



Implementation of the Precautionary Principle According to Article 2 and Article 29 Law Number 10 of 1998 concerning Banking

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Abstract:

The principle of prudence is carried out to prevent bank losses due to lending to irresponsible customers and prevent damage or the decline of the Bank's good name from consumer trust. This study aims to analyze the concept and the application of the precautionary principle in accordance with Article 29 of Act No. 10 of 1998 concerning Banking. This study uses normative research methods. The approach taken is to use a statutory approach, a doctrinal approach, and a comparative approach. The results of this study indicate that the principle of prudence, also known as prudential banking principles, is essential in the banking world in Indonesia, so it must be implemented or carried out by banks in carrying out their business activities. The current prudent banking arrangements are in Law Number 10 of 1998. Apart from that, there are also circular letters and decrees from the Directors of Bank Indonesia. Using the Branchless Banking model in the banking industry, banks are required to apply the precautionary principle comprehensively. They must also provide security and protection to customers when using products in branchless banking.

Keywords: Model; Precautionary Principles; Banking; Good faith

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Introduction

When the New Order Era was in power, economic actors and authorities saw the law as an obstacle to the continuity of economic activity. This is because the law is not used as a basis, guide, and enforcement of economic activities. Legal provisions are not used as a foundation; even the law is considered unnecessary for the wheels of the economy to run. The existence of law was damaged by the authorities only to



defend the New Order's political economy, which served the economic interests of developed countries, conglomerates, and multinational corporations. However, after the monetary crisis, which devastated the economies of several countries in parts of the world, they realized the importance of legal authority. To create a conducive economic climate and to attract investment (Maileni 2019).

Along with the rapid development of economic and technological progress and the increasing standard of human life, the necessities of life are also increasing. One of the necessities of life that must be met is the need for credit facilities provided by banks with house guarantees in the context of business development (PERMANA 2018).

Following the functions of the Bank as stipulated in the provisions of Article 3 of Law Number 10 of 1998 in carrying out their business, banks must apply prudential principles, including but not limited to the distribution of funds in the form of credit (S. Sembiring 2000).

Substantively, the precautionary principle emphasizes that in carrying out activities or business activities, banks must be careful in providing loans to the public, not solely without looking at the risks. In granting credit, the precautionary principle is applied to the 5C principle, which is used as an analysis in granting credit to prospective customers (Johannis 2020).

The precautionary principle must be based solely on an objective and practical assessment to avoid bank losses. This was mainly driven by the ease with which people borrowed money at banks and the precautionary principle that needed to be carried out optimally.



Based on these conditions, the writer is interested in writing an article titled Application of the precautionary principle under Article 29 of Law Number 10 of 1998 concerning Banking. This is interesting because, with the development of increasingly sophisticated technology, it is balanced with crimes of various modes that are no less sophisticated (Primasari 2019).

Method

The type of this research is normative research or library research. The approach in this study is the statutory approach, the doctrinal approach, and the comparative approach (Mahmud 2017). While the data source is legal material consisting of primary legal material, secondary legal material, and tertiary legal material. The technique for collecting legal materials is by tracing various sources in laws and regulations, literature or literature, and the opinions of appropriate experts. The analysis used is qualitative.

Discussion

1. Application of the Prudential Principle in Law Number 10 of 1998 concerning Banking

The prudential principle or principle requires that banks are always careful in carrying out their business activities, in the sense that they must always be consistent in implementing laws and regulations in the banking sector based on professionalism and good faith (Hermansyah 2020). The definition of the precautionary principle itself is the principle of risk control through applying laws and regulations that apply consistently (Naja, SH, and Kn 2018).

This principle is regulated in Article 29, paragraph (2), paragraph (3), and paragraph (4) of Law Number 10 of 1998 concerning Banking. In addition to the legal basis Can be seen namely in Law Number 3 of 2004 concerning Bank Indonesia (Az 2011).



The precautionary principle or principle, also known as the prudential banking principle, is essential in the banking world in Indonesia, so it must be implemented or carried out by banks in carrying out their business activities. Banks must also be able to design an excellent legal relationship with their prospective customers or debtors to create a good working synergy between creditors and debtors (Tobing 2013).

If we look at it in terms of the prudential principle approach, banks carrying out branchless banking must prioritize protecting their customers. Customers' protection will increasingly generate a sense of trust in the Bank. Trust in the Bank refers to the expectation that the Bank will perform specific actions necessary to consumers, regardless of the ability to monitor or control other parties (OKTORIO 2018).

