

# Legal Study On Withdrawal of Fiduciary Guarantee Based On The Decision of The Constitutional Court Number 2/Puu-Xix/2021

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# **Legal Study On Withdrawal of Fiduciary Guarantee Based On The Decision of The Constitutional Court Number 2/Puu-Xix/2021**

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## **ABSTRACT**

The practice of withdrawing fiduciary guarantees by financing institutions has often caused controversy because each party has a legal basis that can be used to maintain the goods resulting in the use of physical force to be able to withdraw fiduciary guarantee goods. These ways of withdrawal eventually became a problem in society so that it extended into problems related to human rights violations. That resulted in the emergence of a request for a material test of Law No. 42 of 1999 on Fiduciary, especially in Article 15 paragraphs (2) and (3) and then the Constitutional Court issued Decree No. 18 / PUU-XVII / 2019 about Fiduciary especially in Article 15 paragraphs (2) and (3) and then the Constitutional Court issued Decree No. 18 / PUU-XVII / 2019 which contains that there must be an agreement between the debtor and creditors about the state of default and for that then the debtor is authorized to withdraw the fiduciary guarantee or willingly release the fiduciary guarantee item, if there is no agreement and willingness then the withdrawal order must be through a court ruling. Because it is considered that the verdict provides injustice on the creditor's side, it is further submitted a material test of the court's decision, and through The Court's Decision No. 2/PUU-XIX/2021, the Court stated that it rejected the request for a material test and upheld the previous verdict. Based on this, this study will legally review how the withdrawal of fiduciary guarantee goods based on the ruling and as a conclusion is the withdrawal that can be made by creditors against fiduciary guarantee goods are: (a) Make an agreement with the debtor where the debtor voluntarily submits the fiduciary guarantee to the creditor, for sale through auction. The terms of the sale are prohibited to harm the debtor, i.e. if the selling price is below the value of debit debt; (b) Request a verdict to the judge to be able to execute the item based on the registered fiduciary certificate, and for the next sale of the fiduciary guarantee at auction. If it is not done as such then the creditor is at risk of being reported as a criminal delik with Article 362 of KUHP for attempted theft (if the taking of the goods is unknown to the owner of the goods) and/or Article 368 of the Criminal Code on attempts to confiscate the property of others.

**Keywords:** Withdrawing Fiduciary Guarantees, Fiduciary Guarantee.

## **I. INTRODUCTION**

Lately, we often hear and/or read news about the confiscation of motorized vehicles by debt collectors (currently better known as eagle eyes) who, according to his confession, have obtained the power of attorney to withdraw from a finance company. This is because the debtor has been deemed to have violated his promise or default because he did not pay the installments that had been previously determined by the financing company so that the finance company believed that there would be problems with the object of financing, the finance company tried to withdraw the vehicle which was the object and at the same time the collateral for the financing (Agustianingsih & Yunita, 2022).

The practice of withdrawing financing collateral which is currently being debated because in some cases it is not carried out in a fair and polite manner, for example blocking in the middle of



the road and forcibly pulling a vehicle that is being driven by a debtor or other person borrowing a vehicle, committing physical violence to the debtor to forcibly withdraw his vehicle, take a series of actions whose purpose is to embarrass the debtor in his environment so that the debtor gives up his vehicle, and there are many other examples of incidents. This results in negative news for finance companies and leads to legal settlement of cases (Hadinata, 2021).

Before heading to matters related to the withdrawal of financing collateral, we first describe what and how the financing company is <sup>2</sup> in accordance with the applicable laws and regulations so that the position of the financing company and debtor in this financing agreement is clear. That the presence of the financing company is inseparable from the economic condition and financial strategy of the debtor where when it is associated with the people's economic condition, this is mainly due to the debtor's financial inability to buy motorized vehicles in cash, while the need for motorized vehicles is considered important and the community's inability to meet the requirements set forth in the above (Jamil, 2021). must be met if they borrow from banking financial institutions to buy motor vehicles as expected, the limitations of the pawnshop system for financing and the trap of loan sharks who provide loans with stifling interest. Meanwhile, if it is associated with a financial strategy, it is an effort by the community to regulate the flow of money (cash flow) so that in addition to obtaining assets in the form of vehicles, they are also able to operate normally (Markum et al., 2021).

Consumer financing is financing in the purchase of an item and a customer desired by the debtor so that the debtor will only receive the goods, "this consumer financing is in sales credit because consumers do not receive cash but only receive goods purchased from the credit". For example, for financing the purchase of a car, the debtor only needs to show the car to be purchased to the finance company, so if all the requirements have been completed and the agreement is agreed upon, then the finance company will buy the vehicle and hand it over to the debtor (Ariawan & Maryanto, 2021).

