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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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# RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE

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## A. Background

Credit risk in the context of financial institutions is a common occurrence but it has a negative impact if not insurmountable be influential on the soundness of the financial institution. Nevertheless, this risk can be managed and controlled, by way of precaution in terms of lending.<sup>1</sup> Therefore, in the granting of credit, the bank must pay attention to the principles of lending right,<sup>2</sup> which one of them is through the appraisal (coleteral) in the form of collateral that can be used as protection for creditors (financial institutions) in the event of default or breach of contract.

Use of the mortgage institutions by financial institutions as collateral for the credit of the debtor for repayment of debt, considered more a sense of security in terms of lending, compared with provisions on the guarantee in the Civil Code in Article 1131. The weakness in terms of guarantees contained in the provisions of Article 1131 of the Civil Code is very different from the conception of the imposition of bail in the mortgage rights Act which guarantees the imposition of security rights institutions specifically tied and mutually exclusive because it applies only to one creditor only. This legal consequences on the situation in which if the debtor in default, mortgage holders creditors are entitled to sell the object as collateral through public auction in accordance with the provisions of the legislation in question with the right to precede rather than other creditors.

Based the provisions of Article 6 of Law No. 4 of 1996 On Mortgage of Land And Objects Relating to Land (hereinafter referred to as UUHT). Takeover of collateral can be done by holders of mortgage without the need to seek prior authorization to the giver

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<sup>1</sup> Adiwarman A. Karim, *Bank Islam : Analisis Fiqih dan Keuangan* (Jakarta : PT. Raja Grafindo Persada, 2006), p. 255.

<sup>2</sup> Kasmir, *Manajemen Perbankan* (Jakarta : Raja Grafindo Persada, 2007), p. 91.

mortgag, and do not need to also ask for the establishment of a local court, if want to execute on mortgage as collateral the debt of the debtor in the case of debtor default.<sup>3</sup> Mortgage holders may request to the Head of Auction Office to the auction on the objects mortgage concerned,<sup>4</sup> so this is a new step where before the execution of the deed grosse mortgages can only be done through the execution of the District Court.<sup>5</sup> Execution of mortgage, this concept is known in the Code of Civil Code (hereinafter referred to as the Civil Code) is known as parate execution as referred to in Article 1178 of the Civil Code.

Based these provisions, the takeover of the collateral in the form of a guarantee can be done by holders of mortgage (creditor) without the need for prior approval to the mortgage providers, when will be the execution of the mortgage which is a guarantee of debt of the debtor in which case the debtor is in default, this concept is known as parate execution which means that people refer to it as the execution is always ready at hand or parate execution.<sup>6</sup>

In practical implementation, execution parate implementation on the mortgage rights are not clear and even tend to stray far from the principles and doctrines parate execution. This is one of them can be seen in Article 14 paragraph (2) and (3) UUHT, where execution can be carried out on the certificate of mortgages in which includes *irah-irah* with the words : “FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD”. Thus, the aforementioned phrase (*irah-irah*), indicates that the execution of the security object on the ground bound with mortgage understood as execution as grosse acte hypotheek.

Other than that, on a general explanation Point 9 of the Act Mortgage stated that the concept of parate execution mortgage referred to in Article 14 paragraph (3) of the law still refers to Article 224 Herziene Indonesisch Reglement (hereinafter abbreviated as HIR). HIR provisions of Article 224 states that :

The original letter from the letter of the mortgage and debt securities strengthened in front of a notary in Indonesia and whose head wear the words “On behalf of the Law”, equal magnitude with the judge’s decision, if the letter that should not be kept by peaceful means, then subject it to run held by the command and leadership

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<sup>3</sup> Remy Sjahdeini, *Hak Tanggungan, Asas-asas, Ketentuan-ketentuan Pokok dan Masalah yang Dihadapi Oleh Perbankan*, (Bandung : Alumni, 1999), p. 46.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> J. Satrio, *Hukum Jaminan Hak Jaminan Kebendaan Hak Tanggungan*, Book I, (Bandung : Citra Aditya Bakti, 1997), p. 224.

from chairman of the district court which is in the jurisdiction the person who owes it silent or stay or choose a place of residence in the manner stated in the articles above in this section, but with the understanding that force the body can only be done, if it is allowed by the judge's decision. If carrying out that decision to be executed at all or in part outside the area of the law courts the chairman ordered to run it, then the rules in Article 195 second paragraph and the next one followed.

