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# The Validity and Binding Power of the Parate Execution Clause in the Deed of Granting Mortgage Rights

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**Abstract**

Mortgage rights as collateral for land play a significant role in financing practices in Indonesia. One of the main characteristics of mortgage rights is the priority position of the holder and the ease of execution if the debtor defaults. Law Number 4 of 1996 concerning Mortgage Rights on Land and Land-Related Objects (UUHT) introduced the concept of parate execution as regulated in Article 6, which grants the first mortgage holder the right to sell the mortgage object at his own discretion through a public auction if the debtor defaults. In practice, the provisions of Article 6 of the UUHT are outlined and emphasized in the parate execution clause included in the Deed of Granting of Mortgage Rights (APHT). However, questions arise regarding the validity of this clause from a contractual legal perspective and the extent of its binding force on debtors and third parties, considering that the execution process in reality still involves an Auction Institution and its validity is often challenged in court. This study aims to analyze the validity of the parate execution clause in APHT from the perspective of contract law and UUHT, and to examine the binding force of the clause on the parties and third parties. The method used is normative legal research with a statutory approach and a conceptual approach. The results of the study indicate that the parate execution clause is essentially valid and binding as an accessory agreement based on Article 6 of UUHT and the principle of freedom of contract, as long as it does not conflict with public order and is implemented in accordance with auction procedures stipulated by law. However, its implementation cannot be interpreted as a completely independent execution without the involvement of an auction institution and without providing space for debtors to file objections. Parate execution in the context of UUHT is more appropriately understood as the creditor's right to initiate a sale through a public auction with simplified procedures, not as the complete elimination of the control function of the judicial institution. Therefore, it is necessary to affirm the limits of the implementation of parate execution through consistent guidelines and jurisprudence to create a balance between certainty and justice for both creditors and debtors.



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## 1. INTRODUCTION

Security institutions play a central role in the modern financing system. In credit activities, particularly in the banking sector, the existence of collateral provides a sense of security for creditors and simultaneously enables debtors to obtain larger credit facilities at more reasonable interest rates. In Indonesia, one of the most important forms of security is the mortgage right on land and land-related objects. The mortgage right emerged as a replacement for mortgages on land and credit guarantees, with the aim of providing greater legal certainty and aligning with the national agrarian legal system. The main characteristics of a mortgage right are a priority status (droit de préférence) and the property of following its object to whomever the object passes (droit de suite).

Law Number 4 of 1996 concerning Mortgage Rights on Land and Land-Related Objects (UUHT) systematically regulates the creation, transfer, and termination of mortgage rights, as well as their execution. One important innovation in the UUHT is the regulation regarding ease of execution, both through the executorial title attached to the mortgage certificate and through the separate execution mechanism as stated in Article 6. This article authorizes the first mortgage holder to sell the mortgage object at their own discretion through a public auction if the debtor defaults. This provision is often seen as a form of strengthening the position of creditors and an answer to the business world's need for certainty and speed of collateral execution.

In practice, the provisions of Article 6 of the UUHT are reinforced by the inclusion of a parate executory clause in the Deed of Grant of Mortgage Rights (APHT). The APHT, as an authentic deed drawn up by a Land Deed Official (PPAT), contains certain promises permitted by the UUHT, including the promise that if the debtor defaults, the mortgage holder has the right to sell the mortgaged object without further approval from the mortgagee. This clause is essentially a contractual elaboration of the provisions of Article 6 of the UUHT and is often seen as a concrete manifestation of the principle of freedom of contract in the field of material collateral. However, there is debate regarding the extent to which this clause can be implemented directly without court intervention and its position within the civil procedural law system and state auction regulations.

The implementation of the right of parate execution in practice does not always run smoothly. On the one hand, creditors desire ease and speed in executing collateral when debtors default, in order to minimize the risk of non-performing loans. On the other hand, debtors often feel disadvantaged, especially when execution is carried out without adequate communication, without a proper valuation, or without adequate opportunity to undertake rescue efforts. Debtors often file lawsuits to challenge the validity of the execution, delay it, or even cancel it, on various legal grounds such as procedural violations, impropriety, or abuse of the debtor's rights.

This situation raises fundamental questions regarding the validity and binding force of the parate executory clause in the APHT. Legally, this clause is supported by the provisions of Article 6 of the UUHT and the principle of freedom of contract as stipulated in the Civil Code. However, its implementation must also consider other principles such as good faith, equality of party status, protection of the vulnerable, and public order. Furthermore, the execution of mortgaged property through public auction is subject to other laws and regulations governing auction procedures and the role of state auction institutions.

