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The Principle of Justice in the Weakness of Objective Rights Holders Against Privileges Rights Holders

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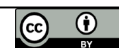
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Justice; Absolute; Material Rights; Material Security; Privileges.

Abstract

Material guarantees create material rights with superior characteristics. One is absolute, that is, the right holder can enforce material rights against anyone. It is as if nothing can beat the holder's position of material guarantee in the event of a conflict with concurrent creditors and creditors holding privileges. However, this absolute character can be weakened by law. In certain circumstances, such as the right to collect the cost of saving the collateral object, the position of the creditor holding the material guarantee must surrender to the creditor with the privilege. Creditors can even threaten their position by not getting full repayment because the object of the material guarantee is to pay the bill from the creditor who holds the privilege first. The problem analyzed in this article concerns the principle of justice associated with weakening the characteristics of material rights in material guarantees for privileges. This study uses statutory, conceptual, and case approaches. The result of this study is that the creditor's bills of the holder of the privilege arising from the salvage of collateral objects must take precedence over the bills of creditors of property security holders. This is considered fair, whereby the salvage of collateral causes creditors to remain in their preferred creditor position.

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Introduction

In general, every credit grant requires collateral. Based on a survey from the World Bank, in low- and middle-income countries, between 70 per cent and 80 per cent of firms applying for a loan are required to pledge some form of collateral¹

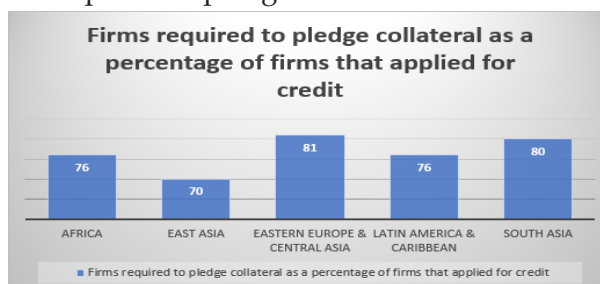


Figure 1. Most Firms Applying for a Loan Must Pledge Collateral

Note: The data are from surveys conducted in more than 60 countries from to 2001-2005

Source: World Bank Group, Enterprise Surveys (<https://mu.worldbank.org/EnterpriseSurveys>)

¹ Heywood Fleishig, Mehnaz Safavian and Nuria de la Pena, *Reforming Collateral Law to Expand Access to Finance* (The World Bank 2006) 2.

Based on the figure above, in 2005, 81% of companies in Eastern Europe and Central Asia and 80% of companies in South Asia required collateral as a loan. Therefore, it is necessary to reduce the occurrence of future risk. The World Bank also released data in 2022 on the percentage of loans that must use collateral:²

Table 1. Number of Companies that require a Guarantee

No	Country	Percentage
1	Indonesia	80.4
2	Malaysia	64,7
3	India	84.7
4	Europe	66.1

Source: World Banks Enterprises Surveys Global Database

The table above shows that among Asian countries, India ranks first and has the highest percentage of guarantees (84.7%), whereas Indonesia ranks second at 80.4%. Malaysia ranks fourth at 64.7%, while European countries such as the Netherlands, France, and Italy rank at 60%. This indicates that collaterals have a significant position in credit. Therefore, even though collateral is not an absolute requirement in Article 8 of Banking Law No. 7/1992 as amended by Law No. 10/1998, banks always require a guarantee in practice.

Credit disbursement carried out by banks is very risky, although, on the other hand, banks benefit in the form of loan interest, administration fees and provisions. Banks must detect credit risk early, and preventive measures are taken to avoid financial losses, as stated by Manish Kumar Pandey³ that credit risk can be defined as the risk of default on a debt that may be unlawful or illegal cheating meant for financial or personal gain or due to some or other circumstances. Banks should incorporate risk prevention and credit risk detection to avoid financial losses. Due to the existence of credit risk, banks must minimize it by carrying out a credit analysis known as the 5 C Principles: character, capital, capacity, collateral, and condition of the economy. Heffernan also stated this.⁴

² The World Bank, 'World Banks Enterprises Surveys Global Database' (2020) <<https://www.enterprisesurveys.org/en/custom-query>>.

³ Manish Kumar Pandey, Mamta Mittal and Karthikeyan Subbiah, 'Optimal Balancing and Efficient Feature Ranking Approach to Minimize Credit Risk' (2021) 1 International Journal of Information Management Data Insights 2 <<https://doi.org/10.1016/j.jjimei.2021.100037>>.

⁴ Shelagh Heffernan, *Modern Banking* (John Wiley and Sons Ltd 2009) 156.

about the importance of 5 C's, one of which mentions the existence of collateral, that: there are five key ways a bank can minimize credit risk: through accurate loan pricing, credit rationing, use of collateral, loan diversification and, more recently through asset securitization and/or the use of credit derivatives. The weight applied to each method varies, depending on whether the loan is commercial or retail. Giuseppe Corbisiero conveyed this idea.⁵ The importance of collateral in the application of bank credit states that a firm can borrow from banks to finance a project, pledging a real asset as collateral. The central bank injects liquidity into commercial banks' balance sheets, thus affecting the equilibrium interest rate, and in turn, investment. Mario Di Filippo⁶ said the same about the importance of collateral on credit, stating that riskier banks reduce their uncollateralized lending on the lending side. However, this reduction is offset by a more secure lending. These results suggest that riskier banks take precautionary measures because they prefer to lend in a secured market against high-quality collateral rather than in an unsecured market.

