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Legal Values Contained in Society as Exit Emergencies in the Deciding Ratio Process that Produces Judge Made Law in Bankruptcy Law

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Abstract
Bankruptcy law in Indonesia has special characteristics compared to other fields of law. Article 2 Paragraph (1) is the basis for the bankruptcy decision, and the decision is an immediate decision (uitvoorraad bij voorraad). So that when a bankruptcy decision occurs, the curator supervised by the supervisory judge immediately executes the bankruptcy estate for management and/or settlement of the bankruptcy estate. The simple requirements of Article 2 Paragraph (1) apply to debtors who are solvent or not. If the debtor is no longer solvent, the bankruptcy law can be applied as a solution by the debtor and creditor. However, if the solvent debtor, namely the assets of the company/individual, is much larger than the debt, other problems will arise. Due to the fact that, the bankruptcy law in Indonesia is not required for a solvency test before the application, therefore it will be very detrimental to the debtor and creditors, because the bankruptcy requirements are very simple, and the bankruptcy law appears to be scary for the solvent debtors.Debtors' fear of the application of bankruptcy law should not occur if they interpret Article 8 Paragraph (6) letter a which states “The court decision as referred to in Paragraph (5) must also contain; a. certain articles of the relevant laws and regulations and/or unwritten sources of law used as the basis for adjudicating…”. With the enactment of Article 8 Paragraph (6) letter a opens an opportunity for solvent debtors to avoid bankruptcy. Article 8 Paragraph (6) can be used as an emergency exit for a judge made law process. Therefore, the researcher analyzes the values of justice in society as an emergency exit in the process of judge made law, if the debtor is still solvent. The problems raised in this study are: how do judges in their legal considerations (ratio decidendi) make judge made law as an emergency exit for debtor.This research belongs to a normative legal research. The researcher applies some theories, namely the theory of legal objectives that originate from the three general teachings of Gustav Radbruch and the theory of the legal system of Kees Schuit. The approaches used are the conceptual approach, the historical approach, the statutory approach, the comparative law approach and the case approach. This research is expected to have prescriptive value for the legal world in the future, especially bankruptcy law.
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I. Background

Bankruptcy law, in its regulation, contains formal law which is coercive (dwingendrecht). This coercive law cannot be deviated since it is based on legal certainty, namely the guarantee of security provided by the state for justice seekers (justiabelen), where the sense of justice (principle of justice) is the goal of the law itself. Likewise, the law must also be benegicial for the justiabelen, the expediency and legal certainty are instruments of justice. It is in accordance with the theory of 3 (three) general teachings of Gustav Radbruch and his shifting teachings on certainty, expediency and justice.[1] These three theories is also related to the theory of the legal system[2] namely the ideal element, law is about meanings; operational elements, the law is about the authority in the law itself; and the actual element, the law in the actual setting; How this law can be applied fairly in society is contained in court decisions that have permanent legal force (Inkracht Van Gewisjde).

The coercive nature of the formal law in bankruptcy law (*dwingendrecht*) is obviously illustrated in Article

1 Ivida Dewi Amrih Suci, *Hukum Kepailitan Karakteristik Renvoi Prosedur dalam Perkara Kepailitan*, Laksbang Justitia, Yogyakarta, 2020, pp. 14-16
2 *Ibid*, pp. 11-13.

2 Paragraph (1) of the Bankruptcy Law which is stated as follows: "Debtors who have two or more creditors, and do not pay off at least one debt that is due and can be collected, are declared bankrupt by a Court decision, either at its own request or at the request of one or more creditors." Basically, an application for a bankruptcy decision has a simple nature and simple evidence

According to Prof. Hadi Shubhan in his scientific speech at the inauguration of his professors, stated that bankruptcy must meet 2 (two) cumulative conditions, namely, the debtor has one debt that is due and can be collected, and the second is that the debtor has at least 2 (two) creditors, and one additional material condition is that it must be proven in a simple way. The condition for this petition for bankruptcy is expressis verbis which means words stated expressly in Article 2 Paragraph (1) as well as Article 8 Paragraph (4) of Bankruptcy Act.[1]

