**EXAMINATION OF BANK DUTY OF CONFIDENTIALITY**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE**

**REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS**

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# CERTIFICATION

The undersigned certifies that she has read and here by recommends for acceptance by the Open University of Tanzania a dissertation entitled, ***“Examination of Bank Duty of Confidentiality*”**. In fulfillment of the Requirements for the award of Degree of Master of Laws (LL. M)

……………………………………

Dr. Doreen Mwamlangala

 (Supervisor)

…………………………………

Date

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Date

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# DEDICATION

This dissertation is dedicated to my extended family from the more the members of one’s family the merrier and the more joy abound. Special thanks to my grandfather who did not taught me how to live, he lived and from him I learned to live.

# ABSTRACT

The rapid advancements in Information and Communication Technology (ICT) across the globe have given rise to various ICT-related crimes. Consequently, the international community has initiated a concerted effort to promote transparency in banking activities. Transparency is seen as essential for fostering trust within the realms of business and investment. As a result, there has been a need for regulatory reforms and the implementation of laws governing the lifting of bank confidentiality. In many instances, these developments have been introduced with the greater good of the public in mind, even though they may have some adverse effects on individuals. This study aims to provide a comprehensive analysis of the legal framework governing bank confidentiality in Tanzania, along with its exceptions. The research examines the legality of the procedures used to lift bank confidentiality, legal issues pertaining to the impact of lifting bank confidentiality on bank customers, and the concerns related to data privacy within the context of bank confidentiality, which is considered a fundamental aspect of human right. To conduct this study, a doctrinal legal research method was employed. This involved gathering primary information from various legal documents, including laws, cases, and legal writings, from collection centers throughout the country. The findings of this study indicate that the legal provisions governing the lifting of bank confidentiality in Tanzania are often mandatory in nature. This sometimes creates a challenge for the courts and banks in striking a balance between safeguarding bank interests and promoting public interests. As a recommendation, this study suggests a review of existing laws to ensure the proper procedures for lifting bank confidentiality are adhered to, and that personal data must be adequately protected to prevent individuals from misusing such information.

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# LIST OF INTERNATIONAL AND REGIONAL INSTRUMENTS

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The African Charter on the Rights and Welfare of the Child, 1990

The African Union Principles on Freedom of Expression, 2002

The American Convention on Human Rights, 1969

The American Declaration of the Rights and Duties of Man, 1948

The Arab Charter on Human Rights, 2004

The Charter of the United Nations,San Francisco 1945

The Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019

The General Comment No. 27, Adopted by the Human Rights Committee, 1999

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

The International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.9, 1999;

The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,” 2009, A/HRC/17/34

The Universal Declaration of Human Rights, 1948

1. **Domestic Legislations**

The Anti-Money Laundering Act 2006 CAP [423 R.E 2022]

The Anti-Money Laundering Regulations 2012 CAP [G.N. No. 298 of 2012]

The Banking and Financial Institutions Act, [RE 2006 CAP 342 R.E 2019]

The Constitution of the United Republic of Tanzania, 1977[CAP 2 R.E 2005]

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The Evidence Act, R.E. 2022

The Law of Contract Act, 2022 RE

The Order XI of the Civil Procedure Code [R.E 2019]

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*Dixon v Holden (1869) L.R. 6 Eq. 485*

*Foster v Bank of London (1862) 3 F. & F. 214*

*Tournier v National Provincial Bank of England [1924] 1 K.B. 461*

*Williams v Summersfield [1974] 2 Q.B. 512*

*GSB v Switzerland [2015] ECHR 1122*

*Khehili v Switzerland [2011] ECHR 195*

*Klass et al. v The Republic of Germany [1978]2 EHRR 214*

 *Leander v Sweden [1987] 9 EHRR 433*

*Odievre v France, [2003] F.C.R. 621*

*Rotaru v Romania, [2000] ECHR 92*

*Szulc v Poland [2013] 57 EHRR 5, 163-167*

*Sparks v. Union Trust Company of Shelby, 124 S.E. 2d 365 (1962)*

 *Suburban Trust Co. v. Waller, 44 Md. App. 335 (1979)*

*Twiss v. State Dept. of Treasury, 124 N.J. 461 (1991)*

*United States of America v. First National Bank of Mobile, 67 F. Supp. 616 (1947)*

 *Zimmerman v. Wilson, 81 F.2d 847 (1937)*

# ABBREVIATION AND ACRONYM

AML Anti-Money Laundering

DPP Director of Public Prosecutions

ECHR European Convention for the Protection of Human Rights

ESAAMLG Eastern and Southern Africa Anti-Money Laundering Group

FIU financial intelligence unit

ICCPR International Covenant on Civil and Political Right

MFI: Multilateral Financial Institutions

NGO: Non-governmental organization

OAU: Organization of African Unity

PCCB Prevention and Combating of Corruption Bureau

STR suspicious transaction reports

UDHR Universal Declaration of Human Rights, 1948

UN: United Nations

**CHAPTER ONE**

# GENERAL INTRODUCTION AND BACKGROUND OF THE STUDY

# Introduction

Customer confidentiality has historically been one of the cornerstones of the banking industry worldwide. The advent of information age technology, enabling banking transactions to be made at lightning speed across multiple borders, has amplified the importance of having regulations that balance customers’ rights and the prevention of unlawful activity. The right to confidentiality is that of the customer so that where a customer can be compelled to disclose his or her secrets, his or her bank can be compelled to do so as well.[[1]](#footnote-1)

The banker’s duty of confidentiality is founded on the contract between banks and their customers, and is one of the pillars governing the banker-customer relationship in Tanzania. The banks have the obligation to keep information concerning their customers’ affairs confidential. The law permits the duty of confidentiality to be lifted in certain specific situations including where information related to customers’ transaction is required to prevent or control illicit activities such as money laundering, terrorism, drug trafficking and corruption or to facilitate the conduct of legal proceedings in courts.

The above statutory exceptions to the bank confidentiality present a situation where public policy seems to override the need to preserve bank confidence. This happens while the bank customers in Tanzania are protected by several laws governing bank customer’s privacy and transfer of personal data. This includes the law of contract, law of torts and all other civil laws, among others. The bank is put to a place whereby in most cases needed to reconcile the pull of the two laws on bank confidentiality, e.g., some laws requiring lift of bank customer confidentiality while other laws confining confidence on customer information.

It will be seen in this study that some laws empower certain officials to access customer information without prior determination of the matter by the court of law. This makes the entire process to lack partiality and hence may attract malpractice. This study explores the laws governing lifting of bank confidentiality in Tanzania and spot key legal issues related to the impact of lifting bank confidentiality to the bank customers.

**1.2 Background to the Problem**

The duty of confidentiality which applies to all banking industry including that of Tanzania is originally derived from Common law of England which forms part of the laws of Tanzania.[[2]](#footnote-2)From the common law perspective, the duty of confidentiality is the very basis of banker customer relationship. The fiduciary nature of the bank and its customer requires that a banker shall have to maintain secrecy of all the information about the customer's account and its affairs. However, this banking principle is not absolute as it is subject to certain exceptions as established in the Tournier Case.[[3]](#footnote-3)

Mr. Tournier was a customer of National Provincial and Union Bank of England and his account was overdrawn. A cheque was drawn by another customer of the bank in favor of Tournier who, instead of paying it into his own account, indorsed it over to a third party. When the cheque was presented for payment, the bank contacted the endorsee’s bank and was informed that the endorseewas a bookmaker. The bank subsequently telephoned Tornier’s employer for his address and in the course of that conversation disclosed to the employer that Tournier was indebted to them and was sending money to a bookmaker.[[4]](#footnote-4)

As a result of this disclosure Tournier lost his job. Tournier then sued the bank for slander and for breach of an implied term of his banker-customer contract that the bank would not disclose to third persons the state of his account or any transactions relating thereto. Tournier lost at first instance but appealed on the ground that the trial judge had failed to direct the jury as to the circumstances when it would be reasonable and proper for the bank to disclose information about their customer. The Court of Appeal upheld the appeal and ordered a new trial. The Court of Appeal held that the bank was guilty of a duty of confidentiality and awarded damages against it.[[5]](#footnote-5)

Lord Atkin pointed out that the information, which the bank was bound to treat as confidential, was not only restricted to facts that it learnt from the state of the customer’s account. The bank’s duty remained intact even after the account had been closed or ceased to be active. The bank’s duty to maintain secrecy included “information obtained from other sources than the customer’s actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers.” In the instant case this happened since the information received by the branch manager was based on a cheque made payable to one of the bank’s customers and drawn by another customer.[[6]](#footnote-6)

In the foregoing case, Tournier sets out four areas where a bank can legally disclose information about its customer. These exceptions are (a) under compulsion of law, for example if the banker responds to the court's order for presenting statement of accounts/documents for legal purposes or for example for prevention of a crime, regulatory investigation, for producing evidence in proceedings or for taxation purposes. If called upon to do so, a copy of an entry in the bankers' book will be accepted as prima facie evidence by the court; (b) in the public interest, i.e., disclosing enemy accounts during war period or in today’s world often under the auspices of headings such as ‘national security’ (c) in the interest of the bank , for example when the bank has to file a suit to recover its dues; and (d) under express or implied consent of the customer i.e. implied in case of supplying credit information in general terms.[[7]](#footnote-7)

In Tanzania, liberalization of the Banking industry in early years of 1990s which was fueled by globalization World Bank policies led to the enactment of the Banking and Financial Institutions Act.[[8]](#footnote-8) The Banking industry in Tanzania underwent a dramatic change whereby the newly erected Act allowed the establishment of private banks in the country. Liberalization of the banking sector made it possible for over 800 Tanzanians to get employed in sixteen projects which were approved up to 1998 by the government authorities to carry on financial business, mainly in the banking sector.[[9]](#footnote-9)

The Banking and Financial Institutions Act[[10]](#footnote-10) provides for the bank’s duty of confidentiality to its customers. The Act provides that a bank shall not disclose “... information relating to its customers or their affairs except in circumstances in which ... it is necessary or appropriate for the bank… to [reveal such] information.”[[11]](#footnote-11) The Act provides also that before assuming his/her position and discharging his/her duties, a director, a member of a committee, an auditor, an advisor, a manager, an officer or an employee of a bank shall make a written declaration of fidelity. The Chief Executive Officer or the Secretary of a bank shall witness the signing of the declaration made by the above officials.[[12]](#footnote-12)

The Bank of Tanzania owes the duty of confidentiality towards its customers.[[13]](#footnote-13)It is further provided that, except for the purposes of the performance of his or her functions, when so required by law or authorized by the Board of the BoT, “... no member of the Board or staff of the Bank [of Tanzania] shall disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties.” Moreover, the Banking and Financial Institutions Act requires the BoT to observe confidentiality with regard to information about customers’ affairs acquired from commercial banks during the central bank’s exercise of its supervisory functions.[[14]](#footnote-14)

Furthermore on the bank confidentiality in Tanzania, the Bank of Tanzania Act provides further that the BoT shall not disclose to any person: (i) any information concerning affairs of a customer of a bank obtained in the exercise of its regulatory and supervisory functions; or (ii) a record contained in or related to a report of examination or other confidential supervisory information prepared by, on behalf of, or for the use of the Bank or any other agency that regulates or supervises banks or financial institutions.[[15]](#footnote-15) The Ban of Tanzania may publish whole or part of information furnished by a commercial bank, but the information so published shall not disclose the financial affairs of a bank’s customer unless a written consent of the customer has first been obtained by the Bank of Tanzania.[[16]](#footnote-16)

Banker customer relationship in Tanzania is also bound to the doctrine of *Privity to Contract*. The doctrine of *privity* of contract is a common law principle which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such. A contract is defined to an agreement made between two parties and it is enforceable by law.[[17]](#footnote-17)

As stated above, the bank is always found in difficult time to balance in implementing both of the mentioned legal requirements regarding bank confidentiality. If the bank act without care on the laws requiring lifting bank confidentiality it will lose customer trust and confidence which is bad for the banking business. Again, if it persist on keeping the bank confidentiality the laws pressing for the lift are likely to be brutal. This has attracted attention of the researcher of this study to analyse the laws governing lifting of bank confidentiality for public interest.

