

## **BANK SECRECY: AN OVERVIEW ON THE RULE OF SHARIA BANKING LAW IN INDONESIA**

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### **ABSTRAK**

Tulisan ini akan membahas bagaimana kerahasiaan bank syariah di Indonesia sesuai dengan hukum yang berlaku dan bagaimana hal itu diterapkan di lapangan. Penelitian ini merupakan penelitian deskriptif yang memberikan gambaran hukum kerahasiaan bank syariah. Hasil penelitian menunjukkan bahwa kerahasiaan bank syariah: a. Informasi mengenai investor; b. Kewajiban bank dan pihak terafiliasi untuk menegakkan kerahasiaan investor; c. Pelanggan kerahasiaan bank informasi dapat dibuka untuk tujuan tertentu. Pengecualian syariah kerahasiaan bank untuk tujuan berikut: a. investigasi kriminal pajak; b. Keadilan dalam kasus pidana; c. Pemeriksaan dalam kasus perdata; d. Pertukaran informasi antara bank; e. Menuntut investor klien; dan f. Pewaris sah untuk memperoleh gambaran simpanan nasabah.

Kata kunci : Kerahasiaan Bank, Aturan Hukum, dan perbankan Syariah *Indonesia*.

### **ABSTRACT**

*This paper would discuss how was the Islamic bank secrecy actually in Indonesia in accordance with the applicable law and how it was applied in the field. This research was a descriptive study that provided an overview of bank secrecy law in Islamic bank. The results showed that Coverage of sharia bank secrecy: a. Information regarding the depositors and investors; b. Liabilities of banks and affiliated parties to uphold the confidentiality of depositors and investors; c. Customer information bank secrecy can be opened for certain purposes. Exceptions sharia bank secrecy for the following purposes: a. Tax criminal investigations; b. Justice in criminal cases; c. Examination in civil cases; d. Exchange of information between banks; e. Demand depositor or investor clients; and f. The rightful heir to obtain a description of customer deposits.*

*Keyword: Bank Secrecy, the Rule of Law, and the Indonesian Sharia banking.*

### **Introduction**

Historically, the application of bank secrecy is as old as the development of the banks. It has been since 4000 years ago in Babylonia as stated in the *Code of Hamourabi*. Bank secrecy rules in its development were also recognized as

part of human rights serving to protect right of privacy and financial privacy. Even bank secrecy in various countries has been included in the constitution or laws whose purpose is to create public confidence to save their money in the bank (Heru Suprptom;2005;26).

In medieval times such provision of banking secrecy had been set in legislation, even in the kingdom of Germany at that time, there had been stipulated in the Civil Law. With the development of trade and the collapse of feudalism in the increasingly fierce battle to fight the individual rights, trust in the wisdom of banking institutions to conceal particulars of matters financial and private customers become a necessity that can't be negotiable for protection of privately property rights and for the trade practices. Towards the middle of the 19th century, virtually, all governments in Western Europe has adopted the principle of bank secrecy, and since then a similar law has been enforced in any country that requires an orderly banking system (Muhammad Djumhana;1996;112).

Not much different from those in other countries, in Indonesia, the task of the bank in achieving national development goals is to realize a just and prosperous society based on Pancasila and the Constitution of 1945. In addition, the bank has a very important role that is set in the rule of banking in Indonesia. Because, as one of the nation's development tool, banking institutions have a strategic role as the intermediary that has the function to collect funds from the public as customers in the form of savings and channels back the funds as loans to people in need. Banks are expected to harmonize and balance the elements of equitable development and its results, economic growth and national stability which in turn led to improve living standards of many people.

Banks in Indonesia are part of the financial system and the payment system of a country. In the era of globalization, the bank also has been part of the financial system and the world of payment systems. Given such that, then once a bank obtained permission to stand up and operation of the monetary authorities of the concerned country, the bank was owned by the community. Therefore, its existence is not only maintained by the bank owners and its officials, but also by national and global communities.

Bank is a financial institution whose existence depends absolutely on the confidence of its customers who entrust their savings to the bank. Therefore, the bank concerned to the level of public confidence which has and will have saved their money is well maintained to high levels. Bank is part of the financial and payment system that is the concerned public in the health of these systems, while public trust in the bank is the most fundamental element of the existence of a bank, then the maintenance of public confidence in the banks is also public interests (Andrian Sutedi ;2007;1).

However, to prove the existence of a bank can also be seen by looking how the bank secrecy is, but generally, the secrecy systems of banks in Indonesia are almost all of them exactly in practice both conventional and Sharia banking. The confidentiality of any of these banks is a must in the rules of each bank. The main reason why customers want to do transactions at the bank is with great trust to a bank in order to maintain the confidentiality of

its customers and is also the value reason that is brought in it, for example: a value of Sharia banking.

