

## CHAPTER I

### INTRODUCTION

#### A. Context of Study

The definition of bank according to Oxford Dictionary is an organization that provides various financial services, for example keeping or lending money.<sup>1</sup> A bank is a financial institution where its existence depends absolutely on the trust of the customers that entrust their funds and other services which they do through the banks in particular and from the society in general.<sup>2</sup> The basic principle of banking is trust between a bank and its customers. If there is no trust between a bank and its customer the banking activities will not run properly. One of the factors that can affect the public confidence to the bank is whether the secret of the customer is guaranteed. If there is no guarantee for the secrecy of any information about the customers, the trust of the customers to the bank will decrease and it will interfere the stability of economy.

People as the bank customers must believe to the bank, so the banking activities can run smoothly because the bank can increase the obligations to keep all information about the customers. However it should be known that customers must understand when and in what case a bank can be allowed to open the information about the customers to the third party of all things related to the

---

<sup>1</sup> Oxford Learner's Dictionary, <http://www.oxfordlearnersdictionaries.com>.

<sup>2</sup> Andrian Sutedi, *Hukum Perbankan*, (Jakarta: PT. Sinar Grafika, 2007), p. 1.

finance and other things from the customers which are known by the bank because of those business activities. That is why, the point is when the customers deal with the bank, they want any warranty of financial secrecy of banks to prevent any abusive case. Therefore to avoid a bad relationship between a bank and its customers, law has made regulations based on law year 1992 about the provisions of bank secrecy.<sup>3</sup> That is why, bank secrecy is needed, so the information of the customers will stay up well and the customers believe at bank that bank will not do any abusive case because it has been regulated by the law that bank has obligation to keep all the customers' data which are accordance with article 1 number 28 law number 10 of 1998 about banking which state that, bank secrecy is everything which is related to the information about the customer's storage and customer's deposits.<sup>4</sup>

Before Banking Law is regulated in Law No. 10 of 1998, Banking Law is regulated in Law No. 7 of 1992 on Banking. Then regarding bank secrecy is regulated in Article 1 Number 16 law Number 7 of 1992 about Banking stated that: "Bank secrecy is everything which is related to the financial and the others thing from bank customers which is based on banking law must be maintained."<sup>5</sup>

Those regulations are also in line with the regulation of bank secrecy which is regulated in article 40 section (1) Law no. 10 of 1998 jo. Law no. 7 of 1992, which stated that, bank has obligation to keep secret all of the information related to the customer's storage and deposits, except article 41, article 41A, article 42,

---

<sup>3</sup> Gatot Supramono, *Perbankan dan Masalah Kredit: Suatu Tinjauan Yuridis*, (Jakarta: Djambatan, 1996), p. 17-18

<sup>4</sup> Law Number 7 of 1992 on Banking

<sup>5</sup> *Ibid.*

article 43, article 44, and article 44A<sup>6</sup>. Then the Article 40 section (2) stated that, the provision which means in the section 1 also applies to affiliated parties.

According to the speech before, Asociacion Bancaria the Panama describes that the historical background of the secrecy law, shows that financial privacy is a common feature in many European countries.<sup>7</sup> That is why, the position of bank secrecy becomes one of the important things in banking system element. Customer believe that bank will keep all of the customer informations, because the relations between bank and it's customers is civil relationship based on trust and formalized by agreement. Which is a written evidence between bank and it's customer. In the form when the customer want to make a new account then they should fulfill the form and sign the agreement, that is why the agreement was done by the bank and its customer.

