



# BEYOND EFFICIENCY: ESTABLISHING SOCIAL JUSTICE AS A FUNDAMENTAL AND ETHICAL NECESSITY FOR LEGAL CERTAINTY IN THE EXECUTION OF MORTGAGE RIGHTS

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## Abstract

This research aims to improve efficiency and create more practical legal certainty in the execution of Mortgage Rights (HT) in Indonesia. This research will redesign the legal framework for the execution of HT guarantees by placing social justice as the primary moral principle, in line with the values of Pancasila, replacing the formal approach to legal certainty. This research is a normative legal study with a philosophical approach, and a comparison of cases in HT with the Constitutional Court's ruling on fiduciary guarantees. The results show that excessive emphasis on parate execution (Article 6 of the HT Law) for the sake of efficiency will weaken legal certainty. In practice, this demonstrates lawsuits from debtors demanding substantive justice due to defaults unilaterally determined by creditors. Legal certainty should stem from social justice, namely by providing balanced legal protection for debtors and creditors. This research is supported only by normative data without empirical data on auction implementation and socio-economic impacts. This research provides a philosophical and normative model as a first step towards reforming the HT Law and developing progressive jurisprudence, with social justice as a primary requirement for legal certainty and efficiency. A comparison of the Constitutional Court's ruling on fiduciary guarantees strengthens protection for debtors in mortgages.

**Keywords:** *Mortgage Rights, Social Justice, Legal Certainty, Execution, Progressive*

## 1. Introduction

### 1.1 Background

Mortgage guarantees are crucial for maintaining economic stability. This legal provision is designed to assure financial institutions (creditors) that their capital can be quickly recovered if the debtor defaults. (Christanto, 2017) As a normative basis, the UUHT provides strong legal protection for creditors through the existence of a *grosse akta* (GA), an authentic document with executory legal force, equivalent to a court decision with permanent legal force. The GA's distinctive character is symbolically characterized by the use of the phrase "For the Sake of Justice Based on Belief in the One Almighty God," which demonstrates the document's legal force and moral legitimacy. The legal privileges stipulated in the UUHT culminate in the implementation of the parate execution (PE) mechanism.

The PE as stipulated in Article 6 of the UUHT, grants the first-ranking HT holder the right to sell the collateral object through a direct public auction, without going through a lawsuit procedure to the District Court (PN). Therefore, the execution process can be carried out more quickly and efficiently. This parate execution mechanism is often considered one of the main pillars or mainstay weapons in efforts to resolve problem loans. The goal is none other than to guarantee the principle of legal certainty and procedural efficiency, which aims to recover creditors' capital as quickly as possible and maintain the continuity of the financial intermediation function amidst a dynamic economic system. However, it is important to review the balance of fundamental values that form the basis for the formation of legal norms, especially in terms of HT execution. According to Gustav Radbruch, an ideal legal system should reflect harmony between three main pillars, namely justice, legal certainty, and benefit (efficiency). (Syahrir, 2025) All three must run proportionally and must not conflict with each other.

In the practice of executing HT (Foreign Exchange Debt) in Indonesia, there is a significant imbalance in the position of creditors and debtors. Current legal provisions tend to over-prioritize efficiency and formal legal certainty, particularly in efforts to maintain economic stability and protect creditor interests. Conversely, the value of social justice, which should be the foundation of law enforcement, is neglected. Legal certainty, which relies solely on compliance with formal procedures, often creates a loophole for ignoring moral and humanitarian considerations, particularly in assessing the position of debtors facing execution. With this approach, the law easily lapses into utilitarian logic, focusing



primarily on the end result the efficiency of asset recovery without considering whether the process is substantively fair to all parties involved.

If this formalistic approach continues to be enforced without the filter of justice, the law will lose its legitimacy in the eyes of the public. Laws that do not reflect a collective sense of justice, even if born from constitutional procedures and enacted by a legitimate authority, cannot be recognized as good law. As emphasized by Radbruch through the Radbruchsche Formel, legal regulations that are substantially contrary to justice are not true laws, even if they are officially created by lawmakers.

