



The Implementation of Constitutional Court Decision No. 2/PUU-XIX/2021 on the Execution of Movable Objects as Fiduciary Guarantee

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ABSTRACT

Fiduciary guarantees have an important role in the implementation of credit in Indonesia, where creditors can use movable objects as collateral to ensure debt repayment by debtors. However, despite being regulated in Law No. 42/1999 on Fiduciary Guarantee, the execution of movable objects as fiduciary objects often raises legal issues, especially in relation to the protection of debtors' rights. This research focuses on the application of Constitutional Court Decision Number 2/PUU-XIX/2021 which discusses the constitutionality of Article 15 Paragraph (2) related to the execution of fiduciary guarantees. The formulation of the problems raised includes the form of legal protection for debtors against defaults committed by creditors and the mechanism for executing fiduciary guarantees. The research method used is normative juridical with a legislative approach and case studies. The results showed that the Constitutional Court's decision affirmed the creditor's right to execute the fiduciary certificate without going through the court, as long as the certificate has been registered. However, protection for debtors must still be considered, especially in the context of potential defaults from creditors. This decision strengthens legal certainty in fiduciary execution, but also demands stricter supervision to prevent abuse of power by creditors. Thus, the balance of rights between creditors and debtors can be maintained in accordance with the principles of justice in Indonesian security law.

Keywords: *Constitutional Court Decision No. 2/PUU-XIX/2021, Debtor Legal Protection, Fiduciary Guarantee Execution*

INTRODUCTION

The development of security law proceeds in sync with the practice of credit, loans, and debt repayment between creditors and debtors. Creditors generally require more valuable collateral to protect their receivables, especially if the debtor fails to fulfill their obligations. Security law continues to evolve along with the advancement of the credit sector, which is based on the creditor's trust in the debtor. In this context, banks have an important role as a source of funding for the community, both for consumption needs and business development, as the capital of individuals or business entities is often insufficient (Sutarno, 2023).

Commercial banks, as creditors, are responsible for collecting funds from the public and distributing them as loans to improve the quality of life, as stipulated in Article 1 Paragraph (2) of Law No.10/1998 on Banking. Credit is defined as a purchase or lending transaction with a commitment to return in the future, involving creditors, both individuals, financial institutions, and companies (Priyatna, 2014). Article 1 Paragraph (11) of the UUP explains the definition of credit. The main purpose of creditors in providing credit to debtors is to obtain profit from interest, support the continuity of the debtor's business, and encourage economic development and other sectors (Chosyali & Sartono, 2019).

One of the services offered by banks is the provision of loans to clients, as stipulated in Law No. 10/1998 on Banking. The definition of credit is explained in Article 1 number 11, which states that credit is defined as a supply of money or bills based on a loan and borrowing agreement between a bank and another party, in which the borrower is obliged to repay the debt within a certain period of time with credit interest (Indonesia, 1998). The development of collateral law is related to the increasing needs of the community for funds, which are usually obtained through applying for loans to financial institutions and are outlined in a debt and credit agreement accompanied by collateral.

The existence of collateral serves an important role in the repayment of debts by debtors. Collateral provides property rights that provide privileges to creditors if the debtor has failed to fulfill his obligations. Collateral provides the creditor legal protection in fulfilling its rights and responsibilities related to debt and can use the collateral to cover the debt if the debtor has difficulty making payments (Jannah & M., 2023).

From a legal perspective, control of the object used as collateral results in property rights that give priority to the creditor in the event that the debtor cannot fulfill his obligations. Besides being a legal protection for creditors, collateral also serves to ensure certainty in debt transactions (Saragih et al., 2024). In Indonesia, one of the more recognized forms of collateral is fiduciary collateral, as regulated in Law No. 42/1999. Fiduciary guarantees cover certain movable and immovable objects and give the fiduciary a priority position over other creditors.

