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## LEGAL PROTECTION OF THE PARTIES IN CREDIT AGREEMENT WITH FIDUCIARY GUARANTEE AFTER THE ISSUANCE OF CONSTITUTIONAL COURT DECISION NO.18/PUU-XVII/2019

Celina Tri Siwi Kristiyanti

Universitas Katolik Widya Karya Malang

Email: celina.tri@widyakarya.ac.id

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### Abstract

Article 15 of Law No. 42 of 1999 concerning Fiduciary Guarantees is felt burdensome to debtors because creditors make forced efforts to take fiduciary guarantee objects in the form of 2-wheeled and 4-wheeled vehicles. The purpose of this study is (1) to find out the basis of the Constitutional Court's Decision No. 18/PUU-XVII/2019 (2) to find out the legal consequences of the Constitutional Court Decision No. 18/PUU-XVII/2019 on legal protection for parties to credit agreements with fiduciary guarantees (3) to find out the obstacles on Financial Service Institutions in the implementation of the constitutional court decision No. 18/PUU-XVII/2019. The research method used is juridical normative and empirical with a case study approach. The results of this study revealed that (1) since the Decision of the Constitutional Court No. 18/PUU-XVII/2019, the executive confiscation cannot be done directly by creditors must go through a court decision. The executorial confiscation in Article 15 of Law Number 42 concerning Fiduciary Guarantee has been contrary to Article 1 (3), Article 27 (1), Article 28D (1), Article 28G (1) and Article 28H (4) of the Constitution of 1945. (2) It takes good faith from the parties so that the implementation of the Constitutional Court Decision No. 18/PUU-XVII/2019 guarantees justice, legal certainty and provides legal protection. (3) An agreement is required in accordance with the principle of freedom of proportionate contract; there is a balance of position between the debtor and the creditor.

**Keywords:** constitutional court decision; fiduciary guarantees; legal protection; parties

### 1. INTRODUCTION

Collateral is an effort to obtain capital, from a principal agreement of accounts payable or credit. Modern credit currently has several objectives, namely firstly to provide benefits to creditors obtained through an interest in conventional credit agreements or in the form of margins in financing agreements, on the other hand, profits are also obtained by customers, especially if the credit is intended to support the sustainability of the debtor's

business (credit). Firstly, it is carried out for investment in the expansion and development of the debtor's business), or at least in general, with credit, the debtor can easily obtain the needed objects, secondly, it aims to encourage national development in various sectors, with credit increasing the amount of tax revenue, opening or expanding job vacancies, increasing the number of goods and services needed by the community, increasing the amount of foreign exchange and so on (Abdullah & Tantri, 2002).

Material guarantees that are easy to practice are in the form of trust or fiduciary. Fiduciary in Indonesia is regulated in Law No. 42 of 1999 concerning Fiduciary Guarantee. The fiduciary is the development of a pawning institution, therefore the object of the guarantee is movable goods, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered by Mortgage Rights.

Fiduciary, according to Law no. 42/1999 concerning the Fiduciary Guarantee, is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object. The owner of the object acts as a fiduciary giver (debtor), while the fiduciary recipient (creditor) is a party who has a receivable whose payment is guaranteed by a fiduciary guarantee. Meanwhile, according to A. Hamzah and Senjun Manulang as quoted by Salim HS, a fiduciary is a way of transferring property rights from the owner (debtor in the main agreement) based on a debt agreement to creditors, but only the rights are handed over by juridical-levering and only owned by the creditor in trust only (as collateral for the debtor's debt), while the goods are still controlled by the debtor, but not as an eigenar or as a bezitter, but only as a detentor or houder and on behalf of the creditor-eigenar (Salim, 2004).

Execution is the final step that can be undertaken by the creditor when it is believed that the debtor no longer has the ability and/or good faith to settle his obligation to pay credit. Payments that should be paid periodically are not made by the debtor. In practice, it is found several reasons for non-performing credit (bad credit) that should be met by the debtor, one of which is caused by the increase in unexpected needs in the family and become dependents of the debtor, the failure of the business as the main source of income for the debtor and/or family, or one of them is known because the debtor

does not have good faith to settle credit in accordance with the agreed agreement. For these different reasons, creditors generally have a way of settling bad loans or a different method of execution.

