

Harmonization of Legal Decision Number 18/PUU-XVII/2019 by The Constitutional Court Concerning Fiduciary Guarantee

AlFath Anggara¹, Herwastoeti², Fitria Esfandiar^{3*}

^{1,2,3} Faculty of Law, University of Muhammadiyah Malang, Malang, Indonesia

*Corresponding author. Email: fit.esfan@gmail.com

ABSTRACT

After the decision of Constitutional Court No. 18/PUU-XVII/2019 states that the conditional unconstitutionality of the explanation regarding the execution of fiduciary guarantees regarding the part of execution is not absolute. but it is necessary to have an agreement between the creditor and the debtor. This research uses normative legal research methods. The legal materials used are primary, secondary, and tertiary legal materials by including literature studies. The results of the study show that after the quo decision, the legal problems encountered are related to the substance of the ruling that has not been implemented into regulations (positive law) with the harmonization of law, so there will be potential for overlapping regulations. The conclusion shows that post-a quo legal issues, which are final and binding, still do not have clear legal instruments regarding legal procedures regarding the confiscation of the execution of fiduciary guarantees. Suggestions, it is necessary to harmonize the law by making laws and regulations through legislative acts and forming technical guidance regarding the procedures for the execution of fiduciary guarantees related to confiscation.

Keywords: *Harmonization of Laws, Execution of Fiduciary Guarantees, Legal Certainty*

1. INTRODUCTION

A holistic and comprehensive change in the science of legislation is very urgent[1]. Especially regarding the efforts to harmonize the law in the Constitutional Court Decision No.18/PUU-XVII/2019 concerning Fiduciary Guarantees and benefits after efforts have been made to harmonize the law. Among the articles that are considered to infringe on constitutional rights are articles 15 paragraphs (2) and (3). Looking at the reasons for the judicial review being submitted, namely, first, the lack of legal protection so that the Act was requested for a judicial review. Second, the existence of exclusive rights granted to creditors. Third, there is a neglect of the rights of the debtor who should receive equal protection and the right to obtain the proceeds from the sale of the object of the guarantee at a fair and reasonable price[2].

From the decision handed down above, the Constitutional Court essentially became the creator of the law even though it did not go through the legislative process (legislate from the bench), because this was not the competence of the Constitutional Court. Various decisions of the Constitutional Court have influenced the norms and legal system in Indonesia[3]. Then the decision is implemented by establishing laws and

regulations. Because the decision affects other norms, the law must always be operational[4]. The legal harmonization of the Constitutional Court's decision is a mandatory step to be taken in order to complete the laws and regulations that have been tested materially and are normally followed up by the House of Representatives[5]. Harmonious means suitable, balanced and in harmony[6].

2. RESEARCH METHOD

The research method in this study uses a method of normative legal research by conducting an assessment of legal products in the form of legislation[3]. this study using legal materials which include letters, books, laws, and regulations, to official documents issued harmonization of law decisions NO.18/PUU-XVII/2019 by the constitutional court on fiduciary guarantees[4]. This normative juridical approach has a focus on juridical issues regarding the provisions of the guarantee law in the form of a fiduciary guarantee[5]. Approach methods in this study include statute-approach, conceptual approach[6].

3. RESULT AND DISCUSSION

a. Legal Harmonization of Constitutional Court Decision NO.18/PUU-XVII/2019.

Opening an explanation of harmonization in the language approach, the word harmony is defined as something related to harmony or *Seiya* & one word. Looking at Law no. 42/1999 concerning Fiduciary Guarantees, there is a norm of the regulation that violates constitutional rights, this is stated in a final and binding manner through the decision of the Constitutional Court Number 18/PUU-XVII/2019[2]. From this point of view, it can be explained that the harmonization of laws and regulations must be carried out in 2 (two) ways of formulation, namely **First**, the harmonization of regulatory system formulation policies. **Second**, harmonization of substance, this second path has the intention to lead to the formulation of harmonization of norms in the legal material. types or types of harmonization, including vertical harmonization and horizontal harmonization: **First**, regarding vertical harmonization itself there is a principle that supports this understanding, namely the principle of *lex superior derogate legi inferiori* meaning that higher regulations override lower regulations. Statutory regulations must contain the composition of statutory regulation in harmony with the articles in the higher statutory regulations, where this is the article that lays the foundation for the formation of the statutory regulations. Thus, vertical harmonization of laws and regulations is the harmonization of laws and regulations with other laws in different hierarchies. Regulation with a special character overrides a rule with a general character. Legal fields are not the same but they bind themselves integrally to one another so that a categorical, assertive, and comprehensive arrangement is needed. The horizontal harmonization of the laws and regulations is subject to the underlying principle of a statutory regulation located in the same and equal hierarchy. special character and different from other laws and regulations, to achieve certain goals.

b. The Conception of Legislators' Relationship with the Constitutional Court in the Perspective of Checks and Balances.

