

Taradhin Principle in Fiduciary Guarantee Parate Execution after the Decision of the Constitutional Court No. 18/PUU- XVII/2019

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Abstract

This article was analyzes the principle of Willingness in the Execution of fiduciary guarantees after the decision of the Constitutional Court Number 18/PUU-XVII/2019, in practice Parate execution can be carried out either with or without the consent of the debtor, such conditions often lead to acts of coercion and violence from fiduciary guarantee holders, even giving opportunities to arbitrary acts committed by fiduciary recipients (creditors) and degrading the dignity of the debtor. From the research conducted, it was found that the application of the principle of willingness in the Parate Execution of fiduciary guarantees by the Constitutional Court provides benefits and prevents harm to debtor and creditors, this can be seen from the main idea of the Court which states that parate Executions should no longer be carried out without an agreement of the customer's and the customer's willingness to return the collateral. If the customer does not admit the defaulted, then the fiduciary holder can submit an application through fiat Execution to the Court.

KEYWORDS *Agreement, Fiduciary Guarantee, Parate Execution, Sharia Bank, Taradhin*



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Abstrak

Artikel ini menganalisis Prinsip Kerelaan dalam parate eksekusi jaminan fidusia pasca putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019, dalam prakteknya Parate eksekusi dapat dilakukan baik dengan persetujuan maupun tanpa persetujuan debitur, kondisi demikian sering menimbulkan adanya perbuatan paksaan dan kekerasan dari Pemegang jaminan fidusia, bahkan melahirkan perbuatan sewenang-wenang yang dilakukan oleh penerima fidusia (kreditur) serta merendahkan harkat dan martabat debitur. Dari penelitian yang dilakukan ditemukan bahwa penerapan prinsip kerelaan dalam parate eksekusi jaminan fidusia oleh Mahkamah Konstitusi memberikan maslahat dan mencegah kemudharatan bagi pemberi dan penerima fidusia, hal tersebut terlihat dari pokok pemikiran Mahkamah yang menyatakan bahwa parate eksekusi tidak boleh lagi dilakukan tanpa adanya kesepakatan mengenai wanprestasi nasabah dan kerelaan nasabah untuk menyerahkan agunannya, jika nasabah tidak mengakui bahwa ia wanprestasi, maka pemegang fidusia dapat mengajukan permohonan melalui fiat eksekusi pada pengadilan.

KATA KUNCI *Jaminan Fidusia, Parate Eksekusi, Perbankan Syariah, Perjanjian, Taradhin*

Introduction

Through the Decision Number 18/PUU-XVII/2019 the Constitutional Court stated that Article 15 paragraph (2), paragraph (3), and the explanation of Article 15 paragraph (2) of the Fiduciary Guarantee Under Law Number 42 of 1999 were contrary to the Constitution so that no longer has binding legal force. In the decision, the Court stated that the Execution of fiduciary guarantees can only be carried out by the creditor in the event that there is an agreement for the creditor and debtor regarding the debtor's defaulted and the debtor or the owner of the guarantee voluntarily submits the guarantee to the creditor to be sold through auction. Parate execution is a simplification of bail Execution without

involving a court bailiff.¹ The goal is that fiduciary holders can obtain faster repayment of receivables. However, in practice, the Execution of a fiduciary guarantee on a parate basis tends to be carried out arbitrarily by the creditor by forcibly confiscation or confiscation of the object of the fiduciary guarantee. In this case, the creditor exclusively and unilaterally assesses and determines whether there has been a "breach of promise" without giving the debtor (fiduciary) the opportunity to rebut and or defend. On the other hand, The Execution of fiduciary guarantees tends to be carried out by degrading the dignity of the debtor. Often the creditors with the help of *debt collectors* withdraw collateral on public roads so that it embarrasses the debtor. On this basis, the Constitutional Court issued Verdict Number 18/PUU-XVII/2019.

Consideration of the Constitutional Court in the decision almost the same with consideration in the case of *John v Trimble* 1902 TH 146² who decided that the sale of collateral object without the consent of the debtor cannot be allowed. The reason is because there is often oppression of debtors when giving creditors permission to take their own actions. The court stated the obstacles that might arise in the implementation of the Parate Execution. The creditor can be honest, but can also be wrong in ensuring that the debtor is in default condition. The creditor then sells the debtor's house without notification to the customer, making the sale to them in good faith. The debtor may still be trying to repay the debt, but a customer then comes and informs him (the debtor) that he is no longer the owner of the collateral, and says that he (the debtor) has to move. It will prejudice the debtor by preventing him from filing a defense such as a payment, or a misrepresentation or breach of contract by the creditor.

The Supreme Court Decision Number 3210/K/Pdt/1984, dated January 30, 1986, is very similar to the Constitutional Court Decision

¹ Teddy Anggoro, "Parate Execution: Creditor Rights Derogating Formal Law (A Basic and Deep Understanding)", *Journal of Law and Development* 37, No. 4 (2007): 535-565.

