



## Reconstruction of regulation of the position of the financial services authority (OJK) as supervisor to improve banking condition based on justice value

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### Abstract

The position of the financial services authority (OJK) as supervisor to improve banking conditions is not yet just because it still has the potential to cause conflicts of interest to certain parties, including inside the government. For this reason, in carrying out their duties and authorities, regulatory agencies and the financial services sector, of course, must be in the right legal corridor that ensures that such independence can be held accountable. This is the basis for the author in writing this paper which is analyzed using empirical juridical research methods to review, see, and analyze the problems that are the object of research, namely the reconstruction of the position of the financial services authority (OJK) as supervisor to improve banking condition.

The results of the study indicate that the weaknesses that arise in the position of the financial services authority (OJK) as supervisor to improve banking conditions are the not yet integrated system of supervision of the capital market sector, The Non-Bank Financial Industry's supervision that is still separated which means that the supervision is not yet integrated. Although supervision is carried out well, on the other hand, it is still not carried out well. Based on this, it is necessary to reconstruct Article 40 paragraph (1) of the OJK Law to become: "The authority of the OJK in terms of bank inspections, so that the completion of all banking supervision is the authority of the OJK. Likewise, in Article 39, reconstruction is carried out so that OJK has the authority to stipulate regulations regarding supervision in the financial services sector without coordinating with BI, coordination is still carried out between OJK and BI, by upholding moral norms so that behavior in this relationship will be commendable".

**Keywords:** financial services authority, banking condition, justice value

### Introduction

The Financial Services (OJK) Authority in carrying out its supervisory and regulatory duties in the financial services sector for legal protection for the public is regulated in Article 28 of Law no. 21 of 2011 concerning the Financial Services Authority, which states that: "*For the protection of consumers and the public, OJK has the authority to take steps to prevent losses for consumers and the public, which include:*

1. *providing information and education to the public on the characteristics of the financial services sector, services, and products.*
2. *ask the Financial Services Institution to stop its activities if the activity has the potential to harm the community.*
3. *other actions deemed necessary and in accordance with the provisions of the legislation in the financial services sector*".

The authority of OJK to deal with companies that make illegal investments in this article is to take steps to prevent losses for the sake of legal protection for the public in the form of consumers and to defend the law. The article is implemented by the Board of Commissioners in charge of Education & Protection in legal protection for the public as consumers of financial services using the Twin Peak Concept, namely preventive and repressive measures in maintaining financial stability through regulation and supervision based on the precautionary principle provided in

article 28 paragraph 1. These preventive measures regulate legal protection for the public with finances as providing information and education to the public on the characteristics, products, and services in the financial services sector, by providing information and educating the public to know the characteristics and products in the financial services sector.

OJK's steps to educate the public on the mandate of Article 28 are by providing education to several regions through the OJK minisite in the field of Education and Protection. which is reasonable in line with the profits of the company's business activities and is smarter in channeling funds to institutional companies that clearly have a supervisory agency's Service Authority permit.

In addition, with the National Financial Strategy, public education can be optimized, the National Strategy was launched simultaneously with Financial Customer Care, these two programs are carried out to reduce public losses due to ignorance. The National Strategy for Financial Literacy Program was created to educate the public to have a high financial knowledge and increase the use of financial products and services. The author is of the opinion that Article 28 paragraphs 2 and 3 are OJK steps at the repressive stage (Widodo, 2018) <sup>[8]</sup>, namely by asking financial service institutions to stop their activities if these activities have the potential to harm the community, and take actions that are deemed necessary, namely in accordance with the author's research discussing illegal

investments, the OJK, the use of this article is a follow-up to public complaints as consumers who are harmed by illegal investment activities, so that companies that make illegal investments can have their business licenses revoked.

This problem is what urges the author to study it further in a research with the main problem as follows:

1. What are the weaknesses that arise in the position of the financial services authority (OJK) as a supervisor to improve banking conditions?
2. How to reconstruct the regulation on the position of the financial services authority (OJK) as a supervisor to improve banking conditions based on the value of justice?

