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THE EXISTENCE OF CONSTITUTIONAL COURT DECISION NUMBER 18/PUU-XVII/2019: ITS RELEVANCE TO THE EXECUTION PARATE PROCESS IN FIDUCIARY GUARANTEE AGREEMENTS IN INDONESIA

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Abstract

Parate execution has graded legal protection not only for debtors but also for creditors in the practice of fiduciary guarantee agreements in Indonesia. On the other hand, the decision of the Constitutional Court Number 18/PUU-XVII/2019 which regulates the new execution parate process in Indonesia after testing Article 15 paragraph (2) and Article 15 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees against the 1945 Constitution is questionable in its existence. Based on that, this short paper was prepared to highlight the existence of the Constitutional Court Decision Number 18/PUU-XVII/2019 in its relevance to regulating execution parate in fiduciary guarantee agreements in Indonesia. The problem that was then seen was related to the obedience and compliance of finance companies as creditors and also the community as debtors to the Constitutional Court Decision Number 18/PUU-XVII/2019. This paper is divided into several parts of discussion, including: First, discussing the background of the problem and the importance of this research conducted. Second, present the research methods used in this study. Third, analyze the existence of constitutional court decisions on the implementation of execution parate in fiduciary guarantee agreements in Indonesia. Fourth, reviewing the implementation of parate execution after the issuance of the constitutional court decision in which it discusses the current practice of parate execution, examines the weaknesses of constitutional court decisions and finds appropriate solutions to overcome these weaknesses. Fifth, it contains the conclusion of the entire discussion. The conclusion drawn in this entire discussion is that the existence of the Constitutional Court Decision Number 18/PUU-XVII/2019 can be further emphasized in the practice of parate execution in fiduciary guarantee agreements if revisions are made to laws and regulations, especially the Fiduciary Guarantee Law.

Keywords: Existence, Constitutional Court Ruling, Parate Execution, Fiduciary Guarantee.

INTRODUCTION

The constitutional court is one of the state institutions that carries judicial power in Indonesia in addition to the Supreme Court institution in accordance with the mandate of Article 24 paragraph (2) of the 1945 Constitution. According to the idea of its formation, the constitutional court institution in Indonesia is expected to be the guardian of the constitution, especially in guaranteeing the human rights and constitutional rights of every Indonesian citizen (Fitriansyah, 2023) to be fulfilled properly and properly. To be able to carry out this task, the constitutional court is equipped with a number of powers, one of which is *judicial review* as stipulated in Article 24C paragraph (1) of the 1945 Constitution. At the legal level, the judicial review authority of the constitutional court is reaffirmed in Article 10 paragraph (1) of Law No. 24 of 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) as amended three times by Law No. 8 of 2011, Law No. 4 of 2014 and Law No. 7 of 2020. Judicial review intended in this case is the authority to examine the Law against the 1945 Constitution where the results are determined in

a final decision (Ritonga, 2023). One example of a constitutional court decision in the context of *judicial review* is Constitutional Court Decision Number 18/PUU-XVII/2019 which tested the constitutionality of Article 15 paragraph (2) and Article 15 paragraph (3) of Law No. 42 of 1999 concerning Fiduciary Guarantees against the 1945 Constitution.

This Constitutional Court Decision Number 18/PUU-XVII/2019 has significantly brought changes in the execution parate process in fiduciary guarantee agreements in Indonesia. Initially, parate execution in Indonesia was subject to the provisions of the fiduciary guarantee legal regime, namely Law No. 42 of 1999 concerning Fiduciary Guarantee (hereinafter referred to as the Fiduciary Guarantee Law). In the Fiduciary Guarantee Law, legal norms have been established that provide power for creditors to be able to parate execution/direct execution of the object of fiduciary guarantee in the hands of the debtor. This is stipulated and regulated in Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Guarantee Law, each of which states as follows:

> Article 15 paragraph (2): The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executory power as a court decision that has obtained permanent legal force;
>
> Article 15 paragraph (3): If the debtor defaults, the Fiduciary Receiver has the right to sell the Thing that is the object of the Fiduciary Guarantee in his own power.

Sociologically, the two articles above have brought adverse implications in the practice of fiduciary guarantee agreements, especially in the execution parate process in Indonesia. This is because the regulation of these articles provides subjective authority for the debtor to assess and decide unilaterally about the act of default/default of the debtor. In other words, the creditor is given the power to judge the debtor according to his assumptions on the basis of the evidence he has unilaterally without taking into account the debtor's explanation. In the end, with their own decisions that are not objective and cannot be accounted for, creditors can then make withdrawals on the object of fiduciary guarantees (Ling &; Widodo, 2024). For example, in the case of the withdrawal of fiduciary guarantee objects in the form of Mitsubishi Outlander type cars carried out by creditors, namely one of the finance companies with the help of debt collector services, which occurred in Semarang on December 8, 2023. In fact, in such cases, the withdrawal of the object of fiduciary guarantee is carried out in inhumane and unkind ways such as threats or intimidation to physical violence in the form of beatings.

That if departing from the explanation of the sociological aspects above, it can also be seen that the adverse implications arising from the regulation of norms related to parate execution are also seen in philosophical and juridical perspectives. Philosophically, parate execution has contradicted the values of Indonesian life as stated in the 5th precept of Pancasila and the Preamble of the 1945 Constitution which explicitly affirms social justice for all Indonesian people and people's freedom from inhuman oppression. Which means there is an order to generalize rights and obligations and guarantee legal protection for all Indonesian citizens. Therefore, every act, behavior and rule of law must uphold justice and fully accommodate equal and equal legal protection to be accessible to all Indonesian citizens. Meanwhile, in a juridical perspective, parate execution can be said to contradict Article 33 paragraph (1) of the 1945 Constitution which stipulates that the economy is structured as a joint

effort based on the principle of kinship. That means the process of parate execution in fiduciary guarantee agreements should present unity and unity as fellow citizens and not vice versa cause division and disorder.

