

**THE BANKER CUSTOMER
CONFIDENTIAL RELATIONSHIP**

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THESIS

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يا من أحمل اسمه بكل فخر
يا من اشعل لي انامله حتى أكبر
يا من أودعتك الله
أهديك هذا البحث .. أبي

To the man whose name I carry with pride

To the man who would make a torch of his fingers for me to
enlighten my ride

This research is dedicated to you... DAD

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Abstract

Conscious of the limitations of the petroleum-based economy in Bahrain, the Bahraini government aims to improve other industries, such as finance. Therefore, the aim of this thesis is to study the current status of banking confidentiality in Bahrain, and to discover the possibilities for improvement in the banking sector in Bahrain, so that the country can succeed in being the financial centre of the Middle East. The main aspects of this study are to explore the meaning of the doctrine of confidentiality; the duration of and the exceptions to the duty of confidentiality, and the delicate balance between protecting banking confidentiality and combating money-laundering. This thesis is based on library research, involving an analysis of a range of documents, publications, cases, articles, online sources and legal materials from the United Kingdom (UK) and Bahraini jurisdictions and legislations, both in Arabic and English.

The findings are as follows: surprisingly, compared to English law, the exceptions to the duty of confidentiality under Bahraini law are much more limited. They are clearly stated under the CBBFIA. Although the CBBFIA designates four articles that deal with the duty of confidentiality, it lacks specific and important details related to the application of these articles, such as the scope and duration of the duty of confidentiality. Bahraini courts have failed to apply any article for the protection of banking confidentiality, and the court records lack any cases relating to the protection of banking confidentiality. Also a significant number of money- laundering transactions could be performed through banks. Finally, bank customers in Bahrain have little awareness of their rights in the framework of banker-customer confidentiality.

Contents

Acknowledgements	4
Abstract.....	6
Acronyms	10
Chapter One: Introduction.....	11
Chapter Two: Doctrine of Confidentiality.....	15
2.1 Attorney Client Confidentiality	15
2.1.1 The value of confidentiality	17
2.1.2 Confidentiality and legal privilege	19
2.1.3 Exceptions to the legal privilege	21
2.2 Arbitration Confidentiality	24
2.2.1 Sources of confidentiality in arbitration	26
2.2.2 The umbrella of confidentiality	31
2.2.3 Exceptions to confidentiality in arbitration	34
2.3 Government Confidentiality	35
2.3.1 What is government confidentiality?	36
2.3.2 Who decides what information constitutes governmental confidentiality?.....	37
2.3.3 Governmental justification of secrecy.....	37
2.3.4 Minimal censorship is better	39
2.4 Business Confidentiality	40
2.4.1 Trade secrets definition	41
2.5 Medical Confidentiality	43
2.5.1 Importance of medical confidentiality.....	46
2.5.2 Exceptions to the medical confidentiality	48
2.5.3 Medical confidentiality in certain issues.....	51
2.6 Confidentiality in Private Affairs	56
2.6.1 Private life	58
2.6.2 Family life.....	60
2.6.3 Correspondence and confidential information	62
Chapter Three: Legal Sources of Banking Confidentiality.....	64

3.1 Constitutional Sources of Banking Confidentiality	66
3.1.1 .Kingdom of Bahrain	66
3.1.2 United Kingdom	69
3.2 Duty of Confidentiality: Sources in Penal Law	71
3.2.1 Kingdom of Bahrain	72
3.2.2 United Kingdom	86
3.3 Sources of Banking Confidentiality: Labour Law	87
3.3.1 Kingdom of Bahrain	87
3.3.2 United Kingdom	91
3.4 Duty of Confidentiality: Sources in Banking Law	93
3.4.1 Kingdom of Bahrain	94
3.4.2 United Kingdom	95
Chapter Four: Scope of Banking Confidentiality.....	99
4.1 Introduction.....	99
4.2 Types of Information Protected Under Banking Confidentiality.....	100
4.2.1 Kingdom of Bahrain	100
4.2.2 United Kingdom	103
4.3 Duration of the Duty of Confidentiality.....	105
Chapter Five: The Limits of Banking Confidentiality.....	107
5.1 Exception One: Disclosure under Compulsion of Law	108
5.1.1 Court order	108
Kingdom of Bahrain	117
United Kingdom	119
5.2 Exception Two: Disclosure with Customer’s Consent	124
5.2.1 Kingdom of Bahrain	125
5.2.2 United Kingdom	126
5.3 Exception Three: Disclosure for the Bank’s Own Interest	127
Bahrain Law	127
English Law.....	128
5.4 Exception Four: Duty to the Public to Disclose.....	130
Bahrain Law	131
English Law.....	131

5.5 Disclosure in Accordance with the Central Bank’s Instructions	133
Bahrain Law	134
United Kingdom	135
Chapter Six: Money Laundering.....	139
6.1 Money Laundering Definition	142
6.2 Money Laundering Phases.....	145
6.3 Sources of Illegal Funds for Money Laundering Crime	148
6.4 Money Laundering Characteristics	149
6.5 Types of Money Laundering Crime, Methods of Committing and Instances.....	151
6.5.1 Types of money laundering	151
6.5.2 Money laundering methods	152
6.5.3 Money laundering instances.....	156
6.6 Money Laundering Through Banks.....	157
6.6.1 Bank borrowing.....	157
6.6.2 Internet banking	157
6.6.3 Private banking services	158
6.6.4 Documentary credits	160
6.6.5 Credit cards.....	161
6.6.6 Automatic teller machines.....	161
6.6.7 Wire transfer.....	162
6.6.8 Secret exchange houses (black market) and non-banking institutions	165
6.6.9 Lease finance	165
6.6.10 Smart card.....	166
6.6.11 Ordinary bank transfers and bank cheques.....	166
6.7 A Bank's Responsibility for Money Laundering Crimes.....	167
6.7.1 When is a bank considered as a contributor to the crime of money laundering?	168
6.7.2 Does accepting the deposit of dirty money constitute the crime of hiding things obtained from a crime?	169
Chapter Seven: Conclusion	171
Appendix.....	174
Bibliography	175

Acronyms

AAA	American Arbitration Association
ATCSA	Anti-Terrorism Crime and Security Act
ATM	Automated Teller Machine
AMLA	Anti-Money Laundering Act
BCDR	Bahrain Chamber of Dispute Resolution
BMA	Bahrain Monetary Agency
CBB	Central Bank of Bahrain
CBBFIL	Central Bank Bahrain and Financial Institutions Act
CCPA	Civil and Commercial Procedures Act
CHIPS	Clearing House Inter-bank Payments
CJA	Criminal Justice Act
DPA	Data Protection Act
DTA	Drug Trafficking Act
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ERA	Employment Rights Act
FATF	Financial Action Task Force
FSA	Financial Services Authority
FSMA	Financial Services and Market Act
FTA	Financing Terrorism Act
GMC	General Medical Council
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ICTA	Income and Corporation Taxes Act
LCIA	London Court of International Arbitration
PACE	Police and Criminal Evidence Act
PCA	Proceeds of Crime Act 2002
PPMLA	Prevention and Prohibition of Money Laundering Act
SFO	Serious Fraud Office
SWIFT	Society for Worldwide Inter-bank Financial Transactions
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
US	United States
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization

Chapter One: Introduction

The banker/customer relationship is one of the oldest relationships in society, developed over time. Initially, bank customers were only the wealthy but, gradually, the banker customer relationship expanded to include almost the majority of the people engaged in banking transactions. Moreover, banking transaction types and functions have expanded to the point that banks have become aware of a great deal of personal information about their clients. Therefore, banker customer confidentiality is a term used to describe how all client information which reaches the bank through the course of the banker/customer relationship should remain confidential and not be published or disclosed to the general public. Disclosing customer information without their previous acceptance may harm the banking sector, as people and organisations may refrain from depositing their money, in order to protect their private information. Nowadays, banks play an essential part in the economic system, promoting savings and investments. Modern trade and domestic and international commercial transactions would be almost impossible without the availability of suitable and robust banking services.

Therefore, a set of moral and professional ethics shapes the boundaries of each profession. Ordinarily, professions are affected by the habits, traditions, values and laws in their societies. Accordingly, bankers set their professional ethics and banking confidentiality at the core of the relationship between banks and their customers; some jurisdictions have codified the duty of confidentiality, others have not. Based on that, a bank's duty of confidentiality has been transformed from merely a principle of honour and professional ethics to a legal obligation – there are many jurisdictions, such as Switzerland and the Lebanon, which have realised the importance of banking confidentiality and implemented a special Act for banking confidentiality. Other jurisdictions have separate Articles within Financial Acts to emphasise a bank's duty of confidentiality; in some countries, such as the UK, banker customer confidentiality is mainly recognised by the common law.

It should be borne in mind that most countries which aim to improve their banking industry sector need to improve and protect the concept of banker customer confidentiality. Nevertheless, banking confidentiality is not an absolute obligation, rather it is subject to number of exceptions, and varies from one jurisdiction to another. The famous *Tournier* qualifications were as follows: firstly, compulsion by law; secondly, where there is duty to the public to disclose; thirdly, where the bank interest requires disclosure and, finally, where customer consent allows the disclosure. There might be additional exceptions in some jurisdictions or even fewer than those stated above.

In Bahrain, banking confidentiality has been protected under the Constitution, Criminal Law, Labour Law and Financial Services and Banking Institutions Law, with few exceptions to the duty of confidentiality. However, the courts in Bahrain rarely refer to the duty of confidentiality; during the research period, the researcher failed to find a single case related to the duty of confidentiality. This is to say that, on the one hand, a significant level of protection is provided to banking confidentiality under the law in Bahrain but, on the other, the courts fail to emphasise this protection by stating it in its judgments, and people fail to defend their rights of protecting their confidential information. English law has a powerful Financial Services Act, a long history of, and excellent reputation in, protecting banking confidentiality, therefore English law has been chosen as example for Bahrain.

Under English law, banking confidentiality is protected under the common law with many judicial proceedings. The famous judgment in the *Tournier* case in 1924 is considered the cornerstone in banker customer confidentiality, with Bankes LJ's famous qualifications: '*(1) where disclosure is under compulsion by law, (2) where there is a duty to the public to disclose, (3) where the interest of the bank requires disclosure, (4) where the disclosure is made by the express or implied consent of the customer.*' However, ever since the judgment, there has been a lot of criticism of the above qualifications. Also it has been impossible to enact a banking confidentiality law in order to protect banker customer confidentiality. Therefore, Article 8 of the Human Rights Act 1998 provides some kind of protection under the general concept of protecting the right to privacy.

The main purpose of this thesis is to highlight the great importance of the confidential relationship between banks and their customers from a legal point of view, and to spotlight the existing invasions of customer confidential financial data through the growing disclosure in different directions. This thesis also will study the limits of banking confidentiality and how it has expanded during the last decade. The study of English law, with its experience and long history in banking confidentiality, will help in setting the parameters for any required reform in Bahrain. The study of English law will also help in deciding what amendments the Bahraini jurisdiction should adopt in order to gain all the advantages of the English law and avoid the disadvantages.

Consequently, the author will rely on many sources to help analyse and clearly understand the current lack of confidentiality. This PhD thesis is based on library research involving an analysis and a comparative study of a range of documents, publications, cases, articles, online sources and legal materials from the UK and Bahraini jurisdictions and legislation, both in Arabic and English. Arabic books, periodicals, official documents, magazines, reports and other sources are related to Bahrain. The library material will be collected from various libraries in Bahrain, the central library of Manama, and the University of Bahrain library. Besides some legal databases such as LexisNexis, Westlaw, etc., materials relating to English law and practice will be collected from different libraries in the UK, mainly the libraries of Brunel University, University College London, and Westminster Library.

This thesis will be divided into seven chapters. Chapter 1 will be the introductory chapter. Chapter 2 will analyse the doctrine of confidentiality from different perspectives: attorney-client confidentiality; arbitration confidentiality; government confidentiality; business confidentiality; medical confidentiality, and confidentiality in private affairs. Chapter 3 will discuss the legal sources of banking confidentiality and how it has been transformed from merely a principle of honour and profession into a legal obligation; this chapter will discuss the constitutional sources of banking confidentiality, banking confidentiality sources under the penal law, sources of banking confidentiality under the labour law and, finally, banking confidentiality sources under banking law.

Chapter 4 will explore the scope of banking confidentiality by stating what type of information should be protected under banker customer confidentiality and the duration of the duty of confidentiality. Chapter 5 will discuss the limits of banking confidentiality and how it has been expanded through the last decade by analysing the *Tournier* qualifications and the limits under Bahraini law. Chapter 6 will review the delicate relationship between protecting banking confidentiality and combating money laundering, and Chapter 7 will be the concluding chapter.

Chapter Two: Doctrine of Confidentiality

Before being a legal principle, confidentiality is a moral principle found at the heart of several professions such as advocacy, medical, psychology, arbitration and many others. Therefore, it is vital to study the doctrine of confidentiality in order to understand the principle of banking confidentiality, and comprehend the importance of banking confidentiality. Thus, the researcher will first discuss attorney client confidentiality; then arbitration confidentiality; thirdly, government confidentiality; fourthly, business confidentiality; fifthly, medical confidentiality and, finally, confidentiality in private affairs.

2.1 Attorney Client Confidentiality

Society is in the nature of humans, people cannot live only within a community as a fundamental factor of the surrounding community. In a community, disputes will inevitably arise, either due to interpersonal conflict, across different socioeconomic levels, through disrespect for the rights of others, through negligence or through aggressive and uncontrolled actions, which may threaten the rights of others, or be the cause of damage. The police, legal profession, courts and judiciary have arisen in their turn to moderate these disputes and maintain order with regard to the way that actions in conflict with the law affect society, and the government of the nation as a whole. Nowadays, with all the modern and complicated issues and disputes, most people prefer to seek legal advice from a professional lawyer before entering a court, as all the procedures which are followed need a certain level of specialist skill and knowledge. Even those who admit guilt have a right to legal representation.

One of the vital duties of lawyers towards their clients is to determine the best possible course of legal argument to protect the interests of their client within the frame of the law. In order for lawyers to perform this duty, they need to listen to their clients clearly to understand their legal situation, be able to provide legal advice for them, and also to guide

them to the legal solution for their problem. In another words, clients must speak up freely to their lawyers and reveal all the information which might be helpful in protecting their threatened rights or clear their legal situation. Incidents related to employee negligence, family private affairs or even the committing of a crime, must be discussed with lawyers in trust. For this free disclosure on the part of the client, it is necessary that clients be made aware in advance that their lawyers will not disclose any of the information or secrets told in the course of requesting advice or legal services. Because of this, there are strict professional regulations, laws and ethics to which lawyers are held regarding client confidentiality. Lawyers are held responsible professionally, legally and ethically for maintaining this standard.

Therefore, it is an ethical and legal obligation which prevents lawyers from disclosing certain information to others which has been received from the client, including all communications, legal opinions, meetings, and all the documents related to the legal matter.¹ Client confidentiality must also be guaranteed to protect the integrity of the court process.² Based on that legal and ethical obligation, the client's consent must be obtained in advance before the lawyer may make use of any information that has been disclosed to the lawyer, either for the benefit of the lawyer himself, or in using the client information against the interests of the client in any way. This ethical obligation goes back in history to the earliest times.³ As such, beyond the legal requirements of attorney client confidentiality (also known as privilege), the obligation of confidentiality exists and applies, regardless of the existence of specific attorney client privilege. Professional confidentiality is supreme and retains its power for an unlimited duration.⁴ It may be said, '*Confidentiality lies at the very heart of legal professional privilege.*'⁵

¹ T. Baudesson and P. Rosher, 'Professional secrecy versus legal privilege', International Business Law Journal, 2006

² Ethical client confidentiality defined as '*an obligation to protect information that is not generally known*', see R. Pattenden, 'The Law of Professional Client Confidentiality', p 12

³ Hippocrates, BC 370 – 460, and all the religions and prophets emphasis upon keeping secrets

⁴ T. Baudesson and P. Rosher, 'Professional secrecy versus legal privilege', International Business Law Journal, 2006

⁵ C. Tapper, 'Cross and Tapper on Evidence', Butterworths, 8th edn, 1995, p 474, citing J. Auburn, 'Legal Professional Privilege: Law and Theory', Hart Publishing, 2000, p 64

2.1.1 The value of confidentiality

There is no doubt that encouraging professional confidentiality has many different facets and has an impact on clients, society and on the legal profession as whole.

1. Value to clients

The relationship between clients and the lawyer is unique in its nature, as clients usually seek legal advice when they are in a difficult position – they may be vulnerable, puzzled, scared, perplexed, unsure and confused. They resort to lawyers to find security and certainty, as far as it may be had. This means that lawyers should cultivate a manner and reputation that encourages confidence, as well as open environments that support clients and encourage them to speak frankly about all the pertinent details of a situation where legality or the legal position may be uncertain. Confidentiality and privacy allow clients to disclose their concerns without any fear, which will help lawyers to understand the client's legal situation and provide proper legal advice.⁶ Thus, attorney client confidentiality requirements '*facilitate choice by removing scrutiny, criticism, hostility, domination, manipulation and anything else that puts pressure on the individual to conform to social norm.*'⁷

Moreover, the respect of client confidentiality implies a greater ethical requirement of respect of human dignity in general, when lawyers treat client information respectfully by not disclosing it to the public. Regardless of whether the client was foolish, venal, guilty or incapable (either because of his age or because of mental illness), he will not be exposed to ridicule:⁸ '*the man whose every need, thought, desire, fancy or gratification is subject to public security, has been deprived of his individuality and human dignity.*'⁹

⁶ Clients may sit with a lawyer for hours, refer to many things, and reveal some information which is related to the matter or may not be related; the lawyer should listen to the client and choose which information might help to provide legal advice, however, the principle of confidentiality protects all the information the client has disclosed to the lawyer. See A. Boon and J. Levin, 'The Ethics and Conducts of Lawyers in England and Wales', Hart Publishing, 2nd edn, 2008, p 219 - 238

⁷ R. Pattenden, 'The Law of Professional Client Confidentiality', Oxford Press, 2003 p 12

⁸ Ibid

⁹ Ibid

2. Value to society

Maintaining professional confidentiality means a society in which people maintain control over their speech, and in which people are free to choose what to speak about it in public and what to keep secret. Levels of social complexity and intimacy are created in which people have forms by which to behave in respecting private life. In such a society, there is less interference of the public or official gaze in the private lives of individuals.¹⁰ Maintaining professional confidentiality means protecting clients, in particular those who may need to be protected if they are such clients who cannot protect themselves: minors, and the disabled, for example.

3. Value to the professional

One of the most important advantages of maintaining professional confidentiality is in order to protect the legal profession itself. People will not entrust their information to a lawyer if the profession does not have a reputation for being reliable. Therefore, each instance of confidentiality maintained supports a trust in legal profession as a whole.

Another important side of protecting confidentiality is that confidentiality provides a shield for the lawyer in situations where he is required not to disclose information against his client's interest.¹¹ So long as he is not required to act on the information in a way that would conflict with his duty to the court, the lawyer is protected.

Professional confidentiality is easy to define as materials falling under confidentiality requirements cover all the communications, correspondence, emails, diaries and notes between a lawyer and his clients. Any paper carrying the lawyer's office letterhead may be considered sufficiently related to the professional relationship to be considered confidential.¹²

¹⁰ Some argue that the fewer the secrets, the healthier the democracy; everything is transparent and clear to everyone and there is nothing to hide. See R. Goldfarb, 'In Confidence: when to Protect Secrecy and When To Require Disclosure', Yale University Press, 2009, p 37 - 57

¹¹ In other words, if the lawyer knows his client is conducting an unlawful act, they can find excuse not to disclose the information which is against the client interest. See T. Baudesson and P. Rosher, 'Professional secrecy versus legal privilege', International Business Law Journal, 2006

¹² T. Baudesson and P. Rosher, 'Professional secrecy versus legal privilege', International Business Law Journal, 2006

Professional confidentiality is not an absolute rule, and exceptions to this principle are varied and different from one jurisdiction to another.¹³ In some jurisdictions, for the reason of preventing substantial physical harm to a third party, an attorney has the right to reveal or disclose client secrets. Other jurisdictions give an attorney the discretionary right to disclose information where such disclosing might help in protecting the financial interest or property of another.¹⁴

2.1.2 Confidentiality and legal privilege

The existence of an attorney client relationship is the most important factor in order for the rules of professional privilege to be applied to specific material. Moreover, there should be a confidential environment surrounding all the communications with the attorney, either when the client is speaking to the lawyer and disclosing information, or even when the lawyer is providing legal advice to the client. Thus, this privilege is also applied to the advice and guidance given by the lawyer to the client, no matter whether this information was communicated in written, oral or even nonverbal communications such as signing or expression.¹⁵

*'The principle which runs through all these cases is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests'.*¹⁶

¹³ However, in some other countries, professional confidentiality is absolute, such as France. See Commission of the European Communities, 'Lawyers in the European Community', Brussels, 1987, p 142. See also A. Boon and J. Levin, 'The Ethics and Conducts of Lawyers in England and Wales', Hart Publishing, 2nd edn, 2008, p 231

¹⁴ A. Boon and J. Levin, 'The Ethics and Conducts of Lawyers in England and Wales', Hart Publishing, 2nd edn, 2008, p 223

¹⁵ B. T. QC and others, 'The Law of Privilege', Oxford University Press, 2006, p 297 -304

¹⁶ L. Taylor in *R v Derby Magistrates Courts*, ex parte B, 1995, a All ER 526

Additionally, for the attorney client privilege to be applied, the relationship between the lawyer in question and the client should be for the purpose of seeking his legal advice, or in the preparation of litigation.¹⁷ Which means that if the lawyer and one of his clients were discussing certain issues not related to the seeking of legal advice, such as talking about a technical issue, then professional privilege will not apply. Also, where the communications between the lawyer and his clients are not private and confidential, for instance when a third party was allowed to attend and hear the conversation, or such conversation has been delivered to the third party, in these cases, attorney client privilege will not apply.¹⁸

Much discussion has been had regarding whether professional privilege should be applied to the relationship of a client with a patent agent or not; in this regard some courts agree with the opinion that patent agents are not lawyers, but they are engaging in and carrying on transactions and communications which are similar to those engaged in by lawyers. In such an instance, courts agree that legal professional privilege should apply to restrict a patent agent from breaching confidentiality.¹⁹ On the other hand, others emphasise the idea that patent agents are not lawyers, and they are not performing legal work of the same order that lawyers do. They are merely transforming certain types of information and preparing it to be disclosed later on, therefore there is no professional privilege obligation on the part of a patent agent.²⁰

The same discussion has been raised regarding the specific role of the corporate patent lawyer and whether professional privilege should be applied or not. In this regard some courts agree that professional privilege should be applied based on the nature of the job that corporate patent lawyers are performing, as the professional privilege should apply to the legal opinions on patentability or infringement.²¹ However, other courts have held that

¹⁷ A. Boon and J. Levin, 'The Ethics and Conducts of Lawyers in England and Wales', Hart Publishing, 2nd edn, 2008, p 223

¹⁸ Ibid. p 223

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

corporate patent lawyers are mainly assessing the competitive business of a given patent, therefore they are not subject to apply professional privilege.²²

2.1.3 Exceptions to the legal privilege

1. Cases involving children

Basically, it is not clear whether ‘cases involving children’ should be considered as an exception to professional privilege or not, as some commentary suggests that children’s cases are not subject to the privilege. On the basis that, ‘*children’s proceedings are not considered adversarial*’ there might be said to be no requirement for privilege rules outside the general obligation of confidentiality.²³ However, other jurisdictions have held that cases involving children constitute an exception to the rule of legal privilege that prohibits lawyers from discussing information with a third party.²⁴

2. Disclosure for the public interest

First of all, public interest disclosure is considered an exception to the confidentiality principle, not to the rules governing professional privilege. Accordingly, lawyers are not subject to the professional obligation of confidentiality if they have disclosed information given by client for the public interest, and to protect people from serious harm.²⁵

It is occasionally debatable where lawyers, for the purpose of protecting the public from danger, are allowed to reveal client communications and information to the public. The question arises in defining whether the information disclosed comes under the umbrella of

²² See W. R. McLucas, H. M. Shapiro and J. J. Song, ‘The Decline of the Attorney – Client Privilege in the Corporate Setting’, *The Journal of Criminal Law and Criminology*, 2006, Vol. 96 No. 2; J. Loughrey, ‘Legal Advice Privilege and the Corporate Client’, *International Journal of Evidence and Proof*, 2005; see also C. A. Schipani, ‘The Corporate Attorney-Client and Work Product Privileges: Things of The Past’, *Company Lawyer*, 2009

²³ A. Boon and J. Levin, ‘The Ethics and Conducts of Lawyers in England and Wales’, Hart Publishing, 2nd edn, 2008, p 228

²⁴ *Ibid.* p 228 - 231

²⁵ Commission of the European Communities, ‘Lawyers in the European Community’, Brussels, 1987, p 139 - 149

the public interest or not. Some argue that exceptions to the privilege should be limited and narrow, but should not be widened in order to protect confidentiality and professional privilege. Others argue that the concept explored in the *W v Egdell*²⁶ case should be applied as a general precedent and lawyers should be allowed to disclose information to protect the public: *‘As a matter of public policy...the solicitor ought to be entitled, without either being liable to actions by his client or to a charge of professional misconduct, to take the necessary steps in the public interest to prevent death or serious injury.’*²⁷

There is a distinction to be made between an obligation to disclose and the situation where a lawyer is not forced to disclose certain information but, if they do so, may justify it as having been done for the purpose of protecting the public. There are other situations where lawyers are forced by law to disclose client information to the authorities. These situations include crimes like money laundering where, by retaining the information, the lawyer may be considered a supporter of or accessory to the ongoing criminal arrangements. By not disclosing information where their duty to the court requires it, they may be considered as having committed an offence.²⁸

3. Client lawyer litigation

A concern arises when a lawyer is acting on behalf of a client for certain period and, subsequently, the client makes the decision to sue the lawyer. In this situation the requirement of confidentiality is removed and the lawyer is able to reveal or disclose some client information in order to prepare a defence. This exception to the rule of privilege includes all the investigations, proceedings and communications with the lawyer which are relevant to the suit at hand.²⁹

The main justification for this exception is that, if the client decides to sue the lawyer, the client has implicitly waived the privilege. On the other hand, this exception does not

²⁶ *W v Egdell* 1990, 1 All ER 835

²⁷ M Brindle and G. Dehn, ‘Confidence, Public Interest and the Lawyers’, in Cranston, n13, p 122

²⁸ P. F. Cabana, ‘Legal Professional and Money Laundering in Spain’, *Journal of Money Laundering Control*, 2007

²⁹ A. Boon and J. Levin, ‘The Ethics and Conducts of Lawyers in England and Wales’, Hart Publishing, 2nd edn, 2008, p 234

include situations where an aggrieved lawyer decides to sue the client. In this case, there is no removal of the privilege.³⁰

4. Waiver

Waiving the privilege of confidentiality is an absolute right of the client. Aside from the legal obligations discussed above, client waiver is considered the only exception to privilege. Waiving privilege means that the client loses the benefit of the privilege. The client permits the lawyer to disclose information imparted under confidential circumstances that would otherwise attract privilege.³¹ Usually, such a waiver would have to be made expressly, to make it clear that the client has clear intent to waive this right to privilege. However, implied consent is considered in some cases.³² The client privilege can be removed partly if the documents are irrelevant.

5. Joint client

Here we should distinguish between two situations. Firstly, when certain information has been disclosed to the lawyer by a co-client, or by one client but in the presence of another client, then all the information in relation to that transaction should be given to both clients in order that no one can claim privilege over documents against the other.

Secondly, when certain information will be disclosed to a third party, then both clients have the right to waive the privilege and the lawyer is not allowed to discuss certain information with the third party, unless both clients have waived the privilege expressly or by implication.

6. Insolvency and bankruptcy

When the client is a company or a corporate body then the question becomes who owns the privilege and the attendant right to waive it. This is an issue particularly in instances

³⁰ *Lillicrap v Nalder & Son*, 1993, 1 All ER 724 CA

³¹ See J. Auburn, 'Legal Professional Privilege: Law and Theory', Hart Publishing, 2000, p 195

³² As discussed above, when the client sues the lawyer, this is considered as an implied waiver to professional privilege

where the company sues one of its own directors. Also in the case of insolvency, where a lawyer is retained by a company that is then liquidated or merged, there is a question as to whether the lawyer is allowed to reveal information about the company to the liquidator, and to what extent.

The general agreement on this point is that in such situations the liquidator is acting on behalf of the company and for its interest and, under law, both are considered as one entity. Therefore, the lawyer should provide the liquidator with all the relevant information. It is similar in cases of individual bankruptcy. When the client is declared bankrupt, the lawyer should provide the trustee of bankruptcy with all the information.³³

2.2 Arbitration Confidentiality

The existence of arbitration is as old as human society.³⁴ Perhaps the oldest form of arbitration is the appeal to religious authority. When conflict arose between Cain and Abel the acceptable solution was resorting to the sky.³⁵ Historical documentation shows that, even as far back as Sumerian law and Egyptian mythology, there is evidence of arbitration systems, where insoluble disputes with diametrically opposed interests were submitted to an arbitrator.³⁶ The Greeks describe arbitration in Solos' legislation and there were channels for arbitration in Roman law.³⁷ The advantages of arbitration were articulated by Aristotle, who stated that parties to a conflict might prefer arbitration to litigation. The principle that underlies arbitration is that arbitrators search for justice where a judge considers only the right application of legislation in the interests of the society as a

³³ A. Boon and J. Levin, 'The Ethics and Conducts of Lawyers in England and Wales', Hart Publishing, 2nd edn, 2008, p 236 - 237

³⁴ According to Sam Luttrell, arbitration '*is a flexible process for the final determination of private rights ..., when parties submit to arbitration they agree to appoint a third party to act quasi-judiciary and finally decide their rights, duties and obligations in the dispute*', see S. Luttrell, 'Bias Challenges in International Commercial Arbitration', Walters Kluwer, 2009, p 2

³⁵ See Quran Sura (Almaeda) verses 27-32, for further details see N. A. Stillman, 'The Story of Cain and Abel in the Quran and the Muslims Commentators: Some observations', Oxford Journals, Volume XIX, Issue 2, p 231 – 239

³⁶ See G. B. Born, 'International Commercial Arbitration', Walters Kluwer, p 8

³⁷ Ibid. p 8

whole.³⁸ Islamic law goes to arbitration in cases involving individual rights, such as when a dispute arises between spouses.³⁹ Thus, arbitration is a special or private jurisdiction, erected for the purposes of a single case in which parties to a dispute decided to arbitrate it rather than resort to the vagaries and expenses of the courts.

There are many advantages of arbitration which cause individuals and corporate bodies to prefer to arbitrate a dispute rather than take it to a court. First of all, arbitrators can choose to apply a binding solution without being limited to the local laws of any nation.⁴⁰ Moreover the parties to the contract can choose the applicable rules to the proceeding.⁴¹ Secondly, parties to the dispute are allowed to agree on the qualified arbitrator to deal with their case,⁴² an arbitrator who has experience, knowledge and skills in the field in question. Thirdly, one of the advantages of the arbitration is that contractors can avoid delay which might result from litigation on different levels. Such a delay in the performance of a contract might causes losses to the parties.⁴³ Fourthly, parties to the dispute can choose a neutral place of arbitration where the country in which the dispute arose is not convenient for the parties.⁴⁴ Also, they are free to choose the language of the proceedings.⁴⁵ A fifth motivation is to save money.⁴⁶ Generally, arbitrators must be well paid compared to the local courts, where usually less money is paid directly to the service of decision-making. However, losses resulting from delay may often exceed what has

³⁸ Aristotle: *'Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law'*, see also A. Beever, 'Aristotle on equity, law and justice', *Legal Theory*, 2004, 10 (1) , p 33-50

³⁹ See Quran Sura (Alnesaa) verse 35 *'If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah hath full knowledge, and is acquainted with all things'*, see also A. K. Al-Hudaithi, 'The Arbitration and it's Importance', Ajman Chamber of Commerce and Industry Publications, available at: <http://www.ajmanchamber.ae/UserFiles/The%20Arbitration%20and%20its%20Importance.pdf>

⁴⁰ See M. I. M. Aboul Enein, 'International Commercial Arbitration', paper submitted to the conference of 'Preventing and Managing International Commercial Disputes Toward a EuroMed Alternative Dispute Resolution Infrastructure', Rome – Italy, Sep 2007

⁴¹ Ibid.

⁴² Ibid.

⁴³ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, 'Law and Practice of International Commercial Arbitration', Sweet and Maxwell, 4th edn, 2004, p 28

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ See G. B. Born, 'International Commercial Arbitration', Walters Kluwer, p 84 – 86. However, Redfern and Hunter classified cost as the first disadvantage of arbitration, see A. Redfern, M. Hunter, N. Blackaby and C. Partasides, 'Law and Practice of International Commercial Arbitration', Sweet and Maxwell, 4th edn, 2004, p 28

been paid to the arbitrators. Finally, and most importantly, for the purposes of discussing confidentiality, is that confidentiality may be secured in hiring private arbitrators to give judgment. Litigation is open to the public to attend, and is part of the public record. Therefore, more and more contractors tend to arbitrate their disputes rather than litigate, to secure the confidentiality of the information disclosed in the proceedings to protect their position in the market.⁴⁷

2.2.1 Sources of confidentiality in arbitration

1. Implied in law

The duty of confidentiality is an implied term of an arbitration contract, and it arises out of the nature of the arbitration process. This was the substance of the court's decision in *Dolling–Baker v Merrett*.⁴⁸ Accordingly, in the absence of an express agreement about confidentiality between parties, this means that there is an implied duty of confidentiality, and this duty extends to cover all the documents produced in the proceedings, hearing transcripts, information given by witnesses, and the final award.⁴⁹ Some writers argue that the duty of confidentiality is implied in arbitration, and there is no necessity to expressly state it in the agreement every time, as confidentiality is clearly one of the motivating factors for parties to prefer arbitration.⁵⁰

In *Ali Shipping Corporation v Shipyard Trogir*⁵¹ the court restated the same decision and emphasised the principle that the duty of confidentiality is implied in the choice of arbitration as a mode of dispute resolution, and that confidentiality is an important factor

⁴⁷ E. U. Udobong, 'Confidentiality in International Arbitration; How Valid is This Assumption?', University of Dundee publications

⁴⁸ *Dolling – Baker v Merrett*, 1991, 2 All ER 890, 1990, 1 WLR 1205 at 1213, CA (Eng)

⁴⁹ Ibid.

⁵⁰ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, 'Law and Practice of International Commercial Arbitration', Sweet and Maxwell, 3rd edn, 1999, p 29

⁵¹ *Ali Shipping Corporation v Shipyard Trogir*, 1998, 2 All ER 136; 1999 1 WLR 136; 1998, 1 Lloyd's Rep 643, CA, see also *London and Leeds Estates Ltd v Paribas Ltd (No.2)* 1995, 2 EG 134, *Sacor Mritima SA v Repsol Petroleo SA*, 1998 1 Lloyd's Rep 518, *Aquator Shipping Ltd v Kleimar, The Capricorn*, 1998, 2 Lloyd's rep 379

to ‘*the essentially private nature of arbitration*’.⁵² The *Ali Shipping* decision is considered a landmark case; it protects the duty of confidentiality in general, and protects parties to arbitration regarding their privacy. Some still dispute the decision as being too close to judicial activism in the interests of commercial ease.

*‘The Court of Appeal’s decision in Ali Shipping stands in sharp contrast to the general trend of recent English Decisions against technical legalism. It takes the doctrine of arbitral confidentiality far beyond its original purpose which was simply to close proceedings to the public. The decision is, however consistent with the greater emphasis English Judges place on contractual as opposed to judicial aspects of arbitration. Peter LJ acknowledged that the outcome “did not assist in the course of justice”’.*⁵³

In this regard it might be important to point out that this principle of implied confidentiality has been departed from by the court in *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)*⁵⁴ where the court held that the duty of confidentiality is not implied in an agreement to arbitrate. It held that confidentiality is not vitally important or considered to be an essential part of the arbitration agreement, and went on to elaborate that, even if parties agreed on confidentiality clause, this does not mean that such a clause would be absolutely binding; there are exceptions to any confidentiality clause. The decision of *Esso v Plowman* was ‘*unwelcomed*’⁵⁵ and those writers who criticise the court’s decision tend to minimise the importance of confidentiality in arbitration. Redfern and Hunter state:

‘This could be a dangerous road to tread, leading to increased intervention by the courts in the arbitral process. On balance, it is hoped that the case is confined to its particular fact – namely, one in which the relevant Minister sought information to enable him to

⁵² Ibid.

⁵³ See S. R. Shackleton, ‘Global Warming: Milder Still in England’ , part 2, 2 (4), *International Arbitration Law Review* 1999, p 117-126; see also V. Bhatia, C. N. Candlin and R. Sharma, ‘Confidentiality and Integrity in International Commercial Arbitration Practice’, *Arbitration*, 2009

⁵⁴ See *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minister of Energy and Minerals)* 1995, 128 ALR 391, see also *United States v Panhandle Eastern Gen* ,118 FRD 346 (D Del) 1988

⁵⁵ S. Rajoo, ‘Privacy and Confidentiality in Arbitration’, 2003 available at http://sundrarajoo.com/wp-content/uploads/2009/09/privacy_1_.pdf , see also K. Fabian, ‘Confidentiality in International Commercial Arbitration; To Whom Does The Duty of Confidentiality Extend in Arbitration’ Central European University, LLM Thesis, March 2011 available at http://www.etd.ceu.hu/2011/fabian_klaudia.pdf

carry out his duty of supervising public utilities.... even if the parties had expressly agreed that everything that occurred in the arbitration would be confidential, the Minister would have been entitled to the information he sought. For clearly, the parties could not by private agreement displace a duty imposed by statutes'.⁵⁶

2. Party agreement

As discussed above, in *Esso* and *Panhandle Eastern*, the courts held that, in cases where there is no express contract between parties or any confidentiality agreement, then there is no existence of confidentiality between parties, as the contract shows the desire of parties to protect confidentiality. On the other hand, commentators have written that in some cases it is unfair to assume that the absence of a confidentiality agreement means that parties have no intent to protect their confidentiality at all. Some parties have presumed that confidentiality is a 'given' part of the process of arbitration and that there is no need to agree on it separately. Moreover, from a practical perspective, some contractors find it uncomfortable or irrelevant to discuss confidentiality in detail when they are still at the early stages of discussing a deal; *'parties may not want to talk about funerals while negotiating the terms of marriage*'.⁵⁷ As a result, confidentiality agreements are often poorly drafted or left absent in arbitration clauses.