Due to the purchase financing is about goods and the type of goods is very much so in this study focused on the type of motorized vehicle. The financing process involves the following parties: (a) Finance companies (funding/loan providers); (b) debtor (recipient of funds); (c) Supplier of goods. As one of the requirements or articles in the consumer financing agreement, it must be followed by collateral or credit guarantees which are considered by law as a condition for securing the repayment of loans or loans (Kristiyanti, 2021). According to the Indonesian legal system, guarantees can be distinguished from guarantees by controlling the object and guarantees by not controlling the object. Collaterals that control the object are called pawns, while guarantees that are given without controlling the object are found in mortgages, mortgages and fiduciaries (Pradnyawan et al., 2020). In practice, we often encounter movable objects in fiduciary guarantees,



because what is used as the object of the guarantee is the object of a purchase that is paid in installments through a financing institution. According to Article 1 number 2 of Law no. 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Law), fiduciary guarantees themselves are security rights for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with mortgage rights that remain in control (Yustianti & Roesli, 2018). fiduciary giver, as a guarantee for the repayment of certain debts that give priority to the fiduciary recipient over other creditors.

The existence of a financing method like this is not without risk, because the object of the agreement is not physically controlled by the financing company as the lender (creditor), the risk of loss or damage to the object of the agreement is very large along with the debtor's inability to pay the installments. Therefore, the creditor as the lender will always try to collect the payment of the installment and if it is still uncollectible, the loss is endeavored to be minimized by withdrawing the object of the loan. The problem that occurs is, as explained earlier, that the process of withdrawing the object of the agreement (collateral) due to default is considered to have violated human rights because it was carried out by means of violence (confiscation) (Kusumah & Witasari, 2021).

Based on Article 29 of the Fiduciary Law, it is stated that "If the debtor or fiduciary provider is in breach of contract, the execution of the object that is the object of the Fiduciary Guarantee can be carried out by:

- a. implementation of the executorial title as referred to in Article 15 paragraph (2) by the Fiduciary Recipient;
- b. the sale of objects that are the object of the Fiduciary Guarantee on the authority of the Fiduciary Recipient himself through a public auction and take repayment of his receivables from the sale proceeds;
- c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties.

Where the sale is carried out after 1 (one) month has elapsed since the debtor and creditor have notified them in writing to the parties concerned and announced in at least 2 (two) newspapers circulating in the area concerned (Hidayat, 2018). As stated that the execution of fiduciary guarantees can be carried out by creditors if they have a fiduciary certificate because there is the word "For the sake of justice based on the Almighty God" where the sentence is the same as the sound of the judge's decision so that it means that if you have a fiduciary certificate, the creditor can execute the fiduciary guarantee personally because the position of the certificate is "equal" to the judge's decision. Therefore, the Creditor may conduct an auction process for fiduciary guarantees that have been executed from the debtor personally (parate execution) either

through a public auction or privately provided that the auction is carried out after 1 (one) month has passed since the announcement of the auction plan to the debtor and has gone through announcement of newspapers with a minimum number of 2 (two) newspapers.

In 2018 there was a lawsuit over the process of executing fiduciary guarantees by creditors at the South Jakarta District Court with case number 345/PDT.G/2018/PN.Jkt.Sel where the Plaintiff (debtor) objected to the execution by the Defendant (creditor) because it was deemed has defaulted while the Plaintiff feels that he has carried out his obligations in accordance with the agreement, therefore the Plaintiff has filed a lawsuit that the Defendant has committed an unlawful act. The judge's decision at that time was to pass the Plaintiff's claim and punish the Defendant to return the confiscated goods to the Plaintiff. However, the Defendant is not willing to carry out the judge's decision by insisting on a fiduciary certificate which gives creditors the freedom to execute fiduciary collateral and conduct a Parate auction.

Because the judge's decision was deemed non-binding and coercive, the Plaintiff then filed a Judicial Review application to the Constitutional Court (MK) on Article 15 paragraphs (2) and (3) of the Fiduciary Law. Through the decision of the Constitutional Court No. 18/PUU-XVII/2019 dated January 6, 2020, the Constitutional Court is of the opinion that:

- a. For fiduciary guarantees in which there is no agreement on breach of contract (default) and debtors object to voluntarily submitting objects that are fiduciary guarantees, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply in the same way as the execution of court decisions that have been enforced. permanent law.
- b. The existence of a breach of contract is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine that a breach of contract has occurred.
- c. For fiduciary guarantees where there is no agreement on breach of contract and debtors object to voluntarily submitting objects that are fiduciary guarantees, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force.

Based on the decision of the Constitutional Court, it can be concluded that the execution of the fiduciary guarantee is carried out when there is an agreement regarding the breach of contract/default and the willingness of the debtor to surrender the object that is the object of the fiduciary. If there is no agreement regarding the breach of contract and the debtor does not submit the object of collateral voluntarily, then the procedure for executing the fiduciary guarantee is the same as the execution of a court decision that has permanent legal force, namely by submitting a



request for execution to the district court. In addition, breach of contract also cannot be determined unilaterally. There must be an agreement regarding the breach of contract/default determined by both parties or on the basis of legal remedies (lawsuits) stating that one of the parties has defaulted.

