

ABOLITION OF *PARATE EXECUTIE* AS A RESULT OF CONSTITUTIONAL COURT RULING NUMBER 18/PUU-XVII/2019

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Abstract

Constitutional Court Ruling Number 18/PUU-XVII/2019 have caused changes to the method of execution in fiduciary security rights, by introducing, through the Court Ruling's third judgement, either voluntary or legal effort requirement to the acknowledgement of breach of contract in the exercise of *parate executie*. This is due to the Court had erred in considering *parate executie* as connected to *executoriale titel*. This paper first aims to delineate *parate executie* as a distinct method of foreclosure from *executoriale titel* using a conceptual approach. By further using this approach, this paper shows that the effect on foreclosure in the fiduciary right is that *executoriale titel* is unaffected while foreclosure in *parate executie* is effectively abolished. However, law practitioners should still be able to use a subpoena to notify creditors as to the breach of contract to fulfill legal effort requirements. Second, this paper discusses whether the Constitutional Court Ruling impairs exercise of *parate executie* in other security rights by comparing it to Supreme Court Ruling Number 3210/K/Pdt/1984, dated 30 January 1986, which impairs the exercise of *parate executie* in Mortgage, before being remedied by implementing regulation of the Auctioneer Office. Using that approach, the ruling can be shown to have a chilling effect on the exercise of *parate executie*. The article ends with the suggestion that further guidance is needed in the form of implementing regulation, both by the Supreme Court or the Auctioneer Office.

Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019 telah menyebabkan perubahan pada metode eksekusi hak jaminan fidusia, dengan memperkenalkan, melalui Amar Putusan 3, persyaratan mengenai penentuan adanya cedera janji dalam pelaksanaan parate eksekusi secara kesepakatan atau melalui upaya hukum. Hal ini disebabkan Mahkamah Konstitusi telah keliru

dalam mempertimbangkan parate eksekusi sebagai terkait dengan titel eksekutorial. Artikel ini pertama bertujuan untuk membedakan parate eksekusi sebagai metode eksekusi yang berbeda dari titel eksekutorial menggunakan pendekatan konseptual. Dengan lanjut menggunakan pendekatan ini lebih lanjut, makalah ini menunjukkan bahwa efek pada eksekusi dalam hak jaminan fidusia adalah bahwa titel eksekutorial tidak terpengaruhi sedangkan eksekusi pada parate eksekusi, secara efektif, dihapuskan. Namun, praktisi hukum dapat tetap menggunakan somasi untuk memberi tahu kreditor tentang cedera janji untuk memenuhi prasyarat upaya hukum. Kedua, makalah ini membahas apakah Putusan Mahkamah Konstitusi menghambat parate eksekusi pada jaminan lain dengan membandingkannya dengan Putusan Mahkamah Agung Nomor 3210/K/Pdt/1984, yang menghambat pelaksanaan parate eksekusi dalam jaminan hak tanggungan, sebelum diperbaiki dengan peraturan pelaksana oleh Kantor Lelang. Dengan menggunakan pendekatan ini, makalah ini menunjukkan bahwa putusan ini memiliki efek menghambat pada eksekusi berdasarkan parate eksekusi. Artikel ini diakhiri dengan saran bahwa pedoman lebih lanjut diperlukan dalam bentuk peraturan pelaksanaan, baik oleh Mahkamah Agung atau Kantor Lelang.

Keywords: *Parate Executie, Executoriale Titel, Fiduciary Security Rights, Security Right, Foreclosure*

Introduction

In order to secure creditor's interest, credit agreement usually contains security rights over certain objects.¹ Security rights, considering the 'closed' nature of property law in Indonesia, can only come in the form of hypothec, pledge, mortgage, or fiduciary security. Fiduciary security, enacted through Law Number 42 of the Year 1999 regarding Fiduciary Security (henceforth, 'Fiduciary Law'), has recently been the subject of judicial review in Constitutional Court Ruling Number 18/PUU-XVII/2019 (henceforth, '2019 Constitutional Court Ruling'). In its consideration, the court has connected two distinct methods of

¹ 'Security rights' is also known as 'encumbrance right', but 'encumbrance right' usually refers only to '*Hak Tanggungan*', which is a subset of the larger 'security right'. In this article, the writer will use the term 'security rights' when referring to '*jaminan kebendaan*', while using 'mortgage' for '*Hak Tanggungan*'. The term 'encumbrance' as a noun will be avoided as much as possible, but 'encumber' as a verb will be used to refer to the act of putting a property under security rights.

foreclosing on security rights, *parate executie* & *executoriale titel*, and interpret them as part of the same procedure.²