This condition caused multiple interpretations are not contradictory between Article 6 *jo.* Article 20 Paragraph (1) Clause (a) of the Act Mortgage, Article 14 paragraph (3) and Point 9 General Explanation Mortgage Act. This condition eventually making the principles of simplicity and legal certainty parate execution of mortgage not be achieved because eventually the creditor, in this case the holders of mortgage, can not run execution of mortgage easily, in accordance with the ideals of the establishment of the Act Mortgage as stated in the General Explanation of Mortgage Rights Act.

## **B. Problem Formulation**

To ensure fairness, legal certainty, simplicity, and usefulness in terms of implementation of the parate execution mortgage, we need a rule of law, firm, clear, and fair so that in addition to the position of rights that take precedence for holders of mortgage, in this case the creditor becomes crucial, but the interests of debtors on the one side are also accommodated. Based on the above description of the background, the writing of the dissertation with the title "Reconstruction Parate Execution Mortgage Land Based Values The Justice", will examine some of the underlying problems, which can be formulated as follows : How reconstruction parate execution mortgage on land based on values of justice?

## **C. Discussion**

Reconstruction of parate execution mortgage on land based on values of justice.

- a. Reposition the main purpose of the implementation of the execution parate;

The basic provisions of parate execution contained in Article 6 Mortgage Act, which stated that :

If the debtor in default, the first holder mortgage has the right to sell the object of mortgage on its own power through a public auction, and take repayment of its receivables, from the sale proceeds.



Dismantling the concept of justice in parate execution can not be seen as partial, fragmentary, and separately between philosophical purpose and execution, but must be comprehensively understood better as a whole. That is the value of justice contained in the doctrine parate execution should depart from the basic concept of their rights and obligations which are born and must be implemented by the creditor and the debtor in implementing the credit agreement. Philosophically, the desire for justice in parate execution born to protect the interests of creditors on the one side, and on the other side to keep the debtor's financial obligations on credit payment facility had received.

In line with this John Rawls giving emphasis justice can be achieved when the distribution of rights and obligations occurs equally in society. Because with the balance of rights and obligations, then every person has an opportunity to benefit from it and in real time as well as bear the same burden.<sup>7</sup> This means that justice will be achieved when between creditors and debtors equally do obligations according to the agreement. Therefore, it is when the creditor has made an obligation, and the debtor has done right to receive credit, the debtor should have to perform payment obligations to creditors as a replacement.

Distortion of meaning parate execution by mixing them with meaning grosse deed execution on the basis of Article 224 HIR, which must go through the fiat determination of the Chief Justice,<sup>8</sup> it detracts from the side of justice. Of course, fairness for creditors who not only have to bear the loss, due to non-performance of the obligation of payment of loans by debtors, but at the same time, the creditor (financial institution/bank) should make a backup of PPA amounted to 100% (one hundred percent) of the total value of such credits, reduced with the value of the collateral.<sup>9</sup> On the other side, these problem also further aggravate the logical consequence of the debtor, because the longer the settling time, the increasingly heavy burden borne by the debtor credit dependents, as well as opening up possibilities of dispute in court.

- b. Revitalization of the judicial aspect through the synchronization of the rules of law, and compliance with the implementing rules.

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<sup>7</sup> John Rawls, *A Theory of Justice*, (London : Oxford University Press, 1971), p. 4-5.

<sup>8</sup> M. Yahya Harahap, *Kedudukan Grosse Akte Dalam Perkembangan Hukum di Indonesia*, Media Notariat No. : 8-9, Tahun III, Oktober 1988, p. 113.