**1.3 Statement of the Problem**

Since the global financial crisis emerged, politicians in some jurisdictions have been increasingly strong to reduce levels of bank secrecy at the justification of safeguarding public interests.[[18]](#footnote-18) This raises a number of questions as to the manner and procedures used to provide customer information by the bank. Tanzania is not left behind this global trend; for example, several statutes in Tanzania impose a duty on banks to disclose information about affairs of their customers, namely; the Prevention of Terrorism Act,[[19]](#footnote-19) the Anti-Money Laundering Act,[[20]](#footnote-20) the Cybercrimes Act,[[21]](#footnote-21) and the Electronic and Postal Communications (Investigation) Regulations.[[22]](#footnote-22) With these legislations, Banks or banking staffs are compelled by law to make disclosure of customer information. The Prevention of Terrorism Act[[23]](#footnote-23) provides for mandatory reporting requirement for banks to allow enforcement agencies to detect and prevent financing of terrorist acts.[[24]](#footnote-24)This is likely to cause some legal issues to the parties to the banking contract.

The Constitution of Tanzania guarantees to every person the respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.[[25]](#footnote-25) However, for the purpose of preserving the person’s right in accordance with this Article of the Constitution, the state authority has been allowed to lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be infringed upon without prejudice to the provisions of this Article. This does not mean passing laws that erode entirely privacy of bank customers especially when such statutes are interpreted and applied with political sentiments.

The judiciary in Tanzania enjoys exclusive constitutional powers[[26]](#footnote-26)to administer justice in Tanzania. The constitution as well guarantees presumption of innocence of every individual until when proven guilty by the court.[[27]](#footnote-27) The act of granting statutory powers to law enforcement persons to directly demand exposure of customers of Bank information from bank officials is a direct violation of constitutional principles and customer rights provided above. Political interests or even individual biasness may likely possibly make customers of banks victims of been exposed off their information without courts or such customers’ consent.

The Cybercrimes Act empowers a police officer in charge of a police station or a law enforcement officer of a similar rank may issue an order to any person in possession of such data compelling him or her to disclose it.[[28]](#footnote-28) It may happen, however, that there is resistance from the party holding data of evidential value. Similarly, it may be impossible to obtain the data without the use of force. In these circumstances, the law enforcement officer may apply to court for an order of disclosure or preservation.

The duty to make interpretation of laws made by the parliament is within the judiciary. Judges and magistrates are skillfully trained to make legal interpretation of provisions of statutes. Sometimes it happens that the words of a statute have more than one meaning so it is the duty of the judges/magistrates to make interpretation depending on the context. With this regard, determining whether a certain conduct of a person constitutes elements of an offense is a duty of the judiciary too. Having laws which empower certain persons to access and share banking information of a third party who is a customer of a bank contravenes the right to privacy. This erodes the bank-customer confidentiality. This study explores these laws and the legal issues likely to arise in the process of lifting bank confidentiality in Tanzania.

**1.4 Significance of the Study**

Banking secrecy is an important aspect towards bank -customer relationship which ensures that all banking information of a customer is secure and private between the two parties to the banking agreement. Since various laws in Tanzania empower certain persons to share customer bank information without his/her consent, customers rights are violated. This study serves the following importance:

1. It provides a light to the policy and law makers to learn that granting powers to individuals to lift bank confidentiality without prior court determination of that need may be subject to certain legal issues and malpractices. This happens when there some political biasness between the bank customer and the government.
2. In order to protect public interest at the cost of an individual right, a fair process is mandatory to be used. The court is a public organ exclusively vested with power to do justice and fairness.
3. It calls upon law makers to amend the above-mentioned laws in order to secure customers right of privacy and secrecy. It also reminds the law makers on violation of the concept of *privity* to contract whereby the infringing laws should be amended to allow courts alone to give order of release of customer information.
4. This study is also important to the society and law enforcers to seek permission of the court before interfering bank-customer information in absence of his/her knowledge.

# 1.5 Objective of the Study

# This part of the study covers objectives of the study and it is divided into the main objectives and specific objectives of the study for the purpose of clarity in the presentation.

## 1.5.1 General Objective

General objective of this study is to analyze the bank confidentiality in Tanzania by identifying its exceptions and issues related thereto.

## 1.5.2 Specific Objective

(a) To analyze the relationship and development of bank confidentiality in Tanzania

(b) To examine the court interpretation of banks duty of confidentiality

(c) To analyze the legal issues arising from lifting of bank confidentiality in Tanzania.

# 1.6 Research Questions

(a) What are challenges due to development of bank confidentiality?

 (b) Which is impact of legislations that limit Bank Confidentiality in Tanzania?

 (c) What are the legal issues arising from lifting bank confidentiality in Tanzania?

# 1.7 Scope of the Study

This study is focused on the critical analysis of bank confidentiality with specific examination of laws eroding Bank-customer confidentiality in Tanzania. The study examines the laws governing lifting of bank confidentiality and its procedure while identifying legal issues related to that. The study further analyzes the constitutional right to privacy as far as bank confidentiality concerns. The possibility of persons involved on lifting customers’ information from the bank use that exercising the existing laws to justify biasness may be brought by political interests.

In conducting this study, the researcher faced the limitation related to access to certain information which justifies the process of lifting customer confidentiality especially on cases related to economic crimes or those with political sentiments.

# Limitations of the study

1. The researcher was limited by the available information on the topic from officials from Banks, financial institution who were not willing to open up information because of nature of business and employment.
2. The limited information from local jurisdiction on issues related to banking confidentiality.

However, from those challenges the researcher managed to conduct research as he accessed documents in library in different institution like high court library, OUT and other online access.

# 1.9 Literature Review

Several authors have worked on the concept of Bank confidentiality addressing various issues related to laws allowing violation of duty of secrecy between Bank and customers. The laws above mentioned have based on the justification that the violation serves to protect public policy especially on prevention of financial related crimes.

Islam, R.[[29]](#footnote-29) provides that it was a long-established principle of common law jurisdiction that a customer is bound by the banking practices of its banker, which allows the bank to provide a banker’s reference to a third party on the ground that the customer has given an implied consent to that effect. This was overruled by the English courts which confirmed that no “implied consent” theory is applicable in the disclosure of any information of a customer to a third party. He further provides those statutory restrictions have been imposed which require a written permission from the customer to disclose any information to a third party.

Study Gap: the author study focuses on English jurisdiction whereby of all exceptions to the duty of confidentiality are tested and proved by the courts. This makes the entire process of eroding the bank duty of secrecy reasonable and justifiable. Although Tanzania has implemented same principles which erodes bank confidentiality in certain cases, the process does not always involve courts’ determination of the matter. There are certain persons are empowered by law to erode the bank duty of confidentiality in Tanzania without using the court. This study intends to examine the expected malpractices that might happen during exercise of the power given to persons by law that erode the duty of confidentiality without leave of the court in Tanzania.

According to Roberts, C.[[30]](#footnote-30) the UK courts have spelled out of the various factors the Court will take into account in deciding whether a public interest defense should succeed against a claim for breach of confidence, and is timely given the increasing tension between businesses' duties to make disclosures to regulators and law enforcement authorities, and their obligations to safeguard certain categories of information pursuant to (for example) confidentiality and personal data obligations. The author further states that, accordingly, a balancing exercise is required to determine whether a breach of confidence may be justified by the public interest defense, as the protection of confidentiality is itself also a matter of public interest.

Study Gap: The above author has demonstrated how the UK judiciary has provided a guideline regarding manner through which breach of bank confidentiality may be made justifiable. In Tanzania, there have been passed laws which allow breach of bank confidentiality especially when dealing with fighting offenses of Money laundering, terrorism and economic crimes. Courts in Tanzania have not stipulated such measure like that in UK jurisdiction. This study will recommend to the end the need to have this guidance while pointing out negative impact of possible breach of the duty of confidentiality.

Lord Atkin, L.J.,[[31]](#footnote-31) has described the Bank- customer relationship being mingled with that of a fiduciary duty on part of the bank towards its customers. He further provided that in discharging this fiduciary duty the bank largely depends upon the banking practice, since as a matter of veracity in the commercial world the relationship between the bank and its customers also much depends on the general banking practices.

Study Gap: the author has demonstrated how banking customs and practices should be considered when the Bank confidentiality wants to be eroded, among others. This study intends to establish also that, it is necessary to consider the nature and extent of the duty of confidentiality, which will differ from case to case.

According to Chaikin, D.[[32]](#footnote-32) the duty of confidentiality is frequently linked to the maintenance of customer confidence in the banking system which is a major source of finance for businesses. Chaikin states that the recent global financial crisis demonstrates that a lack of confidence in the banking system undermines business activity, growth and employment. He further warns that if customers lose confidence in their banks, widespread withdrawals stemming from panic could be generated, leading to bank illiquidity and ultimately to bank liquidations. The current laws eroding bank confidentiality in Tanzania are likely to reduce customer confidence in banks because of the procedure is applied. This study explores on the procedure which normally involves certain officials and not the court.

According to Kapinga, W.B.[[33]](#footnote-33), the role of the financial intelligence unit in Tanzania in fighting against money laundering and its predicate offences, examine its potential in controlling the problem and describe factors that undermine its efficacy. The author states that there is a need for Tanzania to undertake policy, legislative and institutional reforms to augment the efficacy of the financial intelligence unit. He suggests further reforms should be implemented concurrently with other measures, which will enhance the country’s anti-money money laundering regime.

Study Gap: The author does not provide how the said reform should be made. The legislature or the judiciary should provide guidelines on how the breach of duty of confidentiality based on the said public interest should be stipulated and justified, this study serves the purpose.

Mniwasa, E.E.[[34]](#footnote-34), provides that the banker’s duty of confidentiality to its customers, which is founded on the contract between banks and their customers, is one of the pillars governing the banker-customer relationship in Tanzania. Those banks have an obligation to keep information concerning their customers’ affairs confidential. The author on the other hand states that, the law permits the duty of confidentiality to be lifted in certain specific situations including where information related to customers’ transactions is required to prevent or control unlawful activities such as money laundering, terrorism, drug trafficking and corruption or to facilitate the conduct of legal proceedings in courts.

Study Gap: The pressing need introduced by some of the laws in Tanzania to lift the Bank confidentiality should be made fair if courts are empowered to order such lift and opposed to officials as well as law enforcers as it is done in Tanzania. This study covers this gap and provides a recommendation to put the likely problem to an end.

# 2.0 Research Methodology

In order to provide a critical analysis of the laws eroding Bank confidentiality in Tanzania the researcher has used a doctrinal legal research method. This is the method which asks what the law is in a particular area. It is concerned with analysis of the legal doctrine and how it has been developed and applied. This type of research is also known as pure theoretical research. It consists of either simple research directed at finding a specific statement of the law or a more complex and in-depth analysis of legal reasoning.[[35]](#footnote-35)

Since doctrinal legal research is concerned with the formulation of legal “doctrines” through the analysis of legal rules, the method has assisted to provide a good analysis of the constitutional right to privacy in relation to the all-legal provisions governing lifting of bank confidentiality in Tanzania. Legal doctrines clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules. Deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines (for example, lifting bank confidentiality doctrine). Chynoweth remarks that within the common law jurisdictions legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation.[[36]](#footnote-36) This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration

Based on the methodological clarification provided above, it is found that doctrinal legal research has been used to analyze study of existing laws governing lifting of bank confidentiality together with its related cases and authoritative materials as a whole. This method has been used to test existing laws governing bank confidentiality in Tanzania and managed to ascertain whether the existing laws and procedures involved within lifting is so far valid or not. Through this method the researcher has managed to deals with verifying existing knowledge on the right to privacy provided by the URT Constitution whether it is not violated.