By this simple requirement with the principle of a fast trial, the debtor can be declared bankrupt immediately. However, with very simple requirements, the judge can still reject the bankruptcy petition against debtors who are still able to pay their debts (solvent). It is done by the judge's legal considerations (ratio decidendi) which is quite adequate, namely based on Article 8 Paragraph (6) letter a of the Bankruptcy Law, which states: "The Court's decision as referred to in paragraph (5) must also contain: a. certain articles of the relevant laws and regulations and/or unwritten sources of law that are used as the basis for adjudicating…" This article can be interpreted as an emergency exit for judges in examining cases for debtors who are still very solvent with an unwritten legal basis, namely the law of the values contained in society, which include decency values, moral values, fairness values and religious values.[2]

By the above elaboration, the research problem is found, namely "How Judges in Their Legal Considerations (Ratio Decidendi) Make Judge Made Laws as Emergency Exit for Debtors" ?. The research made is a normative research that starts from the legal concept of the bankruptcy law norm. The theory used is the theory of 3 (three) general teachings of Gustav Radbruch and the theory of the legal system of Kees Schuit, as well as the theory of legal values in society from Konrad Kebung. The approaches used are conceptual approach, statutory approach, historical approach, comparative law approach and case approach. Thus, this research is entittled **"Legal Values Contained in Society as Exit Emergencies in the Deciding Ratio Process that Produces Judge Made Law in Bankruptcy Law".**

II. Discussion

The Judges of Legal Considerations (Ratio Decidendi) Make Judge Made Laws as Emergency Exit for Debtors"

a) Meaning of Justice Value

Values in the Big Indonesian Dictionary are defined as: traits (things) that are important and useful for humanity[3]; and justice means:"fair and just nature (action, treatment, etc.), and justice means: 1. impartial; 2. Support the right side, holding on to the truth; 3. duly; not arbitrary"[4]. Therefore, the value of justice means traits or things that are important and useful for humanity that are impartial, not arbitrary, adhering to the truth and what is appropriate. Where in legal scholarship the value of justice is the value of justice that is not arbitrary, appropriate and adheres to the truth. Thus the value of justice that is not arbitrary and appropriate in the science of law, can be taken from the values that have been decided by the judge. Where the values of justice have gone through a fact check, namely the verification process and have been concluded through the judge's consideration *(ratio decidendi*) as material for a decision.

The discovery of the law by a judge whose testing is in the actual case, and through verification which then results in the judge's consideration (*ratio decidendi*), which in the end also produces a decision (vonnis). The judge's legal discovery (judge made law) is necessary for a consideration on the basis of a statutory regulation as a guideline. The judgment it is not value-free, because in his judgment the judge also considers the values contained in society, because the laws governing which are state products to create a sense of security in the community which also contained in the principle of legal certainty, sometimes do not regulate problems in society. However, in analyzing the legal considerations, the judge must also apply values that are not related to the law, such as being free from political pressure, values that are not related to the law, etc. in addition, it must also consider the values contained in society. Therefore, the value-free are distinguished between legal discovery by judges and scientific testing in legal discovery by a legal scientist which is a doctrine used by a judge in legal considerations. It can be analyzed in the judge's decision, namely:

1. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor: 77/Pdt.Sus-*Renvoi* prosedur/2015/PN.Niaga.Jkt.Pst jo. Nomor:77/Pdt.Sus/PKPU/2015/PN.Niaga.Jkt.Pst jo.Nomor:77/Pdt.Sus/Pailit/2015/PN.Niaga. Jkt.Pst.
2. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor: 406 K/Pdt.Sus-Pailit/2015,

1 Hadi Shubhan in Ivida Dewi Amrih Suci, Monitorsnetwork.com, Tuesday, August 16, 2022.
2 *Ibid*, Monitorsnetwork.com
3 Department of Education and Culture , *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, p. 615.
4 *Ibid*, pp. 6-7.

tanggal 7 Juli 2015.

3. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor 940/Pdt.Sus/2010 tanggal 11 Februari 2011.
4. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor: 216 K/Pdt.Sus/2011 tanggal 28 Juli 2011.
5. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor: 623/Pdt.Sus/2010, tanggal 11 Februari 2011.
6. *Ratio Decidendi* Putusan Mahkamah Agung Republik Indonesia Nomor: 022 K/N/2005, tanggal 29 November 2005.

