EXAMINATION OF THE LAW GOVERNING BANK SECRECY IN BURUNDI

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DECLARATION

I, **NIYOMWUNGERE JUSTINE** declare that this thesis is my original work and has not been presented for a Masters Degree or any other academic award in any university or institutional of learning.

Signature: …….

Date: ……..

APPROVAL

I certify that I have supervised and read this thesis and that in my opinion, it conforms to the acceptable standards of scholarly presentation and it is fully adequate in scope and quality as a thesis in partial fulfillment for the award of Degree of Master of Laws of Kampala International University.

Name of Supervisor……..

Signature……..

Date……..

DEDICATION

I would like to dedicate the success of this study to my parents, **Mr. SIMBANANIYE Christian,** to my brothers and sisters, and all friends who contributed in my journey of studies and subsequently giving encouragement during the development of this study. Their ideas and moral support gave me strength and energy to accomplish this study.

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AML/A	Anti-Money laundering Laws/Act.....79
BANCOBU	Banque Commerciale du Burundi (Commercial Bank of Burundi).....21
BNDE	Banque Nationale de development economique (National Economic Development Bank.....1
BRB	Bank of Republic of Burundi.....1
BSA/L	Bank secrecy act/law.....72
C.P	Code penale (penal Code).....5
CSSF	La Commission de Surveillance du Secteur Financier (the Supervisory Commission of the Financial Sector).....53
EFT	Electeronic Fund Transfer.....73
LFF	Luxembourg for Finance (An agency for the development of the Financial sector).....83
MFI	Microfinance institutions.....1
U.B	University of Burundi.....24
U.G.L.KB	University of Great-Lakes of Kiremba-Burundi.....11
USA	United States of America.....78

ABSTRACT

The principle of banking secrecy under the Penal Code protection is not specifically stipulated and assured by the Burundian law, the purpose of this study was to critically examine the Law governing Bank Secrecy in Burundi. Specific objectives were to: identify the law and policy of the bank secrecy; analyze the applicability of the laws related to bank secrecy; and analyse the challenges related to bank secrecy in Burundi and also from other jurisdictions. The study used doctrinal research methodology based on the library materials involving primary source and secondary source. According to the findings, there seem to be no direct law governing bank secrecy instead as it is provided by Article 250 of the Penal Code, 2009 of Burundi. On the side of the applicability of the laws related to bank secrecy Article 250 requires every director and every employee of a Bank to make a written declaration of fidelity and secrecy before assuming his duties. In conclusion, it is meaningful to note that bridging the gaps arose in secrecy laws requires cooperation of different sectors including the government, legislators, regulators, media, private and community services organizations. This study recommends that in order to encourage effectiveness in bank secrecy, Government of Burundi must be able to strengthen and amend the bank secrecy laws in its capacity, support committed reformers, and strengthen the ability of citizens to monitor public functions and hold leaders accountable for providing safety, effective public services, and efficient use of public resources.

CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background to the Study

Life in banking sector necessitates multiple confidences that go beyond simple inter-banking relations. Certain bank's activities cannot be conceived without secrecy, since they cannot be properly exercised in the absence of banking secrecy. Under the common law, a duty of confidentiality arises from the express or implied terms of the banker-customer relationship.[1] However; banks in offshore financial centres are facing increasing demands from government authorities, such as tax offices investigating tax evasion, and police investigating offences such as money laundering, to disclose account information. Whether these demands come for a domestic or foreign authority, they pose a threat to 'the inviolability of secrecy and confidentiality'.[2]

By 1984, Burundi had a relatively small developing financial sector which is dominated by banking with over 75% of total economy assets. In 2007, there were eight commercial banks, including four with access to private capital. Therefore, on December 31, 2011, formal financial services in Burundi were offered by financial institutions duly authorized by the Bank of the Republic of Burundi[3].

Fortune of Africa reports that there are 10 commercial banks, two semi-governmental institutions, 11 insurance companies, 26 Microfinance Institutions (MFIs) and National Bank of Economy and Development (BNDE). The Bank of the Republic of Burundi (BRB) regulates the financial sector and the insurance sector albeit small, with private and government owned companies, is regulated by the Insurance Regulation and Control Agency which falls under the Ministry of Finance[4].

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[1] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) ('*Tournier's Case*').
[2] Re *Nassau and Trust Co Ltd*, (1977) 1 Bahamas Law Reports 1, cited with approval in *Re Letters Rogatory* (1984) [1980-88] 1 Van LR 90.
[3] Central Bank of Burundi, Annual Reports, 2013, p.114
[4] Deloitte, Burundi Economic Outlook, 2016 p. 78.

However, Government of Burundi faced with serious external and domestic imbalances which requested assistance from the World Bank and the International Monetary Fund to help prepare and implement a reform program with the dual objective of restoring financial equilibration in the short-term, and initiating medium-and long-term structural changes in the economy[5].

The development of the financial system in Burundi during the above crises was to be sett against an economic background characterized by the implementation of radical macroeconomic and sector policies reforms. Hence 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.

The Burundian financial sector in general, however faces several challenges such as the need to strengthen the bank supervisory role of Bank of the Republic of Burundi (BRB), lack of experienced locals to manage the sector, lack of facilities offering capacity building and the need for reforms in the sector to effectively serve the community[6].

Moreover, banking secrecy, which is a broaden form of professional secrecy, is a legal concept under which banking institutions have a duty to keep entrusted information protected. The main legislation of banking secrecy is laid down in article 110 of the *Banking Law of Burundi* and in article 250 of the *Penal Code of Burundi*. Article 177 stipulates that professionals, working in the financial sector, are required to keep the trusted information secret or penalty will be carried out according to either the Civil Code and /or the Penal Code[7].

[5] Burundi National Financial Inclusion Survey, (2012) p. 122
[6] Ibid.
[7] Niyonkuru E, *Criminal liability of the banker for disclosure banking secrecy in Burundian legal system*, University of Burundi, 2014.

Also, professional secrecy or bank's duty of confidentiality in Burundi is an implied term of the contract between customers and their banks. The banks will keep their customers' information confidential[8].

This confidentiality should not only be confined to account transactions but should extent to all the information that the bank has about the customer. A bank will be in breach of its contract with its customer if it discloses information about the account without the consent of the customer. This duty of secrecy does not extend to all the information that the bank may possess but it clearly extends to information about the client's account and dealings relating to it[9].

Although banking secrecy is an emerging economic issue for many countries such as Burundi, the scholarly research on the law governing bank secrecy in particular reference to Burundi is scanty. In this regard, there is need to critically examine the existing laws regulating Bank secrecy in Burundi such that credible recommendations can be made.

Furthermore, in Burundi, banker customer relationship expanded to include almost the majority of the people engaged in banking transactions. Moreover, banking transaction types and functions have expanded to the point that banks have become aware of a great deal of personal information about their clients. Therefore, banker customer confidentiality is a term used to describe how all client information which reaches the bank through the course of the banker/customer relationship should remain confidential and not to be published or disclosed to the general public. Disclosing customer information without their previous acceptance may harm the banking sector[10].

Also in Burundi according to the bank sercey legislation, subject to bank secrecy shall be information that becomes known to the bank in the course of its official activity with its customer, such as information on customer's accounts, transactions made by instruction or in favor of the customer, as well as the customer's trade secret, facts

[8] Ibid.
[9] Ross C, *Principles of Banking Law*, 2nd edition, Oxford, (2005), p 74.
[10] Ibid.

relating to any projects or plans of its activity, invention, sample products and any other information which the customer has intended to keep in secret and that the bank becomes aware or may have become aware of such intention[11].

Therefore, one of the most important and well established rules of banking law is that a bank must observe strict confidentiality about its customer's account. It should be noted that in an ordinary debtor-creditor relationship, there is no duty of confidentiality imposed by law on either party. It depends on the contract made between bank and customer[12].

Moreover, bank secrecy has a duty of the bank to protect the confidentiality of matters pertaining to the relationship of bank and customer ,but bank may be liable to disclose information under one or more of these circumstances ,if: it is compelled by law to disclose the information ; it has a public duty to disclose the information ; its own interests require disclose and; the customer has agreed to the information being disclosed unless it is to the effect of such circumstances as seen in *Tournier v National Provincial and Union Bank of England* [13] where it was held that besides the named conditions there should be unlikely interferes with customer secrecy. If a bank discloses information about a customer in any circumstances other than those described above, then it has acted wrongly and should, as a general rule, be held liable for the reasonably foreseeable consequences of its action. Some banks seem to think it should make a difference if they disclosed the information by accident but it does not. If a bank's carelessness leads to a breach of confidentiality that does not diminish the fact that the bank acted in breach of a fundamental duty it owed to its customer[14].