This interpretation by the Constitutional Court is incorrect. The main difference between the four security rights mentioned above and general guarantee as mentioned in article 1131 of the Indonesian Civil Code (henceforth ‘ICC’) is the ease of foreclosure and preference right. In essence, ease of foreclosure is effected by giving encumbered creditors three methods to bypass the litigation to foreclose an encumbered object (foreclosure is also known as the execution of security right). This is done as opposed to filing a lawsuit for the sale of the object in question, which can result in a long and costly period of litigation. First, there is *private sale*, whereby the creditor and the debtor agree to find a willing third-party buyer to buy the object. Second, there is *parate executie*³, whereby a creditor, under his own authority, sells the object through a public auction. Third, there is *executoriale titel*⁴, whereby some document—in this case, the certificate of security rights—is considered as a final and binding ruling, therefore can be executed using the method set forth in chapter 5 of Renewed Indonesian Reglement (*Herziën Inlandsch Reglement*, henceforth ‘HIR’). In addition to these three methods laid out above, a creditor also always has the right to sue for damages, costs, and interest as set forth in ICC article 1243, but this last method negates the reason for the existence of security rights in the first place, which is to bypass litigation for ease of foreclosure.

The result of falsely combining *parate executie* and *executoriale titel* is the false conclusion by the Constitutional Court that the method of foreclosure using *executoriale titel* is for the creditor to take possession of the object and sell it to anyone under his own authority.⁵ This is incorrect, as will be discussed below. Regardless, due to this error, the

² Mahkamah Konstitusi Republik Indonesia, *Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019*, 6 January 2020, p. 119, point 3.16, 2. Here, the Constitutional Court connected article 15(3) to article 15(2).

³ ‘*Parate Executie*’ is the Dutch term for ‘Summary Execution’. The Indonesian version of it is ‘*Parate Eksekusi*’. See Eric Dirix, “Remedies of Secured Creditors Outside Insolvency”, in *The Future of Secured Credit in Europe*, ed. by Eidenmülle, Horst, and Eva-Maria Kieninger (Berlin: Walter de Gruyter, 2008), p. 230.

⁴ ‘*Executoriale Titel*’ is the Dutch for the Bahasa term ‘*Titel Eksekutorial*’. ‘*Titel*’ refers to ‘rights’ as in ‘title deed’ or *rechtstitel*, not ‘heading’, although some academics confuses the two.

⁵ Mahkamah Konstitusi, *Putusan Mahkamah ...*, p. 117, point 3.14, 2.

court has reinterpreted article 15(3) of Fiduciary Law in 2019 Constitutional Court Ruling's judgment by adding

“The existence of a breach of contract is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal efforts that determine the occurrence of a breach of contract,”⁶

to its original text, which reads as follow:

“If the debtor defaults, the Fiduciary Recipient has the right to sell the object of the Fiduciary Security on his own authority.”⁷

This, as we shall examine below, have a consequential effect on the existence of *parate executie* as it has essentially abolished it.

This research uses normative juridical research to examine the recent 2019 Constitutional Court Ruling's effect on the method of foreclosure in fiduciary security right, and what the effect is on other security rights. By utilizing conceptual approach, the researcher collects statutory, case law, and secondary legal materials such as restatement and legal textbooks to find and explain the concept of *executoriale titel* and *parate executie*, followed by a legal analysis of what the effect is to other security right by comparing this 2019 Constitutional Court Ruling to Supreme Court Ruling Number 3210/K/Pdt/1984, dated 30 January 1986 and enactment of Law Number 4 of 1996 regarding Encumbrance Right Over Land And Land-Related Objects (henceforth, ‘1996 Mortgage Law’).

Concept of *Executoriale titel*

As noted above, one of the methods for bypassing the court is the usage of *executoriale titel* which exists in a certificate of security rights, among other documents.⁸ This does not exist in all security rights, as

⁶ Mahkamah Konstitusi, *Putusan Mahkamah ...*, p. 125, Point 3 of Judgement.

⁷ Article 15(3) Fiduciary Law.

⁸ *Executoriale titel* also exists in other documents such as Notarial Acknowledgement of Debt, Tax ‘Letter of Force’ (‘Surat Paksa Penagihan Pajak’), and Court Ruling, even domestic Arbitration Award. See Panusunan Harahap,

pledge does not have a legal requirement of a form of contract (*vreiform*); hence there is no requirement for them to be in written form, but they exist with the remaining three security rights: Hypothec, Mortgage, and Fiduciary Rights. This subchapter will briefly examine each of these, noting the effect of the 2019 Constitutional Court Ruling to *executoriale titel*, before concluding with the method of executing using *executoriale titel*.

The proof for hypothec is called Grosse Hypothec or '*Grosse Akta Hipotek*'. In the past, *hypothec* serves as a security right over all immovable property;⁹ however, with the enactment of the 1996 Mortgage Law, Mortgage ('*Hak Tanggungan*') now serves that function for land-related objects. However, there is still a function for Grosse Hypothec in maritime matters. As can be read in Article 60 of Law Number 17 of 2008 regarding Shipping, ships registered in Indonesia can be encumbered as a guarantee for loans. This act must be done in the form of hypothec executed by Official of Registrar of Ship Names. The hypothec is then proven by *Grosse Akta Hipotek* which has 'executorial power which is the same as a final and binding court ruling';¹⁰ this phrasing will also serve as a catch-phrase for detecting *executoriale titel*.

