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Reconstruction of The Principle of Legal Certainty Fair Auction For Joint Assets After Divorce Decision

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Abstract

Introduction: This article is about analyzing the implementation of joint property auctions after a divorce decision that has not yet received fair legal certainty. The number of cases after the divorce decision results in the distribution of joint assets between the parties submitted to the Court after not getting peace in the distribution of joint assets, the Court can take over the matter by way of auction.

Purposes of the Research: To analyze the principle of legal certainty in auctions in the implementation of auctions after divorce decisions in laws and regulations. Explain the legal problems in applying the legal principle of joint property auctions after the divorce decision. Finding reconstruction as the basis for setting up a bill on joint property auction laws after divorce decisions in the future.

Methods of the Research: Based on hermeneutic paradigmatic which is based on philosophy and the scientific nature of law. This hermeneutic paradigm is carried out through a methodological strategy approach to learn from people, namely studying law by exploring and researching the meanings of law from the perspective of users or seekers of justice in the Religious Courts.

Results of the Research: In the reconstruction of the principle of legal certainty in an equitable auction of joint assets after the divorce decision in future laws and regulations in legal considerations regarding joint assets that must be auctioned, through an auction procedure in accordance with applicable regulations.

1. INTRODUCTION

Based on the law in force in Indonesia (Positive law), the distribution of joint assets in the event of a divorce or the death of one of the spouses is that each husband or wife has the same rights to joint property, that is, the husband/wife is entitled to half of the joint property as long as it is not specified otherwise in the marriage agreement.¹ This division applies regardless of who is working hard to get wealth during marriage. One of the principles adhered to in the UUP is the principle of equality for husband and wife. With this principle, it means that husband and wife bear a noble obligation to uphold the household in accordance with their respective duties and responsibilities. The husband has obligations, among others, to provide maintenance. Article 80 paragraph (4) KHI stipulates that in

¹ Seen article 97 Compilation of Islamic Law

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accordance with his income the husband bears: maintenance, kiswa, and residence for the wife; household expenses, maintenance costs, and medical expenses for wife and children; And education costs for children.

The distribution of joint assets in half for the husband and half for the wife is in accordance with a sense of justice, if the husband or wife both perform their respective roles, duties and responsibilities in maintaining the integrity and survival of the family. The consideration is that the husband or wife is entitled to half of the joint property based on the role played by the husband or wife as complementary partners in efforts to foster family unity and sustainability.

The definition of role here is not based on gender and role freezing, that the husband is the breadwinner while the wife is the housewife. In the event that the husband does not work, but the husband plays a major role in maintaining the integrity and continuity of the family such as taking care of household affairs, looking after the children, taking and taking up the children or wife and even providing all the needs for food and drink, then the husband is still eligible to get half rights joint property.

Legal uniformity in the distribution of joint assets is indeed a commitment from legal unification efforts to overcome conflicts that may arise between parties due to legal pluralism. However, the question arises, namely how far the concept of sharing joint assets can fulfill a sense of justice in the event that the husband never provides alimony while in marriage and all joint assets are obtained by the wife from the results of her work?

Religious courts which have the main task of examining and adjudicating certain cases for those who are Muslim, including the settlement of the distribution of joint assets which refers to the provisions of article 97 of the Compilation of Islamic Law, which requires the distribution of joint assets to be divided in half. The judge argued that all assets acquired in marriage were joint property. Often the wife is harmed and experiences injustice in the distribution of joint assets. It turns out that the items that the husband has donated to his wife must also be counted divided by two. Based on the provisions of paragraph 20 QS. An Nisaa is emphasized which means as follows: "And if you want to replace your wife with another wife, while you have given them a lot of wealth, then do not take it back from her at all."

Based on the background above, the researcher sees that there is injustice for one of the parties, especially the wife, if the rules for dividing joint assets do not provide legal certainty for the parties after the divorce is concluded. So here the auction office which is authorized by laws and regulations to carry out a sale in public to fulfill the rights of the parties submitting an application for auction at the Religious Court, the authority given to the auction office is to conduct an auction in public for the joint property.

For example, case Number 1794/Pdt.G/2020/PA.PLG. between RA Marini Binti RM Djunaidi Arifin and KMS Yusuf Bin Nanang Syaipudin the husband and wife feel that the assets that are broken down in the lawsuit by the plaintiff and the defendant are joint assets that must be divided by the two joint assets and hand over ½ (half) to the Plaintiff and ½ (half) to Defendant and if it cannot be implemented in kind then the object is sold at auction through the KPKNL (State Wealth and Auction Service Office) and the proceeds from the sale are divided according to their respective portions between the Plaintiff and the Defendant.²

² Decision of the Palembang Religious Court. Number 1794/Pdt.G/2020/PA.PLG.

