

Reconceptualizing Banking Collateral Requirements in Indonesia: The Performance-Based Guarantee System as a Modern Approach to the 5C Credit Analysis

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ABSTRACT

The Indonesian banking collateral regime, based on the traditional 5C credit analysis, requires all borrowers including bona fide debtors to provide readily executable collateral. In practice, cross-collateral arrangements under Articles 5 and 6 of the Mortgage Law have generated legal uncertainty, execution deadlocks, and substantive injustice when a single collateral object secures multiple credit facilities. This normative legal research employs a descriptive-analytical approach supported by qualitative analysis of statutory regulations, legal doctrines, and structured interviews with key stakeholders in banking, legal practice, business, and financial supervision. The study finds that the absence of specific prudential regulations at the level of the Financial Services Authority (OJK) has resulted in inconsistent banking practices and increased dispute risks. To address these shortcomings, the research proposes a Performance-Based Collateral System that limits the executorial function of collateral for bona fide debtors while strengthening risk management through enhanced Five Cs analysis, legal due diligence, and internal governance. The study further recommends the formulation of an OJK regulation, standardized internal bank manuals, and the establishment of formal debtor consortia supported by the Know Your Partner principle.

Keywords: Cross-Collateralization; Prudential Banking Principle; Performance-Based Collateral; Risk Management Regulation; Know Your Partner Principle; Indonesian Banking Law

INTRODUCTION

Economic development constitutes a fundamental pillar of national development aimed at achieving social welfare, equitable growth, and economic sustainability. In developing countries, the availability of adequate financial resources is a decisive factor in sustaining development momentum. The banking sector plays a central role in mobilizing savings and channeling credit to productive economic activities, thereby acting as a key driver of economic growth (Beck, Levine, & Loayza, 2000). As credit expansion accelerates, the legal infrastructure governing banking activities must be capable of balancing economic efficiency, prudential risk management, and legal certainty.

From a law and finance perspective, credit relationships inherently involve risk asymmetry between lenders and borrowers. Collateral functions as a legal instrument designed to mitigate such risks by providing creditors with preferential rights and enforceable claims in the event of default (Djankov, McLiesh, & Shleifer, 2007). Strong collateral regimes are empirically associated with higher levels of private credit, improved access to finance, and greater financial stability (La Porta, Lopez-de-Silanes, & Shleifer, 2008). Consequently, the effectiveness of banking credit systems is closely linked to the clarity, predictability, and enforceability of collateral law.

Within the Indonesian legal system, land occupies a particularly important position as collateral due to its high economic value and relative legal certainty. The Basic Agrarian Law of 1960 (*Undang-Undang Pokok*

Agraria or UUPA) established a national land law framework intended to replace fragmented colonial institutions and to support economic development through secure land tenure and land-based financing. Article 51 of the UUPA mandates the creation of a strong security right over land, known as *Hak Tanggungan*, reflecting the legislator's intention to provide a modern and unified collateral institution aligned with national legal principles (Harsono, 2008).

However, for more than three decades following the enactment of the UUPA, *Hak Tanggungan* could not operate effectively due to the absence of comprehensive implementing legislation. During this transitional period, colonial-era mortgage institutions such as *Hypotheek* and *Credietverband* continued to apply pursuant to transitional provisions, despite their conceptual inconsistency with national land law principles (Sutedi, 2010). This regulatory gap generated legal uncertainty, particularly with regard to enforcement mechanisms, executorial titles, and auction procedures, thereby undermining the practical effectiveness of land as collateral.

The enactment of Law No. 4 of 1996 on Security Rights over Land and Objects Related to Land (*UU Hak Tanggungan*) marked a significant reform in Indonesia's collateral regime. The law strengthened the position of secured creditors by introducing clear priority rules, executorial power, and simplified enforcement mechanisms. Notably, Articles 5, 6, and 7 of the *UU Hak Tanggungan* allow a single collateral object to secure more than one debt, thereby providing the legal foundation for cross-collateralization. This flexibility reflects an attempt to accommodate evolving banking practices and the increasing demand for credit in a developing economy.