It is even stated that the existence of collateral in bank credit is one of the efforts to provide legal certainty to the bank as a creditor that the debtor will fulfil his achievements as agreed. M. Isnaeni⁷ mentions that receivables that are protected by material guarantees, the creditor's position is almost safe and comfortable because if the debtor breaks his promise, the sale of the object of material security can cover bills in the form of principal debt, interest, fines, and other costs. Likewise, Ioannidou⁸ stated that the existence of collateral reduces moral hazard, and that there is a causal relationship in which the existence of collateral reduces the probability of failure by 27.6%. Not much different from the results of research by Allen N. Berger⁹ that almost 70% of commercial and industrial loans in the United States use collateral, his statement is as follows.

⁵ Giuseppe Corbisiero, 'Bank Lending, Collateral, and Credit Traps in a Monetary Union' (2022) 144 *European Economic Review*.

⁶ Mario Di Filippo, Angelo Ranaldo and Jan Wrampelmeyer, 'Unsecured and Secured Funding' (2022) 54 *Journal of Money, Credit and Banking* 660.

⁷ M Isnaeni, *Lembaga Jaminan Kebendaan Dalam Burgerlijk Wetboek* (Revka Petra Media 2018) 21.

⁸ Vasso Ioannidou, Nicola Pavanini and Yushi Peng, 'Collateral and Asymmetric Information in Lending Markets' (2022) 144 *Journal of Financial Economics* 93, 93-121.

⁹ Allen N Berger and Gregory F Udell, 'Collateral, Loan Quality and Bank Risk' (1990) 25 *Journal of Monetary Economics* 21, 21-42.

Collateral plays an essential role in U.S. domestic bank lending, as evidenced by the fact that nearly 70% of all commercial and industrial loans are currently secured. Unsurprisingly, the role of collateral has received considerable attention in the theoretical literature on financial contracting. Several studies have found that safer borrowers are more likely to pledge collaterals.

According to the World Bank¹⁰ Loans secured by collateral are part of a broader set of secured transactions, in which the parties agree to secure an obligation with an enforceable security interest in the property. Besides a lender, the party accepting the security of collateral could be a business selling goods on credit or any other party needing a guarantee, such as a government contracting agency seeking a performance bond from a road-construction firm. These transactions are governed by a legal system that can dictate many things: how a security interest is created, who may create it, who has priority in receiving the proceeds from the sale of the collateral, how security interests are made public, what rights other parties have in the property offered as collateral, how the property is repossessed in the event of default, how it is sold, and how the proceeds are used to satisfy the claim of the party who has a security interest in the property.

Referring to these opinions, the position of collateral is significant in the provision of bank credit, because it secures the credit that the bank has disbursed if the debtor breaks his promise. Collateral in the banking dictionary is equated with collateral, namely, additional guarantees submitted by debtor customers to banks in the context of providing credit or financing facilities based on Sharia principles.¹¹ The main guarantee is in the form of bank confidence in the faith, ability, and ability of debtor customers to fulfil their obligations, following what has been agreed upon in the Law of the Republic of Indonesia No. 7 of 1992 concerning banking as amended by the Law of the Republic of Indonesia No. 10 of 1998.

Placing the bank in the position of the preferred creditor, namely the creditor whose repayment is prioritized compared to other creditors, requires the existence of collateral in the form of property from the debtor or the property of a third party that is agreed to be stated in the material guarantee agreement as an agreement to override the existence of general guarantees, as regulated in Article 1131 *Burgerlijk Wetboek*. The existence of material guarantees has succeeded in placing banks as creditors holding material rights

¹⁰ Fleishig, Safavian and Pena (n 1) ix.

¹¹ <<https://www.bi.go.id/id/glosarium.aspx>> accessed 20 September 2022.

that provide guarantees with superior characteristics, namely the absolute principle, the principle of *droit de suite*, the principle of *droit de preference*, the principle of priority, and the existence of parate execution. However, a bank's position as a property rights holder is not always superior. This has been confirmed in Article 1134 *Burgerlijk Wetboek* that an individual right is a right that is granted by law to a debtor so that the level is higher than that of other debtors, solely based on the nature of the debt. *Pawns and mortgages are superior to privileges, except in cases where the law provides otherwise.*

Pawns and mortgages as material security have a higher position than privileges, except in cases in which the law provides otherwise. Among other things, related to taxes, auction fees, court fees as regulated in Article 1139 point 1 and Article 1149 point 1 *Burgerlijk Wetboek* and the cost of salvaging collateral objects. Thus, the position of the holder of the material guarantee must succumb to creditors holding excluded privileges. Even during the course of the Constitutional Court, Decision No. No. 67/PUU-XI/2013, which places workers' rights to their wages first over all types of creditors, namely separatist creditors, state claims, and auction offices. Thus, it is clear that the position of creditors holding material guarantees in bankruptcy as separatist creditors is defeated if there is a bill for workers' wages. /labourer. It is not impossible if the claim from the creditor of the exempted privilege is so large that the claim rights of the creditor holding the material guarantee will not be paid in full and may not even be paid at all, which, of course, weakens the superior characteristics of material rights, namely the absolute principle, the principle of *Droit de preference*, and the principle of *Droit de suite*.