The Constitutional Court and the House of Representatives as the legislators have a reciprocal relationship[7]. explicitly in the decision of the Constitutional Court mentions the constitutional mandate to the legislators.

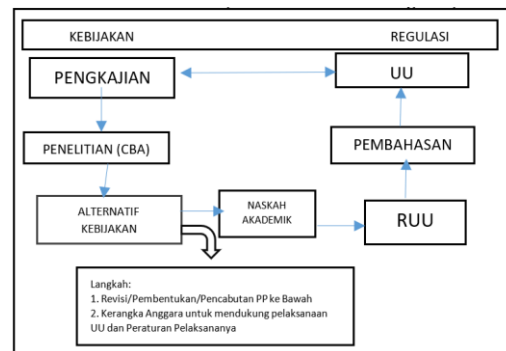
The constitution contains rules that construct the balance of power, the relationship and even the interaction between the constitutional court and the legislature. Returning to the idea of the principle of checks and balances, this principle gives birth to an important goal of creating a comprehensive and equal balance and

coordination between state powers. This embodiment provides ideal conditions for the law itself, namely: first, the decision of the constitutional court to obtain its authority existence, secondly being able to stem the law that was formed after the decision of the constitutional court which in the future has the potential to contain constitutionality problems again.

c. Design of Legal Harmonization Construction Prior to the Establishment of Legislation Against the Constitutional Court Decision NO. 18/PUU-XVII/2019

The stages of discussion in the policy formulation process which include various activities in terms of the flow of regulation formation, according to the author, it is important to know the understanding of policy formulation especially related to schematic descriptions to determine the quality of regulations, among others as follows[8]:

TABLE I. REGULATORY FORMING FLOW



The formulation of the concept of the formation of regulations is an integration between the formulation of policies and the formation of regulations. In this scheme, the policy formulation stages/steps taken are from assessment, research, to creating policy alternatives. Then in the context of the formation of regulations, the activities found are the preparation of academic texts, the formulation of draft laws, discussions, even up to the promulgation. Problems with the regulation of Law no. 42/1999 concerning Fiduciary Guarantees can be classified into 3 (three) things, namely Conflict Regulations, Multiple Interpretations, Non-Operational.

1) Conflict regulation

The problem with this regulation is that there is a conflict because it is found that the legal provisions of Law no. 42/1999 concerning Fiduciary Guarantees contradicts other legal provisions, this can be found in Article 15 paragraph (2) which stipulates that principally related to executive powers have the same legal

force as court decisions that have binding on them. permanent law, while Article 196 HIR states that basically if the negligent party does not heed the decision peacefully, then the winning party (the creditor) needs to submit a request to the head of the district court to summon the negligent party to immediately fulfill the decision in the court. the time determined by the head of the judge's court.

2) Multi-interpretation

This regulatory problem is stated to have multiple interpretations or ambiguities, because the legal provisions of Law no. 42/1999 concerning Fiduciary Guarantees in which clearly there is ambiguity in the object and subject that is regulated so as to cause language ambiguity/complexity, this can be found in Article 15 paragraph (3) that in conditions involving the phrase "breach of promise", it does not show clarity indicators and assessments of them, the expressive verbis juridical provisions do not regulate who is authorized and has the right to give an assessment that the debtor has committed an act of "breach of promise", so it is clear that the absence of such conditions gives birth to a subjective and one-sided assessment of the Fiduciary Recipient/Creditor without considering The Fiduciary Provider/Debtor does not even consider the "good faith or good intentions" of the Debtor. The formulation of the article and explanation above does not answer the conditions in the phrase "breach of promise", so the potential for widespread interpretation due to ambiguity or multiple interpretations is very large.

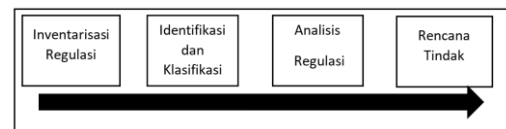
3) Not operational

Regulations in the legal construction of Law no. 42/1999 concerning Fiduciary Guarantees is declared to be non-operational, because it has no usability in a concrete mechanism, in this case, it should be further regulated in accordance with the model of the mechanism for confiscation of fiduciary security objects that are assertive and categorical in order to be in line with legal traffic procedurally, so that In practice, there are concrete procedural provisions with standard legal mechanisms.

