# CHAPTER 1

# INTRODUCTION

## 1.1 Background

Banking has been existed and recorded as old as history recorded by humans; this is because the simplest form of banking system has been existed at least from 2000 BC in Babylon. At that time, banking institutions, better known as Temples of Babylon, had activities in the form of borrowing gold and silver at an interest rate of 20% (twenty percent) each month.[1] That statement is supported by the evidence that there are also instruments used in the form of "promises" to pay or "orders" to pay where the payment instruments used are still in the form of gold and silver.

In the 16th century, it is being categorized in the history of banking as the era of modern banking. The development of banking occurred very rapidly in England, Netherlands and Belgium. At that time, the goldsmiths are willing to accept payment instruments in the form of gold and silver to be stored and as proof of storage, where later the goldsmiths will issue a letter called Goldsmith's Note.[2] However, in its development, the Goldsmith's Note was used as a payment

[1] Muhamad Djumhana, Hukum Perbankan Di Indonesia, (Bandung: PT. Citra Aditya Bakti, 1993), pg. 38.
[2] Y. Sri Susilo, Sigit Triandaru dan A. Totok Budi Santoso, Bank Dan Lembaga Keuangan Lain, (Jakarta: Salemba Empat, 2000), pg. 2.

instrument and it was accepted legally in economic transactions at the time, this is what then became the origin story of banknotes (uang kertas).[3]

Nowadays, in the era of globalization, the existence of banks in public life is classified as a necessity and has a very important role. The bank is a financial institution that is a place for business entities, government agencies, private and an individual as a place to store funds and as a vehicle for conducting various types of financial transactions. How it works, banks will distribute the collected funds back to the public through credit institutions. In addition to the function mentioned above, banks also provide various banking services needed by customers and the general public.

Not only it is an essential for our everyday life, banking also has a very important role in development of a country, especially in supporting the country's economic growth by serving various financing needs and accelerate the payment system mechanisms for all sectors of the economy. Banking law is a positive law that regulates everything related to banks. Banks are one of the financial institutions that raise funds.[4] That statement is also legally stated in to Article 1 point 1 of Indonesian Banking Law Number 10 of 1998, that "bank is a business entity that

[3] KC. Shekar, Banking Theory and Practice, (New Delhi, India: Vikas Publishing House Pvt Ltd, 1994), pg. 497.
[4] Rachmadi Usman, Aspek-Aspek Hukum Perbankan di Indonesia, (Jakarta: PT Gramedia Pustaka Utama, 2001), pg. 2.

collects funds from the public in the form of savings and distributes it to the community in the form of credit and or other forms in order to improve the lives of many people."

One of the forms of service business that offers a variety of public needs is financial services. In addition to promoting professionalism in service to the public as a customer, the banking service business must also prioritize trust, because it can be said that the banking industry is an industry that sells trust to the public as its customers. In order to maintain relationships with customers, there is the term "risk appetite" meaning that in every form of banking transaction there will always be a risk when it comes to it and it cannot be eliminated, but as a bank, they only can anticipate these risks by finding alternatives and mitigations in order to not cause losses for the bank in the future. Therefore, risk appetite is a policy of the bank in deciding to conduct a banking transaction by accepting the risks that occur and making efforts to overcome those risks with the aim of minimizing losses that might arise, but if it does happens, where the bank losses funds, they must accept the loss is as a cost of doing business. By doing risk appetite adjustments, Bank can perform stimulus to increase the number of customers and / or debtors or maintain the number of customers and / or debtors or reduce the number of customers and / or debtors.[5]

[5] Djoni S. Gazali dan Rachmadi Usman, Hukum Perbankan, (Jakarta: Sinar Grafika, 2010), pg. 136.

