

Research Article

Legal Certainty As An Effort To Protect Customers Peer To Peer Lending Financial Technology In Indonesia

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Abstract.

The development of P2P lending fintech in Indonesia is expected to be a solution for people who have not been influenced by conventional banking services. However, the growth of illegal P2P lending fintech creates new legal problems that risk the public who use these financial institution services. The purpose of this research is to explore the concept of legal certainty as an effort to provide legal protection for customers of P2P lending fintech in Indonesia. This research uses normative legal research method and the theory used to analyse the data is legal certainty theory. This research uses a statute and conceptual approach. The result of this research reveals that the regulations related to the industrial licensing of P2P lending fintech have shown legal certainty. This case is manifested through good and clear norms in statutory regulation. However, in its implementation, particularly ones that related to law enforcement of P2P lending fintech executant, it has not been implemented consistently. By this reason, there is no legal certainty for illegal P2P lending fintech actors. Therefore, to achieve legal certainty, law enforcement that is consistent, consequent, and not influenced by subjective circumstances is necessary. With consistent law enforcement, it is expected that legal protection for P2P lending fintech customers can be manifested.

Keywords: Statutory regulation; fintech; bank services

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1. Introduction

Normatively, regulations that related to the IT-based of a financial institution or peer to peer lending financial technology (P2P lending fintech) in Indonesia is regulated in Financial Services Authority Regulation No. 77/POJK.01/2016 of IT-Based Lending Services (POJK No. 77/POJK.01/2016). Meanwhile, the regulation of consumers protection in the financial services sector is regulated in POJK No.1/POJK.07/2013 of Consumer Protection in the Financial Services Sector (POJK No. 1/POJK.01/2013). The implementation of those regulations is expected to encourage the development of P2P lending fintech practices in providing an effect of financial services, also can influence public funding where conventional banking cannot yet accommodate.

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In reality, by looking at the Financial Services Authority statistics, so far 157 P2P lending fintech companies have been officially registered, but only 33 are licensed. However, on the other side, there is quite several P2P lending fintech that operate without a license or illegally. OJK has made various efforts through the Investment Alert Task Force, one of the many ways is to stop P2P lending fintech from operating. However, those efforts have not been able to reduce the dominance of illegal P2P lending fintech operation, which is obviously very detrimental to the public because of the lack of knowledge of P2P lending fintech.

Besides, the result of the study on risk potential mapping of Fintech business process in Indonesia, which is based on the findings of intelligence operation performed by OJK Market Conduct Directorate, it is discovered at least 4 (four) aspects of consumers protection that must be considered, both by government and regulators in the financial services sector which includes completeness of information and transparency of products or services, handling complaints and resolving consumer disputes, prevention of fraud and reliability of service systems, and protection of personal data (cybersecurity) [1]. However, those 4 (four) aspects of consumer protection have not been able to provide legal protection to the public if there is no firm action against the operation of illegal P2P lending fintech.

Based on the background above, the problem which is quite relevant in this research is what form of legal certainty can provide legal protection against the activities of illegal P2P lending fintech business actors.

2. Discussion

2.1. The Overview of License and Legality

The licensing provision which applies to service activities of P2P lending fintech is divided into 2 (two) stages, i.e registration and license. Based on Article 8 paragraph (1) POJK No. 77/POJK.01/2016, it is stated that executant who will perform activities of IT-Based Lending Services is required to submit a registration application to OJK. When the executant has received a registered proof, he should apply for a license within the period on 1 (one) year from the date of registration with OJK. This is stated in Article 10 paragraph (1) POJK No. 77/POJK.01/2016. For executant who has received the registered proof but does not follow up the submission of a permit application or does not meet the licensing requirements, the executant's registered proof is declared as null. This is stated in Article 10 paragraph (2) POJK No. 77/POJK.01/2016.

Based on the Financial Services Authority's statistical data on August 14, 2020, 157 P2P lending fintech companies officially registered but only 33 companies are officially licensed. This means, around 124 registered P2P lending fintech companies have not submitted a license application or have not met the license requirement. Of the 124 companies, some have even been registered since 2017 and 2018 but have not been licensed and are still operating. If it refers to Article 10 paragraph (2) POJK No. 77/POJK.01/2016, automatically the company must be null or illegal.

The definition of license in Black Law Dictionary is "a personal privilege to do some particular act or series of the act on land without processing any state or interest therein, and is ordinarily revocable at the will of licensor and is not assignable [2]. This definition can be interpreted as a personal privilege given to perform particular actions on land without processing its ownership or any interests in it, and it usually can be cancelled by the will of the licensor. A license also can be defined as "The permission by a component authority to do and act which, without such, permission, would be illegal, a trespass, a tort or otherwise not allowable. This definition can be interpreted that the issuance of a license by an official who has the authority to do an act without the permission, would be illegal, perform a violation or act against the law, and an activity which is not permitted.