Furthermore, case Number 209/Pdt.G/2021/PA.Plg between dr. Soraya Sagita Desmarad bint H Mastan Kider and dr. Emir Fakhrudin bin Rizani Amran, a married couple who were divorced on July 1 2020, since then, the defendant has never given hadhanah and divided the joint assets of the marriage between the plaintiff and the defendant, to fulfill a sense of justice according to applicable law, it is very have legal grounds if the Plaintiff filed a lawsuit for joint assets / joint assets to the Class IA Palembang Religious Court. And it has been decided and in its decision the assets must be auctioned off because the Defendant does not want to share the joint property.³

The existing auction regulations do not support the development of auctions as buying and selling institutions and do not provide enough protection for the interests of the rights of justice seekers in joint property auctions in the Religious Courts. Regulations in the field of auctions as a system of normative thinking that is logical and rational have not been able to solve all practical problems of a legal nature, even though they should be solved according to law, such as the unclear certainty of the rights of applicants for joint property auctions in the Religious Courts.

With the birth of the UUP and the Law on the Religious Courts. The applicable law in the Religious Courts contains legal provisions characterized by rational modern law.⁴ Based on the description and problems above, the author is interested in raising this dissertation with the title "Reconstruction and Normatization of the Principle of Legal Certainty in the Auction of Joint Assets After Divorce in the Religious Courts in Indonesia" another because: 1). There is no new auction regulation regarding the distribution of joint assets after divorce which provides legal certainty for parties claiming their rights regarding joint property auctions in the Religious Courts in Indonesia; 2). There is no recent Reconstruction and normativization of auction rules for the implementation of auctions in the Religious Courts in Indonesia. in the future.

2. METHOD

Legal research regarding, "Reconstruction and Normatization of the Principle of Legal Certainty in the Auction of Joint Assets After Divorce in the Religious Courts in Indonesia", is a legal research based on hermeneutic paradigm.⁵based on the philosophy and scientific

³ Decision of the Palembang Religious Court. Number 209/Pdt.G/2021/PA.PLG

⁴ The concept of rational modern law as it appears in Weber's legal sociology, shows the following characteristics: a) Legal rules have a general and more or less abstract "normative" quality. A rule of law is general in nature when it also applies outside the mighty limits encountered and applies to all similar cases; b) Modern law is "positive" law resulting from conscious decisions. Modern law is strengthened by the coercive power of the state in the form of deliberate sanctions, which are linked to legal rules and which can be enforced through courts in case of violation of these rules; c) Modern law is "systematic", its rules, principles, concepts, different doctrines, and various parts of procedural law and material law relate to each other so that it forms a system of logical, rational normative thought. , on the basis of which all practical problems of a legal nature, in principle, can be solved according to law.

⁵ The hermeneutic approach, aka the imperative approach, assumes that paradigmatically, every form and product of behavior is related to legal production, both in abstracto and in concreto, which will always be determined by interpretations made and agreed upon by the actors involved in the process, which will provide meaningful diversity of facts that are being studied as objects., Soetandyo Wignjosebroto, 2002, Law: Paradigm, Method and Dynamics of the Problem, ELSAM-HUMA, Jakarta, p. 140. Then, hermeneutic paradigmatic studies reject the notion of universalism in the science of law, especially with regard to human objects and society, instead it is relativism that is acknowledged. The hermeneutic approach or paradigm in science opens up opportunities for legal researchers to not only dwell on exclusive professional interests., Otje Salaman and Anton F. Susanto, 2004, *Legal Theory: Remembering, Collecting and Reopening*. PT. Refika Aditama, Bandung, p. 81-82.

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nature of law. This hermeneutic paradigm is carried out through a methodological strategy approach to learn from people, namely studying law by exploring and researching the meanings of law from the perspective of users or justice seekers.⁶To seek answers from the discourse on the application of the Reconstruction and Normalization of the Principle of Legal Certainty in the Auction of Joint Assets after Divorce in the Religious Courts in Indonesia, it is not sufficient to use a normative approach but also to use empirical research methods, namely by conducting field research, because research or research means searching for form of searching for answers to a problem.⁷

3. RESULTS AND DISCUSSION

3.1 Sources and Legal Basis for Reconstruction and Normalization of the Legal Certainty Principle of Joint Assets Auctions

The law is tasked with creating legal certainty because it aims to create order in society. Legal certainty is a characteristic that cannot be separated from law, especially for written legal nomenclature. According to Fence M. Wantu, "law without the value of legal certainty will lose meaning because it can no longer be used as a guideline for behavior for everyone".⁸

Legal certainty is defined as clarity of norms so that they can be used as guidelines for the people who are subject to this regulation.⁹The definition of certainty can be interpreted that there is clarity and firmness towards the enactment of law in society. This is so as not to cause a lot of misinterpretation. This is also closely related to Reconstruction and the normativization of the principle of legal certainty in the auction of joint assets after the divorce decision in the religious court, as submitted by the applicant for the auction of the joint property he submitted in court will obtain legal certainty.