The principle of justice approach is used by judges in Constitutional Court Decision Number No. 67/PUU-XI/2013 to prioritize the rights of creditors holding special rights over the rights of creditors holding material guarantees. However, the principle of justice used as the basis for excluding the position of creditors holding special rights results in legal uncertainty regarding the position of creditors holding material guarantees for the fulfillment of their rights to claim. Therefore, this study analyzes the principle of justice that underlies the priority claims of creditors holding special rights compared to the claims of creditors holding material guarantees.

Research Methods

This study analyzes the relationship between the principle of justice in weakening material rights' characteristics and material guarantees. Statutory, conceptual, and case approaches were used to address the research problems. The statutory approach reviews all laws and regulations related to the legal issues being analyzed. Then, a conceptual approach is used to examine the framework of thought or the conceptual framework, as well as the theoretical basis following the objectives of this research. The case approach in this study is to analyze the ratio decidendi in Constitutional Court Decision No. 67/PUU-XI/2013.

Collateral in Bank Credit Risk

Credit risk is one of the risks faced by banks, considering that loans channelled to debtors by banks have the potential for default. Badan Sertifikasi Manajemen Risiko (BSMR)/The Risk Management Certification Agency states that credit risk is defined as the risk of losses associated with the possibility that a counterparty will fail to meet its obligations when they fall; in other words, the risk that a borrower will not repay what is owed.¹² The Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 18/POJK.03/2016 Concerning the Implementation of Risk Management for Commercial Banks, Credit risk is the risk due to the failure of other parties to fulfil obligations to the bank, including credit risk due to debtor failure, credit concentration risk, counterparty credit risk, and settlement risk. This is also stated in Standard 4.4a Management of credit risk Regulations and guidelines regarding the importance of conducting credit analysis to minimize credit risk, one of which is the presence of collateral, as follows:¹³

Credit risk is defined as a counterparty's potential failure to meet its contractual obligations. This standard should be applied to all activities that pose credit risk to a supervised entity. Loans are the largest source of credit. However, credit risk (counterparty risk) may also be inherent in other types of assets such as bonds, short-term debt securities and derivatives, and off-balance-sheet commitments

¹² Badan Sertifikasi Manajemen Risiko, *Workbook Level 1* (Global Association of Risk Professionalis 2005) 37.

¹³ The Financial Supervision Authority, *Standard 4.4a : Management of Credit Risk Regulations and Guidelines* (Financial Supervision 2004) 10-13.

such as new credit lines or limits, guarantees, and documentary credit. Country and settlement risks are regarded as credit risks. Each credit decision is based on credit analysis. Credit analysis provides a sufficiently accurate picture of the borrower applying for credit and the project to be financed. At a minimum, the factors to be considered in the credit analysis should include the borrower's current, historical, and future repayment capacity; the purpose of the credit and sources of repayment; the proportion of the borrower's funding for the project concerned for commercial credit; the status of the borrower's industry or economic sector; the borrower's position within this sector; and the business expertise of the business management commitments of groups of connected customer coverage and realizability of collateral or guarantees assessment of risks posed by macro-economic developments. The credit decision is primarily based on the borrower's creditworthiness; however, the collateral offered as coverage for credit risk is also significant. In considering an application for commercial credit, the supervised entity should pay adequate attention to the company's business idea, the project to be financed, the company's cash flow, and profit-earning capacity, and not only be content with adequate collateral. As a rule, credit shall not be granted if the customer lacks credit repayment potential, apart from the realization of collateral.

Nurwahjuni also conveyed this.¹⁴ in his article that:

Although bank balance sheet assets are the most significant part of operational funds, credit is simultaneously the largest source of operating risk. Non-performing loans and even bad loans are a problem for banks because non-performing loans not only reduce bank income but also undermine the number of operational funds and bank financial liquidity, which will ultimately undermine the health of banks and ultimately harm depositors.

The debtor's failure to fulfil its performance results in the emergence of non-performing loans and even bad loans. According to Rajagukguk¹⁵ the emergence of lousy credit in banks is possible for two reasons: lack of caution and insufficient collateral. Therefore, before extending credit to debtors, five essential things must be considered: the 5C principle, namely character, capacity (ability to repay loans), capital, collateral, and the condition of the economy (prospects business of debtor customers). According to Erman Rajagukguk, the occurrence of bad loans in state-owned banks cannot be

¹⁴ Nurwahjuni Nurwahjuni dan Abd Shomad, 'Four Eyes Principle Dalam Pengelolaan Risiko Kredit Pada Bank' (2016) 31 *Yuridika* 273, 281 <<https://e-journal.unair.ac.id/YDK/article/view/4844>> diakses 6 Juni 2023.

