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LEGAL POSITION OF FIDUCIARY DEEDS IN A *MURABAHA* CONTRACT FOLLOWING THE INDONESIAN CONSTITUTIONAL COURT DECISION NUMBER 18/PUU-XVII/2019 ON DEFAULT AGREEMENT BY CREDITORS AND DEBTORS

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Abstract

Penelitian ini merupakan penelitian hukum normatif dengan tujuan untuk menganalisis kedudukan hukum fidusia dalam akad murabahah pasca Putusan Mahkamah Konstitusi Republik Indonesia Nomor 18/PUU-XVII/2019 tentang wanprestasi antara kreditur dan debitur. Penelitian ini menggunakan pendekatan perundang-undangan dan pendekatan konseptual. Hasil penelitian menunjukkan bahwa kedudukan akta fidusia setelah putusan tersebut tentang perjanjian yang ada dilaksanakan sebagaimana mestinya. Selanjutnya, untuk akta fidusia yang dilaksanakan setelah putusan ada, harus ada kesepakatan wanprestasi sebagai bentuk pelaksanaan putusan dan antisipasi jika di kemudian hari debitur tidak menyerahkan benda fidusia secara sukarela. Upaya penyusunan kesepakatan klausula wanprestasi dalam akta fidusia dengan pembiayaan murabahah di perbankan syariah merupakan bagian dari perlindungan hukum preventif. Perlindungan hukum merupakan upaya yang dilakukan oleh penegak hukum untuk melindungi hak-hak subyek hukum. Wanprestasi tidak dapat dinyatakan secara sepihak oleh kreditur. Eksekusi putusan pengadilan yang telah berkekuatan hukum tetap harus dilaksanakan apabila belum ada kesepakatan mengenai wanprestasi di awal. Hal ini juga berlaku apabila terjadi

wanprestasi, tetapi debitur menolak untuk menyerahkan agunan secara sukarela. This normative research aims at analyzing the legal position of fiduciary deeds in murabaha contract following the decision of Indonesian Constitutional Court No. 18/PUU-XVII/2019 on default agreement between creditors and debtors. The study applied conceptual and statute approaches. The results reveal that the fiduciary deed position after the mentioned decision is about the existing agreement carried out as it should. While for the fiduciary deed implemented after the decision exists, there must be a default agreement as a form of the decision's implementation and anticipation if in the future the debtor does not voluntarily turn in the fiduciary object. Efforts to draw up an agreement on the clause of default in a fiduciary deed with murabaha financing in Islamic banking is part of preventive legal protection. Legal protection is an effort made by law enforcement to protect the rights of legal subjects. Default may not be declared unilaterally by the creditor. Execution of court decisions that have legal force must still be carried out, if at the beginning, there is no agreement regarding a breach of contract and when there is a default but the debtor refused to voluntarily submit the collateral.

Keywords: *default agreement, Indonesian constitutional court decision number 18/PUU-XVII/2019, murabaha contract*

Introduction

Murabaha contract-based financing has currently been serving the highest contribution to Indonesian sharia financing, which constitutes approximately 60%. This happens because most credit and financing provided by sharia financial institutions, especially banking, relies on consumptive sectors.[1] The features of *murabaha* contract are overwhelmingly desired in sharia financial institutions; therefore, the National Sharia Board of Indonesian Ulama Council (hereinafter called as DSN-MUI) issues a fatwa No. 03/DSN-MUI/IV/2000 that allows banks to request *murabaha* contract-based guarantees from their customers to protect the institutions' financial health.

One of the likely guarantees in a *murabaha* contract is fiduciary, i.e. an object that grants creditors the right of priority for repayment. Due to the ease of execution, fiduciaries have more advantages than any other guarantees in general. One of the advantages provided by the law is that creditors are authorized to execute the fiduciary object by themselves. Fiduciaries give a debtor on one side rights to control the object and a creditor on the other side to hold its ownership. Furthermore, a creditor has such a privileged position that they should be prioritized for repayment, particularly in case of a default and that they are entitled to sell the fiduciary object under prior agreement.[2]

1 "Standar Produk Perbankan Syariah Murabahah," n.d.

