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PARATE EXECUTION AFTER THE INDONESIAN CONSTITUTIONAL COURT'S JUDICIAL REVIEW OF FIDUCIA LAW AND MORTGAGE LAW

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Abstract

According to the Law No. 42 of 1999 on Fiducia Security ("Fiducia Law") as well as the Law No. 4 of 1996 on Mortgage, if there is a breach of fiduciary guarantee and mortgage rights, the secured creditors can undertake a parate execution, as the expedient, simple and cost-efficient method by means of a public auction. However, the Indonesian Constitutional Court's (MKRI) Decision Number 18/PUU-XVII/2019 has interpreted Parate Execution of Fiduciary Guarantee must firstly obtain the debtor's consent that a breach has indeed occurred and the voluntarily surrenders of the guarantee object to the creditor. On the other hand, in the Decision No. 21/PUU-XVIII/2020, MKRI did not define the same process for Parate Execution of Mortgage Rights. From the substance point of view, the two MK verdicts provide a different interpretation of the principle of "*pacta sunt servanda"* and fiducia security. This has caused the execution of Fiduciary Guarantee becomes not easy, expedient and cost efficient any longer. This normative research attempts to analyse the legal and economic impact of the two verdicts and their implementation from a law and justice perspective. The results show the need of consistency in the implementation of Parate Execution for both. This means that an agreement regarding the existence of a breach is not required. In addition, if the debtor does not voluntarily surrender the guarantee object, then the creditor by law reserves the rights to seize the object. Arguably, it is necessary to amend the Fiducia Law in accordance with the MKRI's Decisions, in line with the general principles of security in parallel with the principles of justice, legal certainty and utility.

Keywords: *Fiducia Security; Mortgage Rights; Parate Execution; Indonesian Constitutional Court (MKRI) Decision*

1. INTRODUCTION

Legally, fixed guarantee is one of the guarantee institutions other than personal guarantee. Fixed guarantee is divided into movable objects, namely pledge, fiducia and ship hypothec, while immovable fixed guarantee, namely mortgage rights, covers land and building. Fixed guarantee is aimed to facilitate the settlement of credit disbursed by the creditor if the debtor defaults. Thus, effective and adequate regulation regarding an easy, quick and simple execution is required so that not much time or resources are wasted. Among others, this can be done by providing authority to the creditor holding the guarantee object to conduct parate execution.

The verdict of the Indonesian Constitutional Court (MKRI) No. 18/PUU-XVII/2019 address judicial review of Article 15 paragraph (1), paragraph (2) and paragraph (3) of Law No. 42 of 1999 on Fiduciary Guarantee (Fiduciary Guarantee Law). Such provisions, relates to the fiduciary guarantee with full executorial authority, in the sense that if the debtor is in breach or defaults, then the receiver of the fiducia (financial institutions) has the rights to sell the guarantee objects on its own behalf through an auction. In the verdict that is *erga omnes*

in nature the MK define that the fiduciary guarantee certificate does not immediately have executorial authority. In this context, a breach in the execution of a fiduciary agreement must be based on a mutual agreement between the debtor and the creditor or based on a legal recourse, namely a lawsuit, to a court determine that the breach exists.

In another verdict (No. 21/PUU-XVIII/2020), MK rejects the petition for judicial review of Article 14 paragraph (3) and Article 20 paragraph (1) of Law No. 4 of 1996 on Mortgage Rights for Land and Objects Related with Land (Mortgage Rights Law). The applicants for the judicial review refer their petition to MK Verdict No. 18/PUU-XVII/2019 on the review of Article 15 paragraph (2) of the Fiduciary Guarantee Law. According to the MK, there are fundamental differences between the nature of fiduciary guarantee and mortgage rights.[1]

The significant difference between the MK verdict for parate execution in the Fiduciary Guarantee Law and the Mortgage Rights law is the application of the *pacta sunt servanda* principle, which is a fundamental norm of an agreement. In a fiduciary guarantee agreement, the MK considers that the terms and conditions regarding a breach that is stipulated in a fiduciary agreement does not bind the creditor and debtor that signs it. Moreover, there must be a written confirmation from the debtor regarding the existence of a breach when the creditor views that the debtor has conducted a breach. In mortgage rights, the MK believes that the terms of a breach that are stipulated in a mortgage rights agreements are binding to the creditor and debtor that sign the agreements, therefore a written confirmation from the debtor regarding the existence of a breach is not needed.

It must be noted that the two MK verdicts as mentioned above impact the mode of execution. If there is no agreement in regards to the existence of a breach between the debtor and creditor, and the debtor does not voluntarily hand over the fiduciary guarantee object, then execution of the guarantee object cannot be done through parate execution. In other words, it must be done through fiat execution based on executorial title, which is by permission from the head of the court. If the execution of fiduciary guarantee is conducted through a court process, then it will need longer time, uneasy, and more expensive. Obviously, it is not in line with the general principles of fixed guarantee, where execution may be conducted in a quick, easy and affordable manner. Meanwhile, mortgage right guarantee execution may still be conducted via parate execution. Since such guarantee does not require an agreement regarding whether or not a breach has occurred. Additionally, there is no requirement for voluntary handover of the mortgage right guarantee object.

Based on the above problem, the research questions encompass problem on how parate execution of fiduciary guarantee and mortgage rights guarantee is regulated, how it is implemented and how parate execution should be regulated in Indonesia so that it can better support legal certainty and justice.

[1] Constitutional Court Verdict No. 21/PUU-XVIII/2020, Petitum, page 20.

2. RESEARCH METHODS

This research uses juridical normative methodology supported by empirical normative one. The focus is the analysis on the provision of parate execution in Fiduciary Guarantee Law and Mortgage Rights Law and their judicial review in the Constitutional Court.

For the data analysis, the research uses qualitative method, namely regulatory and conceptual approach, as well as uses primary, and secondary data, collected based on library research and document review regarding the legal consideration in the two MK verdicts and other relevant court verdicts.