From a banking perspective, cross-collateralization offers practical advantages, particularly for bona fide debtors who face structural difficulties in providing separate collateral for multiple credit facilities. By allowing one high-value asset to secure several loans, cross-collateral arrangements may reduce transaction costs and expand access to finance (Salim HS, 2017). In practice, Indonesian banks have increasingly encountered cross-collateral proposals, especially in corporate lending and group-based financing structures.

Nevertheless, cross-collateralization also introduces complex legal and prudential challenges. Comparative legal studies emphasize that the economic benefits of collateral depend not only on its availability but also on the predictability of enforcement and risk allocation (Armour et al., 2009). In Indonesia, the indivisible nature of land as a collateral object under *Hak Tanggungan* law complicates enforcement when only one of several secured obligations becomes non-performing. Article 6 of the *UU Hak Tanggungan* grants the first-ranking security holder the right to execute the collateral through public auction in the event of default, yet execution must be conducted against the collateral as a whole.

This enforcement model may result in disproportionate consequences, particularly when performing debtors are adversely affected by the default of another debtor whose obligation is secured by the same collateral object. Such situations often lead to resistance against auction, diminished market interest, and execution deadlock, ultimately harming both creditors and compliant debtors (Widjaja, 2018). From the perspective of banking prudence, these outcomes undermine effective credit risk management and weaken the function of collateral as a recovery instrument.

Regulatory theory underscores the importance of detailed supervisory guidance in managing complex credit structures. International standards emphasize that financial regulators must provide clear and operational rules to ensure that innovative credit practices remain consistent with prudential principles and financial stability objectives (Basel Committee on Banking Supervision [BCBS], 2015). In many jurisdictions, secured lending frameworks are complemented by regulatory guidelines addressing valuation, enforcement, and risk-sharing mechanisms (World Bank, 2016).

In Indonesia, however, while cross-collateralization is implicitly permitted under statutory land law, there is currently no specific regulation issued by the Financial Services Authority (*Otoritas Jasa Keuangan* or OJK) governing its application within banking prudential supervision. This regulatory vacuum results in inconsistent banking practices, as some banks accept cross-collateral arrangements under strict internal conditions, while others categorically reject them due to enforcement concerns (Usman, 2016). The absence of standardized internal guidelines or supervisory benchmarks also complicates regulatory oversight and increases legal uncertainty.

Accordingly, this research does not examine cross-collateralization from the doctrinal perspective of land law as an object-based security right, but rather from the standpoint of banking law and financial regulation. The study focuses on three interrelated issues: the lack of specific OJK regulations governing cross-collateral systems; the absence of standardized internal banking procedures for assessing and approving cross-collateralized credit; and the need for an institutional mechanism conceptualized as a debtor consortium to facilitate risk communication, coordination, and dispute resolution among debtors sharing a single collateral object. By integrating Indonesian legal norms with international banking and regulatory scholarship, this study aims to contribute to the development of a more equitable, enforceable, and prudentially sound framework for cross-collateral systems in Indonesian banking law.

LITERATUR REVIEW

Legal Certainty and Justice: Classical and Contemporary Debates

The tension between legal certainty and justice constitutes one of the most enduring debates in legal philosophy. Legal certainty is traditionally associated with the predictability, clarity, and enforceability of legal norms, allowing individuals and institutions to anticipate legal consequences and organize their conduct accordingly. Within the positivist legal tradition, certainty is often regarded as an intrinsic value of law and a precondition for justice itself (Kelsen, 1967; Raz, 1979).

In the Indonesian legal discourse, Rochmat Soemitro represents a legal positivist position that equates legal certainty with justice. According to Soemitro, justice is embedded in statutory law insofar as legislation reflects rational deliberation and formal coherence. Legal certainty, therefore, emerges from well-drafted legal norms that are clear, unambiguous, and linguistically precise (Soemitro, 1992). From this perspective, the quality of legal language and legislative technique plays a decisive role in achieving justice, as certainty reduces arbitrariness and discretion in law enforcement.