Such conditions are what make and underlie the birth of the Constitutional Court decision Number 18/PUU-XVII/2019 which in its judgment states that Article 15 paragraph (2) and Article 15 paragraph (3) and the Explanation of Article 15 paragraph (2) of the Fiduciary Guarantee Law are contrary to the 1945 Constitution. As for its legal considerations, the constitutional court stipulates a number of conditions that must be met by creditors in order to carry out parate execution against debtors. These conditions include: First, obtaining an acknowledgment of default of the debtor by which the debtor voluntarily surrenders the object of fiduciary guarantee. Second, conducting a default lawsuit in court which with a court decision with legal force still declares the debtor in default, then parate execution can be carried out by creditors (Nugroho &; Putri, 2023). The determination of the judgment with legal considerations governing these conditions is in principle considered to have saved the debtor from arbitrary actions and abuse of creditor power. However, the real problem has just begun because after the constitutional court ruling was issued, its existence was questioned by the public. That this constitutional court decision does not seem to be binding because it has not been implemented at all by creditors in this case all finance companies in Indonesia even though it is normatively stated that the decision is final because it is tried at the first and last instance. This is corroborated by the fact that cases of withdrawal of fiduciary guarantee objects still occur intermittently after the year the decision is issued. For example, from the example of the case presented by the author above, which shows the tempus of events in 2023, which means four years after the constitutional court decision. So, it can be considered that this decision of the constitutional court is only nominal i.e. it is textually contained but not implemented. In the end, the execution parate process can be said to return to the original arrangement, namely in accordance with the provisions of Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Guarantee Law with all its legal implications.

Based on that background description, this paper was written to find solutions to the legal problems studied. The paper is divided into several sections as follows: First, it discusses the background of the problem and the importance of this research being conducted. Second, present the research methods used in this study. Third, analyze the existence of constitutional court decisions on the implementation of execution parate in fiduciary guarantee agreements in Indonesia. Fourth, reviewing the implementation of parate execution after the issuance of the constitutional court decision in which it discusses the current practice of parate execution, examines the weaknesses of constitutional court decisions and finds appropriate solutions to overcome these weaknesses. Fifth, it contains the conclusion of the entire discussion.

Finally, and the most important thing is that this paper not only examines and analyzes changes in the implementation of the execution parate process after the issuance of the Constitutional Court decision Number 18/PUU-XVII/2019 and the legal protection resulting from the decision for the parties. However, specifically this study looks at whether the decision is effective, namely that immediately after the decision is established into law then then changes the pattern of behavior or culture of creditors in parate execution. If not, what is the cause and how can the solution be offered. This distinguishes the theme and substance of the research that the author discusses with

other research. Such is the case when compared to the research owned by Hari Nugroho and Sari Putri entitled: "A Parate System in the Execution of Fiduciary Guarantees", Comprehensive Journal Law 1, no. 1 (2023). As well as with research from Fang Ling and Ernu Widodo with the title: "Execution of Fiduciary Guarantee Objects for Debtors Who Defaulted After the Constitutional Court Decision Number 2/PUU-XIX/2021", Scientific Journal of Wahana Pendidikan 10, no. 2 (2024). The two studies basically only focus on changes in the execution system of fiduciary guarantees and legal protection guarantees as a result of the issuance of constitutional court decisions. Therefore, the author can emphasize that this research is confirmed to be novel so that it is useful as a breakthrough for the development of civil law, especially in relation to the law of guarantees and constitutional court decisions.

RESEARCH METHODS

The research method used by the author is normative legal research, namely the pattern of reviewing theories, principles, principles, concepts and laws and regulations (Halim &; Nurbani, 2015) which is useful for providing a systematic and comprehensive explanation of the object under study. This type of research has several problem approaches which in this paper are more aimed at the statutory approach, conceptual approach and case approach (Marzuki, 2005). Sources of legal materials in this study include, among others, laws and regulations, books, journals, articles and other documents relevant to the object of research. All legal materials are collected through literature techniques, analyzed qualitatively and presented prescriptively analytically (Ansari, 2023).

RESULTS AND DISCUSSION

The existence of Constitutional Court Decision Number 18/PUU-XVII/2019 on Parate Execution in Fiduciary Guarantee Agreements in Indonesia

The Constitutional Court Decision Number 18/PUU-XVII/2019 has created a new norm related to parate execution, which also means that through this decision, the execution of fiduciary guarantees has a new system to apply. The ruling existentially brings changes in the nature, basis for the validity and mechanism of the process of implementing parate execution, as well as presenting guarantees of legal protection.

Changing the Nature of the Existence of Execution Parate

Ontologically, the nature of parate execution in fiduciary guarantee agreements, especially in Indonesia, was originally intended to guarantee the implementation of financing agreements. A self-financing agreement is an act of financing agreement held by several parties. These parties include finance companies (creditors) and consumers (debtors) (Tobing, 2017), as well as buying and selling between suppliers (suppliers) and consumers (debtors) (Vinaya, 2018). Legally in the Civil Code (hereinafter referred to as the Civil Code) there is no concrete definition of a financing agreement. The Civil Code textually only regulates the types of agreements in general such as buying and selling, leasing, and borrowing. The absence of financing agreement arrangements in this Civil Code makes financing agreements known as *innominaat* agreements or unnamed agreements (Fuadi, 2006). Even so, actually the financing agreement is an agreement in general because it also applies the provisions of the legal conditions of an agreement as stipulated in Article 1320 of the Civil Code. In this context, the presence of execution parate in the fiduciary guarantee agreement

which is an additional agreement to the main agreement, namely the financing agreement itself serves to ensure the fulfillment of the performance of the parties. That is, the nature of parate execution here is as a guarantee institution whose role is to ensure good and consistent repayment of the performance of the debtor to the creditor in the financing agreement.

The nature of execution parate as a collateral institution in its course can be said to be exclusive. Exclusivity is intended for creditors who are given priority and priority in terms of repayment of their receivables through direct execution of the object of fiduciary guarantee in the hands of the debtor in the event of default. This is in accordance with the basis of the executory title contained in the fiduciary guarantee certificate (vide Article 14 paragraph (1) of the Fiduciary Guarantee Law) namely the words "FOR THE SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD", which is regulated in Article 15 paragraph (1) of the Fiduciary Guarantee Law. The content of the executory title itself is equated with the strength of a court decision with permanent legal force. Therefore, parate executions are allowed to be carried out immediately without the need for legal legitimacy, assistance from the judiciary and/or the authorities.

