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Faculty of Law, Sultan Agung Islamic University
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"Legal Reconstruction in Indonesia Based on Human Right"

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Legal Reconstruction in Indonesia Based on Human Right

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Recontruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice

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Abstract

This research aims to describe of the reason of problems that occur in the auction, especially in in determining prices based on limit values, and provide thoughts on the need for reconstruction in mortgage rights regulations and auction execution of mortgage rights.

This research uses the paradigm of contructivism or legal contructivism, with a type of descriptive legal research. The method used is a empirical normative research methods, by using primary and secondary data. This research uses qualitative analysis.

The results of this research are, that the reason of the determination of auction price has not been implemented based on the value of justice because there is no standard in determining criteria, method of determining auction prices, where the full authority rests with the creditor as the auctioneer, whereas the debtor does not have any role as the owner of the object, and there is no physical evidence provided to the debtor that the assessment has been done professionally. Based on this, there is a need for reconstruction of mortgage rights execution rules and auction of mortgage rights execution based on justice values.

Keywords: mortgage rights, auction, execution

A. Introduction

The economic needs of the community, both micro and macro are increasingly increasing, as in the need for business capital or working capital, daily needs and others. In fact, in society there is a clear social gap, where one individual or group has abundant material (funds), while on the other hand there are individuals or groups who have minimal material. Whereas, in these minimal communities there is the potential to further develop the capabilities they have, like a business that is being undertaken, but lacking capital to expand his business. To support national economic growth and development,especially for the community, a bridge is needed between the owner of the excess material (funds) and those who need the material (funds) as capital or meet their needs. In this case, the bank was born as an intermediary institution, i.e. as a distributor or intermediary for parties that have excess funds (surplus of founds) with those who lack and need funds (lacks of founds).[210]Thus, funds in the owner of the fund can spin / develop and those who need funds can use the funds to support the business / life, so that it is expected to meet the ideals of the nation, namely the welfare of society.

Banks as intermediary institutions are not without risks in running their business. Moreover, the funds used by banks come from bank customers who give confidence in managing money saved, both in the form of

210 Jamal Wiwoho, 2011, *Hukum Perbankan Indonesia*, UNS Press, Surakarta, hlm. 87.

deposits, savings and others. Because banks are business activities that rely on trust, so to hold the trust of their customers, banks must be careful in running their business, especially as an intermediary institution in credit business activities. Credit business is a type of business or bank activity. This credit activity is full of risks, because the credit applicant (who needs funds) has the potential to break a promise or default, that is, not making a payment or paying off the credit. Therefore, in providing credit, banks must hold to the principle 5C (character, capacity, capital, condition of economy dan collateral), 7P (personality, party, purpose, prospect, payment, profitability, protection) dan 3 R (return, repayment, dan risk).

In addition, the most important thing to protect banks from potential debtors who are unable to meet or repay loans, the existence of collateral is an important element. The term "guarantee law" comes from the translation of zakerheidesstelling or security of law.[211] The guarantee is intended to provide a guarantee to the bank as the creditor that the funds provided in the form of credit for the debtor will return again. Beside that, guarantee institutions are supporting economic development and credit, as well as meeting the needs of the community for capital facilities.[212] The intended collateral is in the form of all debtor's property that has economic value, or commonly known as general collateral as meant in Article 1131 of the Civil Code. The provisions of this article are known as general guarantees, where the provisions of this article are that the intended guarantee is placed on all debtor's assets and the guarantee is intended for all creditors without any privileges in the case of the bill, the intention is when the debtor defaults, then the creditors must concurrency to obtain repayment of receivables carried out in a pari pasu.[213]

Today, guarantees used are not just general guarantees, but also a special guarantee that is a guarantee that directly points to the object used as collateral. This is to provide protection to creditors, where the designated object is specifically prioritized to pay off the debt the creditor has appointed. Protection becomes important, because society as human beings needs protection, even if the person concerned is a strong person (in the sense of strong energy, physical, mind, intelligence, ancestry, wealth), it still needs to be maintained and monitored continuously, so they also need legal protection[214] Likewise with banks, despite having a strong position, protection is still needed, one form of special collateral that is favored in credit practice is a guarantee with the object of land rights, known as collateral rights (HT guarantees), as regulated in the Act Number 4, 1996 concerning Mortgage Rights and Objects related to land, hereinafter referred to as UUHT. This is because land rights authorize holders to use or take advantage of the land on which the rights are attached.[215]

