

# Employee Criminal Liability for the Prudential Principle of a Bank

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**Keywords:** Criminal liability; Banking; Bank caution.

**Abstract:** In conducting business in the banking sector in Indonesia, it is based on economic democracy by using the precautionary principle. The implementation of financial transaction activities is important to apply the precautionary principle in order to minimize the banking risks. Regulations regarding the application of the precautionary principle of banks made by the Financial Services Authority (FSA) as a rule maker in the Financial Services Sector. The regulation does not contain criminal sanctions, but only administrative and compensation sanctions. This study will examine and analyze: criminal liability for bank employees who do not implement the bank's prudential principles. In this research, normative legal research was carried out using secondary data as legal material sourced from existing banking cases, particularly at the Lubuk Pakam District and Medan District Courts. In the event of a violation of the regulations regarding the application of the precautionary principle of the bank, the perpetrators are only subject to administrative and compensation sanctions in accordance with regulations issued by the FSA, not criminal sanctions based on the Criminal Code. Law Enforcement Officials must distinguish between violations of bank internal rules and violations of criminal law.

## 1 INTRODUCTION

Liability arises as a result of actions. The types of liabilities that exist consist of 3 (three) responsibilities such as administrative responsibility, compensation, and criminal liability. Likewise with actions, consisting of administrative actions, actions that cause harm, and actions that violate criminal law (Agustina, Rosa., 2003).

In carrying out duties in the banking sector, each employee is required to carry out banking principles. These principles emphasize the legal relationship between banks and depositors are fiduciary, confidential, prudential principle, and know your customer principles (Rozali, Asep., 2011) (Apriani, R., and Hartanto, 2019).

All banking principles are regulated in statutory regulations and the implementation of the regulations tend to be administrative mechanistic in that they put forward procedural aspects (Apriani, R., and Hartanto, 2019).

Indonesian banks in conducting their business are normally based on economic democracy by using the precautionary principle. This is important to be applied in carrying out financial transaction activities in order to minimize banking risks that can

occur. Banks must understand and recognize the risks that may arise in carrying out their business activities, so they can know when these risks arise in order to take appropriate actions (Idroes and Sugiarto, 2006).

Banks in carrying out business functions and activities that collect and distribute public funds are required to apply the precautionary principle to protect funds entrusted to the public. This principle is stipulated in Law No. 10 of 1998 that Amendments to No. 7 of 1992 concerning Banking. Implementation of the precautionary principle in the banking world, is an obligation for banks to pay attention and implement it, including for their employees.

Banking in Indonesia has implemented internet banking, there are several potential holes or security holes in the technical implementation of the internet banking service itself. Users receive attacks in the form of viruses that can tap, change, delete, or falsify data (PINs, credit card numbers, and secret keys) (Rahardjo, B., 2001). According to Karen Furst, in the journal entitled: "Internet Banking: Development and Prospects" in the Program on Information Resources Policy at Harvard University, explains that internet banking is a form of internet media use by banks to promote and simultaneously

conduct online transactions, both from products it is conventional and new. With internet banking, every customer can carry out electronic transaction activities at any time by accessing them via personal computers, cellphones, or other wireless media (Furst, K., 2002).

In addition, the integrity of bank employees is often tested in relation to dealing with customers. Related to the integrity of bank employees, in the much-cited English decision in *Tournier v. National Province & Union Bank of England* (1924) 1 KB 461 (CA), the court not only recognized the existence of the duty, but also listed a number of exceptions to the rule. In certain circumstances the bank is relieved of its duty of confidentiality and secrecy and either has a duty or is allowed to disclose information about the affairs of its client. The court classified these exceptions under four heads: 1) where disclosure is under compulsions by law; 2) where there is a duty to the public to disclosure; 3) where the interests of the bank require disclosure; and 4) where the disclosure is made by the express or implied consent of the client (Schulze, H., 2007).