3. International conventions

Regarding arbitration, there are three main International Conventions that are relevant; The New York Convention,⁵⁸ Geneva Convention,⁵⁹ and Panama Convention.⁶⁰ The three conventions concentrate on ensuring the enforcement of the tribunal award as the most

⁵⁶ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, 'Law and Practice of International Commercial Arbitration', Sweet and Maxwell, 3rd edn, 1999, p 29

⁵⁷ See D. Fraser, 'Confidentiality in Arbitration', Paris, Oct 1998, cited in A. C. Brown, 'Presumption Meets Reality: An Exploration of The Confidentiality Obligation in International Commercial Arbitration', Brown Publisher, 2001, available at: <http://www.wcl.american.edu/journal/ilr/16/brown.pdf?rd=1>

⁵⁸ Available at: <http://www.newyorkconvention.org/> which has been ratified by the Kingdom of Bahrain in 1988; see Legislative Decree No. (4) for the Year 1988 with respect to the approval of the Kingdom of Bahrain to accession with reservations to the New York Convention regarding the recognition and enforcement of the foreign arbitration awards 1958. Available at: <http://www.legalaffairs.gov.bh/viewpdf.aspx?ID=L0488>

⁵⁹ Available at: <http://www.international-commercial-arbitration.com/conventions/>

⁶⁰ Available at: <http://www.international-commercial-arbitration.com/conventions/>

important part of arbitration. There is little focus on describing or circumscribing the details of individual proceedings. In terms of determining the significance of confidentiality, therefore, it is not useful to look to these Conventions.

4. National legislation

National legislation in most countries does not specifically codify the duties of confidentiality in arbitration. By reviewing much arbitration legislation, it became evident that there is no codification of the duty of confidentiality except that articulated in the New Zealand arbitration legislation.⁶¹

5. Institutional rules

a. Model Rules

The United Nations Commission on International Trade Law (UNCITRAL)⁶² Rules only protect the ‘hearings’ that are part of the arbitration process, by giving arbitrators the power to exclude certain people from attending a hearing.⁶³ Logically, if the hearing is closed, then the documents which are produced or disclosed at the hearing remain closed also.⁶⁴ At this point, it is very important to emphasise the need for extra protection of confidentiality during arbitration in the UNCITRAL Rules, as many countries use the UNCITRAL model legislation to define their local law.

b. International Institutions Rules

⁶¹ New Zealand Arbitration Act, Art 14, 1996, ‘*the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings*’; see also D. Williams, ‘New Zealand: New Arbitration Act – Adoption of the Model law With Additions’, 1 (6), *International Arbitration Law Review*, 1998, p 214-216; J. Saries and M. Brown, ‘Solving The Arbitral Confidentiality Conundrum in International Arbitration’ in the American Arbitration Association’s annual volume, *ADR & Law*, 18th edn, 2002

⁶² United Nations Commission on International Trade Law

⁶³ See UNCITRAL Rules (revised in 2010), Article (28.4), ‘*Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire*’, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html, the rules of the ICC, ICDR, ICSID, LCIA and the WIPO contain similar provisions

⁶⁴ A. Redfern, M. Hunter and others, ‘*Law and Practice of international Commercial Arbitration*’, Sweet and Maxwell, 4th edn, 2004, p 33

International Chamber of Commerce (ICC)⁶⁵ rules do not provide an adequate protection of the duty to maintain confidentiality, even though they grant the arbitral tribunal the power to ‘*Take measures for protecting trade secrets or confidential information*’.⁶⁶

Comparatively, the London Court of International Arbitration (LCIA)⁶⁷ provides reasonable protection to the duty of confidentiality in arbitration; Article 30.1 provides that parties are responsible for keeping all awards in their arbitration together with all other documents which have been submitted in the proceedings confidential, unless it is otherwise agreed in writing.⁶⁸ The LCIA protection of the duty of confidentiality makes it attractive to those parties for whom confidentiality is important.

The rules related to the protection of the duty of confidentiality in the World Intellectual Property Organization (WIPO)⁶⁹ are broad and detailed. They commence at Article 52 which defines what should be considered confidential information and continue through Articles 73 – 76.⁷⁰

c. National Institution Rules for International Arbitration

The American Arbitration Association (AAA)⁷¹ asserts and regulates the duty of confidentiality in its guidelines. Arbitrators are obliged to provide protection for the duty of confidentiality of the proceedings, and to ensure that no information has been disclosed to third party. This Article is the same as the article in the

⁶⁵ International Chamber of Commerce

⁶⁶ ICC Rules of Arbitration, Art 20.7, available at: <http://www.iccwbo.org/>

⁶⁷ London Court of International Arbitration

⁶⁸ LCIA Rules Art 30, ‘*Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority*’, see also Art 30.2 ‘*The deliberation of the Arbitral tribunal are likewise confidential to its members ...*’

⁶⁹ World Intellectual Property Organization

⁷⁰ See WIPO Arbitration rules Art 52, 73, 74, 75, 76, available at: <http://www.wipo.int/amc/en/arbitration/rules/>

⁷¹ American Arbitration Association (AAA)

Bahrain Chamber of Dispute Resolution (BCDR):⁷² ‘Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award’.⁷³

Confidentiality protection under this Article is not adequate, as the Article only obliges arbitrators to maintain confidentiality of the arbitral proceedings without covering the rights and duties of the parties. In another words, parties, according to this rule, might disclose confidential information of the arbitral proceedings, or use information which disclosed by other party during the proceedings without being obliged to keep it confidential according to the rules.

2.2.2 The umbrella of confidentiality

It is not clear enough which elements of arbitration fall under the umbrella of confidentiality. Moreover, where there are rules, these are different from one jurisdiction to another. Elements that might be considered in relation to confidentiality requirements begin with the fact of arbitration itself and pass through the documents that are produced, witness and expert witness testimony, trade secrets that might come under discussion, minutes and hearings and all of the movements of the arbitration until the final award. Each element will be examined separately below.

1. Facts of arbitration

Some writers suggest it might be necessary to keep the mere fact of the existence of arbitration confidential.⁷⁴ The reasoning is that the majority of contractors seeking to

⁷² See the Legislative Decree No. (30) for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution, available at: <http://www.bcdr-aaa.org/BCDRDecree.asp>

⁷³ See Art 34 of the AAA Arbitration Rules available at: <http://www.adr.org/> and Art 34 of the BCDR Arbitration rules Available at <http://www.bcdr-aaa.org/>

⁷⁴ F. Dessemontet, ‘Arbitration and Confidentiality’, American Review of International Arbitration, 1996, Vol. 7, No 3 -4, p 299 - 307

arbitrate a dispute might wish to keep the dispute private in order to protect their reputation or their interests with either individuals or corporate bodies. If the fact that an arbitration is in process becomes public, or if later the award is published, it is easy for people to deduce the parties involved even when names have been removed before publishing the award. At the date of writing this thesis, courts had not yet articulated a general rule.

2. Documents produced in arbitration proceedings

Based on the leading case in this field, *Ali Shipping*,⁷⁵ all the documents and evidence disclosed during the arbitration proceedings are protected by the duty of confidentiality. This protection extends to all the documents provided in the arbitration proceedings in any form, either soft or hard copy, in addition to all the information contained in them. It might be useful to add that the duty of confidentiality is binding to all involved in the arbitration proceedings, such as lawyers, arbitrators, witnesses and the parties.⁷⁶

3. Fact witness testimony

It is interesting to note that fact witness testimony is not protected by the duty of confidentiality. For example if a witness testifies in a case, parties to that case cannot legally bind this witness from disclosing any information regarding the arbitral proceedings.⁷⁷ Moreover if the witness, as a fact witness, was asked to testify in a future arbitration or in judicial proceedings and he gives different information, then his contradictory testimony from the first proceeding could be disclosed in the subsequent proceedings.⁷⁸

4. Expert witness testimony

⁷⁵ See *Ali Shipping Corporation v 'Shipyards Trogir'*, 1998, 1 Lloyd's Rep. 643

⁷⁶ See *Ali Shipping Corporation v 'Shipyards Trogir'*, 1998, 1 Lloyd's Rep. 643; see also M. Collins, 'Privacy and Confidentiality in Arbitration Proceedings', *International Law Jurisdiction*, 1995, p 121

⁷⁷ Unless there is a contractual obligation which prevents the fact witness from disclosing information, i.e., the fact witness is an employee of one of the parties.

⁷⁸ See F. Dessemontet, 'Arbitration and Confidentiality', *The American Review of International Arbitration*, 1996, Vol. 7, No 3- 4, p 299 - 318

Legally, expert witnesses are not bound by the duty of confidentiality.⁷⁹ From a legal point of view, contractual obligations bind only the parties who signed the contract. Therefore, third party C is not bound by a contract between A and B. In order to protect information and prevent an expert witness from disclosing the arbitration proceedings, the parties should request that the expert sign a confidentiality agreement. Thus, although the arbitration agreement cannot bind the experts, a supplementary agreement between the expert and one of the parties may provide protection to the confidentiality.

5. Trade secrets revealed during the proceedings

For those in the commercial and industrial sector, protecting trade secrets is at the top of any priority list when going in to dispute resolution. Trade secrets are necessary to protect the position of the company in the market and to compete with other companies. Therefore, it is important to these parties that trade secrets should be confidential when they are revealed in the course of arbitration proceedings.⁸⁰ In addition to the protection provided explicitly in an arbitration agreement, there are other areas of law that protect the confidentiality of trade secrets. Patent and copyright conventions, national criminal rules and the national civil procedures all provide separate regulation of trade secret confidentiality.⁸¹

6. Transcripts and minutes of the hearing

Transcripts and minutes are expressly protected by the duty of confidentiality.⁸² The protection of the hearings will be meaningless if the public are allowed to read the arbitration proceeding transcripts.

7. Final award

⁷⁹ Ibid.

⁸⁰ See L. F. Wyss, 'How to Protect Business Secrets in International Commercial Arbitration', *International Arbitration Law Review*, 2009

⁸¹ Ibid.

⁸² See *Ali Shipping Corporation v 'Shipyard Trogir'*, 1998, 1 Lloyd's Rep. 643

Legally, a final award should not be disclosed and published without the consent of the parties.⁸³ The majority of institutional rules emphasise that the publication of the award without the consent of the parties is prohibited. In reality, the award is usually disclosed to the public after removing all the identifying features in order to protect the interest of the parties. However, as we discussed above, if the fact of arbitration proceedings between certain parties is publicly known, and an anonymous detail of award is later published, it becomes easy to guess at the identity of those parties. BCDR provides that:

*'Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.'*⁸⁴

However, there is a sense among arbitrators that publishing the final award might be useful and important in advancing the field.⁸⁵ There is a growing trend to publish the final awards. It allows interested readers to understand the logic and ruling process which were applied to the proceedings to achieve a fair outcome.⁸⁶

2.2.3 Exceptions to confidentiality in arbitration

The duty of confidentiality in arbitration proceedings is not absolute. There are a number of exceptions which might apply. Firstly, the parties may consent to non-confidentiality.⁸⁷ Parties are allowed by law to set the entire arbitration environment including location, language, whether lawyers are involved and under which applicable laws they wish to have the ruling made. Therefore, they can set an arbitration clause that defines how far they wish to keep data confidential. On the other hand, parties may agree on the disclosure

⁸³ See F. Dessemontet, 'Arbitration and Confidentiality', *The American Review of International Arbitration*, 1996, Vol. 7, No 3- 4, p 299 - 318

⁸⁴ Bahrain Chamber for Dispute Resolution Article 27.8

⁸⁵ See V. Bhatia, C. N. Candlin and R. Sharma, 'Confidentiality and Integrity in International Commercial Arbitration Practice', *Arbitration*, 2009

⁸⁶ See S.I. Strong, 'International Commercial Arbitration', *The American Review of International Arbitration*, Vol 20 No. 2 2009 available at <http://www.cisg.law.pace.edu/cisg/moot/Strong.pdf>

⁸⁷ See S. Crookenden, 'Who Should Decide Arbitration Confidentiality Issues?', *Journal of The London Court of International Arbitration*, Vol. 25, No. 4, 2009

of particular information or documents produced in the arbitration proceedings, either expressly or implicitly.

Secondly, in certain circumstances, disclosure might be compelled by law.⁸⁸ This second exception to confidentiality is made when a court issues an order to the parties to provide information, if the case is brought by a third party against the contractors or vice versa.

Thirdly, an exception is made to confidentiality where the disclosure of particular information is necessary to protect the legitimate interest of an arbitrating party.⁸⁹ This might be the case when admissible material is deployed before a court of proceeding concerning the arbitration.

In light of the vague coverage by legislation regarding the duty of confidentiality in arbitration in most jurisdictions, it is advisable for parties to negotiate a strong confidentiality clause into their original contract or into their arbitration agreement. By doing so, parties will secure their right to keep information disclosed in the arbitration proceeding confidential: *'with respect to confidentiality in international Commercial Arbitration, nothing should be taken for granted'*.⁹⁰

2.3 Government Confidentiality

The requirement of confidentiality in regards to certain government issues is one of the most well-known forms of confidentiality. Modern international relations require modern countries to keep certain issues out of the public eye by keeping materials confidential.⁹¹ Throughout history, the practice of confidentiality within and between international governments has fluctuated in times of war and peace, and has been contingent on the strength of individual diplomatic relationships between nation states. What is treated as

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See A. Tweedale and K. Tweedale, 'Arbitration of Commercial Disputes: International and English Law and Practice', Oxford University Press, 2005, p 355-356. Some writers suggest that the preferable solution to solve the lack of clarity in the confidentiality situation in international arbitration is achieving a uniform rule through an international conference; see J. Saries and M. Brown, 'Solving the Arbitral Confidentiality Conundrum in International Arbitration', The American Arbitration Association's Annual Volume ADR & the Law, 18th edn, 2002

⁹¹ Administrators and Executives prefer to call it confidentiality; on the other hand, the public and journalist prefer to call it secrecy.

confidential, and how it is protected has shifted with the shifting of borders and national sovereignties, as well as models of government over time.

What is understood by the term ‘confidentiality’ when it is applied to government practice is that most governments require the hiding or censorship of particular types of information from the public. Although most governments make a claim of transparent dealings and allow varying degrees of public access to parliament and legislative records, in order to function effectively, all governments also retain the right, particularly in cases of military applications, to label information as secret or confidential and to protect it so the general public are not allowed access to it. The quality, type and quantity of the information that will be defined as confidential may vary from one country to another, and what might be treated as confidential material at a certain time, may not be so treated in another. Moreover, often confidentiality laws have an expiry date; in the interests of the public’s access to information, the classification of documents as sensitive expires over a period of time, and they become part of the public record when their sensitive nature has ‘worn off’; *‘Government secrecy in democracies is a result of a deliberate act on the part of those who govern to keep the governed from knowing something at a given point in time’*.⁹²

Authoritarian governments tend to retain more discretion over what material they treat as confidential. Administrators or executors granted the power can decide that certain information is confidential, and prevent the public from access, relying on an informal code of conduct. Countries with less unilateral power structures control the flow of information in more democratic and legal way by enacting laws, and classifying in public and accountable ways which types of information are considered confidential.⁹³

2.3.1 What is government confidentiality?

Government confidentiality that is regulated by legislation tends to be defined as applying to certain categories of information. Government confidentiality laws divide sensitive

⁹² F. Carl, ‘Government propaganda is by and large identical to government secrecy; the pathology of politics’, New York: Harper & Row, 1972, p 175 - 209

⁹³ For example; the Official Secrets Act 1911 was passed when the UK was under military threat from Germany during the Agadir Crisis.

material into categories of national security secrets, military secrets, material affecting diplomatic and international relations that must be kept secret, and nuclear secrecy. The disclosure of any information touching these matters, or attempting to access documents defined as confidential can be considered a criminal offence.⁹⁴

2.3.2 Who decides what information constitutes governmental confidentiality?

This is very crucial question; who has the power to decide what is to be considered confidential and what is not? In all countries, government officers carry the responsibility of deciding what is confidential or secret, but the essential question is, whether everything that is given the label ‘confidential’ by a government label ought truly to be defined so. Liberal opinion often asserts that certain issues the general public should know about are concealed by governments in their own political interests alone, without the justification of some greater national interest.

2.3.3 Governmental justification of secrecy

No matter how it is defined, confidentiality consists in a body in power retaining secrets from its citizens. The main reasons given by governments usually consist of justifying the confidentiality, firstly, as an attempt to protect the citizen, secondly to protect the democratic institutions and, thirdly, to protect the nation’s participation in or position with the community of nations.⁹⁵ One essential reason cited by governments for keeping some information secret is to protect national integrity and sovereignty from enemies.⁹⁶ However, another opinion would be that governments keep secrets for the purpose of protecting specific, and less ethically sound, hidden agendas.⁹⁷

‘Just as individuals require privacy, states require a degree of secrecy in order to function: the question facing the democratic states is where to draw the line between what

⁹⁴ Atomic Energy Act 1946

⁹⁵ See R. T. Reagan, ‘Keeping government secrets: A pocket guide for judges on the state secrets privilege, the classified information procedures act and court security officers’, Federal Judicial Centre, 2007 available at: [www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/\\$file/secrets1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/secrets1.pdf/$file/secrets1.pdf)

⁹⁶ Ibid

⁹⁷ Ibid

information should be kept secret in order to safeguard security and what information should be made freely available to the demos'.⁹⁸

Maintaining levels of confidentiality is very important for international surveillance and intelligence, as intelligence agents can be treated as spies if they are captured, and diplomacy requires secrecy while negotiating nations bargain with the knowledge that is their power. Less ethically, some governments maintain confidentiality over illegitimate incidents or conceal knowledge in international relations to avoid criticism and to control public opinion. In such incidents, stringent confidentiality is coupled with powerful propaganda or misinformation, as in the case of North Korea.⁹⁹ Even in more democratic governments, national security requires certain level of confidentiality.¹⁰⁰ Although it is couched passively as being necessary in order to protect the public from harm, confidentiality has also proved essential to the successful development, implementation and completion of military actions, diplomatic plans and intelligence missions. Broad secrecy that covers technological advances can also be related to the protecting of key export or military technologies.

Confidentiality also is essential to the effective conduct of developing diplomatic negotiations; the secret diplomacy that preceded President Nixon's trip to China in 1972 was essential to the specific outcome of those ongoing negotiations.¹⁰¹

National security is one of the state's most potent justifications for harsh laws governing confidentiality. To threaten national security is to undermine the sovereignty over territory that governments maintain. To be branded a 'traitor' is the most serious crime an individual can commit; in the UK it still carries the death penalty. The problem faced in the forum of public opinion and international law is that the calculations of national

⁹⁸ See A. Rogers, 'Security and Power in the British State; a History of the Official Secrets Act', Pluto Press, London, 1997, p 1

⁹⁹ A. Westin, 'Privacy and Freedom', New York, Atheneum, 1967, page 7

¹⁰⁰ Some British researchers used to gain information about the UK from the United States; for example Charles Medawar, the Director of Social Audit, reveals that he was able to get information about British companies from Washington. See J. Michael, 'The Politics of Secrecy', Penguin Books, 1982, p 9. However, much more information (quality and quantity) has been classified as confidential in the United States, since the September 11th attacks.

¹⁰¹ J. Michael, 'The Politics of Secrecy', Penguin Books, 1982, p 9

security are always subjectively political. No overarching ‘objective’ or legal definition of national security exists.¹⁰²

2.3.4 Minimal censorship is better

The UK has one of the most extensive systems for controlling the flow of official information to the public of any western democracy.¹⁰³ For the last century, it has been a criminal offence to reveal official information without authority. Over 100 statutes prohibit disclosure of information of all kinds.¹⁰⁴ A powerful and persistent culture of secrecy reflects a basic assumption that good government is a self-contained and closed government. This can be seen as a paternalistic attitude to the public on the part of the government; suggesting that the public should only be allowed to know what the government determines they should know.¹⁰⁵

The majority of publications in this field have criticised governments for the rapid expansion of categories of information which have been classified as confidential and through which the public has been prevented from knowing the details of events that might otherwise be seen as important, particularly where it pertains to human rights. The state secret defence has been raised more frequently these years especially after the attacks of September 11th 2001 that began the ‘War on Terror’; government initiatives aimed at preventing similar terrorist attacks in a response to the fear that these were part of a concerted attempt on the part of radical Islamic activists to destroy democratic society. The state secret defence has been raised more frequently in recent years, particularly after the 9/11 attacks: *‘Every government has an interest in concealment; every public in greater access to information.’*¹⁰⁶

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ In the late nineteenth century, the number of newspapers and readers grew. This created demand for more information, and the problem of how to keep information away from the general public and the press began to preoccupy Whitehall. The response of ministers and civil servants was to create a strong statutory framework that would enforce secrecy and replace the previously accepted common code of conduct among the elite. See C. Ponting, ‘Secrecy in Britain’, Basil Blackwell, 1990 p 2

¹⁰⁶ S. Bok, ‘Secrets: on the Ethics of Concealment and Revelation’, 1982, pp 48 - 56

Professor Goldfarb states in his objection to this trend that, '*Government records are the public's records. If the public cannot scrutinize government policies by checking government records, democratic society is endangered.*'¹⁰⁷ In the Franks Committee report, the trend towards indiscriminate government confidentiality laws is a disturbing one: '*The leading characteristic is its catch-all quality. It catches all official documents and information. It makes no distinction of kind, and no distinction of degree. All information which a Crown servant learns in the course of his duty is "official" for the purpose of section two, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything: nothing escapes.*'¹⁰⁸ The fear is that governments will use information selectively, releasing only that information which is to their credit or underlines the credibility of their openness, and that this reduces the requirement of accountability to a meaningless incantation.¹⁰⁹

2.4 Business Confidentiality

Historically, protecting trade confidential information is the key factor for improving and protecting trade in general. Thus, the best way to protect any new information, which has measurable value in the business, is that this information should be strictly confidential. The formula for Coca-Cola is a typical example of a well-kept trade secret. Coca-Cola terminated its investments in India in 1977, when the Indian government required the company to reveal the secret formula of Coca-Cola under Indian law.¹¹⁰ The company failed to persuade the Indian government that the secret formula should be considered technology under Indian law. Because of the importance of protecting trade secrets in

¹⁰⁷ R. Goldfarb, 'In Confidence; When to Protect Secrecy and When to Require Disclosure', Yale University Press, New Haven & London, 2009, p 57

¹⁰⁸ Franks Committee Report, Comnd 5104, Para. 17, 1972

¹⁰⁹ Robertson. K. G, ' Public Secrets; A study in the development of government secrecy', The Macmillan Press, 1st edn, 1982, p 11

¹¹⁰ In 2006, BBC News published that three people had been arrested because of stealing the Coca-Cola secret formula, and they were trying to sell it to the main competitor company, PepsiCo. In this regard Neville Isdell the chief executive of Coca Cola wrote a memo to the employees saying that '*Information is the lifeblood of the company*', available at: <http://news.bbc.co.uk/1/hi/5152740.stm>; see also I. Eagles and L. Longdon, 'Microsoft's Refusal to Disclose Software Interoperability Information and the Court of First Instance', European Intellectual Property Review, 2008

international trade, this topic was heavily negotiated between countries and organisations, until the codification of the Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹¹¹

2.4.1 Trade secrets definition

Internationally, there is no single comprehensive definition of trade secrets. However, most countries' legislation defines trade secrets in a similar way.¹¹² Trade secrets can be defined as any information, ideas, sketches or characters that are important for the company to function or are essential to business growth. Trade secrets may also include any type of commercial knowledge or experience, company sensitive statistics, contracts, contractors, strategy and technology used in manufacturing. In *Saltman Engineering v Campbell Co* Lord Greene described confidential information as, '*something was not public property and public knowledge*'.¹¹³

Most trade secrets regulation sets criteria for certain information to be considered as trade secrets and therefore eligible to be protected against disclosure. Firstly, information must be confidential, where such information is not accessible or open to the public. Secondly,

¹¹¹ See TRIPS Article (39) '1- In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3. 2- Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, (b) has commercial value because it is secret; and, (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. 3 - Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use'. Available at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

¹¹² See US Uniform Trade Secret Act 1985, 1.4, which defines trade secrets as '*information, including a formula, pattern, compilation, program, device, method, techniques, or process ...*'

¹¹³ See *Saltman Engineering v Campbell Co* 1948 65 RPC 203. However, this description was criticised by writers who found it '*very vague*' and '*imposes only a very low threshold of confidentiality*'; see A. Coleman, 'The Legal Protection of Trade Secrets', Sweet and Maxwell, 1992, p 5

the information must have a commercial value. Thirdly, the information holder must take reasonable measures to maintain its confidentiality.¹¹⁴

1. Confidentiality

Trade secrets must have special characteristics in order to be separated from other information which is considered public information. For the information to be considered a trade secret, it must be unknown to the public,¹¹⁵ and it must be difficult for business competitors to gain the information.¹¹⁶ As in the case of Coca-Cola, the information might be a product formula. This formula is treated as a trade secret because it is not accessible to the public, and it is protected against business competitors within the soft-drink market. It is important to note that certain information remains confidential even if it becomes known by an individual, or if it is held by multiple sources. Such information remains confidential, even if more than one person or company claims to be the rights holder of the same trade secrets, as long as each of them as obtained or invented it independently.¹¹⁷

2. Commercial value

Information must have commercial value for the holder to be eligible to claim confidentiality. Mostly, traders will not aim to protect certain information and so to protect their own business unless this information has significant commercial value. Information such as computer programs may be protected against misuse from the public where the core business is growing by hiding this type of information from the public.¹¹⁸

3. Reasonable measures

¹¹⁴ See the Bahraini Trade Secrets Law, Article (1): '*Any natural or legal person is prohibited from disclosing information in his possession if such an information contains the features hereunder: (a) if the information is confidential, confidentiality is thereto fulfilled if the information in its final form or its specifics are unknown nor circulated and not accessible for those who usually deals with such type of information, (b) if it was of a commercial value due to its confidentiality, (c) if its confidentiality was dependable on the effective measures undertaken by its legal holders to preserve it....*'.

¹¹⁵ See L. Bently and B. Sherman, 'Intellectual Property Law', Oxford University Press, 2nd edn, p 999 – 1012; see also T. Aplin, 'Commercial Confidence After the Human Rights Act', European Intellectual Property Review, 2007

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

Trade secret holders should undertake reasonable measures to assert a desire to maintain confidentiality for this information. Reasonable measures mean all the precautions taken by company or individual to protect information against disclosure. Such measures indicate that the information holder seeks to hide the information from the public. It is essential for companies to decide what information is confidential, and what is not, in order to protect it.¹¹⁹ Some companies use a high level security to protect trade secrets.¹²⁰ However, a high level of security is not required for certain information to be considered a trade secret. Taking reasonable measures is considered enough. A company might indicate their desire to protect information through such means as:

- Placing documents or information in safe places.¹²¹
- Identifying persons who are allowed to access to these documents or information.¹²²
- Documents or information should be sealed and marked as confidential.¹²³
- Preventing others from filming or copying the information.¹²⁴
Signing non-disclosure agreements between the information holder and the employee.¹²⁵
- Signing an agreement between the information holder and the employee preventing employees from working in any other competitor company for a certain period.¹²⁶

2.5 Medical Confidentiality

Historically, the relationship between doctors and their patients has been considered one of the most sacred duties of trust throughout the ages. Patients consult their doctors as the ultimate authority on their well-being, and ask for advice regarding complex and intimate

¹¹⁹ See *P.A. Thomas v Mould* 1968 QB 913; see also *Ocular Sciences v Aspect Vision* 1997 RPC 289; *CMI-Centers for Medical Innovation v Phtopharm* 1999 FSR 235, and *Suhner v Transradio* 1967 RPC 329 where the court refused to grant confidentiality on the bases that it was very difficult to know precisely what is the confidential information.

¹²⁰ See R. L. Parr and G. V. Smith, 'Intellectual Property: Valuation, Exploitation and Infringement Damages', John Wiley & Sons, 2010, p 14

¹²¹ See T. Aplin, 'Commercial Confidences after the Human Rights Act', *European Intellectual Property Review*, 2007

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

issues. They respect the doctor's opinion and expect the care of their doctor in most things related to health and lifestyle. It is the Greeks who expressed the fundamental principle of morality that requires the doctor to maintain a duty of confidentiality towards patients: *'Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret'*.¹²⁷

This principle was first codified for the profession in the declaration of Geneva.¹²⁸ By this code, doctors are obliged to *'Respect the secrets which are confided ... even after the patient has died'*.¹²⁹ In the special relationship between doctors and their patients, patients must feel comfortable discussing and disclosing private information to the doctor on the basis of trust that the doctor will not allow the information disclosed between them to become public.

Trust is the cornerstone in the relationship between doctor and patient, as the majority of patients prefer to seek medical advice, recommendations, diagnoses, and physical and mental treatments from competent doctors. The competency that is sought includes the ability of the doctor in question to keep secrets.¹³⁰ Thus, in the absence of competency, where doctors are unable to keep secrets, patients are unwilling to seek advice, and are less frank with their doctors, which can make diagnosis and treatment difficult. If patient confidentiality is breached, it not only endangers an individual relationship of trust, it affects general trust in the profession and subsequently the health of the people.¹³¹

¹²⁷ This is The Hippocratic Oath. However, the first book which articulated medical ethics was 'The Conduct of a Physician' by the Muslim scholar Ishaq bin Ali Rahawi. See also the historical references of the famous scholar Zakariya Al – Razi

¹²⁸ Declaration of Geneva 1948, amended at Sydney 1968, 1983, 2006, available at: <http://www.cirp.org/library/ethics/geneva/>; see also the European Convention of Human Rights 1998 Article 8

¹²⁹ Declaration of Geneva 1948, amended at Sydney 1968, 1983, 2006

¹³⁰ B. Greene, 'Understanding Medical Law', Cavendish Publishing, 2005 p 89 - 93

¹³¹ See R. Gillon, 'Philosophical Medical Ethics', Chichester, John Wiley, p 108, cited in M. Stauch, K. Wheat and J. Tingle, 'Medical Law', Cavendish Publishing Limited, 2nd edn, p 235: *'Why should doctors from the time of Hippocrates to the present have promised to keep their patients' secrets? The commonest justification for the duty of medical confidentiality is undoubtedly consequentialist: people's better health, welfare, the general good, and overall happiness and more likely to be attained if doctors undertake not to disclose their patient's secrets. Conversely, if patients did not believe that doctors would keep their secrets then either they would not divulge embarrassing but potentially medically important information, thus*

Doctors' responsibility to maintain confidentiality covers all types of information, no matter how silly or serious, whatever the information was that the patient disclosed.¹³² This can include age, health care history, health conditions and problems, marital status,¹³³ test results and X-ray, MRI and CT scan results,¹³⁴ and any physical examination that the doctor engages in or prescribes. Information related to sexual conduct is also privileged,¹³⁵ even though it is not medical information.¹³⁶ All oral or written information comes under the umbrella of medical confidentiality, either for past or present health problems or even if the information has nothing to do with the health of the patient.¹³⁷

At first glance it might appear that the duty to maintain medical confidentiality is straightforward and as simple as doctors or health care professions are obliged to maintain duty of confidentiality for their patients, as whenever patient goes to a hospital to seek treatment, he is eligible to be treated equally no matter whether the patient is an ordinary citizen or a criminal.¹³⁸

Nowadays, the health service has become more complex, where a patient might utilise the services of a large number of different health care professionals to provide a holistic and complete health service. On the one hand, the obligation not to disclose confidential material is still enshrined in many laws. Article 26 of the Bahraini Law Decree No. (7) of 1989 concerns the practice of medical profession and dentistry, which provides that doctors and dentists are not allowed to disclose any information that is revealed to them through the course of their medical careers.¹³⁹ Article 15 of the Bahraini Law Decree No. (2) of 1987, concerns the practice of non-doctors or pharmacists as paramedics, stating that, '*any person licensed to practice one of the auxiliary medical professions that do not*

reducing their chances of getting the best medical care, or they would disclose such information and feel anxious and unhappy at the prospect of their secrets being made known'

¹³² See L. K. Mason and G. T. Laurie, 'Mason & McCall Smith's: Law and Medical Ethics', Oxford University Press, 7th edn, p 253 - 257

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ See *Stephens v Avery* 1988 2 All ER 477

¹³⁶ See *R v Wilson* 1996 3 WLR 125

¹³⁷ See L. K. Mason and G. T. Laurie, 'Mason & McCall Smith's: Law and Medical Ethics', Oxford University Press, 7th edn, p 253 - 257

¹³⁸ *Ashworth Security Hospital v MGN Ltd*, 2000 1 WLR 515, 527

¹³⁹ See the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry Article 26

disclose any secrets comes to his knowledge through his career¹⁴⁰ On the other hand, access to medical information is still available to many other workers in the health field; files are passed between doctors and are kept on databases to which many people have access. The probability of disclosure or incidental breach is very high; there are at least 101,272 non-medical staff working in National Health Service Trusts in the UK who have access to confidential medical records. On average, 723 staff in each Trust, who are not involved in patient care, have access to medical records.¹⁴¹ This access is necessary for the smooth running of complex hospital systems and is extremely helpful to patients with multiple specialist doctors. However, it has grave implications for the effective promise made by doctors that they will protect patient confidentiality.

2.5.1 Importance of medical confidentiality

1. Respect for patient dignity

Respecting patient dignity means respecting the humanity of the vulnerable party. Where a patient for any reason needs to see a doctor to discuss health problems, the patient must feel that his dignity has not been compromised. No one who does not have the patient's first interests at heart will have access to his revelations of illness or vulnerability.¹⁴² No one would benefit from this information, and no one accordingly will be able to humiliate

¹⁴⁰ See Article 15 of the Bahraini Law Decree (2) of 1987 concerning the practice of non-doctors or pharmacist as paramedics, this includes, *'Nursing, Midwifery and Obstetrics, Laboratory Workers, Radiology Technicians, Physiotherapy, Dental, Optics, Audiologist and Speech, ECG, Nutrition, Respiratory, Nuclear Medicine, Artificial Limbs and Health Inspection'*; see also Article 9 of the related Ministerial Resolution No. (1) of 1991 organising the practicing of nursing profession; *'each one granted the license to practice nursing profession should commit to the duties of his profession in honesty, integrity and confidentiality and may not be incompatible with the work of the profession'*

¹⁴¹ Big Brother Watch concluded that, *'According to the responses that were received, some Trusts found it difficult to quantify exactly how many people have access at any one time because the figure fluctuates constantly depending on staff turnover access to the computer network and security clearance. This problem will be more keenly felt at larger Trusts. Access changes often and there is only a certain group of staff that have access to patient data as part of their role, whereas the rest – while not formally required to access patient data – are often able to do so as they have access to the Trust's computer network. at present, there is no clear framework for tracking and auditing the access to medical records by non-medical personnel in Britain'*; see *'Broken records: the worrying lack of security around your medical history, and how it could be changing for the worst'*, Big Brother Watch UK, March 2010, available at: <http://www.bigbrotherwatch.org.uk/brokenrecords.pdf>; see also A. A. Sheikh, *'Confidentiality and Privacy of Patient Information and Records: a Need for Vigilance in Accessing, Storing and Discussing Patient Information'*, *Medico – Legal Journal of Ireland*, 2010; and D. K. Sokal and J. Car, *'Patient Confidentiality and Telephone Consultations: Time for a Password'*, *Med – Ethics*, 2008

¹⁴² I. E. Thompson, *'The Nature of Confidentiality'*, *Journal of Medical Ethics*, 1979, Vol. 75, p 57 - 64

the patient.¹⁴³ Respecting patient dignity encourages patients to speak freely and to be open with their doctors, which is fundamentally necessary in the quest to provide better health care services.

2. Protect the doctor–patient trust

Building trust requires a great deal of patience and consistent proof of integrity. It may be lost entirely in a single miscalculation. Building and maintaining trust between doctors and their patients is among the top priorities of health professionals.¹⁴⁴ When the duty of confidentiality is guaranteed between doctors and patients, an environment of trust emerges in which patients can speak fearlessly and the doctor can do his work unhindered by shyness or lies. A patient must be confident in the professional ability of the doctor, as well as his professionalism. Trust is also more likely to lead patients to follow a doctor's instructions, which may result in a more effective treatment, swifter recovery, or better overall health.¹⁴⁵

3. Protect the medical profession

It is obvious that one of the most important outcomes of secure disclosure is the expectation that building strong relationships between doctors and their patients will encourage patients to visit their doctor more often. Free and frank speech from patients helps doctors to diagnose the health problems easily, as well as to build a picture of incidental factors that may affect other patients, or lead to a fuller understanding of particular ailments. When approached with full disclosure, doctors have the material available to link many factors to build full and clear knowledge. Sharing information among doctors in a way that does not breach individual patient confidentiality helps to improve individual health service and can contribute to medical research in a way that benefits the profession as a whole.

¹⁴³ See T. Hope, J. Savulescu and J Hendrick, 'Medical Ethics and Law: the Core Curriculum', Churchill Livingstone Elsevier, 2nd edn, 2008, p 95 - 97

¹⁴⁴ See S. D. Pattinson, 'Medical Law and Ethics', Sweet and Maxwell, 2006, p 174 - 177

¹⁴⁵ Ibid.

2.5.2 Exceptions to the medical confidentiality

1. Patient consent

Express consent to waive confidentiality is the most straightforward type of patient consent; this consent is effective if communicated clearly by any means, including written or oral consent as well as body language such as nodding the head.¹⁴⁶ Consent must be freely given, without coercion, and the patient must be mentally capable of providing consent and understand exactly what that consent implies.¹⁴⁷ Moreover, a patient has the right to know who will have access to his information. Regarding this last point, some writers argue that patients are not always providing fully informed or fully free consent.¹⁴⁸ Practically speaking, patients may give express consent to waive confidentiality under the pressure, or perhaps when a consultant asks permission to allow student doctors to be present; surely this will affect doctor patient confidentiality.¹⁴⁹

The second variety of consent to breach of doctor patient confidentiality is implied consent.¹⁵⁰ For example, in cases where a patient with broken leg needs the radiologist to examine his leg via an X-ray scan, the presence of the patient at the testing equipment is considered as an implied consent to the disclosure of his medical condition.¹⁵¹ Another situation where consent is implied is when a woman asks the doctor for her ultrasound or pregnancy test result while her partner is sitting beside her. Asking the question in the presence of another implies consent that all those present other will hear the confidential answer. In all such cases of implied consent, the patient should know to whom his information will be disclosed.¹⁵²

¹⁴⁶ See J. McHale and M. Fox, 'Health Care Law', Sweet and Maxwell, 2nd edn, p 596 – 597

¹⁴⁷ Ibid.

¹⁴⁸ See J. K. Mason and G. T. Laurie, 'Law & Medical Ethics', Butterworths, 6th edn, 2002, p 243

¹⁴⁹ Ibid.

¹⁵⁰ B. Greene, 'Understanding Medical Law', Cavendish Publishing, 2005, p 93; it is arguable whether disclosure for management purposes, where all doctors are required to submit information for medical auditing, is considered as implied consent or classified to be disclosing for the public interest as well, discussed later, see J. McHale and M. Fox, 'Health Care Law', Sweet and Maxwell, 2nd edn, p 597

¹⁵¹ B. Greene, 'Understanding Medical Law', Cavendish Publishing, 2005, p 93

¹⁵² Ibid.