### Method of Research

The research paradigm used in this research is the Constructivism Paradigm, which is a theoretical approach to communication. The research conducted by the author is more aimed at the legal approach and the case approach. The research will be conducted using sociological or empirical legal research methods (Amiruddin & Zainal, 2004). The empirical juridical method in this study reviews and sees and analyzes the problems that become the object of research (Pratama, 2020)<sup>[7]</sup>, which is the Reconstruction Of The Moratory Of The Provision Of Remissions Against Drug Criminal As Additional Punishment In A Justice Value-Based Penal System.

### Research Result and Discussion

#### 1. Weaknesses That Arise In the Position of The Financial Services Authority (OJK) As A Supervisor To Improve Banking Conditions

The establishment of the Financial Services Authority (OJK) in Indonesia has been regulated in a Law of the Republic of Indonesia Number 21 of 2011 concerning the Financial Services Authority which was promulgated on November 22, 2011. The regulation states that the definition of the Financial Services Authority is an independent institution in carrying out its duties and authorities, free from interference from other parties, except for matters that are expressly regulated in this OJK Law.

OJK was formed with the aim that all activities in the financial services sector can be carried out in an orderly, fair, transparent, and accountable manner, to be able to realize a financial system that grows in a sustainable and stable manner and is able to protect the interests of consumers and the public, which is realized through a regulatory system and integrated supervision of all activities in the financial services sector. OJK carries out the task of regulating and supervising financial service activities in the banking sector, capital market, insurance, pension funds, financing institutions, and other financial service institutions, including conducting supervision, examination, investigation, consumer protection, and other actions against Financial Services Institutions, actors, and/or supporting financial service activities as referred to in the laws and regulations in the financial services sector, including licensing authority to Financial Services Institutions.

The OJK was formed to overcome the weaknesses and lack of supervision in the financial sector in Indonesia, but the actual implementation of the institution to achieve its objectives is the most difficult and a challenge for the State of Indonesia. Another challenge faced by Indonesia is having a high commitment in the process of establishing the

OJK to be able to carry out tasks in greater economies of scope & economies of scale, legal reform, and better politics. However, OJK will also pose a number of risks that will affect the Indonesian economy. The source of OJK's financing, which originally came from the State Budget (APBN) can disrupt the independence of the institution and even be vulnerable to inappropriate political actions so that OJK will be sensitive to the risk of being politicized as well as 'fraud' efforts such as corruption. and collusion that currently occurs in organizations that use state budgets (Widodo, 2019)<sup>[9]</sup>.

The establishment of the OJK gives high hopes to the Indonesian government, the Financial Services Industry community, and even the Indonesian people in general. Expectations of OJK must be handled fairly, namely in terms of the ability to carry out operational executions in accordance with the demands of the community, as well as the ability to become an independent institution that prioritizes best practices of good corporate governance and risk management so that no reputation is tarnished. In this regard, OJK will face reputational risks that can affect public trust and the financial services industry towards it and in the end, may have an impact on the development of the financial industry services sector in Indonesia which it oversees.

The Financial Services Authority (OJK) then had additional work in 2014, after The Bank of Indonesia (BI) gave its authority to oversee the banking sector. The joining of the banking sector will make OJK have the task of regulating and supervising all sectors of the financial services industry. The increasing legal awareness of consumers and the financial services industry will demand services at a more professional level in accordance with new rules set by new independent institutions such as the OJK in Indonesia. Legal risk will arise as a result of the inability of the financial services industry to apply regulatory requirements to their operational systems. So the legal aspect must be a concern for risk management professionals in Indonesia, especially in the financial services industry sector.

As an independent supervisory agency that has just been established and operates in Indonesia, OJK is expected to be able to make the financial services sector operate better. However, as previously explained, the establishment and implementation of the OJK will bring challenges and risks. The government and the people of Indonesia are expected to be able to handle the risks posed by the new independent institution, by reviewing the rule of law and implementing the duties and functions of the OJK as an independent supervisory agency. It is necessary to hold an integrated selection and training process in the operation of OJK so that the institution can be supported by reliable systems and human resources. Human resource training in the financial services industry sector is also needed in order to produce risk management professionals who are able to overcome the risks that arise.