The many cases of resistance (*derden verzet* or *executorial verzet*) against the execution of HT that reached the Supreme Court (MA) prove that the legal certainty promised by GA and PE was not truly able to reduce the conflict. (Mahmud, 2025) The conflict shows a real gap between the ideal legal norms as stated in written regulations (*das sollen*) with the implementation or practice of law enforcement in the field which is often full of interests (*das sein*), which ultimately reflects the failure of the legal system in realizing the principles of substantive social justice. Based on the background above, the problems in this study are:

- 1) How can social justice be established as a moral and philosophical imperative that underpins legal certainty in the execution of mortgage rights?
- 2) How can a progressive legal reconstruction model, which focuses on balancing the positions of debtors and creditors, be applied to the practice of mortgage rights execution through a reformulation of the role of the District Court?

The purpose of this research is to encourage the concept of legal certainty to be returned to the ethical foundations that should be its foundation. In practice, when legal certainty is only interpreted formally and procedurally but instead results in substantive injustice, this actually triggers a new form of uncertainty, namely the emergence of protracted legal disputes. Therefore, a paradigm shift is needed from a purely formalistic model of legal certainty to a form of just legal certainty (Just Legal Certainty), which is able to guarantee proportional legal protection for all parties. The Research Gap in this research, although other legal instruments of guarantee, such as fiduciary guarantees, have undergone fundamental changes through the decision of the Constitutional Court (MK) which requires the determination of default to be carried out fairly [DJKN: MK Decision Regarding Fiduciary Guarantees Has No Impact on the Auction Process], to date there has been no in-depth philosophical study to apply a similar approach to the UUHT. In fact, the UUHT regulates objects that are very crucial to people's lives, namely land and housing. Therefore, its regulations must be adjusted to social justice standards following the MK decision. This study aims to fill this gap by offering a solid ethical framework as a basis for overhauling normative provisions and judicial practices in the implementation of HT executions.

## **2. Literature Review**

### ***2.1 Philosophical Foundations of Social Justice in Indonesian Law***

Social justice not only serves as an ideal goal in politics and economics, but also as a major philosophical pillar in the Indonesian legal system. As the Fifth Principle of Pancasila, social justice has a position as a legal ideal (*Rechtsidee*) and at the same time as a basic state norm (*staatfundamentálnorm*) (Asshiddiqie, 2006) This position places it at the top of the pyramid of national legal values, which should be the moral and ethical foundation in every formation and application of legal norms in Indonesia (Kaelan, 2013). As a legal ideal, social justice goes beyond the idea of distributive justice in the narrow sense. This concept includes universal principles such as the protection of human rights, equality before the law, equal distribution of welfare, and proportionality between individual, collective, and state interests (Indrati, 2007). In this case, social justice becomes an ethical and constitutional filter for the implementation of positive norms that have an impact on society, especially vulnerable groups such as debtors in the material guarantee system (Pangaribuan, 2001).



This idea aligns with Gustav Radbruch's three-pillar theory: justice, legal certainty, and utility. Radbruch emphasized that legal certainty should not be at the expense of justice, especially in situations where formal legal norms conflict with human values (Radbruch, 2006). In this sense, justice, as emphasized by FX. Adji Samekto is a commitment to consistently provide everyone with their legitimate rights (Samekto, 2012). This means that in the context of HT execution, the debtor has the right to fair, proportional, and non-arbitrary legal treatment, just as the creditor has the right to the repayment of his receivables (Ghazali, 2022). Sharp criticism of the unilateral parate execution mechanism in the UUHT shows that the rigid positive provisions that do not provide room for testing for default are contrary to the spirit of social justice<sup>8</sup>. It is at this point that social justice must function as an ethical imperative that directs the law to always side with balance and fair protection for all parties (Ghazali, 2022).

