

POLICY REFORM OF DEBTOR PROTECTION IN THE EXECUTION OF FIDUCIAN OBJECTIVES OF WARRANTY BY CREDITORS

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ABSTRACT

Economic needs and economic pressure cannot release every human being from his dependence on loan security institutions include fiduciary security institutions. It is because in its development, the increasing needs require every human being and business institution to make loans to meet their needs. In practice, the installment payment process often fails so it is requiring the guarantor's property be executed by the creditor. The problem comes because there are many creditor companies do not register fiduciary securities and the practice collateral execution by creditors is carried out force by a debt collector as a representation of creditor without prior notification to the debtor. It raises a legal problem because seizure of the security unilaterally is against the laws and regulations and contradict the principle of justice. In addition, there is also a problem regarding who is entitled to the fiduciary security if the debtor is unable to pay credit installments. So, it is necessary to examine the protection of debtors from the execution of fiduciary security unilaterally and in relation to the rights of fiduciary security. Based on the research conducted, it can be concluded that, it is necessary to do a law reformation by amending the provisions that are regulated on article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Security.

Keywords: Execution, Fiduciary, Policy, Protection, Reform

INTRODUCTION

The business world is basically unable to be apart from the role of capitalist institutions. It is because in its development there is an increasing of life necessities which requires every human being and business institution to make loans to fulfill their needs and desires for an object or related to the fulfillment of their daily needs. One of loans type is through a loan fiduciary security through creditors, which in this case is mostly related to the sale and purchase of motor vehicles. The financing company or creditor is an institution that provides financing for the purchase of goods or businesses which the payment can be done periodically or by installments.

The development of creditor companies is growing rapidly in Indonesia. The types of goods being financed are increasingly diverse, not only in the transportation sector, but also in the construction, industrial, agricultural and other sectors. Financing made by the creditor is stated in the credit agreement between the creditor and the debtor. In the agreement, the creditor usually includes "d by fiduciary" which means that in the credit agreement (as the principal agreement) there is a fiduciary security agreement (as an accessoire agreement) which impose the object being financed as a collateral for repayment of debt when there is a bad credit or default.

In addition, the imposition of objects that are used as fiduciary security must be registered at the fiduciary registration office as regulated in Article 11 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Security (Law 42/1999). Registration of fiduciary security is carried out no later than 1 (one) month after the credit or financing agreement is made. A fiduciary security certificate must be made at the notary's office as regulated in Article 5 paragraph (1) Law 42/1999 (Naja, 2005). By registering a fiduciary security, it will easier for the creditors to execute fiduciary securities in the event of bad credit or default happens. However, there is a fact that shows many creditor companies did not register fiduciary securities, and the confiscation of the guarantee object by creditors was carried out by force without prior notification to the debtor. It raises a legal problem, because the seizure of the guarantee unilaterally by coercion without the existence of a fiduciary security deed is contrary to the provisions in Law 42/1999 and Head of Indonesian Police Regulation number 8 of 2011 concerning Safeguarding the Execution of Fiduciary Security (Kapolri regulation 8/2011). Beside of that, the problem that exists is who is entitled to the fiduciary security object if the debtor is unable to pay credit installments because there are differences in regulations between the Law Number 8 of 1999 concerning Consumer Protection (Law 8/1999) and Law 42/1999. In the provisions of article 18 paragraph (1) letters d and f of the Consumer Protection Law, which prohibit business actors to include standard clauses in the financing agreement regarding the granting of power over the objects to the business actor in order to reduce service benefits or consumer assets that become the object of sale and purchase of services in the event of bad credit or default. Whereas article 15 paragraph (3) Law 42/1999 stipulated that the fiduciary have a right to sell objects which are used as a fiduciary security by their own will. Beside of that, the prohibition of unilateral execution as intended by Article 15 paragraph (3) Law 42/1999 related to fiduciary security is also regulated in the Constitutional Court Decision Number 18/PUU-XVII/2019 that also prohibits unilateral execution by the creditors. It means that the existence of article 15 of Law 42/1999 has clearly resulted an opportunity for the execution of fiduciary security carried out unilaterally by creditors and has clearly resulted injustice for the debtor. Therefore, this research is necessary to examine the mechanism of fiduciary security execution to see what causes these problems and how to solve it.