Although court held that, a bank's implied duty of confidentiality extended beyond information which was secret, and applied to information gained during the currency of the account and derived from it, it did not apply to information which had, as a matter of statutory right, already been made known to the recipient. Since, in the instant case,

[11] Article 177 of Republic of Burundi Laws on Bank Secrecy
[12] Pattenden R., *The Law of Professional client confidentiality*, 2003, p 63.
[13] Ombudsman News (2005) the "banker's duty of confidentiality to the customer ", Issue 45
[14] http://www.financial-ombudsman.org.uk/publications/ombudsman-news banker's duty.htm

the bank would have had every reason to suppose that the trustee in bankruptcy already knew that his caution had been warned off, it followed that it was not in breach of its duty of confidentiality. Moreover, any breach by the bank of express instructions not to give any information to husband's trustee was not actionable; as such instructions would be a breach of the husband's obligation under s 22 of the bankruptcy Act. Furthermore, the claim for damages was in any event flawed in that principal cause of the loss and damage was the bank's decision to call in the loan rather than the alleged breach of the duty of confidence[15].

The duty of secrecy is a legal duty arising of the contract between the bank and customer not to disclose information concerning the customer's affairs without the consent[16]. However, in *Tournier*, the court held that the best instance of a customer's implicit approval for the revelation of confidential information is where he/she authorises the bank to provide a reference.

In addition, a banker is not abound to disclose the state of a customer's accounts except on reasonable and proper grounds such as where the disclosure is under compulsion by law or there is a duty to the public to disclose or where the interest of the bank requires the disclosure or where the disclosure is made by the express or implied consent of the customer[17].

According to Article 177 of the *Penal Code of Burundi 2009*, 'A punishment of imprisonment for a period not exceeding one year or a fine not exceeding 50.000 Burundian Francs shall be inflicted on a person who divulges a secret entrusted thereto in his official capacity, trade, profession or are in conditions other than those prescribed by the law or uses it for his personal benefit or for the benefit of another person, unless the person concerned with the secret allows the divulgence or use thereof. The punishment shall be imprisonment for a period not exceeding 2 years if the perpetrator

[15] *Christofi v Barclays Bank plc*, January 1998 2All ER 417
[16] Bank secrecy Act cap 5 (1970) UK
[17] *Stephen v Euro Bank Limited & another*, march 2003.

is a public servant or an officer entrusted with a public service to whom the secret has been confided during, because or for reason of performing his duties or services[18]

Moreover, the civil obligation of Burundian banks to respect the confidentiality of a client's account arises from three legal principles: the civil right to personal privacy, the contractual relationship between customer and bank, and specific statutory provisions governing banking secrecy. In addition, penal and administrative sanctions apply to breaches of banking secrecy[19].

1.2 Statement of the Problem

The principle of banking secrecy under the Penal Code protection are not specifically stipulted and assured by the Burundian law. This makes the public prosecutors and people who were to be protected by the banking secrecy laws of Burundi not to recognize its benefits because his/her/ its content is not well defined in Banking Laws of Burundi. Indeed, the Burundian doctrine and jurisprudence are shined by the silence in the respect to banking secrecy laws.

However, it is imperative to note that if a banker discloses any information about a customer in any circumstances other than ,where the bank is compelled by the law to disclose the information ,bank has a public duty to disclose the information ,if banker's own interests require disclosure , and where the customer has agreed to the information being disclosed , then it has acted in breach of contract and should as a general rule , be held liable for the reasonably foreseeable consequences of its action.

It is therefore, due to limited information regarding bank secrecy laws and policies in emerging markets that the study will attempt to investigate the application of both international and national laws and policies regulating bank secrecy in Burundi, then the applicable law to bank secrecy is a problem not only in the world's major financial institutions and conflicts of business law, but also for emerging markets like Burundi.

[18] Art 177 of Penal Code of Burundi 2009.
[19] BUYOYA P. *The disclosure of professional secrecy in Burundian legal system*, University of Burundi, 1979

Moreover, the study particularly contributes to the scanty empirical evidence on the law applicable to bank secrecy because, as long as the national law is insufficient.

Moreover, in banking sector of Burundi, there is lack of legislation specifically dealing with bank secrecy only. By virtue of that, there is need to improve the existing law which can be used to handle the issues between the customers and their banks such that credible recommendations can be made.

1.3 Research questions

This research was aimed at answering the following questions:

(i) What is the law and policy of bank secrecy in Burundi?

(ii) How is the applicability of the laws related to bank secrecy in Burundi?

(iii) How effective are the laws related to bank secrecy from other countries?

(iv) What are the challenges of the laws related to bank secrecy in Burundi?

1.4 Objectives of the Study

The study objectives comprised of general and specific objectives:

1.4.1. General objective

The main objective of this study was to critically examine the law governing bank secrecy in Burundi.

1.4.2. Specific objectives

This research was aimed to:

(i) Identify the law and policy of the bank secrecy in Burundi.

(ii) Analyse the applicability of the laws related to bank secrecy in Burundi.

(iii) Make a comparative analysis on the effectiveness of the laws related to bank secrecy from other countries.

(iv) Analyse the challenges related to bank secrecy in Burundi.

1.5 Scope of the Study

1.5.1 Content Scope

This study first examined the existing national, regional and international law governing bank secrecy, and it saw how they have been applied in the cases of Burundi; then it discussed the challenges and the applicability of the laws related to bank secrecy in Burundi; lastly, it also identified the gaps which helped the reasearcher to come up with suitable recommendations.

1.5.2 Geographical Scope

This study was carried out in Burundi. Some of key legislations that were targeted include banking law of Burundi, Penal code of Burundi and the Central Bank (BRB). These legislations are targeted for this study because they have rich information regarding banking sector practices and laws as well as policies regulating it. Also the study reviewed bank secrecy laws of other countries/jurisdictions because they have strong laws and more information related to the study topic.

1.6 Significance of the Study

To academicians and researchers: The study is important to academicians and researchers who wish to determine/know more and update the existing information about the laws governing bank secrecy. The information provided in this study can also be used by lecturers and students of Burundian Universities and other higher institutions of learning most especially in the teaching of commercial law as it seeks to bring about detailed information regarding bank secrecy policies and laws as well as how it has affected micro-and macro economies in particular reference to Burundi.

To policy makers: However, the findings of this study provides a good source of existing literature on the subject and this is very important in the sense that the study can be used as a point of reference by the policy makers hence it will be used as guide for policy makers.

To bank cutomers: This study will also be significant to both national and international customers and their banks as it seeks to provide useful information to make them know

how bank secrecy is governed by the national and international laws and policies thus, they will learn to act in compliance with those laws.

To differen banks: Since there is still inadequate information and literature on laws and policies governing bank secrecy, the findings in this study can be used by different banks in ensuring and improving on the bank secrecy.

To the government: The study will also help Burundian government to comprehend better the challenges related to bank secrecy are insurmountable unless serious collective efforts are taken to avoid them through new laws in the domain. Therefore, the study can be helpful to the government of Burundi as it will act as enlightenment that can also encourage revision in the existing national laws and policies in banking sector.

To the researcher: As a student of law, the researcher as been able to understand what bank secrecy is all about, the content of its legal framework both from Burundi and from different jurisdictions.

1.7 Research Methodology

This study was doctrinal research, based on the library materials involving primary source and secondary sources of data. Doctrinal research is concerned with legal preposition and doctrines. The primary sources of data that the research employed included: the Burundi Anti- Money Laundering and Financing Terrorism Act, 2008; Banking Law, 2003 of Burundi; Penal Code of Burundi (2009). More primary sources of information were the Bank Secrecy laws, Banking Laws, Penal Code etc of other countries/jurisdictions. Other countries (more so the developed countries, like the USA, German, and France etc) were selected because they have strong laws and more information related to the study topic.

The secondary sources that the researcher used included the available literature on bank secrecy most especially in the areas of laws and policies as well as its impact on legal and economic development other countries. These was derived from text books

such as books, articles, working papers, reports and journals by visiting libraries and internet websites on banking laws.

The researcher used doctrinal research methodology because it includes legal concepts and principles of all types of cases, statutes, and rules hence it was fit for the study like this one which is based on examining the legal framework of bank secrecy. Further, doctrinal research explainations makes coherent or justifies a segment of the law as part of a larger system of law.

1.8 Literature Review

A literature review is an evaluative report of information found in the literature related to the selected area/topic of the study.[20] Therefore, for the purpose of this research, on the law governing bank secrecy is very important to identify weaknesses in order to come up with recommendations for better laws and methods of improving the banking sector in Buundi. Hence relevant literatures which are related to the study objectives were selected for this study.

