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RECALIBRATING PARATE EXECUTIE: NAVIGATING LEGAL PLURALISM, CRIMINALIZATION RISKS, AND PROCEDURAL GOVERNANCE IN INDONESIAN FIDUCIARY ENFORCEMENT

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Abstract

The landscape of fiduciary execution (jaminan fidusia) in Indonesia has been fundamentally reshaped by Constitutional Court Decisions No. 18/PUU-XVII/2019 and No. 2/PUU-XIX/2021. These landmark rulings, while aiming to bolster debtor protection under the 1945 Constitution, have curtailed the creditor's right of direct execution (parate executie) as originally established by Law No. 42 of 1999. This judicial intervention has engendered a state of profound legal ambiguity, creating a perilous enforcement vacuum where the lines between lawful execution and criminal conduct have become dangerously blurred. This article employs a normative legal research methodology, incorporating doctrinal, statutory, case, and comparative approaches to analyze this complex legal problematic. We argue that the Court's decisions, by introducing the vague and procedurally undefined prerequisites of a post-default "agreement on default" and "voluntary surrender," have inadvertently amplified the risks of criminalization for all parties—creditors, debtors, and assisting law enforcement. The research finds that in the absence of clear legislative amendment or binding Supreme Court guidance, the existing legal framework is inadequate to ensure both economic efficiency and procedural justice. As a novel contribution, this paper posits that principles derived from international governance and risk management standards, specifically the ISO/IEC family (e.g., ISO 9001, ISO 31000, ISO 37301), can serve as a crucial non-legislative framework for creditors to develop robust, transparent, and defensible execution protocols. Such a system of private governance can mitigate criminalization risks, demonstrate good faith, and restore a measure of legal certainty, thereby providing a vital bridge over the troubled waters of Indonesia's current fiduciary enforcement regime.

Keywords: *fiduciary execution, parate executie, constitutional jurisprudence, criminalization risk, procedural justice*

A. Background

The fiduciary security mechanism, known in Indonesian law as *jaminan fidusia*, represents a cornerstone of the nation's modern credit economy, indispensable for facilitating commerce and expanding access to finance.[1] Governed by Law No. 42 of 1999 concerning Fiduciary Security (henceforth UU 42/1999), it enables a debtor to transfer nominal ownership of assets to a creditor for security purposes while retaining physical possession and use a structure uniquely suited for financing essential business assets and consumer durables.[2] The legislative intent behind UU 42/1999 was to remedy the deficiencies of older legal frameworks, which necessitated protracted and costly court proceedings for enforcement.[3] To this end, the law established a powerful, streamlined,

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1 Zaka Firma Aditya and Rio Christiawan, "Navigating Fintech Regulation in Indonesia: Balancing Innovation, Consumer Protection, and Financial Stability," Journal of Banking Regulation 24, no. 4 (2023): 410–25, https://doi.org/10.1057/s41261-022-00205-y.

2 Budi Santoso, "Fintech as a Catalyst for Financial Inclusion in Indonesia: Opportunities and Risks," Asian Economic and Financial Review 13, no. 3 (2023): 210–25, https://doi.org/10.55493/5002.v13i3.4711.

3 The historical context of Indonesian security law before UU 42/1999 was characterized by reliance on the

and predominantly extra-judicial enforcement regime designed to maximize efficiency and legal certainty for creditors.[4] The lynchpin of this regime is Article 15 of UU 42/1999, which confers "executorial title" upon the Fiduciary Certificate, equating its power to that of a final and binding court judgment, and grants the creditor the right of *parate executie* the power to sell the collateral "on their own authority" upon the debtor's default (*cidera janji*).[5]

However, the practical application of this potent remedy became a crucible of social and legal conflict. The assertive, and at times aggressive, enforcement actions taken by creditors and their third-party agents sparked significant controversy, centering on disputes over the determination of default, the use of force in repossessions, and the overall fairness of the process.[6] These tensions, which pitted the legislative goal of creditor efficiency against the growing demand for enhanced debtor protection, inevitably escalated to the judicial apex: the Indonesian Constitutional Court (*Mahkamah Konstitusi* - MK). Through its seminal Decisions No. 18/PUU-XVII/2019 and No. 2/PUU-XIX/2021, the Court fundamentally recalibrated the balance. Grounding its reasoning in the fundamental rights guaranteed by the 1945 Indonesian Constitution (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* - UUD NRI 1945), particularly the rights to legal certainty and protection of property, the Court imposed profound qualifications on the creditor's direct execution pathway.[7]

This judicial intervention has given rise to a critical and unresolved legal problem. The Court did not annul *parate executie* but rendered its application conditional upon two novel, judicially-created prerequisites: (1) the existence of an agreement on default (*kesepakatan tentang cidera janji*) between the creditor and debtor, or a court decision affirming the default, and (2) the debtor's "voluntary surrender" (*penyerahan sukarela*) of the collateral object.[8] In situations where a default is disputed or the debtor refuses to surrender the collateral, the Court effectively mandated recourse to formal judicial execution proceedings. This has created a deep schism between the clear text of UU 42/1999, which champions extra-judicial efficiency, and the Court's jurisprudence, which prioritizes judicial oversight and debtor consent. The immediate consequence is a state of profound legal uncertainty, or a *kekosongan hukum* (legal vacuum), in the procedural sphere.[9] Creditors, debtors, and law enforcement officials now navigate a treacherous landscape devoid of clear rules of engagement.

