

# JURNAL 19

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# Legal Protection of Bank Confidential Security After Constitutional Court Decision Number 64/PUU-X/2012

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**Abstract.** Bank confidentiality regulations is intended to protect customer confidentiality and ensuring data confidentiality related to customer deposits, especially regarding their financial condition. The Indonesian regulation on maintaining customer confidentiality is regulated in Article 40 Paragraph (1) of Law Number 10 of 1998 on Banking. However, there has been recent regulation changes with the Constitutional Court Decision No.64/PUU-X/2012. This decision originated from a lawsuit on divorce and division of shared property registered at the Syariah Court of Banda Aceh City No. 21/Pdt-G/2012/MS-BNA on February 1, 2012, filed by Magda Syafitri, whereby the bank refuses providing information regarding the husband's savings due to bank confidentiality regulations. This study is a Normative Law research in form of document studies, with descriptive style. Primary data is used in forms of Constitutional Court Decision Number 64/PUU-X/2012, laws, regulations, and books. This study indicates that according to decisions of the Constitutional Court Number 64/PUU-X/2012 regarding divorce civil trials and shared property divisions, an exception exists to bank confidentiality regulations, before being confidential with the Constitutional Court's decision, therefore the regulations in Article 40 paragraphs (1) and (2) are not applicable, in divorce cases. If the government covers banking institutions to maintain trust and bank confidentiality through regulations, countries can use bank confidentiality as competitive advantage. Bank confidentiality is a tool of economic engineering based on economic law approach emphasizing the purpose of legal benefits, which is important if it is utilized as a means of economic engineering or as a tool for driving a country's economy.

**Keywords:** Legal Protection · Security · Bank Confidentiality

## 1 Introduction

Banking holds a very prominent importance in human civilization, ranging from a reliable depository for valuables, to an intermediary institution with a significant role in the payment mechanism. Today, a bank is considered to be the most important institution in the modern economy [1]. The role of banking has greatly influenced the economic activities within a country. Banking is considered as the heart of the country's economy.

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Therefore, bank progress may also be taken as a measure of the progress of the country concerned. The more developed a country is, the greater the role of banking will control the country. In other words, the existence of the banking world is increasingly needed in the order of the government and society.

Banks as part of the financial system and payment system in a country, have a very important role. The important role of the bank can not be separated from its function as a financial intermediary institution, which is engaged in business activities to collect funds (*fund raising*) from the public as well as channeling funds (*fund lending*) to the public. Fundraising activities are carried out based on an agreement or deposit contract as well as an agreement or contract between the bank and the depositor [2]. The contractual relationship between the bank and the customer, which is based on the fiduciary principle, has the consequence that the bank does not only pay attention to its own interests, but also has to pay attention to the interests of the depositing customers [3].

In conducting banking businesses, it is based on four important principles, namely the principle of trust (fiduciary principle), the principle of prudence (prudential principle), the principle of confidentiality (confidential principle), and the principle of knowing your customer (know your costumer principle), which all four leading to the principle of protection and partnership principles between the implementing bank, Bank Indonesia and customers. One fundamental element in maintaining and increasing public trust in banks, in particular, and banking, in general, is the possibility of banks to be trusted by customers who deposit their funds and/or use other services from the bank, to avoid disclosing the financial condition and transactions of customers, as well as other matters of the customers concerned with other parties. This responsibility of maintaining bank confidentiality should be placed not only as a contractual obligation, but also as a public obligation in order to avoid being easily overlooked [4].

As a financial institution, the existence of a bank is highly dependent on the trust of the community as customers. Public trust is the primary basis on which a bank operates properly, considering that the banking business involves all the risks incurred by the depositor. The foremost risk is security risk, which formerly was the burden of the depositor now shifting to the bank. A bank must ensure the confidentiality of customer funds deposited safely in the bank.

There are two theories relating to bank confidentiality, namely the theory of absolute bank confidentiality and the theory of relative bank confidentiality. Absolute theory of bank confidentiality refers to the obligation of a bank to protect the secrets or information concerning its customers disclosed by the bank due to its business activities under any circumstances, ordinary or extraordinary. This theory emphasizes individual interests to the extent that country and community interests are often neglected. According to the Relative Theory of Bank Secrecy, a bank is allowed to disclose or provide customer information concerning its customers, particularly for urgent purposes, such as the interests of the state or the interests of the law. This theory is widely adopted by banks in many countries worldwide. Therefore, with the exception of the regulation of bank confidentiality, it is permissible for certain interests of a body or agency to request information or data about the financial condition of the relevant customer in accordance with applicable laws and regulations [5].

