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THE EPISTEMOLOGICAL ERRORS IN REGULATION OF ABSOLUTE COMPETENCE ON MORTGAGE DISPUTES IN CREDIT CONTRACTS

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Abstract

The development of Collateral Law relating to the attachment of Mortgage Rights to a Credit Agreement, nowadays, it is impossible to avoid the development of Sharia Law in Indonesia. This study tries to reveal an epistemological error from the Supreme Court which issued Supreme Court Regulation Number 14 of 2016 concerning Procedures for Settlement of Sharia Economic Cases against the phenomenon of disparity in judicial decisions on Mortgage attached to Sharia-based Credit Agreements. This study uses a normative juridical method using the Communication Speech Act approach and the Relationship Trichotomy approach. The results of this study indicate that there was an epistemological error from the Supreme Court which issued the Supreme Court Regulation Number 14 of 2016, instead of as a form of resolving legal anomalies, which showed the existence of domination based on power and authority from the Supreme Court by applying an eclecticism mechanism to rights. Dependents with Sharia-based Credit Agreements which are assumed to be true.

Keywords: *Contracts; Credit; Epistemological; Mortgage.*

A. INTRODUCTION

The debate on the principle of the rule of law is a classic debate that has not been completed until now. Although it is a classic debate, this concept deserves to be studied continuously academically, considering that this concept is always changing along with the times. The rule of law is the rechtsidee (legal ideals) of a country that departs from the soul of a nation. Its characteristics depend on the values and norms of a nation that form the identity of the nation. The development of the meaning of this identity requires the elasticity of the concept of the rule of law so that it is timeless.[1]

1 Dodi Haryono, Identitas Dan Elastisitas Konsep Negara Hukum Pancasila Yang Demokratis, *Fakultas Hukum Universitas Riau*, page.1–29 2012, Retrieved June 6, 2022;

However, the principle of the rule of law itself has an operational definition of the state administration process, according to Muntoha,[2] which is limited by the will of the law and not humans. That is, in the projection, with reference to the pillars of the principle of the rule of law itself, the state in carrying out the function of state administration cannot, in absolute terms, carry it out without an acknowledgment of the principle of limiting power. Thus, through the principle of democracy as a form of dual function along with the principle of the rule of law, the state is obliged to share power even though it is unethical if it is also poured out by fully accommodating the concept of trias politica, in creating the welfare of citizens as a consequence of the emergence of the development of the concept of the Welfare State Law.

The implementation of the function of state administration, in this case related to the resolution of conflicts/disputes that arise in society, through the implementation of the concept of judicial power, is carried out by the Supreme Court which aims to uphold law and justice. the main factor in the judge's decision is not understanding the outflow of values of the rule of law, justice and all the benefits that are coveted.[3]

Referring to the constitutive powers, the Supreme Court, through Act No. 48 of 2009 concerning Judicial Power (UU No. 48/2009) and Act No. 3 of 2009 concerning the Second Amendment to Act No. 14 of 1985 concerning the Court Agung (UU No. 3/2009), was given the authority to provide assistance to citizens as justice seekers through the authority to issue judicial technical arrangements to achieve order and order in the judicial process in Indonesia(Republik Indonesia 1985), to fill legal gaps and voids.[4]

Efforts to fill the legal vacuum, in the theoretical realm, are known as the concept of legal discovery. In general, the authority that has the authority to make legal discoveries is believed to be the judge, that is what law students have always taught. So that outside the jurisdiction of the judiciary, it does not have the authority to interpret a statutory regulation.[5] As also emphasized by Yudha Bhakti Ardhiwisastra, if the definition of law is defined in a limited way as a decision of the authorities and in a more limited sense as a legal decision (court), the main issue is the duty and obligation of the judge in finding what can become law. so that through their decisions, judges can be considered as one of the law-forming factors.

