



## Legal Certainty and the Harmonization of the Principle of Prudence: A Reconstruction of Bank Compliance Parameters in the Discourse on the Business Judgment Rule

Rizki Pratama<sup>1\*</sup>, Ida Nadirah<sup>2</sup>

<sup>1</sup>Magister Program in Law, Universitas Muhammadiyah Sumatera Utara

<sup>2</sup>Lecturer, Faculty of Law, Universitas Muhammadiyah Sumatera Utara

[pratamar0707@gmail.com](mailto:pratamar0707@gmail.com), [idanadirah@umsu.ac.id](mailto:idanadirah@umsu.ac.id)

**Corresponding Author:** Rizki Pratama [pratamar0707@gmail.com](mailto:pratamar0707@gmail.com)

### ARTICLE INFO

### ABSTRACT

*Keywords:* Prudential Banking Principle, Legal Certainty, Business Judgment Rule, Banking Criminalization

*Received :* 20 December 2025

*Revised :* 23 January 2026

*Accepted:* 26 February 2026

©2026 Pratama, Nadirah: This is an open-access article distributed under the terms of the [Creative Commons Atribusi 4.0 Internasional](https://creativecommons.org/licenses/by/4.0/).



The banking sector plays a crucial role in national economic development and must operate in accordance with prudential banking principles. However, legal uncertainty arises due to the clash of norms between the regulations governing the Board of Directors' duties under Law No. 40 of 2007 concerning Limited Liability Companies (UU PT) and criminal liability under Law No. 10 of 1998 concerning Banking. This research aims to analyze the harmonization of these regulations and propose a reconstruction of prudential parameters to avoid the criminalization of business risks. The research adopts a normative legal method, and findings indicate that the lack of clear "compliance steps" parameters creates disparity in court rulings. The discretion granted to businesses under the Business Judgment Rule doctrine is sometimes misinterpreted, leading to criminal implications. The study recommends reinforcing the role of the Financial Services Authority (OJK) by instituting a Cease and Desist Order as a precondition for criminal law enforcement in compliance matters.

## INTRODUCTION

Banking is the lifeblood of a nation's economy, serving as a financial intermediary. Due to its nature, which relies heavily on public trust, this sector demands management standards that are far stricter than those in other business sectors. Sutan Remy Sjahdeini emphasized that the relationship between a bank and its clients is a fiduciary relationship, which legally mandates the application of prudential banking principles as an imperative duty (Sjahdeini, 2018). In Indonesia, this principle is affirmed in Article 2 of Law No. 10 of 1998 on Banking, which requires banks to always remain healthy and comply with all applicable legal provisions.

However, in implementation, there is a sharp ambiguity between the position of banks as legal entities and their function as managers of public funds protected by criminal law. As a legal entity, banks are subject to Law No. 40 of 2007 on Limited Liability Companies. Article 97, paragraph (2) of the UU PT mandates the Board of Directors to manage the company with good faith and full responsibility. Further, Article 97, paragraph (5) offers protection through the Business Judgment Rule (BJR), where Directors cannot be held accountable for company losses if they can prove the decisions were made based on sufficient information, without conflicts of interest, and with prudence (Fitriani, 2020).

A fundamental legal issue arises when business risks, which should be protected under the UU PT, are instead brought into the criminal realm under Article 49, paragraph (2) letter b of the Banking Law. This article threatens criminal sanctions for bank officials who "intentionally fail to take the necessary steps to ensure the bank's compliance with legal provisions." The phrase "steps to ensure compliance" in this article is abstract and lacks a definitive parameter in the legal explanation. This lack of clarity violates the principles of *\*lex certa\** (laws must be clear) and *\*lex stricta\** (laws must be interpreted strictly), which are the main pillars of legal certainty (Sinaga et al., 2025).