2 Salim HS, *Perkembangan Hukum Jaminan Di Indonesia* (Jakarta: PT. Rajagrafindo Persada, 2016),

Fiduciary agreement lies its main clauses on a debt agreement. As fiduciary agreement is based on the so-called *accesoir* principles, a creditor has granted an authority to execute a fiduciary object from an underperformed debtor. The procedure is regulated in Article 29 Section (1) of Law Number 42 of 1999 on the fiduciary object execution: selling on the basis of one's power *(parate executie)* through a public auction and a direct sale.[3]

The *parate executie* authority, which seems to give a 'privilege' for creditors to self-execute a fiduciary object, has in fact triggered a complicated problem that leads to the detriment of one party. For example, when a debtor – for one reason or another – is reluctant to hand over a fiduciary object voluntarily, a creditor sometimes executes or withdraws the object by force. The problem becomes more complex when a creditor transfers (often deliberately) the rights over the object control to a third party. In the implementation level, the execution of fiduciary objects in *murabaha* contracts is frequently carried out by financial institutions themselves or by third parties, without involving courts and auction houses. This is due to the fact that the fiduciary is not registered to the Fiduciary Registration Office.

The above cases are in line with the problems encountered by sharia leasing. In 2016, 32% of the complaints filed to the Indonesian Consumers Foundation were regarding lease agreements that involve fiduciaries. Although this trend decreased by 12% in 2018[4], but the number rose again in 2019 and reached 40% of cases, with more or less the same complaints: withdrawal of fiduciary objects, transfer of non-performing loans, or unpleasant behavior of debt collectors.[5]

The regulation regarding fiduciary is stipulated by the Indonesian Constitutional Court Decision Number 18/PUU-XVII/2019, particularly Article 15 Section (1), Section (2), and Section (3) of Law Number 42 of 1999 concerning Fiduciary. The decision regulates the fiduciary certificate which has executive power. That is, if a debtor breaches the contract, a creditor is authorized to sell the collateral object under his own power.

On January 6, 2020, in its decision of judicial review over Law Number 42 of 1999 concerning Fiduciary, the Indonesian Constitutional Court stated that the phrases *"enforceable"* (executorial power) and *"has the same power as court*

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3 Frieda Husni Hasbullah, *Hukum Kebendaan Perdata: Hak-Hak Yang Memberi Jaminan* (Jakarta: Ind-Hill Co, 2002), 79.

4 Suwandi Wiratno, "Dampak Putusan Mahkamah Konstitusi Terhadap Industri Pembiayaan" (Surabaya, n.d.).

5 "YLKI: OJK Abaikan Perlindungan Konsumen | YLPK Jatim," accessed October 12, 2021, http://ylpkjatim.or.id/ylki-ojk-abaikan-perlindungan-konsumen/.

decisions that have permanent legal force" as mentioned in Article 15 Section (2) of the Fiduciary Law contradict to the 1945 Constitution and have no binding legal force as long as it is not interpreted "towards a fiduciary where there is no agreement on the breach of contract (all legal mechanisms and procedures of the execution of fiduciary deeds must be applied equally to a court decision with permanent legal force)."[6] As for Article 15 Section (3) of the Fiduciary Law, the Court decided that the phrase *"breach the contract"* is contrary to the 1945 Constitution and has no permanent legal force, as long as it is not intended to mean "the occurrence of a breach is not unilaterally claimed by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies that consider that a breach of contract has occurred."

The decisions made by the Indonesian Constitutional Court imply two common phenomena: (1) the absence of default criteria mutually agreed upon in the written contracts by both the creditor and the debtor; and (2) the debtor's reluctance to have his collateral object confiscated by the creditor. Whereas, fiduciary literally means a debt agreement between a creditor and a debtor that involves guaranteed objects whose ownership status lies on the creditor's side. To provide legal protection to the status of fiduciary objects, a notary arranges and registers a deed to obtain a fiduciary certificate, by including the phrase *"For the sake of justice under One Almighty God"*, as regulated in Article 15 Section (1) of Law Number 42 of 1999 on Fiduciary.

Although the Constitutional Court's decision Number 18/PUU-XVII/2019 is final and binding, the implementation is not always easy due to, at least, three factors. First, the terms and conditions of default or breach of contract must be agreed upon by both parties, namely the creditor and the debtor. Second, if a debtor is in default or breaches a contract, they must voluntarily surrender the fiduciary object. Third, a debtor who does not voluntarily turn in the object cannot be forced, so the creditor must issue a lawsuit to the district court or an execution to the fiduciary deed.