In 2021, an employee of a finance company conducted a review of the Constitutional Court's decision No. 18/PUU-XVII/2019 where the decision has stifled the ability of finance companies to save their financial condition through the execution of fiduciary guarantees. Through an internal meeting, the Constitutional Court then issued a decision No. 2/PUU-XIX/2021 which essentially is to amend and state that the execution of a fiduciary guarantee certificate through a district court is actually only an alternative so that it is therefore not an obligation because the executorial power of a fiduciary guarantee certificate is aligned with the judge's decision. However, in the decision there is a requirement regarding a prior agreement between the creditor and the debtor if there is a default condition so that the debtor as the fiduciary giver can give the creditor as the fiduciary recipient the right to execute the fiduciary collateral (Doyoharjo, 2022).

## **2. RESEARCH METHOD**

This type of research is legal research (juridical-normative) which aims to find the rule of law, legal principles and legal doctrines in order to provide a systematic explanation of the rules governing guarantee law, provide analysis of the relationship between legal rules regarding fiduciary guarantees and provide perception of what should be done in the withdrawal of fiduciary guarantees in accordance with the Constitutional Court Decision No. 2/PUU-XIX/2021. In this study, the legal research approach is used as follows:

### **Statue Approach**

The approach is taken by reviewing all applicable laws and regulations and related to research on legal studies on the withdrawal of fiduciary guarantees based on the Constitutional Court Decision No. 2/PUU-XIX/2021. So that the study produces conclusions that can be used to solve issues in the field of guarantee law.

### **Conceptual Approach**

The approach that comes from the views and doctrines that have developed in legal science is to find ideas that give birth to legal understandings, legal concepts and legal principles that are relevant to the legal issue of carrying out executions after the Constitutional Court Decision No. 2/PUU-XIX/2021.

## **3. RESULT AND DISCUSSION**

### **Guarantee Law in Indonesia**



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The term guarantee comes from the word "guarantee" which means responsibility, so guarantees can be interpreted as dependents. In this case, what is meant is liability for all engagements from a person as specified in the legislation or otherwise specified in an agreement.

Broadly, the guarantee institutions that apply in Indonesia can be divided into:

- a. How it happened; Based on the way the birth institution the guarantee there are those born because of the law some are born because of the agreement/assesoir.
- b. The object: the object of a moving object and unmoving object.
- c. Its nature, based on its nature, includes general guarantees, special guarantees, personal guarantees and material guarantees.
- d. Authority to control the object of collateral, there are creditors who control the object of collateral, there are also those who do not, but the status of the item is collateral.

Collateral that is born because of the law is a guarantee whose existence is designated by law, without the agreement of the parties, namely that which is regulated in Article 1131 BW which states that all debtor property, both existing and new, will exist in the future, will be responsible for all engagements. Thus, it means that all debtor's assets become collateral for all creditors.

In principle, Articles 1131 and 1132 of BW emphasize that without a specific agreement, all debtor's assets are collateral for the repayment of their debts. This guarantee can be called a general guarantee institution. Between creditors (lenders and guarantee recipients) and debtors (loan recipients as well as guarantee providers) bind themselves in an agreement that is specifically required for the guarantee, when the agreement is signed, the guarantee institution is born.

In addition to guarantees designated by law, as part of the principle of consensuality in contract law, the law allows the parties to enter into guarantee agreements aimed at guaranteeing the settlement or implementation of debtor obligations to creditors. This guarantee agreement is an assessor agreement attached to the basic agreement that issues debts between debtors and creditors such as mortgages, mortgages, fiduciary guarantees, pledges, borgtoch, and guarantee agreements.

Based on its nature, general guarantee institutions are provided for the benefit of all creditors and involve all debtor's assets, while special guarantees are guarantees in the form of appointment and delivery of certain goods specifically as collateral for the settlement of debt/debtor obligations to certain creditors which only applies to certain creditors, either materially and individually. The emergence of this special guarantee is due to the existence of a special agreement between the creditor and the debtor which can be in the form of:

1. Material guarantees, namely the existence of certain objects that are guaranteed (zakelijk).

Legal science does not limit the objects that can be used as collateral, it's just that the



objects that are guaranteed must belong to the person who provides the guarantee of the material.

2. Individual guarantees (personlijk), namely the existence of certain people who are able to pay or fulfill achievements if the debtor breaks his promise. This individual guarantee is subject to the legal provisions of the agreement regulated in book III of the Civil Code.

Material guarantees are institutionalized in the form of mortgages, mortgages, fiduciaries and liens. This material guarantee is a right granted on the basis of *jura in re aliena* and therefore must comply with the principles of recording and publicity in order to give birth to absolute rights over the guaranteed object.