In 2019, it is recorded in last September that there is growth in the number of accounts and nominal deposits at 111 commercial banks. According to the Secretary of Deposit Insurance Agency (LPS), Muhammad Syukron, that the total of commercial bank savings accounts as of September reached 295,024,628 accounts, it increased up to 2,064,006 accounts or 0.70% (MoM) compared to August 2019's position of 292,960,624 accounts. As the foe the nominal of deposits at commercial banks as of September 2019 increased by 1.46% (MoM), from Rp5,898,423 billion in August 2019 to Rp5,984,425 billion in September 2019.[6] Based on this report, it can be conclude that Bank can be a very important institution based on the history of its formation, and "trust" is one of the main for banks to run their businesses. Meaning that, if there is absence of trust between the relations between banks and their customers, there wouldn't be 295,024,628 accounts that are willing to store their funds on the bank.

As a consumer or market, the public has various considerations in choosing the banking service business for them be used, including the interest rate factor offered by banks to the public, the level of comfort felt by the public in terms of depositing money at the bank, also regarding ease in obtaining loans. These factors are the basis of public consideration for choosing banking services, both directly and indirectly, which can form a loyalty in the community towards banks that are used as a choice they trust.

[6] https://ekbis.sindonews.com/read/1454177/178/jumlah-rekening-di-bank-umum-naik-070-dan-dana-simpanan capai-rp5984-miliar-1572502782. Accessed on October 15th 2019

As the writer stated the passage earlier, it is true that the existence of banking services in society is indeed more profitable, especially in the economic sector, where economic actors are freer to carry out their activity. Banking businesses in the community that prioritize good service in order to gain the trust of the public as their customers will face a variety of conditions or views that arise from the public as an expression of satisfaction or dissatisfaction with the services, they receive from the bank they trust.

Related to the customer's trust to the bank in giving a sense of security while depositing funds in the bank, a concept that is called "bank secrecy" emerged , where the banks secrecy was initially only given as a form of collateral to support the customers sense of security when they deposited funds in the bank, therefore a third party which has nothing to do in transactions between the customers and banks do not need to know the financial situation or data of the customer. As a Bank, they must comply with the bank secrecy obligations, because that is one factor that able to help maintain and increase the level of public confidence particularly in a bank and banking in general. The intention is related to "Whether or not a bank can be trusted by a customer to not to disclose the customer's deposits or customer identity to other parties". In other words, it depends on the ability of the bank to uphold and adhere strictly to "bank secrecy".[7] Those statements are being supported the Law, Article 1 point 28 of the Indonesian Banking Law Number 10 of 1998, the

[7] Sutan Remy Sjahdeini, Rahasia Bank: Berbagai Masalah Disekitarnya dalam Hukum Perbankan, (Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 1999). Pg.2

definition of bank secrecy is “Bank Secrecy is everything related to information about depositors and their deposits.”

The concept bank secrecy actually does appear and became a law when the British Court of Appeal case unanimously decided its position in the Tournier v. National Provincial and Union Bank of England in 1924. A court ruling which later became the leading case law concerning the provisions of bank secrecy in the UK and then turned into a reference for other courts from countries that adhered to the common law system. This case in particular is an example for proving the importance of bank secrecy that must be carried out by the bank.

This case was occurred in 1924, which began with the appearance of a plaintiff's lawsuit (Tournier), a customer of the defendant (National Provincial and Union Bank of England) in one of its branch offices in Moorgate Street Branch. It was started because the plaintiff's account at the bank has a negative balance of £ 9 (nine pounds). The defendant urged the plaintiff to pay, but with limited funds, the plaintiff found a middle ground, where he agreed to pay an installment of £ 1 (one poundsterling) per week to the defendant. After making three installments, the plaintiff suddenly stopped his installment payments. However, the bank's manager later learned that the plaintiff received payment from another party in the form of a check for £ 45 (forty-five pounds), but it was not put into his account.

After being investigated by the defendant, the check was billed by the plaintiff through London City and Midland Bank from an account of a bookmaker. Later the bank manager called the plaintiff's employer to ask for the plaintiff’s address.

