CHAPTER I

INTRODUCTION

1.1 Background

Economic development is part of national development, an ambition to achieve the 5th principle of Pancasila, namely social justice for all Indonesians *(Keadilan Sosial Bagi Seluruh Rakyat Indonesia).* According to Kamus Besar Bahasa Indonesia, *Adil* means *berpegang pada kebenaran* and *Sosial* means *memperhatikan kepentingan umum.* Thus, the 5th principle of Pancasila has the meaning of adhering to the truth in paying attention to the public interest. This is also the objective of the Indonesian nation, as stipulated in the 1945 Constitution (*Undang-Undang Dasar 1945 ("UUD 1945")),* as the highest constitutional standing.[1] Welfare is among the core aspects of social justice and is correlated to government support for minority groups. The term "welfare" itself applies to three primary elements: (a) social welfare; (b) economic welfare; and (c) state welfare. Social welfare means welfare concerning the life of society, economic welfare refers to the financial welfare viewpoint, and state welfare refers to a scheme in which the government is in charge of the people's welfare.[2] A powerful legal system can be one of the ways to sustain the welfare of the people in a country which must be followed by enforcing strict laws and regulations effectively and appropriately.

To achieve the aforementioned welfare, the state in question must adhere to the rule of law. The principle of the rule of law states that judicial tools are specifically used to balance and provide justice in all aspects of people's lives. The idea was also adopted by Indonesia, where

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[1] Pasal 1 Ketetapan MPR No. III/MPR/2000 tentang *Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan,* 18 Agustus 2000.

[2] Black's Law Dictionary, "What is Welfare State? Definition of Welfare.", <thelawdictionary.org/welfarestate/.>

Indonesia strictly adheres to its laws and regulations regulating its citizens. Indonesia would have the certainty of its citizens by following this principle. However, it is still common to see circumstances in Indonesia where there are certain laws and regulations which are ambiguous or inadequate in certain matters.

Over time, the growth in development activities has a significant impact on the growing financial demands of individuals and businesses. Funding needed to fulfill these needs is accessed by leasing or borrowing.[3] Banking institutions form the foundation of the finances of a government which supports the funding needs by lending activities and various services offered, and operate payment systems for the sectors in the economy.[4] `

Previously there had been one or two types of non-bank fund channeling institutions in Indonesia. However, institutionally, the development of leasing in Indonesia began in 1974, with the Joint Decree of the Minister of Finance, Minister of Industry, and Minister of Trade of the Republic of Indonesia KEP-122/MK/IV/2/1974, Number 32/M/SK/2/1974, and Number 30/KPB// I/1974, dated 7 February 1974 concerning Leasing Business Licensing. Furthermore, the provisions regarding Financing Institutions are regulated by Presidential Decree No. 9 of the Year 2009 which explains that the activities of finance companies include:[5]

1. Leasing (Sewa Guna Usaha)
2. Factoring (Anjak Piutang)
3. Credit Card (Usaha Kartu Kredit)
4. Consumer Finance (Pembiayaan Konsumen)

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[3] Rusdin, *Bisnis Internasional dalam Pendekatan Praktik*. Jilid 1. Bandung: Alfabeta, 2002, hal. 33.

[4] T. Gilarso, *Pengantar Ilmu Ekonomi Makro*, Yogyakarta: Kanisius, 1992, hal. 45.

[5] Munir Fuady, *Hukum Tentang Pembiayaan Dalam Teori Dan Praktek, cet. 1*, (Bandung: Citra Aditya Bakti, 1995), hal. 3.

Recognition of leasing as alternative financing in Indonesia derives from the presence of an open framework embraced by the Civil Code, as laid down in Article 1338 Paragraph 1 of the Civil Code, which specifies that all legally established agreements are legitimate as laws for those who make them. This ensures that the legislation gives the parties involved the fullest possible right to agree on anything, as long as it does not interfere with law, public order, and morality.