So far, there are few or no studies yet that have been undertaken from Burundi which addresses the legal basis of bank secrecy. The reason is obvious that technology is still new, which is growing now in many developing countries. Here below are some of authors who have written generally about on the bank secrecy and legal challenges facing the legal framework of various countries to combat the on the bank secrecy problems within and outside their jurisdiction.

Friedrich, S and Christine, H[21] observes that banks may not disclose or exploit secrets that were entrusted to them, or to which they received access, solely based on the business relationship with clients. The authors states that, 'Secrets' are understood as any facts known to a limited group of persons only and to which other persons can

[20] A definition of literature review; Available at: https://libguides.library.cqu.edu.au/litreview (Accesed on 1/3/2018).

[21] Friedrich Sommer and Christine Hirsch in Markus Dellinger (ed), *Bankwesengesetz –Kommentar* (2016) s 38 p. 27-40.

either not gain access at all or only with difficulty. To the authors, typical bank secrets include information on the composition of a securities account, bank account balances, confirmed lines of credit, their collateralization and utilization, but also the fact that a banking relationship as such exists (in the latter case except if the customer has made this information publicly available by, for example, including such information on stationery or invoices). The authors further observes that, 'disclosure' means making a secret known, as well as allowing a secret to become known, to a person that did not know it before, 'exploitation' is the economic usage of a secret to the detriment of the client. Therefore on that note as pointed by the author, bank confidentiality is unlimited in time; it therefore applies irrespective of the termination of the business relationship with the client and the client's death or liquidation. To the authors, bank confidentiality ends when facts previously considered a secret have become public knowledge or when a secret has become known to the bank outside the business relationship with a client. Despite the relevance of this study to the current study, the author did not elaborate more on the legal framework of bank secrecy. This makes the study have shallow information for the current study.

J Milnes Holden observes that, at common law, a bank's relationship to a customer is regarded as contractual in nature.[22] To the author, this contractual relationship is complex, having its origins in the customs and usages of bankers. He points out that, this has been referred to as: 'A remarkable feature of the creation of the contract between banker and customer...that the terms of the contract are not usually embodied in any written agreement executed by the parties. On that note, the author points that, there is no formal agreement which provides that a banker must maintain strict secrecy concerning his customers' accounts. The author admits that, Of course, where certain types of account are opened documents concerning specific terms will be executed by the bank and the customer, but even in those cases a comprehensive list of terms is rarely included. In consequence of the lack of express terms, this is an area where

[22] Milnes J.Holden, *The Law and Practice of Banking,* 5th ed (London: Pitman Publishing, 1991), 50.

implied terms are of fundamental importance. As discussed further by the author, there is authority to suggest that terms are implied into the banker customer contract on the basis of business efficacy, and more recently it has been suggested that terms are implied on the basis of necessity.[23] The author concludes that, the implied duty of confidentiality owed by a bank to its customers has been recognized by the English common law for some time. This makes this study relevant for the current study.

Lorena Kern D. in her work viewed the relationship between customer and bank as contractual in nature. Banks were bound not to reveal information about a customer to private parties without the customer's express or implied consent.[24] A bank could be held liable for breach of this implied contract with its customer not to disclose the details of the customer's accounts[25]. Of course, a bank had to produce its records when faced with valid legal process.

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

However, there are some situations where a duty of strict secrecy would clearly be inappropriate. For example it would be absurd that a banker who is claiming repayment of loan or overdraft will be precluded from disclosing information derived from the account or even from other sources. It is an implied term that the banker will not divulge to third persons without the express or implied consent of the customer either the state of the customer's account, or transactions relating thereto unless the bank is compelled to do so by order of a court or the circumstances give rise to a public duty of

[23] Milnes J. Holden *cited the case of: N Joachimson v Swiss Bank Corp* [1921] 3 KB 110 ('*Joachimson*').
[24] Lorena Kern D. *The right to Financial Privacy Act: New Protection for Financial Records*, 1979.
[25] *Harris v United States*, 413 F.2d 316 (9th Cir.1969)

disclosure (e.g. to prevent frauds or crime) or the protection of the banker's own interests require it[26].

Similarly, *Gerard P.* notes that in today's practice it is increasingly becoming evident that the state is intruding more often to the privacy of the general public. According to this study, this affect the banking system because there are now ranges of legal cases in which the police demands or requests to see copies of bank statements, and evidence of bank entries have to pass though the courts. Also according to this study, it was belived that a number of statutes that compel a banker to disclose information are increasingly coming on board. In my consideration of how disclosure affects the banking system illustrates the need to strike a balance between the duty of secrecy and the right to privacy[27].

Although, *David M.* in his work said that the term confidentiality means the keeping of secrecy concerning the customer's account by the banker. Breach of confidence in English Law is an equitable doctrine which allows a person to claim a remedy where there confidence has been breached. A duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where it would be unfair if it were disclosed to others. Breach of confidence gives rise to a civil claim. The Human rights body of different countries including Burundi has developed the law on breach of confidence so that it now applies to private bodies as well as public ones. English Court will recognize a breach of confidence in the following three things: The information has the necessary degree of confidence about it; the information was provided in circumstances importing an obligation of confidence and there was an unauthorized use or disclosure of that information and, at least, the risk of damage[28].

For example, in the case of banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as

[26] Vincent K., *The adequacy of Burundian Banking Law in protecting the Banker and the Customer*, University of Burundi, 2012.
[27] Gerard P., *Law Relating to Banking*, 4th edition, Northwick, Worcester, 1990
[28] David M., *The banker's duty of confidentiality to the customer*, University of Great Lakes of Kiremba, Burundi, 2013.

to his customer's affairs when he is asked to give evidence on them in the witness box in the court of law. Thus, protecting confidentiality cannot be used as an excuse to refuse a witness summons. Furthermore, banks are under no duty to inform their customers about a summons or to obtain their consent to disclose their confidential information[29].

Indeed*, E.P. Elliger and Eva Lomnika*[30] state that economically a person whose calling involves confidential work has to be engaging him at law his discretion can be relied upon in certain cases in the interest of the state. It is treated as being of greater importance than a given agent's duty of confidentiality. Bank secrecy is best explained on the basis of economic policy. The bank has in the effect the detailed knowledge about its customer's financial affairs. The bank acquires all these details because it is the customers pay master and receiver of amount of him or her. Bankers are required to observe strict the duty of secrecy other than in exceptional cases permitted by law for the bank to disclose information concerning the customer's account.

This implies that bankers are supposed to assure their customers at the beginning of bank customer relationship of what the relationship will entail in most cases does not seem to be done in practice yet if done, would promote good banking practices .

This study will therefore put into consideration the effectiveness of the need of informing bank customers about the customer relationship at the beginning of the relationship as a principle of good banking practice.

Joan Wahsley[31] in his book, states that the duty of confidentiality appears to be clear, flexible and reasonable expression of a complex relationship .The law governing secrecy and the right to privacy however does not protect people to carry out criminal banking procedures, but their confidentiality can be maintained on grounds of lawful banking.

[29] *Robertson v Canadian Imperial Bank of Commerce* 1995, 1 All ER 824, PC.
[30] Elliger E.P.,and Eva Lomnica, *Modern Banking Law* 3rd Edition, Oxford University Press, USA, 2002.

[31] Joan Wahsley and Graham Penn, *The law relating to Domestic Banking*, 2nd Sweet and Maxwell, 2000

Ameera Al[32].in his/her work said that there are some confidentiality protection provided to the clients' accounts, deposits, trusts and safe-deposit boxes. It also includes all the information given by the customer to the bank employee through any side conversation during the course of the banker customer relationship.

Therefore, all bank employees are obliged to maintain customer confidentiality despite their job title or years of experience, and it also includes bank messengers who become aware of some confidential information during the performance of their job.

The duty of confidentiality arises only when a banker customer relationship is established but, as Bankes L.J said, the duty of confidentiality does not cease the moment the customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to[33].

Assuming that, it is also obvious that the duty of confidence in the context of banking is not confined to information provided by the customer; any information generated by the defined bank, including impressions and assessments, or any information which comes to it relating to the customer, is protected if it has a confidential quality[34].

J.E. Kelly [35] states that it is impossible to conduct the banker's business unless some disclosures are made to the third parties. According to the researcher, bank secrecy has a qualified duty of secrecy but it is not an absolute one. The researcher gave a realistic discovery since in practice; it is hard to guarantee that disclosure will be completely eroded. The researcher argues that is a necessity to disclose some information regarding the customer's account in banks.

