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Problems with the Implementation of Parate Executie in Indonesia for Land as an Object for Debt Collateral

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Abstract

When the debtor defaults on the agreed debt agreement, then legally the creditor has the right to the debt collateral object for payment of achievements that should be carried out by the debtor by executing it, but the implementation must of course be by applicable legal provisions. Execution of the debt guarantee object can be carried out by parate executie, by way of title executorial, or by way of a private sale. As for Parate Executie or direct execution on one's power, it is a practice of simplifying executions without having to involve the judiciary, which is quite simple, low cost, and relatively fast in time. Unfortunately, parate executives in Indonesia often cause problems in their applications. including because of its existence which currently exists or does not exist and is even considered the same as the concept of the executorial title, so its application becomes inconsistent. The existing problems cause the author to intend to conduct research that aims to find out what exactly is the cause of problems occurring in the implementation of parate executie and what are the solutions to overcome these problems. This research uses normative legal research methods using a statutory approach (statute approach) and a case approach (case approach) that are relevant to the object of the problem in this research. The results of the research from the author's research to find out what are the real problems in implementing parate executie in Indonesia are that there are inconsistent arrangements and implementation and there is confusion in the arrangement which originally regulated 3 (three) types of execution that can be taken by creditors against collateral objects of mortgage rights Also included here is the object of fiduciary guarantees if the debtor defaults (default), namely the exercise of executorial title, parate executie on his own power and underhanded execution, but in the end, it is no longer different and all must get fiat from the Chair of the District Court.

Keywords: Parate Executive, Collateral Object, District Court Fiat

1. Introduction

In practice, if the debtor breaks promises or defaults, the creditor will first remind the debtor of negligence or default by sending several subpoenas or warning letters, but if the debtor still does not heed and carry out his achievements after being reminded several times, the creditor will take legal steps by ways provided by law such

as: filing a claim to the competent court or can carry out executions with executorial titles based on civil procedural law or can also be executed on their power (*parate executie*) or by selling underhanded.

Execution by the executor is no stranger to Indonesia because *parate executie* has long been regulated and implemented in several provisions, including provisions regarding mortgage guarantees and *creditverband* guarantees, mortgage guarantees, and fiduciary guarantees. In this provision, creditors on their authority (*parate executie*) can sell collateral objects through the auction office without having to involve a court. Execution by *parate executie* is a relatively easy way and does not require a long time for the creditor to get paid for settlement of receivables in the event of a defaulting debtor compared to having to go through the Courts which requires time, costs, and a process that is not easy.

The application of *parate executie* in Indonesia always causes many problems, apart from the occurrence of inconsistencies in its application there are also rejections such as the occurrence of lawsuits and so on so that *parate executie* in its application becomes completely unacceptable in the practice of legal relations of debt agreements.

Execution of a *parate executive* through the auction process without the intervention of the Court often has an impact on the interest of auction buyers, because there are not a few obstacles when vacating the house or withdrawing the collateral object from the hands of the debtor. After all, the execution does not go through the Court, so buyers are more likely to believe in buying auction items that have gone through the process of execution from the court. On the other hand, the concept of *parate executie* is very helpful for creditors or creditors for business actors, because it does not require a protracted process to make sales and get payments for fulfilling the debtor's achievements, meaning that *parate executie* is a way of accelerating the settlement of creditors' receivables.

For debtors, it is felt that the concept of *parate executie* does not provide justice and legal protection. The debtor feels that the *parate executie* provision has harmed his constitutional rights so that in its development there has been a judicial review of the articles of law and regulations which give great authority to creditors with their powers to make sales without going through fiat from the Court, this happens because in general, the debtor requires that if there are differences of opinion or opinion regarding the contents and implementation of the agreement, especially regarding defaults which are not only always committed by the debtor, but also at the same time do not rule out the possibility of being carried out by the creditor, the court's role is to settle the problem between them first.

