

CONCRETISATION OF THE PRINCIPLE OF SUSTAINABLE FINANCE IN THE BANKING SECTOR LEGISLATION IN INDONESIA: LON FULLER EIGHT DESIDERATA APPROACH

Reka Dewantara
Faculty of Law, Brawijaya University
email: rainerfhub@gmail.com

Bimarceline Agatha
Faculty of Law, Brawijaya University
email: bimarcelline_agatha@yahoo.com

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Abstract

This article aims to explore an issue where Sustainable finance itself is a form of embodiment in Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia that the national economy is organized based on several principles, one of which is sustainable principles by maintaining a balance and unity of the national economy. Thus Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia is a juridical basis of sustainable finance that promotes a sustainable financial system. The research methodology was an integration of empirical juridical research methods and interpretation of the normative method results. The results indicated that with the involvement of banks in implementing sustainable finance, banks must be selective in granting credit to debtors by setting conditions that are following bank policies. Because basically, sustainable finance activities do not harm the community, it creates justice for the community based on the constitutional rights of citizens to get a decent life. In the concept of sustainable finance, economic sustainability includes several criteria in carrying out credit risk analysis, including sustainability of resources, the sustainability of results and sustainability of the business.

Keywords:

Sustainable finance, Banking, Legal Certainty.

Abstrak

Artikel ini bertujuan untuk mengeksplorasi isu hukum dimana asas *sustainable finance* itu sendiri merupakan bentuk konkretisasi dari Pasal 33 ayat (4) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 yang mengatur bahwa ekonomi nasional diselenggarakan berdasarkan beberapa prinsip, salah satunya adalah prinsip berkelanjutan dengan menjaga keseimbangan dan kesatuan ekonomi nasional. Dengan demikian Pasal 33 ayat (4) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 merupakan dasar asas *sustainable finance* yang mempromosikan sistem keuangan berkelanjutan. Metode penelitian yang digunakan adalah metode penelitian yuridis normatif dengan teknik analisis interpretasi. Hasil penelitian menunjukkan bahwa dengan keterlibatan bank dalam menerapkan *sustainable finance*, bank harus selektif dalam memberikan kredit kepada debitur dengan menetapkan kondisi yang sesuai dengan kebijakan bank dalam menjaga keberlanjutan lingkungan (*green credit*). Karena pada dasarnya kegiatan yang berdasarkan *sustainable finance* tidak membahayakan hak-hak masyarakat namun justru menciptakan keadilan bagi masyarakat berdasarkan pada hak-hak konstitusional warga negara untuk mendapatkan kehidupan yang layak. Dalam konsep *sustainable finance*, keberlanjutan ekonomi mencakup beberapa kriteria dalam melakukan analisis risiko kredit, termasuk keberlanjutan sumber daya, keberlanjutan hasil, dan keberlanjutan bisnis.

Kata Kunci:

sustainable finance, bank, kepastian hukum.

Introduction

The involvement of banks in running sustainable finance is certainly positive competitiveness for a bank in increasing its green portfolio, namely environmentally friendly funding, one example is organic farming. Besides, it creates added value for the bank, enhances its reputation, improves the quality of existing management risks. So sustainable finance must be seen as an opportunity for environmentally friendly business activities, not losses and realize the sustainability of results and business. With the economic foundation, the implementation of sustainable finance does not burden the parties and the community. Indonesia is piloting an integrated approach because they believe that banking is limited and financial deepening is necessary to develop sustainable finance. For example, banks, especially commercial banks, tend to finance short-term loans. Therefore, Indonesia plans to create more financial instruments, such as green bonds or sukuk (Islamic bonds) for long-term green investment¹.

Sociologically, it describes the reality of society which includes the existence of a legal need in society, the condition of society and values that have lived and developed (a sense of community justice). Which consists of facts which are a demand for the needs of the community that encourage the need for sustainable finance. Of course, sustainable finance is formed to answer the problem solving that occurs, which is related to human relations in the community where one interacts not only with each other but also with the environment. Sustainable finance for banks includes sustainability criteria that facilitate citizens in the context of social and cultural integration. Besides, Indonesia is a country rich in abundant natural resources, both natural resources from the agricultural, livestock, forestry, plantation, mining, energy sources, and fisheries sectors. But it is no stranger to the problems of injustice that occur in society. Environmental pollution and environmental degradation by companies whose presence has received protests from the public demands justice. The company certainly gets the flow of loan funds

¹ Sustainable Finance Case Study: Indonesia, <https://www.ifc.org/wps/wcm/connect/20ff87c3-e8d8-4c6e-8f83-40cae86f5d93/SF+Case+Study+-+Indonesia+July+7+.pdf?MOD=AJPERES&CVID=IVXUH14> accessed 12 November 2019.

from banks as the capital of the company's activities. So that causes people to lose natural resources which are part of their lives.

The financial services industry has an important role to provide infrastructure development financing through financial instruments based on sustainable financing or green financing so that infrastructure development can be carried out in environmentally and socially friendly corridors. There are several steps that need to be taken to encourage the development of sustainable finance. First, to ensure the availability of systematic and massive programs to ensure concern for all stakeholders. Second, collaborating with the government and the private sector. Third, forming an increasingly complete ecosystem. Finally, the commitment of the global community to help developing countries provide the needed ecosystems².