For debtors, the Constitutional Court's decision seems to provide a 'fresh air' because it offers them more constitutional rights protection. The execution mechanism that can only work under the court permission is likely to "protect" them from arbitrary, unpleasant withdrawal of the collateral objects done by creditors. On the other hand, for creditors, the decision has created new obstacles in their business. They need harder efforts to reduce the risk of loss.

6 Yohannes Sogar Simamora, "Jaminan Fidusia Pasca Putusan MK: Prinsip Eksekutabilitas Atas Jaminan Fidusia Pasca Putusan MK" (Surabaya, 2020).

For courts, the decision can trigger a massive number of applications of fiduciary. District courts need to provide an effective mechanism and competent human resources (judges) to resolving fiduciary-related cases. Meanwhile, for notaries, the decision has multifaceted impacts; one of which is uncertainty of the legal standing of fiduciary deeds made before the Constitutional Court's decision. Notaries are also required to include clauses that can accommodate the mandate of the Court's decision. In fact, a fiduciary deed, which has legal force, made by a notary binds all parties because the notary's authority is guaranteed by the law to provide legal certainty to the people, especially in the areas of private law.

The decision has, to some extent, created conflicting interests among four parties, namely the creditors (fiduciary givers), debtors (fiduciary recipients), notaries, and courts. This study was carried out to examine the contractual aspects of *murabaha* on fiduciary particularly in the formulation of the default clauses and the legal position of fiduciary deeds in the *murabaha* contract related to the provision of the default agreement, following the Indonesian Constitutional Court's decision Number 18/PUU-XVII/2019.

Research Methods

This study applied normative research method, also commonly known as doctrinal research, which analyzes laws that are conceptualized on the basis of adopted and developed doctrines.[7] The researchers attempted to examine the legal position of fiduciary deeds in *murabaha* contract following the Indonesian Constitutional Court's Decision Number 18/PUU-XVII/2019 related to the provision of default clause agreements by creditors and debtors. This normative research used conceptual and legislation *(statute)* approaches. The data sources include primary and secondary legal materials. The researcher operated documentation techniques to dig up information through written sources, such as archives, records, and official documents[8] on the provisions of fiduciary default clause agreement in *murabaha* contracts.

The data collected from the documentation study were analyzed using qualitative descriptive method: starting with problem classification and identification. It is then studied by explaining the relationship between the primary and secondary legal materials with the position of the fiduciary deeds in *murabaha* contracts following the Indonesian Constitutional Court Decision

7 Soetandyo Wignjosoebroto, *Hukum, Paradigma, Metode Dan Dinamika Masalahnya* (Jakarta: ELSAM dan HUMA, 2002), 148.

8 Arikunto Suharsimi, *Prosedur Penelitian: Suatu Pendekatan Praktik* (Jakarta: Rineka Cipta, 2002), 26.

Number 18/PUU-XVII/2019, with the main focus on the articles regulating default agreement between creditors and debtors. The results of the study were analyzed in-depth using the theories of (guarantee) contract law. The results of the analysis were finally concluded and aligned to the research objectives.

Discussion

The following sections scrutinize the legal position of fiduciary deeds in *murabaha* contract following the decision issued by Indonesian Constitutional Court number 18/PUU-XVII/2019 on default agreement between creditors and debtors. They cover two major aspects, fiduciary deeds in *murabaha* contract and the urgency of agreement clauses in fiduciary contracts.

Fiduciary Deeds in Murabaha Contract

In practice, *murabaha* contract is a financing product which is based on sales and purchase agreement *(bai')*. *Murabaha* is a popular product of Islamic financial institutions, especially Islamic banking, to fund the purchase of consumer goods, such as motorcycles, cars, electronic devices, and houses. The fatwa of DSN-MUI Number 04/DSN-MUI/IV/2000 defines *murabaha* as selling an item by confirming its basic purchase price to the buyer and he/she pays at a higher price as profit. Article 19 Section 1 letter (d) of Law Number 21 of 2008 on Islamic Banking explains that *murabaha* is a financing contract for an item by confirming its basic purchase price to the buyer and they pay it at a higher price as an agreed profit.

