

# Legal capacity in online loan transactions (The study on legal personal liability theory)

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## Abstract

**Purpose:** This study aims to determine how the law views the aspect of legal capacity in conducting online loan transactions and the exact aspect of legal capacity in the context of the Legal Personal Liability theory.

**Research Methodology:** This research employed a blended aspect by using a statutory approach, case approach, and theoretical approach.

**Results:** The author claims that the understanding of legal capacity in the legal aspect that measures age and status is inappropriate, and legal capacity must be interpreted not only in terms of age or status but it must also be interpreted more broadly, involving the ability of the parties to make decisions and the ability of the parties to carry out what has been decided by prioritizing legal personal liability.

**Limitations:** The author argues that positioning Legal personal Liability is very important in Loan transactions. Legal capacity should not be merely interpreted in terms of age and status aspect but it should take broad interpretation because related awareness to implement the agreement has been made. The restrictions of legal capacities based on the law in Indonesia are to be analyzed using the theory of Legal Personal Liability.

**Contribution:** This study is expected to educate and be useful to lecturers, legal practitioners, loan business practitioners, policymakers, the financial service authority, and all the members of the public performing loan transactions.

**Keywords:** *legal capacity, loan transaction, personal liability*

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## 1. Introduction

The positive characteristic of the current FinTech revolution is the attention entrepreneurs and investors have given to positive change for society and particularly underprivileged groups of people (Victor Murinde, 2022). Economically it is believed that the proliferation of online loan services will be able to boost the community's economy if the funds obtained are used to set up or develop their business. Online loan business is preferred by the community because it is considered to give benefits compared to conventional loan transactions in banks and financial institutions. While online loan transactions can be done anywhere, conventional loan services must be made at the address of the bank / financial institution. These days, doing conventional transactions at a bank can be tiring for some people since it requires them to travel to the bank and spend money on travel costs. Technology nowadays, however, allows people to do transactions anywhere in no time and it serves as a fundamental pillar for the economic, social, and cultural development of society (Marta Barroso & Juan Laborda, 2022). Mobile payments make transactions more straightforward, easier, and faster (Candy, et.al, 2022). Financial Technology (henceforth referred to as fintech) allows people to make financial transactions without physically reaching financial business offices such as banks, pawnshops, and so on (Muslih & Supeno, 2022). Second, online loan transactions can be done at any time regardless of the time limit because the loan service often works around the clock. These online loan transactions only require a smartphone. In other words, loans can be given in no time to applicants following a desired amount. On the other hand,

a long queue of people waiting to be served at a bank will probably delay a transaction and causes the transaction to be performed the following day. This conventional way will probably cause a little hiccup for prospective bank customers. Third, online loan transactions only require a simple and easy application process, while a conventional loan transaction method often involves long paperwork, increasing the possibility of customers missing the terms and conditions given therein. This situation may pose a risk to both parties in lending services. According to Consumer International Organization, fintech provides the following benefits to customers : (i) increased competition and the gains in choice, service, and value; and (ii) increased access, as fintech opens up financial services to groups of consumers for whom such services were previously beyond reach (Yuniarti & Rasyid, 2020). Fintech opens opportunities but with potential risks (Ehrentraud, Ocampo, Garzoni, & Piccolo, 2020). The absence of physical meetings between lenders and loan recipients may raise risks for both parties (Putri, Nasution, Sunarmi, & Siregar, 2022).

Fintech and digital platforms provide alternative business models and solutions to help governments and other financial institutions expand the scope of providing appropriate financial services (Subagiyo, Gestora, & Sulistiyo, 2022). Principally, digital financial institutions must obtain legality or license issued by the Financial Services Authority (OJK) to provide comfort and legal certainty for the community. Data obtained from the Financial Services Authority (OJK) as of August 2022 reported that there were 102 legal Online Loan applications and 105 applications of Illegal Online Loans that are not registered/licensed under the Financial Services Authority (OJK). Tok and Heng (2022) argue that there are predatory lending practices that harm vulnerable groups. Services offered on SMS/WhatsApp involve very high-interest rates and penalties. Borrowers are charged additional fees, the repayment period is too short or not according to the agreement, and access to personal data is required and requested. Debt collection comes with coercing, intimidating, and threatening for delayed debt payment. Illegal loan services are often without a standard call center for complaints, have no clear office identity, and commit personal data theft. All these problems cause some risks affecting the parties involved in this fintech lending business. Bates (2017) shows the same cases showing irresponsibility and predatory lending.