Social justice is not merely a political or economic concept, but is the main philosophical foundation of the Indonesian legal system. Social justice is the Fifth Principle of Pancasila, which functions as a legal ideal (*Rechtsidee*) and a fundamental state norm (*staatsfundamentalnorn*).<sup>2</sup> This means that Pancasila is at the top of the hierarchy of legal values. As a legal ideal, it goes beyond mere distributive justice. This concept implies the protection of rights, equality before the law, general welfare, and the principle of proportionality between individual, social, and state interests. Within the Radbruch framework, justice, certainty, and benefit must be found to meet, but legal certainty must not sacrifice justice.<sup>1</sup> Justice, according to FX. Adji Samekto, is the willingness to consistently provide everyone with what is rightfully theirs. In the context of collateral law, this means that debtors have the right to a fair and balanced process when facing losses, just as creditors have the right to debt repayment.

Social justice must act as an ethical and constitutional filter. If a positive legal rule, such as the overly rigid parate execution provisions in the UUHT, contradicts the spirit of the Fifth Principle, then the resulting legal certainty will lose its constitutional legitimacy. Therefore, social justice is established as an ethical imperative that requires legal certainty to be subject to the principle of balance. Although justice is often difficult to measure and formulate solely, this is not a reason to leave the formulation of justice entirely to the legislators (UU). In the case of HT, if legislators are driven by dominant economic interests, namely the banking need for rapid capital recovery, the resulting legal product will tend to be biased. Therefore, the task of law is to realize the idea of justice in a concrete form that benefits human relations, not only financial institutions. Good law (good norms) must contain the principles of sustainability, justice, and democracy.

## ***2.2 Progressive Law***

Progressive Law introduced by Satjipto Rahardjo is a critical approach that rejects the rigidity of legal formalism. Its basic principle emphasizes that law for humans and a decent life is the basis of good law (Rahardjo, 2006). This view emphasizes the importance of the role of law enforcement officers, especially judges, to not only view law as a tool to maintain order, but must be in line with the prevailing social, economic, and political order (Ardiansyah & Nugroho, 2023). In the context of HT implementation, the progressive legal approach provides a philosophical basis that judges should not only refer to fast and formal auction procedures (parate execution), but must also pay attention to the profound humanitarian implications of the confiscation process. When the HT object is the debtor's sole residence, the eviction has a major social impact that should be considered ethically by the judge (Wulandari, 2024).

Progressive law firmly rejects the view that law is final and absolute. This stance is highly relevant to Article 6 of the UUHT, which positions the authority to confiscate as something that cannot be contested (Mahendra, 2021). If the judge only acts mechanically as an administrator by issuing an execution order after the creditor shows the *grosse aktat*, then the legal certainty created is only formal and meaningless, merely fulfilling procedures. Progressive law requires judges to seek true and substantive justice.



### **2.3 Legal Structure of Mortgage Guarantee and Execution**

A mortgage right (HT) is a security right over land encumbered to secure debt repayment, granting the creditor priority (*droit de préférence*) over other creditors. A HT is created through a Deed of Grant of Mortgage Rights (APHT) by a Land Deed Official (PPAT), which is an official state deed. The power of seizure (executory) is derived from Article 14 paragraph (4) of the UUHT and the existence of a GA, which has direct seizure power, equivalent to a final court decision. The fastest seizure mechanism is *Parate Exekusi* (Article 6 of the UUHT), which involves the public sale of the mortgaged asset through a public auction by the KPKNL.<sup>6</sup> However, if the creditor encounters obstacles, execution can be carried out through a District Court (PN) order. The property asset auction process must be announced twice in local newspapers with an interval of 15 days.

The main criticism of the current HT execution model is the imbalance in the legal position of the *Parate Executor's* power. Execution places creditors in an overly dominant position, allowing them to determine for themselves when the Debtor is considered to be in default (default). This unilateral determination, which has historically been based on the Debtor's promise in the APHT to release collateral assets upon execution, has the potential to violate the principle of good faith and give rise to abuse of the situation. The consequence of this imbalance is that execution may ignore losses suffered by the Debtor due to the Creditor's business processes or disputed default determinations. Ignoring the Debtor's losses is tantamount to undermining the legal norms regarding execution procedures, which should aim to balance rights and obligations. Therefore, fair law must ensure a balance in the legal position between debtors and creditors, the economic conditions faced, and the restructuring efforts that have been made.