Various other findings were produced by other studies which have discussed issues related to this paper such as Fahlevi and Sihombing (2023) with the title "Parate Execution of Freehold Land as Debt Guarantee" This research takes a case study in the form of a phenomenon that occurred on October 20 of the year In 2014 there was a credit agreement between Bank CIMB Niaga as the creditor and M. Nova Irdiansa as the debtor. The decision of the Panel of Judges of the Supreme Court when deciding on the dispute in its decision contained a rejection of the request for a memorandum of cassation filed by the plaintiffs. The plaintiffs, in this case, are M. Nova Irdiansa and Hj. Enny Adriati is subject to Article 6 of the Mortgage Act (*Parate Execution*) as legal certainty for debt repayment because mortgage rights have easy and certain characteristics. With the conclusion of the analysis of the author's research, the execution carried out by Bank CIMB Niaga as a creditor through an auction is proven to have been authorized by law to carry out executions without the consent of the debtor giving the Mortgage (*Parate Execution*) based on Article 6 of the Mortgage Law, the implementation of which is based by the promises contained in the Deed of Granting Mortgage Rights Number 233/2014 in Article 2 number 6 so that in the decision the Panel of Judges rejected the application submitted by the Plaintiffs because it was clear that each party had previously agreed. However, in the implementation of the execution through an auction conducted by Bank CIMB Niaga, there is a discrepancy in Article 49 of the Minister of Finance Regulation Number 27/PMK.06/2016 Concerning Instructions for Conducting Auctions. which is expected to be able to support and at the same time act as a security tool for credit activities to meet the need for availability of funds through Banking Institutions to support National Development. Through this Law, the Unification of National Land Law was completed, especially the law on guarantees for land, which is one of the objectives of the Basic

Agrarian Law, so that Mortgage Rights become the only Guarantee Institution for Land. Finally, research from Savira and Setyorini (2022) has an explanation in their research in the form of one of the characteristics of mortgage rights, namely easy and certain implementation of execution, which is regulated in Article 20 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (hereinafter referred to as the Mortgage Law or UUHT) consists of Execution under Article 6 of the Mortgage Law (Parate Execution), Execution based on executorial title and Underhand Execution. However, in its implementation, problems often arise. If the debtor does not fulfill his obligations and for this action, the creditor has given a warning letter 3 times so that the obligations can be fulfilled immediately as stated in the agreed agreement. So that creditors carry out executions based on Article 6 UUHT on auction rules.

2. Research Method

This research uses normative legal research methods which are nothing but a type of research with techniques for collecting data, processing data, and research data obtained from primary legal materials, secondary legal materials, and tertiary legal materials (Soerjonono & Mamudji, 2018). The normative or doctrinal legal research method used in this study is a method that focuses on positive legal inventory steps, legal principles, and doctrine, legal discovery in concreto cases, legal systematics, level of legal synchronization, legal comparisons, and legal history. Abdulkadir Muhammad, 2004: 52). While this research uses a statutory approach (statute approach) and a case approach (case approach) that are relevant to the object of the problem in this research. This research needs to be done to find out the problems of implementing parate executie in Indonesia against collateral objects in agreements that have defaulted.

3. Results and Discussion

Initially, the guarantee institutions for land were mortgages and credietverband, in which mortgage institutions were regulated in Article 1162-1232 Book II Burgerlijk Wetboek (BW) or the Civil Code (KUHPperdata), while credietverband was regulated in the Staatsblaad provisions of 1908 Number 542 which amendments were made to the provisions of the Staatsblaad 1937-190. However, since the enactment and enactment of Law Number 5 of 1960, guarantees for land are no longer burdened by mortgages and mortgages, but with mortgages which later gave birth to Law Number 4 of 1994 concerning Mortgage Rights on Land and Objects Related to it. Land.

The choice to use the land as collateral or as collateral for credit, both for productive loans and for consumptive loans, is because the land is considered the safest and has a relatively high economic value. (Agus Yudha Hernoko: 1998). Land encumbered with mortgages is considered more effective and safer, because it is easier to identify the mortgage object so that it is clear and the execution is certain, besides that credit or debt with mortgage rights must be paid first than other bills. from the auction results. (Retnoulun Sutantio: 1999).

Parate Executive comes from the word *paraat* which means the right to the collateral object that is given is ready to be in the hands of the creditor to carry out the sale in public based on his power as if it were considered as selling his property or his own (M. Isnaeni 1996).