The bank's confidentiality provisions gave the impression to the public that the bank could be deliberately conceal financial resources of clients unhealthily from the public eye who wants to find out. So, the impression that the banking system is that the bank hid behind bank secrecy to protect the interests of its clients is not necessarily true. Different perceptions of community on the Sharia banking will be different from the conventional precisely because the values brought by the Sharia banking are the values contained in Islam that is far from good value in principle. So, Indonesia where Islam are most dominant thought that, with sound, financial resources of these clients should be deposited in a bank that has a healthy bank secrecy system as well.

Apart from that belief, if the bank really protects the interests of customers who are honest and clean, it is a necessity and propriety. Therefore, the provision of banking secrecy is something that is very important for our customers and their savings and interests to the bank (Hermansyah ;2005;110).

Nevertheless, bank secrecy provisions in Indonesia are stipulated in the Banking Act. With the existence of the Act, it aims to avoid financial abuse of customers that prohibit banks to provide recorded information to anyone associated with the financial condition of customers, deposits and storage as stipulated in Law Number 7 of 1992 on Amendment of Law Number 10 of 1998 on Banking (UUP), except in

certain matters expressly mentioned in the law. Related to these rules, a violation of the bank secrecy is also a criminal offense and those who do not adhere to the confidentiality provisions of these banks can be subject to criminal sanctions.

For Sharia banking, bank secrecy provisions are specifically stipulated in the provisions of Article 41 through Article 49 of Law Number 21 of 2008 on Sharia Banking (UUPS). However, Article 42 to Article 48 UUPS regulate the exceptions to the stipulation that bank secrecy is not much different from what is stipulated in UUP. However, basically, the setting terms of bank secrecy in banking activities do not much differ from bank secrecy provisions in the conventional banking operations as set out in the Banking Act.

In further explanation looking at the background of the problem, the authors will be highlighting critical of bank confidentiality provisions set forth in the rule of law and in particular the rules of Sharia banking law and also describe the exception set forth therein regarding bank secrecy.

## **Discussion**

### **Bank Secrecy in Indonesia Understanding the Bank Secrecy**

According to Sutan Remy Sjahdeini, Bank is a financial institution whose existence depends absolutely on confidence of the customers who entrust any other services through the banks in particular and society in general. Therefore, the bank is very concerned that the levels of public confidence well-maintained high levels. Bank is part of the financial system and

the payment system where the wider community concerned over the health of these systems, while public confidence in the bank is the most fundamental element of the existence of a bank and the maintenance of public confidence in the banks is also public interests.

Related to term of bank secrecy, he gives the sense that the bank secrecy is to maintain and enhance public confidence in the bank not to disclose the financial condition and other customer transactions as well as the circumstances of the customer concerned to the other party. In this case the principle of banking secrecy is essential in maintaining public confidence.

In other terms, Muhammad Djumhana stated that bank secrecy is everything related to the financial and other matters of bank customers in the ordinary course of banking world where it should not be publicly disclosed to the public. The ordinary course shall be kept confidential by the bank is all the data and information on all things related to finance and other things from people and entities known to the bank for its business activities (Muhammad Djumhana).

In addition, According to Munir Fuady, he also had different interpretations of bank secrecy. He said that that bank secrecy is the relationship between the bank and its customers was not that was as usual contractual relationship. But in this relationship there is also an obligation for banks not to divulge its clients to any other party unless otherwise provided by applicable law. It was named after the bank secrecy. Thus, the

bank secrecy term refers to a secret in relations between the bank and its customers (Munir Fuady;1999;80).

In UUP, bank secrecy means everything related to customer information and their savings (Article 1 Paragraph (28), Law Number 10 of 1998 on Amendment of Law Number 7 of 1992 on Banking). While UUPS, bank secrecy means everything related to information about customers and their savings as well as customers and investors and their investments (Article 1 Paragraph (14), Law Number 21 of 2008 on Sharia Banking).

Basically, there are differences of understanding of bank secrecy in regulations of law from Act Number 14 of 1967 to Law that is still valid today. Below is an excerpt of some understanding of bank secrecy, namely (Muhammad Djumhana;2012;158):

- a. According to Law Number 14 of 1967 on the Principles of Banking, as in Article 36 stated that: "*Yang dimaksudkan dengan rahasia bank adalah segala sesuatu yang berhubungan dengan keuangan dan lain-lain dari nasabah menurut kelaziman dunia perbankan perlu dirahasiakan.*"
- b. Furthermore, according to Article 1 Point 16 of Law Number 7 of 1992 on Banking, stated that: "*Rahasia bank adalah segala sesuatu yang berhubungan dengan keuangan dan lain-lain dari nasabah bank yang menurut kelaziman dunia perbankan wajib dirahasiakan.*"

