The Position of Debt Collectors in Handling Bad Loans in Financing Institutions in the Perspective of Treaty Law

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ABSTRACT

The purpose of this study is to analyze: 1) How is customer protection against the presence of *debt collectors* in handling bad loans? 2) What is the position of *debt collectors* in the engagement between customers and financing institutions? 3) What is the responsibility of the financing institution for the involvement of *debt collectors* in handling bad loans?. This research is a type of normative juridical research with a statutory approach, concept approach, and case studies.

The results showed that: 1) Referring to PMK regulation No. 130/PMK.010/2012 where the lessee must know that in the event that the execution of fiduciary guarantees must be notarized by a notary and registered at the fiduciary registration office, if not, the fiduciary has no legal force and has no executory rights, it is considered that forced withdrawal violates Article 368,369 paragraph 1, 365KUHP, if this still happens, lessee can report to OJK with evidence included, besides that it can also go through BPSK, report to the Police, file a lawsuit to the PN for forced withdrawal. 2) *Debt Collectors* work for banks that strongly use the precautionary principle. The prudent principle is closely related to the maintenance of bank health and legal protection for customers of the bank, the form of implementation is the establishment of Risk Management PBI by Bank Indonesia. The definition of risk management is defined as a systematic logical method through the process of identifying, quantifying and reporting risks that take place in every activity in banking. The cooperative relationship between *the Debt Collector* and the bank is stated through the provisions in article 1320 of the Indonesian Civil Code which mandates the terms of the validity of the agreement.3) There are many cases of Debt Collectors who violate the rules or do not obey the required conditions as they should, this is due to the absence of regulations or legal umbrellas that specifically discuss the Debt Collector profession, only discussing collection ethics that can be done, This is regulated in Bank Indonesia Regulation Number 11 of 2009. However, there are no limitations, actions, or legal consequences that can be done by the Debt Collector. All of these things are only limited to the power of attorney agreement made between the finance company and the Debt Collector

Keywords: Position, Debt Collector, Handling, Credit, Non-Performing, Institution, Financing, Perspective, Law, Agreement

INTRODUCTION

Background

The Bank has a function as a financial intermediary in the economic life of the Indonesian people, which has the main activities to save and forward public funds as well as transfer public funds that are surplus spending units to the spending unit deficit. The bank's efforts aim at the national development process, increasing

economic growth and overall public welfare, and improving a stable country for the realization of a healthy country.[1]

Banking institutions are unable to meet the credit that society has made that has continued to increase during their development. The inability of the community to meet credit requirements, such as the lack of collateral owned by the community as credit collateral, causes banking institutions to be unable to provide credit to the public, giving birth to non-bank financial institutions known as financing institutions. According to Article 1 point 1 of Presidential Decree No. 61 of 1988, a financing institution is a business entity that carries out financing activities in the form of providing funds or capital goods by not attracting funds directly from the public.[2] Presidential Regulation No. 9 of 2009 concerning Financing Institutions replaced Presidential Decree No. 61 of 1988 concerning Financing Institutions.

The business focus of this financing institution is the financing function that helps provide cash for the needs of the community. After being established, this financing institution is widely used by the community, one of which is in vehicle financing because the process is simple and the installment system is simple, people prefer to use this service. A financing agreement is a debt receivable agreement made by a financing institution and an individual who purchases a motor vehicle. Financing institutions take risks, such as returning consumer credit. This often happens because consumers do not pay credit arrears, so financing institutions can use financing agreements. What can be agreed is a thing or goods, in this case a motor vehicle, which serves as a condition for establishing consumer obligations in case of a dispute.[3]

The financing institution has exclusive rights in the financing agreement. By applying *privileges*, the rights and obligations of consumer and consumer financing institutions are not balanced. The right is used to benefit financing institutions, among other things. The consumer must authorize the financing institution to forcibly tow the motor vehicle and sell it through auction or under hand if it fails. Financing institutions often even use the services of third parties to collect client arrears.