The power as a preferred creditor or privileged creditor to pay off debts must have a fiduciary guarantee certificate which contains the identity of the fiduciary giver and recipient, description of the object, the value of the guarantee, until the value of the object includes the sentence 'For Justice Based on God Almighty' as the court decision reads. Initially, Article 15 paragraph (2) of Law no. 42/1999 on Fiduciary stipulates that a fiduciary guarantee certificate has the same executorial power as a court decision which has permanent legal power. Furthermore, Article 15 paragraph (3) of Law 42/1999 states that the fiduciary recipient has the right to sell objects that are the object of the fiduciary guarantee on his own power if the debtor breaks his promise.

The two paragraphs in Article 15 of Law No. 42 of 1999 concerning Fiduciary Guarantees is felt to be burdensome for debtors because creditors make efforts to forcefully take the object of fiduciary in the form of 2-wheeled and 4-wheeled vehicles. This often happens in the community and the number is increasing. Throughout 2019, the Indonesian Consumers Foundation recorded 32 complaints related to the financing industry out of a total of 263 complaints from the financial services industry. Of this amount, the banking sector recorded 106 complaints, online loans 96 complaints, insurance 21 complaints, and electronic money 8 complaints (Pratama, 2020).

Responding to complaints and lawsuits from debtors of financial institutions for forced efforts in taking the object of fiduciary guarantees, the Constitutional Court of the Republic of Indonesia issued a decision regarding the execution of fiduciary guarantees that must go through the courts. The Constitutional Court requires the execution of objects of

fiduciary security that are not submitted voluntarily by the debtor must follow the procedure for executing court decisions that have permanent legal power.

The Constitutional Court's decision related to the interpretation of Article 15 paragraphs (1-3) of Law no. 42 of 1999 concerning Fiduciary Guarantees related to breach of contract (default) in the execution of fiduciary guarantees. This begins with the article being interpreted if the debtor (consumer) is breach/breaks a promise, the fiduciary recipient (leasing company) has the right to sell the object of collateral with his own power (auction) as is the case with an inkracht court decision. However, after the issuance of the Constitutional Court's decision numbered 18/PUU-XVII/2019 dated January 6, 2020, the Court gave a different interpretation from the previous article. Now, the certificate of fiduciary guarantee, which contains instructions "For the sake of Justice Based on the One Godhead", no longer automatically has executive power. In that decision, breach of contract in the execution of a fiduciary agreement must be based on an agreement between the two parties between the debtor and creditor. If there is no agreement, one of the parties can take legal action through a lawsuit to the court to determine/decide that the breach of contract has occurred. The implementation of Article 15 paragraph (2) and paragraph (3) of the Fiduciary Guarantee Law related to the execution of this fiduciary guarantee in practice creates arbitrariness of the creditor when collecting, withdrawing the object of the fiduciary guarantee (movable object) on the pretext of the debtor's breach of contract.

Several related studies have previously examined fiduciary guarantees, including research conducted by [Ramanda et al. \(2021\)](#) that examined the legal consequences for debtors who have been voluntarily submitted to the creditor for a voluntary warranty and the legal protection of a debtor who is in good faith

hand over a fiduciary guarantee. The results of this study showed that Financial Services Authority Regulation Number 33 / Pojk.03/2018 Regarding Quality of Earning Assets and Formation of Allowance for Earning Assets of Rural Credit Banks, regulating the issue of Collateral Foreclosed can be overridden or become not valid, or at least a material test by the Supreme Court. If violated, it results in being null and void. Furthermore, based on legal protection theory, that Article 15 paragraph (2) of Law Number 42 Year 1999 does not provide legal certainty and justice for debtors. [Markum et al. \(2021\)](#) also conducted a similar study with this present study. [Markum et al. \(2021\)](#) analyzed the juridical implications of the Constitutional Court's decision on fiduciary agreements made before the Constitutional Court's Decision (MK), as well as the juridical implications of fiduciary agreements or on fiduciary executions that have been carried out before the MK Decision Number 18/PUU-XVII/2019. The results of this study showed that the ratio of the decision of the MK Decision Number: 18/PUU/XVII/2019 Regarding Fiduciary Guarantees do not apply the principle of balance and has no legal consequences for the fiduciary guarantee agreement made before the decision is enforced. [Hadinata \(2021\)](#) also conducted a similar study that examined legal consequences faced by the creditor related to the forced withdrawal of the fiduciary security object. The results of this study revealed that as a result of the creditor executing the object of fiduciary security by force when the debtor defaults, it can be subject to criminal sanctions contained in Articles 335, 365, and 368 of the Criminal Code related to using coercion and physical violence and in Article 3 paragraph 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 which also imposes sanctions on financial institutions that do not register the object of guarantee at the fiduciary guarantee registration office. As for the things that underlie the parties to take legal action,