From the above, Muhammad Djumhana (159) interprets that it still felt very broad because there is the phrase "*hal-hal lain dari nasabah bank menurut kelaziman*

- dunia perbankan wajib dirahasiakan*". Further, the ordinary meaning of the other things is all data and information on all things related to finance and other things from people and entities known to the bank for its business activities.
- c. According to Law Number 10 of 1998 on Amendment of Law Number 7 of 1992 on Banking, Article 1 Point (28), stated that: "*Rahasia bank adalah segala sesuatu yang berhubungan dengan keterangan mengenai nasabah penyimpan dan simpanannya.*"
- d. Article 1 Point (14) Act Number 21 of 2008 on Sharia Banking, stated that: "*Rahasia bank adalah segala sesuatu yang berhubungan dengan keterangan mengenai nasabah penyimpan dan simpanannya serta nasabah investor dan investasinya.*"

### Theory of the Bank Secrecy

Talking about the theories of bank secrecy, there are provisions on bank secrecy creating an impression for the people (customers). Bank deliberately conceal the financial situation that is not healthy from the debtor, whether individuals or companies that are into the public eye (Hermansyah).

The trust in the bank is very doubtful. However, there are also provisions that bank secrecy is very important for depositors or deposits and also for the interests of the banks. Thus the bank secrecy is also required.

Theories of bank secrecy means that a bank must keep a variety of client information with absolute provisions. Furthermore, proposed two theories about bank secrecy, among others are: (Hermansyah)

- a. **Absolute Theory:** The purpose of this theory that the bank has an obligation to keep secret or particulars of bank customers who are known for their business activities under any circumstances, in ordinary circumstances or in exceptional circumstances. This theory offers the benefit of individuals and communities often overlooked.
- b. **Relative Theory:** According to this theory, banks are allowed to unlock the secrets of the customer or provide information about their clients to the urgent need, for example: the state's interests or the interests of the law.

It means that there is the exclusion of confidential customer to allow banks disclosing information relating to an agency or agencies also allowed to request information or data about customers' financial information concerned in accordance with the provisions of applicable law.

In contrast, the bank secrecy provisions under English law is civil liability or contractual obligations, then the disclosure made by the bank based on the approval of the customer as the parties to the agreement is not an act of default. However, in terms of the obligations of bank secrecy, it is not a civil liability but criminal liability, then there is an element of the offense, the elements of the crime of bank secrecy (Adrian Sutedi;14). No written request or written consent from the customer as part of the bank's financial transactions is an element of the criminal offense in question. In other words, if there was a request or written consent from customers to banks

disclose their financial circumstances, it couldn't be considered a criminal offense has occurred disclosure of bank secrecy (Adrian Sutedi;15).

It is still confusing that is whether the public interest may be exempted from bank secrecy provisions. The setting of this problem is also not included in the Banking Act. Experts say that whether or not the public interest can't be determined solely by the bank but must be determined by the court, case by case. The problem is how to get the court's opinion and what to extent the court's opinion (*fatwa*) have the force of law to be obeyed by the other judges. To avoid differences in this view, there is no other way except to be regulated by law to include details in the types, the criteria of public interest and other matters that are part included in the public interest (Adrian Sutedi).

### **Coverage of Bank Secrecy in Sharia banking Operations in Indonesia**

As a business entity that is believed by many people for collecting and distributing funds, naturally bank guarantees protection to customers related to the financial circumstances of customers typically named with the bank secrecy (Rachmadi Usman;2003;153). Scope secret in Sharia banking business activities stipulated in Article 41 of Law Number 21 of 2008 on Sharia Banking which determines as follows:

*"Bank dan pihak terafiliasi wajib merahasiakan keterangan mengenai nasabah penyimpan dan simpanannya serta nasabah investor dan investasinya."*

In line with the provisions of Article 41 UUPS, a previous provision in Article 1 (14) UUPS formulates understanding of bank secrecy in Sharia banking business activities, namely:

*"Rahasia bank adalah segala sesuatu yang berhubungan dengan keterangan mengenai nasabah penyimpan dan simpanannya serta nasabah dan investor dan investasinya."*

Thus, based on the understanding of bank secrecy as contained in the provisions of Article 1 Point 14 UUPS, then linked to the provisions of Article 41 UUPS, it is clear that the definition and scope of bank secrecy in Sharia banking business activities are restricted, among them:

1. Regarding everything related to information about customers and their savings and investment and investor clients;
2. Basically the bank and affiliated parties are obliged to uphold the confidentiality of information about customers and their savings and investment and investor customers, if it was not prohibited by law;
3. Due to specific interests, information about everything related to the description of the depositors along with savings and investor clients along with investment can be opened.

