2016): 46.

The pattern of execution of a court decision that has permanent legal force must be based on the procedure for carrying out the execution as regulated in Articles 196 HIR and 208 RBG. Creditors before carrying out the execution must submit an application to the district court. This execution pattern is still conventional because it is still based on the provisions of HIR and RBG that were made hundreds of years ago. Meanwhile, the issue of the execution of fiduciary guarantees is regulated by Law Number 42 of 1999 concerning Fiduciary Guarantees. It is impossible for a fiduciary regulated by law which was born in 1999 to have completion of execution which is based on the HIR and RBG that have existed since hundreds of years ago. Therefore, to answer this challenge, when the decision of the Constitutional Court Number 18/PUU-XVII/2019 came out, it should have been followed by the birth of a new norm in the field of fiduciary guarantee execution. Based on practice in the field, executions face many obstacles, both juridically, sociologically and philosophically<sup>5</sup>.

Almost all the objects of fiduciary guarantees are motor vehicles, which are very large in number. Meanwhile, the number of bailiff officers in courts is still limited to carry out the execution. Then, other supporting facilities and infrastructure are not adequate because executing motor vehicles is different from executing land. Sometimes, the position of the object being guaranteed is in distant and unclear location. Then, even to execute it requires operational costs that are greater than the price of the object of the guarantee.

In some literature related to the execution of Fiduciary Guarantee objects, after the issuance of the Constitutional Court Decision Number 18/PUU-XVII/2019, the execution is still general in nature and has not led to a technical pattern of execution. The legal reconstruction of the *parate* execution of Fiduciary Guarantee is a legal formulation that will exist in the future including strengthening the existence of the *parate* execution, carrying out executions without court decisions<sup>6</sup>. In another literature, it is stated that the

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<sup>5</sup> Syprianus Aristeus, "Eksekusi Ideal Perkara Perdata Berdasarkan Asas Keadilan Korelasinya Dalam Upaya Mewujudkan Peradilan Sederhana, Cepat Dan Biaya Ringan," *Jurnal Penelitian Hukum De Jure* 20, no. 3 (2020): 383.

<sup>6</sup> Ageng Triganda Sayuti, Yenni Erwita, "Parate Eksekusi Jaminan Fidusia: Urgensi Dan Rekonstruksi Hukum

execution or confiscation of Fiduciary Guarantee objects must consider the moral sense<sup>7</sup>.

Because no literature discusses the creation of new norms in the execution of Fiduciary Guarantee objects after the Constitutional Court Decision Number 18/PUU-XVII/2019, the researchers are interested in discussing this issue.

To sharpen the main idea above, the statements of the problem that will be raised are what is the pattern of execution after the issuance of the decision of the Constitutional Court Number 18/PUU-XVII/2019 and how is the existence of new norms after the decision of the Constitutional Court Number 18/PUU-XVII/2019?

## RESEARCH METHOD

The research method used in this paper is a normative legal research type, where the types of the approach used in this paper are a statutory approach and a conceptual approach<sup>8</sup>. The data sources used are secondary data covering laws and legal literature and those related to this research. The analysis method used is a deductive method by presenting theories as general materials and relating them to secondary legal materials as specific materials.

## DISCUSSION AND ANALYSIS

### A. The Pattern of Execution After the Decision of the Constitutional Court Number 18/PUU-XVII/2019

Due to the current globalization, everyone needs a tool to support their activities in achieving the desired goals. One of the tools to support these activities is a motor vehicle. However, not all parties are able to own or buy a motor vehicle, therefore the alternative option is to purchase a motor vehicle through a third party, or a financing institution so that parties who do not have the money to buy the motor vehicle are financed by a financing institution<sup>9</sup>.

Financing institutions as a third party will certainly benefit from the difference in price and interest<sup>10</sup>. In providing credit to consumers called debtors, financing institutions need guarantee, which is known as Fiduciary Guarantee. This is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees.

