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The Criminalization of Banking Business Risks: A Review of the Business Judgment Rule in Light of Supreme Court Decision No. 8506 K/Pid.Sus/2025

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A B S T R A C T

This study examines the phenomenon of the criminalization of bank management decisions resulting from law enforcement's failure to distinguish between business risks (breach of contract) and banking crimes. The principle of prudence is often interpreted broadly, so that financial losses resulting from non-performing loans are easily drawn into the criminal realm, as reflected in Supreme Court Cassation Decision No. 8506 K/Pid.Sus/2025, which overturned an acquittal (onslag). Using a normative legal research method with legislative, conceptual, and case-based approaches, this study analyzes the parameters of criminal liability through the lens of the theory of legal certainty, the Business Judgment Rule (BJR), and the principle of ultimum remedium. The research findings indicate that credit defaults constitute a civil-law business risk.

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INTRODUCTION

Banking institutions play a vital role as a pillar of the national economy that functions as an intermediary institution in collecting and distributing public funds. In carrying out these strategic functions, banks are required to rely on high professionalism to mitigate the inherent legal risks in their activities. The highest moral value that is the compass in banking operations is the *prudential principle*, which is juridically mandated by Article 2 and Article 29 (Law (Law) Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, 1998), and now its spirit continues to be strengthened through (Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, 2023). Banking law expert Sutan Remy Sjahdeini emphasized that this principle requires banks to always be at a level of maintained health, where any policy taken by the board of directors must be based on good faith and measurable risk analysis in order to protect the public funds entrusted to it.

In the civil law dimension, credit distribution is essentially a contractual relationship that originates from the Principle of Freedom (Ritonga & Nadirah, 2022) Freedom *of contract* as stipulated in Article 1338 of the Civil Code and the fulfillment of the conditions for the validity of the agreement in Article 1320 of the Civil Code (Nadirah, 2026). As stated by Prof. Subekti, the relationship between the bank as a creditor and the customer as a debtor creates a debt-receivables alliance that is subject to the principle of *Pacta Sunt Servanda* (a binding agreement as a law for the parties) (Subekti, 2007). Based on Article 1238 of the Civil Code, if the debtor fails to fulfill his obligations according to the agreed period, it is classified as a default. In line with that, M. Yahya Harahap gave a firm line that disputes born from contractual failures are purely the domain of civil law, considering that Article 1131 of the Civil Code has provided guarantees through the principle *of creditorum parity*, where all the debtor's property is a guarantee of repayment (Harahap, 1997).

However, the reality of law enforcement in Indonesia shows an anomaly in the form of a clash between the civil and criminal realms (Nadirah, 2018). This is often rooted in the vagueness of law enforcement officials' understanding in dichotomizing the concepts of "Banking Crimes" and "Crimes in the Banking Sector". Criminal law expert Prof. Indriyanto Seno Adji highlighted this phenomenon as a form of neglect of the doctrine *of Business Judgment Rule* (BJR) (Adji, 2009). According to him, the authorities often equate corporate losses due to inherent business risks with losses due to malicious intent, thus triggering a tendency to expand the meaning of the prudential principle beyond administrative and civil boundaries into a policy criminalization.

This phenomenon of legal uncertainty is very sharply illustrated in the dynamics of the Supreme Court Cassation Decision Number 8506 K/Pid.Sus/2025. In this case, the court of first instance (*judex facti*) initially handed down a verdict of release from all lawsuits (*onslag van alle rechtsvervolging*), considering that the defendant's actions constituted a risk of disbursing funds in the civil realm. However, the Supreme Court annulled the release verdict and reversed to sentence the defendant to 3 years in prison and a fine of Rp5 billion. This disparity confirms Prof. Barda Nawawi Arief's concern about the tendency of law enforcement to often use criminal law as the main weapon (*primum remedium*), even though philosophically, criminal law in the administrative-business realm should act as the ultimate *remedium*. Without a thorough *assessment of mens rea* (malicious intent) and the completeness of formal procedures, legal considerations can easily shift from mere business negligence to criminal offenses (Arief, 2003).

