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Research Article

The Interplay of Banking Development and Legal Reforms: A Comparative Study of Mortage Rights Enforcement in Indonesia and India

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ABSTRACT: The enforcement of mortgage rights plays a pivotal role in ensuring economic stability and protecting citizens' financial interests. Within the broader context of economic governance, the banking sector acts as a fundamental pillar, driving economic growth and safeguarding financial certainty. This study examines the regulatory framework governing the enforcement of mortgage rights in Indonesia, emphasizing its impact on financial security and the reduction of Non-Performing Loans (NPL). Through a normative juridical approach, this research analyzes the existing legal provisions in Indonesia and explores avenues for enhancing the mortgage enforcement process. In addition to legal analysis, philosophical discourse is employed to understand the practical challenges in enforcing mortgage rights. A comparative approach focuses on the Indian legal system, where mortgage rights can be executed without court intervention. India's approach has effectively reduced Non-Performing Assets (NPA), offering valuable insights into Indonesia's legal reform efforts. The study suggests adopting a comparable framework in Indonesia could streamline mortgage enforcement procedures, reduce litigation, and enhance financial stability. This research aims to contribute to Indonesia's broader economic management and governance strategies by proposing legal reforms and promoting a more efficient, competitive, financial security, and equitable financial system.

KEYWORDS: Legal Reform, Banking, Mortgage Rights, Indonesia, India.

I. INTRODUCTION

In Indonesia, there is a primary focus on national regulations that should be structured to protect creditors' rights efficiently and ensure the funds' certainty. Indonesia has enacted several laws to provide a comprehensive framework for

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handling insolvency and bankruptcy cases, such as Law No. 37/2004, known as the Indonesian Bankruptcy Law, Law No. 40/2007 on the Establishment of Limited Liability Companies, and Law No. 21/2011 on the Financial Services Authority (OJK). The enactment of these laws is intended to provide a structured approach to protecting banks as creditors through a combination of bankruptcy laws, financial oversight, and corporate governance standards. The three laws also play a pivotal role in creditor-focused regulations that can yield better financial returns, ultimately maximizing economic development in the country.[1] This could involve reducing bureaucratic hurdles or allowing creditors to bypass specific procedural requirements, offering creditors more robust tools for enforcing their claims and focusing on recovering their funds.

Indonesia's government must increase competitiveness on the global stage; its legal framework plays a crucial role in supporting the country's sustainable economic growth. This involves a comprehensive approach to legal development that regulates and addresses economic challenges, especially within trade and industry sectors, and ensures robust legal certainty for investments through effective legal enforcement and protection. The Indonesian Central Bank, for instance, has always adopted mixed policies to maintain an inclusive finance system, monetary stability, and economic growth.[2] According to Law No. 17/2007 concerning the 2005-2025 National Long Term Development Plan, Indonesia's legal policies are designed to align with and support the national's 2030 vision.

The vision emphasizes the importance of integrating legal reforms with economic objectives to foster a stable and dynamic business environment in the country.[3] It is also designed to guide the consistency of national development to build a just and prosperous society, as asserted in the Indonesian Constitution and other national regulations. To achieve these visions, Indonesia needs well-structured legal institutions, strong legal frameworks, and consistent enforcement

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1 OJK, *Potensi Pertumbuhan Ekonomi Ditinjau dari Penyaluran Kredit Perbankan kepada Sektor Prioritas Ekonomi Pemerintah* (Otoritas Jasa Keuangan, 2015) at 1.

2 Bank Indonesia, *Mendorong Peningkatan Intermediasi di tengah Ketidakpastian Global* (Jakarta: Kajian Stabilitas Keuangan No. 42, 2024) at 2-4.

3 Adi Sulistiyono & Muhammad Rustamaji, *Hukum Ekonomi sebagai Panglima* (Jawa Timur: Masmedia Buana Pustaka, 2009) at 16.

mechanisms to promote an environment conducive to investment and economic progress.

The development of the economic sector requires substantial capital accumulation, a critical factor in achieving successful and sustainable development.[4] Financial support, mainly through banking channels, is integral to this process as banks play a pivotal role in channeling funds through credit, which is essential for economic growth and stability. The efficiency and robustness of the banking sector are often seen as indicators of a country's financial health, which means that the growth of a given bank in a country is used as a measure of that country's overall economic progress and development. As highlighted by the World Bank in 2020, a well-functioning financial system supporting a country is pivotal for economic activities because banks transform assets by mobilizing savings, facilitating investments, and managing risks.[5]

As a country advances, the role of banks in managing its government becomes significant, underscoring the growing reliance of the country and its society on the banking sector.[6] Banks are integral to the country's financial and payment system. In the current era of globalization, they have also become a crucial part of the global economic and payment network.[7] In the Indonesian context, the significance of the banking sector cannot be overstated. According to the Bank Indonesia Annual Report in 2023, banks are crucial for Indonesian economic development as they provide the necessary capital for businesses and infrastructure projects, thereby driving economic growth in the country. [8] It must be asserted that banks are integral not only to Indonesian domestic financial

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4 Herowati Poesoko, *Dinamika Hukum Parate Executie Obyek Hak Tanggungan* (Yogyakarta: Aswaja Pressindo, 2013) at 1.