### Fiduciary Guarantee

Fiduciary according to its origin comes from the Roman word "fides" which means trust. Fiduciary is a term that has long been known in Indonesian. Likewise, this term is used in Law Number 42 of 1999 concerning Fiduciary Guarantee which is a transfer of ownership rights that occurs because of trust with the promise of objects whose ownership rights are transferred remain in the control of the owner of the object. In Dutch terminology, this term is often referred to in full, namely *fiduciare eigendom overdracht*, namely the surrender of property rights in trust. While in English terms it is called Fiduciary Transfer of Ownership. When Roman law was accepted by Dutch law, the fiduciary institution was not taken over, therefore it is not surprising that the fiduciary as a guarantee institution is not contained in *Burgerlijk Wetboek (BW)*. Fiduciary is an institution originating from the western civil law system whose existence and development is always associated with the civil law system.

The definition of fiduciary is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership is not transferred remains in the possession of the owner of the object. Thus, it means that in a fiduciary there has been a surrender and transfer of ownership of an object which is carried out on a fiduciary basis on the condition that the object whose ownership rights are handed over and transferred to the fiduciary recipient remains in the control of the owner of the object (the fiduciary giver). In this case, what is handed over and transferred from the owner to the creditor (fiduciary recipient) is the right of ownership of an object that is used as collateral, so that the juridical ownership rights of the guaranteed object are transferred to the creditor (fiduciary recipient). Meanwhile, the economic ownership rights to the guaranteed object remain in the hands or in the control of the owner.

Fiduciary Based on Article 1 number 2 of the Fiduciary Law, it is emphasized that the meaning of Fiduciary Guarantee is "a guarantee right to movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with Mortgage Rights as referred to in Law Number 4 of 1996 concerning Mortgage which remains in the control





of the fiduciary giver, as collateral for the repayment of certain debts, which gives priority to the fiduciary recipient over other creditors”.

Based on the provisions in Article 1 Paragraph (2) of the Fiduciary Law, the elements of a fiduciary guarantee are:

1. As a board of material guarantee rights and priority rights;
2. Moving objects as objects;
3. Immovable objects, especially buildings that are not encumbered with mortgage rights, are also objects of fiduciary guarantees;
4. Unmoving objects, especially buildings that are not encumbered with mortgage rights; are also objects of fiduciary guarantees;
5. To pay off a certain debt;
6. Giving priority to fiduciary recipients over other creditors.

From the definition above, it means that fiduciary is a process of transferring ownership rights while fiduciary guarantee is a guarantee that is given in the form of fiduciary. In the arrangement of fiduciary guarantees, a fiduciary guarantee can be abolished. According to the Government Regulation of the Republic of Indonesia Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Fiduciary Guarantee Deeds, it is stated in Article 16 paragraph 1 which affirms that, "fiduciary guarantees can be canceled due to the elimination of debts guaranteed by fiduciary, relinquishment of rights to fiduciary guarantees. by the fiduciary recipient or the destruction of the object that is the object of the fiduciary guarantee”.

#### **Principles of Fiduciary Guarantee**

Fiduciary guarantees according to the Fiduciary Law are collateral rights to movable objects, both tangible and intangible and immovable, especially buildings that cannot be encumbered with mortgage rights that remain in the control of the Fiduciary Giver, as collateral for certain repayments, which gives the Fiduciary Recipient a position against creditors. other. As for the principles in fiduciary guarantees contained in the Fiduciary Law, namely:

- a. Principle of Specialty on Fixed Loan

The object of a fiduciary guarantee is a collateral or guarantee for the repayment of certain debts which gives priority to the fiduciary recipient over other creditors. Therefore, the object of the fiduciary guarantee must be clear and certain on the one hand, and on the other hand the amount of the debtor's debt must be certain or at least the amount can be ascertained or calculated (verrekeningbaar, deductible).

- b. Basic Assesor



According to Article 4 of the Fiduciary Law that a fiduciary agreement is a follow-up agreement to the principal agreement which is a debt agreement, thus the validity of the fiduciary guarantee agreement depends on the principal agreement, and the abolition of the object of the fiduciary guarantee depends on the abolition of the principal agreement.

c. *Basic Droit de Suite*

According to Article 27 Paragraph (2) of the Fiduciary Law, it is stated that the fiduciary guarantee continues to follow the object that is the object of the fiduciary guarantee, in whatever hand the object is in, unless its presence in a third party based on the transfer of rights to receivables or cessies based on Article 613 of the Civil Code. Thus, the right to fiduciary security is an absolute material right or in rem not in person.

d. *Basic Preferen (Droit de Preference)*

The principle of preference or right of precedence is the right that takes precedence or precedence from the fiduciary recipient to other fiduciary recipients to take the fulfillment of debt repayment payments on the sale of the object of the fiduciary guarantee. The quality of the rights of the fiduciary recipient is not nullified even though it is bankrupt or liquidated as stipulated in Article 27 Paragraph (3) of the Fiduciary Law.