2 Muntoha, Demokrasi Dan Negara Hukum, *Jurnal Hukum Ius Quia Iustum*, Vol. 16, No. 3, 2009, page.379

3 Elif Acar, Sugeng Sudrajat, Effectiveness of Applying Principles of Legal Certainty of Justice In The Handling of Criminal Case, *Jurnal Pembaharuan Hukum,* Vol. V, No. 3, Sepember-Desember 2018, page.431-444

4 Nelly Mulia Husma, Faisal A. Rani, and Syarifuddin Hasyim, Kewenangan Pengaturan Mahkamah Agung (Kajian Yuridis Terhadap Peraturan Mahkamah Agung Nomor 4 Tahun 2016 Tentang Larangan Peninjauan Kembali Putusan Praperadilan), *Syiah Kuala Law Journal*, Vol. 1, No. 2, 2017, page.1-16.

5 Rocky Marbun, *Praktik Hukum Pidana Dalam Sistem Peradilan Pidana: Membangun Landasan Kefilsafatan Dan Teoretis (Buku I)*, Yogyakarta, CV. Arti Bumi Intaran, 2019, page.13

Legal formation activities-including making a decision, regarding the deficiencies and legal voids, are based on Article 5 paragraph (1) of Act No. 48/2009, including implementing the law itself. The activity of applying the law means determining what is the legal norm for concrete events. Where basically is to formulate a hypothesis about the meaning of a text. Regarding this matter, Aulis Aarnio explained that the science of law is the science of meanings.[6] Therefore, the application of law in the judicial process is related to the problem of the legal paradigm, and a legal decision itself is a set of processes of interpretation and application activities based on authoritative/juridical texts.[7]

However, legal discovery activities, in order to form a decision, do not stand alone. The activity of meaning in Legal Science requires a dual function between the activity of applying the law starting from the activity of interpreting legal norms with the concrete facts that occur.[8]

This law discovery activity is one of the functions of the judiciary to solve concrete problems in the legal field. However, to this day, the common sense logic that emerges regarding the use of power often leads to prolonged and confusing discourses for the public as justice seekers, resulting in public distrust.[9]

In this study, the authoritative text as the basis for the emergence of disparity in execution of Mortgage Rights attached to a Credit Agreement, especially Credit Contracts based on Sharia Law is Article 55 paragraph (1) of Act No. 21 of 2008 concerning Islamic Banking (UU No. 21/2008) which affirms "Syariah Banking dispute resolution is carried out by courts within the Religious Courts." Thus, the Religious Courts obtain their absolute competence in examining and deciding sharia banking disputes, not from Act No. 3/2006, but derived from Act No. 21/2008.

However, in sharia economic cases there are no guidelines for judges in resolving sharia economic disputes. To expedite the process of examining and resolving shari'ah economic disputes, Supreme Court Regulation Number 2 of 2008 was issued concerning the Regulation of the Supreme Court of the Republic of Indonesia concerning the Compilation of Sharia Economic Law (PERMA No. 2/2008).

Thus, in the context of dispute resolution on the existence of collateral in a financing, Islamic banks raise disparities in court decisions, where the judiciary in Indonesia itself is not one voice. For example, in the Decision of the Bantul Religious Court Number 0328/Pdt.G/2012/PA.Btl dated November 26, 2012, relating to the existence of a guarantee for immovable objects in the form of a Certificate of Ownership which is placed

6 *Ibid.*

7 Carel Smith, The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor, *Erasmus Law Review*, Vol. 4, No. 1, 2019, page 21–38.

8 Teddy Lahati, *Proses Hakim Dalam Membuat Putusan Mengkonstatir (Bagian I)*, Direktorat Jendral Badan Peradilan Agama Mahkamah Agung, Jakarta, 2013, page.5

9 Cekli Setya Pratiwi, Kegagalan Mewujudkan Keadilan Prosedural Dan Substansial Dalam Putusan Hakim Tinggi Perkara Tindak Pidana Psikotropika Nomor: 25/Pid/B/2010/PT Sby, *Humanity*, Vol. 9, No. 1, 2013, page.167–86

in the Mortgage Deed, it was stated by the Bantul Religious Court that it was not authorized check the case.