### **3. Methodology**

This research falls into the category of Normative Legal Research, a scientific procedure for seeking legal truth based on scientific logic, focusing on written legal norms (*das sollen*).<sup>18</sup> This research does not involve empirical social behavior data, but rather an analysis of the legal norms, principles, and philosophy that underlie legislation. The research is descriptive and analytical in nature.<sup>20</sup> The goal is to explain in depth the concepts of Legal Certainty and Social Justice in the UUHT, as well as to analyze and critique the prevailing norms. The results of this analysis are then used to formulate a philosophically based legal reform model. The approaches used in this research include philosophical, conceptual, statutory, and case/jurisprudential approaches.

### **4. Results and discussion**

#### ***4.1 Social Justice as a Fundamental and Ethical Necessity for Legal Certainty Within the Framework of Mortgage Execution***

Article 6 of the Mortgage Law authorizes creditors to conduct *parate execution*, which is the direct sale of collateral through auction without going through litigation in court. This mechanism is designed as a fast, practical, and efficient means of resolving problem loans, and is highly advantageous from the perspective of financial institutions. In practice, *parate execution* is considered a primary instrument, even a "toll road," for asset recovery, avoiding the delays and uncertainty inherent in conventional judicial processes. However, the dominance of the efficiency paradigm within the collateral legal framework has created a normative imbalance. An over-focus on speed has resulted in a false, or even fragile, legal certainty. Normatively (*de jure*), the law does guarantee the right of execution for creditors, but empirically (*de facto*), this guarantee is often not accompanied by calm and clarity in its implementation on the ground. Data shows that although the number of applications for execution auctions increases annually, the sale rate (auction success rate) is stagnant or even declining. This indicates a more complex structural problem than just administrative barriers.



One manifestation of this vulnerability is legal resistance from debtors, who often file lawsuits with the District Court as a form of resistance to the auction process. This phenomenon creates a paradox for a legal system designed for efficiency, instead triggering additional legal conflicts that prolong the settlement process. Ironically, the initial goal of efficiency is actually failed to be achieved due to the emergence of protracted legal challenges. The root of this problem lies in the legal system's failure to accommodate the principle of balance between creditor rights and debtor protection. Guarantee law, in this context, appears to ignore the dimensions of social and procedural justice, especially for debtors who may experience economic vulnerability. Parate execution should not be the primary mechanism, but rather should be positioned as the *ultimum remedium*, a last resort taken after all restructuring mechanisms and persuasive approaches have been optimally exhausted.

The execution of collateral can be traced through data on lawsuits challenging the execution of collateral recorded at the Supreme Court. This high number of cases reflects the fact that the implementation of collateral (HT) execution still presents numerous problems, particularly when creditors unilaterally declare a debtor in default without undergoing an objective and fair verification process. This practice often triggers debtors to take legal action by filing a challenge in court, as a means of protecting their rights. Furthermore, Supreme Court ruling data shows that disputes related to collateral (HT) execution occur in significant numbers. This illustrates that although the GA has executorial power, claims submitted by creditors are not always accepted by debtors and often become the subject of legal disputes. In this context, the root of the conflict is the issue of who has the authority to determine a default.

Creditors, referring to the contents of the Deed of Granting Mortgage Rights (APHT), tend to assume that the right to declare a debtor in default is their exclusive right. However, in reality, debtors in many cases do not dispute the debt obligation itself, but rather question the mechanism and timing of the default determination. The debtor questioned whether the process carried out had fulfilled the principles of fairness, transparency, and was free from abuse of dominant positions by creditors who had greater bargaining power.

Thus, the root of the problem lies not solely in the substance of the debt, but rather in the often disproportionate procedure for determining default. When creditors' right to execute is exercised without adequate legal oversight, the potential for inequality increases, and the credibility of the legal system in delivering justice is compromised. When procedural legal certainty results in substantive injustice, for example, by ignoring the debtor's right to optimal debt restructuring, legal certainty itself is degraded. Dissatisfaction rooted in this injustice leads to judicial resistance (counterclaims). The lengthy dispute process, from the court of first instance to cassation, ironically creates real uncertainty. This is a fundamental contradiction: speed (utility) pursued through formalism produces formal certainty, but this formal certainty, by ignoring social justice, actually produces actual uncertainty (litigation), thus rendering the initial utility goal futile.