However, due to the renewal of community needs in terms of guarantee over movable property, and the guarantee object is still freely used or controlled by the debtor in real terms, the Fiduciary Guarantee was born as an answer to the needs of the community in general. Therefore, it is very clear that the biggest difference between fiduciary guarantees, pledge, and mortgages is in the control of the object of the guarantee<sup>11</sup>.

Fiduciary guarantee agencies have a powerful article that is contained in article 15 paragraph (1) and paragraph (2). Article 15 paragraph (1) reads "*In the Fiduciary Guarantee Certificate as referred to in paragraph 14 paragraph (1) the words "FOR THE SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD" shall be included.*" Then article 15 paragraph (2) reads "*The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same execution order as a court decision that has obtained permanent legal force*"<sup>12</sup>.

Departing from this powerful article, Apriliani Dewi and Suri Agung Prabowo filed a petition for judicial review to the Constitutional Court regarding article 15 paragraphs (2) and (3), due to differences in interpretation of this article. Apriliani and Suri are one of the many victims of legal irregularities committed by creditors through an accomplice, namely debt collectors in the context of executing fiduciary guarantees. This is one of the peaks of public resistance to the pattern of executions carried out by financial institutions. Because with the words FOR THE

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Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019."

<sup>7</sup> James Ridwan Efferin, "Eksekusi Objek Jaminan Fidusia Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019," *Yuriska: Jurnal Ilmu Hukum* 12, no. 1 (2020): 48.

<sup>8</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Surabaya: Kencana : Prenada Media Group, 2021): 133.

<sup>9</sup> Purwanto, "Beberapa Permasalahan Perjanjian

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Pembiayaan Konsumen Dengan Jaminan Fidusia," *Jurnal Rechts Vinding* 1, no. 2 (2012): 200.

<sup>10</sup> Benny Krestian Heriawanto, "Pelaksanaan Eksekusi Objek Jaminan Fidusia Berdasarkan Title Eksekutorial," *Legality* 27, no. 1 (2019): 55.

<sup>11</sup> Ahmad Sanusi, "Pendaftaran Jaminan Fidusia Dan Akibat Hukumnya," *Jurnal Ilmiah Kebijakan Hukum* 7, no. 1 (2013): 78.

<sup>12</sup> Republik Indonesia, *Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia* (Indonesia, 1999), <https://jdih.kemenkeu.go.id/fullText/1999/42TAHUN1999UU.HTM>.

SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD, debt collectors arbitrarily without considering the situation and conditions carry out executions anywhere and anytime. In fact, they also commit violence and inhumane actions in carrying out fiduciary executions.

In the decision of the Constitutional Court Number 18/PUU-/XVII/2019, the petition of the petitioners has been granted in part, while the essence of the decision is as follows<sup>13</sup>:

- a) Declaring that Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase of “execution order” and the phrase “same as court decision which has permanent legal force” contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as it is not interpreted “towards fiduciary guarantees in which there is no agreement on breach of contract (default) and debtors object to voluntarily surrendering objects that become fiduciary guarantees, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply as the same as the execution of court decisions that have permanent legal force”;
- b) Declaring that Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase “breach of contract” is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as it is not interpreted that “the existence of a breach of contract is not determined unilaterally by the creditor but based on an agreement between the creditor and the debtor or based on legal remedies that determine that a breach of contract has occurred”.

<sup>13</sup> Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019* (Indonesia, 2019), [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_mkri\\_6694.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_6694.pdf).

- c) Declaring that the Elucidation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase “execution order” is contrary to Law No. 126 of the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted “with respect to fiduciary guarantees in which there is no agreement regarding on breach of contract and the debtor objected to voluntarily surrendering the object under fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same way as the execution of court decisions that have permanent legal force”.

Prior to the issuance of this Constitutional Court decision, the implementation of *parate* execution of the object of fiduciary guarantee was carried out directly by financial institutions through debt collectors,<sup>14</sup> without any agreement between the parties regarding when the breach of contract (default) occurred and the confiscation of the vehicle from the debtor was carried out by force. This caused public sentiment on the pattern of execution of the object of fiduciary guarantees. During the *parate* executions, they carried it out arbitrarily and sometimes used violence and inhuman actions.

