



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

A COMPARATIVE LEGAL STUDY ON BANKING CONFIDENTIALITY

BY

SARABDEEN JAWAHITHA

A DISSERTATION SUBMITTED IN PARTIAL
FULFILMENT OF THE REQUIREMENT FOR THE
DEGREE OF MASTER OF COMPARATIVE LAWS

KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

JULY 1999

ABSTRACT OF THE DISSERTATION

Banking confidentiality is a very important element in banking law. Without the assurance of this principle the banking business will face a major set back. Even if this is very much understood by every one, practically it seems impossible to guarantee banking confidentiality in totality. This is due to the reason that it will induce or at least facilitate criminal activities. Banking confidentiality in Islamic *fiqh* (law) has no direct principles, therefore indirect principle need to be considered to justify the application of banking confidentiality since this issue cannot be ignored if the Islamic banking system is to be practiced successfully.

The dissertation considered the necessity of banking confidentiality in general and its application in international trade. It elaborated how would it be possible to maintain confidentiality in Internet banking. Since it is alleged that money laundering is facilitated by banking confidentiality, discussion also touched on the measures taken by various countries to combat this offence. In respect of Islamic aspect on banking confidentiality the application of this principle was focused.

Accordingly Chapters 2, 3, 4 and 5 discussed the application and restriction of banking confidentiality in various situations and its related offence of money laundering under the common law and statutes, whereas Chapter 6 discussed on the Islamic law regarding this principle.

In conclusion, the author emphasised the need to balance the individual right to banking confidentiality and public right of disclosure of banking confidentiality.

خلاصة البحث

تعتبر سرية البنوك عاملاً مهماً جداً في قانون البنوك لأنها إذا فقدت في التعامل البنكي سيواجه عمل البنوك فشلاً كبيراً، وحتى إذا كان هذا واضحاً للكل، فإنه من غير الممكن ضمان سرية البنوك بشكل كلي، وصعوبة تطبيقها تؤدي إلى جرائم عديدة.

وفي الفقه الإسلامي لا يوجد طريق مباشر لمعالجة السرية في التعامل البنكي، ولكن هناك طرق غير مباشرة يمكن أن توضع في الاعتبار لمعالجة هذه المسألة، لأنها مسألة مهمة ولا يمكن تجاهلها في البنوك الإسلامية، إذا أرادت النجاح في عملها.

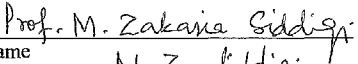
هذا البحث يعالج سرية البنوك عامة، وإمكانية إيجاد خصوصية التعامل البنكي في الشبكات الإلكترونية (الانترنت) وقد عالج البحث أيضاً الوسائل التي تعالج بها دول مختلفة جريمة التعامل غير السري للبنوك، إضافة إلى التطبيق الإسلامي لسرية التعامل البنكي.

وقد ناقش الفصل الثاني والثالث والرابع والخامس إمكانية السرية في التعامل البنكي وحدودها في عدة حالات، وعلاقتها بالتعامل الغير القانوني في الأموال تحت القانون العام، والقانون الوضعي، والفصل السادس يناقش القانون الإسلامي لمعالجة هذه الحالة.


وختاماً تؤكد الباحثة ضرورة إيجاد التوازن بين حقوق الأفراد تجاه سرية التعامل البنكي والحقوق العامة في إظهارها.

APPROVAL PAGE

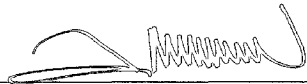
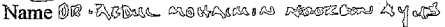
I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.


Name
Supervisor M. Z. Siddiqi
6/7/99

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.


ASSOC. PROF. DR. SAMSTAR KAMAR B. AB. LATIF
Name Head
Examiner Department of Private Law
Kulliyah of Laws
International Islamic University Malaysia


This thesis was submitted to the Kulliyah of Laws and it is accepted as partial fulfilment of the requirements for the degree of Master of Comparative Law.