On the other hand, there are still many practices carried out by customers and fintech lending providers that are not in accordance with the basic joints of the agreement, namely the validity of the agreement, where there must be an agreement between the two parties, the parties must be capable of acting legally, the object must be clear and the cause is allowed. regarding the capacity of the parties as one of the conditions, in some cases of online loans, it turns out that the applicants are immature and incapable of acting legally in transactions. Many parties ignore this aspect even though this condition is taken into account for the validity of transaction agreements in loan service, and online loan transactions are very specific agreements because they are related to debts and receivables. In this case, the principle of prudence is still ruled out by fintech lending providers in Indonesia. So far, capacity is defined only in terms of age, whereas the capacity to act legally cannot only be measured by age but must be measured by the debtor's ability to pay. According to Definition Global (2022), contract intelligence plays an important role in this trend; powering, protecting, and accelerating business.

## **2. Literature review**

This research studies and analyses the ability to act legally in online loan transactions and their legal consequences using the theory of Legal Personal Liability. Some previous studies that have the same scope but different focus of discussion involve the following; the research conducted by Arvante (2022) published in the Indonesia Law Journal entitled The Impact of Online Loan Problems and Legal Protection for Online Loan Consumers focusing on the problems that occur in online loans and how legal protection is provided for customers, research conducted by Pradnyawati, Sukandia, and Arini (2021), entitled Financial Technology (Fintech) Based Online Loan Agreement and published in the Legal Construction journal on the legal protection of creditors providing online loans based on Financial technology, research conducted by Mahfuz (2021) entitled Legal Risk Analysis of the Existence of Online Loan Businesses in Indonesia published in the Doctrinal Law journal discussing the legal basis for online loans in Indonesia and the legal risks that occur from online loans, research conducted by Triasih, Muryati, and Nuswanto (2021) presented in a national seminar at Semarang State University

focusing on legal protection for consumers in fintech online loan agreements, research conducted by Panos and Wilson (2020) entitled Financial Literacy and Responsible Finance in the Fintech era: capabilities and challenges focusing on the importance of financial literacy and responsibility in the financial technology era, Lestari and Rahmanto (2021)'s research entitled Fintech and Challenge for Bank Sector aiming to analyse the fintech strategy to enter the financial service sector and bank responses to financial technology movement in the digital era following the urging situation of competition requiring banks and fintech to become more innovative, research conducted by Sudirman and Disemadi (2022) on Legal Protection for Borrower and Business Dispute Resolution in Fintech Lending Service studying how important the legal protection for borrowers using fintech service and the measures taken to resolve business disputes, Magna (2020) questioned whether the agreement with Fintech service is valid?, Research by Virgionandy, Husni, and Muhaimin (2021) focuses on the Legal Liability of Fintech Companies for Accessing Telephone Contact Lists and Photo Galleries in the Online Loan Process.

The above research is mostly limited to legal protection for the parties, the validity of online loan agreements, and legal risks, while none has examined legal capacity in online loan transactions. The juridical and empirical facts analyzed using the theory of Legal Personal Liability may contribute to the novelty of this research.

### **3. Research methodology**

In this study, researchers used a type of blended aspect research by combining juridical aspects with empirical aspects and by placing the two specs in a balanced and mutually reinforcing manner by examining social phenomena that occur in society directly related to applicable legal rules. This research also used statutory and theoretical approaches. Legal cases in the online lending business (fintech) and relevant legal rules were developed and analyzed in such a way as to use Legal Personal Theory from primary and secondary legal sources. The analysis resulted in inductive conclusions, generally providing an understanding of better structuring online loans in Indonesia.

## **4. Results and Discussion**

### **4.1 *Capability in the legal context***

An important aspect of an agreement is the validity of the agreement, and whether or not a transaction is valid will have legal consequences for both parties in fulfilling their obligations. So, the agreement made by the parties can serve as a law for the parties based on Article 1338 of the Civil Code, and it must fulfill the elements as regulated in Article 1320 of the Civil Code, namely: 1). Agreement of the parties bound; 2) the capacity to be involved in an agreement; 3). A certain subject matter; 4). A cause that is not prohibited.

According to Article 1329 of the Civil Code, everyone is generally considered capable of making an agreement unless the law determines otherwise. An agreement is a legal act that is commonly carried out in society both in the context of a simple capability that has minor impacts and a complex capability carrying major impacts; therefore, the law places everyone capable of making an agreement in terms of basic human rights. Unless the law determines otherwise, "capable" must be determined by criteria, a certain measure, or limitation. Therefore, according to Article 1330 of the Civil Code, those who are declared incapable of making agreements are minors, persons placed under guardianship and women who are married under the law, and, in general, all persons who are prohibited by law from making certain agreements. Persons under these criteria are declared incapable of making agreements. That is, those not belonging to these criteria are deemed "legally capable of making agreements". Ability in law carries two meanings, namely being competent to do legal action and having the power to make agreements (Magna, 2020).