In the perspective of Jan Gijssels and Mark van Hoecke, legal certainty involves two aspects: first, the law must be determinate (*\*bepaaldheid\**), and second, the law must be predictable (*\*voorspelbaarheid\**) (Van Hoecke & Gijssels, 1982). When a bank official cannot predict whether a decision in accordance with SOP (Administrative Law) will be considered a criminal act (Criminal Law) by investigators, legal certainty has collapsed. Further, Gustav Radbruch, in his theory of the three basic values of law, asserts that law must contain certainty (*\*rechtssicherheit\**), utility (*\*zweckmassigkeit\**), and justice (*\*gerechtigkeits\**) (Radbruch, 1932). Radbruch critically states that if there is a conflict between legal certainty and justice, where legal certainty results in extreme injustice, legal certainty must be defeated in favor of justice (Julyano & Sulistyawan, 2019).

The criminalization of bank officials who have followed Standard Operating Procedures (SOP) but face losses due to economic fluctuations is a clear example of injustice. In line with this, Lon Fuller in *\*The Morality of Law\** mentions that one "failure of law" is having regulations that cannot be understood or are interpreted differently by different parties (Koto et al., 2023).

Article 49 of the Banking Law has transformed into a "rubber clause" that undermines the morality of law itself.

Additionally, the neglect of the *\*Ultimum Remedium\** principle in banking law enforcement shows a shift in the role of criminal law. According to Barda Nawawi Arief, criminal law should be a last resort when other legal efforts (such as administrative or civil sanctions) have proven ineffective (Barda Nawawi Arief, 2018). In the context of UU PT and the Banking Law, the OJK as the supervisory authority has strong administrative sanctions to regulate banks. However, in practice, law enforcement agencies often bypass or even ignore OJK's supervision. This creates a legal chaos that is frightening for banking practitioners.

Barda Nawawi Arief further emphasizes that legal certainty in banking depends heavily on the synchronization between supervisory regulations and investigative regulations (Arief, 2002). Without clear parameters for "compliance steps" (such as an OJK regulation adopted as a standard for criminal proof), the fate of bank officials will always depend on the subjectivity of law enforcement officers. This injustice reminds us of St. Augustine's doctrine, *\*lex iniusta non est lex\**, that laws that are inherently unjust are not laws.

Therefore, this research is crucial to fill the legal gap (*rechtsvacuum*) regarding prudential principles. This research intends to reconstruct the thinking of Article 49, paragraph (2) letter b of the Banking Law by integrating the Business Judgment Rule doctrine from the UU PT into banking criminal law. The goal is to create regulatory harmony that provides protection for well-meaning bank officials, in order to maintain the stability of the national banking industry as a public trust institution.

## LITERATURE REVIEW

### 1. Theory of Legal Certainty

This research is based on the Theory of Legal Certainty developed by Gustav Radbruch, a German legal philosopher. Radbruch emphasizes that law must balance three fundamental values: justice (*justitia*), utility (*utility*), and legal certainty (*certainty*). According to Radbruch, legal certainty is a fundamental requirement for law to function effectively as a tool for regulating society. This concept stresses the importance of *lex certa* (clear norms) and *lex stricta* (strict interpretation), ensuring that every citizen can predict the consequences of their actions (Radbruch, 1932). In the context of banking law in Indonesia, legal certainty becomes critical because unclear phrases used in regulations can lead to subjective interpretations. For example, in Article 49, paragraph (2), letter b of Law No. 10 of 1998 on Banking, the term "compliance steps" does not have clear standard parameters. This ambiguity may cause disparities in decisions between regulatory authorities and courts, creating uncertainty for banks in carrying out their operational activities. As a result, without sufficient legal certainty, law loses its function as a protector of the rights and obligations of business actors and instead becomes a source of risk for those acting in good faith. This phenomenon is reinforced by empirical studies from the Financial Services Authority (Otoritas Jasa Keuangan, 2022), which note that unclear legal norms

regarding banking compliance lead to 17% of administrative disputes between banks and regulators. Therefore, Radbruch's principle of legal certainty is not only theoretical but also practically relevant to encourage compliance, prevent disputes, and ensure the stability of the banking system.

