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# Judicial Analysis of Banking Criminal Actions Related To Law Number 10 of 1998

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**ABSTRACT**

Banking has the main function as an intermediary, namely collecting funds from the public and channeling them effectively and efficiently to the real sectors to drive the development and stability of a country's economy, the bank bears a large reputation risk. Banks must always maintain the level of trust of customers or the public in order to save their funds in banks, and banks can channel these funds to drive the nation's economy. Banking criminal acts are basically acts against the law carried out, whether intentionally or unintentionally related to institutions, instruments and banking products, so that they cause religious and / or material mischief for the banks themselves or for customers or other third parties. Various kinds of laws and regulations have been issued by the government in the context of overcoming mistakes, negligence, and intentional actions of these insiders.

**Keyword:** BankingCrime, Licensing, Bank Secrecy.

## 1. INTRODUCTION

Finance is a financial institution that has a role in the financial system in Indonesia. The existence of the banking sector has a quite important role, where in the life of the community the role is greater than the banking sector. Financial relationship between financial institutions and financial intermediaries between parties who have funds and those who need funds. Financial institutions have a very strategic role in financial activities through their business activities raising public funds and channeling funds for productive and consumptive businesses, as well as being a determining direction for the formulation of government policies in the field of finance and finance in supporting national economic development, can be a place of deposit safe funds, places that are expected to be able to conduct financing activities for the smooth running of the business and trade world.[1]

The presence of banks is a provider of financial services that is related to the needs of the community to apply for loans or financing to banks. Financing as an instrument is sometimes equated with debt or loans whose repayments are made in installments. So if someone needs a number of funds, they can apply for financing to the Bank. Banking products are actually required to meet the provisions contained in Act Number 10 of 1998 concerning Banking, which includes

[1] Teguh Pudjo Mulyono, *Manajemen Perkreditan Bagi Bank Komersil*, BPFE, Yogyakarta, 2006, h. 56.

compliance with prudential banking principles. Law No. 10 of 1998 concerning Banking defines banks as legal entities that collect funds from the public in the form of deposits and distribute them to the public in the form of credit and / or other forms in order to improve the lives of many people.[2]

Banking has the main function as an intermediary, namely collecting funds from the public and channeling them effectively and efficiently to the real sectors to drive the development and stability of a country's economy. In this case, the bank collects funds from the public based on the principle of public trust. If the community believes in the bank, then the community will feel safe to save money or funds in the bank. Thus, the bank bears a large reputation risk. Banks must always maintain the level of trust of customers or the public in order to store their funds in banks, and banks can channel these funds to drive the nation's economy.[3] The banking world, customers are consumers of banking services. The position of customers in relation to banking services is in two positions that can be alternated according to which side they are on. In terms of the mobilization of funds, customers who deposit their funds in banks either as depositors or depositors of securities, then at that time the customer is a bank creditor. Whereas in terms of channeling funds, the borrowing customer is the debtor and the bank as the creditor. Of all these positions, basically the customer is the consumer of the business actor who provides services in the banking business sector.[4]

Customers according to Law Number 10 of 1998 concerning Banking are parties who use bank services. In this law, this customer is divided into 2 (two), i.e.:[5]

a. Depositing customers are customers who place their funds in a bank in the form of deposits based on a bank agreement with the customer concerned.
b. Debtor customers are customers who obtain credit or financing facilities based on sharia principles or are likened to a bank agreement with the customer concerned.