namely: the creditor wants the debtor's obligations to be carried out correctly to pay off his debt. In contrast, the debtor wants to get protection against the forced withdrawal of the object of the guarantee carried out by the creditor.

From previous research, it was revealed that creditors often carry out executions without supporting documents as preferred (privileged) creditors in the form of a fiduciary guarantee deed registered at the Fiduciary Registration Office (referred to as KPF), so that they confiscate the object of fiduciary guarantees arbitrarily because they are strong business actors. This is supported by the existence of a standard clause that has been signed by the debtor/consumer so that it supports the abuse of circumstances by carrying out an executorial confiscation that is not in accordance with the regulations. Therefore, this study aims (1) to find out the basis of the Constitutional Court's Decision No. 18/PUU-XVII/2019 (2) to find out the legal consequences of the Constitutional Court Decision No. 18/PUU-XVII/2019 on legal protection for parties to credit agreements with fiduciary guarantees (3) to find out the obstacles on Financial Service Institutions in the implementation of the constitutional court decision No. 18/PUU-XVII/2019.

## **2. METHODS**

The method used in this study is a juridical normative empirical legal research, namely research that examines the statutory regulations in a normative manner whether they are in accordance with applicable principles and how they are implemented, related to fiduciary guarantees after the Constitutional Court Decision No. 18/PUU-XVII/2019. In addition, a case study approach is the approach of this study. The juridical normative empirical research method with a case study approach is carried out in order that achievements are more comprehensive related to the principle of legal protection for parties in fiduciary guarantees.

## **3. RESULTS AND DISCUSSION**

### ***The Basis of Constitutional Court Decision No. 18/PUU-XVII/2019 in terms of legal protection theory***

In economic activities, collateral plays an important role because to get a capital loan, a guarantee is required, which is met by capital seekers in order to get a long-term or short-term capital loan (Winarno, 2013). The execution of fiduciary guarantees based on Article 29 of Law No. 42/1999 concerning Fiduciary Guarantees states that the execution of fiduciary guarantees is carried out by means of implementing executorial titles, selling through public auctions, with the approval of both parties (Budi, 2017). The problem that occurs is the act of vigilantism in the settlement of fiduciary guarantee disputes. Legal uncertainty in the execution of fiduciary guarantees is a problem due to misinterpretation.

The Constitutional Court (referred to as MK) through Decision Number 18/PUU-XVII/2019 regarding requests for judicial review of Law No. 42 1999 concerning Fiduciary Guarantees Article 15 paragraph 2 and Article 15 paragraph (3) by Apriliani Dewi and Suri Agung Prabowo. Case registration number 18/PUU-XVII/2019. The Petitioner argues that Article 15 paragraph (2) and 3 of the Fiduciary Law reads Article 15 paragraph (2) that "The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has obtained permanent legal power", and Article 15 paragraph (3) that "If the debtor is in breach of contract, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Guarantee on his own power" is considered to have harmed his constitutional rights. The Petitioners also considered that the article was contrary to Article 1 (3), Article 27 (1), Article 28D (1), Article 28G (1) and Article 28H (4) of the 1945 Constitution.

The execution of fiduciary guarantees, which in practice often creates polemics, is

carried out with the norms of Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees which refer directly to Article 15 paragraph (2) and paragraph (3) of the quo Law. To answer the existing polemic, interpreting Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees as an appropriate solution to serve as the basis for the parties involved in the fiduciary guarantee agreement.

Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees states that the certificate of a fiduciary guarantee agreement has binding legal power as a court decision that has permanent legal power. This is interpreted in absolute terms so that the execution of fiduciary guarantees against defaulting debtors no longer requires a court decision. Likewise, Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees also creates a polemic, because the Article a quo only mentions the condition of breach of contract, but it does not specifically explain the indicators of the breach of contract and it does not specify which party has the authority. to declare the condition of default against the parties involved in the fiduciary guarantee agreement (Amry, 2020).