However, this institution is not without blemish because in its journey, this institution still has several weaknesses. Weaknesses that arise in the position of the financial services authority (OJK) in their supervision to improve banking health include the not yet integrated system of supervision of the capital market sector, the Non-Bank Financial Industry (IKNB) with separate supervision so that supervision is not integrated. Although supervision is carried out well, some sectors are not. This has the potential

to have an unfavorable impact on the financial industry as a whole, especially if there is "trouble" in one sector of the financial industry (Christiani, 2021)<sup>[1]</sup>. Therefore, integrated monitoring is needed.

## 2. Reconstruction Of The Regulation On The Position Of The Financial Services Authority (OJK) As A Supervisor To Improve Banking Conditions Based On The Value Of Justice

The Financial Services Authority in carrying out its supervisory and regulatory duties in the financial services sector in terms of legal protection for the public is authorized by Article 28 of Law No. 21 of 2011 concerning the Financial Services Authority, which states that for the protection of consumers and the public, take steps to prevent losses for consumers and the public where the authority enables them to:

- a. provide information and education to the public on the characteristics of financial services sector, services, and products.
- b. ask the Financial Services Institution to stop its activities if the activity has the potential to harm the community.
- c. other actions deemed necessary and in accordance with the provisions.

The author is of the opinion that Article 28 paragraphs 2 & 3 are OJK's steps at the repressive stage, namely by asking financial service institutions to stop their activities if these activities have the potential to harm the community, and take actions that are deemed necessary, namely in accordance with the author's research discussing illegal investments in the OJK. The use of this article is a follow-up to public complaints as consumers who are harmed by illegal investment activities, so that companies that make illegal investments can have their business licenses revoked. The assessment of the soundness of a bank is carried out based on the results of the examination, periodic reports submitted by the bank, and other publicly known information such as the results of an assessment by the authority or other authorized institution. OJK may request information and explanation from the bank in order to obtain the results of the assessment of the condition of the bank in accordance with the actual condition of the bank. The Bank of Indonesia is required to evaluate the soundness of banks in accordance with these steps on a quarterly basis for positions at the end of March, June, September, and December. In order to carry out bank supervision, OJK conducts a quarterly assessment of the condition of banks, for positions at the end of March, June, September, and December (Marwah, 2018)<sup>[2]</sup>.

From the explanation above, it can be said that the Bank condition assessment is carried out every year, whether there is an increase or decrease in the condition. For a bank whose condition continues to improve then it is not a problem, because that is what is expected and that the condition has been maintained well. To assess a bank's condition can be seen from the various assessment that aims to find out whether the bank is in a very healthy, healthy, moderately healthy, less healthy, and unhealthy condition. The predicate of a healthy or moderately healthy or unhealthy level will be lowered to unhealthy if there are things that endanger the bank's continuity. The factors that can abort the condition of the bank, based on the

explanation above, namely:

- a. Internal disputes that are expected to cause difficulties within the bank concerned.
- b. The intervention of parties outside the bank in the management of assistance is included in unfair cooperation which results in one or several offices being independent.
- c. Window Dressing in bank books and reports that can materially affect the financial condition of the bank, resulting in erroneous assessments of the bank
- d. Bank practices inside or doing business outside the books
- e. Other practices that deviate and can endanger the viability of the bank or reduce the condition of the bank.

Furthermore, Article 4 of the OJK Law explains the purpose of establishing the OJK, namely that all activities in Indonesia in the financial services sector can:

- a. Organized regularly, fairly, transparently, and accountably.
- b. Able to realize a financial system that grows in a sustainable and stable manner.
- c. Able to protect the interests of consumers and society.

Article 5 of the OJK Law states that: "*functions to organize an integrated regulatory and supervisory system for all activities in the financial services sector*". The meaning of implementing an integrated regulatory and supervisory system is believed that the function of the OJK is an integral part of the system of financial service institutions including the banking system, capital market, insurance, pension funds, financing institutions, and other financial service institutions.

