

BANK'S LIABILITY REGARDING THE IMPLEMENTATION OF SECRECY PRINCIPLE FOR THE INTEREST OF THE CORRUPTION COURT

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ABSTRACT

Bank's secrecy principle requires bank to keep its customer's data safe, in which the customer's trusted the bank to save their deposits in. However, secrecy principle isn't formally absolute. In other words, there are exceptions of the implementation of the principle itself, including corruption case. Therefore, there needs to be bank's liability as a form of protection for the bank's customers in order for the secrecy principle to be implemented well. This research's purposes are to know the regulation regarding bank's secrecy principle in a corruption case and the bank's liability regarding bank's secrecy principle for the matter of the court in a corruption case. Through normative method, this research is systematically arranged to be understood more easily. The results of this research show that the regulation regarding bank's secrecy principle in a corruption case is regulated outside of the law of banking and the bank's liability regarding the implementation of bank's secrecy for the matter of the court in a corruption case is just the same as any other exceptional circumstances inside the law of banking.

Keywords: Secrecy Principle, Bank, Bank's Liability, Corruption Case

I. Introduction

1.1 Background

Nowadays, the role of bank has become really significant in our everyday life since the economy sector in Indonesia has started to get more attention, especially under the leadership of Joko Widodo.¹ Apart from its role as the financial institution, bank also has an important role in increasing public prosperity.² Through bank operation, people could borrow money, which is also known as credits, and channel their funds to save money, which is also known as deposits.³

According to Act Number 10 of 1998 concerning The Amendment of Act Number 7 of 1992 concerning Banking, which then will be called Act concerning Banking, a bank is an institution that deposits public funds and channels the funds

¹ Murni, Retno, Ni Ketut Supasti Dharmawan, and Putu Aras Samsithawrati. "Transformasi Good Faith Principle Dalam Hukum Perbankan Khususnya BPR: Perspektif Lokal Nasional Dan Internasional." *Arena Hukum* 11, no. 3 (2019) p. 572.

² Permatasari, Luh Intan, and I. Ketut Markeling. "Upaya Perlindungan Hukum Bagi Nasabah Bank Dalam Permasalahan Kredit Macet." *Kertha Semaya: Journal Ilmu Hukum* 6, no. 9 (2018) p. 2.

³ Dharmawan, Ni Ketut Supasti, and I. Gede Agus Kurniawan. "Fungsi Pengawasan Komisaris Terkait Kesehatan Bank Perkreditan Rakyat: Pendekatan Good Corporate Governance dan Asas Itikad Baik." *Law Reform* 14, no. 2 (2018) p. 236.

back to public as credits to improve public living standard.⁴ Therefore, it can be shown that bank has two functions, which are to deposit funds and to channel credits from and to people.

In its relationship with its customer, a bank runs its function by holding onto banking principles, such as trust principle, prudential principle, secrecy principle, and know-your-customer principle. But in this article, the principle that is being emphasized is secrecy principle, which means a bank has an obligation not to leak its depositor's information to a third party,⁵ unless it's regulated differently in laws. Consequently, the regulations concerning secrecy principle is really essential for bank's depositors' and bank's own interests.⁶ That is because public trust upon a bank would then be maintained if the bank obeyed its obligation regarding the secrecy principle as mentioned.⁷

According to Article Number 40 (1) of the Act concerning Banking, it is assertively stated that a bank is obliged to preserve its depositor's confidential and their deposits. Because of that regulation, Financial Services Authority or *Otoritas Jasa Keuangan* (OJK) in Bahasa, then released a Circular Letter Number 14/SEOJK.07/2014 concerning Secrecy and Security of Consumer's Personal Data and/or Information. That circular letter stated that all the Financial Services Business (FSB), including bank, must not disclose its customer's data and/or information to any third party,⁸ which:

1. For natural persons include name, address, date of birth, age, phone number, and/or one's biological mother's name.
2. For corporates include name, address, phone number, composition of board of directors and/or commissioners, including identity documents, and/or the composition of shareholders.

All of the data above are considered as bank secrecy, which means what's considered as bank secrecy is any data and/or information regarding the depositor which is not only about one's financial state, but also the depositor's confidential that's known by the bank.⁹ Bank secrecy itself according to Article 1 point 28 of the Act concerning Banking means any data and/or information that has a relation to

⁴ Article 1 point 2 Act No. 10 of 1998 concerning the Amendment of Act No. 7 of 1992 concerning Banking.

⁵ Hasanah, Uswatun. *Hukum Perbankan*. (Malang: Law of Banking, 2017) p. 23.

⁶ Hermansyah, *Hukum Perbankan Nasional Indonesia. Ditinjau Menurut Undang-undang No. 7 Tahun 1992 tentang Perbankan Sebagaimana Telah Diubah dengan Undang-undang No. 10 Tahun 1998, dan Undang-undang No. 23 Tahun 1999 jo Undang-undang No. 3 Tahun 2004 tentang Bank Indonesia, Cetakan Kedua*. (Jakarta: Kencana Prenada Media Group, 2005) p. 131.