5 *Global Financial Development Report 2019/2020: Bank Regulation and Supervision a Decade after the Global Financial Crisis*, Global Financial Development Report Annual Report (Washington D.C: World Bank, 2020) at 19.

6 Nurul Ichsan Hasan, *Pengantar Perbankan* (Jakarta: Gaung Persada Press Group, 2014) at 1.

7 Adrian Sutedi, *Hukum Perbankan Suatu tinjauan Pencucian Uang, Merger, Likuidasi, dan Kepailitan* (Jakarta: Sinar Grafika, 2007) at 1.

8 *Sinergi Memperkuat Ketahanan dan Kebangkitan Ekonomi Nasional*, Laporan Perekonomian Indonesia Annual Report, Laporan Perekonomian Indonesia Annual Report (Jakarta: Bank Indonesia, 2023).

systems but also to the global financial network as a result of globalization and the interconnectedness of the economic system.

A guarantee serves as a crucial mechanism to ensure the creditor's security, specifically by assuring debt repayment or the fulfillment of the debtor's obligations. The term itself in the Indonesian context derives from the Dutch word "zekerheid" or "cautie," and broadly encompasses how creditors secure payment beyond just holding the debtor responsible for their assets.[9] Despite its frequent use in legal contexts, such as in Article 1131 of the Civil Code and the Explanation to Article 8 of the Banking Law, these regulations do not clearly define a guarantee, even though they imply its strong connection to debts and receivables. Article 8 of the Banking Law only asserts that credit given by banks has a potential risk, which then requires the bank to have a guarantee of their business loss.[10] The absence of a precise legal definition of "guarantee" in statutory frameworks may create ambiguity in its interpretation, but the underlying principle remains clear. A guarantee reinforces the creditor's confidence in the debtor's ability to fulfill financial obligations.

The regulation of mortgage and banking systems has become a principal global trend over the past few decades, driven by evolving legal frameworks, economic development, and digital transformation. In India, for example, the legal framework on a mortgage is regulated by Law No. 1882 on Transfer Property which provides provisions on lease, mortgage, sale, exchange, will, or gift.[11] As a sector with a 6.8 % share of India's GDP and 32 % growth between 2014 and 2015, real estate has been consistently impressive in India's economic development.[12] With this economic improvement, India must have regulations that ensure mortgage stability, safeguard debtors from lending practices, and protect creditors in case of borrower default. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Act enacted in

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9 Salim HS, *Salim HS, Hukum Kontrak Teori dan Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2004) at 21.

10 Bambang Catur, "Pengamanan Pemberian Kredit Bank dengan Jaminan Hak Guna Bangunan" (2014) 1:2 J Cita Huk 273–288 at 275.

11 Vaibhav Kartikeya Agrawal, "Concept of transfer of movable properties in India: Legal discourse with reference to the transfer of property act 1882" (2024) 4:1 Int J Civ Law Leg Res 1–4 at 2.

12 Parishwang Piyush, Himanshu Negi & Navneet Singh, "Study of Housing Finance in India with Reference to HDFC and LIC Housing Finance LTD" (2016) 7:3 Int J Manag IJM 39–49 at 40.

2002 is one of the most significant legislative instruments that regulates banks' ability to seize and sell mortgaged property if the debtors default on their loans.

A lesson learned from Indonesia and India may be noted is that sufficient regulation on mortgages is required to maintain financial sectors and ensure an adequate flow of credit to the housing industry, where creditors or banks provide housing loans for debtors. The significance of this regulation is that it secures creditors' claims on property to ensure repayment of loans. This means that the mortgage rights require debtors to provide collateral of equivalent or higher value as a safeguard.[13]

The mortgage challenges in India and Indonesia share common issues but differ in their respective economic, legal, and institutional frameworks. Both have experienced rapid growth in housing markets in recent decades, but how their mortgage sectors have evolved showcases unique domestic factors that influence their challenges. In India, the primary issue revolves around the accumulation of Non-Performing Assets (NPAs) due to high rates of loan defaults. The rapid expansion of the housing finance sector, coupled with inadequate risk management by banks, has led to a significant rise in mortgage defaults. Indian banks, in many cases, extended credit to borrowers without properly assessing their repayment capacity, resulting in a large volume of bad loans. The inefficiency of the legal system, particularly in executing foreclosures, exacerbates the problem.

In contrast, Indonesia's mortgage market is relatively minor but faces challenges. One of the critical problems in Indonesia is the lack of widespread homeownership and access to mortgage financing, particularly for lower-income groups[14]. While India struggles with defaults, Indonesia grapples with ensuring that a larger proportion of its population can access mortgage loans in the first place. The Indonesian banking sector has traditionally been more conservative in extending credit, which has helped limit the rise of Non-Performing Loans (NPLs). However, this caution has also meant that fewer people, particularly in

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13 Gatot Supramono, *Perbankan dan Masalah Kredit* (Jakarta: Rineka Cipta, 2009) at 196.

14 Elis Deriantino Naiborhu, "The lending implications of loan loss provisioning and monetary policy in Indonesia" (2024) 86:5 Pac-Basin Finance J 244–264 at 246.

rural areas, have access to affordable housing finance[15]. As a result, Indonesia's mortgage sector is underdeveloped compared to India's, with fewer borrowers but a growing demand for affordable housing solutions.