As described above, the problem of bad loans can actually be resolved by civil law, but the effectiveness and mechanistic efficiency of such litigative settlements still leaves problems for financing institutions that have large volumes of bad loans. To overcome this effectiveness problem, *debt collectors* are involved in collecting bad loans.[4]

The risk that is often posed in credit is a condition where the customer is unable to pay part or all of his obligations to the financing institution as agreed. Today in society there are often cases of debt collection against debtors by creditors by using debt collection *(debt collector)* in collecting debts in a way and using violence, In this case the financing institution trusts debt collection services which are often called *debt collectors*, in general the world *of collectors* or better known as *debt collectors* In the eyes of the public, it is known as a collector of bad or problematic loans who are trusted by financing institutions to visit customers or debtors who experience bad or problematic credit.[5]

In practice, the financing institution will certainly use easy and hassle-free efforts so that it rarely uses legal remedies by filing a lawsuit to the court. It does not rule out the possibility for financing institutions to utilize third-party services in consumer debt collection. The financing institution can use debt collection services in collecting consumers in order to pay off arrears provided by the financing institution to consumers. Sometimes in customer debt collection, *debt collectors* commit violence against customers as a fear effect so that customers immediately pay off their debts. For example, the case of Irzen Octa's death, who was persecuted by *Citibank's debt collector* related to the repayment of his credit, must certainly be a common concern. Cases that show the conflict of interest of business entities with criminal aspects, are increasingly obvious when *debt collectors* are suspected to be the cause of the customer's death. On the one hand, the presence of *debt collectors* shows that the settlement mechanism based on civil law between banks and customers is not effective and efficient. While on the other hand, it shows the confusion of arrangements that should be studied regarding the entry *of debt collectors* in the realm of civil engagements between banks and customers.

Agreements made by financing institutions with consumers provide less legal protection to consumers, and are more widely used to transfer the risk of financing institution losses if consumers default.

Problem Statement

1. How is customer protection for the presence of *debt collectors* in handling bad loans?
2. What is the position of *debt collectors* in the engagement between customers and financing institutions?
3. What is the responsibility of financing institutions for the involvement of *debt collectors* in handling bad loans?

THEORETICAL FRAMEWORK

1. Theory of Legal Protection

According to Fitzgerald, as quoted by Satjipto Raharjo, the beginning of the emergence of the theory of legal protection came from the theory of natural law or the flow of natural law. It was pioneered by Plato, Aristotle (a disciple of Plato), and Zeno (founder of the Stoics). According to the school of natural law, it is said that the law comes from God who is universal and eternal, and between law and morals should not be separated. Adherents of this school view that laws and morals are reflections and rules internally and externally of human life manifested through laws and morals.[6]

The term legal protection theory comes from English, namely *legal protection theory*, while in Dutch, it is called *theorie van de wettelijke bescherming*, and in German it is called *theorie der rechtliche schutz.*[7]

Grammatically, protection is:

1. Shelter; or
2. Things (deeds) protect.

To protect is to cause or cause shelter. The meaning of shelter, covering: (1) putting oneself out of sight, (2) hiding, or (3) rescuing or giving help.[8]

Satjipto Raharjo revealed that legal protection is an effort to provide protection for human rights (HAM) that are harmed by others and this protection is carried out on the community so that they can enjoy all their rights that the law provides. The law can function to realize protection that is not only flexible and adaptive, but predictive and anticipatory as well. Laws are necessary for the weak and those who are politically, economically, and socially insecure, in order to obtain social justice. Satjipto Rahardjo revealed that legal protection is all efforts to protect the interests of an individual through the allocation of a human rights power to others to take action in the interests of that individual.[9]

2. Theory of Treaty Law

The theory of agreement according to doctrine (old theory), called agreement is a legal act based on the word agreement to cause legal consequences. According to Van Dunne's new theory, what is defined by agreement is: "a legal relationship between two or more parties based on the word agreement to give rise to legal consequences"

The theory does not only look at agreement alone. But it must also be seen the deeds that preceded or preceded it. There are three stages to making agreements according to the new theory, namely:

1. The Precontractual *stage* is acceptance and offer.
2. The *contractual stage* is the existence of a conformity of the statement of will between the parties.
3. The *postcontratual stage* is the execution of the agreement.