Ironically, the Tebing Tinggi District Court Decision Number 3/Pdt.G/2013 dated 20 August 2014, where the Panel of Judges considered that the Tebing Tinggi District Court did not have absolute authority to examine, hear and decide on the case, in the event of an auction process for the object of Rights. Dependents—in the form of Certificate of Ownership No. 965/Rantau Laban on behalf of Kusdianto, which began with the Plaintiff's default against the Sharia Contract in the form of Al Murabahah Financing Facility based on the Murabahah Sale and Purchase Agreement. The decision of the Tebing Tinggi District Court Number 3/Pdt.G/2013 dated 20 August 2014 was later strengthened by the Medan High Court Decision Number 113/PDT/2015/PT.MDN dated 18 June 2015.

The problem regarding the disparity of absolute authority should stop when the Constitutional Court issues Decision No. 93/PUU-X/2012 which states the Elucidation of Article 55 paragraph (2) of Act No. 21/2008 does not have binding legal force because it creates legal uncertainty, in terms of the emergence of various institutions/institutions that are given the authority to examine and decide on disputed cases from a sharia economic perspective.

Based on the Constitutional Court Decision No. 93/PUU-X/2012, the Supreme Court responded by issuing Supreme Court Regulation Number 14 of 2016 concerning Procedures for Settlement of Sharia Economic Cases (PERMA No. 14/2016). Where, in Article 2 PERMA No. 14/2016 emphasizes "Sharia Economic Cases can be filed in the form of a simple lawsuit or a lawsuit with an ordinary procedure." This is followed by Article 13 paragraph (1) PERMA No. 14/2016 which emphasizes "The implementation of sharia economic case decisions, mortgage and fiduciary rights based on sharia contracts is carried out by the Court within the Religious Courts."

Instead of PERMA No. 14/2016 as an effort to resolve the problem, in essence, in the realm of praxis, still raises problems in the application of the law, namely related to the absence of procedural law in the execution process, as stated in the Decree of the Religious Courts No. 02/Pdt.Eks.HT/2021/PA.Dum dated August 18, 2021, which is still following the procedural law from the District Court.

However, the main problem in the research is that there is an attempt to justify the intersection between Mortgage that arises through the material security legal system that is subject to the Civil Code and credit contracts that submit to the concept of Sharia.

B. RESEARCH METHODS

This research is directed to the interests of civil justice practices which are directed to criticism of the formation of regulations under the Act, by questioning the philosophical reflections (ontology, epistemology, and axiology) of the issue of absolute competence of the Religious Courts in examining, deciding, judging and carrying out executions. on the Mortgage attached to the Sharia-based Credit Agreement. This criticism is based on

the legal research method model using the Communication Speech Acts approach and the Relationship Trichotomy approach, in addition to the approaches commonly used in Legal Studies, namely the philosophical approach, conceptual approach, legal approach, and case approach. In this legal research method using secondary data in the form of primary, secondary, and tertiary legal materials obtained from literature studies, qualitative descriptive analysis models to measure the discovery of meaning to the data used.

C. RESULTS AND DISCUSSION

Thinking activity is a form of process to arrive at an answer model to be able to discuss the existence of a phenomenon or reality, so that reality or phenomenon can be communicated to other parties.[10] Thus, language is an important instrument in every thinking activity to communicate the results of his thoughts.

This language ability, in essence, is an effort to construct the knowledge it has and an effort to convey it to others, both orally and in writing.[11] This then experienced a reduction in the civil law legal system which mainstreamed written language. Thus, communication as a form of spoken language is not well discussed.

The interesting thing, in relation to language and law, is the ability to process sources of knowledge in the form of concepts as the basis for processing thoughts to convey these answers. Misguided thinking in law begins with the inability to understand legal concepts. Thus, failure to understand a legal concept that is used in the framework of thinking or interpreting activities will lead to inaccuracies-even mistakes, in reaching the conclusion.[12]

So, it is not surprising that the legal world always avoids abstraction of thought, where logic and reasoning are seen as unimportant. Therefore, every Bachelor of Law is imprisoned in a pattern of thinking that law is only related to data and facts, as well as empirical experience without heeding the abstraction of rational and logical thought.[13] It is the views that are communicated by ignoring the straightness of thinking that gives rise to epistemological errors or errors of knowledge.