Name 
Dean, Kulliyah of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Sarabdeen Jawahitha

Signature..........

Date...28...Dec...1999...

© Copyright by Sarabdeen Jawahitha and
International Islamic University Malaysia

This dissertation is dedicated to my parents, parents-in-law and daughters.

ACKNOWLEDGEMENTS

In the name of Allah (*SWT*) the Most gracious, the Most merciful

My utmost gratitude to Allah (*SWT*) Who gave me the ability and strength to complete this dissertation.

I would like to record my appreciation for the great people who were instrumental in the successful completion of this work. I am especially grateful to my supervisor, Prof. Dr. Mohd. Zakaria Siddiqi, for his constant encouragement, patience and guidance throughout the writing of this dissertation. My special thanks are also due to Dr. Samsar Kamar Latif, Dr. Mohd. Daud Bakar, Dr. Abdul Muhaimin Ayus, Dr. Zaleha Kamarudin, Dr. Ida Madeha, Br. Ibrahim Abd. Rahim and Dr. Masum Billah for their advice and comments.

Last but not least, my thanks will go to all those who have assisted me technically. May Allah bless us all.

Sarabdeen Jawahitha

July 1999

TABLE OF CONTENTS

	Page
Abstract	ii
Approval Page	iii
Declaration	iv
Acknowledgements	vii
List of Cases	xi
List of Statutes and Regulations	xii
List of Conventions	xiv
List of Abbreviations	xv
 CHAPTER 1: INTRODUCTION	
1.1 Statement of Problem	1
1.2 Hypothesis	3
1.3 Concept	4
1.4 Scope and Limitation	5
1.5 Methodology	6
1.6 Literature Review	7
1.7 Chapterisation	9
 CHAPTER 2: BANKING CONFIDENTIALITY: UNDER THE COMMON LAW AND BANKING AND FINANCIAL INSTITUTIONS ACT, 1989	
2.1 Introduction	11
2.2 Contractual Duty of Confidentiality	12
2.2.1 Disclosure under Compulsion of Law	14
2.2.2 Public Duty to Disclose	16
2.2.3 Disclosure in the Interest of Bank	17
2.2.4 Disclosure with the Consent of the Customer	18
2.3 Confidentiality in Banking and Financial Institutions Act, 1989	20
2.4 Conclusion	23
 CHAPTER 3: INTERNET BANKING AND CONFIDENTIALITY	
3.1 Introduction	24
3.2 Internet Banking	24
3.2.1 Credit Card Bank	25
3.2.2 Electronic Cash Bank	25
3.2.3 The Virtual Bank	26

3.2.4 Digital Cash Bank	27
3.3 Violation of Internet Banking Confidentiality	27
3.3.1 Fraud	28
3.3.2 Unauthorised Access and “Hacking”	30
3.3.3 Illegal Collection and Storage of Data	31
3.4 Countermeasures for the Protection of Internet Banking Confidentiality	32
3.5 Conclusion	35

CHAPTER 4: INTERNATIONAL TRADE AND BANKING CONFIDENTIALITY

4.1 Introduction	36
4.2 Nature of Services Extended by a Bank in International Transaction	37
4.2.1 Bill of Exchange	37
4.2.2 Documentary Credit	41
4.2.2.1 Transferable Credit	43
4.2.2.2 Revolving Credit	43
4.2.2.3 Standby Credit	44
4.3 Banking Confidentiality in International Trade	45
4.4 The Exceptions to the Duty of Confidentiality	48
4.4.1 Statutory Disclosure	48
4.4.2 Public Duty to Disclose	50
4.4.3 Disclosure for the Interest of the Bank	51
4.4.4 Disclosure with the Consent of the Customer	52
4.5 Conclusion	53

CHAPTER 5: MONEY LAUNDERING AND BANKING CONFIDENTIALITY

5.1 Introduction	55
5.2 The Concept of Money Laundering	56
5.3 The Effect of Money Laundering	60
5.4 Money Laundering through Banking System	61
5.5 Control of Money Laundering via Restriction of Banking Confidentiality	63
5.6 Malaysian Money Laundering Laws and Banking Confidentiality	65
5.7 Conclusion	68