The polemic caused by Law Number 42 of 1999 concerning Fiduciary Guarantees is what the Constitutional Court interprets differently from the absolute interpretation as described above. The Constitutional Court in its Decision Number 18/PUU-XVII/2019 provides an interpretation of the executive power referred to in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which can be interpreted as before as long as the parties voluntarily accept the execution and admit that they have committed a default, and Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantee provides an interpretation that the condition of breach of contract must be determined by the court if one of the parties does not

admit that he has been in breach of contract or in other words, there has been an agreement that there has been a breach of contract occurs.

The basic legal considerations of the Constitutional Court in its Decision Number 18/PUU-XVII/2019 relate to the main issues in Article 15 paragraph (2) and paragraph (3) of Law Number 42 of 1999 concerning Fiduciary guarantee as stipulated in the Decision of Constitutional Court Number 18/PUU-XVII/2019 which is basically as follows: The consideration of the Constitutional Court provides the interpretation of "executory title" for fiduciary certificates and "equalizes it with court decisions that have permanent legal power "in Article 15 paragraph (2) of Law Number 42 1999 concerning Fiduciary Guarantees can cause an imbalance in legal rights between creditors and debtors because the executive authority is given to creditors on their own power without having to go through a civil lawsuit in a court of law or ask for assistance from the competent state apparatus for that, such as in the execution of court decisions. This is contrary to the principle of balance in achieving legal justice in order to realize the legal protection of the parties. Justice itself is interpreted as granting a right to everyone by considering individual merits, based on balance (Santoso Az & Yahyanto, 2016). Furthermore, the Constitutional Court is also argued that although the petition for judicial review is requested to test the provisions in Article 15 paragraph (2) of the Fiduciary Guarantee Law, it has been declared unconstitutional to the phrases "executory power" and the phrase "the same as court decisions. permanent legal power" and the phrase "breach of promise" in Article 15 paragraph (3) of Law Number 42 of 1999, the Constitutional Court, states that the Elucidation of Article 15 paragraph (2) of the Fiduciary Guarantee Law, the phrase "executory power" is contrary to The 1945 Constitution and does not have binding legal power as long as it is not interpreted "for fiduciary guarantees where there is no

agreement on breach of contract and debtors object to voluntarily submitting objects that become fiduciary guarantees, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out. and applies the same as the implementation execution of court decisions that have permanent legal force (Syafri & Hartati, 2020).

Constitutional Court Decision No. 18/PUU-XVII/2019 aims to realize the legal protection of the parties. The parties to the agreement have rights and obligations that must be interpreted that their position is proportional, there is no bad faith that harms one of the parties. The law is based on values, human rights and it is regulated on the constitutional basis of the 1945 Constitution

***The legal consequences of the Constitutional Court's Decision No. 18/PUU-XVII/2019 on legal protection for parties in credit agreements with fiduciary guarantees***

Law Number 42 of 1999 concerning Fiduciary Guarantees has the aim of providing legal certainty and a sense of legal balance between the parties entering into an agreement with fiduciary guarantees. According to responsive legal theory, the law is an instrument to serve human needs, therefore the law must be able to carry out its functions for the benefit of society (Suratman, 2018). However, in practice, there are many injustices and a lack of legal balance between the parties.

A fiduciary guarantee is a form of engagement between creditors and debtors born from the agreement. A fiduciary guarantee is a follow-up agreement from the main agreement in this case a loan agreement. Fiduciary guarantees as debt guarantees are carried out through three stages, namely, the first phase, the obligator agreement phase is an agreement in the form of lending and borrowing money between creditors and

debtors. The second phase, the material agreement phase is the transfer of property rights from the debtor to the creditor carried out by means of a constitutum possessorium, namely the transfer of property rights as an object of fiduciary security without handing over the physical property of the collateral object, and the third phase, the lease-to-use agreement phase is an agreement that the debtor can still control legally physical object of the fiduciary guarantee (Fuady, 2002).