Legally, Indonesia also faces challenges with enforcing mortgage rights, although the issues are somewhat different from those in India. In Indonesia, regulatory inefficiencies and a lack of precise legal mechanisms for quick resolution often hinder mortgage enforcement. The legal framework governing mortgage rights is considered underdeveloped, and banks frequently need help in repossessing properties when borrowers default. Like India, Indonesia needs more clarity on property titles, especially in rural areas, which creates challenges in securing mortgages and in property recovery.

In practice, guarantees are essential in mitigating the creditor's risk, especially in credit agreements. In essence, guarantees are a risk management tool in the broader financial system. Based on the comparative description, this article will examine how the mortgage system in Indonesia and India operates to maintain the stability of the financial market and economic growth in both countries.

II. METHODOLOGY

Secondary data is legal material in normative research, obtained from literature studies consisting of primary legal material, secondary legal material, and non-legal material. This data comes from various sources, is widely published, and is necessary for normative legal research. Secondary data is obtained by documentation studies and literature searches related to this research.

In legal research, there are generally three (three) ways of collecting data: the study of documents or library materials, observations, and interviews if necessary. These three data collection methods can be used individually or together for maximum results. Document study is the first step in any legal research, both

[15] Michael Lee, "The evolution of housing finance in Indonesia: Innovative responses to opportunities" (1996) 20:4 Habitat Int 583–594 at 590.

normative and empirical because legal research always starts from normative premises.

Document study for legal research includes primary, secondary, and tertiary legal materials. Each legal material must be re-checked for validity and reliability, determining the research results.[16] Data processing begins by reviewing all available data from various sources obtained through document studies, interviews, and observations written in notes obtained in the field. After studying and reviewing, the next step is to reduce data by abstracting. Then, organize them into units and categorize them. The final stage is to check the validity of the data and then interpret the data.[17]

Mortgage rights are security rights attached to property rights, and are considered one with the underlying property. This mortgage right is useful for guaranteeing the debtor's repayment obligations, because the concept of the main creditor can be a guarantor of the bank's protection as a lender. In the form of collateral that is guaranteed for debts that have been paid off, or are known when the debtor arrives at the guarantor's place, it is stated that in the event of non-fulfillment of all obligations related to the provision of a loan, a condition is imposed. This condition is the repayment of debtors to creditors in the form of collateral. The existence of conditions in the form of guarantees is intended to guarantee the existence of a legally binding payment obligation. These guarantees come into play especially if the debtor is negligent due to financial problems or does not pay off the debt within a certain period.

If the debtor defaults during the loan process, the incident is quite detrimental to the creditor. For this reason, a mechanism for guaranteeing the provisions of the dependent burden is needed, which is formally regulated in the loan agreement. In this case, the debtor delegates the existence of the goods that will be guaranteed or pledged as collateral to the creditor as the recipient of the collateral. However, the mechanism must be based on a deed of mortgage rights prepared by the PPAT, the Land Deed Making Officer. PPAT is the party in charge of writing as a public official, and the letter's contents are intended to provide

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16 Amirudin & Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Pers, 2004) at 68.

17 Lexy J Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosda Karya, 2015) at 247.

evidence of any legal action taken.[18] In the sense that the writing is in the form of a deed. The deed is a Deed of Granting Mortgage Rights (APHT). Mortgage rights provide creditors with security to repay exceptional, prioritized debts.[19]

The large number of debtors who do not fulfill their obligations certainly impacts the problematic situation for creditors. This encourages the government to form an institution to help creditors struggling to obtain their rights in the event of default by simplifying the use of substantive collateral. The institution is the State Property and Auction Services Office. Despite this issue, it is not possible to implement collateral, especially mortgages. These obstacles often result in KPKNL decisions needing to be implemented, including the collateral object that will be auctioned, which is recognized by the third party as belonging to him, and which the third party requests to the District Court; the collateral object is still occupied. Article 1 number 1 of the Minister of Finance Regulation, Number 213/PMK.06/2020 concerning Auction Implementation Guidelines, provides that an auction is the sale of goods that is open to the public by offering prices in writing and/or verbally and increasing or decreasing to reach the highest price, which is preceded by with the auction announcement.

The implementation of parate execution, which occurred within the period since the enactment of the UUHT, could not be carried out as expected by banks as creditors because it was hampered by the Decision of the Supreme Court of the Republic of Indonesia (MARI) Number 3210 K/Pdt/1984, dated 30 January 1986, one of which was the ruling the decision stated that the parate execution was carried out personally by the Head of the State Auction Office on the orders of the Creditor Bank and not on the decree/fiat of the Head of the District Court. According to MARI, the public auction was invalid and contrary to Article 224 H.I.R.. Then, according to this decision, the implementation of parate execution must be carried out by the fiat of the Chairman of the District Court.

MARI's decision is also supported by Book II of the Guidelines for the Supreme Court of the Republic of Indonesia, which requires fiat execution from the

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[18] Irma Devita Purnamasari, *Kiat-Kiat Cerdas dan Bijak Memahami Hukum Jaminan Perbankan* (Jakarta: Kaifa, 2011) at 3.

