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Fundamental Commitment and Agreement in Bank Credits: Evidence from Indonesia

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ABSTRACT

Legal protection theory is economically and juridically given to weak communities. To protect human rights, the state wants a harmonious relationship between the government and the people based on a proportional functional relationship between state powers where dispute resolution is carried out through deliberation. The paper is aimed at discussing commitments and agreements among banks and bank creditors. The present study employed a descriptive qualitative method. The results show that objects are classified as movable and immovable in which five distinctions can be seen. The first is related to collateral charges including a distinction between movable and immovable objects, between movable and immovable objects that determine the form or type of encumbrance in the form of fiduciary or pledge and collateral in the form of immovable objects, of binding or encumbrance, and of Mortgage Rights. The second refers to leveraging, namely the distinction between movable and immovable objects resulting in differences in the delivery of the object. The third is oriented to movable objects, in which delivery is carried out by handing over the object, whereas for immovable objects the handover is done in exchange of name, for example. The fourth considers the terms of expiry for immovable objects with no expiration, while for movable objects there is an expiration. Finally, it regards the *bezit* for movable objects in which a bezitter of movable property is the owner of the object, whereas for immovable objects he is not the owner.

Keywords: Credit guarantee, law, agreement, special guarantee, debt guarantee

INTRODUCTION

Understanding Legal Protection

As a legal state,[1] Indonesia upholds and elevates the rights of every citizen. The supremacy of law becomes the basis for life behavior and equality before the law. The purpose of law is to achieve order in society where human interests are protected. [2] The legal protection theory (or *theorie van de wettelijke bescherming* in Dutch or *theorie der rechtliche schutz* in German) is given to weak communities, both economically and juridically. Lexically, protection means a place of shelter, and the act of protecting and the words *shelter* and *protect* almost have the same meaning[3] (see also Badudu Zain[4]). In the Dutch-Indonesian dictionary, the term *protective* is defined as protection (*onderprotectie staan*) in English; *iemand*

[1] As stated in the Opening of the 1945 Constitution, Article 1 paragraph (3) states "The State of Indonesia is a State of Law".
[2] Sudikno Mertokusumo, Mengenal Hukum: Suatu Pengantar, (Yogyakarta: Liberty, 1991), p. 19.
[3] Departemen Pendidikan dan Kebudayaan, Kamus Besar Bahasa Indonesia, (Jakarta: Balai Pustaka, 1989), p. 526.
[4] Badudu-Zain, Kamus Umum Bahasa Indonesia, (Jakarta: Pustaka Sinar Harapan, 2001), p. 816.

protectie verlenen means to provide protection to someone. [5]

To protect human rights, the state wants a harmonious relationship between the government and the people based on a proportional functional relationship between state powers where dispute resolution is carried out through deliberation. In this regard, legal protection means "guaranteeing legal certainty, the rights and interests of the parties by the government";[6] hence, "the main aim of law is to create order and balance". [7] Regarding the implementation of legal protection, three elements, namely certainty (*rechtssicherkeit*), expediency (*zweckmassigkeit*), and justice (*gerechtigkeit*) are involved. [8] Indonesia provides legal protection to its citizens based on Pancasila[9]; thus, law is a means or tool to achieve a goal that is non-juridical in nature and develops due to factors from outside the law, making the law dynamic. [10]

The legal relationship between the Bank and the customer can be realized from an agreement, either in the form of a private deed or in authentic form. [11] Hence, legal protection means an act permitted by statute, law or statutory regulations and aimed at protecting the rights of the parties (in this case creditors, debtors, guarantors, and auction buyers, if the parties have carried out their obligations).

Legal certainty is intended to provide legal certainty for parties interested in obtaining their rights. If a credit has problem and/or the debtor breaks his promise, the collateral that has been encumbered with a Mortgage will be executed through auction to pay off such problem; in this case, the creditor gets the right to take precedence. There are bodies that partially handle legal protection for the people and Soemitro devides such bodies into three divisions: [12]

Black's Law dictionary has defined the term *protection*[13] and legal protection is the right of every citizen in a rule of state law enforce legal supremacy, such as, legal certainty, equality before the law, and legal justice proportionally. [14] Theoretically, legal protection has two types, namely, preventive and repressive legal protection. [15] The first provides the people with the opportunity to submit objections (*inspraak*) or opinions before the government makes a definitive form. Its aims are to prevent disputes and encourages the government to be careful in making decisions related to the *freies ermessen* principle, and the people can raise objections or be asked for their opinion regarding the planned decision. [16] The final demands rights from parties deemed to have suffered losses where one party feels their interests have been harmed and aims to resolve the dispute by returning to the situation before the violation of legal norms occurred.

Based on the concept of *rechtstaat* and the rule of law as a framework of thought and

[5] Susi Moeimam and Hein Steinhauer, Kamus Belanda-Indonesia, (Jakarta: Gramedia Pustaka Utama, 2005), p. 828.

[6] Azhar Usman, Perlindungan Hukum dalam Penempatan Tenaga Kerja Indonesia, Jurnal Mimbar Hukum, (Jakarta: Universitas Islam Jakarta, 2007), p. 77.

[7] Mertokusumo, op. cit. 1991

[8] Mertokusumo. Ibid

[9] Phillipus M. Hadjon, Perlindungan Hukum bagi Rakyat Indonesia: Sebuah Studi tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara, (Surabaya: Bina Ilmu, 1987), p. 20.

[10] Mertokusumo, op. cit, p. 17

[11] Ronny Prasetya, Pembobolan ATM, Tinjauan Hukum Perlindungan Nasabah Korban Kejahatan Perbankan, (Jakarta: Prestasi Pustaka, 2010), p. 65.

[12] Hadjon, op. cit, hlm. 26

[13] Bryan A. Garner (Editor in Chief), Black's Law Dictionary, Seventh Edition, (Minnesota: West Group, 1999), p. 1.238.

[14] Romli Atmasasmita, Reformasi Hukum, Hak Asasi Manusia and Penegakan Hukum, (Bandung: Mandar Maju, 2001), p. 131.

[15] Hadjon, op. cit. p. 2-5. The term protected activity refers to conduct that is permitted or encouraged by a statute or constitutional provition, and for which the actor may not legally be retailated against, while protection means the act of protecting

[16] Salim H.S. and Erlies Septiana Nurbani, Penerapan Teori Hukum pada Penelitian Tesis and Disertasi, (Jakarta: Rajagrafindo, 2016), p. 264 dengan mengutip Pendapat Hadjon.