The problem of bank secrecy is always an interesting topic to be discussed in some elements, such as academic people, legal practitioners, and also politicians. Basically, the interesting problem was caused by the curiosity of public, especially parties who have personal interest and who want to know about the conditions of customer finance.<sup>8</sup> But in other conditions, we knows that a bank is impossible to give that information because of the provisions of bank itself, that the principles of bank is fiduciary, prudential, and confidential or we called it as a bank secrecy. So, we know that a bank has an obligation to keep all of the identity

---

<sup>6</sup> Article 40 version (1) Law no. 10 year 1998 on Banking

<sup>7</sup> General Counsel for credit Suisse; Judge at the Commercial Court of the Canton of Zurich (banking division); admitted to the Zurich Bar, 1961; Dr. Jur., 1959, University of Zurich Law School , as quoted in Journal on Banking Secrecy Today, Jornal of International Law (Werner de Capitani), p. 1.

<sup>8</sup> Hermansyah, *Hukum Perbankan Nasional Indonesia*, (Jakarta: Kencana Prenada Media Group. 2005), p.131

of the customers and the conditions of their finance, because all of the identity and the finance condition of the customers are concluded as a bank secrecy or confidential principle.

Bank secrecy is an important instrument, because if there is no bank secrecy principles it can make the customers put the trust away from the bank. Because all of the customers informations can be opened to public. So, to protect the customers information, bank must implement the principles of bank secrecy. Usually people will only utilize the services of the bank if the bank can guarantee that the bank will not abuse the deposits and the financial of the customer. Therefore, the bank's customer as a customer of banking must be protected for their rights and their importance.<sup>9</sup> That is why, many people save their money in the bank, because they believe that bank will keep all of the customers informations even though it's only an address.

So, there was found bank consequence that bank has obligation to keep secret as a reciprocal principle, the trust who given from society to the bank as a financial institutions or the sources of public funds.<sup>10</sup> Automatically, a bank can guarantee all of the information of the customers and makes the customers trust with the bank. Referring to the article 40 version (1) and (2) law no. 10 year 1998 about amendment law no. 7 year 1992 about banking.

The efforts made by government in banking institutions, especially at the bank by making exceptions on the confidentiality of bank secrecy provision, bank

---

<sup>9</sup>Lukman Santosa Az, *Hak dan Kewajiban Hukum Nasabah Bank*, cet. ke-1, (Jakarta: Pustaka Yustisia, 2011), p. 113

<sup>10</sup> Muhamad Djumhana, *Hukum Perbankan di Indonesia*, (Bandung: PT Citra Aditya Bakti. 2000), p. 161

is not absolute but not unlimited because of the few exceptions on bank secrecy itself so that for particular interests to be opened and to be known. A few exceptions in the secret of the bank are:<sup>11</sup>

- 1) For the purposes of taxation
- 2) Settlement of accounts receivable bank which has been submitted to the Affairs of the Receivable and the Auction of State Affairs Committee or the Receivables of the state
- 3) The importance of the judiciary in criminal matters
- 4) The interest of justice in civil matters between the bank and its customers
- 5) Informations between Exchange-Traded bank
- 6) The request, the consent or authority of the client repository are made in writing
- 7) Request a legitimate beneficiary of depository who have died.

So, automatically if there are found some cases that include in the some of those exceptions, bank can disclose the information but it should be based on the command of the Indonesian Bank Regulation. Then, if it is found a case that does not include in some of the exception that have been mentioned before, but the plaintiff would like to open the defendant transparency finance, automatically bank must refuse to give the information because of the bank secrecy regulations.

---

<sup>11</sup>Adrian Sutedi, *Hukum Perbankan Suatu Tinjauan Pencucian Uang, Merger, Likuidasi dan Kepailitan*, (Jakarta: Sinar Grafika, 2007), p. 9.