Sustainable finance is one of the solutions to the above problems. With the involvement of banks in implementing sustainable finance, banks must be selective in granting credit to debtors by setting conditions that are following bank policies. Because basically, sustainable finance activities do not harm the community, it creates justice for the community based on the constitutional rights of citizens to get a decent life. In the concept of sustainable finance, economic sustainability includes several criteria in carrying out credit risk analysis, including sustainability of resources, the sustainability of results and sustainability of the business. Whereas the sustainability of the environmental principle is divided into 2 criteria, namely soil quality, water, air and preservation of ecosystem functions. This is the difference between the concept of sustainable finance and Corporate Social Responsibility (hereinafter referred to as CSR). The difference between the green economy, sustainable finance, and CSR is clearly explained in the table as follows:

² Ini Taktik OJK Dorong Perkembangan Keuangan Berkelanjutan,
<https://www.gatra.com/detail/news/410367/ekonomi/ini-taktik-ijk-dorong-perkembangan-keuangan-berkelanjutan>

Table 1: Differences in Green Economy, Sustainable Finance and CSR

Green Economy	The concept that aims to prosper society and sustainable development while reducing the existence of significant environmental risks.
Sustainable Finance	A form of effort in applying the Green Economy in terms of financing or funding.
CSR	A form of corporate moral responsibility towards all company stakeholders.

Source: Secondary Legal Materials, Processed, 2018.

Based on the table above, it can be concluded that between the Green Economy, Sustainable Finance and CSR there are differences, although all three have the same goal of increasing sustainable development by balancing the Principles of People (social), Profit (economy), Planet (environment)³.

One of the obstacles in realizing Sustainable finance is the lack of understanding of business people regarding environmentally friendly projects. For this reason, sustainable finance must provide empowerment by conducting socialization for employers as a form of business opportunity to obtain environmentally friendly funding and training for internal banks, seeing the limited human resources for knowledge regarding sustainable finance. The training of human resources in internal banks related to sustainable finance products can have a good impact to improve their ability to assess a debtor or company is indeed worthy of getting funds from the bank. Banks in carrying out sustainable finance activities do not forget about the CSR for social activities, although both have different concepts, namely by providing public facilities, business opportunities for the community, and opening employment opportunities for the surrounding environment. Thus, one of the goals of sustainable finance is to reduce the existence of social inequality.

Discussion

A. The Urgency of Sustainable Finance Concretization in Indonesia

The urgency of sustainable finance in Indonesia can be viewed from 3 aspects, namely juridical, economic and sociological aspects. Ideally, the rationale underlying

³ <http://www.hukumonline.com/berita/baca/lt56533b0576d41/isustainable-finance-i-mengubah-paradigma-serakah-menjadi-hijau>, diakses pada 12 November 2017

the process of making a law is a juridical, economic and sociological foundation, so that it can reflect good legislation. The juridical foundation is a legal provision that is a source of law/legal basis for the establishment of statutory regulation⁴. In the Economic Platform, existing regulations must contain economic considerations both macro and micro. Whereas the sociological foundation is that there is something needed by the community so that it needs regulation⁵. These three aspects are also the basis for the regulation of sustainable finance, the explanation of which is as follows:

Juridical aspect, divided into both formal and material angles. One of the parties involved in supporting sustainable finance is the financial services industry. Therefore the formal juridical basis, in Article 8 of the Indonesia Financial Services Authority Act authorizes financial service authorities to set policy regulations in the financial services sector. So Otoritas Jasa Keuangan (the Indonesia Financial Services Authority) has the authority to stipulate regulations related to sustainable finance because it is following their duties and functions in implementing banking arrangements. Sustainable finance is one of the activities required for all financial service industries, one of which is in the banking sector.

While based on material juridical, Sustainable finance itself is a manifestation of Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia that the national economy is organized based on several principles, one of which is sustainable principles by maintaining a balance and unity of the national economy. Thus Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia constitutes a juridical basis of sustainable finance that prioritizes a sustainable financial system. In addition to the 1945 Constitution of the Republic of Indonesia, there are several other regulations that explicitly or implicitly regulate sustainable finance. Which regulation is compiled to overcome legal problems that occur in the community, namely by bringing together three fields, namely economic, social and environmental. One example of an existing legal problem is when a bank flows loan

⁴ Hamzah Halim & Kemal Redindo Syahrul Putera, *Cara Praktis Menyusun & Merancang Peraturan Daerah*, Kencana, Jakarta, 2009, hlm 24

⁵ Id, hlm 25

or credit funds for debtors/companies whose business activities harm the environment. To overcome these legal problems, it must be considered the existing rules to ensure legal certainty and create a sense of justice for the community.

Current regulations relating to sustainable finance are a juridical basis, namely the Banking Act of 1998, the Protection and management of the environment Act of 2009, the limited Company Act in 2007, Bank Indonesia Regulation No. 11/25/PBI/2009 - Amendments to Bank Indonesia Regulation No. 5/8/PBI/2003 concerning Application of Risk Management for Commercial Banks, Bank Indonesia Regulation No 14/15/PBI/2012 concerning Assessment of Quality of Assets of Commercial Banks, SEBI No. 15/28/DPNP dated 31 January 2013 concerning the inclusion of AMDAL and PROPER documents in Environmental Management, POJK number 51/POJK.03/2017 concerning the Implementation of Sustainable Finance for Financial Services Institutions, Issuers, and Public Companies. The rules above are mutually sustainable. But the problem is that the existing regulations are general and scattered so they are not systematically regulated. So the need for clear and systematic rules.

