

# **Role of the Financial Service Authority of the Republic of Indonesia in Determining Financial Technology Crime as *Bijzondere Toestanden***

## **Jarot Jati Bagus Suseno**

Faculty of Law, Universitas Prima Indonesia, Medan, Indonesia

Email: [jarotjati21@gmail.com](mailto:jarotjati21@gmail.com)

## **Tutut Ferdiana Mahita Paksi**

Jimly School of Law and Government Surabaya, Indonesia

Email: [tututferdiana@gmail.com](mailto:tututferdiana@gmail.com)

## **Yusriando**

Faculty of Law, Universitas Prima Indonesia, Medan, Indonesia

Email: [yusriando@unprimdn.ac.id](mailto:yusriando@unprimdn.ac.id)

## **Abstract:**

Changes in civilization through information technology have also brought changes to the world of financial administration, including fund lending institutions. The change is demonstrated by the presence of financial technology (fintech). The progress of the digital financial world, including fintech institutions in the country, needs to be balanced with adequate legal policies regarding implementing online lending by fintech. This has given rise to various problems, including criminal matters through fraud and threats from fintech institutions and online loans. Regarding this, the Financial Services Authority of the Republic of Indonesia (OJK), the authorized institution for handling fintech issues that lead to criminal matters, is not yet optimal. This doctrinal method article aims to discuss topics related to the urgency of the role of the Financial Services Authority in handling fintech crimes. Based on existing studies, the OJK, the party responsible for fintech criminal matters, has been unable to supervise and protect fintech users. This is the basis for the need to create a formulation regarding supervision and action through criminal law, specifically against fintech institutions that are

illegal and commit actual unlawful acts, where the law enforcement agency is the OJK, which partners with law enforcement agencies in the context of state primary constitutional organs and enforcement agencies which has the status of a state auxiliary organ.

Perubahan peradaban melalui teknologi informasi juga telah membawa perubahan pada dunia administrasi keuangan, termasuk lembaga peminjaman dana. Perubahan tersebut ditunjukkan dengan hadirnya *financial technology* (Fintech). Kemajuan dunia keuangan digital, termasuk institusi fintech di Tanah Air, perlu diimbangi dengan kebijakan hukum yang memadai terkait penerapan pinjaman online oleh fintech. Hal ini menimbulkan berbagai masalah, termasuk masalah kriminal melalui penipuan dan ancaman dari lembaga fintech dan pinjaman online. Terkait hal ini, Otoritas Jasa Keuangan (OJK), lembaga berwenang penanganan isu fintech yang mengarah pada masalah pidana, belum optimal. Artikel metode doktrinal ini bertujuan untuk membahas topik-topik terkait urgensi peran Otoritas Jasa Keuangan dalam penanganan kejahatan fintech. Berdasarkan kajian yang ada, OJK, pihak yang bertanggung jawab atas masalah pidana fintech, tidak mampu mengawasi dan melindungi pengguna fintech. Hal ini menjadi dasar perlunya dibuat rumusan mengenai pengawasan dan penindakan melalui hukum pidana, khususnya terhadap lembaga fintech yang ilegal dan melakukan perbuatan melawan hukum yang sebenarnya, dimana lembaga penegak hukumnya adalah OJK, yang bermitra dengan lembaga penegak hukum dalam konteks organ konstitusional primer negara dan lembaga penegak hukum yang berstatus sebagai organ pembantu negara.

**Keywords:** *Bijzondere Toestanden; Financial Technology; Financial Services Authority; Crime.*

## **Introduction**

Advances in information and communication technology and the increasing need of society for lending institutions to support economic needs have quickly given rise to various kinds of breakthroughs in providing digital-based financial services institutions. One of them is the existence of a financial technology institution called fintech. Financial technology is concerned with building systems that model, value, and process financial products represented by price, time, and credit dimensions. Like commercial systems, financial systems incorporate trading systems and trading technology to enable the buying and selling products at

different times and in various market spaces.<sup>1</sup> Referring to the definition above, fintech is a business activity in the financial services sector designed around information technology so that consumers can widely trade financial products without time and space limitations. Fintech has become an alternative public financing because its service is quickly and practically accessed.

In Indonesia, fintech is a financial services institution in the form of a start-up. The financial service products offered include crowdfunding, microfinancing, peer-to-peer lending, market comparison, and digital payment systems.<sup>2</sup> As a financial services institution, fintech is an institution that operates in the financial services sector, where fintech has products in the form of providing financial services with creative ideas and technological innovation, as well as payment activity modes, money transfers, fund intermediation, and investments that orient towards technology information and communication progress.<sup>3</sup>

Among fintech product services, peer-to-peer (P2P lending) is the most popular product used by most Indonesians. P2P Lending is a financial service that connects lenders and loan receivers to form a loan and borrowing arrangement in rupiah directly over the Internet.<sup>4</sup> According to data, 44% of Indonesians used P2P lending as the dominant financial product, followed by the digital financial innovation category 24%, digital payments 17%, and crowdfunding services 1%.<sup>5</sup> We can conclude that P2P lending meets the Indonesians' need to support their financial condition, especially for middle-low income families during the Covid-19 pandemic.<sup>6</sup>

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<sup>1</sup>Roy S. Freedman at Dona Budi Kharisma, *Problematika Mekanisme Penyelesaian Pinjaman Gagal Bayar pada Pinjaman Online di Indonesia*, Jurnal Rechtsvinding, April, 2020, p.1.