¹⁵ Agnes Pembriarni Nuryuaningdiah, 'Urgensi Pembentukan National Asset Management Credit dalam Penyelesaian Kredit Macet Bank BUMN' (2020) 49 *Masalah-Masalah Hukum* 443, 449.

included in state losses; even though it departs from the carelessness of state-owned banks, bad loans are the business of the state-owned bank concerned. Moreover, the credit given is always followed by collateral and an agreement to be included in civil law. Thus, we can say that collateral in bank loans is significant, one of which is to minimize credit risk due to debtors' defaults. As Benjamin Hemingway¹⁶ put in, collateral is used in loan contracts. Specifically, I emphasize two theoretical roles for collateral: the use of collateral *ex-ante* in reducing adverse selection *and* the *ex-post* role of collateral in reducing the loss given the default of a particular loan, thus reducing the risk profile of a given loan.

Therefore, banks must mitigate the credit risk they face to maintain their health. If non-performing loans (NPLs) increase, they can affect the soundness of banks. According to the BSMR, banks that mitigate credit risk include:¹⁷

1. Grading models for individual loans
Regular bad lending is possible but unlikely if banks pursue sound lending policies. The first step is to create detailed credit-granting models to establish the odds of default.
2. Loan portfolio management
Similarly, banks measure their loan portfolios to ensure that their lending is not overly concentrated in a single industry or geographic area. This allows banks to ensure that their portfolios are well diversified.
3. Securitization
Securitization allows banks to reduce potentially high levels of exposure to specific forms of lending, the scenarios of which are most at risk or where they have a high concentration of risk.
4. Collateral
Collateral is defined as assets pledged by a borrower to secure a loan or other credit, and are subject to seizures in the event of default. Collateral plays a significant role in banks' lending policies. It can take many forms, is the most apparent and secure cash, and is the most common residential property.
5. Cash flow monitoring
Many banks that have suffered high default levels have found that a rapid reaction to a deteriorating credit situation can significantly reduce this problem.
6. Recovery management
Many banks have found that efficient management of defaulted loans can

¹⁶ Benjamin Hemingway, 'Banking Regulation and Collateral Screening in a Model of Information Asymmetry' (2022) 61 Journal of Financial Services Research 367-405 <https://ideas.repec.org/a/kap/jfs-res/v61y2022i3d10.1007_s10693-021-00357-w.html>.

¹⁷ Badan Sertifikasi Manajemen Risiko (n 12) 17.

significantly recover the original loss. Thus, they developed departments for handling recovery situations as an essential part of high-quality credit risk management processes.

Collateral is a safeguard against loans that have been disbursed by banks, as has been confirmed in Article 29, paragraph (3) of Law No. 7 of 1992 concerning banking as amended by Law No. 10 of 1998 that in providing credit or financing based on Sharia principles and carrying out other business activities, banks are required to take methods that do not harm the bank and the interests of customers who entrust their funds to the bank. Considering that the funds used by banks in disbursing credit to debtors are mostly depository funds entrusted to the bank, they must not betray the trust that has been given by disbursing credit haphazardly without paying attention to sound credit principles. This is also confirmed in the Financial Services Authority Regulation No. 42/POJK.03/2017 concerning Obligations to Formulate and Implement Policies and Credit or Bank Financing for Commercial Banks, banks must pay attention to sound credit principles to minimize credit risk.

Main Characteristics of Property Rights

Referring to Sri Soedewi Masjchoen Sofwan¹⁸ that material rights are absolute rights to an object that can be defended against anyone. Material rights are absolute rights as opposed to relative or individual rights. In Book II, *Burgerlijk Wetboek* expressly regulates the types of material rights with specific characteristics, which are divided into material rights that provide enjoyment, namely property rights and assets, and material rights that provide guarantees, namely mortgages, mortgages, and outside *Burgerlijk Wetboek*, namely mortgage rights and fiduciary guarantees. According to Israeli¹⁹ Material rights that provide guarantees function to support collection rights that are classified as individual rights or relative rights, it can be assumed that material rights that provide guarantees have advantages over supported rights, namely relative rights.

¹⁸ Sri Soedewi Masjchoen Sofwan, *Hukum Perdata: Hukum Benda* (Liberty Offset 1981) 24.

¹⁹ Moch Isnaeni, *Pengantar Hukum Jaminan Kebendaan* (Revka Petra Media 2016) 114.

The existence of objects in human life, especially in business transactions, requires absolute legal certainty. As stated by Isnaeni, the legal provisions relating to the law of objects are positioned as *dwingend Recht* (coercive provisions).²⁰ The superior characteristics of material rights are as follows.

