

CONSTITUTIONALITY ISSUES OF PARATE EXECUTION IN SHARIA ECONOMIC DISPUTES (CASE STUDY OF DECISION NUMBER 950/PDT.G/2019/PA.JP)

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Received : 15 September 2025

Published : 10 November 2025

Revised : 10 October 2025

DOI : <https://doi.org/10.54443/ijerlas.v6i1.4449>

Accepted : 31 October 2025

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

Parate execution is a mechanism of direct enforcement without prior judicial proceedings, as regulated under Article 6 of Law No. 4 of 1996 concerning Mortgage Rights. However, this mechanism often conflicts with Article 224 HIR/258 R.Bg, which requires execution through court execution by court fiat. This study examines the constitutionality of Article 6 in relation to Article 224 HIR/258 R.Bg, using Central Jakarta Religious Court Decision No. 950/Pdt.G/2019/PA.JP as the primary case study. It also analyses the concept of justice in Islamic law and Jeremy Bentham's theory of legal utility. The findings reveal a normative conflict that creates legal uncertainty and undermines substantive justice, particularly in Sharia-based financing. Harmonisation between statutory law and Islamic legal principles is therefore necessary to achieve legal certainty and substantive justice.

Keywords: *Parate Execution, Fiat Execution, Security Rights, Legal Certainty, Substantive Justice*

INTRODUCTION

Legal certainty is a fundamental principle in the legal system that serves to protect the rights of the people so that their rights are fulfilled in accordance with the principles of human rights. This principle emphasises that the law must be clear, concrete, consistent, and continuously enforceable. In the case of Islamic banking, legal certainty is a very important reference for maintaining the balance of rights and obligations between the parties involved in Islamic financing contracts. Legal certainty should be understood as the enforceability of legal norms, supported by the real and effective authority of the law. The existence of the principle of legal certainty is a form of protection for litigants (those seeking justice) against arbitrary or unlawful actions, meaning that a person will receive or obtain what is expected in certain circumstances.

Parate execution is one of the mechanisms within the Mortgage Rights regime that allows creditors to directly execute collateral in the form of land rights without having to go through the judicial process first. Article 6 of Law Number 4 of 1996 concerning Security Rights explicitly regulates this as a convenience and legal certainty for creditors. However, in practice, the existence of parate execution has generated controversy in relation to Article 224 HIR/258 R.Bg, which requires an execution order by the court as stated in the general explanation of Law Number 4 of 1996 concerning Mortgage Rights. This conflict of norms raises questions about the constitutionality of parate execution. The inconsistency between Article 6 of the Mortgage Law and Article 224 HIR / 258 R.Bg shows the need for regulatory harmonisation so as not to violate the principles of justice and legal certainty, especially in sharia financing.

Central Jakarta Religious Court Decision Number 950/PDT.G/2019/PA. JP, which ruled that the parate execution carried out by Bank Muamalat Indonesia as the creditor against PT. Mofatama Bangun Nusa as the debtor was declared invalid, has caused legal uncertainty regarding the institution of parate execution, namely whether parate execution can be carried out independently by the holder of the mortgage right or must be carried out through a court order. On the other hand, parate execution also touches on the realm of substantive justice in Islamic law. This raises two fundamental questions: (1) whether parate execution aligns with the concept of justice in Islamic law, and (2) how the mechanism of parate execution operates within the context of Decision No. 950/Pdt.G/2019/PA.JP.

LITERATURE REVIEW

Studies on parate execution in sharia economic disputes have attracted the attention of many academics and legal practitioners, especially with the increasing complexity of legal issues arising amid the dynamics of the sharia financial system in Indonesia. Several scientific works have discussed the juridical aspects of the Security Rights institution, particularly Article 6 of Law Number 4 of 1996, as the legal basis for the implementation of parate execution. J. Satrio, in his book *Hukum jaminan, hak jaminan kebendaan, hak tanggungan* (Law of Security, Property Security Rights, Security Rights), explains that parate execution is a manifestation of simplified execution rights, which are granted directly by law to the holder of mortgage rights without having to go through litigation. This view is strengthened by Yudhis Tira Cahyono in his study reviewing court decisions related to the implementation of parate execution.

On the other hand, the conflict between Article 6 of the UUHT and the provisions of Article 224 HIR/258 R.Bg has been the main focus of various legal analyses. Sudikno Mertokusumo, in his chapters on legal discovery, emphasises the importance of legal certainty and harmony between regulations as the foundation of a state based on the rule of law. The inconsistency in the regulation of execution, where on the one hand it gives direct authority to creditors, but on the other hand refers to the execution by court fiat mechanism, raises legal doubts that have an impact on legal uncertainty. In the context of Sharia, this imbalance is even more complex due to the centrality of the principle of justice (*al-'adl*) and the prohibition of *zulm* (injustice) in every transaction.