In this regard it is interesting to say that the Bahraini Law explicitly considers only written consent as sufficient to authorise a doctor to disclose patient information. This would exclude oral and body language acceptance. Article 26 of the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry, states that, '*no doctor is allowed to disclose any information that comes to his knowledge because of his career except by court permission, or by patient written consent for disclosure, or where disclosure to close relative - husband, wife, father, competent children - is necessary either because of the seriousness of the patient health situation or for any other reason the doctor finds enough to justify such disclosure ...*'¹⁵³

For the above Article it seems that the legislator has emphasised the need for written consent to authorise disclosure. However, Siegler argues that oral consent and physical signs should be considered especially in emergency cases where there is no time or it is impractical to insist on patient written consent.¹⁵⁴

2. Disclosure to prevent crime

Disclosure to prevent crime is considered as the public interest exception to confidentiality duties. Where doctors are disclosing their patient information in such instances, they are justifying the breach of confidentiality by suggesting that it will prevent a crime in an immediate way. Thus, the Bahraini Law in Article 26 states that, '*... also the doctor has the right to disclose information in order to prevent crime and such disclosure is limited to the official authority...*'¹⁵⁵ English common law has considered the relevance of protecting the public and preventing crime as an exception to confidentiality in the case of *W v Edgell* in 1990.¹⁵⁶

¹⁵³ See the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry, Article 26

¹⁵⁴ See M. Siegler, 'Medical Confidentiality : A Decrepit Concept', *New England Journal of Medicine*, 1982

¹⁵⁵ See the Bahraini Law Decree No (7) of 1989 concerning the practice of medical profession and dentistry, Article 26

¹⁵⁶ See GMC 2004, Para. 22; See *W v Edgell* 1990 1 All ER; see also *Initial Services Ltd v Putterill* 1968 1 QB 396; *Malone v Commissioner of Police of the Metropolis (No.2)* 1979 2 All ER 620; *R v Crozier* 1990 8 BMLR

W v Edgell is the leading case on patient confidentiality where the public interest is in conflict with the doctor's duty to his patient. The court balanced the public interest in maintaining a duty of confidentiality against the public interest in allowing restricted disclosure in certain cases. It concluded that confidentiality may be breached in a limited way where it is in the public interest to do so. Firstly, disclosure must be limited to those whom it is necessary to tell to protect the public. Secondly, the risk of harm must be a real risk of physical harm.¹⁵⁷ Examples of such serious crimes that might require disclosure are murder, manslaughter, rape, treason, kidnapping and child abuse. For example, if a patient were to tell a doctor that his children were being abused by his partner, then the doctor should breach the duty of confidentiality. On the other hand, where the adult patient is the victim being abused by his partner then it is arguable whether the doctor can disclose information unless it is for the purpose of protecting the patient from immediate physical harm.¹⁵⁸

3. Disclosure to prevent civil wrongs

Article 26 of the Bahraini Law Decree No. (7) of 1989,¹⁵⁹ states that disclosure is permitted only to prevent a crime, therefore preventing a civil wrong is not a sound enough basis upon which to justify disclosure of medical confidentiality. Although it has been argued that preventing the commission of a proposed civil wrong may excuse disclosure, when the court is balancing the two important principles of disclosure for the public interest and the public interest in maintaining the duty of confidentiality, the duty of

128. In all the above cases the level of the danger of the crime is varied, therefore it is arguable whether the doctor should consider how harmful the crime is in order to disclose.

¹⁵⁷ See K. Liddell, 'Personal data for public good: using health information in medical research', reported by the Academy of Medical Sciences, 2006; see also M. Brazier and E. Cave, 'Medicine, Patients and the Law', Penguin Books, 4th edn, p 80.

¹⁵⁸ In this regard, the GMC advised the doctors that '*If you believe a patient to be a victim of neglect or physical, sexual or emotional abuse and that the patient cannot give or withhold consent to disclosure, you must give information promptly to an appropriate responsible person or statutory agency, where you believe that the disclosure of information is not in the best interests of an abused or neglected patient, you should discuss the issue with an experienced colleague. If you decide not to disclose information, you must be prepared to justify your decision*' GMC, 2004, Para. 29

¹⁵⁹ See the Bahraini Law Decree No (7) of 1989 concerning the practice of medical profession and dentistry, Article 26

confidentiality would likely outweigh public interest in preventing civil wrongs. As such, patients disclosing civil wrongs to their doctors may rest easy. Even if the doctor is aware of a civil wrong in contemplation, preventing such a wrong is not an accepted justification for the disclosure of medical confidential information.¹⁶⁰

2.5.3 Medical confidentiality in certain issues

1. Confidentiality and medical students

In order to enhance practical learning, medical students are required to train in clinics or hospitals. Therefore, it is likely they will access patient confidential information, either incidentally or as part of their education. This situation raises two main issues. The first question is whether students ought to be eligible to access this confidential information. The second question is whether the duty of confidentiality devolves upon them when they are exposed to patient information as student doctors. Are they required to maintain confidentiality as though they were the doctor giving treatment?¹⁶¹ In answer to the first question about eligibility, patient consent should be obtained in order to allow medical students to access to confidential information.¹⁶² In answer to the second question, it is important that when giving consent to medical students learning private medical information, the patient is secure in the discretion of these students. In this regard, the student doctors should have a duty, like doctors, to keep patient information confidential if they are exposed to it in the course of their clinical studies.

In order that the patient gives informed and free consent, students should introduce themselves to the patient as students, not doctors. In England, the law is clear enough that students are held responsible for patient confidentiality, however, in Bahrain there is no provision to deal with medical students. After extensive research regarding this point in Bahraini law, it becomes clear that medical students are under no obligation to maintain duty of confidentiality; the law of 1989 concerning the practice of the medical profession

¹⁶⁰ See M. Stauch, K. Wheat and J. Tingle, 'Source Book on Medical Law', Cavendish Publishing, 2nd edn, 2002, p 260

¹⁶¹ Practically, medical students are considered among the health care team, as the main reason for accessing the clinical information is for education purposes, see T. Hope, J. Savulescu and J Hendrick, 'Medical Ethics and Law: the Core Curriculum', Churchill Livingstone Elsevier, 2nd edn, 2008, p 106

¹⁶² See S. D. Pattinson, 'Medical Law and Ethics', Sweet and Maxwell, 2006, p 198 - 199

and dentistry obliged practicing doctors only, while medical students at the time of training are considered students, not doctors. As such, they are not subject to the law that governs those practicing the medical and dentistry professions, nor to the law governing the practices of non-doctors, such as pharmacist and paramedics.¹⁶³

2. Confidentiality and children

Doctors owe a duty of confidentiality to the patient himself, and to none other. However, children are generally considered incapable of informed consent on complex matters. Child consent is generally governed by a parent or guardian. The question is, therefore, how far are doctors obliged to maintain duty of confidentiality for children?

According to the United Nations, people are considered children until the age of 18.¹⁶⁴ The General Medical Council (GMC) guidance advises doctors to maintain confidentiality for children and incapacitated adults, unless disclosure is ‘essential’ for their health situation.¹⁶⁵ Dame Elizabeth Butler Sloss states, ‘*Children, like adults, are entitled to confidentiality in respect of certain areas of information. Medical records are the obvious example.*’¹⁶⁶ Thus, children 16 years and over are considered competent and capable of consent, and are therefore entitled to the same duty of confidentiality as adults.¹⁶⁷ As they are considered capable of informed and free consent, they are able to control the disclosure of their information. The leading case, *Gillick v West Norfolk and Wisbech Area Health Authority*,¹⁶⁸ discussed the ability of children younger than 16 years to understand and control their health information. In this case, it was considered that doctors in certain circumstances should follow the child’s instructions in keeping health records confidential. According to the test of ‘Gillick Competency’ those children who are

¹⁶³ See the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry, and the Bahraini Law Decree (2) of 1987, concerning the practice of non-doctors or pharmacists as paramedics

¹⁶⁴ According to the United Nations Convention on the Rights of The Child 1989, Article (1) states that, ‘*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*’; available at: <http://www.unicef.org/crc/>

¹⁶⁵ See GMC, 2004, Para. 28

¹⁶⁶ See *Venables v NGN* 2001 Fam. 430 - 469

¹⁶⁷ See *Torbay Borough Council v MGN* 2003 EWHC 2927

¹⁶⁸ See *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112

younger than 16 years and considered competent enough, should subject their doctor to the duty of confidentiality. In all cases, the doctor should respect the dignity of his patient and seek their permission before discussing a health issue with their parents. The case dealt with a 14 year old boy who had contracted a sexually transmitted disease. Silber J stated that the Gillick principle should be applied to abortion as well as contraception, bearing in mind that this concept should not contradict human rights jurisprudence.¹⁶⁹

Doctors are obliged to consider and act in a child's best interest; therefore where the child refuses to discuss his health issue with his parents but the doctor considers that disclosure is the best for the patient's ultimate interest, disclosure in this case is not considered a breach of the duty of confidentiality.

In Bahrain, Article 26¹⁷⁰ does not specify any confidentiality protection for children and it may be beneficial to look at Article 73 of the civil law which states that, '*Every person under seven years shall be deemed as lacking discretion*',¹⁷¹ meaning any person who is under seven years old has no legal capacity to conclude any transaction and all his acts in law are deemed to be void.¹⁷² Article 74 states that, '*Contracts and other dispositions of property entered into by a minor possessing discretion are valid when wholly to his advantage and void when wholly to his disadvantage*'.¹⁷³ Based on this, doctors may maintain medical confidentiality with children who are seven years and older, and they have the authority to estimate whether maintaining confidentiality is for the absolute advantage of his young patient or not.

3. Confidentiality and the incompetent adult patient

¹⁶⁹ See *R (on the application of Axon) v Secretary of State*, 2006 All E.R. (D) 148; see also J. McHale and M. Fox, 'Health Care Law', Sweet and Maxwell, 2nd edn, p 581 – 592; A. Cater and C. Cartwright, 'A Child's Right to Privacy: Out of Parents Hands', *Entertainment Law Review*, 2009

¹⁷⁰ See the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry, Article 26

¹⁷¹ Bahrain Civil Law 2001, Article 73.B

¹⁷² *Ibid.* Article 73.A

¹⁷³ *Ibid.* Article 74

An incompetent patient means a patient who is unable to give informed consent about their health problems.¹⁷⁴ Incompetent patients are eligible for exactly the same protection as competent patients, on the basis that doctors are obliged to refrain from disclosing their information to other parties, and the patient cannot consent to waive the existing duty. The only difference is that doctor should act for the patient's best interest where it is necessary to discuss the patient health problem with his close relatives.¹⁷⁵

4. Confidentiality and communicable diseases

In cases of communicable diseases, there are two conflicting interests, and two sets of responsibilities which may make it difficult for doctors to make a decision regarding confidentiality. Either it is in the public interest to disclose the health status of a patient with a communicable disease for fear of the spread of the disease in the community, or the doctor must protect the patient by maintaining trust and persuading him of the importance of receiving proper treatment. Except in the cases of extreme epidemics, the doctor must maintain the confidentiality of a patient with a communicable disease. There are two remarkable cases which discuss the duty of doctors to patients with AIDS; *X v Y*,¹⁷⁶ and *W v Edgell*.¹⁷⁷ In *X v Y*, the court held that, '*the public in general and patient in particular are entitled to expect hospital records to be confidential and it is not for any individual to take it upon himself as herself to breach that confidence whether induced by a journalist or otherwise*'.¹⁷⁸

However, in *W v Edgell* as discussed above, the court held that there is no breach of duty of confidentiality where the disclosure of patient information was for the purpose of protecting the public.¹⁷⁹ Applying *W v Edgell* principles might mean that doctors are permitted to disclose patient health data for the public interest in extreme cases. Where a

¹⁷⁴ See T. Hope, J. Savulescu and J. Hendrick, 'Medical Ethics and Law: the Core Curriculum', Churchill Livingstone Elsevier, 2nd edn, 2008 p 108

¹⁷⁵ Ibid. p 109; see also *R. (on the application of S) v Plymouth City Council*, 2002 EWCA Civ 388, which was the first case to confirm the eligibility of incompetent adults for the duty of confidentiality; S. Cross and J. Sim, 'Confidentiality within Physiotherapy: Perceptions and Attitudes of Clinical Practitioners', *Journal of Medical Ethics*, 2000, 26, p 447 - 453

¹⁷⁶ See *X v Y* 1988, 2 All E.R. 648

¹⁷⁷ See *W v Edgell*, 1990 1 All ER

¹⁷⁸ Ibid

¹⁷⁹ Ibid.

patient is infected with HIV/AIDS and refuses treatment, it has been argued that doctors may have the right to inform a patient's sexual partner if they believe the partner is unknowingly at risk.¹⁸⁰

Article 26 of the Bahraini Law Decree No. (7) of 1989 concerning the practice of the medical profession and dentistry¹⁸¹ states that doctors are allowed to disclose patient medical information where disclosure to close relatives is necessary for the seriousness of the patient's health situation, or for any other reason the doctor finds enough to justify the disclosure. Accordingly, doctors are allowed to disclose patient information at their own discretion. However, even where it is necessary because of the seriousness of the health situation of the patient, disclosure in this regard is restricted to certain relatives as specified in the Article. That is to say, wife, husband, father and competent children.

5. Confidentiality and patient death

The special relationship between doctors and their patients may last until the death of the patient. The ancient Hippocratic Oath emphasises maintaining medical confidentiality even after death but, legally, the situation is not very clear whether there is a legal rule which forbids doctors from disclosing patient medical information post mortem.¹⁸² Generally, discretionary justifications of disclosure after death are more acceptable to the law. However, from a policy angle, disclosing patient secrets, even after death, may encourage other patients to refrain from full and frank disclosure to a medical professional

¹⁸⁰ See the GMC's Serious Communicable Disease 1998, Article 22; '*you may disclose information about a patient, whether living or dead, in order to protect a person from risk of death or serious harm. For example, you may disclose information to known sexual contact of a patient with HIV where you have reasons to think that the patient has not informed that person, and cannot be persuaded to do so. In such circumstances you should tell the patient before you make the disclosure, and you must be prepared to justify a decision to disclose information*'; Article 23 '*you must not disclose information to others, for example relatives, who have not been, and are not, at risk of infection*'; R. Gilber argues that duty of medical confidentiality should be reconsidered in family issues for the purpose of protecting the family from expected harm, see R. Gilber, 'Medical Confidentiality Within the Family: The Doctor's Duty Reconsidered', *International Journal of Law, Policy and The Family*, 2004; M. D. Perez-Carceles, J. E. Pereniguez, E. Osuna and A. Luna, 'Balancing Confidentiality and the Information Provided to Families of Patients in Primary Care', *Journal of Medethics*, 2005; T. M. Gibson and W. J. Coker, 'Medical Confidentiality and Human Immunodeficiency Virus (HIV) Infection: A Hypothetical Case', *Journal of Army Medical Corps*, 2003, 149 p 267 - 273

¹⁸¹ See the Bahraini Law Decree No. (7) of 1989 concerning the practice of medical profession and dentistry, Article 26

¹⁸² See S. D. Pattinson, 'Medical Law and Ethics', Sweet and Maxwell, 2006, p 18

in the future.¹⁸³ As such, the GMC advises doctors to maintain a duty of confidentiality even after patient death.¹⁸⁴

2.6 Confidentiality in Private Affairs

Private affairs confidentiality is considered one of the most important and sensitive issues which affects the stability of societies. As it is related to the protection of personal information, maintaining confidentiality in private affairs is essential for individual expression and freedom. Confidentiality in private affairs is also essential for democracy and liberty. From a wider perspective, the privacy of an individual is protected while he is required also to respect others' privacy. Respect for privacy is a cornerstone of personal liberty and an essential foundation of human rights and public freedoms. Accordingly, governments and legislators set out legal protections against the abuse of human freedom through infringements of privacy. This is the main reason that privacy is found in most international and regional human rights instruments.¹⁸⁵ The Universal Declaration of Human Rights states that, '*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation, everyone has the right to the protection of the law against such interference or attack.*'¹⁸⁶

According to the English law, the law of privacy has been developed in the common law through the cases *A-G v Guardian Newspapers (No. 2)*¹⁸⁷ and *Hellewell v Chief Constable*

¹⁸³ Ibid.

¹⁸⁴ GMC 2004 Para. 30 '*you still have an obligation to keep personal information confidential after a patient dies. The extent to which confidential information may be disclosed after a patient death will depend on the circumstances. If the patient had asked for information to remain confidential, his views should be respected. Where you are unaware of any directions from the patient, you should consider requests for information*'; see also S. Lock and J. Loudon, 'A Question of Confidence', 1984, 288 British Medical Journal, 123; this article was criticising the publication of the book 'Churchill – A Struggle For Survival', written by Churchill's doctor, Lord Moran, and published following the prime minister's death

¹⁸⁵ See the Universal Declaration of Human Rights 1948; The International Covenant on Civil and Political Rights, and The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). However, the Arab Charter of Human Rights 2004, did not contain any article to emphasise the protection of human private affairs confidentiality. Available at: <http://www.pogar.org/publications/other/laws/humanrights/acharter-04e.pdf>

¹⁸⁶ See The Universal Declaration of Human Rights 1948, Article 12

¹⁸⁷ See *A-G v Guardian Newspapers (No 2)* 1990 1 AC 109

of *Derbyshire*;¹⁸⁸ however, England's ratification of the The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1998 is considered the most significant articulation of a protection of privacy and confidentiality in private affairs. Article 8 provides that, '*1- Everyone has the right to respect for his private and family life, his home and his correspondence. 2- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*'¹⁸⁹

In Bahrain, the main source of laws protecting privacy is the Bahraini Constitution of 1971, and its subsequent amendment in 2002.¹⁹⁰ Article 19.A states that, '*Personal liberty is guaranteed in accordance with the law*', and Article 25 states, '*Places of residence shall be inviolable. They may not be entered or searched without the permission of their occupants except in the circumstances and manner specified by the law.*' Also Article 26 states, '*Freedom of postal, telegraphic and telephonic communications and the secrecy thereof shall be guaranteed. No communications shall be censored nor the contents thereof revealed except in cases of necessity prescribed by the law and in accordance with the procedures and guarantees stated therein.*'

Moreover the Bahrain Civil Code 2001 also contains some relevant provisions,¹⁹¹ such as Article 162: '*A. Damages for an unlawful act shall cover the damage even if it is of a moral nature. B. A moral damage shall include, in particular, the physical or psychological damages suffered as a result of prejudicing his life, liberty, integrity,*

¹⁸⁸ See *Hellewell v Chief Constable of Derbyshire* 1995 1 WLR 804 where Laws J stated that '*if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, the subsequent disclosure of the photograph would, in my judgment, as surely amount to breach a confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law should protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be a breach of confidence*'

¹⁸⁹ See ECHR 1998, Article 8

¹⁹⁰ See the Bahrain Constitution for 1971 and its subsequent amendment in 2002, Articles 25, 26

¹⁹¹ See the Bahrain Civil Code 2001, Article 162

honour, reputation, social or literary status or financial position. Such moral damage shall also include the feelings of grief and sadness felt by the person.'

2.6.1 Private life

According to human rights principles, an individual has the right to keep their private affairs confidential. Thus the right to enjoy private life means the right to control private information related one's own life and protect the public from interference. This concept gives even public individuals the power to protest about intrusive media or broadcasting interfering in private affairs. Moreover, it means that no one is allowed to publish private pictures, photographs, images, diaries, notes, medical records and letters except with previous permission from the owner.

The term 'private life' has been interpreted widely by the courts. It includes an individual's right to control all information related to their sexual identity, the right to choose their lifestyle, image and style of dress, and the right to forbid anyone touching or filming one's body.¹⁹²

The principle of private life also includes the right of individuals to develop skills, to express their personalities, and to establish or maintain relationships without allowing this information to become public. This concept includes the right of individuals to contribute to economic, social and cultural activities within their communities. Thus, in *Niemietz*, the E Ct HR stated that:

*'It would be too restrictive to limit the notion (of private life) to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.'*¹⁹³

¹⁹² This right also includes those of individuals to cover their body from the public where each has the right to be kept undressed in front of the public, or to take blood samples without the prior permission of that person

¹⁹³ See *Niemietz v Germany* 1992 16 EHRR 97, E Ct HR Para. 29

Given the broad definition of private life, it is important to discuss each element of the concept separately.

1. Respecting physical and moral integrity

This type of protection was adopted by the European court in *Botta v Italy*¹⁹⁴ and restated in *Bensaid v The United Kingdom*.¹⁹⁵ Here, the court stated that, ‘private life is a broad term not susceptible to exhaustive definition.’¹⁹⁶ The case established the right of an individual to protect his body physically against any disapproved of interference, such as taking blood and urine samples without his permission.¹⁹⁷

2. Respecting personal identity

Individual identity is considered an important and fundamental part of private life. Everyone has the right for his identity to be protected against public consumption. Although ‘identity’ has not been strictly classified under Article 8 of the ECHR, both the Human Rights committee and the European Court have confirmed the principle.¹⁹⁸ Therefore, should an individual wish to protect his first name and surname, this can fall under the protection offered to private life, because nomenclature constitutes an important component of identity.

3. Respecting private space

In *Niemietz*, the ‘inner circle’ protected as part of an individual’s private identity is not only restricted to people, but also to places.¹⁹⁹ Private places are held to mean those arenas where people gather to enjoy private events. Therefore, a restaurant venue constitutes a public place, but should a group of people rent the hall for one night for a party, such a hall becomes a private place; wedding parties are also considered private. In terms of communication, a cell phone is also a type of private space insofar as individuals have the

¹⁹⁴ See *Botta v Italy* (Application no. 21439/93). Date: 24th Feb 1998

¹⁹⁵ See *Bensaid v United Kingdom* (Application no. 44599/98). Date 6th Feb 2001

¹⁹⁶ Ibid.

¹⁹⁷ See *Peters v Netherlands*, 1994 77-A DR 75

¹⁹⁸ See *Stjerna v Finland*, 1994 24 EHRR 195, see also *Burghartz and Burghartz v Switzerland*, 1994 18 EHRR

101

¹⁹⁹ See *Niemietz v Germany* 1992, 16 EHRR 97, E Ct HR

right to control all the information regarding such a place and to prevent the public's access.

Some writers argue that, although Article 8 of the ECHR does not mention private places, there are no geographical limits laid out in Article 8. This means it does not apply to homes only, but extends rather to include all private places. However, the more public the place, the more difficult it is for such places to be considered as private places.²⁰⁰

4. Respecting sexual relations

Protecting the privacy under which individual sexual relations take place falls at the heart of private life. Thus, individuals have the absolute right to prevent the public from interfering in their sexual relations. The issue regarding homosexual privacy was discussed in the famous case of *Dudgeon v The United Kingdom*.²⁰¹ Here, the court stated that laws prohibiting homosexual relations should be considered interference with the right to respect for private life. In *Norris v Ireland* the court stated that, '*Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanction when it is consenting adults alone who are involved*'.²⁰²

2.6.2 Family life

The family is the basic unit in all societies, and worthy of protection. Therefore, the state often endeavours to legislate to maintain the stability of family units. As such, most states legislate to prevent interference in family matters. The obligation for the protection of family life has positive and negative aspects. Thus, the public are not only required to refrain from interfering of private life of others, but governments may also take positive

²⁰⁰ See *Fridle v Austria*, 1995 21 EHRR 83

²⁰¹ See *Dudgeon v The United Kingdom Series A, No. 45. Before the European Court of Human Rights. 23 September 1981*

²⁰² See *Norris v Ireland (Application No. 10581/83). Date: 26th Oct 1998*

steps to protect families. Article 8, ‘*does not merely compel the state to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for family life.*’²⁰³

However, the notion of ‘family’ is not sufficiently clearly stated and family structures may vary from one society to another. Families may be based on blood ties, marriage, economic ties or adoption. Thus, according to *K v UK*, the existence of a protected family unit should be considered contingent on, ‘*the real existence in practice of close personal ties.*’²⁰⁴ Accordingly, the existence of a marital bond constitutes the centre of the traditional family,²⁰⁵ where the formal relationship protects the family life between husband and wife. Moreover, in some cases, engagements to marry may be considered sufficient for the protection of family life.²⁰⁶ However, according to Article 8 of the ECHR, the notion of family may go beyond formal relationships and includes other ‘*de facto family ties.*’²⁰⁷ Here, the seriousness, stability, intention, and commitments in the relation between the two parties may give parties eligibility for family life protection.²⁰⁸

However, in Bahrain, where Islamic Shari’a governs family matters, marriage is the essential element constituting a protected family relationship.²⁰⁹ Any other relationship outside marriage has no legal protection against any type of interference. To be distinguished from British law, in Bahrain, marriage can only exist between a male and a female. Gay marriage is illegal and punishable.²¹⁰

Children within a family are also eligible for their private life to be protected against disclosure or interference, from the very moment of the child’s birth or any other reason for the existence of the child within the family, such as adoption, even if their parents are not living together.

²⁰³ See *Marckx v Belgium* 1979 2 EHRR 330, E Ct HR

²⁰⁴ See *K v United Kingdom* 1986 50 DR 199

²⁰⁵ See *Benes v Austria* 1992 72 DR 271 where the court held that marriage for immigration purposes falls outside the scope of Article 8 (1) of the ECHR

²⁰⁶ See *Wakefield v United Kingdom* 1990 66 DR 251 Para. 255

²⁰⁷ See *Kroon v Netherlands* 1995 19 EHRR 263, E Ct HR, Para. 30

²⁰⁸ See *Alam and Khan v United Kingdom* 1967 10 YB 478; see also *A and A v Netherlands* 1992 72 DR 118

²⁰⁹ See the Bahraini Family Law 2009, Article 4, ‘*marriage is a legal contract between male and female for the purpose of establishing a family where it creates reciprocal rights and duties*’

²¹⁰ See the Bahraini Penal Law 1976, Article 316

One fundamental question regarding the protections of privacy that are afforded to family life is the question of family name; does Article 8 of the ECHR protect the privacy of a family name? Essentially, the question arises where a family name may be considered as leading to any identification of other protected areas of a private life? In this regard the court in *Burghartz v Switzerland* held that the family name contains identification to the family life, therefore it is protected against interference.²¹¹

2.6.3 Correspondence and confidential information

Confidentiality of correspondence is considered as one of the fundamental rights of human beings, and has been confirmed and ratified by most sovereign powers of the world. The right is also enshrined in Article 26 of the Bahraini Constitution.²¹² Also, Article 8 (1) of the ECHR emphasises that the right of individual private correspondence should be respected.²¹³ In this regard, some commentators argue that, when a state interferes in an individual's private correspondence, such an action may be read as, '*lack of respect for private life.*'²¹⁴ Therefore, individuals should have the legislative protection that affords them the right to enjoy privacy in their letters, telephone and daily conversations, emails and all types of communication with others. To ensure this, states should guarantee that, outside exceptional situations of national safety, mail should be guaranteed privacy, and delivered to the addressee without being opened, read or scanned.

Comments

- A duty of confidentiality should be applied to restrict patent agencies from breaching confidentiality. Also, in cases involving children, to be considered as exception to the attorney duty of confidentiality there should be a classification of the child's age, as it is according to the United Nations range 0–18 years old. Therefore, older children should enjoy the protection of their confidential information.

²¹¹ See *Burghartz v Switzerland* 1994 18 EHRR 101, E Ct HR; see also *Guillot v France* 1996 1593, E Ct HR, *Rogl v Germany* 1996 85A DR 153, EComHR

²¹² See the Bahrain Constitution Article 26, '*freedom of postal, telegraphic and telephonic communications and the secrecy thereof shall be guaranteed. No communications shall be censored nor the contents thereof revealed except in cases of necessity prescribed by the law and in accordance with the procedures and guarantees stated therein*'

²¹³ See ECHR Article 8.1; see also *Halford v United Kingdom* 1997 24 EHRR 523, E Ct HR

²¹⁴ See L. L. H Hill and D. Pannick, '*Human Rights Law and Practice*', Butterworths, 1999, p 182

- Although confidentiality is implicitly protected in arbitration, taking into account the court decision in *Esso Australian Resources Ltd*, it is strongly recommended that a confidentiality clause is added into the arbitration agreement to protect both parties, as it is unfair to assume that the absence of a confidentiality agreement means that parties have no intent to protect their confidentiality at all.
- Research shows that arbitration confidentiality is well protected under London Court of International Arbitration (LCIA) Article 30.1, however, Article 27 of the BCDR does not provide adequate confidentiality protection.
- As a result of the fact that witness testimony and expert witness testimony are not bound by the duty of confidentiality, it is strongly recommended to add a supplementary agreement between the witnesses and parties to prevent them from disclosing confidential information regarding the arbitration to the general public.
- It is excellent practice from the Bahraini legislature that it requires written permission from the patient to allow disclosure. However, there is a legislative vacuum in relation to medical students, as they are under no legal obligation to maintain doctor–patient confidentiality, as the law of 1989 concerning the practice of the medical profession and dentistry only refers to practicing doctors and dentistry, not students.
- The principle of banking confidentiality is significant, and is located at the heart of all human, legal and commercial transactions. Also there is banking confidentiality of a different nature, linked to the confidentiality of individuals in particular, and the country’s economy in general

Chapter Three: Legal Sources of Banking Confidentiality

After discussing the doctrine of confidentiality in the previous chapter, the conclusion was reached that the principle of banking confidentiality is significant, and is located at the heart of all human, legal and commercial transactions. It was also concluded that there is banking confidentiality of a different nature, linked to the confidentiality of individuals in particular, and the country's economy in general.

Banking operations based mainly on confidentiality are key to a bank's activities, either for the benefit of the bank, or in the interests of the client, or both. This results in mutual interests arising between banks and their clients. Several factors have contributed to the development of the concept of banking confidentiality, including geographical, political and ethical factors.

Geographically, both the Kingdom of Bahrain and the UK enjoy a special geographical location. The UK is located at the heart of Europe, and comprises a group of islands, giving it a privileged position for communications and trade, and boosting commercial activity, in particular banking activity.²¹⁵ This could explain the history of the banking system in the country, where the first bank was established in 1694.²¹⁶ The same applies to the geographical location of Bahrain. Bahrain's geographical location makes it a centre of trade between the civilisation of Mesopotamia (now Iraq) and the Indus Valley (mainly Pakistan).²¹⁷ The beginning of this prosperity and trade, and its growth during the Dilmun civilisation, is associated with the Sumerian civilisation in the third millennium BC.²¹⁸ Bahrain was part of the Babylonian Empire in the period before 600 AD.²¹⁹

²¹⁵ A. H. Jensen, 'Geography - History and Concepts: a Student Guide', Thousand Oaks, CA: SAGE, 2009; see also G. Bridge and S. Watson, 'A Companion to the City', London, Blackwell, 2003

²¹⁶ The Bank of England was founded in 1694, see <http://www.bankofengland.co.uk/about/index.htm>

²¹⁷ See F. Aljeb, 'History of Portuguese Colony in Bahrain 1521 – 1602', 1st edn, Beirut, Arab Institution for Publication and Studies, 2003, p 9

²¹⁸ Ibid.

²¹⁹ Ibid.

Bahrain is located at the heart of the Arab Gulf, and consists of a number of islands.²²⁰ This waterway has helped Bahrain in the expansion of its role as a trade link between India, the Far East and the Middle East.²²¹ In 1920, Standard Chartered was the first bank established in Bahrain and it was also the first in the Gulf region.²²²

Political stability also plays a major and effective role in the improvement of banking operations. Throughout history, free and democratic regimes have encouraged the stability of banking activities, as the relationship between liberalism and bank confidentiality is very close. In the UK, the political situation seems to have been stable for a very long time, a fact that helps in the improvement of banking activities in general, and banking confidentiality in particular. In Bahrain, the impact of political stability can be seen clearly in the economic and banking boom that accompanied the political reforms in 2001,²²³ where the banking industry grew significantly, giving it a very strong financial reputation. Many financial institutions were established during this time. During this time, more foreign banking institutions and offshore banks opened branches in Bahrain²²⁴ compared to the period after the unrest in 2011.²²⁵ Reports showed that after this, Bahrain lost its economic position as a haven for offshore money.²²⁶

A set of moral and professional ethics shapes the borders of each profession. Ordinarily, professions are affected by the habits, traditions, beliefs, values and laws in certain societies. Accordingly, bankers set their professional ethics in relation to customers. Customer confidentiality is at the core of the relationship between banks and their customers.²²⁷ Some jurisdictions have codified the duty of confidentiality; others have

²²⁰ See F. Aljeeb, 'History of Portuguese Colony in Bahrain 1521 – 1602', 1st edn, Beirut, Arab Institution for Publication and Studies, 2003, p 9; see also S. F. Hamdi, 'Spotlights on The Modern History of Bahrain', Beirut, Dar Al Hekma, 2007, p 17

²²¹ Ibid.

²²² See Standard and Chartered Bank: <http://www.standardchartered.com/bh/our-history/en/>.

²²³ See reports of the CBB 2001 - 2010: www.cbb.bh.

²²⁴ See the Bahrain official report on the growth of the financial sector 2001 – 2010:

<http://www.bna.bh/portal/news/447185>

²²⁵ See recent Reuters reports available at <http://uk.reuters.com/article/2011/05/04/bahrain-assets-idUKLDE7430H920110504>

²²⁶ Ibid.

²²⁷ E. P. Ellinger, E. Lomnicka and R. J. A. Hooley, 'Ellinger's Modern Banking Law', 4th edn, Oxford, Oxford University Press, 2005, p 167

not.²²⁸ Based on this, a bank's duty of confidentiality has been transferred from merely a principle of honour and professional ethics, to a legal obligation.²²⁹ Therefore, it is important to understand the legal basis for banking confidentiality.

After reviewing the historical, geographical and ethical factors of confidentiality, this chapter discusses the legal sources of banking confidentiality in both Bahrain and the UK. Firstly, this chapter discusses the sources of banking confidentiality and how it has been protected in constitutional law. Secondly, the chapter explores the protection of confidentiality in penal law. Thirdly, the chapter analyses the protection of banking confidentiality in labour law. Fourthly, the chapter examines how far banking confidentiality is contained within banking law and common law.

3.1 Constitutional Sources of Banking Confidentiality

Constitutional rules sit over all legislation, as no law or legislation can contain any rule or article contrary to a constitution.²³⁰ Some countries, such as Bahrain, collect the entirety of their fundamental principles and provisions in one document, called the codified constitution.²³¹ Other countries, such as the UK, have no single core constitutional document; this is called an uncodified constitution.²³² Accordingly, banking confidentiality protection within the constitutions will be discussed in this chapter by focusing on the Bahraini situation first, and then comparing this to the UK situation.

3.1.1 .Kingdom of Bahrain

With regard to the Bahraini Constitution, there are a number of articles concerning personal rights and freedom,²³³ which do not refer directly to the individual's rights, or

²²⁸ For more details see N. Mughabghab, 'Banking Confidentiality', Beirut, 1996

²²⁹ See N. Mughabghab, 'Banking Confidentiality', Beirut, 1996

²³⁰ J. Alder, 'Constitutional and Administrative Law', 8th edn, Basingstoke, Palgrave Macmillan, 2011, p 3

²³¹ M. Al-Mudaress, 'Constitutional Law in Bahrain', Bahrain University Press, 2009, p 13

²³² I. Loveland, 'Constitutional Law: a critical introduction', 2nd edn, London, Butterworths, 2000, p 1 - 7

²³³ Constitution of Bahrain, Articles 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30; see also M. Al-Mudaress, 'Constitutional Law in Bahrain', Bahrain University Press, 2009 p 57 – 89

protecting their banking information from being disclosed, or even the general right of protecting personal data. The related constitutional articles are very broad and general.

1. Personal freedom

The Bahraini Constitution contains a single Article on the principle of personal freedom; in reality this Article has been narrowly interpreted and applied.²³⁴ It is Article 19 (a); '*Personal freedom is guaranteed under the law*'.²³⁵ Some commentators argue that personal freedom in this Article means the human body should not be subjected to torturous activities,²³⁶ that human dignity is guaranteed, and that human freedom should not be violated by extra-legal arrest or imprisonment.²³⁷ It may also be interpreted as protecting an individual's freedom in taking decisions regarding their own personal life without interference.²³⁸

Nevertheless, a Kuwaiti Member of Parliament questioned the Kuwaiti Minister of Public Health, requesting him to provide a list of names and cases of all those sent by the Government for treatment outside the state in the past four years. The minister replied with a list of patients and their cases, without mentioning their names, ostensibly for the purpose of protecting medical confidentiality. For this reason a case was brought to the constitutional court of Kuwait to explain Article 30 of the Kuwaiti Constitution,²³⁹ '*personal freedom is guaranteed*'. The courts interpreted the Article as guaranteeing individual personal freedom, including maintaining their dignity and standard of life, and keeping their privacy protected. This is due to the main principle that everything related to someone's personal life is part of his moral entity. No one is allowed to publish anything regarding anyone unless prior approval is given, according to the law. Individuals have the

²³⁴ M. K. Lailah, 'Constitutional Law', Dar Al Fekr Alarabi, Cairo, 1962, p 63

²³⁵ Constitution of Bahrain, Article 19.

²³⁶ M. K. Lailah, 'Constitutional Law', , Dar Al Fekr Alarabi, Cairo, 1962, p 63

²³⁷ E. A. Shiha, 'Constitutional Law', Alexandria, 1983, p 571- 572

²³⁸ Ibid. See also O. A. Al Saleh, 'Human Rights Guarantees in Kuwait', Journal of Arabian Human Rights Science, 1982, p 18

²³⁹ Constitution of Kuwait, Article 30.

right to prevent disclosure of their medical reports and health condition. In short, *'everyone has the right to protect their secrets from being disclosed'*.²⁴⁰

Based on the above Kuwaiti constitutional interpretation, the identical Article in the Bahraini Constitution gives the 'personal freedom' concept a wider scope of application, as the court decided that this notion provides a safeguard in protecting personal secrets.²⁴¹ Therefore, the writer agrees with the Kuwaiti Constitutional Court's interpretation regarding Article 30, which is similar to Article 19 (a) of the Constitution of Bahrain. Banking confidentiality is located in Article 19 (a) of the Constitution of Bahrain.

Therefore, the adoption of the principle of personal freedom does not prevent the adoption of the principle of privacy as well, as some Arab constitutions contain the adoption of the two rights together, as in the Egyptian Constitution.²⁴²

2. Articles 25 and 26

It might be suggested that protecting banking confidentiality in the Constitution of Bahrain falls under Articles 25 and 26.²⁴³ However, Article 25 states: *'Dwellings are inviolate. They cannot be entered or searched without the permission of their occupants except in cases of maximum necessity as laid down and in the manner provided by law'*. This addresses only an individual's right to privacy inside their homes.²⁴⁴ Thus, this Article definitely does not prevent any customer information from being disclosed.

Article 26 states: *'The freedom of postal, telegraphic, telephonic and electronic communication is safeguarded and its confidentiality is guaranteed. Communications shall not be censored or their confidentiality breached except in exigencies specified by law and in accordance with procedures and under guarantees prescribed by law'*. This Article clearly protects private life by providing constitutional protection to communications and correspondence. Hence, by analysing the constitutional provisions related to privacy, it can be concluded that provisions related to privacy protection are

²⁴⁰ See Kuwaiti Constitutional Court decision 14 Nov 1982.