⁷ Gazali, Djoni S., and Rachmadi Usman. *Hukum Perbankan*. (Jakarta: Sinar Grafika, 2010) p. 485.

⁸ See Circular Letter No. 14/SEOJK.07/2014 concerning Secrecy And Security of Customer's Personal Data And/Or Information.

⁹ Latubatara. F. M. A., Rudv. D. G., and Purwanti. N. P. (2018). *Rahasia Bank Terkait Perlindungan Data Nasabah Pasca Diterbitkannya Perppu Nomor 1 Tahun 2017 Tentang Akses Informasi Keuangan Untuk Kepentingan Perpajakan*, *Kertha Semaya: Journal Ilmu Hukum*, 3(1), p. 4.

depositors and their deposits. Besides that act, There are also theories regarding bank secrecy, which are:¹⁰

1. Absolute Bank Secrecy Theory¹¹
This theory says that a bank has an obligation to preserve its depositor's secrecy or any kind of data and/or information about the depositor, in which that secrecy has to be kept secret at all costs, even though it's against society's and nation's interest.
2. Relative Bank Secrecy Theory¹²
Different from the absolute theory, this theory allows a bank to disclose the depositor's data and/or information if it's regulated differently in accordance to the nation's or law's interest.

As stated in the relative bank secrecy theory, it's shown that there are exceptions that allow a bank to disclose its depositor's data and/or information, which are for:

1. The interest of taxation, which is regulated in Article 41 of the Act concerning Banking.¹³
2. The settlement of bank's claims that have been transferred to Agency for State Debt and Auction Affairs or State Debt Affairs Committee, which is regulated in Article 41A of the Act concerning Banking.¹⁴
3. The procedural interest of a court's criminal case, which is regulated in Article 42 of the Act concerning Banking.¹⁵
4. The procedural interest of a private case between a bank and its customer, which is regulated in Article 43 of the Act concerning Banking.¹⁶
5. The purpose of information exchange between banks, which is regulated in Article 44 of the Act concerning Banking.¹⁷
6. The interest of the depositor or his/her heir upon a request, approval, or through the letter of attorney, which is regulated in Article 44A point (1) and (2) of the Act concerning Banking.¹⁸
7. The interest to give information to the Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* (KPK), which is stated in the Supreme Court Letter Number KMA/694/R.45/XII/2004

¹⁰ Hermansvah. *On.Cit.* n. 132-133.

¹¹ Diumhana. M. (2000). *Hukum Perbankan di Indonesia*, cetakan ketiga, Bandung: Citra Aditya Bakti, p. 2

¹² *Ibid.*

¹³ See Article 41 of the Act concerning Banking.

¹⁴ See Article 41A of the Act concerning Banking.

¹⁵ See Article 42 of the Act concerning Banking.

¹⁶ See Article 43 of the Act concerning Banking.

¹⁷ See Article 44 of the Act concerning Banking.

¹⁸ See Article 44A point (1) and (2) of the Act concerning Banking.

concerning Law Consideration of the Implementation of KPK's Competence Regarding The Regulation of Bank Secrecy.¹⁹

Since the exceptions regarding the disclosure of information to KPK isn't regulated in the Act concerning Banking like the other exceptions, then it's needed to be discussed further so that the study regarding that matter could be deepened for the interest of the corruption court.

1.2 Legal Problems

1. How is the regulation regarding bank's secrecy principle to disclose its depositor's data for the interest of the corruption court?
2. How is bank's liability regarding the violation of bank's secrecy principle for the interest of the corruption court?

1.3 Purposes

The purposes of this research is to know about:

1. The regulation regarding bank's secrecy principle to disclose its depositor's data for the interest of the corruption court.
2. Bank's liability regarding the violation of bank's secrecy principle for the interest of the corruption court.

II. Method

2.1. Type of Research

This research is done using normative type method, in which the research is mostly done through the study of documents and literature. In other words, the materials which are used to conduct this research are mostly gained from primary and secondary legal materials.

2.2. Type of Approach

This research is done using statute and conceptual approach. By using those types of approaches, it means that it's done by using legislation and regulation,²⁰ and then completed by adding related banking concepts, plus the regulations concerning banking and corruption, to be applied to the research.

2.3. Legal Material

This research, as stated above, is done by using primary and secondary legal materials. Primary legal material is needed because this is a normative research which refers to legislation, while secondary legal material such as books and journal articles are needed to complement the legislation.

2.4. Legal Material Collecting Technique

The legal materials that support this research are collected through library research. For the secondary one, the materials are from either private collection, library borrowing, and e-books which are found from the internet.