From an Islamic legal perspective, scholars and national Sharia institutions have conducted studies on musyarakah contracts and their implications for the execution of collateral. Wahbah az-Zuhaili in *al-Fiqh al-Islāmī wa Adillatuhu* explains that syirkah contracts such as musyarakah are partnerships based on trust and shared risk, so that disputes must be resolved fairly and through transparent procedures. Fatwa No. 08/DSN-MUI/IV/2000 and No. 105/DSN-MUI/X/2016 of the National Sharia Council-MUI emphasise that although collateral can be used in musyarakah financing, its purpose is only to cover losses due to negligence, not as a means of automatic execution of capital. The Financial Services Authority (OJK) also stipulates in its Musyarakah Financing Product Guidelines that collateral can only be executed after a final and binding court decision, in accordance with the principle of protecting the rights of business partners.

In addition, the philosophical approach to law also makes an important contribution to understanding this issue. Jeremy Bentham's theory of utilitarianism, as examined in general legal literature, emphasises that a legal rule must produce the maximum benefit for the greatest number of people. In the context of parate execution, the efficiency offered must be balanced with considerations of substantive justice. If this mechanism has the potential to violate the constitutional rights of debtors, then the benefits produced are merely illusory. This perspective is in line with the concept of *maqāsid al-syarī'ah*, particularly *ḥifẓ al-māl* (protection of property), which requires that the execution of collateral be carried out through fair, open, and non-arbitrary procedures. Harmonisation between positive law and sharia values is a necessity in order to create a legal system that is not only efficient but also substantively just.

METHOD

This type of research is normative legal research, which is research that aims to be a scientific procedure that seeks to discover the truth based on legal scientific logic from a normative perspective. Normative legal research can be defined as research involving analysis of legislation based on dogmatic law, legal theory, and legal philosophy.

RESULTS AND DISCUSSION

The Mortgage Rights system aims to accelerate the process of fulfilling creditors' rights in the event that the debtor defaults, which refers to a situation where the debtor fails to fulfil their payment obligations in accordance with the agreement previously agreed upon. According to J. Satrio, who was later quoted by Yudhis Tira Cahyono in his writing, the right to sell the object of the Security Right on one's own authority if the debtor defaults is an implementation of a simplified execution right, which is now granted by law to the first Security Right holder creditor. This means that the exercise of this right does not require a court decision or court proceedings and does not use procedural law because its implementation depends on the condition of 'debtor default'. This authority appears to be an enforcement right that is always at hand when needed by the creditor. As stated in the explanatory section of the Mortgage Law, the execution of the mortgage object by the Creditor is based on the provisions contained in the Mortgage Certificate, which reads 'In the Name of Justice Based on the One Almighty God' which has executory power equivalent to the power of a court decision which contains the right to sell on its own authority

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through public auction to obtain repayment of its receivables, as referred to in Article 20 paragraph (1) letter b of the Mortgage Law. Under Law No. 3 of 2006, the Religious Court is authorised to adjudicate Sharia economic disputes. Therefore, the Religious Court also has the authority to execute collateral pledged to sharia banks, because in essence, a collateral agreement is an accessory agreement to the main agreement. This means that if a type of sharia financing agreement is accompanied by a collateral agreement, then the collateral agreement is also subject to sharia principles, so that if a dispute arises, the Religious Court has the authority to resolve it if the Aanmaning has been carried out.

Article 54 of Law No. 7 of 1989 concerning Religious Courts states that the procedural law applicable in courts within the Religious Court system is the civil procedural law applicable in courts within the General Court system, except as specifically regulated in this Law. The parate execution regulated in the general court is also the procedural law applicable in the Religious Court, so that the HIR/R.Bg and the Mortgage Law are guidelines for the Religious Court in executing mortgage rights. Judges in upholding justice and legal truth must uphold the principle of impartiality or non-partisanship. An impartial legal process (free from pressure, both physical and psychological, and non-partisan) is one of the characteristics of a constitutional state. The principle of judicial independence is one of the characteristics of a modern constitutional state, which is manifested in the theory of separation of powers. The executive, legislative and judicial powers, commonly referred to as the judiciary, form three branches of government, as a system of checks and balances aimed at preventing the abuse of power. Judicial decisions are the authority of judges and are based on the facts of a case, commonly known as *res judicata*, which binds only the parties to the case and not parties outside the case.