The researcher has studied bulk of data generated from primary and secondary authorities related to case laws and related authoritative books and academic writings in the OUT-library HQ, the Internet and all other libraries, legal books and materials collections within Dar es Salaam. The choice of the method was influenced by the type of research topic in place.

# CHAPTER TWO

**THE DEVELOPMENT OF THE CONCEPT OF BANK CONFIDENTIALITY**

# 2.1 Development of the Concept of Bank Duty of Confidentiality

Banking is risky due to its highly sensitive nature of information which is often exchanged, recorded and retained. To eliminate this risk, it means that dissemination of certain information must be restricted. Breach of confidentiality, then, refers, to the violation of this trust that has been placed in another in a fiduciary relationship, in this case bank and their customers. This chapter provides a presentation on the rationale and historical development of the concept of bank confidentiality internationally and in Tanzania.

The Black’s Law Dictionary defines bank confidentiality as bank's promise to keep financial affairs and dealings concerning privacy, privilege and secret of its customer confidential.[[37]](#footnote-37) This is a state of having the dissemination of certain information of the bank customer restricted. Breach of confidentiality, then, refers, to the violation of this trust that has been placed in another in a fiduciary relationship, in this case bank and their customers. As a general rule, the bank’s duty of confidentiality is a feature to the customer’s protection against unwarranted attempts by outsiders to enquire into his affairs.

Banking confidentiality is a cardinal principle under banking law.[[38]](#footnote-38) The relationship between the banker and customer is based on this principle of confidentiality. Every legal system recognizes its importance but, in most cases, fails to address the issue in a comprehensive manner so that the interest can be protected by legal enforcement. Through this confidentiality, banks do normally promise to treat all customers’ personal information as private and confidential (even when they are no longer customers). Banks do further promise not to reveal customer’s name and address or details about his/her account to anyone, other than under given exceptional cases when banks are allowed to do so by law.[[39]](#footnote-39)

Banking confidentiality, which is at the heart of banking law, arises out of a contractual relationship with the banker and customer.[[40]](#footnote-40) Under the common law any breach of the confidentiality will entitle the customer to sue the bank for breach of contract.[[41]](#footnote-41) Where banking operations are an important component of economic activity in a country, the prohibition is made through statutes.

## 2.2 Categories of Duty of Confidentiality

Under common law position, when the contract between the banker and customer is concluded, the banker is under an implied duty to keep the affairs of his customer confidential.[[42]](#footnote-42) This is a qualified duty. It does not necessarily derive from the customers' own account rather the information can be from other sources.[[43]](#footnote-43) If there is any breach, the customer will be entitled to take action for breach of contract and defamation.[[44]](#footnote-44) The origin of the concept of bank confidentiality applied under several jurisdictions today comes from the decision made in the English case of *Tournier v. National Provincial and Union Bank of England*.[[45]](#footnote-45)

In this case, the plaintiff was a customer of the defendant bank. His bank account was in debit. The bank pressed for payment and it was arranged that the plaintiff would reduce the debt by a weekly payment. After three payments, he stopped paying. The branch manager observed that another customer of the bank had issued a cheque in favor of the plaintiff. The plaintiff did not pay it into his account but the cheque was collected through the London City and Midland Bank for a bookmaker. The branch manager later called the plaintiffs employer to obtain the plaintiffs’ private address. In the course of conversation, he revealed to the plaintiff employer that he had seen a cheque made payable to the plaintiff being diverted into the account of a bookmaker. Due to this disclosure, the plaintiff’s contract was not renewed. The plaintiff brought an action against the bank for slander and for the breach of a banker's duty of confidentiality.

 The court stated that the banker's duty of confidentiality is always subject to four qualifications. They are as follows:

 (i) Where the disclosure is under the compulsion of law; (ii) Where there is a public duty to disclose; (iii) Where the interests of the bank require disclosure, and (iv) Where the disclosure is made by the express or implied consent of the customer.[[46]](#footnote-46)

 This decision had a great impact on the issue of banking confidentiality. It not only recognized the existence of such a duty but also laid down circumstances under which this duty can be restricted.

Since the obligation of confidentiality is imposed on the bank as a result of an agreement of personal choice, it should be stressed that in this case, the confidential information will become the law of the parties. Any disregard of this obligation will entail contractual liability of the responsible party, which could represent damages, termination of the contract and other sanctions. It is appreciated that by concluding a confidentiality agreement the bank acquires a lot of sense of confidence, noticed as a consequence of the principle of good faith in contractual relationships.

The cause of a will to impose the obligation of confidentiality on the other party lies in the legitimate confidence that the client has towards the bank in keeping the secrecy and not disclosing information to third parties. From this point of view, it is considered that ‘the client’s trust resides in the quality of the bank and its employees to ensure the protection of confidentiality and the reputation of its honesty’.[[47]](#footnote-47)

Following the decision in *Tournier case* above, the rules around bank confidentiality continue to evolve, in many cases to the detriment of individuals but to the benefit of the public good. Since the global financial crisis, politicians in some jurisdictions have been increasingly keen to reduce levels of bank secrecy. So far, the common law and the legislatures of various commonwealth jurisdictions including Tanzania have lodged a burden of confidentiality upon certain bilateral legal relationship, such as the bank (including its employees) and its clients, in various roles such as a depositor or a debtor. Under ordinary circumstances, the bank has a duty[[48]](#footnote-48) not to disclose bank records to third parties. Bank records are comprised of sensitive personal data that may cause an adverse impact on the plaintiff when disclosed.

## 2.3. Rationale of Banks Duty of Confidentiality

According to the Banking laws and regulations in Tanzania the obligation of confidentiality presents itself generally as a mutual obligation, regardless of the position of the parties sitting at the negotiation table. The legislative system has appreciated the protection of confidential information, which is required to be incorporated explicitly in a legal provision.

This must be seen from a dual perspective, first the negative, where the holder of the confidential information is obliged not to disclose the information to third parties. The positive one establishes that the party which possesses confidential information must inform the other party of its nature. It has rightly been held that, regarding confidential information, ‘the parties seek the protection of their private interests, therefore they can abolish or restrict the sphere of its application’.

The obligation of confidentiality in Tanzania, like in many other jurisdictions, is a general rule from which the parties may derogate according to their own interests. With regard to the contract, where a confidentiality obligation is stipulated, it can be emphasized that the manifestation of the parties' will can take place either at the negotiation stage or during the conclusion of the contract. The parties have to carefully mention: ‘what information is secret, the persons who have access to it, the protection measures to be observed, the duration of the information obligation, and the penalties that may apply if the underwriting has been violated’.

The law in Tanzania prescribes penalties and imposes sanctions on bank officers or banks for breaching the banker’s bank of confidentiality. The Banking and Financial Institutions Act provides that an officer of a bank who breaches the banker’s duty of confidentiality owed to a customer commits a criminal offence and, upon being convicted, such officer shall be liable to pay a fine not exceeding TZS20M or to be imprisoned for a term not exceeding three years or to both.[[49]](#footnote-49)

Where a customer fears that his/her bank is about to infringe on, or has already breached the duty of confidentiality, she/he has two remedies against the bank. First, the customer may sue the bank and recover damages for loss arising from the disclosure of information relating to his/her affairs. The court can order the bank to pay the customer loss of profits caused by disclosure.[[50]](#footnote-50) Second, the customer may apply for an injunction to restrain the bank from making further disclosure or repeating the previous disclosure. In Tanzania, a customer may apply the procedures provided for under the Civil Procedure Code1966[[51]](#footnote-51) to obtain civil reliefs against a bank for breaching the banking confidentiality.

A bank and its customer have rights and duties towards each other. The rights and duties are expressed in the agreement between the parties and implied in the contract by the law and trade customs and usages.[[52]](#footnote-52) The Court in *Re Diplock case*[[53]](#footnote-53) stated that the bank is required not to disclose to third parties either the state of customer’s account or any of his transactions with the bank or information relating to customers acquired through maintenance and administration of the account.[[54]](#footnote-54) This duty extends to all transactions that go through a customer’s account and all information a bank has about its customer.[[55]](#footnote-55)

In Tanzania, the Banking and Financial Institutions Act provides for the bank’s duty of confidentiality to its customers. A bank shall not disclose “... information relating to its customers or their affairs except in circumstances in which ... it is necessary or appropriate for the bank… to [reveal such] information.”[[56]](#footnote-56)

Since the bank-customer relationship is created in the contractual basis, the above provision in should be interpreted in line with the Law of Contract Act.[[57]](#footnote-57) Bank–customer relationship begins when the banking transaction begins. This means that the information is considered confidential when a person perceives it as such and it is communicated to the other contracting party during the negotiations. It is a matter that needs to be analysed, whether at the negotiating stage when one party communicates to the other party, should the second party perceive the information automatically as a secret or is it necessary to point out its confidential nature.

So long as communication is an essential requirement in the formation of contract, the party must communicate the confidential character of the information to the other contracting party. It follows that ‘the information must be at least perceived in such a way with reasonable diligence’, which means that, if a third party could assume that the information brought to the attention was confidential, then the party could also assume this. Therefore, a person who possesses some confidential information and wants its protection must fulfil two positive obligations: firstly, the obligation to determine the content of the confidential information, and, secondly, the obligation to inform the other party of that nature.[[58]](#footnote-58)

Regarding banking law, the obligation of confidentiality must be interpreted ‘in a flexible way’ meaning that the bank, even in the absence of an agreement concluded by the parties, is required not to disclose information of the contracting party concerning its object of activity as understood in section 48(1) of the Banking and Financial Act, that the bank must ensure confidentiality with regard to any information that the customer provides during the pre-contractual stage. Thus, the confidentiality criteria provided by the law for the banks are: any fact, date, and information that relates to the client's activity or the person, property, activity, business, personal or business relationships of clients or customer account information balances, turnover, services rendered or contracts with clients.[[59]](#footnote-59)

# 2.4 The Relationship between the Bank Duty of Confidentiality and other Bank Duties

Relationship between a banker and customer comes into existence when the banker agrees to open an account in the name of customer. The relationship between a banker and a customer depends on the activities, products or services provided by bank to its customers or availed by the customer. Thus the relationship between a banker and customer is the transaction relationship. Bank’s business depends much on the strong bondage with the customer. Trust plays an important role in building healthy relationship between a banker and customer.[[60]](#footnote-60)

The Banking and Financial Institutions Act defines the term bank as an entity that is engaged in the banking business,[[61]](#footnote-61) while Banking Business as the business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and to use such funds, in whole or in part, for loans or investments for the account of and at the risk of the person doing such business.[[62]](#footnote-62)

A banker-customer relationship is based on trust, for this bank has to carry out its duties to the customer in utmost good faith and due diligence. Bank’s supreme responsibility lies in protecting customers’ interest, mainly the deposit and secrecy about customers.[[63]](#footnote-63) There are numerous kinds of relationships between the bank and the customer based on the duties and activities that are performed from both sides. Basically, a “banker-customer” relationship starts with the opening of an account with the bank. Bank accounts in Tanzania are opened basically in relation to the Law of Contract Act.[[64]](#footnote-64) The relationship between a bank and its customers can be broadly categorized into two categories, namely, General relationship and Special relationship.[[65]](#footnote-65)

## 2.5 Bank-Customer General Relationship.

Under the Bank-customer General Relationship exists several other relationships including Debtor-Creditor relationship whereby a ’customer' opens an account with a bank, he/she fills in and signs the account opening form. By signing the form, he enters into an agreement/ contract with the bank. When a banker receives deposits from a customer, he/she is technically said to borrow money from the customer. So, he/she is acting as a debtor who is bound to return the money on-demand to his creditor namely its customer.[[66]](#footnote-66)

Creditor-Debtor relationship is another relationship existing under bank-customers general relationship where lending money is the most important activity of a bank. The resources mobilized by banks are utilized for lending operations. The customer who borrows money from bank is the debtor and the banker is the creditor. Principal-Agent Relationship is another existing relationship where Bankers are to work as an agent on behalf of their customer/principal. When the banker collects cheques, bills, dividend warrants, pays insurance premium, subscriptions etc. on behalf of his customer as an agent then the agent-principal relationship exists between a banker and its customers.[[67]](#footnote-67)

Trustee-Beneficiary Relationship is another existing relationship in customer-bank where a person entrusts valuable items with an intention that such items would be returned on demand to the customer/beneficiary the relationship becomes of a trustee and beneficiary. A banker becomes a trustee only under certain circumstances, for example, when money is deposited for a specific purpose, till that purpose is fulfilled; the banker is regarded as a trustee for that money. Again, when a cheque is given for collection, till the proceeds are collected, he holds the cheque as a trustee.[[68]](#footnote-68)

Bailor-Bailee Relationship is another bank-customer relationship where a customer deposits certain valuables, bonds, securities or other documents with the bank, for their safe custody, the bank besides becoming a trustee, also becomes a bailee and the customer is the bailor. This is followed by a Lessor-Lessee Relationship where the banks provide safe deposit lockers to the customers who hire them on lease basis. The relationship, therefore, is that of lessor and lessee. In such case a banker becomes the lessor and the customer becomes the lessee.