<sup>9</sup> Bank Indonesia Regulation No. 7/2/PBI/2005 on Asset Quality Rating for Commercial Banks, as has been amended the last time by Bank Indonesia Regulation Number 11/2/PBI/2009.

Grammatically the parate execution mature when in the event of default/breach of contract, and implementation can be done alone, but must go through a public auction. This means that aspects of arbitrariness that is born from the phrase “self rule” is clearly directly limited by the phrase “public auction” in order to bring justice to the debtor to get the price, which corresponds to the value of collateral objects on sale.

One problem that is being polemic is that the phrase “breach of contract” which is considered controversial and polemic. Because, breach of contract also stipulated in the Civil Code and must be proven through tort lawsuit. Instead, the provisions of Article 6 Mortgage Act itself, does not require proof through a court decision, because sufficiently proven through evidence of neglect of payment, when due and/or through notification of creditors to the debtor. It can be understood that the implementation of the provisions of parate execution an order of law (*ex lege*) and not based the agreement. So that a specific law in accordance with the principle of *lex specialis*, then Mortgage Act is a special legal rule (*lex*), and the exclusion of the Civil Code (*lex generalis*).

As fulfillment of the judicial aspect of course synchronization juridical aspect, as the legal basis parate execution essential in order to minimize the potential occurrence of injustice. This synchronization of course related to the jurisprudence based on Supreme Court Decision No. 3021/K/Pdt/1984 dated January 30, 1986 which is contrary to the provisions Mortgage Act especially in Article 6. Based on the principle of “*lex posteriori derogat legi priori*”, means legal new overriding the old law, then directly jurisprudence referred to can not be used as the legal basis for cancellation of parate execution implementation.

Further according to the sort order legislation Act No. 12 of 2011 then a Circular (Supreme Court) in this case the Supreme Court Circular (SEMA) No. 7 of 2012 does not include the sort order for the legislation, so it can not be used reason or legal basis for refusing the execution of mortgage based on parate execution in Mortgage Act.

Another point is the need for the implementation of the regulation is published which regulates the execution parate technical things because one aspect of the inhibitors is the absence of the rule implementation parate execution itself. Of course this implementation execution parate rule, not merely

supplementary but further this implementation execution parate rule, serves as a rule of procedure, conceived jointly by creditors and debtors. A common understanding about the rule of this procedure, will give birth to the cautious attitude, mutual respect, and mutual benefit creditors and debtors, so that in case parate execution, then the debtor will respect and appreciate, because their interests will also be accommodated.

Therefore, it should parate execution remains in the frame implementation execution creditor rights on collateral object, where implementation without (outside) through the provision of procedural law, without foreclosure, without involving the bailiff, without court permission. This is a realization of the position preferred by the mortgage institutions that exist in Mortgage Act, but keep it within the fair for all parties both creditors and debtors.

Reconstruction of parate execution under Article 6 *jo.* Article 20 Paragraph 1 (a) Mortgage Act in the substance of Mortgage Act and provisions of other legislation can be seen in the following table :

**Table 3**  
**Reconstruction of Parate Execution**

No.	Regulation Parate Execution	Substance	Reconstruction
1.	Article 11 Paragraph 2 letter (e) Mortgage Act	Implementation parate execution authority, no longer absolute command law ( <i>ex lege</i> ), but also based on an agreement between the parties.	Modified with the substance of the provisions that can differentiate clearly between parate execution with the execution title executorial
2.	Article 14 Paragraph 2 Mortgage Act	Implementation parate execution equalized with execution title executorial (mortgages) for which the Chairman of the Court fiat.	Modified with the substance of the provisions that can differentiate clearly between parate execution with the execution title executorial.
3.	General Explanation of Number 9 Mortgage Act	Implementation execution can only be carried out based the provisions of Article 224 and Article 258 HIR	Erased