In a conversation between the plaintiff's employer and the bank's manager, he told the plaintiff's employer regarding the situation. As a result, the contract between the plaintiff and his employer was not renewed and the plaintiff was dismissed from his job. Because of this, the plaintiff sued the defendant for defamation and slander. the defendant is deemed not fulfilling his obligations in maintaining confidentiality. In the final decision of this case, it is stated that it has become a customer's legal right for the bank to maintain the secrecy of their information. All the judges who examined the case argued that the obligation to maintaining a secret was not only in the moral sense, but also in the law based on the contractual relationship between the bank and the customer.[8]

It is being stated that this case is often used as a reference by countries that adopts the common law system to show clearly that the rights of customers are protected by law, one of which is *duty of secrecy*. Duty of secrecy is an obligation set out in the contractual relationship that occurs between the bank and its customers, but this obligation is not absolute but contain qualifications or exceptions for certain reasons. According to Tournier's case, the Judge in this case, Bankes L.J, has stated the exceptions to the bank secrecy obligation:[9]

1. If it is an express or implied consent
2. If it is for the bank's interest

[8] Pho Chu Chai dan Dennis Campbell, dalam Yunus Husein, Rahasia Bank Privasi Versus Kepentingan Umum, (Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2003), pg.137.
[9] Yunus Husein, Rahasia Bank Privasi Versus Kepentingan Umum, (Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, 2003), pg. 138

3. If the disclosure is being regulated by the law
4. If the disclosure is made by the bank in order to carry out its obligations to the public.

In a certain situation that is in accordance with one of the qualifications above, the bank has the right to conduct disclosure of a secret without resulting a violation of the duty of secrecy. According to The Bankers Books Evidence Act, it requires to disclosure and is included in the first qualification and if there are things that are endangering the country or if there is a public interest, those are the second qualification. When a bank files a claim for receivables, the disclosure regarding the customer's account in the context of the lawsuit referred to include in the third qualification. The example for the fourth qualification is in the case of a request from a third party which is then fulfilled by the bank with the customer's approval.

Therefore, based on customary banking practices, contractual agreements between banks and customers, as well as written regulations established by the state bank secrecy is the core soul of the banking system.[10] Until now, bank secrecy is still being applied by banks in running their businesses. A custom or a habit is an event that is the same or occurs simultaneously which is repeated continuously in a particular activity, which means that it needs to be understood that a habit is not a law, but a habit can become a law requires two advantages, namely a recurring pattern of action and

[10] Yunus Husein, Op.Cit, pg. 134

society accepting a pattern. Such actions are something that they must obey and accept as binding rules (opinion iurus necessitates).[11]

This continues to grow, so that in the end it raises 2 (two) theories related to bank secrecy, namely the absolute theory and the relative theory.[12] Based on the absolute theory, bank has an obligation to keep their customers' secrets or information that are known by the bank because of its business activities under any circumstances, either in ordinary or extraordinary circumstances. This theory greatly emphasizes the interests of individuals, meaning that the interests of the state and society are often overlooked. Adherents of this theory hold that all matters that are related to people, absolutely must be kept secret without any exceptions. This theory is very individualistic where it is very contradictory and does not appreciate the public interest. Hence, the relative theory was developed. According to this theory, in urgent situations, such as the state interest or to be use on a legal interest, Bank are allowed to disclose the secret or provide information about its customers. This theory is widely adopted by banks in many countries around the world, with the existence of exception of bank secrecy provisions, it is possible for an institution or agency with a certain interest to request for information or data about the financial condition of the relevant customer, as long as it is in accordance with the applicable laws and regulations.

[11] Mochtar Kusumaatmadja dan B. Arief Sidharta, Pengantar Ilmu Hukum Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum Buku I, (Bandung: Penerbit Erlangga, 2000), pg. 66.
[12] Hermansyah, Hukum Perbankan Nasional Indonesia Edisi Revisi, (Jakarta: Kencana Prenada Media Group, 2008), pg.121.