Therefore, debt bound by a fiduciary agreement is preferential debt, namely debt that must be paid first to the fiduciary recipient from other creditors from the sale of the collateral object.

e. Charging and Registration of Fiduciary Guarantees

The imposition of objects with fiduciary guarantees is made with a notarial deed (Article 5 Paragraph (1) of the Fiduciary Law) where this is in line with mortgages on immovable collateral based on the Mortgage Law, then in accordance with Article 1870 of the Civil Code which confirms that the notary deed is an authentic deed that has the power of perfect proof of what is contained therein between the parties and their heirs or successors. That is why the Fiduciary Law stipulates that a fiduciary agreement must be made with a notary deed. Considering that the objects of fiduciary security in general are movable goods, it is only natural that the closest authentic deed is to guarantee legal certainty over fiduciary guarantees.

Article 6 of the Fiduciary Guarantee Law regulates the provisions that must be contained in a fiduciary guarantee deed. Starting from the time, the identity of the parties, the object of the fiduciary guarantee, up to the principal of the agreement as outlined or the agreement of the parties made clearly in the fiduciary guarantee deed. Article 8 of the Fiduciary Law stipulates that fiduciary guarantees can be given to one or more recipients of power or representatives of the fiduciary recipients. This provision is intended as a fiduciary grant in the context of financing consortium credit.



The provisions of Article 9 of the Fiduciary Law emphasizes that fiduciary guarantees can be given to one or more units or types of objects, including receivables, whether existing at the time the guarantee is given or obtained later on means that the object by law will be burdened with fiduciary guarantees when the object is intended to become the property of the fiduciary giver. The imposition of the fiduciary guarantee does not need to be carried out with a separate agreement. This is because the object has transferred ownership rights.

Furthermore, regarding the results or follow-ups of the objects that are the object of the guarantee, it is regulated in Article 10 of the Fiduciary Law. Article 11 of the Fiduciary Law itself regulates the obligation of objects that are burdened with fiduciary guarantees to be registered at the fiduciary registration office located in Indonesia, also applies to objects that are burdened with fiduciary guarantees located outside the territory of Indonesia. This is to guarantee legal certainty over the guaranteed object.

The fiduciary guarantee agency is in the Department of Law and Human Rights. The fiduciary guarantee registration application is made by the fiduciary recipient. Then the fiduciary registration office records the fiduciary guarantee in the fiduciary register book on the same date as the date of receipt of the registration application. This provision is intended so that the Fiduciary Registration office does not evaluate the truth contained in the Fiduciary Registration statement, but only checks the data contained in the Fiduciary Statement. The date of recording in the fiduciary register is considered as the birth of the fiduciary guarantee.

It can be concluded that the registration of a fiduciary guarantee is considered or constitutes a constitutive act that gives birth to a fiduciary guarantee. As emphasized in Article 28 of the Fiduciary Law which states that if the object that is used as the object of a fiduciary guarantee is more than one agreement, the first to be registered is the one who is recognized as the fiduciary recipient.

The next step taken by the fiduciary registration office as evidence of the fiduciary registration has been carried out, namely by issuing a Fiduciary Guarantee Certificate issued on the same date stated in the application letter for fiduciary guarantee registration. The fiduciary guarantee certificate is listed as "for the sake of justice based on the ONE ALMIGHTY GOD" so that the position of this fiduciary guarantee certificate is the same as a court decision that already has permanent legal force. Further provisions regarding the procedure for fiduciary registration are regulated in the Minister of Finance of the Republic of Indonesia No. 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies Conducting Consumer Financing for Motorized Vehicles with Fiduciary Guarantees Charged.

#### **Execution of Fiduciary Guarantee**



One of the characteristics of a good material debt guarantee is when the guarantee can be executed quickly with a simple, efficient process and contains legal certainty. Of course, fiduciary as a type of debt guarantee must also have these fast, cheap and sure elements. Because so far there is no clarity on how to execute a fiduciary. The basis for the execution of fiduciary guarantees is regulated in Article 29 paragraph (1) of the Fiduciary Law. This execution can also be interpreted as "carrying out" a court that enforces a court decision with the help of general powers if the losing party does not want to carry it out voluntarily. Execution can be done if it has permanent legal force. If the debtor breaks his promise, then the fiduciary recipient has the right to sell the object that is the object of the guarantee on his own power. This is one of the characteristics of material guarantees, namely the ease of execution.