3. ANALYSIS AND DISCUSSION

3.1. Review on The Aspect of Legal Certainty and Justice

Legal certainty is one of the purposes of law as part of the effort to actualize legal protection for the public. The tangible form of legal certainty is the implementation or enforcement of law regarding an action that does not take into consideration who conducts such action. With legal certainty, any person can predict what will happen if a certain legal action is taken. It is required to actualize the principle of equality before the law without discrimination. It is defined in positive law.[2] In this research, the topic is focused on laws that specifically regulate fiduciary guarantee and mortgage rights. The existence of the two regulations is expected to provide legal certainty and justice in the lending and borrowing environment. If there is clear legal basis, then a person can obtain a guarantee of protections afforded by the law. Such certainty is necessary, and crucial to be understood in the context of a legal state. Simplistically, it may be understood that when the business world requires regulatory guidance, and such regulation does not exist, then there will be legal uncertainty as well as uncertainty in business.

The law, as the personification of justice, according to Radbruch, becomes the measure of whether or not a legal system is just. Not only that, justice is also the basis of law as a law. Therefore, justice has both normative and constitutional nature for law. Law is the basis for each dignified positive law.[3] Gustav Radbruch emphasizes that law is the personification of justice and justice is both normative and constitutional law. It is normative since positive law stems from justice values. It is constitutional since justice must become the absolute factor in law. Without justice, a regulation is not proper to become a law. If, in the enforcement of law, the tendency is on the value of legal certainty or from its perspective, then as a value, it has set aside the value of justice and utility. The reason is that in legal certainty, the most important aspect is for the law itself to be in accordance with what was formulated. This also applies if the value of utility is prioritized. In this case, the value of utility will set aside the value of legal certainty and justice since what is most important for the value of utility is the benefit of law for the people. Such is also the case when only the value of justice is observed, then it will set

[2] M. Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," *Legalitas: Jurnal Hukum* 4, no. 1 (2013): 143, http://legalitas.unbari.ac.id/index.php/Legalitas/article/view/117.

[3] Yovita A. Mangesti and Bernard L. Tanya, *Moralitas Hukum* (Yogyakarta: Genta Publishing, 2014), 74.

aside the other values. Therefore, the enforcement of law must have a balance between the three abovementioned values.[4]

The law is all that gives utility for the public. As part of the purpose of law, justice and legal certainty also require a complement in the form of utility. Utility may be understood as happiness. The good or bad in law is determined by whether or not the law can provide utility to all legal subjects. Law is categorized as good if it can provide happiness to the biggest part of society. The public expects utility in the implementation and enforcement of law. The law is for people so that its implementation or enforcement must provide benefit or utility for the people. The implementation and enforcement of law must avoid stirring discord within society. Law that is good is law that provides utility for the people. Here, utility may also be understood as happiness. The public will obey law without having to be coerced by sanctions if it feels that there is utility on it.[5]

Normatively, the Fiduciary Guarantee Law provides legal certainty for the public because it provides a legal basis for the fiduciary guarantee execution process and can resolve problems regarding fiduciary guarantee execution. For business actors, particularly financing companies, the Fiduciary Guarantee Law may provide more guarantee for them in extending credit to the public. Article 15 paragraph (3) of Fiduciary Guarantee Law provides authority for the recipient of fiducia to sell off the guarantee object. The rights to sell the guarantee object is a form of legal certainty for the creditor if the debtor conducts a breach. Article 15 (2) of the Fiduciary Guarantee Law states that the Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial authority as a court verdict that is final and binding. Such provision explains the power of executorial title may be directly implemented without having to undergo a court proceeding and is final and binding for the parties in carrying out the verdict. This means that the creditor is facilitated in conducting execution of fiduciary guarantee object, particularly considering that movable objects are easily damaged, lost or depreciated. In relation to such risk for the creditor, execution of fiduciary guarantee object is crucial instrument.

From a legal aspect, the MK verdict No. No. 18/PUU-XVII/2019 does not reflect legal certainty as it provides different interpretation than the normative provisions as regulated under the Fiduciary Guarantee Law. Furthermore, the MK verdict regarding the interpretation of "existence of a breach is not unilaterally determined by a creditor but through an agreement between the debtor and the creditor or a legal recourse which determines that a breach has occurred" is an issue because on one hand, the terms and condition of a "breach" have been determined by the creditor and debtor upon the signing of the credit agreement and guarantee agreement. One thing that is certain is that this verdict severely impacts relevant institutions. Since the enactment of this MK verdict, the mechanisms for an auction has become more complex and tedious for creditors, since there is an added requirement of needing a Declaration of a Breach from the debtor. In

[4] Bernard L. Tanya, Yoan N. Simanjuntak, and Markus Y. Hage, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi* (Yogyakarta: Genta Publishing, 2013), 117.

[5] Fence M. Wantu, "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, dan Kemanfaatan di Peradilan Perdata," *Mimbar Hukum* 25, no. 2 (2013): 206. https://jurnal.ugm.ac.id/jmh/article/view/16092.

other words, the debtor must admit that it has conducted a breach. Conceptually, this contravenes with the principles of contract law, whereby an occurrence of a breach does not depend on the approval from the creditor, but whether or not the debtor's obligations are fulfilled.

By definition, a "breach" is failure or negligence in conducting obligations as determined in an agreement made between a creditor and debtor.[6] Breach, or failure to perform a commitment occurs either intentionally or unintentionally.[7] In practice, a Breach is "the implementation of an agreement that is not on time or is not as it should be, or not at all."[8] So, a breach does not require approval from the debtor since proving its existence is a simple process. If the proof of a breach must be based on an agreement between the creditor and debtor, then it will be more difficult for the creditor to conduct execution. Normatively provision of breach have already regulated clearly and adequately. It has been used as a reference in the legal practice and established certainty.

