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PROGRESSIVE LAW EQUITABLE TO THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE CREDIT AGREEMENT

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Abstract

The purpose of this study is to analyze: 1) Why is law enforcement of the rights and obligations of the parties in the current credit agreement not fair? 2) How does the concept of progressive law apply justice to the rights and obligations of the parties to the credit agreement in the future? The research method used is normative juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) Discussion on law enforcement is inseparable from the existence of legal relations between the Bank as a creditor and debtor customers. Legal relations can run improperly, such as one party or both parties violate agreements or agreements that have been mutually agreed. The position of the debtor customer is in a difficult position related to the legal relationship contained in the Bank Credit Agreement. It is said to be very difficult, because the debtor customer is the one who violates the juridical documents contained in the Bank Credit Agreement. 2) The entrance for the application of progressive law in judicial practice in Indonesia has been formally given by the Law on Judicial Power which affirms that the judicial power is tasked with upholding law and justice. In that order, judges are required to explore the values of law and justice that live in society. This means that judges are not just tasked with applying the rules as they are, but how they can bring about justice.

Keywords: Progressive Law, Equitable, Rights, Obligations, Parties, Credit Agreement.

INTRODUCTION

Background

The provision of credit creates a legal relationship with all juridical consequences that can cause losses or risks to the bank as a creditor if basic matters are neglected. Risk is the potential loss due to the failure of the customer or other party (debtor) in fulfilling obligations to the bank in accordance with the agreed agreement. Failure to pay made by debtors can be divided into two types of default, namely: a) Those who are able (default intentionally), and b) Defaults due to bankruptcy, that is, unable to pay back their debts.[1]

One of the principles in providing credit is collateral, the principle of guarantee is a form of prudence because collateral is a security in taking credit by debtors both material guarantees and individual guarantees. Before obtaining a credit facility, prospective debtors must meet the requirements of the bank, one of which is credit guarantee, because the function of providing credit guarantees is to give rights and power to banks

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to get repayment with these collateral items if the debtor is injured or does not pay his debt.[2]

Bank Indonesia through Bank Indonesia Regulation Number 14/15/PBI/2012 concerning Asset Quality Assessment of Commercial Banks, provides a classification on credit quality whether the credit provided by banks includes *performing loans (non-problem) or non-performing* loans (problematic). The credit quality is classified as follows: 1) Current, 2) Under special attention, 3) Substandard, 4) Doubtful, 5) Short.[3]

Loans that are included in the current category and in special attention are considered as performing loans, while loans that are included in the sub current, doubtful and bad categories are considered as non-performing loans. The factors that must be considered in determining credit quality include: 1) Business prospects, 2) Performance of debtors, 3) Ability to pay. The existence of bad loans will certainly be a burden on banks because credit quality is one of the determining factors and indicators of a bank's performance. [4]

The legal arrangement of engagements is carried out with an "open system", meaning that everyone can enter into any engagement whether it has not been specified in the law. But this openness is limited by three things, namely that it is not prohibited by law, it does not contradict decency, and it does not conflict with public order. Debt-receivables relationship where there are outstanding obligations from debtors and rights to performance from creditors, legal relations will be smoothly carried out if each party fulfills its obligations. However, in a collectible relationship ("*opeisbaar*") if the debtor does not fulfill the performance voluntarily, the creditor has the right to demand the fulfillment of his receivables ("*verhaal*" rights, execution rights) against the debtor's assets used as collateral.[5]

The existence of law is best understood in a systemic context. That is, the law must be seen as a system. Lawrence Friedman[6] divided several elements, namely: (1) Structure, in the form of institutions created legal systems with various functions in supporting the actualization of law and constantly changing, giving a kind of form and limits to the whole. (2) Substance, is a rule, norm, provision or rule of law made and used to regulate human behavior. (3) Culture (legal culture), concerning values, attitudes, community behavior and non-technical factors is binding on the legal system.[7]

Progressive law enforcement is carrying out the law not just the black-and-white words of the regulation (according to the *letter*), but according to the spirit and deeper meaning (*to very meaning*) of the law or law. Law enforcement is not only intellectual intelligence, but rather spiritual intelligence. In other words, law enforcement is carried out with determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to find another way than usual. Justice is the courage of interpretation of the Law to uplift the dignity and dignity of Indonesian people.[8]

In terms of law enforcement in Indonesia in particular, if understood rigidly and soberly, no judge is wrong in giving or deciding a case, even though the decision is wrong, wrong, inappropriate, contrary to justice, even contrary to his own conscience. So this gave rise to arbitrary and oppressive jungle law enforcement officials.