According to Van Apeldoorn, "legal certainty can also mean things that can be determined by law in concrete matters".¹⁰Legal certainty is a guarantee that the law is enforced, that those entitled according to law can obtain their rights and that decisions can be implemented. Legal certainty is justifiable protection against arbitrary actions, which means that a person will be able to obtain something expected under certain circumstances, and obtain justice and legal certainty for the rights he submits in the case of joint property auctions after the divorce is concluded.

Grammatically certainty comes from the word definite which means it is fixed, must and certain. In the Big Indonesian Dictionary, the definition of certainty is definite (fixed) matters (states), provisions, decisions, while the notion of law is a legal instrument of a country capable of guaranteeing the rights and obligations of every citizen, so legal certainty is provisions or provisions made by a legal instrument of a country capable of guaranteeing the rights and obligations of every citizen.¹¹ Legal certainty refers to the enforcement of a clear, permanent and consistent law where its implementation cannot be influenced by subjective circumstances.¹² Quoting the opinion of Lawrence M. Wriedman, a Professor at

⁶ Otje Salaman and Anton F. Susanto, 2004, *Op. Cit.*, p. 82.

⁷ Setandyo Wignjosoebroto, 2002, *Op. Cit.*, p. 123.

⁸ Fence M. Wantu, *Op. Cit.*, p. 388.

⁹ Tata Wijayanta, *Op.Cit.*, p.219

¹⁰ Van Apeldoorn, *Op. Cit.*, pp 24-25

¹¹ Ministry of Education and Culture, *Big Indonesian Dictionary*, Jakarta: Balai Pustaka, 1997, p. 735

¹² Raimond Flora Lamandasa, *law enforcement*, quoted from Fauzie Kamal Ismail, *Thesis entitled Legal Certainty on Notary Deeds Relating to Land*, Faculty of Law, University of Indonesia, Depok, 2011, p. 2

Stanford University, argues that in order to achieve "legal certainty" it must at least be supported by the following elements, namely: legal substance, legal apparatus, and legal culture.¹³ Which regulates the auction of joint assets which will provide legal certainty for the auction applicant.

According to Maria SW Sumardjono that regarding the concept of legal certainty, namely that "normatively, legal certainty requires the availability of a set of statutory regulations that operationally support their implementation. Empirically, the existence of laws and regulations needs to be implemented consistently and consistently by supporting human resources.¹⁴ A regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense that it does not cause doubts (multiple interpretations) and is logical so that it becomes a system of norms with other norms that do not clash or give rise to norm conflicts. Norm conflicts arising from regulatory uncertainty can take the form of norm contention, norm reduction or norm distortion, as well as auction rules which must be normalized again in order to provide legal certainty for bidders.

The real legal certainty of an auction is when statutory regulations can be implemented in accordance with legal principles and norms. According to Bisdan Sigalingging: "between certainty of legal substance and certainty of law enforcement should be in line, legal certainty should not only depend on law in the books but real legal certainty is if certainty in law in the bookscan be carried out properly in accordance with the principles and legal norms in upholding legal justice.¹⁵ Especially for justice seekers as joint property bidders who should have obtained legal certainty and justice in obtaining their rights so far they have not obtained them.

3.2 The Urgency and Relevance of Reconstruction and Normatization of the Legal Certainty Principle of Joint Assets Auctions

In the context of discussing legal certainty which is one of the "kings" in the realm of legal theory. Legal certainty is interpreted as a situation where the law is certain because there is definite power for the law in question. This is a justifiable protection against arbitrary action, which means that someone will be able to get something that is expected in certain circumstances.¹⁶ Regarding legal certainty, Lord Lloyd,¹⁷ gives the following explanation: "Law seems to require a certain minimum degree of regulation and certainty, for without that it would be impossible to assert that what was operating in a given territory amounted to a legal system"