## **2. Theory of Criminal Liability**

At a medium level of legal analysis, this research uses the Theory of Criminal Liability, which emphasizes the principle of *mens rea* (guilty mind) as the foundation for imposing criminal sanctions. Referring to the thoughts of Barda Nawawi Arief, the principle "no crime without fault" (*geen straf zonder schuld*) emphasizes that a person can only be subjected to criminal penalties if two essential conditions are met: criminal intent (evil intent) and the ability to bear responsibility (Barlian & Arief, 2017). In the context of banking, this principle aligns with the *Ultimum Remedium* principle, which states that criminal law should only be applied as a last resort after administrative efforts through the supervisory authority, in this case, the Financial Services Authority (OJK), fail to enforce compliance. In other words, imposing criminal sanctions for administrative-technical violations without evidence of criminal intent is a deviation from the essence of criminal law, as it is premature and could harm individuals acting in good faith. Furthermore, in banking operations, it is essential to distinguish between individual errors and organizational business risks. Individual errors may include intentional or negligent actions in procedures, while organizational business risks are inherent in legitimate banking activities and cannot be criminalized without criminal intent. An empirical study by the OJK (2022) showed that of the 45 banking violations brought to the criminal realm, 60% were related to procedural inaccuracies, not individual criminal errors, emphasizing the relevance of applying *mens rea* and *Ultimum Remedium* principles in banking law enforcement practices. This approach stresses that criminal law must remain proportional, just, and selective, and should not be used to penalize administrative violations that should be resolved through internal supervisory and regulatory mechanisms. This approach also ensures legal certainty and protection for business actors acting in good faith, while maintaining the credibility of the criminal law system in the business realm.

## **3. Business Judgment Rule Doctrine**

At the micro or application level, this research refers to the Business Judgment Rule (BJR) doctrine, which is normatively regulated in Article 97, paragraph (5) of Law No. 40 of 2007 concerning Limited Liability Companies. This doctrine provides legal protection for Directors from claims for company losses, as long as the decisions made meet criteria based on sufficient information, prudence, and good faith. BJR acts as a legal analysis tool to differentiate between reasonable but risky business decisions and criminal acts. For example, in the context of bank credit distribution, a decision leading to non-performing loans should not automatically be classified as a criminal act. If the decision was made based on adequate analysis, rational risk considerations, and in line with professional practices, it is part of legitimate business risks, not

a criminal violation. Integrating BJR into banking operational analysis has several strategic goals:

1. Preventing the criminalization of positions for Directors and bank employees who have fulfilled their professional duties correctly.
2. Ensuring legal certainty in business decision-making practices, allowing management to act without fear of disproportionate criminal claims.
3. Strengthening corporate governance, as BJR encourages decision-making based on complete information, adequate documentation, and prudence in line with banking industry standards.

Empirical studies in Indonesia show that applying BJR is highly relevant for distinguishing business failures from criminal mistakes, especially in cases of non-performing loans involving state-owned and large private banks. For example, in the OJK study (2022), most non-performing loans analyzed did not show evidence of criminal intent, but rather inherent business risks covered by the BJR principle, making this doctrine an essential tool for limiting excesses in criminal law enforcement against bank management. Thus, BJR is not only a normative instrument but also a practical analysis tool for balancing criminal law interests, legal certainty, and business risks in banking operations.

## **METHODOLOGY**

This research uses normative legal research, focusing on the inventory and analysis of legal principles, harmonization of regulations, and examination of the binding nature of legal doctrines (Soekanto & Mamudji, 2004). The research approach is conducted through three main paths: a statutory approach to dissect the harmonization between Law No. 10 of 1998 on Banking and Law No. 40 of 2007 on Limited Liability Companies; a case approach through a literature review study to find the ratio decidendi related to the principle of prudence; and a conceptual approach referring to the Business Judgment Rule and Fiduciary Relation doctrines.

The legal materials used are secondary data, including primary legal materials such as banking regulations, limited liability company laws, and court decisions; secondary legal materials consisting of legal literature, journals, and previous research; and tertiary legal materials such as legal dictionaries (Soekanto, 2006). The legal materials are collected through library research, systematically organized according to the legal issues raised. All the collected legal materials are then processed using qualitative analysis methods with a descriptive-analytical technique, where the researcher performs legal interpretation and rational argumentation to evaluate the effectiveness of norms in ensuring legal certainty for banking professionals (Hadjon, 2003). This research is projected to be completed within four months, focusing on the development of jurisprudence in the legal domain of Indonesia.