CHAPTER 6: BANKING CONFIDENTIALITY IN ISLAMIC LAW

6.1 Introduction	70
6.2 Principles Governing Banking Confidentiality	70
6.2.1 Good Faith	71
6.2.2 Responsibility and Accountability	72
6.2.3 Trustfulness and Honesty	73

6.2.4 Brotherhood	74
6.3 Comparison of Banking Confidentiality between the Islamic Banking Act (IBA), 1983 and Banking and Financial Institutions Act (BAFIA), 1989	75
6.4 Conclusion.	79
CHAPTER 7: CONCLUSION	81
BIBLIOGRAPHY	86

LIST OF CASES

- Attorney-General v. Guardian Newspapers Ltd.(No.2) [1994]1 WLR 1493
- Bank Islam Berhad v. Tinta Press Sdn. Bhd. [1986] 2 MLJ 256
- Bank of Tokyo Ltd. v. Karoon [1987] 1 AC 45
- Barclays Bank Ltd. v. Aschaffenburg Zellstoffwer Ke Aa [1967] Lloyd's Rep. 387
- California Bankers Association v. Schuttz (1974) 416 US 21
- Cac Minerals Ltd v. International Corona Resource Ltd.[1990] FSR 441
- Parry Jones v. Law Society [1969]1 Ch.1
- PP v. Lim Ah Kew Alor Setar Sessions Court Arrest Case No. 62-6-93 (unreported)
- R v. Daye [1908]2 KB 333
- Robertson v. Canadian Imperial Bank of Commerce [1994] 1 WLR 1493
- Royal Bank of Canada v. IRC (1971) 47 TC 565
- Standard Bank of Canada v. Wildey (1919) SR (NSW)384
- The United States v. L.B.S Bank-New York Inc. (1990) US.Dist.Lexis (E.D.Pa.1989)
- The XAG and Ors v. A Bank [1983] 2 All ER 464
- Tournier v. National Provincial and Union Bank of England [1924]1 KB 461
- United States v. Miller (1976) 425 US 435
- Wilvor Nominees Ltd. v. I.R.C (1973) 49 TC 559

LIST OF STATUTES AND REGULATIONS

Malaysia

- Banker's Books (Evidence) Act, 1949
- Banking and Financial Institutions Act, 1989
- Bills of Exchange Act, 1949
- Computer Crimes Act, 1997
- Dangerous Drug (Forfeiture of Property) Act, 1988
- Digital Signature Act, 1997
- Islamic Banking Act, 1983
- Kidnapping Act, 1961
- Prevention of Corruption Act, 1961

Singapore

- Computer Misuse Act, 1990
- Digital Signature Act, 1997

United Kingdom

- Banking Act, 1987
- Computer Crimes Act, 1997
- Computer Misuse Act, 1990

Income and Corporation Taxes Act, 1988

Tax Management Act, 1970

Trade Discriptions Act, 1968

United States

Bank Records and Foreign Transactions Act, 1970

Model Regulations of Illicit Drug Trafficking and Related Offences, 1992

LIST OF CONVENTIONS

ICC Uniform Customs and Practice for Documentary Credit (UCP 500), 1993

United Nation's Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic
Substance, 1988

Geneva Uniform Law on Bill of Exchange and Promissory Notes, 1930

LIST OF ABBREVIATIONS

AC	Appeal Cases
All ER	All England Law Report
Art.	Article
BAFIA	Banking and Financial Institutions Act, 1989
Ch	Chancery
ed./edit	edition
Etc.	(<i>et cetera</i>): and so forth
Feb.	February
IBA	Islamic Banking Act,1983
Ibid.	<i>Ibidem</i>
Id.	<i>Idem</i>
IUM	International Islamic University Malaysia
KB	King's Bench
Lloyd's Rep.	Lloyd's Report
MLJ	Malayan Law Journal
No.	Number
op.cit	<i>Opere citato</i>
p./pp.	page/pages
S.	Section
<i>S.A. W</i>	<i>Ṣallallāhu 'alaihi wasallam</i> (Peace be upon him)