Pancasila as the foundation, the principle of legal protection for Indonesians is based on the principle of recognition and protection of human dignity and on the principle of a rule of law based on Pancasila. [17] The doctrine here relates to execution auctions, first, the auction is carried out quickly, effectively, easily, simply, surely, and fairly, through (1) private auction (Article 20 paragraph (2) and paragraph (3) of Law No. 4 of 1996 concerning Mortgage Rights), and (2) public auction through (a) relatively easier and simpler conditions, (b) transparent and open to the public, (c) positive approach to prospective buyers, (d) price assessments carried out by KJPP/qualified independent appraisal agency, and (e) simple, fast, certain, and fair procedures.

Second, the implementation of an execution auction for Mortgage Rights, if carried out in accordance with applicable provisions, guarantees legal protection to the following parties, such as (i) public or private sales with the agreement of the debtor, creditor, and the purchaser of the object of the Mortgage Rights must comply with the applicable provisions, (ii) the debtor's debt is paid off fully and the creditor's receivables are paid off fully, (iv) the collateral object belonging to the guarantor is sold at auction then the guarantor's responsibility is limited to only the collateral object belongs to the guarantor on which the Mortgage Right has been installed, and (v) the buyer of the Mortgage Right object gets legal protection where the validity of the Mortgage Rights object is guaranteed and the auction buyer can control and utilize the object he purchased through the Mortgage Rights execution auction.

LITERATURE REVIEW

General Principles in Engagements and Agreements

A principle is a basis or something that becomes the basis for thinking or opinions or becomes a basic law or basis for thinking in law. The principle is defined as the truth which becomes the basis for thinking, acting, and so on[18] (see the Black's Law dictionary for meaning of principle[19]). Legislative regulations and implementers who implement and enforce statutory regulations must obey the universal principles of law. Legal principles are essential and legal principles become the heart of law. [20] Thus, state administrators are obliged to maintain and develop a legal system based on legal principles to guarantee the implementation of free and independent judicial power to uphold law and justice. [21] Regarding legal principles, there are various opinions, for example, Bellefroid, Hommes, Van der Velden, and Scholten (in Mertokusumo[22]). Legal principles are not concrete laws, but general and abstract basic thoughts, or become the background of concrete regulations in every legal system manifested in statutory regulations and judges' decisions which are positive law and can be found by looking for common traits or characteristics in these concrete regulations. Legal principles are rooted in the reality of society and chosen as guidelines for life. [23]

1. Principle of Freedom of Contract and Principle of Balance

In daily practice, business people and ordinary people often exercise freedom of contract complying the standard transaction

[17] ibid.

[18] Departemen Pendidikan and Kebudayaan, Kamus Besar Bahasa Indonesia, (Jakarta: Balai Pustaka, 1995), p. 186.

[19] Garner, op. cit. A principle means: A fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure, or legal determination. A truth or proposition which is still clearer. That which constitutes the essence of a body or its constituent parts. That which pertain to the theoretical part of a science.

[20] Surachmin, 101 Asas and Prinsip Hukum, (Jakarta: Yayasan Gema Yudistisia Indonesia, 2005), p. 3.

[21] ibid.

[22] Sudikno Mertokusumo, Penemuan Hukum Sebuah Pengantar, (Yogya¬karta: Liberty, 2004), p. 5

[23] ibid.

patterns under the philosophy of *laissez-faire*. As a result, contracting parties are permitted to enter into any type of agreement they wish, as long as it is legal; this is what is called freedom of contract. In accordance with Law Number 7 of 1992 concerning Banking which has been amended by Law Number 10 of 1998 (Banking Law), credit agreements must be made in written form and are different from money lending and borrowing agreements which are in free forms or in written forms, but it is not prohibited if they are in unwritten form; therefore, in principle, credit agreements qualify as anonymous agreements. [24]

One of the principles in contract law refers to the principle of freedom of contract as a generally accepted principle that regulates legal relations between legal subjects; there is freedom to enter into agreements as long as they do not conflict with statutory regulations, morality, and public order. [25] Freedom of contract for the parties can be made with or without agreement, with content of agreement, and with the form of agreement.[26] The principle of freedom of contract is regulated in Article 11 paragraph (2) of Law no. 4 of 1996 concerning Mortgage Rights. [27]

The conditions necessary for the validity of an agreement are found in Article 1320 of the Civil Code. From the structure of the agreement, Asser differentiates between parts of the agreement, namely the core part (*wezenlijk oordeel* or *essentialia*) and the non-core part (*non wezenlijk oordeel* including *naturalia* and *accidentalia*). [28] The Article contains subjective and objective requirements[29] and the Article 1321 of the Civil Code states "There is no valid agreement if the agreement was given by mistake or was obtained by force or fraud." The agreement requires both parties to have freedom of will from the parties, free from pressure that results in "defects" in the realization of that will.

The Articles 1338 to 1341 of the Civil Code can be concluded that the agreement is made legally in accordance with Article 1320 of the Civil Code. As law the agreement binds parties who involve (*pacta sunt servanda*) and., in this case, the agreement must be implemented rationally and properly or appropriately (*rationalen billijk*) in society. This condition is called *objectieve goeder trouw* and the term *good faith* can also be interpreted subjectively, namely honesty (*subjectieve goeder trouw*) meaning the inner attitudes of humans are applied in material law (see Book II of the Civil Code[30]).

In recent developments, civil law experts agree that good faith in contract implementation has three functions, namely, to complete/add (*aanvullende werking van de goeder trouw*) the contents of the agreement, to limit the implementation of the agreement (*derogerende werking van de goeder trouw*), and to eliminate the implementation of the agreement. [31] Article 1340 of the Civil Code states that an agreement only applies to the party involved (see also Article 1341 of the Civil Code). As previously stated, in accordance with the Decree of the Directors of Bank of

[24] Moch. Isnaeni, Hukum Jaminan Kebendaan; Eksistensi, Fungsi, and Pengaturan, (Yogyakarta: Laksbang Pressindo, 2016), p. 59.