In February 2012, it is found an interesting case about Magda Safrina who filed petition of divorce and division of “gono-gini” property (community property) that have been registered in Sariah Court Banda Aceh. In community property, it is noted that a number of community property in form of savings and deposits stored in the name of her husband in district and province banks of Banda Aceh. But, the husband doesn't recognized the existence of savings and deposits which have been proven itself, because according to him the amount of the funds which are located in the deposits and savings account have been exhausted. The problem here, the husband can not give the evidence from his reason, because of that conditions, then the Sariah Court asked to the banks to give the informations about the existence of the community property itself in the interest of protection of community property which in that position was protected by law. The banks are, Bank Mandiri KCP Keutapang, Bank Mandiri Cabang Unsyiah Darussalam, Bank BRI cabang KCP Peunayong, but the respond of three of them are refused to give informations which have been asked by the Syariah Court, so until now the applicant didn't know the real amount of the community property itself because of the bank secrecy according to article 40 section (1) Law No. 10 of 1998 on Banking related with the bank secrecy. That is why, the applicant is likely will lose such community property.

The petition made by Magda Safrina is essentially asked the Constitutional Court to declare the article 40 (1) of law No. 10 of 1998 jo. law No. 7 of 1992 about banking which is contradict with the 1945 Constitution and didn't legally bind because the applicant feels that the enforceability of a quo has detrimental

the constitutional rights and potentially violates the constitutional rights of other citizen in the future. Based on article 51 (1) law no 24 of 2003.<sup>12</sup>

*A quo* case has given space to one party, it can be husband or wife whose name is registered as a customer of the bank to control and divert or partially or fully and shared property obtained during marriage without being noticed by the other party, so that it can lead to one of the parties and can take other parties arbitrarily, while other parties may lose part or all of its rights and community property (gono-gini) acquired during the marriage.

Then the case was brought to the Constitutional Court. According to constitutional court in a quo There are specific constitutional disadvantage, the existence of causal and when testing application is successful then it will not happen again. That is why according constitutional court there is a need to reinterpretation related with article 40 section (1) law no.10 of 1992 jo. Law no 7 of 1992, because regulation of bank secrecy is important to keep the customer data but the constitutional court should fulfill the sense of justice then the customer data can be opened in order to fulfill the interest of civil court.

So, based on the case above, Constitutional Court made decision number 64/PUU-X/2012 which stated that:

1. Article 40 section (1) law No. 10 year 1998 about amendment of law No. 7 year 1992 about banking, is contrary to the Constitution, if doesn't mean include for judiciary interest regarding community property in divorce cases.

---

<sup>12</sup> Article 51 (1) law no 24 of 2003

2. Article 40 section (1) law No. 10 year 1998 about amendment of law No. 7 year 1992 about banking, has no binding legal force, if doesn't mean include for judiciary interest regarding community property in divorce cases.<sup>13</sup>

According to constitutional Court, community property which is obtained during marriage, including the property stored by the husband or wife is a community property between husband and wife then will be more fulfilling sense of justice when the consumer data can also be opened in order to the court interest. Whereas, it is already regulated in article 28G version (1) and 28H version (4) 1945 Constitution. If article 40 version (1) is contradict with constitution entirely, it can make there is no protection about the consumer data and it can be dangerous because the customer doesn't trust again with the bank. That is why, there is an extension meaning about article 40 version (1) because Constitutional Court needed to give legal certainty and law protection fairly.

Thus, This paper was made for the purpose of analyzing the implementation of Constitutional Court decision, because until now as far as the writer concern, there is no research done in this case. That is why, this thesis would like to analyze the implementation of constitutional court decision.

---

<sup>13</sup> Decision of Constitutional Court Number 64/PUU-X/2012.



## **B. Problem Formulation**

1. How is the legal competence of Shariah Court and Constitutional Court regarding bank secrecy in the matter of community property lawsuit in Magda Safrina case?
2. How is the implementation of bank secrecy after the decision of Constitutional Court no. 64/PUU-X/2012?

## **C. Research Objectives**

1. The research objective is to know about the legal competence of Shariah Court and Constitutional Court regarding bank secrecy in the matter of community property lawsuit in Magda Safrina case.
2. The research objective is to analyze the implementation of bank secrecy after the decision of Constitutional Court no. 64/PUU-X/2012.