Despite being regulated in law, the practice of fiduciary guarantees still faces various legal problems. Therefore, its application must be able to provide legal certainty, justice, and fair benefits for all parties, both creditors and debtors. The main purpose of this application is to create balance and protect the legal interests of both parties in meeting their funding needs.

Credit activities always contain risks for creditors, especially if debtors cannot fulfill their obligations, which can lead to non-performing loans (NPLs). To minimize this risk, creditors need to analyze the debtor's ability and commitment before providing a loan (Maziyyah et al., 2021). In the process of granting credit, there are agreements and guarantees that must be fulfilled, one of which is a fiduciary guarantee. If the debtor fails to fulfill the agreement, the creditor has the right to take back the collateral and sell it to pay off the debt. Therefore, a collateral institution is needed that can facilitate debt collateral without losing the debtor's control over the pledged goods (Bouzen & Ashibly, 2021).

Fiduciary is a process whereby the debtor cedes ownership rights to the creditor based on the principle of trust, known as *Constitutum Possessorium*. Although the title has been transferred to the creditor, physical control over the goods remains with the debtor. The fiduciary concept stipulates that once the debtor has paid off his debt, the creditor is obliged to return the title to the goods to the debtor (Purgito, 2022).

In the process of providing credit, creditors expect the borrowed funds to be returned along with the agreed interest. However, problems often arise such as late payments, known as problem loans. The fiduciary security institution has an important role in credit agreements, especially in motor vehicle financing, with legal support to take back the pledged goods in accordance with the agreement. Therefore, banks need to ensure the debtor's ability and good faith in repaying debts and set collateral with a value that is generally higher than the credit provided (Akifah, 2022).

The lack of clarity regarding the debtor's obligation to provide more valuable collateral and the execution of the collateral is a crucial issue. Constitutional Court Decision No. 2/PUU-XIX/2021 rejected the judicial review on the execution of fiduciary guarantee certificates and allowed creditors to apply for the execution of fiduciary guarantees through the district court if the debtor does not voluntarily surrender the object of the guarantee. Law No. 42/1999 on Fiducia defines fiducial security as a security right over movable and immovable objects that remain in the debtor's possession, while giving priority to the creditor over other creditors (Bouzen & Ashibly, 2021).

This research has general and specific objectives. In general, this research aims to analyze the legal status of fiduciary security objects in debtors with bad credit and the execution of the fiduciary security object. Meanwhile, the specific

purpose of this research is as a prerequisite for graduation in the Master of Law study.

The benefits of this research are expected to be felt by various parties. Theoretically, this research is expected to be a study material for writers and academics regarding legal developments related to fiduciary security objects in debtors who experience bad credit. Practically, this research can provide a new source of information for practitioners, the public, and the government as well as a contribution of thought in solving problems related to the object of fiduciary guarantees. Academically, this research is the researchers' contribution to the development of knowledge regarding the theory and legal provisions related to fiduciary security objects.

LITERATURE REVIEW

Fiduciary Guarantee

Fiduciary Guarantee is regulated in Law No. 42/1999 as a response to the needs of the business world, legitimizing pre-existing legal practices based on jurisprudence and transforming them into formal legal norms. The Fiduciary Guarantee aspect is also supported by Article 15 of Law No. 4/1992 on Housing and Settlement, which states that houses built on land owned by others will be subject to Fiduciary Guarantee. A similar principle is found in Law No. 16/1985 on Flats, which states that ownership of flats can be used as debt collateral on a fiduciary basis.

Fiduciary guarantees cover movable goods, both physical and non-physical, as well as immovable goods such as buildings that cannot be used as mortgages in accordance with Law No. 4/1966 on Mortgage Rights (Atikah, 2019). Although the pledged goods remain in the possession of the Fiduciary, this guarantee serves as collateral for the payment of certain debts, giving priority to the Fiduciary over other creditors. This is affirmed in Article 27 of the Fiduciary Law, which establishes this right of priority as the main basis in the practice of fiduciary guarantees.