As has been done by the Supreme Court, in exercising its power and authority, which led to PERMA No. 14/2016 in response to the Decision of the Constitutional Court Number 93/PUU-X/2012 and the data in the form of disparity in court decisions relating to absolute authority over the authority to examine, hear, and decide on Mortgage disputes attached to Sharia Credit Agreements.

10 Ainur Rahmat Hidayat, *Filsafat Berfikir: Teknik-Teknik Berfikir Logis Kotra Kesesatan Berpikir*, Madura, Duta Media Publishing, 2018, page.5

11 Musa Darwin Pane, and Sahat Maruli Tua Situmeang, *Asas-Asas Berpikir Logika Dalam Hukum*, Bandung, Penerbit Cakra, 2018, page.32

12 Abintoro Prakoso, *Hukum, Filsafat Logika Dan Argumentasi Hukum*, Surabaya, LaksBang Justitia, 2015, page.2

13 Urbanus Ura Weruin, Logika, Penalaran, Dan Argumentasi Huku, *Jurnal Konstitusi*, Vol. 14 No. 2, 2017, page.374

Article 13 paragraph (1) PERMA No. 14/2016 which emphasizes "The implementation of sharia economic case decisions, mortgage and fiduciary rights based on sharia contracts is carried out by the Court within the Religious Courts." This provision, which is identical to what was stated by Bagir Manan, is a moment of hospitalization behavior to close loopholes in the law, either in the form of natural defects or artificial defects.[14] This defect is not only due to pouring ideas / ideas from the mind into written form, but - in Islamic banking, it also arises from the process of adopting values originating from outside the value system in Indonesia, in addition to disharmony and asynchronousness in the legislative process.

In order to understand and solve legal problems, activities that contain philosophical reflection activities must also be carried out, namely based on ontological studies (meaning/nature), epistemological (understanding) and axiological (benefits) of Legal Science. The study of these three aspects will determine the existence and scientific character of Legal Science which will have implications for the way of developing Legal Science and practical Legal Science (implementing practical law) in the reality of social life.[15]

In connection with the decision to provide financing to customers from Islamic Banks, Article 23 paragraph (2) of Act No. 21/2008 asserts "To obtain the assurance as referred to in paragraph (1), Islamic Banks and/or UUS are required to conduct a careful assessment of the character, ability, capital, Collateral, and business prospects of the prospective Facility Recipient Customer." The problem regarding the "collateral" nomenclature, then according to the Elucidation of Article 23 paragraph (2) of Act No. 21/2008 which states "In carrying out an assessment of Collateral, Islamic Banks and/or UUS must assess the goods, projects or collection rights financed with the relevant Financing facility and other goods, securities or risk guarantees added as additional Collateral, whether they have been sufficient, so that if the Customer Recipient of the Facility is unable to pay its obligations in the future, the Collateral can be used to cover the repayment of financing from the Sharia Bank and/or UUS concerned."

A different meaning-conventionally, is regulated in Article 1131 of the Civil Code which affirms "All property rights of the debtor, both movable and immovable, both existing and those that will exist in the future are borne by all of the engagements." According to Ifa Latifa Fitriani, the difference in the existence of collateral in the norms of banking legislation in Indonesia, where in Act No. 7 of 1998 concerning Banking basically does not mention the existence of an obligation to have Collateral in the provision of Credit and Financing. However, the Elucidation of Article 8 of Act No. 10/1998 clearly shows that there is an emphasis on the important factor of the existence of collateral, where this guarantee is realized with the main collateral and additional collateral. In line with the provisions of Article 1131