<sup>2</sup>Financial Services Authority, *Yuk Mengenal Fintech! Keuangan Digital yang Tengah Naik Daun*, retrieved from *Yuk mengenal FinTech! Keuangan Digital Yang Tengah Naik Daun* :: SIKAPI :: (ojk.go.id) on Feb 12<sup>th</sup>, 2024.

<sup>3</sup>Posma Sariguna Johnson Kennedy, *Tantangan terhadap Ancaman Disruptif dari Financial Technology dan Peran Pemerintah dalam Menyikapinya*, Jurnal Forum Keuangan dan Bisnis Indonesia (FKBI), Vol. VI, 2017, p. 172.

<sup>4</sup>Services Authority, *Financial Services Authority Regulation Number 77/PJOK.01/2016 on Information Technology Based Lending Services*.

<sup>5</sup>Syaiful Ali, Billy Simboh, and Ulfa Rahmawati, *Determining Factors of Peer to Peer (P2P) Lending Avoidance: Empirical Evidence from Indonesia*, Gadjah Mada International Journal of Business, Vol.25, No. 1, 2023, p. 2.

<sup>6</sup>Siti Nasikhatuddini, *Perlindungan Hukum Pidana terhadap Nasabah dalam Pelaksanaan Pinjam Meminjam Uang Berbasis Teknologi Informasi (Fintech) Peer to Peer Lending*, Lex Renaissance, Vol.6, No.3, 2021, p. 440.

Apart from that, juridically, Article 1 Number 6 of Financial Services Authority Regulation No. 77/PJOK.01/2016 on Information Technology Based Lending and Borrowing Services (PJOK No.77/PJOK.01/2016) explains that what is meant by P2P lending is:

Information Technology Money Lending and Borrowing Services Provider, the Operator, is an Indonesian legal entity that provides, manages, and operates Information Technology Money Lending and Borrowing Services.

POJK Provisions No. 77/POJK.01/2016 on Information Technology Based Lending and Borrowing Services was updated with the Republic of Indonesia Financial Services Authority Regulation Number 10 /POJK.05/2022 on Information Technology Based Joint Funding Services (POJK No. 10 /POJK.05/2022). Article 116 POJK No. 10 /POJK.05/2022 states that:

Information Technology Based Money Lending and Borrowing Services, referred to in Financial Services Authority Regulation Number 77/POJK.01/2016 concerning Information Technology Based Money Lending and Borrowing Services, are declared as LPBBTI based on this Financial Services Authority Regulation.

Furthermore, PJOK No.77/POJK.01/2016 has been revoked and amended by Financial Services Authority Regulation Number 10/PJOK.05/2022 concerning Information Technology-Based Joint Funding Services (PJOK No.10/PJOK.05/2022). What is meant by Information Technology-Based Joint Funding Services or LPBBTI according to Article 1 paragraph (1) POJK No. 10 /POJK.05/2022 is the provision of financial services to bring together funders and recipients of funds in carrying out conventional funding or based on sharia principles directly through an electronic system using the internet.

The implementation of information technology-based funding in everyday life is carried out by fintech institutions in the online lending sector (*Pinjol*). The implementation of online lending in its development is not without risks, considering that until now, the existence of P2P lending has only been regulated in PJOK No.10/PJOK.05/2022. In several literatures, the risks of using P2P lending include fault risk and operational risk. It means the risk of default on the loans will be increased because P2P loans do not require collateral.<sup>7</sup> On the other hand,

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<sup>7</sup>Syaiful Ali, Billy Simboh, and Ulfa Rahmawati, *Determining Factors of Peer..* p. 4.

operational risk means when the platform loses money once the nonperforming loans rise above guaranteed income.<sup>8</sup>

Apart from technical risks, there are also violations often found in implementing P2P lending, which lead to criminal acts such as extortion, threats of collection, breaches of personal data and privacy, and insults.<sup>9</sup> These crimes do not include cases of sexual harassment via electronic media, fraud, and defamation.<sup>10</sup> This case is similar to what happened to YI, who borrowed one million rupiah to send her child to school at a financial technology-based money lending service institution that YI obtained through Google Playstore. The administrative requirements are only to send a photo of your KTP and biodata. In the development, after one week, the interest and unexplained fees were considerable, and YI had to pay them; this situation made YI make a new loan totaling IDR 4,000,000.00 (Four million rupiah). This made loan interest increasingly uncontrollable, so YI's debt of four million rupiahs had to be repaid by thirty million rupiahs. This is not true, considering that the principal loan amount and the burden that must be repaid do not match. This situation became even more complicated with various threats and photos of YI being distributed with the rumor that YI was a commercial sex worker. This is the spread of false information that can harm a consumer of financial technology.<sup>11</sup>

The case that happened to YI also happened to other P2P lending borrowers. Threats and defamation are methods commonly used by P2P lending to collect loan funds borrowed by borrowers. According to a report from the Directorate of Special Economic Crimes, Indonesian Police Crime Investigation Agency, there were at least 371 reports related to illegal P2P lending in 2021. Of the 371 reports received, 91 cases have been processed, nine are under investigation at the prosecutor's office, and eight have undergone trial. Of the reports received, most were reported on charges of criminal acts of threats and defamation.<sup>12</sup> Furthermore, citing data

<sup>8</sup>Syaiful Ali, Billy Simboh, and Ulfa Rahmawati, *Determining Factors of Peer..* p. 4.

<sup>9</sup>Setiyo Utomo, Alfian Alfian, and Lisa Aprilia, *Penegakan Hukum terhadap Aktivitas Pinjaman Online*, Jurnal Credo, Vol.4, No.2, 2022, p. 78-80.

<sup>10</sup>Siti Nasikhatuddini, *Perlindungan Hukum Pidana...* p. 446.