In Indonesia, provisions relating to bank secrecy have become a problem in law enforcement, especially in relation to criminal acts that uses bank as an institution to save funds from the proceeds of crime. Provisions related to bank secrecy often give an impression to the public, that the bank has an interest in running its business so that it deliberately hides an unhealthy financial situation from customers and / or debtors, both individuals or companies that are in the public spotlight. Or in other words that banks hide behind bank secrecy provisions to protect the interests of their customers, which are not necessarily true with the aim of continuing to run the banking business in order to gain profit. However, on the other hand, the bank will be considered as an institution of trust by the customer, because bank has the duties and obligation to protect and maintain secrets related to the customer and their savings, especially when they are clean and honest customers.

Those statements above, has caused banks in Indonesia to be on a very complicated and difficult place, where there is a possibility that if the bank continues to maintain bank secrecy too tightly even when they are embracing the theory of bank secrecy, it is absolutely possible that the banking industry will emerge as a repository for the results of criminal acts, such as the results of corruption, tax evasion, money laundering and other criminal acts. This has been proven in Indonesia, that the problem of money laundering is now a major concern in relations with banking institutions

Former Director of International Monetary Fund (IMF), Michael Camdessus, has stated that he estimated amount of money laundered globally in one year is 2 - 5%

of global GDP, or $800 billion - $2 trillion in current US dollars.[13] Though the margin between those figures is huge, even the lower estimate underlines the seriousness of the problem governments have pledged to address. In Indonesia itself, it is being stated by Fayota Prachmasetiawan, Senior Financial Transaction Researcher at Reporting Analysis and Financial Transactions Center (PPATK), that There were 159 money laundering (TPPU) decisions from 2016 to 2018, with all combined, the crime value reached over Rp 10.39 trillion.[14] This is quite a worrisome matter for the law enforcement in Indonesia and the situation is even worse because the results of money laundering that are being committed in Indonesia are transferred by criminal offenders to foreign bank accounts overseas with the aim of establishing or investing in various legitimate businesses.

However, if Indonesian banks do not enforce bank secrecy, it can be ensured that banking businesses in Indonesia will not be able to operate perfectly, because customers will not trust the bank due to them did not get protection related to the information including the savings that is in the bank. Therefore, the thing that must be understood is that bank secrecy is closely related to the protection of data from customers, both the protection of the data from external and internal parties of the bank itself, but the protection of the data must also be balanced with the needs of the public or the state for enforcing the law in Indonesia.

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[13] N.H.T. Siahaan, Money Laundering Pencucian Uang Dan Kejahatan Perbankan, (Jakarta: Pustaka Sinar Harapan, 2002), pg. 1

[14] https://finance.detik.com/moneter/d-4709805/dalam-2-tahun-ada-rp-10-t-duit-terindikasi-pencucian-uang,Accessed on November 17th 2019

In Indonesia, bank secrecy is regulated in Article 40 of the Republic of Indonesia Law Number 10 of 1998 concerning Amendment to the Republic of Indonesia Law Number 7 of 1992 concerning Banking which states: *Banks are required to keep information regarding depositors and deposits*, except in the case referred to in Article 41, Article 41 A, Article 42, Article 43, Article 44 and Article 44 A.

Based on that Article, it can be seen that banks in Indonesia are required to enforce bank secrecy, where bank secrecy is applied merely to information on depositors and their deposits, which means any information that are not related to depositors and their deposits is not considered as bank secret, such as information about debtor and loan. However, the bank's secrecy is not applied absolutely because there are a some exceptions, namely for tax interests, the interests of criminal justice, the interests of civil justice between the bank and its depository customers, the exchange of information between banks, receivables and state auctions or state debt management committees and parties appointed by the depository committee of the account receivable customer.