MECHANISM OF FIDUCIARY SECURITY EXECUTION

As stipulated in art 4. 1992 Act No 42 fiduciary security is a main agreement resulting in a liability of the respective parties to fulfill an obligation. With regards to fiduciary objects based on Article 20 Law 42/1999 stipulated that fiduciary security follows the object, whoever the object is, except there is a transfer of inventory objects. This article is based on the principle of the *droit*

de suite because the absolute rights over the object's control is on the debtor. In general, execution is the implementation of a court decision or deed.

Execution of fiduciary security is the confiscation and sale of of fiduciary security object (Usman, 2011). The purpose of the execution is to sell the fiduciary security as repayment of the debtor's unfulfilled obligations. The creditor has the right to collect the debtor's obligation, including collecting all installments and other fees that have not been paid by the debtor, and has the right to execute the creditor's object which is used as collateral without having to return the excess price from the sale of the object. The execution of this fiduciary security occurs if the debtor defaults or breach of the contract. If there is a default by the debtor which causes losses to the creditor company, based on Article 1239 of the Civil Code, that party can claim compensation in the form of fees, losses and interest.

The execution of fiduciary security is based on Article 29 of Law 42/1999 which states that if the fiduciary guarantor breaches his/her promise, then the object of fiduciary security can be executed by the fiduciary recipient. The execution of the object also stipulated in article 30 of Law 42/1999 which states the Fiduciary Giver is obliged to hand over the object of fiduciary security to be executed.

DEBTOR PROTECTION IN THE EXECUTION OF FIDUCIARY SECURITY BY CREDITORS UNILATERALLY

Basically, the implementation of Article 15, Article 29, and Article 30 of the Law 42/1999 has been prohibited by Law 8/1999, Kapolri regulation 8/20011 and the Decision of the Constitutional Court Number 18/PUU-XVII/2019. Article 4 Law 8/1999 states that the consumer has a right to feel comfortable, secure and safe in consuming goods and/or services and also has the right to get advocacy, protection, and proper consumer protection dispute resolution efforts. It means that, the unilateral execution against this provision because it often uses violence by debt collectors and is often done without any prior notification to the debtor. In fact, based on Law 8/1999 debtors as consumers should have a right to feel safe. In addition, the implementation of Article 15, Article 29, and Article 30 of the Law 42/1999 also contradicts Article 5 letter (d) of the Law 42/1999 which states that the consumer protection disputes should be done properly. It also contradicts Article 18 of the Law 8/1999 which states that in offering goods and/or services business actors are prohibited from making or including standard clauses on each document and/or agreement if it states the transfer of responsibility of business actors, states that the power of attorney from consumers to business actors, either directly or indirectly, is to carry out all unilateral actions relating to goods purchased by consumers in installments, give business actors the right to reduce the benefits of services or reduce the assets of consumers which are the object of sale and purchase of services, states that the consumer authorizes the business actor to impose a mortgage, lien, or security right on goods purchased by consumers in installments. And every standard clause that has been stipulated by the business actor in a document or agreement that meets these shall be declared legally null and void.

