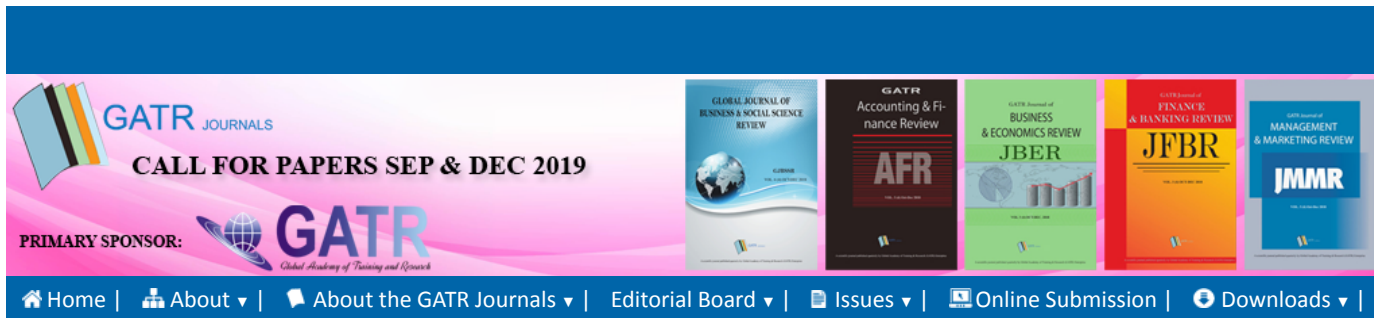


# Global Journal of Business and Social Science Review

# GJBSSR

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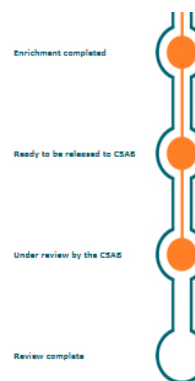
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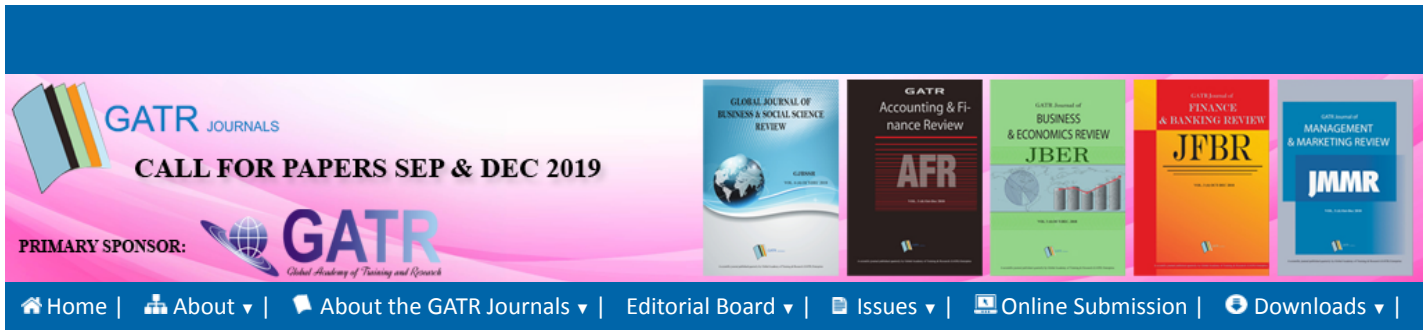
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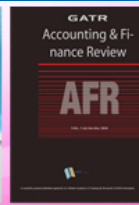
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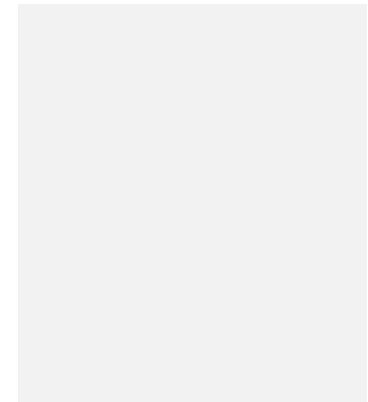
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**Keywords:** Cooperatives; Life Impulse; Environmental Influence; Women Entrepreneur.

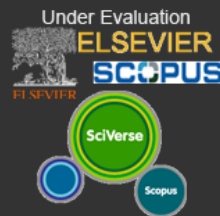
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## Philosophical Study of Interference in Setting the Legal Protection of Bank Customers in Indonesia\*

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### ABSTRACT

**Objective** – The objectives of this research are, first, to analyze state interventionism in the protection of bank customers in Indonesia, and, second, to determine and analyzed the form of state interventionism in the regulation of banks with regard to the protection of customers.