2.5. Legal Material Processing Technique

¹⁹ See Supreme Court Letter Number KMA/694/R.45/XII/2004.

²⁰ Marzuki, Mahmud. *Penelitian Hukum: Edisi Revisi*. (Jakarta: Prenada Media, 2017) p. 137.

After being gained through library research, the legal materials need to be processed so that the research would be coherently and systematically written. The legal materials are classified according to the need of the research, and then the materials are sorted systematically to make it easier to find logical relations for the research's purpose.

III. Results and Analysis

3.1. The regulation regarding bank's secrecy principle to disclose its depositor's data for the interest of the corruption court

In Supreme Court Letter No. KMA/694/R.45/XII/2004, it's stated that KPK is given the authority to gain information about a bank's depositor if needed for the interest of investigation and/or prosecution. According to Article 42 of the Act concerning Banking, it's also stated that a bank can disclose its depositor data and/or information to the authority for the interest of the criminal court, in which it's known that corruption is included as one of the special crimes in criminal law. Therefore, if the police, prosecutor, or judge needs information about a bank's depositor, the bank is allowed to disclose it with the permission from the head of Bank Indonesia. Besides that, more specifically about corruption, it's regulated in Article 29 point (1) of the Act Number 31 of 1999 concerning The Eradication of Corruption as revised by Act Number 20 of 2001 concerning The Amendment of the Act Number. 31 of 1999 concerning The Eradication of Corruption, which will then be called the Act of The Eradication of Corruption, is stated that for the interest of investigation and/or prosecution, as well as the examination at the hearing, the authority could gain information from the bank regarding the financial situation of the suspect or the defendant.

The information request to the bank is asked to the Governor of Bank Indonesia as written in the applicable laws. The governor is then obliged to fulfill the request not later than 3 (three) working days, starting since the complete document is received.

Additionally, in Article 12 point c of the Act Number 30 of 2002 concerning Corruption Eradication Commission, also known as Komisi Pemberantasan Korupsi (KPK) in bahasa, which will be called the Act concerning KPK, is stated that in order to do investigation and/or prosecution, KPK is allowed to request upon a bank or other financial institutions regarding the financial situation of a suspect or a defendant. In other words, KPK's authority is not limited by bank's secrecy principle.

Therefore, it's known that the regulations concerning secrecy principle in the Act concerning Banking, is not formally absolute. But instead, those regulations can actually be ruled out (*lex specialis derogate legi generali*) by more specific regulations concerning the disclosure of bank's secrecy principle, including for the interest of the corruption court.

3.2. Bank's liability regarding the violation of bank's secrecy principle for the interest of the corruption court

Bank is a financial institution whose existence is based solely on trust from its customers who save their funds or other services in a bank.²¹ In other words, bank's life really depends on public trust which is put in that institution.²² And one of the factors that actually can maintain and increase public trust to the institution is bank's obedience to bank's secrecy principle.²³ Therefore, every bank has to hold onto the principle of secrecy as mentioned.²⁴

Basically, the relationship between bank and its customer is based on a contractual relationship, in which there are rights and obligation within that relationship. Saving agreement is one of the formal contractual relationship sources between bank and its customer. Regarding the saving agreement, there is bank secrecy that should be protected by the bank at all costs. That is because bank's customers as the users of financial services that's held by a bank, they have the right of protection in the place that they save their deposits in.²⁵ Therefore, there is an implied term that a bank is considered to have an obligation to keep its secrecy principle.

The violation of bank's secrecy principle, including the violation regarding bank's secrecy principle for the interest of the corruption court, in which the staff of the bank is the one disclosing its depositor's data and/or information to a third party is a violation of the depositor's right.²⁶ It is protected by the law and because of that, there is a potential dispute between bank and its depositor if there is a violation regarding that matter. The law protection for the bank's customer, especially depositor, is really important because in the agreement, bank holds a higher position than the customer. Therefore, the law protection to guarantee the fulfillment of bank's customer's rights and obligations should be written so that it would seem as more balanced.

In order to uphold bank's customer's protection, OJK is made based on Act Number 23 of 1999 concerning Bank Indonesia, as revised a few times, lastly with Act Number 6 of 2009 concerning The Establishment of Act Number 2 of 2008 concerning The Second Amendment of Act Number 23 of 1999 concerning Bank Indonesia. It's made due to the many problems in financial services sector and one of them is the low amount of customer's protection in financial services sector. As a result, the OJK

²¹ Adrian, Sutedi. *Hukum Perbankan: Suatu Tinjauan Pencucian Uang, Merger, Likuidasi dan Kepailitan*. (Jakarta: Sinar Grafika, 2007) p. 1.

²² Faisal, Fitriah. "Pengaruh Prinsip Kerahasiaan Bank Terhadap Tindak Pidana Pencucian Uang." *Al-Amwal* 3, no. 1 (2018) p. 37.