The unclear boundary between business risks that lead to default and pure criminal offenses creates serious *legal uncertainty* for bankers. In fact, credit congestion is often caused by external factors such as macroeconomic conditions or *side streaming* by debtors beyond the control of banks. Therefore, this study is crucial to analyze the parameters of violations of the principle of prudence using a precise analysis knife of criminal and civil law doctrine. The goal is to formulate clear criteria for when a credit act is worthy of being categorized as a Banking Crime, in order to stop the trend of criminalization of business policies that are actually based on *the Business Judgment Rule* and banking operational procedures

THEORETICAL REVIEW

Legal Certainty Theory

On a philosophical level, this research is based on the Theory of Legal Certainty proposed by Gustav Radbruch. Radbruch constructs that the ideal law must be supported by three basic values that are mutually tensioned but must be harmonized (Radbruch, 1932): Justice (*Gerechtigkeit*), Utility (*Zweckmassigkeit*), and Legal Certainty (*Rechtssicherheit*). In the context of business and banking law, *the Rechtssicherheit* principle occupies a very crucial position because business actors and investors need predictability over regulation and the legal consequences of every business step they take. Without legal certainty, the investment climate and banking operations will be filled with fear of *arbitrariness* in law enforcement.

Furthermore, in the practice of criminal justice in Indonesia, this legal certainty is often reduced by the multiple interpretations of law enforcement officials on the demarcation boundary between civil default and corporate crime. Law enforcement officials often draw simplistic conclusions that every loss experienced by banks is a form of criminal act, ignoring the fact that credit disbursement is inherently accompanied by the risk of default (Purwogandi, 2023). The disparity in judicial decisions, as can be seen clearly in the Supreme Court Decision Number 8506 K/Pid.Sus/2025 which annulled the first-level release decision, is empirical evidence that there is no standard dogmatic parameter among judges.

Therefore, this theory is used in research to justify the urgency of providing legal protection for bankers. The interpretation of investigators and judges on common business risks should not be done haphazardly. Legal certainty requires that the rules *of the game* in the banking sector be *interpreted* strictly, so that administrative and civil operational policies are not easily smuggled into the criminal realm.

Doctrine Business Judgment Rule (BJR)

As the main analytical knife in the realm of corporate law, the doctrine *of Business Judgment Rule* (BJR) was raised to provide a firm demarcation between reasonable business policy and criminal acts. Historically and theoretically, BJR was born from the conception of *fiduciary duty* carried out by the Board of Directors, which includes duty *of care* and *duty of loyalty*. This doctrine prohibits courts or law enforcement officials from intervening or interfering (*judicial non-interference) in the* business decisions of a corporation, because in essence judges are not business experts who understand the dynamics of market risk when the decision is made.

Dogmatically strengthened by the views of Sutan Remy Sjahdeini, BJR acts as a legal shield (*safe harbor*) that provides immunity to the Board of Directors for company losses (including the birth of bad loans/NPLs) (Sjahdeini, 2007). This protection is absolute as long as the decision is taken by meeting four cumulative prerequisites: (1) based on good *faith* for the benefit of the bank; (2) no *conflict of interest*, let alone the receipt of bribes/kickbacks; (3) has been carried out with the principle *of duty of care* through adequate risk analysis; and (4) decided in accordance with the authority and *Standard Operating Procedure* (SOP) applicable within the bank (Zen, 2021).

In this study, the BJR doctrine will be explored to construct the argument that financial losses due to credit crunch cannot be immediately constructed as a delinquency or banking crime. As long as the BJR element is met cumulatively, the debtor's failure to repay credit due to external factors (such as a macroeconomic crisis or the deterioration of the debtor's industry) is purely a business risk. Punishing the directors for business risks is the same as killing the essence of corporate entrepreneurship itself.