Parate Executie has been around for a long time and existed when the guarantee institution, namely mortgages, was enforced as stated in Article 1178 paragraph (2) of the Civil Code which strictly reads as follows:

"However, it is permissible for the creditor of the first mortgage to, at the time the mortgage is given, expressly ask for an agreement that, if the principal amount is not repaid properly, or if the interest owed is not paid, he will be empowered to sell the plots that are bonded in public, to take repayment of principal, as well as interest and fees, from the sales revenue. The promise must be carried out according to the method as stipulated in Article 1211 BW "

Yahya Harahap argues that paratae executie is an exception to the principle of execution under the hands and leadership of the Chief Justice (M. Yahya harahap 1988). Even though the Mortgage is an additional guarantee agreement (not the credit agreement as the main agreement) its function is still to provide a sense of security for the creditor, so the contents of the agreed Mortgage Certificate should not be considered non-existent or have its strength weakened. The function of a legal guarantee is to cover the debt because the guarantee is a means of

protection for the creditor who guarantees him legal certainty about the payment of his receivables or the performance of the debtor (Juhaenda Hasan 2000).

The means of legal protection for creditors has been regulated and confirmed in Article 1131 of the Civil Code which states "That all objects belonging to the debtor, whether movable or immovable, which already exist or will exist in the future, are borne by all individual agreements".

Legal protection for creditors, if the debtor breaks his promise/defaults, cannot be ignored, especially since the debtor is stuck making payments will certainly be very detrimental to creditors. The use of *parate executie* on collateral objects for mortgages is thus the fastest way to pay off debts so that the funds that have been issued can be returned to creditors where the funds can be used or reused in the rotation of the economy.

Based on the Mortgage Law Article 20 paragraph (1) letters a and b, it is stated that the execution of the mortgage object can be taken in 3 (three) ways, namely as follows:

Parate executie (The right of the holder of the first mortgage right to sell the object of the Mortgage right as referred to in Article 6 of the Mortgage Law);

Executorial title (i.e. contained in the Mortgage Certificate as referred to in Article 14 paragraph (2); and Sales under the hand (i.e. execution through the sale of the Mortgage Right object under the hand upon the agreement of the giver and Mortgage Beneficiary according to Article 20 paragraph (2) of the Law Number 4 of 1996).

In the 3 (three) types of execution confirmed by Article 20 of the Mortgage Law, each has its meaning, characteristics, and procedures and are certainly different from one another. In executing the *executorial title* in the Mortgage Certificate (previously using the *Grosse Acte Mortgage*), the sale of land or buildings as collateral objects is subject to the provisions of the Civil Procedure Code by what has been determined in Article 224 HIR/258 RBg, where the weakness is that the implementation procedure takes time quite a long time. Meanwhile, for executions carried out under the hands or underhanded executions, it is necessary to fulfill the requirements, namely, among other things, there must be an agreement between the Mortgage Beneficiary (Creditor) and the Mortgage Giver (Debtor). The problem that needs to be resolved first in carrying out underhanded execution is regarding the validity of selling Mortgage objects by the Bank, based on a power of attorney to sell underhanded from the Mortgage Giver. (Sutan Remy Sjahdeini 1999).

Subekti provides a definition that *Parate Executie* is "executing himself or taking what is his right, in the sense without the mediation of a judge, which is aimed at a collateral item to then sell the item himself". From this definition, it can be concluded that *parate executie* as a method of execution is the easiest and most simple way for the creditor to get back the money owed to him in the case of a defaulting debtor compared to the method of execution which is taken through process and assistance or the intervention of the District Court.

Since the Decision of the Supreme Court Number 3210 K/Pdt/1984 dated January 30, 1986, the implementation of *parate executie* during the period when Law Number 5 of 1960 came into effect until Law Number 4 of 1996 concerning Mortgages over Land and Property -Objects related to land cannot be implemented by the Creditor as expected, because the legal balance in the Decision confirms that "if the auction is carried out by the Head of the Bandung State Auction Office on the Order of the Original Defendant I (Bank-Creditor) and not on ordered by the Chairman of the Bandung District Court, then according to the Supreme Court of the Republic of Indonesia the public auction is contrary to Article 224 HIR, so the auction is invalid."