The characteristics of the Fiduciary Guarantee include several important aspects, one of which is that this guarantee always follows the pledged object, regardless of who controls it, as stipulated in Article 22 of the Fiduciary Law. In addition, fiduciary guarantees fulfill the elements of specialty and publicity that bind third parties and provide legal certainty for all interested parties, in accordance with Articles 6 and 11. The execution of fiduciary guarantees is regulated in Article 29, which confirms that the execution process is easy and certain, providing protection for the Fiduciary Recipient in the event of default by the Debtor.

The Fiduciary Guarantee provides creditors with a strong legal position when debtors do not fulfill their obligations, even though the goods used as

collateral remain in the debtor's possession and can be used to run a business or other profitable activities. This guarantee gives creditors confidence in extending credit because their rights to the collateral are guaranteed even though the goods are still controlled and used by the debtor.

The Fiduciary Guarantee Institution functions as a guarantee that can be widely and flexibly utilized, allowing various parties to access financing more easily. Its simple and fast implementation provides the legal certainty that creditors need, so that they can take immediate action in the event of default by the debtor. This makes the Fiduciary Guarantee an important instrument in the banking and financing system in Indonesia.

Agreement

In accordance with Article 1313 of the Civil Code, an agreement is defined as an act in which one or more people bind themselves to one or more other people. The concept of this agreement is concrete and is a legal action that involves a commitment between the parties involved.

An agreement can be defined as a situation in which a person makes a promise to another person or when both parties promise each other to perform certain actions (Borman, 2019). Subekti states that agreements are often referred to as agreements, which indicate an agreement between the two parties. Although agreements are not attached to a particular format and can be made orally or in writing, written documents serve as evidence in the event of a dispute (Subekti, 2005).

Some categories of agreements require a written form as a condition of validity. In general, agreements consist of three main components: *Essentilia*, which is the part of the agreement that must exist, such as goods and prices in buying and selling; *Naturalia*, the part of the agreement regulated by law as an addition; and *Accidentalialia*, the part that is not regulated by law but is determined by the parties.

An agreement is considered valid if it fulfills the conditions in Article 1320 of the Civil Code, namely the agreement between the parties who bind themselves, legal capacity, certain objects, and halal purposes. The agreement must be free from coercion, error, or fraud in accordance with Articles 1321, 1322, and 1328 of the Civil Code. The clarity of the object in the agreement is also important, because if the achievement is not clear, the agreement can be null and void.

Loans

According to Article 1 point 11 of Law No. 10/1998, which is an amendment to Law No. 7/1992 on Banking, credit is the provision of money or equivalent bills based on an agreement between a lender and a borrower, in which the borrower is obliged to repay the debt along with interest within an agreed period. Credit functions as a provision of achievement in the hope of future

counterproduction, creating cooperation between creditors and debtors, and sharing profits and risks.

Lending is based on the creditor's trust in the debtor. Therefore, prudence is needed so that the credit channeled can be returned as agreed. In the banking world, creditors must be selective in assessing credit applications with careful planning.

Finance

According to Article 10 of Minister of Finance Regulation No. 1251/KMK.03/1988, financing is the provision of funds to consumers for the purchase of goods with installment payments. A financing institution, as a business entity that carries out this activity, provides funds or assets without raising funds directly from the public.

Based on Article 2 Paragraph (1) of Presidential Decree No. 61/1988, this institution operates in leasing, venture capital investment, securities transactions, accounts receivable financing, credit card business, and consumer financing. Financing institutions have an important role in providing funding alternatives that are more flexible than banks.

Assumption of Ownership Rights of Fiduciary Guarantee Objects

The right of ownership in fiduciary security includes "the right of ownership as well as the right to control the object." When a debtor transfers ownership rights to a fiduciary security object, the level of control is reduced, as the rights to the object have passed to the creditor. In a fiduciary agreement, the ownership and control of the object of collateral passes to the creditor.