However, this formalist understanding of justice has been widely criticized for its inability to respond to social complexity. Contemporary legal theorists argue that certainty alone cannot guarantee justice, particularly in dynamic socio-economic contexts where rigid rules may produce disproportionate or inequitable outcomes (Fuller, 1969; Tamanaha, 2004).

Progressive Law and the Critique of Legal Formalism

Satjipto Rahardjo's theory of *bukum progresif* (progressive law) constitutes a fundamental critique of legal positivism and its emphasis on certainty. Rahardjo reconceptualizes law as a human-centered institution whose ultimate purpose is to promote justice, social welfare, and human happiness (Rahardjo, 2009). In this framework, law is not a closed system of norms but an evolving process that must remain responsive to societal needs and moral values.

Rahardjo explicitly rejects the notion that legal certainty is synonymous with justice. He argues that over-idealizing certainty transforms it into an ideology that constrains law's emancipatory function. According to Rahardjo, legal certainty is a derivative and relative concept, dependent on broader normative systems within society. Excessive reliance on statutory certainty risks marginalizing ethical judgment and social context, resulting in legal outcomes that are formally valid but substantively unjust (Rahardjo, 2009).

This critique resonates with international scholarship that questions the adequacy of strict rule-based systems in addressing complex regulatory environments, particularly in financial and commercial law (Black, 2008). In such contexts, flexibility, proportionality, and responsiveness are increasingly viewed as necessary complements to certainty.

Rule of Law, Moral Legitimacy, and the Indonesian Constitutional Framework

The debate between certainty and justice is inseparable from the concept of the rule of law. Franz Magnis-Suseno emphasizes that a genuine *rechtsstaat* requires not only formal legality but also substantive justice. He identifies two essential elements of the rule of law: the subjection of governmental power to objective legal norms, and the moral legitimacy of those norms in light of fundamental legal ideals (Magnis-Suseno, 2001).

Magnis-Suseno further articulates four moral-political justifications for governing through law: legal certainty, equality before the law, democratic legitimacy, and rational justification. Legal certainty, while essential, is only one component of a broader normative structure that must also accommodate justice and democratic accountability. This conception aligns with contemporary rule-of-law scholarship, which emphasizes that legality without legitimacy undermines public trust and institutional effectiveness (Craig, 2012).

Indonesia's constitutional framework explicitly affirms the principle of the rule of law. Article 1(3) of the 1945 Constitution declares Indonesia a state based on law, while Article 1(2) emphasizes popular sovereignty exercised according to constitutional norms. These provisions imply that legality must be harmonized with justice and democratic values, particularly in the regulation of economic power and financial institutions.

Legal Positivism, Legisme, and Indonesian Legal Culture

Despite its constitutional commitment to justice, Indonesian legal practice has been significantly shaped by legal positivism. Scholars observe that Indonesian legal actors often adopt a rule-bound and formalistic approach, prioritizing statutory compliance over substantive evaluation (Rahardjo, 2009). This tendency is reinforced by the dominance of *legisme*, a doctrine that views legislation as the primary and often exclusive source of law (Schuyt, 1998).

Under *legisme*, legal reasoning becomes mechanistic, reducing complex legal relationships to textual interpretation. While this approach enhances predictability, it may also limit the capacity of legal institutions to address inequities arising from rigid rule application. In financial and banking law, this problem is particularly acute, as standardized rules may fail to account for asymmetries of power, risk distribution, and economic interdependence.

International regulatory scholarship similarly warns that excessive formalism in financial regulation may undermine regulatory objectives, especially when rules are applied without sufficient contextual judgment (Black, 2008; BCBS, 2015).