For the sake of the creation of a healthy Indonesian banking system, according to Usman, banking activities must contain the principles of banking law as follows:[6]

a. The Principle of Economic Democracy

   The principle of economic democracy is affirmed in Article 2 of Law No. 10 of 1998 concerning Banking. The article states that Indonesian banks in conducting their business are based on economic democracy by using the precautionary principle. This means that banking

[2] Lukman Santoso, *Hak dan Kewajiban Hukum Nasabah Bank* (Yogyakarta: Pustaka Yustisia, 2011), hal. 31.
[3] *Ibid*, h. 13.
[4] *Ibid*, h. 14.
[5] Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1992 Perbankan, Pasal 1.
[6] Lukman Santoso, *Op.Cit.*, h. 36-38.

business is directed to implement the principles contained in economic democracy based on the Pancasila and the 1945 Constitution of the Republic of Indonesia.

b. The Principle of Trust

The principle of trust is a principle that states that a bank's business is based on a trust relationship between a bank and its customers. Banks mainly work with funds from the public which are deposited with them on the basis of trust, so that each bank needs to continue to maintain its health while maintaining and maintaining public trust in it.

c. Principle of Confidentiality

The principle of confidentiality is a principle that requires or requires banks to keep all matters relating to finance and other matters of bank customers, which according to the norms of the banking world must be kept confidential. Confidentiality is in the interests of the bank itself because the bank needs the trust of the people who keep their money in the bank. The public will only entrust their money to the bank or take advantage of bank services if the bank guarantees that there will be no misuse of the bank's knowledge about its deposits. Thus, banks must hold firm bank customers' secrets.

d. The Principle of Caution

The principle of prudence is a principle which states that banks in carrying out their business functions and activities are required to apply the precautionary principle in order to protect public funds entrusted to them. This is stated in Article 2 of Law No. 10 of 1998 concerning Banking that Indonesian banks in conducting their business are based on economic democracy by using the precautionary principle. Then it is also mentioned in Article 29 paragraph (2) that banks are required to maintain the soundness of banks in accordance with the provisions of capital adequacy, asset quality, management quality, profitability, and liquidity, and are required to conduct business activities in accordance with the principle of prudence.

Banking criminal acts are basically acts against the law, either intentionally or unintentionally related to banking institutions, instruments and products, thus creating material and / or material misconduct for the banks themselves or for customers or other third parties.[7]

In general, crimes in the field of banking are crimes that are classified in the laws and regulations in the field of administrative law that contains criminal sanctions. The term crime in banking is to accommodate all types of unlawful acts related to activities in carrying out bank business. Crime in the banking sector is one form of economic crime that is often committed by using banks as targets and means of activity in a mode that is very difficult to monitor or prove

[7] Anwar Salim, *Tindak Pidana di Bidang Perbankan*, Alumni, Bandung, 2001, h. 14.

based on banking laws. The most serious problem faced by the banking industry and bank supervisory agency is to supervise or know quickly the negligence or deliberate management of banks and or bank employees and or shareholders and or affiliated parties in committing mistakes or crimes, for example fraud and embezzlement committed. The forms of violations or legal crimes committed by management, bank employees and shareholders are often closely related to the responsibilities and management tasks of bank management in managing bank business activities, especially related to lending to debtors. Lending to affiliates of the bank is often not accompanied by sound lending analysis, causing many bank funds not to return to the bank. Types of criminal acts in the banking world are those discussed with:[8]

a. Licensing (illegal bank crime)
b. Banking Secrets
c. Banking Business
d. Bank Supervision and Guidance

This means that public funds entrusted to banks are misused by irresponsible people, so that banks and communities who entrust their funds suffer losses from the loss of these funds. Bank Indonesia, the government, and the police as law enforcement officials are required to work together to tackle various crime of theft of public funds at banks in Indonesia. If the public no longer believes in law enforcement in Indonesia in preventing and following up on various banking crimes in Indonesia, it will also indirectly have an impact on people's trust in banks.

Various kinds of laws and regulations have been issued by the government in the context of overcoming mistakes, negligence, and intentional actions of these insiders. In Article 49 paragraph (1) of Law Number 10 of 1998 concerning Banking which states that Members of the Board of Commissioners, Directors, or bank employees intentionally :

a. Making or causing false records in books or in the report process, or in documents or reports on business activities, transaction reports or bank accounts.
b. Eliminating or not entering or causing not to be recorded in books or reports, or in documents or reports on business activities, transaction reports or bank accounts.
c. Altering, obscuring, hiding, deleting, or eliminating the existence of a record in a bookkeeping or in a report, or in a document or business activity report, transaction report or bank account, or deliberately changing, obscuring, deleting, hiding or damaging the bookkeeping records, threatened with imprisonment of at least 5 (five) years and a maximum of 15 years and a fine of at least IDR

[8] Jonker, *Tanggung Jawab Yuridis Bankir Atas Kredit Macet Nasabah* (Bandung: Alumni, 2009), hal. 64.

