

The Limits and Exceptions of the Banks' Secrecy

A comparative Analytical Legal Study

Dr. Jouda Ibrahim Mohamed Alnour

Associated Professor - Faculty
of Law –University of Gezira

Abstract:

Banking secrecy is the obligation placed on the banks to preserve the economic, financial and personal issues related to customers and other persons, even to a lesser extent, which may have fallen into their work during the exercise of their professions or in the course of this practice, while acknowledging that there is an evidence to preserve secrecy in the interest of these customers. The research aims to present the concepts of bank secrecy, to draw the scope of this commitment and the extent it occupies in banking dealings with customers by setting a set of determinants, and to highlight the conditions that necessary for the implementation. The research will follow the descriptive analytical and comparative methodology. The research obtain many results such as: The researcher also support the Iraqi legislator's position on some issues related to his regulation of banking secrecy in the Iraqi Banking Law No. 94 of 2004, including his position in regulating issues related to the exchange of customer information between banks in order to conduct credit operations and grant loans on sound grounds, provided that such exchange is restricted in the narrowest possible range so that this does not involve weakening such commitment, the position of the legislator regarding his preference for the public interest over the private interest, which has been evident in more than one place, including the status of the exception related to providing information when there is a suspicion that some of the funds that are used in support of terrorist operations, given

the current security situation in Iraq, where this ruling finds great support and blessing. The researcher recommended the following: urging the legislator to organize the issue of banking secrecy, as it is required, and there should a looking ahead to a new stage in which we intend to encourage investment and push its wheels to put in place such effective and important texts in achieving that goal.

Keywords: Secrecy, bank, dealings, conditions, organizing

مستخلص:

السرية المصرفية هي الالتزام المفروض على البنوك للحفاظ على القضايا الاقتصادية والمالية والشخصية المتعلقة بالعملاء والأشخاص الآخرين ، حتى بدرجة أقل ، والتي قد تكون وقعت في عملهم أثناء ممارسة وظائفهم أو في سياق ذلك. الممارسة ، مع الإقرار بوجود دليل على الحفاظ على السرية لمصلحة هؤلاء العملاء. يهدف البحث إلى عرض مفاهيم السرية المصرفية ، ورسم نطاق هذا الالتزام ومدى احتلاله في التعاملات المصرفية مع العملاء من خلال وضع مجموعة من المحددات ، وإبراز الشروط اللازمة للتنفيذ. اتبع البحث المنهج الوصفي التحليلي والمقارن. توصل البحث على العديد من النتائج مثل: - كما يدعم الباحث موقف المشرع العراقي من بعض القضايا المتعلقة بتنظيمه للسرية المصرفية في قانون البنوك لمختلف الدول، بما في ذلك موقعه في تنظيم المسائل المتعلقة بتبادل معلومات العملاء. بين البنوك لإجراء عمليات الائتمان ومنح القروض على أسس سليمة ، على أن يكون هذا التبادل مقيداً في أضيق نطاق ممكن بحيث لا ينطوي ذلك على إضعاف هذا الالتزام ، موقف المشرع من تفضيله للمصلحة العامة على المصلحة الخاصة ، والتي ظهرت في أكثر من مكان ، بما في ذلك حالة الاستثناء المتعلق بتقديم المعلومات عند الاشتباه في أن بعض الأموال تستخدم لدعم العمليات الإرهابية ، في ظل الوضع الأمني الراهن في الدول ، حيث يحظى هذا الحكم بدعم كبير ومستمر ، وقد أوصى الباحث بما يلي: حث المشرع على تنظيم موضوع السرية المصرفية بالشكل المطلوب والتطلع إلى مرحلة جديدة ننوي فيها تشجيع الاستثمار ودفع عجلاته لوضع مثل هذه النصوص الفعالة والمهمة في تحقيق هذا الهدف.

الكلمات المفتاحية: السرية، المصرف، التعاملات، الشروط، تنظيم

Introduction

bank secrecy is not a new concept. Many countries, such as Switzerland and The Bahamas, have become attractive as international banking centers in part because of stringent bank-secrecy laws that protect the secrecy of financial information regarding bank customers. Since the 1930s, the number of countries that have adopted bank-secrecy laws has increased significantly. These

laws have helped a number of countries to grow substantially in their international banking activities. For example, International Monetary Fund statistics indicate that from 1985 to 1986, international bank lending to offshore banking centers (as defined by the Fund staff) surged from approximately \$39 billion to about \$88 billion, while international bank deposit-taking from offshore banking centers increased from approximately \$54 billion to almost \$127 billion.

Yet it must also be recognized that the existence of stringent bank-secrecy laws is not essential for the creation or development of international financial centers. Within the United States, for example, New York, Miami, Chicago, and Los Angeles all have come to play increasingly important roles in international finance without secrecy laws. Likewise, other financial centers outside the United States, such as London, do not possess stringent bank-secrecy laws.

Significance of the Study:

1. Banking secrecy is considered a form of professional secrecy that focuses, in essence, on the right of individuals to financial privacy.
2. There are many confusions regarding the term bank secrecy, this because of many overlaps between them.
3. This research gives a detailed concepts and explanations of bank secrecy that may help, clients, bankers and other pertinent authorities in this regard.

Statement of the Problem

From the above mentioned, it is clear that the main research problem included in the main question: what are the limits and exceptions regarding banking secrecy. The sub questions are as follows:

1. What is the main concept of bank secrecy?
2. How laws dealt with the bank secrecy?
3. What is the legal justification for the bank secrecy issue/

Objectives of the Study

1. To present the concepts of bank secrecy
2. drawing the scope of this commitment and the extent it occupies in banking dealings with customers by setting a set of determinants
3. to highlight the conditions that necessary for the implementation of this commitment

Research Methodology:

The research followed the descriptive analytical and comparative approach

Organization of the Research:

This research containing, two themes.

1. The first: Definition and concepts of banking secrecy. Which can be discussing through two subtitles?
2. Second topic tackled with the exceptions related to the commitment to banking secrecy through three demands.
3. Conclusion

1-Introducing banking secrecy

To define banking secrecy, it is necessary to clarify the nature of banking secrecy, then address the position of comparative legislation on the idea of banking secrecy, which we will address to clarify successively and through the following two requirements:

1st: Nature and Definitions of banking secrecy

1-Nature of Banking secrecy

The secret relates to the private lives of individuals as it represents an aspect of personal freedom. Every individual has the right to keep his secrets, and if he wishes he can hand them to me for others or disclose some of them to another person whom he trusts, and the confidant who is entrusted with the secret must conceal it because confidentiality is a duty imposed by it. Beginning with the rules of religion, because keeping secrets and keeping them secret is a great trust that must be fulfilled.