[19] Remy Sjahdeni, *Hak Tanggungan, Asas-Asas, Ketentuan Pokok dan Masalah yang Dihadapi oleh Perbankan (Suatu Kajian Mengenai Undang-Undang Hak Tanggungan)* (Bandung: Alumni, 1999) at 15.

District Court. Likewise, it is also hampered by Article 26 UUHT. Data obtained from the Tangerang II State Property and Auction Services Office regarding auctions for mortgage rights from 2020 to 2022 showed that the number of auctions for mortgage rights at the District Court in 2020 was nine files; in 2021, there were 27 files, and in 2022 there were 18 files. Furthermore, the total data on applications up to the auction at the District Court in 2020 is 14 files; in 2021, there are 40 files, and in 2022 there are 32 files.

The case data above illustrates that the current situation regarding the execution of mortgage rights is ineffective. The possibility of filing a lawsuit with the court to obtain a decision before executing mortgage rights results in the execution process taking a long time and incurring significant costs. Apart from this issue, external parties outside the creditor's control could influence the status of mortgage rights, slowing down the process of executing mortgage rights. This is contrary to the principles of the judicial system, where Article 2 paragraph (4) of Law Number 48 of 2009 concerning Judicial Power states that "Judicial proceedings are carried out simply, quickly and at low cost."

Previous research explains that there should be a review and re-examination of the policy for implementing execution auctions according to the Mortgage Rights Law, which has accommodated implementing auctions based on mortgages and credit verband. Apart from that, reviewing and re-examining these policies needs to be followed up by preparing and recommending implementation of execution auctions that are maximal, fair, easy, fast, simple, in good faith, guarantee legal certainty, and provide protection to the parties.[20] The position of auctions for the execution of Mortgage Rights in settling debt guarantees as an effort to enforce collateral law has yet to provide legal certainty, which reflects an easy, cheap, and fast process as a last resort in settling debt guarantees.

The mortgage execution auction is the largest auction by the State Property and Auction Services Office, but the sales rate is only 13%. This is because the debt guarantee is not free and clear, and the guarantee law is not yet complete in regulating the execution of mortgage rights as enforced by the guarantee law. The

[20] Burhan Sidabariba, *Perlindungan Hukum terhadap Para Pihak dalam Pelaksanaan Lelang Eksekusi Hak Tanggungan* (Disertasi, Universitas Gadjah Mada, 2018) [unpublished].

current regulations are only limited to the Regulation of the Minister of Finance of the Republic of Indonesia Number 27/PMK.06/2016 concerning General Auction Implementation Guidelines, applicable to all types of auctions.

As a result, the goal of executing debt guarantees through an easy, cheap, and fast Mortgage Execution Auction is challenging to realize and far removed from the meaning of legal certainty. Creditors need legal certainty in selling debt collateral to collect debt repayment. Auction officials can be sued civilly or criminally for carrying out an Auction for the Execution of Mortgage Rights by the auction implementation rules. It is not easy for buyers; they are hampered or cannot control the auction objects they purchase.[21]

III. REGULATIONS ON THE IMPLEMENTATION OF LIEN RIGHTS IN INDIA

India is a country in South Asia with the second largest population in the world after China, with a population of 1,352,642,280 people. India is also the seventh largest country based on the size of its geographical area, which reaches 3,287,590 km2. Four of the main world religions, Hinduism, Buddhism, Jainism, and Sikhism, were also born in India. This country was part of the United Kingdom, England, before gaining independence in 1947.

Indian society adheres to various religions. Hindus, Buddhists, Jains, Sikhs, Christians, Jews, Parsis, and, of course, Muslims live side by side in this country. It is challenging to bring every community under the same legal umbrella. 79.8% of the population is Hindu, while Islam is the most widespread minority at 14.23%. Even though Islam is a minority in India, this number places Indian Muslims as the second largest in the world after Indonesian Muslims. Long before the British colonized India, the authorities gave the people complete freedom to follow their respective religions and beliefs.

The government did not discriminate or intervene in the religious matters of its residents. Until after independence, India did not have an official religion. The

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[21] Syukriah HG, *Pengaturan Lelang Eksekusi Hak Tanggungan untuk Kepastian Hukum dalam Jaminan Utang* (Disertasi, Universitas Andalas, 2020) [unpublished].

1950 Constitution of India, amended in 1976, expressly declared India to be a secular republic. Even though they do not have an official religion, in the eyes of the state, all religions in the land are equal.[22] For countries that adhere to secularism, religious issues are not of interest to the government. The state is neutral and does not support religion or religious people. With the secular concept adopted by India, it is appropriate to separate power between religion and the state. However, the state still protects individual interests[23]. India guarantees the rights of its citizens to practice their respective religions. During the British colonial period in India, they implemented policies that ensured the continuity of various family law rules to the diversity of religious affiliations of the population. This policy continues today, and all existing communities apply their own family law rules.[24]

India has economic development issues, and the problem of private assets and mortgages has become a government concern[25]. The problem of mortgages in India, particularly concerning Non-Performing Assets (NPAs), revolves around several key issues. A significant challenge is the increasing level of NPAs, which occur when borrowers fail to repay their loans (both principal and interest) for a specified period, generally 90 days. This is especially prevalent in the housing finance sector, where individuals and businesses cannot meet mortgage repayment obligations due to economic downturns, job losses, or poor business performance. The accumulation of NPAs stresses banks, reducing their ability to lend and causing liquidity issues, which can slow down the overall economy.