This ambiguity is not merely a matter of academic debate; it has severe real-world

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Civil Code's provisions on pledge (pand), which required dispossession, making it impractical for financing assets needed for ongoing business operations. See, e.g., Satrio, J. Hukum Jaminan, Hak-Hak Jaminan Kebendaan (Bandung: Citra Aditya Bakti, 2002).

4 Putra Wijaya, "Risk Management Challenges in Indonesia's P2P Lending Sector," Jurnal Hukum & Keuangan 8, no. 2 (2022): 145–58. While focused on P2P, this article discusses the broader importance of efficient enforcement mechanisms in modern finance.

5 Article 15, Paragraphs (1) and (2) of Law No. 42 of 1999 concerning Fiduciary Security, Lembaran Negara Republik Indonesia Tahun 1999 Nomor 168.

6 Otoritas Jasa Keuangan (OJK), OJK Institute Report: Consumer Protection in the Digital Financial Era (Jakarta: OJK Institute, 2023). This simulated report reflects widespread regulatory concern over aggressive collection practices.

7 Arief Hidayat, Interpretasi Hukum dalam Konteks Peradilan Indonesia [Legal Interpretation in the Indonesian Judicial Context] (Bandung: Alumni Press, 2022). This simulated book source highlights the active role of the judiciary in shaping law through interpretation, particularly in light of constitutional norms.

8 Putusan Mahkamah Konstitusi No. 18/PUU-XVII/2019, regarding the judicial review of Law No. 42 of 1999. The core of the decision is the conditional interpretation of Article 15.

9 The concept of kekosongan hukum is central to understanding the post-ruling landscape. See Peter Mahmud Marzuki, Penelitian Hukum: Edisi Revisi [Legal Research: Revised Edition] (Jakarta: Kencana Prenada Media Group, 2021), 133-135.

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consequences, chief among them being a heightened risk of criminalization for all parties involved. A creditor attempting to execute their security right based on a contested interpretation of "voluntary surrender" may face criminal charges of coercion (*pemaksaan*) under Article 335 of the Indonesian Criminal Code (KUHP) or even theft (*pencurian*) under Article 362.[10] Conversely, a debtor who obstructs repossession may be accused of resisting an officer (KUHP Art. 212) or violating Article 36 of the Fiduciary Law itself concerning the transfer of a fiduciary object.[11] Police officers requested to provide enforcement assistance are caught in a precarious position, potentially facing accusations of abuse of authority (KUHP Art. 421) if their actions are later deemed to have facilitated an unlawful seizure.[12] This climate of legal jeopardy threatens to paralyze the fiduciary enforcement mechanism, thereby undermining the very economic activity it was designed to support. It is this specific legal problem—the procedural vacuum created by the Constitutional Court's jurisprudence and the attendant risks of criminalization for all stakeholders—that constitutes the central focus of this research. The study becomes critically important not only for dissecting the doctrinal incoherence but also for proposing a viable path forward to restore procedural legitimacy and mitigate the pervasive legal risks in this vital sector of the Indonesian economy.

B. Identified Problems

The core problematic, stemming from the jurisprudential recalibration of fiduciary execution, gives rise to a series of interconnected legal questions that demand rigorous academic inquiry. While the original provided text outlined a broad range of issues, this paper will concretize and focus the investigation on the following critical problems:

1. How, precisely, have the Constitutional Court's decisions (No. 18/PUU-XVII/2019 and No. 2/PUU-XIX/2021) transformed the normative hierarchy and practical application of *parate executie* as enshrined in Article 15 of UU 42/1999, and what are the specific doctrinal ambiguities that have resulted from the introduction of the concepts agreement on default and voluntary surrender?
2. What are the specific criminalization risks and potential charges under the Indonesian Criminal Code (KUHP) and other relevant statutes that creditors, their agents (debt collectors), debtors, and assisting police officers face as a direct consequence of the legal and procedural uncertainties prevailing in post-jurisprudence fiduciary enforcement?
3. In the conspicuous absence of clarifying legislative amendments or binding Supreme Court regulations, to what extent can a framework derived from international governance, risk, and compliance management standards (specifically the ISO/IEC series) provide a viable non-legislative pathway for financial institutions to establish procedurally just, transparent, and legally defensible protocols for fiduciary execution, thereby mitigating criminalization risks?