The secrets differ according to different people and circumstances, there is the secret entrusted to doctors, commercial secrets, and there are banking secrets, which are the subject of our research, where the researcher will present through two branches to clarify the linguistic and idiomatic concept of banking secrecy as follows: -

a-Banking secrecy in language.

Secret language: it is what a person conceals in himself, it is news about which knowledge is limited to a limited number of people, and it is every piece of information that is decided to be concealed, or it is what the other person leads, trusting him not to disclose it. (Almongid 1986: 312)

Confidentiality is derived from the secret, which is an industrial source language that is derived from the word (password).

In the English language, the word “secrecy” is also derived from the word “secret” which has its roots in the Latin word “secretum”, which means what must not be disclosed, so it is said, for example, that the ballot is secret and the words synonymous with banking secrecy in the English language is the word (confidentiality). It is a word that is derived from (confidential) which means a secret or secret matter. For the above, confidentiality means the prudence and secrecy that accompanies the activity, and if we want to drop what was mentioned on the issue of banking secrecy, we say that it means the prudence and secrecy that accompanies the activity of banks and prevents the transfer of their information or their work to others. (Alfarogi, 2003:896)

b- Banking secrecy in the convention

The secret is the news that must be concealed even if its disclosure does not result in damage to the reputation or dignity, and it is not disgraceful to those who want to conceal it, but may be honorable to it.

Confidentiality also means making information unavail-

able to the public and limited to concerned parties, as it is one of the means that the legislature will take to protect the legitimate rights and interests that the latter seeks to protect. Likewise, the secret is defined idiomatically and within the framework of banking secrecy as (all data or information that is not known, in its precise components or in its final form, that would affect the dealings with the bank's client or trust him or affect his financial or social situation in general). (Faid, 2000).

As for banking secrecy, it does not come out in its conventional definition according to what was stated, so we say that banking secrecy initially involves a financial aspect, such as the secret entrusted to bank employees by virtue of their profession. That was the interest in banking secrecy, in ancient and modern times. A part of the jurisprudence defines banking secrecy, or rather, banking secrecy, by saying (it is every matter or incident that reaches the bank's knowledge, whether in connection with its activity or because of this activity, and whether the customer himself leads to the bank about this matter or is given by someone from others, and the customer has an interest in concealing it). Banking secrecy in its broad sense is nothing but a form of professional secrecy that everyone who engages in a particular profession is supposed to respect in the course of practicing it. As for banking secrecy in its narrow sense, it is a legal system that banks must abide by. Likewise, banking secrecy is the obligation placed on the banks to preserve the economic, financial and personal issues related to customers and other persons, even to a lesser extent, which may have fallen into their work during the exercise of their professions or in the course of this practice, while acknowledging that there is an evidence to preserve secrecy in the interest of these customers. (Ebeidat, 2005:13)

As for the legal definition of banking secrecy, we find that the comparative laws, including the Iraqi banking law and instruc-

tions to facilitate the implementation of the Iraqi banking law, as well as other legislation did not provide a definition of banking secrecy, and perhaps the reason behind this stands in the clarity of the linguistic and idiomatic meaning of it, in addition to that we point to the existence of semi-consensus. (Algaluibi, 2005: 956)

However, it is not the legislator's task to set the definitions, as it is one of the tasks of legal jurisprudence and not the author of legislative texts. We will discuss this matter further when addressing the position of legislation on banking secrecy. Perhaps, in this regard, it is possible to see the most important forms of banking secrecy. Despite the agreement of comparative legislation on the introduction of banking secrecy, there is a relative discrepancy that may occur in the legislative treatments, which is due to the diversity of forms of banking secrecy. The first of these pictures is the relative banking secrecy that most countries of the world have taken on, which dictate that the bank is committed to maintaining the confidentiality of information unless there is a legal text requiring it to disclose that information, as stated in the Iraqi Banking Law No. 94 of 2004, and other legislation. In this regard, we note that the essence of relative banking secrecy is based on the inclusion of a set of exceptions that allow the bank, in the event of one of them, to reveal the data and information of customers without being exposed to liability. As for absolute secrecy, it can be said that it does not exist or is scarce, because most countries make exceptions regarding the scope of application of banking secrecy. Likewise, it can be said that there is strict banking secrecy. This term implies the legislative orientation that information related to the customer may not be disclosed except with the consent of the customer himself. Likewise, there is the semi-absolute banking secrecy with which the legislation is taken, including the Iraqi law, where we see it close in its essence to the relative banking secrecy. Perhaps the difference lies in that the latter is only by the text of the law,

but we see that the permissibility of disclosing bank secrecy by a legal text makes it from the first door that can be detected with approval. Written client, which is included in almost absolute banking secrecy between its two covers, as it requires the protection of the credit interest, or in exceptional cases the legislator estimates that it is more worthy of care than the interest in concealing the banking secret.

2-The position of comparative legislation on banking secrecy

Comparative systems vary with regard to the issue of banking secrecy. Some of them have devoted a separate law to dealing with this issue, and some of them have worked to include texts on banking secrecy within the laws of commerce or the laws of the central bank. The foreign branch is from banking secrecy, and the second branch is in the position of Arab legislation, including Iraq, regarding the issue of banking secrecy.

a-the position of foreign legislation on banking secrecy: -

The legislative treatment of the issue of banking secrecy varies in different countries, and here we cannot take note of these treatments in all countries. Rather, we will shorten the discussion of the stance of Switzerland, the United States and France on this issue, as it will be discussed in the following paragraphs: -

First: Banking secrecy in Switzerland: - It is one of the most important stable norms in banking in Switzerland, as the latter is the country most committed to achieving complete secrecy of bank accounts since the feudal era, despite the absence of a text relating to punishment for banks' disclosure of the secrets of their clients deposited with them a year ago. 1934, the usual practice of banks to observe the obligation to keep secret banking secrets. With the foregoing, it is evident that banking secrecy in Swiss banks did not enjoy a special law, nor was it included in the texts of laws regulating the work of banks or even commercial laws. Rather, the text on the violation of account confidentiality was mentioned within

the criminal laws, that is, within the framework of the general law.