## **D. Definition of Terms**

1. Banking: Anything related to the bank, covering institutional, business activity, as well as the manner and process in carrying out in business activities in conventional and sharia as set forth in the law of banking and law of syariah banking.<sup>14</sup>

---

<sup>14</sup> Law of Republic Indonesia Number 21 of 2011 on Financial Services Authority, article 1 section 5

2. Banking secrecy: anything with the description related to the customer's storage and customer's deposits.<sup>15</sup> banking secrecy on this case related with the article 40 section (1) law no. 10 year 1998 jo. Law no. 7 year 1992 about banking which stated that bank is obliged to keep the customer's storage and deposits except in the article 41, 41A, 42, 43, 44, 44A.<sup>16</sup> Based on those regulation, bank can open the customer's storage and deposits only in the exception above, because bank secrecy is the important instrument in banking system in order to run the business properly. That is why, it needs bank secrecy to protect the customer's storage and deposits.
3. The decision of Constitutional Court: is final and legally binding, because the decision of constitutional court directly acquire legal force since already spoken and there is no remedy that can be reached.<sup>17</sup> That is why, the decision of Constitutional Court related in the case of Magda Safrina is final and binding.

---

<sup>15</sup> Law of Republic Indonesia Number 10 of 1998 jo. Law Number 7 of 1992 on Banking, article 1 section 28

<sup>16</sup> Law of Republic Indonesia No. 10 of 1998 jo. Law no 7 of 1992 about Banking

<sup>17</sup> Hukumonline.com

## E. Theoretical Review

1. Theory of bank secrecy suggests two opinions. The first one is absolute theory and the second one is relative theory. Here are the explanations:

a. First about absolute theory, bank has obligation to keep the customers secret which already known by the bank caused of their business activity in the some ordinary conditions or extraordinary conditions.<sup>18</sup>

Absolute Theory is theory that the individual interest as a priority so the interests of the state and society are often neglected.<sup>19</sup> This theory is based on the trust between customer and bank, so bank must keep all of the customers identity. That is why, the individual interest became the important thing, so there is a lot of rights of societies which have been neglected. Absolute theory is assumed having individualist characteristic because it's prefer to the individu itself and this theory also violated the public interest, because the interest of society and state is not related with the individual interest. This theory is very strict and the bank secrecy itself cannot be known entirely. The example of absolute theory is swiss country which has strict regulations to protect the customers secret.

b. Relative Theory is that bank secrecy has relative characteristic (limited) or nisbi. Bank must keep all of the customer's data but, in other condition bank is possible to open the secret of the customers only in a certain condition, like in public interest and also legal interest. This

---

<sup>18</sup> , Muhamad Djumhana, *Asas-Asas Hukum Perbankan Indonesia*, cet. ke-1 (Bandung: PT Citra Aditya Bakti, 2008), p. 271.

<sup>19</sup> Muhammad Djumhana, *Op.Cit*, p. 164.

theory is based on the proportional principle which requires consideration where the heavier to open or not to open the bank secrecy, related with a great interest which can be concluded in state interest or the interest of law.<sup>20</sup> Relative theory is based on the sense of justice because the interest of society and state are not be ruled out, because this theory does not make the individual interests as a priority. That is why, if there are found some reason that are not in line with the procedure of law it can be possible if the bank secrecy can be opened. In Indonesia, bank secrecy is included in the relative theory which is regulated in article 40 law number 7 of 1992 jo. Law number 10 of 1998 about banking. Specifically, law number 7 of 1992 and law number 10 of 1998 regulate bank secrecy as a follow:<sup>21</sup>

- 1). Bank secret is everything related to information about customer's storage and deposits
- 2). Bank has obligation to keep secret all of the informations about the customer's storage and deposits
- 3). These provisions are applied also to the affiliated party
- 4). Affiliated party

This theory is possible to open the secret of bank regarding the cunsomer data such as: tax problem, the state debt, criminal cases, private cases between customer and bank, exchange the information from the

---

<sup>20</sup> Rachmadi Usman, *Aspek Hukum Perbankan Syariah di Indonesia*, cet. ke-1 (Jakarta: Sinar Grafika, 2012), p. 332.