² Cook, Samantha, and Grant Quixley. "Parate executie clauses: Is the debate dead?." *South African Law Journal* 121, No. 4 (2004): 719-730.

18/PUU-XVII/2019. Creditor conducts a public auction in the city of Bandung through his auctioneer because the debtor is in default. The District Court and High Court stated that the action was not detrimental and strengthened the auction. However, at the cassation level, the Supreme Court reversed the decisions of the District Court and the High Court and ruled that the action was against the law.³ The supreme Court has opinion that. Whereas based on Article 224 of HIR, the auction conducted as a result of the grosse mortgage deed entitled "For Justice Based on the One Supreme God" which has the same legal force as a court decision, must be carried out by order and based on the leadership of the head of the district court if there is no reconciliation . "Even though it is visible to the naked eye, it should be noted that the creditor in the above case actually exercised his parate execution rights, not his executorial title rights. Therefore, Article 224 HIR should not apply to this case at all. However, from that time until today, all land mortgages must exercise executorial rights. Not only that, even the Execution of mortgage rights cannot be carried out due to the decision.⁴

From the two decisions it can be said that The substance of the Constitutional Court's decision has long been a polemic in its implementation, even before the appear of Mortgage and Fiduciary Guarantees, Parate Executions have been widely carried out by creditors and those authorized by creditors to withdraw collateral with their own power, in order get a faster debt repayment. In such cases, agreement by the debtor is not required. The spirit contained in both decisions are accordance with the principle of muamalat in Islam, where transactions based on Islamic principles must not contain usury, maisir, gharar and do not prejudice the other parties, and must be transparent. In addition, all transactions carried out must be consensual or voluntary between each

³ Budi, Antonius Nicholas. "Abolition Of Parate Executie as a Result of Constitutional Court Ruling Number 18/PUU-XVII/2019." *Jurnal Hukum dan Peradilan* 9, No. 2 (2020): 255-274.

⁴ Antonius Nicholas Budi.

other, there must be no pressure, coercion, fraud, and mis-statements. If this is not fulfilled, then the transaction is carried out in a vanity way.⁵ As explained in the Qur'an Surah Annisa (4): 29 which means:

O you who believe, do not eat each other's wealth in a false way, except by way of commerce which is carried out with mutual consent between you.

The verse above shows that transactions should be based on the willingness of each other. In a muamalat relationship, transactions made by coercion or fraud cannot be justified. If that happens, then the transaction is void. The voluntary element in a transaction shows the sincerity and good faith of the parties.

In the Compilation of Islamic Economic Law it is explained in article 403 paragraph 1 of the Compilation of Islamic Economic Law regarding the sale of rahn assets which states that murtahin must warn Rahin to immediately pay off his debt when it is due. If there is no warning from the murtahin to pay off the debt from rahin, then the confiscation cannot be carried out. In addition, the auction must be based on the willingness of rahin and murtahin⁶.

On the other hand, The Constitutional Court added provisions in the Execution of fiduciary guarantees in the form of a statement from the seller that the auctioned goods were in the possession of the seller and had been submitted voluntarily by the debtor/fiduciary giver, and the debtor/fiduciary giver had agreed that there had been a breach of contract/default and there were no objections from debtor/fiduciary for the implementation of the auction. This study examines the principle of willingness to parate Execution which is the basis of the Constitutional Court in Decision Number: 18/PUU-XVII/2019 and its compliance with the principles of Sharia Guarantee Law.

⁵ Gemala Dewi, Wiryaningsih, and Yeni Salma Barlinti, *Islamic Binding Law in Indonesia*, (Faculty of Law, University of Indonesia, Prenadamedia Group, Depok, 2020), p 30.

⁶ Asna Jazillatul and Nasyiah Chusna Iffaty, "Implementation of Sharia Principles on Confiscation of Fiduciary Collateral," *De Jure: Journal of Law and Sharia* 4, No 2 (2012): 155-166

Methods

The method of this research is qualitative, namely research both positive law and Islamic law as well as other legal materials related to the Principle of Willingness in the Parate Execution of Fiduciary Guarantees. While the approach method used is a legal comparison which is carried out by comparing the Principle of Willingness to Execute Fiduciary Guarantees in the Constitutional Court's Decision with the Principle of Volunteering (*Taradhin*) in Islamic law. The results of this comparison was analyzed the suitability of the principle of Willingness to Parate Execution of Fiduciary Guarantees in the Constitutional Court's Decision with the Voluntary Principle (*Taradhin*) in Islamic law, so that should be found whether the post-MK Parate Execution is appropriate or contrary to Islamic law. The data used is secondary data which includes: Primary legal materials such as: Al-Qur'an, Hadith, Constitutional Court Decision 18/PUU-XVII/2019 and Fiduciary Guarantee Law Number 42 of 1999 concerning Fiduciary Guarantee; Secondary legal materials such as: Civil Code, National Sharia Council Fatwa, KHES, books on Guarantee Law, both national and international journals related to Parate Execution.

