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INCONSISTENCY OF LEGAL CERTAINTY PRINCIPLE OF BANKING SUPERVISORY LAW BY THE OTORITAS JASA KEUANGAN

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Abstract
The enactment of the Law of the Republic of Indonesia Number 21 of 2011 concerning the OtoritasJasaKeuangan (the Financial Service Authority), abbreviated as OJK, has brought changes to banking supervision which initially under the authority of Bank Indonesia to become the OJK's authority. However, the enactment of the OtoritasJasaKeuangan Act is not accompanied by revising other banking related laws. There found conflict of norms, vague norms, and inconsistencies with other laws and regulations in the banking section under the supervision of the OJK regulated by the OJK law. Based on these findings, this article focuses on the existence of inconsistencies in the principle of legal certainty. This inconsistency will have an impact on legal protection for depositors. The main idea of this article has never been discussed by other author, or is a new issue. Thus, this article is expected to contribute to the improvement, harmonization and synchronization of the OJK Law with other banking related laws in line with the principle of Legal certainty.

Keywords: *Inconsistency, Supervision, Banking, Legal Certainty*

Background

The issuance of the Act on the OtoritasJasaKeuangan changed the supervision model of financial service institutions in Indonesia, initially the supervision is carried out by several institutions, i.e., regulation and supervision of the banking services sector is carried out by Bank Indonesia (BI), insurance regulation and supervision is carried out by the ministry of finance, regulation and supervision of securities is carried out by the Capital Market and Financial Institution Supervisory Agency, which then transformed to be an integrated supervision carried out by a single institution, i.e., the OtoritasJasaKeuangan (hereinafter abbreviated as OJK). The enactment of the Act No. 21 of 2011 concerning OJK is the beginning of new system implementation in the regulation and supervision of the financial services sector in Indonesia, including in the banking sector.

This article limits the topic of OJK supervision on banking due to the establishment of the OJK brings juridical implications to the duties of Bank Indonesia, besides that, 90% (ninety percent) of financial institutions in Indonesia are engaged in Banking. The OJK is an independent institution to organize an integrated system of regulation and supervision of the whole financial services activities as stipulated in article 1 paragraph (1) of Joint Article 2 (paragraph 2) of Act No.21 of 2011 concerning the Otoritas JasaKeuangan.

The above provision shows that the OJK is independent from both government and non-government parties. the characteristics of an independent institution is having the authority to carry out the duty without any control / direction from the selected government such as the President, Ministry or the prime minister (Verthey; 2003; 156). The terminology of independence in the Black's Law Dictionary is a condition that is free from dependence, modification controls or restrictions from other parties. The OJK board of commissioners consists of 2 members from the Bank Indonesia and the Minister of Finance. This fact doubts OJK's independence from government interference. (Lestari H.D.; 2012; 565).

The Article 4 of the OJK Law stipulates that: the objective of OJK establishment is in order all financial sector activities are: a. organized regularly, fairly, transparently and accountably; b. able to realize a sustainable and stable financial system, and c. able to protect the interests of consumers and society. To carry out these objectives OJK has the function of organizing an integrated system of regulation and supervision of all activities within the financial services sector. The bank is one of the credible institutions functioned as an intermediary, helps the flow of the payment system, and it is a media of implementing government policy, namely monetary policy. Due to these functions, the existence of banks as a system is a prerequisite to a healthy economy. (Djumhana M; 2006; 86). The Banks need supervision to protect the interests of depositors. This goal can be achieved as long as the Bank carries out its business activities based on healthy and accountable business principles. Thus, these conditions maintain the credibility of the Banks (GandaprajaPermadi; 2004; 1).

In the legal practice, there often found a legal vacuum *(leemten in het recht)*, norm conflicts (antinomy), vague norms and inconsistencies in legislation (PoesokoHerowati; 2018; 163). In the supervision of OtoritasJasaKeuangan on banking institutions is found conflicts of norms, vague norms, and inconsistencies with other laws and regulations in the banking sector, including inconsistencies with the Banking Law, Bank Indonesia Law, Law of Insurance Agency, and Syariah banking Law. Essentially, the supervision of banks is intended to protect customers or maintain public trust in the presence of various problems that cause philosophical problems, especially towards the principle of legal certainty which will also have an impact on optimal protection for customers, especially depositors.