<sup>21</sup>Sri Susilo, et.al, *Bank dan Lembaga Keuangan Lain*, (Jakarta: Salemba Empat, 2000), p. 36.

director of the bank with other director, customer inheritance, written permission from the customer. That is why bank is obliged to maintain all of the customer secret but in that condition bank can open it, so in relative theory the regulation is not as strict as in the absolute theory.

2. Theory of community property or “*gono-gini*” According to Sayuti Thalib, says that community property is property acquired during the marriage which is obtained upon the efforts of the parties individually or together called as a community property to the husband and wife itself.<sup>22</sup> While according to the Compilation of Islamic Law stated that “Marriage wealth or community property is a treasure which is obtained single or together between the husband and wife during the marriage, without questioning registered on behalf of anyone “<sup>23</sup> where is based on Indonesian Civil Code stated that “Since the marriage happen based on the law property occurred along throughly between husband and wife, so far there is no other provisions in marriage agreement . Community property occurs during the marriage and cannot be modified by a written agreement between the husband and wife itself”.<sup>24</sup> Those definitions are quite similar with the definitions of community property in Marriage law. According to marriage law it is stated that “community property which is obtained during the marriage became community property”<sup>25</sup>

---

<sup>22</sup> Hukum Kekeluargaan Indonesia, 1986, p : 89

<sup>23</sup> Compilation of Islamic Law Article 1 Letter f based on Inpres No. 1 of 1991

<sup>24</sup> Indonesia Civil Code Article 119.

<sup>25</sup> Law of Republic Indonesia No. 1 of 1974 about Marriage Article 35 section 1.

That is why, from those explanation it can be concluded that community property is treasure between the husband and wife which is obtained during the marriage. So anything related with the property which is obtained during marriage automatically become community property. Based on the Marriage law article 97 stated that “Widow or widower divorced each of them should get a half from the community property itself if there is no other provision in the marriage agreement”.<sup>26</sup> So, if the husband and wife divorce, both of them should get a half from the community property itself.

3. Human Rights Theory is a right which is owned by human because she/he is human. Humans have those rights not because it was given to him by the public or based on positive law, but rather on the basis of his dignity as a human being.<sup>27</sup> Eventhough everyone was born with different skin colour, gender, language, culture and nationality, but humans have those rights. This is the universal characteristic and those rights cannot be revoked by anyone. So, the right is binding to their itself as a human being. In human rights, the right is divided into two, which are: derogable rights and non-derogable rights.

---

<sup>26</sup> Law of Republic Indonesia No. 1 of 1974 about Marriage article 97.

<sup>27</sup> Jack Donnelly, *Universal Human Rights in Theory and Practices*, Cornell University Ithaca and London, 2003 p. 7-21, also Maurice Cranston, *What are Human Rights?* Taplinger, New York, 1973, p. 70, as quoted in Rhona K.m Smith, et.al, *Hukum Hak Asasi Manusia*, (Yogyakarta: PUSHAM UII, 2008), p. 11.

Derogable rights are rights that still can be reduced or restricted by the State in certain circumstances. For example, someone has rights to express his opinion but the rights itself is restricted if he express his opinion in the certain places such as mosque, public places and others. Non-derogable rights are human rights (HAM) which can not be reduced under any circumstances. For example is right to life, those right cannot be restricted by anyone. That is why, regarding the case of Magda Safrina the bank secrecy was conluded as a derogable rights because bank secrecy is restricted in order to banking interest. Someone can tell something about their financial conditions to others because there is no restriction, but restriction here on the employee of bank because bank has obligation to keep all of the customers's storage and deposits that have been regulated by law. So, bank secrecy still can be reduced or restricted by the state in certain circumstances.