The value-free problem can be solved by distinguishing between the context of discovery and the context of justification. Context of discovery means the context in which knowledge is found. It always develops in the context of space, time and social. The birth of science is determined by certain context. In this context, the desires, personal, social, cultural and political interests that drive scientific research can be seen. There are values included in it: religious, morals, traditions and other values. Likewise, scientific activities are made not only for purely scientific interests, but also for something outside of science, for example, for the sake of human safety, appreciation, ideological, cultural, economic, and similar factors.[1]

In the context of justification, scientific testing of scientific activities is made. What is important there is the data or facts and the validity of the scientific method used, without the need to consider external criteria (empirical evidence and logical-rational reasoning in proving the truth of a new hypothesis). Through this distinction, in the context of justification, science must be value-free. The purpose of the distinction is to protect the objectivity of the end result of scientific activity for the sake of scientific autonomy. As a consequence, the following conclusions can be drawn:

1. The scientific goals of scientific research must be distinguished from the personal and social goals of scientific research. The aim of science is to obtain only objective clarity and truth.
2. Scientific progress must be distinguished from social progress in general, although the two influence each other. However, scientific progress has to do with the objective attainment of truth.
3. Rationality, scientific rules and criteria are only concerned with evaluating the truth with empirical and rational evidence. Various other aspects are also important, but not relevant to have scientific truth.
4. In relation to the empirical sciences, the assessment of the results of scientific activities is only based on empirical success or failure, namely the presence or absence of facts that support conclusions.
5. Only scientists have the authority to make judgments about facts and data, and about the truth of research results.[2]

Ethics is etymologically derived from the word ethos which means custom, habit, character, or morals. In philosophy, ethics talks about human behavior or actions in terms of good and bad, and ethics is discussed scientifically the same as moral philosophy. Good and bad is an assessment of what can be seen and felt such as actions, behavior, movements and words. While many other aspects concerning motives, character or conscience are difficult to assess. There are also various divisions in ethics that can be concluded in two types, namely descriptive ethics and normative ethics. Descriptive ethics only describe, explain and tell things as they are, and do not provide judgments or provide guidelines for how to act. Normative ethics, on the other hand, has provided good and bad judgments, which should be made or not. Normative ethics can be general if it proposes general principles that must be followed, such as values, motivation for an action, conscience, etc. Specific normative ethics relate to the implementation of the general principles above, such as social ethics, work ethics, and others.[3]

Moral derives from the Latin word *Mos* (G: Moris) which means custom or way of life. Ethics and morals have fundamental differences although in everyday use people often confuse the two. Morals relate to the principles of how people should live and act, and all of these usually come from a statute, laws and regulations that govern our behavior. While ethics is more of a deep philosophical-critical thinking about morality. It can also be seen that morality is judged based on whether or not the law or regulations are implemented properly, even though ethics is more of a science of moral teachings, and how people take a responsible attitude when dealing with various moral teachings. Ethical attitude is seen as an attitude that is based on free will, our awareness and responsibility to judge something that is normative.[4]

The general norms of scientific ethics always apply to all scientists. A scientist should not be influenced by cultural systems, political systems, traditional systems or anything that deviates from the real purpose of science. In addition to general scientific ethics that apply to all scientists, there are also scientific ethics that apply only to certain groups of scientists, for example, medical ethics, business ethics, politicians, and other professional ethics that are normatively understood by that particular group. This kind of scientific ethics can free people from

1 Konrad Kebung Ph.D., *Filsafat Ilmu Pengetahuan*, Prestasi Pustaka Publisher, Jakarta, 2011, p. 235.
2 *Ibid*, pp. 235-236.
3 *Ibid*, p. 238.
4 *Ibid*, pp. 238-239.

various kinds of anxiety over the development of science and technology, and on the contrary bring people to joy, determination and happiness in their own lives. Scientific ethics (in Indonesia) intends to uphold human values, science and technology so that the citizens of the nation are able to maintain their dignity, stand for the truth in order to achieve progress in accordance with religious and cultural values. This ethics is manifested personally or collectively in the initiative, creativity and work which is reflected in creative, innovative, inventive and communicative behavior, in reading, studying, researching, writing, creating and creating a conducive climate for the development of science and technology.[1]

