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Misuse of Customer Saving Funds as a Banking Crime

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Abstract
The research analyzes the misuse of saving funds as well as the securing model of customer saving fund that must be done by the government. The type of research is normative juridical while the approaches are statute, conceptual and approach. The results of research indicate that abuse of customer saving fund is a banking crime. Preventive law enforcement by the internal bank has not been done optimally, resulting in the misuse of saving funds by bank employees. The securing model of customer savings funds that have been done by the government as enacted by Act No. 24 of 2004 on the Deposit Insurance Agency, which has 2 (two) functions are to guarantee customer saving and settle or handling failed banks, as well as the synergy of institutional supervision between Bank Indonesia and the Financial Services Authority (OJK). Therefore, there needs to be an increase in the regulation and supervision of government banks and private banks by Bank Indonesia and the Financial Services Authority as well as strict action against any violation of the law on customer saving funds by a bank, if necessary administrative sanctions by revoking the business license from the bank concerned.
Keywords: Banking Crime, Business Law, Customer Fund

1. Introduction

Legal protection in banking transactions as a matter that should be put forward to the interests of the parties can be protected. Basically, the form of legal protection is a law enforcement effort. Conceptually, the law enforcement is an activity of harmonizing the relationships of values outlined in steady rules and manifesting and acting as an elaboration of the final values to create, protect, and maintain peace in life. More concrete elaboration is manifested in the form of legal norms that guide the behavior or attitudes of actions that are considered appropriate.[1]

Law enforcement efforts are inseparable from the legal ideals as it embraced by the community concerned into the instruments of various positive legal rules, legal institutions, and processes (bureaucratic behavior of government and citizens)[2]. In upholding the law, there are 3 (three) elements that must be considered, namely legal certainty (*rechtssicherheit*), usefulness (*zweckmassigkeit*), and justice (*gerechttigkeit*). Legal certainty is a will of every person, how the law should apply or be applied in concrete events. It means that anyone can demand that a law can be enforced and satisfied, and that any violation of the law will be dealt with and subject to legal sanctions. Furthermore, law enforcement must provide usefulness to the community, and finally justice is demanded by the community. Legal protection in banking transactions should pay attention to these three elements.

Legal protection for customers in transactions with banks, especially depositors before the enacting of Act No. 24 of 2004 regarding the Deposit Insurance Institution has not run optimally. Protection for customers is not expressly stipulated in the Banking Act and Bank Indonesia Act, then the supervision and development of banks is very important to be done by Bank Indonesia on an ongoing basis.[3] Here it appears that the banking business has a specificity compared to the business in general. Thus, bank can directly in contact with the public interest. For that reason, it is appropriate that all bank activities be closely monitored by the agency appointed for it so that the public still believes that the bank is a safe and reliable financial institution.

The guarantee of customers' saving is intended to maintain public image and trust in the bank institution. The banking crisis has incurred public disbelief in the financial institutions, especially with the frequent occurrence of bank burglary cases such as the case of Bank Global. Nevertheless, the government continues to rebuild public trust by issuing a guarantee policy on customer savings. On the one hand, Act No. 24 of 2004 on Deposit Insurance Agency is expected to provide legal protection for customers in case of bank freezing and/or closing operations due to violations by management. However, on the other hand, the enactment of this law may also trigger business crime in the banking sector because it does not rule out the crime is repeated by bankers and other bank owners because they feel the government will complete the payment of bank customer savings.

The banking industry is one of the most important components in the national economy in order to maintain a balance of progress and national economic unity. The stability of the banking industry is necessary to maintain public confidence in bank institutions, so that the monetary and banking crisis in 1998 will not happen again. Trust in banking institutions is a key and this trust can be gained by legal certainty in the regulation and

[1] Pelupessy, E. (2010). *Hukum Dagang*. Bandung: Logoz Publishing, p. 34
[2] Irwansyah, Hakim, W., & Yunus, A. (2017). "Environmental Audit as Instrument for Environmental Protection and Management", *The Business and Management Review 9* (2), 228-232
[3] Djanim, R. (2006). *Korporasi dan Pertanggungjawaban Pidana*. Semarang: BP Undip, p. 30.

supervision of banks and the guarantee of bank customer savings to improve the viability of the banks business in a healthy way.

