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### Legal Certainty against Banking Fraud Criminal Liability

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#### Abstract

Some of the applicable provisions, cases of banking crimes, including fraud committed by banking corporations, use regulations that are not always consistent, while special laws regulate banking. It can be said that almost all of the perpetrators of unlawful acts in the banking sector are entrepreneurs/executives and officials. In addition, the difficulty of dealing with banking fraud is due to the perpetrators using almost the same modus operandi, making it difficult to distinguish them from other economic crime modus operandi, thus requiring special handling from law enforcement officials. This study aims to identify and analyze the issue of whether the legal certainty of criminal liability for banking fraud meets legal certainty based on banking regulations. The research method used is normative legal research, using a statute approach and an analytical approach. This study found that laws and regulations that do not precisely formulate the principle of corporate criminal liability do not have legal certainty, so it is difficult to apply and allows various interpretations. POJK does not provide legal certainty guarantees because the regulations regarding bank business activities are exposed to risk. Operational, so that it cannot be used as a practical guideline for aggrieved parties against banking actions, the existence of more than one provision for the investigation of a criminal act, one of which is a financial service crime, creates a separate discourse and the identification of corporate criminal liability still leads to the management. As regulated in the Banking Law.

#### Keywords:

#### INTRODUCTION

The role of banks for people living in developed countries is a basic need that must be met. Banks are partners in meeting all people's daily financial needs. Banks are places to carry out various transactions related to finance, including places to secure public funds, investments, remittances, make payments and collections, and other financial transactions.

Developing legal policies in the banking sector shows a commitment to providing security for banking businesses. However, banking crimes are increasing, and the problem is that law enforcement against banking crimes is not widely disclosed, processed and resolved through the judiciary compared to the number of crimes that occurred.

Several applicable regulations, and cases of banking crimes, including *fraud* committed by banking corporations, use regulations that are not always consistent, while special laws govern banking.

In addition, the difficulty of dealing *with fraud* is due to the perpetrators using almost the same modus operandi, making it difficult to distinguish them from other economic crime modus

operandi. This banking crime requires special handling from law enforcement officials. (Hindriana & Imaniyati, nd) Cases of banking crimes that have been resolved through the judiciary, whether based on Law Number 7 of 1992 as amended by Law Number 10 of 1998 concerning Banking (from now on referred to as the Banking Law) or other laws, such as the Criminal Code (from now on abbreviated as KUHP) and Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 1999 concerning the Eradication of Corruption Crimes (from now on referred to as the Corruption Crime Act), namely: (Supaijo, 2010) the Dicki/Bank Duta Jakarta case (source of Supreme Court Decision Number 14K/Pid/1992), Eddy Tansil/Bapindo case (source of Supreme Court Decision Number 14K/Pid/1992), the Citra Bank case, the Bali Bank case; and the case of Industrial Bank. However, the regulations to settle the above mentioned cases are not always consistent.

Inconsistency in law enforcement against banking crimes, including *fraud*, in terms of prevention and eradication (countermeasures) using the Corruption Law because what is being referred to, is the term banking crime based on the arguments put forward by experts that tend to lead to crime. The white collar was popularized by EH Sutherland (Sutherland, 1940). Conceptually, white-collar crimes identify crimes committed by business people/executives and officials that harm the public interest. Therefore, the perpetrators of unlawful acts in the banking sector can be said to have almost all come from business people/executives and officials, the term used is banking crime (Sholehuddin, 1995). This is one form of legal uncertainty in the legal approach used.

Based on the background description described previously, this research focuses on the issue of whether the legal certainty of criminal liability for *fraud* meets legal certainty based on banking regulations. This article is interesting to study because it raises legal certainty regarding the provisions in banking in criminal liability for *fraud*. So that it is essential to research findings that are used to improve and strengthen banking regulations that can meet legal certainty against criminal liability for *fraud* banking

## METHOD

The type of research used in this research is normative *legal research*, which explores the prevailing positive legal norms. This research uses a statutory *approach* and an *analytical approach*. (Irwansyah, 2020)

The primary material was analyzed using a theme analysis model from the research title (*theme analysis*). Processing and analysis of legal materials consist of primary, secondary, and tertiary legal materials. (Z. Ali, 2021) Collecting materials to classify written legal materials systematically facilitates the analysis of primary legal materials. Secondary legal materials were analyzed from an inventory of positive law and library materials, which were analyzed critically and juridically. Both primary and secondary data analysis is based on a comprehensive, holistic and in-depth approach, following qualitative research methods, presented in a prescriptive manner, which aims to provide an overview or formulate problems following existing circumstances or facts relating to the realization of certainty. Furthermore, criminal liability is committed by corporations against *fraud* based on banking regulations.