Mortgage serves as security right over land and land-related objects. Article 14 of 1996 Mortgage Law regulates the evidentiary and executorial power of 'Sertifikat Hak Tanggungan' (Certificate of Mortgage). As a rule, they must contain this heading: "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*". When they have been made following the rules above, the certificate has 'executorial power which is the same as a final and binding court ruling'. Thus, this proves that '*Sertifikat Hak Tanggungan*' have *Executoriale titel*.

Then there is Fiduciary Security. Unlike other security rights with has a clear type of property in mind, fiduciary security is different; it allows for both movable and immovable objects. It also allows for tangible and intangible objects to be included. The only restriction of objects that can be found is in article 3 of Fiduciary Law, which disallow

"Eksekutabilitas Putusan Arbitrase oleh Lembaga Peradilan", *Jurnal Hukum dan Peradilan*, vol. 7, no. 1 (2018), p. 143.

⁹ Some people also spell *Hipotek* as *Hipotik*. To ease reading, the writer will uniformly use 'Hypothec' or '*Hipotek*'.

¹⁰ Article 60(4) of Law Number 17 of Year 2008 regarding Shipping: '... mempunyai kekuatan eksekutorial yang sama dengan putusan pengadilan yang telah memperoleh kekuatan hukum tetap'.

objects that can already be given other security interest such as mortgage or hypothec, and Circular Letter of Director General of Common Legal Administration Number C.HT.01.10-22 Year 2005 regarding Procedure Standardization for Registration of Fiduciary, which disallows legal rights to be included as ‘objects’ to be encumbered as security rights.¹¹ Regardless, in fiduciary security, the objects encumbered by fiduciary security rights remain in possession of the debtor, unlike in pledge.

Article 15(1) and 15(2) of Fiduciary Law regulates the executorial power of ‘*Sertifikat Jaminan Fidusia*’ (Fiduciary Security Certificate). Like in mortgage, *Sertifikat Jaminan Fidusia* must also contain the heading: “Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa”. If made so, *Sertifikat Jaminan Fidusia* has the ‘executorial power which is the same as a final and binding court ruling’. This proves that ‘*Sertifikat Jaminan Fidusia*’ also have *executoriale titel*.

After analyzing the three certificates above, we must turn our attention to what, if any, effect does the 2019 Constitutional Court Ruling has on the executorial power of ‘*Sertifikat Jaminan Fidusia*’. Some legal analysts have concluded that the 2019 Constitutional Court Ruling has abolished *executoriale titel* in Fiduciary Security Rights by requiring the creditor to petition the court.¹² This cannot be farther from the truth; in fact, the 2019 Constitutional Court Ruling has reiterated that the method of foreclosing using *executoriale titel* is the same as if the creditor has obtained a final and binding court ruling. As quoted from point 2 of Judgment of 2019 Constitutional Court Ruling, Article 15(2) and its explanation must be read with the addition of:

¹¹ Fatmah Paparang, “Standarisasi Prosedur Pendaftaran Fidusia Dalam Praktek Perbankan”, *Jurnal Lex Privatum*, vol. 4, no. 7 (2016), p. 169.

¹² Handoko Eko Santoso, “Hapusnya Kekuatan Eksekutorial Sertifikat Jaminan Fidusia”, *Hukumclick* (10 January 2020), <https://hukumclick.wordpress.com/2020/01/10/hapusnya-kekuatan-eksekutorial-sertifikat-jaminan-fidusia>, accessed 11 May 2020; Aska Cardima and Hadyan Iman Prasetya, “Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019: Apa Implikasinya Bagi Proses Bisnis Lelang?”, *KPKNL Bekasi* (22 Januari 2020), <https://www.djkn.kemenkeu.go.id/kpknl-bekasi/baca-artikel/12953/PUTUSAN-MAHKAMAH-KONSTITUSI-NOMOR-18PUU-XVII2019-APA-IMPLIKASINYA-BAGI-PROSES-BISNIS-LELANG.html>, accessed 19 March 2020; Moh. Dani Pratama Huzaini, “Advokat Ini Bicara Soal Dampak Putusan MK Tentang Eksekusi Jaminan Fidusia”, *Hukumonline.Com* (17 Januari 2020), <https://www.hukumonline.com/berita/baca/lt5e210756c2b40/advokat-ini-bicara-soal-dampak-putusan-mk-tentang-eksekusi-jaminan-fidusia>, accessed 15 April 2020.

“For fiduciary security which has no agreement towards a breach of contract (default) and debtors object to the voluntary surrender of objects encumbered by fiduciary security, then all legal mechanisms and procedures in the *execution of the foreclosure of the Fiduciary Security Certificate must be carried out and be the same as the execution of a court decision that has the power of a final and binding court ruling.*”

However, contrary to widespread belief, a final and binding court ruling cannot be executed automatically by the winning party themselves. Parties to a lawsuit can—and do—in practice, voluntarily comply with the ruling. However, if the losing party refuses to comply with the ruling, the winning party must resort to using ‘*fiat eksekusi*’, whereby they petition of Chairman of District Court to force compliance.¹³ The Chairman of District Court will then summon the losing party for admonition (a process known as *aanmaning*) and will give the debtor up to 8 days to voluntarily comply with the ruling. If the time has elapsed, then the Chairman of District Court will instruct the District Court Clerk to seize and begin the process of public auction by petitioning the auctioneer¹⁴ (a process known as ‘*sita dan penjualan eksekusi*’ or ‘*executoriaal beslag and executie verkoop*’).