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Law enforcement officials should really understand the function of the law and prioritize the law in acting, meaning that in carrying out law enforcement activities they must rely on applicable law. Especially the law must be able to respond to the dynamics of the development of people's thinking so that the law does not run in place.[9]

Based on the description above, the author is interested in examining the development of national law in Indonesia in the context of credit agreements which are further examined in progressive law and integrative law with a study entitled "**Progressive Law with Justice to the Rights and Obligations of the Parties to the Credit Agreement"**

Problem Statement

1. Why has law enforcement of the rights and obligations of the parties to the current credit agreement not been fair?
2. How does the concept of progressive law apply justice to the rights and obligations of the parties to the credit agreement in the future?

Theoretical Framework

This research uses *Grand Theory, Middle Theory and Applied Theory* as follows:

1) Grand Theory

The Grand Theory or the main theory on which the analysis knife is based in this study is the Legal Mind Theory. The ideals of Indonesian National Law based on Pancasila have been distorted to the extent of its failure to manifest its rules, culture, and legal structure. The strong current and paradigm of legal positivism in the post-independence Indonesian legal tradition, and the uncontrolled implementation of values, morals and norms of indigenous Indonesian culture, have made the law run alone and commit its arbitrariness against the legal community itself. When many countries and academics stated the failure of the Cartesian-Newtonian thinking building that became a reference to the paradigm and theory of science in the 19th century, aka the Indonesian National Law Ideal building must be penetrated with transcendental conceptions and paradigms containing normative rules of religion, morals and social ethics so that the construction of laws that are born is really able to humanize the law, not punish humans.[10]

2) Middle Theory

Middle Theory in this study uses the Hierarchy Theory of Legislation. Hans Kelsen in the "General Theori of Law and State" translation of the general theory of law and [11] state elaborated by Jimly Assihiddiqie[12] under the title Hans Kelsen's theory of law among others that Legal analysis, which reveals the dynamic character of the system of norms and the functions of basic norms, also reveals a further peculiarity of law: law governs its own formation because one legal norm determines the way to create another legal norm, and also to some degree, determine the content of the other norms. Because, one legal norm is valid because it is made in a way determined by another legal norm, and this other legal norm is the basis for the validity of the first legal norm.

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3) Applied Theory

Applied Theory in this study uses Progessive Legal Theory, Integrative Legal Theory, and Relational Legal Theory.

a) Progessive Law

Progressive law is the concept of the way of law. The progressive way of law is not just to apply positive legalistic law, then apply the law, then read and spell the law and apply it like a machine, but an action or effort. The construction of philosophical thinking is based on 3 (three) foundations of thinking which include ontological, epstemological and teleological thinking foundations.[13] Progesive law is the concept of how to act by taking into account ontological, epstemological and teleological as well as the sources of law that develop in society.[14]

b) Integrative Law

The term integration comes from English, namely integration which means intermingling to become a whole and rounded unity. Integrating means perfecting by uniting elements that were originally separated into a complete unity so as to create harmony and harmony. Integration in this case is to combine or unite legal sources into a positive legal system and applicable laws and regulations in Indonesia.[15] The integration of legal sources that develop in Indonesia includes western law, Islamic law, customary law and other developments such as information and technological advances.

c) Relational Law

Relational law is that it addresses the gap between internal and external legal theory or to put the same point in different ways, to address the gap between jurisprudence and the sociology of law.[16] Relational law is needed in the development of national law in Indonesia which has various sources of law such as positive law, Islamic or religious law, and customary law.