In 1934, the Swiss legislator found it necessary to guarantee the bank's offer related to banking secrecy and to provide criminal protection for it, according to the federal law relating to banks and savings funds. This law relied on the norms that existed before that time and we mean the banking norms that were based on The relationship of trust between the bank and the customer as well as strengthening this concept through the issuance of the Swiss Civil Code of 1912, Article 28 of which stipulated respect for the right to privacy for all natural and moral persons. <http://www.admin.ch/ch/d/ff/index.html>

Promises to start, we say that the Swiss Banking and Savings Funds Act came to strengthen and tighten the hardening of the provisions of banking norms, by strictly respecting the banking secret because it punishes or criminalizes the disclosure of such a secret, which is what is mentioned in Article 47 of this law and in this context we say that the text The aforementioned referred the commitment to banking secrecy from being a civil obligation that derives its strength from banking norms or from the contract concluded between the bank and the customer. (ElyasNassif, 1983: 297)

I say that the text referred this commitment to the general right of its incrimination, by punishing anyone who divulged a bank secret. It thus gave greater confidence to banking transactions in the face of clients, so when the violation of that secrecy becomes a danger to those who act against it and are prosecuted with penal rulings, this undoubtedly establishes a greater trust that surpasses any other trust granted to any other type of secrecy that is not surrounded by penal sanctions. In this regard, he indicates that resorting to Swiss banks at the present time is with the intention of evading taxes and covering up some bank accounts. However, the international pressure exerted on Switzerland, especially by the United States, as an incubator for illegal bank accounts - if you

will - paid The latter has decided to abandon the principle of absolute secrecy that it adopts. Its banking legislation has ruled that the bank is not criminally or civilly liable when it reports on a client suspected of committing a crime, when this is reported based on reasonable reasons.

i- Banking secrecy in the United States: -

The United States of America was distinguished by the existence of an independent banking secrecy law issued in 1970 called (BSA). It has been legislated to identify the financial flows of financial institutions and their sources to and from the United States on the one hand, and to achieve the interest of government authorities, especially the tax authority, in knowing the financial data of bank clients on the other hand. (Manna'a, 2010: 29)

Some believe that this law does not relate to the protection of banking secrecy, but rather contains a restriction of that protection, as it gives the federal authorities the right to investigate procedures related to money laundering operations and to combat them by requiring financial institutions to keep records for every transaction that exceeds (10,000) ten thousand dollars and informing about activities. Suspicious. (Mighabghib, 1996: 22)

Some believe that this law does not relate to the protection of banking secrecy, but rather contains a restriction of that protection, as it gives the federal authorities the right to investigate procedures related to money laundering operations and to combat them by requiring financial institutions to keep records for every transaction that exceeds (10,000) ten thousand dollars and informing about activities. Suspicious. However, we see otherwise, as the laws regulating the banking business in the United States aim to control illegal activities. Therefore, we find that banking secrecy when it permits legal disclosure regarding customer information with the bank, this is in the orbit of preventing illegal financial activities according to the spread of this phenomenon in The United States,

as one of the financial and commercial centers, therefore, we find the issuance of more than one law in this regard, including the Anti-Money Laundering Act of 1992, as well as the Money Laundering Suppression Act of 1994. In addition to the above, there is the Law on the Right to Financial Privacy issued in 1987, as well as the Law on Modernization of Financial Services issued in 1999.

ii- Banking secrecy in France: -

Until the twentieth century, French legislation did not include a text stipulating a commitment to secrecy or a criminal sanction for breaching this obligation. There was a jurisprudential debate regarding the extent to which the French bank was subject to the obligation to secrecy based on the text of Article 378 of the French Penal Code repealed for the year 1880, and this resulted in this. Controversy over two opinions in jurisprudence:

http://en.wikipedia.org/wiki/united_state_code

First: It goes that Article 378 of the French Penal Code applies to everyone who is considered a keeper of the secret by necessity, i.e. by virtue of his practice of a profession or a specific industry, provided that that profession or industry is general and to the public, and therefore the bank differs from these people because it is not necessarily prepared to receive the secrets of others. The customer is not obliged to deal with banks and the consequent transfer of his secrets to the bank, and therefore he is not included in the provisions of the above text. (ibid, Mana'a, 29)

The second: it goes to the bank's submission to the provisions of Article 378 French penalties. This trend appeared after 1941 when the law regulating the work of banks was issued and the establishment of specialized technical bodies to direct credit. Banks became monopolized by banking activity, which necessitates resorting to them and dealing with them. (Sarkhwah, 1989:22)

The French legislator put an end to this disagreement when it issued the Credit and Supervision Institutions Law No. 46 of

1984, which obligated every person participating in any way in the management of a credit institution or working in it with the secret of the profession with the conditions and penalties stipulated in Article 378 of the French Penal Code. The issuance of the French Currency and Money Act of 2000 did not change the position of the French legislator. The provisions of this law stipulated that every member of the board of directors or his supervising committee and every person who participated in managing and directing a credit institution or using it with banking secrecy. Accordingly, the provisions of bank secrecy in French law are subject, as a general rule, to the provisions of professional secrecy contained in the penal code, with the exception of some special provisions that were mentioned in the French Currency and Money Act 2000. The second branch: the position of Arab legislation on banking secrecy: -

Here we are referring to the legal regulation of banking secrecy in some Arab countries that have gone towards codifying such an obligation in legislative texts, in order to finally turn to the position of the Iraqi legislator on this matter, and here we will present each of the positions of the countries of Lebanon, Egypt and finally Iraq as follows: -

iii- Banking secrecy in Lebanon: -

The Lebanese legislator was inspired by the banking secret from the Swiss law and its practical applications when he issued the Lebanese Banking Secrecy Law in 1956. (Article 511-33, cash and finance law of France, 2000)

This law has been regulated in ten articles of banking secrecy, and the first article of it subjected all Lebanese banks and branches of foreign banks to banking secrecy, while Article 8 of the law considered the perpetrator of every intentional violation of its provisions punishable by imprisonment from three months to one year, as well as the initiation of the same punishment and

no action is taken The public right based on the complaint of the aggrieved party.(Ala'gami, ibid, 34)