Fiduciary guarantees as a form of the agreement must meet the legal requirements of the agreement as stated in Article 1320 of the Civil Code, namely the agreement of those who bind themselves, the ability to make an engagement, a certain subject matter, and a cause that is not prohibited. The first and second terms are called subjective terms because they are related to the parties entering into the agreement, while the third and fourth terms are called objective conditions because they are related to the object of the agreement. If the subjective conditions are not met, the cancellation of the agreement can be submitted, whereas if the objective conditions are not met, the agreement is null and void. The agreement applies the consensual principle which means that the contract occurs at the time of the agreement.

According to Salim H.S, an agreement is the conformity of the statement of will between one or more people with another party, what is appropriate is the statement because the will cannot be seen/known by others (Salim, 2006). The agreement must be made in the awareness and willingness of both parties. Article 1321 of the Civil Code also confirms that an agreement has no force if it was given by mistake or obtained by coercion or fraud. The agreement between the parties makes the agreement considered a law for both parties.

The parties must respect the agreement and cannot be withdrawn without the

agreement of both parties as the application of the principle of *pacta sunt servanda* (Noor, 2015). This injustice and imbalance can be seen in the execution of fiduciary guarantees with the executorial title as mandated in Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees. The granting of the executive title is intended to provide legal protection to creditors against debtors who are in default, but the authority given is often understood excessively by creditors which have implications for the arbitrariness of the creditor to the debtor. This also causes creditors to act uncooperatively with judicial proceedings and court decisions because this fiduciary guarantee agreement has a fiduciary guarantee certificate which has the same executorial power as court decisions which have permanent legal power.

The practice of arbitrary execution of fiduciary guarantees as carried out by PT. Astra Sedaya Finance to Apriliani Dewi and Suri Agung Prabowo with the object of a fiduciary guarantee, namely one unit of Toyota Alphard V Model 2.4 A/T 2004. PT. Astra Sedaya Finance executed the fiduciary guarantee under the pretext that the debtor had defaulted, but the debtor himself did not feel a default because he had paid the installments as agreed, but the creditor continued to execute the fiduciary guarantee even though the debtor had filed a lawsuit with the district court with a basis for unlawful acts. The creditor does this on the basis of the executive title attached to the fiduciary guarantee certificate and the creditor can unilaterally declare the condition of default because Law Number 42 of 1999 concerning Fiduciary Guarantee does not describe the party determining the breach of contract (default) (Mardatillah, 2020).

The impact of the decision of the constitutional court has an impact on financial institutions that can no longer carry out *parate* executions and/or unilaterally sell objects of fiduciary guarantees based on fiduciary certificates, there is no agreement on default. The

position of the debtor in default becomes weaker despite the objection to granting a fiduciary object, the creditor's position remains strong to execute the object of the guarantee without an order for a court execution mechanism.

The act of execution should be avoided so as not to cause arbitrary actions against debtors who still have rights as fiduciary givers. The Constitutional Court explained that the material in Article 15 (2) of Law no. 42 of 1999, fiduciary has constitutionality issues which are emphasized in the explanation of Article 15 paragraph (2) of the Fiduciary Guarantee Law which states "In this provision, what is meant by "executory power" is that it can be directly exercised without going through a court and is final and binding on the parties to implement the decision. the." The Court reinterpreted the constitutionality of the Elucidation of the Article to the phrase 'executory power' and 'the same as a court decision with permanent legal power' (Hasani, Trianingsih, & Rizky Saraswati, 2020).

After the Constitutional Court Decision No. 18/PUU-XVII/2019 Recipients of fiduciary rights or creditors of fiduciary recipients may not carry out the execution themselves (*parate* execution) but must submit a request for implementation to the District Court. *Parate* execution can be carried out if there is an agreement on the default that has been determined in advance and the debtor is willing to submit the object of the fiduciary guarantee voluntarily. The decision of the Constitutional Court stated that not all executions of objects of fiduciary guarantee must be carried out through the courts. For fiduciary guarantees where there is no agreement regarding breach of contract (default) between creditors and debtors, and debtors object to submitting fiduciary guarantee objects voluntarily, then all legal mechanisms and procedures in the execution of fiduciary guarantee certificates must be carried out and apply the same as a strong court decision. permanent law. If there are no default

criteria agreed upon between the debtor and creditor in the contents of the agreement, the debtor is reluctant to hand over the object of the fiduciary guarantee to the creditor, then the court will mediate to grant execution permission if the conditions have been met. Not all withdrawals of objects of security must be carried out through the courts because it will result in the court being flooded in handling cases of execution of objects of fiduciary security in addition to many other cases that must be resolved by the court.