[25] Compare Any Nugroho, "Prinsip Keseimbangan dalam Konstruksi Hukum, Al-Mudharabah pada Perbankan Syariah di Indonesia", (Disertasi, Fakultas Hukum Universitas Gadjah Mada, 2016), p. 54.

[26] Salim et al., Perancangan Kontrak and Memorandum of Understanding, (Jakarta: Sinar Grafika, 2008), p. 2.

[27] Nurhasan Ismail, Perkembangan Hukum Pertanahan: Pendekatan Ilmu Ekonomi Politik, (Yogyakarta: Penerbit HUMA dan Magister Hukum UGM, 2007), p. 21.

[28] Asser, Handleiding Tot De Beoefening Van Het Nederlands Burgerlijk Recht, (Tjeenk Wilink-Zwole, 1968), p. 337.

[29] Elly Erawati and Herlien Budiono, Penjelasan Hukum Tentang Kebatalan Perjanjian, (Jakarta: NLRP, 2010), p. 48.

[30] Wery P. L, Perkembangan tentang Iktikad Baik di Nederland, (Jakarta: Percetakan Negara RI, 1990), p. 8.

[31] Ridwan Khairandy, Iktikad Baik dalam Kebebasan Berkontrak, (Jakarta: Fakultas Hukum Pascasarjana, Universitas Indonesia, 2003), p. 216.

Indonesia Number 27/162/KEP/DIR dated 31 March 1995, every credit grant must be stated in a written credit agreement. The form and format depend on are the Bank to determine, but at least two conditions must be taken into account.[32] The composition of a bank credit agreement generally includes three things [33], such as, title, comparison, and substantive. Table 1 shows bank credit agreement with 14 clauses[34] and 16 clauses by Wardoyo (in Gazali and Usman[35]); consider also Sjahdeini[36] and Djumhana[37].

Table 2 shows eleven clauses minimally available in bank credit agreement[38]. Their inclusion in the Bank credit agreement should be a partnership effort between banks as creditors and debtor as customers because they need each other in their efforts to develop their respective businesses. Such strict clauses become the Bank's attitude to implement the principle of prudence in providing credit. The parties agreeing to bind themselves is an essential legal principle in the law of engagement and this is called the principle of autonomous consensus which determines the existence of an agreement. In fact, the principle is an absolute requirement for modern contract law and for the creation of legal certainty. This principle can be found in Article 1320 of the Civil Code. [39] Thus, the credit agreement signed by the creditor and debtor with collateral only for the land or the building on it must be based on the principle of freedom of contract and the principle of balance between the two parties.

2. Principles of Order and Legal Certainty

The principles of order and legal certainty prioritizes the basis of statutory regulations, propriety, and justice to carry out the duties and authority of state administrators. The principles state every material in legislative regulations must create order in society through guarantees of legal certainty and are imbued by guarantee institutions in Indonesia, both movable and immovable property guarantee institutions, where the agreement must be preceded by an agreement or contract between the parties. In case of default, the credit guarantee can be executed on the basis of applicable provisions. Hence, three basic values can be considered, namely, the legal certainty regarding the clarity of behavioral scenarios that are general in nature and binding on all members of society, including the legal consequences, the basic value of justice which is an abstract concept, and finally, the value of usefulness to optimize the social goals of the law. [40]

Based on Article 1131 of the Civil Code, a receivable can be classified as an ordinary type; however, if it is supported by a material guarantee agreement (in this case the debtor agrees to hand over certain objects belonging to him to be tied up as collateral) then it occupies the position of a special receivable which does have a special character. If the debtor defaults then the creditor doesn't need to make a fuss in court following the lawsuit process but just acts quickly by selling the collateral at auction so that the repayment of the receivable becomes smooth, simple, and easy (see also Isnaeni[41]). This principle is very prominent because, if the debtor defaults, the creditor as the holder of the First Mortgage Right is given the authority by law to hold a public auction together with the State Property and Auction Service Office (KPKNL) in order to obtain repayment of his receivable to meet order and legal certainty.

[32] Djoni Gazali S. and Rachmadi Usman, Hukum Perbankan, (Jakarta: Sinar Grafika, 2012), p. 328.
[33] Rachmadi Usman, Hukum Jaminan Keperdataan, (Jakarta: Sinar Grafika, 2009), p. 267-268.
[34] Gazali and Usman, op. cit, p. 329.
[35] Gazali and Usman, op. cit, p. 331.
[36] Sutan Remy Sjahdeini, 1993, Kebebasan Berkontrak and Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit di Indonesia, (Jakarta: Institut Bankir Indonesia), p. 178-179.
[37] Muhammad Djumhana, 2012, Hukum Perbankan di Indonesia (Bandung: Citra Aditya Bakti, 2012).
[38] Usman, op. cit, p. 334.
[39] Djumhana, op. cit, p. 342.
[40] ibid. p. 23, 25, 30
[41] Isnaeni, op. cit, p. 140.