The implementation of Article 15, Article 29, and Article 30 of the Law 42/1999 which opens up the opportunity for unilateral execution by creditors of fiduciary security also contradicts the Kapolri Regulation 8/2011. Article 2 of Kapolri Regulation 8/2011 states that the regulation has a purpose to make sure that the implementation of the execution of Fiduciary securities will be done safe, orderly, smooth, and in an accountable manner and also to make sure the safety and security of the Fiduciary security recipient, fiduciary security provider. It is also automatically contradicting the Constitutional Court Decision Number 18/PUU-XVII/2019 which opposes the unilateral execution as referred in Article 15 paragraph (2) and paragraph (3) Law 42/1999. So it is clear that automatically the unilateral exclusion of objects of fiduciary security by creditors also contradicts Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that "Indonesia is a State of Law", article 27 paragraph (1) Constitution of the Republic of Indonesia 1945 which states that all citizens shall have equal position in law and government and are obliged to uphold the law and government without exception, and article 28D paragraph (1) Constitution of the Republic of Indonesia 1945, which states that everyone has the right to recognition, guarantees, protection and legal certainty that is just and equal treatment before the law. So that automatically the existence of Article 15, Article 29, and Article 30 Law 42/1999 clearly contradicts the First, Second, and Fifth Precepts of Pancasila.

Legal inconsistency between Law 42/1999, Pancasila, Constitution of the Republic of Indonesia 1945, Law 8/1999, Kapolri Regulation No. 8 of 2011, as well as the Decision of the Constitutional Court Number 18/PUU-XVII/2019 causes many cases of violence that have violated human rights in the execution of fiduciary security that was carried out unilaterally by the creditor with the help of debt collectors. For examples, the case of execution of fiduciary security with a violence which committed by six a debt collector to someone initially as BA who resulted BA being the victim of injuries.¹ Based on the facts regarding a contradiction of regulations which potentially cause legal uncertainty as well as the fact that in practice article 15, article 29, and article 30 causes harm to society as experienced by BA, it can be clearly concluded that revisions are needed to the fiduciary security law in order to ensure legal protection of the debtor.

EXECUTION OF FIDUCIARY SECURITY IN THE UNITED STATES

The law in the execution of fiduciary assets in America is more directed at a process to maximize the value of the ongoing business and maintain the social benefits of business existence, as well as increase the bills held by creditors. It means that the purpose of fiduciary securities focuses to improve the company, maximize a returns to creditors, create a fair system according to the level of creditors' bills, and identify the causes of company failure, and impose sanctions on management who causing the company bankrupt (Goode, 1997). It is clearly seen in Chapter 11 of the Bankruptcy Code (Schick, 2006). Then in its development in America, the law of fiduciary security execution has a purpose to protect honest debtors by waiving their debts or discharge. This goal is also attached to the execution of fiduciary security of individuals who breach the contract so that will be a fair distribution of debtor assets that cannot pay debts among creditors by provide an opportunities for debtors to be free from all burdensome debts, as long as they can provided that they do not commit any other dishonest or improper acts (Rose, 1994). And also in America,

¹<https://regional.kompas.com/read/2020/03/10/19282921/tarik-paksa-kendaraan-dengan-kekerasan-6-debt-collector-ditangkap>, 12 Mei 2020.

the default itself is not determined unfairly by creditors as in Indonesia. There are two kinds of examination that have to be done, there are equity test and the other one is a cash flow test or a balance sheet test that will be done by Uniform Commercial Code (UCC) (Carl, 1986).

The United States has two doctrines to limit whether creditors' bills can be accepted in the execution of fiduciary security. First, doctrine of provability, this doctrine said that creditors' claims that can be proven that are included in the criteria for billing in the execution of fiduciary security. Second, doctrine of allowability that determines creditors' bills can be accepted by the Bankruptcy Court if it can be calculated rationally without delaying the administrative process for executing fiduciary security. It is clearly different from the implementation of the execution of fiduciary security as contained in Article 15, Article 29, and Article 30 of Law 42/1999, where the default or insolvency lies on the creditor's perception. So, it should be necessary to set a standardization of the default category and it is also necessary to do an examination of insolvency situations through the judiciary as in the United States. Besides can be adopted in Indonesia, this mechanism also will good and can be adopted too in another country to ensure a legal protection for public.