1. Material rights are absolute rights that a holder can defend against anyone. In the same vein, HFA. Vollmar stated that material rights have an absolute nature because those entitled to objects have the power to defend their rights against anyone.²¹
2. *Zaakgevolg* or *droit de suite* states that material rights follow wherever the object is located. The transfer of an object because it is not voluntarily released does not eliminate its material rights, so that the object's rights remain attached to the object being controlled by another party. It appears that the principle of the *droit de suite* goes hand-in-hand with the absolute principle of material rights.²² This is reflected in Article 1152 (3), *Burgerlijk Wetboek* on pawning; Article 1163 (2), *Burgerlijk Wetboek* on mortgages, Mortgage Rights in Article 7 of the Mortgage Law; and fiduciary guarantees in Article 20 of the Fiduciary Guarantee Act.
3. The priority principle is that material rights born first precede those born later. In the case of pawning, it is not possible to re-pawn it to other creditors, considering that there is an obligation to hand over the pledged object to the creditor or a third party, even if the lien is still in the power of the pawnbroker, as regulated in Article 1152 paragraph (1) (2) *Burgerlijk Wetboek*. However, mortgages are possible with Article 1181 *Burgerlijk Wetboek* and Article 5 of the Mortgage Law, while fiduciary security is not possible if it refers to Article 17 of the Fiduciary Guarantee Law. The explanation states that ownership rights over the object of collateral the fiduciary has been transferred to the fiduciary recipient so that the fiduciary giver is no longer authorized to guarantee the object of the fiduciary to other creditors.
4. *Droit de Preference* that the holder of material rights has priority in payment compared with other creditors. In this case, what is meant is that concurrent creditors and creditors hold privileges that are not excluded, as referred to in Article 1134 paragraph (2) *Burgerlijk Wetboek*. Pawning is reflected in Article 1150 *Burgerlijk Wetboek* and mortgage in Article 1198 *Burgerlijk Wetboek*, while mortgages and fiduciary guarantees are reflected in Article 1 number 1 of the Mortgage Law and Article 1 number 2 of the Fiduciary Guarantee Act.
5. The principle of publicity is that material rights require specific actions that must be carried out so that the public knows the existence of these material rights, which

²⁰ Moch Isnaeni, *Hukum Benda Dalam Burgerlijk Wetboek* (Revka Petra Media 2016) 11.

²¹ *ibid* 14.

²² *ibid* 15; see also Jonathan Barrett, 'An analysis of Jean-François Millet's The Angelus and the origins of *droit de suite* through the multifocal lens of love' (2020) 15 *Journal of Intellectual Property Law & Practice* 660, 660–668 <<https://academic.oup.com/jiplp/article/15/8/660/5866250>>; Vitaliy Kalyatin dan Erik Valdes-Martines, 'Droit de suite convention: to be or not to be?' (2020) 29 *https://doi.org/10.1080/13600834.2020.1732035* 121, 121–134 <<https://www.tandfonline.com/doi/abs/10.1080/13600834.2020.1732035>>.

is essential so that the material guarantee agreement made by the parties binds third parties even though the third party is not a party to the agreement. The pawn is reflected in Article 1152 paragraph (1) *Burgerlijk Wetboek*, which according to Isnaeni, as the fulfilment of the abstract publicity principle is different from the concrete publicity principle as in mortgage guarantees, mortgage rights, and fiduciary guarantees²³, the mortgage in Article 1179 *Burgerlijk Wetboek*, mortgage in Article 13 paragraph (1) of the Law on Mortgage, and fiduciary guarantees in Article 11, paragraph (1) of the Fiduciary Guarantee Act.

6. Pirate Execution is a characteristic of material rights that guarantees the authority to sell collateral if the debtor defaults. This is evidenced by parate execution provisions on material guarantees, namely pawning in Article 1155 *Burgerlijk Wetboek*, Mortgages in Article 1178 paragraph (2) *Burgerlijk Wetboek*, Mortgage in Article 6 of the Mortgage Law, Fiduciary Guarantees in Article 15, paragraph (3). Article 29 of the Fiduciary Guarantee Law states that, in the case of material rights that provide enjoyment, there is no parate execution characteristic.

Owing to the superior characteristics described above, the holder prioritizes the position of creditors holding material guarantees in terms of their rights in conflict with concurrent creditors or creditors holding special rights. However, the superiority of creditors holding material guarantees turns out to be, in reality, not always prioritized in terms of paying off their bills, especially for creditors holding privileges that are excluded by law, as emphasized in Article 1134 paragraph (2) *Burgerlijk Wetboek*.

Article 1133 *Burgerlijk Wetboek* states that the right to be prioritized among creditors arises because of special rights, pledges, and mortgages, so it is clear that the creditor holding the privilege is one of the creditors who are prioritized according to Article 1133 *Burgerlijk Wetboek*. However, the position of creditors holding privileges takes precedence because of the law that determines, in contrast to pawns, mortgages, mortgages, and fiduciary guarantees, that they take precedence because they are born from a material guarantee agreement. Isnaeni said that privileges are the creation of rulers through the law, while people create pawns and mortgages through agreements. However, the authorities respect the creation of the people through the agreement, as stated in Article 1134, paragraph (2) *Burgerlijk Wetboek*.