The execution of HT (Hard Sale and Purchase Order) contains three legal values: legal certainty, utility, and social justice. In the formalistic approach, legal certainty emphasizes the ease and speed of the execution process through Article 6 of the UUHT and GA. The goal is to provide predictability to creditors so that their rights are effectively protected. However, this often neglects the aspect of substantial justice for debtors. Conversely, in a progressive legal approach, legal certainty is not only about speed of the process, but must also guarantee the protection of debtors' rights. Fair certainty requires that procedures be carried out transparently, proportionally, and take into account substantive justice, even if the process is more complex and time-consuming.

Utility, in the formalistic approach, defines efficiency as the fastest possible credit recovery to maintain liquidity and stability in the financial sector, particularly banking. Execution is the primary instrument



for resolving credit problems. Within a progressive legal framework, benefit is understood more broadly, meaning it must be socially responsible. Before proceeding with execution, alternative mechanisms such as restructuring or mediation should be explored to minimize the negative impact on the debtor's life (especially the household). For social justice, in formalistic logic, justice is considered fulfilled if procedures are carried out in accordance with positive law. However, this approach tends to ignore the unequal power relations between creditors and debtors, especially if the debtor is an individual or family with a weak bargaining position.

Basic Legal Values	Reconstruction (Progressive Law)	Definition (Progressive Law)
Legal Certainty	Fast, formal, and pro-creditor (based on the Grosse Akta)	Fair certainty guarantees debtors' rights in the procedure.
Benefits (Efficiency)	Focus on efficiency and credit recovery	Responsible Interests: Prioritize seeking restructuring/mediation solutions before execution.
Social Justice	Considered fulfilled if legal procedures are followed	Legal balance, protection for individual debtors (households), and prevention of unequal bargaining positions

Table 1: Comparison of Three Legal Values in Mortgage Execution

Reformulating the concept of legal certainty requires a fundamental shift in the underlying legal philosophy, as illustrated in Table 1. Legal certainty can no longer be understood solely as speed or adherence to formal procedures. Instead, it must be built on the principle of true procedural justice, namely procedures that respect the human rights of the parties, ensure a balance of legal positions, and are free from domination or abuse of power. Thus, authentic legal certainty can only be achieved if the legal process is carried out fairly, transparently, and accountably, not by sacrificing justice itself for the sake of apparent efficiency.

#### **4.2 A Reconstruction Model that can be Implemented in the Practice of HT Execution through Reformulating the role of the District Court (PN)**

##### **4.2.1 Equilibrium Model: Learning from Fundamental Changes in Fiduciary Guarantee Execution Post-MK**

The legal guarantee system in Indonesia has undergone a significant paradigm shift as a result of Constitutional Court (MK) Decision Number 18/PUU-XVII/2019 and its derivative implications, particularly in the context of regulating Fiduciary Guarantees. This decision fundamentally changed the mechanism for executing fiduciary guarantees, which previously had direct executorial power. Prior to this decision, a Fiduciary Guarantee Certificate containing the injunction "For the Sake of Justice Based on Belief in the One and Only God" was considered sufficient to execute the guarantee without going through the courts. However, the Constitutional Court, through its decision, confirmed that although the executorial status of a Fiduciary Certificate remains recognized, its implementation is no longer automatic.

The Supreme Court has determined that for direct execution (parate execution) to be valid, additional, more stringent requirements must be met, namely:



1. There is an explicit agreement between the creditor and the debtor that the debtor has committed a default, or
2. The occurrence of a default has been proven through a judicial process and declared legally and convincingly by a court decision.

Thus, this ruling has important implications for the protection of debtors' rights and emphasizes the importance of procedural fairness in the implementation of fiduciary guarantees, ensuring that they are not solely in favor of efficiency and the interests of creditors. The legal changes signaled by this Constitutional Court ruling represent a progressive step in realizing procedural fairness and reflect the application of the principle of balance between the rights and obligations of the parties in a fiduciary agreement. This ruling directly encourages creditors to refrain from acting unilaterally in executing collateral.