Indonesian banks follow the theory of relative bank confidentiality. The obligation of banks to maintain customer confidentiality is regulated in Law Number 10 of 1998 concerning Banking, Article 40 Paragraph (1) that banks are obliged to keep confidential information regarding depositors and their deposits, with the exception of the cases referred to in Article 41, Article 41A, Article 42, Article 44 and Article 44A. The exceptions to these bank secrets are as follows: (1). For tax purposes; (2). For the settlement of bank debts submitted to the state receivables and auction agency; (3). For judicial purposes in criminal cases; (4). Based on the request, consent or authorization of the depositing customer; (5). For the purpose of investigation in cases of money laundering.

However, related to Article 40 Paragraph (1) of the Banking Law, there has been a recent update whereby the terms of Article 40 Paragraph (1) are not applicable for judicial purposes regarding joint property in divorce cases. This new exception related to bank confidentiality was established through Constitutional Court Decision No. 64/PUU-X/2012 on July 27, 2012. This decision of the Constitutional Court originated from a lawsuit for divorce and division of shared property registered at the Syariah Court of Banda Aceh City No. 21/Pdt-G/2012/MS-BNA on February 1, 2012, the lawsuit was filed by Magda Syafitri against her husband, in which the bank refused to provide information regarding the husband's deposits due to bank confidentiality provisions. With this legal standing, Magda Syafitri filed a lawsuit against Article 40 Paragraph (1) of the Banking Law to be stated as contrary to the 1945 Constitution and subsequently declared invalid. In its ruling, the Constitutional Court decided, as follows:

1. Article 40 paragraph (1) of Law Number 10 of 1998 Regarding the Amendment to Law Number 7 of 1992 Regarding Banking (National Sheet of the Republic of Indonesia of 1998 Number 182, Supplement to the National Sheet of the Republic of Indonesia Number 3790) is in contradiction with the 1945 Constitution of the Republic of Indonesia to the extent that it is not interpreted, including for judicial purposes regarding joint property in divorce cases.
2. Article 40 paragraph (1) of Law Number 10 of 1998 Regarding the Amendment of Law Number 7 of 1992 Regarding Banking (National Sheet of the Republic of Indonesia of 1998 Number 182, Supplement to the National Sheet of the Republic of Indonesia Number 3790) has no legal binding force as long as it is not interpreted, including for judicial purposes regarding joint property in divorce cases.

With the decision, of course, there will be an impact on banking institutions, considering that banking institutions operate based on the principle of customer trust in customer data and deposits. Disclosure of bank confidentiality in civil cases related to the problem of shared property can also reduce the integrity of banking, which becomes a problem in itself later. Disclosure of bank confidentiality will later undermine customer trust (fiduciary relationship) towards the bank. Therefore, it is considered necessary to conduct a study to review how the analysis of legal protection of bank confidential security in protecting customer interests based on the principle of maintaining customer trust and the relation between bank confidentiality as means of economic mobilization of a country with the disclosure of customer data in divorce civil cases.

## 2 Method

Considering the type, this research is classified as Normative Legal research which is a legal research method useful in addressing legal issues encountered by taking a literature study approach through data collection methods by studying copies of decisions, case files, books, laws and regulations, as well as writings related to the problem being studied.

Meanwhile, in terms of its nature, this research is a descriptive analytical study, whereby this research is carried out by studying, describing and analyzing accurately the legal literature materials related to the problem being studied. The object of the research concerns the analysis of legal protection of bank confidential security in protecting the interests of customer data based on the principle of trust in banks (Case Study of Constitutional Court Decision Number 64/PUU-X/2012 regarding Bank Customer Data and Deposits for the Benefit of Marital Property in Divorce Civil Cases).

The data source used in normative research is secondary data, which can be grouped into three legal materials, which are primary, secondary and tertiary legal materials. By using these legal materials (and, if necessary, by using non-legal materials as supports); the researchers are able to draw conclusions which answer the problem in question [6]. The description of the three legal materials is as follows:

- a. Primary Legal Materials it refers to all legal materials or provisions which are binding the problem to be studied and includes binding legal materials such as legislation, jurisprudence or court decision [7]. Primary Legal Materials refers to data obtained from searching the library by reading decisions, namely: Constitutional Court Decision Number 64/PUU-X/2012 regarding Bank Customer Data and Deposits for the Purpose of Marital Property in Divorce Civil Cases, Law No. 10 of 1998 regarding Banking, Law Number 50 of 2009 regarding the Second Amendment to Law Number 7 of 1989 regarding Religious Courts. Also, reading laws and regulations and books related to the problem being studied.
- b. Secondary Legal Materials refers to materials which provide explanations of primary legal materials, such as opinions of experts or legal experts as well as scientific works which may be used as supporting materials for research.
- c. Tertiary legal materials, namely materials which provide instructions and explanations for primary legal materials and secondary legal materials [8]. Such as law dictionaries and encyclopedias.

