CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 71/PUU-XIX/2021

Concerning

Embezzlement of Fiduciary Guarantees, Execution Processes and Authorities in the Fiduciary Guarantee Execution Process

Petitioner : **Johanes Halim and Syilfani Lovatta Halim**

Type of Case : Examination of the Criminal Code (KUHP) and Law Number 42 of 1999 concerning Fiduciary Guarantees (Law 42/1999) against the 1945 Constitution of the Republic of Indonesia (UUD 1945)**.**

Subject Matter : Examination of Article 372 of the Criminal Code and Article 30 along with the Elucidation of Article 30 of Law 42/1999 against the 1945 Constitution.

Verdict :
1. To grant the Petitioners' petition in part;
2. To declare that the phrase "authorized party" in the Elucidation of Article 30 of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889), is in contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted as "the district court";
3. To order the recording of this Decision in the State Gazette of the Republic of Indonesia as appropriate.
4. To dismiss the Petitioners' petition for the remainder.

Date of Decision : Thursday, February 24, 2022

Overview of Decision :

The Petitioners are individual Indonesian citizens, and are married couples, registered under the Marriage Deed Number 218/JU/PK/2015 issued in Jakarta, February 14, 2015.

Regarding the authority of the Court, the Petitioners petition for a review of the constitutionality of legal norms, *in casu* the Criminal Code (hereinafter shall be referred to as the Criminal Code) and Law Number 42 of 1999 concerning Fiduciary Guarantees, hereinafter shall be referred to as Law 42/1999) against the 1945 Constitution, therefore the Court has the authority to review the *a quo* petition.

Regarding the legal standing of the Petitioners, that Petitioner I was arrested by the members of the police and was detained in the custody of the Polda Metro Jaya (Regional Police in the Capital Area of Jakarta) on the grounds of embezzlement based on Article 372 of the Criminal Code and Article 36 of Law 42/1999. Meanwhile, Petitioner II as the wife of Petitioner I is factually actively involved in the payment of instalments or car loans which are the object of fiduciary guarantees, so that when the Fiduciary Grantee or the creditor reports Petitioner I as a debtor and then was arrested and detained, Petitioner II, either directly or indirectly, has suffered losses.

Whereas the arrest and detention of Petitioner I was based on the provisions of Article

372 of the Criminal Code which is detrimental and creates legal uncertainty for the Petitioners. This legal uncertainty is due to the fact that there is no pre-determination regarding the object of fiduciary guarantee which will later become the debtor's rights because it is protected as property under his control, thus this has been suspected as embezzlement. Therefore, this is in contrary to Article 28D paragraph (1), Article 28G paragraph (1) and Article 28H paragraph (4) of the 1945 Constitution. The reasons for the Petitioners for not showing the vehicle unit that is the object of the fiduciary guarantee is done in order to protect the object that is in their control so that such object is not withdrawn arbitrarily and it has the tendency to violate the law as has previously happened with other fiduciary guarantee objects. Therefore, whether or not the unconstitutionality of the norms of Article 372 of the Criminal Code and Article 30 of Law 42/1999 along with its Elucidation, which are petitioned for review, are proven, the Court is of the opinion that the Petitioners have the legal standing to file the *a quo* petition.

Whereas because the Petitioners' petition is clear, based on Article 54 of the Constitutional Court Law, there is no need for the Court to hear the statements of the parties as referred to in Article 54 of the Constitutional Court Law.

Whereas regarding the *a quo* petition, there are two petitions to become the Related Parties, namely PT BCA Finance and the Association of Indonesian Financing Companies (*Asosiasi Perusahaan Pembiayaan Indonesia* or APPI), however because the *a quo* petition is sufficiently clear, based on the considerations of the Court, there is no need for a further trial with an agenda of obtaining evidence and summoning the parties as intended in Article 54 of the Constitutional Court Law. Therefore, the Court is of the opinion that it has no relevance to accept the petition of the Related Parties and such petition must be declared as dismissed. Regarding such matter, the Court has issued a Decision of the Related Parties.

Whereas Article 30 and the Elucidation of Article 30 of Law 42/1999 have already been submitted for review and have been decided by the Court in the Decision of the Constitutional Court Number 19/PUU-XVIII/2020, dated June 25, 2020, after reviewing the *a quo* Petitioners' petition, and the petition in the previous case, the Court was of the opinion that it was true that there were differences regarding the basis of the review and the reasons for the *a quo* petition in submitting the review of Article 30 and the Elucidation of Article 30 of Law 42/1999 with the petition for Case Number 19/PUU-XVIII/2020. Therefore, based on these legal facts, the Court is of the opinion that the Petitioners' petition fulfils the provisions of Article 60 of the Constitutional Court Law and Article 78 of PMK 2/2021 so that it can be re-submitted.

