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The Executorial Nature of Fiduciary Guarantee Certificates as Equivalent to Final and Binding Court Decisions

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Abstract

In the fiduciary guarantee certificate, the phrase "For the Sake of Justice Based on God Almighty" is included, which grants it the same executorial power as a court decision with permanent legal force, as regulated in Article 15 of Law Number 42 of 1999 on Fiduciary Guarantees. This study examines three main problems: first, the function of the principles of publicity and speciality in fiduciary guarantee registration; second, the legal force of the fiduciary guarantee certificate; and third, its position as the basis for execution of fiduciary guarantee objects. The research adopts a doctrinal method aimed at systematically explaining legal rules, analyzing interrelations among them, clarifying obscure aspects, and predicting future developments. The approach combines statutory, conceptual, and historical perspectives, employing both primary and secondary legal materials, alongside non-legal references, analyzed through a deductive-qualitative method. The principle of publicity functions to ensure accessibility in identifying fiduciary objects, while the principle of speciality provides legal certainty to fiduciary recipients. However, the fiduciary guarantee certificate is issued by the Ministry of Law, which does not possess the authority to grant executorial power. Therefore, from a theoretical standpoint, the fiduciary guarantee certificate should not equate to a court decision with permanent legal force but rather serve merely as proof of registration containing the statement "For the Sake of Justice Based on God Almighty." This reveals a normative contradiction between statutory regulation and the practical interpretation of the certificate's legal force".
Keywords: *Executorial, Fiduciary, Court Decision.*

Abstrak

Pada sertifikat jaminan fidusia, dicantumkan irah-irah "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa" yang mempunyai kekuatan eksekutorial yang sama dengan putusan pengadilan yang telah berkekuatan hukum tetap berdasarkan Pasal 15 Undang-Undang Nomor 42 tahun 1999 tentang Jaminan Fidusia. Selanjutnya mengenai permasalahan pada penelitian ini *pertama* fungsi asas publisitas dan spesialitas dalam pendaftaran jaminan fidusia, *kedua* kekuatan hukum sertifikat jaminan fidusia**,** dan *ketiga* sertifikat jaminan fidusia sebagai dasar pelaksanaan eksekusi objek jaminan fidusia. Metode penelitian yang digunakan dalam bentuk doktrinal untuk memberikan eksposisi yang bersifat sistematis aturan hukum, menganalisis hubungan antar aturan hukum, menjelaskan bagian yang sulit dipahami dan mungkin memprediksi perkembangan dimasa mendatang. Pendekatannya perundang-undangan, konseptual, dan sejarah dengan bahan hukum primer, sekunder, dan non hukum yang dianalisis dengan metode deduktif-kualitatif. Asas publisitas dan asas spesialitas berfungsi sebagai kemudahan dalam mengindentifikasi benda jaminan fidusia dan memberikan kepastian pada penerima fidusia dalam mempertahankan benda jaminan tersebut kepada siapapun bilamana

debitur melakukan cidera janji atau wanprestasi. Sertifikat jaminan fidusia diterbitkan oleh Kementerian Hukum yang tidak memiliki landasan kewenangan untuk mencantumkan kekuatan eksekutorial berdasarkan undang-undang. Maka menurut hukum seharusnya sertifikat jaminan fidusia secara teori tidak memiliki kekuatan eksekutorial yang sama dengan putusan pengadilan yang telah berkekuatan hukum tetap dan hanya berupa tanda bukti pendaftaran jaminan fidusia yang berisi muatan catatan formulir pernyataan pendaftaran jaminan fidusia dengan irah-irah "Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa".
Kata Kunci: *Eksekutorial, Fidusia, Putusan Pengadilan.*

Introduction

The 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) expressly stipulates that the State of the Republic of Indonesia is a state of law. The State of Law has principles that guarantee the certainty, order, and protection of the law which is based on truth and justice.[1] Related to that, in collateral law, there is a need for legal certainty and protection for interested parties in debt or credit relationships. Likewise, it is necessary to facilitate the repayment of debts or credits encumbered with security rights to debtors who are in default or default through the institution of execution.

Debt or credit in social life has become a necessity for the purpose of establishing and developing a business. Under such circumstances, there is a great and increasing need for the availability of capital and funds in the community.[2] The absorbed business capital can be given in the form of debt or credit, its function can be as capital. In this regard, both for the community, individuals, and a business entity, funds or credit can be obtained from financial institutions in the form of banks and non-banks. In the law of fiduciary guarantee as regulated in Law No. 42/1999 on Fiduciary Guarantee, the regulation was not originally in the form of a law, but grew and developed through various jurisprudence [3] also did not originate from the existing law of objects and the law of guarantee, but rather preceded its parent, namely the law of objects and the law of guarantee, should the law of objects and the law of guarantee be formed first which then gave birth to the fiduciary guarantee.[4]

Initially, fiduciary guarantees were recognised based on jurisprudence.[5] The existence of fiduciary security grew and developed and was widely used in the practice of debts and credits with its process considered simple, easy, and fast. The fiduciary guarantee allows the borrower to retain control of the property for business.[6] This is the breakthrough of the fiduciary guarantee over the pawn guarantee, which is very strict on the *inbezitstelling*