²⁴¹ See M. H. Abdualaal, 'Constitutional Law', Cairo, 1992 p 202

²⁴² See Egyptian Constitution 1971, Article 54

²⁴³ M. Al-Mudaress, 'Constitutional Law in Bahrain', Bahrain University Press, 2009, p 165 – 169

²⁴⁴ For more details see M. K. Laila, 'Constitutional Law', Cairo, 1982, p 218 – 232

almost identical in most Arab constitutions,²⁴⁵ and that the concept of privacy protection is limited only to the protection of home and correspondence. Except in Egypt, Mauretania and Algeria,²⁴⁶ the protection of privacy in all other Arab constitutions is limited to, '*the freedom of postal, telegraphic, telephonic and electronic communication is safeguarded and its confidentiality is guaranteed*' without protecting the right of privacy in general.²⁴⁷

Therefore, when we apply this Article to bank customer confidentiality, it extends its protection to the correspondence and communication between banks and their customers, including by post, telegraphic, telephonic and electronic communications. Post is not the only means of communication for banks with their customers. For that, Article 26 of the Bahraini Constitution does not provide adequate protection for banking confidentiality.

Banking confidentiality finds constitutional protection under Article 19 (a) of the Bahraini Constitution, bearing in mind the interpretation of the Kuwaiti Constitutional Court of the similar article in the Kuwaiti Constitution.

3.1.2 United Kingdom

In contrast to many countries, the UK has an uncodified constitution, consisting instead of a number of different documents.²⁴⁸ However, much of the UK's constitution is materialised in written form and given the power of constitutional principles, such as parliamentary sovereignty,²⁴⁹ the Royal prerogatives,²⁵⁰ parliamentary privilege,²⁵¹ and constitutional conventions.²⁵² With regard to banking confidentiality, as the ECHR considered as part of the UK constitution, it is necessary to explore the protection of banking confidentiality within the ECHR, to examine how well banking confidentiality is protected therein.

²⁴⁵ See M. A. Hassan, 'General Principles in Protecting the Right of Privacy in the Relationship Between Individuals and States', Dar Al Nahda, Cairo, Egypt, 2001, p 553

²⁴⁶ See Egyptian Constitution 1971, Mauretanian Constitution 2006, Algerian Constitution 2002

²⁴⁷ See M. R. Alhelo, 'Constitutional Law', Munshaat AlMaaref, Alexandria, Egypt, 2000 p 834; see also M. A. Muhammed, 'The Notion of Privacy Under Constitutional Law', Dar Al Nahda, Cairo, Egypt, 1994 p 117; H. O. M. Othman, 'Constitutional Law', Dar Al Jamea, Alexandria, Egypt, 2005 p 216 – 222

²⁴⁸ D. G. Cracknell, 'Constitutional and Administrative Law', London, Routledge-Cavendish, 2007,

²⁴⁹ I. Loveland, 'Constitutional Law: a Critical Introduction', 2nd edn, London, Butterworths, 2000, p 19

²⁵⁰ Ibid. p 75

²⁵¹ Ibid. p 212

²⁵² Ibid. p 246

The most directly relevant article is Article 8. Article 8 (1) states: ‘*Everyone has the right to respect for his private and family life, his home and his correspondence.*’ Article 8 (2) states: ‘*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*’

It is clearly stated that Article 8(1) protects four main areas: private life; family life; the home, and correspondence.²⁵³ However, the notion of private life is not clear. In *X and Y v Netherlands*,²⁵⁴ the court stated: ‘*Private life is a concept which covers the physical and moral integrity of the person, including his or her sexual life*’. Meanwhile in *Niemietz v Germany*,²⁵⁵ the court stated: ‘*it would be too restricted to limit the notion (of private life) to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relations with other human beings*’. Therefore, the limits of the idea of private life under Article 8 must be known in order to decide whether banking confidentiality falls within the boundaries of one’s private life. Protecting private life could mean the protection of an individual’s physical and mental inviolability, protection against attacks on individual’s honour or reputation, protection against the unauthorised use of an individual’s name and identity, protection of an individual against harassment, or protection against the disclosure of information, where the information is covered under a professional duty of confidentiality.²⁵⁶

Clearly, banking confidentiality falls within the last mentioned category, where information held by a banker in respect to their customers is held under the professional obligation of secrecy, which is the implied contractual duty of confidentiality.

²⁵³ J. Rehman, ‘*International Human Rights Law*’, Harlow, Longman, 2010, p 204

²⁵⁴ See *X and Y v Netherlands* Application No. 8975180, 1985

²⁵⁵ See *Niemietz v Germany* (1992) 16 EHRR 97

²⁵⁶ See J. G. Merrills and A. H. Robertson, ‘*Human Rights in Europe: a Study of The European Convention on Human Rights*’, 4th edn, Manchester, Manchester University Press, 2001, p 138

In *Gaskin v United Kingdom*, the contention that records held by the local authority in respect of a boy who had spent his formative years in foster care were not within the ambit of Article 8 (1) was rejected. The court stated that ‘*the records contained in the file undoubtedly do relate to Mr Gaskin’s “private and family life” in such a way that the question of his access thereto falls within the ambit of Article 8*’. Although this decision has no direct relation to banking confidentiality, it serves to establish one key point, namely that, *prima facie*, there is no reason as a matter of law why the collection of financial data regarding a person could not fall within this band of authority and, as a consequence, also fall under the broad application of Article 8 (1). It may be suggested that the collection of financial information regarding a person, whether for the purpose of preventing financial crime, or for other purposes, would fall within Article 8 (1), and as such the collection of such financial information must be justified in accordance with the principles laid down within Article 8 (2).

Accordingly, a banker’s duty of confidentiality can be protected under human rights principles, the right to a private life as laid down by Article 8.

3.2 Duty of Confidentiality: Sources in Penal Law

Penal law is a set of legal rules which governs and regulates the state’s ability to punish acts which threaten people’s rights, and society’s interests. It is advisable to include provisions penalising the disclosure of confidential information. Both people’s and states’ interests require the protection of their privacy.

The main reason for punishing the disclosure is that the legislature would have aimed to protect individuals in keeping their information confidential.²⁵⁷ Moreover, the legislative intent is to protect and maintain the continuity and sustainability of certain socially important professions, as it is assumed that customers should disclose some confidential information, in order for them to exercise their professional activity.²⁵⁸ Where this confidential information is not protected, people may refuse to resort to these services,

²⁵⁷ See M. N. Hosni, ‘Comments on Penal Law’, Dar Al Nahda, Cairo, Egypt, 1988, p 755

²⁵⁸ Ibid. p756

which may harm the society in general. For example, a patient keeps his health information confidential with his physician and a litigant keeps his confidential information with his lawyer; they would prefer that their interests be lost rather than to have their confidential information released, thus the practice of medicine and law would be seriously delayed and damaged. In this case, significant damage would be caused to the community. Thus, the reason for criminalising disclosure is the protection of such vital community interest.²⁵⁹

3.2.1 Kingdom of Bahrain

According to Article 371 of the Penal Law of Bahrain 1976, '*A punishment of imprisonment for a period not exceeding one year or a fine not exceeding BD 100 shall be inflicted on a person who divulges a secret entrusted thereto in his official capacity, trade, profession or art in conditions other than those prescribed by the law or uses it for his personal benefit or for the benefit of another person, unless the person concerned with the secret allows the divulgence or use thereof. The punishment shall be imprisonment for a period not exceeding 5 years if the perpetrator is a public servant or an officer entrusted with a public service to whom the secret has been confided during, because or for reason of performing his duties or services*'.²⁶⁰

1. A secret entrusted

A secret is an event or quality which is only known to a limited number of persons. There is an interest recognised by law for one person or more to keep knowledge limited within such a scope. For example, an illness suffered by a person is an event, the knowledge of which, is limited to the patient and his doctor. In this case, the patient has an interest recognised by law in ensuring that knowledge thereof does not go beyond that to a third person.²⁶¹ Likewise, a litigant who conveys to his lawyer certain information related to the case to be used in his defence, or who gives him access to information that is relevant or important to this case, has an interest recognised by law that such information or documents should not be released to his opponent.

²⁵⁹ Ibid.

²⁶⁰ See the Bahrain Penal Law 1976, Article 371

²⁶¹ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1988, p 755

It is clear from the above that the guiding principle is considering the event as confidential with two aspects. It is imperative that knowledge thereof must be limited to specific persons and there should be a legitimate interest in keeping such knowledge within such limits.²⁶² Knowledge of an event is deemed limited to specific persons if such persons are certain and identifiable. However, if it is known to a number of people without distinguishing them, then the nature of the confidentiality is no longer established. This means that if the number of persons who are aware of the event is large but they are certain and identifiable, this does not mean it lacks the nature of being confidential.²⁶³ An illness could be known to members of the patient's family and a large number of medical practitioners who provide him with medical care. However, it still remains confidential information. At the moment when an event becomes known to an unlimited number of people so that its disclosure does not add greater knowledge thereof, it becomes public knowledge. Such awareness means that it has necessarily forfeited the confidential nature thereof. It is assumed that the guiding principle for considering an event confidential, is that there is one person or more who has (have) a legitimate interest to keep knowledge of the event limited to the specific number of persons who are aware thereof. Such a person is the victim in case the information is divulged.²⁶⁴

Thus, the above Article does not apply to everyone, but only to those who gained the confidential data of others as a result of their career, profession, trade or art. So this Article assumes that there are a number of professions, trades and arts, where confidentiality is an issue, and which deal with or engage with individuals differently.

Confidential information may reach the professionals from the client himself, i.e., patients who disclose confidential information to their doctor. It is also not required of the client to ask the professions to maintain confidentiality over the disclosed information, as it is implicitly assumed.²⁶⁵ Moreover, the law does not require a certain legal capacity in the client for his information to be protected.²⁶⁶ Also contracts between professions and their clients are not required to be valid in order to maintain confidentiality over all the

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ See M. K. Bahar, 'Protecting Privacy in Penal Law', Dar Al Thaghafa , Jordan, 2003, p 261

²⁶⁵ See A. A. Al Maashari, 'The Right of Privacy', Oman Legal Magazine, July 2011, p 112 - 119

²⁶⁶ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 757

information which disclosed by the client.²⁶⁷ For example, an incompetent patient or, say, in the case of fainting, if the patient required some of his confidential information, doctors are still under the duty of confidentiality, likewise lawyers are required to maintain confidentiality over their clients' confidential information even though the contract between both parties is void or invalid.

Therefore, the essence of the crime of disclosing confidential data is the breaching of a legally binding rule to maintain confidentiality, by people who are responsible because of their profession, career, trade or art. These are mentioned as examples, but they are not exhaustive.²⁶⁸ Accordingly, this obligation applies to all those who are in possession of others' secrets and confidential data. There is no single Article determining whether banking work is considered a profession, career or trade, but it is certainly one of those; therefore this Article assumes that banks and banking institutions are obliged to maintain banking confidentiality, and are penalised for unauthorised disclosure.

There is no doubt that the crime of disclosing confidential information exists where the defendant was practicing one of the professions referred to by the law, but it also applies to any other profession with the same specifications found in the Article. By reading the Article, it appears that legislator aimed to ensure that some important professions were functioning in an orderly manner, assuming people who practice these professions possess expertise which qualifies them to know their clients' confidential information. Additionally, knowing such confidential information is essential for practicing the profession properly, because he cannot exercise his profession and achieve the client's interest or the public interest without knowing this confidential data.²⁶⁹ In addition, the client should be able to resort to these professions and disclose their confidential information for an urgent or emergency need, otherwise his interest may be at risk.

²⁶⁷ Ibid.

²⁶⁸ N. S. Al Jaboori, and T. M. Alyaseen, 'Legal protection of banking confidentiality in Iraqi legislation', Babel University, 2010. See also H. Isa et al., 'Explanations of Penal Law', Dar Wael Press and Publications, 2002, p 136

²⁶⁹ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 757

One more factor affects the clarification of these professions, and that is that these professions are important socially;²⁷⁰ if these professions were not practiced, guaranteed and protected, the public interest may be harmed. Thus, to sum up, there are four major characteristics relied upon in order to identify the professions referred to in the Article:

- Trust and expertise;
- The profession can only be practiced by knowing confidential information;
- There must be resort to such professions for an urgent and emergency needs; and
- The profession must be important socially.

The Article did not specify professions as this is not possible; perhaps other professions will arise in the future which have the same characteristics.

The above Article should apply to lawyers, judges, doctors, accountants, bankers and many other people who, because of their specific position, have privileged access to people's confidential information, which may relate to their private life, career and financial situation.²⁷¹

2. Divulgence

The Bahraini penal code does not specify the meaning of the act of divulgence; it only mentions those who are aware of confidential information as a result of their career, profession or trade, and disclose this information unlawfully. Unfortunately, there is no definition of the act of divulgence, either in law itself or in any judicial precedent. Should divulgence be oral, written, or both? Is the concept of divulgence the same in all professions, careers, trades and arts, or do they differ?

A definition of divulgence is to inform others of confidential information about someone, which means that the concept of divulgence is transferring certain information about one person to another.²⁷² There are two main elements of the act of divulgence; first, the

²⁷⁰ See M. K. Bahar, 'Protecting Privacy in Penal Law', Dar Al Thaghafa , Jordan, 2003, p 266

²⁷¹ Ibid.

²⁷² See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 759

information and, second, the person who owned the information. Thus, the mere disclosure of information is not considered divulgence, it must also identify the person to which it relates.²⁷³ Knowing the person who owned the information is essential to determine the victim in the crime; as well being able to assign criminal behaviour, this is also to protect the legitimate interest of the victim. Therefore, a doctor who publishes an article explaining the symptoms of a particular disease and how to treat it without identifying the person is not considered guilty of divulgence; the lawyer who addresses the facts of a certain case without mentioning the parties is also not considered guilty of divulgence.

Although disclosing the facts without the name of the victim is not considered divulgence, disclosing some information that describes his character, in a manner sufficient to identify them is considered as divulgence and is subject to judicial opinion to determine whether the elements of disclosure constitutes a crime or not.²⁷⁴

Divulgence assumes that a secret, and the person to whom it relates, has been revealed to a third party. The third party here means a person who does not belong to the group of people who are the only persons that should get to know the information described as a confidential. This means that, where the secret is divulged to a person who belongs to this group of people, this is not considered as a disclosure.²⁷⁵ In the application of the above principle, if a patient appoints two physicians to treat him and each discloses information gathered from his examination of the patient to the other, this is not considered as a disclosure.

In addition, such disclosure is based upon its implicit acceptance by the patient, understood from his appointment of the two doctors to jointly treat him. The same rule applies in the case of a litigant who retains two lawyers to defend him. However, the rule does not apply where a patient appoints a certain medical specialist to treat him but the latter discloses the findings of his examination to another physician who has not been asked to treat him, as this would be an act of disclosure.

²⁷³ Ibid.

²⁷⁴ Ibid. p 761

²⁷⁵ See M. K. Bahar, 'Protecting Privacy in Penal Law', Dar Al Thaghafa, Jordan, 2003, p 235

Methods of Divulgence: methods of disclosure are the same in law as long as they achieve the disclosure of confidential information within the limited scope in which it should remain, whether the disclosure is verbal or written by giving others a certificate or report containing the confidential information. However, it is noted that giving the person who owns the information a report containing such a secret is not considered as a disclosure, as in the case of a physician who gives the patient a report about his illness. Where such a report is given to a person who has been asked by the information keeper to obtain it on his behalf, this shall not be deemed as a disclosure.²⁷⁶ If such delegation of authority is proved and established, the provider of the report shall not be held responsible if the confidential information is disclosed by the representative who holds it. Disclosure is not realised if the person, who has an obligation to keep confidentiality, notes down the information for his own benefit to be able to study and examine it later on.²⁷⁷ However, he has a duty in such a case not to allow third party access to such information.

It is the same in law where disclosure is made to the public domain. An example of such disclosure to the public is represented by the release by a physician or lawyer of professional secrets in a published article or academic lecture. An application of the above is constituted where the crime of disclosure is committed by the author of a medical book who gives examples of the soundness of medical theories discussed in his book by mentioning cases of medical conditions that he treated and also the names of persons who suffered from such conditions. A crime of disclosure that lacks the public domain element takes place where the accused notes down the confidential information in a personal letter sent to a third party, even if he requests him to maintain confidentiality. It is clear that it is the same in law whether the disclosure is made to a single person or to a number of persons.²⁷⁸

Forms of Divulgence: forms of disclosure are the same in law. Whether the disclosure is explicit which is the usual form of disclosure, or whether it is implicit as in the case of a physician who allows a person to have access to the documents containing his patient's

²⁷⁶ See A. F. Sroor, 'Legal Protection to Private Life', Dar Al Nahda, Cairo, Egypt, 1986 p 358

²⁷⁷ Ibid.

²⁷⁸ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 766

confidential information.²⁷⁹ It is virtually the same if disclosure is automatic or non-automatic. An example of non-automatic disclosure is where a professional who has a confidentiality obligation appears to give testimony in court concerning an event which is considered confidential. He cannot plead exemption from giving testimony given to him by law and must disclose the secret.

Disclosure may also take place in certain forms of abstention. An example of this is where someone who has a confidentiality obligation finds someone seeking to have access to documents containing the information of his customers, but does not prevent him from having such access in spite of his ability to do so. However, silence on the part of a person, who has a confidentiality duty, towards a question asked to him is not considered as a disclosure, even if a certain result is concluded from this silence, by way of conjecture, as such silence is not a breach of a legal duty.²⁸⁰

Disclosure may be indirect. The most important forms of such disclosure is where someone accepts to undertake two tasks, one of which requires disclosure of information acquired through the other task but there is still an obligation to keep it in confidence.²⁸¹ It is applicable, for example, where a physician treats a patient but may not agree to carry out a duty as an expert, since his duties as an expert would oblige him to release information obtained from his treatment of the said patient in his capacity as his private doctor. It is not permissible for a lawyer who has agreed to defend a person and gained access to his documents to abandon him to defend his opponent.²⁸²

Any person to whom an accused person has disclosed confidential information shall not have a legal capacity in this case. It is possible for a person who has been trusted by the victim to keep his information confidential, since the victim trusted a certain person but not anyone else, even if the latter is engaged in the same profession with an obligation to maintain confidentiality.²⁸³ In the application of the above principle, a physician who commits the crime of disclosure is deemed liable if he divulges his patient's confidential

²⁷⁹ See A. F. Sroor, 'Legal Protection to Private Life', Dar Al Nahda, Cairo, Egypt, 1986, p 360

²⁸⁰ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt 1998, p 768

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt 1998, p 772

information to another doctor who is not involved in the patient's treatment. In such a case, a colleague in business is considered as a third party so long as he has no close relationship with the victim who got to know his secret.

Total and Partial Disclosure are the Same: disclosure occurs when a third party gets to know the whole confidential information or part thereof, even if he knows very little about it. In addition, disclosure occurs if a physician discloses one of the many illnesses suffered by a patient to a third party, even if he does not advise the third party about the reason for the illness or the extent of its seriousness.²⁸⁴ In addition, disclosure occurs if a third party learns a little about an event or gets to know of it, remains unaware of all its circumstances or characteristics, but the accused informs him of everything or part of anything of which he was unaware.²⁸⁵ Disclosure materialises if a third party gets to know everything that the accused has disclosed to him but his knowledge was uncertain or unsure. When the accused confirms such information, his knowledge becomes certain. The addition of confirmation enhances the third party's assessment of the authenticity of the event, which would be certain knowledge of what used to be unknown to him.²⁸⁶

Nevertheless, if a third party is already aware of the event to a certain extent, the accused's disclosure thereof does not become an act of disclosure as he adds nothing new to the third party's awareness. Difficulties arise if there are related facts and where only some of them are confidential.²⁸⁷ Is it permissible for the accused to disclose such facts which do not have this confidential nature? The reason for the difficulty arises where the latter's disclosure involves an implicit disclosure of the former. Furthermore, he may act in a wrongful manner to cause more serious damage to the victim. In our opinion, this means the occurrence of a crime as it is considered as an implicit disclosure.

3. Information used for personal benefit or for the benefit of another person

²⁸⁴ Ibid.

²⁸⁵ See M. A. Ammar, 'Banking Confidentiality and Money Laundering Dilemma; Egyptian Law', Dar Al Nahda, Cairo, Egypt, 2001, p 26

²⁸⁶ See O. A. Qayed, 'Doctors' Legal Responsibility For Disclosing Confidential Information', Dar Al Nahda, Cairo, Egypt, 2000, p 137

²⁸⁷ Ibid.

The law not only punishes the disclosure of confidential data by those who were entrusted with secrets, but it also penalises the unlawful use of individual data for the holder's own benefit, or if he use it for '*his personal benefit or for the benefit of another person*'.²⁸⁸ To confine the scope of personal interest, it might be said that personal interest is simply opposite to the public interest²⁸⁹ but, in reality, it is not so clear cut. In some cases, there might be overlaps between the two.²⁹⁰

Disclosure of secrets is subject to all the reasons of authorisation of disclosure as recognised by law. However, some of these reasons have a special significance in this particular crime, or they raise problems that require special regulation. We shall discuss here some of the most important reasons.

4. Exception (1): disclosure by law

The law penalises a person who discloses confidential information, '*in conditions other than those prescribed by the law or uses it for his personal benefit or for the benefit of another person*'.²⁹¹ The law in some cases may impose an obligation on individuals to disclose certain information in the public interest. Although there is no one single Article describing the situations where the law permits the disclosure of confidential information, there are some articles that penalise non-disclosure to public authorities in the case of national internal and external security.²⁹²

The law requires professionals engaged in certain practices to maintain professional confidentiality; where professionals in this same practice divulge or release some confidential information they have come to learn (or are entitled by law to have access to) for the protection of a certain interest or general interest that they are obliged to protect, such disclosure shall not constitute a crime. The legislation has determined that the crime

²⁸⁸ The Bahrain Penal Code 1976, Article 371

²⁸⁹ Egyptian Administrative Court Decision, 2693 / 1953, Cairo; see also J. Fowdal, 'Principles of Administrative Law', University Institution Press, Publication and Distribution, 2008, p 122 – 139

²⁹⁰ J. Fowdal, 'Principles of Administrative Law', University Institution Press, Publication and Distribution, 2008, p 122 - 139

²⁹¹ The Bahrain Penal Law 1976, Article 371

²⁹² The Bahrain Penal Law 1976, Article 158

of disclosure is explicitly in cases other than those where the law requires the release or disclosure of such information (Article 371 of the Penal Code).

It is not possible to lay down a general rule combining the events of the mandatory or permitted disclosure. Here we shall merely mention examples thereof. Article 141 of the Penal Code provides for penalising ‘*everyone who becomes aware of the commission of a crime of violating state security and fails to report it to the concerned authorities.*’ This point applies to professionals who usually have an obligation to maintain confidentiality. On the one hand, the provision of the Article is of a general nature without giving any scope for exempting professionals. On the other hand, the interest protected by this provision is above any interest of the information keeper who wishes to maintain its confidentiality, so that it is inconceivable that the legislation is intended to maintain the obligation to keep confidentiality in such cases.

5. Exception (2): consent

The Bahraini legislature has decided that the consent of the information owner is the second exception.²⁹³ Disclosing confidential information with the consent of the actual owner is not considered a breach of the duty of confidentiality. For this purpose, consent should be clearly expressed orally or in writing.²⁹⁴ Such consent is a personal right.²⁹⁵

If information keeper agrees or consents to its disclosure by the person who has knowledge thereof or becomes aware of it by reason of his profession, will such disclosure constitute a crime or may he rely upon such consent as a reason for permitting the disclosure?

There are some who hold the view that consent cannot serve as a reason for permitting such a crime. The argument in this case is that incriminating disclosure has not been determined in protecting the victim’s interest, especially where he gives a concession with his own consent but disclosure is then determined necessary for protecting the

²⁹³ The Bahrain Penal Law 1976, Article 371.

²⁹⁴ N. Mghabghab, ‘Banking Confidentiality’, Doctoral thesis, France, 1996, p 150

²⁹⁵ Ibid.

community's interest in the proper practice or engagement in social professions, hence the victim has no concern with relinquishing such interest.²⁹⁶

However, the writer disagrees with this opinion. As the confidential information keeper or holder is empowered to disclose it, there is no crime in his act. It is considered as a disposal of his own right; hence there is no crime where he disposes of such a right through another person by authorising the confidential information keeper to release it to a certain person or to make it public by some kind of method. The basis for such permission is the general legal principle that states, '*where a victim has the right to dispose of his right through his consent without prejudicing third parties*'.

In addition, the information keeper may have an interest in informing the person who holds it through a certain person or entity, as in the case of having an interest in giving testimony in court or noting the information down in a report to be submitted to a certain authority. If the professional in this case is concerned about being liable for a penalty should he give testimony or submit a report, he will surely refuse to do so. This result, in addition to its damage to the public interest, is detrimental to the information keeper, which is not logical since his interest has been taken into consideration in carrying out a disclosure.²⁹⁷ This opinion does not deny the reason for disclosure which is protection of a public interest, but it determines that such an interest should not be undermined unless the disclosure of the confidential information is not approved of by the keeper thereof, because had it been with his consent, it would be within the scope of the proper legal framework that recognises such interest.²⁹⁸

It is noted that a professional's disclosure of confidential information with the consent of its holder does not undermine confidence in the profession. This opinion has been admitted by the Egyptian Court of Cassation which ruled as follows: '*No penalty shall be imposed pursuant to Article 310 of the Penal Code for disclosure of a secret if it occurs upon the request of the secret keeper.*'

²⁹⁶ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 786

²⁹⁷ See A. Alshawarbi, 'Comments on Penal Law', Munshaat Al Maaref, Alexandria, Egypt, 2003, p 672

²⁹⁸ F. A. Al Shathli, 'Comments on Penal Law', Dar Al Matboat Al Jameya, Cairo, Egypt, 2009, p 261

Results Arising from Considering Consent as Reason for Permission: the most important of these results is that a professional is not deemed to have committed a crime if he discloses confidential information that he keeps or of which he is aware. It should be noticed that a professional is not obliged to release confidential information if so accepted by its original keeper but this remains permissible for him only. If he decides to refuse to release it in spite of the consent, he shall not be deemed liable.²⁹⁹ He does that if he suspects the issue of the consent from a perspective of free will, or if he deems under his professional duty that he must keep it confidential. One cannot say otherwise unless the contract concluded between them contains an obligation for disclosure.³⁰⁰ Such an obligation cannot be presumed. The only exemption from the rule of permitted disclosure is the case of giving testimony in court.

Provisions Governing the Consent: consent shall not have an effect as a reason for permission unless it is given by the confidential information keeper himself. This rule shall not be limited in the case where the information keeper has given it, but includes the case where it is kept with him by another person. This shall include cases where a professional learns the information through his technical expertise. The application of this principle might include that, if a wife keeps confidential information belonging to her husband with a doctor, the consent for its disclosure must be given by the husband. In this event, the wife's approval is not crucial. It is not required that the consent be written nor should it be explicit.³⁰¹ It can be implicit. If the wife accompanies her husband in his visit to the doctor, this act is an implicit one from the husband so that the doctor can disclose the information of his illness to his wife.

However, consent cannot be presumed.³⁰² If a doctor examines a man who wishes to get married, it is not presumed that he consents to the girl he wishes to marry or to her family being informed of the result of the medical assessment. It is the duty of this doctor to show the result of the assessment to his customer only. If there are several confidential

²⁹⁹ A. K. Adli, 'Comments on Penal Law', Munshaat Al Maaref, Alexandria, Egypt, 2009, p 768

³⁰⁰ Ibid.

³⁰¹ See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 789

³⁰² See M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 790

information keepers, it is mandatory that the consent be given by all of them.³⁰³ It does not matter that consent is given by one of them or some of them; it must be given by all. An application of the above rule would be if a doctor treats a couple for a genital disease, he should not release their confidential information except with their mutual consent. Where the patient is a minor, consent must be given by the guardian and the person responsible for him. Needless to say, the consent must fulfil the conditions of its validity, hence it must represent an expression of a free will and must be given before rather than contemporaneous to disclosure.³⁰⁴ The implication of this is that consent which follows disclosure cannot serve as a reason for permission.³⁰⁵

It is permissible for consent to be retracted after giving it. If an information keeper dies, there is the question whether the right to give consent is transferred to his heirs. It is argued that it should not be transferred on the ground that such right is purely personal.³⁰⁶ To counter this argument, it is said that confidential information could be of a financial nature; hence it should be transferred to the heirs with the transfer of its subject matter to them.³⁰⁷ In addition, they could have a legitimate interest in advising the testator's information to a certain person or organisation, such as in the case where they wish to obtain a medical certificate that the testator was of sound mind at the time of making his will in order to obtain a judgement confirming the invalidity of the will. The effect of that is the transfer of the right to consent to the heirs. This is the opinion that we uphold.³⁰⁸

Related to consent, is the discussion of the provisions governing professional certificates or reports, such as a medical certificate issued by a doctor and containing information about a patient that he has treated. The basic rule is that there is no general obligation on a professional the requirement to give his client any such certificate. However, such an obligation may be derived from the relationship between them. There is no requirement to have an explicit provision to this effect, as it could be derived implicitly. The guideline here is that it must be required for the customer's legitimate interest. The rule in this

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ See A. Alshawarbi, 'Comments on Penal Law', Munshaat Al Maaref, Alexandria, Egypt, 2003, p 681

³⁰⁶ See A. K. Adli, 'Comments on Penal Law', Munshaat Al Maaref, Alexandria, Egypt, 2009, p 770

³⁰⁷ Ibid.

³⁰⁸ Ibid.

connection is simply there is no crime if a professional issues a certificate to the confidential information keeper or if he gives it to a third party with his approval.³⁰⁹

However, he is deemed to have committed the crime of disclosure if he issues it to a third party without the information keeper's consent, even if the third party is closely related to him. For example, a doctor is deemed liable when he issues a certificate to a patient's wife without the former's consent. He is even liable if he issues the said certificate to the patient's divorced spouse or, in the case of a worker, where he gives the certificate to his employer or one of his employees with the latter passing it on to the government.³¹⁰ The above case excludes cases that require or dictate filing reports to the authorities.

6. Public sector employees

A public servant commits a confidential information disclosure crime if he divulges any of the information of his employment, which is any information that he got to know by reason or owing to his employment. However, this provision does not apply to all civil servants but only to some of them who cannot carry out their job duties unless certain confidential information is kept with them, because such information is the subject matter of their work, or their means of realising the interest for which they are responsible.

Thus, it can be said that a government is obliged to deposit confidential information with such civil servants or allows them to have knowledge thereof. In most cases, their work is considered of special social importance. Identifying such groups requires an investigation of the powers vested in their members and ensuring the fulfilment of the aforesaid characteristics in them.³¹¹ Such an investigation is to be undertaken by the substantive judge. The legislation may lay down provisions that impose such an obligation and decide a penalty for a breach thereof. It is quite likely that the penalty is severer than that provided for in Article 371 of the Penal Code. As for other civil servants, they shall not be

³⁰⁹ See A. K. Adli, 'Comments on Penal Law', Munshaat Al Maaref, Alexandria, Egypt, 2009, p 770

³¹⁰ Ibid.

³¹¹ M. N. Hosni, 'Comments on Penal Law', Dar Al Nahda, Cairo, Egypt, 1998, p 791

liable for disclosing job-related confidential information but they will only face disciplinary action.³¹²

In order for the criminal liability to arise, it is important that the civil servant's powers should fulfil the aforesaid characteristics that render him, '*worthy of the trust enjoyed for his job*'³¹³ on the part of the state, and that the act of disclosure must be deliberate. The civil servants who commit the breach of confidentiality crime are those who disclose to third parties such job-related confidential information as military, diplomatic and political data. Likewise, Treasury staff who release the secrets of taxpayers where they have access to them through the tax declarations submitted or through the investigations conducted by such staff would be liable; the same applies to policemen with regard to the information they have access to through the investigations or measures that take place according to the law.³¹⁴ This is equally true of postmen and civil servants in the telephone and telegraph companies if they release confidential information or public correspondence or the information from telephone calls or telegrams where they have access to them.³¹⁵

3.2.2 United Kingdom

In the UK, unfortunately, the Proceeds of Crime Act 2002 does not include any protections relating to the duty of confidentiality. Rather, there are a number of Articles preventing disclosure in general terms, and particular, it considers the major threats to the duty of confidentiality.³¹⁶

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Proceeds of Crime Act 2002, Articles 330, 337, 338; see also R. Stokes, 'The banker's duty of confidentiality, money laundering and the Human Rights Act', *The Journal of Business Law*, 2007, p 502-526; H. E. Ping, 'The Measures on Combating Money Laundering and Terrorist Financing in The PRC: From The Perspective of Financial Action Task Force', *Journal of Money Laundering Control*, 11 (4), 2008, p 320 – 330; R. Stokes, and A. Arora, 'The duty to report under the money laundering legislation within the United Kingdom', *The Journal of Business Law*, 2004 p 332-356; J. Wadsley, 'Banks in a Bind: the Implications of the Money Laundering Legislation', *Journal of International Banking Law and Regulation*, 2001, 16(5) 125

3.3 Sources of Banking Confidentiality: Labour Law

There is no doubt that bank workers, in order to perform the work assigned to them, require knowledge of confidential data. Thus the worker should be trustworthy, and refrain from disclosing the employer's (the bank's) confidential information, because it would damage the interests of the employer and the client.

Nevertheless, the workers' duty to maintain confidentiality drives from the general principle of performing the work in good faith.³¹⁷ It is obvious by virtue of working conditions and, given the technical development in means of communication and information, that workers may become exposed to much industrial and commercial confidential information, the transferring of which to competitors may result in damaging the current employer.³¹⁸ Some scholars find that employees should refrain from disclosing confidential information either to a competitor or any other person, as the protected principle here is to maintain confidentiality, not the breach of competition legislation.³¹⁹ Moreover, it is also useful to emphasise that the employment contract in itself is the source of this obligation, even if it does not include an explicit clause, it still provides for the worker commitment to maintain confidentiality.³²⁰

3.3.1 Kingdom of Bahrain

Article 1 of the Bahrain Labour Law 1976 defines 'employee' as, '*any person, male or female, employed for remuneration of any kind in the service of an employer and under his control or supervision*',³²¹ and 'employer' as, '*any person or body corporate employing one or more workers for remuneration of any kind*'.³²² Banks, according to Bahraini law, should be established according to the terms applied to joint stock companies,³²³ licensed to undertake banking activities.³²⁴ Based on the above Articles,

³¹⁷ See A. A. Al Zqrd, 'Labour Law', Modern Library, Cairo, Egypt, 2007, p 357

³¹⁸ See A. A. Khalifa, 'General Rules For Labour Contracts', Dar Al Kutob Al Gameeya, Cairo, Egypt, 2004, p 56

³¹⁹ See E. A. Saleem, 'Comments on New Labour Law', Munshaat Al Maaref, Alexandria, Egypt, 2004, p 581

³²⁰ See E. A. Saleem, 'Comments on New Labour Law', Munshaat Al Maaref, Alexandria, Egypt, 2004, p 581

³²¹ See the Bahrain Labour Law 1976, Article 1

³²² Ibid.

³²³ The Bahrain Law of Commerce 1987, Article 5 (7), and the Bahrain Commercial Companies Law 2001, Article 63 – 108

bank employees are subject to Bahraini labour law as they are performing work for remuneration, under the supervision, control and management of the ‘employer’. Moreover, the principle of good faith in the execution of contracts requires the employee to maintain the work secrets known to them as a result of performing their job. As stipulated in Article 48 (4), the worker shall, ‘*keep the industrial and commercial secrets of the work even after the conclusion of the contract*’.³²⁵

In order for bank employees to perform their job, they must become aware of the employer’s (the bank’s) secrets regarding customer data. Consequently, bank customers’ information is considered work secrets, and bank employees should refrain from disclosing it.³²⁶ The Bahraini legislature found that the implementation of this obligation requires that an employee does not work for others, whether paid or unpaid, especially if this leads to others learning confidential information from the facility.³²⁷ Also, the Egyptian legislation prevents employees from working for a third party if doing this work will affect the good performance of their primary employment, or if it affects the dignity of employees, or if it reveals employers’ confidential information to competitors.³²⁸

1. Work secrets

‘Work confidential information’ means information concerning methods of production, including the machinery and materials used. It also means all the information related to the establishment’s activities, transactions and services, and its relation to clients.³²⁹ Work confidential information may also be any other information that reaches the employee through his work, provided that such information is legitimate and not contrary to law,³³⁰ and that their disclosure would damage the employer.³³¹

Workers’ obligations to maintain confidentiality are not limited to industrial, commercial and agricultural information, according to Article 48 (4): ‘*A worker shall: [...] (4) keep*

³²⁴ Central Bank of Bahrain Rules Book LR – 2 Licensing Conditions, LR – 2.1, Legal Status

³²⁵ See the Bahrain Labour Law 1976, Article 48.1

³²⁶ N. Mghabghab, ‘Banking Confidentiality’, Doctoral thesis, France, 1996, p 49

³²⁷ S. Deyab, ‘Bahraini Labor Law’, University of Bahrain Press, 2010, p 232

³²⁸ See Egyptian Labour Law 2006, Article 57B

³²⁹ S. Deyab, ‘Bahraini Labor Law’, University of Bahrain Press, 2010, p 232

³³⁰ Ibid.

³³¹ Ibid.

the industrial and commercial secrets of the work even after the conclusion of the contract'.³³² These obligations extend to including any confidential information regarding the business, or activities of the establishment,³³³ no matter what kind of information it is.³³⁴ This clearly includes maintaining banking confidentiality, and applies to bank employees. Therefore, the bank employee must be honest and trustworthy in protecting the entire bank's data, and client information, and must refrain from disclosing it to the public during and after their period of employment.

The concept of work confidentiality differs depending on whether it is related to the work of industrial, commercial or business, or agriculture. Therefore, it can be said that work confidentiality means all information related to the actual production, machinery and materials used in, or is the information concerning activities of the facility and its transactions and pricing of goods or services.³³⁵ Nevertheless, the restriction in Article 48³³⁶ to maintain the confidentiality of the commercial, industrial and agricultural sectors does not mean this is specifically limited to those who engage in such business, but the prohibition extends to any confidential information related to any act or activity, regardless of the nature of this work or activity.³³⁷ Consequently, work confidentiality is not merely works, but it is the style and method of work, customers, relations and communications,³³⁸ the decision of the Court of Appeals in Alexandria that informing the customer about the actual prices, or telling him that another customer bought at a lower price than the price offered to him is considered disclosure of work confidential information.³³⁹

Accordingly, although dismissal is the maximum penalty employees may face in case of breaching the duty of maintaining confidentiality which caused serious damage to the employer; this does not prevent the employer from taking the appropriate punishment if

³³² See Bahrain Labour Law, Article 48.4

³³³ S. Deyab, 'Bahraini Labor Law', University of Bahrain Press, 2010, p 233

³³⁴ Ibid.