In its journey, the nature of execution parate as an exclusive guarantee institution was then changed to a conditional guarantee institution after the issuance of Constitutional Court Decision Number 18/PUU-XVII/2019. Referring to the ruling, there are two important points that illustrate the change in the nature of parate execution. First, the Court cancels the power in the executory title contained in Article 15 (2) of the Fiduciary Guarantee Law which is equated with the power of a court decision with permanent legal force. The cancellation makes it impossible to carry out parate execution directly unless a number of conditions are met. Second, the Court sets the conditions that must be met for parate execution by creditors, including:

1. There must be an acknowledgment from the debtor to the creditor that he has defaulted and voluntarily surrendered the object of the fiduciary guarantee.
2. If the debtor does not carry out the things required in the first point, the creditor must file a default claim in court and with a legally enforceable decision still declaring the debtor in default, the creditor can carry out parate execution.

When examined, it can be said that the above two conditions are set by the Court in the legal consideration of its decision by looking at a number of developing situations. The first situation is that the Court considers the exclusive nature of parate execution to create conditions or circumstances of arbitrariness or abuse of creditor authority against the debtor. That by utilizing the power of the same executory title as a court decision with permanent legal force, it can create a conclusion that the debtor has defaulted. This conclusion is considered incorrect because the state of default declared by the creditor against the debtor is carried out unilaterally through his subjective assessment. Instead of assuming the default, the creditor should also be able to blind the elements of the default. This is contrary to the principle of balance in achieving legal justice where the interpretation of justice is the granting of a right to everyone by remembering individual merits, based on balance (Alison, 2019). The second situation is that when the execution of parate by creditors is prone to human rights violations and there is no guarantee of legal protection for debtors. This is evidenced by the fact that creditors use debt collector services to withdraw fiduciary collateral objects which then tend to be carried out by physical violence and violate

human values. Based on that, the nature of the existence of execution parate as a guarantee institution that is exclusive due to the existence of an executory right which from the beginning was delegated by the framer of the law then changed its nature to a guarantee institution with conditional executory rights.

Reconstructing the basis and new mechanisms in the process of implementing parate execution

Long before the legal rule of fiduciary guarantees was born, parate executions were already carried out subject to the provisions of Article 224 H.I.R./Article 258 RBg namely using *the Grosse Acte Hypotheek*. However, after the establishment of the fiduciary guarantee legal regime, namely the Fiduciary Guarantee Law (or before the Constitutional Court Decision Number 18/PUU-XVII/2019), the process of implementing the execution of fiduciary guarantees with execution parate was carried out based on the application of the provisions of Article 29 of the Fiduciary Guarantee Law. There are three ways regulated in the article, namely: First, the execution parate process is carried out in accordance with the provisions of Article 15 paragraph (2) of the Fiduciary Guarantee Law, namely through the executory title contained in the Fiduciary Guarantee Certificate. This fiduciary guarantee certificate itself in accordance with the provisions of Article 14 paragraph (1) of the Guarantee Law is issued after going through recording in the Fiduciary Register Book which contains the stages of encumbrance and registration of fiduciary guarantees in accordance with the provisions of Article 5, Article 11, Article 12, and Article 13 of the Fiduciary Guarantee Law. Second, the sale of the object of fiduciary guarantee is carried out on the power of the Fiduciary Beneficiary himself in this case the creditor through a public auction from which repayment of the receivables is taken. In practice, public auctions are handed over responsibility to the State Wealth and Auction Service Office (KPKNL) and the District Court (PN) clerk's office at the location where the financing agreement was made and implemented. Third, underhand sales are carried out by agreement of the debtor and creditor if in this way the highest price can be obtained that benefits both parties. All these provisions make so that the object of fiduciary guarantee will be directly executed without the intermediary of the order (fiat) of the Chief Justice of the District Court to carry out confiscation and auction as well as the assistance of the competent authorities (state instruments). This also benefits the creditor because he can minimize expenses or costs by parate execution with the executory title in the fiduciary guarantee certificate. On the contrary, when compared to having to rely on the executory title that is on the fiat of the chairman of the District Court which of course requires costs to file a petition and execution.

After the Constitutional Court Decision Number 18/PUU-XVII/2019 was issued, the new basis and mechanism in the process of implementing parate execution as mentioned above then changed. The constitutional court reconstructed by affirming that the basis and process of implementing the execution parate is no longer carried out under the regime of Article 19 of the Fiduciary Guarantee Law but is subject to the constitutional court's decision governing the process of conditional execution, namely voluntarily and/or with the assistance of the district court through a court decision with permanent legal force and with a confiscation order by a judge and with the assistance of the competent authorities. If these two conditions cannot be carried out, the creditor must return to the auction mechanism, namely execution in general according to the provisions of Article 196 H.I.R/Article 208 RBg. This assertion, of course, means that the execution of the object of fiduciary guarantee must be through the intermediary of

a judge's decision or the fiat of the Chief Justice of the District Court to make a seizure. In other words, parate executions are carried out with the help of state instruments.

The above decision of the constitutional court was based on the consideration that Article 29 of the Fiduciary Guarantee Law which regulates parate execution mutatis mutandis is carried out in close coordination with Article 15 paragraph (3) of the Fiduciary Guarantee Law. In Article 15 (3) of the Fiduciary Guarantee Law, there is a blurring in the meaning of the phrase "on its own power", resulting in a conflict of norms between the article and the new interpretation of Constitutional Court Decision Number 18/PUU-XVII/2019. As a result, there is a dysfunction of legal protection for debtors because creditors have full authority to confiscate directly or parate executions on the object of fiduciary guarantee. In response to that in the creditor's interpretation, it will certainly be said that the decision is detrimental to him. This is because creditors as fiduciary recipients lose their authority in parate execution and settlement of effective and efficient execution of collateral seizures. However, this assumption is actually unreasonable because the new basis and mechanism set by the constitutional court in the decision is also beneficial for creditors. Meanwhile, if properly examined, this basis and execution process provides privileges for creditors to sue according to the provisions of Article 1243 of the Civil Code (vide Article 7 of the Fiduciary Guarantee Law) if proven debtors are in default. Based on this explanation, it can be said that the Constitutional Court decision Number 18/PUU-XVII/2019 has been designed to accommodate legal interests and present legal protection for parties, both creditors and debtors, by referring to legal objectives, namely justice, certainty, legal expediency.