Law in the positivistic paradigm requires regularity. and "certainty" (certaing) to support the proper and smooth functioning of the legal system. So that the goal of absolute legal certainty is to be achieved in order to protect the public interest (which also includes

¹³ Lawrence M. Wriedman quoted from Fauzie Kamal Ismail, *Thesis entitled Legal Certainty on Notary Deeds Relating to Land Affairs*, Faculty of Law, University of Indonesia, Depok, 2011, p. 53

¹⁴ Maria SW Sumardjono, "Legal Certainty in Land Registration and Its Benefits for the Banking and Property Business," Paper presented at a seminar on new policies in the field of land, impacts and opportunities for property and banking businesses, Jakarta, August 6, 1997, p. 1 quoted from Muhammad Insan C. Pratama, Thesis, entitled Legal Certainty in Production Sharing Contracts, Faculty of Law, Indonesian Islamic University, Yogyakarta, 2009, p. 14

¹⁵ Bisdan Sigalingging, Legal Certainty, quoted from <http://bisdan-sigalingging.blogspot.co.id/2014/12/certainty-Hukum.html>, date. January 1, 2016.

¹⁶ Sudikno Mertokusumo, *Chapters on Legal Findings*, Citra Aditya Bakti, Bandung, 1993, p. 2

¹⁷ Lord Lloyd and MDA Freeman, *Lloyd's Introduction of Jurisprudence*, Steven & Son, London, 1985, p. 60

private interests) which will function as the main motor for enforcing public order (order), upholding citizens' trust in authorities (government), and upholding the authority of rulers (government) in before the eyes of the citizens of the country.¹⁸

¹² Without legal certainty, people do not know what to do and in the end, uncertainty arises which will eventually lead to violence (chaos). Upholding the law strictly and decisively is one of the efforts to maintain legal certainty, but whatever happens the rules must be upheld and obeyed by all citizens without exception. Laws are often considered cruel when implemented strictly and repressively *lex dura sed tamen scripta* (The laws are cruel, but they are).¹⁹ HLA Hart,²⁰ also states a similar thing as stating; "This is the law, but it is too iniquitous to be applied or obeyed"

Seeking a harmonious relationship between the three (especially between justice vis-a-vis legal certainty) is not a simple matter, it is not uncommon for conflicts to occur between legal certainty, benefit and justice. If we stick too much to legal certainty, then justice and benefits will be sacrificed. If we hold too much on expediency, then justice and legal certainty will be sacrificed and so on. Because of this, wisdom and the right method are needed to do it. It is man's duty to be able to "perfect" it through the interpretation of his reason. Presumably the legal philosopher of the historical school Von Savigny²¹ said; "interpretation of law is an art" (*eine Kunst, die sich ebensowenig als irgend eine andere, durch Regeln mitteilen oder erwerben lässt*). The art of reconciling and finding the best way for the three of them to get justice.

According to Kelsen, the concept of applying law with a normative-juridical method approach is clean from non-juridical elements such as sociology, politics, history, and ethics. Legal regulations are always positive (written) law.²² The conception of positive (written) law is law in reality (sollen categories) and not the law that should or aspires to (sein categories). A jurist cannot work in the field of sollen with the construction of thought and the world of sein. Thus, even though the law is *sollens* categorie (must ideal category), it is positive law (*ius constitutum*), not the ideal law (*ius constituendum*).²³ For him, law is a necessity that governs human beings as rational beings. In this case, what is being questioned by the law is not how the law should be, but what the law is. It is this normative juridical way of thinking that gives rise to the principle of legal certainty which must exist in every breath of state law products.²⁴ As the most important aspect in the legal paradigm of *rechtstaat*, the principle of legal certainty has the goal of realizing certainty in human relations, namely guaranteeing predictability in law. The principle of legal certainty as the highest principle in the *rechtstaat* has several derived principles contained in the principle of legal certainty, such as: the principles of legality, constitutionality and rule of law; the principle of law which stipulates various sets of rules on how the government and its officials carry out government actions; the principle of non-retroactive legislation; non-

¹⁸ A. Ridwan Halim, *Evaluation of Legal Philosophy Lectures*, Ghalia Indonesia, Jakarta, 1987, p. 166

¹⁹ Sudikno Mertokusumo, *Chapters*, *Ibid*, p., 3 Hari Chand, *Modern Jurisprudence*, Golden Books Centre, Kuala Lumpur, 1994

²⁰ HLA Hart in Hari Chand, *Op.Cit*, p. 54

²¹ Von Savigny in Sudikno Mertokusumo, *Invention Op.Cit*, p. 57

²² Mahmud Siregar, *Legal Theory Lecture Module: Legal Theories of Legal Positivism*. University of North Sumatra Graduate School. Medan. 2008, p. 78

²³ Mahmud Siregar, *Ibid.*, p. 79

²⁴ Law is actually oriented towards its goal, namely to realize certainty, justice and usefulness. This means that every legal norm must produce a balance between certainty (certainly, *zekerheid*), justice (*Justice, billijkheid*) and usability.

liquet basis; the principle of similia similibus (non-discriminatory in law); protection of human rights.²⁵The protection of human rights is very closely related to requests for joint property auctions after divorce in religious courts, in order to obtain justice and legal certainty, which so far has not been clearly seen and has not provided justice in society.