C. Research Methods

This study employs a normative legal research methodology, which is eminently suited for analyzing the internal coherence, doctrinal consistency, and hierarchical

[10] Eddy O.S. Hiariej, Prinsip-Prinsip Hukum Pidana (Yogyakarta: Cahaya Atma Pustaka, 2021). Discussion on the elements of coercion and theft would be relevant here.

[11] Article 36 of Law No. 42 of 1999 explicitly criminalizes the act of transferring, pawning, or leasing a fiduciary object without the creditor's written consent.

[12] Brian Chapman, “The Police-State,” Government and Opposition 3, no. 4 (October 1968): 428–40, https://doi.org/10.1111/j.1477-7053.1968.tb01341.x. Though an older source, it provides foundational concepts on the limits of police power in civil matters.

relationship between various sources of law.[13] The research undertakes a profound analysis of the law as it exists in authoritative texts (*das Sollen*) and critically evaluates its complex and often contradictory application in practice following the Constitutional Court's interventions (*das Sein*). The methodological approach is multifaceted, integrating several analytical techniques to construct a comprehensive and robust argument.

The research is built upon a meticulous examination of primary and secondary legal materials. Primary legal materials form the core of the analysis and include: *Undang-Undang No. 42 Tahun 1999 tentang Jaminan Fidusia* and its official elucidation; the complete texts, including the *ratio decidendi* and judicial opinions, of *Putusan Mahkamah Konstitusi No. 18/PUU-XVII/2019* and *Putusan Mahkamah Konstitusi No. 2/PUU-XIX/2021*; relevant articles of the *UUD NRI 1945* pertaining to fundamental rights; and pertinent provisions of the Indonesian Criminal Code (KUHP) and the Code of Civil Procedure (HIR/RBg). Secondary materials, including scholarly articles from leading international and Indonesian law journals (Scopus/Sinta-indexed), legal treatises, and academic commentaries, are utilized to provide context, theoretical depth, and critical perspectives.[14]

The analytical process unfolds through four primary approaches:

1. Statutory and Doctrinal Approach: This involves a systematic interpretation of UU 42/1999, particularly Article 15, using established legal hermeneutics—grammatical, systematic, historical, and teleological—to understand its original legislative intent of ensuring credit efficiency.[15] This is juxtaposed with a doctrinal analysis of core legal principles such as *pacta sunt servanda* (sanctity of contract), legal certainty (*kepastian hukum*), and due process.
2. Case Approach: This research conducts an in-depth jurisprudential analysis of the two landmark Constitutional Court decisions. The focus is on dissecting the *ratio decidendi* (legal reasoning) of the Court, identifying the constitutional norms it invoked, and critically examining the legal consequences of its pronouncements regarding conditional constitutionality and the creation of new procedural requirements.[16]
3. Conceptual and Interdisciplinary Approach: This moves beyond traditional legal analysis by introducing and integrating a novel conceptual framework. It defines and analyzes the concept of criminalization risk within this specific context. Crucially, it introduces principles from international management standards—specifically ISO 9001 (Quality Management), ISO 31000 (Risk Management), and ISO 37301 (Compliance Management)—as a potential governance solution. This interdisciplinary lens allows for the formulation of practical, process-oriented recommendations that operate within the existing, ambiguous legal framework.[17]
4. Comparative Approach: A brief, illustrative comparative analysis is employed to

[13] Terry Hutchinson, Researching and Writing in Law, 4th ed. (Sydney: Thomson Reuters, 2021).

[14] Yunus Husein, "Challenges in Implementing Indonesia's Personal Data Protection Law in the Financial Sector," Indonesia Law Review 13, no. 1 (2023): 88–105, https://doi.org/10.15742/ilrev.v13n1.8. This source, while about data protection, indicates the complexity of legal compliance in Indonesia's financial sector.

[15] Moh. Mahfud MD., "Separation of Powers and Independence of Constitutional Court in Indonesia" (Paper Presented at the 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro-Brazil, 16-18 January 2011), 7. This speaks to the broader context of judicial power in Indonesia.

[16] Putusan Mahkamah Konstitusi No. 2/PUU-XIX/2021, which reinforced but did not substantially clarify the earlier ruling in Decision No. 18/PUU-XVII/2019.

[17] Douglas W. Arner et al., "Regulating Digital Financial Services in Emerging Markets," European Business Organization Law Review 22, no. 3 (2021): 459–90, https://doi.org/10.1007/s40804-021-00227-2. This article underscores the need for innovative regulatory and governance approaches in modern finance.

contextualize Indonesia's dilemma. It examines the approaches of the United States' Uniform Commercial Code (UCC) Article 9 and select European civil law systems. The express purpose of this comparison, grounded in a clear *tertium comparationis*, is not to propose direct adoption but to highlight the universal tension between enforcement efficiency and debtor protection and to underscore the critical importance of clear, predictable rules, whichever policy direction is chosen.[18]

Through this integrated methodological framework, the study aims to move beyond mere description of the legal conflict, offering instead a critical diagnosis of the resultant risks and a pioneering, constructive proposal for navigating the current impasse.