The values of justice used in this study are the values of justice in the judge's legal considerations (*ratio decidendi*). Because in the *ratio decidendi*, the values of justice that have been considered by the judge will grow by examining the facts on the ground (actually) by examining the case in evidence and claims/applications and answering answers. The values of community justice that can be used by judges in their cases involve ethics and morals. The notions of morals and ethics are equivalent or identical, because morals involve human morals, morals are related to decency, while ethics related to a clean conscience, or morals is ethics in a narrow sense.[2] Ethics comes from the Greek *ethos* which means custom, in Arabic it is called *akhlaq* which means character.[3]

A person's actions violating moral values can also be interpreted that the act violates the ethical values and norms that apply in society. Values are related to hopes, ideals, desires and all things internal (inner) human considerations. Values can be subjective or objective. It is objective when the value is given by the subject (in this case humans are the main supporters of the value), and is objective if the value is "attached" to something, "apart" from human judgment. In order values can be more useful in guiding human attitudes and behavior, they need to be concreted and formulated to be more objective, making it easier to describe them in concrete behavior. Thus, the concrete form of value is the norm, which is always related to morals and ethics.[4]

Morals[5] contain integrity (sincerity, honesty) and the dignity of the person. In other words, the level of a person's personality (dignity) is largely determined by the morality. Meaning that the moral of a person's personality is reflected in his behavior. It shows that we come to the realm of norms as a guide to human attitudes and behavior.[6]

Moral and ethical are closely related, even sometimes the two things are equated. These two things have differences. Moral is a set of teachings or discourses, standards, a collection of rules, both oral and written about how a human being must live and act in order to become a good and virtuous human being. While ethics is a branch of philosophy, namely a "critical and fundamental thinking" about the teachings and moral views. In other words, ethics is the science of morality. Decency is identical with the notion of morals, so that ethics is essentially a science that discusses the principles of morality. According to Bruggink, ethics is a theory about morals, namely as a whole of rules and values. The term ethics is often used as a distinctive word by scholars to refer to intellectual reflection on morals. Thus, ethics is meta-moral thinking, thoughts and discussions about morals.[7]

Ethical authority is seen as being in the hands of those who provide moral teachings, so that ethics are not authorized to determine what a person may or may not do. Herein lies the lack of ethics compared to moral teachings. However, in ethics one can understand why and on what basis humans must live according to certain norms. This last point is the advantage of ethics when compared to morals. It can be analogous to that of moral teachings as a guideline, for example, treating motorcycles well, while ethics gives us an understanding of the structure and technology of motorcycles themselves. This is the systematic relationship between values, norms and morals which lead to a practical behavior in human life.[8]

The meaning of the values contained in society is based on the value of propriety, moral values and religious values. Properness means appropriateness; suitability; compatibility[9]. The value of propriety is "Things that are important and useful to humanity about decency, suitability, worthiness and suitability. Thus, in every action other than the rules that have been set, the feasibility and suitability of what was done or done shall also be considered. Morality means matters of morality (1. Good manners; civilized; polite; orderly; 2. Good customs; courtesy; politeness); related to etiquette and manners.[10] So the value of decency is about the qualities or things that are useful and important for humanity about decency, order, good customs, good manners and also being civilized. Then religious means being obedient to religion; pious; while religion means "religion, piety can

1 *Ibid*, pp. 241-243.
2 Soerjono Soekanto in Abintoro Prakoso, *Filsafat Ilmu dan Ilmu Hukum*, Laksbang Justitia, Yogyakarta, 2019, p. 213.
3 Abintoro Prakoso, *Ibid*, p. 213.
4 Kaelan dalam Abintoro Prakoso, *Ibid*, p. 213.
5 *Ibid.*
6 *Ibid*, pp. 213-214.
7 Bruggink in Abintoro Prakoso, *Ibid*, p. 214.
8 Kaelan in Abintoro Prakoso, *Ibid*, p. 215.
9 *Op. Cit*, KBBI, p. 655
10 *Ibid*, KBBI, p. 874.

be obtained through education. [1] Thus, religious values are traits or things that are important and useful for humanity regarding obedience to religion through good education.