## RESULTS AND DISCUSSION

Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that "everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law", meaning that legal recognition, guarantee law, legal protection, and legal certainty given to every citizen must be based on the principles of justice and legal equality. The preamble to the Banking Law outlines the essence of the formation of this law from a historical, sociological and juridical point of view, which aims to carry out the constitutional mandate by considering the elements of the development trilogy, increasing equitable development and being responsive to increasingly widespread challenges. However, it seems that the Banking Law has essentially not been able to answer the increasingly widespread banking challenges, particularly the complexity of banking crimes, including those committed by corporations. This can be seen in the absence of the regulation of corporations in the provisions of Article 1 of the Banking Law.

Juridically, a corporate crime includes 3 (three) aspects of the legal settlement approach, namely aspects of civil law, criminal law, and administrative law with different characteristics. The civil

law aspect prioritizes peace between the parties so that the nature of the regulation is more prominent. Meanwhile, aspects of criminal law, which protect the interests of the community/state and are coercive, lead to legal certainty rather than regulation. The coercive nature of criminal law aims to deter criminals. The function of criminal law, which is "*ultimum remedium*" or "*the last resort*" to achieve justice and legal certainty, has now shifted its function to "*primum remedium*" or "*the prime resort*" for order and legal certainty in finding justice in any business activity. Meanwhile, aspects of administrative law have not always reflected the principle of legal certainty because their application is often inaccurate.

Law is tasked with creating legal certainty because it aims to create order in society. Legal certainty is an inseparable feature of the law, especially for written legal norms. (Muslih, 2017) Materially, legal certainty is realized through sanctions. Multiple interpretations of legal sanctions are unlikely to guarantee the achievement of justice. Theory of the Legal System by Lawrence Friedman, the process of enforcing rules in the form of laws, is a critical reflection on the existence of three essential elements to assess the success or failure of the rule of law, namely the legal structure, legal substance, and legal culture. (Friedman & Hayden, 2017)

The creation of legal certainty, especially in legislation, as explained by Nur Hasan Ismail (Ismail, 2006), requires requirements relating to the internal structure of the legal norm itself. The internal requirements are as follows:

- a) Clarity of concepts used, legal norms contain descriptions of specific behaviors, which are then incorporated into certain concepts.
- b) Clarity of authority of the forming legislative institutions. The clarity of this hierarchy is important because it concerns whether or not it is legal, binding or not the laws and regulations it makes. The clarity of the hierarchy will provide direction for lawmakers who have the authority to form specific laws and regulations.
- c) There is the consistency of statutory legal norms. This means that the provisions of several laws and regulations related to a particular subject do not conflict.

The same thing is also explained by Gustav Radbruch (Theo, 1995). The element of legal certainty must be maintained for the sake of order in a country. Therefore positive law that regulates human interests in society must always be obeyed, even though positive law is unfair or unfair. Achieve the goal of the law itself.

According to Van Apeldoorn, legal certainty has two aspects, namely as follows: (Scholten, 1993)

- a) Regarding the matter, it can be determined (*bepaal baarheid*) the law in concrete matters. This means that parties seeking justice want to know what the law is in a particular case before starting a case.
- b) Legal certainty means legal security. This means protection for the parties against the arbitrariness of the judge.

Legal certainty is always associated with the relationship between citizens and the state. Legal certainty is often associated with consistent implementation of the law in a social process so that behavioral standards are obtained. Thus, people's lives can take place in an orderly, peaceful and just manner.

Problems that arise in connection with criminal liability from corporations, because the main principle of criminal responsibility is that there must be an error (*schuld*) on the perpetrator, so how to construct the error of the corporation, as well as criminal liability and the element of error in the corporation, can it still be maintained as in humans? (Yoserwan, 2006)

The consequence is that laws and regulations that do not specifically formulate the principle of corporate criminal liability, do not have legal certainty, so that they are difficult to apply, allowing various interpretations to arise. One of the efforts that can be done is to fulfill the formulation of legislation policy regarding the banking corporate responsibility system in criminal law. The current legislative policy specifically contains corporate responsibility including: the formulation of prohibited acts (in what and how a crime is said to be a corporate crime) is still unclear, as well as in determining who can commit the crime. Determining corporate error, which is the lifeblood of criminal law is also difficult to do, because the blame assigned to the corporation is not a corporation personally, because the person who commits the crime is the person (corporate management) (Karmila & Zulkifli, 2015). Law on the Eradication of Corruption Crimes for the occurrence of *fraud* in the banking sector in the case of ECW Neloe and his two colleagues, I Wayan Pugeg and M. Soleh Tasripan. The three of them gave *Bridging Loan* to PT. Cipta Graha Nusantara (PT. CGN) of Rp. 160,000,000,000.00 (one hundred and sixty billion rupiah) by ignoring the principles of sound credit and the principle of prudence because it has been wrong

in providing information on the guarantee provided by PT. CGN to Bank Mandiri and is not commensurate with the credit given. The case is considered to have harmed the state's finances or the state's economy, and is included in the form of a criminal act of corruption by enriching oneself. The judge's decision in the Supreme Court cassation case Number 1144 K/PID/2006 dated September 13, 2007 in the ECW Neloe case (Bank Mandiri Case), explained:

*"That it was proven at trial that the Defendant in the process and termination of lending to PT. Cipta Graha Nusantara, had committed an act that violated the provisions of the Banking Law (Law Number 10 of 1998) and Bank Mandiri Credit Policy (KPBM) of 2000. namely violating the precautionary principle of Law Number 10 of 1998 where the prudential principle of banks must meet 5 C's, namely: character, condition of economy, capital, collateral, and capacity, and the purpose of providing credit is to the productive sector and in the context of granting credit, banks must have in-depth analysis, have the ability to repay from the debtor and do not violate the principles of sound credit. From the description of the considerations and facts, the actions of the Defendants have violated the principle of prudence and the principle of sound credit, essentially has ignored the principles of "Good Corporate Governance" which are in the realm of the Perb Law However, this unlawful act became the starting point and even then expanded and entered the area of criminal acts of Corruption which resulted in very large state losses.*

Regardless of whether or not the Supreme Court decision applies the provisions of the Corruption Eradication Act in punishing the directors of Bank Mandiri, the fact is that the application of sound credit principles and the precautionary principle which is the domain of the Banking Law is not used as a basis for prosecution. Prosecutors and judges' decisions in the application of sanctions in the case.

The existence of banking institutions is expected to become an institution that provides guarantees for depositors' funds and is better in terms of guaranteeing third party funds, both in terms of legal certainty regarding customer deposits in a bank, as well as on the service side, and legally. Ideally, banking institutions are regulated in adequate legislation, so that their existence can really benefit the community in general and customers/debtors in particular.

Stipulation of technical regulations from Bank Indonesia and Financial Services Authority Regulations (hereinafter abbreviated as POJK) concerning the Implementation of Anti- *Fraud* for Commercial Banks which regulates *fraud* as an act of deviation or omission that is intentionally carried out to deceive, deceive, or manipulate banks, customers, or other parties. Others, which occur within the bank and/or use bank facilities, resulting in the bank, customer, or other party suffering losses and/or *fraud* obtaining financial benefits, either directly or indirectly.

The regulation strengthens the legitimacy that *fraud* is a serious concern that has a juridical impact on legal actions between customers/debtors and banks, however, the issuance of POJK only tends to be used against organs, so that banking performance and financial system stability remain stable. Meanwhile, POJK does not guarantee legal certainty, because the regulations regarding bank business activities are exposed to operational risk, so it cannot be used as an effective guideline for parties who are disadvantaged against banking actions.

The ideal bank supervision system from the point of view of the sole purpose of realizing and maintaining a sound banking system will be achieved if the bank supervisory authority can easily carry out its supervision effectively and all banks are supervised in fully controlled conditions (Adrian Sutedi, 2014). Inconsistency in banking supervision arrangements can cause banking supervision not to run optimally.

The unity of legislation as a written legal norm in the context of providing legal certainty is not merely realized in a written form (*geschreven, written*). In order for the law to truly guarantee legal certainty, legislation in addition to meeting formal requirements, must meet other requirements, namely: (Hoesein, 2012)

- a. Clear in its formulation (*unambiguous*)
- b. Consistent in its formulation, both internally and externally. Internally consistent means that in the same statutory regulations a systematic relationship must be maintained between the rules, the standard structure and language. Externally consistent is the existence of a harmonious relationship between various laws and regulations.

- c. Use of appropriate and easy to understand language. The language of laws and regulations must be the language commonly used by the community. However, this does not mean that legal language is not important. Legal language in terms of structure, terminology, or certain writing methods must be used consistently because it is part of the effort to guarantee legal certainty.

The potential for disadvantaged communities to obtain legal certainty and equal treatment before the law against unclear interpretations of several articles in the Banking Law. The existence of more than one provision for the investigation of a criminal act, one of which is a financial service crime, creates a separate discourse. This is because the Police Act and the Financial Services Authority Law both state that the two institutions have the authority to investigate banking crimes. For example, being tried with 2 (two) cases with the same *locus* and *tempus* with the same violation of the Banking Law. The investigative authority becomes biased, when a *fraud* handled by a police investigator/prosecutor, the OJK investigator does not have the capacity and authority to conduct an investigation. Which means that OJK investigators can only carry out investigations if victims of *fraud* report directly to OJK and have not been handled by police investigators/prosecutors. In the case of an investigation into a criminal act related to financial services, it is regulated in Article 49 of the OJK Law. The reality of law enforcement, many victims of criminal acts do not know their rights and law enforcement officers also do not provide much information related to the rights of victims of criminal acts. (Haerah & Amriyanto, 2020)