Pledgor-Pledgee Relationship is also another bank-customer relationship which occurs when goods are delivered by one person to another to be held as a security for the payment of a debt or the performance of some other obligations and upon the express or implied understanding that the subject matter of the pledge is to be restored to the owner till the debt is discharged. Under such circumstances the borrower becomes the pledgor and the lending banker becomes the pledgee.[[69]](#footnote-69)

Mortgagor-Mortgagee Relationship is also a bank-customer relationship where exists a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. The person transferring the interest is called the mortgagor, and the person to whom the interest is transferred is called the mortgagee.[[70]](#footnote-70)

## 2.6. Bank- Customer Special Relationship

Apart from general features of relationship, banks provide variety of services, which makes the relationship wider and more complex. Depending upon the type of services rendered and the nature of transaction, the banker acts as a bailee, trustee, principal, agent, lessor, custodian etc.[[71]](#footnote-71) This relationship exist due to some special features that arise due to the following bank legal obligations.

Statutory obligation to honor cheque is one of the bank-customer special relationships arising when a customer opens an account there arises a contractual relationship between the banker and the customer by virtue of which the banker undertakes an obligation to honor its customers' cheques. When a banker overrides his /her statutory obligation and dishonors a cheque on reasonable ground, the banker is justified in doing so. However, if dishonors a cheque by mistake, the bank is liable to compensate the customer for any loss or damage caused to him.[[72]](#footnote-72)

Banker’s duty to maintain secrecy of customer’s account, as previously discusses above in this chapter arises when a person opens an account in a bank, he/she is entitled to a reasonable assurance that information regarding the account remains a matter of knowledge only between the banker and account holder. This is so because; it is one of the principal duties of the banker to maintain complete secrecy of the status of its customer's account. This obligation of the bank to maintain secrecy continues even after the customer's account is closed.

Banker’s Lien is one of the bank-customer special relationship arising when a banker can exercise the right of lien on all goods and securities entrusted to him as a banker. It must be noted that a banker's lien is generally described as an implied pledge. It means that a lien not only gives a right to retain the goods but also gives a right to sell the securities and goods of the customer after giving reasonable notice to him. This right of sale is normally available only in the case of a pledge. That is why a banker's lien is regarded as an implied pledge.[[73]](#footnote-73)

Right to claim incidental charges is one of the bank-customer special relationships arising when a bank claims the incidental charges on unremunerated accounts. These incidental charges take the form of ‘service charges’, ‘processing charges’, appraisal charges’, penal charges, handling /collection charges’ and so on.[[74]](#footnote-74)

Banks and banking transactions is fundamental pillar of the financial world. However, in order to maintain confidence and credibility in banks, the protection of customers' secrets is imperative. In Tanzania, this obligation for banks to maintain secrecy is based on the right to protecting individuals' private lives set out under the United Republic of Tanzania Constitution.[[75]](#footnote-75) The protection of customer secrets is guaranteed under the Criminal Code, the Banking and financial Institutions Act and the bank of Tanzania Act.[[76]](#footnote-76)Bank secrecy law aims to give a perfect privacy and security of depositors from fraud.

Banking confidentiality is one of the most obscure types of personal information confidentiality, owing to its traditionalistic character regarding various professional bilateral legal relationships. The duty posed on the banks gives a right of action for a breach of implied contract, or confidence, or occasionally gives redress upon either regarding other tort doctrines, or civil code, or other statutory remedies. The history of banking confidentiality has been scantly researched and there is no uniform body of knowledge concerning its traditional, case law or statutory origins, which has seemingly developed over the last two centuries.[[77]](#footnote-77)

# 2.7 Conclusion

The banker’s duty of confidentiality to its customers, which is founded on the contract between banks and their customers, is one of the pillars governing the banker-customer relationship in Tanzania. The banks have the obligation to keep information concerning their customers’ affairs confidential. Apart from being originated from the common law doctrines, the duty of confidence in Tanzania is also linked to the constitutional right to privacy which is also a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society.

#

# CHAPTER THREE

**INTERNATIONAL STANDARD ON BANKS DUTY OF CONFIDENTIALITY**

# 3.1 Introduction

Bank secrecy was established as a policy intended to encourage banking growth, discourage the private hoarding of money, and build trust in domestic banking services and institutions by the people. These laws have notably been invoked in recent corruption prosecutions, illustrating the political and legal problems tied to bank secrecy. Such lawsuits have given rise to international and domestic calls to reform the bank secrecy statutes. Tanzania is one of the jurisdictions where there are exist laws that compel banks to breach the bank confidentiality. This study discusses the laws governing lifting of bank confidentiality in Tanzania. The presentation begins with a look on common law position and later on the position of this undertaking in Tanzania.

# 3.2 Banking Confidentiality under the Common Law

The issue of banking confidentiality under common law it was a matter of morality and professionalism no information could be released without the consent of the individual. The trend changed after 1924 where the duty of secrecy was determined in the court of law.

Common law is one of the sources of laws in Tanzania.[[78]](#footnote-78)These are the body of law developed through judgments of the English courts which made reference to the customs and usage of the English people and then interpreted in courts. By preservation of courts, they remain applicable (when there is no local law or rule) and persuasive laws in Tanzania through the doctrine of precedents.[[79]](#footnote-79)A "common law system" is a legal system that gives great precedential weight to common law, on the principle that it is unfair to treat similar facts differently on different occasions.

It follows that through the doctrine of precedents there are many legal principles that are borrowed from English courts that are made applicable to domestic courts in Tanzania. One of the legal principles that are borrowed from the English Legal System is the concept of Bank confidentiality. As it has been discussed in the previous chapter that bank-customer relationship is guided under the law of contract, the contractual relationship created is subject to certain limitations. These limitations on the duty of secrecy of banks were firstly evolved in the English case of Tournier.[[80]](#footnote-80)

In the Tournier case the court stated that the banker's duty of confidentiality is always subject to four following qualifications: Where the disclosure is under the compulsion of law; where there is a public duty to disclose; where the interests of the bank require disclosure, and Where the disclosure is made by the express or implied consent of the customer.[[81]](#footnote-81) The court in this case laid down limitations on how the duty of confidentiality can be limited under common law. Thereafter, several other interpretations on the said limitation were evolved in England and other jurisdictions.

Lord Diplok in *Parry-Jones v. Law Society[[82]](#footnote-82)*clearly explained further on the justification of disclosure of bank customer information under compulsion of law. He stated that duty of confidence is subject to and overridden by the duty of any party to that contract to comply with the law of the land. If it is a duty of such a party to a contract whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary will be illegal and void. For example, in the case of a banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as to his customer's affair when he is asked to give evidence on them in the witness box in a court of law.[[83]](#footnote-83)

# 3.3 Duty of Confidentiality

Bank secrecy laws generally prohibit banking institutions and their officers and employees from disclosing customer data to third parties. The legal frameworks and rules that govern customer data disclosures under bank secrecy laws vary significantly across jurisdictions. In most jurisdictions, bank confidentiality has been guaranteed under constitutional right of privacy. Privacy is a fundamental human right, enshrined in numerous international human rights instruments.[[84]](#footnote-84)

**3.4 Relationship Between bank duty Confidentiality and Human Right**

The relationship between bank duty of confidentiality and human rights revolves around the intricate balance between an individual's right to privacy and the broader societal imperatives of financial transparency, accountability, and security. Firstly, the right to privacy is a foundational human right, enshrined in numerous international agreements and national constitutions. It encompasses the idea that individuals possess an inherent entitlement to control their personal information, including their financial data. Banks have a fundamental ethical and legal obligation to uphold this right by safeguarding the confidentiality of customer financial information, fostering trust, and ensuring that sensitive financial details remain private and secure.

Additionally, this relationship is marked by a delicate equilibrium. While the right to privacy is a fundamental principle, it is not absolute. In the context of bank confidentiality, exceptions are recognized, allowing for the disclosure of financial information in specific circumstances, such as law enforcement, national security, taxation, or investigations into financial crimes. These exceptions are typically defined and regulated by legal frameworks and procedures, often involving court oversight and adherence to due process. Striking the right balance is a complex challenge, as it necessitates safeguarding individual privacy while addressing legitimate societal interests.

International organizations like the Financial Action Task Force (FATF) provide global standards for combating financial crimes while emphasizing the importance of respecting human rights and data protection principles. This demonstrates that the relationship between bank duty of confidentiality and human rights is multifaceted, evolving, and necessitates a nuanced approach to reconcile individual privacy rights with broader societal objectives in an increasingly interconnected financial world.

## 3.5 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights requires no one to be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. It also calls for everyone to have the right to the protection of the law against such interference or attacks.[[85]](#footnote-85) This is a call to all member states of this document to make sure that the right to personal privacy of an individual is guaranteed in every domestic jurisdiction. This should automatically go in hand with establishment of the implementation machinery for protection on this right.

It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[[86]](#footnote-86)

Right to privacy grants every member of a society to effectively exercise his/her duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.[[87]](#footnote-87)

## 3.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

The right to privacy has been recognized also by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Immigrant workers and all members of their family have been given this protection against being subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honor and reputation. The Convention grants each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.[[88]](#footnote-88) This is a manifestation of the importance of the duty of confidentiality in the society.

## 3.7 International Covenant on Civil and Political Rights, 1966 and its Commentaries

The International Covenant on Civil and Political Rights (‘ICCPR’) reinforces Article 12 of the UDHR, by prohibiting any person to be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. To make sure that this right is protected to everyone the Convention grants everyone the right to the protection of the law against such interference or attacks.[[89]](#footnote-89)

The Human Rights Committee[[90]](#footnote-90) has noted that states parties to the ICCPR have a positive obligation to “adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right to privacy. This is a right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honor and reputation.