If a debtor files a good-faith objection to an alleged default, the creditor is required to resolve the dispute through the judicial process first, rather than through direct execution. This policy serves as a control mechanism against potential abuse of power by creditors, particularly in the context of unequal legal relationships. Despite concerns from the financial sector regarding the potential increase in non-performing loans and the resulting increase in interest rates, the Directorate General of State Assets (DJKN) confirmed that the fiduciary auction process can still proceed effectively after administrative and procedural adjustments are made. This demonstrates that equitable legal certainty does not always have to conflict with economic efficiency. In fact, through more accountable and fair legal mechanisms, financial system stability can be maintained without compromising debtors' fundamental rights.

An analysis of the collateral system in Indonesia reveals substantial legal anomalies, particularly if the parameters of legal certainty are expanded to include the value contained in the collateral object and its impact on human rights, particularly the debtor's economic and social rights. In this context, HT, which is commonly imposed on land and immovable property, including the debtor's primary residence, should be regulated with a higher standard of procedural protection compared to fiduciary collateral. Land as an object of HT not only has economic value, but also vital social and constitutional dimensions, given that land is often a source of livelihood, identity, and social protection for individuals and families. Meanwhile, fiduciary objects are generally movable objects with relatively lower social value.

Taking into account the principles of equality and legal justice, a normative logic can be proposed: if the obligation to objectively prove default (through agreement between the parties or a court decision) is imposed in the execution of a fiduciary guarantee, then legal protection for debtors under fiduciary guarantees should not be less stringent. In fact, ethically and constitutionally, fiduciary guarantees should be subject to stricter procedures, given the potential impact of their execution on housing and the violation of the right to a decent standard of living. However, to date, the fiduciary guarantee law has not been adjusted to accommodate the procedural justice standards established by the Constitutional Court in the context of the aforementioned Constitutional Court decision. This creates a normative inconsistency in the national guarantee system. Determination of default in fiduciary guarantees can still be made unilaterally by creditors, without adequate control mechanisms, even though the collateral at stake has the highest social value in a person's life.

Therefore, a legal analogy approach is needed to fill this gap. The procedural justice standards affirmed by the Constitutional Court in fiduciary cases must be normatively adopted as an ethical imperative in the execution of fiduciary guarantees, to ensure that legal practices are not only formally valid but also substantively fair.

Crucial Aspects	Mortgage Rights (Law No. 4/1996)	Fiduciary Guarantees (Post-Constitutional Court Decision No. 18/2019)
Power of Gros	Seizure of Deeds with Irah-irah	Fiduciary Guarantee Certificates with Irah-irah.
Determination of Default	Determined unilaterally by the creditor, based on the debtor's promise	Must be agreed upon or proven in court (Procedural Justice).
Role of the Administrative Court	Administrative Court (determination/permit for execution) or the place of challenge (debtor).	Wajib menguji <i>wanprestasi</i> jika debitur keberatan/tidak mengakui secara sukarela.
Implications of Justice	Vulnerable to abuse, ignoring the debtor's condition, and triggering contested disputes	Mandatory to test for default if the debtor objects/does not voluntarily admit it.

Table 2: Analysis of Paradigm Changes in Guarantee Execution (HT vs. Fiduciary Post-MK)

The inequalities depicted in Table 2 highlight the normative inconsistency within the Indonesian collateral system. Currently, legal certainty in mortgages stems from the application of double standards, where collateral objects, which have significantly higher social and constitutional value, namely land and immovable property, are not protected by equivalent procedural standards, and are even weaker than collateral for movable objects such as fiduciaries. Fiduciaries, whose objects have relatively lower social value, have been corrected through Constitutional Court decisions to adhere to the principle of procedural justice, while mortgages still justify unilateral execution by creditors without objective verification. This situation demonstrates that our legal system does not yet guarantee proportional protection based on the value and social function of the collateral object, which in turn obscures the substantive meaning of legal certainty itself. Therefore, changes to the provisions on mortgage rights are needed.