²³ Moch Isnaeni, *Lembaga Jaminan Kebendaan Dalam Burgerlijk Wetboek: Gadai Dan Hipotek* (Revka Petra Media 2016) 72.

Justice in Weakening of Property Rights that Provide Guarantees

Article 1134 paragraph (2) *Burgerlijk Wetboek* contains two meanings. On the one hand, the ruler has respected the creation of the people through an agreement so that the creation of the people is won. However, on the other hand, it turns out that the creation of the people must succumb to the creation of the ruler, according to the narrative, “unless the law determines on the contrary”. According to Israeli,²⁴ the exception is not the arbitrariness of the authorities but a form of government service so that the rotation of the wheels of government can still create a conducive situation for the growth of the business world. In an emergency, privileges must take precedence. This cannot be separated from the business world, as there are special events that must be regulated to deviate from the basic pattern.

The weakening of material rights owned by holders of material guarantees is because of the law that regulates them. Among other things, in the following events:

1. The salvage of collateral objects is affirmed in Article 1150 *Burgerlijk Wetboek* on pawning and Articles 65 and 66 of the Shipping Law on ship mortgages.
2. Article 1137 *Burgerlijk Wetboek* is a tax bill. Regarding the tax bill, philosophically, taxes are placed in a position to proceed with separatist creditors in the case of bankruptcy because taxes are essentially related to the public interest and the benefit of many people so that they take precedence in the interests of the nation and state.
3. The costs of matters that arise solely from the sale of movable or immovable goods as the execution of a decision on a claim regarding ownership or control. These costs are paid with the proceeds of the sale of the goods, before all other debts that have the right to be prioritized, even before mortgages as per Article 1139 number 1 of the *Burgerlijk Wetboek* and the costs of matters that solely arise from the sale of goods as the execution of a judgment on a claim regarding ownership or possession, and salvage of property, which takes precedence over pledges and mortgages as in Article 1149 number 1 of the *Burgerlijk Wetboek*.

²⁴ *ibid* 205.

Property rights that provide collateral are weakened in the event of salvage of collateral objects, as regulated in Article 1150 Burgerlijk Wetboek that bills for saving pawned objects and auction fees for pawned objects must take precedence over claims from creditors holding pawns. This norm is clearly stated in Article 1150 of Burgerlijk Wetboek, which places the claim rights of creditors holding privileges first. Likewise, Articles 65 and 66 of the Shipping Law also place one of the priorities on salvage costs compared to rights for liens, mortgages, and registered receivables. Based on the principle of fairness, the claim from the creditor who saves the collateral object should be prioritized in payment compared to the creditor's bill for the material guarantee holder, considering that the saving of the collateral object results in the object of the collateral being saved so that the material guarantee agreement does not become null and is undoubtedly beneficial for the creditor holding the material guarantee. Suppose that the object of collateral is not saved. In this case, the object will be destroyed, resulting in the collateral agreement being nullified and the legal consequences for the creditor turning into a concurrent creditor.

Satrio also emphasized this.²⁵ It is appropriate that the cost of salvaging the collateral object is paid in advance even than the pledge of the object because salvaging the pledged object will benefit the pledge holder. Without an effort to save the collateral object, the creditor's bill is no longer guaranteed by the object, especially if the object is the debtor's only property. Even in Law no. 28 of 2007 concerning the Third Amendment to Law no. 16 of 2000 concerning the Second Amendment to Law no. 6 of 1983 concerning General Provisions and Tax Procedures, Article 21, paragraph (3) states that the preemptive right for tax claims exceeds all other precedents except:

- a. court fees solely due to a conviction for auctioning movable or immovable goods;
- b. costs that have been incurred to save an item;
- c. court fees are solely due to the auction and settlement of an inheritance.

Likewise, auction fees for collateral objects are a manifestation of the execution of collateral objects because the debtor is in default. This is intended to fulfil the debtor's

²⁵ J Satrio, *Hukum Jaminan Hak Jaminan Kebendaan* (2002 2002) 67.

performance to the creditor. The bills arising from the auction of the collateral object should be prioritized for payment over creditors holding material guarantee rights. Israeli emphasized that the case process requires a fee in the context of implementing the auction of collateral objects to generate funds for the settlement of receivables so that these services must be respected by giving their rights first compared to the rights of the holders of material guarantees. No less attractive is the Constitutional Court Decision No. 67/PUU-XI/2013, which stipulates that when a company goes bankrupt, the payment of wages owed to workers/labourers takes precedence over all types of creditors, including claims for separatist creditors, claims for state rights, auction offices and legal entities established by the government. It even takes precedence over tax bills. However, if you refer to Sarwirini's opinion that taxes are the most critical source of state revenue and are collected based on the provisions of applicable laws and regulations and from the tax sector, they are used to finance the budget for government administration, public services, and national development. This is also confirmed in Law No. 9 of 1994 concerning Amendments to Law No. 6 of 1983 concerning General Provisions and Tax Procedures that the position of the state as a preferred creditor in the sense of having prior rights to the goods belonging to the tax guarantor to be auctioned in public compared to other creditors. However, with the decision of the Constitutional Court, the tax bill must succumb. Meanwhile, Susilo Andi Darma²⁶ Argues that the right to wages for workers/labourers is a form of justice because the state, in this case the government, is not allowed to dominate or take advantage of unfair opportunities (in the sense of the state's prior rights) obtained from the law. At the same time, some parties held weak positions. Moreover, they do not have an excellent opportunity to compete for bankruptcy rights.

