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Dualism of The Execution of Property Guarantees in Dispute Resolution Practices in District Courts: A Study of the Decline of Effectiveness and Usefulness of the Law

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Abstract

The position of the court is very important in economic development, especially in providing legal certainty in resolving economic disputes such as credit and banking guarantees. This is in accordance with the constitutional basis for the development of Indonesian economic law. From the philosophy that has always been an initial study of how the function of the court as a judiciary is the same as the power of the Executor or adjudicating plus the executor, is this not excessive overhead? Do these two functions make it easier for the court to carry out fiat execution or make it increasingly difficult to carry out fiat execution? Execution of material collateral is the peak of resolving collateral disputes in court, execution is an effort to force the implementation of the judge's decision. The law of collateral is applied in providing both banking and non-bank financial institutions. Related to the credit provided by this institution, it becomes a means of economic growth for the people because the provision of business capital credit with a collateral system is one form of material rights to guarantee debt repayment. The object is the Mortgage Law UUHT Number 6 of 1996 which is the question of how the effectiveness of the law and the legal benefits of the dualism of execution, By using a normative legal research model and empirical studies in several district courts in North Sulawesi, this research was conducted. The results of the study show that there are differences between fiat execution and parate execution, both in terms of legal effectiveness, legal benefits and legal certainty, it turns out that parate execution is better and faster in realizing the three things above.

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1. Introduction

Dualism of execution of mortgage rights, both parate execution in Article 6 UUHT and fiat execution in Article 20 UUHT, increases legal uncertainty related to the acceleration of mortgage rights execution (Simorangkir,2014).

Collateral disputes arise from the default of installment payments by customers who are the guarantors. This dispute does not occur if the debtor customer properly carries out the obligation to pay credit installments. Debtor customers should understand the risks when they are late or do not pay installments, the creditor will exercise their rights.

Creditor actions that are detrimental to the debtor who provides the guarantee will result in a legal dispute over the guarantee in court. Collateral disputes occur when the debtor is negligent and does not want to be executed parate by the creditor in this case the bank as the recipient of the guarantee. Default debtors should be aware of the legal consequences that arise if they are negligent in paying installments which result in defaulted credit along with all the associated risks.

Collateral credit agreements in which collateral such as land certificates, houses and other objects are submitted by the debtor as collateral for debt repayment. If the debtor is negligent, the creditor will execute. Debtor customers should be aware that the credit guarantee agreement.

Occurs because of the bank's trust that the debtor is able to pay off his debt. The main motive for legal disputes of collateral brought to court because the debtor is negligent in trying to avoid parete execution by the creditor or other party that is detrimental to the core of the lawsuit is to request fiat execution by the court. The debtor is negligent in carrying out his obligations, then the creditor will take action in the form of arbitrary and detrimental execution.

The implementation of execution is not a problem if the debtor and creditor have good intentions, whereas if the debtor has bad intentions, the problem will become complicated. The auction proceeds are used to pay off debts after which costs that must be incurred are deducted (Yani et al, 2011). Based on this dilemma, the government and law enforcers need to be given an understanding and comprehension of the execution of material collateral and its excesses.

In a credit agreement with a mortgage right, the customer must perform in installments by paying it on time. The reward in the form of goods remains in the hands of the debtor. A grant of performance by one party to another party and the performance (service) will be returned at a certain time in the future accompanied by a counter-performance (reward) in the form of interest. Installments of bills that can be equated with that are based on an agreement between the leasing company receiving the mortgage right, who is obliged to pay off the installments after a certain period of time with a predetermined amount of interest (Kansil, 2008). Payment of the collateral object is usually made through installments (Simorangkir, 2004).