The elements of the covenant according to the old theory, namely:

1. The existence of legal acts
2. Correspondence of statements of will of several people
3. This conformity of will must be published stated
4. The legal act occurred due to cooperation between two or more people
5. The manifestations of the will on which things must depend on each other
6. The will is intended to cause legal consequences
7. The effect of the law is in the interest of one on the burden of the other or reciprocal.[10]

RESEARCH METHODOLOGY

This research is a type of normative legal research, which is an assessment of legal materials, both primary legal materials and secondary legal materials. If a researcher finds a problem that will be researched, the next activity is to collect all information that is related to the problem, then selected relevant and essential information, then determined the legal issue sometimes to determine the legal issue requires general information.

This information is intended to help orient to such a situation, the best way to do is to be treated with a review of secondary legal material, through the help of secondary legal material legal issues can be formulated sharply. In addition, the examination of secondary legal materials can be identified as necessary legal materials as follows:[11]

Data collection in this study was carried out based on field research and the method of collecting legal materials was carried out by means of *library research*, namely research conducted by examining library materials or so-called secondary legal materials. The secondary legal materials used in writing this dissertation include books both from private collections and from libraries, articles related to the object of research.[12]

This research used a statutory approach and a comparative approach.[13] Legal research conducted by examining library materials or secondary data.[14] Statute *approach*: an approach taken by examining laws and regulations related to the focus of research. Then, the data collection taken in this study uses literature studies, namely data collection by searching, examining and reviewing secondary data.[15] In this research, document studies will be carried out as a means of collecting data related to the problems raised, namely literature studies / document studies (*documentary study*), sourced from laws and regulations, books, official documents, publications and research results.[16]

RESEARCH RESULTS

Customer Protection for the Presence of *Debt Collectors* in Handling Bad Loans

Basically, an agreement or contract has a reciprocal nature where each party has rights and obligations in accordance with the agreement contained in the agreement. So that indirectly consumers already have a bond with the financing institution, in this case the Financing Institution (Finance). The conditions for the validity of an agreement or contract must be in accordance with article 1320 BW, namely:

1. Agree;
2. Soy sauce;
3. Object;
4. Halal cause.

However, an agreement does not always run or be carried out smoothly, in the sense that between the parties, both creditors and debtors, defaults or one of the parties defaults or in other words does not perform its obligations.[17]

As is well known that conceptually the word legal protection contains the meaning of providing a sense of security to victims in the form of services, providing protection, guaranteeing certainty of rights. Such legal protection can be preventive as well as repressive. The form of protection for the community has many dimensions, one of which is legal protection against conflicts of interest in society must be minimized by the presence of law in society. The existence of legal protection for all Indonesian people can be found in the Constitution of the Republic of Indonesia. In the opinion of scholars regarding legal protection, among others: Satjipto Raharjo stated that legal protection is an effort to protect one's interests by allocating a power to him to act in the framework of his interests.[18]

As is well known that as a lessee, citizens who are bound by motor vehicle leasing contracts have been guaranteed their interests by various laws and policy regulations such as UUPK, UUJF No. 42 of 1999, KAPOLRI Regulation No. 8 of 2011, No. 130 / PMK. 010/2012, Constitutional Court Decree 18/2019 and so on. However, the various policy laws and regulations mentioned above are still rules whose implementation requires the involvement of government officials so that these rules can be implemented. Theoretically, the norms that contain rules that provide protection to the lessee are relatively adequate and these various regulations in the literature are categorized as preventive legal protection while in reality the lessee also urgently needs very repressive legal protection whose implementation is carried out by government officials such as police officers.

The forced taking of a motor vehicle by a debt collector representing a leasing company can be categorized as arbitrariness on the part of the entrepreneur to his customer which in the business world should the entrepreneur continue to maintain such a good relationship with the customer so that the lessee has loyalty to the company concerned because it has been treated humanely even though the person concerned is indicated to be in default in paying installments when a situation occurs financial that is less intended for the person concerned. In a business context, a leasing entrepreneur not only tries to provide satisfaction to customers but the flow tries as much as possible to build the loyalty of the lessee as a customer who can then provide good information to friends, colleagues, and relatives to want to do business with the company concerned.