Economic aspects, sustainable finance can provide economic value and improve the economy in Indonesia. One of the national institutions authorized to carry out sustainable finance, namely banking. It can be seen from the function and purpose of banking in national economic development, namely as a financial intermediary. The Bank has principal business activities to collect and channel public funds, which are following the activities of sustainable finance, namely by providing funding or loans to debtors by bringing together economic, environmental and social aspects.

Seeing that the environment is the basis for the functioning of the economy in development in the country. Natural resources are overused by the business sector. The natural resources are polluted by the business sector only to improve the economic sector regardless of the existing environmental conditions. For this reason, the financial services sector, such as banking, was criticized by the approach of economic law. Which are identical banks only seek economic benefits, even though there is sustainability that must be considered? Thus indirectly the negative impacts

that result from the process of economic activity. The existence of a sustainable finance bank has a positive impact by considering three different fields, namely economic, social and environmental. The main mission of sustainable finance is to change national development which tends to be a greedy economy to become a green economy. The Greedy economy views economic growth by exploiting nature. Whereas green economy changes the view of economic development by paying attention to the balance of 3P, namely People (social), Profit (economy), Planet (environment). 3P is used as the principle of sustainable finance as a form of bank concern. Companies can grow, banks commit to overcome social problems and care about the preservation of environmental functions in terms of funding or financing.

With the involvement of the bank in running sustainable finance, it is certainly positive competitiveness for a bank in increasing its green portfolio, creating added value for banks, enhancing its reputation, improving the quality of existing management risks. So sustainable finance must be seen as an opportunity for environmentally friendly business activities, not losses and realize the sustainability of results and business. With the existence of an economic foundation, the implementation of sustainable finance does not burden the parties and the community.

Sociological aspects will be described the reality of the community which includes the legal needs of the community, the condition of the community and the values that live and develop (a sense of community justice). Which consists of facts which are a demand for the needs of the community that encourage the need for sustainable finance. Of course, sustainable finance is formed to answer the problem solving that occurs, which is related to the humanitarian relations that exist in society. Where someone interacts not only with each other but also with the environment. Indonesia is a country that has abundant natural wealth, both natural resources from agriculture, livestock, forestry, plantations, mining, energy sources, and fisheries. But it is no stranger to the problems of injustice that occur in society. Environmental pollution/environmental damage by companies whose presence has been protested by the public demands justice. The company certainly gets a flow of loan funds from banks as the capital of the company's activities. So that causes people

to lose natural resources which are part of their place of life. Sustainable finance is one of the solutions to the above problems. With the involvement of banks in implementing sustainable finance, banks must be selective in granting credit to debtors by setting conditions that are following bank policies. Because basically, sustainable finance activities do not harm the community, it creates justice for the community based on the constitutional rights of citizens to get a decent life.

One of the obstacles in realizing Sustainable finance is the lack of understanding of business people regarding environmentally friendly projects. For this reason, sustainable finance must provide empowerment by conducting socialization for entrepreneurs as a form of business opportunity to obtain environmentally friendly funding and training for internal banks, seeing the limited human resources for knowledge regarding sustainable finance. The training of human resources in internal banks related to sustainable finance products can have a good impact to improve their ability to assess a debtor or company is indeed worthy of getting funds from the bank. Banks in carrying out sustainable finance activities do not forget about the Corporate Social Responsibility program for social activities, but still go hand in hand with CSR activities even though both have different concepts by providing public facilities, business opportunities for the community, and opening jobs. Which is one of the goals of sustainable finance is to reduce the existence of social inequalities.

B. Regulatory Impact Analysis of Regulations concerning Sustainable Finance in Indonesia

In Indonesia, there are cases related to environmental pollution and the massive exploitation of natural resources caused by the business activities of industrial companies. Though the environment is very functioning for the economy in Indonesia, which is a source of income for the country. Of course, as citizens, we must be able to control the use of natural resources and preserve the environment. As stated in Article 33 paragraph (3) that the earth, water, and natural resources and what is contained in it are controlled by the state and used entirely only for the people's prosperity. And Article 33 paragraph (4) which states national economy is

based on economic democracy with several principles, namely the principle of togetherness, the principle of efficiency, the principle of justice, the principle of sustainability, the principle of environmentalism, the principle of independence, by maintaining a balance of progress, national economic sustainability, and unity. In carrying out the national economy sustainable finance uses the principle of sustainability. Sustainable principles are following the goal of sustainable finance, namely implementing sustainable development. The existence of sustainable finance is a sustainable concept of financing. With the existence of these two Articles, it is expected that the economic sector will not only have the principle of seeking profit but also looking at other principles.

It can be concluded that juridically in the 1945 Constitution of the Republic of Indonesia, the philosophical and juridical basis for sustainable finance is still implicitly contained in Article 33 paragraph (4). That the national economy, one of which is banking, can carry out its business activities based on all the aforementioned principles, especially the principle of sustainability, following the objectives of sustainable finance.