The types of executions based on Article 29 of the Fiduciary Law are: (a) the executorial title), namely through a court order; (b) by parate execution, namely by selling through auction; and (c) sold by no auction mechanism by the creditors themselves. The basis of Article 29 above is because of the titles on the fiduciary certificate which reads "For the sake of Justice Based on the One Godhead" where the sentence is usually found in the judge's decision on a trial that has been carried out. Article 15 paragraph (2) of the Fiduciary Law considers that the executorial power of a Fiduciary certificate is the same as the power of a judge's decision which has permanent legal force, so that Creditors feel they can carry out the execution of fiduciary collateral at any time if the debtor is deemed to have defaulted because it is deemed to have been decided by the panel of judges.

For the implementation of fiat execution itself, the process should be escorted by the Indonesian National Police, in accordance with National Police Chief Regulation No. 8 of 2011 concerning Security of Execution of Fiduciary Guarantees, namely Article 1 paragraph (12) which explains that securing the execution of fiduciary security is the duty of the police, provided that: (a) there is a request from the applicant; (b) have a fiduciary guarantee deed; (c) the fiduciary guarantee is registered with the fiduciary registration office; (d) have a fiduciary guarantee certificate, and (e) the fiduciary guarantee is still in the territory of the Republic of Indonesia. This states that the police still require the legality of the fiduciary collateral before providing security services for execution.

Referring to the Decision of the Constitutional Court of the Republic of Indonesia Number 18/PUU-XVII/2019 stating Article 15 paragraph (2) of the Fiduciary Law and its explanation along the phrase "executory power" and the phrase "the same as a court decision with permanent legal force" are unconstitutional on the condition that:

- a. there is no agreement on breach of contract (default) and the debtor objected to submitting voluntarily the object of the fiduciary guarantee, then all legal mechanisms and procedures



for the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of court decisions that have permanent legal force.

- b. As long as “the default is determined unilaterally by the creditor, without any prior agreement between the creditor and the debtor or on the basis of legal remedies that determine that a default has occurred”.

So that if conditions like the above are found, the execution must be carried out through a judge's decision in the District Court by submitting an application for execution of fiduciary guarantees.

#### **Legal Consequences of the Decision of the Constitutional Court Number 2/PUU-XIX/2021 for Execution**

In 2020, a collector from a finance company named Joshua M. Djami submitted a review to the Constitutional Court on the decision on the execution of fiduciary guarantees in the Constitutional Court's Decision No. 18/PUU-XVII/2019 with the reason that the decision caused him and his company to find it difficult because they had to go through a court decision mechanism first to be able to withdraw fiduciary collateral and there were naughty debtors who did not want to pay and voluntarily submitted fiduciary guarantees and took refuge in behind the decision of the Constitutional Court so that it can directly or indirectly affect the existence of finance companies in carrying out their economic activities.

On the request for review of the Constitutional Court's decision No. 18/PUU-XVII/2019 mainly concerning Article 15 paragraph (2) of the Fiduciary Law which has been decided previously, where the execution of fiduciary guarantees if there is no agreement on default and the willingness of the debtor to deliver the goods must be carried out through a judge's decision in the district court. The Constitutional Court decided to reject the lawsuit because it considered that the direct execution carried out by creditors was considered a violation of legal and human rights and through decision no. 2/PUU-XIX/2021, the Constitutional Court stated that it rejected the lawsuit and at the same time corrected the decision on Article 15 paragraph (2) of the Fiduciary Law by stating that the settlement of executions through the courts is an alternative step where if the creditor and debtor have mediated and there is an agreement, then the execution through parate execution can be carried out without the need to request court fiat. So in this case the interpretation of the Constitutional Court Decision No. 18/PUU-XVII/2019 which states that the execution of fiduciary guarantees must go through a court decision is wrong. The conclusion of this chapter is that the withdrawal of fiduciary collateral which is currently controlled by the debtor can be carried out in two ways, namely:

- Make an agreement with the debtor wherein the debtor voluntarily submits the fiduciary collateral to the creditor, for sale through auction. The terms of the sale are prohibited to harm the debtor, namely if the selling price is below the value of the debtor's debt.
- Request a decision from the panel of judges to be able to execute the goods on the basis of the registered fiduciary certificate, and for further sale of the fiduciary guarantee by auction.

### **Legal Consequences For Creditors Who Withdraw Fiduciate Guarantee Goods Unilaterally**

#### **Basic of Execution**

Execution is a legal action taken by the court to the losing party in a case, it is also a further rule and procedure of the case examination process. Execution is a continuous action of the entire civil procedural law process. Execution is an integral part of the implementation of the procedural rules contained in the HIR or RBG. And it also includes guidelines for execution rules that must refer to statutory arrangements as regulated in HIR and RBG.

The procedure for executing a decision, which is also known as execution, is further regulated in Articles 195 to 208 and Article 224 of the HIR or Articles 206 to Article 240 and Article 258 of the RBG. In addition to these articles, there are still others that regulate the execution, namely Article 225 HIR or 259 RBG. These two articles regulate the execution of a court decision that convicts the Defendant to commit a "certain act". And Article 180 HIR or Article 1919 RBG, which regulates the implementation of the decision "immediately" (*uitvoerbaar bij voorraad*) even though the decision has not yet obtained permanent legal force.