In conducting this research, the author uses data collection techniques by conducting document studies on written legal materials. Once all data is obtained and collected, the data is then categorized based on the type of the two main problems studied. Data obtained from document studies, by taking a statutory approach and case approach, are then presented in the form of sentence descriptions, then analyzed and presented. In drawing conclusions, the author uses the deductive method of reasoning, namely drawing conclusions from general matters to specific matters. Deductive is reasoning that departs from generally accepted legal rules in individual and concrete cases faced [9].

### 3 Result and Discussion

#### 3.1 Analysis of Legal Protection of Bank Confidential Security in Protecting Customer Interests Based on the Principle of Trust in Banks

As a financial institution, the existence of a bank is highly dependent on the trust of the community who become its customers. In maintaining customer trust, the bank must comply to the regulations regarding bank confidentiality, in order to prevent any misuse of customer finances, therefore a special regulation is made which prohibits banks from providing recorded information to anyone related to customer finances, deposits and storage as stipulated in Article 1 Point 28 of Law Number 10 of 1998 regarding Banking. Banking confidentiality is also the main key to success and trust of a bank in a customers' eyes, hence this banking confidentiality must be protected by the bank to maintain the customers' trust [10].

The existence of bank confidentiality is compulsory and fulfills the needs of the community, as the community demands a sense of security and comfort with confidentiality which serves as an attractive factor for customers to deposit funds and loan funds from the bank. The doctrine behind bank confidentiality is the opinion that safety and soundness of the financial system depend on public trust, and public trust can be nurtured and maintained by bank confidentiality.

In conducting its business activities, the bank must comply with the regulations on bank confidentiality which have been stipulated by law. If violations occur, Bank Indonesia (BI) and the Financial Services Authority (OJK), as parties with the authority to take measures against the bank concerned by imposing sanctions. However, in the context of internal supervision and in order to facilitate the understanding of its employees, the bank is allowed to conduct internal supervision by making the internal regulations of the bank itself (*self regulation*), guided by the policy on bank confidentiality determined in the legislation and by Bank Indonesia as the party having its authority to supervise Indonesian banking.

The willingness of the public to deposit part of their money in the bank, is merely based on the belief that the money will be available again at the desired time accompanied by a reward as well, everyone keeps their money in the bank, called depositors [11]. The legal relationship between depositors and banks is based on an agreement, therefore it is certainly reasonable if the customer's interests are legally protected, such as the protection provided by law to banks, there is no denying that there has indeed been a political will from the government to protect the interests of customers, especially depositors, as evidenced by the release of Law No. 8 of 1999 regarding Consumer Protection, and also regulated in Law No. 10 of 1998 regarding Banking [12].

The obligations of banks to maintain confidentiality of their customers are regulated in Law Number 10 of 1998 regarding Banking, Article 40 Paragraph (1) states that banks are obliged to keep confidential information regarding depositors and their deposits, with the exception of the cases referred to in Article 41, Article 41A, Article 42, Article 44 and Article 44A. The exceptions to the bank confidentiality are as follows: (1). For tax purposes; (2). For the settlement of bank debts that have been submitted to the state receivables and auction agency; (3). For judicial purposes in criminal cases; (4). Based

on the request, consent or authorization of the depositing customer; (5). For the purpose of investigation in cases of money laundering.

However, related to Article 40 Paragraph (1) of Law Number 10 of 1998 regarding Banking, there was a recent change with the Constitutional Court Decision No. 64/PUU-X/2012. This Constitutional Court decision originates from a lawsuit for divorce and division of shared property registered at the Banda Aceh City Syariah Court No. 21/Pdt-G/2012/MS-BNA on February 1, 2012, which was filed by Magda Syafitri against her husband, in which the bank refused to provide information on the husband's savings due to bank confidentiality regulations.