In short, the MK verdict does not provide legal certainty for both parties, particularly for the creditor. The elements of parate execution for movable objects which require easy, speed and efficiency in its execution process are disrupted by such MK verdict above, especially for the business sector.

3.2. Parate Execution of Fiduciary Guarantee in Accordance with Fiduciary Guarantee Law

Article 15 Paragraph (3) of the Fiduciary Guarantee Law determines that "If debtors are in default, Fiduciary Recipient has the rights to sell Assets that become Fiduciary Guarantee objects on their own authority". In this case, the creditor's authority to conduct Parate Execution is obtained based on the executorial right attached to the fiduciary guarantee certificate as stipulated in Article 15 Paragraph (2) that "the Fiduciary Guarantee Certificate has the equal executorial authority to a court decision that already has a permanent legal force". As for what is meant by "executorial title" is that it "may be directly executed without having to go through a court and is final and binding for the parties to carry out the verdict". The execution of Parate Execution does not involve a court process or a bailiff. If the requirements under Article 29 Paragraph (1) letter b of the Fiduciary Guarantee Law is fulfilled, the creditor may directly contact the auctioneer and request for the guarantee to be auctioned off as soon as possible. In this case, Parate Execution must be carried out through a public sale or auction. Meanwhile, Article 30 of Fiduciary Guarantee Law governs that "The grantor of Fiducia must hand over the fiduciary object for execution of fiduciary guarantee." In the elucidation of the provision, it is stated "in the event that the grantor of the fiducia does not hand over the object that is the guarantee object at the tme that the execution is conducted, the receiver of the fiducia has the right to seize the fiduciary guarantee object and, if necessary, request aid from authorized parties to do so." Chief of Indonesian Police Force Regulation Number

[6] Salim HS, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2008), 108.
[7] Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak* (Jakarta: Rajawali Pers, 2007), 74.
[8] M. Yahya Harahap, *Segi-Segi Hukum Perjanjian*, 2nd ed. (Bandung: Penerbit Alumni, 2017), 60.

8 of 2011 on the Safeguarding of Fiduciary Guarantee Execution provides the explanation on who the "authorized parties" refer to. In addition, if the debtor does not hand over the fiduciary guarantee object, then the creditor may take legal measures such as coordinating with the police to secure or provide securitization to the execution conducted on the fiduciary guarantee object. The execution is also conducted by external teams of the creditor (legal counsel or debt collector) with the creditor. To ensure that the execution is conducted in a proper and legal manner, if parate execution is conducted, then it is conducted with executorial title. Executorial title is implemented through a petition to the head of the district court which is followed by summons, executorial seizure and sale of the guarantee object through an auction. In practice, creditors often conduct parate execution since the implementation of executorial title requires more time and cost as its procedure is not simple and is quite complex. Even though the debtor is required to hand over the guarantee object, often times, there are actions that disrupt the debtor verbally and physically, at times there can even be use of violence and forced seizure. These factors are the main reason for the submission of the judicial review to the Law Number 42 of 1999.

3.3. Parate Execution of Fiduciary Guarantee After the Indonesian Constitutional Court's Verdict Number 18/PUU-XVII/2019

After the MKRI's verdict Number 18/PUU-XVII/2019, Parate Execution of fiduciary guarantee is conducted in accordance with the interpretation set forth by the MKRI. In short, there must be an agreement between the debtor and the creditor regarding the existence of a breach, and that the debtor must have handed over the fiduciary guarantee object voluntarily to the creditor. If there is no agreement regarding the existence of a breach, or if the debtor does not voluntarily hand over the guarantee object, then the execution is conducted based on the permission of the court. In this case, it will be commanded to the debtor to fulfil its obligation. In case the debtor does not fulfil such command, then the court shall administer a fiat execution and order an attachment of the guarantee object to be subsequently auctioned off. That the process of settlement for the receivables of the creditor.

It must be noted that financing companies have conducted the methods as regulated by the MK verdict. However, in practice, it is not easy to obtain consent regarding the existence of a breach from the debtor. In this regard, the debtor will choose the procedure in which the creditor submits for an execution through the court. There are instances in which the debtor has agreed that a breach occurs, but does not voluntarily submit the guarantee object. So that it become a complex legal problem. What is certain is that execution conducted by financing institutions post MK verdict in regards to fiducia can be summarized, as follows:

1. Parate execution cannot be conducted like it has been before the MK verdict. Currently, financing institutions must enter into an agreement with the debtor regarding the existence of a breach. This may be done by submitting warning letters for several times, and if the debtor does not comply its obligations, the financing

institution will send their representative to negotiate with the debtor. The results of the negotiation may also vary, as follows:

a. The debtor agrees that it is in breach and voluntarily hands over the fiduciary guarantee. In such case, the debtor will sign an agreement which states that he is in breach and has voluntarily handed over the fiduciary guarantee object to the creditor. Based on this, the execution may be conducted using the parate execution prosedur
b. The debtor agrees that it is in breach, but the debtor refuses to handover the fiduciary guarantee object. In such case, the debtor will only sign an agreement stating that he is in breach, parate execution shall be done through executorial title.
c. The debtor disagrees with the creditor that a breach has occurred, and the debtor is not willing to hand over the fiduciary guarantee object. In this case, execution cannot be conducted, and the creditor must submit a breach of contract lawsuit to the court. In general, creditors will not choose these options due to time and cost concerns. Meanwhile, the value of the guarantee object will depreciate over time and it will not be beneficial for the creditor to commence a breach of contract lawsuit. In practice, these kinds of cases have become the *status quo.*

2. Execution using executorial title. So far, courts rarely conduct execution using executorial title. This is because if there is no agreement between the creditor and the debtor regarding the existence of a breach, and the debtor does not hand over the fiduciary guarantee object. Similarly, if there is an agreement regarding the existence of a breach but the fiduciary guarantee object is not voluntarily handed over by the debtor, then the auction cannot be carried out. This is because for movable objects, they may only be auctioned if the object is physically controlled by the applicant for the auction, namely the creditor. In this regard, some courts may conduct executorial title with only an agreement of the breach's existence and without voluntary hand over of the guarantee object of the debtor. The condition is that when the auction is held, the auction petitioner or creditor physically controls the goods to be auctioned.
3. Execution through private sale. This method is often done by financing institutions or creditors. The condition is that there must be an agreement that the debtor is in breach, and the debtor agrees to sell the guarantee object privately. For private sale, generally a time span of between 1–3 months is given. If the private sale is not successful, then the guarantee object will be sold off through an auction.