Arbitrariness in the form of the use of force by debt collectors is solely based on practical considerations (short term) but does not prioritize the interests of the company in the long term. There are many cases that can be told about the importance of loyalty of the debtor or creditor in a business activity where a debtor who suffers from illness so that the person concerned defaults due to a difficult situation. In this regard, the debtor provides a kind of policy of delaying payments to the debtor until the person concerned can return and can do his business so that he can pay off his loan to the creditor.

Referring to PMK regulation No. 130 / PMK.010 / 2012 where the lessee must know that in the event that the execution of fiduciary guarantees must be notarized by a notary and registered at the fiduciary registration office if not then the fiduciary has no legal force and does not have executory rights considered a forced withdrawal violates Article 368,369 paragraph 1, 365 of the Criminal Code, if this still happens the lessee can report to OJK with evidence included, in addition, it can also go through BPSK, report to the Police, file a lawsuit to the PN for forced withdrawal. Leasing that does not register a fiduciary guarantee will have no preferred rights. Leasing is also subject to warnings, until the revocation of business licenses.

Referring to Article 4 of the Law where consumers (lessee) regarding consumer rights, one of which is the right to comfort, security, safety, the right to be treated or served correctly and honestly and not discriminatory, the Chief of Police issued No.8 of 2011 which is effective since June 22, 2011, the aim is to create a sense of security, order, accountability to protect lessees and leasing or debt collectors, and or society of things that harm both property and soul.[19]

The position of *debt collectors* in customer engagements and financing institutions

Debt Collector or commonly referred to as debt collector, is a person or entity sent to carry out an action in the form of a reprimand or withdrawal of a vehicle. Before making a vehicle loan between creditors and

debtors usually enter into an agreement called a fiduciary agreement. This is done to provide legal certainty for financing institutions (Leasing) and consumers who are closely related to the transfer of property rights over motor vehicles from consumers to financing institutions or commonly known as fiduciaries. The fiduciary agreement itself is regulated in Article 15 paragraph (3) of the fiduciary guarantee law which explicitly gives the creditor the right to execute the fiduciary guarantee object if the debtor does not fulfill the performance (default). In conclusion, if there is a default, the creditor has the right to carry out execution by taking a motor vehicle accompanied by a verdict.[20]

Debt Collector in carrying out his duties also has the following ethics:

a. People who enter collection services have received adequate training related to billing duties and how to ethically collect according to applicable SOPs.
b. The identity of the person included in the collection service is regulated rapidly and systematically by the financing institution or in this case the bank.
c. People who enter the collection service in carrying out billing comply with the principles of billing ethics.[21]

Debt Collectors in carrying out their duties cannot immediately confiscate goods that have experienced credit payment arrears. This must be a process because if you commit a criminal act, *the Debt Collector* can be subject to Article 362 of the Indonesian Civil Code "*Whoever takes something, which wholly or partly belongs to another person, with the intention to possess it unlawfully, is threatened with theft, with a maximum imprisonment of five years or a maximum fine of nine hundred rupiah.*" If in the course of his duties also found acts of violence or threats in the process of withdrawing goods, it may be subject to Article 365 paragraph (1) of the Criminal Code "*Shall be punished with imprisonment for not more than nine years of theft preceded, accompanied or followed by violence or threats of violence, against persons with the intent to prepare or facilitate theft, or in the event of being caught, to enable escape by themselves or other participants, or to stay in control of stolen items.*"These actions can be reported by the debtor to the police if they experience adverse things as stated in the law.[22]

Debt Collector in carrying out his duties must have a full sense of responsibility towards the creditor or the debtor. In recalling a vehicle, a *Debt Collector* must know that. *Debt Collectors* work for banks that use the precautionary principle very much. The prudent principle is closely related to the maintenance of bank health and legal protection for customers of the bank, the form of implementation is the establishment of Risk Management PBI by Bank Indonesia. The definition of risk management is defined as a systematic logical method through the process of identifying, quantifying and reporting risks that take place in every activity in banking. The cooperative relationship between *the Debt Collector* and the bank is stated through the provisions in article 1320 of the Indonesian Civil Code which mandates the terms of validity of the agreement. In carrying out its responsibilities as a Debt Collector, the Indonesian National Police took part by issuing Perkaporli No. 8 of 2011 which was effective on June 22, 2011. The purpose of the issuance of the regulation is to ensure the implementation of the execution of fiduciary guarantees so that it runs safely, peacefully, and orderly so as not to disturb the safety of life and does not threaten public order.[23]