The enactment of Law on the Deposit Insurance Agency is expected to provide legal certainty for depositors to obtain adequate legal protection and realize a sound and stable banking system. This law is intended to improve the bank customer saving guarantee program which has been regulated through various political policies.

2. Method of the Research

The type of research is a normative juridical; to examine legal concepts related to misuse of customer saving funds in banking practices in Jayapura City, which can be identified as banking crime. The approach used in this research is statute, conceptual, and case. The analytical method used is qualitative

3. Misuse of Customer Saving Funds as a Banking Crime

As a party that requiring trust in its business operation, it should be if the bank and the related parties carry out their duties and obligations with full responsibility. The principle of responsibility and prudential is essentially important in order to safeguard trust that is already entrusted by the public and to prevent fraud or even an offense or misappropriation of funds. There are many provisions governing the principles of responsibility and prudential that must be adhered to by the board, officers, affiliated parties and shareholders of the bank. In this section, however, only the provisions relating to banking crime will be mentioned.

Theoretically, to describe what is meant by this banking crime, there are many terms used. These terms include banking evil, evil in banking sector, evil against bank, banking crime, crime in banking sector, crime against banking, and various other terms. Against these terms, the authors group them into two parts. The first group is a group of crime in banking sector with the same meaning as the definition and term of evil in banking sector, crime against banking or evil against banking. The second group is banking crime whose understanding covers the definition and term of banking evil. Therefore, in this article to be compared only relates to "banking crime" and "crime in banking sector."

Banking crime is a form and an economic crime, which is a criminal act that has an economic motive and is usually done by people who have intellectual ability and have an important position in the community or work.[1] While, crime in banking sector is a form and criminal acts in the economic field, namely conventional criminal acts that seek profit with economic motives such as: theft, embezzlement, robbery, fraud, etc and in this case shown to the bank.[2]

In this section, the authors would suggest that the term "banking crime" or in some literature referred to as "banking evil" is essentially derived from the word "corporate crime" – consider that a bank is a Corporation or in civil law known as a legal entity. Related to the above two terms, the author emphasizes that in defining what constitutes banking crime, it must be distinguished between "banking crime" and "crime in banking sector." The differences here become important in relation to the unlawful acts committed by the perpetrators of the criminal offenses concerned.

To explain this, the author attempts to formulate a definition of banking crime in a definition following: Banking crime is a lawless act committed either intentionally or unintentionally (negligent) committed by the corporation and/or its members in operating every the form of their business (bank business) resulting in material and immaterial losses both to the public and to the state, conscious and unconscious, occurring within a certain territory of a country or transnational with a real time or in the presence of time period. While, the meaning of crime in banking sector is any act against the law that makes the bank as a means or media (*crimes through the bank*) or bank as a target and a crime (*crimes against the bank*).

According to Conklin,[3] corporate crime (in this case is a bank) as well as business crime have an economic dimension. Business crime is an illegal act, punishable by a criminal sanction which is committed by an individual or o corporation in the course of a legitimate occupation or pursuit in the industrial or commercial sector for the purpose of obtaining money or property avoiding the payment of money or the loss of property, or obtaining business or personal advantage.

Based on the above explanation, it can be concluded that banking crime can be categorized as white-collar crime, economic crime as well as business crime. In addition, according to the authors' opinion, banking crime can also be categorized as an organized transnational crime and using highly sophisticated equipment. It is said that because the evil or crime involves a systematic system and its elements are very conducive.

The first element is the existence of a very solid criminal group either ethnic ties, because of political

[1] Hermansyah. (2009). *Hukum Perbankan Nasional Indone*sia, Edisi Revisi, Jakarta: Kencana, p. 160.
[2] Oxenham, L. (1992). *The Modern Martgage Banking Guide,* Illinois, USA, Bank Administration Institute
[3] Edward, W.R and Giu, E.K. (1995). *Commercial Bank Prentice Hall Inc* (Translated by: St. Dianjung), Bumi Aksara, Jakarta, page. 27.

interests as well as other, with a solid code of ethics. The second element, which always exists in this crime, is the existence of a protective group consisting of law enforcers and professionals. The third element is a community group that enjoys the outcome of a crime or a systematically committed crime. In addition, this crime often contains elements of deceit, misrepresentation, concealment of facts, manipulation, and breach of trust, subterfuge, or illegal circumvention so that it is very harmful to the public at large.[1] Therefore, it is not excessive to conclude that banking crime can be viewed or categorized as transnational crime.