The Definition of Principle

The principle is essentially similar to the word foundation. In Dutch, the principle is called *"beginsel"*(HoeveW.Van; 1996; 32) or in Latin it is called*"principium"*(BagusLorens; 1996; 891-892). In terminology, the word principle has 2 (two) meanings, first is basic or fundamental, the second is a truth which is the basic subject or foundation of thought or opinion. (YahyaLukman S; 2016; 152) The Oxford Dictionary explains the principle as (1) the strong moral rule of belief that influences your actions; (2) basic general truth. (Oxford University; 2003; 340).TesaurusBahasandonesiadefines the term "principle" as:*(1)akar, alas, basis,dasar, fondasi, fundamen, hakikat, hukum, landasan, lunas, pangkal, pegangan, pilar, pokok, prinsip, rukun, sandaran, sendi, teras, tiang, tonggak; (2) hukum, kaidah, kode etik,norma, patokan,pedoman, pijakan,tata cara.*(Editorial Team ofThesaurusof BahasaIndonesia;2008;29).Based on Tesaurus Bahasa Indonesia, the word "principle"means: *(1) asas, dasar, etika, hakikat, pokok, rukun, sendi; (2) filsafat, kepercayaan, keyakinan, kredo, mandu,opini, paham,pandangan, pendapat, pendirian, sikap; (3) ajaran, diktum, dogma, doktrin, etik, hukum, kaidah, patokan, pedoman, pijakan.* (Editorial Team ofThesaurus of Bahasa Indonesia;2008;386)

The Law Dictionary defines principle as an idea that is broadly formulated and underlies the existence of a legal norm, (Law Dictionary; 2008; 31 and 401). Regarding the principle of law, it is defined as the foundation that supports the robustness of a legal norm. Thus, the legal principle is also considered as the general foundations in legal regulations and that containsethical values. The principle of law is not a concrete legal norm because it is the soul of legal norms or legal regulations (Dirdjosisworo S; 2009; 54).

The followings are the definitions of Principle of Law according to some experts:

1. Paul Scholten in JJ HBruggink, (Brugink JJH; 1996; 119), outlining the principle of law is the basic idea, which is contained within and behind the legal system each formulated in the rules, legislation, and decisions of judges. Anything relates to the provisions and individual decisions can be seen as the description.
2. Van Eikema Homes in Sudikno Mertokusumo, (Mertokususumo Sudikno; 2003; 34), explains that the principle of law is not a concrete legal norm, but as general basics or instructions for applicable law. Meaning that it is the basis or direction in the formation of positive law.

The principle of law is the foundation of a statutory regulation (Santoso L; 2003: 154). This principle is not a legal rule, but without knowing it, the law cannot be understood. This legal principle indicates ethical meaning to the legal regulations and legal rules (Rahardja S; 2014; 47). The principle of is the heart of the rule of law for two reasons, namely:

1. It is the broadest foundation for the emergence of legal regulations meaning that the legal regulations can eventually be returned to these principles, this principle deserves to be considered as the motive of the rise of legal regulations, or is a legislative ratio of legal regulations;
2. The principle contains ethical demands. It is considered as the bridge between legal regulations and social ideals and the ethical view of the society.

Legal Certainty Theory

Legal certainty Principle can be analyzed based on the theory of legal certainty. The Law without the value of certainty will be meaningless because it can no longer be used as a guideline for everyone. According to Radbruch, certainty in law was achieved if the law is in the form of Acts, which do not contain contradictory provisions (The Acts based on a logical and practical system. The Act is made based on *"rechtsleerkelijheid"* (serious legal justice) in which the contain cannot be multi interpreted (Utrecht; 1957; 22-23)

Legal certainty is derived from positive mind of the world of law adopted by the Juridical Dogmatic Idea, which is viewed from positive or normative point of view, or dogmatic juridical law, the objectives of law is emphasized in terms of legal certainty, which tends to see the law as autonomous, independent, because for followers of this idea the law is merely a compilation of rules. For them, the purpose of law is to guarantee the realization of legal certainty (Ali Ahmad; 1996; 94-95). According to SatjiptoRahardjo, a certainty must be initially created to organize a value system which is able to provide a "legal certainty" in the relations among the society. This fact demands a consistent set of rules (Rahardjo S; 1996; 34). M. Isnaeni also revealed that legal instruments which concern on the consistency would be able to rise a legal certainty as widely expected (Isnaeni M; 1996; 34). On the other hand, if the laws and regulations are not flowed by the flow of consistency, it means that the image itself is never certain, so it is very difficult to expect the birth of legal certainty from such rules.

Furthermore, Jan M. Otto as cited by Sidhaarta that (SidhartaArief; 2006; 85) opines that legal certainty in certain situations requires the following:

1. There are clear, consistent and accessible legal rules issued by the powers of the State;
2. That the governments apply these legal rules consistently and are also submissive and obedient to them;

3. That Principally, the majority of citizens agree to the contents and therefore adjust their behavior to these rules;
4. That concrete judicial decisions are carried out.