In other words, trust in the Bank is the consumer's expectation that the Bank will take the appropriate actions necessary for the consumer if something undesirable happens. This is the opinion expressed by Kyung Kyu Kim. Which more or fewer states that it is imperative to maintain the good name of the Bank so that the level of consumer or customer confidence does not decline (Ashila 2019).

Hermansyah It has reminded us that customer protection is one of the problems that until now has yet to have a good place in the national banking system (Grafika 2009). The first branchless banking in Indonesia was initiated by Bank Indonesia (BI) in 2013, namely under the name Digital Financial Services (LKD), which was later amended to Bank Indonesia Regulation Number 11/12/PBI/2009 concerning Electronic Money with the promulgation of Bank Indonesia Regulations. Indonesia Number 16/18/PBI/2014 concerning Amendments to Bank Indonesia Regulation Number 11/12/PBI/2009 concerning Electronic Money (in the future referred to as Electronic Money PBI) (Bokings 2022).

Then in 2014, the Financial Services Authority (OJK) also issued a branchless banking program based on Financial Services Authority Regulation Number 19/POJK.03/2014 concerning Officeless Financial Services in the Context of Inclusive Finance, abbreviated as Laku Pandai. Both programs from BI and OJK are a form of support for the success of the government's program, namely the National Strategy



for Financial Inclusion (SNKI). Moreover, both programs are still running in the banking industry (Podung 2016).

Branchless Banking is a bank service without branch offices. In providing LKD branchless banking services to customers, the banking industry has involved other parties, be it individuals or business/legal entities, as well as technological assistance from telecommunication companies. With the involvement of third parties, banks are required to be more careful in running their business.

Vishal Goyal, Dr. US Pandey, Sanjay Batra, which states that the existence of branchless banking in the banking industry can provide easy access to banking services and pose a risk to the use of these services. This can be seen as the danger of wiretapping in the use of telecommunications and also bad faith from third parties. In order to maintain the security of LKD branchless banking activities and achieve optimal benefits for customers, arrangements are needed to prevent banks and customers from losses and fraud by other parties. The existence of banking regulations is significant to protect customers and ensure security in transactions (Wijaya and Sukranatha 2018).

In practice, there is preventive protection for LKD; the Bank must provide information regarding service and security as well as branchless banking LKD risks when customers register and fill out application forms at branch offices or agents. In the registration process, it is the bank officer, in this case, the customer service or agent, who informs the customer about LKD branchless banking services in the form of a cell phone account, either general service information or additional fees that may arise, such as SMS fees in transactions (Kurniawan and Setyawan 2018).

Furthermore, in the form of repressive protection, this can be carried out if danger or risk has befallen the customer in using LKD branchless banking services. Such conditions require that the Bank is obliged to protect its customers. Related to this form of protection can be found in Article 50 POJK Number 1/POJK.07/2013, which states that Financial Services Businesses, in this case, Banks, are required to have an internal control system related to consumer protection. The internal control



system referred to at least includes the Bank's compliance with the implementation of the principles of consumer protection and the reporting and monitoring system for the follow-up of consumer complaints.

Thomas Suyanto Stated that to determine risk management policies and procedures related to the application of the know your customer principle, at a minimum, they must contain the following: First, Supervision by management of commercial banks (management oversight)(Suyatno 1988) . Second, delegation of authority. Third, segregation of duties. Fourth is an internal control system, including internal audit, and Fifth is an employee training program for applying the know your customer principle (Sutinah 2020).

Based on this, the institution's Bank must have a section or division that deals with consumer protection issues, including complaints against customers. In this condition, the Bank must also report and monitor customer complaints. This ensures that banks protect their customers from the dangers of branchless banking services. LKD must provide a customer complaint scheme.

It is essential to understand that to provide comfort and a sense of security for all customers, each Bank should receive complaints or complaints and provide facilities/media to convey these complaints. This is under the provisions of the Financial Services Authority concerning Consumer Protection in the Financial Services Sector and the Circular Letter of the Financial Services Authority concerning service and settlement of consumer complaints to Financial Services Providers.

The form of complaint expresses customer dissatisfaction caused by a loss or potential financial loss. In other words, complaints can be submitted in writing or verbally to the relevant Bank Office or through the Bank's own Call Center (Perwirasari and Ikrardini 2020).

Furthermore, to follow up on these complaints, the complaint handling process is by the Financial Services Authority Regulation Number 18/POJK.07/2018



Concerning Consumer Complaint Services in the Financial Services Sector; for verbal complaints, the Bank will follow up on complaints for five working days, and for handling complaints in person. The Bank will follow up on the complaint within 20 working days. In certain conditions, the Bank may extend the full 20 (twenty) working days after the period referred to in point 1 above ends.