In addition, according to HIR article 224, the same applies to foreclosure of security rights using *executoriale titel*. The creditor with security rights must also petition the Chairman of District Court using the security rights certificate which has *executoriale titel*.¹⁵ The Chairman of District Court will then summon the debtor for *aanmaning* before issuing a writ of the seizure (*penetapan sita*) for the Court Clerk to seize and sell the encumbered objects of the losing party through a public auction. Both in executing a final and binding court ruling or foreclosing based on *executoriale titel*, the Court Clerk—not the creditor—act as the applicant to the auctioneer.

As noted above, a creditor has the option between exercising his right of *executoriale titel* or exercising *parate executie*. Why a creditor would choose one over the other can be seen by comparing the cost between

¹³ Article 195(1), 196, 197(1), jo. 197(2) HIR.

¹⁴ Auctioneer here means ‘Pejabat Lelang’, while Auctioneer Office means ‘Kantor Pelayanan Kekayaan Negara dan Lelang’.

¹⁵ Article 224, 195(1), 196, 197(1), jo. 197(2) HIR.

both of them. Whereby both of them must pay auctioneers cost, only in exercising *executoriale titel* does a creditor have to pay for petitioning the court. A creditor may also choose *parate executie* rather than *executoriale titel* considering the debtor may oppose the exercise of *executoriale titel* by appealing to the District Court.¹⁶ The process of *executoriale titel* itself takes a long time, as the fastest time possible for *executoriale titel* is 96 days.¹⁷

In concluding this subchapter, the writer reiterates the executorial power held by *grosse akta hipotek*, *sertifikat hak tanggungan*, and *sertifikat jaminan fidusia* is unchanged, which is to say that they must be exercised as if they are a final and binding court ruling. To exercise this power, the creditor must petition the court to obtain a writ of seizure to Chairman of District Court which will then instruct Court Clerk to seize and sell through a public auction the encumbered objects of the debtor.

Concept of *Parate executie*

This subchapter will briefly examine the legal basis for *parate executie* in all 4 of the security rights, the procedure to exercising *parate executie*, and examines what effect does the 2019 Constitutional Court Ruling has on *parate executie*, before concluding with a suggestion.

Whereby we can find a clear rule of procedure for exercising *executoriale titel*, we cannot say the same for *parate executie*. This reflects the fact that *parate executie* is done without involving the court at all. As has been described, when exercising *parate executie*, a creditor does so ‘under his own authority’, not the courts. However, that is not to say that exercise of *Parate executie* is without rules. ICC regulates their existence to a certain extent. And as have been stated above, the exercise of *executoriale titel* requires public auction; likewise, with *parate executie*.

ICC acknowledges *parate executie* in regard to pledge and hypothec. This can be seen in article 1155 for pledge, whereby a creditor has the right to sell an object pledged unto him in public, if and only if, the debtor has not complied with his obligations (default or breach of contract). The same stipulation can be found in article 1178 regarding hypothec. If explicitly promised, when a debtor default, a first-ranked

¹⁶ Article 195(5), 207, jo. 208 HIR.

¹⁷ H. R. M. Anton Suyatno, “Perlawanan Eksekusi Obyek Jaminan Hak Tanggungan Berdasarkan Titel Eksekutorial”, *Jurnal Hukum dan Peradilan*, vol. 3, no. 1 (2014), p. 6.

hypothec creditor ‘shall be irrevocably authorized to sell the mortgaged property in public’. This selling in front of the public must conform to article 1211, which requires it through a public auction. This allowance of *parate executie* is also known by its Dutch term ‘*beding van eigenmachtige verkoop*’.¹⁸ (*beding van eigenmachtige verkoop* literally translated means ‘promise to sale [under] own authority’).

Historically, when *Burgerlijk Wetboek* was being codified, there were two templates for the foreclosure of encumbered objects. Dutch lawmakers can copy from the *Code Civil des Français* (known to us as the Napoleonic Code) which allows for summary execution or they can copy the practices of the Germans which only allow for execution to happen under a judge’s order.¹⁹ Motivated by the perceived need for summary execution for both the interest of the creditor and the debtor, Dutch lawmakers chooses the former over the latter, hoping that it will spur credit creation to lower-income borrowers. However, for immovable objects, such sales must be agreed explicitly. This agreement, when registered, will be valid not only to the parties connected but also to third parties.²⁰