Definition and scope of bank secrecy in the business activities of Sharia banking as noted above in line with the definition and scope of confidential business activities conventional banking as stipulated in UUP, that bank secrecy provisions initially include customer creditors and

debtors, have been limited only involves customers depositors and their savings.

Previously, pursuant to Act Number 7 of 1992, the scope of secret bank includes funds in customer deposits (loan customer) and credits received by customers (customers debtor), but today based on Act No. 10 of 1998, the scope of the secret bank is limited only to the identity of the depositor in addition to the state of deposits depositors concerned. This means that what is protected bank secrecy is not only about savings but also includes the customer's identity stockpiles.

Sharia banks as intermediary institutions in carrying out their business activities always rely on the element of public trust especially to trust of depositors putting deposits from customers and investors putting money in Sharia Bank. As an institution of trust, the Sharia Bank and affiliated parties are obliged to keep secret everything related to information about customers and their savings and investments and investor customers at Sharia Bank. Thus, the bank secrecy is required as one of the factors to maintain customer trust and their savings and investment and investor customers.

Bank secrecy provisions was originally stipulated in Act Number 7 of 1992 in lieu of Act Number 14 of 1967 as amended by Act Number 10 of 1998 but earlier this bank secrecy provisions were stipulated in the Act number 23 of 1960 on Bank Secrecy. Compared to the formulation of a different understanding of bank secrecy between Act Number 7 of 1992 and Act Number 10 of 1998, Originally, the

understanding of bank secrecy was given formula as stated in Article 1 Point 16 of Act No. 7 of 1992, namely:

*"Rahasia bank adalah segala sesuatu yang berhubungan dengan keuangan dan hal-hal lain dari nasabah bank yang menurut kelaziman dunia perbankan wajib dirahasiakan."*

Then, in the provisions of Article 40 Paragraph (1) of Act Number 7 of 1992 states that:

*"Bank dilarang memberikan keterangan yang tercatat pada bank tentang keadaan keuangan dan hal-hal lain dari nasabahnya, yang wajib dirahasiakan oleh bank menurut kelaziman dalam dunia perbankan, kecuali dalam hal sebagaimana dimaksud dalam Pasal 41, 42, 43 dan 44"*.

Meanwhile, the explanation on Article 40 Paragraph (1) of Act Number 7 of 1992 outlines the following:

*Kelaziman wajib dirahasiakan oleh bank adalah seluruh data dan informasi mengenai segala sesuatu yang berhubungan dengan keuangan dan hal-hal lain dari orang atau badan yang diketahui oleh bank karena kegiatan usahanya.*

Based on Article 1 point 16 and Article 40 paragraph (1) of Law No. 7 of 1992 associated with an explanation as stated above and associated with the elucidation of Article 40 paragraph (1) in the words *"kerahasiaan itu diperlukan untuk kepentingan bank sendiri yang memerlukan kepercayaan masyarakat yang menyimpan uangnya di bank"*, it could be concluded that the

scope of the bank secrecy covering customer deposits.

When looking at the next words of explanation of Article 40 paragraph (1), that "*masyarakat hanya akan mempercayakan uangnya kepada bank atau memanfaatkan jasa bank apabila dari bank ada jaminan bahwa pengetahuan bank tentang simpanan dan keadaan keuangan nasabah tidak akan disalahgunakan*", it could be concluded that the scope of bank secrecy is not only about the financial condition of customers saving money on bank, but also other customers using or taking advantage of banking services in addition to storage services funds.

It means that, based on Law No. 7 of 1992, both the debtor and creditor bank customers as well as other bank customers also using or utilizing the services of the bank are protected by bank secrecy provisions. Similarly, secret is not limited only the related data and information on all things related to finance at the bank concerned but including other things and persons or entities known by the bank for business activities which must also be kept confidentially (Djoni S. Gozali and Rachmadi Usman ;2008;328).

Society was not satisfied on the formulation of bank secrecy as defined in Article 40 paragraph (1) of Act Number 7 of 1992 which the formula was too far because of including bank loans provided to customers. Society believes that the scope of bank secrecy should only include customer deposits funds (bank liabilities) and the statement regarding their storage. The scope of bank secrecy which includes

credits earned by the customer (bank assets) was perceived by the public as the deprivation of the right of people to know the bad loans in the banking most affecting the health of the banking (Sutan Remy Sjahdeini;34).

The formulation and scope of bank secrecy has been amended by Act Number 10 of 1998 formulated in Article 1 point 28 of Act Number 7 of 1992 as amended by Act Number 10 of 1998, namely:

*"Rahasia bank adalah segala sesuatu yang berhubungan dengan keterangan mengenai nasabah penyimpan dan simpanannya"*.

Similarly, the provisions of Article 40 paragraph (1) of Act No. 7 of 1992 amended with new formula as contained in Article 40 paragraph (1) of Law No. 10 of 1998, as follows:

*"Bank wajib merahasiakan keterangan mengenai nasabah penyimpan dan simpanannya, except in the case referred to in Article 41, 41A, 42, 43, 44, and 44A"*.