Subhan also drew a similar conclusion.²⁷ The legal relationship between the entrepreneur who runs the company and the worker is a special and unique legal

²⁶ Kedudukan Pekerja and others, 'Kedudukan Pekerja/Buruh dalam Perkara Kepailitan Ditinjau dari Peraturan Perundang-Undangan dan Teori Keadilan' (2013) 2 *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 141 <<https://ejournal.uin-suka.ac.id/syariah/Supremasi/article/view/1905>>.

²⁷ M Hadi Shubhan, 'Fenomena Hukum Pengajuan Kepailitan Terhadap Pengusaha Oleh Pekerja Karena Hak Pekerja Yang Tidak Dibayar Pengusaha' (2020) 50 *Jurnal Hukum dan Pembangunan* 520.

relationship regulated in labor law. The specificity and uniqueness of the legal relationship between the entrepreneur and the worker are due to the different economic backgrounds in which the entrepreneur has a solid economic position as the company owner compared to workers whose economic background is unable and in dire need of the job. So there is inequality. Therefore, it is necessary to protect workers from powerful employers. Legal protection is a form of protection provided by the state to legal subjects (individuals or entities) following legal norms, including preventive and repressive legal protection. Legal protection is intended to balance the legal relationship between employers and workers.

This is also the judge's consideration in Constitutional Court Decision No. 67/PUU-XI/2013 that the existence of pawn agreements, mortgages, mortgages, and fiduciary guarantees are agreements made by legal subjects, namely entrepreneurs and investors who are socioeconomically stronger than workers/labourers. Therefore, the panel of judges considers that workers must be protected when juxtaposed with separatist creditors.²⁸ It is also mentioned that Article 28 paragraph (1) of the Constitution states that everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law. Constitutional Court Decision No. 67/PUU-XI/2013 has changed the position of the bill for workers/laborers who were previously listed as creditors holding privileges as regulated in Article 1149 number 4 *Burgerlijk Wetboek*, which does not take precedence if their rights conflict with the holder of material guarantees in the event of bankruptcy. However, it has turned into creditors who have priority over separatist creditors, namely, creditors holding material guarantees.

The weakening of material rights that guarantees these events is based on justice as a reference. Legislators strive to create a conducive situation for smoothness, comfort, and certainty in the business world so that a fair and definite settlement has been anticipated. Referring to the opinion of Budiharto and Edy Sismarwoto on Justice in Pancasila, humans are creatures of God who must submit, obey, and follow God's

²⁸ According to Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Separatist creditors hold material guarantees, namely creditors holding pledges, mortgages, mortgages and fiduciary guarantees.

rules and manifest an attitude of mutual respect, tolerance, and peace for fellow human beings. The statement is as follows:²⁹

Justice in Pancasila has a level of meaning ranging from meta-ethical values to practical values. The meta-ethical value is hidden in the meaning of the first precepts: Godhead, which is the essential character of the Indonesian people in interpreting justice—that is, the understanding that humans are God’s creatures who must submit, obey, and follow God’s rules. This value becomes meta-ethical, as it is in the subconscious of every Indonesian human being. Justice at this level manifests itself as an attitude of mutual help, assistance, respect, tolerance, and peace for fellow human beings. The precept of just and civilized humanity emphasizes morality as fair and civilized in human relations, including banking agreements. This value is derived from the religious values that exist in the precepts of the Pancasila principle and clearer goals in terms of human attitudes.

According to Peter Mahmud, the true meaning of justice in the sense of the *sum cuique tribuere* is to give people what their share is. This doctrine was first conveyed by Ulpinus, who reads *Iustitia est Perpetua et Constans voluntas ius suum cuique tribuendi*, meaning justice is a desire that continues and continues to give to people what is part of it so that if it is examined that justice does not have to mean with equality such as distributive justice. Thomas Aquinas also proposed commutative justice.³⁰ According to the Naturalism School, the primary purpose of law is justice. Therefore, the law must reflect justice. Moral instruments are tasked with validating justice so that a rule can only be seen as law if it contains or contains morals. A rule cannot be seen as a law even though it has been “positive” by the authorities if the rule does not contain morals so that this justice will then provide legal certainty and benefit for the community.³¹

According to Aristotle, justice means doing good. In other words, justice is the primary virtue. “Justice consists in treating equals equally and unequal unequally, in proportion to their inequality.” This principle begins with the assumption that equal things are treated equally and unequal things are treated unequally and proportionally. The

²⁹ Budiharto and Edy Sismarwoto, ‘Freedom of Contracts and Dispute Settlement between Conventional Banking and Sharia Banking’ (2020) 8 International Journal of Economics and Business Administration 288.

³⁰ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Kencana 2015) 155.