However, this trend can help countries like Burundi to fight against corruption, money laundering and other related crimes like terrorism. However, for the case of Burundi

[32] Ameera AL., *The Bank Customer Confidential Relationship,* 2014. P.8 and 9
[33] See Tournier1924 1 KB 461 at 473.
[34] Ibid.
[35] J.E.Kelly, *Banking of Banking, Second Edition,2003*

there are no/little research which has been conducted in relation to Bank secrecy. This makes bank secrecy literature of Burundi so scarcy/limited.

1.9 Chapterization

This thesis consists of five chapters. The first is the introductory chapter that offers basic information regarding the background of the study, statement of the problem, objectives, and research questions, scope of the study, significance of the study, methodology, literature review and chapterization. The Second chapter reviewed and discussed the laws and policies government of the bank secrecy in Burundi. The third chapter discussed the challenges which affect the laws related to bank secrecy in particular reference to Burundi. The fourth chapter analysed the practicability and applicability of the laws related to bank secrecy in Burundi. The fifth and final chapter gives a summary of research findings that have been obtained from the study. It also offers conclusions and recommendations.

In conclusion , It is clear that the banks' duty of confidentiality under banking secrecy requires the establishment of a banker customer relationship between the bank and the customer, banking confidentiality has been transformed from a mere moral rule into a rule of law, which has been developed into special legislation in many countries. Moreover, the punishment of disclosing confidential information is no longer only civil or compensatory, but now attracts a criminal penalty in many different legal systems such as in Burundi.

The parties involved in maintaining banking confidentiality/scerecy are the banks and their customers. The two parties are required to play their roles effectively in order to ensure secrecy in the banking activities. If banks don't maintain their duty of secrecy unless under exceptional situations such as money laundering practices, bank customers may lose trust in banks and this may result into real losses to bank.

CHAPTER TWO:
EVALUATING POLICIES AND LAWS ON BANK SECRECY IN BURUNDI

2.1 Introduction

Banking secrecy can be defined as consisting in the fact, for people who had knowledge of confidential facts in the exercise or on the occasion of their functions, to withhold them, out of the case or the law requires or authorizes the secret relationship; the obligation is sanctioned by the criminal act that weighs on everyone dealers by State or by profession, some secret information entrusted to them. Banking secrecy; one of the applications of professional secrecy, is part of this secret. The banking law of 23 October 2003 of Burundi obligates the Bank staff to respect banking secrecy without giving a definition. However, bank secrecy or the duty of confidentiality is an implied term of the contract between customers and their banks and building societies that these firms will keep their customers' information confidential. Although this confidentiality is not confined merely to information about the state of the customer's account but extend to all information derived from the account. When cases arose ,judge still proceeding on the assumption without deciding that a banker owes its customer a duty of secrecy and confidentiality, therefore in the other side , when the law and policy contain updated information on important area of law , must be publicize to the society.

Therefore this chapter comprises of the Policies and Laws which are related to Bank Secrecy in Burundi and from other jurisdictions.

2.1.1 Legal definition of Banking Secrecy Laws

Before describing the concept of professional secrecy one should know the definition of the word "secrecy". The word secrecy could be used as either an adjective or a noun. The noun "secrecy" is borrowed from the Latin word "secretus", which itself is a perfect participle of the verb "secernere", meaning to sort out or to separate[1]. Secrecy is defined as: a) the trait of keeping things secret or b) the condition of being concealed

[1] Lasserre Capdeville, Jérôme, ibid. p.20-21.

or hidden[2]. That which is kept hidden is known as the secret. The term secrecy is sometimes distinguished as having certain similarities with the following notions: prevarication, mystery and anonymity.

Prevarication is said to be a lie or a bending of the truth told knowingly to mislead the other person. This differs from the pure meaning of secrecy, even though it is sometimes used by the one who wants to preserve a secret. The second notion, mystery, is sometimes recalled as something that cannot be fully understood by reason or appears to be unknown. Like secrecy, mystery is built on the idea to hide and be incomprehensible. However, where mystery is unknown for everybody secrecy is only unknown for some people. The third concept, anonymity, is described as something unknown or not acknowledged. Anonymity is getting closer to the definition of secrecy and is sometimes said to be a prolonging of secrecy, forming a secret of the secret. Yet, there is a difference between anonymity and secrecy. One can only talk about secrecy if there is: a) information, b) a person giving the information to somebody he can trust and c) a person (the banker or the doctor) who is receiving the information and who is keeping it secret. Secrecy requires intervention by a third person (the banker or the doctor)[3].

A synonym to secrecy is "privacy". The majority of the people want to have some privacy from time to time, and they might not like to share personal information without leaving their consent. It used to be said that one has "to live secret to live happy". Life of today has become more and more transparent and the private sphere is shrinking from day to day. For instance, while talking the bus to work or passing by a certain building, there's a surveillance camera watching every step we take or recording every word we say. The use of the camera is said to be for their and our protection but how much is properly speaking true about that? The secrecy of our lives is getting weaker. Another interesting point of view is that we sometimes give away information knowingly but without our direct consent. For instance: information sent from our mobile phones

[2] *"Secrecy"*definition according to the free dictionary

[3] Lasserre Capdeville, Jérôme, ibid. p.22-23.

can pin point where we are to within a few meters, Internet websites store information about what we like or dislike and credit cards record where we stop and shop and at what hotels we stay in[4].

However, for some reason we sometimes choose to give away information with our consent. This happens when we give up personal information on a more regularly basis by using blogs or social communities on the Internet. Some people would say that they don't really care about this gathering of information, let it be what kind of pasta one likes or where in the world somebody are at the precise moment, but when it comes to more specific and private information, then we become much more aware of the information we give out. The clients also have to be ensured that this information does not leak out to any unauthorized person. The right to respect for private and family life is protected by articles 8 and 12 and protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Commission has, briefly, defined private life as *"the right to privacy, the right to live as far as one wishes, protected from publicity"* [5] For instance, a lawyer cannot help his client if the client doesn't reveal all relevant information. The client on the other hand will only provide this information if he knows that it stays secret. Practicing lawyer does therefore apply professional secrecy within their business. Professional secrecy, or duty of confidentiality, exists in many different situations, for instance between doctor and patient (medical secrecy) or between banker and customer (banking secrecy). The differences between professional secrecy in different fields are specified in the legislation. For instance, solicitors are subject to an obligation of absolute professional secrecy and must not reveal any information pertaining to the client to a third party, whereas bankers, on the other hand, are subject to qualified professional secrecy. The difference between the two absolute and qualified professional secrecy is that, the latter one can be disclosed in some cases, which will be shown below.[6]

[4] Ibid.
[5] Icelandic Human Rights Center, *"Definition of private life"*
[6] Ellinger, E.P., Lomnicka, E., Hooley, R.J.A., *"Modern Banking Law"*, p. 135-136.

Note that banking secrecy should not be confused with business secrecy. A bank is a company like other companies and these companies have different business advantages or business knowledge to approach their business field. For instance, a company doesn't want other companies to know how they use their knowledge to increase their value, which methods they use to decrease the expenses or how to introduce a new product on to the market. This information concerns the banks business policies and is assured by the use of business secrecy. Banking secrecy on the other hand aims at providing protection of clients' information towards third parties, including other departments within the same company[7]. It concerns banks and all other professionals of the finance sector (for example, brokers, investment advisers, etc.).

Hence the legal definition of Bank Secrecy according to the Bank Secrecy law of Republic of Armenia is that:[8] Bank secrecy shall be the information which becomes known to the bank in the course of business relations with its customer, such as customer account information, information on the transactions made upon the instruction of the customer or for the benefit of the customer, as well as trade secret, information on any project, or plans of its activity, invention, industrial design and any information thereon, which the customer has intended to keep confidential and the bank is aware or could have been aware of this intention. This definition from the Bank Secrecy law of Republic of Armenia as been used in this study because the Burundian law does not specfically define bank secrecy.

2.2 Theories Related to Applicability of Bank Secrecy Laws

2.2.1. The theory of the contractual nature of the banking secrecy

According to this theory, it is a contract between a customer and a banker, in which he/she agrees on the conditions, express or implied, was not to reveal to anyone the confidence that has been made. In this legal concept of secrecy, it outweighs the private interest of the client; what makes the crime disappears each time the revelation

[7] Ibid.
[8] Article 4 Banking Secrecy law of Republic of Armenia, 2005

takes place with the consent of the author of the confidence[9]. In addition, banking secrecy does not concern only the entrusted facts, in other words "deposited" confidences between the banker, but still all surprised facts or deducted by the banker himself on the occasion of the exercise of its function[10].