The Principle of Ultimum Remedium in Administrative Criminal Law

This research also borrows the views of criminology and criminal law from the legal scholar Prof. Barda Nawawi Arief regarding the principle *of Ultimum Remedium* or the principle of subsidiarity (criminal law as a last resort) (Muladi & Nawawi, 1998). The Banking Law is not purely a general criminal law regime, but is characterized by *Administrative Penal Law*. This means that banking regulations are designed first and foremost to safeguard the health of banks and protect public funds through instruments of administrative supervision, not solely to sentence legal subjects to prison.

This characteristic of Administrative Criminal Law carries the consequence that the settlement of every dispute or operational violation must prioritize administrative sanctions (Aritonang, 2021) (such as written reprimands, a decrease in the bank's health level, license freeze, and fit *and proper tests* by the OJK) as well as civil recovery (through a default lawsuit or the execution of collateral guarantees) first. The use of criminal sanctions can only be justified if the civil and administrative instruments have been proven to be powerless, ineffective, or if the act has a level of destructive power (*mens rea* evil) that can no longer be tolerated.

This theory is very central to criticizing the current phenomenon of banking law enforcement. Law enforcement officials often act *over-criminalization* by making criminal law the main and first weapon (*primum remedium*) in ensnaring bank directors. In fact, imprisoning the board of directors for bad loans without optimizing the execution of the debtor's dependents does not provide economic recovery (*asset recovery*) for banks, but only creates a precedent of fear that destroys the reputation of the banking industry systemically.

Theory of Criminal Liability (Mens Rea and Actus Reus)

To prove precisely the existence of a Banking Crime, this study relies on the dualistic doctrine in criminal law, which is based on the adagium *Geen Straf Zonder Schuld* (no crime without fault) (Hakim, 2019). The condition for the fall of the sentence requires the proof of two absolute elements that are inseparable simultaneously, namely *Actus Reus* (outward acts that violate the law) and *Mens Rea* (the inner attitude or evil intention of the perpetrator). In the context of credit distribution, the act of approving credit (*actus reus*) is basically a neutral and legally valid administrative act, so that the main determinant of the status of the crime is the mens *rea* element (Mallarangeng & Ali, 2023).

Criminal law expert Prof. Indriyanto Seno Adji often emphasizes how dangerous it is to confuse administrative errors with intentional malice (Adji, 2009). In the doctrine of corporate criminal liability, business negligence or weakness of administrative analysis (*culpa*) cannot be equated with intentional evil to break into a bank (*dolus*). Banking Crimes are intentional offenses, not negligence. Therefore, if the directors are deceived by false documents from the debtor, it is a weakness of the system, not the crime of the directors.

This theory is crucial for dissecting and testing the judge's considerations (especially in the Supreme Court's Cassation Decision). The researcher will use this theory to measure whether the judge has materially explored and found *mens rea* (conscious will to violate the law for personal/group gain) from the board of directors when approving credit, or whether the judge is only stuck in a *strict liability way* of thinking that only sees the consequences in the form of material losses of credit congestion (*actus reus*). Criminalization without *mens rea* in banking cases is a form of misapplication of the law.

METHODOLOGY

Types of Research

This research is normative *legal research* or what is often referred to as doctrinal law research (Ibrahim, 2008). This research is focused on the study of the application of rules or norms in positive law, legal doctrines, and legal principles that regulate the boundary between banking business risks and criminal acts, in order to answer legal *issues* regarding the criminalization of bank board of directors policies.

Research Approach

To examine these legal issues comprehensively, this study uses 3 (three) approaches at once, namely (Mahmud Marzuki, 2005):

a. Statute *Approach*: It is carried out by examining all laws and regulations related to the legal issues handled, especially Law No. 10 of 1998 concerning Banking, Law Number 4 of 2023 concerning PPSK, as well as provisions in the Civil Code and the Criminal Code.
b. Conceptual Approach: Moving from the views and doctrines that have developed in the legal sciences. This approach is used to build legal arguments through an understanding of the doctrine of *Business Judgment Rule* (BJR), the principle *of Ultimum Remedium*, and the theory of criminal liability (*Mens Rea*).
c. Case Approach: It is carried out by examining the ratio decidendi or the judge's legal considerations on court decisions that have permanent legal force (*inkracht van gewijsde*), specifically dissecting the dynamics of the Supreme Court Cassation Decision Number 8506 K/Pid.Sus/2025 which annulled the first-degree release verdict in the Banking Crime case.