Some of the values contained in the community are part of the actions that should be carried out in every human behavior or society in Indonesia with good customs, manners, adaptability, conformity, order, suitability, appropriateness, feasibility, obedience to religion with good education. If it is interpreted as an act that produces a law, then these values must also be the basis for a legal discovery or the basis for making the rule of law. Likewise, judges who also have the authority to find the law in the actuality of the rules that have been set or norms that have been enacted must also make the values in the community the basis or foundation.

Bankruptcy law also opens up opportunities for judges to make the values contained in society as the basis for their legal considerations (*ratio decidendi*) to make their decisions. It is stated in Article 8 Paragraph (6) letter a, which states that "The Court's Decision as referred to in paragraph (5) must also contain: a. certain articles of the relevant laws and regulations and/or unwritten sources of law that are used as the basis for adjudicating…". It is an emergency exit for debtors who are still able to pay their receivables so as not to be declared bankrupt, even though Article 2 Paragraph (1) clearly stipulates simple requirements regarding bankruptcy applications.

b) Authority in the Commercial Court

Bankruptcy cases are examined by the panel of judges (not by a single judge), both at the first level and at the cassation level. Regarding the panel of judges, it is implied in Article 8 Paragraph (6) letter b which states that "legal considerations and opinions differ from the member judges or the chairman of the panel". Thus, it is the panel of judges in the commercial court who has the authority to examine bankruptcy cases.

The authority to make decisions based on Article 91 which states "All decisions regarding the management and/or settlement of bankrupt assets are determined by the Court at the last level, unless this Law provides otherwise", and also based on Article 92 namely: "All decisions regarding the management and/or or settlement of bankrupt assets which is also determined by the judge can be carried out first, unless this Law provides otherwise". Thus, the authority to adjudicate in applications for stipulations and applications for bankruptcy decisions is the judge of the commercial court which is a panel of judges.

The supervisory judge is based on Article 65 of the Bankruptcy Law which states that "The Supervisory Judge supervises the management and settlement of the bankruptcy estate", and in accordance with the provisions of Article 66 of the Bankruptcy Law which states "The court is obliged to hear the opinion of the Supervisory Judge, before making a decision regarding the management or settlement bankruptcy estate". Based on the description above, it can be analyzed that the judge examines bankruptcy cases related to disputes.

In addition to the deciding judge or commercial court judge, there is a supervisory judge whose duty is to oversee the management and settlement of bankrupt assets. This supervisory judge was appointed because of a bankruptcy decision or a PKPU application. Based on Article 15 Paragraph (1) it is stated that "In the decision to declare bankruptcy, a Curator and a Supervisory Judge must be appointed from a Court judge". Therefore, in every bankruptcy case, it is regulated that the appointment of a supervisory judge is also decided. Some of the duties of the supervisory judge are as follows:

In Article 15 of Act Number 37 of 2004 it is emphasized that the judge's decision regarding the declaration of bankruptcy is also appointed by a supervisory judge who has the following duties:

1. Supervise the management and settlement of bankrupt assets; (Article 65)
2. Presided over a verification meeting or creditor meeting; (Article 85)
3. Propose the appointment of additional curators to the Court;
4. Supervise the actions of the curator in carrying out his duties; provide advice and warnings to the curator or the implementation of tasks that have been reported; (Article 74)
5. To form a committee of creditors if a creditors committee has not been appointed in the bankruptcy decision, or replace a temporary creditors committee if a temporary creditor committee has been appointed in the bankruptcy decision;
6. Approve or reject lists of claims submitted by creditors;
7. Forward the bills that cannot be settled in the verification meeting to the Court Judge who has decided the case;
8. Listening to witnesses and experts on all matters relating to bankruptcy (for example: about the state of boedel, bankruptcy behavior, and so on); (Article 67)
9. Giving permission or refusing the application of the bankrupt to travel (leave) his residence.[2]

In correlation to the tasks as above, the commissioner judge will indeed issue a lot of stipulations for verification meetings, and it is not impossible for all of his decisions to be disapproved by both creditors and

1 *Ibid*, KBBI, p. 739.
2 Zainal Asikin, *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang di Indonesia*, Pustaka Deka Cipta, Bandung, 2013, p. 72.

debtors. Therefore, if there are parties who are not willing to accept the decision of the commissioner judge, then he/she can file a legal action in the form of an appeal to the district court (which decided the bankruptcy) within a grace period of 5 days from the issuance of the stipulation (Article 66 paragraph 1 PK).[1] Based on the provisions in the bankruptcy law, the supervisory judge only has the authority to make administrative decisions, while the stipulation or decision containing a dispute over the authority to adjudicate is the judge of the commercial court or the deciding judge.