---

## RESEARCH RESULTS

### **Harmonization of the Prudential Principle within the Framework of the Company Law (UU PT) and the Banking Law**

Analysis of the Harmonization of Norms shows Tension between the Board of Directors' Management Standards under the Company Law (UU PT) and Compliance Offenses under the Banking Law. In the Company Law (UU PT), the prudential principle is part of the Board of Directors' duty, which must be executed in good faith and with full responsibility. Article 97, paragraph (5) of UU PT provides legal protection through the Business Judgment Rule doctrine, where members of the Board of Directors cannot be held personally liable for the company's losses if they can prove that the actions were taken without a conflict of interest and based on sufficient information (prudence).

On the other hand, Law No. 10 of 1998 on Banking, through Article 49, paragraph (2) letter b, tends to disregard this professional protection by threatening criminal sanctions for bank officials who fail to implement the necessary compliance measures for the bank. Based on the Fiduciary Relation theory by Sutan Remy Sjahdeini, banking prudential standards are indeed imperative because they involve public funds (Sjahdeini, 2018). However, theoretically, the offense in Article 49 should be understood as "compliance of the bank" as an entity, rather than merely "individual compliance," without the need for proving malicious intent (\*mens rea\*).

The ideal synchronization would be to adopt the BJR parameter from UU PT as a standard for law enforcement to determine whether an action constitutes a professional mistake that can be penalized or is simply a business risk protected by law. **Implications of Unclear Compliance Parameters on Disparity in Court Rulings**

Legal uncertainty arises because the Banking Law does not explicitly define or provide clear boundaries for the "compliance steps." The implications of this gap in standards are clearly visible in the disparity of court rulings, as analyzed in the case of Bank Permata (Decision No. 666/Pid.Sus/2020/PN.Jkt.Sel): Bank officials were still sentenced to prison despite the Financial Services Authority (OJK), as the supervisory authority, not finding any violations or investigative reports (Erdiana, 2023). Thus, according to the researcher, this uncertainty's implication is quite evident.

Referring to Gustav Radbruch's Legal Certainty Theory, this disparity indicates the collapse of the value of \*rechtssicherheit\* (legal certainty) (Julyano & Sulistyawan, 2019). Without clear parameters (such as the consistent use of the 5C analysis: Character, Capital, Capacity, Collateral, Condition), law enforcement often generalizes that the occurrence of non-performing loans (NPLs) is evidence of a violation of the prudential principle. This creates fear among bank officials when making business decisions, which ultimately may hinder the function of banking intermediation itself.

---

## **Reconstruction of the Prudential Principle Parameters Based on the Ultimum Remedium Principle**

To ensure legal protection for banking professionals, a reconstruction of the boundaries of the prudential principle is required, grounded in the Ultimum Remedium principle.\*\* As stated by Sentosa Sembiring, the process of supervision by the authorities (OJK) should prioritize Supervisory Actions or administrative measures first (Sembiring, 2000). The element of "failure to implement compliance steps" in Article 49 of the Banking Law can only be legally fulfilled if an administrative order from OJK (such as an Action Plan or Cease and Desist Order) has been issued but still not complied with by the bank.

The ideal reconstruction of the prudential principle parameters includes:

1. Procedure Compliance: Ensuring that all supporting documents for credit decisions are valid and legally binding.
2. Professionalism: The performance of duties based on professional skills, honesty, and objectivity.
3. Authority Clearance: Criminal law enforcement should only be carried out after an investigative report from the OJK (Financial Services Authority) indicating that administrative improvements have failed or there is clear evidence of malicious intent (*mens rea*).

With clear boundaries in place, the prudential principle is no longer a "rubber clause," but rather a standard that provides legal certainty and fairness for banking professionals in carrying out their operations.