As *murabaha* contracts concern on financing consumer needs, a bank will buy goods as desired by the customer and resell it at a profit. When the bank hands over the goods to the customer, the goods legally become the costumer's property. The customer may pay the cost either by installment or lump sum at the agreed time. To ensure that the customer makes payments on the receivables/loans, the bank may ask for a guarantee, be it collateral or a guarantee by a person or a corporation. In the Indonesian law system, the collateral can take the form of collateral rights over goods such as mortgages, encumbrances, liens, and fiduciaries. Regulations regarding collaterals for a contract guarantee have been stipulated in Article 1820 to Article 1850 of the Indonesian Civil Code. In practice, banks usually bind the goods being financed as collateral for the customer obligations. When the goods being financed acts as collateral, it is called principal collateral.[9]

9 Sutan Remy Sjahdeini, *Perbankan Syariah: Produk-Produk Dan Aspek-Aspek Hukumnya* (Jakarta: Kencana, 2014), 214.

In its fatwa Number 03/DSN-MUI/IV/2000 on *murabaha,* DSN-MUI allows banks to ask for a collateral to a customer to secure the loan. The fatwa mentions that guarantees in *murabaha* are allowed to ensure customers' serious intention on their orders. Banks may require customers to provide trusted asset collaterals. It is implied from the fatwa that banks are permissible to ask for collaterals from the customers to protect or guarantee their rights from any possible violation and to avoid consuming other people's properties improperly.

Islamic banking in Indonesia grows very rapidly due to its ability to collect and provide funding/loans by implementing a sharing system to people in need. Any profits (benefits) and losses (risks) are borne by both parties: banks as the givers and people as the receivers. The relation between banks and people who use the finance is not as creditors and debtors but as partners who uphold the principles of partnership. Sharia banking system applies the principle of prudence under the framework of healthy business activities and that of justice such as through collateral policy.

Article 1 number 23 of Law No. 10 of 1998 states that additional guarantees are presented by a debtor to the bank to obtain credits or financing facilities based on sharia principles. Thus, a collateral or guarantee is a construction of an additional *(accessoir)* agreement aiming to obtain financing facilities from a bank. Collateral, according to Hadisoeprapto and Bahsan, refers to an object given to a creditor to raise their confidence that a debtor will meet the obligation that can be valued by contract-based money.[10]

The aforementioned definition suggests that: a) a collateral or guarantee focuses on the fulfillment of a debtor's obligation to the creditor (bank); b) its form can be valued by money; and c) a collateral or guarantee is resulted from a contract agreed by a creditor and a debtor.

A collateral or a guarantee is actually not a part of essential pillars or absolute requirements in Sharia banking financial system. However, it can raise bank's trust over the customer's ability to pay-off the loan they receive. In the context of trust building on the side of creditors to that of debtors in a *murabaha* contract, a collateral function is to give legal certainty. This is in line with one of *ushul fiqh* principles, i.e. *al-mashlahah al-mursalah*, which supports the legal alignment to public needs, interests, and goodness as long as it leads to the common good and it neither contradicts the Sharia law nor harm other parties in general.

10 Mariam Darus Badrulzaman, *Mencari Sistem Hukum Belanda* (Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1983), 227.

The Urgency of Agreement Clauses in Fiduciary Contracts

During the implementation of the collateral-bound agreement between a creditor and a debtor, defaults or breaches of contract may always be possible to occur. As default concept is closely related to performance problem, discussions on default should involve discussion on performance. The meaning of performance in the context of Indonesian Civil Law system is very broad, not only concerning contractual obligations, but also related to any obligations in general arising from a contract.

Reciprocal agreements always lead to both active and passive sides. Creditors are granted the active-sided rights to demand for the performance fulfillment, while debtors gain the passive-sided rights to carry out a good performance. Performance and default interact and influence one another; under some circumstances, however, the performance does not work properly and this leads to the so-called default.[11]

The interpretation on the Indonesian Constitutional Court Decision No. 18/PUU-XVII/2019, particularly on Article 15 section (1), section (2), and section (3) of Law No. 42 of 1999 on Fiduciary, particularly regarding Default and Execution of Fiduciary, has shifted. Previously, it was regulated that if the debtor (consumer) broke his promise or defaulted, the fiduciary recipient (leasing company) had the right to sell the object of collateral with his own power (auction). However, the Constitutional Court Decision No. 18/PUU-XVII/2019 decided that a fiduciary certificate does not necessarily/automatically have executive power. In addition, a breach of contract in the execution of a fiduciary should be based on either an agreement between the two parties, i.e. the debtor and the creditor, or a legal action (lawsuit to court) that judges the occurrence of a breach of contract.