10,000,000,000.00 (ten billion rupiah) and a maximum of IDR 200,000,000,000.00 (two hundred billion rupiah).

According to the explanation of Article 49 paragraph (1) and paragraph (2) points a and b, the term for bank escort in that article has a different meaning. In the provisions of Article 49 paragraph (1) and the provisions of Article 49 paragraph (2) point a, what is meant by bank employees are all bank officials and employees, whereas in Article 49 paragraph (2) point b, bank employees are defined as bank officials. has authority and responsibility regarding matters relating to the business of the bank concerned.

The existence of false records in the books or in the process of reporting transactions or accounts of a bank and eliminating or not entering or not recording in the bookkeeping reports, as well as in transaction documents or bank accounts. This is the reason for the crime of money laundering. Money laundering is a type of white collar crime or a white collar crime, where the crime of money laundering is a continuation of other crimes, which are usually committed by individuals, or corporations within the borders of a country or carried out across borders another region.

## 2. DISCUSSION

### Criminal Banking Responsibility

Criminal responsibility means that every person who commits a crime or is against the law, as formulated in the law, then that person must be responsible for the actions in accordance with their mistakes. In other words, a person who commits a criminal act will be held accountable for the crime with a crime if he has a mistake, someone has a mistake when at the time of doing an act viewed from a community point of view shows a normative view of the mistakes made by that person.[9] Criminal liability is intended to determine whether a person can be held accountable for the criminal or not for the actions committed.[10]

Thus, someone gets a criminal depending on duahal, namely (1) there must be an action that is contrary to the law, or in other words, there must be an element of unlawfulness so there must be an objective element, and (2) there is an element of wrongdoing in the form of intentional and / or wrong. negligence, so that actions against the law can be accounted for so there is a subjective element. Criminal liability occurs because there has been a crime / act committed by someone. According to Roeslan Saleh, he said that in the sense of criminal acts did not include accountability. Criminal acts only refer to prohibited acts. Whether the person who has committed

[9] Moeljatno, 1993, *Perbuatan Pidana dan Pertanggung Jawabannya Dalam Hukum Pidana*, Jakarta: Rinneke Cipta, h. 41.

[10] S.R Sianturi, 1996, *Asas-Asas Hukum Pidana Indonesia dan Penerapannya*, Cet. IV, Jakarta: Alumni Ahaem-Pateheam,h. 245.

the act is then also convicted, depending on whether he did the wrong thing or not. If the person who committed the crime did indeed have a mistake, then of course he will be convicted.[11]

Criminal liability is essentially a mechanism established by criminal law to react to violations of agreements to reject certain acts. Sudarto said that a person's conviction is not enough if that person has committed an act that is against the law or is against the law. So even though the act fulfills the formulation of offense in the law and is not justified, it does not yet meet the conditions for imposing a criminal sentence. For criminalization there is still a need for a criminal sentence, that is, the person who commits the act has an error or is guilty. The person must be held accountable for his actions or if viewed from the point of his actions, his actions can only be accountable to the person.[12] Criminal liability refers to a criminal offense that carries out an act that is deemed to have committed a criminal offense specified in the Act. Seen from the point of occurring a prohibited act (required), a person will be liable if the act is illegal or rechtsvaardigingsgrond or (justification reasons). From the point of view of being responsible, only those who are "capable of being responsible" can take responsibility for their speech.