The existence of human rights in indonesia are stipulated on article 28

A until 28 I which stated that:

- 1). Article 28 A: right to life
- 2). Article 28 B: right to marry and get protections from discrimination
- 3). Article 28 C: right to develop themselve, to get educations, to increase the quality of life and to establish their right collectively

- 4). Article 28 D: right from recognition, guarantee, protection, legal certainty before the law, right to work then get the salary, equal opportunities in the government and right to get nationality status.
- 5). Article 28 E: right to choose their religion, get freedom and also freedom of expression
- 6). Article 28 F: right to communicate each other then get informations to develop themselves and other society.
- 7). Article 28 G: right to get protection of personal self, family, honor, dignity, and property under his control as well as the right to security and protection from the threat of fear to do or not to do something which is a human right and also right not to be tortured.
- 8). Article 28 H: right to physical and spiritual prosperity, get social guarantee, have a private property rights and the property rights should not be taken arbitrarily by anyone.
- 9). Article 28 I: right to respect the traditional rights, promotion, enforcement and fulfilling the society rights are responsibility of the state especially government and should be based on democratic principles.
- 10). Article 28 J: everyone must respect the human rights of others in an orderly life of society, and everyone is subject to mandatory limitations as are determined by law for the purpose securing and



respect for the rights and freedoms for others and fair demands related with the moral considerations, religious values, security and public order in democratic society.<sup>28</sup>

Because those rights are stipulated on 1945 Republic of Indonesia Constitution, the rights which are regulated in the constitution itself means as a constitutional rights, where constitutional rights are rights that should be guaranteed, so state has an obligation to guarantee all of those constitutional rights.

## **F. Research Method**

### **1. Source of Data**

The source of data is divided into three which: primary legal materials, secondary legal materials and tertiary legal materials. The primary legal materials that were used to complete this research are laws and regulations, the researchers obtained data directly from the decision of the constitutional court no. 64/PUU-X/2012 which related with article 40 version (1) law no. 10 year 1998 about amendment law no. 7 year 1992 about banking. Then also from the Indonesian bank regulations and the regulations of OJK. The secondary legal materials are the result of the interview from the interviewees who have been assigned in the subject of research and also including data obtained through the literature, which consists of Primary Legal Materials, which is binding legal materials that

---

<sup>28</sup> 1945 Republic of Indonesia Constitution

related to the object of research consist of: law no. 10 year 1998 about amendment law no. 7 year 1992 about banking, law no. 1 year 1974 about marriage, 1945 Constitution, decision of Constitutional Court. As for the tertiary legal materials are law dictionary and business dictionary.

## **2. Data Collecting**

The process of collecting data in the making of this research is done by literature review as many as possible. It can be books, articles, documents and also from the interview of the officials such as Financial Services Authority, Indonesian Bank, BNI Bank and Mandiri Bank.

## **3. Data Approach**

### **a. Statute approach**

Statute approach is done by reviewing legislation or regulation that deals with the legal issues being researched.<sup>29</sup> This approach is used for researching and reviewing some of the legislation used in the writing of this research proposal in particular regulations that discuss the secret banks and decision of Constitutional Court number 64/PUU-X/20121. This approach is used to regulate and determine the juridical basis in the process of settlement of bank secrecy case regarding the community property.

---

<sup>29</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, second edition, (Jakarta: Kencana, 2005), p.93

**b. Case approach**

This research uses case approach for reviewing cases which had been decided by court which has force of law which deals with issues that already faced.<sup>30</sup> Several cases were investigated as a reference for writing argument in solving the legal issues.

**4. Data Analysis**

In the process of analysing data during the process of this research, it is applied the normative legal method of analysis. Which is done by analysing the document study. It means uses a variety of secondary data such as regulations, court decision, legal theory, and scholar's opinion. This research is using qualitative analysis that explains the data narratively.

---

<sup>30</sup> *Ibid.*, p. 94.