India's foreclosure laws are seen as inefficient compared to global standards. Even with legislation like the SARFAESI Act, enforcement mechanisms often face resistance due to protracted legal battles, borrower objections, and regulatory

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22 Tahir Mahmood, *Statute-Law Relating to Muslims in India: A Studi in Constitutional and Islamic Perspectives* (New Delhi: Institute of Objective Studies, 1995) at 3.

23 A Purwanto, "The Successful of Strengthening ASEAN Centrality Through the ASEAN Way" (2024) 4:1 J Contemp Sociol Issues 84–101 at 89.

24 Moh Khusen, *Pembaharuan Hukum Keluarga di Negara Muslim* (Salatiga: STAIN Salatiga Press, 2012) at 40.

25 John Y Campbell, Tarun Ramadorai & Benjamin Ranish, "The Impact of Regulation on Mortgage Risk: Evidence from India" (2015) 7:4 Am Econ J Econ Policy 71–102 at 80.

challenges. The inefficiency of the foreclosure system slows down asset recovery, exacerbating financial instability in the mortgage sector.

High interest rates also contribute to the problem. Many borrowers, particularly those from lower-income groups, need help with their mortgage payments due to high interest costs. In rural areas, where formal credit histories are often lacking, banks face challenges in assessing borrowers' creditworthiness, increasing the risk of default. Economic factors such as inflation, unemployment, and real estate market fluctuations make mortgage repayment more complex, leading to higher default rates.

Moreover, a lack of consumer awareness about the risks associated with taking on mortgages further complicates the situation. Borrowers may overestimate their ability to repay or fail to fully understand the terms of their loan agreements, which can increase the likelihood of default. Additionally, the issue of unclear property titles poses challenges. Complex land laws and inadequate records make it difficult to verify ownership, which hampers both the securing of mortgages and the recovery of properties in cases of default.

The mortgage crisis in India has been shaped by several underlying factors, many of which stem from broader economic, legal, and structural issues. One key reason is the rapid growth of the banking and housing finance sector without the corresponding development of effective regulatory frameworks[26]. Over the past two decades, India has seen significant expansion in its housing market, fueled by urbanization and a growing middle class. However, this rapid growth has often outpaced the ability of financial institutions and regulators to manage the risks associated with housing loans.

In an attempt to capitalize on this demand, many banks extended credit to individuals and businesses without adequately assessing their repayment capacity, leading to a rise in Non-Performing Assets (NPAs). India's mortgage sector faces a series of interconnected problems, from rising NPAs and inefficient foreclosure mechanisms to economic factors and issues with property titles. These challenges

[26] Felipe Carozzi, Christian A L Hilber & Xiaolun Yu, "On the economic impacts of mortgage credit expansion policies: Evidence from help to buy" (2024) 139 J Urban Econ 1–19 at 8.

affect the banking sector and pose risks to the country's overall financial stability and economic growth.

India has an Act on Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 /SARFAESI) enacted on December 17, 2002, to address the problem of non-performing assets (NPAs) and provide practical tools for banks and financial institutions playing an essential role in improving the loan recovery process and reducing NPAs. Under the SARFAESI Act, banks and financial institutions that have extended loans to borrowers have the power to take over the assets pledged as collateral in the event of default by the borrower. They are also authorized to sell or lease assets to restore their financial condition without court intervention.

In India, the rules regarding collateral for mortgage rights are regulated in Chapter III, Article 13, which governs the Enforcement of Security Interests. It states that a creditor can exercise any security interest created for the benefit of a secured creditor without court or tribunal intervention by the provisions of the Law. In other words, in India, the applicable method of executing Mortgage Rights is para te execution.

The main objectives of the SARFAESI (Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests) Act are:[27] (1) The legal framework relating to scanning activities in India is explained; (2) Methods for transferring troubled assets to the asset reconstruction business are developed,enabling banks and financial institutions to recover NPAs quickly and effectively; (3) Allows financial institutions and banks to sell property (commercial or residential) if borrowers fail to repay their loans; (4) Give financial institutions the authority to take over control of immovable property that has been mortgaged or charged for debt recovery.

IV. RECONSTRUCTION OF THE LEGAL IMPLEMENTATION OF THE EXECUTION OF MORTGAGE RIGHTS IN INDONESIA

[27] Arjun Rathod, "Constitutional Validity of Sarfaesi Act", (2002), online: *Bhatt Joshi Assoc* <https://bhattandjoshiassociates.com/constitutional-validity-of-sarfaesi-act-2002/>.