Meanwhile, the explanation on Article 40 paragraph (1) of Law No. 7 of 1992 as amended by Act No. 10 of 1998 states that:

*"Apabila nasabah bank adalah nasabah penyimpan yang sekaligus juga sebagai nasabah debitur, bank wajib tetap merahasiakan keterangan tentang nasabah dalam kedudukannya sebagai nasabah penyimpan. Keterangan mengenai nasabah selain sebagai nasabah penyimpan, bukan merupakan keterangan yang wajib dirahasiakan bank."*

From the foregoing, it could be known that the scope of secret restricted or narrowed, namely:

1. Regarding the information about customers and their savings. It means that it did not include information about the debtors and their loans;
2. Basically, the bank and affiliated parties are obliged to uphold the confidentiality of such information, unless it is not prohibited by law;
3. Certain situations in which the information on depositors with savings participant are allowed, possible or justified only to be revealed by the parties affected by the ban if the information was classified in the exempted information or customer information and their savings not included in the qualification of bank secrecy (Djoni S. Gozali and Rachmadi Usman;330).

Thus, Act Number 7 of 1992 as amended by Act Number 10 of 1998 has been limited or narrowed the scope of bank secrecy only associated with loan customer and their savings and the rest related to debtors and credit is not included which shall be kept confidentially by the bank. Actually, the change of bank secrecy provisions is very dilemma in practice. If the names of the debtors might be announced by the bank only to note the general public because of the announced actions not prohibited by Act Number 10 of 1998, it would be used by comrades of trading to drop his efforts so these large companies will seek hard to seek loans from banks abroad to avoid the publication of the name of the company concerned. If this happens it could be

detrimental to national banks (Adrian Sutedi;8).

### **Exceptions of Bank Secrecy in Sharia banking**

Act Number 21 of 2008 on Sharia banking in a limited manner specifies exceptions to the stipulation of bank secrecy in sharia banking activities. Exceptions of bank secrecy provisions in sharia banking operations shall be prescribed in the provisions of Article 42 through Article 48 of Act Number 21 of 2008, which is set as follows:

#### Article 42

(1) *Untuk kepentingan penyidikan pidana perpajakan, pimpinan Bank Indonesia atas permintaan Menteri Keuangan berwenang mengeluarkan perintah tertulis kepada bank agar memberikan keterangan dan memperlihatkan bukti tertulis serta surat mengenai keadaan keuangan Nasabah Penyimpan atau Nasabah Investor tertentu kepada pejabat pajak.*

(2) *Written orders referred to in paragraph (1) harus menyebutkan mana pejabat pajak, nama nasabah wajib pajak, dan kasus yang dikehendaki keterangannya.*

#### Article 43

(1) *Untuk kepentingan peradilan dalam perkara pidana, pimpinan Bank Indonesia dapat memberikan izin kepada polisi, jaksa, hakim, atau penyidik lain yang diberi wewenang berdasarkan undang-undang untuk memperoleh keterangan dari bank mengenai simpanan atau investasi tersangka atau terdakwa pada Bank.*

(2) *Permit referred to in paragraph (1) diberikan secara tertulis atas*

*permintaan tertulis dari kepala Kepolisian Negara Republik Indonesia, Jaksa Agung, Ketua Mahkamah Agung, atau pimpinan instansi yang diberi wewenang untuk melakukan penyidikan*

- (3) Requests referred to in paragraph (2) harus menyebutkan nama dan jabatan penyidik, jaksa, atau hakim, nama tersangka atau terdakwa, alasan diperlukannya keterangan, dan hubungan perkara pidana yang bersangkutan dengan keterangan yang diperlukan.

#### Article 44

*Bank wajib memberikan keterangan as referred to in Article 42 and Article 43.*

#### Article 45

*Dalam perkara perdata antara bank dan nasabahnya, direksi bank yang bersangkutan dapat menginformasikan kepada pengadilan tentang keadaan keuangan nasabah yang bersangkutan dan memberikan keterangan lain yang relevan dengan perkara tersebut.*

#### Article 46

(1) *Dalam rangka tukar-menukar informasi antar bank, direksi Bank dapat memberi tahukan keadaan keuangan Nasabahnya kepada bank lain.*

- (2) The provisions concerning the exchange of information referred to in paragraph (1) shall be stipulated in Regulation of Bank Indonesia Regulation (PBI)

#### Article 47

*Atas permintaan, persetujuan, atau kuasa dari nasabah penyimpan atau nasabah investor yang dibuat secara tertulis, bank wajib memberikan keterangan mengenai simpanan*