Legal practitioner’s interpretation regarding this promise to sell under the creditor own’s power generally falls under two camps. They interpret it either that the creditor acts as a power of attorney of the debtor in the public auction (*‘mandaat theory’*) or that the registration means that this is no mere legal right, rather it is a property right (*zakelijke*) owned by the creditor (doctrine of *‘leer der vereenvoudigde executie’*). It is generally noted that courts generally follow the former, while academics generally adheres to the latter.²¹ It should also be noted that *mandaat* theory has many deficiencies, in particular as it fails to address the conflict of interest inherent in the public auction, where the creditor will try to achieve the price equal to his unpaid loan, while debtor will try to achieve the true value of the object. Besides that, there is also the conflict inherent in the fact that creditors will cover his debt-

¹⁸ Teddy Anggoro, “Parate Eksekusi: Hak Kreditur, Yang Menderogasi Hukum Formil (Suatu Pemahaman Dasar Dan Mendalam)”, *Jurnal Hukum & Pembangunan*, vol. 37, no. 4 (2007), p. 553.

¹⁹ J. Satrio, *Parate Eksekusi Sebagai Sarana Menghadapi Kredit Macet* (Bandung: Citra Aditya Bakti, 1993), p. 16–18.

²⁰ Article 1178(2) jo. 1178(3) ICC.

²¹ Rachmadi Usman, *Hukum Jaminan Keperdataan* (Jakarta: Sinar Grafika, 2016), p. 270–273.

claim first before submitting leftover money, if there are any, to the debtor.²² Lately, Constitutional Court Ruling Number 70/PUU-VII/2010 has taken the view that *parate executie* is a relative right²³ bestowed by a debtor to a creditor, not to agents to the creditor.²⁴ This would indicate that the Constitutional Court has adopted the latter's view.

The abovementioned definition of *eigenmachtige verkoop* is later incorporated into other security rights. In 1996 Mortgage Law²⁵, article 6 states that:

“If the debtor default, *the first mortgage holder has the right to sell the object encumbered on their own authority through public auctions* and take the payment of his receivables from the results of the sale.”

The same can be found for fiduciary security rights as seen in article 15(3) of Fiduciary Law:

“If the debtor defaults, *the Fiduciary Recipient has the right to sell the object of the Fiduciary Security on his own authority.*”

And further on article 29 (1) (b) of Fiduciary Law:

If the debtor or the Fiduciary Grantor defaults, execution the object of the Fiduciary Security can be done in these manners: ...

b. *sale of the object of the Fiduciary Security on Fiduciary Recipient own authority through public auctions* and take the payment of his receivables from the results of the sale

²² Sri Soedewi Masjchun Sofwan, *Hukum Perdata: Hak Jaminan Atas Tanah, Cetakan V* (Yogyakarta: Liberty, 2001), pp. 28–30.

²³ Relative here means it can't be substituted by another party. It does not mean the opposite of *absolute*. Therefore, the debtor does not necessarily have to agree to the sale of objects secured.

²⁴ Herowati Poesoko, *Dinamika Hukum Parate Executie Obyek Hak Tanggungan* (Yogyakarta: Aswaja Pressindo, 2013), pp. 271–277.

²⁵ 1996 Mortgage Law also indirectly refers to *parate executie* when making a distinction of foreclosure method between *executoriale titel* and *parate executie* in article 20(1)(a).

Therefore, albeit ICC itself does not explicitly state that *parate executie* is *eigenmachtige verkoop*, later securities rights laws have acknowledged that *parate executie* is *eigenmachtige verkoop*.

After reviewing the legal basis, we must turn our attention to the matter of the procedure of *parate executie*. Besides, in the abovementioned articles, they can also be found in the implementing regulation regarding the public auction, Regulation of the Director-General of State Assets Number 2/KN/2017 regarding 'Technical Guidelines for the Implementation of Auction ('Auction Guidelines Regulation'). Here, the ease of foreclosure on a encumbered object is truly achieved; because when exercising *parate executie* creditor does not need to involve the court at all. First, we should note that rules of public auction make the distinction between the exercise of *executoriale titel* and *parate executie*; as Articles 6 of the Auction Guidelines Regulation divides auction between 'Court Ordered Execution' (point 2) from auction resulting from 'Mortgage Foreclosure' (point 5), 'Fiduciary Security Foreclosure' (point 10), and 'Pledge Foreclosure' (point 14). The first is an exercise of *executoriale titel* as can be seen by the fact that Court Ordered Execution Auction requires proof of *aanmaning* and writ of seizure, while the latter three types of auctions merely require the proof of loans, security rights, that debtor have defaulted, and details of loans to be repaid. This shows that in *parate executie*, the court does not need to be involved. Second, whereby in the case of *parate executie* the applicant to the auctioneer is the creditor himself, in *executoriale titel* the applicant is Court Clerk. So, we can determine that it is faster, cheaper, and easier for a creditor to use *parate executie* because the creditor does not have to wait for *aanmaning* procedure that is needed in *executoriale titel*.

In short, the procedure for a creditor to use *parate executie* is for the creditor to petition the Auctioneer directly by herself, without needing to seek prior approval by the debtor. In exercising *parate executie*, a creditor also does not need to obtain a writ of seizure issued by the Chairman of District Court (*fiat eksekusi*), which he must do if he exercises *titel executoriale*.