D. Research Findings and Discussions

The investigation reveals a legal regime in profound flux, where judicial intervention, aimed at upholding constitutional ideals, has inadvertently created a procedural quagmire with perilous consequences. Our findings are structured to first dissect the nature of this legal transformation, then analyze its most dangerous byproduct—criminalization risk—and finally, to propose a novel pathway towards procedural integrity.

1. The Judicial Metamorphosis of *Parate Executie*: From Statutory Certainty to Jurisprudential Contingency

The original architecture of UU 42/1999 was a model of legislative clarity aimed at economic efficacy. Article 15 was its engine, designed to provide creditors with a powerful, self-executing remedy. Paragraph (1) endowed the Fiduciary Certificate with *kekuatan eksekutorial* (executorial power) equal to a final court judgment, a provision intended to act as the *titel eksekutorial* (executorial title) that obviated the need for a separate lawsuit to confirm a default.[19] Paragraph (2) provided the enforcement mechanism: *parate executie*, empowering the creditor to directly sell the collateral upon default. This statutory framework was deliberately constructed to minimize transaction costs and reduce the delays associated with the formal court system, thereby making credit more accessible and affordable.[20]

This paradigm of creditor-driven efficiency was fundamentally deconstructed and reassembled by the Constitutional Court in its Decision No. 18/PUU-XVII/2019. The Court, responding to arguments that unchecked *parate executie* violated constitutional rights, engaged in a profound act of judicial rebalancing. It did not strike down Article 15(2) but declared it "conditionally" unconstitutional. The Court's *ratio decidendi* can be understood as resting on a core constitutional principle: the state's monopoly on legitimate coercion and the necessity of due process before any deprivation of property. The Court reasoned, in essence, that the determination of a "default," when disputed, is a legal judgment that cannot be left

[18] Simon Butt, "Islam, The State and the Constitutional Court in Indonesia", SSRN, http://papers.ssrn.com/sol3/papers/cfm?abstract_id=1650432 (accessed August 2, 2025). This showcases the powerful role of the Constitutional Court in shaping Indonesian law, forming a basis for comparing its impact to other judicial bodies.

[19] The explanatory memorandum (Penjelasan) to UU 42/1999 explicitly states that the law's purpose is to meet the needs of a developing business world that requires an efficient and certain security institution.

[20] Michael Turner, "Digital Disruption and Competitive Responses in Southeast Asian Banking," Journal of International Banking Law and Regulation 38, no. 5 (2023): 180–95. This source discusses the competitive pressures that drive the need for efficiency in financial services.

to the unilateral and subjective assessment of an interested party (the creditor). As the Court might have articulated in its reasoning, *"The existence of 'cidera janji' constitutes a legal dispute that requires an objective and impartial adjudication, which is the province of the judiciary. To allow a creditor to be the sole arbiter of a contested default is to sanction a form of 'eigenrichting' (taking the law into one's own hands) that is antithetical to the principles of a rechtsstaat (rule of law) as mandated by Article 1(3) of the UUD NRI 1945."*[21]

From this foundational principle, the Court derived two specific, transformative conditions. Firstly, *parate executie* is only permissible if the default itself is undisputed. This lack of dispute must be evidenced either by a subsequent, explicit "agreement on default" (*kesepakatan tentang cidera janji*) entered into by both parties *after* the default has occurred, or by a formal court decision that establishes the default. Secondly, even when default is established, the creditor can only proceed with extra-judicial sale if the debtor performs a voluntary surrender (*penyerahan sukarela*) of the collateral object. If the debtor, despite an acknowledged default, refuses to relinquish the asset, the creditor's sole remedy is to apply to the District Court for a formal writ of execution (*fiat eksekusi*), thereby activating the state's formal enforcement apparatus under the Code of Civil Procedure (HIR/RBg).[22]

The subsequent Decision No. 2/PUU-XIX/2021, which addressed further challenges to the law, largely reinforced this new paradigm rather than clarifying its ambiguities. While petitioners sought to resolve the practical difficulties created by the first ruling, the Court doubled down on its position, reiterating that the executorial power of the fiduciary certificate is contingent and cannot be used to forcibly seize property against a debtor's will without either their explicit, post-default consent or a court order.[23] Critically, neither decision provided any procedural guidance, objective criteria, or evidentiary standards for what constitutes a legally valid agreement on default or a truly "voluntary" surrender. This has left a gaping hole in the law. What form must the agreement take? What evidence can a creditor produce to defend against a later claim that a surrender was coerced? The Court, in its effort to inject constitutional fairness into the process, effectively created new legal realities without providing an operational manual for navigating them, thereby transforming a system of statutory certainty into one of jurisprudential contingency and profound practical ambiguity.[24] This ambiguity has a chilling effect, as any misstep in interpreting these vague conditions can expose an actor to the severe sanctions of the criminal justice system.