Nurhasan Ismail argues that the establishment of legal certainty in the regulations of legislation need requirements relating to the internal structure of its own legal norms (Ismail N.H; 2007; 32). The internal requirements are: the clarity of the concept used, legal norms containing descriptions of certain behaviors which are then incorporated into certain concepts as well, then the clarity of the authority hierarchy from the legislative institutions. The clarity is important because it concerns the legality and the binding of the legislation made. It directs the lawmakers who have the authority to form certain laws and regulations. Further, the consistency of statutory legal norms. It means that the provisions of a number of laws and regulations related to one particular subject do not conflict with one another. Basically, legal certainty is the implementation of the law in accordance with the rule, for community can ensure that the law is implemented. It is defined as the existence of clarity of the law itself, that the law does not cause confusion / multiple interpretations. Lon Fuller proposed 8 (eight) principles that must be fulfilled by law (Fuller Lon; 1971; 54-58):

1) A legal system consisting of regulations, which is not based on misguided decisions for certain matters;
2) The regulation is announced to the public;
3) It is not retroactive, because it will damage the integrity of the system;
4) Made in an understandable formula;
5) There must be no conflicting rules;
6) It may not require an action that exceeds the capability;
7) There must be conformity between regulations and daily implementation.

Discussion

To carry out theduties and authorities the OtoritasJasaKeuangan must rely on this principle: The Principle of Legal Certainty, the principle that prioritize the regulatory foundation of the legislation and justice in every policy of the implementation of Financial Service Authority (OJK Bill Committee Team; 2018). Whereas in the general explanation of the OtoritasJasaKeuangan Act there are 8 principles underlying OJK including the Principle of Legal Certainty. Regarding this principle, it should be considered that juridical, the issuance of the OtoritasJasaKeuangan is on the mandate of Bank Indonesia Law, in Article 34 of Act No. 23 of 1999 concerning Bank Indonesia, that the authority of banking supervision will be transferred from Bank Indonesia to an independent Financial Service Sector Supervisory Agency established based on the explanation of Article 34 of Act No. 23 of 1999 concerning Bank Indonesia that this institution has the authority to supervise other financial service sectors such as insurance, pension funds, securities, venture capital, finance companies and other agencies that administer public funds. The regulatory task is still carried out by Bank Indonesia. Similarly, Article 34 of Act No. 3 of 2004 concerning Amendments to the Law of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia also mandating the same matter but on the explanation of Article 34 of Act No. 3 of 2004 concerning Amendment to the Law of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia, which has omitted the phrase "The regulatory task is the duty of Bank Indonesia". This change, according to Khopiatuziadah, needs to be criticized because it impacts on the constellation of regulatory authority in the banking sector which will be translated in the law concerning the financial services sector supervisory institution that initiate the emergence OtoritasJasaKeuangan. (Khopiatuziadah; 2012)

Article 1 paragraph 1 of the OtoritasJasaKeuangan Act states that the OtoritasJasaKeuangan as an independent institution does not only supervise the financial services sector but also regulates, examines and even conducts investigations. In other words, the OtoritasJasaKeuangan has broader duties and authorities

than the mandate of the Bank Indonesia Law as its juridical basis. The juridical foundation is very important in establishing legislation, because it will show these following points (BagirManan; 1994; 13-20):

a. The need of authority from the legislator. Each legal product must be made by an authorized official, otherwise the legal products are null and void *(van rechtswegenietig)* or is considered to have never existed and all the consequences are null and void by law;
b. The necessity for the conformity of the form or type of legal products with the regulated material, especially under the order of the higher or equal statutory regulations. Mismatch of form or type can cause the cancellation of the legal product *(vernitiegbaar);*
c. The requirement to follow certain procedures. The denial on following required certain products, then the legal products do not have binding legal force, and it can be void by law;
d. Requirements to not conflict higher-level laws;
e. The Legal products made for the public can be accepted by the community naturally and even spontaneously.

Based on the point b above, the OtoritasJasaKeuangan having wider authority is certainly no longer compatible with the material regulated in the law mandating it. Historically, the formation of the OtoritasJasaKeuangan was the desire for a special institution to supervise banking institutions. This idea has been raised since the establishment of Act Number 23 of 1999 concerning Bank Indonesia. Article 34 paragraph 1 of Act Number 23 of 1999 states explicitly that the banking supervision will be carried out by an independent financial service supervisory institution. Then the Article 34 paragraph 2 of Act Number 23 of 1999 concerning Bank Indonesia stated that the establishment of the supervisory institution will be carried out no later than December 31, 2002. The establishment of the financial services sector supervisory agency (OJK) is not running smoothly even though it has been mandated through the 1999 Act of Bank Indonesia, in fact until 2002 the draft establishment of the OJK does not exist. Further, in 2004 amendments to the Bank Indonesia Act, namely the Law of the Republic of Indonesia Number 3 of 2004 concerning Amendment to Act Number 23 of 2004 concerning Amendment to Act No.23 of 1999 concerning Bank Indonesia, Article 34 mentions;

(1). Banking supervision will be carried out by independent financial service supervisory institutions constituted by law,
(2). The establishment of a supervisory institution as referred to in paragraph (1) will be implemented no later than December 31, 2010.