The banks in Lebanon take the form of the joint-stock company, and these banks are subject to the protection of the secrecy of accounts in accordance with the law on bank secrecy promulgated in 1956, the provisions of which are subject to bank managers and employees and whoever has knowledge by virtue of his capacity or position in any way whatsoever on the entries of books, transactions and bank correspondence, which is referred to in Article 2) From the Lebanese Bank Secrecy Law of 1956. (article (2) Lebanese law for banking secrecy for 1956)

iv- Banking secrecy in Egypt: -

The Egyptian legislature regulated the secrecy of bank accounts in two phases, the first was through Law No. 205 of 1990 and the second Law No. 88 of 2003. To begin with, we say that the Egyptian legislator was not isolated from the successive developments that occurred on the issue of banking secrecy in the various legislations. In 1990 the legislator issued an independent law for banking secrecy called (Bank Account Secret Law No. 205 of 1990), where the first article of it stipulated making all clients' accounts and their deposits Their trusts and safes in banks, as well as the information related to them are confidential). Article 5 of the same law was presented to the heads and members of bank boards of directors, directors and employees in them to give or disclose any information or data on bank clients or their accounts except in cases authorized by law, as the aforementioned law permitted Clients open secret accounts or the so-called licensed accounts, which is an account that is opened under a specific secret number between the bank and the customer with mentioning the name of the customer. The account is opened at the moment of opening the account only to verify his person, and then all correspondence between him and the bank takes place under this number without the

need to mention the name of the customer In any financial dealings for this account. However, this law was soon canceled by the issuance of the Central Bank of Egypt Law No. 88 of 2003. This law was issued in seven chapters containing (135) articles, and in Chapter 4 thereof, in Articles 97-101, the issue of preserving the secrecy of bank accounts, it is clear from reading the texts of these articles that they come close to a great extent with the canceled bank account secrecy law. In addition to the above, we note here that the Egyptian Trade Law No. 17 of 1999 has included in its texts provisions related to banks' commitment to secrecy, which is stated in Article 377 of it in its text (If the current account is open with a bank, the bank may not give data or information about No. The account, its movement, or its balance, except for the account owner, his private agent, or his heirs who are recommended to them after his death or according to the provisions of Law No. 205 of 1990 regarding the confidentiality of accounts) www.cbe.org.eg

v- Banking secrecy in Arabic Countries :

1-in Sudan

The laws of the Central Bank of Sudan (CBOS) in chapter twelve under the title of miscellaneous provisions stipulated a detailed article (61) which states that "regarding the secrecy of the Bank's affairs Every member of the Board and employees of the Bank shall have due regard to secrecy, with respect to the matters connected with the affairs and clients of the Bank, save as performance of the duties thereof may require under the provisions of this Act.

2-Other countries such as:

a-In Iraq: -

To begin with, we point out the possibility of saying that there are many texts scattered in more than one law issued in the relationship that may relate to a direct or indirect relationship with the issue of banking secrecy. However, in order to avoid prolongation

and limitation in researching the legislative treatment of banking secrecy within the scope of commercial legislation in Iraq or related. In the commercial environment, we will limit our words in this context to the legislative treatment of banking secrecy in accordance with the Iraqi Banking Law No. 94 of 2004 and the Central Bank of Iraq Law No. 57 of 2004.

1- Banking secrecy according to the Iraqi Banking Law No. 94 of 2004: -

The Iraqi legislator has dealt with banking secrecy in Chapter Eight of it in Articles 49-52, as Article 49 of it stipulates that (the bank maintains secrecy with respect to all clients' accounts, deposits, trusts and safes with it, and it is prohibited to give any data about them directly or Indirectly, except with the written consent of the concerned client, or in the event of the customer's death, except with the consent of his legal representative, one of the client's heirs, or one of the recommended ones, except by a decision of a competent judicial authority or from the public prosecutor in an existing legal dispute or because of one of the cases permitted under the provisions of this law. This attendance exists even if the relationship between the customer and the bank ends for any reason).

The articles subsequent to this text also came to regulate issues related to banking secrecy.

It appears from reading those texts that the Iraqi legislator bestowed the status of a legal obligation on banks operating in Iraq and their employees, which involves maintaining bank secrecy, in order to complement the trend in encouraging investment, which was represented in part by the issuance of the amended investment law for the year 2006.

Likewise, the Iraqi legislator stressed in those texts the legal protection established for banking secrecy, as Article (52/1) of the Iraqi Banking Law of 2004 referred to restricting access to

information related to the bank's client through authorized employees in the Central Bank of Iraq.

Moreover, we say that the Iraqi legislator, on the matter of auditors, obligated them to adhere to the necessities of banking secrecy by holding them responsible for disclosing any information about the bank or the customer, except for those that are disclosed in good faith.

2. Banking secrecy according to the Central Bank of Iraq Law No. 56 of 2004: -

The Central Bank of Iraq is a public bank that manages monetary policy in Iraq and works to achieve and promote sustainable development and job opportunities by working to create a stable financial and monetary system. The central bank carries out a number of tasks that cannot be mentioned in this regard. However, as far as the matter is related to banking secrecy, we say that Article 22 of the Iraqi Central Bank Law referred to the issue of banking secrecy under the heading of confidentiality and exchange of information through three paragraphs. Paragraph (1) of the above article stated that (a person who works as a governor and deputy governor is not allowed And another member of the council or employee, client or correspondent of the Central Bank of Iraq): - A- Identify and disclose or publish private information obtained during the performance of official duties, with the exception of what is required of him and based on paragraph 2 of this Article and as necessary to carry out any work or responsibility imposed by this law, the banking law, or any other relevant legislation. B- Using this information or permitting it to be used for personal gain. The previous text appears clear in its significance, as it explicitly referred to the prohibition of disclosure of private information that is accessed by the governor of the central bank or his deputy or any employee in it except what is requested of that information for practical and functional necessities. We note in

this regard that the role that the Central Bank plays in the financial and banking life in the country through monitoring and supervising the work of banks and granting loans and financial facilities, as this is the case with wide knowledge and knowledge of a large aspect of the secrets of these financial and banking institutions, and therefore it was necessary to surround the work of the bank. Central represents this commitment.