The institution that runs sustainable finance in the banking sector. Which is the activity of sustainably financed by the bank, namely by giving credit. Broadly speaking, according to the Banking Act Article 1 paragraph (11) credit is the provision of money from banks to other parties based on a loan and loan agreement by requiring the borrowing party to repay the debt after some time agreed with the interest. Banks in conducting their business activities through the provision of funds or granting, of course, must pay attention to the soundness of the bank, as stated in Article 29 paragraph (2) of the Banking Act stating that:

"Every bank is required to maintain the soundness of the bank following the provisions of capital adequacy, asset quality, management quality, liquidity, profitability, solvability, and other aspects related to bank business activities, and is required to conduct business activities following the principle of prudence"

The definition of bank soundness in the article above is one of them, how banks can guarantee that in providing credit, the borrower must also be able to repay the debt in full to the bank.

The Banking Act only few mentions about sustainable finance, which is in the explanation of Article 8 paragraph (1) which explains that banks in providing credit must pay attention to the results of the Environmental Impact Analysis (AMDAL) especially for companies with large scale or high-risk capacity so that the project which he finances while maintaining environmental sustainability. For that bank before giving credit to its customers, you should have to selectively assess it. In the Banking Act, it has not been explicitly explained about sustainable finance for a bank. This regulation in the Banking Act does not explicitly regulate sustainable finance for banks.

Sustainable finance is a good opportunity for the entire financial services industry, especially for banks in participating and making sustainable development successful in Indonesia. Sustainable development according to Article 1 paragraph (3) is a conscious and planned effort by combining several aspects, namely environmental, social and economic into development strategies to be able to guarantee the sustainability and integrity of the environment both from safety, welfare capabilities and quality of life for the present generation and of course in the future. One form of protection provided by the Protection and management of the environment Act (hereinafter referred to as PPLH Act) is the existence of environmental risks that must be carried out by each business activity as contained in Article 47 paragraph (1), namely activities that have an impact on the environment both on ecosystems, life, safety, and health are required to analyzed environmental risks. There are three environmental risk analysis itself, namely risk assessment, risk management, and risk communication.

One of the roles of banks in maintaining environmental sustainability is by requiring businesses to provide environmental impact analysis (AMDAL) documents and inclusion of documents on Corporate Performance Rating Programs in Environmental Management (PROPER) before giving credit to debtors or customers as stipulated in Article 22 PPLH Act. The regulation of banks related to sustainable

finance is also still implicit in Article 68 letter b of the PPLH Act, in which everyone who conducts business activities must maintain the sustainability of environmental functions. What each person means is to include all people including banks who are obliged to sustainably maintain environmental functions. So sustainable finance is the right step for banks to maintain environmental and social existence. Banks are expected to no longer be seen as institutions that only seek profits, but also take responsibility in the environment by minimizing environmental damage through financing. For banks to understand what is mandated in this legislation, the need for information exchange between the ministries of environment and banking is needed especially in the implementation of sustainable finance.

In implementing sustainable finance is based on several principles, namely by using the principle of responsible investment, the principles of strategies and sustainable business practices, risk management principles and the environment, governance principles, principles of communication that provide informative, inclusive principles, the principle of development in priority sectors and the principles of coordination and collaboration. The eight principles in POJK are not clearly explained. So that banks as one of the financial services institutions that implement sustainable finance cannot implement them effectively. One of the eight principles is the risk management principle and the environment. On this principle, of course, banks do not have adequate knowledge of human resources related to this and the absence of risk management related to risk management and the environment. Risk and environmental management have been regulated according to the PPLH Act, while there are no banking regulations.

Besides, there is a link between CSR and sustainable finance. Which financial service institutions that are required to be able to implement CSR must also allocate a portion of funds from CSR to support the implementation of sustainable finance as referred to in Article 8 paragraph (1). So here the bank is not only obliged to implement CSR, but it is also expected to be able to run in balance with the activities of sustainable finance. In this article, it becomes a problem, so providing a loophole to financial service institutions that is not required to implement CSR is also not required to carry out sustainable finance. The formulation of Article 8 paragraph (1)

contradicts Article 2 which requires financial service institutions to implement sustainable finance. Thus the need for consistency in each article formulation.

The provision of incentives by financial services authorities is intended for financial service institutions, issuers and public companies that effectively implement sustainable finance as contained in Article 9 paragraph (2) in the form of:

1. to participate in competency development programs from human resources;
2. awarding a sustainable finance award; and/or
3. other incentives.

so far the provision of incentives by financial services authorities is the awarding of sustainable awards. Appreciation by the Otoritas Jasa Keuangan (hereinafter referred to as OJK) sustainable award was held on December 19, 2016, where the winner's assessment was divided into four categories consisting of banking, capital market, non-bank financial industry. The sanctions imposed on financial service institutions if they do not implement sustainable finance. Sanctions imposed on financial service institutions according to Article 13 paragraph (1) are administrative sanctions, namely in the form of written or written warnings.

This regulation has explicitly explained about sustainable finance. However, there are weaknesses in this regulation, firstly the definition of sustainable finance is still abstract, secondly, this regulation is still general, especially regarding its objectives, both financial service institutions, issuers, and public companies. the third is the absence of risk management regulations related to social and environmental management for banks so that the OJK rules become unclear so that banks certainly have difficulty implementing sustainable finance effectively. The fourth is related to sanctions, administrative sanctions, namely in the form of written warnings or written warnings, are deemed not to have a deterrent effect for a bank if it violates the provisions in Article 2.