The curator is also part of the implementation of the bankruptcy management and settlement process, it is in accordance with Article 69 Paragraph (1) of the Bankruptcy Law, according to Zainal Asikin the duties and authorities of the curator are:

a. To announce the judge's decision on the declaration of bankruptcy no later than 5 days after the date of the bankruptcy decision in the State Gazette of the Republic of Indonesia in at least 2 (two) daily newspapers determined by the Supervisory Judge; The announcement will include several things including: the name, address and occupation of the debtor, the name of the Supervisory Judge, the name, address and occupation of the Curator; names, addresses and occupations of temporary creditors; the place and time of the first creditor meeting;
b. To announce the decision on cassation and review which annuls the bankruptcy decision in the State Gazette of the Republic of Indonesia as referred to in article 15 above;
c. Carry out management or settlement of bankrupt assets (article 69), and if the bankruptcy decision is canceled at the level of cassation and review, the curator's actions remain valid; In carrying out these duties the Curator is not required to obtain the approval of the Debtor. Even the Curator can make loans from third parties to increase the value of the bankruptcy estate;
d. Encumber the bankruptcy estate with pledge, fiduciary, mortgage, or other collateral rights with the approval of the Supervisory Judge;
e. Implement the confiscation of the assets of the bankrupt, in the form of jewelry, securities, cash and other objects by providing a receipt (article 98); the confiscation was attended by 2 witnesses, one of which was from the Regional Government;
f. Prepare an inventory of bankrupt assets and a list of debts and receivables of the bankrupt no later than 2 (two) days after his appointment as Curator; The Register of Records shall be placed in the Registrar's Office of the Court to be seen by all free of charge; (article 103)
g. Open all letters and telegrams of the bankrupt addressed to the bankrupt; letters and telegrams that are not related to the bankruptcy estate are handed over to the debtor; (article 105)
h. Provide maintenance money to the bankrupt person (taken from the bankruptcy estate), after obtaining permission from the supervisory judge; (article 106)
i. With the approval of the Supervisory Judge, he is entitled to sell the bankruptcy estate's goods, if it is deemed that the goods are not durable; and the proceeds of the sale are included in the bankruptcy estate (boedel);
j. Making a chord (peace-according) after first obtaining approval from the supervisory judge, and advice from the committee of creditors; (article 109)
k. The right to continue the bankrupt company with the approval of the Creditors. However, in the absence of a committee of creditors, the Curator's actions to continue the bankrupt company must obtain permission from the Supervisory Judge. (article 104) [2]

Based on the above matters, the authority to make legal judgments of judges (*ratio decidendi*) is the deciding judge or Commercial Court Judge who examines cases, and is obliged to analyze the results of the facts in the examination through answers and proofs, then the legal considerations are made (*ratio decidendi*) as the basis of a decision. Thus, if the decision contains a legal discovery (judge made law), due to the lack of regulations in a norm, the ambiguity of the norm (vague norm) can lead to misguided reasoning. So the basis for making the legal discovery (judge made law) is the legal consideration of the judge (*ratio decidendi*) who examines the case, namely the judge of the commercial court.

c) The Principle of Justice Established by the Commercial Court

According to the theory of 3 (three) general teachings of Gustav Radbruch, the principle of justice cannot be separated from its two instrument principles, namely the principle of certainty and the principle of expediency. The principle of legal certainty from the commercial court based on Article 2 Paragraph (1) of the Bankruptcy Law is a guarantee of security given by the state to file an application for a bankruptcy decision with the principle of fast trial, so that the settlement of debts that are the problems of the parties can be immediately resolved. Likewise, bankruptcy law also provides regulations that are also fair, namely Article 8 Paragraph (6) letter a of the Bankruptcy Law. This regulation becomes an emergency exit when certain case requires the

1 *Ibid*, pp. 72-73.
2 *Ibid*, pp. 73-74.

judge's consideration to make a decision.