In fact, in the implementation of the *parate* execution of object of fiduciary guarantees, to avoid resistance from the public, financing institutions may request an escort from law enforcement officers such as the police. This is of course regulated in the Regulation of the Chief of the Indonesian National Police Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees<sup>15</sup>. In the Considering section point b, it

<sup>14</sup> Rian Sacipto Khifni Kafa Rufaida, “Tinjauan Hukum Terhadap Eksekusi Objek Jaminan Fidusia Tanpa Titel Eksekutorial Yang Sah,” *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no. 1 (2019): 30, <https://ejournal.uksw.edu/refleksihukum/article/view/2777/1307>.

<sup>15</sup> Kepolisian Republik Indonesia, *Peraturan Kepala Kepolisian Republik Indonesia* (Indonesia, 2011), <https://ntb.polri.go.id/wp-content/uploads/2018/02/perkap-nomor-8-th-2011-ttg-pengamanan-eksekusi-fidusia.pdf>.

is clearly stated that “*that as a state instrument, the Indonesian National Police has the authority to provide assistance in securing the implementation of court decisions or the execution of fiduciary guarantees, activities of other agencies, and community activities*”, and point c “*that the execution of fiduciary guarantees has binding legal force, which is the same as a court decision that has permanent legal force so that it requires security from the Indonesian National Police*”.

Based on the Regulation of the Chief of the Indonesian National Police, it has already provided an illustration that in carrying out the *parate* execution for the object of fiduciary guarantees, financing institutions should include the police to avoid unpredictable problems in the field. However, in fact, financing institutions through debt collectors always move alone, causing unrest in the general public. This is because the method of execution carried out by debt collectors is like robbers who rob their victims and do not care about the time and place when carrying out executions, so there is often a commotion. In fact, there were victims of beatings, both from debt collectors and debtors at the time of the execution. This causes turmoil in social life. The execution is also not carried out humanely so it often causes conflicts with consumers<sup>16</sup>.

Supposedly, this can be avoided if all existing financing institutions use the assistance of the police so that in carrying out executions, they can minimize unpredictable and unexpected events.

Therefore, after being interpreted by the Constitutional Court, Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees is still valid today. According to the interpretation of the Constitutional Court, there is a requirement to carry out *parate* execution. If at the time of *parate* execution of the object of fiduciary guarantee, in the contract there is an agreement regarding breach of contract (default), and at the time of *parate* execution, the debtor does not object or voluntarily submits the object of the fiduciary guarantee to the creditor, then execution of the fiduciary guarantee can be performed upon

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<sup>16</sup> Andi Risma Rustan, Sahban, “Perlindungan Hukum Pembelian Kendaraan Dalam Perjanjian Pembiayaan Konsumen Dan Pelaksanaan Eksekusi Jaminan Fidusia,” *Supremasi: Jurnal Pemikiran, Penelitian Ilmu-Ilmu Sosial, Hukum dan Pengajarannya*. 16, no. 1 (2021): 16, <http://103.76.50.195/supremasi/article/view/20226>.

him. This is because there is an acknowledgment from the debtor that he has neglected to carry out his obligations and consciously without any intimidation and intervention from any party for the debtor to submit the object of the guarantee.

However, in fact, there are difficulties in carrying out the execution of objects of fiduciary guarantees after the issuance of this Constitutional Court decision, namely regarding the agreement of breach of contract (default). This is related to whether the contract that has been agreed upon by the creditor and debtor has included the agreement of the parties regarding when the breach of contract occurred. If in the contract there is an agreement on when the breach of contract will occur, it will make it easier for the creditor to know that the debtor has been negligent in carrying out his obligations.