[1] Herowati Poesoko, *Prinsip Pengawasan dan Pembinaan Mejelis Pengawas Daerah merupakan Antisipasi Kriminalisasi terhadap Notaris*, Seminar Nasional Ikatan Mahasiswa Magister Kenotariatan Fakultas Hukum Universitas Jember, Jember, 22 Oktober 2017, 1

[2] Tutik Hidayati, et.al, "Praktik Utang Piutang melalui Aplikasi Peer to Peer Lending Kredit Pintar dalam Perspektif Fatwa DSN-MUI", *Rectenstudent Journal,* Vol. 3 No. 3 (2022): 332.

[3] Ayang Fristia Maulana, et.al, "Legal Analysis of Fiduciary Guarantees in Finance Companies" *Rawang Rencang,* Vol. 5 No. 4 (2024).

[4] M Khoidin, *Eksitensi Lembaga Jaminan Fidusia dalam Sistem Hukum Nasional*, (Majalah Ilmiah, Perpustakaan Universitas Jember, 2004), 49-51

[5] Rachmadi Usman, *Hukum Jaminan Keperdataan*, (Jakarta: Sinar Grafika, 2016), 160

[6] Aiko Priadinata, et.al, "Implementation of the Execution of the Fiduciary Guarantee Object After the Decision of the Constitutional Court Number 18 PPU XVII 2019" *Journal of Legal and Cultural Analutics,* Vol. 4 No. 2 (2025) https://doi.org/10.55927/jlca.v4i2.14431.

requirement. Where the pawn collateral regarding the object requires it to be handed over to the recipient / holder of the pawn, if it is not handed over, the pawn agreement becomes void (article 1152 paragraph (2) BW).[7]

Execution of the object of fiduciary guarantee can be carried out if the debtor commits a breach of promise (default). The execution is carried out in accordance with the provisions in Article 29 paragraph (1) of Law Number 42 Year 1999 on Fiduciary Guarantee. In the execution mentioned above, the sale of the object of fiduciary guarantee under hand is the easiest way to go, when this method fails, it can be carried out by executing the sale at the power of the fiduciary recipient *(creditor)* itself through a public auction (parate execution). If it still fails, it can be executed forcibly with the help of the court based on the executorial title on the fiduciary guarantee certificate.[8]

According to civil procedural law, execution is the implementation of a judge's decision that has permanent legal force. Decisions rendered by the court must be enforceable or executable. A court decision, especially one that contains a *condemnation* or commonly called *condemnatoir,* is meaningless if it cannot be forcibly enforced against the losing party. The judge's decision has executorial power, namely the power to be implemented by force with the help of state instruments. In order for a decision to be forcibly executed against the losing party, the head of the decision is preceded by the words *"For the Sake of Justice Based on God Almighty"*.

Based on the description above, the President of the District Court is authorised to order and lead the execution. The authority is attached to the President of the District Court because of his position *(ex officio)* based on Article 197 paragraph (1) H.I.R. So, related to execution, the President of the District Court *ex officio* has the authority to order and lead the execution related to court decisions that have permanent legal force. So that this research is entitled the executorial power of the fiduciary guarantee certificate is the same as a court decision that has permanent legal force with the formulation of *the first* problem of the function of the principles of publicity and speciality in the registration of fiduciary guarantees, *secondly* the legal force of the fiduciary guarantee certificate, *thirdly the* fiduciary guarantee certificate as the basis for the execution of the fiduciary guarantee object.

Research Method

This research is conducted in the form of *doctrinal* research, which is legal research that aims to provide a systematic exposition *(detailed explanation)* of the legal rules governing a particular field of law, analyse the relationship between one legal rule and another, explain parts that are difficult to understand from a legal rule, and may even include predictions of the development of a particular legal rule in the future.[9] Basically, the writing of this thesis is to obtain knowledge and explanations relating to fiduciary security certificates having the same executorial power as court decisions with permanent legal force.

Results and Discussion

[7] Afdela Yunita, et.al, "Pawn Execution to PT Pegadaian against Collateral Object Which Does Not Belong to the Pawner" *International Journal of Multicultural and Multireligious Understanding,* Vol. 6 No. 3, (2019): http://dx.doi.org/10.18415/ijmmu.v6i3.872

[8] M. Khoidin, *Kekuatan Eksekutorial Sertifikat Hak Tanggungan,* (Surabaya: Disertasi Program Pascasarjana Universitas Airlangga Surabaya, 2003), 256-257

[9] Dyah Ochtorina Susanti dan A'an Efendi, *Penelitian Hukum (Legal Research),* (Jakarta: Sinar Grafika, 2014), 9-17

Function of the Principles of Publicity and Speciality in Fiduciary Guarantee Registration