Based on the data, there are banking cases that involving employees as a result of ruling out the implementation of the banking principles. The examples of cases that have occurred are: (i) Decision of the Lubuk Pakam District Court No. 964 / Pid.B / 2015 / PN.Lbp., Dated August 19, 2015. The court sentences an employee at the Mandiri Bank Lubuk Pakam Branch with a prison sentence of 1 (one) year 6 (six) months since it was proven legally and convincingly guilty of committing "criminal acts using fake letters" as referred to in Article 263 paragraph (2) jo. Article 55 paragraph (1) of the Criminal Code 1st; (ii) Decision of the Lubuk Pakam District Court No. 1632 / Pid.Sus / 2017 / PN.Lbp., Dated October 18, 2017, which sentenced a person in BPR Nusa Galang Makmur employee to 6 (six) years in prison and a fine of Rp. 100 million since it has been legally and convincingly proven to have committed "a criminal offense to make a false record in a document carried out continuously" as stipulated in Article 49 paragraph (1) letter a of Law No. 7 of 1992 concerning Banking as amended by Law No. 10 of 1998 jo. Article 64 paragraph (1) of the Criminal Code; (iii) Decision of the Medan District Court No. 541 / Pid.B / 2015 / PN.Mdn., Dated August 5, 2015 jo. RI Supreme Court Decision No. 216K / PID / 2016, dated June 6, 2016, which has freed unscrupulous employees who were charged with

committing "fraud" as referred to in Article 378 jo. Article 56: 1 of the Criminal Code; and so forth.

Based on the three above cases examples of cases above, the problem that often occurs is that bank employees who are under pressure against operational targets, often ignoring the precautionary principle of banks to achieve the fulfillment of these targets. Banking in overcoming this problem issued Standard Operating Procedure (SOP), but the regulation is administrative and mechanistic. SOPs do not guarantee that legal problems do not occur. Examples of such cases are the non-implementation of banking principles, particularly the precautionary principle of banks by bank employees.

If there is an act that violates the Banking SOP, then it can only be categorized as an administrative act and an act that causes loss. The responsibility is also just administrative and compensation. Bank employees who have violated SOPs based on the principle of prudence, in practice are held to account for criminal liability. In fact, the banking regulation or SOP does not contain criminal sanctions, only administrative sanctions and compensation or compensation.

## 2 METHOD

This research is a descriptive normative legal research. The data used was sourced from secondary data as legal material which collected using library research techniques. Data were analyzed using qualitative analysis methods. Secondary data in the form of court decisions in the form legal material were obtained from the Lubuk Pakam District Court and Medan District Court. In tracing examples of cases originating from these court decisions, the views of law enforcement officials regarding the precautionary principle were found:

□ Bank employees are representatives, acting for and on behalf of the bank, so they are required to carry out the principle of prudence in carrying out their daily duties.

□ The principle of prudence that is not implemented will raises a legal problem and losses to customers. Legal issues against actors who incidentally bank employees are problems with the bank's internal parties themselves, and with customers. In the case of legal problems with the bank's internal side, the bank employee as the offender is asked for administrative responsibility and compensation, while legal issues with the customer are often held accountable criminal.

□ There are no criminal sanctions in the bank's internal regulations as Standard Operating Procedures, making law enforcement officials use criminal law which should be used as a last resort (*ultimum remedium*) in resolving a legal problem. The inability of law enforcement officers (the Police and Prosecutors' Office) to use banking legal instruments to uncover criminal cases. The articles used are often sourced from the Criminal Code only.

### 3 RESULTS AND DISCUSSIONS

#### 3.1 Second Section

The difference between unlawful acts in the context of criminal law and civil law is more emphasized on differences in the nature of criminal law that is public while private law is private. For that reason, as a reference: The differences between criminal (against the law) and civil actions is that according to their nature as public law. With a criminal offense, there are violated public interests (as well as possibly individual interests), whereas by civil law, the violated is only personal interests (Fuady, M., 2010).

Civil cases will not be able to turn into a criminal case. If there is a change in the civil case in the process which is followed up at the judiciary as a criminal offense, this does not mean the position of the case has changed. The reason for the emergence of criminal offenses which processed is nothing but basically found elements of a criminal act that does occur in civil cases that are being prosecuted, in the case of intention (*mens rea*) and deeds (*actus reus*) that violate the elements of criminal acts (Julisman, 2017).

According to Julisman who gave an example with the use of checks and blank giro as collateral for debt in business transactions, it can be drawn a common thread that acts against the law in a civil context and acts against the law in a criminal context clearly have differences. The difference lies in the "intention" (*mens rea*) of the perpetrators, whether the actions can be categorized as having violated the provisions of the articles in the Criminal Code, or not. To determine a person's "intention", one must look at the series of actions that he does whether or not he meets the elements of a criminal offense (Julisman, 2017). Based on the above description, the difference between unlawful acts in a civil context and acts against the law in a criminal context lies in their nature.