 In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.[[91]](#footnote-91)

In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.[[92]](#footnote-92)

 The Committee has given a clarification between lawful and unlawful interference can be done. In clarifying this, the term “unlawful” was construed to mean that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.[[93]](#footnote-93)

However, the committee further clarified the expression “arbitrary interference” by asserting that it is also relevant to the protection of the right provided for in article 17. According to the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[[94]](#footnote-94)

## 3.8 Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019

The African Commission has drafted a Declaration of Principles on Freedom of Expression and Access to Information in Africa to replace the Declaration of Principles of Freedom of Expression in Africa, adopted by the African Commission in 2002. Under this declaration, everyone has the right to privacy, including the confidentiality of their communications and the protection of their personal information. This may be done by every individual been able to communicate anonymously or use pseudonyms on the internet and to secure the confidentiality of their communications and personal information from access by third parties through the aid of digital technologies.[[95]](#footnote-95)

According to the Declaration, the adoption of laws prohibiting encryption or of other measures that weaken encryption, including backdoors, key escrows, and data 16 localization requirements, are permissible only where justifiable and compatible with international human rights law. This is a great concern has been demonstrated by this declaration by stressing the importance of considering international human rights law as a parameter for passing laws that derogate right to individual privacy.

The protection of personal information of individuals shall be established by law, including in accordance with the following principles: The processing of personal information shall be: (i.) with the consent of the individual concerned; (ii.) conducted in a lawful and fair manner; (iii.) in accordance with the purpose for which it was collected, and adequate, relevant, and not excessive; (iv.) accurate and updated and where incomplete, erased or rectified; v. transparent and disclose the personal information held; and (vi.) confidential and kept secure at all times.[[96]](#footnote-96)

Further that, everyone shall have rights in relation to the processing of their personal information. This includes the right to: (i.) be informed in detail about the processing; (ii.) access personal information that has been or is being processed; (iii.) object to the processing; and (iv.) rectify, complete, update, block or erase personal information that is incomplete or out dated. Meanwhile, everyone shall have the right to exercise autonomy in relation to their personal information and to obtain and reuse their personal information, across multiple services by moving, copying or transferring it without affecting its usability.[[97]](#footnote-97)

However, any person whose personal information has been accessed by unauthorized persons has a right to be notified of this fact and the identity of the unauthorized person(s), unless the identity cannot be established. e. The harmful sharing of the personal information, including that of marginalized groups, such as the non-consensual sharing of intimate images of women and child pornography, shall be established as offences punishable by law.[[98]](#footnote-98)

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# 3.9 Exceptions/Limitation to the Bank Confidentiality Rule

A global trend towards greater financial transparency has created pressure upon several countries with strict and long-standing bank secrecy laws, including Tanzania has increasingly becoming the targets of international institutions. It seeks financial accountability to combat international crime and corruption, as well as to curb tax evasion through offshore storage of wealth. significant efforts to raise global awareness of “dirty money” storage in offshore tax havens and private banks have been made in part through international campaigns for financial accountability that have advocated for reform.

Reforms on various laws governing criminal and civil investigation were made in Tanzania to allow lifting bank confidentiality.[[99]](#footnote-99) This practice, as stated in Tournier case, must be a compulsion made by law passed by the parliament. This reform resulted into the rules of confidentiality and prohibitions against disclosure of data provided under Tanzania’s banking laws to stop apply to law enforcement officers carrying out their duties while investigating or searching for information for purposes of criminal prosecution. The main justification of the laws lifting bank confidentiality was to allow smooth investigation of criminal and civil related offences especially in the contemporary ICT world.

## 3.9.1 Traditional Disclosure of Customer Information by Banks

Banks can disclose information about their customers’ affairs has been a long-time practice in banking industry. This does happen following specified circumstances without incurring any liability to the customer.[[100]](#footnote-100)Firstly, Banks can disclose its customer’s information to third parties in a situation where the law compels banks to make the disclosure of customers’ affairs.[[101]](#footnote-101) Statutory law or a court order may compel a bank to make disclosure of a customer’s affairs in certain circumstances. In many jurisdictions, laws for controlling offences such as money laundering and financing of terrorism require banks and financial institutions to disclose financial information of their customers to facilitate investigation, detection and suppression of such crimes.[[102]](#footnote-102)

Secondly, Bank confidentiality in Tanzania can be lifted where bank customers consent to have their affairs disclosed.[[103]](#footnote-103) If a bank notifies its customer and states clearly what it proposes to do and why and obtains an express consent from the customer, there will be no breach of the banker duty of confidentiality. A customer may request a bank to disclose his/her affairs to a third party, for instance, a creditor who may need information about a customer’s trustworthiness or his/her history relating to repayment of loans to the bank providing information.[[104]](#footnote-104) Also, where there is an implied consent by a customer, the bank may make disclosure of its customer’s affairs without incurring liability to him/her.[[105]](#footnote-105)

Thirdly, Bank confidentiality in Tanzania can be lifted where interests of banks require the disclosure of customers’ affairs.[[106]](#footnote-106) Where a bank needs to protect its interests and this involves the disclosure of a customer’s affairs, it can disclose the information without incurring liability to the customer. For example, Banker follows the practice of making necessary esquires about the customers, their sureties or the acceptors of the bills from other bankers. This is an established practice amongst the banker and is justifiable because an implied consent of the customer is presumed to exist.

Fourthly, Bank confidentiality in Tanzania can be lifted where interests of the public necessitate the disclosure of customers’ affairs.[[107]](#footnote-107) For example, the banker’s duty of confidentiality is overridden by the potential danger to the state or public and the duty to disclose is necessary for the protection of such public interests; when a bank asked for information from government officials concerning the commission of a crime; where the bank considered that the customer is involved in activities prejudicial to the interest of the country; where the bank’s book reveals that the customer is contravening the provision of any law; Where sizable funds are received from foreign countries by a constituent.[[108]](#footnote-108)

Fifthly, Bank confidentiality in Tanzania can be lifted where trade customs and usages allow the disclosure of customers’ affairs.[[109]](#footnote-109) If practices and customary usages among banks permit a bank to disclose a customer’s affairs, the bank can make disclose of such information without incurring liability to the customer.

## 3.9.2 Laws That Limit the Bank Confidentiality in Tanzania

Several statutes in Tanzania compel banks to disclose information about affairs of their customers.[[110]](#footnote-110) Such information may be required by authorities for purposes, among others, of investigating, preventing and fighting criminal activities. The foregoing study discusses these laws as follows but not limited to the Prevention of Terrorism Act; the Anti-Money Laundering Act; the Prevention and Combating of Corruption Act; Electronic and Postal Communications (Investigation) Regulations; and the Cybercrimes Act.

## 3.9.3 Court Orders that Limit the Bank Confidentiality in Tanzania

Court’s capacity to order disclosure of bank customer information has been in practice since the common law era.[[111]](#footnote-111) Under this Courts may compel banks to disclose information relating to the affairs of their customers. Banks are subject to rules of disclosure where they are parties to litigation or arbitration proceedings. A court order will be served on a bank, compel its officials to appear before a court and produce books, documents or letters containing a customer’s affairs.

 In Tanzania, banker’s electronic records or information are now recognized as the banker’s books. Bankers books’ include ledgers, cash books, account books and any other records used in the ordinary business of the bank or financial institution, whether the records are in a written form or a data message or kept on information system including but not limited to computers and storage devices, magnetic tape, micro-film, video or computer display screen or any other form of mechanical or electronic data retrieval mechanism.[[112]](#footnote-112)

Accordingly, the Evidence Act allows a party to legal proceedings to apply to a court for an order to allow inspection and taking copies of any entries in a banker’s books for the purposes of proceedings. The above Section provides that on the application of any party to a legal proceeding, a court may permit such party to inspect and take copies of any entries in banker’s book for purposes of such proceeding.[[113]](#footnote-113) The Act defines ‘legal proceedings’ as “... any civil or criminal proceedings or enquiry in which evidence is or may be given, and includes arbitration.

However, a distinction should be made between civil and criminal cases. With regard to criminal cases, it stated in *Williams v. Summerfield*[[114]](#footnote-114) that courts should warn themselves of the importance of steps that they are taking in making an order of inspection and discovery, ensure that such power is exercised carefully, and take into account, among other things, whether there is evidence to support the charge against accused persons. The Court of Appeal of England was making an interpretation of Section 7 of the English Banker’s Book Evidence Act of 1879 which is pari material to Section 81of Tanzania’s Evidence Act.

Courts should not make orders for discovery to allow the police to undertake what is referred to as ‘fishing expeditions. As regards civil proceedings, the case law has laid down the rule that the statutory power to order inspection should not be inconsistent with, and not override the general law of discovery.[[115]](#footnote-115)

Under Tanzanian jurisdiction, the law governing the discovery and inspection of documents is embodied in the Civil Procedure Code,[[116]](#footnote-116) the Evidence Act[[117]](#footnote-117) and case law.[[118]](#footnote-118) The Civil Procedure Code provides that a party to a suit may apply to a court for an order to compel another party to make a discovery of documents relating to matters contested in a suit.[[119]](#footnote-119) A court can order a party to a suit to produce a document in his/her possession or power.[[120]](#footnote-120) After securing production of the documents, the party who has applied for the discovery may inspect them and take copies of such documents.[[121]](#footnote-121)

On the other hand, where inspection of any business books is applied for, instead of ordering inspection of the original books, a court may order a copy of any entries in the books be furnished and verified by an affidavit of a person who examined the copy of the original entries.[[122]](#footnote-122) Accordingly, documents including banker’s books or copies thereof containing information about the affairs of customers may be produced and inspected applying the above procedure. As such a court can order the production and inspection of a banker’s books containing information about an account of a party to litigation in accordance with the provisions of the Evidence Act.

There are other situations where banks can be compelled to make disclosure of information of their customers to a court. These include a disclosure made in proceedings involving an application for a grant of probate or letters of administration of a deceased customer’s estate; a disclosure made in proceedings of bankruptcy of a bank customer; and a disclosure necessary for the compliance with a garnishee order served on a bank attaching money in the account of its customer.

The Proceeds of Crime Act describes situations where the police, with the assistance of courts, may compel banks to give information about transactions conducted through bank accounts.[[123]](#footnote-123) It provide further that, where the Inspector General of Police (IGP) considers that the commission a serious offence, predicate offence or money laundering is likely to be found in a bank account, and that the procedure for obtaining an order of the court is likely to defeat investigation, the IGP may authorize a police officer to investigate the bank account and such authorization shall be a sufficient warrant for production of information about such account by the bank.[[124]](#footnote-124) The police officer should be of or above the rank of the Assistant Superintendent of Police.

On the other hand, the authorized police officer may take copies of the relevant entries from the account. Where it appears necessary that an account should be held for a period exceeding seven days, the police officer shall be required to obtain the leave of a court for continued holding of such account.[[125]](#footnote-125) A person who fails to produce a bank account or obstructs the police officer from scrutinizing such an account shall commit an offence punishable by imprisonment for two years or payment of fine of not less than TZS1m or both.[[126]](#footnote-126)

 However, the Proceeds of Crime Act provides that the Director of Public Prosecutions (DPP) may apply to a court for the grant of a monitoring order that will direct a bank to give information about transactions conducted through an account held in such bank to the Inspector General of Police (IGP).[[127]](#footnote-127) The court may issue the order if it is satisfied that there are reasonable grounds for suspecting that a holder of the account has committed or is involved in the commission of a specified crime, or has benefited from the commission of such offence.[[128]](#footnote-128)

 The order shall indicate the name of the account’s holder and the kind of information the bank is required to furnish. A bank that contravenes a monitoring order or furnishes untrue or misleading information to the police shall commit an offence and be liable to pay a fine not exceeding TZS1m.[[129]](#footnote-129)

Banks in Tanzania may be required to provide information regarding customers’ dealings to facilitate criminal investigations or proceedings in foreign countries. The Mutual Assistance in Criminal Matters Act 1991[[130]](#footnote-130) provides that where criminal investigations or proceedings relating to commission of a serious narcotic offence or money laundering by authorities in a foreign country and information about transaction conducted through an account held in a bank in Tanzania is relevant to such investigation or proceedings.