Table 1. Clauses of bank credit agreement

No	Contents of Gazali and Usman' clauses	Contents of Wardoyo's clauses
1	maximum credit, credit period, credit purpose, form of credit, and withdrawal permit limits	conditions for the first credit withdrawal (*predisbursement* clause), for example payment of provisions, credit insurance premiums, collateral insurance, and costs for binding collateral in cash, delivery of collateral and documents, implementation of binding of collateral, and implementation of collateral and credit insurances with the aim of minimizing risks that occur outside of the fault of the debtor or creditor
2	interest, commitment fee, and excess withdrawal fines	clause regarding maximum credit (amount clause) contains the object of the credit agreement so that changes to the agreement materials give rise to the consequence of the need to make a new credit agreement, and limits on the creditor's obligations in the form of providing funds during the grace period of credit agreement also means the limit of the debtor's right to withdraw a loan, and is a determination of the amount of collateral value that must be submitted, the basis for calculating the amount of the provision or commitment fee
3	the Bank's authority makes charges on the debtor-customer's checking and loan accounts	clauses regarding the credit period or the time limit after the obligation to fund the maximum credit amount ends and after this period has passed, give rise to the right to collect/refund credit from the customer, becomes the time limit when the Bank may issue warnings to the debtor if they do not fulfill their obligations on time, and is an appropriate period for the Bank to review or re-analyze whether the credit facility needs to be extended or be repaid immediately
4	representations and warranties contain the debtor/ customer's statements regarding facts relating to the legal status, financial condition, and assets of the debtor/customer at the time the credit is granted, which becomes the assumptions for the Bank to decide the credit	the clause for loan interest (or interest clause) contains certainty regarding the Bank's right to collect loan interest in a certain amount. It has been mutually agreed that interest is the Bank's direct and indirect income; it will be calculated with the cost of funds for providing the credit facility, and interest collection above 6% per year is legal as long as it is written in the agreement
5	conditions precedent refers to tough conditions fulfilled firstly by the debtor/customer before the Bank is obliged to provide funds for the credit and the debtor/customer has the right to use the credit for the first time	clauses refers to credit collateral goods where the debtor does not withdraw or replace collateral goods arbitrarily, but must have an agreement with the other party
6	credit collateral and insurance for collateral items	insurance clause aims to transfer risks that may occur, both on collateral goods and on its own credit where the material needs include the appointed insurance carrier, the insurance premium, the requirement for the insurance policy to be deposited with the bank, and so on
7	the terms and conditions of the current account relationship for the credit agreement is compulsory	clauses regarding actions prohibited by the Bank (or negative clauses) consist of various kinds of matters which have juridical and economic consequences for safeguarding the bank's interests as the main objective
8	affirmative covenants contain debtor/customer promises to do certain things as long as the credit agreement is still in effect	trigger or *opeisbaar* clause regulates the Bank's right to terminate the credit agreement unilaterally even though the term of the credit agreement has not yet ended
9	negative covenants regard the debtor/customer promises not to do certain things when the credit agreement is in effect	clause regarding fines (penalty clause) emphasizes the Bank's rights to levy, both regarding the amount and conditions
10	financial covenants where debtor/customers must submit their financial report to the Bank and maintain their financial position at a minimum certain level	expense clause which regulates the costs and fees incurs as a result of granting credit, which are usually charged to customers and includes, among other things, the costs of binding collateral, the deeds of credit agreements, the debt recognition, and the credit collection
11	actions can be taken by the Bank in the context of supervision, security, rescue, and credit settlement	Debit authorization clause regarding debtor loan debits must get permission from the debtor
12	events of defaults mean clauses that determine an event or events which, if they occur, give the Bank the right to unilaterally terminate the credit	Representation and warranties/material adverse can change clause when the debtor promises and guarantees that all data and information provided to the Bank is correct and

	agreement, and to immediately and simultaneously collect the entire credit outstanding	not distorted
13	arbitration regulates the resolution of differences of opinion or disputes in between the parties through an arbitration body, either an ad hoc arbitration body or an international arbitration body	compliance clause is made with the Bank's provisions to safeguard the possibility that there are not specifically agreed upon, but deemed necessary, so it is deemed to have been generally agreed
14	miscellaneous or boilerplate provisions contain terms and conditions that have not been specifically existed in other clauses called additional articles, that have not been regulated in other articles or contain things specifically referred to as terms and conditions that deviate from other terms and conditions that have been printed in the credit agreement which is a standard agreement.	Miscellaneous/boiler plate provision
15		Dispute settlement (alternative dispute resolution) regards to methods for resolving disputes between creditors and debtors
16		Closing article which is a copy of the credit agreement is meant to make arrangements regarding the amount of evidence and the date the credit agreement comes into force as well as the signing date of the credit agreement

Table 2. Usman's clauses of bank credit agreement

No	Conyents of Usman's Clauses
1	provisions should be related to credit facilities, namely the maximum credit amount, credit period, credit purpose, form of credit, and withdrawal permit limits
2	interest rates and costs in providing credit refer to stamp duty, provisions, and overdrawn fines
3	bank authorization may waive the current and/or credit accounts of the credit recipient for interest on overdrawn fines and interest on arrears and all kinds of costs arising from and for the implementation of specified matters which are the burden of the credit recipient
4	representation and warranties can be in the form of a statement from the credit recipient regarding the encumbrance of all assets of the credit recipient as collateral for credit repayment
5	conditions precedent regards with tough conditions that must be fulfilled firstly by the credit recipient in order he is able to withdraw credit for the first time
6	credit collateral and insurance can be used for collateral goods
7	affirmative and negative covenants are related to obligations and restrictions on the actions of the credit recipient as long as the credit agreement is still in force
8	Bank acts in the context of credit supervision and rescue
9	In case of event of default/breach of contract/trigger clause/*opeisbaar* clause, Bank acts at any time to terminate the credit agreement and will immediately collect all debts along with interest and other costs incurred
10	the choice of domicile/forum/law applies if a dispute in credit settlement between the Bank and the credit recipient customer exists
11	provisions for the entry into force of the credit agreement and signing the credit agreement should be available

3. Principles of Law Enforcement

Law enforcement refers to a process of legal desire realization and of seeking justice and reality for the parties. Legal desires, in this context, mean the thoughts of the law-making body formulated in statutory regulations and in Indonesia legislation is made by the President and the House of Representatives (DPR). Formulating the thoughts of law makers or legislation as outlined in various statutory regulations determines how law enforcement is carried out.[42] Progressive law enforcement might include responsive legal theory, legal realism theory, and sociological jurisprudence legal theory and responsive legal theory was initiated by Nonet and Selznick. [43] In law enforcement three elements avail, namely legal certainty (*rechtssicherkeit*), expediency (*zweckmassigkeit*), and justice (*gerechtigkeit*)[44] (see also Hobbes' and Djojodigoeno's viewpoints on law in Mertokusumo [45]). The wisest attitude for

[42] Nomensen Sinamo, Filsafat Hukum Dilengkapi dengan Materi Etika Profesi Hukum, (Jakarta: Permata Aksara, 2014), p. 85.

[43] ibid.

[44] Sudikno Mertokusumo, Bunga Rampai Ilmu Hukum, (Yogyakarta: Liberty, 1984), p. 13.

[45] Sudikno Mertokusumo, Sejarah Peradilan, (Jakarta: Gunung Agung, 1973), p.179.

judges is to take the middle path and pay attention to such elements. [46]

A credit agreement can be signed by the creditor and the debtor with collateral that is encumbered with Mortgage Rights. If the credit goes bad, so the debtor breaks his promise, and for the sake of upholding the law, the debtor is given time for to pay off his obligations, but, if the credit remains bad, the collateral that has been encumbered with a Mortgage must be auctioned off in public for the sake of upholding the law.