<sup>11</sup>Tribun Timur, *Kronologi Nasabah Pinjaman Online Rp 1 Juta, Denda Rp 30 Juta Sebulan hingga Fitnah "Rela Digilir"*, Lihat: <https://www.tribunnews.com/regional/2019/07/25/kronologi-nasabah-pinjaman-online-rp-1-juta-denda-rp-30-juta-sebulan-hingga-fitnahrela-digilir>, retrieved at March 12<sup>th</sup>, 2024.

<sup>12</sup>Pusiknas Bareskrim POLRI, *Polri Ungkap Ratusan Laporan Penagih Pinjol Ancam Masyarakat*, retrieved from Polri Ungkap Ratusan Laporan Penagih Pinjol Ancam Masyarakat | Pusiknas Bareskrim Polri at February 12<sup>th</sup>, 2024.

from Katadata, it was recorded that the number of public complaints to the OJK regarding illegal loans in January-May 2023 reached 3,903 complaints. The content of the complaints is dominated by complaints related to threats of disseminating personal data, billing all contacts on the borrower's cell phone, billing by terror or intimidation, and false billing.<sup>13</sup>

This problem occurs due to the absence of criminal regulations for criminals using online or fintech lending methods. In other words, the development of information technology in the financial industry needs to be balanced with legal protection instruments in technology use. Although the criminal acts as mentioned have explicitly been regulated in the Criminal Code (KUHP) and Law Number 11 of 2008 on Electronic Information and Transactions in conjunction with Law Number 1 of 2024 on the Second Amendment to Law Number 11 of 2008 on Information and Electronic Transactions, there needs to be special regulations governing financial technology crimes.

So, an active role is needed from the Financial Services Authority or OJK. The role of the OJK in fintech criminal matters is not yet visible in society. This is proven by increasing P2P lending complaints, especially illegal P2P lending. Referring to the authority of the OJK based on Article 4 of Law Number 21 of 2011 concerning the Financial Services Authority (UU No. 21 of 2011), the OJK was formed with the aim that all activities in the financial services sector: a) carried out in an orderly, fair and transparent manner, and accountable; b) able to realize an economic system that grows sustainably and stably; and c) able to protect the interests of consumers and society. Thus, based on Article 4 of Law no. 21 of 2011, OJK's role is to protect perpetrators or consumers following electronic transactions in the financial services sector. In this context, the OJK also has the authority to protect financial services consumers against criminal acts committed by P2P lenders. Therefore, it is necessary to discuss the role of the OJK in handling fintech crimes as a particular crime (*Bijzondere Toestanden*).

## Method

This research is doctrinal research, where the research carried out is related to the analysis of the norms behind the text of statutory regulations, both juridically

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<sup>13</sup>Cindy Mutia Annur, *Jumlah Aduan Masyarakat Terkait Pinjol Illegal (Januari-Mei 2023)*, retrieved from [Ada 3,9 Ribu Aduan Kasus Pinjol Illegal sejak Awal 2023, Ini Tren Bulanannya \(katadata.co.id\) February, 12<sup>th</sup> 2024.](https://katadata.co.id)

and philosophically.<sup>14</sup> This research included descriptive research used to obtain a complete picture of the legal conditions that apply in a place and what is happening in society.<sup>15</sup> This research was studied by using a statutory regulation approach and a conceptual approach.<sup>16</sup>

This doctrinal research concept is the basis for the choice of theory in this article which consists of criminal law thinking about *Bijzondere Toestanden* and criminal law thinking *Biomijuridika*. The term *bijzondere toestanden* was first introduced by Lemaire in "*Het Wetboek van Strafrecht voor Nederlandsch-Indie*", meaning "Deviations from the Dutch Criminal Code mainly occur when special situations in the Dutch East Indies require this". The meaning of the words "*bijzondere toestanden*" is a specific situation.<sup>17</sup>

*Biomijuridika* is a legal thought from Barda Nawawi Arief that says national criminal law science must refer to and explore divine knowledge as stated in various religious teachings and from verses, signs and examples of God's creation in nature. The science of national criminal law, therefore, is the science of criminal law that comes from God. In a country that believes in God and where justice is carried out "for the sake of justice based on belief in the Almighty God", the development and enforcement of the law must not only be based on "the guidance of the law", but must also be based on "the guidance of God".<sup>18</sup>

## Discussion

### Criminal Construction in Fintech Crime Cases as *Bijzondere Toestanden*

The specific situation according to Lemaire is "*eeft de commissie niet allen gelet op de Europeesche maatschappij, doc hook account gehoden met de Inlandsche samen leving en de daar heersende toestanden.*" This means specific circumstances that not only take into account European society, but also take into account native society and the conditions that apply there, "*bijzondere toestanden*" in Lemaire's explanation is "*de inheemse samenleving en de daar heersende omstandigheden*", or indigenous people and

<sup>14</sup>Sugiono, *Metode Penelitian Kuantitatif, Kualitatif dan R&D*, Bandung: Alfabeta, 2009, p. 29.

<sup>15</sup>Abdulkadir Muhammad, *Hukum dan Penelitian Hukum, 1<sup>st</sup> Edition*, Bandung: PT. Cintra Aditya Bakti, 2004, p.49.

<sup>16</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2010, p.93-94.

<sup>17</sup>J. E. Sahetapy, *Pidana Mati dalam Negara Pancasila*, Bandung: PT Citra Aditya Bakti, 2007, p. 14.