The basic legal provisions regarding parate execution in the Mortgage Law are essentially intended to facilitate banks as creditors in executing mortgage objects in order to obtain repayment of their debts in the event that the debtor defaults/breaches the agreement, resulting in the agreed agreement not being implemented as it should be. However, normatively, there is confusion in the provisions regarding separate enforcement in the Mortgage Law. If we look at General Explanation number 9 of Law Number 4 of 1996 concerning Mortgage Rights on Land (Mortgage Law), which reads "One of the characteristics of a strong mortgage right is that it is easy and certain to execute if the debtor defaults. Although enforcement is generally regulated in the applicable civil procedure law, it is deemed necessary to specifically include provisions on the enforcement of mortgage rights in this Law, namely those governing Parate Enforcement as referred to in Article 224 HIR and 258 RBG for areas outside Java and Madura. In the general explanation of point 9, it is clearly stated explicitly that the implementation of Parate Execution is based on Article 224 HIR and 258 R.Bg for areas outside Java and Madura. What is stated in the Explanation of point 9 of the Mortgage Law clearly not only contradicts the *ratio legis* contained in the provisions of Article 6 in the Mortgage Law above, which is based on parate execution, but also demonstrates the inconsistency of the legislators who have granted the creditor/first mortgagee the authority to sell the mortgaged property on their own authority through a public auction. This is what causes confusion or conflict between Article 6 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land and Article 224 HIR/258 Rbg.

In case No. 950/PDT.G/2019/PA.JP, the panel of judges ruled that the parate execution carried out by PT. Bank Muamalat Indonesia, Tbk against PT. Mofatama Bangun Nusa was invalid and must go through an execution order through the court due to inconsistencies in the parate execution. This leads to the question of how Islamic law conceptualises justice in the context of this case? The concept of justice in Islamic law occupies a central position in every form of contract and dispute resolution. In the context of disputes over parate execution, as reflected in Decision Number 950/Pdt.G/2019/PA.JP, justice is not only related to the application of positive law, but also touches on the moral and spiritual values upheld by Sharia law. Judges, as executors of judicial power, should consider legal considerations that are not only formal legalities, but also in accordance with the principles of substantive justice in Islam, such as *ḥusn al-niyyah* (good faith) and the prohibition of *ẓulm* (injustice).

In Islamic legal philosophy, justice is rooted in the nature of Allah SWT as the source of all justice. Therefore, humans are obliged to uphold the principle of justice in every aspect of life, including law. This justice is integrated into *maqāṣid al-syarī'ah*, which is the purpose of sharia to realise benefits and avoid harm. The Qur'an affirms this principle in QS. An-Nahl [16]: 90: 'Verily, Allah commands you to be just and to do good...' This verse shows that justice is a universal theological commandment and forms the basis for upholding the law. The concept of justice in the Qur'an is expressed through several words such as 'adl, *qist*, *mīzān*, and *wasath*, which describe justice from various dimensions: legal, social, moral, and cosmological. 'Adl means putting something in its proper place, upholding rights objectively, and being free from personal interests. *Qist* emphasises social balance and proportionality in the distribution of rights. *Mīzān* describes moral and cosmic balance, while *wasath* indicates

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moderation and proportionality in thought and action. These four terms show that Qur'anic justice is integrative and transcends formal legal concepts, as it encompasses spiritual and moral dimensions.

In the context of Islamic economic law, the musyarakah contract contained in case No. 950/PDT.G/2019/PA.JP is a form of cooperation based on the principles of trust and justice. According to Fatwa DSN-MUI No. 08/DSN-MUI/IV/2000 and No. 105/DSN-MUI/X/2016, in principle, musyarakah contracts are not accompanied by guarantees, but Islamic financial institutions may request guarantees to anticipate irregularities. In AAOIFI Sharia Standards No. 5 and 39, it is explained that collateral is only permitted to cover losses due to negligence or breach of contract, not to ensure the return of capital. Thus, parate execution, which allows banks to auction collateral without a court decision, is contrary to the principles of 'adl and the principle of trust in musyarakah contracts.

The OJK's Standard Book on Sharia Banking Products for Musyarakah and Musyarakah Mutanaqishah and Guidelines for Musyarakah Financing Products also emphasise that collateral can only be executed after a court decision that has permanent legal force (*inkracht*). Therefore, the practice of parate execution in musyarakah contracts is not in accordance with sharia principles and Islamic justice, as it disregards the rights of business partners to obtain legal protection. From the perspective of *maqāṣid al-syarī'ah*, the principle of *ḥifz al-māl* (protection of property) requires that disputes be resolved through litigation in order to protect the interests of both parties and prevent injustice.

Furthermore, from a legal theory perspective, the constitutionality issue between Article 6 of the Security Rights Law and Article 224 HIR/258 RBg must also be examined through the three classical legal objectives: justice, certainty, and benefit. These three are key elements in assessing the validity and effectiveness of a legal norm. In this case, the judge faces a dilemma between upholding legal certainty that supports the rights of creditors in swift execution and upholding substantive justice for debtors whose constitutional rights must be protected. In Jeremy Bentham's utilitarian theory, laws are considered good if they produce the greatest benefit for the greatest number of people (the greatest happiness for the greatest number). This principle of utility can be used as a basis for assessing the effectiveness of parate execution. Although it provides efficiency for creditors, the implementation of parate execution without a court process can actually cause legal uncertainty and losses for innocent parties. From a benefit perspective, procedures involving court proceedings are indeed slower, but they provide a sense of security, justice, and certainty for the wider community. Thus, true benefit does not lie in the speed of the procedure, but in the results that provide welfare and justice for all parties.