4. Principle of Justice for the Parties

Justice refers to a condition of morally ideal truth regarding objects and people. Various theories of justice deduce that it is unclear what justice and injustice require. Justice essentially means putting everything in its place.[47] Rahardjo (in Ismail) mentions nine definitions of justice.[48] Justice is an assessment of one person's treatment of others by using certain norms as a measure[49] although two main schools, utilitarianism and deontologicalism, can be used as a reference to state that something is fair.[50] These two criteria are closely related and apply to both debtors and creditors who should not do unreasonable act (*onredelijk*). Rawls argued justice is needed to balance conflicting interests so everyone has an equal right to basic freedoms and the existence of social and economic differences or inequalities should be regulated in such a way as to provide benefits and positions open to everyone.[51]

Law is the external manifestation of justice and justice is the internal authenticity and essence of the spirit of the legal form so that the supremacy of law is the supremacy of justice and both are commutative. Law is not in the absolute dimension of law, but law is in the absolute dimension of justice.[52] Kelsen argued the essence of justice is basically a quality that is possible, but not necessary, of a social order guiding the creation of reciprocal relationships between human beings.[53] The problem is, how does the law regulate the execution of mortgage rights so that they can be considered fair? The answer refers to the school of moral thought on which it is based (see Rachels[54]); hence, commutative justice gives each person the same amount without considering individual merits.[55]

The execution of Mortgage Rights as described above is based on applicable laws and regulations and is carried out quickly, openly, easily, simply, and fairly; in this case, the result of the open auction is to create justice for all related parties, including debtors, creditors, guarantors, and buyers, to have good intentions, and the income for the state comes from tax duties from the auction after the execution of the Mortgage Rights.

5. Principle of Good Faith

The basis of good faith (*goeder trouw*) and appropriateness (*billijkheid*) refers to the freedom of contract (see the provisions in Article 1338 last paragraph and Article 1339 of the Civil Code). Agreements must be implemented with good faith and appropriateness in mind. [56] The regulation of good faith in Indonesia has been determined (see Article 1338 paragraph (3) of the Civil Code). The parties comply with their obligations and behave as honorable and

[46] ibid. p. 141.

[47] Soetandyo Wignjosoebroto, Hukum and Keadilan Masyarakat; Perspektif Kajian Sosiologi Hukum, (Malang: Setara Press, 2011), p. 41.

[48] Nurhasan Ismail, Persembahan kepada Sang Maha Guru, Pilihan Bentuk Keadilan dalam Hukum, (Jakarta: Gitamajaya, 2007), p. 229.

[49] Mertokusumo, op. cit., p. 16.

[50] James Rachels, Filsafat Moral, (Yogyakarta: Kanisius, 2013), p. 187.

[51] John Rawls. Teori Keadlian (A Theory of Justice) diterjemahkan oleh Uzair Fauzan dan Hero Prasetyo, (Yogyakarta: Pustaka Pelajar, 2006), p. 72.

[52] Sukarno Aburaera and Maskun Muhadar, Filsafat Hukum, Teori dan Praktek, (Jakarta: Kencana, 2014), p. 177, 179.

[53] Hans Kelsen, Dasar-dasar Hukum Normatif, (Bandung: Nusamedia, 2014), p. 2.

[54] Rachel. op. cit, p. 187.

[55] L.J Van Apeldoorn, Pengantar Ilmu Hukum, (Jakarta: Pradnya Parami¬ta, 2004), p. 11-12.

[56] Sri Soedewi, Hukum Perutangan Bagian B, (Seksi Hukum, Fakultas Hukum UGM, 1980), p. 34.

honest people even though these obligations are not expressly agreed upon.[57] Honesty in the dynamic sense or propriety is rooted in the nature of the role of law in general.[58] An agreement executed in good faith will be reflected in the actual actions of implementing the agreement, and this will provide an objective measure of whether good faith exists or not. [59]

Aristotle (in Van Apeldoorn[60]) stated legislators order judges in order their decisions pay attention to justice and, likewise, Hoge Raad simultaneously stated there must be appropriateness (*redelijkheid*) or good faith, although legal certainty will not be fully fulfilled very often.[61] Moral responsibility in good faith contains the Principle of Morality[62] and the Principle of Good Faith[63] which is written in Article 1338 paragraph (3) of the Civil Code stating that agreements must be implemented in good faith (*zij moeten te goeder trouw worden ten uitvoer gebracht*).[64]

The Collateral Law basically provides a better position to creditors and the law has efficiency that the market really desires. When the relevant legal regulations are complied with the mechanism, banking business can run as expected. Advantages, conveniences, or efficiencies can be obtained by utilizing legal guarantee rules for banking institutions when disbursing loan funds. Confusion in business activities is often linked to the absence or unavailability of adequate legal regulations according to market desires. Business is growing so fast, and there are times when the existing laws are deemed unable to keep up. The core of the legal complexity lies in the enforcement process which has proven to be very weak, and this is made worse by the disharmony of the existing legal rules.[65]

C. Basic Principles of Credit and Lending

Article 1 Law no. 7 of 1992 amended into Law no. 10 of 1998 concerning Banking formulates the definition of credit as the provision of money or bills that can be equivalent to it, based on an agreement or loan agreement between the bank and another party which requires the borrower to pay off the debt after a certain period of time with the amount of interest, compensation or distribution as profit results.[66] To create a qualified credit grant, principles in accordance with the needs of creditors and debtors so to minimize and anticipate the emergence of credit risks in the future are required. Granting credit covers six principles of credit evaluation.[67]

Table 3. Sutarno's principles of credit evaluation

No	Principles of credit evaluation
1	5C principle: character, capacity, capital, condition of economy, and collateral
2	Four-eye credit termination principle to terminate credit with the aim of minimizing risk costs.
3	One obligor principle, referring to assessment to determine the total credit risk, and the credit facilities do not exceed the LLL (Legal Lending Limit)
4	The principle of exposure consolidation to find out the total credit for debtor by adding up the credit to the debtor or group of debtors
5	The principle of compliance with regulations means every credit official/employee must implement credit provisions/rules..
6	The principle of credit monitoring is active and consistent to see the debtor's business and fulfillment of credit requirements

[57] Ridwan Khairandy, Pidato Pengukuhan sebagai Guru Besar Hukum Perdata (Fakultas Hukum Universitas Indonesia, 2004), p. 22-23.