1. Execution Auction;
2. Mandatory Non-Execution Auction; and
3. Voluntary Non-Execution Auction.

Credit or loans will be obtained based on the deed of granting mortgage rights (APHT) which will then be registered at the land office to obtain a Mortgage Rights Certificate (SHT). The mortgage rights certificate based on Article 14 paragraph (3) of the Mortgage Rights Law has the same executive power as a court decision. KPKNL is often considered to have committed an unlawful act (PMH) because it does not carry out auction procedures. based onFiat Executionthrough the determination of the court chairman. The object can be occupied or auctioned by the winner of the case.

Meanwhile, the execution auction in Article 6 of the mortgage rights held by the state wealth treasury office KPKNL is carried out based on the Parate Executie concept as stated in Article 20 of the Mortgage Rights Law which regulates the execution of Mortgage Rights if the Debtor defaults.

Article 20 paragraph (1) letter (a): The Mortgage Rights Holder can sell the mortgage rights object under his own authority through a public auction as referred to in the provisions of Article 6 of the Mortgage Rights Law. The execution is carried out based on the Executorial Title contained in the Mortgage Rights Certificate, as referred to in Article 14 paragraph (2) of the Mortgage Rights Law.

The difference of opinion regarding the concept of execution of mortgage rights will certainly create loopholes and legal uncertainty in the implementation of auctions, especially auctions of execution of mortgage rights. This can also reduce the level of public trust in the buying and selling process through auctions, which are parate execution, therefore many cases are submitted to the court to request fiat execution to obtain legal certainty. Fiat Executie Article 224 HIR and Article 258 R.Bg. are the authority of the court, initially this execution provision was intended for grosse acte mortgage (now Mortgage Certificate) and grosse acte debt recognition.

Both grosse acts are intended to have execution rights, which means that both grosse acts have the power as a court decision that has permanent legal force. The disputing parties must submit and obey as the implementation of a court decision that must be carried out on the orders of the Head of the District Court in accordance with civil procedure law (Arifin,2016).

So in this case it is clear, in the auction for the execution of Article 6 UUHT, creditors are given a legal option to carry out the execution of their mortgage rights, either using the Fiat Executie, Parate Executie mechanism, or private sale based on an agreement between the giver and the mortgage right holder (Satrio, 2022).

The insurance agreement with a guarantee between both parties is a real agreement, namely an agreement that in addition to the agreement, requires a real action (Widjaya, 2011). In the agreement, several clauses have been determined containing an agreement on the settlement of debts between the debtor and the creditor. If the loan cannot be paid off on time, then the recipient or pawn holder who acts as the creditor has the right to sell the pawned goods as payment for the loan (Arifin, 2016).

Currently, there is a Constitutional Court ruling that regulates the prohibition of forced withdrawal of collateral from defaulting debtors through parate execution, especially when it is in the process of dispute in court. Collateral disputes through the courts are very interesting to study at the dissertation level when the Constitutional Court Issues a Decision on Mortgage Rights. Early in 2020, the Constitutional Court (MK) issued Decision Number 18/PUU-XVII/2019. Prohibition of carrying out parate execution of collateral objects of defaulting debtors.

The decision regarding the phrase of executorial power and the same as a court decision that has permanent legal force (along with its explanation) contained in Article 15 paragraph (2) and secondly, namely the phrase breach of promise contained in Article 15 paragraph (3) of the Mortgage Rights Law. As a benchmark for mortgage rights issues in general. With this Constitutional Court decision, if the debtor (consumer) is in breach/breach of promise (default), the recipient of the mortgage right, either a Bank or a company (leasing company) has the right to sell the collateral object with its own authority (auction). However, the Constitutional Court decided that the mortgage guarantee certificate does not necessarily (automatically) have executorial power.

In addition, a breach of promise in the execution of a mortgage agreement must be based on an agreement between the two parties between the debtor and the creditor or on the basis of legal efforts (lawsuits to court) which determine that a breach of promise has occurred. Article 15 paragraph (3) of the Mortgage Guarantee Law states that insofar as the phrase 'breach of promise' is in conflict with the 1945 Constitution and does not have binding legal force insofar as it is not interpreted to mean that the existence of a breach of promise is not determined unilaterally by the creditor, but rather on the basis of an agreement between the creditor and the debtor or on the basis of legal efforts that determine that a breach of promise has occurred.