³³⁵ S. Deyab, 'Bahraini Labor Law', University of Bahrain Press, 2010, p 233

³³⁶ See Article 48. 4 of the Bahrain Labour Law

³³⁷ See A. R. Al Hawari, 'Comments on Labour Law; Bahrain', Applied Science University Press, Bahrain, 2008, p 240

³³⁸ See Alexandria Court of Appeal, Egypt 27 Nov 1956

³³⁹ See A. A. Khalifa, 'General Rules For Labour Contracts', Dar Al Kutob Al Gameeya, Cairo, Egypt, 2004, p 59

the disclosure did not cause serious harm to the employer, where the penalty is graded according to the damage.³⁴⁰

2. The scope of restraint

Workers' obligation to maintain confidentiality is not limited to the duration of the contract, but remains even after the expiry of the employment contract. In fact, the probability of disclosing confidential information increases after leaving the workplace and, in particular, if the expiry of the contract was caused by a dispute between the worker and the employer.³⁴¹

During the contract period: Article 48 (4) of the labour law is clear and explicit when requiring employees to maintain their duty of confidentiality regarding all the information gained during the employment contract period, whether the employment contract was for a specific period or indefinite.³⁴² Bahraini law has intensified the punishment for employees for disclosing confidential information, by allowing the employer to fire the employee without prior notice, and without compensation in the case of disclosing confidential information. According to Article 113: *'An employer shall not dismiss a worker without payment of indemnity allowance, notice or compensation except in the following instances: [...] (6) if the worker discloses the secrets of the establishment by which he is employed'*.³⁴³ Thereby, Bahraini legislation allows the employers to dismiss the worker as a result of disclosing confidential information, which causes serious harm to the employer.

Disclosure post-contractual period: The law imposes an express obligation on the employee not to disclose confidential information even after the termination of the employment contract. Otherwise they are liable to compensate the employer for all the resulting damages.³⁴⁴

Therefore, if the employee breaches the duty of confidentiality after the expiration of the employment contract, he will be responsible for compensating the employer for all the

³⁴⁰ See A. Rashad, 'Comments on Labour Law; Bahrain', Manama, Bahrain p 241

³⁴¹ Ibid.

³⁴² S. Deyab, 'Bahraini Labor Law', University of Bahrain Press, 2010, p 232

³⁴³ See the Bahrain Labour Law, Article 113.6

³⁴⁴ S. Deyab, 'Bahraini Labor Law', University of Bahrain Press, 2010, p 233

damages resulting from the disclosure,³⁴⁵ as the probability of disclosure increases after leaving the work after a dispute with the employer.³⁴⁶

It is worth mentioning in this regard that employee's duty to maintain confidentiality is subject to the confidentiality of the information itself, so if this information has spread and has become known to others or others can know it easily, it does not remain classified as confidential, and therefore there is no place for this commitment anymore.³⁴⁷ Also, there is no place for this commitment if the employee used the information after the expiration of his contract in his own project, as it considered as gaining benefit from work experience, but that is conditional on the worker not to transfer this information to others. However, the employer may prevent him from using this information if the rights are registered, such as via a patent.³⁴⁸

In addition, if the employee reported information about a crime to the relevant authorities, it is not considered as disclosure of confidential information, because the reporting of crimes is a duty, as stated by the Cairo Court.³⁴⁹ Thus, the duty of confidentiality is not an absolute; rather employees are not obliged to maintain duty of confidentiality where such information becomes known to the public for some reasons other than the employee communicating it.³⁵⁰ Moreover, the employee may also disclose confidential information of the former employer, if he changed the previous activity, since the ban was meant to not to damage the employer, as long as the damage does not exist, the reason for the ban ends.³⁵¹

3.3.2 United Kingdom

Under the UK Employment Rights Act (ERA), 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment; and a 'contract of employment' means a contract of service or

³⁴⁵ See A. M. Alwarqaa, 'Labour Contracts', Ministry of Labour Press, Bahrain, 1995, p 222

³⁴⁶ Ibid.

³⁴⁷ A. Rashad, 'Comments on Labour Law; Bahrain', Manama, Bahrain p 241

³⁴⁸ See A. Rashad, 'Comments on Labour Law; Bahrain', Manama, Bahrain, p 244

³⁴⁹ S. Deyab, 'Bahraini Labor Law', University of Bahrain Press, 2010, p 233

³⁵⁰ Ibid.

³⁵¹ Ibid.

apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.³⁵² ‘Employer’ means, ‘*in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed*’.³⁵³ According to *Faccenda Chicken Ltd v Fowler*,³⁵⁴ employees under an implied fundamental obligation should refrain from disclosing or making use of confidential information, such as trade secrets, acquired in the course of employment, while the employment continues, and after the employee has left. Most employees sign non-disclosure agreements before they join a new organisation or undertake any new duties.³⁵⁵

1. Work secrets

In *Faccenda Chicken Ltd v Fowler* the court distinguished between two types of information: (1) trade secrets and confidential information; (2) general skills and knowledge easily accessible from public sources. Therefore, the court prevented employees from disclosing information from the first group. There are many sources differentiating between trade secrets and confidential information;³⁵⁶ however, in this writer’s view, it is not as important as the distinction between confidential information and general skills or knowledge, as long as the law will protect the first group from disclosure, either under the title of trade secrets or confidential information. For this purpose, the court in *Herbert Morris Ltd v Saxelby*³⁵⁷ held that:

‘wherever such covenants have been upheld it has been on the ground not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over customers of his employer, or such

³⁵² Employment Rights Act 1996 s. 230 (1), (2)

³⁵³ ERA 1996 s.230 (4)

³⁵⁴ *Faccenda Chicken Ltd v Fowler* 1987 ch 117, 1986 IRLR 69, CA. See also *Roger Bullivant Ltd v Ellis* 1987, ICR 464 CA; *Attorney General v Blake* 2001 1 AC 268 HL, *Campell v Frisbee* 2002 EWCA Civ 1374, 2003 ICR 141 CA

³⁵⁵ B. Willey, ‘Employment Law in Context: An Introduction for HR Professionals’, 2nd edn, London, Prentice Hall, 2003, p 62

³⁵⁶ K. Brearley, and S. Bloch, ‘Employment Covenants and Confidential Information; Law Practice and Technique’, London, Butterworths, 1999, p 85 – 92

³⁵⁷ *Herbert Morris Ltd v Saxelby* 1916 AC 688 709; see also *Wessex Dairies Ltd v Smith* 1935 2 KB 80, *Amber Size & Chemical Company Ltd v Menzal* 1913 2 Ch 239

an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentiality obtained'.

2. The scope of restraint

During the contract period: the duty of fidelity means the employee's duty to do the job for the employer in good faith.³⁵⁸ All employees owe their employers a duty of fidelity during the contract period, including their spare time.³⁵⁹

Disclosure post-contractual period: contracts legally bind their parties during the contract period. Once this period is over, the parties are not bound to the contract anymore. However, in labour contracts, employees are still obliged not to disclose confidential information even after the end of the contract.³⁶⁰

In *Faccenda Chicken Ltd v Fowler*,³⁶¹ the defendant, who was a sales manager, had resigned and set up a new business competing with his former employer. His contract with his former employer did not contain any provision preventing him from competing or using confidential information so, when the case was brought to court, the court differentiated between four types of business information: *'(1) information which is especially confidential so as to amount to trade secrets or their equivalent; (2) is merely confidential; (3) amount to general skills of the employee; (4) is trivial or easily accessible from public sources.'* Only information under categories 1 and 2 were considered confidential.

3.4 Duty of Confidentiality: Sources in Banking Law

³⁵⁸ *Robb v Green*, 1895 2 QB 315 CA; see also K. Brearley and S. Bloch, 'Employment Covenants and Confidential Information; Law Practice and Technique', London, Butterworths, 1999, p 22; S. Deakin and G. S. Morris, 'Labour Law', 2nd edn, London, Butterworths, 1998, p 339

³⁵⁹ *Hivac Ltd v Park Royal Scientific Instruments Ltd*, 1946 1 Ch 169

³⁶⁰ H. Collins, K. D. Ewing and A. McColgan, 'Labour Law: Text and Materials', Oxford, Hart, 2005, p 150 – 155

³⁶¹ *Faccenda Chicken Ltd v Fowler* 1987 Ch 117, 1986 IRLR 69, CA

After all that has been discussed so far, the question arises as to whether these rules are enough to protect banking confidentiality, or whether there is still a need for a separate banking code to deal with confidentiality in the banking sector. Is there any necessity or need for special protections for banking confidentiality?

Working in the banking sector is different from other professions. The banking sector also has a significant impact on the economy of the country. Moreover, the relationship between banks and their customers is different from any other relationship. Therefore, some legal jurisdictions, such as Syria, have decided to set up a special code for banking confidentiality,³⁶² while other jurisdictions, such as Switzerland,³⁶³ Lebanon,³⁶⁴ and Bahrain,³⁶⁵ have a dedicated group of Articles within general banking law to deal with banking confidentiality. However, the UK legislature found that there was no need to create special legal Articles to protect banking confidentiality,³⁶⁶ despite the Jack Committee recommendations.³⁶⁷

3.4.1 Kingdom of Bahrain

Despite the fact that the Bahrain Monetary Agency Law 1973 does not include any Articles regarding banking confidentiality, international best practice has been applied by banking institutions to maintain customer confidentiality.³⁶⁸ The Bahraini legislature found it extremely important for the development of the banking sector to identify the parameters of banking confidentiality. To this end, Part 8 of the Central Bank of Bahrain and Financial Institutions Law³⁶⁹ was allocated to governing and controlling banking confidentiality issues in the Kingdom of Bahrain. Therefore, Article 117 was made very broad and general in preventing licensees (banks) from disclosing customers' confidential information for any reason; it gives four exceptions allowing disclosure.

³⁶² Syria Banking Confidentiality Law 2010.

³⁶³ Switzerland Banking Law 1934

³⁶⁴ Lebanon Banking Law 1956

³⁶⁵ Central Bank of Bahrain and Financial Institutions Law 2006

³⁶⁶ White Paper Services: Law and Practice (Cmd 1026) 1990

³⁶⁷ Jack Committee Report, 1989, CM 622

³⁶⁸ Bahrain Monetary Agency Regulations: <http://www.cbb.gov.bh/home.php>

³⁶⁹ Central Bank of Bahrain and Financial Institutions Law 2006 (CBB Law)

1. Article (117)³⁷⁰

‘Confidential Information must not be disclosed by a Licensee unless such disclosure is done: (1) Pursuant to an unequivocal approval of the person to whom the confidential information relates. (2) In compliance with the provisions of the law or any international agreements to which the Kingdom is a signatory. (3) In the process of executing an order issued by a Competent Court. (4) For the purpose of implementing an instruction given by the Central Bank.’

2. Article (118)³⁷¹

‘The Central Bank may disclose under the following circumstances any Confidential Information received thereby directly or indirectly: (1) In any of the cases stated in Article (117) of this law. (2) In connection with any measures taken by the Central Bank to ensure stability and reinforce trustworthiness of banking and financial system of the Kingdom, if the said measures require such disclosure. (3) In cooperation with international financial organizations or competent administrative bodies or authorized committees.’

3. Article (119)³⁷²

‘No person who receives, directly or indirectly, Confidential Information may disclose such information otherwise than as specified under Article 118 of this law.’

3.4.2 United Kingdom

*Tournier v National Provincial and Union Bank of England*³⁷³ is the leading case in transforming the duty of confidentiality from a mere moral duty into a legal obligation. Tournier’s bank account was overdrawn, and he reached an agreement with the Bank to pay regular instalments of £1 per week. As he did not have a fixed address, he gave the Bank the address of his employer. After he failed to repay the agreed amount, the branch manager of the Bank called Tournier’s employer for the purpose of getting Tournier’s private address. While speaking, the branch manager informed Tournier’s employer about

³⁷⁰ CBB Law, Article 117

³⁷¹ CBB Law, Article 118

³⁷² CBB Law, Article 119

³⁷³ *Tournier v National Provincial and Union Bank of England* 1924, 1 KB, 481, 485

his current overdraft, and that he was betting heavily. After becoming aware of Tournier's situation, his employer refused to employ him after his probationary period. For this, Tournier sued the bank for breach of confidentiality. Bankes LJ held:

'on principle I think that the qualifications can be classified under four headings: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer'.³⁷⁴

The key comment in the court's decision is that the court had not explained in detail the main rule of the duty of confidentiality. Instead they had emphasised the four main well-known exceptions. The court's leading decision set down the duty of confidentiality as a legal duty, but it did not clarify the details of this legal obligation. Nevertheless it moved quickly to review the four main exceptions.

The Jack Committee recommended in its report³⁷⁵ that the duty of confidentiality should be codified in order to protect customers from continued endless exceptions; however, the British Government rejected the recommendations, claiming that this might cause difficulties and confusion.³⁷⁶

Still, Paragraph 11.1 of the Banking Code³⁷⁷ provides that, *'we will treat all your personal information as private and confidential (even when you are no longer a customer). We will not reveal your name and address or details about your account to anyone, including other companies in our group, other than in the following four exceptional cases when we are allowed to do this by law.'* It then enumerates the exceptions cited in the *Tournier* case. Nevertheless, some writers criticise Section 12 of the Banking Code,³⁷⁸ which allows the exchange of customer confidential information between banks and some entities, as an obvious breach of the confidentiality duty.³⁷⁹

³⁷⁴ Ibid.

³⁷⁵ 'Banking Services: Law and Practice', Jack Committee Report 1989, Cm, 622

³⁷⁶ White Paper 1990 Cm. 1026, 4

³⁷⁷ Banking Code: A voluntary code of best practice for banks, building societies and other banking services.

³⁷⁸ Alan L. Tyree, 'Does *Tournier* apply to building societies?' *Journal of Banking and Finance Law and Practice* 6, 1995, p 206 – 208

³⁷⁹ *Bank of Tokyo Ltd v Karoon*, 1987, AC 45; see also *Bhoghol v Punjab National Bank*, 1988, 2 All ER 296

The Data Protection Act 1998

Part 1, Schedule 1, of the Data Protection Act (DPA) defines personal data as, '*data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*' 'Processing' is given a wide meaning, and includes, '*obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including: (a) organisation, adaptation or alteration of the information or data, (b) retrieval, consultation or use of the information or data, (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or (d) alignment, combination, blocking, erasure or destruction of the information or data.*'

Schedule 2, Paragraph 6 (1), of the DPA protects individuals against any unlawful use of their personal data, and controls processing and movement of such collective data. Moreover, according to the DPA, personal data should be used fairly and lawfully; personal data should be obtained for specific purposes, and all appropriate measures should be taken while storing this data in order to prevent any unauthorised misuse of individuals' data.

Comments

- Article 8 of the ECHR protects private life, family life, home and correspondence, which is considered a strong defence of banking confidentiality in the UK. The Constitution of the Kingdom of Bahrain lacks adequate protection of private life and privacy in general, much less banking confidentiality in particular. This is because protection is limited to homes and correspondence.
- As Article 8 of the ECHR directly protects an individual's private life, this will directly impact the development of legislation in protecting confidentiality from future

encroachment. However, Article 19 (a) of the Constitution of Bahrain could not, by itself, ensure banking confidentiality. The Constitutional Court of Kuwait's interpretation greatly helps in understanding the scope of the Article, but unfortunately it is not binding.

- When legislation punishes any conduct with a criminal penalty, it causes society to be aware of the seriousness of the crime, and that such action constitutes a real threat to the security and safety of the community or economy. Accordingly, the Bahraini legislature did well by criminalising the act of disclosing confidential information. However, requiring intent to be proven in order to penalise the act of disclosure does not really protect the economy, or provide adequate protection to bank customers to secure their data from being disclosed through negligence, for instance.
- The Proceeds of Crime Act 2002 is considered somewhat difficult with regard to banking confidentiality, as it places more weight on money laundering than protecting banking confidentiality.
- In order to avoid the complexity of identifying what is either a trade secret, confidential information, or general skill/knowledge, it is highly advisable to include a clear term in the employment contract preventing employees from disclosing confidential information.
- Preventing employees from disclosing information during and even after the employment contract does not provide adequate protection to the duty of confidentiality in the banking sector, for many reasons. First of all, the scope of the labour law is not indefinite; there is a limit to this protection. Secondly, it is not always clear whether customer information is classified as confidential information or general skills and knowledge.
- Protection of confidentiality under labour law has been set to protect employers primarily, not customers; therefore its main focus is on the relationship between the employer and employee, but not customers.

Chapter Four: Scope of Banking Confidentiality

4.1 Introduction

As has been concluded in the previous chapter, banking confidentiality has been transformed from a mere moral rule into a rule of law, which has been developed into special legislation in many countries. Moreover, the punishment of disclosing confidential information is no longer only civil or compensatory, but now attracts a criminal penalty in many different legal systems. Therefore, defining the scope of confidentiality remains the most complicated issue with regard to the application of banking confidentiality. The complexities of the banking activities on the one hand and the variations of the solutions adopted on the other hand are the factors which makes this element more difficult.

The parties committed to maintain banking confidentiality are the bank on the one hand, and clients on the other hand. Article 1 of the CBBFIA defines a bank as, '*1- any corporate body licensed under the terms of this law to accept deposits, advance loans, manage and invest funds with or without providing any other related services. (2) any person licensed under this law to accept, manage and invest deposits and savings according to the Islamic Shari'a Principles with or without providing other related services. (3) any other licensee as approved by the Central Bank.*'³⁸⁰ However, the Bahraini legislation does not define the term 'client', but merely defines the meaning of person as, '*any natural or corporate person*',³⁸¹ clearly noting that the legislation does not set a definition for the word 'customer' or 'client'. Therefore, the 'client' is any natural or corporate person, with an intent to enter into transactions or banking operations with a certain bank, where the bank accepts this relationship. The client definition excludes shareholders, employees and board members; thus, they are not protected under banking

³⁸⁰ See CBBFIL 2006, Article 1

³⁸¹ Ibid.

confidentiality unless they become a client of that bank.³⁸² Tourists and travellers are also not considered as clients of the bank.³⁸³

In this chapter the writer will discuss the scope of banking confidentiality, will analyse which actions and information are protected by banking confidentiality, and define the duration of the duty of banking confidentiality.

4.2 Types of Information Protected Under Banking Confidentiality

4.2.1 Kingdom of Bahrain

Legally, many different methods have been used in order to categorise confidential information. The first is the statistical method, which depends on statistical details of various data regarding banking transactions that must be protected under banking confidentiality. An example is the Jordanian law, which states that, '*A bank shall observe full confidentiality regarding all accounts, deposits, trusts, and safe-deposit boxes of its customers*'.³⁸⁴ The second is the objective way; this method depends on the fact that all information which reaches the bank regarding the client must be protected under banking confidentiality, provided that such information is not already known by the public.³⁸⁵

However, Bahraini law does not specify which type of information should be protected under banking confidentiality. According to Article 116, '*In this Chapter, "Confidential Information" means any information on the private affairs of any of the Licensee's customers*'.³⁸⁶

By comparing the English translation with the official Arabic Article, the writer found that it is unfortunately not an accurate translation; the Arabic version says confidential information means database and private information. Therefore, as the Article does not specifically state what type of information is protected under the confidentiality rule, this

³⁸² See S. Al qayloobi, 'Banking transactions; Legal Bases', Dar Al Nahda, Cairo, 1998, p 215

³⁸³ Ibid

³⁸⁴ See Jordan Banking Law 2000, Article 72

³⁸⁵ See Switzerland Bank Act 1934

³⁸⁶ See CBBFIL, Article 116

makes it open to include all types of information, as the Article does not provide any restrictions or limitations.

Article 1 defines Licensees as, ‘*any person licensed by the Central Bank to provide any of the regulated services*’,³⁸⁷ which expands the scope of institutions that are bound by maintaining customer confidentiality to include many other Central Bank licensees such as Islamic Shari’a Banks, Insurance or Reinsurance Companies, Financial Sector Support Institutions and the Stock Exchange.³⁸⁸

It is clear that the banks’ duty of confidentiality under Bahraini law requires the establishment of a banker customer relationship between the bank and the client. Therefore, any information declared by the person before the start of the banker customer relationship is not protected under the confidentiality rule. Thus, practically any person can cash a specific cheque drawn on a certain bank but would not be considered as a bank customer, therefore not protected under confidentiality rule.

Moreover, the writer argues that, in addition to the confidentiality protection provided to the clients’ accounts, deposits, trusts and safe-deposit boxes, it also includes all the information given by the customer to the bank employee through any side conversation during the course of the banker customer relationship. Therefore, all bank employee are obliged to maintain customer confidentiality despite their job title or years of experience, and it also includes bank messengers who become aware of some confidential information during the performance of their job³⁸⁹. Thus, according to the article above the scope of banking confidentiality includes the following.

1. Bank accounts

The mere knowledge of the existence of a bank account is considered part of confidential information,³⁹⁰ as are all client activities during the banker customer relationship, which is always assumed as it illustrates the trust between clients and their bank.³⁹¹ Also included

³⁸⁷ See CBBFIA 2006, Article 1

³⁸⁸ Ibid

³⁸⁹ See R. A. Abdualhameed, ‘Banks Crimes Reconciliation’, Dar Al Nahda, Cairo, 2005, p 375

³⁹⁰ See S. Al qayloobi, ‘Banking transactions; Legal Bases’, Dar Al Nahda, Cairo, 1998, p 238

³⁹¹ Ibid

is all the information related to the natural person, such as name, nickname, place and date of birth, style of life and standard of living.

Through a client's transactions, banks become aware of some details regarding the client's personal life and his habits, such as whether he has been ill, or has a habit of substance abuse, or if he has issued cheques without the funds to clear them. The bank also knows whether a court judgment has been issued against the client, if the client is or has been bankrupt, his true career and the information related to the employer.³⁹² It is also necessary for traders to obtain information related to financial liquidity and business conduct; all this information is also protected by banking confidentiality.³⁹³ Banking confidentiality also includes all the inventions, business agreements and business contracts.³⁹⁴ Nevertheless, the word 'database' means that the duty of banking confidentiality includes all types of bank accounts, current and saving accounts,³⁹⁵ whether credit or debit accounts.³⁹⁶

2. Safe deposit boxes

Leasing safe deposit boxes is an agreement between banks and their customers, where the bank is committed to provide a box or treasury for the customer's (or 'lessee') usage for a specific time.³⁹⁷ Where the bank receives the rent for providing the safe deposit box key to the customer, the customer may secure any item inside such boxes without being monitored by the bank.³⁹⁸ As banks represents a place of trust, security and confidentiality, the primary motive for customers to lease a safe deposit box is that they seek a safe place for their valuable possessions away from the house, which is provided by banks.³⁹⁹

³⁹² See N. Mughabghab, 'Banking Confidentiality', Beirut, 1996, p 84

³⁹³ Ibid

³⁹⁴ Ibid

³⁹⁵ Ibid

³⁹⁶ See Kuwait Court of Cassation, 35, 1997 Commercial

³⁹⁷ See S. Al Qayloobi, 'Banking transactions; Legal Bases', Dar Al Nahda, Cairo, 1998, p 348

³⁹⁸ Ibid

³⁹⁹ Ibid

As defined by the Bahraini law of commerce; *'it is a contract whereby the bank undertakes to place a specific safe at the disposal of the lessee, to make use thereof for a specific period, in return for a specific fee'*.⁴⁰⁰

Therefore, the act of a customer leasing a safe deposit box is considered as confidential information, along with the safe deposit box content, and the bank should refrain from disclosing such information.⁴⁰¹ Legislation in many countries lists items which are protected by banking confidentiality, including safe deposit boxes.⁴⁰² As the content of the safe deposit boxes remains confidential even to the bank itself, therefore the bank in this scope has no information to disclose, except the names of the owners of the safe deposit boxes.

Clients deposit their money with a bank in order to protect it from loss or theft, to gain interest on the money by investing it for a certain period, or even to achieve both purposes together.⁴⁰³ *'A money deposit is a contract which grants the bank the right to possess the deposited money and to dispose thereof in its ordinary course of business with an obligation to return an equal amount thereof to the depositor'*.⁴⁰⁴ Thus, banking confidentiality includes trust as well as cash deposit and safe deposit boxes, where banks should refrain from disclosing confidential information related to trust of all different types.

4.2.2 United Kingdom

The duty of confidentiality arises only when a banker customer relationship is established but, as Bankes LJ said, *'the duty of confidentiality does not cease the moment the customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to.'*⁴⁰⁵

⁴⁰⁰ See Bahrain Commercial Law 1987, Article 293

⁴⁰¹ See N. Mughabghab, 'Banking Confidentiality', Beirut, 1996, p 84

⁴⁰² Jordan Banking Law, Article 72

⁴⁰³ See S. Al Qayloobi, 'Banking transactions; Legal Bases', Dar Al Nahda, Cairo, 1998, p 573

⁴⁰⁴ See the Bahrain Commercial Law 1987, Article 275

⁴⁰⁵ See *Tournier* 1924 1 KB 461 at 473

This means that all information gained before the relationship starts and after it ends falls outside the scope of the duty of banking confidentiality; however, banks need to be cautious in disclosing information gained before the relationship started for many reasons. Firstly, information received before the banker customer relationship started may be repeated once it has commenced and so then fall within the scope of the duty of confidentiality. Secondly, information may be passed to the bank at any time in circumstances that subject it to the general law of confidence. Thirdly, the bank may have given an express undertaking to the customer to keep that information secret.

The Banking Code has therefore been made wide-ranging enough to include all the personal information without any limitations:⁴⁰⁶

*'a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information from others ... to this broad general principle there are three limiting principles ... the first ... is that the principle of confidentiality only applies to information to the extent that it is confidential ... the second limiting principle ... is that the duty of confidences applies neither to useless information, nor to trivia ... the third limiting principle ... is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless the public interest may be outweighed by some countervailing public interest which favours disclosure..'*⁴⁰⁷

It is also obvious that the duty of confidence in the context of banking is not confined to information provided by the customer; any information generated by the defined bank, including impressions and assessments, or any information which comes to it relating to the customer, is protected if it has a confidential quality.

The protection can extend to information acquired by the bank in the course of providing non-banking services. Clearly, the duty does not depend on the capacity of the customer.

⁴⁰⁶ See Banking Code 2005, Para. 11.1

⁴⁰⁷ See *Attorney-General v. Guardian Newspapers Ltd* (No. 2) 1990, 1 AC 109, at 281-2

Information which is common knowledge is not, however, subject to the duty.⁴⁰⁸ Banking confidentiality even includes the information, ‘*of a negative character*’,⁴⁰⁹ such as that the client did not use the account for certain time.

4.3 Duration of the Duty of Confidentiality

It is crucial to determine the moment at which banker-customer confidentiality starts: when exactly banks become legally responsible for maintaining a duty of confidentiality for their customer and when such duty ends. Therefore, the scope of banking confidentiality includes the duration of such duty.

4.3.1 Kingdom of Bahrain

Unfortunately, Section 8 of the CBBFIA⁴¹⁰ lacks a definition of the duration of the duty of confidentiality, and it does not specify the point from which banks are obliged to maintain a duty of confidentiality for their customers. Thus, legally, financial institutions are obliged to maintain duty of confidentiality throughout the existence of the banker-customer relationship, but the question which arises here is, are financial institutions allowed to disclose customer confidential information directly after the termination of the relationship? Based on international banking good practice, banks should maintain customer confidentiality even after the termination of the relationship,⁴¹¹ however, there is no legal duty on financial institutions in Bahrain to keep customer information confidential beyond the duration of the relationship.

⁴⁰⁸ See *Christofi v Barclays Bank plc*, 2000, 1 WLR 937, 1999, 4 All ER 437 (CA)

⁴⁰⁹ See R. Cranston, ‘Principles of Banking Law’, Oxford University Press, 2nd edn, 2002, p 172

⁴¹⁰ See CBBFIA 2006 S. 8

⁴¹¹ See S. Al Qayloobi, ‘Banking transactions; Legal Bases’, Dar Al Nahda, Cairo, 1998, p 569

4.3.2 United Kingdom

Since 1924, in the *Tournier* case, English courts have made it clear that the duty of confidentiality is not restricted to the continuation of the banker-customer relationship but continues after the termination. As Bankes LJ states, '*the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to*'.⁴¹² Moreover, some writers argue that the duty continues after the customer's death.⁴¹³

Comments

- CBBFIA articles relate to the protection of the duty of confidentiality focused on the exceptions of the duty of confidentiality, but do not discuss important details such as the scope and duration of the duty of confidentiality. and it does not specify the point from which banks are obliged to maintain a duty of confidentiality for their customers Thus, legally, financial institutions are obliged to maintain duty of confidentiality throughout the existence of the banker-customer relationship
- Under Bahraini legislation, it is not clearly specified which information is classified as confidential which bankers are not allowed to disclose to the general public. Therefore, as the Article does not specifically state what type of information is protected under the confidentiality rule, this makes it open to include all types of information, as the Article does not provide any restrictions or limitations.

⁴¹² See *Tournier* 1924, 1 KB 461

⁴¹³ See M. Haggood, 'Paget's Law of Banking', 12th edn, London, 2002, Para. 8.2

Chapter Five: The Limits of Banking Confidentiality

Since Hammurabi,⁴¹⁴ most human societies have set rules and regulations to achieve the greatest degree of balance between conflicting interests among the members of the same society. However, there is no absolute legal rule; every legal rule has an exception which addresses various situations and circumstances. Nevertheless, an exception should not be expanded, nor measured upon.

Accordingly the duty of banking confidentiality, like any other legal rule, is not an absolute duty; there are exceptions to that duty, and this may differ from one jurisdiction to another. The *Tournier* decision constituted a milestone in the history of banking confidentiality in the UK; it not only transformed the existence of banking confidentiality from merely a moral obligation into a legal duty, but it also set down the four primary exceptions or qualifications to that duty.⁴¹⁵ In the *Tournier* case, Bankes LJ stated that the duty of confidentiality was subject to four exceptions: '*(a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interest of the bank requires disclosure; (d) where the disclosure is made by the express or implied consent of the customer*'.⁴¹⁶

Similarly in Bahrain, Article 117 of the Central Bank Bahrain and Financial Institutions Act (CBBFIA) 2006 states that, '*Confidential information must not be disclosed by a licensee unless such disclosure is done: (1) Pursuant to an unequivocal approval of the person to whom the confidential information relates; (2) In compliance with the provisions of the law or any international agreements to which the Kingdom is signatory; (3) In the process of executing an order issued by a competent Court; (4) For the purpose of implementing an instruction given by the Central Bank*'.

⁴¹⁴ The first king of the Babylonian Empire 1792 BC – 1750 BC; see M. Alfadhel, 'History of Law', Dar Althaqafa Press and Publishing, Beirut, 1998, p 86 - 89

⁴¹⁵ See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

⁴¹⁶ *Ibid.*

As the third exception (according to the CBBFIA) states, disclosing confidential information because of executing court orders is considered as a disclosing compulsion by law.

This chapter will be divided into five sections: Section One will discuss the first exception, compulsion by law; Section Two will cover the duty to the public to disclose; Section Three, where the interest of the bank requires disclosure; Section Four, the disclosure according to the customer consent, and in Section Five, disclosure for the purpose of implementing Central Bank instructions will be discussed.

5.1 Exception One: Disclosure under Compulsion of Law

Legislation sets certain rules to regulate acts, rights and responsibilities, and also sets some exceptions to that rule, either in the same Act, or there might be other related exceptions in different legal Acts. Therefore, the banking confidentiality legal framework has some exceptions which can be found either within the same legal rule, or there might be some related exceptions in different laws. Thus, to organise the discussion in this section, it might be helpful if the section was subdivided into two subsections: (A) court order to disclose, and (B) the law requires the disclosure.

5.1.1 Court order

A judge may need to request some information from a bank that relates to a specific case being seen before him. This requires courts to order banks to respond to witness summons and writs of sequestration. Banks may also cooperate with the judiciary in the implementation of a judicial decision, such as the case of Garnishee Orders, or to provide the proof in cases where a bank or a bank customer is a party to that case.

1. Discovery orders

A discovery order is a pre-trial procedure, where opposing parties are allowed to ask each other to provide evidence or documents of a great importance in their cases. A discovery order aims to ensure the availability of certain evidence and that it can be presented to the

court at the litigation stage. Consequently, each party can weigh his case and decide whether or not they have enough strong evidence to continue with the litigation.⁴¹⁷

In *Norwich Pharmacal Co. & others v Customs and Excise Commissioners*,⁴¹⁸ the owner and exclusive licensee of a patent was unable to identify the importer of an unlicensed shipment which had already been imported into the UK. Norwich Pharmacal could identify the importer through the Excise Commissioners as they held information enabling them to recognise the importer, but the Commissioners refused to provide the information, claiming that they had no authority to do so. The court decision was that, in the case where a third party who is not related to the case has important information that would affect the case, the court may force him to provide such information to that party. Therefore, banks are required to provide information about a third party to assist the court in identifying a 'wrongdoer'. The Norwich decision constitutes the basic grounds for the disclosure of all customer information. Latterly in *Bankers Trust Company v Shapira*,⁴¹⁹ the court permits even more disclosure by stating that banks do not owe a duty of confidentiality toward customers found guilty of fraud, and they in turn cannot depend on a confidential relationship with their bank.

However, in *Arab Monetary Fund v. Hashim*,⁴²⁰ the court refused to permit disclosure. Hoffmann J states that, *'The reference to "full information" has sometimes led to an assumption that any person who has become mixed up in a tortious act can be required not merely to disclose the identity of the wrongdoer but to give general discovery and answer questions on all matters relevant to the course of action. In my view this is wrong. The principle upon which Lord Reid distinguished the "mere witness" rule was that unless the plaintiff discovered the identity of the wrongdoer, he could not commence proceedings. The reasoning of the other members of the House is the same. The Norwich Pharmacal case is no authority for imposing upon "mixed up" third parties a general*

⁴¹⁷ See J. Wadley and G. A. Penn, 'The Law Relating to Domestic Banking', Sweet and Maxwell, London, 2000, p 143

⁴¹⁸ See *Norwich Pharmacal Co. v Customs and Excise Comrs* 1974, A.C 133, see also *Carlton Film Distributors Ltd v VCI Plc* 2003, EWHC 616

⁴¹⁹ See *Bankers Trust Company v Shapira* 1980, 1 W.L.R. 1274

⁴²⁰ See *Arab Monetary Fund v. Hashim (No. 5)* 1992, 2 All E.R 911

obligation to give discovery or information when the identity of the defendant is already known,⁴²¹

The above judgment clarified the situation of banking confidentiality in discovery orders and set limits for ongoing disclosure. As the judge held that the plaintiff should elucidate an actual possibility that having the information may help in acknowledging or protecting assets, so the judge must take into account the balance between the interest of access to information and the interest of maintaining the confidentiality of information, based on achieving a genuine objective. Taking into account that such confidential information will be disclosed to the plaintiff even before filing a case, an essential requirement must be achieved in order for the judge to allow the disclosure without any unfairness to the customer.

According to the judicial system in the Kingdom of Bahrain, Article 145 of the Civil and Commercial Procedures Act 1971 (CCPA) states that, *‘During the course of the action, even before the Court of Appeal, the Court may, in the circumstances, and subject to the provisions and conditions, specified in the preceding Article, allow a third party to be introduced to be required to submit a document at its disposal. It may also require administrative departments to submit in writing such information and documents as they have that are necessary to the hearing of the case, provided that submitting them would not be detrimental to the public interest.’*⁴²² Thus, courts can only practice a power of ordering certain information from any party during the course of the action, and no one can obtain any information from any party in a future case at any stage before the trial.⁴²³ Therefore, discovery orders are not applicable in Bahrain.⁴²⁴

2. Witness summons (subpoena)

⁴²¹ Ibid.

⁴²² See Bahrain Civil and Commercial Procedures Act 1971, Article 145

⁴²³ See Bahrain Evidence Law in Civil and Commercial Matters 1996; see also Bahrain Civil and Commercial Procedures Law 1971; M. S. Khalifa and A. Othman, ‘Evidence Law; Bahrain’, University of Bahrain Press, Bahrain, 2007

⁴²⁴ See M. S. Khalifa and A. Othman, ‘Evidence Law; Bahrain’, University of Bahrain Press, Bahrain, 2007; see also A. Al Aboodi, ‘Evidence Law’, Dar Al Elm, Cairo, Egypt, 1998

One of the most important tools that courts usually rely on to obtain necessary evidence is the witness summons or subpoena. A witness must appear before the court and disclose all the relevant information he knows, saw or became aware of to the court; testimony is a legal duty and an individual cannot refuse to produce any required document. If necessary, the court can force the witness to appear for testimony. A bank may be considered as a witness in civil proceedings but, in this regard, legislation varies from one jurisdiction to another. Some jurisdictions require the bank to refrain from giving testimony because of banking confidentiality, whether before the civil or criminal court; examples are the Egyptian law of confidentiality of bank accounts⁴²⁵ and the banking confidentiality law of Lebanon.⁴²⁶

In Bahrain there is a differentiation between criminal courts and civil courts, according to Article 114 of the Bahrain Civil and Commercial Procedures Act 1971.⁴²⁷ Lawyers, attorneys, doctors and others who have learned some fact or information through their practice or occupation may not divulge it, even after their period of service is over and they no longer serve in their former capacity, unless it was told to them for the sole purpose of committing a felony. However, such persons must give evidence concerning this fact or information when asked to do so by the person who confided it to them, provided that this does not prejudice the provisions of special laws regarding them. Therefore, according to the Article, and with regard to the criminal courts, a bank cannot refuse to give testimony or to provide any evidence, because this harms the public interest and affects the course of justice, and the interest of public order is always superior to the individual's interest in protecting their confidential information from being disclosed by the bank.⁴²⁸

However, regarding civil procedures, Article 114 of the CCPA states that, '*lawyers, attorneys, doctors and others*',⁴²⁹ are not allowed to disclose customer information. Although this Article does not mention banks explicitly, it seems that the legislation is aimed at protecting the special nature of the relationship between professionals and their

⁴²⁵ See Egyptian Law of Confidentiality of Bank Accounts 1990

⁴²⁶ See Lebanese Banking Confidentiality Law 1956

⁴²⁷ See Bahrain CCPA 1971, Article 114, see also Civil and Commercial Evidence Act 1996, Article 67

⁴²⁸ See M. S. Khalifa and A. Othman, 'Evidence Law; Bahrain', University of Bahrain Press, Bahrain, 2007

⁴²⁹ See Bahrain Civil and Commercial Procedural Act, Article 114

clients; therefore it has been argued that banks may be classified as ‘others’ in this Article and therefore are not allowed to produce testimony before the civil court.