The Supreme Court's decision is also further strengthened by Book II of the Guidelines for the Supreme Court of the Republic of Indonesia which requires *fiat execution* from the District Court for the execution of collateral objects burdened with Mortgage. However, according to M. Yahyah Harahap, the Supreme Court Decision Number 3210 K/Pdt/1984 dated January 30, 1986, became a debate in legal studies, because it was considered that the decision had ruled out the *eigenmachtigeverkoop* principle provided for by Article 1178 paragraph 2 of the Civil Code (M. Yahya Harahap 1993). While Boedi Harsono commented that the decision was one of the facilities that could not be used because the Supreme Court's decision required that *parate executie* first obtain *fiat* from the head of the district court (Budi Harsono 1995).

Fiduciary guarantees are now no longer permitted to carry out unilateral execution by creditors, they must receive fiat from the Chairperson of the District Court if there is no agreement between the creditor and debtor regarding default and the debtor objects to handing over the fiduciary guarantee object (object: vehicle). motor) to creditors. Even though there are 3 (three) ways of executing fiduciary collateral objects in Article 15 of Law Number 42 of 1999 which are the same as the execution of collateral objects permitted in the Mortgage Law, namely as follows: "First: Inside the Fiduciary Guarantee Certificate as referred to in Article 14 paragraph (1) the words "FOR JUSTICE BASED ON THE ONE ALMIGHTY GOD" are included. Second: The Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executive power as a court decision that has permanent legal force. Third: If the debtor defaults, the Fiduciary Recipient has the right to sell the object which is the object of the Fiduciary Collateral on his authority."

However, since the reading of the decision of the Constitutional Court (MK) Number 18/PUU-XVII/2019, acts of coercion or carrying out executions on their power (*parate executie*) are prohibited and are considered unconstitutional or unlawful as long as there is no agreement regarding breach of contract (default) and the debtor objects to surrendering the vehicle which is the object of fiduciary guarantees, which can only be done if otherwise there is an agreement regarding default and the debtor voluntarily surrendering the fiduciary guarantee object to the creditor or what is usually the case, in this case, is the leasing party.

Likewise, since the enactment of Law Number 4 of 1996, creditors have rarely submitted requests for auction to the State Auction Office for land and buildings that are the object of collateral for Mortgage Rights, because they are sure that the application will be rejected by the State Auction Office. After all, there is already a Republican Supreme Court Decision. Indonesia No.3210 K/Pdt.G/1984 and Book II of the Guidelines for the Supreme Court of the Republic of Indonesia.

Since the Supreme Court's decision, there has been a lack of interest from buyers because there are concerns that problems may arise when the vacancy is carried out, which may occur when the court refuses to issue an order to vacate. After all, there is no fiat from the Head of the District Court (*Restowulan Sutantio*: 1999).

Parate executie arrangements in the Mortgage Act there is an irregularity when it is connected between Article 6 of the Mortgage Law with the general explanation of number 9 which confirms that the implementation of the *executie parate* is based on the provisions of Article 224 HIR the arrangement is aimed at mortgage *grosse acte* and debt recognition *grosse acta*, while the provisions regarding article 224 HIR emphasize that the gross act mortgage and gross acta acknowledgment of debt have the power as a court decision that has permanent legal force, meaning that the execution of the *grosse active* mortgage and gross acta acknowledgment of debt is subject to implementation as a court decision which must be implemented on order from the chairman of the District Court. If so, what J said is true.

If the *paraate executie* is obligated to go through fiat from the Chairman of the District Court, then the location of the *paraat* (ready at hand) to sell on his power which is given as a full right by law is lost. Even though *parate executie* is a very simple implementation of execution without the intervention of the District Court, meaning that if the execution of *parate executie* requires obtaining fiat from the Chairman of the District Court, then such a sale is no different from execution based on the executorial title which is regulated as one of the methods of execution in the Mortgage Law.

Let's look at the general explanation of number 9 of the Mortgage Law, in full as follows:

"One of the characteristics of a strong mortgage is easy and certain execution if the debtor defaults. Although in general the provisions regarding execution have been regulated in the applicable civil procedural law, it is deemed necessary to include specific provisions regarding the execution of mortgage rights in this law, namely those governing the *parate executie* institution as referred to in Article 224 of the Revised Indonesian Regulation (*Het Herziene Indonesisch Regulation*) and Article 258 of the Legal Procedure Regulation for Regions Outside Java and Madura (*Reglement tot regeling van het Rechtswezen in de Gewesten Buiten Java en Madura*)."