It should be understood that the regulation has not fully touched on people who are "incapable", firstly the law should include the criteria for "incapacity" for elderly and senile people incapable of acting legally due to their incapacity of properly digesting information from other parties. Such a condition is even deemed 'forgiven' in a religious scope, recalling that such elderly people are not able to distinguish

right and wrong. Moreover, those with mental dysfunction should also be categorized under the criteria of vulnerable persons. Both Articles of the law mentioned above must state that the persons with this dysfunction fulfill the criteria of "incapacity" and this condition is also deemed "forgiven" by the law despite the fact that "insane people" can be categorized as a group under guardianship.

Article 330 of the Civil Code mentions "a person is an adult if he/she has reached the age of 21 years, or has been married before reaching that age". However, a minor under 21 years old can perform all legal acts if he/she is 20 years old and has received a declaration of adulthood (*venia aetatis*) from the President after receiving advice from the Supreme Court, as stated in Articles 419 and 420 of the Civil Code). Furthermore, Article 426 of the Civil Code stipulates that a child who is 18 years old can perform certain legal acts after obtaining a declaration of adulthood from the court and a person who is 18 years old can make a will (Article 897 of the Civil Code). Article 29 of the Civil Code regulates that males who have not reached the age of 18 full years and females who have not reached the age of 15 are not allowed to get married, but due to a particular reason, the President can remove this restriction by granting dispensation. However, Law Number 1 of 1974 concerning Marriage set forth a regulation allowing males and females to get married at 19, and another provision states that children who are 15 years old can serve as witnesses in marriage (Article 1912 of the Civil Code).

According to SEMA No. 7/2012, an adult must reach the age of eighteen or must be married to be capable of acting in law. the definition of adulthood is also found in various laws and regulations such as in the Criminal Code, stating that a 16-year-old person can be categorized as an adult, the Law on the Judicial System of Juvenile Crime, the Labour Law, the Corrections Law, the Human Rights Law, the Child Protection Law, the Law on Pornography, the Citizenship Law, the Law on Eradication of Human Trafficking Crime, all of which limit the age of eighteen as an "adult".

Determining the limit of a person's maturity according to the law based solely on age is not appropriate because the level of maturity of a person is not so influenced by the level of age. For example, there is a condition where those under 18 years old are capable of performing certain legal acts. On the other hand, being 18 years old or above does not guarantee a person is capable of performing legal acts. A person's capability must be measured from various aspects, including emotional, psychological, biological, educational, experience, and economic aspects. Therefore, the determination of "capable" must include the phrase "by considering other aspects that represent a person's maturity".

Capable means "able"; a person is declared capable of performing a legal action if this capability is based on the above aspects, where the person concerned can perform a legal act and consciously knows the consequences of the legal action he performs. Legal capacity refers to the ability to make decisions that are recognized by the law (Glen, 2015).

#### ***4.2 Legal Capacity in Online Loan Transactions from the Aspect of Legal Personal Liability Theory***

The agreement is required to be carried out by a person who has the ability to perform legal acts. Online loans are part of financial services gaining popularity in the current digital era (Widi, Qahar, & Aswari, 2021). Online loan transactions between one person and a fintech provider are legal actions in the field of lending or borrowing law. Fintech is not done face-to-face, and prospective borrowers only need to send proof of identities such as an Identity Card (KTP) or other forms of identity to allow for the immediate process of the debt engagement. The problem is whether the prospective borrower is a person who has the capacity to carry out legal acts, whether the debtor can truly understand the agreement, whether the debtor is able to carry out the contents of the agreement, whether the debtor realizes the consequences if he is unable to carry out the agreement.

Such conditions cannot be ascertained by fintech providers but by the debtors themselves. So, a fintech provider knows that before the parties agree, an in-depth exchange of information must be carried out and there needs to be a question-and-answer process to measure the level of the debtor's ability. The meeting between prospective creditors and prospective debtors in one place/assembly in every transaction should be performed to provide legal certainty of who the legal subject in the agreement is,

thus fostering confidence for the parties to agree or not the agreement. In the concept of financial technology, this aspect is ignored, the agreement in financial technology transactions prioritizes the principle of trust alone without being accompanied by certainty and strong confidence, tending to act hastily and recklessly. This is evident in several cases of ID cards being used for online loan transactions by other people, daily interest rates that change, and so on. According to data from the Financial Services Authority, serious non-performing loans as of January 2022 reached Rp. 785.94 billion, increasing to Rp. 1.21 trillion in July 2022. When viewed in terms of dominant age, 19-34 years old were recorded as those with non-performing loans (dailysocial.id, 2022). This figure shows that there is no direct correlation between capability and age limit to fulfill obligations. The Financial Services Authority (OJK) also recorded losses of financial technology or fintech companies of Rp.114.08 billion in the first semester of 2022 (Intan, 2022).