Article 8 Paragraph (6) letter a of the Bankruptcy Law states that the basis for judging the judge is certain laws and regulations relating to the case, and also unwritten regulations or legal sources. This article makes bankruptcy law not a rigid law and cannot be deviated. Based on the article of bankruptcy law, especially Article 2 Paragraph (1) of the Bankruptcy Law, it can also be deviated as an emergency exit. It only exists for certain related cases for example, for debtors who are able to pay their debts (solvent). If the debtor's assets are greater than the liabilities when the case is being examined, then the judge can apply Article 8 Paragraph (6) letter a concerning unwritten law which is taken from the legal values contained in society which value propriety or fairness. Thus, the principle of justice will be fulfilled in handling bankruptcy law cases

Article 8 Paragraph letter a is also related to the discovery of law by the judge (judge made law, *rechtsvinding*). The discovery of law by a judge (judge made law) is the result of a judge's examination of a case, in which the judge cannot find the law or its rules, or the existing rules are vague (vague norm), the norm cannot be applied on a case, or the judges consider their own considerations based on the legal values contained in society in the form of unwritten law.

Basically a decision made by the judge ideally must contain *idee des recht*, which includes 3 elements, namely justice (*gerechtigkeit*), legal certainty (*rechtsicherheit*), and expediency (*zwechtsmassigkeit*).[1] These three elements should be considered and applied proportionally by the judge to be able to produce good quality decisions that meet the expectations of justice seekers.[2]

According to some experts, the legal findings are as follows:

a. Paul Scholen opined the discovery of law by judges is something other than just the application of rules to events. It sometimes and even often happens that the rules must be found, either by way of interpretation or analogy, or *rechtssvervijning* (legal concretization).[3]
b. John Z Laudoe argued that legal discovery is the application of provisions to facts, and these provisions must sometimes be formed because they are not always found in the existing laws.[4]
c. N. E Algra and Van Duyvendjk defined legal discovery as finding the law for a concrete event, for which a judge or another juridical breaker must be given a juridical settlement. Furthermore, it is also stated that legal discovery is an activity of judges to use various kinds of interpretive techniques. It is described by applying various reasons that are not contained in the legal rules that exist in the events presented to them. The laws are not only made for problems they face, but also for the problems that may occur in the future.[5]
d. According to Sudikno Mertokusumo, legal discovery is the process of law formation by judges or other legal officers who are given the task of implementing the law on concrete events. More concretely, it is said that legal discovery is the concretization, crystallization or individualization of legal regulations or *das Sollen* which are general by remembering concrete events or *das Sein.* Concrete events need to find out general and abstract laws. Concrete events must be met with legal regulations. The concrete event must be connected with the legal regulation so that it can be covered by the legal regulation. On the contrary, the legal regulations must be adapted to the concrete events so that they can be applied.[6]

The basis of the judge in finding the law is by analyzing the cases handled by looking at the facts or actualities that have been examined in the realm of evidence, then the judge analyzes the existing legal theories and uses theoretical approaches. In the end the judge makes a legal consideration (*ratio decidendi*) which is the basis of a decision, and in that decision a judge's legal discovery can be known (judge made law/ *rechtsvinding*). Therefore, the judge in the decision ratio will consider the law in society if it is necessary. The bankruptcy law provides an opportunity in this case as stated in Article 8 Paragraph (6) letter a of the Bankruptcy Law.

The principle of expediency contained in Article 8 Paragraph (6) letter a as the basis for the application of Judge made Law through *ratio decidendi* is that when the judge does not find the law in the existing norm or the norm is vague (vague norm), the judge my consider the legal values contained in society, for example the value of propriety, decency, religious or other legal values related to the examination of cases which are unwritten law, for example case No. 77.pdt.sus/PKPU/2015/PN. Niaga. Jkt. Pst jo Nomor 77/pdt.sus/Pailit/2015/PN. Niaga. jk. Pst. In the *ration decidendi* of this case, the judge considers and in the end makes a legal discovery (judge made law), that the case submitted is a procedural review case, not another case. Such a case is a case of renvoi procedure. Although the basis for submitting this renvoi case is based on Article 127 Paragraph (1) of the Bankruptcy Law which is vague in regulating renvoi procedure, but in this case the judge is obliged to assess and