**Methodology/Technique** – This research is partly normative in nature; it assesses the intervention of bank in the protection of customers who usually are the weaker party in the bank-customer relationship. The research further reveals that state interventionism is required to ensure the protection of customers against the excesses of market mechanisms. Both forms of state interventionism are necessary in order to protect and enhance the rule of law.

**Findings** – In particular, this paper discusses the validity of standard clauses set forth in the Consumer Protection Act.

**Novelty** – The paper concludes that the principle of freedom of contract can only be realized and meaningfully implemented if customers and banks are treated as equal partners in the customer-bank relationship.

**Type of Paper:** Conceptual

**Keywords:** legal protection; law; banking; philosophical; customer-bank

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### 1. Introduction

Banking is an institution that plays a role in moving the economy in Indonesia. Banking institution is an institution that mediates the parties and the excess funds and underfunded. Parties involved in the transaction banking are the bank and the customer. Banking and banks have different notions although both are two things that cannot be separated from one another. Article 1 of Act No. 10 of 1998 says that: "Banking is everything that concerns about banks, including institutional, business activities, as well as the manner and process of carrying out its business activities". It means that the bank is not only concerned with the bank itself as well as

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the manner and process of conducting the business of banking institutions (MuhamadDjumhana, 1996). While understanding the bank has an idea that can be traced from the history of terminology bank. The word "bank" is derived from the language of Italy "*banca*" is a bench seat, because in medieval Italy the bankers who provide loans undertake these efforts by sitting on the benches market yard. Understanding the customer as set out in Article 1 paragraph 16 of Act No.10 of 1998 on the Amendment of Act No. 7 of 1992 on Banking, which reads the Customer is using the services of the bank. There is banking relation between customer and bank. The customer is called customer creditors, and customers who borrow from the bank is called debtor. It can be shown some of the facts in the banking practices that occur in the development of banking in Indonesia, which carries consequences both for the customers either directly or indirectly rising. Facts in the following banking practice rising from the dynamic development of the banking law and legal aspects of the contract between the customers and banking institutions as follows:

- (1) The fact the banking practices that arise from the dynamic development of the banking law. The first example, Banking deregulation policies that have a negative impact for the banks with the establishment of many banks with the health of banks is not good. On the other hand that at that time there has been no mechanism for deposit insurance banks in the banking institutions. This means that if customer's trust funds in the bank and the bank cannot pay its obligations, then the customer's deposits will disappear. The second example, the Bank Century case that appeared in November and December 2008. The case arose because the issue of Bank Century suffered defeat disbursement clearing. Weak supervision by Bank Indonesia to trigger the case. Bank Century case raises a sense of distrust of the banking institutions. At the time of the Bank Century case occurred a exists Act No. 24 of 2004 regarding Deposit Insurance Corporation, but the law didn't protect their customers' funds are also certain restrictions on the amount of collateral.
- (2) The fact the banking practices that emerge from the legal aspects of the contract showing the relationship between customers and banking institutions is not balance. Bank and customer use the standard contract occurs in savings agreements, loan agreements, as well as the use of other bank services agreement. Standard contract means that the bank decides the content and form of the contract between them. Banking juridical facts indicate that the presence of the standard contract was allowed by the provisions of Article 1320 Code Civil. On the other hand, the more standard contract includes obligations to be performed by the customer compared to the clients' rights or obligations to be performed by banking institutions. This situation proves that banking institutions as the party have a dominant position in the legal relationship is still constructing the customer as the weaker party or have a bargaining position lower than the bank institutions. On the other hand, the customer will determine the factual basis of his belief in the banking institution. It is important for a banking institution to give customers protection. It fits with the view of John Locke who said that: the Natural state is a state in which all people have the "natural rights" of "life, liberty, and property". These basic rights should be maintained in a state order that later organized. It is precisely the task of the state is to protect these rights and ensure that the rights it can also be applied to the state. In this task, the law gained legitimacy. Positive law is a concrete elaboration of the basic rights that naturally possessed by each person. This may imply that humans intrinsically have the basic rights It can be defended against any person. The rights attached when interacting with others in social life. Such rights should not be arbitrarily removed. These rights can be reduced or increased by the mechanism of the social contract. The state's task is to organise the right - the natural right. The state's task is to protect these rights and ensures the implementation of the rights proficiency level. The state gives legitimacy to the law to guarantee the implementation of the right customers. Customers have the right to get its rights warranty when their funds were entrusted to the banking institutions. These rights are inherent rights. It cannot be reduced or eliminated arbitrarily. It is important for the

State to interfere by making concrete laws. That laws should guarantee the protection and guarantees the fulfillment of the right customers.