Law No. 42/1999 defines fiduciary as "Transfer of Ownership Rights to an Object Based on Trust," where ownership rights are transferred from the debtor to the creditor with the promise to return them after the debt is repaid.

Engagement in Fiduciary

An engagement in law is regulated in Book III of the Civil Code and is understood as a legal relationship between two or more individuals involving property. Law No. 42/1999 regulates fiduciary guarantee as the transfer of ownership rights of an object while it remains in the possession of the owner.

The principles in fiduciary guarantee, such as *droit de suite* and *droit de preference*, ensure that the object of the guarantee remains with the owner as well as giving execution priority to the fiduciary creditor (Nugraha, 2018).

RESEARCH METHODOLOGY

This research employs a normative juridical method, which focuses on examining legal principles, doctrines, and regulations related to fiduciary guarantees. The normative juridical approach is used to analyze legal norms

governing fiduciary guarantees and their implementation in cases of default (Efendi, Jonaedi & Ibrahim, 2016). The study adopts a legislative approach by reviewing relevant laws and regulations, including Law No. 42/1999 on Fiduciary Guarantees, the Civil Code, and related judicial decisions. This approach aims to assess the consistency and applicability of existing legal frameworks in resolving fiduciary disputes. Additionally, the research incorporates case studies to examine judicial decisions, particularly those involving disputes over fiduciary guarantees. By analyzing case law, this study aims to understand how courts interpret and apply fiduciary laws in practice, identifying potential legal inconsistencies or gaps in enforcement. The primary legal materials used in this research include statutory regulations and court rulings, while secondary sources consist of legal literature, journal articles, and expert opinions. The combination of a legislative approach and case study analysis provides a comprehensive understanding of fiduciary guarantee law and its practical application.

RESULT AND DISCUSSION

Legal Protection for Debtors against Defaults Committed by Creditors in Contracts with Fiduciary Guarantees

Default on obligations, derived from the Dutch term “wanprestatie,” refers to the failure of one party to fulfill its obligations in an agreement, usually due to negligence. According to the Indonesian Dictionary (KBBI), default occurs when a debtor fails or neglects to fulfill the obligations agreed upon with the creditor. In this context, performance is something that can be demanded by one party from the other in an agreement. Default can take several forms, including: completely failing to fulfill performance, where the debtor does not carry out the expected performance; fulfilling performance but not on time, where the debtor meets the performance beyond the stipulated time; and fulfilling performance incorrectly or inappropriately, where the debtor executes the performance but not in accordance with the agreement and the error cannot be corrected.

According to Abdul Kadir Muhammad, default can be caused by force majeure (overmacht). Overmacht refers to unforeseen conditions or events that prevent the debtor from fulfilling their obligations without fault on their part. Overmacht is divided into two types: absolute overmacht, where performance cannot be carried out by anyone, and relative overmacht, where performance is still possible but requires a greater sacrifice from the debtor. The debtor's fault, whether intentional or due to negligence, results in different legal consequences. In situations where the fault is intentional, the debtor may be liable for higher compensation compared to cases caused by negligence. To remind the debtor of default, the creditor may send a demand letter, which serves as a notice to promptly fulfill obligations within a specified period. According to Article 1238 of the Indonesian Civil Code, a debtor is considered in default after receiving a demand letter (in gebreke stelling). The types of demand letters regulated in

Article 1238 of the Civil Code include an order letter issued by a judge and notified by a bailiff, a similar deed which may be an underhand deed or a notarial deed, and provisions implied in the agreement regarding the time when the debtor is deemed in default.

According to Sri Soedewi Masjhoen Sofwan, a debtor is considered in default if three elements are met: first, the debtor's action must be regrettable; second, the resulting consequences must be predictable, both objectively and subjectively; and third, the debtor must be held accountable for their actions, unless they are in a state of insanity or mental weakness. If a third party believes that the debtor's actions may cause harm, they may file for contract cancellation. However, the debtor's negligence does not automatically void the agreement; rather, it requires a judicial decision with a constitutive effect. Judges have the authority to assess the level of the debtor's default and may reject contract cancellation if the negligence is deemed minor, although claims for compensation may still be accepted.