However, if the agreement of the parties regarding the breach of contract has not been determined, it will be difficult for the creditor to execute the object of the fiduciary guarantee. This is for example when the debtor declares that he has not breached the contract, however, there was a delay in payment due to the business or business being run by the debtor, which resulted in delays in the implementation of the debtor’s obligations, especially in the midst of difficult economic conditions<sup>17</sup>. This condition makes the object of guarantee controlled by the debtor not run properly but it is used to run his business and repay the debt he has until it is paid off. If the creditor is harmed, the creditor will ask for legal assistance through the courts to recover<sup>18</sup>.

If it is difficult for the debtor to admit that there has been a breach of contract/default, of course, he will also object to surrendering the object of fiduciary guarantee that is under his control. This is where good faith is needed in carrying out the contract because good faith is a fundamental value in making and implementing the contract as well as possible<sup>19</sup>. Good faith lies in the heart so that

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<sup>17</sup> Rosyidi Hamzah, “Penerapan Azas Kekeluargaan Dan Keadilan Pada Penyelesaian Kredit Bermasalah Pada Pembiayaan Perumahan Di Indonesia,” *COSTING: Journal of Economic, Business and Accounting* 3, no. 2 (2020): 406, <https://journal.ipm2kpe.or.id/index.php/COSTING/article/view/1141>.

<sup>18</sup> Moch Isnaeni, *Pengantar Hukum Jaminan* (Surabaya: Revka Petra Media, 2016): 53.

<sup>19</sup> Rachmadi Usman Djoni S Gozali, *Hukum Perbankan* (Jakarta: Sinar Grafika, 2012): 342.

humans can always remember to carry out the contracts and uphold existing norms<sup>20</sup>.

Therefore, of course, the pattern of execution of fiduciary guarantees after the issuance of the Constitutional Court's decision changes, namely before the issuance of the decision, *parate* execution is carried out directly. After Article 15 paragraph (2) and paragraph (3) of the Law on Fiduciary Guarantees was interpreted, financing institutions can no longer immediately carry out the execution of objects of fiduciary guarantees. This is because there must be a statement from the debtor that he has neglected to carry out his obligations as a debtor, namely to make payment of installments and he shall voluntarily and sincerely submit the object of guarantee to a financing institution, then the execution of the fiduciary guarantee can be carried out. If these two things are not fulfilled in an effort to execute the object of the fiduciary guarantee, then in accordance with the interpretation of the constitutional court, the financing institution must go through the court to execute the object of the fiduciary guarantee. This is because execution is a legal action that shall be carried out by the court against the losing parties in a case<sup>21</sup>.

One of the important problems faced by judicial bodies in Indonesia is the slow process of resolving cases in court, including the accumulation of cases in the Supreme Court of the Republic of Indonesia where the settlement of cases is as many as 8,500 cases every year<sup>22</sup>. This of course raises new problems along with the execution of fiduciary guarantees carried out by local district courts. The limited human resources available in district courts and the many other cases that need executions create new challenges in the implementation of this fiduciary execution. This is because almost all the objects of fiduciary

guarantees are motor vehicles, which are very large in number.

Let alone executing the objects of a fiduciary guarantees, sometimes it takes a long time to execute in other civil cases because of the accumulation of cases that must be executed and the number of bailiffs is not sufficient. Based on the 2020 Annual Report of the Supreme Court, the number of cases in general courts justice is booming at 3,231,292 so it is not comparable to the number of judges of only 3,634. The average burden of judges in litigation is 1:2,668<sup>23</sup>.

Then, regarding technical problems in the field, executions by bailiffs may be rejected by the interested parties, utilizing physical or verbal violence. The new challenge faced by the court in the context of the execution of objects of fiduciary guarantees is regarding the position of the object of the guarantee which is far from the reach of the court bailiff. This takes a long time. Then, the existence of the object of fiduciary guarantee may have been transferred to another party and the operational costs incurred are greater than the total value of the object being executed. The above conditions certainly make confiscation inefficient.