In the end, after handling the complaint, the next step is to resolve the complaint. The first step taken is that the Bank will provide Complaint Responses to Consumers and Consumer Representatives for Complaints received. If the complaint is submitted in writing, the Bank will submit a Complaint Response. If Complaints are submitted verbally, the Bank submits Complaint Responses verbally and in writing.

Furthermore, suppose the customer feels that the settlement solution does not meet his expectations or rejects or does not accept the complaint settlement response submitted by the Bank. In that case, the customer can continue the complaint resolution process through the Financial Services Authority mediation service or the Financial Services Sector Alternative Dispute Resolution Institution. Mediation decisions from the Financial Services Authority or Alternative Dispute Resolution Institutions for the Financial Services Sector as the final solution for resolving customer complaints (Susilo and Gultom 2022).

2. Legal Protection to Customers Depositing Funds in Banks according to Law No.10 of 1998 concerning Banking

Article 1 point 2 of Law Number 10 of 1998 concerning Banking, that "Bank is a business entity that collects public funds in the form of deposits and distributes them to the public in the form of credit and / or other forms in order to improve the lives of many people". Among the businesses of Commercial Banks as above, there are other businesses, namely issuing debt recognition letters, buying, selling or guaranteeing at their own risk or for the benefit of their customers' orders.



The business of Commercial Banks in raising funds from the public is in the form of deposits, the definition of deposits is determined in Article 1 number 5 of Law No. 10 of 1998, that "Deposits are funds entrusted by the public to the Bank based on a deposit agreement in the form of demand deposits, deposits, certificates of deposit, savings and or other forms equivalent thereto" (Simatupang 2019).

Based on the provisions of Article 1 number 5 of Law No. 10 of 1998, there are two relationships between banks and depositors, namely:

- a) A relationship based on trust, and
- b) A relationship based on a deposit agreement.

In this regard, a banking institution is an institution that is highly dependent on the trust of the community. Therefore, without the trust of the community, of course a bank will not be able to carry out its business activities properly. So it is not excessive if the banking world must in such a way as to maintain the trust of the community by providing legal protection for the interests of the community, especially the interests of customers of the bank concerned. In other words, in order to avoid the possibility of a lack of public trust in the banking world which is currently aggressively expanding to find and attract customers, legal protection for depositors against possible losses is very necessary.

The legal relationship between the depositor and the bank is based on an agreement. For this reason, it is only natural that the interests of the customers concerned receive legal protection, as well as the protection provided by the law to banks. It cannot be denied that there has indeed been a political will from the government to protect the interests of bank customers, especially depositors. This

is evidenced by the issuance of Law No. 8 of 1999 on Consumer Protection, in addition to that stipulated in Law No. 8 of 1998 on Banking (Said 2017).

In connection with the legal protection of customers, Marulak Pardede argues that in the Indonesian Banking system, regarding the protection of depositors, can be done through 2 (two) ways, namely:

- a) Implicit deposit protection, which is protection generated by effective bank supervision and guidance, which can avoid bankruptcy. This protection is obtained through :
 - 1) Banking laws and regulations
 - 2) Safeguards resulting from effective supervision and guidance by Bank Indonesia.
 - 3) Efforts to maintain the continuity of the bank's business as an institution in particular and the protection of the banking system in general.
 - 4) Maintaining the health level of the bank
 - 5) Conducting business with the principle of prudence
 - 6) How to grant credit that is not detrimental to the bank and the interests of customers
 - 7) Providing risk information to customers

- b) Explicit deposit protection, namely protection through the establishment of an institution that guarantees public deposits. So that if the bank fails, the institution will replace public funds deposited in the failed bank. This protection is obtained through the establishment of an institution that guarantees public deposits, as stipulated in Presidential Decree No. 26 of

1998 concerning Guarantees Against Commercial Bank Liabilities.

Regarding the legal protection of depositors, Hermansyah divides it into 2 (two) types, namely:

1) Indirect Protection

Indirect protection by the banking world against the interests of depositors is a legal protection given to depositors against all risks of losses arising from a policy or arising from business activities carried out by banks.

2. Direct Protection

Direct protection by the banking world against the interests of depositors is a protection given to depositors directly against the possibility of the risk of loss from business activities carried out by banks (Ngiu 2015).