The trust should be obtained after obtaining definite information about whom someone is dealing with, and how the contents of the standard clause are offered by the fintech lending provider to the debtors so that each party obtains certainty and confidence including in terms of legal capacity. If the online loan application provider is an unclear party and the company is a legal entity in order to become a legal subject, it is still questionable whether the agreement violates the subjective requirements of Article 1320 KHPerdara (Putra, 2021). In this context, prospective debtors must be able to ensure that the online loan provider company is an organizer that is registered and licensed by the Financial Services Authority (OJK) and has a good reputation in running its business.

In the context of online loan agreements, this theory should be used as a guide and guideline for the parties before and in carrying out the agreed agreement. In the theory of Legal Personal Liability, according to Van Hammel, the ability to be responsible represents a situation where a factor in the form of a person's psychological factors and the level of his intelligence affects 3 (three) basic human abilities, namely; first, being able to understand the consequences of his actions; second, being able to realize that his actions according to the perception of society are not allowed; third, being able to determine his own will for his actions. The measure of a person's "capability" to be held accountable for his/her own actions is his/her mental or psychological attitude. This mental or psychological attitude will be apparent in what is said and done. Personal capability should refer to personal maturity in decision making which is defined as the parameter for assessing the quality of decision (Dotsenko, Startseva, Pchelina, Karabero, & Ivantsov, 2020). The objective is to appoint qualified persons who are capable of making decisions without any feeling of apprehension about personal liability that serves as protection. (Chengappa & Jha, 2021).

Thus, in the context of this online loan transaction associated with the theory of legal personal liability, the benchmark for "capable" is that the parties already know the contents of the agreement and understand the legal consequences that will be accepted as a result of not carrying out what has been agreed, the parties must be aware that what is done is of their own free will without coercion or because of the wishes of others and not as a tool or order of others because the responsibility is imposed only on themselves not imposed on the person who forces or orders, and one must realize that not performing the transaction is an act that is despicable, disgraceful, wrong and sinful.

In the context of civil law, a person is said to be "at fault" and can be held legally responsible if the elements of fault are fulfilled. Article 1365 of the Civil Code, commonly referred to as the tort article, requires the fulfillment of the element of fault to declare that a person has committed a mistake and, therefore, can be held liable regarding the existence of an act, the existence of an element of fault, for the fault to cause loss and the existence of a causal relationship between the fault and the loss experienced. Error in this case is an act that is contrary to the law, the law in this context is not only the law but also decency and morality. In the legal relationship of the online loan business, a bond is established and aims to obtain benefits for both parties. When the expected benefits are not obtained and even harm one of the parties is due to a mistake made intentionally, the injured party has the right to claim rights to the party who has harmed him.

Legal reform is not only by forming or changing laws and regulations. More fundamental legal reform is to change the way people think about the law and make the correct interpretation of a rule of law or a legal concept so that the way of thinking of the community and fintech lending actors is not restricted within the term "capable" that is only limited to the age and status of a person. Thus, with the analysis of legal personal liability theory, cases in the online loan business can be avoided and realized by the parties. Legal changes enable new developments and allocate gains and risks from innovation and also repress new conduct that leads to negative effects (Garrido, Liu, Sommer, & Viancha, 2022).

## 5. Conclusion

The definition of being capable in the legal aspect only measured based on age and status is deemed inappropriate. The ability to do law must be interpreted not only in terms of age and status but it must be interpreted more broadly, where capable should mean "capable". A person is declared capable of performing a legal action if he is consciously able to make decisions independently, can perform a legal act, and consciously knows the consequences of his legal actions.

Legal Personal Liability is a theory studying the personal ability to be responsible for legal acts committed by the parties in online loan transactions. According to this theory, being responsible is a state of a person's psychological factor, and the level of intellectuality affects 3 (three) basic human abilities: being able to understand the consequences of his own actions, being able to realize that his actions according to the perception of society are not allowed, and being able to determine his own will for his actions.

### 5.1 Limitations of the study

This research is limited to 2 (two) research scopes, namely to examine the scope of legal capacity according to Indonesian laws and regulations and to analyze the scope of the definition of "capacity" using the theory of Legal Personal Liability. To reach this objective, this research is focused more on loan transaction cases in Indonesia.

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