The second topic

Exceptions to banking secrecy

1-Determination of banking secrecy:

Banking secrecy as an obligation determined by comparative legislation on banks cannot be considered an absolute rule with no exceptions to it. That is because the aforementioned legislation, after the general text requiring the obligation to adhere to banking secrecy, returns and sets certain exceptions to that obligation, and it rises in approving these exceptions according to standards various.

Here we will review the most important of those exceptions that are related to the commitment to banking secrecy, with an explanation of the position of the Iraqi legislator who took some of these exceptions in the Iraqi Banking Law No. 94 of 2004.

Accordingly, we will undertake a statement of these exceptions through three demands, the first of which relates to the exceptions received in the interest of those dealing with the bank, the second relates to the exceptions received for the benefit of the bank itself, and finally the third requirement is in the other exceptions, which we will discuss in succession as follows: -

The first requirement: the exceptions to banking secrecy related to the interest of those dealing with the bank

And it is considered one of the most important exceptions mentioned on the commitment to banking secrecy, as some exceptions are decided in the interest of the customer according

to the fact that this commitment is decided in the beginning in the interest of the customer and these exceptions are embodied by the customer's consent to allow the bank to transfer his information to others, as well as the exception related to inactive bank accounts, which we will discuss in turn and through Two branches.

1st the customer's consent:

In some cases, the customer may allow the bank to inform others about his banking transactions, so he relieves the bank from its obligation to confidentiality, whether this approval was issued by the same customer according to a written declaration or issued by someone on behalf of the client or his successor in his relationship with the bank, whether this succession is public or private. This is what Article 49 of the Iraqi Banking Law No. 94 of 2004 referred to by saying (... It is prohibited to give any data about the aforementioned directly or indirectly except with the written consent of the concerned client or in the event of the customer's death with the approval of his legal representative or one of the client's heirs or One recommended them).

The legislator has stipulated that this authorization should be in writing, and this is of great importance as it prevents disputes between the bank and the customer in the event that the latter claims that the permission has not been issued from him. (Abdulgadir, 2006: 85)

in order for the permission issued by him to be valid, it is required that the client be fully qualified, and that his will be free from defects such as coercion, error and others, as stipulated in the general rules of law. It is also a condition that the disclosure of information related to the customer be after the permission is granted by him, so it is not correct for the bank to divulge the client's secrets, and this is directed towards obtaining the permission of the latter. However, it can be said that granting the customer permission to the bank to disclose his banking secrets after the bank has made

this disclosure may divert Without realizing the bank's civil liability, based on the provisions of the general rules in the law regarding the consideration of the subsequent leave in the rule of the previous agency. The permission may be issued by the client's agent or his general or private successor as a representative of the client. We refer here to what is stated in the Central Bank of Egypt Law of 2003, where Article 97 of it indicated that it is not permissible to give the customer's information without a written permission from him or from the legal attorney or authorized agent. in that .

The second branch: inactive bank accounts The Iraqi legislator did not know inactive bank accounts in the Banking Law No. 94 of 2004, but it dealt with in Article 37 of this law the regulation of the provisions of inactive bank accounts. It seems that these accounts are subject to a special statute of limitations that differs from what is contained in the general rules of prescription, and a part of the jurisprudence goes to indicate that this system is borrowed in the essence of its concept of Egyptian law, which in turn took it from its creator of the French law, which was confirmed by the aforementioned Article 37. Article (37/2) of the Iraqi Banking Law of 2004 provided for the procedures for handling idle accounts, which the bank must take when the account holder does not show interest in the sums he deposited with the bank within seven years from the date of the law's enforcement. These measures are embodied in the following: - 1. Sending a notice by the bank on the first business day of the following year to the account holder at the last known address to him, so that this notification includes the characteristics of the dormant account. (Alshama', 1990: 35)

2. . The name of the account holder is published in at least two widely circulated daily newspapers and in the official gazette, and it seems that the legislator made this procedure coincide with those procedures, without setting a time interval between sending the notice and publishing the name of the account holder in the newspapers.

3. In the event that the account holder is not found despite the notice and publication, the bank must, within a period of 30 days, submit a detailed report to the Central Bank of Iraq and deliver to the latter all the funds deposited in the dormant accounts, provided that the Central Bank keeps those funds in the account. Private and may invest them in securities issued by the Iraqi government or any other securities.

4. The bank maintains the deposited funds for a period of twenty years from the date of their transfer to it from the designated banks, and it may re-pay these funds to their legitimate owners if it is convinced of the evidence or documents they provide for this purpose. If the above period ends, then the claimed amounts are transferred to the Ministry of Finance for deposit in the state treasury.

From the above, it is clear that idle bank accounts are an exception to the banks' commitment to secrecy, because the law obliges the bank to announce these accounts in widespread newspapers.

The second requirement: the exceptions to banking secrecy related to the interest of the bank

These exceptions include inquiring from banks about their opinion of their customers, as well as exchanging customer information between banks and finally, in the event of a judicial dispute between banks and customers, which we will discuss in succession in the following: -

The first branch: inquiries from banks about their opinion of customers

It is self-evident to say that banks and as a result of their activities collecting a lot of information about their dealers related to their commercial activities, their profits achieved and the economic conditions they are going through, and thus they are among the first to review and ask to know the financial position of some people who deal with the bank if I want to enter with the latter. In

a contractual relationship that entails large financial obligations owed by this client, and by referring to the legal texts, we find that one of the bank's tasks is to provide advisory services to investment portfolios and to provide investment trustee services, which is referred to in Article 27 of the Iraqi Banking Law No. 94 of 2004, where the activities that the bank can engage in are specified Such as (Safar, 2001:149):

I - Providing services as a manager of securities, as a financial advisor, or as a financial advisory agent.

j- - Provide financial information and credit reference services.

The Iraqi banking law did not specify what is meant by credit reference services. However, we find a reference to this concept in banking legalization issued by the British Bankers Association, which I defined by saying (the bank gives its opinion on a specific client of its clients in terms of this customer's ability to enter into a specific financial commitment or the extent of his ability To fulfill this obligation).

The question arises here about the extent to which the commitment to banking secrecy on the part of the bank itself intersects with the role of the latter as a specialized body providing advice, financial information and credit reference services when it is intended to provide information related to one of its clients, and in that the jurisprudence was divided into three opinions: -

First: - He thinks that it is not permissible for the bank to disclose information about one of its clients under the pretext of performing its role as a financial advisor to another party, as such is considered as a disclosure of the professional secrecy.