'Breach of contract' must not be interpreted unilaterally by the creditor. The condition of breach should consider the absence of objections from both parties. If an objection is made by the debtor, execution can take place only under the applicable legal procedure, i.e. through a lawsuit in a district court. This system provides legal protection to the debtor because the creditor would not act autocratically in executing fiduciary objects.

Fiduciary recipients (creditors) are prohibited from forcibly taking fiduciary objects from the fiduciary givers (debtors). Otherwise, the fiduciary recipients may have been considered committing an 'act of vigilantism' *(eigenrichting),* which is prohibited by law (see the Decision of the Indonesian Constitutional Court Number 18/PUU-XVII/2019). Mertokusumo explains that Civil Law should essentially refer to that 'it regulates the compliance towards civil law materials

11 Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proposionalitas dalam Kontrak Komersil* (Jakarta: Kencana Prenada Media Grup, 2010), 261.

through judges. Lawsuit in this case means nothing but actions that aim at obtaining legal protection provided by the court to prevent self-judgmental *(eigenrichting)* actions. Such a judgment is a kind of an act that people do to protect their rights in accordance with their arbitrary and unilateral will. Without the consent of other interested parties, *eigenrichting* will cause unexpected losses. Therefore, self-judgmental *(eigenrichting)* actions are not justified even if people wish to protect or fight for their rights.

It seems that amendment of Law No. 42 of 1999, which is under the conditional decision made by the Constitutional Court, is not highly required. Rather, improvement shall be made to unclear mechanisms and improper practices of the execution, such as debt collection by force. Following the Constitutional Court Decision No. 18/PUU-XVII/2019, default and execution should be interpreted differently. Default must be based on both parties' agreement and execution must be carried out either through a voluntary statement made by the debtor or through a court judgment. Article 15 Section (2) of Law No. 42 of 1999 concerning Fiduciary mentions that the phrases *"enforceable"* (executorial power) and *"has the same power as court decisions that have permanent legal force"* are considered unconstitutional as long as they are not interpreted as lack of agreement on the breach of contract and default and that the debtor does not comfortable to voluntarily submit the fiduciary object. Under these likely circumstances, all legal mechanisms and procedures for the execution of fiduciary certificates must be carried out in the same way as other court decisions with permanent legal force.

The decision of the Constitutional Court originated from petitioners named Aprilliani and Suri who had signed a Multipurpose Financing Agreement for a loan to purchase one car unit of Toyota Alphard V Model 2.4 A/T 2004 at PT. Astra Sedaya Finance (ASF Inc.). In accordance with the agreed contract, Aprilliani and Suri were obliged to pay their debt to PT. ASF as much as IDR 222,696,000 with installments for 35 months starting from November 18, 2016. From November 18, 2016 to July 18, 2017, the petitioners paid the installments on time. However, on November 10, 2017, ASF Inc. sent a representative to withdraw the vehicle due to an 'assumed' default. In response to such a case, Aprilliani and Suri submitted a letter of complaint against the ASF Inc. representative's actions. However, the letter was not responded and they even suffered from unpleasant treatments. Finally, they filed a lawsuit to the South Jakarta District Court on April 24, 2018. The lawsuit was based on a tort action and officially registered by number 345/PDT.G/2018/PN.jkt.Sel.

The Court approved the petitioners' lawsuit and judged that ASF Inc. had performed a tort. However, being assisted by police officers, ASF Inc. continued to withdraw the car regardless the Court's judgment that ASF Inc. was not allowed to withdraw the vehicle. The petitioners saw that ASF inc. took into account Article 15 of Law No. 42 of 1999 concerning Fiduciary, which was reviewed in their case. Because the petitioners felt that their constitutional rights were harmed, they asked the Court to declare that the article contradicted the 1945 Constitution.

Article 15 of Law No. 42 of 1999 states that a fiduciary certificate referred to in Article 14 Section (1), which includes the phrase *"For the sake of justice under One Almighty God"*, has the same executorial power as other court decisions with permanent legal force. If a debtor breaches the contract, the fiduciary recipient has the rights to sell the fiduciary object on his/her own power.

The Constitutional Court argues that Article 15 section (2) and section (3) of Law Number 42 of 1999 on Fiduciary does not provide legal certainty in terms of the execution procedure, the time a fiduciary giver (debtor) can be declared as to breach the contract/default, and the loss of opportunity for the debtor to purchase the fiduciary object at a reasonable price. This obscurity frequently causes violence committed by fiduciary recipients (creditors) and leads to unpleasant actions that degrade the debtor's dignity. It is clear that Article 15 section (2) and section (3) of Law Number 42 of 1999 on Fiduciary poses unconstitutional norm problems.