Discussion

Parate Execution before Constitutional Court Decision Number 18/PUU-XVII/2019

The term of "parate executive" etymologically comes from the word "paraat" which means ready to hand, Regarding this parate of Execution, we can see the opinion of Hoogerrechtschof van Nederlands Indie (HGH)

which states it is "the right to take payment without a court decision..⁷ In line with this opinion, PA Stein calls it a "simplified Execution", even because it is so simple A. Pitlo says: "De pandhouder verkoopt deze zaak als ware het zijn eigen zaak", which is usually translated as "The pawnbroker sells the object as if of the thing itself."⁸ This is due to the Execution of the parate Execution which does not involve the debtor or the pawnbroker and does not even involve the Court and the bailiff in the Execution of the sale. Then J. Satrio stated that the right to sell on his own power the object of mortgage if the debtor defaults is the simplified exercise of the right of Execution, which is now granted by the law itself to the creditor holding the first mortgage. In the sense that the implementation of such rights does not need to go through a court and there is no need to use procedural law procedures because its implementation only depends on the conditions of the debtor in default. ⁹

Based on some opinions above it can be concluded that the Parate Execution is an immediate Execution carried out by a creditor or more by selling certain goods belonging to the fiduciary/debtor without having to involve a judge and court bailiff as well as the debtor's approval. The aim is to make it easier for creditors to obtain repayment of their claim rights. We can find this Execution in several material guarantee institutions, including: pawns, mortgages, and fiduciaries. Thus, it can be understood that the implementation of parate Execution is the easiest and simplest way for creditors to recover their receivables when the debtor defaults compared to Executions through court assistance or intervention.

Talking about the Execution of the object of collateral as debt repayment, other than based on Article 224 HIR/258 RBg¹⁰ there are

⁷ Satrio J, *Law of Security and Property Guarantee Rights*, (Bandung: Citra Aditya Bakti, 2002)

⁸ Satrio J

⁹ Satrio J, p. 232.

¹⁰ Based on the Circular Letter of the Supreme Court Number 213/229/85/Um-TU/Pdt explaining the meaning of grosse deed as referred to in Article 224 HIR or 258 RBg is an authentic deed containing an acknowledgment of debt with the mere formulation of an obligation to pay/pay off a certain amount certain money.

regulations specifically on the implementation of collateral rights where creditors are given special rights, namely the right to sell on their own power if the debtor breaks his promise. Prior to the enactment of the Constitutional Court Decision Number 18/PUU-XVII/2019, the arrangement for the Execution of fiduciary guarantees was regulated based on Article 29 paragraph (1) which states, the Execution of fiduciary guarantees can be carried out by: a. implementation of the executive title, on the fiduciary certificate there are *irah-irah* "For Justice Based on the One Supreme Godhead" has the same executive power as a court decision which has permanent legal force: b. the fiduciary recipient or creditor can sell the object that is the object of the guarantee on the authority of the fiduciary recipient through a public auction and take the settlement of his receivables from the proceeds of the sale; c. Underhand sales made based on the agreement of the giver and recipient of the fiduciary in this way are obtained at the highest price that is beneficial to the parties.

While Parate Execution on fiduciary guarantees is emphasized in Article 15 paragraph (3) of Law Number 42 of 1999 concerning Fiduciary which states: If the debtor is in breach of contract, the fiduciary recipient has the right to sell the object that is the object of the fiduciary guarantee on his own power. Fiduciary guarantees have the same characteristics as lien guarantees where the parties do not need to agree that there will be a parate Execution right because the law has automatically granted this right to the creditor.

Parate Execution After the Decision of the Constitutional Court Number 18/PUU-XVII/2019

After the Constitutional Court decision number 18/PUU/XVII/2019, the Execution of the fiduciary guarantee object parate is very different from what has been described previously, the auction must be with the

approval of the debtor. Currently, the enforcement of the provisions of Article 15 paragraph (2) of the Fiduciary Guarantee Law as the basis for the Execution of fiduciary guarantees, with the phrase "*executory power*" and the phrase "*equal to a court decision with permanent legal force*" has been declared contrary to the 1945 Constitution and no longer has any force. legally binding, in this case if there is no agreement on breach of contract (default) between the creditor and the debtor, and the debtor object to voluntarily submitting the object of the fiduciary guarantee, then all legal mechanisms and procedures in the Execution of the object of the Fiduciary Guarantee must be carried out in the same way as the Execution of the decision. court that has permanent legal force.