The relevant authority of the foreign country may request the Attorney General of Tanzania to obtain a monitoring order under the Proceeds of Crime Act. The order shall compel the bank to provide information to the IGP about transactions conducted through the account. The Attorney General may authorize a police officer to apply to the High Court of Tanzania for the grant of the order requested by the foreign authority.

# 4.1 Conclusion

It is important to note that the legislations and Court orders discussed above as exceptions to the bank confidentiality in Tanzania have been introduced due to pressure from international institutions and agencies regarding global fight against crimes. The development of ICT has introduced new offences such as money laundering that has never existed before. However, Tanzania is also committed to the investigation and prosecution of major criminal offences that seek to use other nations' bank-secrecy laws to hide the proceeds of their illegal activities. The major question to consider is whether such laws, court orders and the whole process of access Bank secret is justifiable under the constitutional right of privacy in Tanzania. The next chapter discusses on this aspect.

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# CHAPTER FOUR

**LEGAL FRAMEWORK ON BANK DUTY OF CONFIDENTIALITY IN TANZANIA**

# 4.1 The Bank Confidentiality in Tanzania

Bank secrecy laws appear to be eroding in the global move towards financial transparency. But Banks receiving these banking reforms against bank secrecy have been succumbed into deep sea of fear of losing the business from wealthy clients, specifically to financial centers promising sustained confidentiality. They are pushed to hold on to the bank secrecy principles of independence from interference and privacy in banking as a constitutional right. Strengthening adherence to these principles is the fear of an unending trend of open access to personal account, transaction, and identification information due to transparency and globalization. This chapter provides a presentation on legal issues that can be raised in the process of implementing the laws and court orders regarding lifting Bank confidentiality in Tanzania.

# 4.2 Legal Issues Related to Legislations against Bank Confidentiality in Tanzania

Legal prohibitions targeting bank confidentiality requires a proper interpretation in order to have a better implementation of such legislations without eroding the original purpose of right to privacy which has been guaranteed under the Tanzanian Constitution. Since the Executive Organ of the Republic of Tanzania is responsible to certain degree in making laws[[131]](#footnote-131) and implementing them, implementation of laws lifting bank confidentiality may be at dare situation, especially when dealing with political related issues.

## 4.2.1 Laws Lifting Bank Confidentiality Erodes the Privity to Contract

 Contract is defined to be an agreement between two parties which is enforceable by law.[[132]](#footnote-132) The Bank confidentiality is closely attached to the doctrine of privity to contract which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. The premise is that only parties to contracts should be able to sue to enforce their rights or claim damages as such. However, the doctrine has proven problematic because of its implications for contracts made for the benefit of third parties who are unable to enforce the obligations of the contracting parties.

The obligation of confidentiality presents itself as a mutual obligation, regardless of the position of the parties sitting at the negotiation table. The legislative system has appreciated the protection of confidential information, which is required to be incorporated explicitly in a legal provision.

This must be seen from a dual perspective where the holder of the confidential information is obliged not to disclose the information to third parties. The positive one establishes that the party which possesses confidential information must inform the other party of its nature. It has rightly been held that, regarding confidential information, ‘the parties seek the protection of their private interests, therefore they can abolish or restrict the sphere of its application’.[[133]](#footnote-133)

The obligation of confidentiality is a general rule from which the parties may derogate certain rights according to their own interests. With regard to the contract, where a confidentiality obligation is stipulated,[[134]](#footnote-134) it can be emphasized that the manifestation of the parties' will can take place either at the negotiation stage or during the conclusion of the contract. Regarding this the parties have to carefully mention: ‘what information is secret, the persons who have access to it, the protection measures to be observed, the duration of the information obligation, and the penalties that may apply if the underwriting has been violated.

In the Bank - customer contract, whether expressly or impliedly the Bank as an institution is obliged to keep confidential all facts, data and information about the activity performed, as well as on any fact, date or information at its disposal concerning the person, property, activity, business, personal relations or customer business or customer account information balances, turnover, and operations on the services rendered or on the contracts concluded with the clients. It is clear from the rule in question that the obligation of confidentiality is more like an absolute requirement imposed on the bank as a professional mutual obligation

Since the obligation of confidentiality is imposed on the bank as a result of an agreement of personal choice, it should be stressed that in this regard, the confidential information will become the law of the parties. Any disregard of this obligation will entail contractual liability of the responsible party, which could represent damages, termination of the contract and other sanctions. It is appreciated that by concluding a confidentiality agreement the bank acquires a lot of sense of confidence, noticed as a consequence of the principle of good faith in contractual relationships.

The cause of a will to impose the obligation of confidentiality on the other party lies in the legitimate confidence that the client has towards the bank in keeping the secrecy and not disclosing information to third parties. From this point of view, it is considered that ‘the client’s trust resides in the quality of the bank and its employees to ensure the protection of confidentiality and the reputation of its honesty’.

## 4.2.2 Laws Lifting Bank Confidentiality Erodes the Constitutional Presumption of Innocence

The presumption of innocence is guaranteed under the United Republic of Tanzania Constitution[[135]](#footnote-135)and other Human Rights International Instrument which Tanzania is a signatory.[[136]](#footnote-136) This is the right that guarantees the accused person his innocence and burdens the prosecution side to prove otherwise.[[137]](#footnote-137) The right plays an important role in the protection of human rights in general and in the enhancement of a fair trial in particular. It gives a person, who is under investigation and criminal trial the benefit of the doubt, that, he is presumed to be innocent until the contrary is proved by his accuser.[[138]](#footnote-138)

The trial without the presumption of innocence, at least in the adversarial system, would defeat the entire criminal justice. The right to be presumed innocent until the contrary is proved as indicated forms an important component of a fair trial legal framework. The right is premised on the fact that a conviction carries with it such serious consequences. If such powers were not controlled, the obvious effects would be devastating results on the accused person.

The right of the presumption of innocence is very essential in safeguarding against wrongful convictions. There are possible dangers inherent in conviction. The effects of being found guilty of a criminal offence are enormous as they touch on a person’s liberty and at times loss of properties. The serious stigma a conviction carries is believed to necessitate the safeguarding of the accused from wrongful conviction. What is important to note here is that the right intends to burden the prosecution with proving charges against the accused.[[139]](#footnote-139)

 This rationale is taken by different authors as being the first and foremost reason for recognizing the principle.[[140]](#footnote-140) It is apparent that wrongful convictions create a need for the presumption of innocence especially if the charge has not been legally and convincingly proved. If the prosecution side were not burdened to prove the case against the accused person, the consequences would be far beyond reparation. The possibilities of wrongful convictions would have been more than obvious.

A criminal trial, in most cases, involves two unequal parties. The State with all the resources on one hand and normal human beings on the other hand. Much as the two sides are considered equal before the law, it should need much emphasis to point out the significant imbalance between the two. In such an emphatically truth, uncontrolled criminal proceedings would yield unquestionable risks of wrongful convictions. It is this reason, which calls for an emphasis on the principle of the presumption of innocence in criminal proceedings.[[141]](#footnote-141)

With the resources at its disposal and powers that it wields, unless the state is tied to some principles, it is likely to abuse its powers. The presumption of innocence, therefore, informs the state that despite its powers, the criminal justice fact finding process should be approached on the conception of the innocence of the accused person. The presumption, therefore, helps in limiting the state actions.[[142]](#footnote-142)

Although the applicability of the right remains the issue of debate,[[143]](#footnote-143) it is important as it limits the powers of the mighty. In normal practice, the presumption of innocence is used as the tool of preventing state authorities or their agents from treating guiltily criminal suspects. In these premises, the presumption of innocence is conceived as a ‘counterweight’ against all the real risks involved in an individualized suspicion.

## 4.2.3 Laws Lifting Bank Confidentiality Erodes the Right to Privacy

Privacy is a fundamental human right, enshrined in numerous international human rights instruments which Tanzania has ratified.[[144]](#footnote-144)It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association.

The Constitution of the United Republic of Tanzania guarantees a right to privacy to every person by respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.[[145]](#footnote-145) However, the Constitution clearly stated that the state authority is empowered to lay down procedure and rules of implementation of the above right, but such rules and procedure shall never prejudice the purpose of this right.[[146]](#footnote-146)

Accordingly, privacy rights prevent the government from spying on people (without cause). The government has a responsibility to protect its citizens, but it often crosses the line when it comes to surveillance. In 2013, Edward Snowden blew the whistle on the NSA’s spying program, bringing the issue of privacy into the spotlight.[[147]](#footnote-147) Presence of laws governing privacy even its encroachment helps to safeguard this right in a right way.

Privacy rights helps to ensure those who steal or misuse data are held accountable. When privacy is recognized as a basic human right, there are consequences for those who disrespect it. While there are many “soft” examples of personal data use, like targeted ads, established privacy rights draw a line in the sand. Without these restrictions, corporations and governments are more likely to steal and misuse data without consequence. Privacy laws are necessary for the protection of privacy rights.[[148]](#footnote-148)

 Privacy rights help maintains social boundaries. Everyone has things they don’t want certain people to know. Having the right to establish boundaries is important for healthy relationships and careers. In the past, putting up boundaries simply meant choosing to not talk about specific topics. Today, the amount of personal information kept online makes the process more complicated. Social media can reveal a lot of information we don’t want certain people (or strangers) to know. Media platforms are obligated to offer security features. Having control over who knows what gives us peace of mind.[[149]](#footnote-149)

Privacy rights help builds trust. In all relationships, trust is essential. When it comes to the personal data given to a doctor or a bank, people need to feel confident that the information is safe. Respecting privacy rights builds up that confidence. Privacy rights also give a person confidence that if the other party breaks that trust, there will be consequences.[[150]](#footnote-150) The Bank Customer relationship is built upon a fundamental trust of confidentiality.

On the other hand, Privacy rights ensure we have control over our data. If it’s your data, you should have control over it. Privacy rights dictate that your data can only be used in ways you agree to and that you can access any information about yourself. If you didn’t have this control, you would feel helpless.[[151]](#footnote-151) It would also make you very vulnerable to more powerful forces in society. Privacy rights put you in the driver’s seat of your own life.

Most importantly, Privacy rights protect your finances. Companies that store personal data should protect that information because of privacy rights. When companies fail to make security a priority, it can have devastating consequences.[[152]](#footnote-152) You can have your identity stolen, credit card numbers revealed, and so on. When you give your financial information to a specific entity, you trust them to respect your privacy rights.

## 4.2.4 Legal Issues under the Prevention of Terrorism Act, 2002

The Prevention of Terrorism Act contains a provision which compels banks to report certain transactions made by their customers if they predict to have connection with terrorism. The Act requires a bank to report to the police and to the authority mandated to supervise and regulate activities of commercial banks that such a bank is not in possession or control of a property owned or controlled by or held for terrorists. Failure by the designated officer of a bank to make a disclosure or submit a report about a suspicious transaction to the police amounts to an offence punishable by imprisonment for a term not less than twelve months.[[153]](#footnote-153)

The above provision provides an ambiguous meaning of terrorist. It is a cardinal principle of justice in Tanzania where there is presumption of innocence until when proved guilty by the court of justice.[[154]](#footnote-154) Therefore, requiring Banks in Tanzania to ascertain themselves whether they do not possess any property or money belonging to a terrorist before even the suspected bank customer has been presented before the court is to contravene the Constitution. The provision of the Act remains confusing when the parameters for the said suspicion of terrorism transactions in the Bank have never been defined by the Act.