With this legal standing, the Constitutional Court decided as follows:

1. Article 40 paragraph (1) of Law Number 10 of 1998 Regarding the Amendment to Law Number 7 of 1992 Regarding Banking (National Sheet of the Republic of Indonesia of 1998 Number 182, Supplement to the National Sheet of the Republic of Indonesia Number 3790) is in contradiction with the 1945 Constitution of the Republic of Indonesia to the extent that it is not interpreted, including for judicial purposes regarding joint property in divorce cases.
2. Article 40 paragraph (1) of Law Number 10 of 1998 Regarding the Amendment of Law Number 7 of 1992 Regarding Banking (National Sheet of the Republic of Indonesia of 1998 Number 182, Supplement to the National Sheet of the Republic of Indonesia Number 3790) has no legal binding force as long as it is not interpreted, including for judicial purposes regarding joint property in divorce cases.

With the decision, of course, there will be an impact on banking institutions, considering that banking institutions operate based on the principle of customer trust in customer data and deposits. Disclosure of bank confidentiality in civil cases related to the problem of shared property can also reduce the integrity of banking, which becomes a problem in itself later. Disclosure of bank confidentiality will later undermine customer trust (fiduciary relationship) towards the bank. In other words, the judge should also take into account the opportunity cost, namely the loss of customer and public trust, so that other customers or the public will later be reluctant to deposit their funds in the bank if the state takes an exception policy for the disclosure of bank confidentiality related to the trial of civil cases concerning shared property.

### **3.2 The Relation Between Banks as Means of Driving the Economy of a Country with the Disclosure of Customer Data in Divorce Civil Cases**

Bank confidentiality as a means of economic engineering is based on an economic approach to law which prioritizes the purpose of legal benefits. The concept of bank confidentiality as a tool of economic engineering maximizes the benefits of bank confidentiality policies, where customers will take advantage of bank confidentiality policies to improve their business performance, and the state will benefit from the maximum third party funds collected to carry out the intermediary function of banking institutions.

As we all know that one of the goals of the Indonesian state is to promote public welfare, therefore the regulation of bank confidentiality must lead to a better and more prosperous society. The regulatory formulation must provide legal certainty and lead to

economic change for the better for the Indonesian people. The role of bank confidentiality regulations should be a device for economic change in Indonesia (a tool of economic engineering). The law serves as a determinant of the direction or vision of the Indonesian economy, this thinking is certainly in line with the principles in economic analysis of law, namely maximization, rather than expecting the arrival of social costs and economic costs, it is better to anticipate avoiding losses and achieving maximum benefits.

By using banking confidentiality as a tool of economic engineering, the requirements of bank confidentiality can be tailored to change the Indonesian economy on a large scale. With absolute or near absolute bank confidentiality regulations, domestic banks can attract third party funds as much as possible. Therefore, Indonesian banks can distribute credit within the country for maximum economic development through the intermediation function and resolve the problems of poverty, unemployment, education, infrastructure, and other social problems.

The economic life of a country is never separated from the banking sector, which serves as the core of a country's economy. A collapse of the banking sector of a country can also affect the collapse of the country's economy which ends in bankruptcy. On the other hand, strong banking can also encourage the advancement of a country as experienced by other countries such as Singapore, Switzerland, Luxemburg, Hong Kong, and other countries. Bank confidentiality itself is a cornerstone of banking, in order to establish customer trust (*fiduciary relationship*), bank confidentiality must be maintained.

In practice, the regulation of bank confidentiality is one of the banking sectoral requirements, but provides a broad impact on the economy of a country. Absolute and relative bank confidentiality regulations will each have different impacts on a country, as well as the extent to which the relativity of a bank confidentiality regulation will have a major impact on a country. Furthermore, the bank confidentiality regime applied will affect which direction its citizens will deposit their funds, for a citizen who wants his privacy to be well guarded will shift to a country that applies absolute rules in maintaining bank confidentiality, rather than placing their funds in a country with a relatively impenetrable system.

The significance of bank confidentiality refers to the regulation of bank confidentiality as part of the public interest as well as bank confidentiality being a tool of economic engineering. The more strict the bank confidentiality adopted by a country, the more the flow of capital, third party funds, or investment into a country. As for the exception to bank confidentiality, it should be carried out in a controlled manner, as bank confidentiality is a sensitive issue affecting the performance of banking and the economy of a country, in view of this, any form of exception of bank confidentiality regulations should be done selectively. The formulation of bank confidentiality regulations should be intended to achieve public welfare in Indonesia in accordance with the objectives of the Indonesian state in the 1945 Constitution, namely the welfare state, considering that the objectives are in the economic and social fields, of course the most relevant approach is economic analysis of law [1].