Criminal responsibility must pay attention that criminal law must be used to create a just and prosperous society with material and spiritual equality. The criminal law is used to prevent or cope with undesired actions. In addition, the use of criminal law facilities with negative sanctions must pay attention to the costs and the ability of the workforce of the relevant institution, so that there is no overloading of duties (overbelasting) in implementing them.[13]

**Criminal Liability in Criminal Acts of Bank Licensing**

Bank as an institution that runs its business on the basis of the trust given by the depositors, can at any time easily deceive the public through various criminal acts in the banking sector and other economic crime practices.[14] The operational practice of a bank without a license is known as the "Dark Bank" and the bank will give an impact / a negative picture of the legitimate banking by licensing then this is one of the legal inhibiting factors in developing banks

Pursuant to Article 48 of Act Number 13 of 1968 concerning the Central Bank, Bank Indonesia may request information from a business entity / legal entity that is suspected of conducting illegal business. Illegal banks as referred to legally are not formal, but in general what is meant by illegal banks is a business similar to a bank but without the Minister of Finance's

[11]Roeslan Saleh, 1982, *Pikiran-pikiran Tentang Pertanggungjawaban Pidana*, Jakarta: Ghalia Indonesia, h. 75.
[12] Mahrus Ali, 1988, *Dasar-Dasar Hukum Pidana dalam Sudarto, Hukum Pidana I*, Badan Penyediaan Bahan-Bahan Kuliah, Semarang: FH UNDIP, h. 85.
[13] Moeljatno, Op. Cit., h. 23.
[14] Marulak, *Hukum Pidana Bank*, Pustaka Sinar Harapan, Jakarta, 1995, h. 57.

permission. Bank-type businesses as long as they do not use the word "bank", so Bank Indonesia is concerned about which agency must carry out its supervision and management. If such an effort is expected to be detrimental to the community, then law enforcement officials (investigators) who are authorized to carry out countermeasures, cooperate with relevant institutions / agencies.

The business of a bank in a bank is a practice of illegal banks within a bank. It is so called because there are bank businesses hiding inside the actual / legitimate bank, and the employee or official concerned acts as the main actor in the practice of the illicit bank. The illegal bank business is carried out in two ways as follows :[15]

a. An entity, company or individual carries out activities in the context of carrying out bank business without a business permit from the Minister of Finance. The operation of the business does not need to be carried out as a whole, as long as the entity, company or individual carries out activities similar to the operation of the bank which gives the nature of the business of the bank. These activities indicate that the entity, company or individual has operated a business similar to a bank
b. A bank employee or other person opens an account in his name or in the name of another person or in a fictitious name, which account is used to collect funds from the community that receives a certain interest. Collecting funds in the account is intended to be distributed again to people who need a loan of money (a third party) by means of the account holder withdrawing a check on the burden of his account, which checks are handed over to third parties who then disburse them.

Lending does not require convoluted formalities as stipulated in the regulations that apply in granting credit. In general, the interest charged on loans is higher than bank regulations. This type of illicit bank is known as "black bank".[16]

Article 46 paragraph (1) of Law Number 10 of 1998 concerning Banking mentions :[17]

> "Anyone who collects funds from the public in the form of deposits without permission from the Chairman of Bank Indonesia as referred to in Article 16, is threatened with imprisonment of at least 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp.10,000 .000,000 (ten billion rupiahs) and a maximum of Rp. 200,000,000,000 (two hundred billion rupiahs) "

Article 46 paragraph (2) of Law Number 10 of 1998 concerning Banking mentions :[18]

[15] *Ibid*.
[16] *Ibid*.
[17] Pasal 46 ayat (1) Undang-Undang Nomor 10 Tahun 1998 tentang Perbankan.
[18] *Ibid*., Pasal 46 ayat (2).