In the national context, the first form of banking crime relating to attitudes and/or actions committed by bank employees, bank managers, affiliated parties and bank shareholders is explicitly regulated in Article 50 of Act No. 10 of 1998 on the Amendment to Act No. 7 of 1992 on Banking states that: "*Affiliated parties who intentionally do not implement the necessary measures to ensure compliance with the provisions of this law and other laws and regulations applicable to banks...*"

Under the construction of these provisions, to elaborate further on each element contained in banking crime can be illustrated in Figure 1.

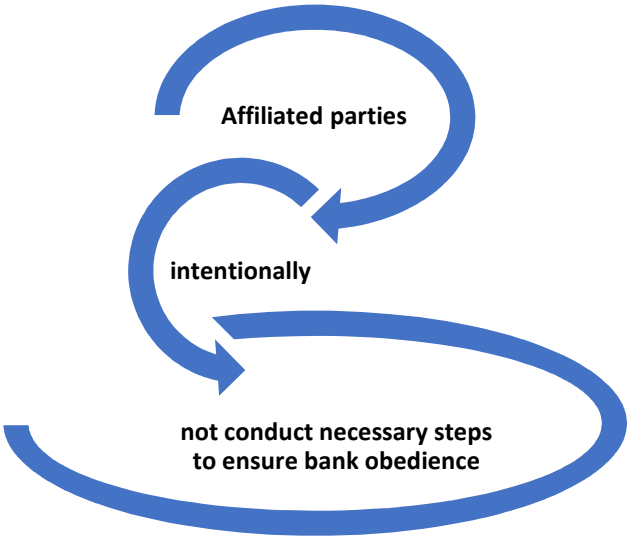

Figure 1. The elements of banking crime

Based on Figure 1 above, it can be seen that those who are sanctioned with criminal under this provision are limited to parties affiliated with the bank. In addition, his actions must be covered with the element of deliberation as described in the previous section. The question now, who is the parties affiliated with the bank? In Article 1 No. 22 of the Constitution of the Republic of Indonesia No. 7 of 1992 on Banking as amended by Act No. 10 of 1998 stated firmly that the meaning of affiliated party includes:

a. Members of the Board of Commissioners, Supervisors, Board of Directors, or their proxies, officers or bank employees;
b. Board member, supervisor, manager or their proxy, officer, or bank employees, especially for bank in the form of cooperative law in accordance with prevailing laws and regulations;
c. The party providing its services to the bank, such as public accountant, appraiser, legal consultant, and other consultants;
d. Parties which according to assessment of Bank Indonesia participate in influencing the management of banks, including shareholders and their families, families of Commissioners, families of supervisors, family of directors, family of board.

Parties that can be sanctioned under this provision become very broad. In short, the parties that run the bank business directly or indirectly such as the board of commissioners, supervisors, board of directors, officials or bank employees, members of the board, members of the supervisor, members of the manager and his powers and the parties who provide services to the bank, but not limited to public accountants, appraisers, legal counsel and other consultants or parties which, according to assessment of Bank Indonesia, they influence bank management such as but not limited to families of boards of commissioners, family of supervisors, family of directors, and intentionally do not implement the necessary measures to ensure that bank compliance with the provisions of the banking law and other laws and regulations applicable to the bank may be held criminally liable. It should also be noted that such conditions, in principle, have deviated from the principle of a criminal law stating that criminal responsibility can only be sought against those who have committed a criminal offense.[2]

[1] Atmasasmita, R. (2003). *Pengantar Hukum Kejahatan Bisnis*. Jakarta: Prenada Media, p. xiii.
[2] Pelupessy, E., Sumardi, J., Marlang, A., & Miru, A. (2015). "Government's Role to Protect the Small Business of Local

Conceptually, the core and meaning of law enforcement lies in the activities of harmonizing relationships of values that are outlined in steady rules and emerge from the attitude of action as a series of final value stages of elaboration, to create, protect and maintain peace of life, Effort to implement and enforce the law and take legal action against any violation or legal irregularities committed by legal subjects, either through judicial procedures or through arbitration procedures and other disputes or conflicts resolution mechanisms.