In general, The Limited Company Act regulates all aspects of the company. Of course, in this The Limited Company Act implicitly explains the relationship with sustainable finance, known as a form of social and environmental responsibility (CSR). It is contained in Article 74 paragraph (1) that the Company which carries out its business activities when it relates to natural resources is required to carry out

social and environmental responsibilities. What is meant by the Company which carries out its business activities related to natural resources is the Company which in business activities manages, utilizes, has an impact on the function of natural resource capabilities.

In the elucidation of Article 74 paragraph (1), it explains the purpose of the implementation of social and environmental responsibility, namely to continue to create a harmonious, balanced and appropriate company relationship in accordance with the values, norms, environment and culture of the local community. So that it is considered necessary and required for the company to be budgeted as company costs. If the company does not carry out social and environmental responsibility, it will be subject to sanctions. However, in this law there are weaknesses in particular related to sanctions which up to now have not been regulated in any statutory regulation, either in Government Regulations number 47 of 2012 concerning The Limited Company CSR nor has it been related to penal arrangements. So that this CSR is not required, only voluntary.

One form of CSR activities carried out by the company such as providing scholarships to take education, providing training to develop capabilities for residents around the company, building public facilities such as parks, toilets, bridges and others. As for the relationship between sustainable finance and CSR, where CSR and sustainable finance together will go hand in hand and have a purpose to increase economic growth and public welfare as stated in Article 8 paragraph (1) POJK No. 51/POJK.03/2017 states that financial service institutions which is required to implement CSR must allocate a portion of CSR funds to support sustainable finance. Not only linkages, there are differences in the concepts between CSR and sustainable finance. CSR is only limited to social activities to the community only by the company. So it can be said that CSR is a corporate moral responsibility as an ideal where the company has operated in the community, while sustainable finance is a form of facility for the community and a business opportunity with a form of financing carried out by the financial services industry. However, it becomes an issue when POJK states that financial service institutions implementing CSR must allocate funds

also towards sustainable finance. This causes confusion for the community that what distinguishes CSR from sustainable finance, so it needs to be clarified.

Products offered by banks are increasingly varied. Of course the risks borne by the banks also increased. Risk is the potential loss arising from certain events. In controlling the risks that arise, banks must have risk management. The definition of risk management explained in Article 1 paragraph (5) PBI Number 11/25/PBI/2009 concerning Application of Risk Management for Commercial Banks is a series of methodologies or procedures used to identify, monitor, measure and control the risks of all business activities of the Bank. So banks are required to have risk management in their business activities. In implemented sustainable finance as a new product by banks, it certainly cannot be separated from a risk. There are four risks that must be borne by a bank in carrying out sustainable finance, namely:

a. Credit Risk

is the risk caused by the debtor's failure to fulfill obligations to the bank. Businesses that have a negative impact on the environment can be detrimental to businesses in the industry and affect the performance of banks that provide credit/financing. Credit channeled certainly has the potential for bottlenecks or failures in the return process.

b. Reputation Risk

is the risk due to a decrease in the level of trust of the public that comes from negative perceptions of a bank. Reputational risk is related to damage to the good name of the company if there are cases or problems, and of course the bank will also be associated with existing problems. Like the banks that finance companies that damage the environment. With the rumors circulating, the damage to the good name of the bank and the opinions that developed in the community about the bank were damaged.

c. Legal Risk

is the risk arising from the inability of a bank to manage legal problems that can cause harm to a bank. Not only the debt or is responsible for protecting the environment but also the responsibility of the banking sector.

d. Environmental and Social Risks

the existence of environmental risks that have not been a factor in banking risk management in considering lending to industrial debtors. The four risks above must be anticipated by banks in implementing sustainable finance.

In conclusion, this Bank Indonesia Regulation (hereinafter referred to as PBI) has not yet regulated social and environmental risks. Yet in implementing sustainable finance the ability of banks in social and environmental risk management is very necessary. At least the bank has guidance on managing environmental risk into the risk of bank credit. It is not enough if the bank only expects AMDAL documents, because these documents cannot in fact fully guarantee the business continuity of the debtor.

Banks in carrying out business activities need to manage credit risk, one of which is by maintaining asset quality. Bank assets are divided into two, productive assets and non-productive assets. Earning Assets is the provision of bank funds to obtain income, one of which is in the form of credit and others. Non-Earning assets are bank assets that have potential losses, such as collateral to be taken over and others. One of the business activities of banks is the provision of funds. Provision of funds by banks must be carried out with the precautionary principle as contained in Article 2 paragraph (1) Bank Indonesia Regulation No 14/15/PBI/2012 concerning Assessment of Commercial Bank Asset Quality. In carrying out the principle of prudence by the bank the board of directors is obliged to pay attention, assess, monitor, and take steps so that asset quality remains good and maintained.