1 Gustav Radbruch cited by Sudikno Mertokusumo in Bambang Sutiyoso, *Metode Penemuan Hukum Upaya Mewujudkan Huukum Yang Pasti dan Berkeadilan*, UII Press Yogyakarta, Yogyakarta, 2012, p. 8.
2 *Ibid.*
3 N. E Algra dan Van Duyvendjk in Bambang Sutiyoso, *Ibid*, p. 51.
4 John Z. Laudoe in Bambang Sutiyoso, *Ibid.*
5 N. E Algra and Van Duyvendjk in Bambang Sutiyoso, *Ibid.*
6 Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Liberty Yogyakarta, Yogyakarta, 2007, p. 80.

make a legal discovery (judge made law/*rechtsvinding*).[1] The benefits of the regulation of Article 8 Paragraph (6) letter a, one of which can be taken as an example as described above, namely by analyzing existing regulations or from legal comparisons or taking from legal values contained in society, the judge can make legal discoveries (judge made law/*rechtsvinding*).

The principle of legal certainty provided by the bankruptcy law upon the judge's legal findings (judge made law) is the enactment of Article 8 Paragraph (6) letter a. Legal certainty is a guarantee of security provided by the state to the community. By providing security in the form of rules, it means the justice granted by the state is useful and has been promulgated into a norm. The inclusion of norms in a law is a form of legal certainty, because these norms can be used as a basis for the imposition of norms for an examination of cases, and it can be a basis for judge's legal considerations (*ratio decidendi*). Article 8 Paragraph (6) letter a is the basis for judges to make a *ratio decidendi* if the judge will make legal discoveries from unwritten law, namely the legal values

contained in society, which include the values of propriety, moral values, fairness values and religious values and other legal values arising from society.

The values of propriety, moral, fairness and religious which are part of legal values in society can be drawn into the judge's legal considerations (*ratio decidendi*). For the example is in the bankruptcy case concerning the bankruptcy application against a solvent debtor (able to pay), if a bankruptcy petition is requested, the judge in his legal considerations can apply Article 8 Paragraph (6) letter a, namely on an unwritten legal basis. In its judgment, it can use the legal value of propriety, legal values in society, that it is appropriate or not that a debtor who is able to pay and the value of assets is much greater than the value of liabilities bankrupt. It allows judges to make legal discoveries by using the value of propriety and fairness in bankruptcy law. Although the rules based on Article 2 Paragraph (1) of the Bankruptcy Law are clear and simple, that if there found a debtor who has two creditors and one of them is due, it can be declared bankrupt. Based on Article 8 Paragraph (6) letter a is the value of expediency and the value of legal certainty (which is an instrument of justice), and these two values will lead to a value of justice which is carried by the bankruptcy law.

III. Conclusion

The legal values contained in society include the value of propriety, morality, fairness and religious adopted by judges in their legal considerations (*ratio decidendi*) and decision. Article 8 Paragraph (6) letter a is an exit emergency for judges to make their legal considerations (*ratio decidendi*) if the rules do not exist or vague, or if the judge's own judgment is needed to make his decision, without basing on the existing rules in the bankruptcy law, making a legal discovery (judge made law) by the judge. Therefore, the *ratio decidendi* of the legal values contained in society can be the basis for judges to make legal discoveries (judge made law/ rechtsvinding) in the ratio decidendi which fulfills the principle of justice for *justiabelen*.

Recommendation

In examining bankruptcy cases, judges are able to act fairly not to make direct imposition on bankruptcy decision, but to make some considerations (*ratio decidendi*) prior to make legal discoveries (judge made law/ *rechtsvinding*) from the legal values contained in society, for the decision meets the principle of justice. Lawyers are expected to be able to properly construct applications in bankruptcy law, which can ease judges to analyze their cases. Policy makers are expected to make breakthroughs in legal arrangements to cut the existing formalities, and to be implemented as a basis for judges to decide the cases.

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1 Ivida Dewi amrih Suci, *Op Cit.*, pp. 366-370.