In a narrow sense, the main actors whose role is very prominent in the law enforcement process are the police, prosecutors, advocates and judges. These law enforcement agencies can be seen first, as people or elements of human beings with their qualities, qualifications, and work culture. In such a sense the issue of law enforcement depends on the actor, offender, officer or law enforcement officer. Second, law enforcement can also be seen as an institution, agency, or organization with its own bureaucratic quality. In this relation, it can be seen that law enforcement and institutional glasses are, in fact, not institutionalized and rationalized institutionalized. But both perspectives need to be comprehensively comprehended by seeing also the interrelationship of each other as well as its relation with various factors and elements related to the law itself as a rational system.

In a modern state structure, the task of law enforcement is run by the executive component and implemented by the bureaucracy and the executive, so often called the law enforcement bureaucracy. Since the country has interfered with many areas of activity and service within the community, law interventions are also intensified, as in the areas of health, housing, production, and education. This type of state is known as the *welfare state*. Executives with their bureaucracy are part of the chain to realize the plans listed in the legal (regulatory) that deal with those fields.

The process of material criminal law enforcement on criminal acts especially banking crime is conducted in accordance with the Criminal Procedure Code. To be able to achieve the objectives of law especially the criminal law and the criminal procedure law will give birth to the function of the law itself. Based on the view of the doctrine of criminal law, the function of criminal procedural law is to seek and find the truth, give and execute judge decisions, is determined by law enforcement tool within the framework of the criminal justice system, from police as the frontline law enforcer, prosecutor as prosecuting attorney and judges as case breaker.

In practice, preventive law enforcement by the internal banks has not been maximized, resulting in misuse of customer funds by bank employees as seen in some banking cases both civil and criminal aspects that have been decided by the District Court Class IA Jayapura and have has a permanent legal power that is very contrary to the application of legal protection theory.

4. Securing Concept of Ideal Customer Saving Funds

Literally, to create health banking, an approach consisting of 3 (three) main pillars namely supervision, internal governance and market discipline. This approach should be done because supervision will not be able to keep pace with the speed of liberalization, globalization and technological advances in financial instruments. Thus, supervision must be complemented by internal and external discipline of the banking system. By involving internal governance, the supervisory approach incorporates the view that banking itself is the best place to organize and maintain sound management practices. The inclusion of market discipline reflects the fact that without a competitive and punitive market for failure to compete in the market it is not sufficiently intensive for bank owners, managers and customers to make sound financial decisions.

The establishment of Deposit Insurance Agency is done as an effort to provide protection against two risks, namely irrational run of bank and systemic risk. In operating a business, the bank usually leaves only a small portion of the saving as receives in case of any withdrawal of funds by the customer. Meanwhile, the largest portions of existing deposits are allocated for lending. This situation causes the banks to not meet the large demand immediately upon the customer savings as they manage, in the event of a sudden withdrawal and in large amount.[1] The limitation in the provision of cash is because the bank cannot withdraw immediately the loan. If the bank cannot meet the demand for withdrawal of saving by its customers, customers usually become panicked and will close their accounts at the bank, even if the bank is actually healthy. While, systemic risk is occur when the bankruptcy of bank is bad for other banks so that destroying the largest segment of the banking system.

The Deposit Insurance Agency (LPS) can function to manage the security and health of banks in general. In addition, LPS can also function as a supervisor conducted by monitoring the balance sheet, lending practices and investment strategies with a view to see the signs of financial distress that lead to the bankruptcy of the bank. Therefore, the existence of LPS as part of the banking system becomes important in order to prevent the panic of customers by convincing customers about the safety of savings even if the financial condition of the bank

Communities Legally in Papua". *Journal of Law, Policy & Globalization*, 38: 14.

[1] Setiyono, H. (2003). *Kejahatan Korporasi Analisis Viktimologi dan Pertanggungjawaban Korporasi Dalam Hukum Pidana*, 2nd Edition, Malang: Bayumedia Publishing, pp. 52-53.

worsened.

Another dimension of the importance of LPS in the banking system is based on the consideration that a country economic growth, the role of a stable financial sector is essential and the core stability of the financial sector is the stability of the domestic banking system. The important role of the banking sector can be seen in the aspect of the payment system that allows for trade transactions. In addition, banks make fund raising more efficiently and are then distributed to the public. Conversely, the public funds stored in the bank greatly determine the existence and profit of a bank.