3.4. Parate Execution of Mortgage Rights in Accordance with the Mortgage Rights Law

Mortgage rights is an institution that provides guarantee over rights of land as governed under Law No. 5 of 1960 on Basic Agrarian Principles. In Mortgage rights, protection is afforded to the creditor since a sum of funds that is loaned to the debtor with a guarantee is prioritized over the rights of the land itself. Executorial right of the object of mortgage rights lies with the creditor and its implementation is easy and certain. Parate Execution is regulated in Article 6 of the Mortgage Rights Law, which gives rights to the first creditor to sell off the object of the security rights through a

public auction and reach the settlement from such sale. This right may be executed without a court decision. Parate Execution may be called as direct execution by the holder of the mortgage rights without assistance or action of other parties. This is the same with the provisions of Parate Execution regulated under the Fiduciary Guarantee Law, since both represent a judicial guarantee with the same principles, one of which being that the procedure of the execution must be easy, quick and affordable.

It should be acknowledged that, implementation of parate execution is the fastest method since it does not require fiat execution from the court and its implementation may be conducted by the creditor as the holder of the mortgage rights directly through a public auction. In this case, the auction is conducted on the State Assets and Auction Service Office (KPKNL).

The provisions regarding the auction process is regulated under Minister of Finance Regulation No. 213/PMK.06/2020 on the Instructions for Auction and Directorate General of State Assets Regulation No. PER03/KN/2010 on Technical Instructions on the Implementation of Auctions and Circular Letter No. 19/PN/2000 on the Implementation of Circular Letter No. SE-21/PN/1998 on Instructions for the Implementation of Article 6 of Mortgage Rights Law.

3.5. Parate Execution of Mortgage Rights After the Indonesian Constitutional Court's Verdict No. 21/PUU-XVIII/2020

Considering the success story of the MKRI's Verdict No. 18/PUU/-XVII/2019 on Parate Execution of Fiduciary Guarantee Law, a debtor as the grantor of mortgage rights submits a judicial review of the provisions of parate execution of Mortgage Rights Law. MK rejects the judicial review as stipulated by MK Verdict No. 21/PUU-XVIII/2020. Parate Execution of Mortgage rights does not require an agreement between the debtor and the creditor regarding a breach nor the voluntary handover of the mortgage rights object.

According to Article 6 of the Mortgage Rights Law, an agreement between the creditor and the debtor regarding the existence of a breach is not needed. Since the guarantee rights object is an immovable good, therefore the "physical control of the guarantee object by the auction applicant" requirement is also not necessary. If the auction object is still possessed by its residents, then it is sufficient to state that description regarding the object. In such case, the execution auction may be carried out and the potential buyer is assumed to be aware that the auction goods are still possessed by a third party.

After the MKRI's verdict, the implementation of parate execution of fiduciary guarantee and mortgage rights could be summarized, as follows:

Table 3.1. *Writer's Conclusion from analysis of Constitutional Court Verdict No. 18/PUU-XVII/2019 and 21/PUU-XVIII/2020 on Parate Execution of Fiduciary Guarantee and Mortgage Rights*

Parate Execution of Fiduciary Guarantee	Parate Execution of Mortgage Rights	Fundamental Difference between the these MKRI's Verdicts
Proof of a written agreement between the creditor and the debtor which states that the debtor is in breach is require; proof of voluntary handover of the fiduciary guarantee object by the debtor to the creditor is also required.	Proof a written agreement between a creditor and debtor which states that the debtor is in breach is not required and proof of a voluntary handover of the Mortgage rights object from the debtor to the creditor is also not required.	The application of *"pacta sunt servanda*" which is a fundamental norm of an agreement. In the Mortgage Rights scheme, the MK acknowledges that the terms and conditions stipulated in an agreement is binding to the parties, whereas in a Fiducia scheme, the MK's approach is different whereby there must be an agreement regarding the existence of a breach between the creditor and debtor.

3.6. The Indonesian District Court Verdicts regarding Parate Execution Disputes after the MKRI'sVerdict

Based on other court decision regarding parate execution of fiduciary guarantee in the era of post MK Verdict No. 18/PUU-XVII/2019, it could be summarized some points as follows:

1. District courts and Supreme Court (MA) acknowledge that the terms and conditions regarding "default/breach" stipulated in a financing agreement or credit agreement that has been signed by the debtor and creditor are legitimate terms and conditions which are binding to its signatories. If the debtor violates on or more of such conditions, then the creditor can determine that the debtor has defaulted or is breach without needing an agreement between the debtor and the creditor.
2. District courts and Supreme Court (MA) believe that the seizure of a fiduciary guarantee object by the creditor after the debtor is declared to be in breach is an action of the creditor to secure the guarantee object to be auctioned. Considering that the fiduciary guarantee object is a movable object that is transferrable, the district courts as well as the MA do not require a voluntary handover by the debtor to the creditor. In several cases submitted to the district court, there are recorded actions of creditors who have forcibly seized the guarantee object from the debtor, and the MA still decides that such action is not an unlawful act.