As an alternative to financing methods, the leasing company appears to offer more convenience than the financing of bank loans. In principle, the lease agreement is not specified in the Civil Code. However, taking into account this leasing company is, in fact, nothing more than a credit agreement that is inseparable from Book III of the Civil Code, as alluded to in Article 1319 of the Civil Code, which reads:

> "All agreements, whether or not known under specific titles, shall be subject to general regulations, which shall be the subject of this and the previous title."

Many people consider leasing only to be an economic activity that is an activity of business financing, whereas if we look at it from another point of view of the law and the Civil Code by adhering to the general terms of the agreement, leasing is a legal phenomenon of a financing agreement or capital goods required by individuals or businesses.

In this agreement, each side, on its own, requires legal certainty, so that the parties involved in this lease agreement will hopefully not suffer losses. It is, thus, at which purpose of the agreement made by the parties in the form of a written agreement (contract) has been governed by Article 1233 of the Civil Code, which specifies that all contracts are the result of an agreement or by statute.

The facilities offered by leasing companies as financing institutions greatly relieve consumers or businesses that require capital to obtain business support goods, making leasing an option. Leasing as a financing institution in its work method would bring together the interests of three separate groups, namely:

a. Creditor, is the leasing party itself, as the owner of capital, which would later provide capital for tools or purchase goods;
b. A debtor is a customer or business that serves as a user of equipment or goods to be leased or rented by the creditor;
c. Vendor or supplier, as a third-party vendor, of an object obtained by the creditor to be leased to the creditor.

The relationship between the creditor and the debtor is reciprocal, involving the fulfillment of obligations and the transfer of rights or entitlements from the benefit of the use of financing facilities under which the creditor and the debtor have entered into a financial lease agreement or a financing agreement. For the creditor, the advantages to be gained in a leasing agreement with the debtor depend solely on the formation of legal certainty for an agreement on a series of payments made by the debtor on the use of the properties subject to the lease, including recognition by the debtor of control over the object by the creditor whose ownership remains. The goods are kept by the creditor, thereby giving rise to a legal right for the creditor when the creditor intended to sell or confiscate the fiduciary object of the contract. The losses may be in the form of:

1. As the owner, the creditor has a bigger risk than the debtor concerning the leased goods, as well as its operating activities, including the presence of third-party liability in the event of an accident or harm to the property of other persons incurred by the lease;
2. The creditor, even though owns the leasehold of the goods, cannot claim it;

3. The manufacturer or supplier must act directly for the Debtor as of the recipient of the goods;
4. As the owner of the goods, the creditor must be legally liable for the payment of such tax obligations;
5. Although the creditor has the legal right to sell the leased goods, particularly at the expiry of the lease, the creditor cannot be certain that the goods are free of various bonds.

Considering the possibility of providing credit, it should be noted that there are four key elements in credit itself, namely trust, time, risk, and achievement.[6] Each component is complementary to one other therefore, it has the same importance. Before entering into a credit agreement, a contract is first made. The agreement binds all parties or, following applicable law, is often referred to as the law of engagement in which the execution of the agreement must be carried out by the obligated party.[7]

An agreement is the most significant source of engagement. In addition to the agreement that has been concluded, there is also a duty that is born out of the law. Under Article 1320 of the Civil Code, the terms of the agreement to be valid are as follows:

1. There must be a consent of the individuals who are bound thereby;
2. There must be a capacity to agree;
3. There must be a specific subject;
4. There must be an admissible cause.

[6] Thomas Suyanto, et. al, *Dasar-dasar Perkreditan*, Edisi Keempat, Jakarta: Gramedia Pustaka Utama, 2007, hal. 14.
[7] R. Subekti, *Hukum Perjanjian*, Cetakan ke XII, Intermasa, Jakarta, 1990, hal. 11

The concept of a credit agreement has not been formulated either in Law No. 10 of 1998 on amendments to Law No. 7 of 1992 concerning Banking or in the draft law on credit. It is therefore important to consider the essence of a credit agreement articulated by a legal expert, namely R. Subekti, who asserts that in whatever form the provision of credit is made, all that occurs is a loan or credit agreement is regulated under Article 1754 to Article 1769 of the Civil Code.[8]

Conversely, another legal expert, Djuhaendah Hasan, takes a different view as to whether the credit agreement is not adequately governed by the provisions of Chapter XIII of Book III of the Civil Code because there are many differences between the loan and borrowing agreement and the credit agreement. The key difference is that the credit agreement is often directed at and generally applies to a development program, generally in the provision of credit, the object of which is to use the money to be obtained, while there is no such provision in the loan-borrowing agreement and the debtor is free to use the money without a specific purpose.