[58] Ismijati Jenie, Pidato Pengukuhan sebagai Guru Besar Hukum Perdata. (Fakultas Hukum Universitas Gajah Mada, 2007).

[59] Djoni S. Gazali and Rachmadi Usman, op. cit. p. 342–343.

[60] LJ Van Apeldoorn, Pengantar Ilmu Hukum, (Jakarta: Pradnya Parami¬ta, 2004), p. 13.

[61] ibid.

[62] Anita Kolopaking, Asas Iktikad Baik dalam penyelesaian Sengketa Kontrak Melalui Arbitrase (2013), quoted from Theo Huijbers, Filsafat Hukum, (Yogyakarta: Kanisius), p. 104.

[63] Ridwan Khairandy, op. cit. p. 37.

[64] Anita Kolopaking, op. cit. p. 103.

[65] Moch. Isnaeni, op. cit. p. 185.

[66] Widjanarto, Hukum and Ketentuan Perbankan di Indonesia, (Jakarta: Pustaka Utama Grafiti, 1993), p. 63

[67] Sutarno, Aspek-aspek Hukum Perkreditan pada Bank, (Bandung: Alfa¬beta, 2005), p. 15.

Credit in banking activities is the most important activity because the largest income from the Bank's business comes from credit business activities in the form of interest.[68] Credit (*credere* in Roman language) means trust, so the relationship in credit activities between the parties is completely based on mutual trust.[69] A sense of mutual trust from all parties will ensure smooth running of the credit business because it is based on good faith of moral integrity. To prevent problematic credit in the future, a bank's assessment before approval to a credit application is based on the 5C formula.[70]

The provisions in Article 8 of Law Number 7 of 1992 as amended by Law Number 10 of 1998 concerning Banking stipulate that (a) in providing credit or financing based on Sharia Principles, commercial banks are required to have confidence based on in-depth analysis of the intention and capacity and capability of the debtor/customer to pay off the debt or return the financing is in accordance with what was agreed, and (b) commercial banks are required to have and implement credit and financing guidelines based on Sharia Principles, in accordance with the provisions stipulated by Bank of Indonesia.[71] Before providing credit, they must carry out a careful assessment through 5CS of credit analysis or 5CS principle[72] or before credit is validated, they should also consider 5P (party, purpose, payment, profitability, and protection) principle.[73] Paying attention to *protection* from group of companies or guarantees from the holding company, or personal guarantees from the company owner is important, especially in cases that are not initially predicted.[74]

Banks in providing credit also uses the 3R--returns, repayment, and risk bearing ability--principle.[75,76] Other principle, for instance, matching, equality of currency, comparison between loans and capital, and comparison between loans and assets is also salient.[77] Another alternative to reduce the risk of a loan is to compare the size of the loan and assets, which is also known as the gearing ratio, that is, low (6-20%), medium (20-40%), and high (above 40%) ratio.[78] The principle of credit assessment can also be a feasibility study, especially for relatively large amounts of credit, in which the assessment of the feasibility study consider seven aspects—legal, market and marketing, finance, technical operations, management, economic/social, and environmental impact analysis (AMDAL).[79]

According to Bank of Indonesia Circular Letter No. 23/12/BPPP dated 28 February 1991, efforts to rescue and resolve bad credit can be in two methods. The first method includes rescheduling, reconditioning, and restructuring, and the second one refers to efforts to resolve problematic credit facilities carried out by banks/creditors in the form of selling collateral with the execution of Mortgage Rights.[80] It is hoped the methods are carried sequentially and the author focuses on the settlement or repayment of bad credit facilities through the Mortgage Rights Execution Auction.

[68] Muhammad Djumhana, Hukum Perbankan di Indonesia, (Bandung: Ci¬tra Aditya Bakti, 2000), p. 365.
[69] ibid.
[70] Hermansyah, Hukum Perbankan Nasional Indonesia, (Jakarta: Prenada Media Grup, 2007), p. 64
[71] Djoni S. Gazali dan Rachmadi Usman, op. cit, p. 272
[72] ibid.
[73] ibid.
[74] Munir Fuady, Hukum Bisnis dalam Teori dan Praktek, (Bandung: Citra Aditya Bakti, 1996), p. 24-26.
[75] Djoni S. Gazali dan Rachmadi Usman, op. cit. p. 276.
[76] Munir Fuady, op. cit, p. 25-27.
[77] Djoni S. Gazali and Rachmadi Usman, op. cit.
[78] Munir Fuady, op. cit. p. 27-28.
[79] Djoni S. Gazali and Rachmadi Usman, op. cit., p. 277–278.
[80] Any Nugroho, "Prinsip Keseimbangan dalam Konstruksi Hukum Al-Mudarabah pada Perbankan Syariah di Indonesia", (Disertasi, Program Doktor Ilmu Hukum Fakultas Hukum UGM, 2015), p. 42-43.

METHODS

The present study employed a descriptive qualitative method. Creswell (2015: 98) regarded a qualitative research as a complex elaboration on words, a detailed report on the respondents' perspective, or a study on a natural situation. In this regard, the descriptive study employed an inductive analysis approach. Moeloeng (2010:157) argued that qualitative research mainly focuses on certain types of data, e.g., words and actions; other types such as documents are regarded as supporting data. The researcher evaluates the model by comparing the paragraph. The data were analyzed by employing Miles and Huberman's Flow Model of Analysis and data analysis process was carried out as to generate conclusions (Mayring, 2014: 16). The steps in the data analysis involved data collection, data reduction, data presentation, and formulation.

RESULT AND DISCUSSION

1. Definition of Credit Guarantee

What is meant by guarantee (or principal guarantee) is a Bank's belief in the debtor's ability to repay the credit in accordance with what was agreed (Article 2 paragraph (1) of Bank of Indonesia Directors' Decree Number 23/69/KEP/DIR dated 28 February 1991 concerning Guarantees Providing Credit). This confidence was obtained by Bank after project assessment and analysis funded from these credits. The request for other collaterals in the form of wealth or material rights from the debtor is additional one.