According to the Big Indonesian Dictionary (KBBI), function refers to usefulness, and in this research it denotes the role of the principles of publicity and speciality in fiduciary guarantee registration.[10] Historically, fiduciary guarantees in Indonesia were based on jurisprudence rather than statutory regulation, as reflected in Surabaya High Court Decision No. 158/1950/Pdt, Supreme Court Decision No. 372 K/Sip/1970, and Supreme Court Decision No. 1500 K/Sip/1978, all of which traced their reasoning to the Hooggerechtshof Decision of 18 August 1932 in the case between Bataafsche Petroleum Maatschappij (BPM) and Pedro Clignett. In that ruling, the court recognized the validity of fiduciary transfer of title to movable property as security for debt, even when the object remained under the debtor's control through a loan agreement. Thus, in its early practice, fiduciary guarantees were established solely through private agreements between parties, without the requirement of registration.[11]

According to M Khoidin in a Scientific Magazine published by the University Library of Jember entitled *The Existence of the Fiduciary Guarantee Institution in the National Legal System* states: This is the breakthrough of the fiduciary guarantee over the pawn guarantee which is very strict on the *inbezitstelling* requirement. Where the pledge regarding the object requires it to be submitted to the recipient / holder of the pledge, if it is not submitted, the pledge agreement becomes void (article 1152 paragraph (2) BW) .[12]

According to Sri Soedewi Masjchoen Sofwan published in his book Rachmadi Usman, stated: The development of community, economic and credit needs requires new forms of collateral, in addition to the forms of collateral that have been regulated in law. The needs of society require a form of collateral, where people can obtain credit with movable goods as collateral, but people can still use it for their daily needs and for their business needs. Credit guarantees over movable objects are increasingly playing an important role in various modern countries, including Indonesia. Such a security institution is known as fiduciary.[13]

According to J. Satrio, the fiduciary institution (fiduciaire eigendoms overdracht) emerged as a practical solution to the need for collateral without transferring possession of the secured object, at a time when no legal provisions on its registration existed. Initially, fiduciary guarantees were essentially an extension of pawn law, enabling the debtor to retain control of the object while transferring ownership in trust, without statutory regulation or registration. However, with the enactment of Law No. 42 of 1999 on Fiduciary Guarantees, the legal framework was formally established, and Article 2 explicitly mandated that all agreements intended to encumber objects with fiduciary guarantees must comply with the provisions of this law, thereby institutionalizing fiduciary security within Indonesia's positive legal system.[14]

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[10] Maya Redanti, et.al, "Legal Protection of Creditors of Fiduciary Guarantee Holders for the Transfer of Fiduciary Guarantee Objects by Debtors" *IJIERM,* Vol. 6 No. 2 (2024): DOI:10.47006/ijierm.v6i2.339

[11] Hirwansyah & Jesse Heber Ambuwaru, "Legal Protection of Creditors Related to Violation of Vehicle Unilateral Fiduciary Collateral Based on the Principle of Justice" *JWS,* Vol. 2 No. 1 (2023): https://doi.org/10.58344/jws.v2i1.197

[12] M Khoidin, *Op.Cit,* 44

[13] Erma Defiana Putriyanti, "Legal Status of Credit Bank Guarantee in Indonesia's Legal Guarantee" *Sriwijaya Law Review,* Vol. 1 No. 2, (2017).

[14] J Satrio, *Hak Jaminan Kebendaan Fidusia* (Bandung: Citra Aditya Bakti, 2002) 151-152)

The encumbrance of objects with fiduciary guarantees, as regulated in Article 5 of Law No. 42 of 1999, must be made by notarial deed in the form of a fiduciary guarantee deed. Such deed must include the data stipulated in Article 6 of the same law, reflecting the principle of speciality that underpins fiduciary guarantees and reinforces legal certainty as one of the law's objectives. The principle of speciality requires that collateral objects be determined specifically, thereby enabling creditors to clearly identify the object when executing an auction sale. Article 6 outlines the mandatory elements of the deed, including the identities of the fiduciary giver and recipient, the principal agreement, a description of the collateral object, the value of the guarantee, and the value of the collateral itself.[15]

Furthermore, fiduciary objects must be registered under Article 11 of Law No. 42 of 1999, which applies to objects located both inside and outside the territory of Indonesia. Importantly, the registration requirement concerns the "object" of the fiduciary guarantee, not the security bond itself. The registration of an object does not automatically equate to the registration of the security bond, and each has distinct legal rules. Ideally, registration should record both the object in the name of the grantor and the creditor's rights under the fiduciary bond, thereby ensuring the enforceability of the security right. This dual registration strengthens the creditor's position and guarantees legal certainty in fiduciary transactions.[16]

Every fiduciary security encumbrance is carried out openly and explicitly, not secretly and secretly, which is the meaning of the principle of publicity. According to this principle of publicity, every security encumbrance must be registered in the place where the law has designated the place of registration. All material security requires registration except pawn, because the pawn is directly handed over to the creditor, so the principle of publicity on the pawn guarantee is carried out by handing over the object. After the collateral object is registered, the *legal fictie* applies that everyone will be considered aware of the granting of the guarantee, so that the recipient of the guarantee can defend the object of the guarantee to anyone.[17]

Based on the description mentioned above, the fiduciary guarantee certificate is According to Sudargo Gautama, legal certainty reflects the principle of legality from two perspectives: first, from the citizen's side, violations of individual rights may only occur if permitted and based on law; and second, from the state's side, every action must be grounded in legal provisions. In this context, fiduciary guarantee objects must be specifically determined in accordance with Article 6 of Law No. 42 of 1999, while their registration is mandated under Article 11 paragraph (1) of the same law. Compliance with these provisions ensures recognition and respect for the rights of others, fulfills moral and religious values, and upholds security and public order in a democratic society. Thus, the registration of fiduciary guarantee objects is inseparably linked to the principles underlying fiduciary law, providing creditors with legal protection for debts secured by fiduciary collateral.