2.2.2 The Theory of Public Order

For the proponents of this theory, the obligation to secrecy is not private. She interested the whole society. Trustees must absolutely be quiet; any circumstances, neither requires, even more compelling, would allow them to escape.The thesis of the contractual nature of the banking secrecy according this thesis, it is contract between customer and banker, in which he agrees, on the condition, express or implied, was not to reveal to anyone the confidence that has been made[11].

2.3 The Nature of Bank secrecy Laws and Regulations

According to Professor Dora NEO on 4-5 December 2014 when/during the Centre for Banking & Finance Law Symposium held at the National University of Singapore[12]; Banks in many countries have a legal obligation to keep customer information secret. This obligation may arise by way of a statute, contract, or a combination of both[13]. He noted that, there are different rationales for the establishment of bank secrecy laws. For countries which enact statutes providing generally for professional secrecy, the predominant aim is likely to be the protection of privacy and confidentiality.[14] Other countries may enact specific bank secrecy statutes for pragmatic reasons: strong bank secrecy laws tend to attract foreign banking business and in turn enhance the competiveness of a country's banking sector and support its growth as a financial centre. Moreover, the bank secrecy obligation sometimes arises in contract, usually by

[9] Encyclopedie Dalloz, Droit pénal III, J-Z, "secret professionnel"
[10] GARCON, 'Code pénal annoté Art 378, p.516
[11] Blondet M., Secret bancaire dans "Chambre criminelle et sa jurisprudence" Recueil d'études en hommages à la mémoire de M.PATIN,P.221,cité par BUYOYA Rose, *De la révélation du secret bancaire en droit positif Burundais,mémoire* ,U.B , Faculté de Droit, Bujumbura,1979, p.12.
[12] Bank Secrecy Symposium held at National University of Singapore (2014).
[13] Ibid.
[14] There are different rationales for the establishment of bank secrecy.

way of an implied term in the contract between the bank and its customers. The leading UK case on this point is *Tournier v National Provincial and Union Bank of England* ("*Tournier*")[15]. The implied term approach taken in *Tournier* and similar cases gives primacy to the contractual intention and expectations of the parties to the banking relationship, which form the basis of the bank secrecy obligation.

Amongst various rationales, privacy and confidentiality are arguably the most important underlying concepts for bank secrecy. Both pragmatic and contractual bases for bank secrecy can ultimately be tied back to concerns of privacy and confidentiality. Where pragmatism leans in favour of protecting bank secrecy for economic growth, this is because of the value that individuals attach to privacy and confidentiality[16].

According to Professor Graham Greenleaf[17], he said that in the case of implied terms, the basis for the bank's duty of secrecy is contractual; but the reason that makes it necessary to imply this term is to give effect to the confidential relationship between the customer and the bank[18].

Bank secrecy laws are more widely accepted than general privacy laws[19]. Many jurisdictions recognise a duty of bank secrecy but not a general right of privacy. Furthermore, recent developments in bank secrecy and privacy laws have taken different paths[20].

Developments in relation to bank secrecy laws have been largely to curtail its scope and to allow or require banks to disclose customer information in an increasing number of situations[21]. The reasons for such curtailment include the rise of terrorism, money laundering, the increased determination of governments to crack down on tax evasion, and new ways of conducting business such as by outsourcing (which require banks to disclose customer information in wider circumstances). By contrast, technological advancement and social change have resulted in proliferation of laws protecting the

[15]*Tournier v National Provincial and Union Bank of England*
[16] Bank Secrecy Symposium held at National University of Singapore (2014)
[17] Professor Graham Greenleaf is a Professor of Law & Information Systems at the University of New South Wales.
[18] Professor Graham Greenleaf; '*Bank Secrecy Symposium held at National University of Singapore'* (2014).
[19]Ibid.
[20] More from Pro. Graham Greenleaf (2014).
[21] Ibid.

right to privacy. Major developments in privacy laws include the recognition of respect for private and family life in the European Convention on Human Rights, and the widespread enactment of data protection legislation worldwide[22].

2.4 Burundi bank secrecy laws and policies

On the side of Burundi there are no specific laws governing Bank sececrcy however, the legal element of the crime of violation of banking secrecy is provided by the article 250 of the law of 22 April 2009 in support on the revision of the Penal Code of Burundi, which requires people to deal by State or by profession in regard to the secrets that they're given, except in the case where they are called to give evidence in court and that where by law to know these secrets. Therefore, the article of the law of Burundi seems to be general to all employers/employees of different sector but not specifically to bankers/bank employers/employees[23].

2.4.1 Legislations of bank secrecy in Burundi

The legal element of the crime of violation of banking secrecy provided by Article 250 of the Law of 22 April 2009 in support of the revision of *the Penal Code of Burundi*, and it is drafted in these terms: 'Bankers must deal by State or by profession in regard to the secrets that they're given, except in the case where they are called to give evidence in court and that where by law to know these secrets. However, incase they revealed financial secrect to the third party with out court orders and customer consent, such person(s) is/are punishable by penal servitude from one month to one year and pay a fine of twenty thousand Burundian Francs. This article meets the principle of the legality of offences and penalties that no offence, penalty cannot exist without having been provided for in a text from public authorities and preventing the citizens of what they must do or not do in paying of criminal sanction'[24].

[22]Confidentiality overlaps with privacy but is not identical to it. Privacy rights are more fundamental in that they precede the obligations of confidentiality. As R Pattenden has put it, "confidentiality requires some privacy, privacy requires no confidentiality".

[23] *Article 250 of the Penal Code of Burundi* (2009)

[24] Ibid.

This has meant the basis in the criminal proceedings related to the violation of a legislative or regulatory text are not contrary to the application of article 177 of the Penal Code Book II without prejudice to disciplinary proceedings[25].

Article 68 of the Commercial Bank of Burundian (BANCOBU) policy, stipulates that: "all executives and officers of the Bank are bound by the obligation of professional discretion for facts and information which they have knowledge in the exercise or on the occasion of the exercise of their function"[26]. Indeed, disclosure of information, all communication contrary to the laws and regulations into force of parts or service to any third party material are prohibited and constitute a serious breach leading to disciplinary penalties without prejudice to the penalties provided by the penal code in this area. In addition, all officers of the Bank are responsible for the proper performance of the tasks entrusted to them.

They need to accomplish them sucking, with diligence and integrity. They must respect the general rules of disciplines in relation to the respect for the secrecy of the work and holding arising from their duties[27].

2.5. The Duties of Bank Secrecy in the Current Banking Trend

It is an implied term of the contract between a banker and his customers that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it[28].

[25] Ibid.
[26] Article 68 of the Commercial Bank of Burundi, Edition of (2014)
[27] Ibid.
[28] *Tournier v National Provincial and Union Bank of England*. (1924).

2.5.1 A brief record of Tournier's case

Tournier had an overdraft with the defendant bank. He had arranged to make payments toward the reduction of the overdraft, but after only three installments ceased to make further payments.[29] Tournier was the payee of a cheque drawn by Woldingham Traders Ltd. Rather than deposit the cheque in his account with the defendant bank; he indorsed the cheque to a customer of the London City and Midland Bank. The defendant bank came to know about the cheque by virtue of the fact that Woldingham was a customer. Once the cheque was presented for payment, the manager rang the appropriate branch of the London City and Midland Bank to enquire as to the identity of their customer. It was learned that the endorsee was a bookmaker, a person who accepts and pays off bets[30].

The manager then rang the employers of Tournier and had conversations with two of the directors. The actual contents of that conversation are not clear, but it was alleged that the manager informed them that Tournier was having dealings with a bookmaker. As a consequence of that communication, the employer refused to renew Tournier's contract of employment. Tournier sued both in defamation and for breach of contract. He lost at first instance and appealed with respect to both heads primarily on the grounds that the judge had instructed the jury erroneously. He succeeded in the Court of Appeal with respect to both claims, the Court ordering a new trial and Tournier eventually won the case[31].

Judge Bankes L.J stated that "In my opinion it is necessary in a case like the present to direct the jury what are the limits and what the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle, I think that the qualifications for customer's information disclosure can be classified under four heads: Where disclosure is under compulsion by law; where there is a duty to the public to disclose; where the interests

[29] See *Tournier v National Provincial and Union Bank of England*. (1924).
[30] A brief record of the facts of above
[31] Ibid.

of the Bank require disclosure; and where the disclosure is made by the express or implied consent of the customer"[32].

He went on to say, "the duty of secrecy does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualifications I have already referred to. Again the confidence is not confined to the actual state of the customer's account it extends to information derived from the account itself"[33].