The meaning of the phrase "breach of promise" after the Constitutional Court Decision Number 18/PUU-XVII/2019, as regulated in Article 15 paragraph (3) of the Fiduciary Guarantee Law, has been declared contrary to the 1945 Constitution and no longer has binding legal force, as long as the meaning of injury is the promise is not interpreted as a breach of contract which 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 breach of contract has occurred. In addition, the Execution of fiduciary guarantees after the decision of the Constitutional Court adds a new provision in the form of a statement from the seller that the auctioned goods are in the control of the seller and have been submitted voluntarily by the Debtor/Guarantor, and the Debtor has agreed that there has been a breach of contract/default and there are no objections. from the Debtor for the implementation of the auction, but if the debtor does not agree on the matters mentioned above, the auction institution requires a requirement in the form of a court decision which is a requirement for the document for submitting the fiduciary guarantee auction.

In the Execution of the Parate Execution after the Constitutional Court's decision, the word voluntary will involve the voluntarism of the

creditor and debtor, so that without voluntary action for both parties, the Parate Execution is invalid. Parate Execution can only be carried out in the event that there is an agreement between the Bank and the customer regarding the customer's breach of contract. In addition, the customer in submitting his collateral to the bank for auction must be based on his willingness. The Court is of the opinion that the Execution of the Fiduciary Guarantee has an impact on the existence of unilateral actions carried out by the creditor, namely the creditor carrying out his own Execution of the object of the fiduciary guarantee on the grounds that the ownership rights of the fiduciary object have been transferred without going through the Execution process as should an implementation of a court decision that has permanent legal force. . unilateral actions taken by creditors as recipients of fiduciary rights have the potential to cause arbitrary actions and are carried out in a less "humane" way, both in the form of physical and psychological threats that are often carried out by creditors (or their proxies) against debtors who often even ignore their rights. - debtor rights.

Principle Volunteering or *Taradhin* in Islam

Willingness/*Taradhin* is one of the pillars in the contract. This of course must be done by both parties, if the *Taradhin* concept is not realized then the contract is void. The purpose of the *Taradhin* concept is to maintain the benefit for both parties. In this case, of course, there is no element of coercion in implementing it. There are two kinds of will: inner and outer. The inner will is the intention or purpose, while the outer will is the *shighat* that expresses the inner will or takes its place like *ta'athi* (direct action). So when the two wills are in line and in harmony, a contract is created.¹¹ If there is only an outward will, like the expression that comes out of a small child who is not yet *mumayyiz*, a sleeping person; or a madman, then the will does not mean anything, just as a *tasharruf* is

¹¹ Wahbah Al Zuhaili, *Fiqh Isuim Wa Adiluituhu 4*, (Gema Insani, Depok, 2011), p. 506.

not created only with an inner intention or will alone. Whoever intends to divorce or waqf something, for example, divorce and waqf will not happen only with the intention to divorce or waqf. In discussing the contract shighat, we already know what are the conditions for the emergence of birth desires. As for the inner desire, it is created by the presence of pleasure and *ikhtiyar* (freedom).¹²

The Hanafiyyah explain that *ridha* and *ikhtiyar* are two different things. *Ikhtiyar* is the intentional act of saying an expression that will lead to a contract, whether based on pleasure or not. Meanwhile, *ridha* is the desire or acceptance of the effect of the contract when it is recited which indicates the process of forming the contract. So, if there is pleasure, it means there is effort. But if *ikhtiyar*, there is not necessarily a blessing.¹³ Meanwhile, according to the Jumhur Ulama (including Syafi'iyah) with the exception of Hanafiyyah, that between *rida* and *ikhtiyar* has the same meaning. According to them, *ikhtiyar* is intentional about the words that make up the contract as a sign or signal of their inner actions which are marked by their acceptance and liking. Without these signs it cannot be said to be an endeavor.

M. Quraish Shihab in his commentary explains the meaning of *Taradin*. He interprets that in buying and selling consensual attitudes are highly demanded and required, although this willingness is hidden in the heart, but the indicators and signs can be seen. which the law uses to denote a willingness. Then in KHES, the *Taradin* principle is defined as an agreement or in contract law it is called the principle of consensualism. Consensualism itself comes from the word "consensus" which means agreement. Agreement in the principle of consensualism means conformity of the will, but the will must be stated. By agreement, it is intended that between the parties concerned there is an agreement of will, meaning that what is desired by one is also desired by the other and the

¹² Wahbah Al Zuhaili

¹³ Wahbah Al Zuhaili

two wills meet in an agreement.¹⁴ Expression of will is not limited to mere utterance of words, but can be achieved by giving signs that can translate the will. In other words, an agreement can occur in various ways and in KHES an agreement in buying and selling can be done in writing, verbally, and by gestures, all three of which have the same law. However, the notion of willingness/agreement is not only in a narrow sense, but includes the understanding that no one has been hurt and there is sincerity from each other. As based on the word of Allah SWT:

O you who believe! Do not eat each other's property with vanity (not right), except in trade which is carried out on the basis of consensual between you. And don't kill yourself. Indeed, Allah is Most Merciful to you. (Surat an-Nisa Verse 29).