3.3 The Substance of Reconstruction and Normalization of the Legal Certainty Principle of Joint Assets Auctions

The substance of the bidding law should be prepared in accordance with the principles, harmony and sync with the values contained in Pancasila and the 1945 Constitution, namely deriving a number of principles to serve as the basis for establishing the latest auction law which can provide legal certainty for seekers of justice, especially applicants for joint property auctions. If we only hold on to the value of justice, then as a value it will shift the value of certainty and use, because the value of justice is not tied to legal certainty or the value of use, because something that is felt to be fair is not necessarily in accordance with the value of use and legal certainty.

Thus we must be able to make comparisons between the three values or be able to seek a compromise that is proportionately harmonious, balanced and in harmony between the three values. The validity of the enactment of the law from the perspective of its regulations is only one aspect, not the only assessment, but more than that according to the potential of the three conflicting basic values. What has been considered valid on the basis of the requirements that must be met by an auction regulation, may be considered illegitimate because of its usefulness or benefits to society.

In adjusting legal regulations to concrete events or facts that apply in society (*Werkelijkheid*), is not an easy thing, because this involves the three values of the law. Therefore in practice it is not always easy to seek comparability between these three values. This situation will have its own influence on the effectiveness of the operation of legal regulations in society, especially regulations in the field of auctions. If we talk about the value of auction legal certainty, then the value of the claim is solely the auction legal regulations or statutory regulations. In general, practitioners only look at statutory regulations or look at formal legal sources.

As is well known, auction regulations are not always perfect and it is impossible for them to completely regulate all legal requirements in society. Sometimes the rules are incomplete and sometimes the rules don't exist or are imperfect. This situation is certainly difficult for judge to try the case before him. However, in carrying out its function to uphold justice, the judge certainly cannot let the case be neglected or not resolved at all.

Based on Article 16 paragraph (1) Law No. 4 of 2004 concerning Judicial Power, which confirms "*The court may not refuse to examine and adjudicate a case filed on the pretext that the law is unclear or unclear, but is obligated to examine and adjudicate it*". Besides that, we can also see Article 22 AB which confirms "*If a judge refuses to resolve a case on the grounds that the relevant laws and regulations do not mention it, are unclear or incomplete, then he can be prosecuted for refusing to try*".

Based on the two provisions mentioned above, the judge is forced or obliged to participate in determining which is law and which is not. If the law does not regulate a case, the judge must act on his own initiative to find and explore the unwritten legal values that live among the people (*living law*). For that, he must be involved in society to know, feel and

²⁵ Mukthie Fadjar, *Type of State Law*, Bayu Media Publishing, Malang, p. 43

1 be able to explore the feelings of law and justice that live in society, especially for justice seekers.

7 Legal discovery is usually interpreted as the process of law formation by judges or other legal officers who are given the task of carrying out the law on concrete legal events. This is a process of concretization and individualization of general legal regulations by considering concrete events. Meanwhile, people prefer to use the term "law formation" rather than "law discovery", because the term legal discovery gives suggestions as if the law already existed.²⁶ This legal discovery institution will lead us to the institution of legal interpretation and legal construction. Because in making adjustments to laws and regulations with concrete events that occur in society, it cannot always be resolved by simply confronting the facts with the regulations through interpretation, but further than that sometimes judges are forced to seek and form their own law through construction by analogy. *Rechtsverfijning* and *Argumentum a contrario*.

As an example it can be stated that in Indonesian customary law adheres to the *system partriar chaat*, all assets arising in marriage belong to the husband, the widow has no right to inherit her husband's inheritance. The position of the widow in this customary law is considered inconsistent with a sense of justice, therefore the widow must be given an appropriate position in addition to the position of the descendants of the deceased's descendants.²⁷ The judge's job is to resolve each case, even if it is against the law or the law remains silent. The judge is obliged to make the settlement desired by the justice-seeking community, based on the law he has found or formed himself.