Humans as living beings are *homo economicus*. In taking action to fulfill their economic needs, humans always prioritize economic values and consideration. The law created must also contain economic considerations and values (economic tools). For such purpose, the creation of law must meet the standards of value, utility, and efficiency<sup>24</sup>.

In practice, the legal aspect and the economic aspect are always contradictory. If one puts the law first, this can hamper business because of the loss of practical and efficient values. Supposedly, the legal aspect and the economic aspect must go hand in hand and support each other. The execution of fiduciary guarantees after the decision of the Constitutional Court Number 18/PUU-XVII/2019 which eliminates the authority of the *parate* execution for creditors and submits the execution of objects of fiduciary guarantees to the court based on article 196 of HIR/208 of RBG makes the execution pattern inefficient and

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<sup>20</sup> Setia Budi, "Permohonan Eksekusi Kepada Pengadilan Negeri Berkaitan Dengan Perjanjian Fidusia Terhadap Jaminan Yang Digelapkan," *Jurnal Cendikia Hukum* 3, no. 1 (2017): 103, <http://e-jurnal.stih-pm.ac.id/index.php/cendekeahukum/article/view/15>.

<sup>21</sup> M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi Keti. (Gramedia, 1988): 1.

<sup>22</sup> Mahkamah Agung, *Laporan Penelitian Alternative Dispute Resolution (Penyelesaian Sengketa Alternatif Dan Court Connected Dispute Resolution) Penyelesaian Sengketa Yang Terkait Dengan Pengadilan* (Jakarta, 2000), <https://perpustakaan.mahkamahagung.go.id/assets/resource/ebook/36.pdf>.

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<sup>23</sup> Mahkamah Agung, *Laporan Tahunan Mahkamah Agung Tahun 2020* (Jakarta, 2020), <https://www.mahkamahagung.go.id/cms/media/8832>.

<sup>24</sup> Richard A Posner, *Economic Analysis of Law*, Seventh. (New York: Aspen Publishers, 2007): 15.

impractical, thereby eliminating economic values. In order for the law to run with its function, it must be implemented with certainty and justice<sup>25</sup>.

The creation of new norms through the Constitutional Court Decision Number 18/PUU-XVII/2019 should have followed the values of the birth of Law Number 42 of 1999 concerning Fiduciary Guarantees. The loss of utility and efficiency standards must find a way out so that business activities in the motor vehicle credit sector, which have been supported by Law Number 42 of 1999 concerning Fiduciary guarantees, still exist to provide balanced protection between creditors and debtors.

According to Jeremy Bentham, the law can only be recognized as law if it can provide the greatest benefit to the people (the greatest happiness of the greatest).<sup>26</sup> The benefits of the birth of a new norm through the decision of the Constitutional Court Number 18/PUU-XVII/2019 in theory should provide benefits to the wider community, both the community as creditors and the community as debtors. However, in reality, there is an imbalance of benefits for creditors when executing objects of fiduciary guarantees. One of the goals of law according to Bentham is to attain equality.

### **B. The Existence of A New Norm After the Issuance of Constitutional Court's Decision Number 18/PUU-XVII/2019**

Legal norms in business activities provide certainty and protection for the parties in business transactions. Legal norms in business must have business characteristics that are efficient, effective, and have economic value. Of course, business people always look for patterns of dispute resolution that are fast, low-cost, and simple. However, in practice, norms regarding dispute resolution are still slow, costly, and highly complex. Therefore, the slogan "*the cost incurred to find a lost goat is the same as the cost of goats*" becomes famous.

Renewal of legal norms that will support business activities is an absolute must. Business activities have a very fundamental role in the welfare of the people and the pattern of business relations is also developing very quickly. On the one hand, the development of law proceeds very slowly. Law is always lagging and limping in following the current development. Therefore, there is a lot of legal uncertainty in the pattern of business transactions because the law has not been in exist and has not been able to resolve the legal event.