The study of principles in treaties starts from the philosophy of treaty justice. The ideal situation requires a fair guarantee of the parties' rights during the agreement process. Justice is often heard, but its implementation is challenging. It is abstract and linked to various complex interests.[28] Legal experts have the same opinion regarding legal principles, namely that legal norms are invisible, but principles are the lifeblood of enforcing legal norms. Legal principles are the primary or abstract principles behind concrete regulations and the law's implementation. Principles in English are formatted as "principles," which means abstract norms become the basis or norms that serve as guidelines rather than concrete norms.[29]

If it is said that law is a set of rules and principles that regulate human life in society, then the most essential function of law is to achieve order in human life in society. The principle of interest in an agreement determines the quality of the agreement and the fairness of rights, considering that human actions are driven by reasons of interest in avoiding a bad situation by achieving a good condition. This means that Sudarta believes in social life because he can calculate what will happen or what he can expect.[30] For Achmad Ali, judges must master the principles of law to know the reasons for applying written norms, help seekers of justice, and try to overcome all obstacles to achieving justice.[31]

The discussion about mortgage rights enters into a special conversation about guarantees because the Mortgage Rights Law, as the basis for this regulation, is a special norm derived from general norms (lex specially). Special guarantees arise from law, namely the Mortgage Law. If it derives from the law, there is no need for a separate agreement between the debtor and creditor as intended in Article 10 of the Mortgage Law. The author's statement refers to the principle of legal consistency: if an agreement has been born out of law, there is no need for another source in the form of a contract or agreement.

Law Number 4 of 1996, the statutory regulations governing the imposition of land rights, are Chapter 21 Book II of the Civil Code relating to Mortgages and

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28 Fauzie Yusuf Hasibuan, *Harmonization of the UNIDROIT Principles into the Indonesian Legal System to Achieve Justice of Factoring Contracts* (Disertasi, Universitas Jayabaya, 2015) [unpublished].

29 Achmad Ali, *Menguak Tabir Hukum* (Jakarta: Chandra Pratama, 1996) at 14.

30 B Arief Sidharta, *Pengantar Ilmu Hukum* (Bandung: Alumni, 2009) at 49.

31 Ali, *supra* note 29 at 370.

the Credietverband in Staatblaad 1908-542 as amended by Staatblaad 1930-190. These two provisions are no longer adequate because they are no longer in line with the needs of credit activities in Indonesia. This discrepancy is because, in the old regulations, the only objects that could be used as objects of mortgages and credits were property rights, business use rights, and building use rights.[32]

On the other hand, almost all civil law experts agree that a special guarantee is a guarantee that arises from an agreement between the parties because it aims to exclude general guarantees. As an illustration, Article 1131 regulates that all goods belonging to the debtor have the potential to be used as a means of repayment of the debt. Still, this rule cannot be implemented until execution if there is no agreement between the parties regarding the goods referred to as collateral. The practice of guarantees in society varies in form and type. From a practical perspective, guarantees are divided into three categories: First, credit with general collateral based on the Civil Code Article 1757. Second, credit with special collateral including fiduciary rights, mortgages, and security rights (personal guarantee and corporate guarantee) based on Article 1331 of the Civil Code. Third, credit with collateral in savings (deposits, current accounts, savings, etc.)is called cash collateral, whereas if the collateral is non-savings, it is called non-cash collateral.

In banking practice, collateral is institutionalized as special collateral of a material nature, namely mortgage, credit, pawn, and fiduciary. Individual guarantees (guarantee agreements, liability obligations, and so on) are often called institutions. A guarantee is a state service mechanism that guarantees the legal relations of the parties in the debt agreement.

John Rawls argued that people in the initial situation would prefer two different principles; firstly, they require equality in determining basic rights and duties, and secondly, they argue that social and economic differences, such as differences in wealth and authority, are just if they can provide compensatory benefits for everyone, and especially for the least fortunate members of society[33]. However,

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[32] Salim HS, *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: PT Raja Grafindo Persada, 2004) at 38.

[33] Lars Lindblom, "In Defense of Rawlsian Fair Equality of Opportunity" (2018) 47:2 Philos Pap 235–263 at 243.

problems based on the principles of justice are challenging and complicated. Rawls had little hope that the the outlined social benefits would beconvincing to anyone. Therefore, what needs to be noted from the start is that justice as fairness, like other contractual views, consists of two parts: first, an interpretation of an initial situation and the existing problem of choice, and second, several agreed principles. Accepting the theory's first part but not the other parts is possible, and vice versa. The concept of the initial contractual situation may appear rational, even if the proposed principles are rejected.

John Rawls's social contract theory can help explain how classical philosophy continues to influence contemporary thought. Rawls openly admitted that he was indebted to John Locke and JJ Rousseau; he stated that Immanuel Kant significantly influenced his theory, which was not wholly original[34]. Rawls's significant contribution to moral and socio-political philosophy stems from bringing Kant's ideas and the social contract to a higher level[35]. He argues his theory is more suitable as an ethical basis for a democratic society. Rawls also noted that his theory was better than the alternative of utilitarianism.

According to John Rawls, two principles of justice will be chosen in the initial position. First, everyone has the same rights to the broadest basic freedoms and similar freedoms that others have. Second, socio-religious and economic differences must be regulated so that these differences become an advantage for everyone and the position, position, status, and space open to everyone can be realized[36].

These principles apply primarily to the basic structure of society. As their formulation suggests, the principles regulate the provision of rights and duties and the distribution of social and economic benefits. These principles assume that the social structure can be divided between aspects of the social system that establish and maintain the equal freedoms of citizens and aspects that determine

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[34] Andrew Levine, "Rawls' Kantianism" (1974) 3:1 Soc Theory Pract 47–63 at 50.

[35] Jonathan Riley, "Rawls, Mill, and Utilitarianism" in Jon Mandle & David A Reidy, eds, *Companion Rawls* (Wiley-Blackwell, 2013) 395-412 at 400.