Furthermore, there is no specific legal structure for the credit agreement, thus it is up to the will of the binding parties to enforce it. Therefore, it is quite common for the creditor and the debtor to have a harmonious relationship only at beginning of the agreement, once the party wants something (funding capital) whereas the other party is trying to earn a profit, thus the relationship between the creditor and the debtor is full of different problems, and the key and most common problems are deferred fulfillment of obligations from the debtor to the creditor.

Failure to meet the debtor's obligations as negotiated is an act of default that presents a business risk to the leasing company, even though the creditor loses or sells the lease object. Losses suffered by the leasing company since the status of the goods still belongs to them and

[8] Ibid., 13.

the Debtor still has the option to purchase after the installment payments, since the risk of losses due to default by the Debtor is reduced by sharpening the terms of the leasing agreement, or by making additional actions as another form of agreement that is incorporated.

Financing institutions have been around for the last twenty years in Indonesia. However, no law officially regulates it; therefore, it still follows the regulations set out by Bank Indonesia as the Central Bank and is an institution that regulates overall finances. The use of leasing as financing institutions is still relatively recent and given that the provision of lending credit is one of a bank's key functions, the confidence principle along with the prudential principle must be applied as referred to in the provisions of Article 2 of Law No. 10 of 1998 on amendments to Law No. 7 of 1992 concerning Banking[9] and Article 10 of Presidential Decree No. 9 of the Year 2009 concerning Financial Institutions to prevent possible non-performing financing (NPF).

The lack of regulations concerning leasing in Indonesia is, of course, an obstacle for Indonesian legal experts to establish an idealistic regulation to see how vital the function of such a leasing finance institution is, particularly when it is linked to national development. Therefore, to avoid credit issues from occurring, a bank or other financial institution such as leasing must evaluate to determine the nature of the credit request. The determination in authorizing a credit application is carried out by reference to the 4P Formula and the 5C Formula. The elaboration of Formula 4P is: (1) Personality, which is the bank seeking complete data on the credit applicant's personality; (2) Purpose, which is a bank seeking data on the object or usage of the credit; (3) Prospect, namely that the bank performs a detailed and in-depth study of the business type to be performed by the applicant; (4) Payment, namely the

[9] Karim, *Manajemen Perbankan*, Cetakan V (Jakarta: Raja Grafindo Persada, 2004), hal. 92.

bank must understand the ability of the creditors to pay off the credit debt in a specified amount and time.[10]

Furthermore, the elaboration of the 5C Formula is (1) Character, that is, the prospective Debtor customer has good character, moral and personal characteristics; (2) Capacity, that is, the ability of prospective Debtor customers to handle their business activities and to see prospects; (3) Capital, the bank must first analyze the capital held by the credit applicant and allocate the capital released so that all existing sources can be effective; (4) Collateral, namely guarantees for the acceptance of credit disbursement as a means of securing (back-up) risks that may occur in the future by Debtor customers in default; (5) Condition of Economy, namely in the provision of credit by banks, requires the bank's attention to the general economic environment and conditions in the credit applicant's business sector to reduce the risks that may occur because of this economy.[11]