Sustainable finance is the provision of funding/financing or commonly referred to as credit. Of course, in providing credit, banks must assess the quality of credit both from the prospects of business, performance and ability to pay. One form of evaluation of business prospects is the efforts made by the debtor in order to preserve the environment as contained in Article 11 paragraph (1) letter e. For non-productive assets whose quality is valued is Collateral Foreclosed. Banks are required to reassess the Collateral Foreclosed to determine the net realizable value of Collateral Foreclosed at the time of the takeover of the collateral. What is meant by net realizable value contained in Article 34 paragraph (2) is equal to the value of

earning assets settled by Collateral Foreclosed. Of course, if the banks do not implement as referred to in Article (2) paragraph 1 and Article 34 paragraph (2) above, administrative sanctions as referred to in Article 70 paragraph (1) may be subject to:

- a. Written Rebuke
- b. Freezing of certain business activities
- c. Inclusion of bank management and or shareholders in the list of parties who did not pass the fit and proper test.

In realizing sustainable development naturally a national economic system is needed that can promote harmony between three aspects, namely economic, social and environmental aspects. Sustainable finance or known as sustainable finance is one of the supporters in sustainable development. As a form of support from the financial services industry, the Financial Services Authority (OJK) issued POJK number 51/POJK.03/2017. This POJK is issued providing a legal umbrella for all financial service industries to be required to implement sustainable finance. The definition of sustainable finance is contained in Article 1 paragraph (8) which is a comprehensive support from all financial service sectors which aims to develop and create economic growth by aligning interests in economic, social and environmental aspects. But in the sense of sustainable finance there is uncertainty in the form of what sustainable finance is. Because the understanding in Article 1 paragraph (8) is very abstract. Is sustainable finance in the form of products, principles, systems or principles. In the definition of financial feasibility, what is meant by all sectors of the financial services industry include:

1. Financial services institutions:
 - a. Banking sector;
 - b. Capital market;
 - c. Insurance;
 - d. Pension fund;
 - e. Financial institutions;
2. Other financial service institutions:
 - a. Pegadaian;

- b. Guarantee Institution;
- c. Indonesian Export Financing Agency;
- d. Secondary Housing Financing Company;
- e. and the Social Security Organizing Agency.

Which financial services institutions above are required to implement sustainable finance in their business activities as in Article 2 paragraph (1).

In implementing sustainable finance, it is based on several principles, namely by using principles of responsible investment, principles of strategy and sustainable business practices, principles of risk and environmental management, principles of governance, principles of informative communication, principles of inclusion, principles of developing priority sectors and principles coordination and collaboration. The eight principles in POJK are not clearly explained. So that banks as one of the financial service institutions that implement sustainable finance cannot implement it effectively. One of the eight principles is risk management and the environment. In principle, banks certainly do not have adequate human resource knowledge in this regard and there is no risk management related to risk management and the environment. Risk management and the environment have so far been regulated under the PPLH Law, whereas banking regulations do not yet exist.

In addition there is a link between TJSI and sustainable finance. Where financial service institutions that are required to implement TJSI must allocate a portion of funds from TJSI to support the implementation of sustainable finance as referred to in Article 8 paragraph (1). So here banks are not only obliged to implement TJSI, they are also expected to be able to run in balance with sustainable finance activities. In this Article it becomes a problem so it gives a loophole to LJK that is not required to implement TJSI nor is it required to carry out sustainable finance. The formulation of Article 8 paragraph (1) is contrary to Article 2 which requires LJK to implement sustainable finance. Thus the need for consistency in each article formulation.

The provision of incentives by the financial services authority for financial services institutions, issuers and public companies that effectively applies sustainable finance as in Article 9 paragraph (2) in the form of:

1. include in the human resource competency development program;
2. awarding the sustainable finance award; and / or
3. other incentives.

So far the provision of incentives by the financial services authority is the awarding of sustainable awards. Appreciation by OJK sustainable award was held on December 19, 2016 where the winner's evaluation was divided into four categories consisting of banking, capital markets, non-bank financial industry. The sanctions imposed on financial services institutions if they do not implement sustainable finance. Sanctions imposed for LJK according to Article 13 paragraph (1) are administrative sanctions in the form of written warnings or written warnings.

This POJK has explicitly explained about sustainable finance. However, there are weaknesses in this regulation, first of all, this regulation is still general in nature, especially regarding its targets for financial services institutions, issuers and public companies. the second is the absence of risk management regulations related to social and environmental management for banks so that the OJK rules are unclear so banks certainly have difficulty implementing sustainable finance effectively. The third is related to sanctions, administrative sanctions in the form of written reprimands or written warnings deemed not to provide a deterrent effect for a bank if it violates the provisions in Article 2.

In realizing sustainable finance in financial services institutions, the Ministry of Environment and the OJK entered into a collaboration by signing an agreement in 2014. This agreement is a continuation of the KLH program with Bank Indonesia in 2010. The contents of this memorandum of understanding OJK and KLH carried out several efforts together in the form of a collective agreement that contains:

- 1) Harmonization of policies in the financial services sector with policies in the field of environmental protection and management;
- 2) Harmonization of policies in the field of environmental protection and management with policies in the financial services sector;
- 3) Provision and utilization of environmental data and information for the development of sustainable financial services;

- 4) Research/surveys in the context of developing policy concepts in sustainable finance;
- 5) Increasing the capacity and competence of the human resources (HR) financial services sector in the field of environmental protection and management.