Based on the opinion above, it can be concluded that all transactions carried out by the parties that make them must be consensual or voluntary between each party, there must be no pressure, coercion, fraud, and mis-statements. If this is not fulfilled, then the transaction is carried out by invalid way.

The Principal of the Willingness Principle in the Parate Execution of Fiduciary Guarantees After the Decision of the Constitutional Court Number 18/PUU-XVII/2019

The application of the principle of willingness in the Parate Execution by the Constitutional Court aims to provide benefits to the parties, this can be seen from the main idea of the Court which states that the Parate Execution can no longer be carried out without an agreement regarding the customer's default and the customer's willingness to deliver them

¹⁴ Asna Jazillatul and Nasyiah Chusna Iffaty, 2012.

collateral, this is to prevent the occurrence of arbitrariness of the fiduciary recipient in the Execution. Therefore, in the event that there is no agreement between the debtor and the creditor regarding the debtor's default, then the Execution must go through fiat Execution. The Court is of the opinion that it is not permissible for the Execution to be carried out alone, but must submit a request for the Execution to the Court. If Judging from the Court's considerations, the application of the principle of Willingness is in accordance with the provisions of Islamic Shari'ah which has the function of bringing benefit and rejecting harm as stated by Ahmad ar-Raisuni in his book *Nazariyah al-Maqasid'inda al-Imam Asyatibi* who tries to clarify the benefits of the expression of benefit. . According to him, the meaning of *maslahah* is to bring benefits or avoid prejudice. Meanwhile, what is meant by benefit here is an expression of pleasure or anything to get the happiness. However, *agony* mean, is an expression of pain or anything leads to get ill.

Previously, the rules for implementing *parate* Executions were based on Circular Letter Number: SE-23/PN/2000, point la letter (e), which stipulates that: "The implementation of the Mortgage Auction as referred to in Article 6 of the Mortgage Law does not require debtor approval for the conduct of the auction. ¹⁵ Based on the circular, it can be seen that the auction of Mortgage Rights as it can be equated with fiduciary guarantees does not require the approval of the debtor, it can cause harm to the customer, because this provision robs the debtor of the right to apply/get a chance to defend himself on suspicion of breach of contract (defaulted) and the opportunity to obtain the proceeds from the sale of the object of the fiduciary guarantee at a reasonable price. Even though under shari'a law it is permissible to conduct a guarantee auction, as based on the DSN-MUI Fatwa No. 68/DSN-MUI/III 2008 which states that "the deposit of the collateral in the form of legal evidence of ownership or certificate does

¹⁵ Fiduciary guarantees and mortgages both function as debt guarantees, both are *accessoir* agreements, which use certain objects as debt guarantees, and have the same characteristics, namely *droite de suite* and *droite de preference*.

not transfer ownership of the goods to the murtahin. In the event of default or unable to pay off the debt, marhun can be sold forcibly or executed directly either through auction or sold to other parties according to sharia principles..

The forced sale as regulated in the Fatwa can cause harm to the customer because it has the potential to provide injustice to the customer in the absence of legal uncertainty, this in itself results in the loss of the customer's rights to defend himself and the opportunity to obtain the sale of the object of a fiduciary guarantee at a price reasonable. Therefore, the opinion of the author that the application of the principle of willingness in the Parate Execution based on the Court's Decision is an effort to avoid any prejudice that may occur in the Execution of the guarantee Execution. By selling collateral on a parate basis, it can threaten the rights of customers and this is contrary to sharia principles. A contract is invalid if one of the parties is forced, coerced or feels cheated. This happens when the time of the contract is mutually agreeable, but when one of the parties feels cheated the contract becomes void. One of the arguments in the petitioner in the Constitutional Court Decision Number 18/PUU-XVII/2019 is the Execution of the parate Execution which was not preceded by legal remedies. Creditors commit arbitrary acts. The debtor who became the applicant in the judicial review of the Constitutional Court's decision also experienced arbitrary action at the hands of the debtor.

Debt collectors who are authorized by creditors. This is very unfortunate. As mentioned above, if the "legal remedies" required by the Constitutional Court's Decision are interpreted as "claims" or "applications for Execution to the Head of the District Court" then it is inconsistent with the laws and regulations as well as the concept of the Parate Execution. However, there is actually a third legal remedy that is consistent with applicable positive principles and laws, although it cannot be considered a

"legal remedy" in the conventional sense, it is a summons or a warning letter as stated in Article 1238 of the Civil Code.¹⁶