The Act Number 21 of 2011 concerning the OtoritasJasaKeuangan was ratified and established on November 22, 2011, the juridical foundation of the establishment of the OtoritasJasaKeuangan as stated in the OJK Law, is based on (the dictum of the OJK Law) Bank Indonesia Act No. 23 of 1999 concerning Bank Indonesia as amended several times by Act Number 6 of 2009 concerning the Establishment of Government Regulation in lieu of Act Number 2 of 2008 concerning the Second Amendment to Act Number 23 of 1999 concerning Bank Indonesia becomes a Law. Therefore, the rise of the OJK Law is expired, regarding the establishment should actually be no later than December 31, 2010 as stipulated in the Act of Bank Indonesia. Thus, based on the provisions of Article 34 of UUBI, as the juridical foundation, the establishment of the OtoritasJasaKeuangan is not appropriate, moreover it does not only supervise the banking institution, but also all financial service sectors in Indonesia.

After the establishment of the OtoritasJasaKeuangan banking supervision is divided into micro prudential under the authority of the OJK and macro prudential under the authority of Bank Indonesia which has no clear limits in the Act of Banking, Bank Indonesia Law and the Act of OtoritasJasaKeuangan. The Act No. 21 of 2011 concerning the OtoritasJasaKeuangan concerning the authority of the OJK to supervise banking sector based on the provisions of article 7 stating that:

> *"Regulation and supervision of institution, health, prudential aspects and bank checks are the scope of micro prudential regulation and supervision which is the duty and authority of the OJK. The scope of macro prudential regulation and supervision, namely regulation and supervision in addition to the matters stipulated in this article, is the duty and authority of Bank Indonesia. In the context of macro prudential regulation and supervision, the OJK helps BI to conduct moral suasion to banks. "*

Regarding macro prudential authority at Bank Indonesia, there found vagueness of norms in the explanation of article 7 above mentioning that *"The scope of macro prudential regulation and supervision is that the regulation and supervision except the matters stipulated in this article belongs to the duty and authority of Bank Indonesia."* There is no clear boundaries (vague norms) related to the macro prudential supervision mentioned above so as to enable overlapping authority. Moreover, the enactment of the OJK law is not accompanied by revising the Bank Indonesia law because it will also simplify the duties and authorities of Bank Indonesia itself.

MochammadMisbachun said that the draft of law which included the National Legislation Program and occupying a priority scale was related to the second amendment to the Law of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia. The agenda for revising UUBI is urgent, considering that its functions and authorities are increasingly inviting polemic after the establishment of the OtoritasJasaKeuangan (Mohammad Misbachun; 2015). According to him specifically, the revision of UUBI also seeks to reinvent the role of BI which tends to be in the gray area and share its role with the OJK which requires synergistic work. Based on the UUBI, the role is not clearly and explicitly stated, as well as referring to the provisions of Article 7 of the OJK Law, it also does not provide strict, clear and detailed limits regarding macro prudential supervision, that may possibly arise overlapping between the implementation of macro prudential supervision policies made by Bank Indonesia and the micro prudential policy made by the OtoritasJasaKeuangan. The goal of macro prudential supervision is to direct and encourage as well as to supervise so that they can contribute to the achievement of macroeconomic targets, both related to public policies to encourage economic growth, stability balance of payments, expansion of employment, monetary stability and efforts to equal income and business opportunities, while the purpose of micro prudential supervision is to make every bank healthy and safe to maintain public trust. It means that, the banks should initially avoid any possible risk that may arise. They should be aware about some risk management, and avoid certain high-risk activities.

Based on the above analysis, inconsistency to the principle of legal certainty is increasingly apparent, and the issuance of the OJK law is not accompanied by revisions to the Banking Law, Sharia Banking Act, Deposit Insurance Corporation Law and Bank Indonesia Law which are intended to divide the clear authority between Bank Indonesia and the OJK to avoid overlapping of authority in supervising the bank.

Conclusion

The principle of legal certainty is contained in the Law of the Republic of Indonesia Number 21 of 2011 concerning the OtoritasJasaKeuangan, but the establishment of the OtoritasJasaKeuanganexceeded the due date as stipulated in Article 34 of the Bank Indonesia Law which becomes the legal basis for its formation providing a deadline for its formation until December 31, 2010 but the OtoritasJasaKeuangan Act was only established on November 22, 2011. In the OJK Law there are also several articles that indicate inconsistency in the principle of legal certainty. The Bank Indonesia Law mandates to form a supervising institution for banking i.e., the Financial Service Authority. In fact, in the implementation, this institution does not only carry out supervision, but also to carry investigation and regulation, thus it has wider authority than the mandate of the law as its juridical basis.

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