According to the provisions of Article 1 paragraph (1) of the OJK Law, it is formulated that, "*Financial Services Authority, hereinafter abbreviated as OJK, is an independent institution and is free from interference from other parties, which has the functions, duties, and authority to regulate, supervise, examine, and investigations as referred to in this law*", and emphasized in Article 2 paragraph (2) stating that "*the Financial Services Authority is an independent institution in carrying out its duties and authorities, free from interference from other parties, except for matters expressly regulated in this Act.*"

Institutionally, OJK is outside the government, which means that OJK is not part of the government's power. However, it is possible that there will be elements of Government representatives because, in essence, OJK is an authority in the financial services sector that has strong relations and linkages with other authorities, in this case, the fiscal and monetary authorities.

According to Law Number 21 of 2011 concerning the Financial Services Authority, in carrying out its duties, the OJK will later be led by a Board of Commissioners which consists of 9 people, a Chair who is concurrently a member; Deputy Chairperson as Chair of the Ethics Committee and concurrently member; Chief Executive of Banking Supervision concurrently member; Chief Executive of the Capital Market Supervisor concurrently member; The Chief Executive of the Superintendent of Insurance, Pension Funds, Financing Institutions, and Other Financial Services Institutions concurrently a member; Chairman of the Audit Board concurrently member; Members in charge of

consumer education and protection; Ex-officio member from the Bank of Indonesia who is a member of the Board of Governors of Bank Indonesia; and Ex-officio Member from the Ministry of Finance who is an echelon I level official at the Ministry of Finance.

As described above regarding the independent nature of OJK and the composition of the OJK Board of Commissioners, the author examines the ambiguity of the meaning of independence in this OJK Law (Sari, 2018)<sup>[6]</sup>.

The ambiguity of the norm occurs in Article 2 paragraph (2) of the OJK Law which states that "*The Financial Services Authority is an independent institution in carrying out its duties and authorities, free from interference from other parties, except for matters that are expressly regulated in this Law*". This independence is a bit questioned where in Article 1 in conjunction with Article 10 of the OJK Law which stipulates that OJK is led by a Board of Commissioners (DK), totaling 9 (nine) people and 2 (two) members of which are Ex-officio from the Ministry of Finance and BI.

Macroeconomic problems such as banks that have a systemic impact that must be rescued can be prevented and handled through the Financial System Stability Coordination Forum (FKSSK) which consists of government elements represented by the Minister of Finance as the Coordinator, Governor of BI, Chairman of the OJK Board of Commissioners and Chairman of LPS. , without having to involve Ex-officio from the Ministry of Finance and BI in the composition of the OJK Board of Commissioners so that the status and position of the OJK institution truly become an independent institution as mandated in Article 34 of the BI Law.

The authority of OJK in bank supervision is in accordance with the provisions of Article 7 of the OJK Law, namely the Regulation and supervision of bank institutions which include: Licensing for bank establishment, the opening of bank offices, articles of association, work plans, ownership, management and human resources, mergers, consolidation and bank acquisitions, as well as revocation of bank business licenses, Bank business activities, including sources of funds, provision of funds, hybridization products, and activities in the service sector, regulation, and supervision of bank soundness which includes:

- a. Liquidity, profitability, solvency, asset quality, minimum capital adequacy ratio, maximum lending limit, loan to deposit ratio, and bank reserves.
- b. Bank reports related to bank health and performance.
- c. Debtor information system.
- d. Credit testing (credit testing).
- e. Bank accounting standards.
- f. Regulation and supervision of prudent banking aspects, which includes: risk management, bank governance, know-your-customer principles and anti-money laundering, prevention of terrorism financing and banking crimes, and bank inspections.

The transfer of duties and authority for banking regulation and supervision from BI to OJK is the granting of government authority by the House of Representatives (DPR) of the Republic of Indonesia together with the President of the Republic of Indonesia to the Supreme Leader of the OJK. So in other words, based on the Law of the Republic of Indonesia Number 21 of 2011 concerning the Financial Services Authority, the Financial Services Authority has the authority to regulate and supervise the

banking sector in Indonesia.