For the Constitutional Court, the exclusive authority of fiduciary recipients (creditors) is always attached as long as there is no serious problem regarding certainty of the time, i.e. when a fiduciary giver (debtor) is considered to have breached the contract/default, and considering the possibility that the debtor would voluntarily submit the fiduciary object to the creditor. It implies that fiduciary givers (debtors) may admit their action of breaching the contract, so that there is no reason not to turn in the fiduciary object to the fiduciary recipients (creditors) and let them sell the item under their own authority.

The decision of the Constitutional Court Number 18/PUU-XVII/2019 does not necessarily eliminate the enactment of laws that regulate the execution of fiduciary certificates. It primarily aims to provide legal protection to related parties, as long as it corresponds to the Constitutional Court's consideration. In both cases, viz that execution is carried out by creditors themselves on the basis of an agreed contract or that the execution is resulted from legal process in district courts, police assistance may still be provided to maintain public

security and order.

Until recently, the criteria of 'breach of contract' have not been clearly regulated. This is because the executive power in Law Number 42 of 1999 on Fiduciary comes immediately (automatically) when the creditor declares that the debtor is in breach of contract, which is equivalent to a court judgment with permanent legal force. Through judicial review petition on Article 15 sections (2) and (3) of Law Number 42 of 1999 on Fiduciary, the petitioners wish that the Constitutional Court can determine the indicators of 'breach of contract' in fiduciary cases.

Breach of contract or default basically means not fulfilling the obligations or being neglectful to perform the obligations as specified in the agreement made by the creditor and the debtor.[12] Default (non-fulfillment of promises) can occur either intentionally or unintentionally.[13] A debtor is considered being neglectful when they do not perform their obligations or are late in fulfilling them.[14] Regulation regarding breach of contract or default can be found in Article 1243 of the Civil Code, which states that reimbursement of costs, losses, and interests resulted from non-fulfillment of a contract will only begin if a debtor, after being declared as 'to be neglectful in fulfilling the contract,' continues to neglect it; or when a necessary thing can only be given or made within the lapse of time.

According to Miru, default may take one of the following actions: a) not meeting the agreed performance at all; b) the performance is not perfect; c) being late in fulfilling the performance; and d) doing what the agreement forbids.[15]

The parties bound in a contract, such as the petitioners who are bound by a Multipurpose Financing Agreement at ASF Inc., must comply with the contract clauses. Article 1338 section (1) of the Civil Code states that all legal contracts/agreements apply as laws for those who make them. The term "applies as laws" means that any contracts that are made legally have the same position as the law. Therefore, when being aggrieved, any party bound in the contract is entitled to legal protection by filing a lawsuit against the other. That is the power of a legal contract.

Whether or not a contract binds the related parties depend on the validity of the contract itself. The validity of a contract can be verified by testing it using

12 Salim HS, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2008), 180.
13 Ahmadi Miru, *Hukum Kontrak Dan Perancangan Kontrak* (Jakarta: Rajawali Press, 2007), 74.
14 Subekti, *Kitab Undang-Undang Hukum Perdata* (Jakarta: PT. Arga Printing, 2007), 146.
15 Ahmadi Miru and Sakka Pati, *Hukum Perikatan* (Jakarta: Rajawali Press, 2008), 12.

legal instruments that have been manifested in the 'conditions for the contract validity' as stipulated in Article 1320 of the Civil Code, i.e. *"In order that a contract becomes valid, four conditions should prevail: (a) agreement to self-bind into the contract; b) ability to make a contract; c) a certain subject matter; d) a cause that is not prohibited"* and in other regulations, namely Article 1335, Article 1339, and Article 1347 of the Civil Code. When both subjective and objective conditions are met, the contract can provide any parties who feel aggrieved with legal protection. The legal protection provided for fiduciary recipients lies on the "executive title" which authorizes them to carry out executions by themselves.