14 Ridwan, *Diskresi & Tanggung Jawab Pemerintah*, Yogyakarta, FH UII Press, 2014, page.71

15 Bernard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum*, Bandung, Mandar Maju, 2009, page.13

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of this KUHPer, a guarantee is required for every credit, where this guarantee arises from law.[16]

In the view of Sharia, Mortgage is defined as Pawn, pawn here is a loan agreement (*akad*) by submitting goods as a guarantee of debt. The meaning of pawn in Islamic law is somewhat different from the meaning of pawn (mortgage) contained in the Civil Code and the provisions contained in customary law. Pawn according to the provisions of Islamic Shari'a is a combination of the meaning of pawn in the Civil Code and customary law, especially concerning the object of the agreement. Pawns according to Islamic law are goods that have property value and it is not disputed whether they are movable or immovable objects. However, the Mortgage which is subject to Act No. 4 of 1996 concerning Mortgage (UU No. 4/1996) only accommodates the object of the dependent in the form of immovable objects.

Pawning (*ar-rahn*), in the perspective of Sharia, is itself a contract agreement between the lender and the party borrowing money.[17] That is, the pawn contract itself is the main agreement. Meanwhile, Mortgage as an object of guarantee given to banks is an additional guarantee or complementary guarantee (accessoir) born from the existence of a main agreement in the form of debt and receivables.[18]

The epistemological error mentioned above also lies in how the law is enforced. Because, according to Padmo Wahyono, legislative activities—in this case the Supreme Court, carry out some of these activities within the regulatory function, demanding that there be regulations regarding the procedural law. This argument refers to Article 54 of the Law on Religious Courts which expressly states that the procedural law applicable in general courts is used in the judiciary, except for those specifically regulated in the Law on Religious Courts. And, most of the legal umbrellas for the execution of mortgage rights are still based on the laws used in general courts, for example, Act No. 4/1996, and Act No. 42 of 1999 concerning Fiduciary Guarantees.[19]

Referring to the description above, the immovable objects placed in a guarantee institution in the form of Mortgage are in two legal domains (*rechtsregiem*), namely referring to Act No. 21/2008 and refers to Act No. 4/1996. Thus, a legal concept of "Mortgage Rights" is in a conflict of norms that gives rise to disparities in the authority (competence) to judge, in order to determine which domain has that competence.

Based on the description above, it is clear that there is a difference in the concept between Mortgage and Collateral in Act No. 21/2008. However,

16 Ifa Latifa Fitriani, Jaminan Dan Agunan Dalam Pembiayaan Bank Syariah Dan Kredit Bank Konvensional, *Jurnal Hukum & Pembangunan*, Vol. 47, 1, 2017, page.134

17 Mardanis, *Gadai Syari'ah (Rahn) Dalam Perspektif Ekonomi Islam Dan Fiqh Muamalah*, Pekanbaru, 2017, page. 15

18 Triamita Rahmawati, *Hak Tanggungan Sebagai Jaminan Perlindungan Hukum Bagi Para Pihak Dalam Pembiayaan Di Perbankan Syariah*, Fakultas Hukum Universitas Islam Indonesia, 2021, Page 3

19 Insyafli, Kewenangan Pengadilan Agama Melaksanakan Eksekusi Hak Tanggungan, *Pengadilan Tinggi Pekanbaru*, Vol. 5, 2015, page.1–8

according to E. Fernando M. Manullang,[20] that efforts to reread legal certainty claimed by legism and legality must be based on the consideration of a phenomenon of shifting interpretation of the idea of legal certainty which some people understand simply, namely what the word legal certainty means. the law is legal certainty. In fact, the claim for legal certainty offered by legism and legality actually started from a problem and a political proposal. However, nowadays, the interpretation of legal certainty is simplified.

This simplification is also seen in the neglect of the ontological aspect between Pawn (ar-rahn) and Mortgage. Pawn (ar-rahn), ontologically, is a form of benefit that exists in a legal relationship. Thus, the essence of a pawn contract is trust, where the pledge agreement is not interpreted as an act to withhold collateral.[21] This is different from the Mortgage, where the Mortgage is basically part of the implementation of the precautionary principle in the banking world.