#### 3.2 Criminal Liability

According to law, responsibility is a consequence of the consequences of a person's freedom regarding his or her actions related to ethics or morals in carrying out an act (Notoatmojo, Soekidjo., 2010) (Triwulan, Titik., And Shinta Febrian, 2010). The criminal liability according to George P. Fletcher is "the question of attribution is resolved under an entirely distinct set of norms, which are directed not to the class of the potential violators, but to the judges and jurors charged with the task of assessing whether individuals are liable for their wrongful acts" (Fletcher, George P., 2000).

Criminal liability in common law and civil law systems is generally formulated negatively. That is, in Indonesian criminal law (like other civil law systems) the law actually formulates the conditions that can cause the maker not to be accounted for (Abidin, Andi Zainal., 1983). Thus, what is regulated are conditions that can cause the maker not to be convicted (*strafuitsluitingsgronden*), which for the most part is the reason for erasure. Whereas in the practice of justice in common law countries, various "reasons for general defense or general excusing of liability are accepted (Huda, Chairul., 2006).

In addition, criminal liability in the common law system is related to *mens rea*. Criminal liability is based on a mental state that is as a guilty mind. Guilty mind implies that it is a subjective mistake, that someone is found guilty because the creator is considered to have the wrong mind, so that person must be responsible. Criminal liability is imposed on the maker and must be punished. No guilty mind means that there is no criminal liability and the perpetrator does not need to be convicted (Chand, Hari, 1994).

Errors as part of *mens rea* are also considered as a form of violation of rules or regulations. Every person who violates the law is responsible for what has been done. Mistakes as an element of accountability in this view make a guarantee for someone and make control of one's freedom against others. The existence of this guarantee makes a person will be protected from the actions of others who violate the law, and as a control because everyone who violates the criminal law is burdened with criminal liability (Ashworth, Andrew., and Jeremy Horder, 2009).

### 3.3 Personnel Accountability in Bank's Prudential Principles

The relationship between banks and customers is based on the fiduciary principle (Explanation of Article 29 paragraph (3) and (4) of the Banking Law) and the Bank is a fiduciary financial institution. The Bank has a very noble mission and vision as an institution whose duty is to carry out the mandate of national development in achieving improvement in the standard of living of the people, as stated by Nindyo Pramono (Pramono, N., 1999).

Hirsanudin stated that the relationship between banks and customers is based on fiduciary relationships where banks must not only pay attention to the interests of the bank, but also the interests of customers both depositors and users of funds. Fiduciary obligations can arise because of a contract and also because of a relationship between two parties. The bank has a relationship with its customers so that if they practice unsafe and unhealthy practices, the bank can be sued for violating fiduciary obligations (Hirsanudin, 2008) (Pramono, N., 1999) (Sjahdeini, S.R., 1994).

The bank prudential principle must be implemented by every employee. For example, Decision of the Lubuk Pakam District Court No. 964 / Pid.B / 2015 / PN.Lbp., Dated August 19, 2015, states that bank employees as defendants do not apply the precautionary principle in opening bank customer accounts. Regulations regarding account opening are regulated in SOPs at the bank. The actions of the defendant who do not implement the precautionary principle according to the SOP are subject to administrative sanctions and compensation. Meanwhile, the actions of the defendant which had harmed the Nasabaha resulted in the defendant being criminally prosecuted.

Based on the example of the case above, the responsibility of bank employees in applying the precautionary principle of the bank (related to opening a bank account) is starting from filling out the application form for opening a savings account until its use in the form of a first deposit and use of an Automatic Teller Machine (ATM).

Based on Article 10 of Bank Indonesia Regulation No. 3/10 / PBI / 2001 concerning the Application of Know Your Customer Principles, banks are required to maintain a customer profile that at least includes information on: a) Work or line of business; b) Total income; c) Other accounts owned; d) Normal transaction activities; and e) The purpose of opening an account. The responsibility of bank employees must also ensure that the data

provided by prospective customers is valid and original data and does not belong to anyone else. The purpose of using the account must also be ensured not to conflict with applicable laws and regulations.

Accountability of bank employees in opening accounts can be in the form of: criminal, administrative and civil liability. Criminal liability is when an employee falsifies letters or puts false information into account opening forms. Meanwhile, related to administrative responsibilities is when prospective customers only attach a personal identity card receipt (PIC). When a PIC is obtained, bank employees must follow it up by attaching a PIC that has been issued by the relevant government agency. In the case of civil liability, when there is an error in the nominal input of the initial deposit, the bank employee (who made a mistake) can correct it by compensating the loss suffered by the customer.