Considering that the judicial review of parate execution in the Mortgage Rights Law was rejected by the Constitutional Court (MK), then there is no conception which has affected the district court's decision, be it before or after the MK Verdict No. 21/PUU-XVIII/2020. The district court verdicts regarding execution of mortgage rights are in essence as follows:

1. Evidentiary proceedings regarding the breach is simple in nature, whereby if the debtor violates the provisions stipulated in the agreement which has been signed with the creditor, then no further proof regarding the breach is required.
2. Execution of mortgage rights auction may be carried out even though there is a recommendation letter from the Head of the District Court to stop the auction. In this case, if the requirements of an auction are fulfilled, then the auction may go on.
3. Execution of mortgage rights auction may still be conducted even though there is a lawsuit in a court. In this case if the requirements of an auction are fulfilled, then the auction may go on.
4. Execution of mortgage rights may be conducted through parate execution as regulated under Article 6 of Mortgage Rights Law, even though the guarantee object is still possessed and resided by the owner of the guarantee object.

3.7. Authority of the Constitutional Court to Conduct Judicial Review of Laws

MK verdicts are *erga omnes* in nature, meaning that it is final and binding, not only for a certain party, but for anyone. The binding nature is emphasized in the elucidation of Article 10 of Law Number 8 of 2011 regarding the Amendment of Law Number 24 of 2003 regarding the Constitutional Court, stipulates that "the final nature of a Constitutional Court Verdict in this Law also includes a binding legal nature". The provisions of Article 29 paragraph (1) of Law Number 48 of 2009 regarding Judicial Powers define that "The Constitutional Court has the authority to adjudicate, on the first and final level, with a verdict that is final in nature…". Accordingly, the Constitutional Court has a legal consequence that is certain and strict, there can be no further legal remedies since the declaration of the verdict. This principle is also stipulated in Law Number 24 of 2003 regarding the Constitutional Court as amended by Law Number 8 of 2011 regarding the Constitutional Court. Therefore, it can be concluded that there is no other option besides carrying out the verdict of the Constitutional Court.[9]

Legal uncertainty caused by two verdicts that are contradictory to each other must be resolved. This relates to the legal uncertainty arising out of the MA verdict, and the two judicial bodies that do not have any resolution to these verdicts. In the future, there must be clarification regarding the hierarchical structure between MA and MK decisions.

Structurally, MA is not subordinate to the MK, and has a different view regarding the execution of movable guarantees. MA may interpret the meaning of the law. The basis for its considerations is as follows:

1) Positive legal norm "all agreements that are legitimate act as law for those that are party to it (*pacta sunt servanda*). This means that violations to the obligations in an agreement are violations of obligations, or breaches. This principle in positive law is regulated under Article 1338 paragraph (1) of the Indonesian Civil Code. Essentially, all valid agreements apply as law to individuals involved. Such agreements are

[9] Maruarar Siahaan, " Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum IUS QUIA IUSTUM* 16, no. 3 (2009): 359, https://doi.org/10.20885/iustum.vol16.iss3.art3.

irrevocable other than through mutual consent, or pursuant to reasons stipulated by the law. This is a fundamental norm in law and is closely related to the principle of good faith in complying to an agreement.[10] An agreement born as a result of consent is a meeting of the intention of the parties and it cannot be realized unless it is based on the good faith of the parties. Without good faith and the ability to carry out what has been promised, the agreement cannot be carried out as it should. In relation to financing agreements and credit agreements, the creditor's obligation to provide a certain amount of funds to meet the debtor's needs has been implemented. Furthermore, the debtor's obligation is to return the funds to the creditor according to the procedures agreed in the agreement. In this case the good faith of creditors and debtors to comply with the agreement is crucial. Without such good faith the financing and credit business, including banking in Indonesia, will not perform properly.

2) The Fiduciary Guarantee Law and the Mortgage Rights Guarantee Law are adoption from the Dutch legal provisions. The Mortgage Rights Guarantee Law is adapted from the provisions regarding hypothec as regulated under Book II of the Indonesian Civil Code and the regulations regarding Creditverband in Staatsblad 1908-542 as amended by Staatsblad 1937-190.[11] The Fiduciary Guarantee Law is adapted from the *Hoge Raad* Judge Decision: *Bierbrowerij* Arrest dated January 25, 1929.[12] The above laws have been adjusted with the national conditions and life values of the Indonesian society. A good law is law that is in line with the law that is present in society. The definition of "in line" here means that the law reflects the values that live in society. Both the Fiduciary Guarantee Law and the Mortgage Law are judicial guarantees with the same legal principles, and are not new legal principles that were created when Indonesia adapted from the Dutch legal provisions. Historically, the legal principles of judicial guarantees are the basic requirements needed to protect the interests of creditors and debtors. Constitutional Court Verdict Number 18/PUU-XVII/2019 which provides a different understanding of certain provisions in the Fiduciary Guarantee Law, results in the change of the understanding of the general principles of judicial guarantees in general such as mortgages and pledges, especially regarding the execution procedures that easy, quick and affordable, namely parate execution.
3) In accordance with the opinion of the expert Aria Sayudi in the Constitutional Court Verdict No. 18/PUU-XVII/2019 statutory provisions regarding guarantees for movable objects will be an indicator of competitiveness and ease of doing business. Some of the guidelines recommended by UNICITRAL agencies and the World Bank in drafting legislation for movable property guarantees include:[13]
    a. Facilitating execution rights of the holder of the guarantee rights efficiently;

[10] J. Satrio, *Parate Eksekusi sebagai Sarana Mengatasi Kredit Macet* (Bandung: PT. Citra Aditya Bakti, 1993), 36.
[11] Law No. 4 of 1996 regarding Mortgage Rights of Land and Land Related Objects, Considerations letter c.
[12] Salim HS, *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2013), 60.
[13] Constitutional Court Verdict No. 18/PUU-XVII,2019, Expert Opinion, page 53.

b. The execution process must uphold the collection rights of the movable object when the debtor is in breach of the obligations which is guaranteed by on object. The enforcement mechanism must allow for execution outside of the courts.