RESEARCH METHODOLOGY

The approach in this study uses a normative juridical approach. The normative juridical approach is an approach that is carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this research.[17]

In accordance with Soerjono Soekanto's opinion[18], normative legal research is research that includes research on legal principles, research on legal systematics, research on legal synchronization, legal history research, and comparative legal research, in order to answer legal problems or issues to be studied. Normative legal research examines legal rules or regulations as a system building related to a legal event. This research was conducted with the intention of providing legal argumentation as a basis for determining whether an event has been true or false according to law.[19]

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Data collection techniques in this study were obtained based on *library research*. The study conducted was a literature study (*library research*) using secondary data. Secondary data in this study were obtained through literature studies, by seeking information as complete and as much as related to comparative studies of conventional bank operational systems and Islamic banks from a legal perspective.[20] This research technique is descriptive analytical, where analysis is carried out critically using various theories on research problems. Prescriptive research analysis, which studies the purpose of law, the values of justice, the validity of the rule of law, legal concepts, and legal norms. Then the analysis used is Deductive Analysis, which is a mindset that departs from general facts or events which are then drawn special generalizations.[21]

RESEARCH RESULTS

Law enforcement of the rights and obligations of the parties to the credit agreement

J. Satrio wrote, the words contract and agreement are the same [22] Furthermore, Suharnoko, [23]stated that a contract or agreement must fulfill the conditions of the validity of the agreement. Soedjono Dirdjosisworo, formulating a contract is a promise or set of promises and as a result of reneging or violation thereof, the law provides recovery or establishes obligations for those who break promises accompanied by sanctions for their implementation.[24] Subekti defines a covenant as an event where a person promises to another person or where two people promise each other to do something. Article 1313 of the Civil Code, Agreement is an act by which one or more persons bind themselves to one or more other persons. In its form, a covenant is a series of words containing promises or undertakings spoken or written. Elements of the agreement/contract:

1. In general, there are parties, usually at least 2 parties
2. The word agreement is a statement of will, complementing each other
3. There are objects, in the form of objects
4. There is a purpose, which is to transfer rights to the object of the agreement
5. Certain forms, oral and written biases.[25]

Credit is the provision of money or bills that can be likened to it, based on an agreement or loan agreement between a Conventional Commercial Bank (BUK) and another party that requires the borrower to pay off its debt after a certain period of time with interest.[26] While the definition of financing is the provision of money or bills or which can be likened to it based on an agreement or agreement between the bank or other parties that requires the financed party to return the money or bills after a certain period of time in exchange for or profit sharing. The creation of a financing agreement can include option rights or not. Inclusion of option rights or liability rights as collateral must be registered first.[27]

The law is obliged to provide justice, because justice is one of the purposes of the law. However, this situation was not followed by the renewal of banking law needed to support the banking industry to grow healthily, in the form of Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning Banking.

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However, the Law has not specifically regulated the relationship between banks and customers, both depository customers and debtor customers, especially those concerning rights and obligations in relation to bank credit.[28]

Although there are provisions that require banks to provide credit based on credit agreements, until now there are no or no guidelines or demands that can be used as a reference by banks regarding what contents or clauses should be contained or not contained in a credit agreement. Many agreements in business transactions occur not through a balanced negotiation process between the parties, but the agreement occurs in a way that one party has prepared standard terms on a printed agreement form and then presented to the other party for approval with almost no freedom at all to the other party to negotiate the terms offered. Such agreements are called standard agreements or standard agreements.

Banking transactions in the credit sector provide a role for the Bank as a provider of funds for pre-debtors. The form can be in the form of credit, such as investment credit, working capital credit, small business credit, and other types of credit according to the needs of the debtor. The relationship between the debtor and the bank is an interpersonal relationship. Interpersonal relationships in the field of credit rely on a trust or more commonly known as credit. The loan and loan agreement between the Bank and its customers is a manifestation of the Bank's Credit Agreement. There is an agreement between the Bank (creditor) and the credit recipient customer (debtor), that they agree in accordance with the agreement they have made. In the credit agreement, each of the rights and obligations is covered, including the term and interest that has been determined together.[29]

The credit agreement contained in the Deed of Credit Agreement is defined as written evidence made in advance and before a notary, which contains clauses regarding rights and obligations between creditors and debtors, where creditors are obliged to submit credit and their rights to receive principal and interest payments, while debtors are entitled to receive credit from creditors, and debtors are obliged to pay principal, interest, and others according to the predetermined period of both.[30]