2. Methods

There are 2 (two) types of legal science, namely dogmatic legal science and empirical legal science. Related to this research, this research is conducted on "legal principles, concepts and legal rules" The focus of this dissertation study is the dualism of execution of objects as collateral, both Parate execution and Fiat Execution in the execution of collateral objects. The legal consequences of execution of collateral objects Mortgage rights are also studied. From the perspective of justice and legal certainty (There are 2 (two) types of legal science, namely dogmatic legal science and empirical legal science. Related to this research, this research is conducted on "legal principles, concepts and legal rules" The focus of this dissertation study is the dualism of execution of objects as collateral, both Parate execution and Fiat Execution in the execution of collateral objects.

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The data obtained were analyzed by interpreting, correlating and comparing legal materials related to execution. Comparison of legal constructions of several legal theories of agreements relevant to agreements between creditors and debtors in Mortgage Rights. To obtain maximum results, the analysis was carried out with three approaches, namely the legislative approach, the conceptual approach (understanding), and the legal approach to the economy, especially examining the implementation of execution in the context of Parate Execution and Fiat Execution.2007).

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3. Results and Discussions

A. Comparison of Legal Effectiveness between Parate and Fiat Execution

In accordance with the results of the investigation of both the process and cases in court practice, differences were found between the two forms of execution in application in district courts related to procedures and handling measured from the effectiveness of the application of mortgage execution in court practice.

Execution Comparison Table

No	Execution Parate	Fiat Execution
1	The procedure is flexible and simple depending on the will of the parties to resolve the problem.	The auction procedure is complicated, because the execution process involves a long procedure and involves both the TNI and Polri.
2	Resolved by mutual agreement, depending on the will of both parties who have good intentions	It involves many parties and takes a long time to resolve, especially if there are attempts by other parties to instigate it.
3	The implementation of the auction at KPKNL will be easy as long as the parties have agreed to the agreement.	It is easy for resistance to occur, especially if it involves many parties, and in reality it is difficult to carry out, especially if the disputing parties continue to put forward resistance.
4	Easy to resolve in good faith, as long as no party objects and files a lawsuit in court.	It will be complicated and convoluted if many parties are involved and continuously put forward resistance.
5	Easy to implement, as long as the parties have agreed in good faith after seeing the benefits that each can obtain.	It is complicated to resolve because in practice the execution is postponed due to pressure from the masses or pressure from various parties from a large number.

When compared to the effectiveness of the law from the two forms of execution above, it can be seen that Parate execution is more effective because it is easy and simple. The effectiveness of the law is always rooted in the optimality of the function of law in resolving a problem. The effectiveness of law is related to the function of law as a "means of social renewal (law as a tool of social engineering).

This also applies in the comparison between parate execution and fiat execution. The effectiveness of law is modified and adapted from Roscoe Pound's theory "Law as a tool of social engineering" which developed in the United States. If explained further, theoretically, Mochtar Kusumaatmadja's Theory of Development Law is influenced by the way of thinking of Herold D. Laswell and Myres S. Mc Dougal (Policy Approach) plus Roscoe Pound's Legal theory (minus his mechanical conception). Mochtar processed all of these inputs and adjusted them to Indonesian conditions (Atmasasmita,2003).

There is an interesting side to the theory presented by Laswell and Mc Dougal where it is shown how important cooperation is between theoretical legal practitioners (scholars) and practical legal practitioners (specialists in decision) in the process of producing a court policy in execution, but on the other hand it is also enlightening. Therefore, the Theory of Development Law from Mochtar Kusumaatmadja, demonstrates a pattern of cooperation by involving all stakeholders in the social community.