Based on the principle of balance of interests. Formulation of the problem a. Why is state interference something important in the protection of bank customers in Indonesia? b. What kind of state intervention in the regulation of bank customer's better protection of the legal aspects of banking and legal aspects of the contract?

## **2. Philosophical Customers Study on the Importance of State Intervention in the Protection of Bank in Indonesia**

People use some alternative investment to manage their funds. Each alternative investments has different risks and consequences. For example, if one chooses institutions as a means of investment bank then there are some advantages and disadvantages obtained by the investor, the advantage that banking institutions are institutions that risk is relatively smaller compared to other investment institutions. Capital market institutions are one where investments are much in demand by investors who have excess funds. The capital market is the place where investors trade securities there. For example, one effect is stock. Ownership of shares as moving objects give property rights to the holder, which rights can be maintained on each person. If the investor will buy shares then the benefits may be obtained by investors depends on the reciprocation of the company that sells its shares in the capital market. Therefore, the maximum and thorough knowledge of securities traded on the stock market is essential for investors when will benefit in the capital market. The risk is at stake in the capital market is very high if not followed by knowledge of the stock and some risks in the capital market. Conversely, if investors know the ways of playing that is true then the profits earned by investors is large. There are some alternative investments that push each bank to provide the best facilities for the society. One factor that is appealing to the public to put their funds into the banking institutions compared with other investment institutions is optimal legal protection for bank customers. The existence of a good legal protection for customers is expected to be positively correlated with increasing public confidence in the banking institution. There are several provisions related to the effort to provide better protection against targeted customers directly to customers as well as those aimed at banking institutions. Good and perfect activity is an activity that does not harm any party because the rights and obligations have been awarded proportionally. As said by Theo Huijbers positive law guarantees the certainty of life, but only be complete if prepared in accordance with the principles of justice. Law is expected to be signed in banking activities and provide solutions in the event of a conflict or dispute in banking activities. Customer protection becomes something very important to set in banking regulation because the customer is the very essence to sustain the operation of the banking institution. In fact, the customer is the party that has unbalanced position compared with bank institutions. It can be seen from the legal relationship between the bank and its customers manifested in a written agreement that is set by one of the parties. Agreements are usually prepared in advance by banking institutions. These agreements are known as the standard agreement (Mariam DarusBadruzaman, 1981). The standard agreement raises many issues related to the clause which unreasonably very burdensome for so that the agreement is considered oppressive and unjust (Sutan Remy Sjahdeini, 1993). On the other hand, many forms of standard agreements exist is needed in today's economy (DjuhaendahHasan, 2004). Likewise, for the banking institutions are also standard agreement used by banking institutions in conducting legal relations with banking institutions. Banks use the standard agreement for clients who do not have substantial funds, but the customers in Indonesia is very large so as to have an important role in supporting the existence of bank institutions. The importance of the existence of such customers should be clearly understood by the banking institution with an effort to provide legal protection for customers as outlined in the agreement between the customer and the bank. The standard agreement doesn't give an advantage for customers. The fact that, the legal protection given by either Bank Indonesia as regulators or government agencies still do not provide legal protection that customers expect. Legal protection for customers most needed by the customer, because adequate legal protection for customers will be the basis for customers

to claim their rights to the funds entrusted to the bank's customers. Adequate legal protection will give confidence to customers that their funds would be safe.