Legal construction can be carried out if a case is submitted to a judge, but there are no provisions that can be implemented to resolve the case, even though legal interpretation has been carried out. Likewise, after searching in customary law or customary law, but there is no regulation that can bring a resolution to the case. In this case the judge must re-examine the legal system which forms the basis of the legal institution concerned. If in several provisions there are similarities, then the judge makes a legal understanding (*rechtsbegrip*) in his opinion.

7 Making a legal sense is an act that seeks legal principles which form the basis of the relevant legal regulations. For example, the act of selling, giving, presenting, exchanging and bequeathing legally (*legateren*, making a testament) contains similarities. The similarity is an act that intends to alienate (*vervreemden*) or divert. Based on these similarities, the judge made a legal definition which he called *exile*. The alienation includes the sale, gift, exchange and inheritance. Seclusion is a legal action by those who do it directed to the surrender (transfer) of an object. Elements contained in both sales, gifts, exchanges and legal inheritance. Such a judge's action is known as the act of carrying out legal constructions. Judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that live in society and in considering the severity of the crime, the judge must also pay attention to the good and evil characteristics of the accused.

All people who still recognize unwritten law, and are in a period of turmoil and transition, judges are formulators and diggers of legal values that live among the people. For that he must plunge into the midst of society to know, feel and be able to explore the feelings of law and sense of justice that live in society. Thus the judge can give a decision in accordance with the law and the sense of justice in society. The good and bad characteristics

²⁶ Van Eikema Hommes, "Logika en Rechtsvinding", (without city: Vrije Universiteit, without year), p. 32.

²⁷ See, the Supreme Court in its Decision of November 2, 1960, Reg. No. 302 K/Sip/1960.

of the accused must be considered by the judge in considering the sentence to be imposed. A person's personal circumstances need to be taken into account in order to provide an appropriate and fair punishment. Such personal circumstances can be obtained from information from people from their environment, neighborhood associations, psychiatrists and so on.²⁸

The notion that judges are nothing but mouthpieces of laws or mere mouthpieces (*La bouche qui prononce les paroles de loi*) have been abandoned, or are no longer embraced and have long been abandoned. According to van Apeldoorn, the judge must adjust (*waarderen*) laws with concrete matters that occur in society and judges can add (*aanvullen*) laws if necessary. The judge must adapt the law to concrete matters, because the law does not cover all events that arise in society. Don't legislators just set a general guideline for life? Considerations regarding concrete matters, namely adjusting the law with concrete matters are left to the judge.²⁹

The judge's decision in joint property cases can add to the law because legislators are always left behind in new events that arise in society, especially justice seekers in the field of joint property. The law is a "moment name" course, i.e. a "moment name" of the state at the time of creation. Based on these two facts, it can be said that the judge also participates in determining which is law and which is not or in other words the judge carries out *rechtsvinding*. Scholten stated that executing the law was always "rechtsvinding".

The independence of the judge in discovering and forming the law, and being able to determine which is law and which is not or in filling in the blank space in the law, is not contrary to the law, because such a judge's decision only applies to the parties. Only and does not apply as a general rule. However, the judge's decision based on the law he found, under certain circumstances and at a certain time, can be followed by other judges in the same case and eventually becomes a permanent jurisprudence and at the same time a formal source of law. The position of jurisprudence in Indonesia is very different from a judge's decision which is *Precedent* as found in England and America, as stated by Gray. Gray's theory is known as the theory that a regulation only becomes a legal regulation if that regulation has been included in a judge's decision. Gray's assumption is based on trials carried out in England, in the United States and in South Africa and are referred to as precedent trials (*Precedenten rechtspraak*).

Thus it can be concluded: 1). Law as a rule, and regulations that can regulate its structure, institutions, and legal processes; 2). Law can benefit society, provide justice for society, and law can act as a means of social engineering; 3). The law must be able to make a balance between justice, usefulness, and legal certainty; 4). The law can strive proportionally between harmony, balance and harmony; 5). People must be able to enforce the law that guarantees legal certainty. From the explanation above, it is necessary to have legal regulations, especially regulations in the field of joint property auctions which can provide legal certainty for the parties requesting the joint property auction in the Religious Courts.

3.4 Scope of Reconstruction and Normalization of the Legal Certainty Principle of Joint Assets Auctions

²⁸ See, Explanation of Article 28 of Law no. 4 of 2004.

²⁹ E. Utrecht, Op. cit, p. 230.