Regarding this direct protection, it can be stated in 2 (two) ways, namely:

1) Preferred rights of depositors

Preference right is a right given to a creditor to take precedence over other creditors. In the Indonesian banking system, depositors are creditors who have preferred rights, in the sense that depositors must take precedence in receiving payments from banks that are experiencing failure or difficulty in fulfilling their obligations.

In this regard, it is known that Law Number 10 of 1998 concerning



Banking has regulated articles that aim to provide legal protection to the interests of depositors and their deposits in banks. The provisions of these articles are Article 29 paragraph 3 and Article 29 paragraph 4.

Based on what has been stated above, in principle, Law Number 10 of 1998 has been regulated in such a way regarding legal protection of the interests of depositors. However, the possibility of the risk of loss for depositors remains. Therefore, the banking world must be able to maintain public trust, by applying the principle of prudence, as well as good faith, and consistent in implementing the laws and regulations related to the business activities carried out.

In connection with the preferential rights of depositors, in the event that the bank that holds public funds fails or experiences difficulties, then based on Presidential Decree No.26 of 1998, public funds deposited in the bank are guaranteed by the government through a deposit insurance institution known as the Government Guarantee Implementation Unit as one of the units in the Ministry of Finance of the Republic of Indonesia.

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Conclusion

Based on the description and explanation above, the conclusion in this paper is the ideal model of the prudential principle as stipulated in Article 29 of Law No. 10 of 1998 concerning Banking that the value of the prudential principle lies in focus it gives to the problem of modeling decisions that arise in the application of formal decision theory, especially in the public policy domain. The precautionary principle makes recommendations about the initial specification of a decision problem, and the essential elements of decision-making that occur before applying specific decision rules. Using the



Branchless Banking model in the banking industry, banks are required to apply the precautionary principle comprehensively. They must also provide security and protection to customers when using products in branchless banking.

Recommendation

Following the conclusions above, what can be suggested or recommended in this paper is as follows:

1. The government should immediately regulate clearer and firmer principles of prudence in Law Number 10 of 1998 concerning Banking.
2. For the Bank to continue to prioritize the principles of good agreements and be careful, do not just benefit one party, especially for the Bank itself.
3. Researchers can provide input for other researchers to develop further research regarding the Study of Law Number 10 of 1998 concerning Banking.

References

- Ashila, Desianita Nur. 2019. "TINJAUAN HUKUM PENERAPAN PRINSIP KEHATI-HATIAN DALAM PENYIMPANGAN PENGGUNAAN KREDIT (SIDE STREAMING) YANG MENAKIBATKAN KERUGIAN BANK DIHUBUNGKAN DENGAN UNDANG-UNDANG NO 10 TAHUN 1998 TENTANG PERUBAHAN ATAS UNDANG-UNDANG NO 7 TAHUN 1992 TENTANG PERBANKAN." FAKULTAS HUKUM UNPAS.
- Az, Lukman Santoso. 2011. *Hak Dan Kewajiban Hukum Nasabah Bank*. Pustaka Yustisia.
- Bokings, Julia Citra Riski. 2022. "Dispute Settlement Model of Land Acquisition for Public Interest." *Damhil Law Journal* 1 (1): 1–16. <https://doi.org/10.56591/dlj.v1i1.1247>.