Initiating Legal Protection

Departing from the previous explanation, it can be seen that there has been an initiation of legal protection for debtors and creditors in Constitutional Court Decision Number 18/PUU-XVII/2019. Legal protection can be interpreted as an effort to protect a person's interests by allocating power to him to act in the framework of his interests (Raharjo, 2000). In addition, legal protection can also be interpreted as an effort to protect the community from arbitrary actions from rulers who are not in accordance with the law or from legal rules that do not provide peace or welfare in the context of fulfilling and enjoying human dignity (Setiono, 2004). In relation to parate execution in fiduciary guarantee agreements, the legal protection provided by the constitutional court decision is legal protection relating to governmental power and economic power. According to Philipus M. Hadjon, legal protection with the characteristics of government power relations can be interpreted as legal protection for the governed (people) against those who rule (government). While in relation to economic power can be interpreted as legal protection for weak parties (debtors) against strong parties (creditors) (Hadjon, 1994). Therefore, if placed according to the context above, according to the author, the constitutional court decision provides two types of legal protection provided for debtors and creditors, namely preventive legal protection and repressive legal protection. As is known that preventive legal protection focuses on aspects of protecting before a violation occurs. Which means providing limits before the violation occurs (Gunawan Putra et al., 2023). While repressive protection places reference to efforts to protect after violations occur. This concept applies *a contrario* from before so that in this case the provision of sanctions such as compensation, imprisonment/confinement, and fines is the priority.

In this regard, if it is drawn in relation to legal protection for debtors by the decision of the constitutional court against the execution parate process, the following construction of legal protection will be found. First, through a constitutional court decision, the debtor's right to the object of fiduciary guarantee is legally protected. This is to prevent the unlawful transfer of the object of fiduciary guarantee from the debtor, including through parate execution. That is why in the decision of the constitutional court, the conditions for parate execution are stipulated, namely the submission of the object of guarantee on the basis of agreement or voluntarily (with the admission of default/default of the debtor) and with the knowledge of the court (through a tort lawsuit by creditors). That is, the constitutional court itself believes that as long as these conditions are not carried out, the creditor or anyone else should not deprive the debtor of the object of fiduciary guarantee because the debtor's rights are still inherent and defensible against the object of fiduciary guarantee. The construction of such legal protection is also to ensure legal certainty from the implementation of the publicity principle whose purpose is to affirm the ownership of the debtor as a fiduciary of objects that really belong to him (Junaedi, 2022). The principle of publicity itself comes into effect when the process of registering objects and security bonds contained in the fiduciary guarantee deed pursuant to Article 13 paragraph (2) of the Fiduciary Guarantee Law (recorded in the register book of the Fiduciary Registration Office) is carried out. Second, through the same constitutional court decision, debtors are given protection in the form of the right to sue. This right to sue can be exercised civilly or criminally, which right is placed in the context when the creditor still insists on withdrawing the object of fiduciary guarantee through execution parate. As a result, the object of fiduciary guarantee, that is, movable objects, is forcibly transferred from the debtor to the creditor. In civil terms, if there is a parate execution, the debtor can sue the creditor in court for all losses he suffers, both material and immaterial, on the basis of Unlawful Acts in accordance with the provisions of Article 1365 of the Civil Code. Meanwhile, criminally, debtors can report the act of parate execution of fiduciary guarantee objects with the offense of Theft with Violence in accordance with the provisions of Article 365 of the Criminal Code/Criminal Code juncto Article 368 of the Criminal Code concerning the offense of Extortion and Threats.

Meanwhile, legal protection is also provided for creditors, although it is said that creditors are theoretically in a strong position. However, it must be realized that the current practice of fiduciary guarantee agreements in society often causes polemics because sometimes creditors are also placed in a weak position. This is evident when the debtor transfers the object of collateral to a third party. The transfer of collateral objects occurs for several reasons such as not being able to pay and not liking the goods. But the usual reason is that the debtor is unable to carry out his achievements in this case to pay the credit installments of the goods until completion. This transfer is done illegally without the knowledge of the creditor or under the hands. The debtor himself in transferring the object of fiduciary guarantee is often only through verbal agreement or at least proven by proof of receipt in which a third party has paid a sum of money in installments that the debtor has paid to creditors. In other words, the third party before taking the object of the fiduciary guarantee must return the installment fee that the debtor has paid to him. This debtor's action is usually postulated by stating that the most important thing is that installments can be carried out until completion so that no loss occurs. This assumption of the debtor is strengthened also on the grounds that the object of the fiduciary guarantee belongs to him but he does not realize that he only owns and physically controls the object of the guarantee while the real property

rights lie with the creditor. Related to that, it is appropriate and appropriate for creditors to also be protected from actions taken by debtors because the transfer of the object of fiduciary guarantees makes so that creditors also experience losses. On that basis, in connection with the Constitutional Court decision Number 18/PUU-XVII/2019, legal protection is also provided for creditors. The legal protection for creditors in accordance with the constitutional court decision is that creditors are given the right to sue both criminally and civilly whose legal construction can be explained as follows.

First, creditors are given the right to sue criminally which has been affirmed in the constitutional court decision. This right is in the form of a provision for criminalization of debtors in accordance with the Fiduciary Guarantee Act when the object of the fiduciary guarantee is transferred. The granting of this right can be seen from the way the constitutional court accommodated the opinions of legal experts, namely Aria Suyudi and Sutan Remy Sjahdeini who asserted that the Fiduciary Guarantee Law was very correct in regulating criminalization as a form of legal protection for creditors. The reason is because the criminalization provision maintains the existence of fiduciary guarantee objects which are movable objects that are prone to damage, loss, impairment, and transferability which means causing losses to creditors. This is in line with J. Satrio's opinion which states:

> "An owner who lends movable property not in the name of assuming the risk that his borrowed property is passed to another person, with the consequence that under Article 1977 (1) of the Civil Code, the title will pass to a third party who passes it in good faith". The article itself contains the principle of mastery of movable objects acting as a perfect title.