*nasabah penyimpan dan nasabah investor pada bank yang bersangkutan kepada pihak yang ditunjuk oleh nasabah penyimpan atau nasabah investor tersebut.*

#### Article 48

*Dalam hal nasabah penyimpan atau nasabah investor telah meninggal dunia, ahli waris yang sah dari nasabah penyimpan atau nasabah investor yang bersangkutan berhak memperoleh keterangan mengenai simpanan nasabah penyimpan atau nasabah investor tersebut.*

Of the same article, it can be concluded that Act Number 21 of 2008 provides exceptions that it can open the information of bank secrecy for six (6) terms. It means beyond 6 (six) excluded things are not included as exempt from the obligation of bank secrecy in activities Sharia banking business. The entry exceptions on bank secrecy in Sharia banking business activities included:

1. For the purposes of a tax criminal investigation given exception to the tax authorities based on a written order of demand-led Bank Indonesia or finance minister (Article 42);
2. For the purposes of justice in criminal cases given exception to the police, prosecutors, judges or other related parties who are authorized by law based on the written permission of chairman of Bank Indonesia at the request of the police chief, the attorney general and the chief justice of the republic Indonesia or the head of the institution given the authority to conduct investigations (Article 43);

3. For the purposes of a civil case between the bank and its customers given an exception to the directors of the concerned bank concerned without obtaining permission of the leadership of Banks Indonesia (Article 45);
4. For the purpose of information exchange between banks granted an exception to the directors of the bank without obtaining permission of the leadership of Bank Indonesia (Article 46);
5. Upon approval, the request or authorization of the Customer or customer storage Investors may be given in writing to the exceptions being leveled by the Depositor or the Customer Investor (Article 47);
6. The presence of the legal heirs to obtain information regarding customer deposits (Article 48).

Thus, bank secrecy provisions in Sharia banking in certain cases can be opened or violated. Act Number 21 of 2008 has granted an exemption or disclosure of bank secrecy details in the business activities of Sharia banking. In Principle, it is obliged to uphold and safeguard the confidentiality of the financial circumstances of customers and their savings and investor customers and investment, but in certain circumstances as mentioned in Articles 42, 43, 45, 46, 47 and 48 of Act Number 21 of 2008, the Sharia banks are possible to provide data and information on all things related to finance and other things from the customer and their savings and investor customers with investment to the specific permission of Chairman of Bank Indonesia, the Board of Directors

of the bank, or the bank concerned in the following matters:

### **The Interests in Tax Criminal Investigation**

The exception setting of bank secrecy for interest of tax criminal investigations in the business activities of Sharia banking can be found in the provisions of Article 42 UUPS which is a disclosure under compulsion of law. UUPS provisions of Article 42 establishes that for the purpose of tax criminal investigation, bank secrecy can be ruled out in order to determine the financial situation of a person being the depositor or investor customers in a particular of Sharia bank, with the following conditions:

- a. The finance minister requests the leadership of Bank Indonesia under the authority issuing a written order to the Sharia Bank concerned.
- b. Contents:
  - (1.) Providing information on tax officials;
  - (2.) Showing evidence documentary to the tax authorities; and
  - (3.) Letter regarding the financial situation of depositors or particular investor customers to the tax authorities.
- c. Requirements:
  - (1.) A written order;
  - (2.) The name the officials, customers taxpayer;
  - (3.) The case of the desired statement.

Exceptions to the provisions of Article 42 of the Sharia banking Act (UUPS) based on the importance of tax issues relating to the interests of the country.

### **The Interest in the Criminal Justice**

Exceptions to the interests of justice in criminal cases were exceptions to legal compulsion subjected to the provisions of Article 43 on UUPS. Based on the terms of Article 43 on UUPS, there are the interests of justice in a criminal case of a written request from the Chief of Police, the Attorney General, the Chief Justice of the Republic of Indonesia and the leadership of institutions authorized to conduct investigations where bank secrecy can be excluded. Police, prosecutors, judges or other investigator can ask permission to head of Bank Indonesia to obtain information from banks on deposits or investments suspect or defendant existing in an sharia bank. Permission is obtained through the procedure stipulated in Article 43 paragraph (2) and (3) of the Sharia banking Act, as follows:

- a. Written request from:
  - (1.) The head of the police in the investigation stage and investigation;
  - (2.) The Attorney General in the prosecution stage;
  - (3.) The Chief Justice under examination in the face of court;
  - (4.) The leadership of the agency authorized to conduct investigations: heads of departments or non-departmental government institution ministerial level in the stage of inquiry and investigation.
- b. Licensor: Head of Bank Indonesia
- c. Contents:

- (1.) Obtaining information from banks on deposits of the suspect or the accused;
  - (2.) Obtaining information from bank about investment concerning the suspect or the accused.
- d. Requirements:
- (1.) A writing order (either in the permission form);
  - (2.) Mentioning the name and position of the investigator, prosecutor or judge;
  - (3.) Name of the suspect or the accused;
  - (4.) The reason of need for information; and
  - (5.) The concerned relationship criminal case with the necessary information.