To prevent the lack of public trust in the bank that can lead to a rush that certainly can endanger the bank individually and the banking system as a whole. In the era of globalization with the advancement of information technology and computer has resulted in global market in the financial sector. In a global market, free funds move from one country to another. If the owner of the fund lacks trust in the national banking system, then he can invest funds in a foreign country (*capital flight*) which can result in the loss or diminution of productive forces of a country.

As recommendation of this research, it needed a synergy of institutional oversight between Bank Indonesia and the Financial Services Authority (OJK). Article 37 Paragraph (2) of the Act on the Financial Services Authority and Bank Indonesia may coordinate and cooperate in joint monitoring of activities in the banking sector. It should be noted that the supervisory authority of Bank Indonesia on banking is part of Bank Indonesia function as defined in Article 5 of Bank Indonesia Acts.

In cooperation of Articles 40 and 41 is stipulated that Bank Indonesia may conduct a direct inspection of the bank by submitting a written form to the Financial Services Authority prior to the inspection, but in such inspection the Bank Indonesia cannot provide an assessment of the soundness of the bank. The report of bank inspection as conducted by Bank Indonesia is submitted to the Financial Services Authority, then the Financial Services Authority informs to the Deposit Insurance Agency (LPS) concerning the troubled bank that is in restructuring efforts by the Financial Services Authority. If the bank is experiencing liquidity difficulties and/or its health condition deteriorates, the Financial Services Authority shall immediately inform Bank Indonesia to carry out the steps in accordance with the authority of Bank Indonesia.

Bank Indonesia, however, to perform its functions, duties and authorities require special inspection of a particular bank, Bank Indonesia may conduct a direct inspection of the bank by giving prior written notification to the Financial Services Authority. In conducting such audit activities, Bank Indonesia cannot provide an assessment of the soundness of the bank. The report on the result of inspection on the soundness of the bank shall be submitted to the Financial Services Authority no later than 1 (one) month since the issuance of the report of the inspection result.

In the event that the Financial Services Authority indicates that a particular bank is experiencing liquidity and/or health problems worsening, the Financial Services Authority shall immediately inform to Bank Indonesia to take steps in accordance with the authority of Bank Indonesia. The Financial Services Authority, Bank Indonesia and the Deposit Insurance Agency shall establish and maintain an integrated means of information exchange. In addition, institutional linkages between Bank Indonesia and the Financial Authority are also reflected through the Financial System Stability Coordination Forum with members consisting of: 1) the Minister of Finance as a member and also the coordinator; 2) Governor of Bank Indonesia as member; 3) Chairman of the Board of Commissioners of the Financial Services Authority as member; and 4) Chairman of Board of Commissioner of Deposit Insurance Agency as member. Thus, between the Financial Services Authority and Bank Indonesia have a close relationship in the arrangement or supervision of the bank, including the Sharia Bank and Sharia Business Unit.

5. Conclusion

Misuse of customer saving funds as committed by the Management of Banks, Bank Employees and Affiliated Parties is a banking crime, as regulated in Article 48 paragraph (2) of Act No. 10 of 1998. Preventive law enforcement by internal bank has not been conducted maximally so it indicates that the misuse of customer saving funds committed by bank employees as seen in some banking cases from both civil and criminal aspects that have been decided by the District Court Class IA of Jayapura and have a permanent legal force which is very contrary to the application of legal protection theory. Securing model of customer saving funds that has been done by the government is by the enactment of Act No. 24 of 2004 on Deposit Insurance Agency, which has two functions namely to guarantee bank customer saving and settle or handling failed banks, as well as synergy of institutional supervision between Bank Indonesia and the Financial Services Authority.

In order to minimize any misuse of customer saving funds, there needs to be legal compliance and moral of the board, officers, and affiliated parties, prioritizing the principles of trust and justice-indexed. In addition, there is a need for strict and proportional screening of any prospective employee or bank clerk by the relevant Bank Authority before being designated as a definitive employee. The role of law enforcement must be able to ensure a balance between sense of justice, usefulness and legal certainty in the enforcement of law to find satisfaction

for those who crave justice. Law enforcement should be guided by justice that is beneficial or gives fair benefit and legal certainty.

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