Therefore, the criminalization provisions as explained above are regulated in Article 23 paragraph (2) *juncto* Article 35 and Article 36 of the Fiduciary Guarantee Law, each of which confirms:

> Article 23 paragraph (2): "The Fiduciary shall not transfer, mortgage, or lease to another party the Thing that is the object of the Fiduciary Guarantee which is not an object of stock, except with the prior written consent of the Fiduciary Beneficiary".
>
> Article 35: "Any person who intentionally falsifies, alters, omits or in any way misinformation, which if known by either party does not give birth to a Fiduciary Guarantee agreement, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp.10.000.000,- (ten million rupiah) and a maximum of Rp.100.000.000,- (one hundred million rupiah)".
>
> Article 36: "Fiduciary who transfers, mortgages, or rents Objects that are the object of Fiduciary Guarantee as referred to in Article 23 paragraph (2) without the prior written consent of the Fiduciary Beneficiary, shall be punished with a maximum imprisonment of 2 (two) years and a maximum fine of Rp.50,000,000 (fifty million rupiah)".

Referring to the provisions and in line with the statements of the experts mentioned above, according to the author, it can also be said that the constitutional court views the criminalization provision as a form of legal protection for creditors whose preventive nature is a necessity. This is evident because the act of criminalization through such articles is not evaluated in the constitutional court decision so that it can be declared to remain valid. In fact, if analyzed logically, all these articles still have a

close relationship with the privileges given by the framer of the law to creditors in order to parate execution. Which means that creditors are placed in a superior position because they have tools to threaten debtors legally. However, according to the author, the constitutional court takes this stance because the constitutional court is well aware that the provisions of these articles are only implemented situationally when the object of fiduciary guarantees is transferred. If there is no transfer incident, then automatically none of the above articles can be used to incriminate the debtor. So factually although power is given to creditors but its implementation is very limited for debtors.

Second, the right to civil sue as a form of preventive legal protection for creditors stipulated in the decision of the constitutional court as hinted at in the legal consideration of the decision. This right to sue is given by referring to a number of articles, including from Article 1246 to Article 1251 of the Civil Code, which is done by taking a mechanism, namely through filing a default lawsuit at the District Court. In other words, this effort is a litigation effort because the creditor chooses to resolve the debtor's default problem through the court. The basis for filing this lawsuit must meet sufficient requirements, namely by showing that legally the creditor does have the right to file a lawsuit (legal interests related to the lawsuit) (Sunarto, 2014). Related to that, the creditor must be able to show it in the lawsuit letter filed.

According to the author, based on his interests, there are several things that the creditor as the plaintiff pleaded with the court to decide. Referring to the legal construction of the agreement, creditors can request that several things be done, including termination of the agreement or termination of the contractual relationship, re-fulfillment of the contract, namely in the form of fulfillment of performance, fulfillment of the contract with compensation claims, or just compensation (Amalia, 2012). Regarding the termination of the agreement according to the explanation above, in the author's view, it can be terminated by a panel of judges if it is explicitly stipulated in the clauses of the agreement and on the basis of the agreement of the parties. But in practice, filing a lawsuit means that the legal relationship between creditors and debtors is tenuous. Therefore, it is certainly very possible that the termination of the agreement or termination of the contractual relationship is realized and terminated. As a consequence, the creditor will definitely only plead with the court for the debtor to pay damages. In other words, the debtor is filed a claim for compensation in accordance with the provisions of the Civil Code. The claim for compensation against the debtor can be charged in 3 (three) components, including costs, losses, and interest.

Costs include all prices paid by creditors in the process of making a fiduciary guarantee agreement (Tjoanda et al., 2021). This fee is in the form of accommodation costs, especially in the process of registering fiduciary guarantee objects, all related administrations until the issuance of a fiduciary guarantee certificate are included in this case. Loss in this context can be interpreted in a narrower sense relating to creditors' property or more precisely regarding wealth. In this context, the debtor is required to pay losses because his act of default can be said to have resulted in the creditor's assets being reduced. This is indeed based on the fact that as is known before the holding of a fiduciary guarantee agreement as a guarantee institution, creditors and debtors have been involved in the principal agreement or credit agreement. Which in the process of making the principal agreement has drained the creditor's assets, namely by spending funds for the debtor to get the goods he wants, namely by buying them from suppliers. Interest relates to other benefits that will be

obtained by creditors after the end of the engagement between creditors and debtors, or other costs beyond principal costs and losses. According to the facts, the emergence of default certainly makes the implementation of the agreement stopped halfway so that the final goal of getting interest will not be achieved. Therefore, it is natural that interest as one of the components of compensation is also included in creditors' claims.

Despite all this, the main purpose in a debtor default lawsuit is an application for execution of the object of the fiduciary guarantee agreement. The creditor here will request that through a court decision, the judge order that the object of fiduciary guarantee be handed back to the creditor if according to the evidence it is found that the debtor has defaulted. For this reason, in the lawsuit, the creditor no longer needs to apply for a security confiscation because in fact the object of the guarantee has the creditor's property rights. It's just that the physical collateral object is in the temporary control of the debtor so that in accordance with the decision of the constitutional court, it is the judge's fiat that can cause its submission to the creditor. Based on that, it is clear to elaborate the form of legal protection provided by the constitutional court decision against creditors for debtor default actions in fiduciary guarantee agreements. In principle, through the explanation above, it will be understood that legal protection is provided for the parties by the decision of the constitutional court with the aim of fostering legal awareness in the practice of fiduciary guarantee agreements, especially related to parate execution.