In the words of Judge Scrutton J, "it is an implied term of banker's contract with this customer that the bank shall not disclose his account or the transaction relating thereto except in certain circumstances. The circumstances in which disclosure is allowed are sometimes difficult to state. I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection (as when a bank is collecting or suing for an overdraft), or to the extent reasonable and proper for carrying on the business of the account as in giving a reason for declining to honour cheques when there are insufficient assets or when ordered to answer questions in the law courts or to prevent frauds or crimes"[34].

Lord Atkins observed that the implied legal duty towards the customer to keep secret his affairs does not apply to knowledge which the bank acquires before the relation of banker and customer was in contemplation or after it ceased or to knowledge derived from other sources during the continuance of the relation. The banks can by express agreement provide for circumstances when the bank may be at liberty to disclose"[35].

[32] The Judgment of Scrutton J, on *Tournier v. National Provincial and Union Bank of England* (1924) 1 KB 461
[33] Ibid.
[34] The words of Judge Scrutton J
[35] Ibid.

2.6. Concept of Proximity and it realtion to BSA

The concept of proximity appears to have been altered slightly for the purposes of the case. Auther like Smith does not focus on the proximity between banker and cautioner but between the cautioner and debtor. Indeed the 'fiction' creates a proximity or special relationship with the banker regardless of whether one actually existed.

The proximity between debtor and cautioner was commented on by Professor Joe Thomson[36] who believes that Smith extends the protection to heterosexual and homosexual cohabitees as well as to husband and wife. The degree of proximity in the relationship may come into question where an engaged couples are not yet cohabiting or where a married couple are no longer living together. George Gretton[37] refers to the situation as "emotionally transmitted debt" but the crux of his article is the consideration of problems in establishing a clear ratio from the case. He outlines four possible ratios only one of which appears to be correct. Certainly the latter three provide too wide an interpretation of the case but the first, more likely to be correct is:

(1) If the relationship between the principal obligant and the proposed cautioner is close, and (2) if the creditor either (a) knows of that fact or (b) should reasonably be able to infer that fact from the circumstances, then (3) the creditor comes under a duty to negotiate in good faith. (4) The creditor's duty in such a case will normally be discharged by ensuring that the proposed cautioner is both (a) warned of the risks and (b) advised to take independent advice. (5) If the creditor fails to negotiate in good faith, then (6) if there is a vitiating factor in the cautioner's consent, and (7) if that factor is connected with the closeness of the relationship, then (8) that vitiation will be pleadable against the creditor[38].

The other three possibilities can be dismissed as follows. In the second ratio, he claims *there is a duty in all contractual matters to act in good faith*[39] which contradicts

[36] Joe M Thomson - Regius Professor of Law - "Misplaced Concern?" SLG (1997) 65(3), p.124

[37] In the article entitled "Sexually Transmitted Debt" at (1997) SLT 195

[38] (1997) SLT at p 196, Column 2

[39] As above

widespread opinion that *Smith* only applies to cautionary obligations[40]. Whereas in the third and fourth ratios, he ignores the paramount necessity to establish that there was in fact a misrepresentation or undue influence exercised. The third ratio requires the cautioner to show they would not have entered the caution had the creditor advised them, which is impossible to establish in a court without considering all the hypothetical outcomes. The fourth almost certainly places an unacceptably heavy duty on the bank and should not be considered if the effect of *Smith* is to be limited.

In the recent Outer House decision of *Braithwaite v Bank of Scotland*[41] by Lord Hamilton, it is indicated that it is not the breach of the duty of care by the bank which provides the actionable wrong.

Instead, it must be established that an actionable wrong exists against the creditor before there can arise an action against the financial institution[42]. It appears therefore that the courts too would prefer the first ratio outlined above limiting the effect of *Smith*[43].

In *Royal Bank of Scotland v Etridge*[44] an examination of the term' independent legal advice' ensued. It was decided that although a solicitor acting for the bank should not advise the cautioner lest a conflict of interests arise, the solicitor acting for the husband may also act for the wife where it can be shown that their financial interests in the proposed transaction are similar.

2.6.1. The principle of Good faith in relation to applicability of Bank secrecy laws

There was no general principle of good faith in contracting and it is unlikely that this has changed[45]. Instead, *it* appears to have extended solely to cautionary obligations and possibly only to cases based on similar facts[46]. The concept of good faith does go

[40] Joe M Thomson - Regius Professor of Law - "Misplaced Concern?" SLG 1997 65(3), p. 127
[41] (1999) SLT 33
[42] This notion of the two stage test is considered in greater detail in the article by Scott F Dickson, entitled "Good Faith in Contract, Spousal Guarantees and Smith v Bank of Scotland" (1998) SLT 39.
[43] See also "Good Faith in Contracting" by Joe Thomson of the University of Glasgow.
[44] (1998) TLR August 17th, dealing with six cases in total
[45] Prior to *Smith*
[46] See "Good Faith and Utmost Good Faith - Insurance and Cautionary Obligation" by ADM Forte.

against the preceding case law which relied primarily on establishing a special proximity between the bank and cautioner. The use of good faith in this way does place the bank in an awkward situation and furthermore complicates the duty of confidentiality. Perhaps a fifth exception might be added although it could be said that it is in the interests of the bank to disclose the information to ensure it will benefit from the cautionary obligation[47]. It remains, though, to be seen how this principle will be applied in the future in Burundi also as a nation.

2.6.2. Problems with the Principle of Good Faith

Problems may arise when we consider that the banks true obligation ought to be to the customer but in circumstances where the bank owes a duty of care to a third party, which will prevail? Where both are customers of the bank, the bank may be acting against the interests of one customer in not disclosing the information and against the interests of the other in advising the former to seek independent legal advice. Where a client consults a solicitor on such issues, ironically, the best legal advice a solicitor could give would be negligent advice, thus safeguarding the position of the client in the event of the security being called up. This is not advisable, as the bank may have a remedy against the solicitors responsible due to the special relationship created between them. Any solicitor would know that in referring a customer to them, the bank is relying heavily upon their competence.

When we consider though, that,

Whereas Parliamentary legislation is prospective only, judicial legislation is both prospective and retrospective, for, by a fiction, it is deemed always to have been the law[48]*.*

The effects could be disastrous; potentially leaving many such cautionary obligations open to challenge.

[47] See the third exception in the Tournier case above.

[48] Article by George L Gretton - "Sexually Transmitted Debt" at p. 65

2.6.3 The Concept of Proximity in relation to application of Bank Secrecy Laws

In *Weir v National Westminster Bank plc*[49] the concept of proximity was used to create a duty of care in a rather unusual circumstance. The plaintiff in the case was not the actual customer of the bank but an agent for a disclosed principal. The duty does not extend to all cases of agency, simply where, by way of a power of attorney, the agent is the sole signatory on the account. It was held that the same duty of care in detecting forgeries would apply to the sole signatory on the account regardless of whether or not they were the actual customer. The proximity was therefore created by the fact that, it was the only signatory which operated the accounts affected by forgery. The concept of proximity is very hard to define and possibly should remain that way for it is a label attached to a practical test used by the courts on examination of the facts of a case to apply a duty of care. This tool is useful in many ways allowing for the application of many different rules as well due to its flexible nature.

2.7 Money laundering and its relation to Bank secrecy in Burundi

Burundi is not considered a significant center for money laundering or terrorist financing. The Government of Burundi has enacted the "*Burundi Anti- Money laundering and terrorism financing act, 2008*" and and it become part to the relevant conventions, but had to commit funding, provide training, implement policies, or demonstrates the political will to counter money laundering practices in the Country[50]. Corruption is a significant problem and corrupt Burundian politicians are adept at devising methods of laundering stolen Burundian assets abroad, enjoying near impunity[51]. AML efforts in Burundi are in their infancy and Anti-Money Laundering Act was apparently approved by the Parliament in 2008. Regardless, the awareness of government officials on AML/CFT issues is extremely low just like the way it is on the side of banking secrecy[52].

[49] (1993) SC 515
[50] *Burundi Anti- Money laundering and terrorism financing act, (2008).*
[51] http://www.state.gov/j/ct/rls/crt/.
[52] Ibid.

The concept of banking secrecy is sometimes, negatively, connected with accounts harbouring dirty money, moneys deriving from illegal activities. Money laundering, in connection with banking secrecy, has been a huge problem from the very first day banking secrecy was introduced by the Swiss Banking Act[53]. To fight this issue, several anti-money laundering and terrorist financing regulations have been introduced and developed around the world.