The execution of the object of the fiduciary guarantee can be carried out by the financing company (leasing) as long as there is an agreement on the default clause (breach of promise) and the debtor voluntarily submits the object of the fiduciary guarantee, then parate execution can be carried out. a breach of contract agreement, for example, the debtor does not pay the installments at a certain time and does not want to voluntarily surrender the object of the fiduciary guarantee, therefore it can be executed by force through the court.

Article 15 paragraph (3) states, if the debtor breach the contract, the fiduciary giver has the right to sell the object of the fiduciary guarantee. The Constitutional Court determines that breach of contract is not determined unilaterally by the creditor but on the basis of an agreement with the debtor. If there is a breach of contract agreement, then the execution of the fiduciary guarantee cannot be carried out by the fiduciary recipient (creditor) but must submit a request for execution to the District Court. The decision of the Constitutional Court aims to provide legal certainty and a sense of justice between the leasing party and the debtor and to prevent arbitrary actions in the execution of the creditor.

The decision of the Constitutional Court states that not all executions of objects of fiduciary security must be carried out through the courts, but parate executions can also be carried out. The fiduciary agreement clause does not regulate the

default clause between the creditor and the debtor, and the debtor object to submitting the fiduciary guarantee object voluntarily, then all legal mechanisms and procedures in the execution of the fiduciary guarantee must be carried out and applied in the same way as a legally binding court decision. On the other hand, if there are no agreement criteria for breach of contract in the fiduciary agreement clause and the debtor is reluctant to have the object of collateral confiscated by the creditor, then the execution is carried out through a district court.

If it is related to the theory of legal protection, referring to M. Isnaeni's opinion that basically the issue of "legal protection in terms of the source can be divided into two (2) kinds, namely "external" legal protection and "internal" legal protection" (Isnaeni, 2016). The essence of internal legal protection, basically the said legal protection is created by the parties themselves at the time of making the agreement, where when packing the contract clauses, both parties want their interests to be accommodated on the basis of an agreement. Likewise, all types of risks are endeavored to be prevented through filing through clauses that are packaged on the basis of agreement, so that with this clause the parties will receive balanced legal protection based on their mutual consent. The parties to such internal legal protection can only be realized when their legal standing is relatively equal in the sense that the parties have relatively balanced bargaining power so that on the basis of the principle of freedom of contract, each partner in the agreement has the freedom to express his will according to his interests. "This pattern is used as the basis when the parties assemble the clauses of the agreement they are working on so that the legal protection of each party can be realized in a straightforward manner on their initiative" (Isnaeni, 2016).

External legal protection is made by the

authorities through regulations for the benefit of weak parties, "according to the nature of the laws and regulations that should not be one-sided and impartial, proportional legal protection must also be given as early as possible to other parties. Because it is possible that at the beginning of the agreement, there is a party that is relatively stronger than the partner, but in the implementation of the agreement the party who was originally strong, falls into the wronged party, for example, when the debtor defaults, the creditor should also need legal protection. The packaging of the laws and regulations as described above illustrates how detailed and fair the authorities provide legal protection to the parties proportionally. Issuing the rule of law with such a model, of course, is not an easy task for a government that always tries optimally to protect its people.

Philipus M. Hadjon said that there are 2 (two) kinds of legal protection, namely, "preventive legal protection and repressive legal protection." (Hadjon, 1994). In preventive legal protection, the law prevents disputes from occurring, while repressive legal protection aims to resolve disputes.

Constitutional Court Decision No. 18/PUU-XVII/2019 is an effort to realize protection for the parties, which begins with an agreement from the parties that must be made proportionally, not harming one of the parties but based on balance. Protection is an important element in rights, as Houwing's opinion sees "rights as an interest that is protected by law in a certain way.". The law must consider interests carefully and strike a balance between them. Van Dijk in Peter Mahmud Marzuki states that "the law must function in achieving the goal of peace, the goal of achieving peace can be realized if the law provides as much as possible a fair arrangement" (Marzuki, 2006). Philipus M. Hadjon argues that, "The principle of legal protection for the people against government actions focuses and originates from the concept of recognition and protection of human rights. Because

according to history in the west, the birth of concepts regarding the recognition and protection of human rights is directed at restrictions and attaching obligations to society and the government." (Hadjon, 1987).