#### **Principles of Execution**

Execute decisions that have permanent legal force

Execution of a decision or execution is an act carried out forcibly against the losing party (the Defendant). The position of the Defendant at the time of execution was changed to "the Executed Party". Not all court decisions have executive power. This means that not all decisions are inherently executive power. Thus, not all court decisions can be executed. Decisions that have not been executed are decisions that have not been executed. In principle, only decisions that have obtained permanent legal force (*in kracht van gewijsde*) can be "executed".

The new execution can be carried out as a legal action starting from the date of the *inkracht* decision and the defendant (the losing party) does not voluntarily comply with the decision. Some forms of exceptions that can be justified by laws that allow executions to be carried out outside of an *inkracht* decision are:

Implementing the decision first (*uitvoerbaar bij voorraad*), the Plaintiff (winner) has the right to submit a request so that the decision can be executed first even though the losing party files an appeal or cassation (Article 180 paragraph (1) HIR or Article 191 paragraph (1) RBG).



Implementation of the provisional decision, the judge grants the provisional claim from the plaintiff even though the decision has not been taken.

There is a peace treaty, both parties agree to make peace during the trial (Article 130 HIR or Article 154 RBG).

Grosse execution of deed, based on Article 224 HIR or Article 258 RBG allows execution of the contents of the agreement as long as the agreement is in the form of grosse deed because it has legal force attached to the executorial.

a. Decision are not made voluntarily

Basically, execution is a forced act of carrying out a court decision that has obtained permanent legal force, it is only a legal choice if the losing party does not want to carry out or fulfill the contents of the decision voluntarily.

b. Decisions that are executed are condemnatoir

That the decision handed down is punishing so that execution is a manifestation of the punishment.

#### **Execution of Fiduciary Guarantee**

Based on Article 29 of the Fiduciary Law, it regulates the execution of fiduciary guarantees, namely:

a. If the debtor or Fiduciary Provider is in breach of contract, the execution of the object that is the object of the Fiduciary Guarantee can be carried out by:

(1) Implementation of the executorial title as referred to in Article 15 paragraph (2) of the Fiduciary Law by Creditors as fiduciary recipients;

In the Fiduciary Guarantee certificate issued by the Fiduciary Registration Office the words "For Justice Based on the One Godhead". This fiduciary guarantee certificate has the same executorial power as a court decision that has obtained permanent legal force. What is meant by executive power is that it can be implemented directly without going through a court and is final and binding on the parties to implement the decision.

This means that there are 2 (two) main requirements in the implementation of the executive title, namely:

- The debtor or fiduciary giver has defaulted;
- There is a fiduciary guarantee certificate which includes the titles "For Justice Based on the Almighty God".

Furthermore, although it is not expressly determined how to implement this title of execution (by auction or underhand) but considering the nature of execution and considering that underhand sales have been given conditions based on the agreement of the fiduciary giver and recipient, the execution of this title of execution must be by auction.



(2) The sale of objects that are the object of the Fiduciary Guarantee on the authority of the Fiduciary Recipient himself through a public auction and take the settlement of his receivables from the sale proceeds

If the debtor defaults, the fiduciary recipient has the right to sell the object of the fiduciary guarantee on his own power. The sale in this way is known as the Execution Parate institution and is required to be sold through a public auction, thus the Execution Parate is more or less the authority given (by law or court decision) to one of the parties to enforce the contents of the agreement themselves by force when the other default.

In accordance with the Constitutional Court Decision No. 2/PUU-XIX/2021, that the execution of fiduciary guarantees requires an "agreement" and "volunteer submission" which results in the execution being carried out without a court decision. This is an affirmation of the rights of the fiduciary giver to be able to maintain his assets is highly upheld because to be able to obtain the loan, the fiduciary giver has fulfilled the terms of the debt-receivable agreement and has had good faith before.

The problem is that if the terms "agreement" and "voluntarily submit" become important points in the execution of fiduciary guarantees in order to avoid legal action in court, there will be risks, among others:

- a. Coercion to include agreed clauses and voluntary submission in the standard additional financing agreement

That absolute proof of a legal relationship between two parties is indicated by the existence of a legal agreement which is described by the signatures of both parties on the agreement document. To change a legal engagement can only be done with a legal engagement, so often additional agreements or changes are made to change the previous agreement. With the obligation to "agree" on default and "voluntary delivery" then the Creditor or fiduciary recipient may make additional agreements to the previous standard agreement which must be approved by the Debtor or fiduciary giver and the agreement can be used as the basis for the execution of the fiduciary guarantee.