Harry C. Bredemeier, a theory of legal function that views a law as an integrative mechanism. He builds his analysis of the function of law as an integrating mechanism or integrator in a framework, namely the existence of four main functions observed in a social system, consisting of adaptation

intended as an economic process, goal pursuit as a political process, maintaining patterns (pattern maintenance) simply as a socialization process, and integration is a legal process. The law only operates after a conflict, for example someone sues that their interests are disturbed by someone else. In this case, it is the court's job to make a decision, to resolve the conflict (Putra et al, 2013).

Satjipto Rahardjo explained that legal rules contain an assessment regarding certain actions. This is clearly visible in the form of commands and prohibitions (Shidarta, 2016). This legal code is manifested in the form of behavioral instructions. Therefore, legal rules are called behavioral instructions about what can and what cannot be done accompanied by sanctions. These legal rules originate from the community itself or from other sources whose validity is recognized by the highest authority in that community. If these rules are violated, this will give the highest authority the authority to impose sanctions.

B. Benefit Aspects of both Execution Models

Benefits related to justice seekers or parties in dispute related to the value of mortgage rights. In principle, the parties in dispute do not want to take a long time, because the value of mortgage objects such as land continues to increase in price. Given that the disputing parties want to quickly get benefits from the land or mortgage object, especially since the parties have agreed to sell the object and share it with the family. Thus, benefits become important for justice seekers, because the focus of justice seekers is to get rights and get benefits from the mortgage object that will be executed.

Execution Benefits Table

No	Execution Parate	Fiat Execution
1	The parties will quickly resolve debt problems or other mortgage problems with a quick sale, so that disputed credit agreement cases will be quickly resolved because the bank will benefit.	The procedure which is too long and complicated in the fiat execution causes the parties not to quickly get the benefits of their land, especially since the case has been going on for years and the parties in dispute have died, leaving only the heirs.
2	The parties will feel that their justice has been fulfilled through deliberation and consensus in good faith in resolving the object of the mortgage, both for banks that quickly take advantage of it and for consumer customers whose problems are quickly resolved.	With the involvement of third parties, including the mass media and the authorities, the execution problem becomes complicated and convoluted, especially with resistance emerging from other parties in the form of new lawsuits and criminal reports.
3	With the peace auction, the parties will not prolong the case any longer, because each party has received benefits from the execution that benefits the parties.	Long cases and complicated resolutions will cause the parties to be constantly in dispute without any resolution either peacefully or by consensus.
4	Easy to resolve in good faith, as long as no party objects and files a lawsuit in court.	It will be complicated and convoluted if many parties are

		involved and continuously put forward resistance.
5	Easy to implement, as long as the parties have agreed in good faith after seeing the benefits that each can obtain.	It is complicated to resolve because in practice the execution is postponed due to pressure from the masses or pressure from various parties from a large number.

Jeremy Bentham also as the leader of the "utility" school of thought the essence of happiness is pleasure and a life free from misery. Therefore the intention of humans to take action is to gain the greatest happiness and reduce suffering. The good or bad of an action is measured by the good or bad consequences produced by the action. An action is considered good if the action produces good.

Conversely, it is considered bad if it results in loss (evil). By Bentham, this theory is analogously applied to the legal field. The good or bad of the law must be measured by the good or bad consequences produced by the application of the law. A new legal provision can be considered good if the consequences resulting from its application are good, maximum happiness, and reduced suffering. Conversely, it is considered bad if its application produces unfair consequences, losses only increase suffering (Putra, 2003). Furthermore, Jeremy Bentham argues that the legislators should be able to produce laws that can reflect justice for all individuals. By adhering to this principle, this legislation should provide the greatest happiness for society (Manan, 2009).