A credit agreement is a strong legal basis and evidence for the parties that can cause certain legal consequences, such as in the event that the debtor defaults or defaults. Delay and arrears in credit installment payments to the Bank as a creditor are forms of default. Suharnoko said, "If there is a *violation of the agreed agreement, a default lawsuit can be filed, because there is a contractual relationship between the party who caused the loss and the party who suffered the loss*".[31] Default or non-fulfillment of promises can occur either intentionally or unintentionally. Parties who accidentally default can occur because they are unable to fulfill these achievements or also because they are forced not to do these achievements.[32] The debtor may object to the inability to repay the credit as agreed, due to certain events or circumstances either due to an earthquake that results in the business premises used as collateral or collateral for the bank being destroyed, or due to other events or natural disasters.

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In fact, in the implementation of credit agreements, the bank only adjusts (increases) the loan interest rate, and never lowers it. As well as the interest rate adjustment clause as intended above, the debtor is subject to regulations made unilaterally by the bank so that the debtor lacks protection, because interest rates can change at any time. Given that the consumer protection process like this takes time to be applied to the banking world in general, it is necessary to carry out socialization and common opinions so that the purpose of consumer protection can be achieved, so that no parties are harmed both banks and borrowers (customers).[33]

The inclusion of the clause containing the transfer of responsibility and the interest rate change clause above is contrary to Law No. 8 of 1999 concerning consumer protection, so that if the clause is still included in the credit agreement, it can be subject to sanctions. These sanctions actually not only apply to the inclusion of these 2 (two) clauses but to all inclusions of clauses prohibited in article 18 of Law No. 8 of 1999 concerning consumer protection, these sanctions are:

a. Civil sanctions stipulated in article 18 paragraph 3 of the Consumer Protection Law read as follows: "*Any standard clause that has been applied by business actors to documents or agreements that meet the provisions as referred to in paragraph (1) and paragraph (2) is declared null and void".*

b. Criminal sanctions stipulated in Article 62 paragraph (1) of the Consumer Protection Law which reads as follows: "*Business actors who violate the provisions as referred to in Article 8, Article 9, Article 10, Article 13 paragraph 2, Article 15, Article 17 paragraph (1) letter a, letter b, letter c, letter e paragraph (2) and Article 18 shall be sentenced to a maximum of 5 (five years or a maximum fine of 2,000,000,000. (two billion rupiah)."*

The government in its efforts to protect consumers related to exoneration clauses has limited or made a ban on the inclusion of exoneration clauses that are considered detrimental to consumers as stated in article 18 of Law No. 8 of 1999 concerning consumer protection. In addition to the ban, it is also followed by sanctions both civil and criminal that can be imposed on delinquent business actors to continue to include the exertion clause that has been prohibited in Law No. 8 of 1999 concerning consumer protection.[34]

The birth of the Consumer Protection Law is expected to become a legal umbrella in the consumer sector. The existence of legal protection for customers as consumers in the banking sector is important, because factually the position of the parties is often not balanced. With good cooperation between the bank and customers, especially in the case of a standard agreement regarding credit at the bank, it is expected to further optimize legal protection for customers, so as to minimize prolonged problems in the future.[35]

The discussion on law enforcement is inseparable from the existence of legal relations between the Bank as a creditor and debtor customers. Legal relations can run improperly, such as one party or both parties violate agreements or agreements that have been mutually agreed.

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The position of the debtor customer is in a difficult position related to the legal relationship contained in the Bank Credit Agreement. It is said to be very difficult, because the debtor customer is the one who violates the juridical documents contained in the Bank Credit Agreement.

Law Number 48 of 2009 concerning Judicial Power, determines dispute resolution both through litigation in court and non-litigation, namely outside the court. Article 58 of Law Number 48 of 2009 states "Civil dispute resolution efforts may be carried out outside the state court through arbitration or alternative dispute resolution." The provisions regarding the forms of dispute resolution have actually been regulated in separate laws and regulations, namely Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which in Article 1 Number 1 is formulated that "Arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute." Munir Fuady explained, arbitration is a private court, which is often also called the 'referee court'. So that the arbitrator in the arbitral tribunal functions like a *referee like* a referee in a football match.[36] Law Number 30 of 1999 formulates in Article 1 Number 10, that Alternative Dispute Resolution is an institution for resolving disputes or differences of opinion through procedures agreed by the parties, namely out-of-court settlement by means of consultation, negotiation, mediation, consolidation, or expert assessment."