Parate Execution in Fiduciary Guarantee Agreement in Indonesia After Constitutional Court Decision Number 18/PUU-XVII/2019

The practice of parate execution after the Constitutional Court decision Number 18/PUU-XVII/2019 is very important to see the current implementation process. This is to find out whether the decision of the constitutional court as a juridical basis that has a great existence in changing the scope of parate execution theoretically, in empirical circumstances is also implemented appropriately and consistently. Therefore, in this discussion section, we will see the latest practices in the execution parate process. Where practice shows that a constitutional court ruling has been able to change the execution parate process, it can be ascertained that the decision is effective as law. Conversely, if it still does not change the execution parate process, it must be analyzed where the cause is. That whether the process of parate execution is not in accordance with the judgment is because the judgment itself is weak and has no legitimacy to apply because it has no force. Moving on from all these hypotheses, an assessment will be carried out to find the right solution to overcome these weaknesses.

Current Execution Parate Practices

A review of the current practice of parate execution must of course be carried out by referring to examples of cases that occur and the facts obtained relating to these examples. This is in accordance with the approach used in this study, one of which is the case approach. As explained by the author in the background of this study that the current practice of parate execution after the constitutional court decision still applies direct execution by creditors in accordance with the provisions of Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Guarantee Law. This provision has been tested in the constitutional court and declared contrary to the 1945 Constitution because it is not fair, beneficial and provides legal certainty and does not provide legal

protection for debtors. Then with that the constitutional court set conditions for creditors who want to parate execution. Therefore, here the author will further reinforce the explanation by presenting examples of similar cases so as to prove that the practice of parate execution is still far from expected.

The first case that proves the description of the explanation above can be seen in the case of withdrawal of fiduciary guarantee objects by the finance company (creditor) Adira Finance which occurred in Pontianak, West Kalimantan. Chronologically, the victim named Nirawati Purnama Sari was visited by debt collector Adira Finance on January 10, 2022 who intended to take her car. They forcefully and violently snatched the car keys and herded the victim to the office of finance company Adira Finance. After arriving the victim is forced to make a statement to make payment of installments/arrears within a period of one month. However, to be able to take the car home, the victim was required to pay six million rupiah. The next day, the victim was only able to pay half the price of three million rupiah and was finally allowed to bring the vehicle. However, on February 5, 2022, the victim was again visited by another debt collector who claimed to be given an order by the head collector of Adira Finance Pontianak Branch to take the car. Even more surprising is that the car was sold unilaterally by the creditor without an agreement with the victim as the debtor. In this case, the victim felt cheated and suffered a loss because the cost of three million rupiah that he had handed over was never returned.

The behavior and practice of parate execution described in the example case above is in fact apparently justified by the finance company or creditor. This can be seen in the latest news that the author quoted from the Bisnis.com online news page with the title "Leasing Explains the Stages of Vehicles Recalled due to Bad Credit", dated November 5, 2023, in which according to the source, namely the Deputy Director and Collection of PT Adira Dinamika Multi Finance Tbk (ADMF), it was explained that his company as a finance company in the practice of credit agreements after maturity always gives warnings to debtors for 7 (seven) good day via messages via SMS and Whatsapp. Then on the 8th day they will give a warning over the phone. If up to a period of two weeks after being given a warning, the debtor does not respond, then they will make a withdrawal. When towing a vehicle (fiduciary guarantee object), the office officer will bring a number of documents such as a letter of duty/power of attorney, warning letter, Indonesian Financing Process Certification, and fiduciary documents.

Similar cases apparently did not stop because the next occurred in Palembang, South Sumatra carried out by PT Woori Finance Indonesia and PT Batavia Prosperindo Finance. The object of fiduciary guarantee in the form of a Suzuki Carry Pick Up car that is in the debtor, namely the victim on behalf of Bambang was seized by the debt collector of the two finance companies when his brother named Badr was driving the car. The debt collector immediately made a forced recall without any other explanation and warrant, other than saying that the car would be taken to the Batavia leasing. For this incident, the victim then reported the act to the Palembang Police Station where a report was made accompanied by her legal representative. According to the lawyer, the police report was made with regard to the criminal offense Article 368 juncto Article 365 of the Criminal Code. The report itself was received at the Palembang Police Integrated Service Center (SPKT) officer with Number LP/B/2599/XI/2023 on November 20, 2023 and further legal proceedings.

Regarding all these cases, it turns out that previously the Chairman of Commission 1 for Research and Development of the National Consumer Protection Agency or BPKN on May 17, 2023 in Bali had given his response. According to him, it is said that withdrawals must meet several conditions, including a warning letter given to debtors one to three times and a fiduciary guarantee certificate. He also emphasized that the trend of withdrawing fiduciary guarantee objects in the form of vehicles seems to be rife now because debtors do not agree to give voluntarily so creditors use coercion on it. He added that forced withdrawals by debt collectors should be carried out by pocketing files such as fiduciary certificates so that the voluntary process of submitting the object of fiduciary guarantee can be carried out by the debtor. If not, the creditor will have to wait for a court decision.

Based on the explanation above, it can be seen that after the Constitutional Court decision Number 18/PUU-XVII/2019, the withdrawal of the object of fiduciary guarantee by creditors through execution parate still occurs. The creditor as in the case of Adira Finance above apparently understands that the withdrawal of the fiduciary guarantee object is valid as long as the internal Standard Operating Procedure (SOP) of his office is complied with. Likewise in the case of Woori and Batavia Finance where in reverse there is also the fact that the debtor who is a victim also still considers the withdrawal valid if there is a warrant. So from all these cases, it appears that the public has not reached out to knowledge about the existence of the constitutional court ruling. Meanwhile, finance companies also still lack information related to legal provisions, in this case, the constitutional court decision prohibits the practice of parate execution and can also ignore even though they know it. Not only that, consumer protection agencies also according to the explanation above still seem to justify the creditor's actions in withdrawing the object of fiduciary guarantee provided that the related documents are complete. Conversely, it does not affirm that the constitutional court's ruling regarding the parate execution of fiduciary guarantee objects actually prohibits it. Contrary to all these explanations, it can be said that the public and even related institutions still interpret parate executions outside of those specified in the constitutional court ruling. Therefore, it is clear that the decision of the constitutional court has not changed the pattern of behavior in the process of withdrawing the object of fiduciary guarantees carried out through parate execution. This is because of the lack of knowledge about the existence of the ruling itself which when compared to the law is more quickly known by all parties.