Reconstruction in its scope includes updating the arrangement in the field of auction law based on Pancasila, which lays down the principle of balance as a guide for action, so based on the principle of balance-harmony-harmony, every government action must maintain balance-harmony from various dimensions, including the relationship dimension between the interests of the government and citizens as well as the interests of the Central Government and Regional Governments, in order to achieve regularity-harmony-balance in controlling the administration of the state. This is a characteristic and basis based on the rule of law of Indonesia as stated by Philip M. Hadjon,³⁰namely: harmonious relationship between the government and the people, functional and proportional relationship between state power, dispute resolution through deliberations and the judiciary as a last resort, as well as a balance between the rights and obligations of the parties to litigation in court, especially in the Religious courts.

Therefore, every government action must be able to guarantee the two previous principles with legal certainty (according to the principle of legal certainty based on applicable legal provisions, decency and fairness, which is formulated according to the principle of accuracy (according to the principle of accuracy in considering all aspects, both legal and the facts on the intended action are complete, so that the intended action is complete, so that government actions are not carried out arbitrarily (according to the principle of prohibition to act arbitrarily, which is based on honesty and openness in the democratic principles of government administration (according to the principle of honesty and openness, cause that every government action can give trust and appreciation to the community through various products of legislation and permits (in accordance with the principles of trust and hope, in order to grow the values and attitudes of the apparatus (*overheidsgedrag*) serving (*diensbaarheid*) and trusted (*betrouwbaarheid*) according to JBJMten Berge.³¹

By adapting the principles of just and proper government as described above, it can be said that the principle of justice in administering government in Indonesia basically also contains the principles of administering the public interest, balance, legal certainty, accuracy, prohibition acting arbitrarily, honesty and openness, as well as the principles of trust and hope. This principle of justice must contain "legal justice" broadly, not just formal positivistic-legalistic, because in the view of Theo Hujibers,³²who quoted the opinion of scholastic philosophy, said that "law" must contain justice itself (*ius quia iustum*), which has the core of an order that is harmonious. Justice, because it is a noble ideal or value that must be upheld, is used as a value in measuring and formulating the principles or principles of the Indonesian government, because justice is the cornerstone and character that is coveted in the life of the state and government.³³because it is a complete goodness.³⁴Therefore, the nature of justice is more appropriate to be placed on fair judges, fair rule makers, fair government, fair rule-making, fair government, fair officials. These kinds of principles or

³⁰ Philipus M. Hadjon., 1987 *Legal Protection for the People in Indonesia*, Surabaya. PT. Science Development, p. 85

³¹ JBJMten Berge, in the writings of De Persoon In Het Bestuursrecht, as quoted by Philipus M. Hadjon, et.al (Compilation Team), 2010. *Administrative Law and Good Governance*, Jakarta, Trisakti University Publisher, p. 9

³² Theo Hujibers, 1982, *Philosophy of Law in the Trajectory of History*, Yogyakarta, Kanisius Foundation, p. 79 (Rahardjo, 2012)

³³ SFMarbun, Op. cit, p. 278

³⁴ The Liang Gie, 1993, *Justice as a Foundation for the Ethics of Indonesian Government Administration*, Yogyakarta, Liberty, p. 49-50

principles of just government can be explained and realized, in the form of making regulations (regelung), making decisions (beschikking), as well as in various forms of material government action (materieledaad or feitelijkhandelingen), both formally and procedurally as well as the substance of the action.³⁵ Substantial-essential governance and regulation will appear in the relationship between regulators and those who are regulated, both in the internal context of ongoing cooperation, and externally between individual administrative subjects and the state as an object to be served, so that it manifests itself in the functional relationship of government itself. ³⁶in order to realize the goals of the state which are based on law, decency and justice. Philipus M. Hadjon³⁷ argues that the principle of government according to law (rechmatig bertuur), especially concerning the issuance of state administration decisions, must be in accordance with the principle of acting according to laws and regulations (wetmatigheid) concerning authority, procedure and substance, and must be in accordance with the general principles of governance which is good as unwritten law, which according to the author includes the principles of obedience and justice.