According to Article 1313 of the Civil Code, a contract is defined as an act in which one or more parties commit to fulfilling certain obligations to another party. For a contract to be valid, several general requirements must be met outside Article 1320 of the Civil Code. These requirements include: the contract must be executed in good faith, where both parties agree without coercion; the content of the contract must not contradict prevailing norms or customs in society; the contract must be based on the principle of fairness that respects rules accepted in society; and it must not harm the public interest. Therefore, a valid contract must fulfill all these conditions and be based on an agreement that binds both parties. If one party fails to fulfill the obligations or provisions stated in the contract, that party is considered to be in default. Types of default include: failing to carry out what was agreed upon, fulfilling obligations but not in accordance with the contract terms, being late in fulfilling obligations, or taking actions that should not be performed based on the agreement. Thus, contract law establishes norms governing interactions between parties based on their agreed commitments, resulting in enforceable legal consequences. In legal studies, there are principles governing contracts, including the principle of contract law that regulates the involved parties, the principle of freedom of contract, the principle of *Pacta Sunt Servanda*, which asserts that a valid contract fully binds the parties according to its terms, and the principle of consensus, which states that a contract is valid even if it is not in written form. Contracts can be categorized as written and unwritten, with written contracts consisting of three types: underhand contracts, contracts legalized by a notary, and notarial deeds. Each type of contract has different legal strength and evidentiary value, providing varying levels of assurance for the involved parties and third parties.

Execution Mechanism for Surrender of Fiduciary Object against Acts of Default Committed by Creditor in Contract with Fiduciary Guarantee

The transfer of ownership rights of fiduciary collateral objects legally differs from the transfer of ownership rights. The transfer aims to permanently shift ownership, whereas the handover can be done for security purposes, temporary use, or sale and purchase transactions. In the context of security law, ownership rights do not only include physical possession of an object but also the ownership rights associated with it. When a debtor transfers ownership rights of an object used as fiduciary collateral, the debtor loses part of their control because the rights over the object have been transferred to the creditor.

In security institutions such as pawn and mortgage, the prevailing principle is that ownership rights over the object remain with the debtor as long as the object is used as collateral. The creditor only holds rights over the collateral, not ownership rights. Even though there may be provisions in the security agreement stating that the collateral will become the creditor's property if the debtor fails to fulfill their obligations, these remain legally invalid. The essence of ownership rights of fiduciary collateral objects under Law No. 42/1999 includes the transfer of ownership rights based on trust, where ownership rights over an object move from the debtor to the creditor with a promise to return ownership once the debt is settled. In this process, fiduciary involves the transfer of ownership, making the fiduciary recipient the owner of the collateral during the agreement. If the receivables secured by fiduciary are transferred, the rights and obligations of the fiduciary recipient automatically transfer to the new creditor, who is required to register this change at the Fiduciary Registration Office. Based on the *droit de suite* principle, fiduciary collateral remains attached to the collateral object regardless of its owner, except in the case of inventory transfer. The fiduciary provider may transfer inventory items provided they are replaced with other items of the same value and type, but this condition does not apply in cases of default, where the proceeds from the transfer or receivables that arise automatically become new fiduciary collateral replacing the transferred collateral.

If the fiduciary recipient grants permission to the fiduciary provider to use, combine, mix, or transfer the object or its proceeds, or to compromise receivables, this does not indicate that the fiduciary recipient relinquishes their security rights. Such consent merely indicates that the fiduciary provider has the authority to manage the collateral object within agreed limits, but must still respect the fiduciary recipient's rights over the collateral. This creates a balance between the rights and obligations of both parties and protects the fiduciary recipient's interests in debt fulfillment.