Procedural Justice versus Substantive Justice in Banking Law

The distinction between procedural justice and substantive justice provides an important analytical lens for evaluating banking regulation. Procedural justice focuses on adherence to formal rules and processes, whereas substantive justice concerns the fairness of outcomes and their moral acceptability (Rawls, 1971). Legal systems that privilege procedural justice may achieve formal certainty while producing outcomes that are socially contested or economically inefficient.

Indonesian law explicitly recognizes the importance of substantive justice. Article 5(1) of Law No. 48 of 2009 on Judicial Power obliges judges to explore and understand the living law and societal sense of justice. This provision reflects an acknowledgment that statutory norms alone may be insufficient to resolve complex disputes fairly.

In the context of banking collateral and cross-collateral arrangements, rigid enforcement of procedural rules such as automatic execution rights may disproportionately affect performing debtors due to the default of other parties. This raises fundamental questions about fairness, proportionality, and risk allocation within secured lending frameworks.

Legal Certainty, Prudential Principles, and Cross-Collateral Regulation

Legal certainty remains a cornerstone of banking prudential regulation. Banks require predictable enforcement mechanisms to manage credit risk and maintain financial stability. The Basel Committee on Banking Supervision emphasizes that effective credit risk management depends on clear legal frameworks governing collateral enforceability (BCBS, 2015).

However, comparative studies indicate that prudential regulation must balance certainty with flexibility and proportionality. Overly rigid collateral enforcement regimes may increase litigation, undermine borrower trust, and ultimately weaken financial stability (Armour et al., 2016).

In Indonesia, Articles 5 and 6 of Law No. 4 of 1996 on *Hak Tanggungan* provide formal certainty regarding execution rights. Nevertheless, the absence of specific regulatory guidance on cross-collateral arrangements creates normative ambiguity. Banks rely on internal policies, while debtors lack collective mechanisms to protect their interests. This regulatory gap illustrates the broader theoretical tension between certainty and justice identified in the literature.

Existing literature extensively discusses legal certainty, justice, and prudential regulation, both in Indonesian and international contexts. However, limited attention has been paid to the intersection of these concepts within cross-collateral systems in banking law. In particular, there is a lack of normative frameworks that reconcile prudential certainty with substantive justice through regulatory design, institutional guidelines, and debtor cooperation mechanisms. This study seeks to address this gap by integrating legal theory, constitutional principles, and banking regulation to propose a more balanced model of cross-collateral governance grounded in both legal certainty and justice.

METHODS

This study employs a normative legal research approach, analyzing law as a system of norms, principles, and regulatory frameworks governing banking collateral and cross-collateral arrangements. The research is descriptive-analytical, focusing on the systematic examination and qualitative analysis of statutory provisions, legal doctrines, and regulatory principles relevant to banking prudential supervision and secured transactions (Hutchinson & Duncan, 2012).

To support its reform-oriented objectives, the study utilizes both primary and secondary legal data. Primary data are obtained through structured interviews with selected stakeholders, including banking practitioners, business actors, legal professionals, and financial regulators, to capture practical perspectives on regulatory gaps and implementation challenges. Secondary data consist of statutory regulations, scholarly literature, and peer-reviewed journal articles addressing collateral law, banking regulation, and cross-collateral practices (McConville & Chui, 2017).

Data analysis is conducted qualitatively through statutory interpretation and systematic legal analysis. Primary data are used to complement doctrinal findings and inform normative recommendations aimed at improving the prudential regulation of cross-collateral systems in Indonesian banking law.

RESULT AND DISCUSSION

A. Prudential Principles in Cross-Collateral Arrangements for Commercial Banks

1. Legal Certainty and Risk Allocation in Conventional Collateral Systems

The findings confirm that Indonesia's banking collateral regime remains predominantly grounded in a conventional, asset-based collateral system, where collateral serves primarily as an executable risk-coverage mechanism. From the bank's perspective, collateral functions as a safeguard against credit risk, particularly when funds have already been disbursed and are no longer under the bank's direct control (Basel Committee on Banking Supervision [BCBS], 2015). In cases involving *bankable* or bona fide debtors, credit risk is generally manageable due to consistent repayment performance. However, for merely *feasible* borrowers, collateral becomes the primary legal instrument for loss recovery through execution.