### *2.1 Position customer unbalanced factual and juridical.*

Banking institutions as financial institutions among other financial institutions that may be authorized withdrawal activities and disbursement of public funds back to the society as well as the provision of certain services activities. Activities of the bank as an institution to withdraw funds and distribute them to the public is a consequence of the bank function as intermediary institutions (Shelagn Heffernan, 1996) that distinguish banking institution with financial institutions( Th Anita Christiani, 2010).In connection with the activities of banking institutions that most of the people use it both in the activities of withdrawals and loans or other services, the potential for conflict between the customer and the banking institutions is very large. Potential conflicts occur between the bank and its customers rise due to the position of the customers are not balanced. The unbalanced position of customers can be seen from the manufacture of the agreement between the bank and the customer when the customer uses the services of the agency agreement used is a standard agreement or standard contract is an agreement that the form and content determined by the bank. The agreement has been set by the bank in advance, prospective customers will only have to choose the approval. The principle is to take it or leave it (Richard A Posner, 1996). Most of the agreement between the bank and the customer is made in the form of a standard agreement. For example are the opening of savings agreement and credit agreement. The rights of the customers are not clearly specified in the agreement. The standard agreement consists banking and customers rights. From the agreement between the customer and the bank, it can be interpreted that the agreement is still not able to give legal protection to guarantee the interests of customers. The agreement between the customer and the bank institutions as described above is subject to the provisions of Article 1320 of the Civil Code, but in practice many raises questions relating to, unilateral agreement, the factors of necessity, limitation or protection of public officials, inequalities in risk, administrative inequality (GunartoSuhardi, 2010). These issues will be explained as follows: The relationship starts with the signatories account opening that is provided by the bank. The standard form contains various basic requirements which prospective customers accept it or not (although for prime customers could happen negotiation requirements). Customers mostly just make a signature and become a client, or have to find another bank. The agreement in question when associated with Article 1320 of the Civil Code. Even if it is in question, the result of the absence of an agreement pursuant to Article 1320 of Code Civil result is irrevocable, meaning that as long as the parties do not request the cancelation of the agreement is considered valid and applicable to the parties on the other. The juridical reality is like this position the bank customers in practice in an increasingly weak position due to that legally the agreement in practice determined unilaterally by the bank is valid according to the provisions of Article 1320 of the Civil Code. From the description above it can be assessed that the client's position unbalanced when compared with customers who are rooted in the written agreement made between the customer and the bank. From the aspect of private law based on the agreement that created the position of the customers is very weak. The intervention of the state of public law aspects is necessary in order to provide protection of bank customers in the framework of maintaining public confidence in the banking institution which is the essence of a contractual relationship between the bank and its customers. Customer relationships and banks in the banking relationship is a relationship that is going on and subject to market mechanisms. The relationship between banks and customers has emerged for both the supply and demand of the bank and the customer. It was mentioned above that the bank is an institution that has an important role in driving the economy of the country (among financial institutions both in the form of a bank or not the banking institution is an institution of the most popular and used by the public). As it is said by neo-classical theory which holds that the economy goes according to the market mechanism, this argument is government intervention would interfere with the passage of the market mechanism, the market becomes efficient. This confirms the view that understanding the role of the state as much as possible reduced or completely eliminated. This understanding is the basis for the existence of free trade that existed at this time. The view which is based on the theory of Adam Smith said that according



to the natural freedom authorities have only 3 liabilities, namely first to protect society from violence and invasion of other countries, the second, as much as possible to protect the individual from injustice, or oppression, by other community, or the right to enforce the judicial system, the third uphold and maintain the works and certain public institutions that will never be an individual or a small group of individuals. In connection with the relationship between the customer and the banking institutions when the client's position in factual and juridical was not balanced then the state will have an impact that is not good for the banking institutions themselves. The Wider impact of the instability of the banking situation will affect the development of the overall economy. From the view of the above, the liability of third countries is not given a role in regulating the market mechanism, but from the first obligation can be assessed that the market mechanisms lead to injustice for the citizens would have been the task of the authorities to protect the injustice. It means that the relationship between the customer and the bank, the state is still given the obligation to regulate the market mechanism that occurs when the market mechanism does not give justice to the parties. Philosophy of state intervention is to ensure that no injustice to the parties concerned. This state intervention is emphasized in the concept of the welfare state (Johnny Ibrahim, 2009) as the holder of the authority to regulate the economy (power of economic regulator) is justified and necessary only if: first in order to protect the freedom of the market itself, both in an effort to create fairness, second in order to make legal certainty for all market participants, The third in an effort to prevent the failure of the market (market failure). Government intervention in the form of public policy is made in a transparent manner in the form of the rule of law. State interference into actions to be performed according to Adam Smith based on that market participants are people who are motivated by moral sentiments to improve the prosperity that impact also on the prosperity of society. Based on the assumption Smith market mechanism will force market participants to act in a fair, ethical and fair, do not hurt each other, but the welfare of each other Smith thought about the free market to try to unravel the relationship between freedom of business and government control. Excessive control will turn off the individual initiative, and economic monopoly would generate huge losses not only for the welfare of society but also for economic activity itself. Business banks needed freedom in developing the banking business itself, but government intervention is still required so that the banking business can generate prosperity for the wider community State intervention needs to be done in accordance to Keynesien that have found the government intervention is essential in building the economy. The relevance of the role of the state in a global society, among others, supported by several reasons: first the majority of the nation state, still live below the poverty is not possible to submit the economic development to the market due to the performance of individuals are allowed to pursue their economic advantages of each is not will ensure fairness in the distribution of income in society. There is no difference opinion about state inference between Keyneissen and Adam Smith. The point is to understand these two have the opinion that the state intervention is necessary if the market mechanisms do not give justice to the economic actors. Based on Adam Smith opinion, the state interfere is not suitable for the country's economic. This is not good for the country's economic success. State interference is important in Indonesia as expressed by Keyneissen but in selective areas. The intervention is realized in the form of laws and regulations made by the authorities, it is the same with a view in understanding positivism that promotes the rule of law in the pursuit of its objectives. Actually, the concept of Adam Smith is still relevant in the case of the injustice and failure of market mechanisms that result from free trade. It means that the duty of the authorities to minimize e injustice to the citizens of Indonesia as the impact of globalization. As revealed by a Tony Prasetyantono, "When the market mechanism fails to give results in accordance with our expectations, which means there has been a" market failure ", the solution needs to take over the government. Although we believe the market mechanism and operation of "hand-invisible hand", it must be remembered that these were also occasionally problematic, and require government assistance to decompose. It is also stated by JosepStiglitz. He says that: Economic damage due to the global crisis makes economy goes well, one reason is the financial sector that actually serves to allocate capital. If all goes well and the economy will be more productive and all will develop faster and gain can be achieved, but the market mechanism does not run properly with the result triggered a crisis or market failures occur. Therefore, regulation of the market is required, which can reduce the crisis. Interference of the state, in this case, is to avoid