4) Consideration that Indonesia is projected to become a developed country in 2045, one way to make this happen is to have good regulations. One of the marks of good regulations is that it fulfills legal principles that can be accepted internationally, so that it will make it easier for foreign capital to invest in Indonesia, as there is legal certainty. The entry of foreign investment will increase employment opportunities and subsequently improve people's standard of living. MK Decision Number 18/PUU-XVII/2019 which provides a different understanding of certain articles in the Fiduciary Guarantee Law, clearly does not provide ease of execution or is inefficient in the execution process. Parate execution in practice will be difficult to be implemented because the debtor will not easily agree with the creditor regarding the existence of a default. Debtors tend to encourage creditors to conduct execution through a court process. The conditions for a breach or default have been stipulated in the principal debt agreement and fiduciary guarantee agreement, so that when the debtor fulfils these criteria in the agreement in question, the creditor can unilaterally determine that the debtor is in default. The next condition is that there must be voluntary hand over of collateral by the debtor to the creditor. This requirement will also be difficult to fulfil after the debtor defaults or is in breach. The procedure for collecting the guarantee object by creditors when the debtor defaults is regulated in the guarantee agreement. Therefore, the creditor has the right to withdraw collateral when the debtor defaults. If these two requirements are not met, then the execution of the guarantee can only be carried out by fiat execution based on executorial title and based on permission from the head of the district court. In contrast, what is recommended by international institutions is execution without involving the court or wholly outside the court.

3.8. Ideal Regulation of Parate Execution

In practice, creditors' efforts to gather fiduciary guarantee objects from the debtor are usually carried out by using a debt collector. Execution methods carried out by debt collectors is often done using force, by seizing the guarantee objects. Procedures like these are not regulated in the execution provisions in the Fiduciary Guarantee Law. In fact, the procedure for collection and seizing fiduciary guarantee objects using a debt collector has been regulated in the Republic of Indonesia Financial Services Authority Regulation (POJK) Number 35/POJK.05/2018 on the Implementation of Financing Company Business, Chapter XI regarding Collection, which is regulated from Article 47 to Article 52, as well as Chief of Indonesian Police Force Regulation Number 8 of 2011 on Safeguarding the Execution of Fiduciary Guarantees.[14]

[14] Regulation of the Financial Services Authority of the Republic of Indonesia Number 35/POJK.05/208 on the Implementation of a Financing Business, Article 47–52, essentially explains the obligations that must be carried out by a financing institution if it is to execute a fiduciary guarantee. The Indonesian Chief of Police Regulation Number 8 of 2011 on Safeguarding the Execution of Fiduciary Guarantees, essentially explains that the Police will assist

With regard to the above analysis, particularly to enable the law provide legal certainty as well as the balance interests of various parties involved in the execution of fiduciary guarantees, it is necessary to set up ideal parate execution regulation by amending the Fiduciary Guarantee Law to accomodate the POJK provisions and the Indonesian Chief of Police Regulation No. 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees. The main points of the amendments are included in the revision of the Fiduciary Guarantee Law which must be accompanied by criminal sanctions provisions, so that all relevant parties will comply with the regulation. Should there be any violation, the parties in violation of the regulation will be subject to criminal sanctions. The rationale for such a change is due to the fact the POJK only regulates financing companies, while the Fiduciary Guarantee Law regulates all parties related to fiduciary guarantees. Another consideration is that the POJK can only set out the financing business' license revocation as the highest degree of sanction while laws are able to impose criminal sanctions. If legal reform or amendment to the Fiduciary Guarantee Law require a long time to effectuate, then the primary revision may be included in the principal debt agreement and guarantee agreement/Fiduciary Guarantee Deed.

Mortgage Rights Law provides that if a debtor is in breach, then the creditor may conduct mortgage rights execution. In this case, the holder of the first mortgage rights reserves the rights to sell off the mortgage rights guarantee on its own behalf through an auction to collect the settlement of its receivables from the sale of the guarantee object.

Referring to Article 6 and Article 20 paragraph (1) letter (1) of the Mortgage Rights Law, and Number 4 of the General Elucidation of such law, it is clearly stated that every execution of an object of mortgage rights can be carried out through a public auction. Through this method, the highest price can be reached out, and the creditor has the right to collect the settlement of its receivables that is guaranteed by the sales of the mortgage right guarantee object. In the event that the proceeds of the sale exceed the receivables, then the remainder has to be becomes hold by the grantor of the mortgage right. Therefore, it can be concluded that the underlying principle of parate execution as a means of accelerating the settlement of creditors' receivables is the principle of legal protection for the holder of the first guarantee right. The embodiment of the principle of legal protection is reflected in the implementation of parate execution, namely due to its facilitation, fast duration and low cost, compared to executions through executorial titles. This is in line with the procedure for selling the object of guarantee right on its own authority, which is without prior security attachment or execution seizure and without court fiat.

3.9. The Bill on Movable Object Guarantee

The government, represented by the Ministry of Law and Human Rights and particularly the National Legal Guidance (BPHN) has prepared a Draft Law on Movable Object Guarantee (Movable Object Guarantee RUU) which will be finalized by the

financial institutions in executing fiduciary guarantees if necessary, under several conditions that must be fulfilled by the financing institutions.

Directorate General of Legislation. The Bill governs the imposition of guarantee on objects previously governed under Fiduciary Guarantee, Mortgage, Warehouse Receipt, Aircraft Guarantees and Ship Hypothec. Additionally, the regulation will also be directed for financing agreements which imposes a movable object as a guarantee (quasi-guarantee).[15]

One of the considerations in drafting this Bill is the need to accommodate the Constitutional Court's Verdict No. 18/PUU-XVII/2019. The Constitutional Court's Verdict caused the conducting of executions (which had so far been carried out by directly taking over the guarantee object objects using fiduciary certificates as the basis for rights) unable to be carried out immediately. If there is no agreement regarding the breach and the debtor refuses to voluntarily hand over the fiduciary guarantee object, the creditor must file for execution assistance to the court.[16]