The position of the parties in a debt agreement with a fiduciary guarantee by the rules should not be treated unfairly. Here the position of the creditor must be protected by the State in the form of laws and regulations as well as the debtor so that direct execution by the creditor unilaterally is not justified if there is an element of harming the debtor.

### ***The Obstacles to Financial Services Institutions (LJK) in implementing the Constitutional Court Decision No. 18/PUU-XVII/2019***

Fiduciary Guarantees are regulated in Law No.42/1999 concerning Fiduciary Guarantees which initially occurred as collateral objects in the form of movable goods, but in the regulation of Law no. 42 of 1999, the object of the guarantee includes the object of the guarantee that is not in the object of the guarantee of the mortgage. This is regulated in Law Number 4 of 1996 concerning Mortgage Rights.

Fiduciary guarantees give the authority of the debtor not to submit goods to be used as collateral so that the goods guaranteed are still used. The creditor receives proof of ownership of the object guaranteed by the debtor. Fiduciary guarantees are used by the average person who makes loans and uses the movable property as collateral.

Based on Article 1 of Law no. 42 of 1999 concerning Fiduciary Guarantees that Fiduciary is the transfer of property rights based on the principle of trust that in principle the object whose ownership rights have been transferred remains in the control of the owner of the object. The owner of the object is the fiduciary giver or debtor, but the fiduciary recipient or creditor is the party who has receivables that have been guaranteed by fiduciary

guarantees. While fiduciary institutions are linked to Article 1152 of the Civil Code which seems contradictory (Ahyani, 2011).

After the decision of the Constitutional Court No. 18/PUU-XVII/2019 possible problems arise, when the creditor submits an application for the execution of the object of fiduciary security to the District Court, prior to the decision on the execution of the Fiduciary Guarantee from the District Court, the debtor or fiduciary giver who has bad intentions may intentionally disappear the object of the guarantee. the fiduciary or debtor changes address whose whereabouts can no longer be traced by the creditor, so that it is detrimental to the creditor (financing company). In addition, another possible problem that arises is that if every execution of a fiduciary guarantee object, the fiduciary recipient or creditor must submit an application for the execution of a fiduciary guarantee to the court, it will cause the burden of duty from the District Court to increase, whether each District Court will be able to handle the application case. execution proposed by the leasing company. Even though there are quite a lot of cases that will be resolved by the District Court, of course, this will cause the decision on the application for the execution of the execution guarantee to take a long time and can be a gap for fiduciary givers who have bad intentions to commit acts that can harm to the fiduciary recipient.

Another obstacle is that the fiduciary provider who has bad faith will take advantage of a long time to transfer the object of the fiduciary guarantee, for example by selling the vehicle at a low price without BPKB (Vehicle Ownership, Book) changing addresses that are difficult or can no longer be tracked by the fiduciary recipient. A situation like this will certainly be detrimental to the leasing company as a fiduciary recipient who has good intentions to carry out the execution of fiduciary guarantees according to the decision of the Constitutional Court. The solution that can be taken by creditors to

prevent the possibility of bad faith from the fiduciary giver, based on the Constitutional Court Decision, the fiduciary recipient does not have to submit an application for execution to the District Court to execute the object of guarantee against the fiduciary giver who is in breach of contract. The fiduciary recipient in this leasing company can use Article 15 paragraph (3) stating, if the debtor is in breach of contract, the fiduciary recipient has the right to sell the object of the fiduciary guarantee on his own power (parate execution). Based on Article 15 paragraph (3) the fiduciary recipient can perform parate execution on the condition that if there is an agreement regarding the breach of contract and the fiduciary giver is willing to submit the object of the fiduciary guarantee voluntarily.

The fiduciary recipient may not execute the object of the guarantee unilaterally. If it is not agreed in advance and the fiduciary debtor is willing to submit the object of the fiduciary guarantee voluntarily. However, in practice, there are still many fiduciary recipients who find violations committed by creditors if the fiduciary giver makes a breach of contract, the leasing company as the fiduciary recipient performs unilateral executions without notification to the fiduciary giver, even using the services of a debt collector which is clearly against the law.