- b. Coercion on the debtor to make a voluntary submission of fiduciary guarantees

In order to anticipate the failure of the execution of the fiduciary guarantee due to "coercion", the steps that can be taken are the Debtor must make a letter of voluntary submission of the fiduciary guarantee to the Creditor so that it seems as if giving permission to the Creditor to execute the guarantee if there is a "congestion" in installment payments. To make the debtor make the letter, sometimes it must be done in ways that are not appropriate so that a statement can be obtained containing voluntarily submitting a fiduciary guarantee.



- c. Making a clause Creditors will not take legal action if a fiduciary guarantee is withdrawn in the default article

The clauses of the financing agreement are now in standard form for reasons of efficiency, and it is allowed as long as both parties agree. To get around so that there is no legal remedy in the withdrawal of fiduciary security, it is possible to add a clause that the debtor will not take any legal action in the event of a withdrawal of fiduciary collateral due to default. And if the Debtor signs this agreement, the withdrawal can be made because there has been permission to do so without any precautions from the Debtor.

- d. Making Sales Authorization for fiduciary collateral as an attachment to the financing agreement

As usual in mortgage agreements, which attach a power of attorney to sell to the creditor if there is a violation of the contents of the agreement. So it is possible that this can occur in a fiduciary agreement, where at the beginning of the agreement, the Debtor is asked to sign a statement of Execution Authority in the event of a default on the financing agreement. This can be interpreted as agreeing and voluntarily submitting fiduciary collateral even though the default status is still "one-sided"

These are examples of things that will happen or are at risk if the withdrawal of fiduciary security can be done without going through a court mechanism as long as there is an agreement on default and the Debtor voluntarily relinquishes the right of possession of the fiduciary collateral to the creditor if it is carried out unilaterally. In other words, it is "prone" to the use of physical violence in carrying out executions without the need for a court decision.

If the Creditor continues to carry out the withdrawal of collateral unilaterally without regard to procedures or procedures executed under Article 196 HIR or Article 208 RBg, where the Article reads: the winner submits a request, either orally or in writing, to the chairman, the district court mentioned in the first paragraph of article 195, to carry out the decision. by the chairman, which lasts for eight days<sup>9</sup>, then the action can be said to have entered the realm of legal action of confiscation (Article 368 of the Criminal Code) and theft (Article 362 of the Criminal Code). This is because there is the taking of someone's belongings without permission and used for the benefit of others or the taker. The difference between the two articles is that the owner of the goods knows the act or not, if he knows then it can be said as confiscation, while if he does not know then it can be categorized as theft.

Article 362 of the Criminal Code states that "Anyone who takes an object wholly or partly belongs to another person, with the intention of unlawfully possessing it, is threatened with theft, with a maximum imprisonment of 5 years or a maximum fine of nine hundred rupiahs". In this case, the keyword is the goods partially or wholly belonging to another person, the intention is to



be owned against the law. The threat of punishment is imprisonment for a maximum of 5 years or a fine of a maximum of nine hundred rupiahs (at the time the Criminal Code was made).

Whereas Article 368 of the Criminal Code states that "Whoever with the intention of unlawfully benefiting himself or another person, forces a person with violence or threats of violence, to give something goods, which wholly or partly belongs to that person or another person; or to give debts or write off receivables", where the key words are there is an intention or intent to benefit oneself or another person, carried out in a way that is against the law, acts of violence in the form of threats in the form of coercion to give or give something to another person, for debt purposes. or write-off of accounts receivable. The threat of punishment is a maximum imprisonment of nine years.

Based on the description above, the legal consequences obtained by the Creditor if carrying out a unilateral execution where previously there was no "agreement" on the default and there was no "delivery of fiduciary collateral from the Debtor to the Creditor because there was no agreement", then the action is considered as an action. against the law and the action can be reported as a criminal offense under Article 362 of the Criminal Code for attempted theft (if the taking of the goods is not known to the owner of the goods) and/or Article 368 of the Criminal Code regarding attempts to confiscate other people's belongings.

#### 4. CONCLUSION

Withdrawal of fiduciary collateral which is currently controlled by the debtor can be carried out in two ways in accordance with the Constitutional Court Decision No. 2/PUU XIX/2021, namely: Make an agreement with the debtor wherein the debtor voluntarily submits the fiduciary collateral to the creditor, for sale through auction. The terms of the sale are prohibited to harm the debtor, namely if the selling price is below the value of the debtor's debt. Request a decision from the panel of judges to be able to execute the goods based on the registered fiduciary certificate, and for further sale of the fiduciary guarantee by auction. The legal consequences obtained by the Creditor if carrying out a unilateral execution where previously there was no "agreement" on the default and there was no "delivery of fiduciary collateral from the Debtor to the Creditor because there was no agreement", then the action is considered as an act against the law and against such action can be reported as a criminal offense under Article 362 of the Criminal Code for attempted theft (if the taking of the goods is not known to the owner of the goods) and/or Article 368 of the Criminal Code concerning attempts to confiscate other people's property.



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