The next step is carried out by analyzing regulations using legality, needs and situational criteria parameters. In relation to the criteria for legality and necessity, the regulatory theory that has been developed is applied with a

philosophical, juridical, and sociological approach. In terms of philosophical and juridical aspects, it is necessary to be represented by legality criteria, while sociological aspects are represented by needs criteria. Furthermore, regarding situational criteria, it can be articulated as criteria developed to accommodate a particular issue, as is the case in Constitutional Court Decision NO. 18/PUU-XVII/2019 stipulates that there must be an agreement between the two parties in advance voluntarily to maintain the dignity of legal certainty in its protection for the parties regarding the execution of the object of a fiduciary guarantee in a friendly manner, then these criteria will be developed further in a concrete manner, for example by establishing a mechanism standards related to the execution of fiduciary guarantees.

TABLE II. REGULATORY SIMPLIFICATION INSTRUMENT



(adopted from the book *Strategi Nasional Reformasi Regulasi: Mewujudkan Regulasi yang Sederhana dan Tertib*, 2015.)

Understanding of regulatory simplification instruments in a schematic manner, containing 3 (three) criteria, namely Legality, Needs, and Friendly. On the criteria of legality (legal-basic), it means that at the level of legislation it is not allowed to conflict with regulations that have a higher value or level, hierarchically tiered. The criteria for needs means that a statutory regulation must have a clear purpose and is really needed by the community and state administrators, as well as answers to the problems to be solved. Furthermore, the friendly criteria means that a regulation must not carry an excessive additional burden on the parties affected by the implication of the regulation directly.

d. Probability of Legal Implications After Legal Harmonization Is Done on Constitutional Court Decision No. 18/PUU-XVII/2019

Changes in law will always be felt since the beginning of the gap between events, public relations, circumstances and the laws that govern them[9]. From this view, it can be the basis when the Constitutional Court Decision No.

18/PUU-XVII/2019 concerning Fiduciary Guarantees is implemented into a Law (positive law).

First, following the views of Mahfud MD, who is classified as critical of the Constitutional Court, he once said that the Constitutional Court's decision is not necessarily fully valid[7]. So that the decision of the Constitutional Court must be read as a consideration within the scope of the legislative body as a form of legislation to follow up on the decision of the constitutional court so that it becomes a legal product that regulates firmly. For this matter, the legislators need and must obey the limits, thus it can be said that the legislators follow the consequences of adhering to the principles of constitutional supremacy and constitutional democracy according to the 1945 Constitution of the Republic of Indonesia. So the legislative review capacity is functioning properly.

Second, the Constitutional Court Decision No. 18/PUU-XVII/2019 concerning the Fiduciary Guarantee can be tested by the Constitutional Court again progressively if it is formulated into a law. Limitations in the judicial review of the 1945 Constitution of the Republic of Indonesia by the Constitutional Court in the case of *ne bis in idem*, this is regulated in Article 60 of Law no. 24/2003 concerning the Constitutional Court, that is, a material contained in paragraphs, articles, and/or parts that are the same as the case that has been tested, cannot be re-applied[10]. as for the Constitutional Court Decision No. 18/PUU-XVII/2019 is casuistic in nature and the legal problems that will arise will not be much different from the 'what' contained in the constitutional loss in the decision. So it will be 'mental' with the output that the application for judicial review has been rejected.

Third, a judicial review can be carried out by the Supreme Court if there is a conflict with other regulations, both vertically and horizontally. It is said so because the touchstone used to apply for a judicial review at the Supreme Court is the law, as in principle the authority is enshrined in Constitution 24A paragraph (1) of the 1945 Constitution of the Republic of Indonesia that the Supreme Court has the authority to examine statutory regulations under the law. against the law, the provisions related to the authority are again regulated in Article 9 paragraph (2) of Law no. 12/2011 concerning the Establishment of Legislation, followed by the legal provisions in Article 31 (1) and (2) of Law no. 5/2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court.

Fourth, the next implication is regarding the harmonization of law in the Constitutional Court Decision No. 18/PUU-XVII/2019 concerning Fiduciary Guarantees is a matter of legal certainty[11] The aspect of legal certainty is also commonly referred to as legality which carries a legal understanding that the law is able to

provide and place the status quo on the rights to something from a person as he is a legal subject. A person will not know legally what to do so that it can cause anxiety.

4. CONCLUSION

That post-a quo legal issues, which are final and binding, still do not have clear legal instruments regarding legal procedures regarding the confiscation of the execution of fiduciary guarantees. Suggestions, it is necessary to harmonize the law by making laws and regulations through legislative acts and forming technical guidance regarding the procedures for the execution of fiduciary guarantees related to confiscation.

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