<sup>18</sup>Muhammad Rustamaji, "*Biomijuridika: Pemikiran Ilmu Hukum Pidana Berketuhanan dari Barda Nawawi Arief*", *Undang: Jurnal Hukum*, Vol. 2, No. 1, 2019, p. 199-200.

the conditions that apply there. It means that Lemaire wants to show through his observations regarding the development of criminal law in colonial countries that law does not always deal with the same general conditions as law in the Netherlands. However, there are often legal gap with the state's development of society that generally cannot be determined but is something that Lemaire calls *bijzondere toestanden*.<sup>19</sup>

Fintech crime is a criminal act in the form of fraud or unlawful acts carried out by using information and communication technology facilities related to financial service institutions. This crime is carried out by technology-skilled criminals in cyberspace. It shows that fintech crime is a modern crime that can be carried out with adequate information and communication technology abilities and skills. Apart from that, fintech crimes only can be carried out through digital platforms, so legal enforcement requires a specific (extraordinary) law enforcement method different from law enforcement for conventional general crimes.

A criminal act as intended in a fintech criminal agreement is different from criminal fraud. This is because fintech acts begin with a digital agreement agreed to by the fintech service user, so proving the existence of a criminal act of fraud is not easy. This condition becomes more complicated because fintech law does not regulate fintech crime provisions.

Nowadays, fintech laws and regulations only regulate the imposition of administrative sanctions as stated in Article 41 of PJOK No. 10 /POJK.05/2022. Article 41 regulates the imposition of administrative sanctions on financial service providers who carry out the following activities:

- a. Shares of business operators who are not Indonesian citizens (WNI) and/or Indonesian legal entities or Indonesian citizens and/or Indonesian legal entities together with foreign citizens (WNA) and/or foreign legal entities (Article 3 paragraph (1));
- b. Foreign ownership in the organizer exceeds 85% of the paid-in capital of the organizer (Article 3 paragraph (4));
- c. Sources of funds for capital participation to organizers come from money laundering activities, terrorism funds, funds for the proliferation of weapons of mass destruction, financial crimes, and loans (Article 4 paragraph (3));
- d. The organizer only has 1 (one) Controlling Shareholder (Article 5

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<sup>19</sup>J. E. Sahetapy, *Pidana Mati dalam Negara Pancasila*, p. 14.

- Paragraph (1));
- e. The organizer does not determine the Controlling Shareholder by applicable provisions (Article 5 Paragraph (2));
  - f. The organizer does not report the determination of the Controlling Shareholder or changes thereto (Article 5 Paragraph (4));
  - g. Concurrent position of controlling shareholder in more than one conventional operator or one operator based on sharia principles (Article 6 Paragraph (1));
  - h. The organizer in connection with the actions of the controlling shareholder who: a) directly or indirectly in bad faith uses the organizer for the interests of the controlling shareholder; b) is involved in unlawful acts committed by the organizer; or c) directly or indirectly unlawfully uses the organizer's assets resulting in the organizer's assets being insufficient to fulfil financial obligations (Article 7 Paragraph (1));
  - i. Operators who have obtained a business license from the OJK do not apply for registration as electronic system operators (Article 8 Paragraph (2));
  - j. The organizer carries out funding before being registered as an electronic system operator with the authorized agency (Article 8 Paragraph (4));
  - k. The operator doesn't submit a copy of the certificate of registration as an electronic system operator to the OJK since receiving the certificate of registration as an electronic system operator (Article 8 Paragraph (5));
  - l. The organizer does not provide funding no later than 30 (thirty) calendar days after being registered as an electronic system operator from the authorized agency (Article 8 Paragraph (6));
  - m. Conventional providers who convert to become providers based on Sharia principles without conversion approval from the OJK (Article 10 Paragraph (1));
  - n. The operator does not include a conversion plan in the business plan as intended in the OJK Regulation on Business Plan for Non-Bank Financial Service Institutions (Article 10 Paragraph (3));
  - o. The organizer does not announce conversion plans and the impact of conversion on users through electronic system in the form of websites and/or mobile applications (Article 10 Paragraph (4));
  - p. The organizer does not report the implementation of the GMS which approves the conversion to become an organizer based on Sharia

principles in writing to the OJK (Article 13 Paragraph (1));

- q. The organizer based on Sharia principles of conversion results do not report the implementation of the conversion to the OJK (Article 14 Paragraph (1));

Violations of these articles will be subject to sanctions in the form of written warnings, restrictions on business activities, and/or revocation of permits. The context of the violation of the article in question refers to the technical implementation of financial service providers which tends to be preventive.

Fintech is a civil legal act born as a new legal act with new methods and consequences. The new legal act can be seen from the digital-based financial agreement model (electronic contract), so fintech was born as a response to the increasing economic needs of society. In other words, fintech is a civil law act based on electronic contracts. Specifically, the electronic contract is a credit or debt agreement in electronic form.

Article 1754 of the Indonesian Civil Code (KUHPperdata) regulates credit agreements and explains that lending and borrowing is an agreement in which one party gives another party a certain amount of goods to use, on the condition that the latter party this will return the same amount from the same type and quality. Furthermore, according to Article 1 number 11 of Law Number 10 of 1998 on Banking (Law No. 10 of 1998), credit is the provision of money or bills that can be equated with it, based on an agreement or loan agreement between the bank and another party which requires the borrower to pay off the debt after a certain period with interest. The credit agreement must be factual, which means that the credit agreement depends on the handing over of money by the bank to the customer.<sup>20</sup>

As a factual agreement, a credit agreement is an agreement with standard clauses which has the following conditions: a) its contents are determined unilaterally by a party with a higher economic position; b) the community (the debtor) does not participate at all in determining the credit clauses of the agreement; c) the debtor is forced to agree to the agreement due to economic factors; d) written form of agreement; and e) prepared in advance en masse and collectively.<sup>21</sup> Referring to the definition of a standard agreement according to

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<sup>20</sup>Mariam Darus Badruzaman, *Aneka Hukum Bisnis*, Bandung: Alumni, 2004, p.110-111.