Weak adherence to Constitutional Court rulings

As explained above, it was found that the constitutional court decision was still very weak in changing the pattern of behavior of finance companies in conducting execution parates. This also means that compliance with constitutional court rulings is still very low sociologically in practice in the field. The author in this case finds several reasons for the weak observance of creditors to the decisions of the constitutional court, which can be explained as follows.

First, the non-binding nature of constitutional court decisions even if they are declared final. This is evidenced by tracing all the provisions of laws and regulations, both Article 24C paragraph (1) of the 1945 Constitution, Article 29 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power (hereinafter referred to as the Law on Judicial Power), and Article 59 paragraph (1) of the first amendment to the Constitutional Court Law. All articles in the law only state that the decision of the constitutional court is final, none

of which mentions the word "binding". Indeed, there is an assumption from a number of legal experts, one of which is I Dewa Gede Palguna who is also a former Constitutional Judge who states that the word "binding" which is not listed to complement the word "final" is not a substantial issue that must be worried (Indra et al., 2023). This statement, according to the author, seems to consider the matter a small thing, but in fact it has a great impact on public compliance with the verdict. The reason is because Indonesia is a legal state that principally adheres to the principle of legal certainty in accordance with the flow of positivism. Legal positivism basically talks about the assessment of the validity of the rule of law which is judged from its formal aspect which applies if it is textually regulated. As a result, if it is not regulated textually in a certain rule regarding a certain matter, then it can be considered that the law does not apply imperatively, but is optional. This is what happened to the Constitutional Court decision Number 18/PUU-XVII/2019. It can be seen that the decision of the constitutional court in the view of creditors is not a law in the true sense that governs parate execution, when compared to the Fiduciary Guarantee Act.

Second, the substance of the judgment that does not contain imperative norms or order norms against the parties to the fiduciary guarantee agreement of both creditors and debtors. In the constitutional court decision, it can be seen that the construction of norms compiled is voluntary (Samudra, 2023). Or it can be said that the Constitutional Court decision Number 18/PUU-XVII/2019 only contains the principle of willingness in regulating the execution parate process in Indonesia. In legal considerations, the judgment is clearly stated that with the admission of default/default of the debtor, there is a voluntary surrender of the object of fiduciary guarantee by the debtor, otherwise the execution parate cannot be carried out by the creditor. In fact, not a single debtor in the current practice of fiduciary guarantee agreements would admit that he or she was in default. In addition, especially until the steadfastness or willingness to hand over the object of fiduciary guarantee to creditors. This is what makes the practice of parate execution even more complicated. The creditor himself certainly does not want to be outdone because he considers himself to be the most disadvantaged party in this matter so that in any way the object of fiduciary guarantee must be obtained. This principle of willingness should not be an important factor in regulating parate execution because the nature of the constitutional court's decision as law should give orders. The existence of the principle of willingness in the decision of the constitutional court is tantamount to opening up space for debate and conflict for the parties, namely debtors and creditors.

Third, the form of judgment that is not easily understood, accepted, and accessed by the public as a form of rule of law in the true sense as well as other laws or regulations, thus making compliance and obedience to the Constitutional Court decision Number 18/PUU-XVII/2019 low. The public's obedience and obedience to the decisions of the judiciary as well as the constitutional court is still very far from expected. According to several studies, it is stated that in the period 2003-2018 there were at least 15% of rulings not fully complied with, 5% of rulings were not obeyed, and 7% of rulings were not followed up (Alfana, 2023). Other research data also states that approximately 22.1% of constitutional court decisions (2013-2019) related to judicial review are not followed up (Sulistyowati et al., 2021). In line with that, the former Chief Justice of the Constitutional Court, Anwar Usman, on one occasion once said this that in fact there are indeed those who do not obey the constitutional court's decision (Rusiana, 2024). All these facts are actually due to the knowledge of the public and access to

constitutional court decisions is still very limited. This limitation is due to the authority of the constitutional court institution which, although in fact forms the law through its decisions, the way it is disseminated to the public is not as effective as the law (promulgation). Meanwhile, the precedent of the community so far has only believed that compliance and obedience are to the laws and regulations, so of course the constitutional court decision is excluded from this group. This is reinforced by the regulative fact, namely in Law No. 12 of 2011 concerning the Establishment of Laws and Regulations (hereinafter referred to as Law P3) does not regulate that constitutional court decisions, especially related to judicial review, are included in the type and hierarchy of laws and regulations in Indonesia. Therefore, when the decision is issued, the role of the Government (President) and the House of Representatives as *a positive legislature* (Hadjie et al., 2024) is needed to follow up on decisions related to judicial review. As explained in Article 10 paragraph (2) of Law P3 which states "Follow-up on the decision of the Constitutional Court as referred to in paragraph (1) point d is carried out by the DPR or the President". So it means that the decision of the Constitutional Court Number 18/PUU-XVII/2019 regarding the examination of Article 15 paragraph (2 and Article 15 paragraph (3) of the Fiduciary Guarantee Law should be immediately followed up by the Government and the House of Representatives whether by revising the current Fiduciary Guarantee Law or by forming a new law or through the instrument of Presidential Regulation.

Based on the description of the explanation above, it is clear that the nature, substance and form of the Constitutional Court decision that makes and influences so that the Constitutional Court decision Number 18/PUU-XVII/2019 regulating the execution parate process cannot be implemented properly by the parties in the fiduciary guarantee agreement. In addition, the responsiveness and lack of initiative from the Government and Parliament in understanding social symptoms in the practice of fiduciary guarantee law, especially with the birth of the Constitutional Court decision Number 18/PUU-XVII/2019 which must be followed up formally are also factors that aggravate the law enforcement process of the constitutional court decision. The result, of course, is that the obedience and attachment of the community, especially economic actors, has been degraded and it also means that the enforceability of the Constitutional Court decision Number 18/PUU-XVII/2019 does not exist at all.