Besides that, the exceptions to bank secrecy are also regulated separately in the Law of the Republic of Indonesia Number 8 of 2012 concerning Prevention and Eradication of Money Laundering, Article 72 paragraph 1 namely:

> *For the purpose of examination in the case of a money laundering, investigators, public prosecutors, or judges are authorized to request Parties. Reporting party to provide written statement regarding Assets Wealth from:*
>
> *a) People who have been reported by PPATK to the investigator;*
> *b) Suspect; or*
> *c) Defendant*

That article is being further clarified in article 72 paragraph 2 namely:

> *In requesting information as referred to in paragraph 1, for investigators, public prosecutors or judges the regulation that governs bank secrecy and the secrecy of other financial transactions does not apply to them.*

Therefore, the application of bank secrecy in Indonesia is not only being regulated in one legislation but there are numbers of separate laws that also cover that issue. Besides that the application of bank secrecy in Indonesia is only limited to the information regarding customers or depositors and their deposits, where this often becomes an obstacle both for the bank itself and other third parties who need such information, related to the extent to which information must be kept confidential and which information is not required to be kept confidential. This is further complicated even more, where in current banking practices it is possible that the customer is also a debtor at the same bank, hence the restrictions related to bank secrecy become a big question for the bank itself.

As a Bank, especially as Commercial Bank with hundreds of branches across the nation wide that covers vast and along with it, problems will automatically arise, certainly like problems relating to bank secrecy will also increasingly occurring. The most common bank secrecy related problem is the problem in disclosing bank secrecy, it mostly happens when there is a link between information that are considered bank secrecy and cases both criminal and outside criminal acts. From the simplest example of the criminal case is fraud by using payment instruments such as cheques and / or transfer cheques (bilyet giro) to a serious crime, such as money laundering. In general,

these Commercial Banks are positioned as witnesses in these cases or as parties who are asked for information related to the deposits owned by the suspects or defendants in these criminal cases. Although in the Law itself there are also the existence of provisions that regulate about exceptions to bank secrecy, but what is less understood is that exceptions to disclose bank secrecy only can be fulfilled if the request to do it is only carried out in accordance with the procedures established by the Laws and regulation. This needs to be understood because after all bank secrecy is a thing that is commonly applied in any kinds of Banking service businesses, because basically bank secrecy is the Bank's form of protection for customer data that has been given to banks based on trust, while on the other hand law enforcement agencies view that this is obstacles in the process of enforcing law.

What inspired the author to write this thesis, is that difference in views between Commercial Banks and law enforcement agencies has been occurring since a long time ago and is also considered a source of problems that can disrupt the development of the Banking industry and law enforcement in Indonesia. The difference in views occurs due to both banking institutions and law enforcement are not aware and unclear about the provisions to disclose Bank Secrecy. But on the other side, Commercial Banks must maintain the trust of depositing customers thus that customers' data which are considered as bank secrecy cannot be easily obtained, and in order to do that, information will not be released by the Bank if the requesting parties are not supported by requests in accordance with the laws and regulations and in the request must explicitly include the requested things as regulated in the Laws. However, it should

also be a concern for Banks in order to simplify the process of understanding and awareness of this problem, Bank should base their internal policies about bank secrecy on laws and regulations that regulate about that matter or in other words, Banks should apply those laws and regulations about bank secrecy as an outline and/or benchmark for their internal policies

Therefore, the conflicting of different views is the background of the making of this thesis, where the author wants to know and examine the applicable procedures in a Commercial bank that are used to facilitate and also help avoid problems and misunderstandings related to bank secrecy nowadays. And based on the previous paragraphs, it can be concluded bank secrecy is a crucial matter, meaning that bank secrecy itself can badly affect the most important elements in the banking industry which is trust, it will instantly happen if the bank fails on protecting matters about bank secrecy or in other words, consumers' data. And to do that, the author conducted a field study at one of Indonesia's well-known Commercial bank which is PT. Bank Bukopin, tbk, and to simplify the process, the author chose to examine the applicable procedures regarding bank secrecy at one of PT. Bank Bukopin, tbk's branch, namely at the Sentraya Building branch, South Jakarta. PT. Bank Bukopin Tbk is a private-owned banking company that was founded on July 10, 1970, which started doing commercial business as a commercial bank in Indonesia from March 16, 1971. As a commercial Bank Bukopin has many advantages, it provides banking products and services such time deposits (i.e, loan, short term credit, etc.), loans to businesses, and provides remittance services, debit and credit cards, and many more.