Related to Lili Rasjidi's theory, legal certainty is a value that in principle provides legal protection for every citizen from arbitrary power, so that the law can provide a sense of justice

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[15] Gatot Eko Yudhoyono & Unggul Basoeky, "The Existence of Law Number 42 Of 1999 on The Execution of Object on Fiduciary Guarantees on Defaulted Debtors" *Equity of Law and Governance,* VOL. 7 NO. 1 (2025): https://doi.org/10.55637/elg.7.1.11596.89-95

[16] Sulani, et.al, "Implementation of Copyright as an Object of Fiduciary Collateral in Indonesia" *Journal of Law and Sustainable Development,* Vol. 11 No. 11 (2023): https://doi.org/10.55908/sdg

[17] Suharnoko, "Legal Issues on Pledge Share Agreement"*Indonesia Law Review,* Vol. 1, (2013).

and can create order in the life of society, nation and state.[18] Therefore, the object of fiduciary security must be specific (special) and determined, so as to provide protection for the creditor from arbitrary actions of the debtor, protection of the creditor's right to demand the debtor's obligation to pay off his debt with a specific and determined object, so that it is certain regarding the object of fiduciary security. Creditors obtain protection for their debts with objects that become objects of fiduciary guarantees based on the registration of fiduciary guarantees, so that objects that become objects of fiduciary guarantees to fiduciaries cannot be re-fiduciated or are prohibited from re-fiduciating objects that become objects of fiduciary guarantees that have been registered.[19] Thus, related to the principle of preference in fiduciary guarantees attached to creditors or fiduciary recipients as holders of security rights compared to other creditors.

Peter Mahmud Marzuki explains that legal certainty has two dimensions: first, the existence of general rules that allow individuals to know what actions are permitted or prohibited, and second, legal security from state arbitrariness through predictable legal norms. In this context, fiduciary guarantees require objects to be specific and clearly determined, and their registration is mandatory under Article 11 paragraph (1) of Law No. 42 of 1999. Legal rules governing fiduciary guarantees may take the form of commands, prohibitions, exemptions, or permissions, but in practice, the encumbrance of fiduciary objects falls under a command—requiring registration with the fiduciary registration office. Such registration ensures transparency for debtors, creditors, and third parties regarding the existence of fiduciary security rights, while simultaneously obligating all parties to comply with the provisions of the law to uphold legal certainty and protect creditor interests[20]

Based on the theory of legal certainty mentioned above, the practice of fiduciary guarantees based on jurisprudence and the expansion of pawn guarantees related to collateral objects are both specific (special) and determined with certainty, but there is no order to be registered, because there is no provision that orders or requires it. Prior to the enactment of Law No. 42/1999 on Fiduciary Guarantees, registration was not required, and the absence of such a registration obligation was felt in practice as a shortcoming and weakness for the legal institution of fiduciary guarantees. In addition to creating legal uncertainty, the absence of the registration obligation means that fiduciary guarantees do not fulfil the element of publicity, making them difficult to control. This can lead to unhealthy things in practice.[21] On the other hand, fiduciary guarantees have been used in Indonesia since the Dutch colonial era as a form of collateral born from jurisprudence. This form of collateral is widely used in lending and borrowing transactions because the process of encumbrance is considered simple, easy, and fast, but it does not guarantee legal certainty.[22]

After the enactment of Law No. 42/1999 on Fiduciary Guarantee, it has expressly regulated that the object of fiduciary guarantee is specific (special) and determined based on the type of size and nature and must be registered. With this provision, if there is a collateral object but it is not specific (special) and is not determined based on the type of size and nature and is not registered at the fiduciary registration office, then the collateral object according to

[18] Lili Rasjidi, *Filsafat Hukum Mazhab dan Refleksinya*, (Bandung: Remaja Roesdakarya Offset, 1994) 27
[19] Undang-Undang Nomor 42 tahun 1999 tentang Jaminan Fidusia, pasal 17
[20] J.J.H. Bruggink, Alih Bahasa Arief Sidharta, *Refleksi Tentang Hukum*, (Bandung: Citra Aditya Bakti, 2015) 100-101
[21] Munir Fuady, *Jaminan Fidusia,* (Bandung: Citra Aditya Bakti, 2000) 29
[22] Penjelasan Undang-Undang Nomor 42 tahun 1999 tentang Jaminan Fidusia, I Umum, angka 2 paragraf 2

the theory of legal certainty mentioned above cannot be called an object of fiduciary guarantee. Because the determination of the object and the registration of the fiduciary guarantee in the theory of legal certainty are provisions that are mandatory for the fiduciary recipient.