various irregularities and even fraud that can harm certain parties, even all parties. Interference of the state in economic activity is important to balance public interest. Interference of the state, in this case, is in order to maintain the balance of interests of all parties in the community, to protect the interests of producers and consumers and to protect the interests of the state and public interests, the interests of the company or personal. Form of intervention is in the form of rules. Elements of the quality of the laws that must be met in the economic system according to a study conducted by Burg's consists of two elements. First, the "stability", where the law has the potential to maintain balance and to accommodate the interests of competing "predict" ("predictability"), is used to predict the result of the measures taken particularly important for countries that most of the people for the first entered the economic relations beyond the traditional social and environmental. Between these two elements is also important to note the aspect of "fairness" (fairness) as the same treatment and standard patterns of behavior that the government needed to keep the market mechanism and prevent excessive bureaucracy. The state which must implement the objectives of the law that will maintain the stability of the different interests and implement the objectives of the law to predict the consequences that arise, which should stick to the principle of justice. Intervention of the state or the role of the state is expected to be realized through new arrangements coercive.

### 2.1.1 State Interference in Setting a Good Bank Customer Protection of Legal Aspects of Banking and Legal Aspects of Contract.

The purpose of the intervention arm of the state is to guarantee legal protection for businesses so that economic activity detrimental to society can be avoided. The issue of the relationship with the bank customer protection settings that government intervention is necessary because between customers and banking institutions have an unequal bargaining position. The bank has a better position due to the advantage of capital and ability compared the position of the customer. The state of insecurity poses a potential customer's rights in the event of problems between clients with banking institutions, the role of the state to intervene to ensure the protection of rights - the right customer with the aim to ensure that balancing right for each customer can be accomplished. Forms of state intervention can be realized in the form of legal protection regulations bank customers. It can be conducted before the dispute occurred (implicit) or after the dispute occurred (explicit).

## 3. Conclusions

### 3.1. *Form state interference in setting a good bank customer protection of legal aspects of banking and legal aspects of contract consist:*

1. Philosophy of state interference in the protection of bank customers in Indonesia is factual and juridical since bank customers are in a weak position compared to banks. This condition will cause injustice to the parties so will make disadvantage for the bank's business continuity and sustainability of the broader economy. State interference in the setting of customer protection is required in terms of ensuring justice in the course of the market mechanism.
2. The form of state intervention in the setting of customer protection is in the form of the rule of law. Intervention of the state of the legal aspects of banking is the legal protection arrangements implicit and explicit legal protection arrangements. Intervention of the state of the legal aspects of the contract in the form of restrictions to the validity of standard clauses set forth in the Consumer Protection Act and the guarantee of the government to the principle of freedom of contract can only be implemented if there is a balancing position between customers and banking institutions.

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