It is expected that the implementation of joint efforts undertaken by KLH with OJK will serve as concrete evidence of support by financial service institutions as a source of funding in realizing sustainable finance. And can provide a positive impact that is changing the paradigm of financial service institutions in the community. Keep in mind that this joint effort is still in the form of a memorandum of understanding is the initial foundation that does not cause legal relations before the agreement. But this memorandum of understanding needs to be analyzed, because it can be an SOP or an implementation guide for the parties.

The various legal arrangements above show that so far there are still many unclear regulations. There are still parts that are not regulated in the existing regulations, especially related to regulations related to the principles of social and environmental risk management and the elaboration of other principles, strict sanctions for banks against the above rules, especially related to TJSI. Existing regulations are still fragmented, causing difficulties and ambiguity in finding regulations that become the basic reference related to sustainable finance.

The integration of the PPLH Law with banking policy must be carried out as an example between one regulation and another having different sanctions for the need for specific or stand-alone rules governing sustainable finance for banks. OJK certainly as an appropriate and authorized institution in making regulations is expected to be able to make regulations that are more specific to banks. POJK issued still regulates generally for financial services institutions, issuers and public companies because each industry has very different characteristics.

C. Analysis of Sustainable Finance Regulation Based on Legal Certainty Theory.

Legal certainty is one of the legal goals that can be said as an effort to bring about justice. The real form of legal certainty is the norm, so certainty is one of the

characteristics of the norm, especially written legal norms. Certainly exact rules are used as guidelines for everyone, because without the value of legal certainty it will lose meaning. Legal certainty is one of the objectives of law which can be said as an effort to realize justice. The real form of legal certainty is the norm, so certainty is one characteristic of the norms in particular written legal norms. Certain rules are certainly appropriate to be used as a guideline for behaving for everyone because without the value of legal certainty, they will lose meaning. Legal certainty contains several meanings, namely the existence of clarity, does not cause a contradiction, does not cause multiple interpretations and is easy to implement⁶. In a legal sense, it must be firm and must not be interpreted. Then the existing law must be open, meaning that anyone can easily understand the meaning of a legal provision. Between regulations, one with the other must not be contradictory which raises doubts for the community. Thus the existing regulations or regulations can guarantee the rights and obligations of every citizen and following the culture of the community.

Fuller argues that there are eight desiderata which are good legal requirements. The eight things are⁷:

1. Generality;
2. Promulgation;
3. Prospect;
4. Clarity;
5. Consistency or avoiding contradiction;
6. Possibility of obedience;
7. Constancy through time or avoidance of frequent change;
8. Coverage between official action and declared rules.

⁶ Fernando M. Manullang, *Legisme, Legalitas dan Kepastian Hukum*, Prenadamedia Group, Jakarta, 2016, Hlm 154

⁷ Gunawan Widjaja, *Lon Fuller Pembuatan Undang-Undang Dan Penafsiran Hukum*, *Law Review, Fakultas Hukum Universitas Pelita Harapan*, Vol. VI. No 1 Juli 2006, (online) <http://download.portalgaruda.org/article.php?article=391106&val=8576&title=Lon%20fuller,%20Pembuatan%20Undang-Undang%20dan%20%Penafsiran%20Hukum>

In Fuller's opinion, the Generality of Law must be general in that in the legal system there must be ongoing regulations and the Law must not be made on the interests of certain groups because it must apply and apply in general. In this case, the existing arrangements relating to sustainable finance are general. There are nine settings available, each of which is generally applicable.

The second is Fuller's opinion, namely, the Law must be announced. Announcements must be made so that the regulations made can be known and can be fully implemented by the entire community. An announcement is a must, given the announcement, someone can predict everything that has been done by him. The announcement must make it possible for every community to get it easily. In this case the NRI Constitution applies to the present, the Banking Act has been in effect since 1998, the PPLH Act has been in effect since 2009, the Limited Company Act Valid since 2007, PBI concerning the Implementation of Risk Management for Commercial Banks is valid since 2009, PBI concerning Commercial Bank Asset Quality Assessment applies since 2012, SEBI regarding the inclusion of AMDAL and PROPER documents in Environmental Management has been in effect since 2013, POJK on the Implementation of Sustainable Finance For Financial Services institutions, Issuers, and Public Companies apply in 2017 and a Memorandum of Understanding between environmental commission and OJK on Increasing the Role of Service Institutions Finance in the Protection and Management of the Environment through the Development of Sustainable Financial Services has been implemented since 2014. Which each of the regulations mentioned above has been known and implemented by the community. Everyone is expected to be able to read, know and understand all the rules properly.

Fuller's third opinion, the Act may not be retroactive. In this case, the regulations that have been promulgated and announced at the time at that time must also take effect from the date the announcement was made. Laws can be enacted after the law has been announced. In terms of existing arrangements related to sustainable finance it has been announced and has been valid until now.