From the debtor's perspective, especially for large and reputable corporations, this system produces disproportionate economic burdens. The requirement to provide high-value, readily executable collateral often exceeding the loan value creates unnecessary costs (*unnecessary costs*) and procedural complexity. These findings support the critique in the literature that excessive reliance on asset-based collateral may undermine substantive justice and economic efficiency, particularly for high-performing corporate borrowers (Armour et al., 2016; Black, 2008).

Accordingly, this study categorizes the prevailing Indonesian model as a Conventional (Traditional) Collateral System, characterized by tangible, transferable assets whose primary function is liquidation upon default. While this model favors creditors, it inadequately reflects principles of proportionality and fairness for bona fide debtors, reinforcing earlier critiques of formalistic legal certainty detached from substantive justice (Rahardjo, 2009; Rawls, 1971).

2. Cross-Collateral under the Mortgage Law (*UU Hak Tanggungan*)

Articles 5, 6, and 7 of Law No. 4 of 1996 on Mortgage Rights (*Hak Tanggungan*) provide the doctrinal foundation for cross-collateral arrangements by allowing a single collateral object to secure multiple debts. Empirical analysis reveals that, in practice, this mechanism is frequently used to address collateral constraints for large-scale financing. However, its execution generates significant legal uncertainty, particularly regarding enforcement.

Under Article 6, mortgage execution must be conducted over the entire collateral object, rendering partial execution legally impermissible. This creates structural inefficiencies: once one debtor defaults, the entire asset is subject to auction, potentially harming performing debtors and reducing market interest due to the asset's size and complexity. These findings corroborate international scholarship emphasizing that rigid enforcement mechanisms may paradoxically increase systemic risk rather than mitigate it (Craig, 2012; BCBS, 2015).

Consequently, while the Mortgage Law formally supports cross-collateralization, it implicitly adheres to a conventional collateral paradigm, prioritizing executorial certainty over equitable risk-sharing. Nevertheless, the study identifies these provisions as potential legal "anchors" (*cantolan hukum*) for regulatory reform through the introduction of a Performance-Based Collateral System.

3. Performance-Based Collateral as a Modern Prudential Approach

The results demonstrate that Indonesian banking practice has begun to shift albeit partially toward a Performance-Based Collateral System, emphasizing business continuity, profitability, and operational performance rather than mere asset liquidation. This trend is driven by competitive pressures, including the emergence of international non-bank financing institutions such as the Loan Market Association (LMA), which rely primarily on financial covenants and performance indicators rather than tangible collateral.

Drawing from field data and comparative analysis, this study develops a four-tier model of collateral systems applicable to large-scale corporate lending:

Table 1. Levels of Collateral Systems in Banking Practice

Level	Collateral Model	Key Characteristics	Risk Orientation
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I	Conventional (Traditional)	Fully executable asset-based collateral	High creditor protection
II	Hybrid–Low	Executable collateral + partial performance criteria	Moderate
III	Hybrid–Medium (Proposed Model)	Performance-based assurance + formal collateral (non-executorial)	Balanced
IV	Full Performance-Based	No executable collateral; pure performance covenants	High institutional maturity

The study proposes Level III (Hybrid–Medium) as the most realistic and equitable reform option for Indonesia. At this level, collateral remains a formal requirement to satisfy statutory obligation particularly the Five Cs analysis under Article 8 of the Banking Law but is not intended for execution except under extraordinary circumstances. This incremental approach aligns with legal quality theory, which emphasizes gradual institutional maturation rather than abrupt regulatory transformation (Atmasasmita, 2012).

4. Integrative Legal Theory and Regulatory Engineering

The adoption of a Performance-Based Collateral System is theoretically grounded in Romli Atmasasmita's Integrative Legal Theory, which conceptualizes law as a dynamic instrument of both bureaucratic and social engineering. The findings affirm that effective regulation of cross-collateral arrangements requires integration between state institutions, financial regulators, and market actors through modern governance tools, including digital oversight and standardized legal manuals.