The second: - He goes to the opposite of the first opinion and says that the banking custom took place in many countries on the condition that the required bank provide information and answer this inquiry, and here the customer has no objection to that as long as that information is correct unless the latter has given instructions

An explicit statement to the bank not to answer any inquiries about it. (Awad, 1989: 676)

The third: - It goes to take a middle position from the above opinions, as on the one hand it stands by the first opinion in saying that providing information about the customer leads to a breach of the obligation to confidentiality, as well as it stands with the second opinion in terms of the possibility of providing some information in the case of inquiring from the bank, And this situation is through not giving confidential information about the customer, but rather only providing non-confidential general information, such as that the customer pays his debts regularly or that there are difficulties that the bank faces when the deadlines of this customer's debts come. (AlamEddin, 2001: 282)

Comparative legislation appears to be standing with the customer in preserving banking secrecy, so we find that the Lebanese Banking Secrecy Law issued in 1956 is moving in the direction of preventing banks from giving any information about clients to anyone without the express permission of the client.

It estimated the matter related to Iraqi legislation, and given the fact that the exceptions contained in the Banking Law of 2004 came exclusively, and there was no indication in them that the restriction was considered the subject of research.

2nd exchange of information between banks

This exception is a form of cooperation and solidarity between banks, whereby information is exchanged between them regarding clients or people who obtain banking facilities, which helps them to make the right decisions.

Despite the aforementioned that banking institutions are considered sources of providing credit information regarding the suitability of their customers and their ability to fulfill their financial obligations, they may sometimes need such information when dealing with a new customer, hence this exception was decided in

the interest of the bank as this information enables him to take The appropriate decision when providing loans and credit facilities to its clients.

Moreover, it can be said that the exchange of information between banks has become a common banking norm internationally, for example in Switzerland and as a result of commitment to absolute or almost absolute banking secrecy, the exchange of credit information between banks is restricted on a small scale due to the absence of the client's explicit or implicit consent.

We find that comparative legislation has regulated such an exception after it was just a banking custom. For example, we refer to the Lebanese Bank Secrecy Law of 1956, which stipulated in Article (6) that (the banks referred to in Article 1 in order to protect their funds may exchange between them only and under Confidentiality of information related to their clients' civil accounts).

In this regard, we support the position of the Iraqi legislator who paid attention to regulating the issue of exchanging customer data between banks in a way that allows customers to find out about clients' transactions and their previous obligations to the official without granting banking facilities to them unless they are established on sound grounds, and on this Article 39 of the Iraqi Banking Law for the year 2000 states. 2004 In its second paragraph, the establishment of bodies or offices to prepare credit reports and provide banks with the information they need on the affairs of their current and potential clients within the restrictions and controls set by the Central Bank of Iraq. (Mustafa, 2006: 27)

This exception was mentioned in Article (51 / e) of the Iraqi Banking Law of 2004 regarding exceptions to banking secrecy.

It appears from reading the above article that exchanging information between banks requires two conditions:

First: The necessity of an actual or prospective relationship that binds the person on whom information is to be provided with the

bank that requested access to that information.

Second: That the exchange of information be subject to restrictions and procedures adopted by the Central Bank of Iraq, which are necessary to protect the confidentiality of banking information and prevent its publication without permission.

The exchange of information between banks takes place either centrally through a central apparatus or a data bank, to which data relating to customers who have obtained bank facilities or financing at the state level as a whole flow to it through the commitment of banks to send information related to customers who exceed the credit facilities granted to them a certain amount.

As an example of countries that adopt this system, we mention both France and Egypt. For example, the Egyptian legislator obligated in Article 66 of the Central Bank and Banking System Law to oblige the Central Bank to establish a central system to record the financing balances and credit facilities provided to bank clients.

As far as the Iraqi legislation is concerned, we say that the Banking Law No. 94 of 2004 referred in Article 51 / H / 3 thereof to the assignment of the task of setting the rules and procedures to be observed by banks when exchanging customer information among themselves to the Central Bank of Iraq. The third branch: the judicial dispute between banks and their customers

Banking norms have settled on exempting the bank from the obligation to confidentiality when a judicial dispute arises between the bank and the customer related to the banking transactions that have been between them. 49, 50) of this law on the disclosure of information in the following cases ... a bank discloses all or some of the information related to a client's transactions to prove his claim in a judicial dispute between him and his client regarding these transactions). (Sarkhwah, ibid, 195)

in this case, in order to exempt the bank from the liability arising

ing from the disclosure of information related to the customer, it is required that there be a judicial dispute between the bank and this customer, and therefore it is not correct for the bank to use this right in other than judicial disputes such as the administrative complaint, also it is required that the disclosure of information be limited to the transactions that the judicial dispute took place. About it.

As for the statement by taking the text in question, the text in question is to extend the scope of the exception to include disputes submitted to arbitration as well as judicial disputes.

And we see the possibility of that, in agreement with what some have argued, as arbitration is one of the alternative means to adjudicate in settling disputes, so the purpose between this and that is one, in addition to that and due to the nature of the arbitration agreement, which resort to it depends on their will, and therefore the consent of the client in resorting to arbitration is an endorsement. Implicitly, he should give up confidentiality and give him permission to the bank to provide that information.

Finally, we point out in the course of talking about the exceptions decided in the interest of the bank to what is stated in Article (49) of the Banking Law, which included information related to safes or leased funds within the scope of commitment to banking secrecy, and that Article (251) of the Iraqi Trade Law No. 30 of 1984 obligated banks to take All measures to ensure the safety of the safes and the preservation of their contents. Therefore, what is stated in Articles (253 and 254) of the Iraqi Trade Law which allows the bank to open these safes after fulfilling the conditions specified by those articles, must be considered among the cases of exception from banking secrecy, which are: Decided in the interest of the bank.