The fourth opinion of Fuller is that the formulation of the law must be clear. Every legislation made and published must provide a formula that is easy to

understand for the community. In this case, there is a lack of clarity in the formulation of legislation such as the one in Article 1 paragraph (8) POJK No. 51/POJK.03/2017 regarding the definition of sustainable finance itself. The ambiguity that is meant by the definition of sustainable finance is whether it is in the form of support, system, principle, product or principle. So that this POJK gives authority to each LJK to interpret itself what is sustainable finance. If indeed the definition stated in the form of support, it should be given a support explanation, for example, because it is still abstract. Then in Article 8 paragraph (1) POJK No 51/POJK.03/2017 states that financial service institutions which is obliged to implement CSR must allocate part of CSR funds to support sustainable finance. It becomes unclear what distinguishes between CSR and sustainable finance itself or whether both of them stand alone but within the same budget. Then in Article 2 paragraph (2) POJK No 51/POJK.03/2017 there is a lack of clarity in the formulation in which the implementation of sustainable finance is carried out with several principles, one of which is the principle of managing social and environmental risks and so on. There is no explanation of definitions and applications regarding some of these principles so that this formula is unclear. The community cannot understand and be able to implement it well, which is unclear in its contents, confusing. For this reason, some unclear formulations as explained above must be reviewed and corrected, so that the formulation in a statutory regulation can be clear.

The fifth opinion of Fuller is consistency, the laws and regulations that are made must not conflict with one another. Legislation that is made inconsistent or not in line with other regulations will lead to difficulties in implementing the regulation in practice. Inconsistency between laws and regulations with one another causes the failure of legal formation in society. Consistent is not only limited to the use of terms in the formulation of words in all types of regulations but also includes consistency in construction and legal conception⁸. In this case, the provisions in POJK No

⁸ *Ferry Irawan Febriansyah, Konsep Pembentukan Peraturan Perundang-undangan DI Indonesia, Perspektif, STAI Muhammadiyah Tulungagung, Vol XXI No 3 September 2016*

51/POJK.03/2017 are inconsistent with the provisions of Bank Indonesia Regulation No.11/25/PBI/2009 concerning Application of Risk Management for Commercial Banks in terms of regulation relating to the eight principles, especially the principles of social and environmental risk. Which is in POJK with risk management PBI for commercial banks, which up to now have not arranged management regarding this principle. Furthermore, the formulation of Article 8 paragraph (1) POJK No 51/POJK.03/2017 requires financial service institutions to implement CSR as well as implementing sustainable finance. This is contrary to Article 2 of POJK itself which requires financial service institutions to implement sustainable finance without exception.

Fuller's sixth opinion, namely legislation, must be implemented. Regulators are not allowed to make rules that cannot be implemented. In formulating a statutory regulation to be implemented properly by the community, it must be adjusted to the existing legal culture and development in the community. In this case, the eight existing regulations relating to sustainable finance that have been mentioned above have been valid and implemented in the community to date.

The seven opinions of Fuller are that legislation cannot be changed frequently. Statutory regulation is made to be applied counted for a long period. Frequent changes to regulations can lead to reduced levels of legal certainty in society. In this case, the regulations related to sustainable finance mentioned above have changed. One of them is Banking Act Number 10 of 1998 which is a change in Banking Act Number 7 of 1992. In addition to these two regulations, others have not experienced a change in regulation.

Fuller's eighth opinion is that there must be conformity between the law and its implementation and the absence of personal interests in implementing the law and its implementation. In this case, there is no Bank Indonesia Circular Letter specifically for banks to regulate technically related to sustainable finance, thus the regulation is not fully operational and still regulates in general due to the absence of implementing regulations. Secondly, there is no implementation regulation regarding the principles of implementing sustainable finance which is contained in

POJK No. 51/POJK.03/2017, especially the principle of social and environmental risk, which until now has not been regulated for banks.

From the explanation above it can be concluded that there are eight things in Fuller's opinion that need to be considered to create legal order in society. Fuller's opinion is in fourth place (Law Formulation Must Be Clear), fifth place (Consistency of legislation), seventh order (Regulations Must Not Be Changed Often), and eighth (Conformity between Laws and Implementation) this cannot be fulfilled in the process of making a law and regulation until it has been implemented in the community, which creates legal uncertainty in the community.

Conclusion

Based on the theory of Desideratum Fuller in the fourth part (Formulation of the Law Must Be Clear), fifth (Consistency of the legislation), seventh (Legislative Regulations Must Not Be Changed Often) and eighth (Conformity between Laws and Implementation) is currently not can be fulfilled in the formation of legislation regarding sustainable finance. Then the existing regulations have not provided legal certainty for the community. Meanwhile, based on OJK Act Number 12 of 2011 concerning the establishment of legislation, regulation of sustainable finance has not reflected good regulations. The formulation of the existing article is unclear so that it eliminates the principle of clarity of the formula. So that there is no legal certainty in the community. Therefore, to provide legal certainty, it is necessary to make changes to more specific regulations, of course, for banks related to sustainable finance.

The legislation can guarantee legal certainty in its implementation for every community development. The first is to see that the many existing regulations relating to sustainable finance are not systematically organized, fragmented. Secondly, there is no definite explanation of the definition of sustainable finance itself, seeing from its abstract and general definition. Third is the need for implementing regulations that are specifically independent for banks and there is a need for further explanation related to each principle in implementing sustainable finance. Therefore, it is necessary to perfect clear and specifically regulating sustainable finance regulations for banks. The contents of these regulations are the

result of integration between regulations relating to existing sustainable finance. This is because that, legal certainty refers to the implementation that is clear, regular, consistent and cannot be influenced by something that is subjective in people's lives.

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