> "In the event that the activities referred to in paragraph 1 are carried out by legal entities in the form of Limited Liability Companies, Associations, Foundations or Cooperatives, the prosecution of such bodies shall be carried out either against those who give orders to carry out such acts or who act as leaders in such acts or against both"

Article 16 of Law Number 10 of 1998 concerning Banking includes bank licensing matters, meaning Article 46 of Law Number 10 of 1998 concerning Banking constitutes a type of banking criminal act in the field of bank licensing.[19]

The acts referred to in Article 51 are classified as criminal offenses, meaning that the actions referred to will be subject to a threat of a heavier sentence compared to if only as an offense. This is considering that banks are institutions that hold funds entrusted by the community to him, so actions that can result in damage to public trust in banks, which basically will also harm banks and the public, should always be avoided. By being classified as a crime, it is expected that more high adherence to the provisions in the Banking Act can be formed.[20]

According to Abdulkadir Muhammad, Article 46 paragraphs (1) and (2) constitute a type of threat of corporate punishment. Corporate crime is actually an organizational crime, occurring in the context of relationships between the board of directors, executives, and managers on the one hand and between the parent company, branch companies and subsidiaries on the other. The anatomy of corporate crime is very complex which leads to economic motives. Corporate crime is generally portrayed by people of high social status by taking advantage of certain opportunities and positions and in a collective way with a smooth modus operandi, which is difficult compared to crimes committed by individuals.[21]

Roeslan Saleh who holds dualistic views distinguishes the conviction of an act by the conviction of a person committing an act, or distinguishes a criminal act from criminal liability or error in the broadest sense. The principle of geen straf zonder schuld is not absolutely valid, meaning that to account for the corporation does not always have to pay attention to the mistakes of the maker, but it is enough to base adagium res ipsa loquitur (the facts speak for themselves), because the reality in society shows that losses and dangers caused by corporate actions very large, both physical, economic losses, and social costs. Besides that. the victims are not individuals, but also society and the state.[22]

[19] *Ibid*.
[20] Penjelasan Pasal 51 Undang-Undang Nomor 10 tahun 1998 tentang Perbankan.
[21] Mahmud Mulyadi dan Feri Antoni Surbakti, *Politik Hukum Pidana Terhadap Kejahatan Korporasi*, Sofmedia, 2010, Jakarta, h. 23.
[22] Edi Yunara, *Korupsi dan Pertanggungjawaban Pidana Korporasi*, Citra Aditya Bakti, 2012, Bandung, h. 64.

Violations of corporate obligations can be applied to the strict criminal liability doctrine according to the law or so-called strict responsibility, especially if the corporation conducts its business without permission, or the licensing corporation violates the conditions (conditions / situations) specified in the permit.[23] Establishing a legal entity as a criminal offense can be based on the criteria for carrying out the tasks and / or achieving the objectives of the legal entity. A legal entity is treated as an agent, if it is proven that the action concerned is carried out in the context of carrying out the duties and / or attainment of the objectives of the legal entity, also including in the case of people (company employees) who have actually carried out the actions by those concerned by doing it on their own initiative and contrary to instructions which are given. However, in the latter case it does not rule out the possibility of a legal entity filing an objection for the reasons for the absence of error in itself.[24]

In line with the principle of accountability of management according to their authority based on the statutes of the legal entity, in this case criminal liability is identified with what is regulated in civil law, specifically regarding acts of "intra vires" and "ultra vires". Acts that are explicitly or implicitly included in the ability to act (legal entity) are acts of "intra vires", on the contrary every act performed outside the scope of the company's ability to act (outside the intent and purpose of legal entities) is an "ultra vires" action therefore not legal and does not bind the company. To find out how the formulation of the purpose and objectives of a legal entity, in practice it is seen in the usual / reasonable meaning and the act supports the business activities mentioned in the articles of association.[25]

**Criminal Liability in Criminal Acts of Bank Confidentiality**

One thing that is interesting for anyone dealing with banks is the guarantee of the identity of the customer. This is understandable, because the banking business is a business of trust. In other words the customer is related to the bank, because the customer believes the bank will continue to uphold the norms in the banking business. One of the norms referred to is bank secrecy.[26] As a business entity that is trusted by the public to collect and distribute public funds, it is only natural for banks to provide guarantee of protection to customers regarding the "financial condition of customers" which is commonly called "Bank Confidentiality". The principle of confidentiality (confidentiality) in matters of banking finance has been known for a long time. In

[23] Alvi Syahrin, *Ketentuan Pidana Dalam UU No. 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup*, PT. Sofmedia, Jakarta, 2011, h. 68.