The fiduciary recipient enforces the withdrawal of the vehicle by using the services of the debt collector, without prior notification and compromise with the fiduciary giver. If this happens, the debtor's position, in this case, is in a weak position by heavily handing over the object of fiduciary security in the form of a vehicle to the debt collector. And if the fiduciary provider still wants to continue his credit, the leasing company charges the debtor to pay for vehicle withdrawal services by the debt collector plus unpaid credit.

The leasing company only determines unilaterally and is not regulated in the agreement to take arbitrary actions that

are not in accordance with legal procedures that are detrimental to debtors who are in a weak position. The action of the fiduciary recipient in this case leasing is clearly contrary to the execution of fiduciary guarantees as regulated in Article 29 of Law Number 42 of 1999 concerning Fiduciary Guarantees and the Constitutional Court's Decision No. 18/PUU-XVII/2019 concerning the withdrawal of the object of fiduciary security against the fiduciary giver who is in default.

If it is associated with the theory of the legal system, in law enforcement the Constitutional Court Decision No. 18/PUU-XVII/2019 requires the good faith of the parties. This relates to the good faith of the parties in carrying out the rights and obligations according to the debt agreement with fiduciary guarantees. Good faith is part of the legal culture of the community, as regulated in Article 1338 of the Criminal Code concerning *Pacta Sunt Servanda* that the agreement that has been agreed upon by the parties applies as law for the parties.

Constitutional Court Decision No. 18/PUU-XVII/2019 is a limitation of the creditor's authority to carry out unilateral executions and there is an element of harm to the debtor, so a court decision is required if the execution is going to be carried out. If the debtor has bad intentions and it is proven that there is a default as stipulated in the agreement and it is agreed and fulfills the principle of freedom of contract, the creditor can carry out the execution without going through a court.

The legal system occurs when the substance, structure, and legal culture are interrelated and run properly. Right here in accordance with the purpose of the law, namely the existence of legal certainty, justice and expediency.

#### **4. CONCLUSION**

Grounded by the results explained above, it can be concluded that (1) the Constitutional Court (MK) through Decision Number 18/PUU-XVII/2019 regarding

requests for judicial review of Law No. 42 1999 concerning Fiduciary Guarantees Article 15 paragraph 2 and Article 15 paragraph (3) by Apriliani Dewi and Suri Agung Prabowo. Case registration number 18/PUU-XVII/2019. The Petitioner argues that Article 15 paragraph (2) and 3 of the Fiduciary Law reads Article 15 paragraph (2) that "The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has obtained permanent legal force", and Article 15 paragraph (3) that "If the debtor is in breach of contract, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Guarantee on his own power" is considered to have harmed his constitutional rights. The Petitioners also considered that the article was contrary to Article 1 (3), Article 27 (1), Article 28D (1), Article 28G (1) and Article 28H (4) of the 1945 Constitution. (2) The legal consequences of the Constitutional Court's Decision No. 18/PUU-XVII/2019 regarding legal protection for parties in credit agreements with fiduciary guarantees, creditors are not allowed to carry out direct executions unilaterally. This is to provide legal protection for debtors who still need a fiduciary guarantee object as a means of earning a living. Unless there is the willingness of the debtor and it has been agreed at the beginning and stated in the agreement, then the execution can be carried out without going through a court. (3) The obstacles to Financial Services Institutions (LJK) in implementing the Constitutional Court Decision No. 18/PUU-XVII/2019 if there is bad faith. It is possible that bad faith arises from each party, both debtors and creditors. The debtor can transfer the object of the fiduciary guarantee without the knowledge of the creditor to a third party. Good law enforcement must be systematized, connected between substance, structure and legal culture. Good faith is a part of a legal culture which in private law must be emphasized because it is a value to realize the purpose of the law, namely justice, legal certainty and expediency. Thus,

based on the conclusion above, it can be suggested that it is necessary to review Law Number 42 of 1999 concerning Fiduciary Guarantees so that it is in harmony with other regulations adjusted to the dynamics of community needs in accordance with legal objectives, namely justice, certainty. In addition, the parties in implementing the Constitutional Court Decision No. 18/PUU-XVII/2019 needs to pay attention to the balance of rights and obligations in the agreement, based on the principle of justice and implemented in good faith. The agreement that has been agreed is binding as law for the parties, but if there is an element of harm or action against the law, the agreement is null and void.

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