However, some executions cause inconveniencies. The most current case occurred on Tuesday, November 10, 2020. A debt collector forcibly took a Honda Genio motorbike (vehicle registration plate: B 4986 KRO) on which an FIF Finance customer was riding. The incident occurred in front of the FIF Finance office, Cimahi City, at around 5 AM. When the customer was about to leave for work, suddenly two debt collectors, who claimed themselves as FIF representatives, grabbed the vehicle. As a result, the customer had to walk as far as 18 kilometers to reach his office in Baloper Padalarang. Not even infrequently, execution of collaterals, mostly vehicles, results in the end of life of either party, the customer or the debt collector.

The Constitutional Court Decision Number 18/PUU-XVII/2019 emphasizes that default clauses in fiduciary contracts must first be agreed by the debtor and the creditor. Article 1338 of the Civil Code contains the principle of freedom of contract, i.e. that everyone is free to or not to enter into a contract, to agree with whomever he/she wishes, to determine the content, the form, and the terms of the contract, and to establish the legal provisions applicable in the contract.[16] The principle of freedom of contract is a continuation of the principle of equality among the parties as the basis of civil relations. The parties are free to determine their will, and this is justifiable under the principle of freedom of contract. In the implementation level, however, the freedom of will in making a contract is the result of coercion, error, and fraud that causes injustice due to the power imbalance in the bargaining position between parties involved in the contract. The party with a higher bargaining position puts pressure on that with the lower position.

The consideration of the Constitutional Court Decision Number 18/PUU-XVII/2019 regarding the absence of balanced legal protection for

16 Muskibah Muskibah and Lili Naili Hidayah, "Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang dan Jasa Pemerintah Di Indonesia," *Refleksi Hukum: Jurnal Ilmu Hukum* 4, no. 2 (April 30, 2020): 175–94, https://doi.org/10.24246/jrh.2020.v4.i2.p175-194, 177.

creditors and debtors in a fiduciary should be linked with the principle of property rights transfer of fiduciary objects from the fiduciary givers (debtors) to fiduciary recipients (creditors). In other words, the two parties' approval on the substances of such a contract occurs in an 'imperfect free state of will' particularly on the part of the debtors as fiduciary givers. In fact, freedom of will is one of fundamental conditions for the validity of a contract (see Article 1320 of the Civil Code).[17]

Lack of absolute freedom may lead to imbalance bargaining position between fiduciary givers and recipients. In such a circumstance, the party with a stronger bargaining position has more power to determine the content of a contract, which is commonly known as a standard contract or a formal agreement. The use of standard contracts is primarily based on economic consideration, i.e. for cost reduction and practicality.[18] However, economic consideration is not a legitimate reason for not implementing the Constitutional Court Decision because it has a binding power that must be obeyed by anyone *(erga omnes)*. The *erga omes* principle is reflected in the provision that any decisions of the Constitutional Court should be directly implemented without requiring the agreement of authorized officials unless the existing laws regulate otherwise.

The implementation of the Constitutional Court Decision is automatic, that is since the decision is read in the Court or within a certain period. The Constitutional Court Decision is immediately binding and has legal consequences. Therefore, because taking up a higher bargaining position, fiduciary recipients must obey the Constitutional Court Decision by including it in the contract explicit clauses of breach of contract or default and the debtors' volunteering to turn in the collaterals if they breach the contract or in a default.

The written and unwritten rules of law function as both general guidelines, for individuals to behave in society and the limitations for society in burdening or taking action against individuals. The implementation of these rules creates legal certainty. Legal certainty is present when rules of law are comprehensively made and officially promulgated because they are clear, logical, are not open to multi interpretation, and predictable.[19] Legal certainty is a condition in which human behavior, whether of individuals, groups, or organizations, is bound

17 "Penafsiran Cidera Janji Oleh Mahkamah Konstitusi Terkait Eksekusi Jaminan Fidusia Dan Implikasinya | Maulana | Notarius," accessed October 16, 2021, https://ejournal.undip.ac.id/index.php/notarius/article/view/31165/17474, 769.

18 Muhammad Faiz Mufidi, "Perjanjian Alih Teknologi Dalam Bisnis Frenchise Sebagai Sarana Pengembangan Hukum Ekonomi" (Universitas Islam Bandung, n.d.), 13.

19 Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: kencana, n.d.), 202.

and within the corridors that have been outlined by the rules of law.[20]

Furthermore, notaries, as the third parties who manage fiduciary deeds, should also obey the Constitutional Court Decision. As the decision is *Ex Nunc*, fiduciary deeds made before the decision is issued should not be amended. The decision applies only to fiduciary deeds that are made from this day forward. There is no need to make any changes that contain default or breach of contract clauses in any fiduciary deeds that has been signed before the decision of the Constitutional Court is issued. Notaries should manage contracts that contain the clauses of default and breach for the deeds made after the issuance of the Constitutional Court Decision.

