



Missing the Essence of Consent in Personal Guarantees in Online Loan Practices

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Abstract

Related to the problem of online loans that no longer heed the approval of third parties in appointing someone as a guarantor of the debtor's debt. Then the novelty will be offered as a solution to the existing problems by using a research method in the form of normative juridical which of course will be guided by the applicable laws and regulations related to the problems that arise and other legal materials that are still relevant. In the economic sector, especially in non-bank financial institutions that provide online loan services, also use the internet as the main media. Seeing the facts that occur, namely regarding the rise of online loans as a creditor who makes a third party a guarantor of the debtor, outside the knowledge and without the consent of someone who becomes a third party, makes the public question how the government, especially those related to the financial sector, handles these cases. Especially for the Financial Services Authority (OJK), which has the authority and duty to supervise various non-bank financial institutions that have been regulated to be outside the authority of Bank Indonesia to supervise them. Because of these complicated problems, researchers are interested in researching further.

Keywords: Civil Law, personal guarantee; approval; online loan.

Introduction

The industrial era 4.0 brings people around the world to a much more advanced direction. The developments that occur in the current era are very rapid. These rapid developments do not only occur in the industrial, technological and economic sectors. However, the developments that occur today also require



humans to be able to follow them in order to maintain their existence in life, so that the revolution of human resources to be able to develop following the flow of this all-advanced era is very influential on which direction the development takes place. Will it lead to developments that bring better impacts or bring worse impacts than before. However, of course, the rapid development cannot be denied that it has a bad impact that will always coexist with the good impact. At least the bad impacts can be mitigated and reduced by human efforts in dealing with them.

The development and progress that occur, between one sector and another sector will always be related, such as the developments that occur in the technology sector which are then related to developments that occur in the economic sector. With the rapid progress in the technology sector, all sectors are also required to be fast in making developments, especially the economic sector because the economic sector is a sector that is a major benchmark used to determine the extent to which a country's development follows developments that occur worldwide, so that when a technology progresses, the economic sector will also feel its progress which has an impact on the health of the economic system.

The progress that has been made in the economic sector, driven by technological advances, cannot be ignored.¹ Economic progress in the current era must be accompanied by legal reform, which is then appropriate and suitable to reduce the risk of an undesirable event, which is carried out by irresponsible individuals because if this is allowed to happen, there will be an imbalance in a system which will have a bad impact on the economy of a country so that good collaboration is needed between one sector and another, especially those that are closely related to the development of a country. Talking about the economic sector, of course, will always be related to the development of a country's development, as stipulated in the national development program for the 2004-2009 period, the main

¹ Ratna Hartanto and Juliyani Purnama Ramli, Hubungan Hukum Para Pihak Dalam Peer To Peer Lending. *Jurnal Hukum Ius Quia Iustum*. 25.2 (2018)
<<https://doi.org/10.20885/iustum.vol25.iss2.art6>>.



objective of a development program is to develop the country's economy. National development is to improve the welfare of the Indonesian people so that a healthy economy becomes the benchmark for the main goal of national development.²

The progress that occurs in the current era has a huge impact on human life, as is the case in the technology sector. Advances in the technology sector have made many human activities much easier than before. Currently, many human activities can be done virtually or digitally. Of course, these activities are carried out in a much easier, practical, and flexible way compared to the conventional or old ways that have been used so far. In the national development of a country, of course, it will always be related to funding, both those that enter the country as capital for the rotation of the economy, as well as funds channeled to the community to boost the economy in the community. Because of this, financial institutions, both in the form of banks and non-bank financial institutions, which have the function of providing a source of financing used for national development, must be able to ensure that later in the process of channeling funds provided for development in accordance with what has been determined by the laws and regulations governing it so that it is expected that the funding carried out for national development becomes a real source of financing.