A buyer of an object used as fiduciary collateral, particularly inventory items, will not face legal claims even if they are aware of the fiduciary security, provided they pay the full purchase price at a fair market value at the time of the transaction. This prevents situations where the fiduciary provider could be

accused of fraud in the sales process, as the buyer conducts the transaction legally and ethically. It also ensures that the buyer is protected from potential claims in the future, as long as the transaction is conducted in good faith. On the other hand, the fiduciary provider is prohibited from transferring, pawning, or leasing non-inventory fiduciary collateral to third parties without prior consent from the fiduciary recipient. Violation of this provision may result in criminal penalties, including imprisonment of up to two years and a fine of up to IDR 50,000,000 (fifty million rupiah). The purpose of this provision is to encourage fiduciary providers to fulfill their debt obligations according to the agreement and to facilitate the fiduciary recipient in collecting debts if the debtor fails to fulfill their promise, without having to locate or consider the fiduciary collateral, which may be difficult to find. The fiduciary recipient is not responsible for any consequences arising from the fiduciary provider's actions or negligence, whether related to contracts or legal violations concerning the use and transfer of fiduciary collateral objects.

Article 8 Paragraph (2) Letter a of Law No. 10/1998 of the Republic of Indonesia stipulates that credit granting based on Sharia principles must be documented in a written agreement, even though the law does not explicitly define what a credit agreement is. In this context, a credit agreement is interpreted as an agreement between a bank and a debtor regulated under Book III of the Indonesian Civil Code. Although credit agreements are not specifically regulated in the Civil Code, Subekti explains that a Loan Agreement, as stipulated in Articles 1754 to 1769, is fundamentally established. The agreement states that a debt arising from a money loan only includes the amount stated in the agreement, and if there is currency value fluctuation before repayment, the repayment must be made according to the value applicable at the time of settlement.

Law No. 42/1999 on Fiduciary Security regulates the transfer of ownership rights of objects based on trust, with the condition that the object remains in the possession of its owner. Fiduciary security is recognized as a legal instrument with several key principles, including the principle of security rights, which gives priority to fiduciary creditors; the accessory principle, which links fiduciary to the main agreement so that it automatically ends when the debt is settled; and the *droit de suite* principle, which ensures that fiduciary security remains attached to the object regardless of ownership. Additionally, the *droit de preference* principle grants the security holder priority in debt repayment, while the *constitutum possessorium* principle allows the security provider to retain possession of the object even though ownership rights are transferred. The importance of fiduciary collateral registration is regulated under the principle of publicity, ensuring public awareness of the object's security status. The law also emphasizes the principle of specificity, requiring the transfer of rights over an object through a notarial deed and prohibiting re-fiduciary for objects already registered as collateral. Finally, Article 15 regulates *parate execution*, granting fiduciary recipients the right to sell

collateral independently if the debtor breaches the agreement, with the proceeds used to settle the receivables. Thus, the Fiduciary Security Law aims to create legal certainty and protection for parties involved in credit agreements.

CONCLUSION

The execution of a fiduciary guarantee involves the seizure and sale of the goods used as collateral objects, usually because the debtor or fiduciary fails to fulfill its obligations after receiving a warning. Before the execution is conducted, the consumer finance company will contact the creditor to remind the overdue installment payment, make a direct visit if necessary, and send a warning letter. If the delay exceeds 60 days, the customer's status changes to non-performing loan (NPL). Any remaining proceeds from the sale of collateral must be returned to the debtor, although the debtor remains responsible for the remaining debt if the proceeds are insufficient.

Motor vehicle towing problems often occur when consumers fail to pay installments, which are usually handled by third parties such as debt collectors. However, consumers have the right to refuse forced withdrawal in accordance with Constitutional Court Decision No. 71/PUU-XIX/2021, which requires creditors to submit a request for execution to the District Court. To ensure that the execution of fiduciary guarantees is safe and orderly, the National Police issued National Police Chief Regulation No. 8/2011 to ensure accountable execution.

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