3.5 The Process of Realizing the Reconstruction and Normatization of the Legal Principles of Joint Property Auctions

Reconstruction and Normatization of the Legal Certainty Principle of Auctions" as the title of this scientific paper presupposes a new awareness regarding the orientation of legal studies in auction law. As is well known, the positive law rules governing existing auctions do not support the development of auctions, as a buying and selling institution and do not provide enough protection for the interests of the auction applicant's rights over joint property.³⁸ because the existing auction laws are irrational, in particular auction regulations lack a general "normative" quality, have not been able to solve all practical problems of a legal nature, as evidenced by the many variations of legal considerations and judges' decisions regarding auctions, regarding bidders, regarding legal consequences from the implementation of the auction, regarding the results of the auction, all of which are different for each decision with the same problem regarding the cancellation of the auction, so that there are various judge's decisions that do not clearly provide a form of legal protection for the auction applicant, because of dualism in several auction decisions being canceled and several auction decisions are not cancelled. If you look at the decisions of the cancellation of the auction, whether the judges of first instance, judges of appellate level,

Legal protection for the auctioneer means that there is legal certainty over the rights of the auctioneer to the joint property being requested through auction. In canceling an auction based on a court decision, the principle that is not visible in the implementation of the cancellation of the auction by a court decision is the principle of legal certainty of the right of the auctioneer and the balance between the principle of legal certainty of the right of the auctioneer and the principle of legal certainty.³⁹ In order to have the principle of legal certainty and the principle of balance in the implementation of auctions, it is necessary to think about the concept of laws which stipulate that each applicant for an auction of joint

³⁵ SF Marbun, Ibid, p. 279

³⁶ HMFaried Ali, *Administrative Philosophy*, Jakarta, PT. Raja Grafindo Persada, 2004, p.3

³⁷ Philipus M. Hadjon, *General Principles of Good Governance (Algemene Beginselen Van Behoorlijke Bestuur)*, Published in Peulus Effendi Lotulung, *Association of Papers on General Principles of Good Governance (AAUPB)*. Jakarta-Bogor, Lemlitibang HAN, 1994, p.119

³⁸ Retnowulan Sutantio, *Final Research Report on Legal Protection for Credit Guarantee Execution*, (Jakarta: National Legal Development Agency, Ministry of Justice, 1997/1998), p. 38.

³⁹ Mariam Darus Badruzaman, et.al, *Compilation of Engagement Law*, (Bandung: Publisher Citra Aditya Bakti, 2001), p. 66.

assets submitted through the court must be able to be implemented and be able to provide legal certainty.

In that context, research on Reconstruction and normativization of the principle of fair legal certainty associated with auction implementation is considered important because the development of an auction for an auction object was canceled by a court decision, resulting in no certainty of the rights of the auctioneer over joint assets. The second reason is that this research is the basis for studying the development of auctions by the private sector which is still limited to non-mandatory auctions or voluntary auctions towards a minimum role for the government in carrying out auctions, by giving more of the role of carrying out auctions by the private sector, especially examining whether it is possible to carry out auction executions by private parties. private sector, this requires certainty of the rights of auction buyers. third reason.

4. CONCLUSION

The construction of the legal certainty principle of fair auctions for joint assets after divorce decisions in the Religious Courts in Indonesia is based on values and a legal basis which includes justice, legal benefits and legal certainty originating from Pancasila, the substance of which is related to decisions that have a legal basis value in enforcement law, and its scope includes the auction of joint assets, as well as the process of realizing the creation of justice which provides legal certainty to the parties applying for the auction of joint assets after the divorce decision in the religious court in Indonesia. In legal problems regarding the application of the legal certainty principle of fair auctions for joint assets after divorce in the Religious Courts based on Indonesian laws and regulations. Differing views were expressed regarding the position of joint assets that were being pledged but were still being sued in court. One new concept offered related to joint property dispute resolution whose object is being pledged is the concept of asset settlement or settlement/settlement of assets with husband and wife with remaining unpaid debts. In this concept, the roles and good intentions of both parties are directed in such a way that without going through a process of execution by courts and/or public auctions, this research is intended as a legal renewal of fair auctions for joint assets. This is because the legal norms in the form of written laws and regulations do not regulate the protection of the rights of the bidder for joint assets. -principle of auction, renewal of auction processes and reform of auction institutions. Renewal of the principle can be carried out by shifting towards a balance of the legal certainty principle of the auctioneer for joint assets after the divorce decision in the Religious Courts in Indonesia. In order to realize legal protection and certainty, especially for joint property auction applicants, in the future an auction renewal will have to be carried out including updating the auction rules and principles, updating the auction process and updating the auction institutions. Renewal of the principle can be carried out by shifting towards a balance of the legal certainty principle of the auctioneer for joint assets after the divorce decision in the Religious Courts in Indonesia. In order to realize legal protection and certainty, especially for joint property auction applicants, in the future an auction renewal will have to be carried out including updating the auction rules and principles, updating the auction process and updating the auction institutions. Renewal of the principle can be carried out by shifting towards a balance of the legal certainty principle of the auctioneer for joint assets after the divorce decision in the Religious Courts in Indonesia.

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