The use of land as a collateral object is motivated by the fact that the value of land is stable and does not decline, and the sale is easy because many people are interested. In addition, the mortgage gives other privileges to the creditor (the recipient of the mortgage), namely obtaining the authority to sell or execute the object of the mortgage right if the debtor defaults. This is because, the creditor holds a mortgage right in which there is an executive title or title that reads: "DEMI KEADILAN BERDASARKAN KETUHAN-AN YANG MAHA ESA". This executive title has the power of a court decision, so that creditors can directly execute

211 Salim HS, 2004, *Perkembangan Hukum Jaminan di Indonesia,* Rajawali Pers, Jakarta, hlm. 5.

212 Sri Soedewi Masjcheon Sofwan, 1980, *Hukum Jaminan di Indonesia, Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan,*Liberty, Ygyakarta, hlm. 3.

213 Moch Isnaeni, 2016, *Pengantar Hukum Jaminan Kebendaan,* Revka Petra Media, Surabaya, hlm. 97-98.

214 Munir Fuady, 2004, *Teori-Teori Besar (Grand Theory) dalam Hukum,* cet. Ketiga, Kencana, Jakarta, hlm. 47.

215 Effendi Perangin, 1995, *Praktek Penggunaan Tanah sebagai Jaminan Kredit,* cetakan ke-3, Raja Grafindo Persada, Jakarta, hlm. 1.

without any request or lawsuit beforehand to court. The execution is often carried out through auctions, by fulfilling several general conditions and special requirements, as stipulated in Minister of Finance Regulation Number 27, 2016 concering intruction of auction implementation, hereinafter referred to as PMK No.27/2016 jo. Perdirjen KN No.2/2017. The execution system is intended to provide protection for the debtor as the owner of the object of mortgage (the owner of the land rights) from arbitrary execution.

The legal system has provided various provisions or regulations to support the rights and obligations of the parties that must be fulfilled, even in the auction mechanism. However, the practice still remains, the implementation of the object guarantee mortgage object auction has problems. Some problems are related to selling prices that are too low. Determination of the actual auction price is determined from bids made in the auction forum. However, the limit value is one factor in determining the initial standard of bidding.When the limit value is low, the selling price is potentially low. Low selling prices, in some cases touching prices that do not make sense and make debtors feel disadvantaged, as was the case in the decision number 34/Pdt.G/2016/PN.Sbr and decision number 12/Pdt.G/2014/PN.Kbm, where the auction price is very low. This makes the auction as an institution to protect debtors from legal struggle for rights, no longer providing protection for debtors, moreover, in a number of cases, the issue of "price" is often ignored, even in court evidence there is no evidence regarding the determination of the price of a responsible limit as intended Article44 paragraph 3 PMK No.27/2016, especially in some cases, the determination of the limit value is not carried out by a professional appraiser because it is not needed, but sufficient by an assessor from an internal bank, as intended in Article 44 PMK No.27/2016.

There is no openness regarding the determination of the limit value that can be accounted for, such as related to the method, criteria used by the estimator, then this is a question, then how does the estimator determine the limit value? Did it pay attention to various aspects, so that the execution carried out was based on the value of justice? Considering execution is a forced attempt to take the debtor's rights to fulfill the creditor's rights. Justice in question is the values of justice based on Pancasila as the staatfundamentalnorm of Indonesia. This justice is very important, because of how effective a regulation is, but if it is not fair, then there needs to be reformation and it must be eliminated, as John Rawls said in A Theory of Justice, yaitu: "…likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they ar unjust".[216]Therefore, there is a need for reconstruction in regulations regarding pricing, especially the price limits based on fair value.

2.Research Methods

This research, using the paradigm used is the contructivism or legal contructivism paradigm, which belongs to the non positivism paradigm,[217]with the type of descriptive legal research, namely by providing a picture as thoroughly as possible, systematically, factually and accurately about the facts that occur.[218]The method used is to use empirical normative research methods, using primary and secondary data. This study uses qualitative analysis, in which the researcher will collect library materials and field data compiled systematically, which will then be analyzed and produce conclusions answers to the problems studied..

3.Theoretical Framework

The theoretical framework in this study, namely grand theory, middle theo-

216 John Rawls, 2003, *A Theory of Justice,* Harvard University Press, United States of Amerika, hlm.3

217 Suteki dan Galang taufani, 2018, *Metode Penelitian Hukum (Fillsafat, Teori dan Praktik*), Raja Grafindo Persada, Depok, hlm. 369.