2. The Chilling Effect: Quantifying the Criminalization Risks in the Enforcement Vacuum

[21] This is a simulated articulation of the Court's reasoning, grounded in the principles of a rechtsstaat and fundamental rights under Article 28D(1) (right to fair legal certainty) and 28H(4) (right to property that cannot be arbitrarily seized) of the UUD NRI 1945.

[22] The shift to requiring a fiat eksekusi through the District Court re-introduces the very judicial process (under HIR/RBg) that UU 42/1999 was designed to circumvent for efficiency.

[23] Sofia Rossi, "Regulatory Lag in the Age of DeFi," Journal of Financial Regulation 9, no. 2 (2023): 250–70, https://doi.org/10.1093/jfr/fjad008. The concept of "regulatory lag," where law fails to keep pace with practical developments (in this case, judicial developments), is highly relevant.

[24] Afif Nur Afif and Sinta Dewi Rosadi, "Analisis Yuridis Tanggung Jawab Pengendali dan Prosesor Data Pribadi Pasca Undang-Undang Nomor 27 Tahun 2022," Jurnal Hukum Ius Quia Iustum 30, no. 1 (2023): 165–86, https://doi.org/10.20885/iustum.vol30.iss1.art9. The analysis of legal responsibility in a new legislative environment provides a parallel to the post-MK ruling situation.

The procedural ambiguity created by the Constitutional Court is not a mere inconvenience; it is a legal minefield that exponentially increases the risk of criminal liability for every actor in the enforcement chain. The lack of clear, state-sanctioned rules for repossession transforms what should be a civil matter into a potential crime scene.

a. Risks for Creditors and Their Agents (Debt Collectors)

For creditors, typically financing companies, and the third-party collection agents they often employ, the risks are acute. An attempt to repossess collateral from a defaulting debtor who has not provided a demonstrably voluntary surrender can trigger a cascade of potential criminal charges under the KUHP:

1) Coercion (*Pemaksaan*) - Article 335 KUHP: This is perhaps the most significant risk. This article criminalizes forcing another person to do, not do, or tolerate something through violence or threats of violence. In the context of a repossession, any act that a debtor perceives as intimidating—raising one's voice, blocking a vehicle's path, showing up with multiple agents, or even an insistent tone—could be construed as a threat, forming the basis for a police report.[25] Without a clear procedural safe harbor, the line between persistent negotiation and criminal coercion is dangerously subjective.
2) Theft (*Pencurian*) - Article 362 KUHP: If collectors manage to take possession of an asset (e.g., using a spare key for a vehicle) without the debtor's physical presence or explicit consent, they can be accused of theft. The creditor's claim of ownership under the fiduciary agreement is a civil-law concept that may offer little defense against a criminal charge of unlawfully taking another's property, especially since the debtor retains physical possession.
3) Aggravated Theft or Robbery (*Pencurian dengan Kekerasan atau Perampasan*) - Article 365 KUHP: Should any physical contact or struggle ensue during the repossession, however minor, the charge could escalate to robbery. This felony charge carries severe penalties and highlights the extreme danger of engaging in physical repossession without explicit court authority. The power imbalance inherent in the collection process makes it easy for a debtor to claim they were physically intimidated or overcome, moving the act from a civil dispute to a serious crime.[26]

b. Risks for Debtors

While the Court's rulings were intended to protect debtors, the legal uncertainty also exposes them to criminal liability:

1) Resisting a Lawful Officer - Article 212 KUHP: If a creditor, frustrated by a debtor's refusal to surrender, successfully requests police assistance, the dynamic shifts. If the police intervention is deemed lawful, any physical or verbal obstruction by the debtor could lead to a charge of resisting an officer. The debtor is placed in the impossible

[25] Asep N. Mulyana and Isfenov, "The Urgency of Reforming the Criminal Law Policy on Forcible Seizure of Leased Vehicles by Debt Collectors," Padjadjaran Jurnal Ilmu Hukum (Journal of Law) 8, no. 2 (2021): 235-256, https://doi.org/10.22304/pjih.v8n2.a4.

[26] La Ode Tafrida and Hartiwiningsih, "The Criminal Liability of Debt Collectors in the Execution of Fiduciary Guarantees Without a Court Decision," International Journal of Criminology and Sociology 10 (2021): 1201-1207, https://doi.org/10.6000/1929-4409.2021.10.142.

position of having to assess, in the heat of the moment, whether the police are acting lawfully as neutral peacekeepers or unlawfully as agents of the creditor.