<i>S.W.T</i>	<i>Subhānahu wa Ta'ālā</i> (Praise be to Allāh and the Most High)
U.K	United Kingdom
U.S.A	United States of America
v.	(<i>versus</i>):against
Vol.	Volume
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 STATEMENT OF PROBLEM

Banking confidentiality is a cardinal principle under banking law¹. The very relationship between the banker and customer is based on this principle of confidentiality. Every legal system recognises its importance but fails to address the issue in a comprehensive manner so that the interest can be protected by legal enforcement. Except the Philippines, Switzerland and Luxembourg and few other countries, most of the countries do not ensure complete confidentiality and have limited its application by specifically enacting laws² to compel the financial institutions to disclose the transactions conducted by certain persons under certain circumstances.

The Malaysian legislation following the common law as well as U.K statutes has enacted provisions on banking confidentiality under Banking and Financial Institutions Act, 1989 (BAFIA). These provisions are such in nature that they create doubts as to the very existence of banking confidentiality owing to the many restrictions on the exercise of banking confidentiality. The Malaysian Constitution does not provide any right to privacy; therefore, the legislature can enact any law defying the principle of confidentiality without any threat of challenge.

¹ Campbell, D. (ed.), *International Bank Secrecy*, Sweet & Maxwell, London, 1992, p. 268.

² Examples are USA Bank Records and Foreign Transaction Act 1970, and sections 97-102 of Malaysian Banking and Financial Institutions Act 1989.

With the development of new technology, particularly with the introduction of Internet banking in recent years, the banks are able to provide quality services to the customers. The threat to confidentiality looms large both within the electronic system and from outside. The main concern in this system is guaranteeing banking confidentiality. Thus the main threat is posed both by the government enforcement agencies and also by those who trespass into the system.

The globalisation of world market has put a new demand on the banking confidentiality. The bank is an important component in international trade. Besides efficiency it is required to act sincerely and maintain banking confidentiality. Despite the existence of legislation that compels the banks in certain situations to disclose the financial dealings of customers, the banks are generally struggling to maintain its duty.

It is true that banking confidentiality must be maintained in order to protect the financial right of an individual. But equally it is important that the financial institutions must cooperate with the authorities to detect certain criminals such as money launderers. In this instance, the banking confidentiality should pave way, otherwise, it will facilitate further commission of such offence.

Banking as it operates in the West was unknown under Islamic system until recently³. But emergence of Islamic banking in many Muslim countries including Malaysia has brought banking confidentiality in sharp focus. Even if there is no literature on the issue, by considering certain principles of Islamic law, it is possible to derive rules on banking confidentiality.

1.2 HYPOTHESIS

This work is a modest attempt to consider the following issues:

1. The duty of banking confidentiality in common law as well as under statutes specially the Banking and Financial Institutions Act and other related statutes of Malaysia.
2. The extent of banking confidentiality in international trade and how it can be maintained.
3. Associated with banking confidentiality is the practice of money laundering indulged in by certain customers. The evil has to be eradicated even at the cost of confidentiality.
4. Islamic Banking Act of Malaysia and the need for its modification in order to be in harmony with BAFIA so that any misinterpretation can be avoided.