In contrast to the UUP, UUPS expands arrangements regarding the investigators who are not only limited to the prosecutor or the police but other investigators from the agency authorized to conduct investigations under the legislation. This means that other investigators outside of prosecutors and police investigators may also ask information on Sharia banks on savings or investment of person who lodged justice in a criminal case.

Similarly, which the disclosure of bank secrecy sharia is stipulated in Article 43 of the Sharia banking Act is based on common interests. The principle of bank secrecy aimed to protect the interests of individuals on a customer. It is sacrificed for the sake of balancing the public interest which in this case involves the completion of the criminal case. The principle of balance prioritizes the protection of the public

interest over individual interests (M. Yahya Harahap;1997;224).

### **The Interest in Investigation of Civil Law between Bank and Clients**

The third exception on bank secrecy in the business activities of Sharia banking is valid in terms of the interests of civil cases between banks and customers as specified in Article 45 of Sharia banking Act. The provisions of Article 45 of Sharia banking Act can be known that the exclusion of bank secrecy in Sharia banking limited to civil cases occurring between Islamic banks and customers.

The provisions in Article 45 of the Sharia Banking Act (UUPS) allow Islamic banks concerned to inform the court about the financial situation of the customer and provide other relevant information with the case filed to the court, with the following requirements:

- a. Information concerning the purpose of a civil case between the bank and its customers;
- b. Directors of the concerned bank may inform the court about the financial situation of the customer and other relevant information to the civil case between the bank and its customers;
- c. No need to ask permission from the Chairman of Bank Indonesia, it means that all the information is needed. Directors of the concerned bank may inform the court about the financial situation of the customer and provide other information relevant to the case.

Such an exception is also found in the provisions of Article 43 of the Banking Act (UUP) that limits the

dispute or civil cases that is occurred between the bank and its customers. This Article allows conventional banks to inform the court about the financial situation of the customer and provide other relevant information to the case filed with the court, with the following requirements:

- a. When it concerns civil cases occurred between the bank with the clients;
- b. Directors of the concerned bank may inform the court about the financial situation of clients in civil cases with and other information related to the case on the bank;
- c. Providing information without the permission of the chairman of Bank Indonesia. It means that the banks can promptly inform the financial situation of its customers without waiting for permission from the leadership of Bank Indonesia.

Establishment adopted Article 43 is very narrow because it is limited to civil cases occurred between the bank and its customers. With restrictions that case, banks are only allowed to update their financial situation in terms of bank customers suing on grounds of default. The narrowness of the application of Article 43 is considered highly detrimental to the public interest, especially for the benefit of the business world. The article contains discriminatory because it only protects the interests of the banking company and does not protect the interests of other types of companies in a broad sense. The Act does not care about the misery experienced by the wider community. Though many companies have purposely not been paying liabilities

(debt) to its business partners in the distribution sector, agents or contractors although such establishments Integration smoothly assets (current assets) in various banks (M. Yahya Harahap).

### **The Interest in Interbank-Informative Exchanging**

The next exception on bank secrecy in Sharia banking business activities is applicable in the interests of information exchange between banks as provided for in Article 46 UUPS. UUPS sets out in Article 46 that in the framework of the exchange of information between banks bank directors may notify the financial situation of its customers to other banks. With reference to the provisions of Article 46 on UUPS, the directors of Islamic banks can notify the customer to the financial circumstances of other Islamic banks conducted within the framework of mutual exchange of information between banks.

Before exemption on bank secrecy in order to exchange information among banks it is also subject to the provisions of Article 44 on UUP stipulating that, in the framework of the exchange of information between banks, bank directors can provide information about the financial condition of customers to other banks. Exchange of information among banks is made to facilitate and secure the business activities of the bank, among others in order to avoid double crediting and to know the circumstances and the status of another bank so the bank can assess the level of risk faced before engaging

transactions with customers or other banks.

The provisions in Article 44 on UUP are highly discriminatory that it is merely interbank by not giving opportunities to people having been in the business world. Whereas, the business world in a broad sense needs actually data information of financial condition of a company being partner with them. Indeed appropriate, a company or society wants exactly to know the financial situation of the prospective partners (M. Yahya Harahap).

### **Request, approval or Written Authorization of Customer Investor**

The next exception on bank secrecy in Sharia banking business activities is applicable in their case request, approval, or written authorization of the depositor or investor customers as specified in Article 47 on UUPS. Article 47 on UUPS stipulated that the Sharia bank is obliged to give information on the deposits of depositors or investors in the concerned bank customer to the party designated by the depositor or investor customers. Information about the customer deposits of depositors or investors would be granted by the concerned bank with the previous requirements: the request, approval, or authorization of the depositor or investor clients; and made in writing addressed to the Sharia banks where depositors placed funds or investor customers invested.