Thus, what is the effect of the 2019 Constitutional Court Ruling on *parate executie*? As have been said above, the Court has inserted:

"The existence of a breach of contract is not determined unilaterally by the creditor but on the *basis of an agreement*

*between the creditor and the debtor or on the basis of legal efforts that determine the occurrence of a breach of contract.*²⁶

to article 15(3) of Fiduciary Law. This means that the creditor must fulfill 2 optional requirements to exercise his *parate executie* right: (1) reach an agreement regarding the existence of a breach of contract with the debtor; or (2) conduct legal efforts that determine the occurrence of a breach of contract. As will be described below, these 2 requirements are inherently incompatible with the exercise of *parate executie* under the creditor's own authority.

First, (1) reaching an agreement regarding the existence of a breach of contract with the debtor would defeat the purpose of having a *parate executie* in the first place, which is the ease of foreclosure regardless of the debtor's admission of default. This is the essence of the doctrine of '*leer der vereenvoudigde executie*', whereby the creditor is empowered to solely determine—under his own authority—himself whether or not the state of a breach of contract has been reached and thus avoiding protracted litigation to determine that state. Should the creditor has determined so falsely, thus he is also solely responsible for his own action and therefore, it can be sued under the tort of unjust enrichment.²⁷ Notwithstanding above, even if the debtor does agree regarding the existence of a breach of contract, that would mean that he agrees to the sale using a public auction, with the creditor acting on his behalf. In short, this means that the creditor is a power of attorney to the debtor.²⁸ This is a clear example of *mandaat* theory, which has been said above to have many deficiencies and therefore incompatible as the legal theory behind *parate executie*. Last, why would any rational creditor and debtor be able to reach an agreement towards the existence

²⁶ Mahkamah Konstitusi, *Putusan Mahkamah ...*, p. 125.

²⁷ Chris Rivaldo Maengkom, "Eksekusi Jaminan Fidusia Yang Berlaku Di Indonesia Sebagai Lembaga Jaminan Menurut Undang-Undang Nomor 42 Tahun 1999", *Lex Privatum*, vol. 4, no. 1 (2016), pp. 74-82, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/11167/10757>, accessed 14 July 2020, p. 78; J. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan Fidusia* (Bandung: Citra Aditya Bakti, 2005), p. 321.

²⁸ A similar interpretation of *parate executie* as voluntary public auction regarding foreclosure of mortgage was denied for the same reason by Jamilus, "Persoalan Dalam Pelaksanaan Eksekusi Sertifikat Dan Hak Tanggungan", *Jurnal Penelitian Hukum De Jure*, vol. 17, no. 2 (2017), p. 295.

of a breach of contract and still use public auction? Any agreement to do so would also be followed suit with an agreement for a private sale because a private sale is always cheaper than a public auction. After all, the parties do not have to pay the auctioneer's fee. This would benefit the debtor immensely as any leftover from the sale after deducting the debt-claim is returned to him, as opposed to going to the auctioneer. So, reaching an agreement with the debtor is inherently incompatible with the concept of *parate executie*. Or if an agreement is reached, the parties would resort to private sale instead.

Second, (2) requiring legal effort would defeat the purpose of having security rights in general. If 'legal effort' is to be interpreted as 'filing a lawsuit', then a creditor with security rights are no better than an unencumbered creditor. Recall that the difference between security rights and general guarantee as mentioned in ICC article 1131 is that security rights are enforceable without a court ruling to foreclose. If 'legal effort' is to be considered, as a lawsuit, then the advantage of an encumbered creditor is null. Another possible interpretation of 'legal effort' is interpreting it as 'obtaining a writ of seizure', however, this would mean that 2019 Constitutional Court Ruling have erred in considering *parate executie* as the same with *executoriale titel*, and thus subjugating the rules and procedure of *parate executie* as the same with the procedure for *executoriale titel*.

So, as it stands, the 2019 Constitutional Court Ruling has abolished *parate executie* in effect, if not in name. This is because of now a creditor in exercising *parate executie* either have to (1) obtain a writ of seizure, (2) obtain a final and binding court ruling, or (3) obtain an agreement as to the existence of a breach of contract with the debtor.

However, those three are not the only method of determining that a breach of contract have been met; although not considered part of 'legal effort' (*upaya hukum*) *per se*, this researcher proposes that current practitioner should use subpoena (*somasi*) to determine that a breach of contract is in existence. Subpoena, as described in article 1238 is one of the ways to notify that debtor has defaulted. However, it is not to be said that subpoena causes the existence of default, rather subpoena merely informs the debtor that he has defaulted. That being said, this method can be beneficial toward law practitioners, as it is not that much costlier than the regular exercise of a *parate executie*. However, effort

must be made for the recording of the debtor's receipt of the subpoena, to prove that the debtor has acknowledged his default.