The enactment or application of the Banking Law as a *lex specialis* which regulates the limitations of the subject of criminal acts, is only applied to commissioners, directors, and bank employees. Which in fact does not protect banking actors, does not provide legal certainty if the perpetrators are parties outside the bank involved, so that they cannot be prosecuted using the articles in the Banking Law. Moreover, with the absence of a formulation / mention of corporations as the subject of criminal acts in the Banking Law, the stipulation of corporations as perpetrators of *fraud*, as well as the conditions and requirements so that corporations can be held accountable. In other words, the identification of corporate criminal liability still leads to the management.

The Banking Law is limited to individuals (*naturlijk persoon*), so that if a criminal act occurs within a corporation, the criminal act is considered to be committed by the management of the corporation. This means that there is no legal certainty that regulates, so that not only individuals who are not bank organs/personnel cannot be convicted, but also cannot criminalize banks as corporations.

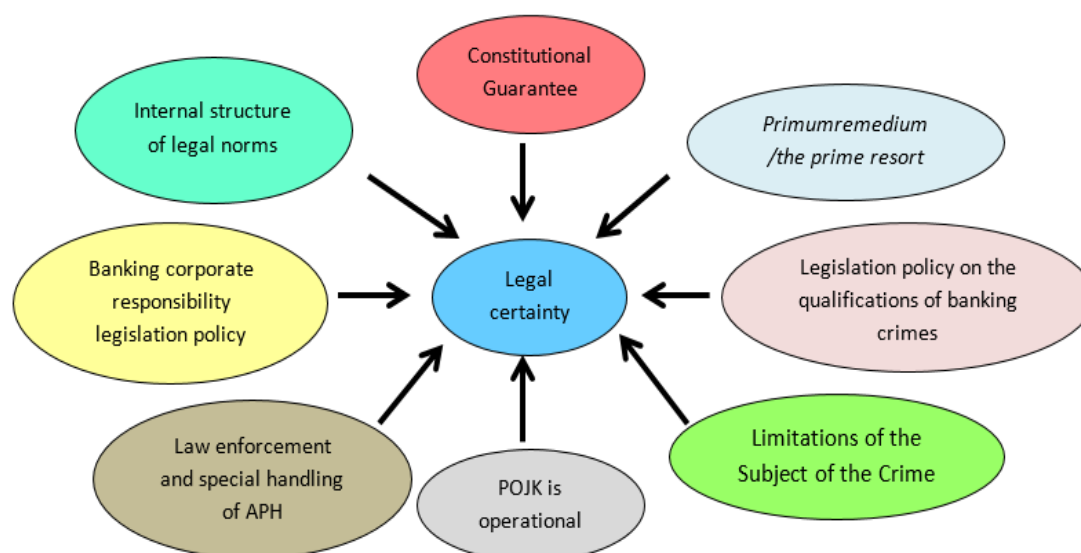
Legislation policies in the Banking Law need to emphasize the qualifications of criminal acts as criminal acts committed by banks (when and in what ways a criminal act committed by a management or organ can be categorized as a crime committed by a bank as a corporation, committed by an organ) as a personal act, or a criminal act committed and accounted for by the bank as a corporation). This is important for the realization of legal certainty.

Legal certainty in the banking world is very necessary in the business world. the community, entrepreneurs who deposit their funds in banks, rely on banks to support their business activities, the need for the community to obtain legal protection for banking activities in order to realize sustainable economic interests.

Legal certainty is a justifiable protection against arbitrary actions which means that someone will be able to get something that is expected under certain circumstances. (A. Ali, 2012)

Because the Banking Law is limited to individuals (*naturlijk persoon*). So that if a criminal act occurs within the corporate environment, then the criminal act is considered to be committed by the management of the corporation. This means that there is no legal certainty that regulates, so that not only individuals who are not bank organs/personnel cannot be convicted, but also cannot criminalize banks as corporations.

The results of the research described above, the researchers simplify in the following picture:



**Figure 1.** Legal Certainty on Banking Criminal Liability

## CONCLUSION

The results of research on the issue of whether criminal liability for *fraud* meets legal certainty based on banking regulations can be concluded that banking regulations have weaknesses in an effort to realize legal certainty against criminal liability for *fraud* due to: banking regulations do not meet the internal structure of legal norms, legislative policies that currently applicable, which contains about corporate responsibility is still unclear, as well as in determining who can commit a crime and determining corporate mistakes is difficult, because the blame assigned to the corporation is not a corporation personally, because the person who commits a crime is a person ( corporate management), and the provisions of the POJK which do not guarantee legal certainty, because the regulation only concerns bank business activities that are exposed to operational risk.

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