In the UK, banks are required to give evidence before the court: as Diplock J states: ‘*For example, in the case of banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as to his customer’s affairs when he is asked to give evidence on them in the witness box in the court of law.*’⁴³⁰ Thus, protecting confidentiality cannot be used as an excuse to refuse a witness summons. Furthermore, banks are under no duty to inform their customers about a summons or to obtain their consent to disclose their confidential information;⁴³¹ the only reasons for a bank to inform its customer about a subpoena and that their confidential information will be disclosed would be courtesy and good business practice. In a case where the bank asked to hide some requested information that seemed irrelevant to the case, such as the final overdraft balance, the court preferred to oblige the bank to comply with the subpoena without any limitations.⁴³² In all cases, whether before a civil or a criminal court, it is vital to mention that, whenever a bank is required to produce any document by witness summons, it should produce the specified required information only without any extra unrequested details.⁴³³ A witness summons of this type can be submitted even before the start of the hearing, just as with a discovery order.⁴³⁴

3. Writs of sequestration

Writs of sequestration are procedures of the civil courts, where the court has the power to order the seizure of the assets of one party and sequester them, for the purpose of preventing such person from squandering the assets before the trial comes to an end. It can be said that writs of sequestration have the same concept in both countries but the courts’ reasons and limits for ordering them differ.

⁴³⁰ See *Parry Jones v Law Society* 1969, 1 Ch 1 at 9

⁴³¹ See *Robertson v Canadian Imperial Bank of Commerce* 1995, 1 All ER 824, PC

⁴³² *Ibid.*; see also J. O’Donovan, ‘Linder Liability’, Sweet and Maxwell, 2005, p 109

⁴³³ See *R v Inland Revenue Commissioners and Others, ex p Unilever* 1996, STC 681

⁴³⁴ See *Khanna v Lovell White Durrant* 1994, 4 All E.R. 267; see also J. Wadsley and G. A. Penn, ‘The Law Relating to Domestic Banking’, Sweet and Maxwell, 2nd edn, 2000, p 144

The concept of writ of sequestration has a wider application in Bahrain than in the UK; in Bahrain, the court may order a writ of sequestration in all cases where, '*the plaintiff has serious grounds for fearing that the defendant will abscond or smuggle his property abroad or dispose of it with the intention of obstructing or delaying any order or decision issued against him.*'⁴³⁵ Consequently, in Bahrain, writs of sequestration may be ordered when the plaintiff has '*serious grounds for fearing*'⁴³⁶ that the defendant may squander his money in a manner that may harm his interests and impede the enforcement of the court's decision; moreover, the plaintiff can request a writ of sequestration from the court of urgent appeals.⁴³⁷ The bank should '*undertake to keep, manage and return it as well as submitting an account concerning it to the person whose right thereto is established under the Court's supervision*'.⁴³⁸

In the British judicial system, a writ of sequestration is a power given to the court against any person who has failed to comply with the court's orders and is described as being in contempt of court.⁴³⁹ The court has the power to issue a writ of sequestration and to appoint a sequestrator.⁴⁴⁰ The bank's role is to monitor the account carefully,⁴⁴¹ allowing ordinary transactions, to report to the sequestrator any unusual transactions,⁴⁴² and to pay to the sequestrated account the amount demanded by the sequestrator.⁴⁴³ Therefore, according to the British legal system, the court's power in ordering writs of sequestration and consequent disclosure of confidential information is limited to situations of contempt of court. Whatever the reason behind ordering a writ of sequestration, the bank cannot refrain from fulfilling the court's orders and is not in breach of the duty of confidentiality.

4. Garnishee orders

⁴³⁵ See Bahrain Civil and Commercial Procedures Act 1971, Article 176

⁴³⁶ Ibid.

⁴³⁷ Ibid. Article 177

⁴³⁸ Ibid. Article 180

⁴³⁹ See *Taylor & another v National Union of Mineworkers (Yorkshire Area) and National Union of Mineworkers* 1984, I.R.L.R. 445

⁴⁴⁰ See *Eckman & others v Midland Bank Ltd & Another* 1973, 1 Q.B. 519

⁴⁴¹ Ibid., see also J. Wadsley and G. A. Penn, 'The Law Relating to Domestic Banking', Sweet and Maxwell, 2nd edn, 2000, p 145

⁴⁴² Ibid.

⁴⁴³ Ibid.

Garnishment is a civil court procedure where a party to the dispute has the power to ask a third party or creditor of his debtor for a garnishee or attachment order. This presumes the existence of three parties, the creditor (the garnishor), the debtor, and the creditor to the debtor (or other third party such as an employer), the garnishee. Where the debtor has failed to perform his financial obligations to the creditor, the latter may resort to the third party or creditor of his debtor by the force of court and ask for a garnishee order. In this relationship, the bank may play the role of the debtor's creditor and the court has the power to order the bank to provide details of the customer's account without any breach of the confidentiality relationship. A garnishee order is the initial step that precedes a court order for an immediate payment to the creditor.

According to Article 282 of the CCPA: *'The litigant that wins the case shall be entitled to seek the enforcement of the Court judgement by way of garnishment, i.e., by attaching any funds held or debts owed by third parties to the debtor, even if such debts are deferred or dependent upon the fulfilment of a particular condition, as well as the debtor's movable property held by any third party.'*⁴⁴⁴ Thus, banks are not only obliged to produce a copy of the customer's account record, but also to provide the entire documents regarding any existing debts *'owed by third party'*.

5. Cross-borders disclosure

Territorial borders are no longer considered as barriers to local courts gaining the required evidence in civil and commercial cases. Rather, many countries have enacted laws to regulate the process, procedures and limits for so doing across borders.⁴⁴⁵ Nations are bound by different bilateral or multilateral treaties to ensure judicial cooperation in this regard.⁴⁴⁶ Therefore, seeking cross-border evidence is no longer a problem. However, in what ways does this affect the duty of confidentiality? And are there any limits to or restrictions on providing or seeking cross-border confidential information? In this regard, two assumptions will be discussed. The first is where foreign courts require assistance

⁴⁴⁴ See Bahrain Civil and Commercial Procedures Act 1971, Article 282

⁴⁴⁵ See UAE Federal Judicial Corporation Law 2006

⁴⁴⁶ See S. Mustafa, 'International Judicial Treaties', Modern University Office, Cairo, Egypt, 2005, p 7

from local courts, and the second is where local courts seek evidence from foreign countries.

Assisting foreign courts: this situation assumes that a case is being heard before a foreign court, that either one or both parties seek some evidence from another country and such evidence cannot be accessed except by the cooperation of the courts in that country. The evidence in this example is a bank customer's confidential information. In Bahrain, unfortunately, there is no specific law that determines local courts' duty in assisting foreign courts; neither the law governing civil and commercial procedures nor that governing evidence in civil and commercial cases contains any article that addresses this issue. There are some bilateral judicial cooperation treaties between the Kingdom of Bahrain and other countries, under which both countries are obliged to provide judicial cooperation, but there are only three of these; between Bahrain and Egypt, Syria and India.⁴⁴⁷ There is thus no clear legal regulation governing the process of providing evidence in assistance to foreign courts. Due to this legislative vacuum, and based on applying the law of the requested states principle, it is suggested that the local court should apply local circumstances in order to decide whether to assist a foreign court or not, and courts should control the disclosure of confidential information in key evidence cases. For instance, as mentioned above, the discovery order is an unknown legal procedure in Bahrain, whereas it is very much applied in the UK and a customer's confidential information could be disclosed as a result. In cases where a UK court seeks the assistance of a court in Bahrain for a discovery order, the laws of Bahrain should be applied, and therefore the Bahrain court should not provide this assistance to the UK court.

In the UK, the Evidence Act 1975 grants an English court the authority to provide assistance to foreign courts in legal proceedings. This includes, '*production of documents, inspection, photographing, custody or detention of any property*'.⁴⁴⁸ However, a court may refuse to assist a foreign court in some situations, such as protecting sovereignty.⁴⁴⁹ In all

⁴⁴⁷ See judicial cooperation treaty between Bahrain and Egypt 1989, judicial cooperation treaty between Bahrain and Syria 2001, judicial cooperation treaty between Bahrain and India 2004

⁴⁴⁸ See Evidence (Proceedings in Other Jurisdictions) Act 1975, Article 2.2

⁴⁴⁹ See *Rio Tinto Zinc v Westinghouse Electric Corporation* 1978 A.C. 547 at 643

cases, and all jurisdictions, courts must examine each case separately and balance two vital interests: firstly, the interest of protecting and enhancing banking confidentiality and saving the economic reputation of the country and, secondly, the interest of cooperation with foreign countries and promoting diplomatic relations with the international community.⁴⁵⁰

Asking foreign courts for disclosure: this assumes a situation where a case is being heard before a local court and either one or both parties ask for the production of evidence that is available in another country. For this purpose, local courts will need to ask for assistance from foreign courts. In Bahrain, as explained above, despite the judicial cooperation treaties with some countries, there is a legislative vacuum in this regard. No specific articles discuss this situation and courts have full discretion whether to ask foreign courts to provide evidence or not. Whereas the English courts basically permit both parties to ask the court for the production of documents from another country, and the only restriction in this regard is that, '*such disclosure does not comply with local law, or invades the other side's rights, or otherwise amounts to unconscionable conduct.*'⁴⁵¹

5.1.2 Law Requires Disclosure

The exceptions to banking confidentiality may be stated in different Acts, and thus require no court order for the bank to disclose the customer's confidential information. In addition, there is another type of legislation whereby banks are required to disclose confidential information indirectly: this is where banks must divulge customer information to the authorities in order to avoid committing an offence of facilitating illegal activities; there is no direct compulsion to disclose confidential information about a customer but the bank is in danger of committing an offence.

⁴⁵⁰ See Re sSate of Norway's Application 1987, Q.B. 433 CA

⁴⁵¹ See J. Wadsley and G. A. Penn, 'The Law relating to Domestic Banking', Sweet and Maxwell, 2nd edn, 2000, p 149

Kingdom of Bahrain

In Bahrain, some legislation have clear provisions that permit banks to disclose customers' confidential information to official authorities; other types of legislation impose a general legal duty on all institutions to cooperate with certain authorities and disclose confidential information without being in breach of confidentiality. Research shows that there is no single article in the Insolvency Act that allows a bank to disclose a customer's confidential information to the liquidator, although the liquidator normally requires powers to collect all documents regarding the trustee.⁴⁵² The exceptions to banking duty of confidentiality under Bahrain laws are as follows.

1. Criminal Proceedings Act 2002

According to Article 47, everyone who is '*aware of the occurrence of a crime*',⁴⁵³ for which the Public Prosecution may initiate a legal action without a complaint or application, shall report it to the Public Prosecution or a judicial arrest officer. Article 47 is directed to the public. However, the question here is whether a bank can rely on this Article in case of disclosure of confidential information or not? Article 47 requires, firstly, that the reported event should be classified as a crime, thus reporting misdemeanours and minor violations is not permitted. Secondly, the reporting should be about a crime that has actually occurred, thus it does not allow reporting in case of doubt or suspicion. Commentators on Article 47 suggest that reporting crimes as a 'right' guaranteed to all people, rather than an 'obligation'; people and organisations have the full right to report any actual occurrence of any crime, but if they do not do so, there is no punishment.

On the other hand, Article 48, which obliges individuals to report an actual occurrence of a crime, states that, '*every civil servant or officer entrusted with a public service*',⁴⁵⁴ who becomes aware, during or by reason of the performance of his duties, of the occurrence of a crime, for which the Public Prosecution may initiate a legal action without a complaint or application, shall report it to the Public Prosecution or the nearest judicial arrest officer. It can be clearly seen that the targeted addressees, according to the Article, are civil

⁴⁵² See Bahrain Insolvency Act 1976

⁴⁵³ See Criminal Proceedings Act 2002, Article 47

⁴⁵⁴ See Bahrain Criminal Proceedings Act 2002, Article 48

servants or officers entrusted with a public service only, and this does not include the banking sector.

2. Companies Act 2002

The CBBFIA Act defines banks as, ‘*any corporate body licensed under the terms of this law*’;⁴⁵⁵ which is authorised to accept deposits from and advance loans to the general public, therefore the bank’s auditor shall have at any time the right of access to the company’s books, registers and documents, and of requesting any details he deems necessary. He shall also have the right to verify the company’s assets and liabilities,⁴⁵⁶ as auditors are responsible for checking the budget items of income and expenditure of the company, and providing periodic reports to the Chief Executive Officer and to the Board on the company's financial affairs. Accordingly, banks may disclose customers’ confidential information to the auditor, for auditing purposes, without being in breach of the duty of confidentiality.

3. Protecting Society Against Terrorism Act 2006

The exception provided for in Article 3 of this Act is applicable to any ‘money laundering crimes’;⁴⁵⁷ ‘*the Public Prosecution shall order proceedings with access or obtaining any data or information related to the accounts, deposits, trusts or safe deposit boxes with banks or other financial institutions or the transactions related thereto if this is deemed necessary for revealing the truth in any of the crimes provided for in this Law. For taking such action, a prior permission shall be obtained from the High Court judge*’.⁴⁵⁸

4. Central Bank of Bahrain and Financial Institutions Law 2006

‘*The Central Bank may disclose under the following circumstances any Confidential Information received thereby directly or indirectly: (1) in any of the cases stated in Article (117) of this law. (2) In connection with any measures taken by the Central Bank to ensure stability and reinforce trustworthiness of the banking and financial system of the*

⁴⁵⁵ See Bahrain CBBFI Act 2006, Article 1

⁴⁵⁶ See Bahrain Companies Act 2002, Article 218.a

⁴⁵⁷ See Bahrain Protecting Society Against Terrorism Act 2006, Article 2.8

⁴⁵⁸ See Bahrain Protecting Society Against Terrorism Act 2006, Article 30

Kingdom, if the said measures require such disclosure. (3) In cooperation with international financial organizations or competent administrative bodies or authorised committees.’⁴⁵⁹

United Kingdom

1. Police and Criminal Evidence Act 1984

According to the Police and Criminal Evidence Act (PACE) 1984, a bank may be asked to produce confidential documents regarding any client who is under investigation. Where there are reasonable grounds for suspicion that a certain type of crime has been committed, the PACE grants investigators the power to ask for any bank document and this is not limited to the entries in bankers’ records: ‘*A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1.*’⁴⁶⁰ Moreover, as stated in *Barclays Bank v Taylor*,⁴⁶¹ when a customer sued the bank for contesting the disclosure order and for not informing him about the order, the court held that the bank is not responsible for informing the account holder about the disclosure request regarding his account; also, the bank is not required to submit any objection regarding the disclosure order.⁴⁶²

2. Insolvency Act 1986

A company which is insolvent may be put into liquidation, sometimes referred to as ‘winding-up’.⁴⁶³ The directors and shareholders can instigate the liquidation process without court involvement by a shareholder resolution and the appointment of a licensed Insolvency Practitioner as liquidator.⁴⁶⁴ However, the liquidation will not be effective

⁴⁵⁹ See Bahrain CBBFI Act 2006, Article 118

⁴⁶⁰ See Police and Criminal Evidence Act 1984 (PACE), Section 9

⁴⁶¹ See *Barclays Bank v Taylor* 1989, 1 W.L.R., 1066

⁴⁶² *Ibid.*, see also *Robertson v Canadian Bank of Commerce* 1994, 1 W.L.R., 1493; J. O’Donovan, ‘Lender Liability’, Sweet and Maxwell, 1st edn, London, 2005, p 105 - 106

⁴⁶³ See R. A. Mann and B. S. Roberts, ‘Essentials of Business Law and Legal Environments’, South-Western, USA, 2012

⁴⁶⁴ See V. Dennis, ‘Liquidation’, The Law Society, 2011

legally without the convening of a meeting of creditors, who have the opportunity to appoint a liquidator of their own choice. The liquidator is entitled by law to collect all the documents regarding the company to be liquidated or person to be bankrupted and, for this purpose, the Insolvency Act includes some provisions which allow the liquidator to request any individual or organisation that has a relationship with the company to submit all documents relating to the subject of liquidation, or bankruptcy in case of individuals, including banks.⁴⁶⁵ Therefore, when the bank discloses confidential information regarding a bankrupt client or a liquidated company to the liquidator, this is not considered as breach of confidentiality. However, liquidators need to balance all the factors before ordering the disclosure of any confidential information to avoid the misuse of such power given to them by law.⁴⁶⁶

3. Criminal Justice Act 1987

According to Section 2 of the Criminal Justice Act (CJA), the Serious Fraud Office (SFO)⁴⁶⁷ has the power to investigate any suspected fraud case. Once the SFO Director has decided that there is reasonable grounds for an investigation, he has the authority to ask for any evidence from any person suspected in connection with the fraud, or who may otherwise assist in the investigation. If information can be found at the bank, the Director can ask the bank to submit such evidence, or to answer any questions during the investigation. Banks cannot refuse to provide such information to the SFO, or they will be accused of committing a criminal offence. It is necessary to take into account that the only grounds for the bank to disclose customers' confidential information to the SFO Director is that the Director reasonably believes that such information may help in the investigation of a fraud case. Therefore, in *Morris v Director of SFO*,⁴⁶⁸ the court held that the SFO Director's powers are not an absolute, but limited to real assistance in serious fraud

⁴⁶⁵ See Insolvency Act 1986, Section 236

⁴⁶⁶ See *B & C Holdings v Spicer & Oppenheim* 1992, Ch. 342, aff'd 1993 A.C. 426 at 429; see also *Morris v Director of SFO* 1993, 1 All E.R. 788. Ch D; *Marcel v Comer of Police of the Metropolis* 1992, 1 All E.R. 72; *Bank of Crete v Koskotas (No. 2)* 1993, 1 All E.R. 748

⁴⁶⁷ Serious Fraud Office

⁴⁶⁸ See *Morris v Director of SFO* 1993, Ch 3721

investigations⁴⁶⁹ and, ‘*should not encroach upon the rights of individuals more than is fairly or reasonably necessary to achieve the purpose for which they were created.*’⁴⁷⁰

In *Saunders v UK*,⁴⁷¹ the applicant complained of the fact that statements made by him under compulsion to the Inspectors appointed by the Department of Trade and Industry during their investigation, were admitted as evidence against him at his subsequent criminal trial. There had been a violation of Article 6 (1) of the ECHR which denied the applicant a fair trial, also considered as a violation of the right not to incriminate oneself.⁴⁷²

4. Income and Corporation Taxes Act 1988⁴⁷³

The Income and Corporation Taxes Act (ICTA) provides the Inland Revenue with wide-ranging powers to ask any entity to provide certain documents regarding tax-payers, including banks.⁴⁷⁴ Therefore, if the Inland Revenue believes that a bank holds specific information or documents, it has the power to require the bank to give information regarding securities held on behalf of the customer⁴⁷⁵ and in connection with the transfer of assets abroad.⁴⁷⁶

5. Custom and Excise Management Act 1979

The Custom and Excise Management Act also provides Customs and Excise with wide-ranging powers to obtain certain information and related documents from any entity, if it believes that this information may help in its investigations. This information can be

⁴⁶⁹ Ibid.

⁴⁷⁰ See J. Wadsley and G. A. Penn, ‘The Law Relating to Domestic Banking’, Sweet and Maxwell, 2nd edn, 2000, p 153

⁴⁷¹ See *Saunders v UK* 1997, 23 E.H.R.R. 313

⁴⁷² See Article 6.1 of the ECHR

⁴⁷³ Income and Corporation Taxes Act 1988 s. 745

⁴⁷⁴ See Taxes Management Act 1970, s. 20; see also *R v I.R.C. ex p Taylor (No 20)* 1990, S.T.C. 379; *T. C. and Coombs & Co v I.R.C* 1991, 3 All E.R 623 HL

⁴⁷⁵ See Taxes Management Act 1970, s. 17, s. 24; see *R. v I.R.C., ex p. Taylor (No. 2)* 1990, S.T.C. 379, CA s.20.2

⁴⁷⁶ See Income and Corporation Taxes Act 1988, s. 745; see also *Clinch v I.R.C.* 1974, Q.B. 76

requested based on reasonable suspicions only, and a bank must obey and submit this information, otherwise it might be accused of committing a criminal offence.⁴⁷⁷

6. Drug Trafficking Act 1994

Drug trafficking is the global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws, such as heroin.⁴⁷⁸ Under Section 50 of the Drug Trafficking Act (DTA) 1994, '*it is an offence to enter into an arrangement which facilitates the retention, or control by or on behalf of another person, of his proceeds of drug trafficking to be used to secure funds for him or her, knowing or suspecting that he or she carries on, or has carried on, drug trafficking*'.⁴⁷⁹ There is a defence for a banker who discloses his belief or suspicion to a constable as soon as reasonably practicable; there is also a defence of a reasonable excuse. Bankers are protected against a breach of confidentiality against their customers, because disclosure to a constable is not to be treated as a breach of confidentiality.⁴⁸⁰

Section 52 creates the offence of failing to disclose knowledge or suspicion of drug money laundering that is gained '*in the course of trade, profession, business or employment*'.⁴⁸¹ The Section makes failing to disclose knowledge or suspicion of money laundering an offence in itself. Here, it is very important to notice that the only required grounds to ask a bank for the disclosure of confidential information is knowledge or merely suspicion, and even the law does not require *reasonable* suspicions.⁴⁸²

7. Anti-Terrorism Crime and Security Act 2001

Part 3 of the Anti-Terrorism Crime and Security Act (ATCSA) 2001 contains powers enabling forfeiture and freezing of funds in certain named accounts, and powers to enable judges to make account monitoring orders to ensure that the government is able to obtain

⁴⁷⁷ See s. 745 of the CEMA 1979

⁴⁷⁸ See United Nations Office on Drugs and Crimes <http://www.unodc.org/unodc/en/drug-trafficking/index.html>

⁴⁷⁹ See Drug Trafficking Act 1994, s. 50

⁴⁸⁰ See J. Sherman, 'Drug Trafficking', ABDO Publishing Company, USA, 2011

⁴⁸¹ See Drug Trafficking Act 1994, s. 52

⁴⁸² Ibid.

any information; these can last up to 90 days.⁴⁸³ Commentators argue that the legislation places the responsibility to take a decision whether to disclose customers' confidential information on banks themselves, which means that the legislation has a '*permissive approach*'.⁴⁸⁴

8. Proceeds of Crime Act 2002

The Proceeds of Crime Act (PCA) 2002 provides that, where any person working in the regulated sector fails to disclose knowledge or suspicion of money laundering, he commits an offence. The provision incorporates an objective test and therefore specifically it is an offence for a person working in a regulated sector to fail to disclose knowledge or suspicion of money laundering based on information that comes to him in the course of business, either when he actually knows or suspects that another person is involved in money laundering, or has reasonable grounds for knowing or suspecting that another person is so engaged.⁴⁸⁵

The provision under Section 328 of the PCA⁴⁸⁶ does not necessarily involve the movement of money. The mere holding of criminally-sourced funds in a dormant account would constitute an offence under this section. It is also considered that funds obtained from tax evasion would be within the scope of this section. It should be noted that, for an offence of failure to disclose to be committed, the person must either know or suspect the facts that give rise to the offence.

Under Section 337,⁴⁸⁷ statutory protection from an action by the customer for breach of confidentiality and protection from any breach of the Data Protection Act is available to the bank if three conditions are satisfied. Firstly, the information or other matter disclosed has come to the person making the disclosure in the course of his trade, profession, business or employment. Secondly, the information or other matter causes the discloser to know or suspect, or gives him reasonable grounds for knowing or suspecting, that another

⁴⁸³ See ATCSA, Part 3

⁴⁸⁴ See R. Cranston. 'Principles of Banking Law', Oxford University Press, UK, 2nd Edn, 2002, p 178

⁴⁸⁵ See M. M. Gallant, 'Money Laundering and the Proceeds of Crime; Economic Crime and Civil Remedies', Edward Elgar Publishing Limited, UK, 2005 p 22-24

⁴⁸⁶ See Proceeds of Crime Act 2002, s. 328

⁴⁸⁷ See Proceeds of Crime Act 2002, s. 337

person is engaged in money laundering. Thirdly, the disclosure is made as soon as is practicable after the information comes to the discloser.⁴⁸⁸

9. Companies Act 2006

Banks may be required to disclose information under various provisions of the CA, relating, for example, to the investigation of companies and other affairs.⁴⁸⁹ If inspectors consider that any person, including a bank, is in possession of information which they believe is relevant to their investigation, they may require him to produce documents, to attend before them, and to give them otherwise all reasonable assistance in connection with the investigation. The customer against whom disclosure is allowed must be the company under investigation, or must have consented, or the disclosure must be authorised by the Secretary of State.⁴⁹⁰

5.2 Exception Two: Disclosure with Customer's Consent

Customers of a bank are the real owners of the confidential data and they have the full right to disclose the information themselves or to permit the bank to disclose it.⁴⁹¹ Disclosing a customer's confidential information with the customer's consent exempts the bank from the duty of confidentiality toward the customer. The consent, however, may be either implied or expressed. Some jurisdictions permit disclosure based on expressed consent only,⁴⁹² other jurisdictions allow the bank to disclose customers' confidential information based on expressed or implied consent.⁴⁹³

⁴⁸⁸ See L. D. Crerar, 'The Law of Banking in Scotland', Tottel Publishing, 2edn, 2007, p 214

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid

⁴⁹¹ See L. D. Crerar, 'The Law of Banking in Scotland', Tottel Publishing, 2nd edn, 2007, p 216

⁴⁹² See Lebanon Banking Confidentiality Act 1956, Articles 2, 3; and Bahrain CBBFI 2006, Article 117

⁴⁹³ See *Tournier v National Provincial and Union Bank of England*, 1924, 1 KB 461

5.2.1 Kingdom of Bahrain

Customers remain free either to enjoy their right of banking confidentiality or to waive it; according to Article 117 of the CBBFI, banks will be committing no breach of customer confidentiality if the disclosure was made ‘*pursuant to an unequivocal approval of the person to whom the confidential information relates.*’⁴⁹⁴ Thus, Bahraini legislation admits the customer’s right to cede enjoying confidentiality over their information, with three main requirements for the customer consent to be legally valid. Firstly, consent should be from the client himself. Secondly, consent must be given from a competent customer. Thirdly, customer consent must be pursuant to an unequivocal approval. All will be discussed as follows.

1. Consent from the client himself

The client is the owner of the confidential information, therefore he has the full right to protect his confidential information, as the duty of confidentiality has been established to protect his interests in the first place, and any approval from any person other than the original customer does not count.⁴⁹⁵ The customer could issue an open approval to the bank to provide any individual or institution with the details of his confidential information, or he might limit such approval to certain people, such as a customer approving the bank to disclose his confidential information to his wife, parents or to his accountant.⁴⁹⁶ The customer has the full right to set the scope and limits of his approval, pursuant to the principle that the right-holder has the full right to waive the right.⁴⁹⁷

2. Consent of competent customer

Customer consent must be expressing the will of legal value, which means the approval should be issued by an adult and competent person who is aware of the effects and results of his approval.⁴⁹⁸ Moreover, the customer’s instructions should be free from any legal defects, and he should be mentally able to produce such consent, knowing all its effects

⁴⁹⁴ See CBBFI Act 2006, Article 117.1

⁴⁹⁵ See N. Mughabghab, ‘Banking Confidentiality’, Beirut, 1996, p 227

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

and responsible for all its results.⁴⁹⁹ Any consent made under coercion, force or threat, either physically or mentally, has no legal value. Furthermore, any consent made as a result of cheating, fraud or error, eliminates the customer's approval and has no legal value.⁵⁰⁰

3. Pursuant to an unequivocal approval

According to Article 117, customer consent should be expressed clearly. Therefore, there is no credibility to an implied consent according to the Bahraini legislation.⁵⁰¹ Unequivocal approval could be in written or oral form, although banking institutions will be keen to ask for written approval.

5.2.2 United Kingdom

Based on Bankes LJ's famous qualifications, disclosure can be made with the customer's consent, either express or implied: '*Where disclosure is made by the express or implied consent of the customer.*'⁵⁰² He gave an example of express consent, in cases where the customer himself authorised the bank to disclose specific information as a banker's reference.⁵⁰³ Another practical example of a customer's express consent is where a customer has authorised the bank to disclose information to his or her husband or wife, or to the customer's auditor. For this purpose, customer consent should be either general, where the client authorises the bank to disclose his confidential information in general and to all those requesting it, or the customer may authorise the bank to disclose specific information only, and to specific entities.⁵⁰⁴

Customers must give their express consent freely, their instructions should be free from any legal defects, and they should be mentally able to produce such consent, knowing all its effects and responsible for all its results. It should be in written form, so that the bank

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ See CBBFI Act 2006, Article 117

⁵⁰² See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

⁵⁰³ Ibid.

⁵⁰⁴ See E. P. Ellinger et al., 'Ellinger's Modern Banking Law', Oxford University Press, 4th edn, 2002, p 186 - 188

can act, based on a specific and clear consent to make disclosure to a limited selection of people.⁵⁰⁵

Implied consent is an area where a problem arises. Some argue that customers are aware of usual banking practice and that the bank may need to disclose customers' information to the reference agencies, therefore they rely on implied consent for disclosure.⁵⁰⁶ However, others⁵⁰⁷ argue that this is a very technical banking question, customers are not aware of this principle of disclosure, and why should banks rely on implied consent when they can seek the customer's express consent within a reasonable time?⁵⁰⁸ It used to be an open argument as to whether banks actually had customers' consent to make the disclosure, or whether it is unfair to customers who were unaware of banking practice. The case *Turner v Royal Bank of Scotland*,⁵⁰⁹ when the court rejected the idea that a customer already knows all the procedures for banks from the very moment of opening a new account, challenged this.⁵¹⁰ Therefore, both the Banking Code⁵¹¹ and the Business Banking Code⁵¹² state that banks should ask their customers' consent before the disclosure.

5.3 Exception Three: Disclosure for the Bank's Own Interest

5.3.1 Bahrain Law

Article 117 of the CCBFIA does not permit banks to disclose customers' confidential information for the bank's own interest. Therefore, in doing so, banks should seek the customers' express consent. Disclosing customers' information cannot be justified for the purpose of protecting the bank's own interest, and the bank should get prior customer

⁵⁰⁵ See J. M. Holden, 'The Law and Practice of Banking', Pitman, 4th edn, 1986, p 74

⁵⁰⁶ See R. Cranston, 'Principles of Banking Law', Oxford University Press, 2nd edn, 2002, p 176

⁵⁰⁷ See L. D. Crerar, 'The Law of Banking in Scotland', Tottel Publishing, 2nd edn, 2007, p 216 - 217

⁵⁰⁸ Ibid.

⁵⁰⁹ See *Turner v Royal Bank of Scotland* 1999, 2 All E.R. (Comm) 664

⁵¹⁰ Ibid.

⁵¹¹ See The Banking Code 2008, s. 8.3

⁵¹² See The Business Banking Code, s. 8.3

express consent for any disclosure, apart from disclosure required for a trial which can be justified according to the law.

5.3.2 English Law

This qualification could be overlapped with other qualifications such as disclosure for the public interest or disclosure with customer consent. There is uncertainty regarding disclosure for the bank's own interest as to what can be considered as the bank's interest and what comes under *Tournier's* other qualifications. *Sunderland v Barclays Bank*⁵¹³ is the only cited case, where a Barclays Bank manager justified the disclosure of confidential information on the grounds that the bank's interest required the disclosure. In this case a lady called her bank to enquire about a cheque which had been refused on the grounds that there were insufficient funds in her account. During the course of the conversation, her husband took the phone, and claimed that the bank's action was unacceptable. To defend their position, the bank staff told the husband that his wife was engaging in gambling, thus the lady claimed that the bank had breached its duty of confidentiality. The bank's first defence in this case was that the disclosure was according to the customer's implied consent (fourth qualification),⁵¹⁴ and based on the manager's statement in this case, the court held that the disclosure was according to the third qualification, and was in the bank's interest to defend its position in front of the customer. When the husband took the phone from his wife and protested that it had not honoured the cheque, the bank was actually defending its own reputation by attacking the wife's reputation, as the bank could simply have justified its act on the grounds that there was an insufficient amount to clear that cheque, and there was no necessity to reveal the gambling fact to the husband.

Disclosure in the interest of the bank is *Tournier's* third qualification, as this exception gave the bank the power to disclose customers' confidential information for the purpose of protecting the bank's own interest. The obvious application of this exception is when the customers sued their bank, or when the bank sued the customer for debt collection, as

⁵¹³ See *Sunderland v Barclays Bank Ltd* 1938, 5 LDAB 163

⁵¹⁴ *Ibid.*

explained by Bankes LJ.⁵¹⁵ The Jack Committee report discussed two main important issues in this regard: the first is the situation of disclosing confidential information to other companies in the same group, and the second is the situation of the bank disclosing confidential information to credit reference agencies. These will be discussed as follows.

1. Disclosing confidential information for a trial

This premise is built on the case of disputes between banks and their customers, where both parties have the right to defend themselves, and respecting this right allows the lifting of bank confidentiality in order to enable litigants to provide proof for their claims. Accordingly, customers cannot also claim breach of banking confidentiality. However, all other confidential information which is not related to the case remains confidential, and banks are not allowed to disclose such data, since this type of litigation should not be a roundabout way of enabling a violation of bank confidentiality.

2. Disclosing confidential information to companies within the same group

Exchanging information between companies in the same group for marketing purposes is usually used to introduce other or new services provided by other companies in the same business group: it increases the profit margin, and reduces marketing costs. Where the bank is one of many other business companies in the same group, either providing banking services or not, should banks be allowed to transfer customer information to other companies? In principle, each individual company is a separate legal entity, therefore disclosing confidential information from one company to another, or even to the mother company, is considered as a breach of the independence principle in general, and of the duty of confidentiality in particular.⁵¹⁶ Yet, when considering the question whether exchanging confidential information between banking companies was in the bank's own interest or not, the Jack Committee stated that banks could exchange confidential information with other banking companies;⁵¹⁷ however, they should not pass any

⁵¹⁵ See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

⁵¹⁶ See R. B. Jack, 'Banking Services: Law and Practice Report by the Review Committee', 1989, Cm 622

Para. 5.16

⁵¹⁷ *Ibid*

confidential information to another non-banking entity in the same group.⁵¹⁸ The Banking Code requires customers' prior express consent in order for banks to transfer customers' information for marketing purposes; the bank must state that: '*This will not be used as a reason for disclosing information about you or your account (including your name and address) to anyone else including other companies in our group for marketing purposes.*'⁵¹⁹

3. Disclosing confidential information to credit reference agencies

Disclosing so-called 'black' information to the agencies, regarding customers who fail to repay loans, can be justified in accordance with the second qualification, disclosure in the public interest, or as disclosure in the bank's own interest, and also it can be justified as disclosure with the customer's implied consent. The argument arises regarding 'white' information: when a customer is keeping up with payments and has no issues, then why should the bank disclose their information? There is a view that disclosing customers' 'white' information to credit reference agencies means protecting the customer from overspending and incurring unmanageable debts, which can be considered in the public interest. The Jack Committee approved both 'black' and 'white' disclosure; however, the Banking Code provides that the 'black' information will be disclosed to credit agencies but, for 'white' information, the bank should seek customer consent.⁵²⁰

5.4 Exception Four: Duty to the Public to Disclose

The second qualification of *Tournier* is the duty to the public to disclose, where banks have no duty of confidentiality toward their customers when the disclosure is made for the public interest. The notion of disclosing confidential information is built on the assumption of two contradicting interests, on the one hand, the individuals' private interest in keeping their information confidential and, on the other hand, protecting the interest of the public. However, there is no clear-cut distinction between the two interests; as Paget

⁵¹⁸ Ibid.

⁵¹⁹ See Banking Code 2008, Para. 8.3

⁵²⁰ See Banking Code 2008, Para. 13.5 – 13.9

states, ‘*the dividing line between a state or public duty and a private duty being hard to define.*’⁵²¹ The often-used example of this is where a customer is trading with enemies in time of war.⁵²²

5.4.1 Bahrain Law

Article 117 of the CBBFIA states that disclosure could be made according to customer consent, where law requires disclosure, and implementing Central Bank of Bahrain (CBB) orders.⁵²³ Therefore, it does not state duty to the public as an exception for banks to disclose customers’ confidential information. Thus no bank can justify any disclosure of a customer’s information for reasons of public interest.

5.4.1 English Law

Lord Finlay’s words in *Weld Blundell v Stephens*⁵²⁴ are considered the backbone of this exception, as, ‘*whenever the state faces any danger, its interests should be superior to the individual’s interests.*’ This is the concept that Bankes LJ relied on. In *Libyan Arab Foreign Bank v Bankers Trust Co*,⁵²⁵ Mr Brottain of the Bankers Trust, in the course of a conversation with the Federal Reserve Bank of New York, disclosed information about the Libyan Arab Bank and justified this on the grounds that *Tournier*’s second qualification permits disclosure in the public interest. Unfortunately, Staughton J held that the second qualification applied but without reaching a final conclusion.⁵²⁶

Later on, in *Price Waterhouse v BCCI Holdings (Luxembourg) SA*,⁵²⁷ Price Waterhouse disclosed confidential information about BCCI (its customer) to the Bingham Inquiry; this

⁵²¹ See M. Hapgood, ‘Paget’s Law of Banking’, Butterworths, 11th edn, 1996, p 122

⁵²² See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

⁵²³ See CBBFI Act 2006, Article 117

⁵²⁴ See *Weld Blundell v Stephens* 1920, AC 956 at 965, 966 HL

⁵²⁵ See *Libyan Arab Foreign Bank v Bankers Trust Co* 1989, QB728; see also *Attorney-General v Guardian Newspapers Ltd (No 2)* 1990, 1 AC 109

⁵²⁶ *Ibid.*

⁵²⁷ See *Price Waterhouse v BCCI Holdings (Luxembourg) SA* 1992, BCLC 583

was a non-statutory inquiry but, although it had no power to ask for the disclosure of any confidential information, the accountancy firm was willing to help and to provide the required information; accordingly they attempted to seek judicial opinion in this regard. Millett held that banks are under no duty of confidentiality in situations of protection of the public interest, therefore the public interest may outweigh an individual's interests, and that public interest, '*was not limited to the public interest in detecting or preventing wrongdoing*'.⁵²⁸ This will open the door to many other non-statutory inquiries and other commissions with no power to order the disclosure of confidential information to do so on the grounds that public interest requires that disclosure be made. Moreover, it is crucial to point out that the argument regarding disclosure in the public interest took another important direction as it became a right for the bank to disclose whenever public interest requires it, not only a duty.⁵²⁹

*Pharaon v Bank of Credit and Commerce International SA (in liquidation)*⁵³⁰ is another example of public interest outweighing, rather than enhancing, the duty of confidentiality. Rattee J stated that the duty of confidentiality should be set aside for the purpose of public interest and, where an individual interest of confidentiality competed with the public interest of disclosure, then confidentiality should be superseded: '*on balance, the public interest lay in the disclosure of documents relating to those customers of BCCI who were shareholders in C.*'⁵³¹ In addition, Rattee J held that the public interest required the disclosure of confidential information, '*if this was reasonably necessary to uncover potential fraud.*'⁵³²

It can be noted from the above cases that there is no unified standard in these matters and each case had to be studied separately for the court to decide whether it fell under the public interest qualification or not. Many other factors surrounding the case may affect a court's decision regarding the public interest, such as the media or public pressure, which may be considered as a serious threat to the duty of confidentiality.⁵³³ Furthermore, with

⁵²⁸ See E. P. Ellinger et al., 'Ellinger's Modern Banking Law', Oxford Press, 4th edn, 2006, p 183

⁵²⁹ Ibid.