Whereas regarding the issue of constitutionality as disputed by the Petitioners, in principal, it relates to the unconstitutionality of Article 372 of the Criminal Code as the main object of *petitum* of the Petitioners' petition which the Court can understand. Regarding such matter, it is important for the Court to affirm the following:

Whereas the Petitioners argue that the norms of Article 372 of the Criminal Code which states "Anyone who intentionally and against the law owns something which wholly or partly belongs to another person, but which is in his control not because of a crime, shall be threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs", is in contrary to the 1945 Constitution as long as it is not interpreted as "Anyone who intentionally own against the rights of such object which wholly or partly belongs to another person and the object is not in his hands because of a crime, shall be punished for embezzlement, with a maximum imprisonment of four years or a fine of nine hundred rupiah, except for the object of fiduciary guarantee which is not shown by the debtor because there is no agreement regarding a breach of contract (default) and the debtor does not voluntarily surrender the object of fiduciary guarantee." Or, as long as it does not contain the meaning of a debtor who does not show the object of a fiduciary guarantee in order to protect against unilateral withdrawal by the creditor because there is no agreement regarding a breach of contract, it shall not be considered as a crime of embezzlement.

Regarding the *a quo* arguments of the Petitioners, it is important for the Court to first affirm the criminal law. Criminal law is part of public law that regulates the relationship between individuals/societies and the state in the form of norms accompanied by regulations and threats of sanctions for anyone who violates them. Criminal law includes or consists of

general criminal law and special criminal law. In this case, doctrinally, general criminal law is a criminal law that applies to everyone originating from the Criminal Code, while special criminal law is a criminal law that applies to certain people originating/regulated in various laws and regulations outside of the Criminal Code.

Whereas the Petitioners filed a review of the provisions of Article 372 of the Criminal Code, where this provision is included in Chapter XXIV concerning Embezzlement which is part of the provisions of general criminal law. The Petitioners in their petition request that the provisions of Article 372 of the Criminal Code be given the meaning of special exceptions for criminal acts in relation to fiduciary guarantees. The Court is of the opinion that the request of the Petitioners will fundamentally change the construction of the legal norms contained in Article 372 of the Criminal Code. This is because the construction of the legal norms of Article 372 of the Criminal Code is universal, which means that the scope of work of these provisions can be aimed at any object committed by any legal subject suspected of committing a crime that meets the elements of the crime of embezzlement. Therefore, the crime of embezzlement cannot only be associated with certain types of legal acts as the exceptions requested by the Petitioners. Therefore, if the addition of the phrase “except for the object of fiduciary guarantee which is not shown by the debtor because there is no agreement regarding a breach of contract (default) and the debtor does not voluntarily surrender the object of fiduciary guarantee”, or, as long as it does not contain the meaning of a debtor who does not show the object of a fiduciary guarantee in order to protect against unilateral withdrawal by the creditor because there is no agreement regarding a breach of contract, it shall not be considered as a crime of embezzlement” as requested by the Petitioner to be accommodated, then this will actually narrow the scope of the nature of the normative provisions of Article 372 of the Criminal Code and shall result in a legal uncertainty. Meanwhile, the provisions of Law 42/1999 have regulated several criminal provisions in relation to the enforcement of primary norms, as stated in the provisions of Article 35 of Law 42/1999 which regulates the acts that intentionally falsify, change, eliminate or in any way provide misleading information, which if it is known by one of the parties shall not result in a Fiduciary Guarantee agreement, as well as in Article 36 of Law 42/1999 which regulates criminal sanctions for Fiduciary Grantors who transfer, pledge, or rent any objects that are the object of Fiduciary Guarantee. Therefore, if it is deemed that there are still problems in providing criminal sanctions for any violations of fiduciary agreements, then it becomes the authorization of the legislators to regulate them, unless the issue of the violation is related to the constitutionality of norms for which the Court has the authority to review it.

Whereas based on the description of the aforementioned legal considerations, the arguments of the Petitioners regarding the unconstitutionality of the norms of Article 372 of the Criminal Code are legally unjustifiable.