From an Islamic law perspective, legal benefit is synonymous with *maslahah*, which is the achievement of welfare and the absence of harm to humans. Therefore, the benefit of law in the context of parate execution can only be realised if the mechanism does not oppress the weak and continues to guarantee the protection of property rights in accordance with the principle of *ḥifz al-māl*. Parate execution carried out unilaterally by banks without a court decision has the potential to violate the principles of Islamic justice and *maqashid sharia*. Therefore, in the context of constitutionality, the implementation of parate execution as stipulated in Article 6 of the Mortgage Law needs to be harmonised so that it is in line with the principle of due process of law as guaranteed in Article 28D paragraph (1) of the 1945 Constitution. Harmonisation of norms between the Mortgage Law and the HIR/RBg is necessary to ensure the protection of citizens' constitutional rights and to create a mortgage enforcement system that is not only efficient, but also substantively fair and socially beneficial.

Conclusion

Based on a comprehensive legal analysis of the Central Jakarta Religious Court Decision Number 950/Pdt.G/2019/PA. JP regarding the opposition to the implementation of parate execution, it can be concluded that the main issue lies in the disharmony between Article 6 of Law Number 4 of 1996 concerning Mortgage Rights (Mortgage Law) and Article 224 HIR/258 R.Bg. This conflict not only causes legal uncertainty in the execution of collateral, but also reveals a paradigmatic problem in the national legal system, which has not been fully able to integrate the principles of substantive justice with legal certainty. Article 6 of the Mortgage Law grants the first mortgagee the authority to sell the collateral through a public auction without a court order. This provision is normatively intended to guarantee the principles of efficiency and legal certainty for creditors. However, in practice, the implementation of parate execution often results in substantive injustice because it disregards the principle of due process of law and the debtor's constitutional right to legal protection and the opportunity to defend themselves. Decision Number 950/Pdt.G/2019/PA.JP shows that parate execution without a judicial mechanism can be classified as a violation of the principles of justice and public interest, particularly in the context of sharia financing based on musyarakah contracts. From an Islamic legal perspective, justice (*al-'adl*) is a universal principle that requires the law to be enforced by putting things in their proper place and giving rights to those who

are entitled to them. A musyarakah contract is a contract based on trust, not a debt contract, so that unilateral parate execution without proof in court is contrary to the principle of *syirkah*, which requires equality between the parties. OJK Musyarakah Product Guidelines, emphasise that execution against collateral can only be carried out after a court decision that has permanent legal force (*inkracht*). This shows that the Islamic legal system and national regulations actually share the same spirit in guaranteeing the protection of the rights of both parties and preventing injustice (*zulm*). From the perspective of legal utility theory as proposed by Jeremy Bentham, the law should ideally create the greatest benefit for the greatest number of people (the greatest happiness for the greatest number). Parate execution does promise procedural efficiency, but this apparent benefit cannot outweigh the risk of substantive injustice and legal uncertainty that it causes. Thus, true legal utility can only be realised if the execution is carried out through a legitimate and open judicial mechanism, which provides space for the proportional protection of the rights of both parties. In the context of Islamic law, this is in line with the principle of *maqāṣid asy-syarī'ah*, particularly *ḥifẓ al-māl* (protection of property), which emphasises that benefits should not be achieved in a manner that causes injustice or unilateral loss.

Suggestion

Based on this analysis, two main recommendations can be made. First, normative harmonisation is needed between Article 6 of the Mortgage Law and Article 224 of the HIR/258 R.Bg through legislative revision or renewal that affirms the limitations and mechanisms for implementing parate execution. This update is important so that the application of the *lex specialis derogat legi generali* principle can be carried out consistently, without sacrificing the principle of substantive justice, which is the main objective of the law. Thus, the Mortgage Law not only provides legal certainty for creditors, but also guarantees the protection of the constitutional rights of debtors as citizens. Second, in the context of sharia economic disputes, the application of enforcement mechanisms must be guided by the principles of Qur'anic justice, which emphasise balance, transparency, and partnership. Unilateral enforcement against collateral in a musyarakah contract without a court decision is contrary to the values of *al-'adl*, *al-maṣlahah*, and the principle of *lā ḍarar wa lā ḍirār* (no harm and no mutual harm). Therefore, dispute resolution through religious courts is the most appropriate measure, as it guarantees legal protection, strengthens the legitimacy of enforcement, and maintains trust in the Sharia court system.

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