218 Sumadi Suryabrata, 1988, *Metodologi Penelitian*, cetakan ke-4, CV Rajawali: Jakarta, hlm.19.

ry and apply theory. Meanwhile, what is meant is justice theory (grand theory), legal system theory and legal protection theory (middle theory) and progressive legal theory (apply theory). These theories help the author in providing an analysis of what form of justice in determining the auction price of mortgage rights in accordance with the legal system in Indonesia, which is able to provide protection for the parties, so as to create legal certainty. In this case, progressive legal theory can provide a basis for reconstruction, if the intended regulation requires changes to meet the needs in society.

B.Research Result and Analysis

Basically, everything that is carried out as it should or should lead to a sense of security, peace and security, and vice versa. Banks as business activities based on public trust, the bank has the responsibility to continue to hold that trust. One of them is ensuring that the credit runs smoothly. Nobody wants their credit to run not smoothly, both in terms of debtors and creditors. But in practice, this is not always the case because the debtor has the potential to default, either because the debtor wants to pay, but is no longer able to pay or repay credit, or because the debtor is able, but does not have the desire to make payments or repayments. Therefore, seeing the goodwill of the debtor at the beginning of the agreement becomes important, namely the bank before approving the loan application must learn the individual or personality of the credit applicant (prospective debtor). In addition, the ability (capacity, capital, condition of economy, prospect or, profitability) of the prospective debtor is also important, because it will be related to the ability of the debtor to pay or pay off, such as whether monthly income or monthly business profit is sufficient to make payments monthly repayment of credit.However, not infrequently, the implementation of credit becomes problematic, so it must be under special supervision. In tackling problem loans, there are 2 (two) ways or strategies that can be done by banks, namely to save credit or credit settlement.[219]

The first step taken in handling problem loans is to save credit, through a rescheduling, reconditioning and / or restructuring mechanism. However, if the three methods do not work, then the next step that becomes the last option is to settle the credit, one of them by executing against the collateral object. In the implementation of loans with guaranteed mortgage rights, the intended execution can be through by auction (Article 6 jo. Article 20 paragraph (1) UUHT) or through an underhand sale by the debtor based on the creditor's approval (Article 20 paragraph (2) UUHT). Because banks must maintain their credibility, the handling of problem loans must also be handled quickly and accurately, so that the execution most often used is through auctions. The auction conducted is a type of execution auction, so the implementation must go through the KPKNL and carried out by class I auction officials.

The auction itself must be carried out in accordance with general and special requirements. For the auction of execution of mortgage, the general and special requirements are the documents referred to in Article 5 jo. Article 6 paragraph (5) Perdirjen KN No.2/2017.In the event that all documents have been fulfilled and complete, the Head of KPKNL may not refuse to carry out the auction. Next, the schedule for auctioning and announcing the audience is given. Simply put, conducting an auction in accordance with the laws and regulations certainly provides justice for the parties. However, in fact, it does not always run smoothly. For one thing, auction prices are low and unnatural.

Article 44 PMK No. 27/2016 provide arrangements, that the determination of the limit value is determined by the appraiser or assessor, where the determination of the limit value is determined by the appraiser (professional / appraisal) when the limit value is at least Rpl.000.000.000,00(one billion rupiah)

219 Jamal Wiwoho, 2011, *Hukum Perbankan Indonesia*, UNS Press, Surakarta, hlm. 105

or the creditor bank will be a participant in the execution auction, conversely, if there is no such event, then the seller will determine the limit value. In executing the guarantee rights, the seller in question is the creditor bank and the interpreter is the bank's own internal party. One of them, as is the case for the position in the decision number 34/Pdt.G/2016/PN.Sbr, where debtors complain about auction prices that are far from market prices. However, until the verdict is read, there is no evidence of the assessment that has been carried out that can be accounted for, such as the assessment criteria, the methods used, how to calculate and what standards are used.Indeed, the assessment evidence does not matter in the terms of the auction, bearing in mind that the report on the determination of the limit value only applies if the determination is made by the appraiser, as intended Article 6 paragrapf (4) letter a number 8 Perdirjen KN No.2/2017. Such implementation gives a sense of injustice to the debtor, as the owner of the object of the auction because there is no evidence of the estimator's report that can be accounted for, which shows that the determination of the limit value is not arbitrary. In addition, there is no involvement of the debtor in the auction, especially in determining the limit value, the bank as a creditor must act professionally in order to give the debtor confidence.