To support daily life and carry out every activity, humans certainly need funds or money. The funds or money are used by them to meet their needs, as in nature, humans have life needs that must be met for their survival. Human needs in the form of primary needs are needs that must be met because without the fulfillment of primary needs, human life cannot go well. In contrast to secondary needs. Without the fulfillment of secondary needs, human life can still run well even though it is still less balanced. Secondary needs are met to support the fulfillment of primary needs, and human life can run well if the fulfillment of these two needs can be met in balance. To fulfill these two basic human needs, of course, requires funds or money. Sources of funds that can be used by humans can also be sourced

² Made Warka, *Penanaman Modal Dan Pasar Modal* (Surabaya: R.A.De.Rozarie, 2019)



or obtained through financing or what is called a loan.

Financing or loans that can be given to the public come from financial institutions, both in the form of banks and non-bank financial institutions, which of course can provide financing or loan facilities with or without collateral or collateral.³ In practice, collateral or collateral that can be used to guarantee a debtor's debt to creditors can be in the form of material security and personal guarantee. There are 2 (two) types of material collateral that can be used as collateral, namely immovable objects and moving objects. Immovable objects such as land and buildings which can then be burdened with mortgage rights and which include movable objects such as motorbikes, cars, jewelry, and many more which can then be burdened with pawn, fiduciary, and mortgage.

The developments and advances that occur in the technology sector, then directly also have an impact on advances in the banking sector. One of them is in the form of lending and borrowing service facilities provided by non-bank financial institutions that can be done only virtually without any meeting between the lender and the loan applicant.

RESEARCH METHOD

The research method in this writing is normative juridical research method, which is a method of library legal research conducted by examining library materials or secondary materials. The research specifications are descriptive analysis, by describing various legal problems that occur, along with facts and other symptoms related to criminal acts against auction goods transactions and legal methods or related regulations, which then the data or materials are systematically analyzed to obtain conclusions.

1. Research Phase and Research Materials

This research is divided into library research stages, and field research stages.

³ Tika Purnami and others, 'Perlindungan Hukum Bagi Debitur Dalam Pinjaman Online Berbasis Peer ToPeer Lending', *Jurnal Kertha Wicara*, 9.12 (2020) <<https://doi.org/KW.2020.v09.i12.p06>>.

- a. Literature Research (library research), namely collecting secondary data which includes:
 - 1) Primary materials, in the form of laws and regulations and court decisions, among others:
 - 2) Secondary legal materials, namely materials that are closely related to primary legal materials and can help analyze primary legal materials, such as scientific works and writings of experts.
 - 3) Tertiary legal materials, namely materials that can support and explain primary legal materials and tertiary legal materials, such as dictionaries, internet, magazines or newspapers.
- b. Field research, namely by conducting field research to collect and obtain data to support secondary data.

1. Data Analysis

The method of analysis in this thesis uses qualitative juridical analysis, namely legislation that does not contradict each other, pays attention to the hierarchy of law and looks for living law. Juridical application because it departs from existing regulations as positive law.⁴ Meanwhile, in qualitative analysis used because this research is to describe the results of research findings qualitatively based on information from data sources without using mathematical formulas or numbers.

Discussion

Application of the Consensualism Principle in Debt Guarantee Agreement

As stipulated in the KUHP, the birth of an obligation can be due to an agreement or can also be due to the law. Then an obligation born due to an agreement is one part of a legal event, where in a legal event a person promises to another person and at the same time binds himself to an obligation made and agreed

⁴ Sudikno Mertokusumo, 1996, *Penemuan Hukum (Sebuah Pengantar)*, Liberty, Yogyakarta, hal. 57-58.



upon.⁵ The agreement that has been made and agreed upon by both parties includes a will which is then poured into an ability or a promise that must be kept or obeyed by both parties. Starting from the will desired by the parties, it is then realized into an agreement, where the agreement will have a binding nature between the parties.