Secondly, the definition of terrorism in the Act raises also a number of questions as who is a terrorist. According to the Act, a person commits terrorist act if, with terrorist intention, does an act or omission which; is intended or can reasonably be regarded as having been intended to seriously intimidate a population; seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of country or an international organization.[[155]](#footnote-155) This means that those all who are currently campaigning that the Covid 19 Vaccine are defective and fake are committing terrorism acts and therefore any Bank transaction made by them should be reported to Police.

On the other hand, any person who involves or causes, as the case may be attacks upon a person's life which may cause death; attacks upon the physical integrity of a person; kidnapping of a person is a terrorist.[[156]](#footnote-156) With these provisions it is obvious they create a very wide chances of the police to lift bank confidentiality. These are unnecessary provisions that are likely to be used by police to lift bank confidentiality especially of Bank customers who are sometimes in conflict with the state I n terms of political interest alone.

## 4.2.5 Legal Issues under the Prevention and Combating of Corruption Act, 2007

The Prevention and Combating of Corruption Act empowers certain PCCB personnel to order access of Bank secrecy directly without passing through court process.[[157]](#footnote-157) The Act provides that where the Director-General of the Prevention and Combating of Corruption Bureau (PCCB) has reasonable grounds to believe that a corruption related offence has been committed and a bank account or banker’s books or document are likely to be relevant for the purpose of investigation of such offence, the Director-General may authorize, in writing, an officer of the PCCB to: (ii) require any person who is in possession or control thereof to produce such account, books or document to facilitate such investigation and the disclosure of all or any information related thereto. The Act does not provide the manner through which the Director-General shall test the said “reasonable grounds.”

On the other hand, according to the Act a person, who fails to produce a bank account, books, or document, or fails to permit an officer of the PCCB to scrutinize or to take copies of any relevant entry thereof, commits a criminal offence. The wrongdoer is liable to pay a fine not exceeding TZS 500,000, or to be imprisoned for a term not exceeding two years or to both. Following this punishment several customer accounts are likely to be accessed by the third party (PCCB) for merely speculation of committing corruption. All these are unnecessary provisions guaranteeing lifting of Bank confidentiality in Tanzania.

## 4.2.6 Legal Issues under the Cybercrimes Act, 2015

Cyber Crimes Act is legislation in Tanzania that empowers a police officer to compel disclosure of data that is suspected to be amounting to cybercrime. A police officer in charge of a police station or a law enforcement officer of a similar rank may issue an order to any person in possession of such data compelling him or her to disclose it. The Act makes it an offence to intentionally and unlawfully prevent the execution of an order under the Act, as well as to fail to comply with such an order. Upon Conviction, the penalty is a fine of not less than three million Tanzanian Shillings or imprisonment for not less than one year, or both fine and imprisonment.[[158]](#footnote-158)

This is another provision which gives unnecessary power to lift Bank confidentiality without passing through court process as the Constitution requires. Development of ICT has brought in place a number of cyber transactions that never existed before. Therefore, there must be a careful process to establish whether a certain act amounts to a crime. Since police officers are protected by law in the act they perform on duty and considering that not every police officer has knowledge in ICT capable to detect a cybercrime, the possibility of unnecessarily accessing bank secrecy may be high.

## 4.2.7 Electronic and Postal Communications (Investigation) Regulations, 2017

The rule allows law enforcement officers have a mandate to obtain access to and intercept personal communication.[[159]](#footnote-159) The Regulation provides that the interception may be done by the Director-General of Tanzanian Intelligence and Security Service, or the Director of Criminal Investigations, upon obtaining a warrant from the Inspector General of Police. This warrant will serve as a disclosure order against any person with access to encrypted or protected information.

Intercepting personal communication of an individual is a crime against individual privacy guaranteed under the United Republic of Tanzania Constitution.[[160]](#footnote-160) Allowing the Director-General of Tanzanian Intelligence and Security Service, or the Director of Criminal Investigations to intercept communication of a bank Customer is violation of individual privacy and Bank confidentiality. This is because the law does not put any manner whereby these officials should exhaust before conducting this act.

# 4.3 Legal Issues Related to Court Orders against Bank Confidentiality

The Courts in Tanzania operates guided by provisions of law and sometimes they are required to depart from the available law to another jurisdiction to borrow certain principle of law under the doctrine of precedence if such departure brings more justice. It is unfortunate that of the provisions governing lifting of Bank confidentiality in Tanzania are not well elaborative enough to provide enough procedures when encroaching Bank confidentiality. This remains to be under courts discretion on how a certain lifting of Bank confidentiality should be applied. This will normally depend on the method of statutory interpretation applied by that particular court.

The Evidence Act allows a party to legal proceedings to apply to a court for an order to allow inspection and taking copies of any entries in a banker’s books for the purposes of proceedings. The above Section provides that on the application of any party to a legal proceeding, a court may permit such party to inspect and take copies of any entries in banker’s book for purposes of such proceeding. The provision does not provide further on the procedure and rights of the Bank customers in this regard, this all depend on the prudence of the judge presiding the case.

However, English Courts have made a further step in explaining how encroachment should be done. Lord Diplock has stated that, not every demand which comes from a government department falls into the exception. A bank can be served with a subpoena for the disclosure of certain confidential materials of its customers.[[161]](#footnote-161) If the order is valid then the disclosing bank can comply without committing a breach of its duty of confidentiality. The disclosure must be directly to the court and not to the party in the suit. Further, the bank is under no obligation to inform the customer that disclosure has been made. Neither has any obligation been imposed on the third-party recipient of that information.[[162]](#footnote-162)

However, due consideration by the disclosing bank should still be made in relation to the nature of the confidential information and to whom it is to be made.[[163]](#footnote-163) Public duty to disclose can only be decided on the basis of the facts of each case. The law protects confidentiality; nevertheless, public interest may outweigh this in certain circumstances. It is possible to gain guidance from commercial cases when defining this particular duty to the banking sector.

The provisions of the law providing for third party access to Bank information in Tanzania, as discussed above in this chapter are compulsive by nature. They do not provide for a chance to the Bank to have discretion or justifiable thinking of balancing the two interests in question, namely, Bank interest of Confidentiality versus public interest demanding disclosure of information. This is same position as Lord d Goff of Chieveley suggested in *Attorney-General v. Guardian Newspapers Ltd*,[[164]](#footnote-164) that the public interest may be outweighed by Banks with some other countervailing public interest which favors. This is a lacking position on Tanzanian laws and court’s need to be embraced.

This position suggests that when Banks have received orders from courts or law enforcers, they should have exercise certain prudence before they respond to the order. In balancing the public interest of confidentiality and disclosure, the bank must take extra care in deciding whether the said disclosure is justified.

However, in dealing with cases of Bank confidentiality, courts have been asked to adhere to a number of tests in order to make sure that bank and public interests are balanced. Tanzania courts are not left behind to adhere with these tests. (1) Whether the facts before the court display a situation that a reasonable banker would understand to be one that would be in the public's interest to disclose; (2) Whether a clear, real, and extensive danger to the public exists;

 (3) Whether the sole interest of making public the confidential information is in society's best interest; (4) Whether the bank has carefully considered if its action will be constructive; (5) Whether the bank has considered if there is an alternative course of action against the potential harm that will be caused if the information is not made public; and (6) Whether the bank has weighed and balanced the harm that might flow from consequential disclosure of other information and not merely the harm flowing from the disclosure of the particular information.[[165]](#footnote-165)

#

# 4.4 Conclusion

It is important to note in the above discussion of this chapter that, Bank Confidentiality is protected by various international instruments which Tanzania has mostly ratified them under the ambit of right to privacy. The same right to privacy has been guaranteed under the Constitution of the United Republic of Tanzania. The Constitution also limits state authority by providing presumption of innocence to everyone until proven guilty by the courts of law. However, the laws and court orders limiting bank confidentiality are also subject to certain legal issues which erode the purpose of the entire concept of confidentiality.

# CHAPTER FIVE

**SUMMARY OF FINDINGS CONCLUSION AND RECOMMENDATIONS**

# 5.1 Findings

This research was conducted as a purely doctrinal study with a focus on the laws governing banking confidentiality. A thorough examination of these laws has revealed the following key findings: The global trend is shifting towards greater financial transparency, leading to a decline in bank secrecy regulations. However, financial institutions subject to these reforms aimed at ending bank secrecy are grappling with significant concerns about potentially losing their affluent clients to financial hubs that promise continued confidentiality. This has led them to feel compelled to adhere to the principles of bank secrecy, which encompass independence from external interference and the constitutional right to privacy in banking.

Their apprehension is driven by the fear that the relentless push for transparency and globalization may result in continual access to personal account information, transaction records, and identification details. In the forthcoming chapter, we will delve into the legal challenges that may arise during the implementation of laws and court orders designed to dismantle bank confidentiality in Tanzania.

The accurate interpretation of legal restrictions aimed at dismantling bank confidentiality is of paramount importance to ensure the effective enforcement of such laws while preserving the original intent of upholding the right to privacy as guaranteed by the Tanzanian Constitution. Given the substantial role played by the Executive Branch of the Tanzanian government in both legislating and executing laws, there is a delicate balance to strike, especially in cases related to politics. Privacy is recognized as a fundamental human right, and Tanzania has ratified numerous international human rights treaties that underscore this principle. Additionally, examining the United States' approach to this matter may offer valuable insights.

The Constitution further restricts the powers of the state by establishing a presumption of innocence for all individuals until proven guilty in a court of law. Nevertheless, the laws and court orders that restrict bank confidentiality also face specific legal challenges that undermine the very essence of confidentiality. When authority is granted to executive branches such as the PCCB and DPP, it poses a threat to the entire notion of banking confidentiality. These authorities may compel banks to reveal confidential information about transactions related to customer accounts without adhering to the established court procedures.

**5.2 Conclusion**

This study has discussed on the concept of Bank Confidentiality in Tanzania. The study aimed at analyzing the bank confidentiality in Tanzania by identifying its exceptions and issues related thereto. The decision of the Court of Appeal in *Tournier v National Provincial and Union Bank of England,* confidentiality has been recognized as a fundamental pillar of the banker–customer relationship, existing as an implied term in the banker–customer contract. Every legal system recognizes its importance but fails to address the issue in a comprehensive manner so that the interest can be protected by legal enforcement.

Bank confidentiality is a conditional agreement between a bank and its clients that all foregoing activities remain secure, confidential, and private. This confidentiality rights help builds trust because in all relationships, trust is essential. When it comes to the personal data given to a bank, people need to feel confident that the information is safe. Respecting privacy rights builds up that confidence. Privacy rights also give a person confidence that if the other party breaks that trust, there will be consequences.

Data privacy in relation to banking confidentiality is one of the most obscure types of personal information confidentiality, owing to its traditionalistic character regarding various professional bilateral legal relationships. The duty posed on the banks gives a right of action for a breach of implied contract, or confidence, or occasionally gives redress upon either regarding other tort doctrines, or civil code, or other statutory remedies.

The common Law system has systematically made Tanzania to borrow and apply various English legal doctrines from when common law was made to be one of the sources of laws in the country. These are the body of law developed through judgments of the English courts which made reference to the customs and usage of the English people and then interpreted in courts. By preservation of courts, they remain applicable (when there is no local law or rule) and persuasive laws in Tanzania through the doctrine of precedents.

Through the doctrine of precedence and common law, various legislations have been passed in Tanzania for protection of Bank confidentiality. The Constitution of the United Republic of Tanzania provides for the right to privacy to every person by respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications. The constitution also guarantees the right to presumption of innocence which also protects every person to be considered guilty without passing through court process.

The Banking and Financial Institutions Act provides for the bank’s duty of confidentiality to its customers. Section 48 (1) provides that a bank shall not disclose information relating to its customers or their affairs except in circumstances in which it is necessary or appropriate for the bank to reveal such information. The Act also provides that before assuming his/her position and discharging his/her duties, a director, member of a committee, auditor, advisor, manager, officer or employee of a bank shall make a written declaration of fidelity. The chief executive officer or the secretary of a bank shall witness the signing of these declarations.