This authority is a new authority granted by the legislator through statutory regulation. So that the authority is obtained by attribution which gives new authority to a new institution called OJK. Attribution authority is original where the authority is directly given to the institution.

Next, Article 7 letter d of Law Number 21 of 2011 mentions the authority of the OJK in terms of bank inspections. However, the provisions of Article 40 paragraph (1) of the OJK Law state that: "*In the event that Bank Indonesia in carrying out its functions, duties, and authorities requires a special examination of a certain bank, they may conduct a direct examination of the bank by submitting prior written notification to the OJK*" which means that BI is given the authority to conduct direct inspections. with permission to the OJK can be said to result in a blurring of norms.

Article 40 paragraph (1) of Law Number 21 of 2011 is the basis for BI to exercise its authority after the enactment of the OJK Law where BI can still carry out direct inspections of certain banks regarding the implementation of their functions, duties, and authorities by submitting written notification to OJK as authorities authorized to conduct bank checks. Elucidation of Article 40 paragraph (1) of Law Number 21 of 2011 also confirms that BI is not entitled to provide a bank soundness level. Article 7 letter d of Law Number 21 of 2011, states that the authority for bank inspection is the authority of the OJK.

Seeing the contradiction of Article 7 letter d with Article 40 paragraph (1), there is a lack of clarity in the formulation and unclear objectives. Therefore, between the articles in Law Number 21 of 2011, there is a conflict where this will lead to confusion. On the one hand, OJK is given the authority to examine banks, while on the one hand, BI is still given the authority to examine these banks even though they have to go through a procedure without the right to determine the status of the bank being examined.

To answer the ambiguity of the norm, in accordance with the explanation of article 7 that regulation and supervision regarding institutions, health, prudential aspects, and bank inspections are the scope of micro-prudential regulation and supervision which are the duties and authorities of the OJK. The scope of macro-prudential regulation and supervision, namely regulation and supervision other than those stipulated in this article, is the duty and authority of BI. In the context of macro-prudential regulation and supervision, OJK assists BI in making moral appeals to the banking system.

The ambiguity of the above norms uses the principle of *lex specialis derogat legi generalis* (Nasution, 2010), which means that the more specialized law may replace the more generalized law then the solution is that all banking supervision is under the authority of the OJK as described in Article 7 and its explanation, then Article 7 of the OJK Law constitutes *lex generalis*, but in accordance with the explanation of Article 40 of the OJK Law that BI can perform direct examination of certain banks that are systemically important banks and/or other banks in accordance with BI's authority in the field of macroprudential that article 40 is *lex specialis*.

Therefore, if the substance of supervision is related to the micro-prudential sector, it is the authority of the OJK, while if the substance is related to the macroprudential sector, then BI has the authority. So that OJK and BI can exercise their authority with clear coordination in micro-prudential

supervision by OJK and macro-prudential supervision by BI.

Article 8 letter d of the OJK Law states that OJK has the authority to stipulate regulations regarding supervision in the financial services sector, while Article 39 states that in carrying out its duties, OJK coordinates with BI in making supervisory regulations in the banking sector, including the obligation to fulfill bank minimum capital requirements, an integrated banking information system, policies for receiving funds from abroad, receiving foreign exchange funds and foreign commercial loans, banking products, derivative transactions, other bank business activities, determining bank institutions that are categorized as systemically important banks and other data excluded from the provisions regarding the confidentiality of information.

In the two articles it is clear that there is a confusion of norms where in Article 8 letter d that the OJK has the authority to make all regulations regarding supervision in the financial services sector, both bank, and non-bank, but in Article 39, OJK coordinates with BI in making supervisory regulations in the field of banking financial services.

Good coordination upholds moral norms so that behavior in this relationship will be commendable between the honorary council (DK) of OJK and the BI Board of Governors both inside and outside FKSSK, the moral norm is the main key (Nasution, 2014). In carrying out its duties, for example, as stipulated in Article 39 of the OJK Law, it is mandated that OJK coordinate with BI in making supervisory regulations in the banking sector, among others:

- a. bank's minimum capital requirement.
- b. integrated banking information system.
- c. policies for receiving funds from abroad, receiving foreign exchange funds, and foreign commercial loans.
- d. banking products, derivative transactions, other bank business activities.
- e. determination of bank institutions that are categorized as systemically important banks.
- f. other data that are excluded from the provisions on confidentiality of information.