Source of Legal Materials

The legal materials used in this study consist of 3 (three) types, namely (Soekanto, 2006):

a. Primary Legal Material: It is an authoritative legal material, including laws and regulations (Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, Civil Code) and the Supreme Court Cassation Decision of 2025.
b. Secondary Legal Materials: These are legal materials that provide explanations of primary legal materials, in the form of literature, legal textbooks by experts (such as Sutan Remy Sjahdeini, Barda Nawawi Arief, M. Yahya Harahap, etc.), legal scientific journals, and articles from validated legal portals.
c. Tertiary Legal Materials: Materials that provide instructions and explanations of primary and secondary legal materials, such as the Legal Dictionary, the Great Dictionary of the Indonesian Language (KBBI), and encyclopedias.

Legal Material Collection Techniques

The technique of collecting legal materials in this study is carried out through library *research* or documentary *study*. The researcher inventories primary, secondary, and tertiary legal materials by reading, studying, making systematic notes, and classifying these materials according to their urgency and relevance to the subject matter (Soerjono & Mamudji, 1995).

Legal Materials Analysis Techniques

The legal materials that have been collected are then analyzed using qualitative-normative methods. The analysis is carried out deductively, namely drawing conclusions from the major premise (positive legal rules and legal doctrines/theories) to be faced with minor premises (legal facts in the Supreme Court Cassation Decision Number 8506 K/Pid.Sus/2025 and banking practices). The results of this analysis are then presented prescriptively, which not only describe the existing conditions, but also provide a prescription or legal argument on how the *prudential principle should* be applied so that there is no criminalization of banking business policies (Soekanto, 2006).

RESEARCH RESULTS

Dogmatic Analysis: Reducing the Meaning of Banking Crimes in Practice

Law Enforcement A misunderstanding of banking legal terminology is often the entrance to criminalization of bank directors. Current law enforcement practices tend to confuse "Banking Crimes" (TPP) and "Banking Crimes" (TPBP). Based on an analysis of laws and regulations (Law (Law) Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, 1998) and (Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, 2023), the TPP has the characteristics of *lex specialis* which is aimed at punishing irregularities in the internal regulations of banks by the bank organs themselves (*crime by the bank* itself). On the other hand, TPBP is subject to other general or special criminal acts where the bank is only an instrument or victim (*crime through/against the bank*).

This ambiguity of limits has resulted in law enforcement officials often using sweeping articles related to "violations of the *prudential principle*" in the Banking Law to ensnare the board of directors for the occurrence of credit jams. In fact, dogmatically in civil law, the distribution of *non-performing* loans (NPL) due to the debtor's business dynamics leads to default (Article 1238 of the Civil Code), not a criminal offense. Without a clear separation, every form of bank operational loss will always be overshadowed by criminal threats, which are contrary to legal *certainty*, as seen in the Supreme Court's Cassation Decision Number 8506 K/Pid.Sus/2025 which annuls the decision (*onslag*).

Business Risk and Malicious Intent Demarcation Limits (Mens Rea)

To dissect whether a failed credit disbursement is a banking crime or purely a business risk, the *doctrine of Business Judgment Rule* (BJR) must be placed as the main parameter. Credit disbursement is a business activity that inherently contains risk. Based on the view of Sutan Remy Sjahdeini, the debtor's failure to return credit due to factors beyond the bank's control (such as macroeconomic crisis or the debtor's business failure) cannot be transformed into an act against criminal law for the directors who terminate the credit (Sjahdeini, 2007).

Legal immunity for bank directors through BJR can be recognized if four cumulative conditions are met when the credit decision is taken:

a. The decision is based on good faith in the interests of the bank.
b. The Board of Directors has conducted a careful analysis (*duty of care*) and met the *Credit Standard Operating Procedure* (SOP).
c. There is no conflict *of interest* or *kickback* (bribe/reward) from the debtor.
d. The decision is taken collectively collegially in accordance with the authority of credit termination.