[36] Julian Culp, "On Rawls, Development and Global Justice: The Freedom of Peoples" (2013) 14:4 J Hum Dev Capab 607–609.

and establish social and economic differences[37]. The fundamental freedoms of citizens are political freedom, the right to vote and be accepted into public positions together with freedom of opinion, speech, and association; freedom to express one's conscience and freedom of thought; freedom to hold personal property; and freedom from arbitrary arrest as defined by the concept of the rule of law. These freedoms must all be equal by the first principle because citizens of a just society must have the same basic rights.

The second principle applies to the distribution of income and success and to the design of organizations that use differences in authority and accountability or chains of command. Meanwhile, the distribution of wealth and income does not need to be the same, so it is for everyone's benefit. At the same time, positions of authority and positions of command must be accessible to all parties.

People who apply the second principle by holding an open position within these limitations can manage social and economic differences so that everyone feels lucky. These principles must be arranged sequentially, with the first principle preceding the second. This arrangement means that the institutions of freedom required by the first principle cannot be established or compensated for more significant social and economic benefits[38]. The distribution of wealth and income, as well as the hierarchy of authority, must be consistent with citizens' equal freedom, equality, and opportunity.

Rawls initiated an effort to realize an egalitarian spirit in society's structure through his views on justice as fairness. Indeed, egalitarianism should not be understood in a radical sense. Rawls argues about fairness, namely that the distribution of primary social values as a primary social good can be called fair if it is carried out evenly unless the unequal distribution benefits everyone. The primary social values referred to are the basic needs we need to live correctly as humans and citizens of society. These basic needs include basic rights, freedom, and prosperity.

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[37] Patrick Flavin, "Campaign Finance Laws, Policy Outcomes, and Political Equality in the American States" (2015) 68:1 Polit Res Q 77–88 at 82.

[38] Joo-Young Lee, "Distributive Justice, and Economic and Social Rights" in (2021) 247-270 at 247.

The above egalitarianism, said Rawls, will be achieved if the basic structure of society agreed upon in a contractual situation benefits all parties. His view of the contractarian situation in building society is not new. Many predecessor thinkers, such as Hobbes, Locke, and Rousseau, have offered the concept of justice[39]. It's just that the contractarian situation of Rawls's society is a 'synthesis,' and previous social contract theories tend to be utilitarianism on the one hand and intuitionistic on the other hand, each of which has fundamental flaws. According to Rawls, utilitarianism has given rise to unjust attitudes of strong people towards weak people and threatens individual rights[40]. At the same time, intuitionism is trapped in moral subjectivism and, therefore, endangers the rationality of justice.

According to Rawls, the main area of the principle of justice is the basic structure of society, which includes social, political, legal, and economic institutions. The structure of these institutions has a fundamental influence on individual life prospects[41]. Therefore, the main problem of justice is to formulate and provide reasons for a series of principles that must be fulfilled by a basic structure of a just society, namely how to distribute income fairly to society.

Rawls stated that the principle of justice must be based on the principle of rights, not benefits. If the principle of benefit is the basis, it will ignore fair procedures. The thing that is considered the most important is the result, which has as many benefits for as many people as possible, regardless of the methods and procedures. On the other hand, the principle of justice, which is based on the principle of rights, will give rise to fair procedures because it is based on (individual) rights that cannot be violated; that is, individual rights are what Rawls persistently fought for against the utilitarians. Then, avoiding violations of everyone's rights will create a fair procedure, regardless of the benefits it produces. Rawls argued that procedures must be made in the original position

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[39] A Galisanka, *John Rawls: The Path to a Theory of Justice* (Harvard University: Harvard University Press, 2019).

[40] Ivar Labukt, "Rawls on the practicability of utilitarianism" (2009) 8:2 Polit Philos Econ 201–221 at 211.

[41] Joseph D Sneed, "John Rawls and the liberal theory of society" (1976) 10:1 Erkenntnis 1–19 at 9.

assumed by impartial persons behind a veil of ignorance[42]. According to Rawls, in this position, we can agree on the principles of justice.

John Rawls emphasizes social justice more, which is related to the emergence of a conflict between individual interests and the state's interests at that time. Rawls sees the primary importance of justice as guaranteeing the stability of human life and balance between private life and collective life.[43] Rawls believes that an ideal, just society is the original basic structure in which basic rights, freedom, power, authority, opportunity, income, and welfare are fulfilled. This category of ideal societal structure is used to assess whether existing social institutions are fair or not and to correct social injustice.

Rawls believes that the cause of injustice is a social situation, so it is necessary to re-examine which principles of justice can be used to shape an excellent societal situation. Correction of injustice is carried out by returning people to their original position. In this essential position, an original agreement is then made between members of society as equals. There are at least three conditions that humans can use to reach their original position. Firstly, it is assumed that it is not known which position a particular person will achieve in the future. It is not known which talent, intelligence, health, wealth, and other social aspects will emerge in an individual; secondly, it is assumed that the principles of justice are consistently applied towards these choices; and thirdly, it is assumed that each person primarily pursues individual interests and treats general interests as secondary. The latter is a natural human tendency that must be considered when developing the principles of justice.[44]

Two main principles are used in the creation of justice, namely equal freedom as much as possible, as long as it still benefits all parties, and the principle of inequality, which is used to benefit the weakest[45]. This last principle combines the tenets of differences and fair equality of opportunity. Meanwhile, there are

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42 Bryan G Norton, "Intergenerational equity and environmental decisions: A model using Rawls' veil of ignorance" (1989) 1:2 Ecol Econ 137–159 at 142.