With regards to the 4P and 5C Formula to ensure legal compliance for the granting of credit agreement, collateral is named as an important factor in banking practice that must be recognized for credit granting, institutionalized as material, and individual collateral.[12] Under the law, the concept of collateral is laid down in Article 1 23 of Law No. 10 of 1998, that is, the principal guarantee given by the Debtor for the provision of credit or funding facilities based on the Sharia Principles, following the provisions laid down by Bank Indonesia. In the meantime, the concept of the guarantee is found in the Decree of the Board of Directors of Bank Indonesia No. 23/69/KEP/DIR of 28 February 1991, which is the confidence of the Bank in the capacity of the Debtor to repay the credit as decided. The terms relating to this assurance

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[10] Kasmir, *Dasar-Dasar Perbankan,* (Jakarta: PT.Raja Grafindo Persada, 2005), hal. 122

[11] Ibid., hal. 124

[12] Sri Soedewi Majchoen Sofwan, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan Perorangan,* Cetakan ke-3 Edisi Pertama (Yogyakarta: Liberty Offset, 2003), hal. 46.

are also set out in Article 1131 and Article 1132 of the Civil Code and the Elucidation of Article 8 of Law No. 7 of 1992 and Law No. 10 of 1998.

Through the explanation of Article 8, credit provided by banks includes risks, so that banks have to pay attention to credit risk principles in their implementation. To reduce this risk, the bank must consider the guarantee of credit extension in terms of confidence in the Debtor's willingness and capacity to pay off his debt as agreed. Before authorizing credit, a bank must carefully evaluate the Debtor's character, ability, capital, collateral, and business prospects to obtain this guarantee. Given that collateral is one of the elements of the loan guarantee, if, based on other elements, there is trust in the debtor's ability to repay his debt, collateral can be in the form of goods, ventures, or collection rights funded by the credit concerned.

However, banks or other financial institutions, such as leasing, are not supposed to demand collateral in the form of goods not tied directly to the object being funded, usually referred to as "additional collateral." No collateral is required in the lease itself because the legal title of the leased asset and the lease payment agreement in conjunction with the income produced by the leased asset is already a guarantee of the lease itself. Therefore, the author in this thesis will focus on the scope of the Fiduciary Security in the matter of leasing, rather than the guarantee in a general banking principle.

The law concerning fiduciary is governed by the regulations, namely Law No. 42 of 1999 concerning Fiduciary. Fiduciary itself was born not from written regulations but comes from jurisprudence. As a result of the enactment of Law No. 42 of 1999 concerning Fiduciary, it is expected that legal certainty will be provided concerning Fiduciary Security for the public, for both creditors and debtors. Additionally, the presence of legal certainty in the use of Fiduciary

Security, especially in the provision of credit by financing institutions would provide a favorable environment for economic growth in general, and in particular for the financial sector.[13]

One of the provisions of Law No. 42 of 1999 concerning Fiduciary states regarding the creditor rights in Chapter V concerning the execution of Fiduciary Security. Although the creditor has the right to execute Fiduciary Security when the debtors fail to comply with the obligations under the contract, it has been strictly controlled. In practice, creditors holding Fiduciary Security often face resistance attempts from Debtors that do not want their fiduciary collateral to be executed. Therefore, police as an instrument of the State plays a role in securing the process of executing the Fiduciary Security. Meanwhile, the billing function can be carried out in collaboration with other parties. Under Article 47 of POJK No. 35/POJK.05/2018, in practice the party is better known as the *Debt Collector*.

Article 29 paragraph 1 of Law No. 42 of 1999 regulates the methods of performing Fiduciary Security, one of which is by applying the executorial title referred to in Article 15 paragraph 2 of Law No. 42 of 1999 concerning Fiduciary. In the opinion of Trisadini Prasastinah Usanti and Leonora Bakarbessy, Article 15 of Law No. 42 the Year 1999 implies 2 (two) ways of execution, namely:[14]

a. Execution using the executorial title is that the execution can be carried out directly through the court under the leadership of the head of the district court or there must be an execution fiat from the head of the District Court because a fiduciary certificate is considered the same as a court decision which has permanent legal force *(Inkracht van Gewijsde)* and is final and binding on the party to enforce the decision.