The number of business people who resolve business disputes outside the court such as arbitration and alternative dispute resolution is proof that the courts have not been able to answer business challenges<sup>27</sup>. *Losing becomes ash, winning becomes charcoal* are sentences that always come to mind when solving problems in court. For this reason, characteristic norms are needed to support business activities. The birth of Law Number 42 of 1999 concerning Fiduciary Guarantees is to support lending and borrowing transactions with a simple, easy, fast pattern and guaranteeing legal certainty.

Fiduciary guarantee agencies give debtors the power to control the objects being guaranteed to carry out business activities that are financed from loans using fiduciary guarantees. This pattern really helps the wider community (debtors) to get a motor vehicle and use the motor vehicle to run their business. Meanwhile, on the other hand, financial institutions as creditors are given legal certainty regarding the object of fiduciary guarantees, such as non-transferable, which can be executed quickly without court intermediaries (*parate* execution) if the debtor defaults and the creditor prefers and provided that the fiduciary guarantee is registered. Fiduciary agencies are facilities to assist business activities and provide legal certainty to interested parties.

The emergence of the *parate* execution norm in Law Number 42 of 1999 concerning Fiduciary Guarantees is regulated in Article 15 paragraphs (1), (2), and (3). In the fiduciary certificate, the words "for the sake of justice based on the one and only God" have the meaning that the fiduciary

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<sup>25</sup> Marulak Pardede, "Hak Menguasai Negara Dalam Jaminan Kepastian Hukum Kepemilikan Hak Atas Tanah Dan Peruntukannya," *Jurnal Penelitian Hukum De Jure* 19, no. 4 (2019): 407.

<sup>26</sup> Markus Y. Hage Bernard L. Tanya, Yoan N. Simanjuntak, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi*, Cetakan Ke. (Yogyakarta: Genta Publishing, 2010): 90.

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<sup>27</sup> Agung, *Laporan Penelitian Alternative Despute Resolution (Penyelesaian Sengketa Alternatif Dan Court Connected Dispute Resolution) Penyelesaian Sengketa Yang Terkait Dengan Pengadilan*.

guarantee certificate has the same execution order as a court decision that has permanent legal force. If the debtor defaults, then the creditor has the right to sell the asset that is the object of the fiduciary guarantee on his own power.

This norm regarding *parate* execution provides legal certainty and certainty of return on capital and profits from lending and borrowing transactions. Creditors in providing loans to debtors have risks, both loss of capital and profits. In order to maintain profits and capital in lending and borrowing transactions, creditors need to be guaranteed by the Fiduciary Guarantee Law to be able to carry out executions without court intermediary against the object of the fiduciary guarantee.

However, in practice in the field, financial institutions as creditors in carrying out executions of fiduciary guarantee objects, which are usually motor vehicles, do so in unresponsive and non-communicative ways. The practice of execution by using the services of a third party (debt collector) is very far from the values of justice and kinship. The culmination of the debtor's resistance was the lawsuit against Article 15 paragraphs (2) and (3) of the Fiduciary Guarantee Law to the Constitutional Court.

The juridical consequence of the birth of the Constitutional Court Decision No. 18/PUU-XVII/2019 is the pattern of execution of objects of fiduciary guarantees. If the debtor does not accept the execution, then all legal mechanisms and procedures in the execution of the fiduciary guarantee certificate must be carried out and apply as the same as the execution of court decisions that have permanent legal force. According to the researchers, the birth of the Constitutional Court's decision is like if you want to kill a rat, do not kill the barn. The fault lies in the practice and does not come from the norm, but with this decision, the legal norms governing the execution of fiduciary guarantees have changed. The crown of the Fiduciary Guarantee Law is in its execution pattern, so the Fiduciary Guarantee Law is like a "Toothless Tiger". The Constitutional Court, which initially had the task of only reviewing laws if they conflicted with the constitution, actually turned into a positive legislature, which can create new norms from the laws being reviewed

at the institution<sup>28</sup>. The Constitutional Court has issued several decisions that make the institution a positive legislature, such as the Constitutional Court Decision Number 46/PUU-VIII/2010 concerning the Rights and Position of Children Born Out of Wedlock<sup>29</sup>, Decision Number 102/PUU-VII/2009 concerning the Presidential and Vice Presidential Election<sup>30</sup>, then Decision Number 110-111-112-113/PUU-VII/2009 concerning the General Election of Members of the House of Representatives, Regional Representative Council, and Regional House of Representatives<sup>31</sup>. These three decisions are manifestations of the Constitutional Court as a positive legislature. The ruling decisions were made based on legal, philosophical, and sociological considerations that cannot be separated from legal interpretation.