3rd : other exceptions

In addition to the aforementioned, there are some other exceptions that come to the principle of banking secrecy, some of which are related to the public interest, and some of them are stipulated in some legislations, and we present them here as an update for the interest and are embodied in the first two branches in the exceptions decided to achieve a public interest and the second branch in the exceptions contained in some Legislation as follows: (Sarkees, 2006: 55)

The first branch: the exceptions to the principle of banking secrecy to achieve public interest

These exceptions are embodied in each of the exceptions decided for the benefit of the judicial authorities and the public prosecution, as well as the exception decided for the interest of the tax departments, which we will discuss in succession in two paragraphs.

first: The exception provided for banking secrecy for the benefit of the judicial authorities and the public prosecution: The bank has the right to give data and information related to clients' accounts to the judicial authorities in the event of a decision issued by the latter requesting such information within the framework of an existing judicial litigation.

And before the statement, in clarifying this exception, it refers to the distinction between it and the exception contained in the previous requirement for the exception related to the judicial dispute as one of the exceptions to the commitment to banking secrecy decided in the interest of the bank, as the latter involves a judicial dispute between it and the bank's customer, which allows the bank to display the customer's data as an exception. Of banking secrecy, while the exception in question concerns the request for customer data in any litigation in which the customer is a party.

Accordingly, if the competent judicial authorities - on their

own initiative or at the request of one of the litigants - request the bank to provide information or data and the bank responds to this, then this is not deemed to have violated its obligation of confidentiality.

With these exceptions, the legislation of many countries, such as Egypt, Jordan and Sudan, was taken into account, while the Lebanese Bank Secrecy Law of 1956 did not allow for this exception, as stated in Article 2 thereof, where the text did not allow responding to the decisions of the judicial authorities regarding the disclosure of confidential information.

As for the Iraqi legislator, reference was made to this exception in Article (49) of the Banking Law of 2004, where the text gave the right to the judicial and public prosecution authorities to issue a decision to obtain banking information or data.

Since the aforementioned article did not indicate the mechanism followed in receiving data and information on clients by the judicial authorities, it is necessary to refer to the procedural texts which require the possibility of seeking the assistance of any person from those authorities to help in memorizing the facts and building their judgments on sound evidence, such as obligating others to testify. After appearing before it, or to oblige people to present evidence or documents in their possession for review.

Second: Exceptions to banking secrecy in favor of the tax departments.

It is considered one of the problems associated with the commitment of the banks to secrecy, which is what led to the dispute in the legislative treatment of this issue between countries.

In Egypt, the legislature did not allow the banks to invoke secrecy towards the tax authorities. Rather, the laws required them (that is, banks) to show the tax authority the documents and data of clients.

However, it is considered the issuance of the Central Bank

of Egypt Law of 2003, as banks have become able to invoke banking secrecy in the face of the tax authorities, which is what Article 97 of the above law stipulates.

Likewise, the ruling is in accordance with the law on bank secrecy in Lebanon, where Article 2 of the same law prohibits access to banking secrets by any individual person, or a public, administrative or judicial authority, except in exceptional cases.

In Iraq, the Banking Law of 2004 was devoid of a text that gives the authority to tax departments to require banks to see banking secrets for the purposes of imposing taxes on customers.

However, the Central Bank Law, as is evident from reading its provisions, allowed access to confidential information within the scope of fulfilling the obligations and responsibilities imposed by the relevant legislation.

We agree with those who went on to state that the position of the Iraqi legislator is twice as important as the banks' commitment to secrecy, which in turn reflects on the relationship between the bank and the customer.

Third: Exceptions to banking secrecy related to money laundering and terrorist operations.

We find the reference to this exception in the texts of the Iraqi Banking Law No. 94 of 2004, as paragraph (c) of Article 51 of the above law included that (the provisions of Articles 49 and 50 of this law do not apply to the disclosure of information in the following cases:

Actions taken in good faith in the context of the performance of the duties or responsibilities imposed under this law or in the implementation of combating money laundering and the financing of terrorist acts, taken in accordance with the regulations of the Central Bank of Iraq).

It appears from the text that the Iraqi legislator has exempted banks from liability for breaching bank secrecy in cases of dis-

closure of information that takes place in good faith in the framework of performing the duties imposed by law. (Alsaffar, 188)

i n this regard, we refer to what is stated in the Iraqi Banking Law to oblige employees of the bank upon their knowledge of any transaction that is related to illegal activity, to be informed of the judicial authorities and inform the Central Bank of that.

Likewise, there is a commitment on the shoulders of bank auditors to report any action by officials or workers in banks if this behavior constitutes a fundamental breach of a provision of the Banking Law or the issued regulations.

The Egyptian legislator followed the same approach in Article (101 / D) of the Egyptian Central Bank Law of 2003, which included that (the provisions of Articles 97, 100 of this law do not prejudice the following: What are stipulated in the laws and provisions regulating anti-money laundering).

The second branch: the exception to banking secrecy for the benefit of others (issuing a certificate or statement of the reasons for refusing to cash the check).

The check is considered a fulfillment instrument that replaces cash, but the creditor merely accepts payment through it, not after fulfilling the debt, because it is dependent on the condition of collecting the value of this check, so if the creditor presents the check to the bank to collect its value and believes that the debtor (the drawer of the check) does not have sufficient funds or does not have sufficient funds, then the bank must, upon the request of the holder of the check, prove these matters in the form of a statement on the check so that the bearer can follow legal methods to fulfill his right .In the face of this obligation, the legislation excluded this matter from the scope of the obligation to bank secrecy, so we find, for example, the Iraqi legislator referred to this provision in paragraph (d) of Article (51) of the Banking Law of 2004, which stipulated that (the provisions of articles (49 and 50) of This law

provides for the disclosure of information in the following cases: Issuing a certificate or stating the reasons for rejecting any check based on the owner's request for a right), and it is the same as the Central Bank of Egypt law for the year 2003. (Mustafa, 1989:10)

finally, we refer in this regard to the bankruptcy of the bank's client, as, as an exception to banking secrecy, it also entails the possibility of displaying his data and information, which is referred to in Article (8) of the 1956 Law of Bank Secrecy in Lebanon. We see the possibility of establishing the idea and adopting it in the Iraqi law by analogy with the idea of presentation or full access to the commercial books, where we see the commonality of the cause in both cases, which is the disclosure of the confidentiality of certain information that could not be disclosed in normal circumstances where the jurisprudence indicates and the extent of the matter related to full access to the commercial books For merchants, so that the latter relinquishes possession of the book in order to put it at the disposal of the opponent to search for it himself or by the simplicity of whoever acts on his behalf for any restrictions or data, as the comparative laws indicated that among the cases that allow full access and disclosure of the trader's secrets is a case of bankruptcy where he does not return, and this case is in revealing those Secrets to the dealer, no harm.