<sup>21</sup>Sutan Remy Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi para Pihak dalam Perjanjian Kredit Bank di Indonesia*, Jakarta: Institut Bankir Indonesia, 1993, p.78. Also read at Wulandani and Tatang Odjo Suardja, *Perjanjian Pinjam Meminjam Berbasis Teknologi (Fintech)*

Article 1 Number 42 of Law Number 4 of 2023 on Development and Strengthening of the Financial Sector (Law No. 4 of 2023), it is clear that a standard agreement is a written agreement including in electronic form which is determined unilaterally by PUSK (Financial Sector Business Actors) and contains standard clauses regarding content, form and method of manufacture, and is used to offer products and/or services to mass consumers. Based on the characteristics and traits of the credit agreement above, we know that the credit agreement in P2P lending is a standard agreement that abandons the principle of balance in contracts because the position of the lender is higher than the borrower. The legal consequence is that regardless of the substance stated in the agreement, the borrower can only agree to the contract without being able to negotiate the contents of the contract.

Apart from that, electronic credit agreements have several weaknesses, such as: a) the form of the agreement is electronic so that the borrower does not have a copy of the agreement; b) the risk of fraud where the debtor defaults by not paying the loan; c) weak in proof because there are no witnesses and the agreement is a private deed;<sup>22</sup> d) providing access to personal contacts on the borrower's cellphone as collateral;<sup>23</sup> e) the clauses in the contract do not contain the complete rights and obligations of the parties, giving rise to new legal problems such as the number of interest costs, loan repayment mechanisms, and loan repayment collection mechanisms.

The weaknesses in electronic credit agreements then encourage criminal offences as a result of electronic credit agreements, especially when collecting loans from borrowers, namely:

- a. The offense of accessing digital transaction user information unlawfully or without permission. This is regulated in Article 32 Paragraphs (1) and (2) of Law No.11 of 2008;
- b. The offense of disseminating personal data of digital transaction users unlawfully or without permission as regulated in Article 27 Paragraphs (1) and (2) of Law No. 1 of 2024 on the Second Amendment to Law No.11

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*Dihubungkan dengan KUHPerdata dan Undang-Undang Informasi dan Transaksi Elektronik, Jurnal Yustitia, p. 204-204.*

<sup>22</sup>Safitri Indriani, *Kedudukan Hukum terhadap Perjanjian Pinjam Meminjam Uang yang Berbasis Online (Fintech) dalam Perspektif Perjanjian Konvensional*, Lex Superior, Vol.1, No.1, 2022,p.31. Also read Istiqamah, *Analisis Pinjaman Online Fintech dalam Kajian Hukum Perdata*, Jurisprudentie Jurnal Ilmiah, Vol.6, No.1, 2019, p.298.

<sup>23</sup>Dewa Ayu Trisna and Ni Ketut Supasti Darmawan at Safitri, p. 34.

- of 2008 on Information and Electronic Transactions (Law No.1 of 2004);
- c. Defamation offence as regulated in Article 27A of Law No.1 of 2024;
- d. The offense of threats via electronic as regulated in Article 27B Paragraph (1) and (2) and Article 29 of Law No.1 of 2024; and
- e. Fraudulent news offenses related to product information, goods, and services in electronic transactions as regulated in Article 28 of Law No.1 of 2024.

These offenses related to electronic crime are regulated in Law No. 11 of 2008 *jo.* Law No.1 of 2024. Electronic crime does not represent the specific characteristic of fintech crime because the fintech crime's scope is wider than the crime mentioned in Law No.11 of 2008 *jo.* Law No.1 of 2024. If we refer to the International Monetary Fund (IMF) literature, financial crimes are defined as those that generally result in financial losses including fraud, electronic crime, money laundering, terrorist financing, bribery and corruption, market abuse, insider dealing, and breaches of information security.<sup>24</sup> The crimes are carried out through fintech transactions such as P2P lending, digital payment, crowdfunding, digital investment, etc. It shows that the government must regulate fintech crime separately from Law No.11 of 2008 and Law No.1 of 2024.

There are at least 5 (five) things that need to be regulated in the fintech crime legal framework, namely: a) customer protection; b) anti-money laundering and counter-financing terrorism; c) risk management; d) data protection and security; and e) individual empowerment.<sup>25</sup> The fintech crime legal frameworks aim to provide consumer protection of digital products and supervise the implementation of electronic transactions.

This legal framework needs to be specifically formulated to accommodate the specific characteristics of fintech crime that emerged starting with electronic contracts. Therefore, to know whether there is a crime, we need to review the agreement clause in the contract. We need to know that consumer approval of the contract can obscure the existence of unlawful acts committed by the organizer. For example, if there is such clause "the borrower agrees to be billed by any method" or

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<sup>24</sup>International Monetary Fund, *Financial System Abuse, Financial Crime and Money Laundering*, Washington D.C: the Monetary and Exchange Affairs and Policy Development and Review Departments IMF, 2001, p.5-6. Also read Jamal Wiwoho, Dona Budi Kharisma, Dwi Tjahja K.Wardhono, *Financial Crime in Digital Payment*, Journal of Central Banking Law and Institutions, Vol.1, No. 1, 2022, p .50.