Discussion of law enforcement due to default in the Bank Credit Agreement, detailed in several steps as follows: The first step, taken by the bank as a creditor to debtor customers who default; the next step is dispute resolution through the Consumer Dispute Settlement Agency (BPSK); The next step is to take advocacy based on a Memorandum of Understanding (MoU) in accordance with the cooperation between the Prosecutor's Office and state-owned and state-owned banks.[37]

The concept of progressive law with justice to the rights and obligations of the parties to the credit agreement

Most discourses on progressive legal developments always point to the jurisdiction of criminal law. Because indeed the criminal law area is public law that concerns public interests and peace (public). Therefore, there are many problems related to criminal law that receive attention from the public. The area of criminal law is indeed more of a study in the discussion of legal science. Including the study of progressive law is also more inclined to discussion in the criminal law area. While in civil law jurisdiction because it is private law / persoon recht, it is quieter and less of a concern for the community.

Because it is as if civil jurisdiction is only about issues that occur between people for commercial or business reasons. In fact, civil law also concerns the fate of many people, most of whom are also small people who lack the ability both financially and legal knowledge. If there is no attention from the state, it is feared that many people will lose their rights simply because they do not have adequate legal knowledge and cannot afford lawyers to defend or fight for their rights.[38]

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In the progressive concept of law, the law does not serve itself, but rather for purposes that are outside of itself.[39] This is in contrast to *the tradition of analytical jurisprudence* which tends to dismiss the external world itself; such as people, society and their welfare. Thus, the law must be responsive. Legal regulation will always be linked to social goals that go beyond the textual narrative of the rules.[40]Progressive law, having a logic similar to *Legal Realism*, sees and judges law by the social goals it seeks to achieve and the consequences arising from the operation of that law, which from an ethical point of view, can be called teleological ethics. This teleological way of thinking, is not inattentive to the law. Rules are important, but it's not the last measure that takes precedence over goals and effects. The central question in teleological ethics, therefore, is whether an action proceeds from a good purpose, and whether an action with a good purpose also has a good effect. In the view of progressive law, legal actors must have sensitivity to crucial issues in human relationships, including human bondage in oppressive structures; both political, economic, and socio-cultural. In this context, progressive law must appear as an emancipatory institution.

Progressive law prioritizes purpose and context rather than the text of rules, so discretion has an important place in the administration of law. Thomas Aaron formulated discretion as: ...*Power authority conferred by law to action on the basic of judgement or conscience, and it use is more on idea of moral than law*".[41] In the context of discretion, law administrators are required to choose wisely how they should act. The authority that exists in them based on official rules, is used as a basis for pursuing a prudent way of approaching the reality of their duties based on a moral approach rather than formal provisions. Weston stated "*decicion making has been termed the selection of the best, the most practical or satisfactory course of action*." [42]

The application of progressive law, which is basically directed at the perpetrators of this law, is expected to be able to direct the laws produced by the legislative process, which tends to be elitist, to lead to the interests of justice and the welfare of the people. The entrance for the application of progressive law in judicial practice in Indonesia has been formally given by the Law on Judicial Power which affirms that the judicial power is tasked with upholding law and justice. In that order, judges are required to explore the values of law and justice that live in society. This means that judges are not just tasked with applying the rules as they are, but how they can bring about justice.[43]

CONCLUSION

The results showed that;

a. The discussion on law enforcement is inseparable from the existence of legal relations between the Bank as a creditor and debtor customers. Legal relations can run improperly, such as one party or both parties violate agreements or agreements that have been mutually agreed. The position of the debtor customer is in a difficult position related to the legal relationship contained in the Bank Credit Agreement. It is said to be very difficult, because the debtor customer is the one who violates the juridical documents contained in the Bank Credit Agreement.

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b. The entrance for the application of progressive law in judicial practice in Indonesia has been formally given by the Law on Judicial Power which affirms that the judicial power is tasked with upholding law and justice. In that order, judges are required to explore the values of law and justice that live in society. This means that judges are not just tasked with applying the rules as they are, but how they can bring about justice.

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