#### 4.2.2 Reformulation of Mortgage Execution from a Justice Perspective

Transformation in the implementation of Mortgage Rights (HT) must begin with a reinterpretation of the concept of legal certainty. Legal certainty is no longer sufficient in a procedural and finalistic sense; it must be transformed into just legal certainty, namely a guarantee that the debtor's constitutional rights, which stem from the principle of social justice, are consistently and sustainably protected (Constitutional Court of the Republic of Indonesia, 2019). Therefore, to realize this principle, restrictions on the authority of the parate execution are necessary, referring to the progressive approach reflected in Constitutional Court Decision No. 18/PUU-XVII/2019, which regulates the implementation of fiduciary guarantees. This model can be used as a reference in overhauling the implementation of Mortgage Rights to better balance the interests of creditors and the protection of debtors' rights. The



proposed reformulation emphasizes that direct execution based on GA through Article 6 of the UUHT can only be justified if the following two conditions are met (Sari & Yusuf, 2025).

#### 1. Post-Default Agreement

Execution can only be carried out if there is a written agreement signed after the default occurs, in which the debtor and creditor explicitly acknowledge the default and agree on the amount of debt to be paid. Furthermore, the phrase "agreement on the existence of the default" must be explicitly stated to ensure that the execution is based on legal and ethical consensus.

#### 2. Application of the *Ultimum Remedium* Principle for Residence

If the collateral is the debtor's sole residence (primary residence), parate execution cannot be carried out automatically. A court examination and determination are required that comprehensively consider the debtor's humanitarian, social, and economic aspects. Execution is only appropriate if it is proven to be a last resort (*ultimum remedium*) after restructuring or mediation options have failed to be effectively pursued.

#### 4.2.3. *Reforming the Role of District Courts (PN) as Guardians of Substantive Justice*

Reforms to the implementation of Mortgage Rights (HT) executions require fundamental changes in the function of the District Court. To date, the District Court has tended to play a purely administrative role, issuing execution orders at the request of creditors without delving into the substance (Constitutional Court of the Republic of Indonesia, 2019). A progressive legal approach requires a shift in this role, where the District Court is no longer merely an administrative facilitator but rather a guardian of substantive justice. Within this framework, judges are required to ensure that the legal certainty provided is not merely formal legality, but rather just and humane legal certainty for the parties involved in the HT execution. This can only be achieved through a thorough examination of HT execution applications, which encompasses the following aspects:

- a) Good faith and proportionality test: the judge must evaluate whether the creditor has acted in good faith toward the debtor and provided a proportional restructuring opportunity in accordance with humanitarian principles.
- b) Protection against abuse of circumstances (*Misbruik van Omstandigheden*): the court must prevent potential abuse of circumstances/power by creditors who hold a dominant position in the legal relationship, particularly in the context of unequal pressure on the debtor. This is in line with the principles of consumer protection and the principle of balance.
- c) Substantive testing of default claims: if the debtor files an objection to the execution, the judge is obliged to conduct a substantive test of the default claim, including assessing the balance of rights and obligations between the creditor and the debtor.

This thorough examination is crucial to ensure that the execution process does not overlook the potential losses experienced by the debtor. If this aspect of loss is ignored, the execution loses the dimension of social justice, which should be a primary principle. The court serves not only as a venue for dispute resolution but also as an instrument of legal protection for the parties involved, assessing whether a breach of contract has occurred legally and convincingly before issuing a decision for further execution—a principle that must be consistently applied in the context of HT.

#### 4.3.4. *Impact of Changes to Rules and Judicial Decisions on Fair Certainty*

Applying the reconstruction model to the HT execution mechanism requires comprehensive reform involving two main pillars of the legal system: the legislative branch, which forms laws, and the judiciary, which implements judicial power. Both institutions play a strategic role in building a legal system that is not only legally certain but also substantively just.

Revision of the UUHT is a fundamental step that needs to be implemented immediately. The main focus of this revision is Article 6, which currently grants creditors direct authority to execute a debt through parate execution without adequate judicial oversight. The new approach requires the addition of provisions for confirmation of default through a legitimate mechanism, as well as legal protection for



collateral, for example, if the collateral is the debtor's sole residence, as part of the right to adequate housing. Postponement of collateral should be made the norm if there is a good-faith objection from the debtor. In this context, collateral should not be viewed as an automatic or administrative action, but rather as part of a legal process that requires verification, balance, and protection of fundamental rights. This reform will restore collateral to its primary role as a just credit protection tool, rather than as a rigid coercive tool that disadvantages the weaker party in a contractual relationship.