The disparity of judges' decisions on the dialectic of absolute competence between the General Courts and the Religious Courts as a result of the differentiation of meanings has provoked the Supreme Court to use its power and authority in issuing technical arrangements which resulted in the emergence of a new meaning to mediate the disparity.

The power and authority in making legal discoveries-as the basis for the inefficiency of language, is basically an effort to achieve a sense of justice. However, the meaning of the fulfillment of the community's sense of justice is sometimes not achieved.[22] Therefore, if one examines the attributive authority of the Supreme Court, it is not based on the fulfillment of a sense of justice, but focuses on maintaining order and order.

The concept of the Relationship Trichotomy-as a model of the research approach in this article, in order to read the phenomenon of law enforcement through the process of finding the law by the Supreme Court, shows the existence of self-awareness of ownership of the trinity of power which is the capital in shaping behavior patterns based on the arena (field),[23] namely the Judicial Power itself.

It is self-awareness of this capital that encourages the Supreme Court to use the trinity of power to form new knowledge. This new knowledge has confirmed that the meaning that appears on the Mortgage attached to the Sharia-based Credit Agreement is absolute competence. Thus, the formation

20 E. Fernando Manullang, *Legisme, Legalitas Dan Kepastian Hukum*, Jakarta, Kencana, 2016, page.5

21 Syukri Iska, *Sistem Perbankan Syariah Dalam Perspektif Fikih Ekonomi*, Yogyakarta, Fajar Media Press, 2012, page.43

22 Ade Saptomo, *Awal Memahami Hukum, Teori Hukum & Filsafat Hukum*, Jakarta, FHUP Press, 2015, page.17

23 Rocky Marbun, Konferensi Pers Dan Operasi Tangkap Tangan Sebagai Dominasi Simbolik : Membongkar Kesesatan Berpikir Dalam Penegakan Hukum Pidana Press Conference And Hand Catch Operations As Symbolic Domination : Dismantling Fallacy In Criminal Law Enforcement, *Ius Constituendum*, Vol. 7, No. 1, 2022, page.1–18

of new knowledge is functioned as a symbolic domination[24] in order to stop the discourse of disparity over the absolute competence.

Thus, the transformation of this new knowledge in its formal form through PERMA No. 14/2016, through the Relationship Trichotomy approach, is nothing more than externalizing the Judicial Power through the mainstreaming of the interests of the Supreme Court in creating order and order in the judicial process in Indonesia. Therefore, the emergence of an epistemological error, contained in PERMA No. 14/2016 is not related to the ontological aspect of the attachment of Mortgage Rights to Sharia-based Credit Agreements. Thus, PERMA No. 14/2016 which functions as Symbolic Domination, only has a practical interest in eliminating the Binary Opposition by preventing the occurrence of binary contamination, in order to fulfill the interests of the existence of the Supreme Court itself in exercising Judicial Power. As a result, the emergence of neglect of "how to" law enforcement on absolute competency disparities is carried out without a separate Procedural Law in the process in the Criminal Court related to the execution of Mortgage attached to Sharia-based Credit Agreements.

D. CONCLUSION

The emergence of Supreme Court Regulation Number 14 of 2016 concerning Procedures for Settlement of Sharia Economic Cases in stopping binary opposition has created an epistemological error through neglecting the ontological aspect of Mortgage based on the national civil system with sharia-based credit contracts. The epistemological error is based on self-awareness of the Judicial Power in a formalistic manner with the main aim of protecting the interests of a judicial institution. Therefore, maintaining order and order in the judicial process is the main focus by ignoring the ontological aspect through efforts to domination of the symbolic based on the power and authority of the Supreme Court.

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24 Rocky Marbun, *Trichotomy of Relation Through Instrumental Communication in Pre-Adjudication Stage: The Failure of Criminal Procedure Code to Foster Law Enforcement Attitudes*, the 1st International Conference on Education, Humanities, Health and Agriculture, 2021, page.1–10

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