A number of fiduciary deeds, including those of *murabaha*-based contracts, has in fact stated some clauses on default or breach of contract. However, some sentences need changes or reformulations particularly regarding circumstances upon which the condition of default or breach of contract is agreed. According to Ajie, Chairman of the Indonesian Notary Association, some clauses in fiduciary deeds should be added or changed to comply with the Constitutional Court Decision. *First*, if the debtor defaults or breaches the contract, he/she will voluntarily submit the collateral object to the creditor so that the creditor can sell it on his own power. *Second*, if the clause referred to in section (1) is not carried out by the debtor, the creditor will sue the debtor by filing a lawsuit to the District Court (in *sharia* economic cases, the lawsuit may be filed to Religious Courts). *Third*, during the lawsuit period, the debtor is obliged to maintain the collateral properly. Any loss or damage of the collateral is the responsibility of the debtor (defendant).

Fiduciary deeds that contain clauses on default and breach of contract agreed by fiduciary givers and recipients can provide legal protection for both parties especially when either case occurs along the term of the contract. Legal protection refers to all efforts made by law enforcement officers to protect legal subjects from possible violation of their rights. A default or a breach of contract must not be declared unilaterally by the creditor. The execution of a court judgment that has permanent legal force must still be carried out in the absence of agreement regarding the default or breach of contract and that of the debtor's voluntary surrender of the collateral, fiduciary object.

Effort to draw up an agreement on the clauses of default or breach of contract in a *murabaha*-based fiduciary deed is a part of preventive legal protection that the government introduces to avoid violations of rights. Legal protection

20 Satjipto Rahardjo, *Sisi-Sisi Lain Dari Hukum Di Indonesia* (Jakarta: Kompas Media Nusantara, 2003), 25.

in laws aims at preventing harm as well as providing guidelines and limitations in performing an obligation. In addition to being in fiduciary laws, clauses of a default or breach of contract in deeds also includes the principles of *pacta sunt servanda* in Article 1338 section (1) of the Civil Code that any contract made legally is valid as a law for those who make it.

A debtor is considered to default or breach the contract only if they have received legal notices (subpoenas) from the creditor or the bailiff. The notices should be made at least three times. If the notices are not responded, the creditor has the right to bring the case to the district court. The court decides whether or not the debtor's actions lie under the criteria of a default. However, while waiting for the court judgment that has permanent legal force, the debtor may delay the resolution of the problem by intention.

In addition to the juridical implications, the Financial Services Authority also considers that there are some economic implications that industries need to anticipate. They are: a) potential increase of interest rates in financing; b) low trust of finance companies to potential debtors; c) decrease of financial distribution; d) disruption of the financial industry. The Constitutional Court Decision affects not only financing industries but also banking, pawnbroker, and financial technology; e) disruption of the automotive industry due to the decline in financing which affects the country's economy; f) lack of investors' trust in financing sectors; and g) difficulties to improve *the ease of doing business*. This contradicts the government's program to invite more (foreign) investment.

Conclusion

Formally, the authentic *murabaha* deed on fiduciary guarantees is based on Article 1320 of the Civil Code, which must provide certainty that an event and fact mentioned in the deed was actually carried out by a notary or explained by the parties appearing at the time stated in the deed in accordance with procedures that have been determined in the making of the deed. The position of the fiduciary deed after the decision of the Constitutional Court Number 18/PUU-XVII/2019 is about the existing agreement being carried out as it should, while for the fiduciary deed which will be implemented at a later date after the decision exists, there must be a default agreement as a form of implementation of the Constitutional Court's decision Number 18/PUU-XVII/2019 and as a form of anticipation if in the future the debtor does not voluntarily surrender the fiduciary object

Efforts to draw up an agreement on the clause of default in a fiduciary deed with *murabaha* financing in Islamic banking is part of preventive legal protection.

Legal protection is all efforts made by law enforcement to protect the rights of legal subjects so that these rights are not violated. Default may not be declared unilaterally by the creditor. Execution of court decisions that have legal force must still be carried out, if at the beginning of the agreement there is no agreement regarding a breach of contract and when there is a default but the debtor objected to submitting the object of collateral voluntarily.

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