BI may conduct a direct examination of the bank by submitting a written notification in advance to the OJK. Furthermore, OJK informs LPS about troubled banks that are in the process of restructuring by OJK. In the event that the OJK indicates that a particular bank is experiencing liquidity difficulties and/or the health condition is deteriorating, the OJK will immediately inform BI to take steps in accordance with BI's authority. Likewise, the OJK can carry out inspections of banks related to their functions, duties, and authorities, as well as coordinate with the OJK in advance.

The coordinating relationship between BI and OJK, including LPS in determining bank assessments and conducting restructuring of troubled banks that are being investigated, is stipulated in Article 43 of the OJK Law, that BI, OJK, and LPS are required to build and maintain an integrated information exchange facility. Based on the provisions of Article 43 of the OJK Law, it is clearly stated that these three institutions have the obligation to coordinate and cooperate in an integrated manner.

Integrated exchange of information means that the supervisory system built by OJK, BI, and the Deposit Insurance Agency (LPS) is connected to each other so that

each institution can exchange information and access banking information needed at any time (Palilati, 2017) <sup>[5]</sup>. The information includes general and specific information about banks, bank financial statements, reports on bank inspection results conducted by BI, LPS, or by the OJK, and other information while maintaining and considering the confidentiality of information in accordance with the provisions of laws and regulations.

The coordination relationship between OJK and BI is also stipulated in the Coordination Protocol as stipulated in Article 44, Article 45, and Article 46 of the OJK Law. This Coordination Protocol act as a forum to bring together the Ministry of Finance, BI, OJK, and LPS in a coordination forum called the Financial System Stability Coordination Forum (FKSSK). Coordination in this forum is carried out if it is not possible to handle banking problems by OJK related to the settlement and handling of a failed bank which is suspected to have a systemic impact.

As the authority of BI to carry out the task of regulating and supervising banks, especially in Article 24, Article 25, Article 26, Article 27, Article 28, Article 29, Article 29, Article 30, Article 31, Article 32, and Article 33 of Law Number 23 of 1999 Regarding Bank Indonesia, OJK also has the authority to regulate and supervise banks in Article 6, Article 7, Article 8 and Article 9 of the OJK Law.

Therefore, it is feared that there could be a dualism in banking supervision in Indonesia so that to solve this problem, the *lex posteriori derogat legi priori* principle can be used, which means that new laws and regulations set aside the old laws and regulations so that when there is a concern for dualism supervision occurs between the OJK Law faced with the BI Law, it can be resolved based on the principle of *lex posteriori derogat legi priori*, the OJK Law must be used because the Act is a new regulation, so banking supervision is the authority of the OJK.

## Conclusion

1. Weaknesses that arise in the position of the financial services authority (OJK) as supervisor to improve banking conditions are the not yet integrated system of supervision of the capital market sector, as the Non-Bank Financial Industry's supervision is still separate. Although supervision is carried out well, on the other hand, some sectors are still not carried out well. This has the potential to have an unfavorable impact on the financial industry as a whole, especially if there is "trouble" in one sector in the financial industry. Therefore, integrated monitoring is needed.
2. Reconstruction of regulations on the position of the financial services authority (OJK) as supervisor to improve banking conditions based on the value of justice can be done by changing the provisions of Article 40 paragraph (1) of the OJK Law to: "The authority of the OJK in terms of bank inspections so that the completion of all banking supervision is the authority of the OJK. Likewise, in Article 39, reconstruction is carried out that the OJK has the authority to stipulate regulations regarding supervision in the financial services sector without coordinating with Bank of Indonesia (BI), coordination is still carried out between OJK and BI, by upholding moral norms so that behavior in this relationship will be commendable between the Ethical Board (DK) of OJK and the Governor of BI both inside and outside the FKSSK.

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