<sup>25</sup>Wimboh Santoso at Jamal Wiwoho, Dona Budi Kharisma, Dwi Tjahja K.Wardhono, p. 64.

"the borrower is willing to provide access to contacts on a mobile phone as collateral for credit" and other types of unlawful clause in the contract.

The way fintech crimes emerge by electronic contracts is difficult to prove. It is because, when the debtor is experiencing the loss of the service after they sign the digital contract upon their willingness, it would not be considered an unlawful act. Consumer's understanding of digital-based fintech knowledge will be the basis for judgment of whether fintech crimes happened. This may happen because a lot of consumers do not understand digital knowledge, so they may sign the contract under the influence, especially at P2P lending contract. Therefore, we must prove whether there is an under-influenced situation to prove the existence of an unlawful act which can ultimately be drawn into the criminal area, hence a regulatory framework is needed to specifically regulate fintech crimes, especially the object of criminal-based-agreement acts such as P2P lending, digital payments and crowdfunding. Also, fintech-technology-based crimes such as money laundering and terrorism.

### **The Role of Financial Service Authority of Republic of Indonesia in Eradicating Illegal Financial Technology as *Bijzondere Toestanden***

Technology advances have delivered a new approach to the development of financial services forms and methods. It showed by the change in model, where initially most financial companies offered their services door to door or manually by marketing agents, now there are "Financial Technology" companies. That change increases the number of fintech users in the capital and financial services trade sector even though the financial technology legal politics have not yet been made to keep up with the development of the financial service models. As a result, various problems have occurred in the use of financial service institutions due to the lack of consumer protection in cyber-based capital lending.<sup>26</sup>

To anticipate the negative impacts of the rapid growth of the fintech industry, the Financial Service Authority of the Republic of Indonesia (OJK) regulates the technical implementation of fintech by forming a Digital Economic and Financial Innovation Development Team (PIDEK),<sup>27</sup> a Digital Financial

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<sup>26</sup>Ferry Hendro Basuki dan Hartina Husein, *Analisis Swot Financial Technology pada Dunia Perbankan di Kota Ambon (Survei Pada Bank di Kota Ambon)*, Jurnal Manis, Vol. 2, No.1, 2018, p. 65.

<sup>27</sup>Tim Pengembangan Inovasi Digital Ekonomi dan Keuangan bertugas mengkaji dan mempelajari perkembangan fintech dan menyiapkan peraturan serta strategi pengembangannya.

Innovation Group, and the Directorate of Fintech Regulation, Licensing, and Supervision.<sup>28</sup> Apart from that, OJK has also formed a Fintech Advisory Forum, which is a forum for developing the direction of the fintech industry which will facilitate and ensure coordination between institutions related to fintech start-up parties. Besides forming a specific unit to regulate fintech, OJK also has issued PJOK No.77/POJK.01/2016 revoked and amended with PJOK No.10/PJOK.05/2022.

Even though the OJK has established a mechanism for handling fintech, law enforcement in fintech cases has not worked optimally. Based on the OJK annual report in 2019, there were 4,662 complaints related to fintech filed with the OJK.<sup>29</sup> Apart from that, OJK was sued by the online loan victim union to express their protest to OJK in 2018. At that time, a group of online loan victims whose data had been illegally published by the fintech company experienced harassment and threats during collection and experienced fraud because the loan and the amount of debt repayment were not comparable. Through the consolidation carried out by the Indonesian Legal Aid Institute, they felt that OJK is not carrying out obligations and duties as mandated by law. Hence, LBH and the victims filed a lawsuit against OJK.<sup>30</sup> The victims refer to 7,200 reports from the public regarding online loans to LBH Jakarta. Among several reports received, LBH Jakarta noted that there were people who committed suicide because they were in debt. In the lawsuit, LBH highlighted the problems of unverified P2P lending registration mechanisms, loan interest, high administration costs, and collection mechanisms that contain criminal elements.<sup>31</sup>

Apart from the 2019 OJK annual report, data on fintech complaints for 2021-2022 shows 2,855 complaints to the OJK. This complaint is the third highest number of complaints with a percentage of 19.33%, below banking complaints of 50.26% and complaints from financial institutions of 19.43%. Of the total fintech

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Indonesia Financial Service Authority, *Kajian Perlindungan Konsumen Sektor Jasa Keuangan: Perlindungan Konsumen pada Fintech*, Jakarta: Departemen Perlindungan Konsumen, 2017, p.48-49.

<sup>28</sup>Indonesia Financial Service Authority, *Loc.Cit.*

<sup>29</sup>Indonesia Financial Service Authority, *Laporan Kinerja OJK 2019*, Jakarta: Indonesia Financial Service Authority, 2019, p.58.

<sup>30</sup>Tempo, *Korban Pinjaman Online di Indonesia Gugat OJK Karena Data Pribadi Disebarkan*, retrieved from <https://www.tempo.co/abc/3282/korban-pinjaman-online-di-indonesia-gugat-ojk-karena-data-pribadi-disebarkan>, at January 12<sup>th</sup>, 2024.