⁵³⁰ See *Pharaon v Bank of Credit and Commerce International SA (in liquidation)* 1998, 4 All ER 455

⁵³¹ Ibid.

⁵³² See *Price Waterhouse v BCCI Holdings (Luxembourg) SA* 1992, BCLC 583

⁵³³ See R. Cranston, 'Principles of Banking Law', Oxford University Press, 2nd edn, 2002, p 178

reference to Bankes LJ's example that this qualification could be applied to disclose which customers were trading with the enemy in wartime,⁵³⁴ it is very important to point out that there is an expansion in the application of the public interest qualification; this can be seen clearly in *Price Waterhouse v BCCI Holdings (Luxembourg) SA*⁵³⁵ when the court stated that disclosing confidential information for the public interest is not merely a duty, rather it is a right for the bank to disclose. It may be argued that this will encourage banks to proceed and expand the disclosure of confidential information under the public interest justification.

As this qualification was not abolished according to the Jack Committee recommendations,⁵³⁶ there should be some control in applying it. Banks should weigh the harm that disclosure may do to the banking industry in general, and to the duty of confidentiality in particular, before disclosing customer information, as protecting confidentiality is protecting the public interest as well.

5.5 Disclosure in Accordance with the Central Bank's Instructions

Central banks are banking institutions which support the monetary system and the economy in the state within the jurisdiction of which the central bank is operating. Taking this objective into consideration clearly highlights the reason for these banks to be owned by the state, that these banks need to be subject to the state's control and supervision.⁵³⁷ The variety of functions entrusted to them is different when compared to conventional banks, and the importance of central banks is increasing due to the complexity of economic and financial issues which these institutions are required to tackle and solve. These may range from servicing the state's loans; note-issuing; stabilising the capital market; activating foreign investments in the country; specifying discount rate and interest

⁵³⁴ See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

⁵³⁵ See *Price Waterhouse v BCCI Holdings (Luxembourg) SA* 1992, BCLC 583

⁵³⁶ See Report of the Review Committee on Banking Services: Law and Practice, 1989, Cmd 622 Chapter 5 Paras 5.38 – 5.48

⁵³⁷ See Z. Aldori and Y. Al Sameraei, 'Central Banks and Monetary Policy', Dar Al Yazori, Iraq, 2013, pp 64 - 79

rate; balancing the rate of exchange; supervising and regulating the banking system in the country, and supporting the economy in general.⁵³⁸

Bahrain Law

The functions of these banks as just indicated may be categorised into two groups: the first is of a general nature and the functions are applicable to the monetary policy and the economy at large, such as note-issuing, credit control, and managing the country's reserve, whereas the other functions are more specific whilst dealing with the banking system falling under its jurisdiction, like management and supervision of their reserve and being the bank where these banks find their refuge in times when financial help is needed.⁵³⁹

In addition, the central bank, in most jurisdictions, is the authority which licenses, regulates and supervises the banking institutions operating under such jurisdictions and their respective operations.⁵⁴⁰ It may suffice to mention here that the bank is entitled to check the reports, data and statistics submitted to it by these banks, as well as conducting field supervision to ascertain the policies followed by these banks, whether those relate to depository operations or credit facilities.⁵⁴¹

The central bank in many jurisdictions is the supervisor and regulator of the banking institutions operating within its jurisdiction. The Bahrain Monetary Agency (BMA) and later the Central Bank of Bahrain (CBB) were the regulators of banks and banking operations, according to the powers vested in those two institutions by the BMA Act 1973 and the CBB Act 2006, respectively.

The institution was entrusted with the duties and powers to regulate financial services, a term which means all the financial services provided by the financial institutions,⁵⁴² including those governed by Islamic Shari'a principles.⁵⁴³ The CBB is also entrusted with

⁵³⁸ Ibid

⁵³⁹ See Central Bank of Bahrain and Financial Institutions Act 2006, Article 40

⁵⁴⁰ Summary of CBB supervisory approach available at <http://www.cbb.gov.bh/page-p-supervision.htm>

⁵⁴¹ Ibid.

⁵⁴² See Central Bank of Bahrain and Financial Institutions Act 2006, Article 1

⁵⁴³ Ibid.

the function of issuing ‘*regulations specifying the regulated services and organizing the provision of these services. The central bank shall supervise and control any licensees providing such services.*’⁵⁴⁴

The CBB is the sole regulator and supervisor of the banking institutions and their operations that fall within the Bank’s jurisdiction. It is provided with two levels of legal frameworks to enforce its regulatory and supervisory powers: firstly, the CBB law itself, through indicating the licensing requirements for banks, restricting banks’ activities, maintenance of accounts and the requirements of business transfers.⁵⁴⁵ The second level of regulation for the banking institutions and their operations is incorporated in the CBB Rulebook, which provides detailed rules governing commercial banking as well as Islamic banking institutions and their operations.

Thus, the ability to query the status of a bank’s clients and any exchange of information relating to customers and their debts, or the instruments returned without payment, or any other actions, may be deemed necessary for the central bank to ensure the safety of banking operations. This is stated clearly by the Bahraini legislation, that confidential information disclosure is acceptable where disclosure is made, ‘*for the purpose of implementing an instruction given by the Central Bank*’.⁵⁴⁶

United Kingdom

Although Bankes LJ does not classify ‘*implementing Central Bank instructions*’ as one of the confidentiality qualifications,⁵⁴⁷ this does not mean that this exception does not apply in the UK. By analysing the qualifications and understanding the provision under the Bahraini CBB Law, it is clear that the above exception also applies in the UK under the first qualification, ‘*where disclosure is under compulsion of law.*’ However, the

⁵⁴⁴ See Central Bank of Bahrain and Financial Institutions Act 2006, Article 3

⁵⁴⁵ *Ibid.*, Article 4

⁵⁴⁶ See Central Bank of Bahrain and Financial Institutions Act 2006, Article 117

⁵⁴⁷ See *Tournier v National Provincial and Union Bank of England* 1924, 1 KB 461

responsible authority for controlling and organising banking industry is not the Bank of England,⁵⁴⁸ it is the Financial Services Authority (FSA).⁵⁴⁹

The FSA is now responsible for the regulation of the financial services industry in the UK and entitled to regulate the banking industry in the UK; previously it was the Bank of England that had this responsibility. The Financial Services and Market Act (FSMA)⁵⁵⁰ contains many provisions obliging banking institutions to provide any information or documents to the FSA.⁵⁵¹

The FSA has the power to regulate accepting deposits, issuing e-money,⁵⁵² effecting or carrying out contracts of insurance as principal,⁵⁵³ dealing in investments (as principal or agent),⁵⁵⁴ arranging deals in investments,⁵⁵⁵ and arranging and regulating exemption requirements.⁵⁵⁶ It also provides alternative dispute resolution⁵⁵⁷ and regulates financial advertising and promotions.⁵⁵⁸ According to the FSMA 2000, the FSA has the power to contact any authorised person and ask for certain information concerning a particular topic to be provided in a certain specified time. With the importance of information sought, it is likely to be confidential; the authorised person will be obliged to disclose confidential information only under specific conditions. The FSA also has the ability to conduct special investigations when it is required.⁵⁵⁹

Therefore, although it is not stated in the *Tournier* case, and the authority is a regulating one, this can be considered as an exception under the first qualification, compulsion by law, as the obligation to disclose is stated in the FSMA 2000.

⁵⁴⁸ Bank of England took responsibility for supervising the banking sector until 1998; see also G. Penn, 'Banking Supervision', 2nd edn, London, 2002

⁵⁴⁹ See The Financial Services and Market Act 2000

⁵⁵⁰ *Ibid.*

⁵⁵¹ See The Financial Services and Market Act (FSMA 2000), Part XI and s. 175.5

⁵⁵² *Ibid.*, s. 4 (ii), see also E. P. Ellinger et al., 'Ellinger's Modern Banking Law', Oxford Press, 4th edn, 2006, p 39

⁵⁵³ *Ibid.*, s. 4 (v) and s. 5

⁵⁵⁴ *Ibid.*, s. 21

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*, s. 429.3

⁵⁵⁷ *Ibid.*, s. 225.1

⁵⁵⁸ *Ibid.*, s. 21.4

⁵⁵⁹ *Ibid.*, Part XI and s. 175.5

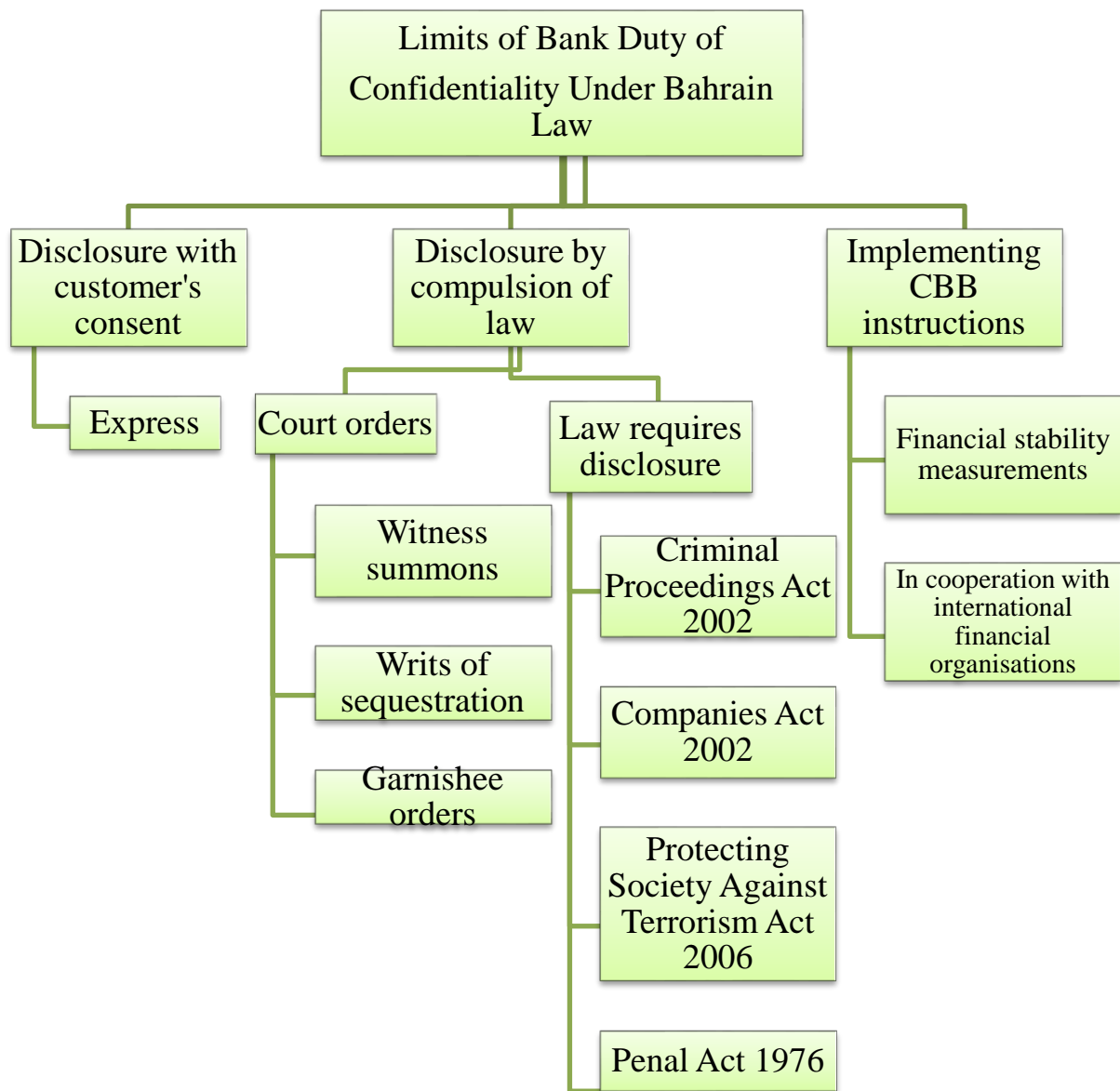


Figure 1: Bank Confidentiality in the Kingdom of Bahrain

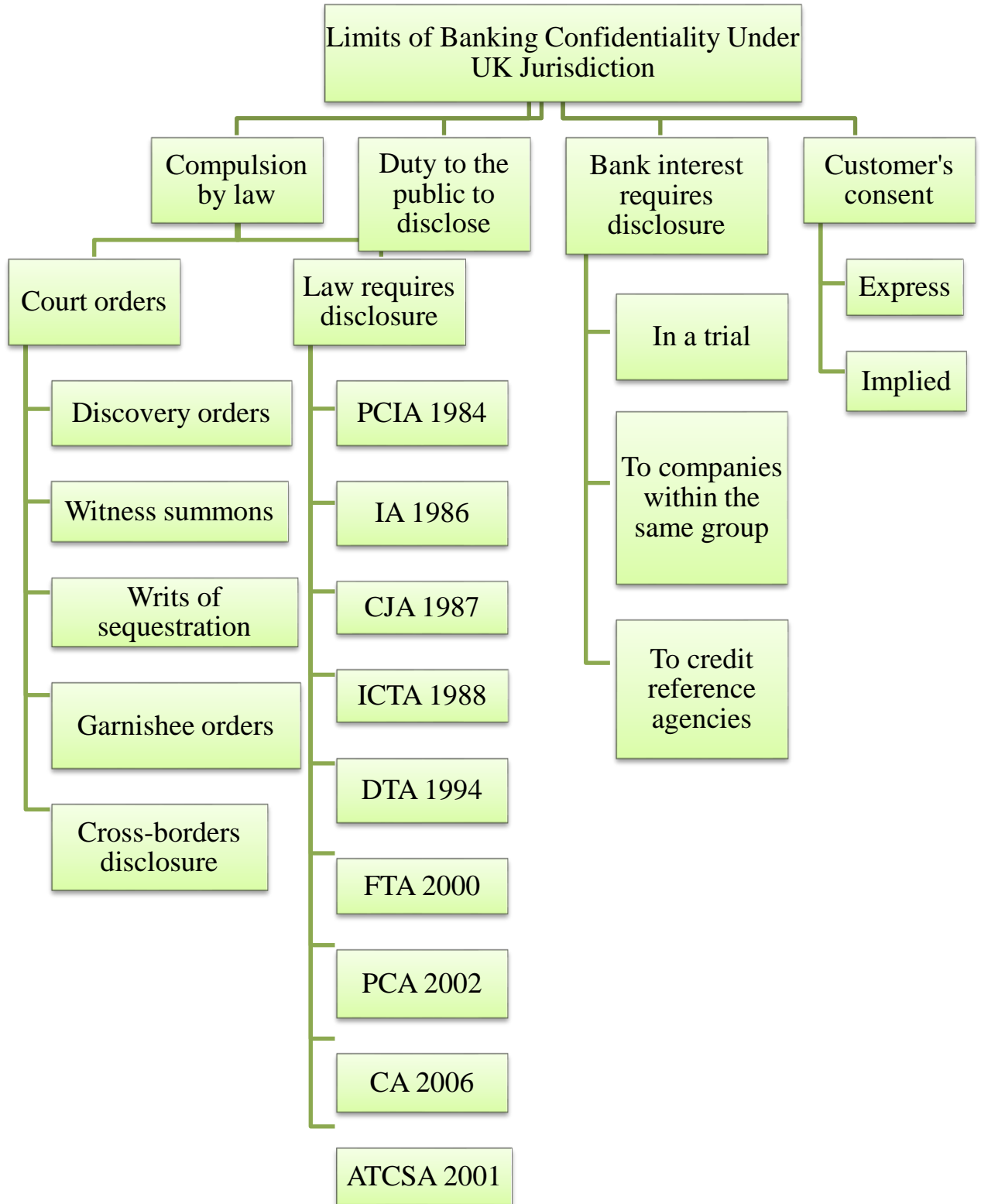


Figure 2: Bank Confidentiality in the United Kingdom

Chapter Six: Money Laundering

‘Money laundering’ is an expression that has been circulating recently in all international fora, regional and local, interested in economic crimes and social and economic security. Money laundering is linked, to a large extent, with illegal activities, beyond the limits of validity of laws against financial corruption, which try to return to the same legal system that criminalised them before. The term ‘money laundering’ refers to actions intended to conceal or disguise the real sources of illicit funds, movable or immovable property that is derived from the commission of organised crime, drug trafficking, arms smuggling, counterfeiting of people and money, the slave trade and embezzlement of public funds, etc., and then to inject these funds as legitimate funds into the economic cycle.

Money laundering, which is generally considered as a new crime in the modern world, is part of what is known as transnational organised crime, that is, organised crime which operates beyond the borders of a single state. This kind of criminal activity has developed along with telecommunications technology and has followed the domination of the ‘interest’ concept as the primary goal of criminal gangs, and the change of criminal perspective from regional to international, especially with regard to financial crimes and offences.⁵⁶⁰ In the past, such crimes used to be of an individual nature and local in quality, without going beyond state boundaries or the political borders of the country.⁵⁶¹

Transnational organised crime of an economic and global nature has become more common in the modern age and constitutes an element of economic destruction and sabotage, given that organised crime has become able to penetrate financial and economic institutions with its enormous capabilities and illegal gains; hence, money laundering operations must be brought to justice, and the penalty for them must match their devastating damage to the national economy. For this purpose, the assistance of scholars in law, philosophy and sociology must be sought and the results of serious scientific

⁵⁶⁰ See A. Al Fauori, ‘Money Laundering; Concept and Legal Nature’, Dar Wael Press and Publishing, Jordan, 2002, p 13

⁵⁶¹ Ibid.

studies in the areas of criminology, penal sciences, criminal policy and criminal law philosophy should be used within this framework.

A typical large-scale money-laundering operation takes place when a criminal acquires 'dirty money' from an illegal source. To avoid keeping such money in regulated international banks, he deliberately transfers the money to another country, selected by him and by his group from amongst developing countries that require foreign capital and do not show much concern about the source of such funds. Developing countries seek foreign funds to overcome unemployment and promote investments; once the money has been invested in such a country, it becomes 'clean' and thus detached from the supervision and control of the foreign country. For the country from which such funds have been gained, the money is considered unlawful and should be subject to criminal justice. In the long run, such operations have harmful results and allow the owners of such foreign funds, although they are international criminals or war criminals, to use this kind of money to exercise control over a state and have a say in how the country is governed, in such a way as to promote their own interests.

The reasons why money laundering operations must be pursued by criminal law lie in its economic effects, which may include: a fall in a country's national income, devaluation of the national currency as a legal tender, decline in the size of savings, increase in the rate of inflation, and abuse of the investment climate.⁵⁶² Social effects include a rise in crime rates, increased unemployment, fall in living standards and exploitation of manpower in some developing countries⁵⁶³ and, in addition, allowing certain persons to occupy senior positions despite their lack of efficiency or effectiveness.⁵⁶⁴ Money laundering also has political effects, such as intervention in some political systems, abusing them, financing religious and ethnic disputes, and exercising influence upon the media and the judiciary at certain times.⁵⁶⁵ Regardless of the national and official considerations, money laundering

⁵⁶² See J. F. Al Rasheedi, 'Combating Money Laundering Under Kuwaiti Law', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2002, p 46 - 48

⁵⁶³ See A. Hejasi, 'Money Laundering', Dar Al Kutob Al Qanooniya, Cairo, Egypt, 2007, p 39

⁵⁶⁴ Ibid.

⁵⁶⁵ See S. Al Saad, ' Money Laundering; Financial, Criminal, Legal Concept', Dar Al Thaqafa Press and Publishing, Jordan, 2003, p 7

operations result in unequal competition with legitimate national and foreign investors and the expulsion of positive trends to the advantage of negative ones.⁵⁶⁶

Thus, if the principle of banking confidentiality is stable in banking transactions, and banks may not disclose client's confidential information except in cases specified by law, is it permissible to exclude the principle of banking confidentiality in the case of suspected money laundering? Does informing a competent authority about suspicious transactions infringe banks' duty of confidentiality? Legislation answers these questions in different ways; some legislation forbids lifting the duty of banking confidentiality in the case of money laundering. However, other recent legislation has begun to challenge the confidentiality principle in the case of money laundering, in order to protect the public interest.

It can be seen from certain issues in several countries, such as Luxembourg and Lebanon and the Cayman Islands,⁵⁶⁷ that money launderers have benefited from the principle of banking confidentiality for suspicious transactions. Perhaps for this reason, Switzerland has alleviated the principle of banking confidentiality in order to preserve the reputation of the banks, where this principle began to decline before money laundering cases existed.⁵⁶⁸ Switzerland, in order to strengthen its position, has begun to provide international cooperation to foreign governments, and assists them in prosecuting crimes of money laundering and in particular those of a political nature.

With respect to Article 2.8 of the PSATA 2006, which considered money laundering as a terrorist act,⁵⁶⁹ and Article 7 of the Prevention and Prohibition Money Laundering Act 2001⁵⁷⁰ which states that, *'on the coming into force of the provisions of this law, no institution can plead before the Investigation Magistrate or the competent Court, secrecy or confidentiality in respect of accounts, identification of customers or record keeping provided under the provisions of any law'*, it is also noticeable that there is an escalating global trend to underestimate bank confidentiality in order to strengthen the fight against

⁵⁶⁶ Ibid.

⁵⁶⁷ See M. S. Saeefan, 'Analysing Banks Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 43

⁵⁶⁸ Ibid.

⁵⁶⁹ See Bahrain Protecting Society Against Terrorism Act 2006, Article 2.8

⁵⁷⁰ See Bahrain Prevention and Prohibition of Money Laundering Act 2001, Article 7

money laundering. Therefore, the writer found it essential to discuss banking confidentiality and money laundering in a separate chapter. This chapter will be divided into seven sections: Section One will discuss the definition of money laundering; Section Two, money laundering phases; Section Three, sources of illegal funds for money laundering crime; Section Four, money laundering characteristics; Section Five, types of money laundering crime, and methods of committing the offence and instances; Section Six, money laundering through banks and, finally, in Section Seven we will discuss banks' responsibility for money laundering crimes.

6.1 Money Laundering Definition

Money laundering is an economic crime (organised crime) carried out by special groups, gangs and organisations that are involved in various criminal activities and operations, including the use of violence, force and other illegal methods with the aim of generating enormous profits from unlawful sources.⁵⁷¹ Money gained from criminal activities is converted into funds from a sound legal source, covering up the true source of such funds that are laundered and pumped into proper channels in the legal economic cycle by cash transactions in the form of bank deposits, purchase of banking drafts and travellers' cheques, and the use of commercial and financial services.⁵⁷²

The banking industry is one of the sectors in which money laundering takes place.⁵⁷³ This is because the process of money laundering involves the use of legitimate means, especially banking methods, for securing the acquisition and concealment of the illegal proceeds of crime. The money generated is then pumped into the pipeline of lawful economic and investment activities at national and transnational levels in a manner that allows it to become deep rooted in a legitimate economic environment.⁵⁷⁴

⁵⁷¹ See J. F. La Rasheedi, 'Combating Money Laundering Under Kuwaiti Law', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2002, p 28

⁵⁷² See M. N. Al Deleemi, 'Money Laundering Under Criminal Law', Dar Al Oluom Press and Publishing, 2006, p 36

⁵⁷³ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 55

⁵⁷⁴ Ibid.

Moreover, money laundering is a process whereby any method can be used to cover up the source of funds gained from illegal activities that are incriminated by law. It is an attempt to give legitimacy to such funds and to their use in public life or in financing a legal business. It is also the use of money generated from an unlawful business, while concealing the identity of the people who obtain the funds and convert them into assets, that makes them seem to be the product of a lawful source and legal activity. This usually takes place through the use of banking channels and financial institutions to change the illegal nature of funds and to make it difficult for the security authorities to trace them; then such unlawful funds are returned to their country of origin after becoming funds with a natural and legitimate quality that is different from their original state.⁵⁷⁵

The process involves concealing or covering up the illegal sources of movable and immovable assets generated from organised crime such as narcotic drug trafficking, arms smuggling and embezzlement of public funds, etc., and then re-routing such funds into the legitimate economic cycle with the aim of handling them in a legal manner. In this sense, the money laundering process is any process that involves concealing or covering up the illegal source from which the money to be laundered has been acquired.⁵⁷⁶ This definition covers all the acts committed by criminals to obscure the illegal source of their revenues.⁵⁷⁷ Money laundering is a process of putting ‘grey area’ money gained from the revenues of criminal activity into the mainstream of the economy in the community to conceal its dirty origins and showing it as clean money, as though it is a return from lawful investments and clean gains and profits.⁵⁷⁸

Money laundering under the PCA is defined as, *‘an act which (1) constitutes an offence under PCA, sections 327, 328, or 329; (2) constitutes an attempt, conspiracy or incitement to commit one of those offences; (3) constitutes aiding, abetting, counselling or procuring the commission of one of those offences; or (4) would constitute any of the above offences*

⁵⁷⁵ Ibid.

⁵⁷⁶ See K. H. Mustafa, ‘Money Laundering; Comparative Study’, Dar Al Nahda Press and Publishing, Cairo, Egypt, 2008, p 68

⁵⁷⁷ Ibid.

⁵⁷⁸ See F. Al Dhafeeri, ‘Combating Money Laundering; Comparative Study’ Kuwait University Press, Kuwait, 2004, p 72

if done in the UK;⁵⁷⁹ and it is defined under the Egyptian Anti-Money Laundering Act as, ‘any conduct involving the acquisition, holding, disposing of, managing, keeping, exchanging, depositing, guaranteeing, investing, moving or transferring funds, or tempering with their value, if such funds are the proceeds of any of the crimes stipulated in Article 2...’⁵⁸⁰ for the purpose of concealing the original sources of such funds.

However, there is no clear definition of money laundering crime under the Bahrain Prevention and Prohibition of Money Laundering Act (PPMLA) 2001, as it does not specify the meaning of money laundering crime, rather it only stated that if acts were committed for the purpose of showing that the source of the money is lawful, such individual acts were considered to be committing a money laundering offence, without specifying certain crimes to be the source of the dirty money. Thus, the public prosecution service has been given a wide range of authority in determining what is and what is not considered to be a money laundering crime. This means giving the investigating authority the power to violate personal freedom in general, which contradicts Article 19.1 of the Constitution of Bahrain, and violates banking confidentiality in particular.⁵⁸¹

Therefore, we should say that a money laundering crime is any of the measures undertaken by criminal parties with the intention of concealing the truth, source or location of funds that are of criminal origin, making them seem lawful in the form of investments in various areas and hence evading the watchful eyes of criminal justice.⁵⁸² There are people involved in narcotic drug trafficking which earns them huge amounts of profit;⁵⁸³ however, such dirty money may be derived from sources other than narcotic drugs, such as unlawful political activities, embezzlement of public funds, smuggling, forging bank cheques, adultery and such other activities.⁵⁸⁴

⁵⁷⁹ See PCA 2002, s. 340. 11

⁵⁸⁰ See Egypt Anti Money Laundering Act 2002, Article 1.b

⁵⁸¹ See above p 5

⁵⁸² See K. H. Mustafa, ‘Money Laundering; Comparative Study’, Dar Al Nahda Press and Publishing, Cairo, Egypt, 2008, p 68

⁵⁸³ See F. S. A. Al Mael, ‘Money Laundering Under Criminal Law’, Alexandria University Press, Egypt, 2007, p

84

⁵⁸⁴ Ibid.

The first initiative towards fighting money laundering goes back to the 1970s, where the United States (US) Bank Secrecy Act stated that any transaction amount of \$10,000 and above should be reported.⁵⁸⁵ The European States also became aware of this serious problem, after which the seven major countries met in 1989, established the Financial Action Task Force (FATF) and called for the introduction of special anti-money laundering laws and legislation.⁵⁸⁶ Earnings generated from such crimes worldwide were estimated by the International Monetary Fund to be between US\$500 billion and US\$1.5 trillion.⁵⁸⁷ This shows the extent of the power enjoyed by drug traffickers, as such earnings equalled the revenues gained by the United States from its car industry.⁵⁸⁸

6.2 Money Laundering Phases

The aim of money laundering is concealing the criminal activity that is the source of dirty money. The FBI has identified more than 177 different criminal activities that generate revenues and earnings that may be laundered afterwards by numerous methods, such as depositing in banks. This is the most basic form of money laundering; it extends to the use of non-banking services such as insurance policies and may also include money laundering online and with smart cards, in addition to the use of the latest banking products such as derivatives and private banking circuit services.⁵⁸⁹

Therefore, the process of money laundering is not a single act but a process that involves several phases and series of procedures. The most important traditional phases of money laundering are discussed as follows:

⁵⁸⁵ See US Bank Secrecy Act 1970, see also Federal Financial Institutions Examination Council, 'Bank Secrecy Act/Anti-Money Laundering Examination Manual', 2010

⁵⁸⁶ See T. Graham et al., 'Money Laundering', Butterworths LexisNexis, UK, 2003, p 6; see also M. M. Gallant, 'Money Laundering and the Proceeds of Crime', Edward Elgar Publishing, USA, 2005, p 11

⁵⁸⁷ The Economist April 2010; see also T. Graham et al., 'Money Laundering', Butterworths LexisNexis, UK, 2003, p 4

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

1. Placement

This is the early phase of money laundering. When someone buys drugs on the street, he usually pays for such drugs in cash, by cheques or with financial papers. Then, the drug dealer takes the money and may deposit it in a bank to be able to pay the total amount to the wholesale dealer, who in turn collects cash notes received from his trade to buy further quantities of drugs and so on and so forth. Applying this to the cocaine trade, we can imagine the huge surplus of cash involved, which is clear evidence that these funds are generated from drug trafficking. In this case, the trafficker cannot prove the legitimacy of such funds.⁵⁹⁰

A money laundering operation takes place when a drug trafficker takes his cash-laden briefcase to the bank to deposit the money in his account. In this case, he converts the cash funds into some form of financial papers.⁵⁹¹ This step is called the stage of replacing dirty money or the phase of early money laundering. This is followed by the stage of giving the dirty money the quality of legitimacy (base): once the dirty money is in the bank, it becomes the base (of the structure) because the following steps are based upon it.⁵⁹²

The first step is the most difficult,⁵⁹³ because when a drug trafficker has a large sum of money in cash and goes to the bank to deposit cash funds above a certain limit, the bank will report to the authorities to find out the source of the cash money.⁵⁹⁴

To avoid such a situation, drug traffickers tend to hire several people for depositing such funds in a number of bank accounts so that the deposited amount will not reach the level where the bank informs the police; this is called 'structuring' or 'smurfing'. Ultimately, these sums of money are transferred to the trafficker's main account. This step may not be

⁵⁹⁰ See M. N. Al Deleemi, 'Money Laundering Under Criminal Law', Dar Al Oluom Press and Publishing, 2006, p 29

⁵⁹¹ See K. H. M. Al Hammadi, 'Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2006, p 63

⁵⁹² Ibid. p 64

⁵⁹³ See F. S. A. Al Mael, 'Money Laundering Under Criminal Law', Alexandria University Press, Egypt, 2007, p 89

⁵⁹⁴ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 106

fully guaranteed as banks could have doubts towards the depositor, especially if he has no business or trade to engage in.⁵⁹⁵

Other methods may have to be used, replacing the cash funds with other assets such as gold or travellers' cheques, or shifting such funds to another country that does not have legislation for enquiring about the source of money or assets. African and East European countries are fairly good targets for smugglers wanting to transfer funds to their banks owing to their economic conditions and their ignorance of the nature of such funds that do not always remain for long in their banks.⁵⁹⁶ Therefore, smugglers transfer their funds overseas and, in the receiving countries, the funds are re-used as though they are legitimate assets.

2. Layering

This is the stage of moving the base funds around, to conceal their origin and make them appear legitimate. In this second phase, the funds become more difficult to trace by the police, because banks are not obliged to file reports about such funds.⁵⁹⁷ Smugglers tend to keep their money in a country that has little legislation for controlling the process of deposits, such as Luxembourg, and then the funds are transferred, for example, to the Caribbean where the smugglers set up shell companies that transfer the funds to them against payment of service fees or customs duties.⁵⁹⁸ Then, the bank account holder pays the value of invoices to the company's owner; if there are suspicions from the police who question the company about the source of such funds, the latter would say that these are service fees for which invoices are raised. What the police are unaware of is that both the bank account holder and the shell company are one and the same person. Thus, the operation continues from one account to the other and from one company to the other under the smuggler's control.⁵⁹⁹

⁵⁹⁵ Ibid. p 113

⁵⁹⁶ See A. Al Fauori, 'Money Laundering; Concept and Legal Nature', Dar Wael Press and Publishing, 2002, p 97 - 104

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ See J. F. La Rasheedi, 'Combating Money Laundering Under Kuwaiti Law', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2002, p 172; see also S. Al Saad, 'Investigating Money Laundering and Financing Terrorism', Arab Banks Union Press, 2006

3. Integration

Through this phase, funds may typically be invested in buying a boat or property or hiring women for illegal purposes. However, part of the funds will be used for legal and legitimate investments to make lawful gains such as buying companies and businesses. In this process, the money is used for buying restaurants, casinos or small businesses such as laundries (from the latter type of business the term money laundering was coined).⁶⁰⁰

Criminals resort to the acquisition of loss-making companies and businesses that could be cheaper to take over; so a smuggler may inject funds into such businesses to make them look as though they are profit-making concerns or extraordinary companies that enjoy tax exemption. For instance, Guinea Bissau is not a tourist country but there are numerous tourist resorts there that do not carry on any business.⁶⁰¹

6.3 Sources of Illegal Funds for Money Laundering Crime

Money laundering operations are usually linked to illegal activities which are beyond the grip of laws combating financial corruption; the attempt is to return the money as legal and recognised by the same laws that would have punished them. Owners of illegal funds or money derived from a dirty business cannot risk bringing their money back into the country unless they are confident that there are no legal violations and risks related to the security or sovereign authorities.⁶⁰² The plurality of illegal fund sources is determined by the plurality of criminal acts, which are difficult to identify, to limit or to quantify.⁶⁰³ The most important are the narcotic drug trade and cross-border smuggling, but others include bribery, trading in foreign currencies, crime gangs, terrorism, embezzlement, corruption in the civil service, tax evasion, human trafficking, illegal political activities, borrowing from

⁶⁰⁰ See E. P. Ellinger et al., 'Ellinger's Modern Banking Law', Oxford University Press, UK, 5th edn, 2011, p 92 - 93

⁶⁰¹ See K. H. Mustafa, 'Money Laundering', Al Saqaseeq University Press, Egypt, 2008, p 221; see also S. Al Saad, 'Investigating Money Laundering and Financing Terrorism', Arab Banks Union Press, 2006, p 24

⁶⁰² See M. S. Saeeфан, 'Analysing Banks Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 177

⁶⁰³ See F. Al Dhafeeri, 'Combating Money Laundering; Comparative Study' Kuwait University Press, Kuwait, 2004, p 57

banks without adequate securities, white collar crimes committed by people of high standing in the community (breach of duty, job exploitation, misuse of authority, etc.), fraud, commercial fraud and cheating, trade mark infringement, currency note forgery, bank cheque forgery and illegal speculation in securities, etc.⁶⁰⁴

6.4 Money Laundering Characteristics

Money laundering is considered as a modern crime, since it is a means of exploiting the proceeds of widespread modern criminal or unlawful activities arising from trading in narcotic drugs or arms, acts of organised and armed theft, or trading in contraband or prostitution.⁶⁰⁵ These are considered as organised crimes, as there is an organised structure in the form of a hierarchical group or gang that enjoys some kind of continuity in the event of the arrest or death of one of its leaders.⁶⁰⁶ Such a structure comprises a limited number of well-trained members. Anyone who breaks away from such an organisation is doomed to be killed according to the customs and traditions of such groups.⁶⁰⁷

Such groups engage in their criminal activities through their ability to challenge the authorities in the country of operation, and their ability to infiltrate its official organs and institutions with the use of the most advanced and sophisticated technologies and facilities in addition to their use of force, violence, deceit, murder, kidnapping and imprisonment of hostages.⁶⁰⁸ As part of their operations they give hefty bribes to state officials as a means of promoting corruption and undermining the government agencies and institutions in order to infiltrate their ranks and achieve their criminal plans.⁶⁰⁹ Organised crime is a

⁶⁰⁴ See A. Hejasi, 'Money Laundering', Dar Al Kutob Al Qanooniya, 2007 p 144 – 149; see also J. F. La Rasheedi, 'Combating Money Laundering Under Kuwaiti Law', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2002, p 293- 295; T. Graham et al., 'Money Laundering', Butterworths LexisNexis, UK, 2003, p 6 - 7

⁶⁰⁵ Ibid. p 3

⁶⁰⁶ See M. A. Al Khudari, 'Money Laundering', Al Neel Group Press and Publishing, Cairo, Egypt, 2003, p 342

⁶⁰⁷ Ibid.

⁶⁰⁸ See N. Moosa, 'Money Laundering Crimes', Dar Al Esra Press and Publishing, Amman, Jordan, 2002; see also A. Al Fauori, 'Money Laundering; Concept and Legal Nature', Dar Wael Press and Publishing, 2002, p 291

⁶⁰⁹ Ibid.

well-designed kind of crime that requires methods, procedures and rules of combat, other than these required by conventional crimes.⁶¹⁰

Money laundering crime is a non-personal crime, with regard to the motive, victim or relationship between the criminal and crime, has a collective nature, and is carried out through the collaboration of numerous people.⁶¹¹ Therefore, the methods of combating it are far more difficult. All these crimes are committed to gain money and criminals usually get huge sums of money from them. Therefore, huge amounts of money are spent on committing such crimes and making them difficult to uncover;⁶¹² hence this represents a large burden for such criminal organisations that find it difficult to dispose of the financial returns of such crimes.⁶¹³ The dirty assets of such funds are difficult to use in clean communities, making these gangs seek to launder their funds.⁶¹⁴ Thus, this crime is not an ordinary kind of crime but it is one that requires to be carried out by organised gangs of professional criminals who have a high degree of coordination and planning and are spread throughout the world.