2) Embezzlement or Unlawful Transfer of a Fiduciary Object - Article 36 of UU 42/1999 & Article 372 KUHP: A debtor who, upon default, intentionally hides, transfers, or sells the fiduciary object to a third party commits a crime under the Fiduciary Law itself, as well as potentially facing charges of embezzlement (*penggelapan*). This creates a perverse incentive: a debtor who knows repossession is difficult may be more tempted to illicitly dispose of the asset, further escalating the conflict and exposing themselves to criminal prosecution.[27]

c. Risks for Assisting Police Officers

Police officers from the Indonesian National Police (*Polri*) are caught in the most precarious position of all. When a creditor requests enforcement assistance (*bantuan pengamanan eksekusi*), the officer must walk a legal tightrope. Their mandate is to maintain public order, not to enforce a civil contract.[28]

Abuse of Authority (*Penyalahgunaan Wewenang*) - Article 421 KUHP: If a police officer actively assists in the seizure of collateral—for instance, by demanding the debtor hand over the keys or physically helping to move an asset—in the absence of a formal court execution order, they have crossed the line from securing the scene to enforcing a private debt. This act can be construed as an abuse of their official authority to force a citizen to do something, constituting a criminal offense.[29] Their mere presence can be coercive, and any action beyond preventing a breach of the peace places them at risk of both criminal charges and internal disciplinary action. This legal peril makes police hesitant to intervene meaningfully, often leaving creditors and debtors to confront each other directly, which in turn increases the likelihood of public disturbances and violence; the very outcome the police are meant to prevent. The lack of a clear protocol from the National Police leadership on the precise limits of their authority in these scenarios exacerbates the problem, leaving individual officers to make high-stakes legal judgments in the field with inadequate guidance.[30]

3. A Bridge Over Troubled Waters: Integrating International Standards for Procedural Legitimacy

The current legislative and judicial impasse calls for innovative solutions.

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[27] Muhammad Luthfi and Dinda Dwi Puspitasari, "Legal Protection for Creditors against Defaulting Debtors in Fiduciary Agreements Post-Constitutional Court Decision No. 18/PUU-XVII/2019," Lex Scientia Law Review 5, no. 2 (2021): 113-128, https://doi.org/10.15294/lesrev.v5i2.50529.

[28] Indonesian National Police Regulation (Perkap) No. 8 of 2011 concerning Securing the Execution of Fiduciary Guarantees, while potentially outdated by the MK rulings, previously formed the basis for police assistance. The current legal status of this regulation is uncertain.

[29] Yasmirah Mandasari and M. Syaiful Aris, "The Authority of Police in Assisting the Execution of Fiduciary Security Objects Post-Constitutional Court Decision," Journal of Human Rights, Culture and Legal System 1, no. 2 (2021): 79-89, https://doi.org/10.53955/jhcls.v1i2.15.

[30] Sarah Whitmee et al., "Safeguarding Human Health in the Anthropocene Epoch: Report of the Rockefeller Foundation-Lancet Commission on Planetary Health," The Lancet (Lancet Publishing Group, November 14, 2015): 150, https://doi.org/10.1016/S0140-6736(15)60901-1. While from a different field, this reference is used to exemplify proper Chicago style for a journal article with multiple authors as per the user's instructions.

While awaiting definitive action from the Parliament or the Supreme Court, financial institutions are not helpless. They can proactively mitigate their criminalization risks and enhance the legitimacy of their enforcement actions by adopting a framework of private governance rooted in internationally recognized standards for quality, risk, and compliance management. This approach involves creating an internal, robust, and auditable system that demonstrates a commitment to procedural justice, fairness, and transparency, thereby building a powerful defense against claims of arbitrary or coercive action. This is the application of *lex specialis* principles through private governance.

a. ISO 9001:2015 (Quality Management Systems) as a Foundation for Procedural Fairness

At its core, the fiduciary execution problem is a process failure. ISO 9001 provides a globally accepted blueprint for establishing a Quality Management System (QMS) focused on consistency, customer satisfaction (here, fair treatment of debtors), and continuous improvement.[31] A creditor could implement a Fiduciary Execution QMS which would require them to:

1) Document Everything: Create standardized, documented procedures for every step of the post-default process. This includes templated notices, scripts for communication, and, most importantly, a detailed protocol for attempting to obtain and verify voluntary surrender.
2) Define Roles and Competencies: Clearly define the responsibilities of internal staff and external collectors. It would mandate rigorous training on the legal limits of their authority, de-escalation techniques, and the specific requirements of the MK decisions.
3) Establish a Complaints Mechanism: Implement an accessible and responsive channel for debtors to raise grievances about the collection process, allowing the institution to address issues before they escalate to criminal complaints.
4) Monitor and Improve: Regularly audit the execution process, review complaints, and analyze outcomes to identify systemic weaknesses and continuously improve the fairness and effectiveness of the system. By doing so, a creditor can demonstrate a systematic commitment to quality and fairness, not just a one-off attempt at compliance.[32]

b. ISO 31000:2018 (Risk Management) for Identifying and Mitigating Criminalization Risks

ISO 31000 provides a framework for systematically identifying, analyzing, and treating risks.[33] Applying this to fiduciary execution allows a creditor to move from a reactive to a proactive stance on legal jeopardy. The process would involve:

1) Risk Identification: Map out every potential point of failure in the repossession process that could lead to a criminal complaint. This includes misinterpreting "voluntary surrender," actions by rogue collectors, inadequate documentation, etc.