2. Credit Guarantee Function

Article 1131 of the Civil Code explains the function of collateral as an effort to fulfill the debtor's obligations which are valued in money/payments; therefore, collateral gives the creditor the right to take repayment from the sale of the assets guaranteed.[81] If among the creditors who provide credit with security over mortgage rights or mortgages, pledges, and fiduciaries, they are separatist creditors who will receive full repayment of their claim rights, taking precedence over other creditors who do not receive special collateral or concurrent creditors. Concurrent creditors will receive proportionally the process from the sale of the debtor's assets after deducting the portion that is entitled to the separatist creditor.[82] The Civil Code regulates the types of credit guarantees[83] the five types of credit guarantees are explained below.

(i). Guarantees born by law and by agreement

The guarantees by law and by agreement (consider the provisions of Article 1233 of the Civil Code) give rise to obligations or *verbintennis*, originating from the word *verbinden* 'binding, bond, or relationship.' In other words, it is the agreement or the law that gives rise to or is the source of the agreement or creates a legal relationship.[84] Guarantees by law exist because they are determined by law; hence, no other agreement between the creditor and the debtor, embodiments would be. The Article 1131 of the Civil Code determines that all debtor's assets, both movable and immovable objects, that already exist and that will continue to exist, serve as collateral for all debts. This means that if the debtor owes a debt to the creditor, all of the debtor's assets automatically become collateral for the debt, even though the creditor does not ask the debtor to provide collateral for the creditor's assets.

The provision that all of the debtor's assets serve as collateral for the debtor's debt applies to all of his creditors. Thus, every creditor providing a loan or debt to a debtor, automatically all of the debtor's assets, both

[81] Arus Akbar Solindae and Wirawan B. Ilyas, Pokok-Pokok Hukum Bisnis, (Jakarta: Salemba Empat, 2012), p. 79 (quoted from Soewarso)

[82] ibid. p. 87

[83] Sri Soedewi and Masjchoen Sofwan, Hukum Jaminan di Indonesia: Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan, (Yogyakarta: Liberty, 1980), p. 1.

[84] Djoni S. Gazali dan Rachmadi Usman, op. cit. p. 335.

movable and immovable assets, belong to the debtor, become of collateral. Agreements born by the law will give rise to general guarantees, therefore, all of the debtor's assets become collateral for all of the debtor's debts and apply to all creditors. Creditors having a concurrent position jointly obtain general guarantees provided by law (Articles 1131 and 1132 of the Civil Code).

Collateral arising from an agreement becomes a guarantee and exists because it was agreed beforehand between the creditor and the debtor. The land along with the house are specifically designated as collateral because they were agreed beforehand between the creditor and the debtor. Collateral in the forms of mortgage, *fiducia*, and pawn is classified as collateral because the creditor and debtor have already agreed.[85] Collateral by law is collateral although no agreement avails between the parties, for example, a statutory provision can determine all of the debtor's assets, both movable and fixed objects, both existing objects or those that exist become collateral for all debts. Thus, creditors can exercise their rights against all debtor's assets, except for objects excluded by law (Article 1131 of the Civil Code).[86]

(ii). General and Special Guarantees

General guarantees by law are determined and appointed by law although no agreement avails between the parties (creditor and debtor). The realization of general guarantees also originates from the law (see Article 1131 of the Civil Code). All debtor's assets according to the law automatically become collateral for his debts to all creditors (it is called *Haftung* in German law). The results of collateral sale are given to the creditors in proportion to their respective receivables.[87] Special guarantees exist because of agreement between the creditor and debtor in the form of material or personal guarantees. The first guarantee refers to the existence of certain objects provided by the debtor as collateral, for example land, buildings, cars, machines, etc. The second one designates the debtor to provide another person to pay off the debt if the debtor breaks his promise. This special guarantee appears because of special agreement between the creditor and debtor to ensure that the debtor provides collateral in the form of material guarantees or individual guarantees.[88]

In banking practice, collateral is institutionalized as special collateral of a material nature, namely mortgage, *credietverband*, pawn, and *fiducia*. Personal guarantees are in nature *borgtocht* (guaranty agreements, liability obligations and so on).[89] Based on the collateral or security, credit is divided into general collateral (see Article 1131 of the Civil Code), special collateral, including *fiducia*, mortgage, pledge, security rights (personal guarantee and corporate guarantee), and credit with collateral in the form of savings (deposits, current accounts, etc.) is called cash collateral, but if the collateral is in the form of non-savings, it is called non-cash collateral.

(iii). Material Guarantee

Material collateral includes pledge, mortgage rights, mortgage and *fiducia*, but discussion is going to talk material security for mortgage rights. A guarantee is given by a debtor or third party to a creditor as his obligations in an agreement. The creditor as the guarantee institution receives benefits and the collateral tied to certain objects agreed among creditors and debtors and/or third parties as a logical consequence or division of objects, namely movable and immovable objects.[90] In banking practice, a guarantee agreement is constructed as an *accessoir* to a main agreement in the form

[85] Sri Soedewi and Masjchoen Sofwan, op. cit. p. 144–145.
[86] ibid. p. 43.
[87] ibid.
[88] Sutarno, op. cit. p. 146
[89] Sri Soedewi and Masjhoen Sofwan, op. cit. p. 46
[90] Herowati Poesoko, Dinamika Hukum Parate Executie Obyek Hak Tanggungan, (Yogyakarta: Aswaja Pressindo, 2013), p. 112.

of a credit agreement. The Law No. 7 of 1992 concerning Banking which was amended by Law no. 10 of 1998 concerning Amendments to the Banking Law provides a formulation regarding the meaning of credit. Credit is based on an agreement or loan agreement between the Bank and another party requiring the borrower to pay off the debt after a certain period of time with the amount of interest, returns or profit sharing (see Article 1 point 12). The elements of credit include credit of money loan, money provider/lender in Banks, reference for the credit agreement, and time.

There is a time when a borrower repays the debt accompanied by an amount of interest or reward, but for Islamic Banks, debt repayment is fulfilled by rewards or profit sharing, but not by interest. After a credit agreement is signed, the creditor has two types of rights, namely collection rights (receivables) and mortgage rights. Receivables falling into the category of personal rights are then supported by mortgage rights as material security rights; then, the relevant Bank receivables will be positioned as special receivables (see Article 1133 of the Civil Code). Because these receivables are classified as special ones, thus, there is a preference attached to them so that the repayment should be prioritized over other creditors.