REFORM OF FIDUCIARY EXECUTION POLICY BASED ON JUSTICE VALUE

The problems that have explained above are also contrary to progressive legal thinking which focused on real efforts of change to make a fundamental reversal in legal theory and practice and to make various breakthroughs. This liberation is based on the principle that law is for humans and not the other way around and the law does not exist for itself, but for something broader that are human dignity, happiness, welfare, and human glory (Rahardjo, 2004). The execution of fiduciary objects using a violent approach is unfair because this method does not reflect the rule of law and has been banned by the Constitutional Court Decision. In order to realize the various existing ideas, a system of law enforcement with high integrity is also needed. Anis stated that a breakdown in the constitutional system is one of the smallest parts such as an execution of fiduciary security is increasing due to the law enforcement crisis (Mashdurohatun, 2011).

Law is closely related to human life, so talking about law cannot be separated from talking about human life (Mertokusumo, 2007). Law is not a final scheme, but is constantly moving, changing, following the dynamics of human life because law does not work in a vacuum, but the basis of its work is society (Rahardjo, 2010). Therefore, the law must be open to change if it is necessary. In this case, as what Friedmann said that the legal system consists of 3 subsystems, there are substance, structure and culture (Roper & Friedman, 1976). By seeing that the problems in debtor protection originate from the substance of Law 42/1999, it is necessary to have reform or legal reform. A legal policy reform is essentially an effort to reorient and re-evaluate the socio-political, socio-philosophical, socio-cultural values that underlie and provide content to the aspired normative and substantive contents of the law (Arief, 2013). So, it is necessary to carry out legal reform by doing an amendment to the provisions of Law 42/1999. *First*, by revoke article 29 and 30 Law 42/1999. *Second*, by amending provisions of article 15 Law 42/1999 to be:

Table 1: The Idea of changing Article 15 Law 42/1999

PROVISIONS BEFORE REFORMED	WEAKNESSES	AFTER REFORM
Article 15 paragraph (3) of Law 42/1999 which states: "If the debtor breaches the contract, the creditor has the right to sell the object which becomes the object of the Fiduciary Security at his own power."	The provision of article 15 paragraph (3) and its explanation has no criteria and explanation regarding the definition of default. So that the default can be interpreted by the creditor freely to carry out the unilateral execution of fiduciary security.	It should be regulated about the criteria of default by debtors to creditors and also the provision which states that the execution can only be carried out by doing an examination of the validity by auditing the debtor's and the examination can only be carried out in court. So, our idea is to add more provisions in article 15 into: 1. The breaches the contract referred to Article 15 paragraph (3) is the absence of good behavior by the debtor in paying off the debt, even though it should be known that the debtor is able to pay off his debt to the creditor. 2. The provisions as intended in Article 15 paragraph (3) can only be carried out when an examination of the validity of the debtor's breaches the contract has been carried out by auditing the debtor's ability to pay off existing receivables. 3. Examination related to breaches the contract as referred can only be carried out by the court.

CONCLUSION

Fiduciary security companies are growing rapidly in Indonesia to fulfill human and companies need. In practice, the installment payment process often fails so it is requiring the guarantor's property be executed by the creditor. The problem comes because there are many creditor companies do not register fiduciary securities and the practice collateral execution by creditors is carried out force by a debt collector as a representation of creditor without prior notification to the debtor. It raises a legal problem because seizure of the guarantee unilaterally is against the laws and regulations and contradict the principle of justice and have violated human rights. In addition, there is also a problem regarding who is entitled to the fiduciary security if the debtor is unable to pay credit installments. It happens because there is legal inconsistency between article 15, article 29, and article 30 of Law 42/1999, Pancasila, Constitution of the Republic of Indonesia 1945, Law 8/1999, Kapolri Regulation No. 8 of 2011, as well as the Decision of the Constitutional Court Number 18/PUU-XVII/2019. Based on the facts regarding a contradiction of regulations which potentially cause legal uncertainty as well as the fact that in practice article 15, article 29, and article 30 causes harm to society, it can be clearly concluded that revisions are needed to the fiduciary security law in order to ensure legal protection of the debtor.

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