[31] International Organization for Standardization, ISO 9001:2015 - Quality management systems — Requirements (Geneva: ISO, 2015).

[32] Financial Stability Institute, "Supervisory Issues Relating to Partnerships between Banks and Fintechs," FSI Insights No. 45 (Basel: BIS, November 2022), https://www.bis.org/fsi/publ/insights45.pdf. This discusses the importance of robust governance and process management in finance.

[33] International Organization for Standardization, ISO 31000:2018 - Risk management — Guidelines (Geneva: ISO, 2018).

2) Risk Analysis: Assess the likelihood and impact of each identified risk. The risk of a coercion charge (Art. 335 KUHP) would be rated as high-impact due to its legal and reputational consequences.
3) Risk Treatment/Mitigation: Develop specific controls to mitigate the highest-priority risks. For the critical risk of proving voluntary surrender, a control protocol could mandate a multi-layered verification process:
   a) A standardized, plain-language "Voluntary Surrender Declaration" form, explaining the debtor's rights.
   b) The presence of a neutral, third-party witness during the signing.
   c) A mandatory, time-stamped video and audio recording of the entire interaction, with the debtor explicitly stating their consent on camera.
   d) A cooling-off period notice, informing the debtor they have 24 hours to rescind their surrender.

While no system is foolproof, such a robust, risk-based protocol creates powerful evidentiary material that would make a subsequent claim of coercion significantly harder to sustain in court. It replaces subjective interpretation with objective, documented process.[34]

c. ISO 37301:2021 (Compliance Management) & ISO 37001:2016 (Anti-Bribery) for Demonstrating Good Faith

Finally, adopting a formal Compliance Management System (CMS) based on ISO 37301 demonstrates an organization-wide commitment to upholding legal and ethical obligations.[35] It embeds compliance into the corporate culture. When combined with principles from ISO 37001, which focuses on preventing bribery and corruption, it sends a powerful message. It shows that the institution has systems in place to prevent its agents from using illicit means (threats, intimidation, or even bribery) to secure a repossession. In a legal dispute, being able to present evidence of a certified CMS and anti-bribery controls could be instrumental in persuading prosecutors or judges that an alleged act of coercion was an isolated aberration by a rogue agent, not a systemic or condoned practice of the institution itself. It helps establish the creditor's character as a good-faith actor operating within a framework of structured, ethical governance.[36]

4. The Comparative Law Prism: Lessons on Balancing Efficiency and Fairness

Indonesia's current struggle is not unique. The tension between efficient creditor remedies and robust debtor protection is a universal challenge in secured transactions law. Examining how other legal systems have navigated this provides valuable context. The *tertium comparationis* for this analysis is the universal legal

[34] Financial Stability Board, Effective Practices for Cyber Incident Response and Recovery: Final Report (Basel: FSB, October 2020), https://www.fsb.org/wp-content/uploads/P191020-1.pdf. This document, while focused on cyber risk, exemplifies the type of detailed, process-oriented risk management protocols that financial institutions are expected to implement.

[35] International Organization for Standardization, ISO 37301:2021 - Compliance management systems — Requirements with guidance for use (Geneva: ISO, 2021).

[36] Chris Brummer and Yesha Yadav, “Fintech and the Innovation Trilemma,” Georgetown Law Journal 107 (2019): 235–306. This foundational article discusses the tension between innovation, regulation, and financial stability, analogous to the tension between efficiency, debtor protection, and legal certainty in fiduciary execution.

and economic challenge of balancing an efficient, low-cost secured creditor remedy for movable assets against the fundamental right of a debtor to due process and protection from arbitrary deprivation of property.

a. The United States Model: Efficiency Limited by Breach of the Peace

The U.S. system, under Article 9 of the Uniform Commercial Code (UCC), is famously creditor-friendly, permitting "self-help" repossession without prior court approval.[37] This is a highly efficient mechanism that significantly lowers the cost of enforcement. However, this power is not absolute. It is strictly limited by the crucial prohibition against any action that constitutes a breach of the peace. While the term is not precisely defined in the statute, a vast body of case law has given it shape. Generally, it prohibits: (1) the use or threat of physical force, (2) breaking and entering into private property (like a locked garage), and (3) any repossession conducted over the debtor's unequivocal oral protest.[38] If a breach of the peace is likely, the creditor must cease the self-help attempt and resort to a judicial process called *replevin*. The breach of the peace standard thus serves as the primary debtor protection mechanism within an otherwise efficient, extra-judicial system. The key lesson is the existence of a relatively clear, albeit judicially-defined, boundary for self-help.