In conclusion, the researcher wishes to reiterate that there is a difference in legal basis and procedure between the *parate executie* and *executoriale titel*. *Parate executie* is the right of the creditor to sell the encumbered object if and when the debtor default, under his own authority. However, the 2019 Constitutional Court Ruling has erred in interpreting *parate executie* and subjugating it under the procedure for *executoriale titel*. Now, the existence of default must be agreed by the debtor or determined through legal effort before *parate executie* can be conducted.

Effect 2019 Constitutional Court Ruling on other Security Rights

Thus, we can see that now *parate executie* can only be exercised after a legal effort to determine a breach of contract has been made. This, among others, can take the form of a writ of the seizure by the Chairman of District Court (*fiat eksekusi*), due to confusion by the Constitutional Court. Strangely, the confusion between *parate executie* and *executoriale titel* is not the first time that it has happened. As shall be described in this subchapter, there have been 2 positive laws that has also erred in interpreting that the exercise of *parate executie* as needing writ of seizure. First is Supreme Court Ruling Number 3210/K/Pdt/1984, dated 30 January 1986, and second is the 1996 Mortgage Law.

On its face, Supreme Court Ruling Number 3210/K/Pdt/1984, dated 30 January 1986, have eerily similarity to the 2019 Constitutional Court Ruling. Both involve a disagreement as to the exercise of *parate executie*. One is about land hypothec, while the other is about fiduciary security. In both instances, a court rules in favor of the debtor granting them relief under tort. One is in the Supreme Court while the other is in the District Court of Jakarta. Both ruling also sets a precedent in requiring intervention by the court in exercising *parate executie*.

In Supreme Court Ruling Number 3210/K/Pdt/1984, dated 30 January 1986 (also known as Kandaga Shopping Center Jurisprudence), a creditor initiated public auction in the City of Bandung through its public auctioneer because the debtor defaulted. The two lower courts found that this action is not tort and upheld the auction. However, the

Supreme Court reversed the lower court ruling and determined that this action is a tort. They then held that:

“Whereas based on HIR Article 224, auction conducted as a result of *grosse akta hipotek* which has the heading “*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*” which has the same power as a court decision, should be carried out on the orders and under the leadership of the chairman district court if there is no peace of conduct.”²⁹

While that is true on its face, it should be noted that the creditor in the case above actually conducted his *parate executie* right, not his *executoriale titel* right.³⁰ Therefore, HIR Article 224 should not have applied to the case at all. Regardless, from then on until recently, all execution of land hypothec must resort to *executoriale titel*. Not only that, but even the execution of mortgage also suffered due to this Kandaga Shopping Center Jurisprudence, as many auctioneers have refused to sell encumbered objects without a writ of seizure.³¹ Thus, Kandaga Shopping Center Jurisprudence is often credited with abolishing all *parate executie* albeit the jurisprudence itself only concerns hypothec.

At this point, a critical reader would retort that surely with the enactment of Law Number 4 of 1996 regarding Encumbrance Right Over Land and Land-Related Objects, whose article 20 delineates between foreclosure based on *executoriale titel* and foreclosure based on *parate executie*, that the difference of concept and procedure between both of them is confirmed.³² While that is true on the surface, the existence of this law merely worsened the situation.³³ For example, point 9 of General Explanation of 1996 Mortgage Law states that:

²⁹ Ahmad Fikri Assegaf and Elijana Tanzah, *Penjelasan Hukum Tentang Grosse Akte* (Jakarta: Nasional Legal Reform Program, 2011), p. 60.

³⁰ Ahmad Fikri Assegaf, *Penjelasan Hukum Tentang Grosse...*, p. 125; Poesoko, *Dinamika Hukum Parate ...*, p. 259–260.

³¹ Ananda Fitki Ayu Saraswati, “Dilematis Eksekusi Hak Tanggungan Melalui Parate Executie Dan Eksekusi Melalui Grosse Akta”, *Jurnal Repertorium*, vol. II, no. 2 (2015), pp. 51–59, <https://www.neliti.com/publications/213089/dilematis-eksekusi-hak-tanggungan-melalui-parate-executie-dan-eksekusi-melalui-g>, accessed 14 July 2020, p. 58.

³² The same hope, regarding fiduciary security, is also expressed by J. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan Fidusia*, pp. 321–322.

³³ Henny Tanuwidjaja Tan, “Parate Eksekusi Hak Tanggungan Kontra Fiat Pengadilan”, *Refleksi Hukum*, vol. 10, no. 1 (2016), p. 105.

“..., it is deemed necessary to specifically include the provisions concerning the execution of the Mortgage Rights in this Law, i.e *provisions that regulate parate executie as referred to in Article 224 of the Het Herzijene Indonesisch Reglement.*”

As the reader can recall from two sub-chapter ago, Article 224 actually regulates *executoriale titel*, not *parate executie*. Taken at face value, 1996 Mortgage Law reaffirms Kandaga Shopping Center Jurisprudence rather than overturns it. Some would argue that the General Explanation does not have binding power of law, and thus point 9 of General Explanation of 1996 Mortgage Law does not have binding power as law.³⁴ However, the current consensus holds that explanation, in general, has persuasive and explanatory, if not binding, power.³⁵ Nevertheless, the main body of 1996 Mortgage Law never specifically states what procedure does *executoriale titel* takes.