From the perspective of criminal law, administrative violations (such as imperfections in bail documents) are simply negligence (*culpa*) or *maladministration*, not an intentional act of evil (*dolus*). Absolute criminality requires proof of *mens rea* (malicious intent) in addition *to actus reus* (outward acts). If a bank loss occurs even though the board of directors has complied with the BJR signs, then it is purely a business loss, not a loss due to banking crimes.

Critical Examination of the Supreme Court Cassation Decision Number 8506 K/Pid.Sus/2025

The dynamics of the Supreme Court's Cassation Decision Number 8506 K/Pid.Sus/2025 which annulled the verdict of release (*onslag*) from *judex facti* has set a bad precedent for the national banking climate. In his consideration, the judge of first instance (*judex facti*) has appropriately placed the position of the case, where the actions of the defendant (the board of directors of the bank) are proven to exist factually, but the act is not a criminal act but an administrative and civil dispute due to business risks. This decision is actually in line with the principle *of Ultimum Remedium*, which mandates that in an administrative criminal law regime such as the Banking Law, criminal sanctions must be the last resort after civil instruments (execution of collateral) and administrative instruments (OJK reprimands) are executed.

However, *the Judex Juris* (Supreme Court) actually canceled the release verdict by imposing a sentence of 3 years in prison and a fine of Rp5 billion. The analysis of *the ratio decidendi* of the cassation decision shows a shift in the paradigm of legal reasoning from the principle of prudence to the principle of penalizing losses. The Supreme Court is considered to be trapped in *the actus reus* in the form of "the occurrence of losses/bad loans" alone, without materially proving the existence of *mens rea* from the board of directors to break into its own bank.

This Cassation Decision ignores the doctrine *of the Business Judgment Rule* because it equates losses due to *side streaming* (irregular use of funds) by the debtor as the absolute fault of the bank's directors. This is very dangerous for the continuity of the banking industry, because the board of directors will experience a chilling *effect* in distributing productive credit, which will ultimately hinder the pace of the banking intermediation function as the driving force of the national economy.

Based on the above analysis, it can be constructed that a violation of the prudential principle can only be categorized as a Banking Crime if law enforcement officials are able to prove the existence of a breach of the protection of *the Business Judgment Rule* (for example, it is proven that there is bribery/conflict of interest) and the existence of *deliberate* mens rea (*dolus*) from the beginning to the detriment of the bank. As long as these elements are absent, credit disbursement is purely a business risk whose settlement is locked in the domain of civil and administrative law.

CONCLUSION AND RECOMMENDATIONS

This study concludes that the criminalization of banking business risks remains a crucial issue in law enforcement practices in Indonesia, particularly when business decisions taken by bank managers are deemed detrimental without considering the Business Judgment Rule (BJR) principle. Supreme Court Decision No. 8506 K/Pid.Sus/2025 demonstrates a tendency toward inconsistent legal interpretation in distinguishing between business errors (business risk) and criminal acts. In this context, the BJR should serve as legal protection for bank directors or managers who act in good faith, with prudence, and within the limits of their legitimate authority. However, the weak understanding and suboptimal implementation of this principle have the potential to create legal uncertainty and hinder rational business decision-making in the banking sector.

Based on these findings, strengthening regulations and clearer guidelines regarding the application of the Business Judgment Rule in the Indonesian legal system, particularly in the banking sector, are needed to prevent overcriminalization of business decisions. Law enforcement officials also need to improve their understanding of the characteristics of business risks and the principles of good corporate governance to accurately distinguish between administrative negligence and acts that meet the elements of a crime. Furthermore, harmonization of criminal law, banking law, and corporate law is needed, as well as improving the capacity of judges to assess cases related to business decisions.

ADVANCED RESEARCH

Further research is also recommended to examine the implementation of BJR comparatively with other countries in order to obtain a more effective and adaptive legal protection model to the dynamics of the financial sector.

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