The pattern of execution of a court decision that has permanent legal force must be based on the procedure for carrying out executions as regulated in Articles 196 of HIR and 208 of RBG. Creditors before carrying out executions must submit an application to district courts. This execution pattern is still conventional because it is still based on the provisions of HIR and RBG that were made hundreds of years ago. Meanwhile, the issue of the execution of fiduciary guarantees is regulated by Law Number 42 of 1999 concerning Fiduciary Guarantees. The fiduciary provisions regulated by the Law born in 1999 are not possible to complete the execution based on the HIR and RBG that have existed since hundreds of years ago. Therefore, to answer this challenge, when the decision of the Constitutional Court Number 18/PUU-XVII/2019 came out, it should have been

<sup>28</sup> Moh. Fadli Fitria Esfandiari, Jazim Hamidi, "Positive Legislature Mahkamah Konstitusi Di Indonesia," *Jurnal Online Mahasiswa* (2014): 3.

<sup>29</sup> Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi Tentang Hak Dan Kedudukan Anak Luar Perkawinan* (Indonesia, 2010), [https://www.bphn.go.id/data/documents/putusan\\_46-puu-viii-2010\\_\(perkawinan\).pdf](https://www.bphn.go.id/data/documents/putusan_46-puu-viii-2010_(perkawinan).pdf).

<sup>30</sup> Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi Tentang Pemilu Presiden Dan Wakil Presiden* (Indonesia, 2009), [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_102PUU-VII2009.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_102PUU-VII2009.pdf).

<sup>31</sup> Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi Tentang Pemilihan Umum Anggota Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Dan Dewan Perwakilan Rakyat Daerah*. (Indonesia, 2009), [https://jdih.go.id/files/148/putusan\\_sidang\\_Putusan\\_110,111,112,113.pdf](https://jdih.go.id/files/148/putusan_sidang_Putusan_110,111,112,113.pdf).



followed by the birth of a new norm in the field of execution of fiduciary guarantees.

The juridical phenomenon that is currently happening is that since the issuance of the Constitutional Court's decision Number 18/PUU-XVII/2019, there is no new norm that specifically regulates how the pattern of execution of objects of fiduciary guarantees is. Financial institutions, both banks, and non-banks are waiting for the new norm so that in carrying out executions of the object of fiduciary guarantees they have legal certainty, are fast, simple, and have low costs. The existence of the new norm is a must. Legal norms must develop according to the needs and development of society. If the execution of the object of fiduciary guarantee is equated with the execution pattern of other court decisions, then this is a setback in the legal world. This is because when there is a fast, simple, and low-cost pattern, it is shifted to a slow, complicated, and high-cost execution pattern. The execution expected by justice seekers should be carried out without having to wait for a long time<sup>32</sup>.

The pattern of execution in the new norm is that creditors submit an application for execution to District Courts. Then, the District Court through the Head of the Court, within a maximum period of three days, summons the parties to obtain information and examine all the documents of the agreement within a maximum period of two days. Then, the Court issues an execution order if it is appropriate to execute and the execution is carried out by creditors or third parties on the orders of the Head of the Court.

The new norm which is expected to be present in the pattern of execution of fiduciary guarantees can at least be through a Supreme Court Circular Letter (SEMA) or a Supreme Court Regulation (PERMA) because the general court is under the Supreme Court. The execution of objects of fiduciary guarantees is certainly different from other executions so the characteristics of the Fiduciary Guarantee Law still exist in lending and borrowing transactions with fiduciary guarantees. The birth of the Constitutional Court's decision Number 18/PUU-XVII/2019 must of course be

responded to in a juridical manner so that it can be applied perfectly.