The characteristics of preference or preemptive right can be traced implicitly in Article 1162 of the Civil Code, which essentially states a mortgage is an object over an immovable object, in order payment for an obligation can be demanded. Thus, in a mortgage there are superior characteristics of material rights, including preferential characteristics in the sense that repayment of the receivable must come first. Receivables from creditors holding mortgages, in accordance with the security agreements made, occupy the position of special or preferential receivables. In providing credit or financing based on sharia principles, banks are obliged to pay attention to matters as specified in Article 8 paragraphs (1) and (2) of Law Number 10 of 1998 as follows. [91]

The Article 8 paragraph (2) is concerned with the credit and financing guidelines based on sharia principles established by Bank of Indonesia and there are six guidelines, such as, the credit or financing is made in written agreement, the Bank must have the ability and capability to carefully assess the debtor's/customer's character, abilities, capital, collateral, and business projects, the Bank's obligation prepares and implements procedures for credit or financing on sharia principles, the Bank is obliged to provide clear information on credit or financing procedures and requirements on sharia principles, the Bank is prohibited to provide credit or financing based on sharia principles to different debtor/customers and/or affiliated parties, and the dispute resolution should be available.

Material collateral is a guarantee in the form of absolute rights over an object which has a direct relationship to those objects, can be defended against anyone, always follows the object in whoever's hands of the object (*Droit de suite*), and can be transferred. It also has a priority nature, meaning that whoever holds collateral for material collateral first will have priority in repayment of the debt compared to later holders of material rights collateral. [92] Its principle states that payments will be prioritized to the creditor or whoever holds the collateral.

If the special collateral is the debtor's particular object, a material guarantee agreement is made relevant to Book II of the Civil Code, the rights will be classified as material rights; meanwhile, the concrete form becomes the type of material right with a guarantee pattern and this is called material security rights. The material security agreements state that the debtor agrees to hand over certain objects belonging to him to the creditor to guarantee

[91] In Arus Akbar Silondae, Pokok-Pokok Hukum Bisnis, (Jakarta: Salemba Empat, 2014), p. 82-83.
[92] Sutarno, op. cit, p. 146.

the amount of debt; hence the debtor has agreed to give a security interest in specific collateral to creditor.[93]

(iv). Debt Guarantee (*Borgtocht*)

In addition to credit guarantee rights in the form of material collateral, such as pawns, mortgages, and *fiducia* guarantees, there are also credit guarantees that are not in the form of material collateral, and such individual collateral is called debt coverage (*borgtocht*). Debt insurance is not bank guarantee (*guarantee bank*) even though it has the same principles. In the provisions of Articles 1820 to Article 1850 of the Civil Code, the term personal guarantee is better known as debt insurance (*borgtocht*). However, in banking practice the term *avalis* is often more popular than the term *borgtocht*. The Article 1820 of the Civil Code states that debt guarantee refers to an agreement in which one party (*borg*) undertakes to another party (creditor) that he will bear the payment of a debt if the debtor does not fulfill his obligations.

In practice, there are two types of personal guarantees, namely, personal guarantees and corporate guarantees. The personal guarantee is made by a third party for the interests of the debtor to the creditor in the form of the third party's ability to pay the loan which is the debtor's obligation if the debtor defaults. While the corporate guarantee is in principle the same as a personal guarantee, but in the second one, the third party as guarantor is the company that covers the company's assets.

A debt guarantee creates a direct relationship with a particular person in which his guarantee can only be maintained against certain debtors, and against the debtor's assets in general, for example *borgtocht* (see Articles 1131 and 1132 of the Civil Code). They are not differentiated between the first and the second receivables; both have the same position in the guarantor's assets and do not respect the order of occurrence. *Borgtocht* in Indonesian is called guarantor (*borg* means guarantor) and is regulated in the Book III Chapter XVII Articles 1820 to 1850 of the Civil Code. It consists of an agreement between a creditor (debtor) and a third party that guarantees the fulfillment of the obligations of the debtor. Such agreement between a creditor and a third party (guarantor) can be made with or without the debtor's knowledge.

According to the principles in the Civil Code, if the debtor defaults then the debtor's assets/collateral are auctioned off first; if it is still insufficient then the guarantor's collateral can be auctioned off. However, in practice, the execution of the auction can be held simultaneously if, according to the creditor's or his attorney's calculations, the execution of the auction for all of the debtor's and guarantor's guarantees must be able to cover all of the debtor's debts.[94]

(v). Guarantee for movable and immovable objects

If the collateral is a movable object, a collateral institution can place it in the form of a pledge or *fiducia*. Meanwhile, if the collateral object is in the form of a fixed object, as a collateral institution, a mortgage can be installed as a mortgage or *credietverband* right now. Handover of movable objects according to their type can be done by actual handover, symbolic handover, *traditio brevimanu*, *constitutum possessorium* endorsement. As for immovable objects, this is done by changing the name, that is, a juridical transfer which intends to transfer the rights must be carried out, made in the form of an authentic deed and registered.[95]

CONCLUSION

The important classification of objects according to the Indonesian civil law system is the classification of movable and immovable objects so that the distinction can be seen from the following: A)

[93] Moch. Isnaeni, op. cit, p. 82

[94] ibid.

[95] Sri Soedewi, op. cit, hlm. 49-50.

collateral charges including 1) there is a distinction between movable and immovable objects, 2) the distinction between movable and immovable objects will determine the form or type of encumbrance in the form of fiduciary or pledge and collateral in the form of immovable objects (land and buildings) in the form of binding or encumbrance in the form of Mortgage Rights, B) leveraging, namely the distinction between movable and immovable objects resulting in differences in the delivery of the object, C) for movable objects, delivery is carried out by handing over the *nayat* (the object), whereas for immovable objects the handover is done in exchange of name, for example, if someone sells land, the handover of the land is carried out by transferring the name of the land certificate from the seller to the buyer at the local Land Office, D) in terms of expiry (*verjaring*) for immovable objects there is no expiration, while for movable objects there is an expiration (30 years), and E) with regard to *bezit* for movable objects, the provisions of Article 1977 of the Civil Code apply, namely that a *bezitter* of movable property is the owner of that object, whereas for immovable objects this is not the case.

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