In relation to the various exceptions of bank confidentiality, the author believes that exceptions are still needed for several criminal acts that are considered having extraordinary impacts on Indonesian society or what is often referred to as extraordinary



crimes, although internationally known as serious crimes, these crimes are terrorism, narcotics, and corruption, as we all know that the impact of terrorism is very significant not only for security, but also for national defense considering that the roots of terrorism, namely radicalism, can threaten the unity and integrity of the Republic of Indonesia.

However, with the latest exceptions related to judicial interests regarding shared property in divorce cases, there is a new exception related to bank confidentiality stipulated by the Constitutional Court decision No. 64/PUU-X/2012, in which this decision decides to exclude regulations related to bank confidentiality, which initially became a confidentiality with this decision, then the matters stipulated in article 40 paragraphs (1) and (2) do not apply, in divorce cases, this of course will certainly impact the banking institution itself later, considering that the banking institution is carried out based on the principle of customer trust in customer data and deposits at the bank itself.

The disclosure of bank confidentiality in the mechanism of civil cases related to shared property issues can also reduce banking integrity and will become a problem in the future. The disclosure of bank confidentiality will in fact harm customer trust (fiduciary relationship) towards the bank. The judge should first consider before deciding this matter, in other words, they should also take into account the opportunity cost of a bank, where customer and public trust is damaged, so that other customers or the public will be reluctant to deposit their funds in the bank if the state adopts an exception policy for the disclosure of bank confidentiality related to the civil case trial regarding shared property.

The government, in this case the House of Representatives (DPR), should revise the regulation of bank confidentiality and its exceptions in various laws and regulations. The regulation of bank confidentiality needs to be limited in its relativity, the exception of bank confidentiality must be limited specifically to criminal acts chosen by the state as a criminal act that has an extraordinary impact on the state or often referred to as extraordinary crime. Based on the economic analysis of law approach, the unlimited bank confidentiality will result in the country losing its competitive advantage [1].

#### 4 Conclusion

1. Based on the decision of the Constitutional Court No. 64/PUU-X/2012 regarding the civil case of divorce trials and the division of shared property, there are exceptions to the regulations related to bank confidentiality, which initially became confidential with the Constitutional Court's Decision, therefore the regulated matters in Article 40 Paragraphs (1) and (2) do not apply, in divorce cases. This decision of the Constitutional Court actually contradicts Law Number 8 of 1999 regarding Consumer Protection Article 1 Paragraph (1), namely: Consumer Protection are all efforts that ensure legal certainty to provide protection to consumers. The government, in this case the House of Representatives (DPR), should revise the regulation of bank confidentiality and its exceptions in various laws and regulations. The regulation of bank confidentiality needs to be limited in its relativity, the exception of bank confidentiality must be limited specifically to criminal acts chosen by the state as a criminal act that has an extraordinary impact on the state or often referred to as extraordinary crime.

2. Trust which is the fundamental condition of banking institutions, should the government be able to protect banking institutions to maintain trust and bank confidentiality through regulations issued, then the country may use bank confidentiality as its competitive advantage. Bank confidentiality as a tool of economic engineering is based on a legal economic approach which prioritizes the purpose of legal benefits, the idea of bank confidentiality as a tool of economic engineering maximizes the benefits of bank confidentiality policies, where customers will take advantage of bank confidentiality policies to improve their business performance, and the country will benefit from the maximization of third party funds collected for use in carrying out the intermediary function of banking institutions. The bank confidentiality is very crucial when used as a tool of economic engineering, which means as a tool to drive the economy of a country. Bank confidentiality determines the direction of citizens' wealth flows, thus determining the direction of a country's economy.

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**Authors' Contributions.** Putra Kubando and Sridevi Ayunda completed a literature study approach through data collection methods by studying copies of decisions, case files, books, laws and regulations, as well as writings related to the problem being studied. Meanwhile Rosyidi Hamzah and Yusri Munaf Collect the Primary Legal Materials, Secondary Legal Materials and Tertiary Legal Materials from various sources. However all the authors had equal input into the writing this manuscript. Putra Kubando wrote the introduction and method, Rosyidi Hamzah analysed the first sub-result, Yusri Munaf analysed the second sub-result, Sridevi Ayunda finished this manuscript by adding the conclusion and abstract, compiling this manuscript due to the template, and translating this manuscript into English. All authors read and approved the final manuscript.

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