Indeed, money laundering is an economic crime that has a serious impact upon national and international economies. It is a deliberate crime, as it is inconceivable to think that it is not premeditated. It can be considered as a crime against humanity owing to its serious effects on national and international economies and even on the whole of humanity as it transcends the geographical boundaries of a single country, given the significant growth and development of telecommunications.⁶¹⁵

Given that the concept of ‘interest’ is an end to be achieved by criminal gangs who share this common goal, regardless of where they carry out their activities, it is a global crime in nature. According to IBM figures,⁶¹⁶ the size of money laundering operations ranges between US\$590 billion and US\$1.5 trillion per annum which equals 2% to 5% of the

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

⁶¹² See M. A. Al Khudari, ‘Money Laundering’, Al Neel Group Press and Publishing, Cairo, Egypt, 2003, p 344

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ See F. S. A. Al Mael, ‘Money Laundering Under Criminal Law’, Alexandria University Press, Egypt, 2007, p 353

⁶¹⁶ See T. Graham et al., ‘Money Laundering’, Butterworths LexisNexis, UK, 2003, p 4

world Gross Domestic Product.⁶¹⁷ Total income generated from the illegal drug trade equals US\$688 billion annually which includes US\$23 billion in Europe, US\$150 billion in the United States, US\$5 billion in the UK and US\$510 billion in other parts of the world.⁶¹⁸

6.5 Types of Money Laundering Crime, Methods of Committing and Instances

6.5.1 Types of money laundering

Money laundering is defined as crime that arises from the acquisition, by an individual or corporate person, of illegal funds as a result of another penal crime where there is a criminal intent (knowledge + initiative) of the person to carry out such money laundering operations and enter into agreement to implement it with other associate or contributing parties.⁶¹⁹ In cases where banks fail to report accounts involved in money laundering, they are not considered to have committed the original crime, rather they are accused of committing offences related to money laundering by participating and facilitating the original crime. However, Article 2.3 of the PPMLA states that, '*A person can be punished for the offence of money laundering under this law even if he is not convicted in the underlying criminal activity*'. In this context, underlying criminal activity, '*refers to criminal activity from which the property which is involved in money laundering offence has been directly or indirectly derived*',⁶²⁰ thus the person is punished for committing a money laundering offence, even if the conviction has not been proven in the predicate offence, which constitutes a clear violation to a constitutional article⁶²¹ which states that the accused is innocent until proven guilty. This can be considered as an assault on the freedom of individuals by punishing actions where the original source of the money is not proven to be illegal, and it truly contradicts the principle of presumption of innocence set out in the Constitution.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

⁶¹⁹ See Bahrain PPMLA, 2001, Article 2.1

⁶²⁰ See Bahrain PPMLA 2001, Article 2.3

⁶²¹ See Constitution of Bahrain 2002, Article 20.D

Aiding and abetting money laundering operations with the awareness that such funds are illegal. Investigating this crime involves tracing financial and banking institutions. This is because this crime extends to every individual or corporate person who has contributed to any acts and arrangements at any stage of money laundering operations. The deliberate criminal intent must be available (knowledge plus initiative).⁶²²

Possession or holding of funds subject to money laundering or its proceeds with the knowledge of the illegal nature in a manner that contributes to concealing or covering up the truth about such funds. There must be a criminal intent (knowledge plus initiative).⁶²³ This, again, involves tracing financial and banking institutions, because this crime extends to every individual or corporate person who has contributed to any acts.

The crime of transfer or shifting of funds from one country to another, or from one bank to another, by an individual or corporate person while having the knowledge concerning the truth of such funds and their source.⁶²⁴ This type also involves tracing financial and banking institutions, because this crime extends to every individual or corporate person who has contributed to any acts.

The crime of failure to report suspicious money laundering activities or failure to prevent them, negligence in uncovering them, violating the requirements of reporting or failure to report the prescribed banking or financial activities according to internal or external control reports and reports of the related institutions. These are part of negligence and failure crimes that create legal liabilities (criminal, civil and disciplinary).⁶²⁵

6.5.2 Money laundering methods

Money laundering operations take place by numerous methods and forms that range from being simple to complex according to the circumstances and nature of the operation. Technology has played a major role in developing the methods used in money laundering. An example of this is smuggling, as those involved in criminal activities smuggle the cash proceeds of their crimes, either personally or in collaboration with others, outside the

⁶²² Ibid., Article 2.2

⁶²³ Ibid., Article 2.6

⁶²⁴ Ibid., Article 2.6

⁶²⁵ Ibid., Article 2.6.c

country. Alternatively, they deposit such funds in a current account in a bank or financial institution.⁶²⁶ In spite of the simple nature of this method and in spite of development in security technology, it is still being used on a wide scale.

As mentioned earlier, money laundering may take place through buying property, and gold and rare paintings that could be sold against bank cheques and then money transfer takes place through such banks. Owing to the difficult economic conditions, some estate agents, gold traders and others do not bother much about the source of funds and do not report such crimes to the security authorities.⁶²⁷ They may convert cash into negotiable instruments, such as cheques, promissory notes, sovereign debt bonds and other securities that are deposited in banks or shifted to another country for depositing.⁶²⁸

Another method is the transfer of funds through non-bank financial institutions, such as currency exchange houses and stockbrokers for buying shares and bonds to be registered in the name of any person or in the name of a shell company or front companies such as insurance companies or import and export companies.⁶²⁹ These companies are set up following the preparation of their constitutional documents and employment of a citizen of the country, after which money is transferred. Another method, as mentioned above, is buying loss-making or nearly bankrupt companies. Wire transfers may also be used; the bank which transfers the money is unaware of the purpose of this operation and some foreign banks do not even keep the customer's name.⁶³⁰

Some countries, such as tax havens, are exploited as there are few income taxes or centres that uphold the banking confidentiality principle. These centres usually enjoy political and financial stability and have an excellent geographical position.⁶³¹ Such countries attempt to attract foreign investments.

⁶²⁶ See M. O. Al Ensi, 'Money Laundering effects on Banking Confidentiality', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2007, p 11

⁶²⁷ See D. Y. Subh, 'Money Laundering and Banking Confidentiality', Dar Al Manshoorat, Syria, 2002, p 33

⁶²⁸ Ibid.

⁶²⁹ See M. S. Saeefan, 'Analysing Banks Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 66 - 77

⁶³⁰ Ibid.

⁶³¹ See K. H. Mustafa, 'Money Laundering', Al Saqaseeq University Press, Egypt, 2008, p 84 - 88

Money launderers also use forged invoices or exaggerated amounts when they set up business operations in two countries; they buy some goods from one country and the money is sent to the other. The value of invoiced goods is forged and the difference becomes the laundered sum of money.

This process can also take place in casinos, gambling and nightclubs where large sums of cash are deposited with the pretext that they are to be used in gambling.⁶³² The criminal then either gambles with small sums of money or does not gamble at all and closes his account before asking to receive a cheque in his name or in the name of another person. The tourist sector may be used, through investment in this field, such as the ownership of hotels or setting up of tourist cities;⁶³³ pumping grey money into such ventures is designed to make them look legal. In addition, pumping the money through the world's stock exchanges, which allow the exchange of funds through globalisation, allows the buying of shares and bonds through facilitating the movement of capital, which in turn helps in money laundering operations.⁶³⁴

Technology is exploited by money launderers, who take advantage of credit cards and smart cards as means of payment for goods and services. The cards are obtained by money launderers from a bank in which they deposit huge sums of money. They make payments from the account of a national bank in a foreign country to a foreign bank that has issued the credit card or by the transfer of money from an automated teller machine (ATM) from any foreign country, in which case the branch from which the withdrawal has taken place will confirm the transfer of money.⁶³⁵ Another method is through obtaining a credit card from a bank in one country for use in payment of debts owed in a foreign country. So funds are deposited in one location and then withdrawn in other locations, with the depositor and withdrawer concealing his identity.⁶³⁶

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 455; see also D. Y. Subh, 'Money Laundering and Banking Confidentiality', Dar Al Manshoorat, Syria, 2002, p 99

⁶³⁶ Ibid.

With the use of internet banking and e-commerce, it becomes simple for individuals to have access to bank accounts to conduct financial and money transactions and to cover accounts and make payments quickly, while maintaining confidentiality away from any supervision.⁶³⁷

Another possibility lies in the use of telephone banking, and this has significantly facilitated money laundering operations. It should be noted that the practice of internal connivance, both on the individual or group levels, with officers of banks, security authorities or customers, as well as arrangements where deposit operations take place through large or small deposits and are carried out by several individuals, leads to a large extent to the completion of money laundering operations. Alternatively, they can be conducted through the ATMs. Such machines can be significantly and repeatedly used for splitting cash transactions to avoid the legal requirements of reporting the cash transactions that exceed a certain limit through online banking.⁶³⁸

The internet is currently being widely used as a channel for providing services to bank customers and it is a facility that contributes to promoting money laundering. There is also the use of encryption and electronic money.⁶³⁹ The use of encryption has led to the emergence of e-money. Protection of banks' data, customers and financial transactions is ensured by the use of encryption keys. It is possible to identify a financial transaction and the data related to the drawer's identity; however, it could be anonymous, in which case e-money becomes like any cash money, which means that its holder can withdraw, spend and launder such money without leaving a trace.

Electronic communications such as email can be used for providing incorrect information about share and bond prices to mislead investors about the availability of free investment facilities on the internet. This drives members of the public to buy or sell shares on the stock market. Money launderers can benefit from this process and make huge profits.⁶⁴⁰ So money laundering operations take place by using the stock market. There is also

⁶³⁷ See F. Al Dhafeeri, 'Combating Money Laundering; Comparative Study' Kuwait University Press, Kuwait, 2004, p 183 - 185

⁶³⁸ Ibid.

⁶³⁹ Ibid.

⁶⁴⁰ See T. Graham et al., 'Money Laundering', Butterworths LexisNexis, UK, 2003, p 4

internet fraud through the creation of online websites by companies for displaying their products and these companies in turn steal the personal data and credit card details used to facilitate the purchase transactions online and then money laundering takes place with the level of sales made online.

6.5.3 Money laundering instances

- 1- A crime may take place in a country, and this includes any crime that provides the source of illegal funds and money laundering operations arising from these crimes. In such cases, the crime is local and subject to the legal and court jurisdiction of the country, and the same applies to the attachment on funds and proceeds arising from such activities, the arrest of suspects and the persons involved with them, and imposing a travel ban against them.⁶⁴¹
- 2- A crime that involves the source of illegal money may take place in one country and the laundering operation may take place in another country. Here, there must be international cooperation for ascertaining the type of crime and elements of its completion and placing the attachment on funds immediately and imposing a travel ban.⁶⁴²
- 3- A crime that involves the source of illegal money may take place in one country and the funds generated from it may be transferred abroad, hence an attachment must be placed upon the balance of the suspects' funds and the manner of the outflow of funds investigated to ensure their attachment and seizure according to international agreements.⁶⁴³
- 4- The whole crime (source and laundering operations) may take place outside the country and the money generated from it could be brought into the country and may exit from it (transit country), hence financial or business institutions could be used for transit purposes, in which instance the whole case must be followed up internationally. It should be noted that there are clauses in the Vienna Convention relating to international

⁶⁴¹ See N. Moosa, 'Money Laundering Crimes', Dar Al Esra Press and Publishing, Amman, Jordan, 2002, p 112 – 141; see also M. A. Al Khudari, 'Money Laundering', Al Neel Group Press and Publishing, Cairo, Egypt, 2003, p 89 - 111

⁶⁴² Ibid.

⁶⁴³ Ibid.

cooperation and extradition of criminals and mutual legal aid which can be referred to, and the same applies to other effective agreements that are beyond the scope of this study.⁶⁴⁴

6.6 Money Laundering Through Banks

The banking system is the most familiar system used for money laundering operations. In the following subsections, the writer will discuss methods used, including bank borrowing, internet banking, private banking services, letters of credit, credit cards, ATMs, wire transfers of funds, money exchange houses, lease finance, smart cards, ordinary bank transfers and bank fraud.

6.6.1 Bank borrowing

Bank borrowing may be used for concealing illegal funds and it could be used in the layering stage after the money is deposited in the bank. A person borrows funds from the bank with the security of such funds, with the aim of establishing distance between the original unlawful funds and the proceeds of the amount borrowed from the bank.⁶⁴⁵ If the client is asked about the source of such funds, he will produce the bank's loan agreement to show their source.

6.6.2 Internet banking

Most banks of the world have their own websites for providing their banking services, and there is competition amongst them online. Owing to the significant development of telecommunications and electronic systems, some of them have set up banks that only exist on the internet (cyber banking). These have become a battleground for money launderers, who take advantage of saving time and money that would be spent on layering and 'smurfing' (structuring), as they can remit their funds easily and conveniently around the world in a few minutes from the convenience of their homes with the use of their computers. They use their passwords to have access to their bank accounts. A notable

⁶⁴⁴ Ibid.

⁶⁴⁵ See M. O. Al Ensi, 'Money Laundering Effects on Banking Confidentiality', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2007, p 123

occasion was when two members of the Russian Mafia set up a bank in the name of the European Union and, after raising funds, they fled.⁶⁴⁶

Due to this serious situation, the United States of America created the Clipper Ship System⁶⁴⁷ which was installed on all equipment carrying data. This system is able to decipher financial transactions conducted on the internet. Eventually, somebody was able to develop a system, whose codes could not be deciphered, called 'Pretty Good Privacy', making the Clipper Ship System obsolete. This new system made it more difficult to oversee and track the sources of funds. In fact, cyber banks can transfer funds quickly, easily and confidentially.⁶⁴⁸

In Bahrain, all Bahraini banks have websites. Using a password, a citizen can easily obtain services through such websites including balance enquiries and transfers between accounts within the same bank. The same transactions can be conducted through telephone banking. A citizen can also conduct many transactions, such as making enquiries, through the use of home banking using an office or home computer.

Since most countries of the world, including Bahrain, use such technology and, owing to their importance at the international level, caution must be exercised towards such services provided online and they should be made use of in a reasonable way, so that they should be provided to the bank's customers within specific ceilings for making such transfers, especially overseas remittances. Fraud and theft operations are quite common on the internet.

6.6.3 Private banking services

Private banks provide special banking services to wealthy customers. They have been able to raise huge funds from the smallest number of customers who are offered packages of profitable banking services. They were first launched in Switzerland and then they became

⁶⁴⁶ See H. Gorson, 'The Electronic Dimension to Money Laundering; The Investigator Perspective', *Journal of Money Laundering Control*, Vol.3, No. 3, 2000, p 233 - 236

⁶⁴⁷ See M. S. Saeeefan, 'Analysing Banks Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 45 - 46

⁶⁴⁸ See J. W. Muhammadeen, 'Banks Role in Combating Money Laundering', Dar Al Jamea Press and Publishing, Alexandria, Egypt, 2001, p 34 - 36

quite common in most countries of the world, especially the United States. Total balances in these banks worldwide are estimated at US\$15.5 trillion.⁶⁴⁹

To open a private bank account, a very large sum of money is required; it could be US\$1 million or more. A special services officer is nominated to be in charge of the customer's business with the bank and in any place in the world. Thus, a personal relationship is established between the customer and the bank's private service to ensure that more revenues are generated by the bank. Therefore, a relationship is developed until the service officer becomes the customer's advisor and then a type of relationship develops between the customer and the service officer. Through their experience, both can evade the regulatory guidelines including the rules concerning money laundering operations.⁶⁵⁰

Customers of private banking services are mainly rich and affluent people, persons with economic influence and clout, and politicians. The nature of such customers make private banking officers feel embarrassed to ask them certain questions. What makes things more complicated is banking confidentiality; clients are keen to have private banking for the benefit of extra confidentiality on their accounts and the establishment of shell companies makes it difficult to identify the real account holders. The case of Raul Salinas, brother of the former Mexican President, is a good example of opening an account in the name of a shell company and then striking off the name from the registration documents. The bank used to refer to him by the words Secret Customer No. 2 and then opened a special account for him under the pseudonym 'Bonaparte'.⁶⁵¹ All this happened as a result of the conflict of interest between obtaining customer deposits and the need to investigate suspicious funds. Even banks that have set up independent control units can only be considered as 'useless'.⁶⁵²

In Bahrain, there is no system offering private banking services or private banks for special customers. However, there are 'VIPs' in Bahrain who are provided with services in

⁶⁴⁹ See M. S. Saeefan, 'Analysing Banks' Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 46 – 48

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid.

⁶⁵² See M. O. Al Ensi, 'Money Laundering Effects on Banking Confidentiality', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2007, p 496

private offices where there is an account officer for several customers.⁶⁵³ This system is largely similar to the private banking system. VIPs usually have close relationships with senior bank officials.

6.6.4 Documentary credits

A documentary credit arises from an international sales contract between seller and buyer. Practically speaking, banks organise the relationship between the parties by opening a documentary credit account, so as to ensure that the buyer will pay the price of the goods and the seller guarantees the shipment.⁶⁵⁴ Documentary credits are used for laundering illegal funds, by reaching an agreement between the seller (exporter) and the buyer (importer). They often have genuine companies that buy, process and ship the goods as required, or manipulate the prices of goods, for which the invoices are provided, with LC documents for large sums of money. The value of the documentary credit is paid by the buyer to make it seem like funds generated from import and export by international contracts. These may include perfumes, antiques and other products.

In such cases, forged invoices are used without being represented by any actual purchase transactions, so that the total amount of the documentary credit is used for money laundering. However, this method involves difficulties as regards the issue of a forged bill of lading and insurance policy. These require the connivance of other parties, which involves the payment of bribes and commissions.⁶⁵⁵ Therefore, we must be wary of this phenomenon in Bahrain to make sure that there are actually shipped goods and the price shown in the documents is close to the real price available with the concerned organisations. Banks must be closely connected to the customers and be aware of their real business activities, because such activities are harmful, give unrealistic indications of the economy and cause direct damage to the bank.

⁶⁵³ See Standard and Chartered Bank priority banking available at: <http://priority.standardchartered.com.bh/en/index.html>; see also bank of Bahrain and Kuwait available at: <http://www.bbkonline.com/PriorityBanking/Pages/PriorityBanking.aspx>

⁶⁵⁴ See A. Al Okaili, 'Comments on Commercial Law', Dar Al Thaqa Press and Publishing, Amman, Jordan, 2nd edn, 2002, p 206 - 211

⁶⁵⁵ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 467

6.6.5 Credit cards

Owing to the significant development of technology, especially computers that are extensively used in banks, there are new methods of payment as substitutes for earlier commercial papers. These include credit cards, which have been introduced into the Bahraini market without being associated with corresponding legal developments.⁶⁵⁶ Visa and MasterCard cards are issued by most Bahraini banks with the approval of the original issuers. Such cards can be used in laundering illegal funds when one person, or several persons, obtain several cards from a number of banks. Their cash withdrawals or purchase of goods are covered by their accounts in a bank situated in another country, where the money comes from illegal sources. Although the amount of funds that can be laundered is limited, they are used in the countries that do not have clear legislation governing payment cards.⁶⁵⁷

The writer personally calls for the introduction of legislation governing such business activities to make banks responsible for the unlawful use of payment cards, due to their responsibility for their poor selection of customers and reducing the credit limit to no more than the customer's actual requirement. Also, the banks need to ensure that the sources of payment for cash withdrawals and purchases are verifiable and to make sure that the funds are of a legal nature.

6.6.6 Automatic teller machines

There are automatic machines used to conduct banking transactions with the use of cards with magnetic strips that pass through the machine's reader and processes the data kept on the card's magnetic strip. ATMs can provide a wide range of services; the most important of these are cash withdrawals, deposits, internal bank transfers, payment of invoices and bank statement requests. ATMs are used for withdrawals and deposits, avoiding having to fill in the prescribed forms. Further, users can split the amount to avoid suspicion.⁶⁵⁸

⁶⁵⁶ See A. Safar, 'Combating Money Laundering in Arab Countries', Arab Banks Union Press, 2003

⁶⁵⁷ See D. Y. Subh, 'Money Laundering and Banking Confidentiality', Dar Al Manshoorat, Syria, 2002, p 112

⁶⁵⁸ See A. F. Al Fauori and E. M. Qutashat, 'Money Laundering Concept and Legal Nature', Dar Wael Press and Publish, Amman, Jordan, 2000, p 88

Taking into account that the world has around 1.5 million ATMs,⁶⁵⁹ Bahrain has a large ATM network covering the Kingdom. Although there are specific CBB instructions to verify the customers who deposit more than BD5,000 in their accounts,⁶⁶⁰ there is no supervision for ATMs. A customer can deposit in an ATM of the bank that issues the card and withdraw from any of the bank's ATMs.

6.6.7 Wire transfer

Different wire transfer systems as described below are used in money laundering and criminal groups are always on the lookout for loopholes to be exploited.

1. Federal Reserve Board (Fed Wire)

This system is used in the United States but is not used in Bahrain. Through Clearing House Inter-bank Payments (CHIPS), this system makes daily transfers in the sum of US\$1.5 trillion. Money launderers use this Fed Wire system for money remittances overseas without the need for disclosing their names. The system has more than 9,500 subscribers linked online with the Federal Reserve Board for sending and receiving payments and transactions that, in 1993, numbered nearly 400,000. Most banks in the US are members of this system.⁶⁶¹ Money laundering groups have sought to take advantage of the authorities' preoccupation with tracing other transactions and speedy transfers through the bank network make it more difficult to trace suspicious transfers, because transfer applicants tend to transfer funds from one bank to another and then to a shell company in one of the offshore areas which enjoy banking secrecy advantages, and then such funds are recovered by different methods including borrowings secured by such funds.⁶⁶²

2. Clearing House Inter-bank Payments

This is a system that is owned by the private sector in the United States. It is a payment system among bank members of the clearing house. It is owned, operated and supervised

⁶⁵⁹ See <http://www.atmmarketplace.com/article/132984/Number-of-ATMs-worldwide-expected-to-hit-1-5-million-in-December>

⁶⁶⁰ Available at <http://www.nbbonline.com/default.asp?action=category&id=5>

⁶⁶¹ Available at: http://www.federalreserve.gov/paymentsystems/fedfunds_about.htm

⁶⁶² See F. Dancan, 'Anti Money Laundering Regulations Burden on Financial Institutions', North Carolina Journal of International and Commercial Regulations, Vol. 19, 1994, p 436 - 470

by the New York Clearing House. Its subscribers are 52 members who represent the major banks in the United States and the world;⁶⁶³ the system is not used in Bahrain.

It should be noted that this system is used in the processing of messages received from members and settlement of their accounts. It is also used as an alternative system for Fed Wire, where both the sender and recipient are CHIPS members. They usually settle their business and account balances through Fed Wire and this is the difference between CHIPS and Fed Wire. Owing to the huge amount of remittances transferred daily through banks from customers, it is difficult to trace such movements, which constitute a gap through which money launderers can conduct their business.

3. Society for Worldwide Interbank Financial Transactions

This system was established in 1973 and its members include more than 9,000 financial institutions all over the world in around 209 countries, exchanging over 15 million messages per day.⁶⁶⁴ These institutions cooperate with each other and do not seek to make profits, and they provide their members with speedy and secure methods of telecommunications; most Bahraini banks are members of Society for Worldwide Interbank Financial Transactions (SWIFT).⁶⁶⁵ To determine whether the beneficiary is a non-banking organisation or not, negotiations were held between SWIFT and FATF followed by the issue of a circular to all members requesting the completion of Sections 50 and 59 of MT103, and it came into effect as from November 1997. Details of the sender and recipient are to be mentioned. In the US, the Federal Reserve Board issued a circular to the financial institutions calling for compliance with the SWIFT standards to the CHIPS and Fed Wire and any other electronic systems.

4. Western Union System

This is an American system used for transferring and receiving funds in most countries of the world within no more than ten minutes.⁶⁶⁶ In addition, there is the Quick Pay service

⁶⁶³ According to CHIPS last update on Feb 20 2012 available at:

<http://www.chips.org/about/pages/033742.php>

⁶⁶⁴ See <http://www.swift.com/>

⁶⁶⁵ See <http://www.cbb.gov.bh/>

⁶⁶⁶ See <http://www.westernunion.com/Home>

that ensures the remittance of cash payments for customers due to companies, through banks that do business with Western Union. Moreover, it is not possible to transfer more than US\$10,000, except according to documents proving the purpose of the transfer, such as medical bills, school fee bills, travel and purchase invoices from where goods are bought.⁶⁶⁷ Sometimes, and at the request of the sender, a question is asked to establish the beneficiary's identity and, in such cases, the question must be answered. Furthermore, it could be used in cases where the beneficiary does not have an identity card or if it is lost or stolen. It is also possible to ask this question to ensure that the transfer's beneficiary is the one who receives such a remittance. Sometimes the laws and instructions of the country to which the transfer is sent require answering for verification, owing to the increase in the number of forgery cases.⁶⁶⁸

A beneficiary must answer the following questions as a precondition for delivering the transferred funds to him:

- What is the transfer number which consists of ten digits?
- What is the transferor's name?
- What is the country from which the transfer is made?
- What is the transfer amount?⁶⁶⁹

In spite of the tight control on such transfers, money launderers may use this service owing to its speed of transfer for amounts of less than US\$10,000, because it does not require submission of supporting documents. Also the speed of this transfer method makes tracing the funds almost impossible, because a beneficiary could easily receive the funds and transfer them to another destination, making it more difficult to trace the transaction.

It is difficult to have full control on attempts by money launderers to transfer money with the use of electronic systems because of the speed and remote locations of the transferor

⁶⁶⁷ Ibid.

⁶⁶⁸ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 316

⁶⁶⁹ Ibid.

and transferee, and where money is more frequently transferred electronically and in large amounts, it becomes more difficult and costly to track.⁶⁷⁰

6.6.8 Secret exchange houses (black market) and non-banking institutions

Such exchange houses and non-banking institutions trade in foreign currencies in most countries of the world. They tend to become more active and thrive where there is a difference between the currency's official exchange rate and its market price linked to supply and demand. This kind of trading tends to flourish in countries where there are illegal funds whose owners wish to conceal their illegal source.⁶⁷¹ This process takes place in the deposit stage. Such transactions depend upon mutual confidence, as money launderers deliver the funds to a person operating locally for delivery to someone else in another country. Then, the proprietor of the exchange house contacts his partner or associate in the other country to ensure delivery of the funds to the addressee after giving him mutually agreed codes. Of course, the parties doing business with the exchange house receive commissions in consideration for such a service.⁶⁷²

6.6.9 Lease finance

Lease finance transactions in their broad sense are contracts whereby the lessor allows the lessee to use privately owned equipment or facilities, against the lessee's obligation to take leases by making successive rental payments during the lease term. During such a period, the lessor will assume the risks of obsolescence or change.⁶⁷³ Large investors prefer to use lease finance because it separates between ownership and use. It also achieves the link between the volume of credit and return, following up rapid technological development, and solving the problem of decline in the useful life and technical life of machinery and equipment.⁶⁷⁴

⁶⁷⁰ Ibid.

⁶⁷¹ See M. S. Saeefan, 'Analysing Banks Role in Combating Money Laundering', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2010, p 56 - 57

⁶⁷² See S. Al Saad, 'Investigating Money Laundering and Financing Terrorist', Arab Banks Union Press, 2006, p 49 - 50

⁶⁷³ See A. Al Okaili, 'Comments on Commercial Law', Dar Al Thaqafa Press and Publishing, Amman, Jordan, 2nd edn, 2002, p 305 - 322

⁶⁷⁴ Ibid.

This method is used in the laundering of illegal funds, where a money launderer buys the property from another person under a lease finance contract, or may obtain a loan from a bank to finance such a lease, which is subsequently operated or sold to a third party to obtain funds in the form of cheques which then seem to be funds generated by a lease finance agreement.⁶⁷⁵

6.6.10 Smart card

This is a card that looks like a credit card but the only difference between them is that a customer pays the money to his bank to be stored on the card's magnetic strip to become only a number used by the ATM. Telephones may be used for charging the card. This technology was first developed in England and then it was used in the United States.⁶⁷⁶

Such cards are capable of storing millions of dollars on the magnetic strip and are used for easy transfer of funds to another card later on and to any place in the world. Thus, such funds can always be beyond the reach of the regulatory authorities. It is always difficult to trace such funds which are often used in the first phase, that is the transfer of funds to a card, and then to use the second phase for layering⁶⁷⁷ by transferring the balance to another card or opening an account with a bank. Using such cards on cyber banks makes the whole thing more complex, which provides a fertile environment for money launderers.

It should be noted that no Jordanian banks issue such cards at present. However, this does not mean that they are not available, as they are issued by foreign banks and their holders can use them in Jordan. Therefore, care should be exercised in dealing with such cards to keep them under control in order to be able to trace the origins of such funds.

6.6.11 Ordinary bank transfers and bank cheques

This method is used in the first phase (deposit) where cash funds are converted into bank cheques or drafts. This takes place in agreement with a group of persons for the issue of

⁶⁷⁵ See A. A. Qahraman, 'Banks Participating in Combating Money Laundering', Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 497

⁶⁷⁶ See F. Al Dhafeeri, 'Combating Money Laundering; Comparative Study' Kuwait University Press, Kuwait, 2004, p 355 - 356

⁶⁷⁷ Ibid.

overseas drafts or bank cheques to avoid exceeding the ceilings that may be transferred legally,⁶⁷⁸ namely US\$10,000 in the United States and BD 5,000 in Bahrain. Such drafts and cheques are issued in favour of an account held by someone in one of the countries that have a strict system of banking confidentiality where it is difficult to track such funds.

In Bahrain, there is no fixed ceiling for money transfers to overseas beneficiaries, whether by bank cheques or drafts. The writer is of the opinion that a ceiling should be set. Any amount above the said ceiling must be supported by documentary evidence for the reason for the transfer, whether it is intended for medical treatment, travel, education or the price of goods and services. In fact, the documentation serves the best interest of the transferor and, ultimately, the country as a whole.

6.7 A Bank's Responsibility for Money Laundering Crimes

As is clear that the banking sector plays a key role in the field of money laundering and the combating of this crime, one cannot imagine the success of any security measures, preventive or punitive, in this area without the cooperation of the banking sector. It is well known and expected that the money launderers resort to the banks to transfer their money to credits and deposits, as it is more convenient to use them. In addition, they invest these funds through banks and financial institutions in order to hide the real sources of this dirty money. Based on what has been described above, banks may be subject to legal accountability for receiving and acceptance of the dirty money, especially if they knew that the money was obtained from a criminal act, and this highlights the question: to what extent are banks considered responsible for, or a contributor to, criminal activity? And to what extent the is the bank considered to have committed an offence of hiding things or money obtained from a crime in the case of acceptance of a deposit of dirty money?

'Any person who commits any of the following acts for the purpose of showing that the source of the property is lawful shall have committed the offence of money laundering: (a) conducting a transaction with the proceeds of crime knowing or believing or having

⁶⁷⁸ See D. Y. Subh, 'Money Laundering and Banking Confidentiality', Dar Al Manshoorat, Syria, 2002, p 84

*reason to know or believe that such property is derived from criminal activity or from an act of participation in criminal activity; (b) the retention or possession of the proceeds of crime knowing or believing, or having reason to know or believe, that the same was derived from criminal activity or from an act of participation in criminal activity’.*⁶⁷⁹

*‘A person who commits any of the following acts shall have committed an offence related to money laundering: (a) failure to disclose to the Enforcement Unit any information or suspicion acquired in the course of that personal trade, business, profession, employment or otherwise regarding the offence of money laundering’.*⁶⁸⁰

6.7.1 When is a bank considered as a contributor to the crime of money laundering?

Some jurisdictions consider that banks, while accepting the deposit of dirty money, should have knowledge of the existence of money laundering crime and that the original source of such money results out of criminal activity. Knowledge of the intent of the launderer is sufficient to uphold the argument that the bank is contributing to facilitating money laundering, and thus its contribution to the original crime that resulted in those funds.⁶⁸¹

However, other jurisdictions provide that it is not required that the bank is truly aware of the illegality of these funds, mere suspicions are enough, such as the Bahraini legislation, which provides that any person, including artificial bodies such as banks, is considered to have committed a money laundering crime if they fail to report acts either *‘knowing or believing or having reason to know or believe’* to the Enforcement Unit. Accordingly, in order to avoid falling under penalty of perjury, banks must take reasonable precautions to verify the identity of the persons dealing with them in all banking operations, especially since most of these operations are based on trust and personal considerations and, in these circumstances, banks should forget customer confidentiality and inform the competent authorities in the event of any suspicious transaction. If banks fail to report the suspected cases in a timely fashion, they bear the legal responsibility as a partner in crime. Thus the banks need to inform the competent authorities of all operations, regardless of the degree

⁶⁷⁹ See Bahrain PPMLA 2001, Article 2.1.a, Article 2.1.d

⁶⁸⁰ Ibid., Article 2.6.a

⁶⁸¹ See A. A. Qahraman, ‘Banks Participating in Combating Money Laundering’, Dar Al Nahda Press and Publishing, Cairo, Egypt, 2004, p 447

of suspicion, to avoid legal accountability. However, the writer believes that a bank should not be assumed to be a contributor to money laundering by way of incitement, conspiracy and assistance for the following reasons:

- 1- The act of contributing to a criminal act must be former or at least contemporary to the original crime. Thus it is difficult to say that the act of a bank's contribution to the crime, where the original crime that takes place prior to the bank receiving dirty money, is the act of accepting a deposit, when the bank cannot be considered as having colluded in the original crime. However, if we consider the banking process as kind of bank collusion with the perpetrator, this collusion cannot amount to the level of being a cause of money laundering crime, especially since the only act of the bank is to secure the money derived from crime.
- 2- Since the contribution to a criminal act requires the contributor to act positively, it is difficult to say that the bank, by failing to investigate the suspicious source of funds, has contributed directly to the crime, Added to that, the failure of the bank to investigate the suspicious source of funds is not enough for it to be considered a partner or contributor in the original crime that resulted in these funds, especially since the behaviour of the bank was not influential in the genesis of the crime.

6.7.2 Does accepting the deposit of dirty money constitute the crime of hiding things obtained from a crime?

Under some jurisdictions, it is stated that the role of the bank is merely to accept a deposit, but its role does not exceed recording the transaction for the client, even if the bank benefits from the deposited funds. The funds remain deposited on behalf of the client and owned by him.⁶⁸² The bank is in possession of the deposited funds under the deposit contract with the client, therefore if the bank breaches the contract obligations this is considered as having committed a crime. However, the writer finds that the above analysis does not stand before the legal logic of banking and commercial legislation, as it is recognised legally that a fund is transferred to the bank's ownership once it is deposited, accordingly the bank has the full right to use it and invest it until the due date, or when

⁶⁸² See D. Y. Subh, 'Money Laundering and Banking Confidentiality', Dar Al Manshoorat, Syria, 2002, p 196

one of the parties requests to terminate the contract. Additionally, the bank is the beneficiary of the funds, not to mention that the bank is also responsible for that money in the event of loss for any reason. Accordingly, and based on the above, the bank remains criminally responsible for retaining such funds in the case of knowing their source, and this is the view of the Bahraini legislation.

Chapter Seven: Conclusion

A study of banker-customer confidentiality clearly shows that applying it correctly has significant benefits for nations' economies; countries which aim to improve their banking industry sector need to improve and protect the concept of banker-customer confidentiality. It encourages individuals to save their money if private information is protected and no-one has access to bank confidential information without permission. This encourages local capital to remain in the country and provides a supportive environment for international capital, which seeks confidentiality. On the other hand, an absolute confidentiality protection may have a negative impact on an economy as well, if money-launderers seek out these places to hide their 'dirty' money because of the absolute confidentiality provided. International organisations fight against providing safe havens for the money-launderer.

Domestic and international legislation should maintain a duty of confidentiality as part of an individual's rights to protect their freedom and privacy, where nobody is allowed to access confidential information without written permission. Moreover, there should be limited, clear, precise and definite exceptions to the duty of confidentiality, and legislators should avoid ambiguous and uncertain exceptions; suspicion should not be an adequate reason for disclosing customer confidential information.

The research shows that, in Bahrain, banker-customer confidentiality is protected under a number of local laws, such as the constitutional law, where Article 19 provides the right to a private life as no-one is allowed to publish anything regarding anyone unless prior approval is given. It is also protected under the penal law, which provides protection to banker-customer confidentiality; Article 371 states a punishment of imprisonment or a fine not exceeding BD 100 for disclosing a secret in conditions other than those stated by law. Moreover, Bahraini labour law provides a certain level of protection to banker-customer confidentiality, as it prevents employees from disclosing confidential information to any competitor. The CBBFIA, under Article 116, emphasises the need for financial institutions to maintain the duty of confidentiality and provides penalties for breaching banker-customer confidentiality. In contrast, banker-customer confidentiality

under English law is only protected under the common law. Jack, in his famous report in 1989, recommended that banker-customer confidentiality should be protected with legislation, but the UK government published its white paper (Banking Services: Law and Practice) which rebuts such recommendations. However, confidentiality remains protected under the common law.

It has been found that the Bahraini courts have failed to apply any article for the protection of banking confidentiality, and the court records lack any case relating to the protection of banking confidentiality. This made it difficult for the researcher to examine the Bahraini courts' approach to protecting confidentiality and to understand the judges' interpretations of these articles. In Bahrain, although the CBBFIA designates four articles to deal with the duty of confidentiality (Articles 116-119), it lacks specific important details relating to the application of these articles, such as the scope and duration of the duty of confidentiality. Therefore, Bahraini law does not specify which type of information falls under the umbrella of confidentiality. However, under English law, confidentiality protection can even be extended to information acquired by the bank in the course of providing non-banking services, and the courts help to explain the boundaries of the duty of confidentiality. Thus, this makes it crucial for the Bahraini legislators to set up a new separate Act related to the duty of confidentiality, to discuss clearly all the different cases and specific details of banker-customer confidentiality.

The United Kingdom has a good reputation in the financial services sector, with its powerful Financial Services Act and long history in protecting banking confidentiality, along with court experience in interpreting and applying the concept of, and exceptions to, banking confidentiality. The researcher started the PhD research regarding banker-customer confidentiality with a first impression that banking confidentiality is extremely protected under English law, and the Bahraini legislators need to create many amendments to Bahrain's laws to match the English version of protecting banker-customer confidentiality. Surprisingly, the research shows that exceptions to the duty of confidentiality under Bahraini law are much more limited and are clearly stated under the CBBFIA, as Bahraini law only allows disclosure based on court orders during the course of litigation. Therefore, the concept of discovery orders is not applicable under Bahraini

law. Moreover, there is a limited number - only four - of laws which require disclosure as an exception to confidentiality. Bahraini law accepts the disclosure only with express consent and, besides, Bahraini law does not state a duty to the public as an acceptable exception to the duty of confidentiality. However, under English law, there seems to be a continuous erosion of the scope of confidentiality with a considerable number of exceptions; studying the new law with all its wider exceptions shows that the country is tending towards disclosing more and away from protecting confidentiality, as disclosure can proceed on mere suspicion, according to the PCA 2000.

Unfortunately, the research shows that a large number of money-laundering transactions can be performed through banks, and therefore it is suggested that there should be a committee in each financial institution to study each case carefully before sending customer confidential information on the basis of mere suspicion. Moreover, in Bahrain, it is highly recommended that Article 2.3 of the PPMLA be amended, as the current version allows for punishment for committing a money-laundering offence, even if the conviction has not been proven in the predicate offence, which violates a core constitutional principle that the accused is innocent until proven guilty.

With all of the improved legislation regarding banker-customer confidentiality in Bahrain, the day-to-day practice between bankers and their customers unfortunately shows that, on the one hand, customers have little awareness of their right to keep their banking information confidential and, on the other hand, bankers should be better trained to be more professional in their job, and should attend extra workshops aimed at improving the practices of maintaining banker-customer confidentiality.

Appendix

The Central Bank of Bahrain and Financial Institutions Law

This document can be accessed from the following link:

http://www.cbb.gov.bh/assets/CBBLaw/THE_CENTRAL_BANK_OF_BAHRAIN_AND_FINANCIAL_INSTITUTIONS_LAW_ENGLISH.pdf

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