²³ Prabawa, I. Gusti Ngurah Wira, and Ida Ayu Sukihana. "Tanggung Jawab Pihak Bank Terhadap Kerahasiaan Data Nasabah Di Kota Denpasar." *Kertha Semaya: Journal Ilmu Hukum* 5, no. 1 (2017) p. 3.

²⁴ Kusuma, I. Made Hadi, and I. Made Budi Arsika. "Peranan Bank Pembangunan Daerah Bali Dalam Menerapkan Prinsip Kerahasiaan Bank Sebagai Bentuk Perlindungan Terhadap Nasabah." *Kertha Semaya: Journal Ilmu Hukum* 4, no. 1 (2016) p. 3.

²⁵ Rani, Marnia. "Perlindungan Otoritas Jasa Keuangan Terhadap Kerahasiaan Dan Keamanan Data Pribadi Nasabah Bank." *Jurnal Selat* 2, no. 1 (2014) p. 171.

²⁶ Jailani. A. (2019). Perlindungan Hukum Bagi Nasabah Terkait Dengan Rahasia Bank, *Dinamika Hukum*, 25(2), p. 5.

Regulation Number 1/POJK.07 of 2013 is made concerning Customer's Protection in Financial Services Sector. In Article 31 Point (1) and (2), it's stated that entrepreneurs in the financial services sector are prohibited in any way to disclose their customer's data and/or information to a third party, except if:

- a. The customer gives a written consent, and/or;
- b. It's obligated by the laws.

Therefore, a disclosure of customer's data and/or information is obviously considered as a violation of bank secrecy. However, even when the violation is committed by the bank staff, the liability can be given to the bank as the bank is the one obliged to keep its customer's data and/or information safe. Therefore, the bank in which its staff disclose the data and/or information of a customer can be given an administrative penalty according to Article 53 POJK Number 1/POJK.07/2013 concerning Customer's Protection in Financial Services Sector, as in:

- a. Written note;
- b. Fine to pay a few amount of money;
- c. The restriction of business activities;
- d. The discontinuance of business activities;
- e. The revocation of permission of business activities.

Regarding the mechanism which is provided for a customer whose data and/or information are disclosed by a bank, there is a facility that's called customer complaint by Bank Indonesia as stated in Bank Indonesia Regulation Number 7/7/PBI/2005 concerning Customer Complaint Settlement as revised by Bank Indonesia Regulation Number 10/10/PBI/2008. A customer that's harmed can share a complaint verbally or nonverbally to every bank office, except for the one that one has opened one's account in or done financial transaction in. That is also being strengthened by the existence of OJK Regulation Number 1/POJK.07/2013 concerning Customer's Protection in Financial Services.

Based on the regulation above, if it's proven that the customer's data and/or information are leaked, then the customer involved as the victim has the right to get compensation from the bank. But, if the agreement isn't achieved after that, the customer then the customer could go through through an alternative dispute settlement or ask OJK to facilitate the settlement of customer complaint. Besides that, the customer can also be done by pressing charge privately to the court. The bank can't be charged criminally because since the Act concerning Banking has been revised to Act Number 10 of 1998, the criminal penalty regarding that matter has been removed.²⁷

²⁷ Gafara, Fathir. "Tanggung Jawab Hukum Terhadap Pelaksanaan Rahasia Bank Menurut Undang-Undang Nomor 10 Tahun 1998 Tentang Perbankan." *Lex Privatum* 7, no. 1 (2019) p. 92.

IV. Closing

4.1 Conclusions

Based on the result and analysis of this research, it can be concluded that the regulations concerning bank's secrecy principle to disclose its depositors data and/or information for the interest of the corruption court is regulated in Article 29 point (1) of the Act concerning The Eradication of Corruption and Article 12 point c of the Act concerning KPK. It's also emphasized through the Supreme Court Letter Number KMA/694/R.45/XII/2004, which is stated that KPK can request upon a suspect's or a defendant's financial situation to a bank or other financial institutions in order to do investigation and/or prosecution within their authority. Furthermore, bank's liability regarding its secrecy principle for the interest of the corruption court, just like its liability regarding other exceptions regulated in the Act concerning Banking, is considered an obligation because of the agreement based on a contractual relationship of a bank and its customer, in which it being violated, harmed customer can go through through an alternative dispute settlement or ask OJK to facilitate the settlement of customer complaint. Besides that, the customer can also be done by pressing charge privately to the court

4.2 Advices

The exceptions which are regulated in the Act concerning Banking should be updated with a more definite regulation about the disclosure of a depositor's data and/or information to a third party for the interest of the corruption court. Besides that, bank should pay more attention to its secrecy principle so that the contractual relationship between a bank and its customer can be kept well and people's trust to the that financial service institution won't lose its existence.

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