## **CONCLUSIONS AND RECOMMENDATIONS**

Based on the research findings and discussion, it can be concluded that the application of the prudential banking principle in banking operations in Indonesia still faces significant legal uncertainty due to the duality of norms between the Banking Law (UU Perbankan) and the Company Law (UU PT). The lack of clarity regarding the parameter for "compliance steps" in Article 49, paragraph (2) letter b of the Banking Law has triggered sharp disparities in court rulings, where violations of administrative Standard Operating Procedures (SOP) can result in acquittals, as in the Bank Swadesi case, but can also lead to criminal sanctions, as in the Bank Permata case. Current law enforcement practices tend to disregard the Business Judgment Rule doctrine as stipulated in Article 97 of the UU PT and bypass the \*ultimum remedium\* principle by criminalizing positions without an investigative report or failure to fulfill administrative sanctions from the Financial Services Authority (OJK).

Therefore, the prudential principle should no longer be seen as a "rubber clause" based solely on business losses, but must be measured against objective professionalism parameters and compliance with administrative instructions from the supervisory authority.

## REFERENCES

- Arief, B. N. (2002). *Bunga Rampai Kebijakan Hukum Pidana*. Citra Aditya Bakti.
- Barda Nawawi Arief. (2018). *Masalah penegakan hukum dan kebijakan hukum pidana dalam penanggulangan kejahatan*. Prenada Media.
- Barlian, A. E. A., & Arief, B. N. (2017). Formulasi Ide Permaafan Hakim (RECHTERLIJK PARDON) dalam Pembaharuan Sistem Pemidanaan di Indonesia. *Law Reform*, 13(1), 28–44.
- Erdiana, E. (2023). Kepastian Hukum terhadap Penerapan Prinsip Kehati-Hatian Perbankan (Prudential Banking Principle) dalam Operasional Perbankan. *Syntax Literate; Jurnal Ilmiah Indonesia*, 8(10), 5774–5787.
- Fitriani, D. (2020). Perlindungan direksi melalui business judgment rule. *Al-Muamalat Jurnal Hukum Dan Ekonomi Syariah*, 5(2), 70–87.
- Hadjon, P. M. (2003). *Penelitian hukum normatif*. Kumpulan Tulisan, Fakultas Hukum Universitas Airlangga.
- Julyano, M., & Sulistyawan, A. Y. (2019). Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum. *CREPIDO*, 1(1), 13–22. <https://doi.org/10.14710/crepido.1.1.13-22>
- Koto, I., Hanifah, I., Perdana, S., & Nadirah, I. (2023). Perlindungan Hukum Atas Kekayaan Intelektual Perspektif Hukum Islam. *Jurnal Yuridis*, 10(2), 66–73.
- Otorisasi Jasa Keuangan. (2022). *Laporan Tahunan OJK 2022*. <https://www.ojk.go.id/id/data-dan-statistik/laporan-tahunan/Pages/Laporan-Tahunan-OJK-2022.aspx>
- Purwogandi, B. (2023). *Rekonstruksi regulasi penegakan hukum dalam upaya penanggulangan tindak pidana perbankan yang berkeadilan*. UNIVERSITAS ISLAM SULTAN AGUNG.
- Radbruch, G. (1932). *Legal philosophy*.
- Sembiring, S. (2000). *Hukum Perbankan*. Mandar Maju.
- Sinaga, N. F., Nadirah, I., & Pohan, M. (2025). Perlindungan Hukum Terhadap Nasabah Bank Yang Menerima Kerugian Akibat Kesalahan Transfer Dana. *Iuris Studia: Jurnal Kajian Hukum*, 6(2), 640–649.
- Sjahdeini, S. R. (2018). *Perbankan Syariah: Produk-produk dan aspek-aspek hukumnya*. Kencana.
- Soekanto, S. (2006). *Pengantar penelitian hukum*. Penerbit Universitas Indonesia (UI-Press).
- Soekanto, S., & Mamudji, S. (2004). *Penelitian Hukum Normatif*, Cetakan ke-8, PT. Raja Grafindo Persada, Jakarta.
- Undang-Undang Nomor 10 Tahun 1998 Tentang Perbankan (1998). <https://peraturan.bpk.go.id/Details/45486/uu-no-10-tahun-1998>
- Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas (2007). <https://peraturan.bpk.go.id/Details/39965>
- Van Hoecke, M., & Gijssels, J. (1982). *Wat is rechtstheorie?* KluwerRechtswetenschappen.