This approach resonates with international regulatory trends emphasizing principles-based regulation, flexibility, and institutional learning (Black, 2008). Moreover, it supports Indonesia's constitutional mandate to harmonize legal certainty with social justice within a rapidly globalizing financial environment.

B. Development of Bank Guidelines as Implementing Regulations of POJK

1. Corporate Governance and Internal Legal Manuals

The findings indicate that the implementation of cross-collateral systems necessitates strong internal governance structures. Under Indonesian Company Law, directors bear full responsibility for corporate management and legal compliance, while commissioners provide oversight and strategic guidance. Accordingly, banks must develop internal legal manuals governing cross-collateral arrangements, subject to approval by the Board of Commissioners and the General Meeting of Shareholders (GMS).

These manuals should function both as performance standards and audit instruments, consistent with modern legal management principles (Craig, 2012). The absence of standardized guidelines contributes to regulatory inconsistency, as evidenced by divergent bank practices in accepting or rejecting cross-collateral arrangements.

2. Enhanced Five Cs Analysis and Legal Due Diligence

The study finds that the traditional Five Cs analysis remains normatively relevant but substantively underdeveloped. Modernization requires reinterpreting each component capital, character, capacity, collateral, and economic conditions through a future-oriented, performance-based lens.

Additionally, Legal Due Diligence (LDD) emerges as a critical prudential instrument, particularly for large-scale and multi-debtor financing. Consistent with international best practices, LDD enables banks to assess legal, financial, tax, environmental, and operational risks comprehensively, thereby enhancing credit decision quality and mitigating systemic risk (Armour et al., 2016).

C. Formation of Debtor Consortia as a Risk-Mitigation Mechanism

1. Typology of Cross-Collateral Consortia

The results identify four consortium models in cross-collateral practice: traditional, contract-based, lease-based, and permanent consortia. Among these, contract-based and lease-based consortia demonstrate the greatest potential for balancing debtor cooperation and risk management.

Consortia serve as collective risk-sharing mechanisms, particularly where a single collateral object secures multiple obligations. The study finds that formalizing inter-debtor relationships through binding agreements significantly enhances legal certainty and dispute resolution capacity.

2. Novelty: The Principle of "Know Your Partner"

A central theoretical contribution of this study is the articulation of the Know Your Partner (KYP) Principle, which complements the established Know Your Customer (KYC) principle in banking regulation. KYP requires debtors within a consortium to conduct mutual due diligence, fostering collective

accountability and early risk detection. Once codified in a POJK, this doctrine may evolve into a binding legal principle, strengthening prudential oversight while reducing reliance on executorial collateral mechanisms.

CONCLUSION

This study concludes that the regulation of cross-collateral arrangements in Indonesian banking law requires a comprehensive prudential framework to ensure legal certainty, proportionality, and substantive justice for all mortgage holders involved. The incorporation of prudential principles governing the requirements and execution procedures of cross-collateral into an Otoritas Jasa Keuangan (OJK) regulation, positioned within a risk management legal instrument, is essential to address existing regulatory gaps and execution deadlocks. Furthermore, the development of standardized internal bank guidelines in the form of an integrated manual system comprising policy, procedural, and operational instructions supported by a legal quality audit mechanism emerges as a necessary institutional response to ensure consistent decision-making, accountability, and ethical compliance across all levels of bank governance. In addition, the formal establishment of debtor consortia through mutually binding agreements executed in authentic deeds is identified as a critical mechanism for collective risk management, dispute prevention, and fair allocation of responsibility in the event of default. As a normative contribution, this research proposes the formal recognition of the Know Your Partner principle to complement the Know Your Customer doctrine, alongside the adoption of modern management and audit systems, thereby strengthening Indonesia's secured lending framework and enhancing its competitiveness within the ASEAN banking landscape.

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