The occurrence of an agreement between creditors and debtors so that both parties obtain economic benefits. In execution as the peak of the settlement of the collateral dispute, both parties must obtain the greatest possible benefit. Creditors who hold the right to settle debts with debtors must receive the greatest possible benefit according to the concept of a win-win solution. in the right of collateral. Likewise, the right of privilege is a right given to a creditor, its fulfillment is prioritized over other creditors solely based on the nature of their receivables. The types of privileges have been determined sequentially by law, some are classified as general privileges and special privileges (Articles 1134, 1149, 1139 of the Civil Code). Also, the right of retention is classified as a guarantee right determined by the Civil Code. A person's welfare is built from a series of satisfactions experienced at various different moments and which shape a person's life, so the welfare of society is built from the fulfillment of the desire system of various individuals in it. The level of satisfaction and welfare are two interrelated concepts.

The level of satisfaction of implementation refers to the state of an individual or group. Well-being is the aggregate condition of the satisfaction of individuals. The principle for individuals is to improve their well-being as far as possible, their desire system, the principle for society is to improve the welfare of the group as far as possible, realizing that at the broadest level the most comprehensive desire system comes from the desires of its members (Rawls, 2006). The law of mortgage rights is not only land and buildings are not burdened with mortgage rights here in relation to. The subject of the mortgage right is the grantor and recipient of the mortgage right. The grantor of the mortgage right is an individual or corporation that owns the object that becomes

the object of the collateral, while the recipient of the collateral is an individual or corporation that has a receivable whose payment is guaranteed by a guarantee in the hands of whoever the object is. In legal science, this principle is called "droit de suite or zaaksgevolg". The definition of droit de suite is explained as a right that always follows the object in the hands of whoever the object is. The recognition in the UUJF shows that the collateral is a property right (zakelijkrecht) and not an

individual right (persoonlijkrecht). Thus, the collateral right can be maintained against anyone and has the right to sue anyone who interferes with the right.

Principle of accessority. This principle means that the existence of a collateral guarantee is determined by another agreement, namely the main agreement or principal agreement. The main agreement for collateral guarantees is a debt agreement that gives rise to a debt that is guaranteed by collateral guarantees. In UUJF, this principle expressly states that collateral guarantees are agreements from a principal agreement (Mardzuki,2019).

In accordance with the nature of this assessor, it means that the elimination of collateral guarantees is also determined by the elimination of debt or because of the release of rights to collateral guarantees by the creditor receiving the collateral guarantee. J Satrio stated that an accessor agreement is an agreement that arises from a transfer and ends/is eliminated depending on the principal agreement. Legal certainty which is usually in conflict with justice actually contains elements of justice itself.

C. Execution that creates legal certainty

The importance of certainty, law in execution so that no party is sacrificed. : Everyone has the right to recognition, guarantee, protection, and certainty of fair law and equal treatment before the law. Charles Himawan stated: These regulations are sometimes so numerous that they cause ambiguity about the applicable law. If authoritative law means law that is obeyed by people, both the person who makes the law and the person against whom the law is directed, the relationship between humans and law will be seen here. The need for authoritative law to support development is also felt. In a different context, the need for legal certainty is observed (Himawan, 2023).

The purpose of establishing laws, including mortgage laws, is to provide certainty for the parties as subjects in the mortgage agreement. O. Notohamidjojo's view on the purpose of law is: "To protect human rights and obligations in society, to protect social institutions in society (in a broad sense, which includes social institutions in the political, social, economic and cultural fields), on the basis of justice, to achieve balance and peace and general welfare (bonum commune)".