Based on the principle of Hypothetical Bargain, the legal provisions made must be in accordance with the substance and purpose of the law. If it is not useful and does not produce benefits for the parties, then by itself the use of legal arrangements will become static so that it is not dynamic<sup>33</sup>.

The creation of a new norm to support the dynamics of the law is absolutely necessary. The development of society must be followed by the development of law. The substance of legal norms must also be strengthened by the dynamic pattern of community development. The pattern of execution of fiduciary guarantees which is effective and efficient and economically useful must be realized immediately after the decision of the Constitutional Court Number 18/PUU-XVII/2019.

Based on the theory of Economic Analysis of Law, people will obey provisions of the law if they estimate that they can gain greater profits than breaking them. This is vice versa. In other words, people will bring any legal issues to courts if they will get benefits (monetary and/or non-monetary) instead of carrying out their legal obligations<sup>34</sup>.

The new norm regarding the execution of fiduciary guarantees must be able to provide protection for creditors from an economic perspective. Fast and efficient executions must be given a strong legal basis to obtain legal certainty. The law created must support business activities. The birth of Law Number 42 of 1999 concerning Fiduciary Guarantees philosophically is to assist business actors in obtaining funds to develop and run their businesses. It is necessary to synchronize material regulations governing execution with the formal provisions of HIR/RBG as formal law<sup>35</sup>.

## CONCLUSION

The pattern of execution of objects of Fiduciary Guarantees after the issuance of the Constitutional Court's Decision Number 18/

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<sup>32</sup> Syprianus Aristeus, "Eksekusi Ideal Perkara Perdata Berdasarkan Asas Keadilan Korelasinya Dalam Upaya Mewujudkan Peradilan Sederhana, Cepat Dan Biaya Ringan.," *Jurnal Penelitian Hukum De Jure* 20, no. 3 (2020): 388.

<sup>33</sup> Fajar Sugiarto, *Economic Analysis of Law* (Jakarta: Prenada Media Group, 2013): 48.

<sup>34</sup> Ibid: 48.

<sup>35</sup> Jamilus, "Persoalan Dalam Pelaksanaan Eksekusi Sertifikat Dan Hak Tanggungan," *Jurnal Penelitian Hukum De Jure* 17, no. 2 (2017): 288.

PUU-XVII/2019 experienced legal ambiguity and uncertainty because to carry out an execution it must obtain voluntary approval from the debtor and the execution must be carried out through court intermediaries as regulated in articles 196 of HIR and 208 of RBG and it is very incompatible with the *parate* execution concept. The execution pattern regulated in the HIR and RBG is not in accordance with the development and needs of legal issues in the execution of objects of Fiduciary Guarantees.

The existence of a new norm regarding the execution of objects of Fiduciary Guarantees after the Constitutional Court's Decision Number 18/PUU-XVII/2019 has no place. Legal norms must develop according to the needs and development of society. If the execution of objects of fiduciary guarantees is equated with the execution pattern of other court decisions, then this is a setback in the legal world. This is because when there is a fast, simple, and low-cost pattern, it is shifted to a slow, complicated, and high-cost execution pattern.

## SUGGESTION

To create legal certainty regarding the execution of objects of Fiduciary Guarantees after the Constitutional Court's Decision Number 18/PUU-XVII/2019, new norms are needed, both in the form of SEMA (Supreme Court Circular Letter) and PERMA (Supreme Court Regulations) regarding the pattern of execution of objects of Fiduciary Guarantees which is effective and efficient. The content of these norms distinguishes the pattern of execution of other civil cases from the execution of objects of Fiduciary Guarantees. District Courts are given time to examine applications for execution for a maximum of one week and District Courts may delegate the execution through creditors or third parties after being examined by Courts.

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