Based on its judicial power, the Supreme Court's support is needed through the issuance of normative instruments such as a Supreme Court Circular (SEMA) or a Supreme Court Regulation (Perma). These instruments must explicitly direct judges at the District Court to adopt a progressive and philosophical approach in handling requests for HT execution. Judges are not only tasked with ensuring the formal validity of documents, but must also actively assess aspects of social justice, proportionality, and the humanitarian impact of the proposed execution. With such a policy direction, the HT execution process is no longer limited to exercising creditor authority, but becomes a legal mechanism that reflects the principle of substantive justice, based on constitutional values, particularly social justice as mandated by Articles 28H and 33 of the 1945 Constitution. The legal certainty resulting from this change is a living, sustainable, and morally legitimate legal certainty, because it is accompanied by protection of the rights of small and vulnerable communities.

## **5. Conclusion**

### **5.1. Conclusion**

This research has successfully reformulated and critically examined the legal system for the execution of HT (Harmful Property) in Indonesia through the perspective of social justice as an ethical imperative. The primary focus of this research is to reform the dominant value of efficiency in the implementation of parate execution, as stipulated in Article 6 of the UUUHT (UUUHT), which has actually contributed to the emergence of formalistic and fragile legal certainty. The high number of lawsuits challenging HT executions is clear evidence that procedural efficiency does not always result in stable and just legal certainty. As an alternative, this research proposes the idea that true legal certainty must be rooted in the values of social justice, as enshrined in the fifth principle of Pancasila. Such certainty not only maintains legal order but also ensures a balanced legal position between creditors and debtors in often unequal contractual relationships. Therefore, a new legal approach is needed that is more humane and reflective of social realities.

The model suggested in this study adopts an analogous approach to the Constitutional Court's ruling in the Fiduciary case, where default may no longer be unilaterally determined by the creditor. Instead, default must be validated through two channels: (1) a written agreement between the parties following the default, or (2) objective procedural review by a judicial institution. Thus, the concept of default becomes not only legally valid but also morally just. Within this framework, the role of the District Court must be transformed from a mere administrative institution to an arbiter of substantive justice. Judges are required to actively examine the element of proportionality and consider the humanitarian and social impacts before approving a request for execution of a debt obligation.

This approach is expected to prevent executions that only benefit creditors and harm debtors socially and economically. However, as research that prioritizes a normative and philosophical legal approach, this study has limitations in presenting quantitative empirical data. This research does not specifically address the social, economic, or financial impacts of the increasing number of counterclaims, nor does it directly correlate between legal uncertainty and the declining rate of asset recovery by creditors. Therefore, the findings in this study are expected to be the initial basis for further studies with an empirical or interdisciplinary approach.

### **5.2. Recommendations**

Based on the findings, it is recommended:



### **Legislative Suggestions:**

1. The government and the House of Representatives (DPR) need to immediately revise the HT Law (Law No. 4 of 1996). The amendment should include a requirement for written confirmation or agreement from the debtor regarding the fact and value of the default before an Execution Parate can be implemented, in accordance with the constitutional standards of the Constitutional Court Decision on Fiduciary Security.
2. A special protection clause should be added for HT assets that constitute the debtor's primary dwelling, requiring execution through a court order that must examine the principle of *ultimum remedium* (last resort) and aspects of social justice.

### **5.3. Judicial Suggestion**

1. The Supreme Court (MA) should issue a clear Supreme Court Regulation (Perma), directing District Court Judges to use a Progressive Law approach in processing HT execution requests. This Perma should emphasize the judge's obligation to actively examine good faith, proportionality, and the prevention of abuse of circumstances by the creditor before issuing an execution order.
2. Judges must use the *irah-irah* "For the Sake of Justice Based on the One Almighty God" in the *Grosse Akta* as an order to achieve Substantive Justice, not just Formal Certainty.

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