Theoretically, parate execution is understood as the creditor's right to sell the collateral without a court order, based on a promise made in advance in the collateral agreement. This concept is known in continental European law and has long been a topic of discussion among legal experts, particularly regarding its balance with the principle of debtor protection. In Indonesia, the debate regarding parate execution has resurfaced with the enactment of the UUHT and the increasing use of mortgage rights in credit transactions. Jurisprudence of the courts, particularly the Supreme Court, shows a variety of views on the implementation of parate execution, ranging from those tending to support it to those that restrict its implementation.

From a contractual law perspective, the parate executory clause in an APHT constitutes an agreement between the parties. The debtor, as the grantor of the mortgage, essentially agrees that if he or she defaults, the creditor may sell the collateral through public auction without further approval. This agreement is set out in an authentic deed that has full evidentiary force. However, it is necessary to examine whether this agreement is truly the result of free negotiation or merely a standard clause imposed on the debtor, and whether it materially violates the principles of justice and fairness.

In banking practice, the bargaining positions of debtors and creditors are unequal. Credit agreements and guarantee deeds are generally drafted unilaterally by the bank as the creditor, while the debtor has limited room to negotiate the agreement's contents. This raises concerns that the parate executory clause could be overused by creditors without providing sufficient room for the debtor to defend its rights. This is where regulations and jurisprudence are needed to define the limits of the clause's implementation to prevent abuse.

## 2. METHOD

Ahmad Mukti Fajar ND and Yulianto explain the definition of normative legal research as "legal research that positions law as a system of norms. The system of norms in question concerns principles, norms, rules, from statutory regulations, court decisions, agreements, and doctrines (teachings).[1]

The theoretical framework used includes the theory of material security rights, the theory of contracts, and the theory of legal certainty. The theory of material security rights explains the accessory, subsequent, and priority nature of collateral rights. The theory of contracts emphasizes the principles of freedom of contract, consensualism, and balance as the basis for assessing the validity and fairness of parate executory clauses. Meanwhile, the theory of legal certainty is used to assess the extent to which the parate executory mechanism provides certainty for creditors without excessively sacrificing the debtor's rights. These three frameworks will be used in an integrated manner to analyze the issues raised in this study.

## 3. RESULTS AND DISCUSSION

### 3.1 Concept and Legal Basis of Parate Execution in Mortgage Rights

Part execution conceptually represents the right granted to a creditor holding a security interest to sell the collateral without requiring a court order of execution, based on a prior promise made to the debtor. This concept developed in continental European legal systems, particularly in the context of pawns and mortgages, as an effort to provide ease and efficiency for creditors in obtaining repayment of their receivables. The parate execution regulation is intended to avoid a complicated and time-consuming judicial process, which can ultimately be detrimental to both creditors and debtors because the value of the collateral can decrease.

In the context of mortgage rights in Indonesia, parate execution is expressly regulated in Article 6 of the Mortgage Law. This article states that if the debtor defaults, the first mortgage holder has the right to sell the mortgage object at their own discretion through a public auction. This formulation emphasizes two main points: first, the right of parate execution is held only by the first mortgage holder; second, the implementation of parate execution is carried out through a public auction, not a unilateral private sale by the creditor without official procedures.

[1]Muhaimin, Legal Research Methods, Mataram University Press, 2020 p. 46

In addition to parate execution, UUHT also recognizes another execution mechanism through the executorial title attached to the mortgage certificate as regulated in Article 14 paragraph (2), which states that the mortgage certificate has the same executorial power as a court decision that has obtained permanent legal force. Thus, the mortgage holder has two main routes to execute the guarantee, namely through separate execution based on Article 6 and through an execution application based on the executorial title of the mortgage certificate. These two routes have different characteristics and legal implications and are often the subject of comparison in practice.

Historically, the provisions for execution separate in the UUHT can be viewed as a continuation of the practice of mortgage execution under colonial law, with adjustments to the national agrarian law system. However, unlike the mortgage system, which more explicitly allows for private sales by creditors, the UUHT emphasizes that execution parate be conducted through public auction. This demonstrates the legislators' intention to continue involving official state mechanisms in the execution process, thus ensuring procedural control over the sale of collateral.

The concept of parate execution in the UUHT cannot be separated from the general principles of property security law. As an accessory property right, a mortgage is dependent on the existence of a principal debt agreement. Execution of a mortgage is the exercise of authority granted to a creditor to satisfy its receivables from the proceeds of the sale of the collateral if the debtor defaults on its obligations. In this case, parate execution embodies the nature of a mortgage right, which grants priority to its holder, while also reflecting the need for certainty and speed in resolving problem loans.