Legal Certainty Table

No	Execution Parate	Fiat Execution
1	Reaching an agreement and the agreement being stated in a peace deed or other type of letter makes it easier to achieve legal certainty.	Execution cases drag on, especially if the parties have died, so the certainty of the resolution of the case for the parties will not reach their children and grandchildren.
2	With the existence of a quick settlement and the will of the parties, it will prevent the emergence of new lawsuits due to dissatisfaction, thus legal certainty will be realized because the case has been completed when the executions were carried out both at the KPKNL and under hand.	If the execution is not carried out, it has the potential to create legal certainty and give rise to new cases, because of intervention from other parties in cases of mortgage rights that cannot be executed and will drag on until they are passed on to children and grandchildren.
3	With the existence of a peace agreement, the parties will	The execution cannot be carried out, especially if there is resistance which

	automatically create legal certainty in resolving the case, because the results of the agreement are binding on the parties in accordance with Article 1338 of the Civil Code.	results in victims, this will give rise to new problems in the form of criminal problems due to the lack of legal certainty in the execution carried out by the court.
4	Easy to resolve in good faith, as long as no party objects and files a lawsuit in court.	It will be complicated and convoluted if many parties are involved and continuously put forward resistance.
5	Easy to implement, as long as the parties have good intentions to deliberate to get good results and think about mutual benefits in the case, then legal certainty will be quickly realized.	Legal certainty is difficult to achieve, with the new lawsuits filed by other parties, the case will become complicated and convoluted, so that legal certainty is difficult to achieve in the execution carried out by the court.

The issue of legal certainty in the prolonged execution fiat is an important thing that is awaited by the parties. In the implementation level, even though there is a court decision, the execution is not easy to carry out, especially if there is resistance from the losing party. This condition ultimately makes the principle of legal certainty in the execution of mortgage rights unattainable. This situation affects the status of the collateral object which has been uncertain for years. The winner of the mortgage case cannot carry out the execution of the mortgage rights easily in accordance with the ideals of the formation of the Mortgage Law.

The ambiguity of the UUHT regulation on the certainty of the execution of the Judicial institution and parate executie with execution based on the executorial title. related to the limits of its legal application. Law Number 4 of 1996 concerning Mortgage Guarantee has confused the understanding of parate executie with execution based on the executorial title, this has caused confusion in many circles, especially creditors holding mortgage rights. The confusion that exists is caused, among other things, by differences in understanding in Article 6 of the UUHT with the General Explanation number 9 of the UUHT and the Explanation of Article 14 paragraphs (2) and (3) of the UUHT which state that the implementation of parate executie is carried out based on Article 224 HIR and Article 258 RBg which states that the grosse acte hypotik (now the Mortgage Certificate), in the event of default or breach of promise, has the force of a court decision whose execution is subject to and subject to civil procedural law on the basis of the order of the Chief Justice using court fiat.

Meanwhile, the implementation of execution with the parate executie mechanism is in principle a simplified execution implementation without the need to involve the court. Indeed, Article 20 of the UUHT has regulated the choice of law for executing its mortgage rights in 3 (three) ways:

1. Execution based on grosse acte hypotheek (Article 224 HIR and Article 258 RBg) through the court in accordance with civil procedure law.
2. Execution based on the executorial title in the Mortgage Certificate (Article 6 and Article 20 UUHT).
3. Private execution based on the agreement between the grantor and the holder of the Mortgage Rights.

4. Conclusion

From the study of the effectiveness and benefits of Parate execution and fiat execution, it is concluede that parate execution is more effective for justice seekers to obtain benefits for the collateral object, because with parate execution, the hopes of justice seekers will soon be realized with peace and a win-win solution that is beneficial for the parties, while prolonged fiat execution is difficult to realize benefits for the parties, especially if there are resistance efforts that give rise to new cases that prolong the execution procedure, especially when carrying out the execution there are clashes and demonstrations that complicate the problem.

The benefits for justice seekers will be quickly achieved if the execution is carried out by fiat, because the parties themselves organize and carry out the auction process themselves, either through KPKNL or a fair auction under hand, which is beneficial for the parties. This situation resolves the case because both parties have benefited from the auction process with parate execution.

In order to realize legal certainty, then the execution parate is more suitable, because the settlement is easy, fast and simple and the costs are low, with the completion of the case then legal certainty is easy to realize especially since the parties have made an interview containing an agreement that binds the parties to be implemented in accordance with Article 1338 of the Civil Code.

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