In general, fiduciary financing and guarantee agreements contain provisions for "automatic default", namely a provision in which a person is declared in default when he does not continue his obligation after a certain time, but with this Constitutional Court Decision, such a clause seems to be "silent" because creditors also still have to submit other evidence above the credit or fiduciary agreement that shows an "active" legal remedy that he is doing, and as seen above, in the fiduciary Parate Execution auction it is required to have prerequisites in the form of "evidence of the debtor in default, including documents warning letter", but it is not the only statutory regulation that requires the existence of a subpoena.¹⁷ There are also similar provisions that we can find for financing institutions and withdrawals of fiduciary guarantee objects. For self-financing institutions, if the creditor is a financial institution, he must comply with the Regulation of the Financial Services Authority concerning the Implementation of the Business of the Financial Services Authority Number 35 /POJK.05/2018 concerning the Business Conduct of a Financing Company, in Article 50 paragraph 2 it is explained that the Execution of collateral by a financing company carried out after the debtor is given a warning letter. Likewise, Execution of collateral carried out by Islamic companies is also required to first provide a warning in the form of a written letter as pursuant to article 47 paragraph 1 letter b of Financial Services Authority Regulation Number 10/POJK.

Thus it is clear that before the debtor submits it is collateral voluntarily to the fiduciary holder to be sold through auction, the fiduciary holder's obligation is to make every effort to help the customer, which

¹⁶ Antonius Budi, "The Abolition of the Parate Execution Institute as a Legal Result of the Constitutional Court Decision Number 18/Puu-Xvii/2019 Antonius Budi, *Journal of Law and Development* 51, No. 2 (2021): 326-341.

¹⁷ Antonius Budi.

includes rescheduling¹⁸, Restructuring¹⁹, Reconditioning²⁰, after one or more of these efforts have been made, the customer is still unable to carry out his obligations, the fiduciary holder is obliged to make a written summons/warning. This aim is to provide an opportunity for debtors to fulfill their obligations as well as invitations from creditors to negotiate in accordance with Article 1339 of the Civil Code which states:

"An agreement is not only binding for things that are expressly stated in it, but also for everything that according to the nature of the agreement, is required by compliance, custom, custom or law."

If the process has been carried out but the debtor is still unable to carry out the obligations, then as a last resort, bank can ask the customer to submit the collateral voluntarily to be sold in order to obtain payment for the financing facilities distributed, but if it turns out that the debtor is still not deliver the collateral voluntarily, so to provide benefits and prevent the occurrence of criminal acts and violence, the fiduciary holder can apply for Fiat Execution.

Willingness is an abstract mental attitude from it to show that a contract, the willingness that has been achieved needs an indicator that reflects it, the indicator is that the consent of Kabul must be clearly made and detailed, so that it can be translated properly to achieve the desired conditions. Likes between parties in transactions that contain elements of coercion (ikrah) must be rejected and declared null and void by law. When the debtor gives his approval, it must be followed by openness/transparency by the creditor as ordered by UUJF. The willingness referred to by the Constitutional Court is not limited to having signed a statement of willingness to submit collateral for sale but to the auction stage, the debtor/guarantee owner has the right to know the

¹⁸ Rescheduling is an action taken by extending the credit period or installment period.

¹⁹ Reconditioning is a bank changing existing conditions such as interest capitalization, delaying interest payments until a certain time, reducing interest rates, interest exemptions

²⁰ Restructuring is an action by the bank to the customer by increasing the customer's capital with the customer's consideration, it does require additional funds and the business being financed is still feasible.

information, which includes (see POJK). This is a form of protection and legal certainty for debtors who are entitled to the remaining sales of their collateral.

The author is of the opinion that the customer willingness statement is not perfect if it is only limited to stating that the debtor is "willing" for the goods he pledged to be sold by the bank, but the statement must be made clearly, not only regulating the willingness to hand over the goods but also must be accompanied by a statement from the bank. the bank regarding the willingness to provide information to debtors regarding the collateral being sold, in addition the bank must sell according to the fair market value and make notification of the sale price of the guarantee to customers. This is in accordance with the principles of justice in Islam, so the bank must declare that it will sell the collateral at fair market value.

Thus, the debtor can find out the selling price of the collateral he submitted, so that when the collateral price exceeds the debtor's remaining loan, it can be returned. In the Fiduciary Guarantee Law Article 34 paragraph 1 it is stated that in the event that the result of the Execution exceeds the guarantee value, the Fiduciary Recipient is obliged to return the excess to the Fiduciary Giver. In practice this rarely happens, based on Constitutional Court's decision, the Constitutional Court only regulates the deliver of collateral voluntarily, where this willingness has the potential to fail when the customer's rights are not paying attention so that there may be conditions where the customer was willing then be unwilling to deliver the collateral, to make the willingness to be perfect the fiduciary holder must be give explanation if the selling price exceed the guarantee value so bank must be return it to debtor, based upon Regulation of Financial Services Authority Article 52 Number 35/pojk05/2018 about the Business Operation of Finance Company.