A Deed of Mortgage (APHT) is an authentic deed used as the basis for granting mortgage rights to land and objects related to land. In addition to containing the identities of the parties, a description of the mortgage object, and the amount of the secured debt, the APHT may also contain certain promises permitted by the UUHT. One of the promises commonly included is a promise regarding the implementation of parate executory, namely that if the debtor defaults, the mortgage holder has the right to sell the collateral object through a public auction without requiring further approval from the mortgage grantor.

From the perspective of contract law, the parate execution clause is an embodiment of the principle of freedom of contract as regulated in Article 1338 of the Civil Code. The parties are in principle free to make an agreement, determine its content, form, and conditions, as long as they do not conflict with the law, morality, and public order. Thus, as long as the parate execution clause is in line with the provisions of the Civil Code and does not violate these limits, the clause is valid and binding on the parties as law.

The validity of the parate executory clause is also supported by the fact that the UUHT itself provides a normative basis through Article 6. This contractual clause essentially only confirms and elaborates on the rights already granted by law to the holder of the primary mortgage. Therefore, from a hierarchical perspective, the parate executory clause does not stand alone but refers to provisions of a higher law. This strengthens the argument that the parate executory clause is not a clause born solely from the creditor's will, but rather an implementation of positive legal provisions.

However, issues arise when questioning whether the parate executory clause is the result of a truly negotiated agreement or simply a standard clause imposed by the creditor on the debtor. In the context of bank credit agreements, it is common knowledge that the debtor's bargaining position is relatively weak compared to the bank's. Credit agreements and guarantee deeds are generally drafted based on the bank's internal standards, and in practice, the debtor has little room to negotiate certain clauses, including the parate executory clause. This raise concerns that the freedom of contract being promoted is formal rather than substantive.

From a contractual justice perspective, a parate executory clause must be tested not only for its formal validity but also for its reasonableness and propriety. The principles of good faith and balance require that such clauses not be used arbitrarily to oppress the debtor. Therefore, even if a parate executory clause is formally valid, its implementation must still respect the debtor's rights, for example, through proper notification, a fair valuation, and the opportunity for the debtor to settle the obligation before execution.

### 3.1 Validity and Binding Power of the Parate Execution Clause against the Debtor and Third Parties

As part of the APHT, the parate executory clause binds the parties who made it, namely the grantor and the holder of the mortgage. Based on Article 1338 of the Civil Code, a legally made agreement applies as law for those who made it. This means that the debtor cannot unilaterally revoke the consent given in the APHT regarding the implementation of parate executory, as long as the agreed implementation conditions are met by the creditor. The parate executory clause provides the basis for the creditor to exercise its rights without needing to obtain re-approval from the debtor in the event of default.

The binding force of the parate execution clause on the debtor is also strengthened by the nature of the mortgage as a property right attached to the collateral object. Every party interested in the collateral object must respect the existence of the mortgage right that has been imposed and the promises inherent therein. However, it is important to emphasize that the parate execution must be implemented within a legal framework that provides minimal protection for the debtor, so the clause should not be interpreted as absolutely eliminating all debtor rights to defend themselves or challenge the execution.

With respect to third parties, the binding force of a parate executory clause is more limited. Interested third parties, such as purchasers of mortgaged property or other creditors, are in principle bound by the mortgage declared through registration, but are not directly bound by the personal clauses of the agreement between the debtor and creditor. However, in the context of a public auction, third parties purchasing mortgaged property are entitled to protection for purchases made under valid auction procedures. If the implementation of the parate executory is subsequently declared procedurally flawed, questions arise regarding legal protection for purchasers in good faith.

In some cases, third parties, such as the debtor's heirs or concurrent creditors, object to the implementation of the parate executory. They question, for example, whether the debtor has truly defaulted, whether the value of the collateral has been fairly assessed, and whether auction procedures have been complied with. These objections can be filed in court through civil lawsuits or execution challenges. Thus, although the parate executory clause is binding on the parties, its implementation can still be tested and assessed by the judiciary from both procedural and substantive perspectives.

As mentioned, the UUHT provides two main routes for mortgage holders to execute collateral, namely parate execution based on Article 6 and execution based on the executorial title of the mortgage certificate as regulated in Article 14 paragraph (2). The main difference between the two lies in the way of initiating execution: parate execution is based on the right that can be directly used by the creditor to submit a public auction, while execution based on the executorial title requires an execution application to the head of the authorized district court.

In practice, creditors are often faced with a choice of which enforcement route to take. Using a parate execution is expected to provide speed and efficiency, but it often faces resistance from debtors who challenge the execution. On the other hand, using an executive title through the courts provides stronger legitimacy but can potentially take longer due to formal court procedures. This situation has given rise to debate over which is more effective and in line with the principles of certainty and justice.