In collecting credit to Defaulting Debtors, *Debt Collectors* must pay attention to aspects of consumer protection. For example, it is not allowed to spread threats, commit violence or acts that embarrass clients. Debt collectors are also prohibited from using verbal pressure, therefore a Debt Collector, especially a *field collector*, has a code of ethics in carrying out their duties including:

1. Bring an official letter of duty and identity in billing.
2. Prioritizing persuasive and professional attitudes in billing.
3. Avoid physical collisions with the debtor and/or the debtor's family.
4. Record correctly every transaction related to its duties.
5. Using the official deposit slip set.
6. Provide reports on the results of visits / visits correctly and can be accounted for.

7. Be honest and responsible for the billing results obtained and tasks received.
8. Look neat and be polite when billing.[24]

Responsibility of Financing Institutions for the Involvement of *Debt Collectors* in Handling Bad Loans The Occurrence of Default to Debtors

That until now there has been no regulation that specifically regulates the use of debt collector services by financing institutions. However, the use of debt collector services as a form of external collector is possible by financing institutions to collect debts against other parties. In employment relations, one of the agreements that may exist is an employment agreement. The work agreement generally contains an agreement between workers and the company, which in this case is often represented by the company's management or directors.[25]

The legal consequence of the defaulting debtor on consumer finance institution companies is that creditors do not get the fulfillment of their rights that should be obtained by the agreement. This happens because the legal relationship that occurs between the debtor and the finance company is based on an agreement, namely a consumer financing agreement. For settlement of default at the financing institution, the debtor will first be summoned or given SP (Warning Letter) by the collector, each of which is as follows:

1. Warning Letter (SP) 1 is given to debtors who are late in making payments for 1 month or 30 days.
2. Warning Letter (SP) 2 is given to debtors who are late in making payments for 2 months or 60 days.
3. Warning Letter (SP) 3 is given to debtors who are late in making payments for 3 months or 90 days.[26]

If within a grace period of 3 months or 90 days the debtor still cannot make payments, then the case will be transferred to the PSO (*Problem Solving Officer*) Division, which is the debtor handling division that is late in carrying out obligations for 3 months and above. If the debtor in the handling of the PSO cannot also make payments, then the unit in this case the motorcycle will be immediately secured by the PSO Division. If the PSO Division is unable to make a withdrawal, the withdrawal process will be carried out by the Debt Collector (DC) who in fact is an external employee of the company (*free lance*).

The forced taking of a motor vehicle in a financing agreement is that the consumer has defaulted (not paying installments as agreed), but if the motor vehicle as an object of fiduciary guarantee is not registered by the finance company with the Fiduciary Office, then the forced collection is invalid, because the material rights of the fiduciary agreement are not born, so the finance company as a creditor cannot use the provisions in Article 29 Law Number 42 of 1999 concerning Fiduciary Guarantee. If the fiduciary is registered in accordance with the Minister of Finance Regulation (PMK) Number 130 / PMK.010 / 2012 and if it is not registered, but the collection of motor vehicles (execution) must involve police officers. This is in accordance with the Regulation of the Chief of Police (Perkap) Number 8 of 2011 which explains how the procedures for taking credit agreement objects on which fiduciary guarantees are attached, and to the knowledge of the local RT / RW.

The act of a debt collector forcibly withdrawing goods, for example pulling a motorcycle that is in arrears on credit or withdrawing items inside the house because they have not been able to pay off debts on leasing, is unlawful.[27]If the creditor still forces himself to confiscate, then this action is a violation of the law, because the act of forcibly withdrawing goods by creditors and debt collectors is a violation of the law, then the action can indicate a criminal act of theft (Article 362 of the Criminal Code) – taking goods that partially or wholly belong to another person unlawfully. For violation of the law, the motorcycle debtor has the right to report it to the police.[28]

Law Number 10 of 1998 concerning Banking has contained various criminal provisions that criminalize acts committed by bank employees. However, there is still criminal behavior by insiders and parties related to banks such as bank debt collectors have not been regulated. The Banking Law has also not criminalized

many crimes against bank customers committed by outsiders. Crimes against bank customers, both committed by insiders and outsiders as parties related to the bank such as the use of debt collection services (debt collector).[29]