[24] *Ibid*.

[25] M. Hamdan, *Tindak Pidana Pencemaran Lingkungan Hidup*, Mandar Maju, Bandung 2000, h. 81.

[26] Sentosa, *Hukum Perbankan Edisi Revisi*, Mandar Maju, Bandung, 2012, h. 30.

medieval times, such provisions have been regulated in statutory regulations. The German Empire, for example, at that time the principle of confidentiality was regulated in the Civil Code.[27]

The regulation on bank secrecy in the Banking Law is set out in Article 1 number (28) which states that bank secrecy is everything related to information regarding depositing customers and deposits. From this understanding, it can be seen that normatively in the Banking Act not only regulates the subject or identity of the protected deposit customer, but everything that is related to customer deposits.[28] It's just that in the Banking Act is not further elaborated, what is meant by everything related to information about depositors and deposits. Article 40 paragraph (1) of the Banking Act only states that banks are required to keep information about the depositing customers and their deposits, except in the cases referred to in Article 41, 41A, 42, 43, 44 and 44A of the Banking Law.[29]

The existence of provisions concerning bank secrets gives the impression to the public, that banks intentionally hide the unhealthy financial situation of debtor customers, both individuals and companies that are in the spotlight of the public. During this time the impression arises that the banking world is hiding behind the bank's secret provisions to protect the interests of its customers which is not necessarily true. However, if the bank really protects the interests of its customers who are honest and clean, then it is a necessity and proper.[30] Provisions regarding bank secrecy are very important for depositors and their savings as well as for the interests of the bank itself, because if the depositing customer does not trust the bank where he keeps his deposits, he certainly will not want to be his customers. Therefore, as a financial institution that functions to raise funds from the public in the form of deposits, it is appropriate for banks to apply the bank's confidentiality provisions consistently and responsibly in accordance with applicable laws and regulations to protect the interests of their customers.[31]

In terms of the definition of "information about depositing customers and their deposits", "information" includes all data and information about the depositors' self and finances that are known to and recorded at the bank and must be kept confidential. This confidentiality is for the benefit of the bank itself which requires the trust of the people who save their funds in the bank. The public will only entrust the funds deposited in the bank or utilize bank services if there is a

[27] Rachmadi Usman, *Aspek-Aspek Hukum Perbankan di Indonesia*, PT. Gramedia Pustaka Utama, Jakarta, 2001, h. 153.
[28] Sentosa, *Op. Cit.*, h. 32.
[29] *Ibid*.
[30] 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, serta Undang-Undang No. 21 Tahun 2011 tentang Otoritas Jasa Keuangan)* (Jakarta: Kencana Prenada Media Group, 2013), h. 131.
[31] *Ibid*., h. 312.

guarantee to the customer that the bank will keep the information about the depositing customer and deposit, of course as long as it is not excluded by law.[32] In the case of bank secrecy, the management acts within its authority but violates existing regulations or is beyond its authority. In a secret criminal act of a bank, the corporation cannot be held liable because in this case the bank is a victim of the management or employee's actions.

## 3. CONCLUSION

Based on the explanation above, the writer concludes that:

1. In Article 46 paragraphs (1) and (2) it is clearly stated that those who can be held accountable for the occurrence of criminal acts of illegal banks, namely those who carry out activities to collect funds without permission from the competent authorities and those who give orders to commit acts that or who acts as a leader in the act or both. With regard to criminal liability for criminal acts, bank licensing applies two forms of criminal liability, namely the management carries out a responsible management, and the bank commits a criminal offense, the management is responsible.
2. In the case of criminal offenses, it is necessary to separate banking criminal offenses from criminal offenses in banking due to the rise of persons who use banking facilities for primary crimes. If the issue of bank secrecy involves the banking person, the company is not responsible for its criminalization so that the banking crime is only bound to employees who commit banking crime.

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[32] Abdulkadir, *Op.Cit*., h. 264.

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