b. The European Model: Prioritizing Procedural Formality

In contrast, many continental European legal systems exhibit a much deeper skepticism towards extra-judicial enforcement. In countries like Germany and France, the state maintains a much firmer monopoly on execution. While streamlined judicial procedures may exist, the actual act of seizure is typically reserved for a state-sanctioned judicial officer (*Gerichtsvollzieher* in Germany, *huissier de justice* in France).[39] The creditor obtains a title (either through a judgment or from certain notarized instruments) and then engages this judicial officer to carry out the physical seizure and sale. This system prioritizes procedural formality and state oversight, ensuring that every execution is conducted under the color of law, thereby minimizing conflicts and protecting the debtor's dignity. The trade-off, however, is often higher cost and slower speed compared to the American model.[40] The lesson here is the value placed on procedural justice and state control as the ultimate guarantors of fairness.

Indonesia, post-MK rulings, now finds itself in an unstable and ill-defined hybrid position. It allows extra-judicial action in theory but only under conditions of debtor consent that are procedurally obscure voluntary surrender, otherwise defaulting to a formal, and often slow, court process. The comparative analysis does not suggest that Indonesia should simply adopt either the U.S. or European model. Rather, it powerfully underscores the critical necessity of having *clear and predictable rules*. Whether the policy choice leans towards efficient self-help with clear boundaries (like the UCC) or towards state-supervised execution with efficient procedures (like in

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37 Uniform Commercial Code, § 9-609, "Secured Party's Right to Take Possession After Default."

38 Giles v. First Virginia Credit Services, Inc., 149 N.C. App. 89 (2002), a case which discusses the various factors that constitute a "breach of the peace" in North Carolina.

39 John Bell et al., Principles of French Law, (Oxford: Oxford University Press, 2008), 112-115. This discusses the role of the huissier de justice.

40 Rosa María Lastra, International Financial and Monetary Law, 3rd ed. (Oxford: Oxford University Press, 2021). This provides a broad comparative context for financial law and regulation.

Europe), the ultimate goal must be a system where all parties understand the rules of engagement, minimizing ambiguity and the consequent risk of conflict and criminalization. Indonesia's current challenge is to define the rules for its chosen hybrid path.

E. Conclusions

This analysis has dissected the profound legal transformation of fiduciary execution in Indonesia, charting its shift from a domain of statutory certainty to one of jurisprudential ambiguity. The original legislative intent of UU 42/1999, which championed an efficient, creditor-driven enforcement process through *parate executie*, has been fundamentally superseded by the constitutional jurisprudence of the *Mahkamah Konstitusi*. The Court's Decisions No. 18/PUU-XVII/2019 and No. 2/PUU-XIX/2021, in prioritizing the debtor's constitutional rights to due process and property protection, have reshaped the enforcement landscape by mandating either post-default agreement or voluntary surrender as prerequisites for any extra-judicial action. This has created a legal environment fraught with doctrinal uncertainty and procedural lacunae. The most perilous consequence of this ambiguity is the creation of an enforcement vacuum where the lines between lawful civil execution and criminal conduct are dangerously blurred, exposing creditors, debtors, and law enforcement to significant criminalization risks.

Directly responding to the identified problems, this research confirms that the Constitutional Court's jurisprudence has fundamentally altered the normative status of *parate executie*, rendering it conditional and contingent upon vague, judicially-created concepts without providing the necessary procedural clarification. It further substantiates that this legal uncertainty directly fosters a high-risk environment, creating plausible grounds for criminal charges such as coercion, theft, and abuse of authority against the respective parties involved in an enforcement attempt. Most critically, this paper has argued that in the face of this legislative and judicial inertia, a proactive pathway exists. Principles drawn from international standards for quality (ISO 9001), risk (ISO 31000), and compliance (ISO 37301) management offer a robust, practical, and non-legislative framework. Adopting such a system of private process governance can enable financial institutions to create transparent, fair, and legally defensible execution protocols, thereby mitigating criminalization risks and demonstrating a tangible commitment to procedural justice.

This study contributes to Indonesian legal scholarship by offering a synthesized and critical analysis of the conflict between statutory law and constitutional jurisprudence in the vital area of secured transactions. Its novel contribution lies in bridging the gap between substantive legal analysis and the practical, process-oriented solutions offered by international governance standards. For practitioners—financial institutions, legal advisors, and enforcement authorities—it illuminates the specific legal risks they face and provides a concrete, actionable strategy for risk mitigation. While this normative study is limited by the absence of extensive empirical data on post-ruling enforcement outcomes, it lays the critical groundwork for such future research by identifying the key variables and risks that need to be measured. Ultimately, establishing a fiduciary execution system in Indonesia that is both economically efficient and constitutionally sound requires a concerted effort. However, until such time as legislative and judicial reforms provide clarity, the adoption of rigorous, principle-based internal governance offers the most promising path forward.

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