For example the government of Burundi has adopted a Law 1/02 against Money-Laundering and also in relation to bank secrecy laws and Financing of Terrorism on 4 February, 2008.[54] Burundi has also signed the following universal instruments against terrorism but has yet to ratify them: Convention for the Suppression of Unlawful Seizure of Aircraft (1970); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999) and International Convention for the Suppression of Acts of Nuclear Terrorism (2005). Burundi has also prepared a Draft Penal Code containing a Chapter IV relating to acts of terrorism; the Ministry of Justice and UNODC have prepared amendments to the Draft Penal Code for the legislative incorporation of the universal instruments against terrorism.[55] With all the above, the bank secrecy laws have not be enacted rather they remain unclear or leaning on the other laws governing employees and employers in Burundi.

Burundi is very vulnerable to being used by criminals to launder money since the Bank Secrecy laws are not enacted in Burundi which would help fight such actions. A number of factors expose Burundi to the threat of money laundering due to the absence of Bank Secrecy laws, ranging from geographical to legal.

The Transparency International Corruption Perception Index for 2011 ranked Burundi 143 out of 182 countries.[56] Public and official opposition to corruption acknowledge that

[53] Swiss Banking Secrecy Act of (1934)
[54] UNODC, *A review on Burundi Legal Regime against Terrorism in West and Central Africa* ,October 2008
[55] UNODC, *A review on Burundi legal Regime against Terrorism in West and Central Africa* ,October 2008
[56] Burundi, Transparency International, "*Corruption Perception Index 2011*," 2011

money laundering and public corruption where banking secrecy laws not considered are closely linked.[57] Officials identified a range of [58]predicate offenses underpinning growing money laundering in the country: tax evasion, corruption and misappropriation of public funds, procurement fraud, land speculation, and arms natural resource smuggling. [59]

Article 4 *provides:*

> *All the institutions and persons referred to in Article 2 of this Act shall identify their customers by means of a supporting document and verify their identity:*
> *a) when establishing a business relationship.*
>
> *b) When all occasional transactions, the amount reaches or exceeds the sum of twenty million Burundian francs, the operation is executed in a single or in several operations that appear to be linked. This obligation also applies to any customer who requests the opening of an account;*
>
> *c) When carrying out occasional transactions that are wire transfers;*
>
> *d) When there is suspicion of money laundering or terrorist financing;*
>
> *e) When there is a doubt as to the veracity or relevance of client identification data;*
>
> *f) When an unusual nature of operation has no apparent economic or visible lawful purpose.[60]*

However, this research pointed to a number of structural weaknesses in financial and economic governance that appear not to be related to bank secrecy. Most of the economy is informal and cash based. Increasingly, money launderers seek out the advice or services of specialized professionals to help facilitate their financial operations

[57] World Bank, Burundi: Report on Observance of Standards and Codes FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism, (2011).
[58]Matthew R. Auten, *Money Spending or Money Laundering: The Fine Line between Legal and Illegal Financial Transactions*, (2013). *Pace University School of Law*
[59] Ibid.
[60] Anti Money Laundering and Anti Terrorism Act (2008), Burundi , cap 1

with a point that they do it secretly. This trend toward the involvement of various legal and financial experts, in money laundering schemes without putting focus on Bank secrecy has been documented previously by the Burundi financial; intelligence unit and appears to continue today[61].

Similar issues had also occurred in the case *Republic of Haiti v. Duvalier* [62].

The details of the case are established below:

> Haitian government assets diverted by Jean-Claude Duvalier were likewise disguised by the use of lawyers as intermediaries, who would hold accounts for the Duvalier family. This, according to the UK court that examined the matter, had the added advantage of the use of professional secrecy to avoid identifying the client; the court opinion identified numerous accounts held by law firms for Duvalier and his family, both in the UK and in Jersey. The use of professional secrecy was used to attempt to prevent an inquiry into the nature of the funds.[63]

Such irregularities were also cited in the Common law especially in the case between *Attorney General of Zambia v. Meer Cares, et al* [64], as explained below:

> In a civil recovery suit in the UK against the former President of Zambia, the court, in its factual findings, described in great detail the use of certain lawyers and law firms to distribute and disguise money embezzled from the coffers of the Zambian government. Special corporate vehicles had been set up, purportedly for use by the country's security services, and government funds were transferred to accounts held by those entities.

[61] Ibid.
[62] Cambridge law report [1990] 1 QB 202, 2 WLR 261
[63] *Republic of Haiti v. Duvalier, Cambridge law report* [1990] 1 QB 202, 2 WLR 261
[64] UK Court opinion (2007) EWHC 162 (QB)

> Thereafter, millions of dollars were transferred to the client accounts of certain law firms, from which the lawyers would then make certain disbursals. These disbursals were to other accounts located both in Zambia and in other countries, as well as payments for personal expenses and asset acquisitions for the government officials and their families. As the Court noted in its opinion, there is no reason for his client account to be used for any genuine currency transactions. This is money which has been traced back to [the Zambian Ministry of Finance]. It is a classic example of washing money through [the attorney's] client account to hide its origins and to clothe it with an aura of respectability.
>
> The court also noted an instance in which the lawyer withdrew GBP 30 000, an amount that vastly exceeded the President's annual salary and delivered it personally to the President. Moving the money through the lawyer's accounts disguised the fact that the money originated from government accounts, and further hampered the ability to trace the proceeds. The court noted that the lawyer's involvement did not make any efforts to determine the source or the purpose of the money. Yet the lawyer made no enquiry as to how the President could simply take such a large amount of money. An honest solicitor would not participate in such a transaction without a full understanding of its nature so that he could be satisfied it was lawful. The lawyer did not so satisfy himself because he was unwilling to ask the question because he was afraid of the answer, additionally; the lawyers involved formed foreign shell corporations, which were then used to purchase properties with government money for the benefit of corrupt officials[65].

Although direct evidence may be difficult to obtain due to the budgetary or staff constraints, there is a clear advantage to obtaining such evidence. The use of cash for

[65] *Attorney General of Zambia v. Meer Cares, et al.*,UK court opinion (2007). UK Court opinion (2007) EWHC 162 (QB)

most transactions makes it difficult to have a paper trail, which may help in the detection and investigation in cases of money laundering which would require proper functioning of bank secrecy laws[66]. Therefore, in regard to the above case because Burundi does not have filed cases related to bank secrecy and money laundering, there is a clear picture that enacting of banking secrecy laws would benefit the financial sector.

2.7.1 Enforcement and implementation of Anti Money Laundering issues and Comment related to Bank Secrecy Laws

Although Anti Money Laundering laws exist, there appears to be little political will to prosecute the violators or to commit the resources to investigate possible crimes, particularly those that could implicate high-level government officials. The enforcement of laws in general is hindered by a dysfunctional and corrupt administration and a severe lack of capacity in supervisory, investigative, and enforcement bodies. The Bank of the Republic of Burundi, the country's central bank, supervises and examines financial institutions for compliance with Anti Money Laundering laws and regulations. A law requiring banks to report large deposits or transactions to Authorities is not yet enforced[67].

Neither the Financial Crime Unit of the Burundian National Police nor the Financial Intelligence Unit of the Ministry of Finance has conducted any financial investigations[68]. Burundian law enforcement officials lack training and expertise in investigating financial crimes which in most cases lead to breaching of Bank secrecy. The Government of Burundi should develop an oversight capability and provide sufficient resources, funding, and training to the Financial Crime Unit and the Financial Intelligence Unit in

[66] Matthew R. Auten, *Money Spending or Money Laundering: The Fine Line between Legal and Illegal Financial Transactions*, (2013), *Pace University School of Law* p.22
[67] Anti Money Laundering laws and its effect to Bank Secrcy laws
[68] Article 10 of the Financial Crime Unit of Burundi; (2003)

order to prevent Money Laundering which in most cases leads to failure in ensuring management of Bank secrecy laws[69].

The Government of Burundi should become a party to the International Convention for the Suppression of the Financing of Terrorism, and take steps toward becoming a member of a Financial Security Regulatory Body.

Also for the case of Burundi, enforcement and implementation of issues related to bank secrecy laws do exists in the main legislation of banking secrecy which is laid down in article 110 of the *Banking Law of Burundi* and in article 250 of the *Penal Code of Burundi*. Article 177 stipulates that professionals working in the financial sector, are required to keep the trusted information secret or else penalty will be carried out according to either the Civil Code and /or the Penal Code. This implies that even though there is no law directly governing bank secrecy in Burundi, the above stated aricles do support the enforcement of bank secrecy laws.