- Grafika, Sinar. 2009. *Hermansyah, Hukum Perbankan Nasional Indonesia*. Jakarta, Kencana.
- Hermansyah, S. H. 2020. *Hukum Perbankan Nasional Indonesia: Edisi 3*. Prenada Media.
- Johannis, Juan JF. 2020. “Kajian Yuridis Prinsip Kehati-Hatian Dalam Pemberian Kredit Menurut Undang-Undang Nomor 10 Tahun 1998 Tentang Perbankan.” *Lex Privatum* 8 (4).
- Kurniawan, Rizki, and Rahmat Afandi Setyawan. 2018. “PENYELAMATAN KREDIT BERMASALAH BERDASARKAN PRINSIP KEHATI-HATIAN DALAM PEMBERIAN KREDIT KEPADA DEBITUR SESUAI PASAL 8 AYAT (1) UNDANG-UNDANG NOMOR 10 TAHUN 1998 TENTANG PERBANKAN.”
- Mahmud, Marzuki Peter. 2017. “Penelitian Hukum Edisi Revisi.” *Jakarta: Kencana Prenada Media Group*.
- Maileni, Dwi Afni. 2019. “PENERAPAN PRINSIP KEHATI-HATIAN BANK DALAM PEMBERIAN KREDIT DITINJAU DARI UNDANG-UNDANG NOMOR 10 TAHUN 1998 TENTANG PERBANKAN.” *PETITA* 1 (2): 473–91.
- Naja, HR Daeng, MH SH, and M. Kn. 2018. *Hukum Kredit Dan Bank Garansi*. PT Citra Aditya Bakti.
- Ngiu, Sutrisno Fernando. 2015. “Perlindungan Hukum Terhadap Nasabah Bank Sebagai Subjek Hukum Menurut Undang–Undang Nomor 10 Tahun 1998 Tentang Perbankan.” *Lex Privatum* 3 (1).
- OKTORIO, HADI. 2018. “PENERAPAN PRINSIP KEHATI-HATIAN BERDASARKAN PASAL 29 UU NO. 10 TAHUN 1998 DALAM PEMBERIAN KREDIT PERUMAHAN RAKYAT (KPR) SUBSIDI PADA PT. BANK TABUNGAN NEGARA (BTN) KANTOR CABANG PEKANBARU.” Universitas Islam Negeri Sultan Syarif Kasim Riau.
- PERMANA, RIYAD EKA. 2018. “TANGGUNG JAWAB MANAGER PT. BRI UNIT PASIRJAMBU SEBAGAI INSIDER TRADING DALAM PENYALAHGUNAAN PRINSIP KEHATI-HATIAN PADA PEMBERIAN KREDIT USAHA MIKRO DIHUBUNGKAN DENGAN PASAL 2 DAN PASAL 29 AYAT (2) UNDANG-UNDANG NO 10 TAHUN 1998 TENTANG PERBANKAN.” Fakultas Hukum Universitas Pasundan.



- Perwirasari, Diah Pradhani, and Zulfika Ikrardini. 2020. "PENERAPAN PRINSIP KEHATI-HATIAN DALAM PENYALURAN KREDIT USAHA RAKYAT NON AGUNAN DITINJAU DARI SISI HUKUM PERIKATAN." *Jurnal Dialektika Hukum* 2 (2): 148–72.
- Podung, Detisa Monica. 2016. "Kredit Macet Dan Penerapan Prinsip Kehati-Hatian Dalam Perbankan." *Lex Crimen* 5 (3).
- Primasari, Imas Khaeriyah. 2019. "IMPLEMENTASI PRINSIP KEHATI-HATIAN DALAM PERBANKAN: Caution Implementation Principles In Banking." *Jurnal Investasi* 5 (1): 69–78.
- Said, Anggraini. 2017. "Perlindungan Hukum Bagi Nasabah Yang Didaftarkan Akibat Kesalahan Sistem Perbankan Menurut UU No. 10 Tahun 1998 Tentang Perbankan." *Lex Crimen* 6 (3).
- Sampul, Marselina. 2016. "Tanggung Jawab Bank Terhadap Hak Yang Dirugikan Dalam Pembobolan Rekening Nasabah Menurut Undang-Undang Nomor 10 Tahun 1998 Tentang Perbankan." *Lex Crimen* 5 (7).
- Sembiring, Sentosa. 2000. *Hukum Perbankan*. Mandar Maju.
- Simatupang, Bachtiar. 2019. "Aspek Yuridis UU No. 10 Tahun 1998 Terhadap Peranan Perbankan Dalam Meningkatkan Perekonomian Indonesia Berdasarkan Pancasila Dan UUD 1945." *Ensiklopedia Social Review* 1 (1).
- Susilo, Wahyu Andi, and Elfrida Ratnawati Gultom. 2022. "Prinsip Kehati-Hatian Dalam Penyaluran Kredit Produk Digital Lending PT. Bank Rakyat Indonesia Agroniaga TBK." *Jurnal Pendidikan Dan Konseling (JPDK)* 4 (6): 11552–58.
- Sutinah, Sutinah. 2020. "TINJAUAN YURIDIS PRINSIP KEHATI-HATIAN BANK INDONESIA DALAM PEMBERIAN KREDIT PERBANKAN." *Mizan: Jurnal Ilmu Hukum* 9 (2): 216–25.
- Suyatno, Thomas. 1988. *Kelembagaan Perbankan*. Gramedia Pustaka Utama.
- Tobing, RudyantiDorotea. 2013. "Konsep Perjanjian Kredit Sindikasi Yang Berasaskan Demokrasi Ekonomi." Universitas Brawijaya.
- Wijaya, Elisabeth Stevani, and AA Ketut Sukranatha. 2018. "Pencegahan Kredit Macet Dengan Penerapan Prinsip Kehati-Hatian Dalam Penyaluran Kredit Perbankan." *Kertha Semaya: Jurnal Ilmu Hukum* 4: 1–13.