The National Police of the Republic of Indonesia sees legal needs and legal vacuums issued Regulation of the Chief of the National Police of the Republic of Indonesia Number 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees to accommodate the interests of the parties, namely the withdrawal of goods for consumer finance companies and guarantees free from coercion or violent criminal acts committed by debt collectors for debtors or consumers. Debt Collectors who work based on a Special Power of Attorney as provided by the Consumer Finance Company need to be submitted for security execution of security confiscation at the nearest Police Station by the Consumer Finance Company to ensure legal certainty and fairness in the execution of consumer financing agreement objects that experience bad loans. Article 8 of the Regulation of the Chief of Police of the Republic of Indonesia *a quo* explicitly mentions the administrative requirements that must be attached by consumer finance companies to obtain fiduciary guarantee execution security services, including a copy of the fiduciary guarantee deed, a copy of the fiduciary certificate, a warning letter to the debtor to fulfill its obligations, the identity of the execution executor, and the execution duty letter. A warning letter to the debtor has been given 2 (two) times as evidenced by a receipt.

If the consumer finance company uses the services of a debt collector to withdraw the object of goods that become a fiduciary guarantee, the consumer finance company must attach a fiduciary guarantee execution cooperation agreement between the recipient of the guarantee and the designated third party. In practice, fiduciary guarantee execution cooperation agreements between consumer finance companies and third parties are carried out based on power of attorney and letter of assignment.[30]

Based on Article 48 Paragraph (4) POJK Number 35 / POJK.05 / 2018 which is fully responsible for the actions and all impacts that occur carried out by the Debt Collector is the authorizing party, or in this case is a finance company. If you follow the rules in the article, the one who has the right to make compensation is the finance company. However, the Debt Collector in collecting is not in accordance with what is authorized by the finance company, he does it in a way that is not in accordance with legal procedures. So, the one who must be responsible for taking compensation actions is the Debt Collector. As stipulated in Article 1801 Burgerlijk Wetboek (BW), "The power of attorney is obliged, so long as he has not been released, to exercise his power, and he bears all costs, losses and interest that may arise from the non-exercise of that power". There is a conflict between Article 48 Paragraph (4) POJK Number 35 / POJK.05 / 2018 and Article 1801 Burgerlijk Wetboek (BW). Keep in mind that there is a principle of lex superior derogate legi inferiori, that is, a higher rule if it conflicts with a lower rule, then the higher rule applies. [31]Thus, based on this principle, Article 48 Paragraph (4) POJK Number 35/POJK.05/2018 does not apply because it conflicts with Article 1801 Burgerlijk Wetboek (BW).

There have been many cases of Debt Collectors who violate the rules or do not obey the required conditions as they should, this is due to the absence of regulations or legal umbrellas that specifically discuss the Debt Collector profession, only discussing collection ethics that can be done, this is regulated in Bank Indonesia Regulation Number 11 of 2009. However, there are no limitations, actions, or legal consequences that can be done by the Debt Collector. All of these things are only limited to the power of attorney agreement made between the finance company and the Debt Collector.[32]

CONCLUSION

The results showed that;

1. Referring to PMK regulation No. 130 / PMK.010 / 2012 where the lessee must know that in the event that the execution of fiduciary guarantees must be notarized by a notary and registered at the fiduciary registration office if not then the fiduciary has no legal force and does not have executory rights considered a forced withdrawal violates Article 368,369 paragraph 1, 365 of the Criminal Code, if this

still happens the lessee can report to OJK with evidence included, in addition, it can also go through BPSK, report to the Police, file a lawsuit to the PN for forced withdrawal.

2. *Debt Collectors* work for banks that use the precautionary principle very much. The prudent principle is closely related to the maintenance of bank health and legal protection for customers of the bank, the form of implementation is the establishment of Risk Management PBI by Bank Indonesia. The definition of risk management is defined as a systematic logical method through the process of identifying, quantifying and reporting risks that take place in every activity in banking. The cooperative relationship between *the Debt Collector* and the bank is stated through the provisions in article 1320 of the Indonesian Civil Code which mandates the terms of validity of the agreement.
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