Based on the brief description above, the author is interested on doing a field study and also doing a research regarding bank secrecy in Indonesia and its relation with protection consumer data, also the implementation of it all based on the principle of trust, due to being hand in hand with the issue of bank secrecy. And with that reasoning, the author will make a thesis with the title "LEGAL ANALYSIS OF BANKS SECRECY IN RELATION TO PROTECTION OF CONSUMERS DATA IN ACCORDANCE TO THE FIDUCIARY PRINCIPLE".

### 1.2 Formulation of Issue

In regard to the topic of this paper, the writer would discuss on the following formulation of issue:

1. What is the correlation between bank secrecy and protection of data that have been given by the customers to the bank in accordance with fiduciary principle?
2. How does Bank Bukopin Sentraya Building branch in implementing the regulation regarding bank secrecy and customer data protection?

### 1.3 Research Objective

Based on the description in the previous subsection, the purpose of writing this paper is to answer the formulation of the problem, namely:

1. To find out and analyze the legal relationship between how the bank secrecy with protection towards data that have been given by the customers to the bank in accordance with fiduciary principle
2. To analyze the implementation of regulation of bank secrecy and customer data protection in Bank Bukopin Sentraya Building branch

## 1.4 Benefits of the research

### 1.4.1 Theoretical Benefit

Theoretical benefit is aim to develop knowledge around banking law regarding bank secrecy and consumer data protection that are already existed and are currently in effect. The writer also does believe that this thesis can be used also as a reference for those who is interested in same field of study.

### 1.4.2 Practical Benefit

The practical benefit is related to the benefits of a legal research to the problem solving in the field of law or the implementation of certain efforts. In regard to this benefit, the writer believes that this paper will provide a better understanding of how banking law works in Indonesia

## 1.5 Research Structure

To ease the reader of this paper, the author will describe the chapters briefly in order to provide a clearer picture of the discussion:

**CHAPTER 1 : INTRODUCTION**

In this chapter, the writer will discuss an introduction that includes the background of the issue, the formulation of issues, research objectives, benefits of the research, and lastly the systematics of writing.

**CHAPTER 2 : LITERATURE REVIEW**

In this chapter, the writer will discuss theories and descriptions of the theoretical foundation used by the author in writing this research that is related to the formulation of issues contained in the first chapter, and the conceptual basis underlying this research to help answer the problems of this research. In writing the theoretical basis, the author used a method of deductive logic to link the frames of the raised issue and the theory. It is a method of thought starting with something that is common which is drawn to a conclusion of something specific. In writing the conceptual basis, definitions of the terminology used in this study were obtained from the understanding contained in the books, experts' opinion and the prevailing laws regarding the choice of law clause.

**CHAPTER 3 : RESEARCH METHODS**

In this chapter, the writer will discuss the research approaches, the research methods, types of research, procedures for obtaining materials research, legal materials and research techniques used in this study, using a method of normative research which seeks the truth through legal formulations comprising of expert opinions, theories and statutory requirements.

**CHAPTER 4 : DISCUSSION AND ANALYSIS**

In this chapter, the writer will discuss research issues and provide answers to the formulation of issues in depth as a result of the writer's research by using the theories described in Chapter 2, research methods described in Chapter 3 as well as laws and regulations.

**CHAPTER 5 : CONCLUSION AND RECOMMENDATION**

In this chapter, the writer will present the conclusion of this research and recommendation or suggestion based on the writer's opinion that will be used in the future, and from the issues that have been formulated and analysis.