Solutions to overcome existing weaknesses

After examining the weaknesses in the Constitutional Court decision Number 18/PUU-XVII/2019 which includes the nature, substance, and form of the decision that causes the practice of parate execution to date still applies the provisions of Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Guarantee Law, namely direct execution of the object of fiduciary guarantee using the executory title in the fiduciary guarantee certificate, the author will present solutions to existing problems. This solution is expected to make the existence of the Constitutional Court decision Number 18/PUU-XVII/2019 specifically as well as other constitutional court decisions in general related to judicial review more real so that it has binding force to be obeyed by the community. The solution as referred to can be conveyed comprehensively in the following explanation formulation. In terms of overcoming problems related to the nature of constitutional court decisions that are not binding even though they are declared final in accordance with the provisions of Article 24C paragraph (1) of the 1945 Constitution, Article 29 paragraph (1) of the Law on Judicial Power, and Article 59 paragraph (1) of the first amendment to the Constitutional Court Law, the author

saves the need for revisions to the Constitutional Court Law and the Judicial Power Law which are not only intended to add "binding" diction will still confirm that the constitutional court decision that It is final and binding in the future must be implemented immediately. In the case of the 1945 Constitution as the main source of regulating the nature of constitutional court decisions, the author is of the view that in the future, if amendments to the 1945 Constitution are carried out in accordance with developing legal issues, it is important to note that it becomes ius constituendum.

Meanwhile, in relation to the issue of the substance of the Constitutional Court decision Number 18/PUU-XVII/2019, the author argues that it should be from the beginning before it is decided, the judges of the constitutional court must think about the practical situation in the field related to obedience to the decision. For this reason, the Constitutional Court decision Number 18/PUU-XVII/2019 should be made by emphasizing imperative norms rather than emphasizing the principle of willingness because the existential urgency of a decision is to be implemented as soon as possible and obeyed. This is certainly an important input not to teach how constitutional judges decide and formulate norms. However, how to respond to the phenomenon of fiduciary guarantee agreement practice in Indonesia today so that in the event of the issuance of a decision related to the parate process, the execution must be obeyed by the community or to the decision in other contexts as well. The author's opinion is based on the opinion that the judgment is the Crown of the institution of judicial power which in this case also applies to the constitutional court itself with its rulings. This crown shows the authority and independence (Suhardin, 2023) of the Constitutional Court institution in determining the direction of development and enforcement of law and constitution in Indonesia in the future. Through the attention of judges to the existence of rulings in society, it is hoped that constitutional court decisions can be even more useful to maintain and guard the human rights and constitutional rights of every Indonesian citizen.

Furthermore, on the issue of the form of constitutional court decisions in general which causes the Constitutional Court decision Number 18/PUU-XVII/2019 cannot be implemented properly and has an existence in changing the execution parate process in Indonesia, the author thinks this requires the participation of the government and DPR in overcoming it. In accordance with the provisions of Article 10 paragraph (2) of Law P3, the Government and the House of Representatives must immediately translate the language of normative constitutional court decisions in the form of concrete laws and regulations, namely the Fiduciary Guarantee Law. For this reason, the author expects the Fiduciary Guarantee Law to be revised immediately by the DPR. If the House of Representatives is still slow, the President must immediately issue a Presidential Regulation as an instrument to make changes to the Fiduciary Guarantee Law. Through the Presidential Regulation, it can then be proposed as a national legislation program of government initiatives so that it is determined as the first amendment to the existing and current Fiduciary Guarantee Law. Moreover, there is also one way that can be done if it is to be effective so that the Constitutional Court decision Number 18/PUU-XVII/2019 and other decisions related to judicial review in the future can be directly applied and more binding on the community. This is by encouraging the revision of Law P3, especially Article 7 paragraph (1) which regulates the type and hierarchy of laws and regulations, where constitutional court decisions relating to judicial review must be declared laws and regulations. For the decision of the Constitutional Court Number 18/PUU-XVII/2019 itself, if changes have been made

to Law P3 according to this explanation, it must be declared retroactive to further emphasize enforceability. However, if in fact before the P3 Law was revised, it turned out that the Fiduciary Guarantee Law had been revised or a Government Regulation in the context of changes to the Fiduciary Guarantee Law had been issued, then it was no longer needed. One thing that should not be forgotten is that the provisions that are expected to be contained later in the revision of the Fiduciary Guarantee Law or Presidential Regulation are the determination of criminal and administrative sanctions against finance companies. Criminal sanctions in this case as primium remedium mean the main choice to crack down on finance companies, especially debt collectors who parate execution. While administrative sanctions are the ultimate remedium which applies as the last mechanism if criminal sanctions are ineffective. This administrative sanction is in the form of revocation of operational licenses from finance companies that still practice direct execution of fiduciary guarantee objects despite warnings by the government. All solutions that the author describes must basically also be based on cooperation shared by all interested agencies and institutions, especially finance companies as creditors. In addition, legal awareness of the community as debtors is also needed to better measure the ability to carry out contractual legal relationships, in this case fiduciary guarantee agreements.

CONCLUSION

Based on the overall results of the discussion, it can be concluded that the existence of the Constitutional Court decision Number 18/PUU-XVII/2019 is still not visible in its relevance to regulating the execution parate process in Indonesia. Facts on the ground show that the practice of parate execution is still being carried out after the issuance of the Constitutional Court decision Number 18/PUU-XVII/2019. Creditors in this context still understand execution parate as a reasonable mechanism in a fiduciary guarantee agreement as stipulated in Article 15 paragraph (2) and Article 15 paragraph (3) of the Fiduciary Guarantee Law, while the debtor himself is still very lacking knowledge of the decision. Coupled with the response of institutions or agencies related to supervision of credit activities and consumer services such as BPKN that do not provide socialization to the public related to existing constitutional court decisions. All of these are caused by inhibiting factors, including the nature, substance, and form of the decision which resulted in weak compliance of finance companies as creditors and the public as debtors to the decision of the Constitutional Court Number 18/PUU-XVII/2019. However, the obstacles faced can be resolved by encouraging the revision of laws and regulations that regulate the nature of constitutional court decisions as binding decisions and must be implemented immediately. In addition, active cooperation is needed from the Government and the House of Representatives to immediately translate the language of the constitutional court's decision in the form of concrete laws and regulations, in this case the Fiduciary Guarantee Law itself. In the end, with all these efforts, the legal protection function of the Constitutional Court decision Number 18/PUU-XVII/2019 can be felt more by debtors and creditors in the future.

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