<sup>31</sup>Tatang Guritno and Dani Prabowo, *LBH Jakarta Terima 7.200 Laporan Masyarakat Terkait Masalah Pinjaman Online*, retrieved from *LBH Jakarta Terima 7.200 Laporan Masyarakat Terkait Masalah Pinjaman "Online"* (kompas.com) at January 12<sup>th</sup>, 2024.

complaints addressed to OJK, complaints related to debt collector behaviour, online loan restructuring, and fraud.<sup>32</sup>

To resolve and deal with illegal fintech cases, OJK forms "*Warung Waspada Pinjol*". *Warung Waspada Pinjol* is a post for public complaints regarding online loans at The Gade Coffee & Gold, Kebon Sirih Street No. 48, Menteng Central Jakarta, which opens every Friday in the second and fourth weeks of every month. The reports received during the consultation revolved around the threat of debt collection, restructuring applications on licensed peer-to-peer lending platforms, the loan received for less than the amount applied for, relatively high fines and loan interest, as well as fake bills (receiving bills even though they did not owe them).<sup>33</sup>

Based on the explanation above, we know that the fintech problem, especially P2P lending, from 2018 to 2023 is at the same point. In other words, the regulatory, supervisory, inspection, and investigation mechanisms carried out by the OJK are not yet able to resolve the fintech legal problems. It is visible that the task of the Financial Services Authority (OJK), namely to regulate and supervise financial services activities in the banking sector, capital markets sector and IKNB sector, has not been realized in general. Meanwhile, OJK specifically supervises the non-bank financial industry, which in the IKNB includes fintech institutions, so OJK's task has not yet shown results, especially in supporting the eradication of illegal fintech.<sup>34</sup>

After the enactment of the Law of the Republic of Indonesia Number 4 of 2023 on Development and Strengthening of the Financial Sector (Law No. 4 of 2023), the OJK is no longer just a supervisory institution for various institutions providing online loans or fintech. Article 1 paragraph (1) of the fourth part regarding the regulation of OJK Law No. 4 of 2023 states that "The Financial Services Authority is an independent state institution that has the functions, duties and authority of regulation, supervision, inspection and investigation as intended in the Law This". Furthermore, Article 48B of Law No. 4 of 2023 then also states that:

(1) The Financial Services Authority has the authority to determine the

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<sup>32</sup>Indonesia Financial Services Authority, *Indonesia Financial Services Authority 2022 Annual Report*, Jakarta: Indonesia Financial Services Authority, 2023, p. 173.

<sup>33</sup>Indonesia Financial Services Authority, *Indonesia Financial Services...* p. 174-175.

<sup>34</sup>Indonesia Financial Services, *Tugas dan Fungsi*, retrieved from <https://ojk.go.id/id/tentang-ojk/pages/tugas-dan-fungsi.aspx>, retrieved at January 23<sup>rd</sup>, 2024.

commencement, non-continuation, or termination of investigations into criminal acts in the financial services sector.

- (2) Before determining the start of the investigation as intended in paragraph (1), the Financial Services Authority investigates alleged criminal acts in the financial services sector.
- (3) At the investigation as intended in paragraph (2), parties suspected of committing criminal acts in the financial services sector may submit an application to the Financial Services Authority for resolution of violations of laws and regulations in the financial services sector.
- (4) The Financial Services Authority assesses requests for resolution of violations as intended in paragraph (3) and calculates the value of losses for violations.
- (5) In assessing requests for settlement of violations and calculating the value of losses due to law-breaking as intended in paragraph (4), the Financial Services Authority considers, at a minimum:
  - a. The existence of a settlement for losses arising from criminal acts;
  - b. Transaction value and/or loss value of law violations; And impact on the financial services sector, LJK, and/or the interest of customers, investors, and/or the community.
- (6) If the Financial Services Authority approves the application for settlement of the violation, the party applying for settlement of the law violation is obliged to carry out the agreement, including the paying compensation.
- (7) If the agreement as intended in paragraph (6) has been completely fulfilled by the party applying resolution of the violation, the Financial Services Authority shall stop the investigation.
- (8) The compensation as intended in paragraph (6), is the right of the loss party and is not income from the Financial Services Authority.
- (9) In addition to compensation, as intended in paragraph (8), the Financial Services Authority has the authority to determine administrative action by imposing administrative sanctions on parties suspected of committing criminal acts in the financial services sector.
- (10) The administrative sanctions as intended in paragraph (9) are:
  - a. Written warnings;
  - b. Restrictions on products and/or services and/or business activities in part or whole;

- c. Dismissal in management;
- d. Administrative fines;
- e. Product and/or service license revocation;
- f. Business license revocation; and/or
- g. Another administrative sanction is based on OJK regulations.

(11) In terms of:

- a. The Financial Services Authority does not approve requests for the settlement of law violations; or
- b. The party who submits a request for resolution of the violation does not fulfill part or all of the agreement as intended in paragraph (6), the Financial Services Authority has the authority to proceed to the investigation stage.

(12) The provisions as intended in paragraph (1) to paragraph (11), are carried out by the characteristics of each financial services sector.

(13) Further provisions regarding procedures for resolving violations and requests for resolution of violations as intended in paragraph (1) to paragraph (11) are regulated in the Financial Services Authority Regulations.

The provisions as intended in Article 1 paragraph (6), Article 48B, and Article 49 of Law No. 4 of 2023 indicate the expansion of the OJK's authority in resolving fintech violations compared with the previous authorities in Article 49 of Law No. 4 of 2023. 21 of 2011, OJK's authority is limited to carrying out investigations together with investigating officers from the Indonesian National Police and civil servant investigators. The expansion of authority in question includes:

- a. OJK has full authority to carry out investigations into criminal cases in the financial services sector together with an investigating officer from the National Police of the Republic of Indonesia, certain civil servant officials, and certain employees based on Article 48B and Article 49 of Law No. 4 of 2023;
- b. The OJK can facilitate the termination of investigations through a request mechanism for resolving violations. A request for violation resolution can be submitted by the alleged financial services provider violator who has committed a fintech violation during the investigation process. If the OJK approves the request based on the assessment as

intended in Article 48B paragraph (5) of Law No. 4 of 2023, both violator and victim must write a resolution agreement. The violator should oblige the resolution agreement including paying compensation to the victim. With the reconciliation results agreed upon, the OJK will stop the investigation; and

- c. OJK is the only one eligible to investigate financial technology crime based on Article 49 Paragraph (5) of Law No.4 of 2023.