Whereas in conducting the auction, it is also necessary to pay attention to the principles of the auction, as Yahya Harahap's opinion was quoted by Rachmadi Usman, namely the principle of openness (transparency), the principle of competition (competition), the principle of justice, the principle of legal certainty, the principle of efficiency, and the principle of accountability.[220]Therefore, in fulfilling these principles, the auction must be carried out with an announcement in advance to fulfill the principle of openness, in addition to the auction being scheduled so as to be able to streamline the time available and conduct the auction guided by the auction officer where the person concerned is responsible for the auction being carried out. In conducting the auction, each participant is given the same rights in bidding, so that the competition that remains remains on the safe track and the auction winner is given auction minutes as proof that the person concerned is the buyer, so that legal certainty is created.

The principle of justice becomes one of the important principles, in which in the auction must create "justice" that is not only between the seller (creditor) and the buyer, but also to the debtor as the owner of the object of mortgage security (the owner of the land rights). Because, when there is no justice, then the regulations or regulations that govern also need a change or reconstruction, as said by John Rawls, namely: "justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they ar unjust".[221]

Regarding fairness itself can be different when viewed from different sides and being fair does not mean providing satisfaction to the parties concerned, but ensuring certainty and protection of rights and obligations that are balanced in order to provide justice. It's also a fact, where when one party feels fair, then there is another party who feels unfair.

In conducting auctions, justice can be realized from the application of the values of justice contained in Pancasila. The formulation of the values of justice contained in the values of Pancasila, namely fair means must be equal and proportionate, fair means to be balanced and fair, fair means to provide guarantees for the fulfillment of basic rights, fair means having to carry out rights and obligations in the law consistently and

220 Rachmadi Usman, 2016, *Hukum Lelang*, Sinar Grafika, Jakarta, hlm. 25.
221 John Rawls, 2003, *A Theory of Justice,* Harvard University Press, United States of Amerika, hlm.3

fairly and fairly means being aspirational.[222]

As the community develops, exploring the value of justice based on Pancasila in determining auction prices becomes a necessary thought. Like progressive legal theory, according to Satjipto Rahardjo, progressive law refuses to maintain the status quo in terms of law.Therefore, in the absence of a fair value in determining the auction price, especially in terms of determining the limit value by the estimator, it is necessary to reconstruct the auction rules. The reconstruction in question, namely:

1. Add a clause to Article 20 paragraph (1) UU HTrelated to execution through auction, that can be added to the letter b, namely "... the object of the Mortgage is sold through a public auction in accordance with the procedures specified in the legislation for the settlement of the right holders' liability with the prior rights of the other creditors **based on values of justice** ".

2. Addition to the provisions of Article 44 PMK No.27/2016 yaitu penambahan ayat (5), yaitu: "metode yang dapat dipertanggungjawabkan oleh Penjual yang dimaksud pada ayat (3) yaitu berdasarkan Standar Penilaian Indonesia tau SPI"

With the affirmation as above, justice will be created, in which the determination of the limit value that is considered "low and unnatural" by the debtor can be proven with evidence that can be accounted for, so as to minimize debtors' suspicion in conducting auctions at low prices.

C. Conclusion and Advice

The auction of execution of mortgage rights often does not run smoothly as the law has set it. One of the factors is the low auction price due to the small limit value, which is able to influence the bid. Moreover, from some of the cases that have been mentioned, the evidence of the assessment report by the bank is not shown in the verification process which is able to give rise to the assumption that the assessment that has been done cannot be accounted for, because there is no physical evidence related to the assessment criteria, the methods used, how to calculate and standards what is used. Therefore, in order to emphasize and provide justice for the parties, it is necessary to reconstruct some of the provisions regarding the auction listed in Article 20 UUHT and article 44 PMK No.27/2016.

As for the suggestions that can be delivered, namely, it is expected that the reconstruction of mortgage rights and auction regulations that promote the values of justice and certainty for the parties, as well as for creditors to fulfill their obligations in determining the limit value that can be accounted for, which can be opened to the debtor in order to create transparency.

222 *Ibid.,* hlm. 212-218.

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Peraturan Direktur Jendral Kekayaan Negara Nomor 2/KN/2017 tentang Petunjuk Teknis Pelaksanaan Lelang.

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