Legal Power of Fiduciary Guarantee Certificate

The fiduciary guarantee certificate is evidence of the existence of a fiduciary guarantee, this is in accordance with the provisions contained in article 14 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which states that the fiduciary registration office is authorised to issue and submit a fiduciary guarantee certificate on the same date as the date of receipt of the application for fiduciary guarantee registration to the fiduciary. The fiduciary guarantee certificate is a copy of the fiduciary register book that contains records of matters as mentioned in the fiduciary guarantee registration statement form.[23]

This is a new provision, because up to now, the fiduciary guarantee, which is based on jurisprudence, does not require the fiduciary to register the fiduciary guarantee and no fiduciary guarantee certificate is issued.[24] It is known that the original regulation of fiduciary in Indonesia was not in the form of legislation, but grew and developed through various jurisprudence. In the Netherlands, the Dutch *Burgerlijk Wetboek* does not regulate fiduciaries, since at the time of its reception of Roman law, Roman law also did not regulate the fiduciary institution. Naturally, the Civil Code also does not regulate the fiduciary institution, because we know that the Civil Code is a copy of the Dutch *Burgerlijk Wetboek* adjusted through the principle of *concordance*.[25]

This was followed by several jurisprudences, including Surabaya High Court Decision Number 158/1950/Pdt dated 22 March 1951, Supreme Court Decision Number 372 K/Sip/1970 dated 1 September 1977, and Supreme Court Decision Number 1500 K/Sip/1978 dated 2 January 1980, which referred to the contents of the *Hooggerechtshof* Decision dated 18 August 1932 between *Bataafsche Petroleum Maatschappij* (BPM)[26]. Regarding jurisprudence as the basis for regulating fiduciary guarantees, its legal force is based on previous decisions and there are no provisions governing fiduciary guarantee certificates.

In Indonesia, the fiduciary guarantee initially developed as an extension of the pawn guarantee, shaped by the urgent credit needs of small entrepreneurs, retailers, traders, and wholesalers, particularly after the First World War when access to credit was vital. Mortgages were unsuitable due to the lack of land as collateral, while pawn guarantees (pand) were impractical since debtors often needed the goods for business and creditors were burdened with storage risks. As an alternative, the vooraadpand system emerged, allowing goods to be pledged without transferring possession or ownership, but it proved weak because it lacked registration and left the debtor as the juridical owner. Consequently, a new security form evolved, transferring both title and control of goods to creditors while permitting debtors to

[23] Putri Dwi Utami, et.al, "Legal Uncertainty In Fiduciary Guarantee Law: An Analysis Of Reality And Its Impact On Creditors" *Diponegoro Private Law Review,* Vol. 8 No. 1 (2021): https://ejournal2.undip.ac.id/index.php/dplr

[24] Rawikara Dhita Sadewa, et.al, "Legal Protection of Recipients of Fiduciary Guarantees for Supply Gooods with Delivery Orders as Proof of Ownership of Collateral Goods" *Journal of Master of Law/.*

[25] Racmadi Usman, *Op.Cit,* 155-156

[26] *Ibid,* 160

retain use as depositors or users. This system facilitated credit between banks, exporters, and traders using merchandise as collateral. However, despite this evolution, fiduciary guarantees remained rooted in pawn law principles, with the pledged object still under the debtor's control and without any formal fiduciary certificate as proof of the guarantee.

Unlike the case with fiduciary guarantees regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. That there is a fiduciary guarantee on the fiduciary guarantee certificate as regulated in article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees Jo. Constitutional Court Decision Number 18/PUU-XVII/2019 states: 1) In the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1), the words "DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA" shall be included; 2) The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial power as a court decision that has obtained permanent legal force with the interpretation along the phrase "executorial power" and the phrase "the same as a court decision that has permanent legal force" "for fiduciary guarantees where there is no agreement on default and the debtor objects to voluntarily surrendering the object of fiduciary guarantee, all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of a court decision that has permanent legal force"; 3) If the debtor is in default, the Fiduciary Beneficiary has the right to sell the object of the Fiduciary Guarantee at its own discretion, with the meaning of the phrase "in default" being "the existence of a default is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that determine that a default has occurred".