The definition of license also can be found in the provision of Article 1 number 19 of Law No. 30 of 2014 of Government Administration which determined that license is Decree of the authorized Government Official as a form of approval for the requests of the community member in accordance with the regulations. From this definition, it can be explained that a license is a form of government decision to direct and control the business activities of its people. Functionally, as a part of the government's authority, a license is a decision given by the government based on its authority to approve business activity for individuals or corporation. Likewise, if the business activity is performed by an individual or corporation without having a license, it can be said that the business activity is illegal.

Based on those definitions, business activities licensing for P2P lending fintech as regulated in Article 10 paragraph (10) POJK No. 77/POJK.01/2016, refers to license as an approval granted by an authorized official, i.e. Financial Services Authority. If the business actor of P2P lending fintech does not apply for a license or does not have a license issued by Financial Services Authority, then the performance of the P2P lending fintech business activities can be categorized as illegal. Without having a license of P2P lending fintech by executives, those parties perform violations or acts against the law. Therefore, to achieve legal certainty, actions must be taken by the regulations. Without

taking action against the parties who commit violations or act against the law of P2P lending fintech business activities, there will be no legal protection for the public.

2.2. The Overview Concept of Legal Certainty

Aristoteles in his book of Rhetorica explaining that the aim of the law is justice, and the law content (material) is determined by ethical awareness of fair and unfair. The law has a sacred and noble duty, i.e justice by giving to each person what is entitled to receive. The law requires separate regulations for each case. According to this theory, the law must be *algemene regels* (general rules/regulations), in which these general regulations are needed by the public for legal certainty [3].

In the development of thoughts about law, objectively, Gustav Radbruch stated that basically, the purpose of law must contain 3 (three) basic values, i.e Law Certainty (*Rechtssicherheit*), Justice (*Zweckmassigkeit*), and Expediency (*Gerechtigkeit*). Of the three legal objectives, each of them has different points of view and request. Specifically, one that related to legal certainty, it has a legal purpose which tends to be positivistic and is more influenced by the Juridical-Dogmatic course. The basic of positivism course – is seeing law as something autonomous and independent. This thought views that legal regulations are not aimed at justice or expediency, but solely for legal certainty. Legal certainty refers to clear, consistent, and consequent law enforcement. In which the implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands but factually characterize the law. An uncertain and unjust law is bad law [4].

Soetanto Soepiadhy views the principle theory of legal certainty as “the physical attitude of humans, it does not see whether a person’s mental attitude is good or bad, what is concerned is how one’s outward actions”. Legal certainty does not sanction someone who has a bad mental attitude, but instead the manifestation of that attitude or makes it a real or concrete act [5].

Principally, a regulation is enforced by the government as a limit for society in taking action to individuals. Regulations that are created must be implemented consistently to provide legal certainty. This view is parallel with Riduan Syahrini who stated that legal certainty is divided into two definitions, i.e. first general regulations to make individuals know what actions can or can not be done, and second legal security for individuals from government authority. By these general regulations, individuals can find out what the government may impose or may do to individuals [6].

The development of thoughts on legal certainty was conveyed by Peter Mahmud Marzuki who stated that legal certainty is not only about articles but also the consistency of judges' decisions between one judge to another judge for similar cases that have been already decided [7]. Thus, legal certainty is not only reflected in law or regulation itself but must be manifested in the consistency between the judges' decisions to another on the same cases.

Therefore, to maintain legal certainty, the role of the government and court is very important. The government is not allowed to issue regulations that are not regulated by law. If that happens, the court must declare that such regulation is null. It means the regulation never exist, then the consequences that probably caused must be restored as before. However, if the government still does not want to revoke the regulation which has been declared as null, this condition will turn into a political issue between the government and legislators. It becomes worse if the legislators do not issue the government's decision to revoke the rules which have been declared as null by the court. Surely, it will not provide legal certainty and consequently, the law does not have predictability. Likewise, the role of the court, specifically the judge as to the decision-maker for justice seeker, ideally, must give a consistent decision between one decision to another on the same cases. This consistency implements law in a concrete event in society has legal certainty.

Legal certainty is the hope for justice seekers to know their rights and obligations according to law. Without legal certainty, people do not know what to do, the right or wrong actions, and prohibited or not prohibited by law. Legal certainty can be manifested through good and clear norms in regulations. Legal certainty means the correctness of the law, the subject, object, and the legal threat. Besides, definite law is a law that shows consistency in court decisions.

According to the explanation above, legal certainty as law objective can be shown from legal regulations and law enforcement that must reflect consistency in the implementation of the law and the implementation of concrete events that are resolved through courts. Therefore, legal certainty is the consistency of law, implementation of the law, and implementation of a legal decision.

3. Conclusions

Legal certainty is a clear, consistent, and consequent law application whose implementation cannot be influenced by subjective circumstances. Legal certainty can be manifested through good and clear norms in a regulation. Legal certainty must also

be reflected in the consistency of the judges' decisions between one decision to another for similar cases that have been decided. Based on the related thoughts, Financial Services Authority Regulations No. 77/POJK.01/2016 of P2P lending fintech has demonstrated legal certainty which is manifested through good and clear norms in regulation. However, its implementation, specifically to ones that related to the law enforcement of illegal P2P lending fintech has not yet consistently implemented. By this there is no legal certainty, it means no firm action against illegal P2P lending fintech.

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