In the academic paper for the Bill, it is stated that, in order to provide legal certainty and facilitate the execution process, it is necessary to regulate the terms and mechanism of the execution. Execution of movable guarantee objects is carried out by means of execution of executorial titles. The implementation of the execution must first be announced and the fiduciary certificate can immediately be used as the basis to directly takeover the movable guarantee object. Execution can be carried out immediately because between the grantor and the recipient of the movable object guarantee has entered into an agreement regarding the elements of a breach and also the willingness of the grantor to voluntarily hand over the guarantee object. This agreement has been stipulated in the deed of guarantee for movable objects. The grantor of the movable objects is obligated to hand over the objects in the event of execution. This obligation arises when the object is not under the possession of the recipient. After the execution is carried out, the recipient may sell the object. Sales are made through a public auction.[17] If, upon execution, it turns out that a problem relating to the collection of the

[15] Academic Papers of the Bill on *Movable Object Guarantee*, Ministry of Law and Human Rights of the Republic of Indonesia Year 2021. Foreward, page ii.
[16] *Ibid,* Guarantee Execution, page 157–158.
[17] *Ibid*, Philosophical, Sociological and Juridical Basis, page 235–237, which is presented in the academic paper as follows:
1) The philosophical basis submits that improvements to the rules for the guarantee of movable objects that will be carried out through this Draft Law must pay attention to fulfilling the needs of national development while fulfilling 3 (three) fundamental aspects of legal value, namely justice, legal certainty and utility. From the aspect of legal benefits, the formulation of this new law was carried out to allow everyone the opportunity to obtain guarantee rights in and simple and efficient way. Guarantees for movable objects as an instrument for obtaining access to capital must be able to improve its role so that it is able reach more people. The easier the public's access to capital, the more it will encourage business activity, which is expected to be directly proportional to the increase in people's welfare.
2) Sociological basis submits that fulfillment of the need for business financing is obtained through the provision of credit through debt agreements between creditors and debtors through credit facilities that contain risks, namely not being repaid by debtors to creditors in accordance with what was agreed. One of the ways to anticipate this is for the debtor to provide guarantees to creditors. One type of guarantee that is applicable in Indonesia is judicial guarantees which includes guarantees for movable objects. In general, regulations regarding movable objects in Indonesia have several flaws, namely the legal framework that has not been integrated, non-possessive ownership arrangements which still impose numerous restrictions, the scope of movable objects that can be guaranteed is limited and has not yet accommodated international practice.

guarantee object occurs, then it can be resolved through a mechanism outside the court. Settlement is carried out by an institution that has a dispute resolution function in collection of guarantee objects. Institutions authorize to conduct these functions are those registered with the Ministry of Law and Human Rights.[18] The purpose of this is to avoid execution through a court process.

Several important articles in the Bill of Movable Object Guarantee includes, amongst others: Article 10 paragraph (1) letter h which states that "A Guarantee Deed for a movable object as mentioned in Article 9 paragraph (1) shall contain at least: a clause regarding a breach which includes that execution may be done immediately and the voluntary handover of the Guarantee object must also be stipulated in the guarantee agreement."

4. CONCLUSION

Normatively, provisions regarding the parate execution of Fiduciary Guarantees are stipulated in Article 29 of Law no. 42 of 1999 concerning Fiduciary Guarantees. The law defines that if the debtor or fiduciary grantor is in breach, then the execution of the object of the fiduciary guarantee can be carried out by selling the object which is the object of the fiduciary guarantee on the authority of the fiduciary recipient himself. The procedure is done through a public auction whereby the proceeds are settled with the obligation. This means that execution by way of parate execution does not involve a court or a bailiff. If the requirements as stipulated in Article 29 Paragraph (1) letter b of the Fiduciary Guarantee Law have been met, the creditor can contact the auctioneer and request that the guarantee object be auctioned off immediately. Meanwhile, provisions regarding the execution of mortgage rights are regulated in Article 6 of Law No. 4 of 1996 concerning Mortgage Rights on Land and Land Related Objects. In principle, if the debtor defaults, then the holder of the first mortgage rights reserves the right to sell the mortgage right object through a public auction and collect the settlement of the receivables from the earning of the sale. The provisions in Article 20 of the Mortgage Rights Law provide protection to creditors with priority rights over other creditors.

In practice, the execution of fiduciary guarantees is confronted by several obstacles. An example of such obstacle is that the grantor of the fiducia, who from the start still possesses the object of the guarantee (*constitutum possessorium*) refuses to voluntarily hand over the object of guarantee to the fiduciary recipient. In this case, the provisions of Article 30 of the Fiduciary Guarantee Law states that "Grantors of fiducia are obliged to hand over objects that are objects of fiduciary guarantees in the framework of executing fiduciary guarantees". To provide legal certainty for the execution through parate execution, the elucidation of Article 30 of the Fiduciary Guarantee Law emphasizes the following principles "In the event

3) Juridical Basis conveys that the special arrangement can also be used to amend the regulation of the provisions for movable object guarantees which have been canceled by the Constitutional Court through the Constitutional Court Verdict Number 18/PUU-XVII/2019 by creating provisions that accommodate the contents of such verdict in order to avoid re-annulment in the future. Due to various developments in the legal needs of society, verdicts of the Constitutional Court and developments in the international world, it is necessary to establish a Movable Object Guarantee Law to improve existing regulations.

[18] *Ibid.*, Conclusion, page 265–266.

that the Grantor of Fiducia does not hand over objects that are objects of fiduciary guarantee at the time the execution is carried out, the fiduciary recipient has the right to collect the objects of fiduciary guarantees and if necessary may request assistance from the authorities." Using the above provisions as a basis, creditors often must forcefully collect the collateral object through various ways. The fact, this coercive practice was used as legal grounds for judicial review of the Fiduciary Guarantee Law to the Constitutional Court.