### 3.4 Standard Operating Procedure of Banking

The banking industry (bank) is one of the transaction-intensive business sectors. These transactions in practice carry many legal risks, including general criminal, civil, banking and even money laundering (Muktar, Bustari, et al., 2016). Legal risks are consequences that must be faced by banks in their business activities as contained in Bank Indonesia Regulation No. 5/8/2003 concerning Application of Risk Management for Commercial Banks.

In an effort to realize transactions in the field of savings that are legally safe, the Bank usually has made a procedural technical provision or often referred to as the Standard Operational Procedure. In the SOP on savings, it is usually regulated in detail and technically how the procedures and conditions for opening, depositing, withdrawing, transferring, RTGS to closing a savings.

Arrangement of transactions concerning savings in SOP, requires "Bank Operations" in carrying out transactions "must refer" to the relevant SOP. Transactions must be carried out in accordance with the terms and procedures specified in the SOP. SOP is a provision that is forcing the implementation of a particular transaction. Forcing does not mean that the SOP must be implemented in full, without exception. The meaning of "force" is that under normal conditions SOPs must be carried out to the maximum extent possible, whereas for certain conditions, SOPs can be distorted or anticipated in other ways. For example, in withdrawing or

requesting a transfer of a savings that should have been made by the account holder's customer, but because of the absence, the savings account owner could not come for the transaction, while the customer requested that the transaction be immediately carried out.

In the above conditions, the anticipation that can be done is that the customer must appoint someone to be their proxy in making transactions by completing the specified requirements. Another step that must be done is to ensure through direct confirmation that the transaction was indeed requested by the customer represented by their proxy. Confirmations with customers should be recorded and witnessed personally by the customer's power of attorney, as well as other people besides the bank employees who make the confirmation. The purpose of these efforts is to avoid each party not recognizing or running away from responsibility for actions and actions taken in the future. SOP was created not to inhibit transactions, but instead to help smooth a transaction by regulating the rules of the transaction. The confirmation referred to is a form of implementing the precautionary principle of the bank.

In some cases that occur with banks, SOPs are sometimes not "adhered to" or even "violated", causing legal problems and losses to customers. Under these conditions, violations of SOP will lead to legal liability, both criminal and civil. If this happens, the Bank's Operational Persons who have committed violations may be subject to legal liability and personal sanctions. In addition, parties who are involved and / or participate as well as those who assist in the transaction can also be asked for the same legal responsibility. Involved, participating or the intended servant is anyone who knows, helps or even allows the violation to occur. Then the violations here are not only violations that are active but also passive, in the sense of violations due to deliberate or negligent in the eyes of the law have the same value.

Seeing the conditions mentioned above, especially regarding sanctions and legal consequences that will be held accountable if "someone" commits an offense, or who participates or assists in the occurrence of a violation, then it should be and there is no choice to always submit, obey and obey the rules there is. This action is the only thing that can save the employee from legal problems in carrying out their duties and responsibilities.

Violation of SOP is a violation of law. The consequences of a violation result in criminal

liability, fines and / or compensation. The thing to note with this legal sanction is that the legal sanctions are "attached to the makers of mistakes" (Thalib, A.R., 2006). The legal responsibility for the violation rests entirely with the person who committed the violation.

According to Mahmud Mulyadi, the principle of "geen straf zonder schuld" or in Latin terms "actus non est reus nisi mens sit rea", the element of error or "mens rea" becomes very important in imposing crimes on perpetrators of crime. "Speaking of" bad intentions (mens rea) "in a conviction, then the essence is inseparable from the existence of" free will "in human beings. In the study of criminal law, "free will" gives birth to two streams in the purpose of punishment (criminal liability), namely classical school and positive flow. Classical schools view that humans have free will to do something. A person who commits a criminal offense will be sentenced according to what is threatened by the law (highly dependent on the issue of whether the perpetrator in committing the crime has an error of intentionality (dolus) or negligence (culpa)). The principle of accountability in criminal law expressly states that there is no criminal without error. This error is seen from the inner connection of the creator (subjective) and his actions in the form of deliberate and neglect / negligence. In criminal law the elements of actus reus (objective element) and the criminal responsibility or mens rea are formulated (subjective elements). Both must be joined by judges in criminal conviction (monoism), or separated in criminal conviction (dualism). Criminal law in Indonesia adheres to dualism according to Article 191 of the Criminal Procedure Code, which separates the subjective and objective elements "(Mulyadi, M., 2016).

