

Modern Challenges to the Principle of the Banker's Duty of Confidentiality: A Critical Analysis

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Background

Banking confidentiality, a tradition and a cardinal principle under banking law is a moral as well as a legal duty. It began as an implied contractual term arising as a result of banker- customer relationship and is thus a fundamental obligation of the banker to observe strict confidentiality about the customer's banking activities. The duty, though not absolute and subject to certain reasonable exceptions, prohibits the release of client account information and protects the financial privacy of customers to a great extent from unauthorized access by other individuals or the state. In most of the countries, the banking secrecy is governed by statute or common law. In Sri Lanka the law is statute and this is defined in Section 77 of Banking Act No. 30 of 1988 and subsequent amendments.

In a modern context, there is a conflict between the need for confidentiality and the need for disclosure of confidential information for the interest of the banks, customers, and the public. Banks have to comply with the duty as well as its exemptions, making it necessary for banks to do a balancing act. The banks need be careful and wise when striking a balance between these two spectrums as any mistake by banks would be costly.

During the last few decades bankers have significantly expanded their activities and services offered to the customers, which have greatly challenged the general law regarding banking confidentiality. In addition certain new challenges have arisen that challenge the said law. Such challenges are seen in the form of technological advancements and cross border banking. Even though those technological advancements are convenient to banking customers they simultaneously bring risks and opportunities for fraud. While the massive growth of cross border banking activities gives potential benefits to banks it also poses a key challenge to the said duty, as cross border banking activities have a free flow of data between two or more different geographical areas. Today money laundering and terrorist financing have become major threats to the banking businesses and therefore banks are implementing regulations to overcome these difficulties all over the world.

As there is no duty to maintain confidentiality by the banker regarding wrongful activities of the client, the exceptions to the duty of confidentiality are justified on grounds of public interest, economic stability and prevention of crimes and terrorism. However, the resultant erosion of a customer's privacy cannot be ignored. Since the customer is the key component in banking law, it is vital to change the general principles introduced in the Tournier case to safeguard the customer and his confidentiality in this new era.

This study identifies the challenges faced by banks when balancing the duty of confidentiality and the duty of disclosure in various scenarios that would crop up as a result of the changing forms of banking. The paper discusses the two opposing arguments

for and against confidentiality, the proponents for each side, and discusses how the law relating to confidentiality as set out in *Tournier*, is challenged today more than ever before.

Methodology

The study was conducted based on articles published in the internet, law journals, law books and case reports (judgments) local and foreign, on the following lines:

- Identification of the problems which had arisen with regard to the duty of confidentiality and the duty of disclosure and providing a description of the current position of the statute and common law relating to this area of law.
- Analysis of the challenges faced by banks when balancing the duties of confidentiality and disclosure.
- Examination of the lacunas, gaps and inadequacy of law.
- Comparative analysis of selected jurisdictions.
- Based on these comparative studies, examining in what respect the law relating to confidentiality and disclosure can be improved in Sri Lanka and the developments that should be implemented in order to avoid inadequacies and constraints in the law.
- Proposing recommendations in order to strike a balance between protecting the interest of the different competing parties to achieve better results.

Outcome

Banks play a vital role in developing a country's economy and its service plays a major role within modern society. Therefore how banks deliver their services is a matter of significance to the customers in their day-to-day banking transactions. The right to privacy is of fundamental importance to most customers. It is essential that banks maintain a high degree of confidentiality with their customers in order to ensure success in the banking industry. Customers have faith in the banking system and disclose information to banks on the understanding that it will remain confidential. They expect high standards of duty of confidentiality from their banks and believe that their financial affairs are kept secret and not revealed to its advisories. It is clear that modern developments such as money laundering and anti-terrorism legislation, international financial centers, credit information bureaus and technological advances etc. demonstrate the far-reaching impact of unauthorised use and hacking of customer information. Hence banks need to recognise their customers' expectations and take this issue of confidentiality seriously for banks to build confidence and trust.

However, there are proponents that say otherwise and want to eradicate bank secrecy because they see it as working against legitimate inquiry about criminal activity and providing a gateway for organized crimes, frauds and corruptions such as money laundering activities, drug trafficking and narcotics etc. The social harm caused by these financial crimes has created consequences which have been detrimental to society. Therefore bank confidentiality is often a target of heavy criticisms for its cloaking of crimes and misconduct and arguments in favour of disclosure have increased.

Conclusions and Recommendations

When analyzing the above key challenges it is clear that the duty of confidentiality has been challenged by the new achievements of the banking sector. Some new concepts are totally contradictory to the duty of secrecy. On one hand, individual interest demands maintaining bank confidentiality, and public interest favors disclosure in selected circumstances to combat criminal financial activities, on the other hand. Therefore, the law must protect customer from unauthorized disclosures and at the same time allow banks to release certain information to certain persons in certain circumstances. It is the task for the law to achieve an appropriate balance between the confidentiality laws *vis a vis* civil rights and public interest. The balance between public interest and private rights should not move too far in the direction of disclosure. While accepting that there is justification for the diminished duty of confidentiality, it is essential protecting privacy and preventing banks from unlawfully disclosing information pertaining to the accounts of customers.

Today in Sri Lanka, the duty of confidentiality is subject to a number of statutory exemptions which allow certain governmental authorities to have access to banks records. Further, there are various other statutes which empower an investigation for the purpose of discovering information as to a customer's banking transactions. Undoubtedly this has resulted major disclosures on customers information. However, our law is not consonant with the most other developed jurisdictions and needs changes to suit the changing times and circumstances. Due to the impact and the social harm caused by the financial crimes there is an imminent need to disclose information pertaining to customers as an effective way of actually curbing or restricting the growth of crime. Archaic banking secrecy laws cannot successfully counter such threats of global terrorism, money laundering and other serious crimes.

As per the general principles of the Tournier case, it is the duty of the banker to keep the confidentiality of the banking activities of the customer. But there is no duty to keep the confidentiality by the banker regarding wrongful activities of the customer. Therefore, there is no reason for keeping confidentiality for druggist and money launderers and other criminals and they should not be allowed to profit from their crimes.