CONCLUSION AND RECOMMENDATION

Praise be to God, he deserves his praise. "And blessings and peace be upon the one after him there is no prophet, and on his family, companions and his army.

Firstly: Findings

After we finished writing this research, with the help and bounty of God, the researchermany results such as follows:

1. The researcher also support the Iraqi legislator's position on some issues related to his regulation of banking secrecy in the Iraqi Banking Law No. 94 of 2004, including:

- A- His position in regulating issues related to the exchange of customer information between banks in order to conduct credit operations and grant loans on

sound grounds, provided that such exchange is restricted in the narrowest possible range so that this does not involve weakening such commitment.

- B- The position of the Iraqi legislator regarding his preference for the public interest over the private interest, which has been evident in more than one place, including the status of the exception related to providing information when there is a suspicion that some of the funds that are used in support of terrorist operations, given the current security situation in Iraq, where this ruling finds great support and blessing. Under the current circumstances.

2. With the foregoing, it was found some observations that we ask the legislator to pay attention to, which we mention as:

- a. The Iraqi banking law did not regulate the issue of providing information about customers when a person inquires about a client at the bank, and it is one of the main tasks of banks in promoting the role of financial and technical advisor in providing advice.

3. The legislature allowed for breaking the scope of banking secrecy - so to speak - by permitting the disclosure of customer information to the bank to the tax authorities, which is a difference in many of the comparative legislation,

4. The researcher believe that such a ruling may affect the strength and effectiveness of such an obligation, as we see that the tax authorities have the use of other means. In carrying out its work without having to resort to violating bank secrecy

Secondly: Recommendations:

- 1. urging the legislator to organize the issue of banking secrecy, as it is required
- 2. there should a looking ahead to a new stage in which we intend to encourage investment and push its wheels to put in place such effective and important texts in achieving that goal.

REFERENCES

First: Language books: -

- (1) Al-Munajjid in Language and Media, Dar Al-Mashriq, 1986.
- (2) The Legal Dictionary, Harith Salman Al-Farouki, Fifth Edition, Lebanon Press, Beirut, 2003.

(3) Second: Legal books: -

- (1) 1- Dr. Ahmed Barakat Mustafa, The Bank's Responsibility for Providing Banking Information and Consulting, A Comparative Study, Dar Al-Nahda Al-Arabiya, Cairo, 2006.
- (2) Dr. Ahmed Safar, Banking and Money Laundering, Arab and Foreign Experiences, Union of Arab Banks, 2001.
- (3) Dr. Elias Nassif, Complete in Trade Law, Part Three, Banking Operations, Mediterranean Publications, Oweidat Publications, Beirut - Paris, 1983.
- (4) Dr. Antoine Georges Corgis, Banking Secrecy in the Light of Globalization, A Comparative Study, Al-Halabi Legal Publications, 2006.
- (5) Dr. Hussein Mostafa, the crime of issuing a check without balance, Al Maaref facility, Alexandria, 1989.
- (6) Dana Hama Baqi Abdul Qadir, Banking Secrecy in the Context of Money Laundering Legislation, General Directorate of Printing and Publishing, Sulaymaniyah, 2006.
- (7) Dr. Samiha Al-Qalioubi, The Mediator in Explaining the Egyptian Trade Law, Part Two, Fourth Edition, Dar Al-Nahda Al-Arabiya, Cairo, 2005.
- (8) Dr. Ali Gamal El-Din Awad, Legal Banking Operations, Dar Al-Nahda Al-Arabiya, Cairo, 1989.
- (9) Dr. Mohi El-Din Ismail Alam El-Din, Encyclopedia of Banking Business in Both Legal and Practical Standards, Part 1, Golden Eagle Press, Cairo, 2001.
- (10) Dr. Naeem Mughabbab, Banking Secrecy, A Study in Comparative Law, First Edition, Beirut, 1996.

- (11) Dr. YaqoubYousefSakhwa, The Secret of the Banking Profession in Kuwaiti Law, A Comparative Study,
- (12) Kuwait, 1989.
- (13) Third: Research and theses: -
 - (1)Dr. Faeq Al-Shamaa, The statute of limitations of debts owed by banks, published research, in the Journal of Legal Sciences, College of Law, University of Baghdad, Volume IX, Issues One and Two, 1990.
 - (2)Dr. Naseer Saber Laftah Al-Jubouri and Dr. The memory of Muhammad Husayn al-Yaseen, Legal Protection of Banking Secrecy in Iraqi Legislation, College of Law, University of Al-Qadisiyah.
 - (3)ZeinaGhanem Abdul-Jabbar Al-Saffar, Banking Secrets and their Legal Protection, a Comparative Study, Doctoral Thesis in Law, College of Law, University of Mosul, 2005.
 - (4)FadiFouadObeidat, Legal Dimensions of Banking Secrecy, Doctoral Thesis in Law, Amman University for Graduate Studies, 2005.
 - (5)Manna Saad Al-Ajami, Limits of the Bank's commitment to banking secrecy and the legal implications of its disclosure, Master Thesis in Law, Middle East University, Amman, 2001.

Laws: -

- (1)Iraqi Civil Law No. 40 of 1951, as amended.
- (2) Iraqi Trade Law No. 30 of 1984.
- (3)Iraqi Evidence Law No. 107 of 1979, as amended.
- (4)The Iraqi Criminal Procedures Law No. 23 of 1971.
- (5)The Iraqi Banking Law No. 94 of 2004.
- (6)The Central Bank of Iraq Law No. 56 of 2004.
- (7) Egyptian Bank Account Confidentiality Law No. 205 of 1990.
- (8) The Egyptian Central Bank, Banking and Monetary System Law No. 88 of 2003.
- (9)The Central Bank of Jordan Law No. 23 of 1971 as amended.

- (10) 10- The Lebanese Banking Secrecy Law of 1956.
- (11) 11- Syrian Banking Law No. 28 of 2001.
- (12) 12 - The Sudanese Banking Act of 1991.

websites :-

- (1) www.admin.ch/ch/d/ff/index
- (2) www.en.wikipedia.org
- (3) www.cbe.org.eg
- (4) www.bba.org.uk