In this arrangement, the fiduciary security certificate contains an phrase with the words "For the Sake of Justice Based on God Almighty", which with the phrase gives the same executorial power as a court decision that has obtained permanent legal force. With this "executorial power", the fiduciary security certificate is immediately enforceable without a lawsuit in court and is final and binding on the parties to implement the decision.[27]

In practice, fiduciary guarantee certificates are issued by the Ministry of Law. The provisions related to the registration of fiduciary guarantees were originally contained in Government Regulation No. 86 of 2000 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Fiduciary Guarantee Deeds. The regulation was later revoked and replaced by Government Regulation No. 21/2015 on the Procedure for Fiduciary Guarantee Registration and the Cost of Making a Fiduciary Guarantee Deed. In both regulations, the provision states that to implement the provisions of Article 5 paragraph (2) and Article 13 paragraph (4) of Law Number 42 Year 1999 on Fiduciary Guarantee, a Government Regulation is stipulated. Related to the application for fiduciary guarantee registration, it has been regulated in article 2 of Government Regulation No. 21/2015 on Procedures for Fiduciary Guarantee Registration and Fees for Making Fiduciary Guarantee Deed, stating: 1) Application for registration of Fiduciary Guarantee, application for correction of Fiduciary Guarantee certificate, application for amendment of Fiduciary Guarantee certificate, and notification of deletion of Fiduciary Guarantee certificate shall be submitted by the Fiduciary, its attorney or representative to the Minister; 2) The application as referred to in paragraph (1) shall be submitted through the electronic Fiduciary Guarantee registration system.

[27] Rachmadi Usman, *Op.Cit*, 214

In this provision, the application for fiduciary registration is submitted by the fiduciary recipient, his attorney or representative to the minister and related to the minister according to article 1 paragraph (6) of Government Regulation Number 21 of 2015 concerning Procedures for Registration of Fiduciary Guarantees and Fees for Making Fiduciary Guarantee Deed is the *minister who organises government affairs in the field of law and human rights.* Thus, the authority related to the issuance of fiduciary guarantee certificates as stipulated in Law Number 42 of 1999 concerning Fiduciary Guarantees and Government Regulation Number 21 of 2015 concerning Procedures for Fiduciary Guarantee Registration and Fees for Making Fiduciary Guarantee Deeds is under the authority of the Minister of Law and Human Rights.

Regarding the Minister of Law, Presidential Regulation No. 155 of 2024 on the Ministry of Law states: Article 1 paragraph (1) Ministry of Law, hereinafter referred to as Ministry, is a ministry that organises government affairs in the field of law and paragraph (2) Minister is a minister who organises government affairs in the field of law. Article 2 paragraph (1) The Ministry is under and responsible to the President and paragraph (2) The Ministry is headed by the Minister. Article 5 The Ministry has the task of organising government affairs in the field of law to assist the President in organising the state government. Article 6 In carrying out the duties as referred to in Article 5, the Ministry shall perform the following functions: a. formulation, determination, and implementation of policies in the field of legislation, general legal administration, and intellectual property; b. implementation of technical guidance and supervision on the implementation of the affairs of the Ministry in the regions; c. coordination of the implementation of tasks, coaching, and providing administrative support to all organisational elements within the Ministry; d. management of state property/wealth which is the responsibility of the Ministry; e. supervision over the implementation of tasks within the Ministry; e. supervision over the implementation of tasks within the Ministry. supervision of the implementation of tasks within the Ministry; f. implementation of national legal guidance; g. formulation, drafting, and providing recommendations on policy strategies in the field of law; h. implementation of human resource development in the field of law; i. implementation of technical activities on a national scale; j. implementation of main tasks to the regions; k. implementation of substantive support to all organisational elements within the Ministry; and l. implementation of other functions assigned by the President.

The Ministry of Law has duties and functions in accordance with Article 1, Article 2, Article 5 and Article 6 of Presidential Regulation No. 155 of 2024 on the Ministry of Law as mentioned above. The duties and functions are in accordance with the provisions regarding government administration as stipulated in Article 1 paragraph (2) of Law Number 30 of 20014 concerning Government Administration. Thus, related to the duties and functions of the Ministry of Law on the implementation of policies in the field of general legal administration, one of which is related to the issuance of fiduciary guarantee certificates, can be qualified as a government administration decision or action as stipulated in Article 4 paragraph (1) letter a of Law Number 30 of 2014 concerning Government Administration, stating: The scope of Government Administration arrangements in this Law includes all activities: a) Government Bodies and / or Officials that carry out Government Functions within the scope of the executive branch.

Based on the description mentioned above, it is also associated with the theory of legal certainty according to Gustav Radbruch's theory, legal certainty is *"scherkeit des rechts selbst"* (legal certainty about the law itself). There are 4 (four) things related to the meaning of legal

certainty, including: 1) that the law is positive, meaning that it is legislation *(gesetzliches Recht);* 2) that this law is based on facts *(tatsachen)* not a formulation about judgements that will later be made by judges, such as "good will", "decency". 3) that the facts must be formulated in a clear way so as to avoid confusion in interpretation, as well as being easy to implement; 4) that positive law should not be changed frequently.[28] Related to this theory, in principle, the fiduciary security certificate that includes the executorial power is clearly formulated in the law and changes in the provisions related to the regulations for its issuance.