Some argue that although Article 6 of the UUHT grants the right of parate execution, its implementation in practice still requires court involvement, particularly when there is resistance from the debtor. In this view, parate execution is not interpreted as eliminating the role of the court, but rather as an initial convenience for creditors to initiate an auction, with the possibility of judicial oversight in the event of a dispute. Thus, parate execution and execution based on executive title can both ultimately result in judicial proceedings if any party challenges their implementation.

From a legal protection perspective, the use of the execution route through the courts provides a clearer opportunity for debtors to raise objections before execution is carried out. However, this can be seen as diminishing the primary objectives of parate execution, namely speed and efficiency. Therefore, the challenge is finding a balance between the creditor's right to obtain prompt repayment of receivables and the debtor's right to a fair and impartial process.

In this context, the parate execution clause in the APHT serves as a contractual basis that strengthens the creditor's right to choose the parate execution route, but it cannot completely eliminate the possibility of judicial control. The clause must be read in accordance with the UUHT and the provisions of civil procedure law, so that its implementation remains within the legal framework that provides balanced protection for all interested parties.

The implementation of the parate execution clause in the APHT cannot be understood as the creditor's absolute authority, free from any restrictions. As part of a legal system that upholds certainty and justice, the implementation of parate execution is subject to normative boundaries, including the provisions of the UUHT, laws and regulations on auctions, the principle of good faith, and the principle of protection for the weaker party. In practice, violations of these boundaries often serve as grounds for debtors to challenge the validity of the execution and seek protection from the court.

Normatively, the UUHT requires that parate execution be conducted through a public auction. This means that creditors cannot arbitrarily conduct underhanded sales under the guise of a parate execution clause. Underhand sales are only permitted under certain conditions, with the consent of the parties, and with strict provisions, particularly regarding the determination of a fair price. Furthermore, the auction procedure must comply with the provisions of laws and regulations governing auction procedures, including the auction announcement mechanism, the determination of the limit price, and the open conduct of the auction.

From a practical perspective, the implementation of parallel execution faces various obstacles. Debtors who feel aggrieved often file lawsuits or challenge the execution, which in turn delays the auction process. Furthermore, state auction institutions or the parties authorized to conduct auctions are often cautious in following up on requests for parate execution, especially when there are indications of disputes or objections from the debtor. This can reduce the effectiveness of parate execution as a fast and efficient execution instrument.

To strengthen legal certainty and prevent abuse of the parate executory clause, several steps are necessary. First, clear guidelines are needed regarding the implementation of parate executory, including minimum notification standards for debtors, a reasonable timeframe before the auction, and an objective price assessment mechanism. These guidelines can be outlined in implementing regulations or circulars from relevant institutions, serving as a reference for banks, notaries/PPATs, and auction officials.

Second, professional organizations and banking supervisory authorities need to encourage good faith practices in the use of parate execution clauses. For example, by requiring banks to first offer restructuring or rescue measures to debtors before resorting to execution, except in certain, extremely urgent cases. This aligns with the principles of prudence and social responsibility of financial institutions.

Third, strengthening judicial capacity in handling disputes related to parate executory is also necessary. Judges need to have a sufficient understanding of the characteristics of mortgage rights and parate executory, so they can render consistent and balanced decisions between the interests of creditors and debtors. Consistent jurisprudence will help provide guidance for the parties and reduce uncertainty in the implementation of parate executory clauses.

Fourth, educating the public, particularly prospective debtors, about the implications of the parate execution clause is also crucial. Debtors must understand that by agreeing to the clause, they essentially authorize the bank to execute the collateral using specific procedures in the event of default. A good understanding will hopefully prevent the perception that parate execution is a unilateral action that the debtor is completely unaware of.

With these steps, it is hoped that the parate execution clause in the Deed of Granting of Mortgage Rights can function as intended by the UUHT, namely as an instrument that strengthens the certainty and efficiency of guarantee execution, while still maintaining the principles of justice and legal protection for both parties.

## 4. CONCLUSION

Based on the description and analysis that have been done, it can be concluded that the parate execution clause in the Deed of Granting Mortgage Rights, in principle, has a strong legal basis and is valid according to Indonesian positive law. The clause is based on the provisions of Article 6 of the UUHT, which gives the first mortgage holder the right to sell the mortgage object at his own power through a public auction if the debtor defaults, and is an application of the principle of freedom of contract in contract law. Thus, normatively, the parate execution clause binds the parties as a law and can be used as a basis for creditors to execute collateral.

The binding power of the parate execution clause on the debtor stems from the agreement granted in the APHT and the nature of the mortgage as a property right. However, the implementation of parate execution cannot be understood as an absolute authority that ignores the rights of the debtor and third parties. The implementation of parate execution must still follow general auction procedures, adhere to the principle of good faith, and allow for judicial oversight in the event of a justified objection. In other words, parate execution is a strong right but not unlimited.

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