³¹ Faizal Kurniawan and others, ‘Unsur Kerugian Dalam Unjustified Enrichment Untuk Mewujudkan Keadilan Korektif (Corrective Justice)’ (2018) 33 Yuridika 19, 21 <<https://e-journal.unair.ac.id/YDK/article/view/7201>>.

principle of justice does not make equality essential in the distribution of life necessities. The desire for equality in the form of treatment must open the eyes to inequality of reality.³² According to Aristotle, justice should not be equated to equality. Justice does not mean that everyone is the same.³³ According to Agus Yudha Hernoko,³⁴ the meaning of justice from a principle that determines form becomes a principle that provides the content of a standard or measure; the distributive justice proposed by Thomas Aquinas is based on respect for the human person and his nobility. Distributive justice cannot be achieved if it is solely based on actual values but also on similarities between one thing and another. There are two forms of similarity: proportional equality, and quantity and quantity similarity. Thus, respect for the person can be realized if there is something that is distributed to someone in proportion to what he or they should receive, so that the recognition of the person must be directed at the recognition of propriety (equity).³⁵

According to John Rawls, it is unfair to sacrifice the rights of one or several people for the sake of more significant economic benefits for society as a whole. Rawls mentions "justice as fairness", formulated in two principles of distributive justice as follows:³⁶

1. The greatest equal principle that everyone should have the same right to freedom is the principle of equal rights.
2. Social and economic inequalities must be regulated so that the following principles need to be observed:
 - a. The different principles; and
 - b. The principle of fair equality of opportunity.

Thomas Aquinas suggests two types of justice: distributive justice (*iustitia distributive*) and commutative justice (*iustitia commutative*). Distributive justice refers to the existence of equality among humans based on the principle of proportionality. This justice has a superordinate and subordinated relationship, as stated by Gustav

³² Agus Yudha Hernoko, *Hukum Perjanjian : Asas Proporsionalitas Dalam Kontrak Komersial* (Kencana Prenada Media Grup 2008) 39.

³³ Marzuki (n 30) 151.

³⁴ Hernoko (n 32).

³⁵ *ibid* 37.

³⁶ Hernoko (n 32).

Radbruch. Implementing distributive justice requires the existence of a party that is superordinate to more than one person or group of people as the party receiving the share that has a subordinate position. The benchmarks of the principle of proportionality in the distributive justice framework are services, achievements, needs, and functions. In the real world, the party that divides is the state, and obtains the share is the people. Meanwhile, commutative justice has a coordinating relationship with the parties. The work of justice requires the existence of two parties who have the same position.³⁷

When referring to the opinion of John Rawls and Thomas Aquinas that distributive justice is considered by judges in Constitutional Court Decision No. 67/PUU-XI/2013, at the same time, the state has made laws that rely on benchmarks of distributive justice, and the actions of the government and courts in making decisions take these measures into account. Thus, it becomes relevant that justice for workers/laborers in a poor socio-economic condition caused by a bankrupt company becomes fair if it has to be prioritized compared to separatist creditors who, in this case, are much stronger economically. The judge's consideration in Constitutional Court Decision No. 67/PUU-XI/2013 states that the entrepreneur or investor is socioeconomically higher. For the entrepreneur, the risk is a natural thing in managing his business, so it is unfair if the business risk is borne by the worker/laborer, where wages for the worker/laborer are a means to meet the necessities of life for themselves and their families.

Referring to the explanation above, which places creditors holding material rights not always favored in paying off their bills because the law stipulates that, on the contrary, the potential for claims rights is not entirely fulfilled. It is even possible not to pay them at all because of the object of the material guarantee being used to prepay bills from creditors holding privileges excluded by law. Of course, this is detrimental to creditors holding material guarantees, even on the pretext of justice, as described above. However, distributive justice, which refers to the existence of equality between humans based on the principle of proportionality that the benchmark in the form of need becomes relevant for the position of the worker/laborer that the wage is needed

³⁷ Marzuki (n 30) 152.

by the worker/labourer to sustain their life; for separatist creditors such as banks, it is still it has many assets so that it is possible to continue to run its business activities even though its rights are not fully fulfilled or even not fulfilled at all from one debtor.

Conclusion

The position of the holder of material security that has superior characteristics seems as if nothing can defeat it when it clashes with the positions of concurrent creditors and creditors of privilege holders. However, the superiority afforded by the law can be weakened by it. The bill of creditors of the holder of privileges arising from the salvage of collateral objects must take precedence over the bill of creditors of property security holders. This is considered fair, whereby the salvage of collateral causes creditors to remain in their preferred creditor position. Justice is also the basis for prioritizing the payment of workers' wages compared to the bills of separatist creditors as holders of material security because it is socio-economically different. However, exceptions by law based on fairness have the potential for creditor bills of property security holders to be threatened by not being fully repaid. Therefore, there needs to be a limitation on the meaning of exceptions, considering that there are enough exceptions regulated by law that result in the position of creditors holding material guarantees having to give in. The principle of justice that is used as the basis must give something to everyone according to their rights.

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