The law in Tanzania prescribes penalties and imposes sanctions on bank officers or banks for breaching the banker’s duty of confidentiality. Under the Banking and Financial Institutions Act, it is a criminal offence for an officer of a bank to breach customer confidentiality. The penalty on conviction is a fine not exceeding 20 million Tanzanian Shillings or imprisonment for a term not exceeding three years or both fine and imprisonment.

Tanzania has also adopted various international instruments which protects persons’ privacy. Most of these instruments require no person to be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. This is a call for everyone to have the right to the protection of the law against such interference or attacks. This is a call to all member states of this document to make sure that the right to personal privacy of an individual is guaranteed in every domestic jurisdiction. This should automatically go in hand with establishment of the implementation machinery for protection on this right.

With times there emerged a greater financial transparency which created pressure upon several countries with strict and long-standing bank secrecy laws, including Tanzania to allow certain degree of lifting bank confidentiality. This move was increasingly becoming the targets of international institutions seeking financial accountability to combat international crime and corruption, as well as to curb tax evasion through offshore storage of wealth. There has also been in place significant efforts to raise global awareness of “dirty money” storage in offshore tax havens and private banks. This was made in part through international campaigns for financial accountability that have advocated for reform.

This global campaign and follow up has necessitated reforms on various laws governing criminal and civil investigation in Tanzania to allow lifting bank confidentiality. A global financial transparency has been cited to be very important in improving global financial security of nations which create confidence to business and investment. The main justification of the laws lifting bank confidentiality was to allow smooth investigation of criminal and civil related offences especially in the contemporary ICT world.

The rules of confidentiality and prohibitions against disclosure of data provided under Tanzania’s banking laws do not apply to law enforcement officers carrying out their duties while investigating or searching for information for purposes of criminal prosecution.

Banks or banking staff may be compelled to make disclosures under statutory law or by a court order. Several statutes in Tanzania impose a duty on banks to disclose information about affairs of their customers, namely the Prevention of Terrorism Act, 2002, the Anti-Money Laundering Act, 2006, the Cybercrimes Act, 2015, and the Electronic and Postal Communications (Investigation) Regulations, 2017, among others.

Apart from presence of legislations lifting bank confidentiality in Tanzania, Banks have certain powers which have been practiced for a long time in a banking industry where Bank can disclose customer’s information to the third party without incurring any liability. When a bank notifies its customer and states clearly what it proposes to do and why and obtains an express consent from the customer, there will be no breach of the banker duty of confidentiality. A customer may request a bank to disclose his/her affairs to a third party, for instance, a creditor who may need information about a customer’s trustworthiness or his/her history relating to repayment of loans to the bank providing information.

Bank confidentiality in Tanzania can be lifted also where interests of banks require the disclosure of customers’ affairs.[[166]](#footnote-166) Where a bank needs to protect its interests and this involves the disclosure of a customer’s affairs, it can disclose the information without incurring liability to the customer. Another situation of lifting bank confidentiality is where interests of the public necessitate the disclosure of customers’ affairs., Bank confidentiality in Tanzania can be lifted where trade customs and usages allow the disclosure of customers’ affairs.

On the other hand, Courts in Tanzania have powers to compel banks to disclose information relating to the affairs of their customers. Banks are subject to rules of disclosure where they are parties to litigation or arbitration proceedings. A court order will be served on a bank, compel its officials to appear before a court and produce books, documents or letters containing a customer’s affairs. Likewise, the Evidence Act allows a party to legal proceedings to apply to a court for an order to allow inspection and taking copies of any entries in a banker’s books for the purposes of proceedings.

Despite of the adaptation of common law legal discipline through precedents and the presence of international instruments on right to privacy in Tanzania, the present practice of courts and bank autonomy to balance Bank interest with public interest, does not reflect the purpose mentioned. Even though the constitution under Article 16(2) directs state authority to make guidelines on implementation of the right to privacy without eroding the main right provided in the Act, yet presence of laws empowering certain officials to violate Bank confidentiality is obvious. There are number of legal issues that may be perceived out of this undertaking in Tanzania.

It has been noted in that, the laws lifting Bank confidentiality erodes the noble principle of privity to contract whereby only parties to a contract have rights over the contract. The doctrine has proven problematic because of its implications for contracts made for the benefit of third parties who are unable to enforce the obligations of the contracting parties. Likewise, the laws lifting Bank confidentiality erodes the Constitutional right to privacy and presumption of innocence.

The laws providing for lifting Bank confidentiality in Tanzania are compulsive in nature associated with punishment for anyone obstructing release or access to certain information by third parties to the Banking contracts. This raises an issue of Banks failing to applying the prudence to examine the balance between public interest and Bank interest like in English courts. The compulsiveness of laws lifting bank confidentiality in Tanzania affects as well the courts because depending in principles of statutory interpretation applied by the court certain power of a court may fail to be applied.

**5.3 Recommendations**

The laws that lift Bank confidentiality in Tanzania need to be reviewed so that it includes a procedure and manner how the procedure of lifting should be made. Empowering government officials to violate personal privacy of an individual in the bank with a compulsion of punishment amounts to violation of the right to privacy provided under Article 16 of the Constitution. This is because these laws do not provide any parameter on how certain persons should considered suspects of offences to the extent of breaching their right to privacy.

There exist a need to enact a set of comprehensive data protection and privacy laws in line with the Constitution and international instruments spirit in Tanzania which lack currently. Even though a bill was been in progress since 2014 when the Ministry of Communications, Science and Technology announced that a bill was being developed as part of its cyber security initiative, it has never materialized. Without these legal protections and procedural safeguards in place, the government has few restrictions on how to handle personal data collected through data processing initiatives.

Review of the laws governing lifting of Bank confidentiality in Tanzania so that they involve a process of passing through the court of law which should be given a mandate to decide whether lifting is justifiable or not. This shall help to minimize the power exercised by the state authority on issues of their interest while disregarding Bank –customer relationship interest. The state authority has been applying these laws with high disregard to Bank and customer interest. This can be justified by the manner cases related to Money laundering and Economic Crimes in Tanzania has been handled since enactment of these laws.

Review the Electronic and Postal Communications (Investigation) Regulations, 2017 in order to ensure that its communication surveillance laws, policies and practices especially those empowering security officers to intervene communication adhere to international human rights law and standards and respect the right to privacy. This is because Intercepting personal communication of an individual is a crime against individual privacy guaranteed under the United Republic of Tanzania Constitution.

The above review of the rules must ensure that all interception activities are only carried out on the basis of judicial authorization and communications interception regime complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are intercepted. This shall create trust among Bank – customer relationship.

Amendment of the Prevention of Terrorism Act 2002 should be done in order to provide guidance of the practical definition of terrorism. The current definition of terrorism is vague and hence it can compel Banks to act of Bank customers who are not real terrorists and erode the banking trust that exist. The Act provides for punishment by imprisonment for a term not less than twelve months to any bank official who fails to make a disclosure or submit a report about a suspicious transaction to the police.

 Review the Cybercrime Act 2015 to ensure its compliance with Tanzania's national and international human rights obligations, and in particular the principles of necessity, proportionality, judicial authorization, and oversight in relations to communication surveillance. Ensure that data processing of personal data is conducted in compliance with national and international standards and obligations, particularly with regards to the processing of sensitive personal information. The Act empowers a police officer in charge of a police station or a law enforcement officer of a similar rank may issue an order to any person in possession of such data compelling him or her to disclose it.

# 5.4 The Agenda of Future Research

However, the work done by a researcher, there is still a work to be done on impact of banking confidentiality and how criminals can hide and launder money using contrary’s legal and financial system. So more research can be done. There is a great challenge on bankers to disclose information on how the confidentiality being eroded so far there’s no enough information on how information given to executive are being used or when it comes on being misused

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108. <https://www.iedunote.com/bank-required-to-disclose-information-about-customers>, visited, 15 June 2021 [↑](#footnote-ref-108)
109. Section 48 (1) of the Banking and Financial Institutions Act, supra [↑](#footnote-ref-109)
110. Longopa, E., (1925), “Eroding Banker’s Confidentiality Obligation through Cracking Down Criminality in Tanzania,” Open University Law Journal, 16(1): 36–59 [↑](#footnote-ref-110)
111. *William v. William [1987] 3 All ER 257* [↑](#footnote-ref-111)
112. Section 67 of the Evidence Act, supra [↑](#footnote-ref-112)
113. Section 81 of the Evidence Act, ibid [↑](#footnote-ref-113)
114. [1972] 3 WLR 131 [↑](#footnote-ref-114)
115. Section 83 of the Evidence Act, ibid [↑](#footnote-ref-115)
116. Order XI of the Civil Procedure Code 1966 [↑](#footnote-ref-116)
117. Part IV of the Evidence Act, ibid [↑](#footnote-ref-117)
118. Trust Bank Tanzania Limited v Le-Marsh Enterprises Limited & 2 Others, Commercial Case No. 4 of 2000, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported) [↑](#footnote-ref-118)
119. Order XI Rule 10 of the CPC, ibid [↑](#footnote-ref-119)
120. Order XI Rule 12 of the CPC, ibid [↑](#footnote-ref-120)
121. Order XI Rules 13 and 14 of the CPC, ibid [↑](#footnote-ref-121)
122. 1Order XI Rule 16 of the CPC, ibid [↑](#footnote-ref-122)
123. The Proceeds of Crime Act 1991 [↑](#footnote-ref-123)
124. Section 63A(i) of Chapter 256 (RE 2002) [↑](#footnote-ref-124)
125. Section 63A (2) of Cap. 256, ibid [↑](#footnote-ref-125)
126. Section 63A (3), ibid [↑](#footnote-ref-126)
127. Section 65(2), ibid [↑](#footnote-ref-127)
128. Section 665(3) of the Proceeds of Crime Act, ibid [↑](#footnote-ref-128)
129. Section 56(5), ibid [↑](#footnote-ref-129)
130. Section 35(3) of Chapter 254 (RE 2002) [↑](#footnote-ref-130)
131. Article 62 of the Constitution of the United Republic of Tanzania, supra [↑](#footnote-ref-131)
132. Section 2 of the law of Contract Act, Cap. 345 R.E. 2019 [↑](#footnote-ref-132)
133. Section 10 of the Law of Contract, ibid, the contract requires a free will of parties which signifies freedom to inter into the contract and freedom to end the contract. [↑](#footnote-ref-133)
134. Privity of Contract principle [↑](#footnote-ref-134)
135. Article 13(5), ibid [↑](#footnote-ref-135)
136. Articles 10 and 11 of the Universal Declaration of Human Rights, Article 14 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, (ICCPR) Article 6(d) read together with Article 7(2) of the Treaty for Establishment of the East African Community, Articles 7 of the African Charter on Human and Peoples, supra [↑](#footnote-ref-136)
137. KOMI, T., the Consequences of the Lack of Definition of the Presumption of Innocence in Finnish Law, Undergraduate Thesis, Tallinn University of Technology, 2017, p. 1 [↑](#footnote-ref-137)
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141. <https://thelawbrigade.com/wp-content/uploads/2020/06/Angelo-CLRJ.pdf>, visited 30/07/2021 [↑](#footnote-ref-141)
142. ASHWORTH, A, ibid, [↑](#footnote-ref-142)
143. Jong, F. et. Al., ibid, p. 35 [↑](#footnote-ref-143)
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145. Article 16(1) of the Constitution, supra [↑](#footnote-ref-145)
146. Article 16(2) of the Constitution, ibid [↑](#footnote-ref-146)
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150. ibid [↑](#footnote-ref-150)
151. ibid [↑](#footnote-ref-151)
152. ibid [↑](#footnote-ref-152)
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