Related to the theory of legal certainty, the fiduciary guarantee based on jurisprudence has not been based on the fiduciary guarantee certificate, the decisions are still based on the agreement and there is no provision stating that in the legal basis, namely related to the fiduciary guarantee certificate, this can be seen from the *arrests* from the Netherlands, followed by Indonesian judges. This is evident from the Surabaya *Hooggerechtshof Arrest* dated 18 August 1932 in the case between *Battafsche Petroleum Maatschappij (BPM) and Pedro Clignett,* followed by several other jurisprudences, including Surabaya High Court Decision 158/1950/Pdt dated 22 March 1951, Supreme Court Decision 372 K/Sip/1970 dated 1 September 1977, and Supreme Court Decision 500 K/Sip/1978 dated 2 January 1980.[29] These decisions are based on the lawsuit of default on the fiduciary agreement and there is no fiduciary guarantee certificate, so related to the fiduciary guarantee certificate based on jurisprudence theoretically has no legal basis.

Law No. 42 of 1999 concerning Fiduciary Guarantees, particularly Article 15 paragraph (2), explicitly grants fiduciary guarantee certificates the same executorial power as court decisions with permanent legal force, thereby embodying the principle of legal certainty. However, while the law clearly formulates this executorial power, its implementation by the Ministry of Law raises issues of authority, as the ministry under Presidential Regulation No. 44 of 2015 and Law No. 39 of 2008 on the Ministry of State does not have the legal competence to issue products with judicial force. According to Article 9 of Law No. 30 of 2014 on Government Administration, ministerial decisions must be based on administrative authority, not judicial power, so attaching executorial force to fiduciary certificates exceeds its mandate. Consequently, although fiduciary certificates are legally recognized as having executorial power under Law No. 42/1999, their issuance by an institution without judicial authority creates inconsistency and undermines legal certainty.

Fiduciary Guarantee Certificate as the basis for Execution of Fiduciary Guarantee Object

The fiduciary guarantee certificate as stipulated in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees expressly determines that the fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force, meaning that it can be implemented immediately without going through the court and is final and binding on the parties to carry out the decision.[30] The executorial power possessed by the fiduciary guarantee begins with the registration of the fiduciary guarantee deed, the registration obligation is imposed on the fiduciary beneficiary of the object of

[28] Achmad Ali, *Menguak Teori Hukum Legal Theory dan Teory Peradilan Judicialprudence,* (Makassar: Kencana, 2007) 292-293

[29] Rachmadi Usman, *Op.Cit,* 159

[30] Undang-Undang Nomor 42 tahun 1999 tentang Jaminan Fidusia, pasal 15 ayat (2) dan penjelasannya

fiduciary guarantee located in the country or abroad as stipulated in Article 11 of Law Number 42 of 1999 concerning Fiduciary Guarantee, which registration is required for the object of fiduciary guarantee. The purpose of registering a fiduciary security deed is to fulfil the *principle of publicity* and openness, so that all information regarding the object of fiduciary security available at the fiduciary registration office is open to the *public*. In addition, fiduciary guarantee registration also aims to provide legal certainty for third parties against other credits regarding the truth of the object of fiduciary guarantee.[31]

The registration of the fiduciary guarantee deed is carried out at the domicile of the fiduciary beneficiary, in accordance with the principle of *actor sequitur forum rei* at the fiduciary registration office located at the ministry of law and human rights. The application for fiduciary guarantee registration is made by the fiduciary beneficiary, or his attorney or representative as stipulated in Article 13 of Law No. 42/1999 on Fiduciary Guarantee. Furthermore, the fiduciary registration office records the fiduciary guarantee in the fiduciary book register as stipulated in article 13 paragraph (3) of Law No. 42/1999 on Fiduciary Guarantee, and the recording is done on the same date as the application is received. The fiduciary registration office, in the case of an application for fiduciary registration, may not make an assessment of the correctness of what is stated in the fiduciary registration statement and is authorised only to check the data as contained in the attachment to the application for fiduciary registration.[32]

The fiduciary guarantee certificate as regulated in Article 15 of Law Number 42 of 1999 concerning Fiduciary Guarantees contains several affirmations, the Fiduciary Guarantee Certificate includes the words "For the Sake of Justice Based on God Almighty", as a legal basis for executorial power. The inclusion of executorial power has the legal effect that the fiduciary guarantee certificate is equated with a court decision with permanent legal force, so that the fiduciary guarantee certificate has the same executorial power as a court decision with permanent legal force, if the debtor or fiduciary commits a breach of promise (default). The meaning of the executorial power as contained in the explanation of Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees, confirms that what is meant by the executorial power of the fiduciary guarantee certificate on execution can be carried out without going through the court. Therefore, the sale can be carried out directly in public by the fiduciary recipient. The power of execution contained in the fiduciary security certificate is in accordance with Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary Guarantees, which gives the creditor the right to parate execution, if the debtor or fiduciary commits a breach of promise or default.[33]

Related to the description mentioned above, associated with the theory of Peter Mahmud Marzuki states, legal certainty has two meanings, namely the first is the existence of general rules to make individuals know what actions can and cannot be done, and secondly in the form of legal security for individuals from government arbitrariness because with the existence of general legal rules it can find out what the state can impose or do to individuals.[34] Related to this theory, correlated with legal rules relating to the behaviour of people, in general, can be in the form of: a) orders *(gebod),* this is a general obligation to do something; b)