Thankfully, both confusions above created so much uncertainty over the execution of encumbered objects that the Finance Department's Agency of Receivables and State Auction felt the need to intervene by issuing Circular Letter Number SE-23/PN/2000, dated 22 November 2000. In that letter, without directly contradicting the Mortgage Law, it is affirmed a distinction is to be made between *executoriale titel* and *parate executie*. For example, the applicant for 'Executoriale titel Foreclosure' is the court, while the applicant for 'Article 6 of Mortgage Law Foreclosure'³⁶ is the creditor himself. While there is a requirement for proof of *aanmaning* for *executoriale titel* foreclosure, none is needed for Article 6 of Mortgage Law Foreclosure. In both instances, the agreement by the debtor is unnecessary. This circular letter's content would later be codified into Regulation of the Director-

³⁴ Rose Panjaitan, "Pengaturan Dan Pelaksanaan Parate Eksekusi Di Luar Hukum Acara Perdata", *Notaire*, vol. 1, no. 1 (July 2018), pp. 135-152, DOI: <http://dx.doi.org/10.20473/ntr.v1i1.9102>, accessed 14 July 2020, pp. 145-147.

³⁵ Bustanuddin, "Analisis Fungsi Penjelasan Dalam Pembentukan Peraturan Perundang-Undangan Di Indonesia", *Jurnal Ilmu Hukum INOVATIF*, vol. 6, no. 7 (2013). pp. 79-90, <https://www.online-journal.unja.ac.id/jimih/article/view/2184>, accessed 14 July 2020, p. 79.

³⁶ Which the researcher has stated above as the implementing regulation that allows for *parate executie* in mortgage law. The circular letter avoids using the term *parate eksekusi* entirely, substituting it with the term 'Article 6 of Mortgage Law', probably due to desire to avoid confusion by directly contradicting general explanation point 9 of 1996 Mortgage Law.

General of State Assets Number 2/KN/2017 regarding Technical Guidelines for the Implementation of Auction, discussed above.

The distinction between *parate executie* and *executoriale titel* has also been affirmed by the judiciary. Without going into the protracted back and forth through the various Supreme Court Circular Letter, the two latest guidance books issued by the court, '*Pedoman Pelaksanaan Tugas bagi Pengadilan, versi 2007*' and '*Pedoman Eksekusi Pada Pengadilan Negeri, versi 2019*', does make this distinction. For example, both of them note that *parate executie* and *executoriale titel* are different methods of foreclosure while noting that the execution of *executoriale titel* is the same as a final and binding ruling.³⁷

However, those circular letters, implementing regulation, and guide books that make these distinctions are made before the 2019 Constitutional Court Ruling. Based on the principle of *lex posterior derogat legi priori*, it would not be controversial to say that these distinctions are nullified by this ruling, *even if they apply to the other security rights*. Just as the 1984 Supreme Court Ruling created uncertainty over the existence and procedure of *parate executie* that persisted even after land-related hypothec is replaced by mortgage that causes refusal by auctioneer office for execution using *parate executie*, the 2019 Constitutional Court Ruling does the same. Thus, the changes made by the 2019 Constitutional Court Ruling might also apply to mortgage and hypothec. Auctioneers in the auctioneer office have noted this.³⁸ However, it remains to be seen whether the efforts of the public auctioneer and the judiciary to distinguish between *parate executie* and *executoriale titel* is all for naught due to this reinterpretation of foreclosure on fiduciary rights. Further guidance in the form of a Circular Letter from the Supreme Court or in the form of implementing regulation from public auctioneer could, at any moment, provide further guidance on these issues.

³⁷ Mahkamah Agung Republik Indonesia, *Pedoman Teknis Administrasi Dan Teknis Peradilan Perdata Umum*, 2007th ed. (Jakarta, 2008), p. 92; Badan Peradilan Umum Mahkamah Agung Republik Indonesia, *Pedoman Eksekusi Pada Pengadilan Negeri*, 2019th ed. (Jakarta, 2019), pp. 15–17.

³⁸ Aska Cardima, "Putusan Mahkamah ...

Conclusion

A security rights holder has two main methods: bypass lawsuit and agreement with the debtor to foreclose on an encumbered object. First is *parate executie*, in which the creditor under his own power applies directly to the auctioneer to sell the object through a public auction. Second, there is *executoriale titel*, in which a creditor based on a certificate of security rights—which is treated the same as a final and binding ruling—can obtain a writ of execution from the Chairman of the District Court. Constitutional Court Ruling Number 18/PUU-XVII/2019 has confused the two in fiduciary security and, through its 3rd Ruling, caused *parate executie* to only be able to be exercised if (1) existence of a breach of contract is agreed by the debtor, or (2) a legal effort has been conducted. This has the effect of abolishing *parate executie* in fiduciary security rights unless ‘legal effort’ is interpreted as a subpoena. The abolition above also has a chilling effect on the exercise of *parate executie* in other security rights, such as hypothec and mortgage.

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