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[13] M. Bahsan, *Hukum Jaminan Dan Jaminan Kredit Perbankan Indonesia*, Raja Grafindo Persada, 2007, hal. 5

[14] Andi Prajitno, *Hukum Fidusia*, Malang: Selaras Malang, 2010.

b. The meaning of parate execution, which is one of the characteristics of material security. According to A.A. Andi Prajitno, the free translation of the Execution Parate is the Creditor exercising the right of his power to sell collateral freely such as his own, if the Debtor does not keep his promise or default.

Furthermore, Article 15 paragraph (2) of the Fiduciary Law states that a Fiduciary Security Certificate has the same executorial authority as a court decision with the permanent legal force since the certificate includes the words "For Justice Based on Almighty Godhead." Creditors can directly execute Fiduciary Security without going through a court based on the executorial title. Fiduciary law also provides the fiduciary beneficiaries (Creditors) with the convenience of execution by non-judicial execution institutions.[15]

However, the Constitutional Court's decision No. 18/PUU-XVII/2019 obscures the meaning of the aforementioned article. The Constitutional Court states in decision No. 18/PUU-XVII/2019 that Creditors can no longer execute or withdraw Fiduciary Security arbitrarily based solely on a Fiduciary Security certificate. As a result, according to Constitutional Court decision No. 18/PUU-XVII/2019, Article 15 paragraphs (2) and (3) are still in place and have legal force; however, the scope of these articles is restricted by the execution of the execution in the region, namely:

a) Is there a clause on the agreement concerning Default between the parties?
b) Does the Debtor have no objection to voluntarily hand over the object which is a Fiduciary Security?

Following the decision, the Constitutional Court ruled that Creditors seeking to seize the Fiduciary Security have to file a submission to the district court. Unilateral execution by

[15] M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Edisi Kedua, Jakarta: Sinar Grafika, 2009, hal. 214.

the Creditor, however, will also be carried out if and only if the Debtor recognizes that there is a Default and willingly submits the object of his Fiduciary Security.[16] Moreover, in Article 15 Paragraph 3 of Law 42/1999, the Constitutional Court found unconstitutionality because the term "default" or Default does not clarify the conditions that allow the Creditors to violate the Debtors' agreement. Nevertheless, the concept of Default is the failure, as required, to perform the duty or obligations that the contract imposes on certain parties specified in the contract in effect.[17] There is, therefore, an inconsistency within the decision and it is important to respond to the changes in the procedure for executing fiduciary security objects following the judgment of the Constitutional Court by establishing a rapid judicial process to provide legal certainty for business actors as well as Debtors.

The author is fully aware of the existence of a previous thesis and journals that were composed similarly to this thesis. The previous thesis was titled *"Perjanjian Penyerahan Benda Bergerak Yang Terikat Leasing Sebagai Jaminan Hutang"* that was written by Amelia Friskila in 2013 published by Universitas Indonesia and *"Tinjauan Yuridis Atas Pendaftaran Fidusia Menurut Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia"* written by Adil Kurniawan in 2017 published by Universitas Pelita Harapan.

There are similarities between this thesis and Amelia Friskila's and Adil Kurniawan's thesis where it particularly discusses the general views on Fiduciary Security and the execution procedure. However, since the Constitutional Court's Decision No. 18/PUU-XVII/2019 is relatively new, therefore, the previous thesis did not further specify the procedure following the Constitutional Court's decision. In this thesis, the author will describe and explain the Judicial Review of the relevant decision as well as the implications towards the execution and

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[16] "IMPLIKASI PUTUSAN MK NOMOR 18/PUU-XVII/2019." *Notary Magazine*, 2020.

[17] R. Subekti, *Hukum Perjanjian*, Cetakan ke XII, Intermasa, Jakarta, 1990, hal. 44

legal rights on the Fiduciary Security and therefore has a different approach to the previous thesis.

In addition to that, there are also similar journals covering a Fiduciary Security with the title of *"Legal Protection of Creditors and Debtors through Fiduciary Security Registration"* written by Ansharullah Ida, et. al published by Universitas Batam in 2020 *and "Execution of Fiduciary Security Under Law No. 42 of 1999 on Fiduciary Security (a Socio-Juridical Analysis to Anticipate Its Effectiveness)"* written by Arie Sukanti in 2013 as part of law review under the Universitas Indonesia.