[31] Yahya Harahap, *Ruang Lingkup Permalasalahan Eksekusi Bidang Perdata*, (Jakarta: Sinar Grafika, 2014) 211
[32] *Ibid,* 211-212
[33] *Ibid,* 213-214
[34] Peter Mahmud Marzuki, *Op.Cit,* 158

prohibitions *(verbod),* this is a general obligation not to do something; c) exemption *(vrijstelling*, dipensasi), this is a special permission *(verlof*) not to do something that is generally required; d) permission *(toestemming*, permissions) this is a special permission to do something that is generally prohibited.[35] Related to the principle of permitted or permissible behaviour in principle, execution can be carried out if the dictum is punitive in nature, where the losing party is punished to carry out something *(condemnatoir)*, while those that explain or determine a situation *(declaratoir)* and those that create or eliminate a situation *(constitutive)* do not require execution.[36]

If the debtor is in default, the execution of the object of the fiduciary guarantee can be carried out based on the executorial power contained in Article 15 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees and its implementation in the manner as contained in Article 29 paragraph (1) letter a of Law Number 42 of 1999 concerning Fiduciary Guarantees. Regarding the basis of execution of fiduciary guarantee and the method of execution of fiduciary guarantee before the enactment of Law No. 42/1999 on Fiduciary Guarantee, there was no clarity on how to execute the object of fiduciary guarantee. Since there was no provision regulating it, many interpreted the execution of a fiduciary security object by using the usual lawsuit procedure (through the court with the usual procedure) which was long, expensive and tiring. Although since the enactment of Law No. 16 of 1985, there is an easier procedure through execution under hand. In addition to the heavy requirements, the execution of fiduciary security objects under the hand of course only applies to fiduciaries related to flats. Relatedly, in legal practice, underhand fiduciary execution is rarely used.[37]

The executorial power of the fiduciary guarantee certificate according to Law No. 42/1999 on Fiduciary Guarantee can be the basis for the execution of the object of fiduciary guarantee. Furthermore, the executorial power is associated with the theory of legal certainty described above that the content material contained in the fiduciary guarantee certificate as specified in Article 14 paragraph (2) in conjunction with Article 13 paragraph (2) of Law Number 42 of 1999 concerning Fiduciary Guarantees. The material content in the article states: a) the identity of the Fiduciary Giver and Recipient; b) the date, number of the Fiduciary Guarantee deed, name, and domicile of the notary who made the Fiduciary Guarantee deed; c) data on the principal agreement guaranteed by Fiduciary; d) description of the Object that is the object of the Fiduciary Guarantee; e) guarantee value; and f) the value of the Object that is the object of the Fiduciary Guarantee.

Based on the theory of legal certainty mentioned above, in terms of carrying out the execution of objects that are the object of fiduciary guarantees by creditors or fiduciary recipients based on the executorial power of the fiduciary guarantee certificate that in theory is not permitted or prohibited, so that debtors or fiduciaries need to obtain protection from arbitrary actions of creditors or from certain other parties. Similarly, in addition to looking at the fiduciary guarantee certificate and its content material, it can be seen that the fiduciary guarantee certificate related to its issuance by the ministry of law does not have the authority based on the position, duties and functions underlying it in the law. Meanwhile, the content material is not *condemnatory*, but *declaratory* in nature, because it only explains or establishes

[35] J.J.H. Bruggink, Alih Bahasa Arief Sidharta, *Op.Cit,* 100-101
[36] Mahkamah Agung Republik Indonesia (MARI), Op.Cit, 95
[37] Munir Fuady, *Op.Cit*, 57

the existence of a situation related to the existence of a fiduciary guarantee between the grantor and the fiduciary recipient. Therefore, in relation to the fiduciary guarantee certificate, it cannot be used as the basis for the execution of the fiduciary guarantee which is equated with a court decision that has permanent legal force, where the executorial force contained in the fiduciary guarantee certificate is issued by the ministry of law which does not have a legal basis in the law and the content material in the fiduciary guarantee certificate is *declarative*, so there is no need for execution.

Conclusion

The principle of publicity and the principle of speciality in objects that become objects of fiduciary guarantees have functions as a convenience in identifying fiduciary guarantee objects and providing certainty to the fiduciary recipient in defending the guarantee object to anyone if the debtor commits a breach of promise or default. Therefore, execution based on the executorial title on the object of fiduciary guarantee as a means of repaying the creditor's receivables can be carried out easily. However, fiduciary security certificates are issued by the Ministry of Law, which does not have the authority to include executorial power based on the law. As such, the execution of a fiduciary security certificate theoretically does not have the same executorial power as a court judgement.

To the fiduciary beneficiary or creditor, related to the fiduciary guarantee certificate is a proof of fiduciary guarantee and for the holder has a priority right on the object as repayment of the debt and follows wherever the object is located. Related to the executorial power of the fiduciary guarantee certificate cannot be executed, because it is *declaratoir*. The fiduciary guarantee certificate cannot serve as a valid basis for execution equivalent to a court decision, since its issuance by the Ministry of Law lacks legal authority and its content is merely declarative rather than condemnatory, thus offering no executorial basis.

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