		RBg.	
4.	Circular of the Supreme Court of the Republic of Indonesia (MARI) No. 7 of 2012	Forced execution order, which is based on the implementation of the execution parate, based Article 6 Mortgage Act, must go through the usual tort (law of regular events).	Erased

#### D. Conclusion

Based on the descriptions in the previous chapters are presented the conclusions which is a response to the issues raised in this research as follows :

Reconstruction of the law must be carried out in order to solve the problems related to parate execution as required by Article 6 of Law No. 4 of 1996 on Mortgage. Reconstruction of this law it is useful to resolve the fundamental problems both related to aspects of the values of justice, expediency, and the rule of law, relating to the implementation of the parate execution. Reconstruction of this law as well as to answer the needs of stakeholders and society in general so that create strong economic stability based on clear regulation.

- a. Conceptualized values of justice parate execution, absolutely necessary in order to align and harmonize with the values of Pancasila justice into execution parate institutions. The entry of Pancasila values of justice such as social justice is useful to shift the perspective of individualism in the implementation parate execution, so that will give birth balances of justice for the parties concerned;
- b. The value of justice balance between creditor and debtor in the execution through execution parate institutions Article 6 of Law No. 4 of 1996 on Mortgage can be realized through a balance between the rights and obligations conferred by law in the form of :
  - 1) Strengthen position parate execution institutions by making implementing rules both with regard to the determination of the auction price limit;
  - 2) Make strict rules and decisive in terms of the debt restructuring, so that the interests of the debtor also maintained;



- 3) Make provisions on the time limit clearly and firmly between the occurrence of default/breach of contract by the implementation parate execution, so that the interests of the debtor will be accommodated and maintained fairly.
- c. Make amendments to Law No. 4 of 1996 on Mortgage on Land and Their Bodies Relating to Land with the rules of law which more better.

## **E. Suggestion**

1. Currently, the need for renewal of the draft Civil Code (Civil Code) in a comprehensive manner is necessary, because as we all know that the Civil Code is already very far behind the complexity of the dynamic development of Indonesian society. Other than that, the Civil Code is also the parent legislation of provisions on parate execution, so there should be fundamental changes in accordance with the current circumstances;
2. It is necessary, the Supreme Court to immediately revoke SEMA No. 7 of 2012 because the existence of SEMA is obviously can not be used as references or sources of law, which has a generally binding validity. The existence of SEMA is also irrelevant with the purpose of the law who wanted to create fairness, expediency and legal certainty for the community, because precisely SEMA where the inconsistency with the provisions of Article 6 of Law No. 4 of 1996 on Mortgage;
3. The government together with the legislature need as soon as possible to encourage discussion on the amendments to the Act No. 4 of 1996 on Mortgage, which in the previous period has become a national legislative program (Prolegnas). It is very important amid the global economic situation is very vulnerable due to the crisis of natural resources, so the key to sustaining economic growth is to gain the trust of economic actors and society through regulations that have legal certainty value, usefulness and fairness.

## **F. Dissertation Implications**

1. Theoretical Implications

This research is a study that examines and conduct a review in depth about parate execution, both in terms of philosophy, in terms of doctrine, or principles of law parate execution. The result is that the current there is a shift of meaning, which is caused by interpretations, conducted by institute legal institutions related to parate

execution. Other than that, parate execution as a legal doctrine which is accepted in Indonesia as a colonial legacy need to be harmonized with Pancasila as the supreme norm or *grundnorm*, so parate execution remains can provide justice in line with Indonesian public sociology. This research has managed to find a new formula for the world of civil law, specially in terms of implementation parate execution which can provide substantive justice for the parties concerned, as well as build a perspective that prioritizes benefits to society without negating the legal certainty.

## 2. Practical Implications

The practical implication of this research is able to provide a complete describe about all aspects of the law relating to the execution parate to institutions legal order existing, legal practitioners, and regulators.

Of course the whole describe is important, so it no longer arise a different interpretation on the meaning parate execution, does not arise again confusion about the making of the regulation, to the interests of practical, for academics, as well as for legal practitioners in the defense which is linked the position of the litigants

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