Apart from that, an interesting concept in Law No. 4 of 2023 is the concept of reconciliation for financial service providers who commit financial service violations. We should underline that Article 48B of Law No. 4 of 2023 mixes criminal acts and criminal offenses in the financial services sector, giving rise to multiple interpretations. Referring to the concept of criminal acts according to the Indonesian Criminal Code (KUHP), it divides criminal acts into crimes<sup>35</sup> and violations.<sup>36</sup> The difference between crime and criminal offenses lies in the level of impact resulting from the mistakes that affect the severity of the imposition of criminal sanctions. That is where the criminal sanction for crimes is more severe than offences. Hence, there needs to be a classification of types of criminal acts and criminal offences in the financial services sector in Law No. 4 of 2023. Bearing in mind, if we examine it together with Law No. 4 of 2023, it is a financial service omnibus law. So, each of the Laws under Law No.4 of 2023 regulates crime, but none of them regulates fintech crime as a specific crime.

Regulation of criminal acts in the financial services sector is only regulated in Financial Services Authority Regulation No. 16 of 2023 on Investigation of Criminal Acts in the Financial Services Sector (PJOK No. 16 of 2023). Criminal acts in the financial services sector are defined as every criminal act regulated in the law regarding the financial services sector. Those included in the scope of criminal acts in the financial services sector are a) banking; b) capital markets, financial derivatives, and carbon exchanges; c) insurance, guarantees and pension funds; d) financing institutions, venture capital companies, microfinance institutions and other LJKs; e) financial sector technological innovation as well as

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<sup>35</sup>Crime is detrimental behavior or behavior that is contrary to social ties (anti-social) or behavior that is not by community guidelines. Bambang Poernomo, *Orientasi Hukum Acara Pidana*, Yogyakarta: Amarta, p.4. More explanation about crime can be read at Book II Indonesian Criminal Code (KUHP).

<sup>36</sup>Violation is an act that violates the law, name yen event that is in the public interest declared by law to be prohibited. Book II Indonesian Criminal Code (KUHP).

digital financial assets and crypto assets; f) the behaviour of financial services business actors and the implementation of consumer education and protection; and g) others as regulated in financial services sector laws, both conventional and sharia. However, there is still a need for specific regulations regarding the classification of crimes and criminal offences in the financial services sector.

Furthermore, the idea of *biomijuridical* thinking to create regulations for fintech crime as a special criminal act (*Bijzondere Toestanden*) has been accommodated in Article 48B of Law No.4 of 2023 jo. Article 2 PJOK No.16 of 2023. Where fintech crime is included in the category of criminal acts in the financial services sector even though the type is not explicitly explained in Law No.4 of 2023 jo. PJOK No. 16 of 2023. Article 49 of Law No. 4 of 2023 also states that OJK investigators are the only ones with authority to investigate and investigate alleged criminal acts in the financial services sector, so it can be concluded that OJK has full authority over fintech inquiries and investigations of crime.

*Biomijuridika* Barda Nawawi aims to realize a criminal policy by approaching the values of social morality and religion, also realizing Pancasila in the concept of criminal law policy.<sup>37</sup> The OJK's role as a law enforcer in fintech law is not yet visible. The data above show that illegal fintech institutions may harm society has not been handled clearly and well. Such a situation is far from balance or harmony in guaranteeing the protection and fulfilment of basic human rights related to self-protection from threats and protection of legally owned property. So, the minimal role of the OJK in protecting society from criminal acts through fintech has violated the basic concept of legal values according to the *Biomijuridika* approach, which is none other than the value of God as the epicentre in the formation of legal regulations that are capable of justice as intended by Barda Nawawi as the embodiment of the values of the Almighty God in completing legal justice.

## **Conclusion**

According to the passage, we can conclude that, *Firstly*, the increasing public interest in electronic financial transaction services through fintech has implications for the rise in criminal cases resulting from the uses of fintech services. This is caused by the OJK not yet optimally regulating and supervising fintech and the absence of specific regulations governing fintech at a general level, especially regulations related to fintech crime. Fintech crime regulations are needed to protect

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<sup>37</sup>Muhammad Rustamaji, "*Biomijuridika: Pemikiran Ilmu Hukum...*" p. 199-200.

consumers from potential criminal acts committed by financial service providers from illegal fintech due to consumers' weak position. Apart from that, the urgency of drafting a legal framework for fintech crime as *bijzondere toestanden* also refers to the specific nature of fintech crime that arises as a result of electronic financial transaction agreements that are standard in nature, thereby allowing for abuse of circumstances that results in lower consumer bargaining power.

Secondly, the OJK is an independent state institution that has the authority to regulate, supervise, examine, and investigate all financial services activities as regulated in Article 1 of Law No. 21 of 2011. As a follow-up to this authority, the OJK has the authority to carry out inquiries and investigations on alleged criminal acts in the financial services sector, including fintech crime. At the regulatory level, the OJK's role in handling fintech crime has been regulated, however, there is no specific regulation regarding the classification of types of criminal acts in the financial services sector, including the legal framework for fintech crime.

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**Role of the Financial Service Authority of the Republic of Indonesia ...**

Jarot Jati Bagus Suseno, Tutut Ferdiana Mahita Paksi & Yusriando

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