Article 1320 of KUHPer has clearly regulated the legal requirements of an agreement so that this article becomes the benchmark in determining that an agreement can be said to be valid or not.

that an agreement can be said to be valid or not. In determining that an agreement can be said to be a valid agreement, the first is that the agreement must be based on an agreement or agreement between the parties to the agreement to bind themselves to the agreement. Then an agreement can be said to be a valid agreement if the parties entering into the agreement are legally capable by referring to the provisions stipulated in the laws and regulations. The agreement is also said to be valid if in the agreement there is an object that is promised, so then the object must be a halal object. So that if an agreement does not meet the first provision, namely related to the agreement and the capacity of the parties or in this case is related to the subjective requirements in making the agreement, then an agreement can be canceled. Meanwhile, related to the existence of an object which is then also by a lawful cause or in this case is referred to as an objective requirement, then an agreement will be null and void if it does not meet these conditions.

In the concept of an agreement, there are several principles that must be implemented when entering into an agreement. One of the principles attached to an agreement concept is the principle of consensualism or what can also be called the principle of consensualism. This principle regulates that an agreement can be said to have been born when there is an agreement. So that an agreement can be born

⁵ Endi Suhadi and Ahmad Arif Fadilah, 'Penyelesaian Ganti Rugi Akibat Wanprestasi Perjanjian Jual Beli Online Dikaitkan Dengan Pasal 19 Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen', *Jurnal Inovasi Pendidikan*, 2.7 (2021).



even though it has not been implemented at that time. This can also mean that when an agreement has been reached, rights will also be born followed by obligations for the parties. This principle only applies to some types of agreements, namely consensual agreements. As for agreements with formal and real types. This consensualism principle cannot be applied. This principle also contains the will of the parties entering into an agreement to bind themselves and to be able to create a trust or confidence or what is referred to as *vetrouwen* between one party and the other that they will fulfill what has been stated in the agreed agreement. The word *se*.⁶ However, on the contrary, the creditor and the debtor cannot make someone as an insurer or guarantor of a debt and credit without notice, especially without the agreement or consent of the third party who will be used as an insurer or guarantor. With the provision that to enter into a responsibility agreement requires an agreement or consent from a third party who will be used as a guarantor or insurer for a receivable, then here will apply the principle of consensualism inherent in the law of the agreement. Without an agreement and consent from a third party to serve as a guarantor of the debtor's debt, both the creditor and the debtor. It turns out that when the application was first opened, Sasa was asked to agree to the online loan service application accessing the camera, location, and including one of the contacts on her cellphone. This then allowed the online lender to access all the contact numbers stored in Sasa's cellphone, including Andi's number, which was randomly selected from the list of contact numbers on Andi's cellphone by the online lender to collect Sasa's debt when Sasa was late in making payments on her debt.

Conclusion

The case of an online loan that establishes a third party as a guarantor or insurer of a debtor's receivable without the knowledge or agreement or consent of the third party

⁶ Siti Nurwulan and Hendrik Fasco Siregar, 'Asas Konsensualisme Dalam Penambahan Klausula Kontrak Berdasarkan Prinsip Itikad Baik', *Prosiding Seminar Nasional Enhancing Innovations for Sustainable Development : Dissemination of Unpam's Reserarch Result*, 1.1 (2019).

is a deviation from the provisions stipulated in the laws and regulations regarding the responsibility agreement which essentially regulates that both the online loan creditor and the debtor cannot make someone a guarantor or insurer of a debt that occurs between the creditor and the debtor without the consent of the third party, but on the contrary, someone can propose himself as a guarantor or insurer of a debt owed by the debtor to the creditor.

As a guarantor or insurer for debts incurred between creditors and debtors without the consent of a third party, but vice versa, a person can propose himself as a guarantor or insurer for a debt owed by the debtor to the creditor without the knowledge of the debtor, which then still refers to the provisions that have been determined. Thus it can be seen that the principle of consensualism in the law of agreements which stipulates that there must first be an agreement for the birth of an agreement, if in the practice of online loans the creditor makes a third party a guarantor or insurer without obtaining the consent of the third party or the absence of an agreement with the third party, the creditor cannot make someone a guarantor or insurer of the debtor's debt and someone who is used as a guarantor without himself agreeing to this, can refuse to be collected for the debtor's achievements that cannot be fulfilled or when the debtor commits an at of default.

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