Anyone who makes mistakes or violations will be legally processed without discrimination. This phenomenon should be considered to be more careful and obedient and implement the laws and regulations that apply fully and consequently to everything related to the work of bank employees.

Another thing to note is that what is meant by "perpetrators of a crime" is not only "those who commit a direct crime", but also includes those who join in, helping and enjoying the results of the crime. Although the employee is not the one who did, or just went along with even just knowing, but does not prevent, it can be suspected of participating in committing criminal acts committed by people who are not responsible. Provisions regarding parties deemed as perpetrators in a criminal offense are

regulated in Articles 55 and 56 of the Criminal Code.

As for those who are deemed as perpetrators of criminal offenses according to criminal law, not only the perpetrators, but also include those who order to do, participate in doing, who give or promise something by abusing power or dignity, which gives opportunity, means or information, which orders to do as well who helped do.

One of the most appropriate ways to overcome to avoid legal problems as mentioned above is to understand, obey and implement SOPs and other provisions related to job duties and responsibilities. Other efforts that can be done are to prioritize: professionalism, accountability, independence and transparency in work (KNKCG, 2004).

Another important thing to do in preventing violations and / or mistakes is to apply the Prudent Banking Principle in a consistent and committed manner. Prudent Banking Principle is a principle or principle that banks in carrying out their functions and business activities must be prudent. Seriousness in applying this principle will greatly help to prevent or reduce errors and violations. The higher prudence in carrying out a job, of course, the less likely the occurrence of errors or violations in the work concerned. Based on Black's Law Dictionary, about "prudential principle" that "Prudence is carefulness, precaution attentiveness and good judgement, as applied to action or conduct, that degree of care required by the exigencies or circumstances under which it is to be exercised" (Black, Richard C., 2004).

The importance of the Prudent Banking Principle in Bank operations, can be seen in Article 2 and Article 29 paragraph (2) of Law no. 7 of 1992 jo. No. 10 of 1998. As such, there is no reason for banks not to apply the precautionary principle in carrying out their business activities and must uphold and adhere to the principle. All actions and policies that are made must always be based on applicable laws and regulations, so that they can be legally accounted for.

An example of the Prudent Banking Principle in a savings transaction is that the bank officer / bank employee must carefully look at the requirements and the documents submitted relating to the transaction in question. For example, carefully examine whether the file is complete or not, original or fake, as well as the signature (original or fake), whether the file was obtained correctly by the party who submitted it (in practice often misuse of PICs and other similar files), whether the transaction is known by the savings owner, if it turns out that what

comes is his power of attorney and other similar acts. The point is the Prudent Banking Principle emphasizes that it is thorough, careful, not rash, but still professional at work.

The next banking principle is the Know Your Customer Principles (KYCP) Principle, a principle applied by banks to find out the identity of customers, monitor customer transaction activities, including reporting suspicious transactions. The application of KYCP in banking transactions is one of the effective efforts in preventing and minimizing the occurrence of violations and errors. An example of KYCP in withdrawal, book-entry or RTGS passbook is the act of "confirmation" done by Teller to the owner of the passbook before the transaction is carried out when the person requesting the transaction is executed is not a direct customer but someone else authorized for it. From this example it is clear how effective the KYCP is in trying to avoid legal problems.

The application of KYCP is a necessity considering the variety of modes practiced by criminal offenders as well as the moral hazard of perpetrators of crime in the banking industry. At present the Know Your Customer Principles have risen towards Customers Due Diligence which actually leads to one of the most important principles and becomes the bank's Prudential Principle. Customers Due Diligence emphasizes the importance of Bank officers to identify and verify prospective customers. This action is an initial effort to prevent criminals from becoming customers of a bank. Identification and verification carried out of course with all the provisions that do not offend the prospective customer concerned.

## 4 CONCLUSIONS

The criminal liability of bank employees who do not implement the precautionary principle arises from complaints reports made by customers. The complaint report is based on an act against criminal law. Meanwhile, the accountability from the internal perspective of the bank is in the form of mechanistic administrative responsibilities and compensation / compensation. As a result, a regulation on the application of the prudential principle is needed in the form of a Financial Services Authority Regulation that contains the legal consequences of violating these regulations. This is aimed at enforcing banking law by an independent Financial Services Authority in supervising the financial services sector, which carries out its supervisory

duties and functions in the case of investigating banking crimes in the financial services sector.

## ACKNOWLEDGEMENTS

This paper is supported by a Lecturer in the Law Study Doctoral Program (S3) Faculty of Law, University of North Sumatra, Medan.

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