43 Hari Chand, *Modern Jurisprudence* (Kuala Lumpur: International Law Book Review, 1994) at 278.

44 Darmodiharjo & Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Jakarta: Gramedia Pustaka Utama, 1995) at 146.

45 Adoniati Meyria Widaningtyas & Windu Darojat, "Maintaining Political Rights Equality" (2023) 3:2 J Contemp Sociol Issues 108–132 at 112.

three principles for seeking justice: maximum freedom as a priority, differences, and fair equality of opportunity. The first principle is based on the natural desire of humans to achieve their interests first and then the public interest. This desire is to achieve happiness, which also measures achieving justice. However, the reality of society shows that freedom cannot be fully realized because of differences in conditions in society. This difference becomes the basis for providing advantages to those who are weak. If there is equality, everyone must have the same opportunity to fulfill their interests, even though differences will arise and develop based on an agreement and the same starting point.

Rawls's basic idea is that true principles of justice are those that free and rational people agree to accept as a reference for determining the basic themes in their assumptions, given that their agreement is made under conditions that are fair to all parties[46]. That is what is meant by justice as fairness. This condition is obtained when no one can reject the agreement or is in a position to have an advantage over the participation of other people. Rawls calls this fair position the original position, which requires justice attainment to be equally available for all regardless of their status.

Nonetheless, for Rawls, neither party in an agreement will know what position he will occupy, nor will he know about the advantages of distribution of assets and natural abilities, intelligence, strength, and psychological characteristics. John Rawls calls this the veil of ignorance if moral considerations would otherwise influence the parties[47]. It can also be called mutual disinterest; the party have no interest in taking on the interests of others.

In addition, the parties are rational in adopting the most effective means toward the stated goals. Thus, they are not motivated by sentiment, such as preventing other parties from enjoying their desired needs. Even though the parties are not allowed to know what specific conception they will posess, they are motivated by the theory of the good, namely that everyone desires a rational life plan in which rights, freedoms and opportunities, and income and wealth form the basics of

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[46] John E Roemer, "Egalitarianism Against the Veil of Ignorance" (2002) 99:4 J Philos 167–184 at 178.

[47] A K Upadhyay, "Rawlsian Principle of Political Obligation: A Complex Mixture of Simple Morality and Tacit Legality" (1998) 59:1/4 Indian J Polit Sci 71–83 at 76.

self-esteem and are the primary needs that are rational to expect. Moreover, the principles of justice regulate the distribution of primary goods.[48]

Rawls's theory of justice can be concluded to have the following core: maximizing freedom. These restrictions on independence are only for the sake of independence itself andequality for everyone, both in social life and in the form of utilization of natural resources. Restrictions, in this case, can only be permitted when profit is more likely. This is the basis for equality of opportunity and the abolition of equality based on birth and wealth.

According to Thomas Hobbes, the theory of justice is a human action that can be said to be fair if it is based on an agreement between two or more parties[49]. The binding of collateral with mortgage rights occurs because of a debt and receivables agreement between the debtor and creditor, with the agreement that if the debtor breaks his promise, the debtor hands over the collateral to the creditor as repayment of his debt. In connection with the execution of mortgage rights, as related to the theory of justice, the author argues that Indonesia can adapt the execution system that applies in India so that the interests of creditors can be accommodated and justice can be applied to avoid harm to creditors.

V. CONCLUSION

In India, the execution of collateral tied to a mortgage does not involve a court or parate executie. This means that if the debtor defaults, the creditor can execute the collateral object without having to ask for a fiat from the head of the court, and the execution of the mortgage can be easier and faster. The main focus is the importance of justice in agreements, interpreted as guaranteeing the parties' rights and legal norms, which are the basis for enforcing concrete norms.

Legal principles, including the principle of interest, form the basis for agreements. Mortgage rights are discussed by highlighting the role of the Mortgage Rights

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48 Muqowin, "Keadilan di Mata John Rawls" (2001) 2:1 J Esensia at 75.

49 Erfan Xia, "'The Greeks Call It Horme': Hobbes' anti-Aristotelian account of human action" (2023) 49:8 Hist Eur Ideas 1316–1331 at 1328.

Law as a particular norm. Banking practice involves material and personal guarantees with special privileges in execution, limited by the freedom of legal subjects. The concept of justice includes legal justice and rights justice, with varying scales in societies. Justice is realized in formal legal processes by paying attention to individual and state aspects. Natural law theory holds justice as the main principle with a definition that includes balance, equality, and granting rights according to proportionality.

The importance of justice in law is closely related to the goal of law, which is to achieve progress and happiness in society. In the context of the execution of mortgage rights, the author argues that the execution system in force in India, namely Parate Execution, accommodates the interests of creditors without harming debtors. The application of justice in this case must consider freedom and equality of opportunity for all parties involved. Thus, the concept of justice can guide the forming of a just societal structure and overcoming injustice in various contexts, including executing mortgage rights.

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