³ According to Haron, S. *Islamic Banking System: Concepts & Application*, Pelanduk Publication, Kuala Lumpur, 1997, p. 7 the establishment of the Mit Ghamr Local Saving Bank in 1963 is the milestone

1.3 CONCEPT

There is no comprehensive definition on confidentiality or secrecy. However, *Dictionary of Banking* defines confidentiality or secrecy as “the withholding of information from persons not authorised to receive it.”⁴

The principle of confidentiality is justified on the grounds of property rights, economic consideration and commercial ethics⁵. The appeal to property right is commonly associated with the argument that an inventor or author is entitled to the fruits of his work⁶. Economic consideration is justified to encourage and reward innovation and effort. Confidentiality in banking is commonly justified by considering commercial ethics⁷. In confidence good faith is a necessary element. Good faith asserts a standard of behaviour upon which business information can be transacted in an ethical manner⁸. A person who transacts his affairs with an institution is entitled to believe that his secrets will be respected and kept and the existence of law of confidentiality helps to sustain that expectation.

for modern Islamic Banking.

⁴ Elien, G., *Dictionary of Banking*, 2nd ed., Pitman Publication, London, 1995.

⁵ John, H., *Commercial Secrecy: Law & Practice*, London Sweet & Maxwell, 1998, p. 2.

⁶ *Ibid.*, p. 3

⁷ *Ibid.* p. 4

⁸ *Ibid.* p. 5

1.4 SCOPE AND LIMITATION

The study covers the general principle of banking confidentiality and its exceptions as recognised by Common law and various Statutes of Malaysia. The scope is extended to cover the new development of Internet banking. It also covers the effects of banking confidentiality in international transactions. The study examines the extent of the duty in facilitating the detection of money laundering and various ways by which it can be controlled.

With a view to examining Islamic position on this issue, the provisions of the *Qur'an*, the *Sunnah* and other sources of Islamic law are analysed. From this analysis indirect Islamic principles have been identified to justify the applicability of banking confidentiality in Islamic law. The work is basically limited to:

1. common law, few statutes of the United Kingdom and Malaysia, and
2. Islamic law of obligation and transaction.

The time constrain did not permit to cover all areas. The uncovered areas could be investigated by other researchers. The possible areas of further research could be: Confidentiality of Internet Banking since it is growing day by day. There is a possibility of many changes in law. So to keep up with the new development further research in this area will be beneficial. The literature on banking confidentiality regarding international

trade is very limited. Therefore, further study will be encouraged. As far as Islamic law is concerned there is no literature on banking confidentiality. Thus, further research is very much needed.

1.5 METHODOLOGY

The study adopts the methodology of doctrinal research. With Internet search and valuable thought provoking advice and guidance of the learned scholars, the author came up with this work on banking confidentiality. The study is based on library research and Internet. Relevant books, articles and statutes on banking confidentiality were consulted and analysed. The extent of banking confidentiality in electronic banking was uncovered with the help of Internet.

The doctrinal research methodology has also been employed to examine banking confidentiality in Islamic law. For the purpose of *Qur'ānic* translation Yūsuf 'Alī's translation was followed, for the various *Ḥadīth*, the translation of various authors was adopted as indicated in the footnote.

The font used in the text of the thesis is New Roman Times 12 and 10 in the footnote.

1.6 LITERATURE REVIEW

Literature on this issue is limited. Majority of the available material is concentrating either on general principle of banking confidentiality and its exceptions or on money laundering. There is lack of literature on Internet banking, banking confidentiality in international transaction, and banking confidentiality in Islamic banking. The author was able to have access to the following literature, which is reviewed hereinafter.

International Transaction: Trade and Investment, Law and Finance (1992) comprises of seventeen articles. The main scope of the book as the title represents is discussing the various issues on international transaction including the method of payment.

Disclosure and Confidentiality: A Practitioner's Guide (1996) deals with the law of confidentiality and disclosure within the ambit of litigation. One chapter is dedicated to banking confidentiality and its exceptions as stated under the laws of U.K.

Commercial Secrecy: Law and Practice (1998) discusses some aspects of privacy particularly on commercial secrecy. Even if there is no discussion on banking confidentiality, the general principles discussed can still be utilised for the present discussion.

In *Confidentiality and law* (1990) topical areas such as banking, employment, access to medical report and computer hacking in relation to confidentiality is covered. The aim of the book is to question how to maintain among various conflicting interests.