Agreement and the willingness in the Constitutional Court's decision must be free from coercion, oversight, and fraud. What is meant by coercion is spiritual coercion or mental coercion, so it is not physical

coercion. For example, one of them, being threatened and intimidated, is forced to agree an agreement. Therefore, if someone is forced to sign an agreement, it is not coercion who, namely as one of the reasons for asking the cancellation of the agreement made. The person who held his hand forcibly did not give his consent.²¹ A mistake occurs, if one of the parties makes a mistake about the main points of what was agreed or about the important characteristics of the things that are the object of the agreement, or regarding the person with whom the agreement is made, that is namely mistake, if a person does not wrong about these things they will not give their agreement.²² Fraud happens when one of them intentionally provides misinformation accompanied by a ruse to persuade the others to give their permission. The deceiving acts actively to mislead the others. Thus, if after the customer signs a statement of deliver of collateral for sale to the bank and it turns out that there are elements of coercion, fraud, and oversight, it means that the Parate Execution carried out by the Bank is void and has no binding legal force.²³

In addition to providing legal certainty for Fiduciary Holders and Fiduciary Recipients, the statement of willingness can be made in the form of an authentic deed, an authentic deed as described in Article 1868 of the Civil Code is a deed made in a form determined by law, by or before an authorized employee. for that where the deed was made. By using an authentic deed, it can provide certainty that the customer really gives his approval for the collateral to be sold by the bank.

Compatibility of the Principle of Volunteering in the Parate Execution of Fiduciary Guarantees with Islamic Principles

²¹ Subekti, *Contract of Law*, (PT. Intermasa, 1985, Jakarta), p. 23

²² Subekti

²³ Subekti.

The principle of willingness in the Parate Execution after the Constitutional Court's decision is in line with the provisions of Islamic law, where previously with the executorial power of article 15 paragraph 2 UUUJF obtained by the fiduciary recipient, it had an impact on the existence of unilateral actions carried out by the creditor, namely the creditor carried out his own Execution of the object of the fiduciary guarantee by the reason for the transfer of ownership rights to the fiduciary object without going through a court process as it should be an implementation of a court decision that has permanent legal force. Unilateral actions taken by creditors as fiduciary holders have the potential (even actually have) led to arbitrary actions and carried out in a less "humane" way.

The Parate Execution provision in the Fiduciary Guarantee does not reflect the provision of balanced legal protection between the parties bound in the fiduciary guarantee and also the object that becomes the object of the fiduciary guarantee, because the executorial title implies that an Execution can be carried out immediately as if it were the same as a decision. a court that has permanent legal force by a fiduciary recipient without the need to ask for court assistance for Execution. It reveals that one side of the existence of exclusive rights granted to creditors and in the other side there has been a neglect of the debtor's rights who should also receive the same legal protection, namely the right to file/get an opportunity for self-defense on allegations of breach of contract (default and the opportunity to get the proceeds from the sale of the fiduciary guarantee object at a reasonable price. Thus the Execution of the fiduciary guarantee can be carried out by the creditor when the debtor voluntarily submits the collateral to be sold to the fiduciary recipient.

The Court's decision be in accordance with the opinion of the Maliki ulema who explained several things in relation to the granting of permission by Ar-Raahin to sell Al-Marhuun. They said that neither Al-Adl

nor Al-Murtahin could sell Al-Marhuun except with Ar-Raahin's permission. Because the power and authority to sell Al-Marhuun belongs to Ar-Raahin or in other words the power and authority to sell Al-Marhuun is Ar-Raahin. If Ar-Raahin allows Al-Adl or Al-Murtahin to sell Al-Marhun, then there are times when the permission is in absolute form or muqaltyad (limited by terms and conditions). If the permit is limited by a condition that Al-Marhuun may be sold if at a certain time the existing debt has not been repaid, then Al-Adl or Al-Murtahin may not sell it before that time. However, you must first meet the judge to explain that the existing debt has been paid or not. If the permission is absolute, then if the permission is given to Al-Adl, then he is free to sell Al-Marhuun without having to meet the judge first. However, if the permission is given to Al-Murtahin, then he may sell Al-Marhun without having to meet the judge first if the permit is issued after the contract. However, if the permit is issued during the contract, then he cannot sell it unless he has to meet the judge first, so that there is no suspicion that Ar-Raahin was forced to give the permit. However, you must first meet the judge to explain that the existing debt has been paid or not. If the permission is absolute, then if the permission is given to Al-Adl, then he is free to sell Al-Marhuun without having to meet the judge first.