Unlike the case with mortgage rights, parate execution based on Article 6 of the Mortgage Rights Law has relatively no obstacles. This is because the collateral object is an immovable object, and therefore the physical possession of the collateral object by the auctioneer is not required. Furthermore, if the auction object is still controlled by residents or other parties, it is sufficient to provide information of such status. In this case, the execution auction can still be carried out and the prospective buyer is deemed to be aware that the object of the auction is still controlled by a third party. Additionally, based on the Constitutional Court Verdict No. 18/PUU-XVII/2019 and No 21/PUU- XVIII/2020, it can be concluded that there are differences in "norms" and legal implications in the implementation of parate execution of fiduciary guarantees with execution of mortgage rights, particularly in the application of the principle of "*pacta sunt servanda*". In the conception of mortgage rights, the Constitutional Court acknowledges that the terms and conditions of a breach that are stipulated in an agreement are binding on the parties. Meanwhile, in the fiduciary scheme, an agreement regarding the existence of a defaults after the default occurs is required. After the Constitutional Court's verdict, the process of implementing the parate execution of fiduciary guarantee became more complex as it is difficult for the debtor and creditor to reach an agreement regarding the existence of a breach. This is also the same for the conditions of the voluntary handover of the guarantee object from the debtor to the creditor. Subsequently, the creditor must carry out the execution of the fiduciary guarantee through the courts. This causes execution costs to be not simple, quick and affordable. As for parate execution of mortgage rights in a normative manner, it remains to be carried out.

According to the Supreme Court (MA), the terms and conditions regarding "breach/default" stipulated in the financing agreement or credit agreement, are legally valid and binding on the debtor and creditor who have signed the agreement. This means, if the debtor violates one or several provisions, then the debtor is deemed to have committed a breach, without further agreement to ensure that a default has occurred. Furthermore, the Supreme Court is of the opinion that the collection/seizing of the fiduciary guarantee objects by creditors is an action to secure guarantee items, considering that fiduciary collateral objects are transferable. Certainly, the creditor's action to forcibly collect the guarantee object from the debtor is not an unlawful act. Meanwhile, Constitutional Court's Verdict Number 21/PUU-XVIII/2020 the procedure for parate execution remains in accordance with the Mortgage Rights Law. In this case, legal standing of the judiciary is consistent, in the sense that the evidentiary process for the breach is simple. If the debtor violates the agreement signed with the creditor, then there is no need for the proof of the breach. The execution of the mortgage right can still be carried out by parate execution as stipulated in Article 6 of the Mortgage Rights Law, even though the collateral object is still occupied by another party and/or controlled by the owner of the guarantee.

Since there are substantially differences between the decisions of the Constitutional Court and the Supreme Court regarding the basic principles of parate execution of Fiduciary Guarantees, it is necessary to have policy steps to provide legal certainty in the implementation of business transactions based on fiduciary guarantees. In this regard, the Constitutional Court's verdict, which is *erga omnes* in nature, results in the need for the Fiduciary Guarantee Law to be revised. This needs to be done immediately while still paying attention to the general principles of judicial guarantees, especially those relating to easy, quick and affordable execution arrangements. More than that, considering that in practice creditors' efforts to collect guarantee objects from the debtor are often done using debt collectors, who tend to do so by force, there is a need to regulate the proper procedure for parate execution in the Fiduciary Guarantee Law. This amendment to the Fiduciary Guarantee Law can then become an umbrella as well as a basis for improving the Regulation of the Financial Services Authority of the Republic of Indonesia (POJK) Number 35/POJK.05/2018 on the Implementation of Financing Company Business, and the Indonesian Chief of Police Regulation Number 8 of 2011 on the Safeguarding the Execution of Fiduciary Guarantees.

In line with the above conclusions, it is advisable to amend Law No. 42 of 1999 on Fiduciary Guarantee by considering MK Verdict No. 18/PUU-XVII/2019 pursuant to the general principles of easy, quick and affordable execution. This step is in line with government’s plan of currently drafting the Bill on Movable Objects Guarantee whose substance include pledge guarantee, fiducia, warehouse receipt. The problem is that if the RUU is enacted into law, then it will revoke the Fiduciary Guarantee Law which is currently effective. Regardless of the process and status of the Bill, the amendments of the Fiduciary Guarantee Law are recommended to be as follows:

1) The financing or credit agreement must regulate in detail provision or clause regarding what qualifies as “breach”. This includes that if the debtor violates the provisions that are stated in the agreement, then the creditor may consider the debtor to be in breach. Thus, the debtor, within a certain time frame, must submit the fiduciary guarantee object to the creditor. If the debtor does not hand over the guarantee object, then the creditor has the rights to seize the guarantee object from the debtor.
2) In the event that the debtor is in breach, then the creditor must conduct collection. This is done, at the very least, through a warning/demand letter in accordance with the term stipulated in the financing agreement. The demand/warning letter must include information on:
    a. The number of late days in the settlement of obligations;
    b. The outstanding amount of the loan;
    c. The interest of the loan; and
    d. The fines for the loan.
3) The financing company or the creditor may cooperate with other parties in conducting collection against the debtor. Such cooperation must be stipulated in writing, with the following conditions:
    a. The other party must be a legal entity;
    b. The other party must have a license from authorized institutions; and

c. The other party must have human resources that have obtained certification in collection from the Professional Certification Institute in the field of collection.

4) The implementation of Fiduciary Guarantee, be it from the creditor himself, or other parties as its representatives must be done in an orderly, safe and responsible manner and must avoid things that may cause judicial losses or endanger physical/mental safety. In this case, the creditor as the recipient of the fiducia must be responsible for the collection that he conducts.
5) Violations to the above must be met with criminal sanctions, be it imprisonment or a fine.

As a short-term solution, considering that the amendments to the Fiduciary Guarantee Law requires a considerable time and effort, then it is recommended for the main points above to be included as a part of the substance in each principal agreement of a loan and/or the guarantee agreement/Fiduciary Guarantee Deed. Meanwhile, for Mortgage Rights Law, particularly for parate execution, no change is necessary since it is already in line with the legal practice and legal rational of the law.

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