Both journals did mention the execution and legal protection which is in line with the author's thesis main topics. However, it has a different approach since the author will not just cover the Fiduciary Security registration, but the aspect of the legal protection of both Creditors and Debtors in the matter of execution procedure following the decision of the Constitutional Court. Moreover, the second journal has more similar content to this thesis because it mainly discusses the execution procedure under the fiduciary law. However, the author will have a more in-depth discussion about the execution procedure and perhaps the interpretation included in the Constitutional Court's decision.

1.2 Research Questions

In regards to the topic of this thesis, the author will further discuss and elaborate on the following research questions:

1. What is the procedure for executing fiduciary objects after the Constitutional Court's Decision No. 18/PUU-XVII/2019?

2. How is the legal certainty of creditors concerning their executorial title in regard to the Constitutional Court's Decision No. 18/PUU-XVII/2019?

1.3 Research Purpose

The purpose of writing this thesis is to answer the aforementioned formulation of issues, which entails:

1. Analyze the provisions of laws and regulations related to the procedure for executing fiduciary objects after the Constitutional Court's Decision No. 18/PUU-XVII/2019.
2. Assessing the legal certainty of creditors concerning their executorial title in regard to the Constitutional Court's Decision No. 18/PUU-XVII/2019.

1.4 Research Benefits

The results of this study are expected to be beneficial, based on two views:

1.4.1 Theoretical Benefits

This study aims to provide a theoretical understanding that can be used as information and basis for further legal analysis, as library content and become guidance for those who wish to explore and understand the application of Fiduciary Security in Indonesia following Decision No. 18/PUU-XVII/2019 of the Constitutional Court. Moreover, it is anticipated that the results of this paper will influence the understanding of the law or legal science such that it can be useful to the development of legal theory.

1.4.2 Practical Benefits

For practical advantages, the author hopes that the findings of this study are intended to be used as guidance for law enforcers such as financing institutions and the consumer group of financing services to recognize the law for the futures contract. This thesis will also include remedies for the Indonesian government and court to eliminate uncertainty in its laws and regulations, specifically for improving the laws and regulations and generally for legal growth.

1.5 Framework of Writing

This thesis consists of five main chapters that will aid the readers to gain an understanding of the issue at stake within this topic.

CHAPTER I: INTRODUCTION

The first chapter of this thesis will explain the background of the issue, the formulation of the issue, the research objectives, the benefits of research, and systematic writing. This introduction would indicate why the author is initiating this judicial review analysis and the importance of it.

CHAPTER II: LITERATURE REVIEW

The second chapter of this thesis will outline the theories, concepts, and principles used by the author in the writing of this thesis, which is relevant and significant to the issues found in the formulation of the problem. These concepts would be used as analytical tools to address the issues.

CHAPTER III: RESEARCH METHODOLOGY

This third chapter of this thesis will address the research objectives, the types of research, and the procedures for acquiring research materials.

CHAPTER IV: DISCUSSION AND ANALYSIS

This fourth chapter of the thesis will explore and develop a proper analysis to address the issues mentioned following the Constitutional Court's Decision No. 18/PUU-XVII/2019, this chapter will discuss the regulations and policies developed by the Indonesian Government regarding the fiduciary. This chapter will also determine Creditors and Debtors' legal certainty under the Indonesian legal framework.

CHAPTER V: CONCLUSION AND RECOMMENDATION

In this last chapter, the author will conclude this thesis by responding to the issues set out in the previous chapters. The author will clarify the inference in detail by formulating approaches and suggestions concerning the problems posed by the law. Such constructive insights can, therefore, be put in place to ensure legal certainty for Creditors and Debtors in the credit agreement, as well as to develop a more in-depth approach following the decision of the Constitutional Court Number 18/PUU-XVII/2019 on the execution of Fiduciary Security.