However, if the permission is given to Al-Murtahin, then he may sell Al-Marhun without having to meet the judge first if the permit is issued after the contract. However, if the permit is issued during the contract, then he cannot sell it unless he has to meet the judge first, so that there is no suspicion that Ar-Raahin was forced to give the permit. However, you must first meet the judge to explain that the existing debt has been paid or not. If the permission is absolute, then if the permission is given to Al-Adl, then he is free to sell Al-Marhuun without having to meet the judge first. However, if the permission is given to Al-Murtahin, then he may sell Al-Marhun without having to meet the judge first if the permit is issued after the contract. However, if the permit is issued during the contract, then he

cannot sell it unless he has to meet the judge first, so that there is no suspicion that Ar-Raahin was forced to give the permit. then he is free to sell Al-Marhuun without having to meet the judge first. However, if the permission is given to Al-Murtahin, then he may sell Al-Marhun without having to meet the judge first if the permit is issued after the contract. However, if the permit is issued during the contract, then he cannot sell it unless he has to meet the judge first, so that there is no suspicion that Ar-Raahin was forced to give the permit. then he is free to sell Al-Marhuun without having to meet the judge first. However, if the permission is given to Al-Murtahin, then he may sell Al-Marhun without having to meet the judge first if the permit is issued after the contract. However, if the permit is issued during the contract, then he cannot sell it unless he has to meet the judge first, so that there is no suspicion that Ar-Raahin was forced to give the permit.²⁴

The permit that given must not based on intimidation or coercion, it is said that in giving the consent there are elements of coercion when:²⁵

- a. The person who forcing is able to carry out their threat.
- b. The person who get intimidation has a strong suspicion that the threat will be carried out to them.
- c. The threat was directed to person or their family.
- d. The person who was threatened had neither the opportunity and ability to protect theirsself.

In a contract, a person's psychological condition also needs to be considered to achieve the validity of a contract. Hamzah Yacub, stated the terms of the subject of the contract as follows:²⁶

- a. *Aqil* (sense)

The person conducting the transaction must be common sense, unreasonable person, or under age, so that they can not take responsibility for what they do;

- b. *Tamyiz* (can distinguish)

²⁴ Wahbah Al Zuhaili, 2014

²⁵ Ghufran A., *Contextual Muamalah Fiqh*, (Jakarta; Raja Grafindo Persada, 2002), p. 27

²⁶ Gemala Dewi, Wirdyaningsih, and Yeni Salma Barlinti, 2020.

People who transact must be in a state of being able to distinguish between good and bad, as a sign of their awareness when transacting.

c. *Mukhtar* (Freedom from Coercion)

The parties to the agreement must be free without coercion and mental pressure. This is the same as the goal that the agreement must be free from coercion as regulated in the Civil Code, Article 1321 Junto Article 1324 states that consent has no legal force if it is given by force, oversight and fraud. This is in accordance with Article 21 letter a Complications Sharia Economic Law (KHES) which states that *Ikhtiyari*/volunteer; every contract is carried out at the will of the parties, avoiding coercion due to pressure from one party or another.

Parate Executions carried out without the willingness of the customer to submit their collateral for sale by the fiduciary holder often lead to acts of "coercion" and "violence" from people who claim to be the part who has the power to collect debts from debtors, which can even lead to arbitrary acts. committed by the fiduciary holder (creditor) and demean the debtor's dignity. Therefore, the Court stated that Parate Execution can only be carried out if there is a willingness from the customer to submit the collateral for sale by the fiduciary holder, and the customer acknowledges that he has defaulted. It can be said that the willingness referred to by the Court is a condition where the debtor has admitted that he is in default and he voluntarily surrenders the object of the fiduciary guarantee, if this occurs then the Execution of the fiduciary guarantee can be carried out by the creditor. However, before exercising their parate Execution rights, the fiduciary holder still has to heed the applicable legal provisions, above the moral, decency, and appropriate norms, namely by first issuing a summons or a letter of reprimand.

This is in accordance with Islamic principles where the purpose of the Court in giving the decision is to create a balance of legal position between the giver of fiduciary rights (debtors) and fiduciary recipients (creditors). Thus, the Court's considerations have provided benefits to both parties

and rejected the disadvantages that often occur due to the executive power of Article 15 paragraph 2 of the Fiduciary Guarantee Law.

Conclusion

The application of the principle of willingness in the Execution of fiduciary guarantees through the decision of the Constitutional Court Number 18/PUU-XVII/2019 is an attempt by the Constitutional Court to balance the legal position between fiduciary rights givers (debtors) and fiduciary recipients (creditors). This can be seen from the consideration of the Court which states that the Execution of guarantees through parate Execution must be based on an agreement between the creditors regarding the occurrence of default by the debtor and the willingness of the debtor to deliver the collateral. In addition, the Bank must sell according to the fair market value and notify the sales price of the guarantee to customers. This is in accordance with the principles of justice in Islam, the bank must declare that it will sell the collateral at fair market value. The agreement and willingness must meet the criteria which include: the debtor's statement containing an acknowledgment that he has defaulted along with the willingness to submit the collateral to be sold through auction and the creditor's statement containing the willingness to provide information to the debtor regarding the collateral being sold. The principle of Willingness in the Execution of fiduciary guarantees is appropriate and be in accordance with the principles of Islamic law which aims to maintain the benefit of both parties. In this case, there is no element of coercion in giving approval to the creditor to sell the debtor's collateral. The meaning of willingness in a sharia agreement is that no one is wronged and offended and there is sincerity from each other.

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