In connection with this provision, it is further regulated in the Elucidation of Article 14 paragraphs (2) and (3) of the Mortgage Law which emphasizes:

"Irah-irah listed on the Mortgage certificate and in the provisions of this paragraph is intended to confirm the existence of executorial power on the Mortgage Certificate, so that if the debtor defaults, it is ready to be executed as is the case with a court decision that has obtained permanent legal force, through procedures and by using parate executive institutions by civil procedural law regulations.

So it is very clear that parate executie must be distinguished from the method of execution based on executorial title and execution under the hands because parate executie by law is considered as a characteristic of strong mortgage rights, easy and certain in execution. Therefore there is confusion in some of the applicable provisions which are problematic in the application of parate executie and must be corrected to achieve legal certainty.

Provisions concerning parate executi which have confusion and their implementation in court are at least sufficient to disrupt legal certainty for the giver and recipient of Mortgage Rights, which has an impact on the lack of trust of economic actors in legal instruments, while parate executi on mortgages has the advantages and advantages provided by Article 1178 paragraph (2) The Civil Code against creditors holding first mortgages, even parate executives at mortgage institutions have a very important role and are the basis for building mortgages.

The contradictions in parate executie arrangements in the Mortgage Law are very disturbing and reduce trust in the guarantee institution, regulations that are considered as a legal fortress regarding guarantees for land and which are used in commercial transactions turn out to be in several provisions ineffective in fending off the risk of loss. Legal instruments that are expected and relied on can help sustain an era of economic growth, in reality, this role cannot be applied effectively and optimally.

The presence of the Mortgage Law should not always be interpreted as achieving perfection in the regulation regarding land security institutions, however, the applicable laws and regulations are not final products, but it is necessary to get input or criticism because laws are the first step in the formation of law. better by developments and the demands of social needs of society. Sudikno Mertokusumo said, "The law cannot be complete. The law is only one stage in the process of law formation and is forced to find its completeness in legal and judicial practice (Sudikno Mertokusumo, A. Pitlo 1993)".

Whereas because the Mortgage Law is a renewal of a guarantee institution for land which is a substitute for a mortgage and credit guarantee institution, the essence of legal reform is appropriate as stated by Peter Mahmud Marzuki who said "renewal of legal values is not just a renewal of legal rules or a renewal of substance the law. Based on these new values, a newly legal substance is built. After the construction of the substance, enforcement procedures are made in the form of formal law. These procedural rules may not set aside or deviate from substantive provisions. Meanwhile, substantive provisions must reflect legal values,

So thus the birth of the Mortgage Law which contains ways of carrying out the execution, especially parate executie, requires a more in-depth discussion so that there are no conflicting provisions or confusion of parate executie in legal practice.

If the implementation of the auction sale of the mortgage object guarantee using parate executie must go through and intervene the District Court (fiat from the Chief of the District Court), it means that the legislators of the Mortgage Law no longer distinguish between the three types of execution methods permitted by the Law. As a result, all of these institutions must and must obtain fiat from the Head of the District Court who obeys the rules of the Civil Procedure Code. Thus, the regulation has shown that the forming nature of the Mortgage Law is inconsistent, so it is appropriate to say that the norms governing the implementation of parate executie for the object of Mortgage guarantees are vague (vage norman).

M. Isnaeni thinks "if there is no consistency flowing within the statutory regulations, it means that the image itself is never certain, then it is very difficult to expect legal certainty to emerge from the womb of such rules.

Even though legal certainty is one of the main pillars of legislation besides the aspect of justice, has a close relationship with the issue of efficiency which is always used as a reference by economic actors who often use legal services in various transactions (M. Isnaeni: 1996) "

4. Conclusion

Based on the explanation it can be explained that if there is confusion in the regulation and implementation, then as the legal philosophers say: "we have to look for the essence of the law, look for what is hidden in the law, investigate legal principles as a value judgment, explain values, the basis legal basis to the last philosophical foundations, trying to reach the roots of law, so that the study of legal principles or legal principles is an important and basic element of legal regulations, even legal principles are the heart of legal regulations (Soetiksno (2002)).

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