Whereas furthermore, the Petitioners argue that the unconstitutionality of the norms of Article 30 of Law 42/1999 along with their Elucidation because of *a quo* norms cannot be separated from the review of the Elucidation of Article 15 paragraph (2) of Law 42/1999 which has been decided by the Constitutional Court in the Decision of the Constitutional Court Number 18/PUU-XVII/2019, dated January 6, 2020 and reaffirmed in the Decision of the Constitutional Court Number 2/PUU-XIX/2021 dated August 31, 2021.

Regarding the *a quo* arguments of the Petitioners, it is important for the Court to first quote the Decision of the Constitutional Court Number 18/PUU-XVII/2019, Paragraph [3.19] in relation to the Elucidation of Article 15 paragraph (2) of Law 42/1999.

Furthermore, in the Decision of the Constitutional Court Number 2/PUU-XIX/2021 Paragraph [3.14.2] and Paragraph [3.14.3], the Court reaffirmed the constitutionality issue of the executorial power of fiduciary guarantee certificate

Regarding the *a quo* arguments of the Petitioners*,* the Court is of the opinion that the legal considerations in the Decision of the Constitutional Court Number 18/PUU-XVII/2019 and the Decision of the Constitutional Court Number 2/PUU-XIX/2021 have actually answered clearly regarding the procedure or rules for surrendering a fiduciary object, so that the concerns of the Petitioners regarding the emergence of unilateral execution or arbitrary withdrawal by the creditors, will not occur. This is because the Court has also considered the procedure for the execution of the fiduciary guarantee certificate which is regulated in other

provisions of Law 42/1999 so that it is adjusted to the Decision of the Constitutional Court Number 18/PUU-XVII/2019. That means, the *a quo* verdict in relation to the Elucidation of Article 15 paragraph (2) does not stand alone because the provisions of other articles in Law 42/1999 in relation to the procedure for execution must also follow and be in accordance with the *a quo* decision, including the provisions of Article 30 of Law 42/1999 and its Elucidation. Therefore, the creditor cannot carry out his own execution arbitrarily, for example by asking the police for help, if there is a breach of contract (default) by the fiduciary rights grantor (debtor) to a creditor who has not yet been acknowledged by the debtor and the debtor has objected to voluntarily surrendering the object that became the object in the fiduciary agreement. Regarding such matter, the Court has reaffirmed it in the Decision of the Constitutional Court Number 2/PUU-XIX/2021 whereas the creditors must submit an application for execution to the District Court.

Whereas regarding the execution of fiduciary object guarantees, it is important for the Court to emphasize that a fiduciary agreement is a legal relationship of a civil nature (private), therefore the authority of the police is only limited to securing the execution process if necessary, but they will not act as a part of the executor, unless there are any actions that contain criminal elements, then the police officers shall have the authority to enforce the criminal law. Therefore, regarding the phrase “authorized party” in the Elucidation of Article 30 of Law 42/1999, it must also be interpreted as “the district court" as the party requested for assistance to carry out the execution.

Whereas based on the description of the aforementioned legal considerations, the arguments of the Petitioners regarding Article 30 of Law 42/1999 have created legal uncertainty as guaranteed by Article 28D paragraph (1) of the 1945 Constitution and has eliminated the right to protect oneself, one's family, honor, and dignity as guaranteed by Article 28G paragraph (1) of the 1945 Constitution are legally unjustifiable.

Meanwhile, the Petitioners' argument in relation to the phrase “authorized party” in the Elucidation of Article 30 of Law 42/1999 which has created legal uncertainty as guaranteed by Article 28D paragraph (1) of the 1945 Constitution, and has eliminated the right to protect oneself, one's family, honor, and dignity as guaranteed by Article 28G paragraph (1) of the 1945 Constitution is legally justifiable in part.

Whereas based on the description of the aforementioned legal considerations, the arguments of the Petitioners are legally justifiable in part.

Accordingly, the Court has subsequently issued a decision which verdicts are as follows:

1. To grant the Petitioners’ petition in part;
2. To declare that the phrase “authorized party” in the Elucidation of Article 30 of Law Number 42 of 1999 concerning Fiduciary Guarantees (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889), is in contrary to the 1945 Constitution and has no binding legal force as long as it is not interpreted as “the district court”;
3. To order the recording of this Decision in the State Gazette of the Republic of Indonesia as appropriate;
4. To dismiss the Petitioners’ petition for the remainder.