Previous exception to bank secrecy is also determined in the provisions of Article 44A which is a new provision added in Act No. 10 of 1998. The provisions of Article 44A paragraph (1)

UUP sets that banks are required to provide information regarding the depositor on bank deposits concerned to the party designated by the depositor. Details on these deposits will be provided by the concerned bank with the condition if earlier: there is a request, approval, authorization of depositors; and being made in writing addressed to the bank by depositors.

The basic exemption of bank secrecy specified in Article 44A paragraph (1) UUP is related to the interests of depositors and there is not the public interest, the interests of settling disputes or the interests of the banks. Bank secrecy, here, should be opened as long as it is approved by the depositor funds or their proxies. Banks are required to open or provide information relating to deposits of depositors as long as there is demand approved or authorized by the depositors to the concerned bank to the party designated by depositors.

### **Legal Heirs to Obtain Information from the Customer Deposits**

Last exceptions on bank secrecy in Sharia banking business activities is applicable in legal heirs to obtain information on customer deposits as defined in Article 48 on UUPS. Article 48 on UUPS determined that the legal heirs of depositors or customers or investors is right to obtain information about the customer deposits of depositors or investors in the case of when depositors or customers or investors have died. If noted, an exception to bank secrecy is based on the interests of the heirs in the settlement of the division of property

inheritance which heirs become customers of Sharia banking.

For conventional banking, exception of bank secrecy regulated in Article 44A (2) UUP stipulates that, in the case of depositors has died, the legal heirs of the depositor is entitled to obtain information about the storage of customer deposits. By itself, the bank is obliged to give information on the deposits of depositors to the legal heirs if the concerned person had died, in order to settle the division of property inheritance.

When compared to the regulatory exception to bank secrecy in UUP, there, UUPS, are no exceptions settings on bank secrecy in the activities of Sharia banking applying in regard to the interests of the settlement accounts of banks that have been submitted to Bureau of State Receivables and Auction (BUPLN) or State Receivable Affairs Committee (PUPN)

Exceptions to conventional banks for receivable interest that has been submitted to BUPLN/PUPN have been regulated in Article 41A which is in addition to bank secrecy provisions through Act Number 10 of 1998 on Act Number 7 of 1992. The provisions of Article 41A on UUP set that to complete bank accounts submitted to BUPLN / PUPN and Head of Bank Indonesia give permission to the official BUPLN / PUPN to obtain information from banks on deposits of customer debtors.

Permission to obtain information from banks on customer deposits debtors referred to in the settlement of accounts receivable submitted to BUPLN / PUPN will be given by the Head of Bank Indonesia with the following requirements:

- a. Made by the written request of the Head of BUPLN / Chairman PUPN by name and job title BUPLN officials / PUPN requesting for information, the name of the concerned debtor of necessary information and the reasons of necessary information from the debtors.
- b. Permission is granted in writing by stating the name and position of officials BUPLN / PUPN requesting for information, mentioning the name of the debtor questioned with regard to receivables of banks to be submitted to BUPLN / PUPN and outlining the purposes of the description associated with the affairs of the settlement of bank receivables with concerned debtors.

If observed, exceptions to the secret for the sake of receivables submitted to BUPLN / PUPN relate to the interests of the banks to ensure sustainability in the attempt.

### **Conclusion**

1. Coverage of bank secrecy in Sharia banking business activities are restricted, among them:
  - a. Concerning all things related to information about customers and their savings, and investment and investor clients;
  - b. Basically, banks and affiliated parties are obliged to uphold the confidentiality of information about customers and their savings, and investment and investor customers, if it was not prohibited by law;
  - c. Because of certain interests, information about everything

- related to the description of the depositors along with savings and investor clients along with investment can be opened.
2. Exceptions of Bank Secrecy in Sharia banking for the interest:
  - a. For the purposes of a criminal investigation of tax
  - b. For the sake of justice in criminal cases;
  - c. For the purposes of examination in civil cases;
  - d. For the purposes of information exchange among banks;
  - e. There is a request or consent or written authorization from the customer or investor clients; and
  - f. There is authorized heir to obtain information on customer deposits.

### **Suggestion**

In order to increase transactions in Sharia banks in particular, there are several factors to consider, not only in terms of security of bank secrecy but also in factors most influencing the level of public trust in the bank, including: management integrity, knowledge and ability of the board in the form of knowledge managerial ability and knowledge and technical capabilities of banking, healthcare of concerned bank and also the factors of bank compliance to the obligations of the bank secrecy specialized in Sharia banking institution.

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