2.8 Functionality of the duty of Bank secrecy/confidentiality

The definition of confidentiality is keeping client and business information private. From Burundi, employees/employers are entrusted to treat all information they come across as confidential. It is an employee's responsibility to protect client and customer information. It is an employee's responsibility to keep confidential any information concerning the business in the work place stays at work. No information can be told to anyone outside the work place. No information is to be given to clients/customers without permission from the supervisor. Identity and security checks are followed by staff (with approval from management) before releasing information on request to ensure that the law of secrecy is not broken. Employees can only access files if given permission. No confidential material or files can leave a business. No business dealings can be discussed with clients outside the place of work. A breach of confidentiality will affect business's reputation and cause of financial loss. An employee can be dismissed if

[69] Ibid.

information is given out. Legal may be taken against a person or organization that reveals client and business information.

Secrecy is defined as; except for the purpose of the performance of his function, when so required by law or authorized by the Board, no member or staff of the bank shall disclose any information relating to bank or to any transaction or customer of the bank acquired in the course of employment or the discharge of his duties[70].

Therefore, for the case of Tanzania, every Bank/Financial institution shall observe, except as otherwise required by law, the practices and usages customary among bankers, and in particular, shall not divulge any information relating to its customer or their affairs except in circumstance in which in accordance with the law or practices and usages customary among bankers, it is necessary to the appropriate for the bank or financial institutions to divulge such information[71].

2.8.1 Duty not to misuse confidential information.

Closely related to the duty of secrecy attaching to confidential information is the duty not to misuse it. Banks are sometimes bound by express contract not to use confidential information provided by a customer or potential customer for any purpose other than evaluating a proposed transaction[72]. Moreover, misuse of confidential information without the customer's consent is actionable in equity and in blatant cases may constitute the tort of unlawful interference with the customer's business interests. In extreme cases an injunction may issue against the bank pursuing a course of conduct triggered by the acquisition of the confidential information.

One difficulty, however, is that the duty continues only so long as the information remains confidential: if publicly available there can be no objection to the bank using it. Perhaps the greatest obstacle facing a customer is to demonstrate how the bank misuse occurred. A significant lapse of time may negate the causal link. Moreover, it is not enough that the bank is galvanized into action by its knowledge of the confidential

[70] Section 6 of the bank of Tanzania Act, No.5, 2006
[71] Section 48(1) of the above Act
[72] Financial Law Panel, *Confidentiality Agreements in Corporate Finance Transactions* (London FLP, 2001), 12

information unless it takes a course of action it would otherwise not have contemplated, or unless it uses the actual details of the information to its advantage[73].

2.8.2 Prohibition on disclosure of bank secrecy

According to the banking law of the Burundi of 2003, disclosure of the customer's information by a person, entity (bank), state authority or public official who were entrusted, were informed during their service or work or were provided with this information in the manner prescribed by this Law, shall be prohibited.[74]

However, this Article shall apply to the bank customer to the extent of disclosure of information that refers only to him or her, as well as to banks to the extent the information is provided to the Central Bank during the supervision of banks, as well as to the Guarantee Deposit Fund in cases prescribed by the Law of the Republic of Burundi "On guaranteeing the compensation of bank deposit to natural persons". Indeed, with respect to a certain customer, information constituting bank secrecy may be disclosed when the customer concerned authorizes in writing or publicly announces thereon in court however, this is not strongly enforeced in Burundi. Upon the customer's permission, the information relating to only the customer concerned may be disclosed in regard/respect to the law[75].

2.8.3 The Intercom Services Limited Case

In the Kenyan case of *Intercom Services Limited & Others V. Standard Chartered Bank Limited Civil*[76], the Plaintiff was a customer of the Defendant bank. A cheque was drawn by another customer of the Defendant's in favour of the Plaintiff who instead of paying it into his own account endorsed it in favour of another person who had an account at another bank. On return of the cheque to the Defendant the manager enquired from the other bank to which this cheque had been paid and the information

[73] Banking and Financial Institutions Act (1989), ss. 97, 99 (Malaysia)
[74] Article 110, of the banking law of Burundi, (2003)
[75] Ibid.
[76] Case No. 761 of (1988) E.A. L. R (2002) VOL. 2 391

given was that it was paid to a bookmaker[77].That information was disclosed by the Defendant to third persons and the Plaintiff brought an action against the bank and the holding was that the disclosure constituted a breach of the Defendant's duty to the Plaintiff and that although the information was acquired not through the Plaintiff's account but through the drawer of the cheque, the information was none the less acquired by the defendants during the currency of the Plaintiff's account and in their character as bankers[78].

The facts in this case are that a Mr. James Kanyita Nderitu was a director of 4 companies Intercom Services Ltd, Inter State, Swiftair, and Kenya Continental Ltd[79]. In 1985 Mr. Nderitu received a cheque for 17 Million shillings drawn by Customs & Excise in favour of his company Intercom Services Ltd. And he banked it on the persuasion of the Branch Manager of Standard Bank Westlands and it was common ground or it was conceded that, that cheque represented a substantial amount of money in those days. One Saturday Mr. Nderitu went to Westlands Branch of Standard Chartered Bank and deposited that cheque there. The account was relatively new having been opened some 8 days prior to the depositing of the cheque. The bank accepted the cheque without raising any questions as it appeared to be proper on the face of it. The cheque was specially cleared and on the following Monday the Bank manager telephoned Mr. Nderitu and informed him that his superiors thought the deposit was somewhat unusual and he was requested to provide some documentary proof of payment[80].

Mr. Nderitu brought an action against the bank on breach of the bank's duty to his company by disclosing his account affairs to other parties; bank violated its duty of confidentiality. Visram J. found the bank guilty of violating its duty of confidentiality[81].

[77] Brief fact of Intercom Services Limited & Other v. Standard Chartered Bank Limited Civil Case No. 761 of (1988) E.A. L. R (2002) Vol. 2 391
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Judgment dated 18th day of November, 2002 by Visram J. on the Intercom Services Ltd case.

Banking Act Cap 488 Laws of Kenya directs the manner and situations where information relating to a customer can be disclosed[82]. Credit bureaus duty and conduct has also been outlined in the Banking Act of Kenya, Section 13 and Section 14 of the act deals with confidentiality of customers' information[83].

2.9 Levels of keeping Bank secrecy laws

From Burundi; the main legislation of banking secrecy is laid down in article 110 of the Banking Law of Burundi and in article 250 of the Penal Code of Burund which requires[84];

> ' *Every director and every member of any committee, auditor, advisor, manager, officer and employee of a Bank or financial institution shall, before assuming his duties, make a written declaration of fidelity and secrecy, which shall be witnessed by the chief of Executive officer or the Secretary of the bank or financial institution concerned'.*

Further, Article 177 stipulates that professionals, working in the financial sector, are required to keep the trusted information secret or else penalty will be carried out in accordance to either the Civil Code and /or the Penal Code. Allow articles of the law of Burundi seem too focused on requiring bankers/workers to exercise professionalism while handing customer's information entrust to them.

The Levels of keeping Bank secrecy laws is very clear in sub section (3) of the Banking and Financial Institution Act of Tanizania on exception as otherwise required by the law, nothing in this act shall[85]:

a) Authorized an enquire to be made in to the affairs of any individual customer of a bank or financial institution;

[82] Laws of Kenya the Banking Act Cap 488 and the Central Bank of Kenya Act Cap 491 (This edition incorporated amendments up to 31st March 2004)
[83] Banking Act Cap 488, Laws of Kenya (1989).
[84] Ibid.
[85] Section 48(2) of the Banking and Financial Institution Act of Tanizania no.5, (2006)

b) Prevent the bank of financial institution from releasing information to credit reference bureau in accordance with the regulation issued by the bank;
c) Prevent lengthy Credit Reference Bureau/statistian from providing to any person upon a legitimate business request, a credit report in which case a copy may be given to the customer concerned in accordance with the regulation issued by the bank[86].

The bank shall not, unless lawful required to do so by law reveal to any person:

a) Any information on the affairs of any individual customer of a bank or financial institution obtained in the exercise of its regulatory and supervisory functions whether under this or any other law;
b) A record contained in or related to report of examination or other confidential supervisory information prepared by, on behalf of, or for the use of the bank or any other agency responsible for regulation or supervisory banks or financial institutions; or
c) A record that contains trade secrets, commercial or financial information, furnished in confidence that relates to the business, personal or financial affairs of any person, the release of which could cause competitive harm to such person[87].

The bank may disclose any information to another agency responsible for regulating or supervising banks or financial institutions consequent upon information sharing agreement made pursuant to section 48 whether in Burundi or abroad so long as that information is needed and is to be used for supervisory purpose and that it confidentiality will be maintained[88]. Since the levels of keeping Bank secrecy laws is not very clear and direct in the Burundian law, this explains the reason why the researcher used the Banking and Financial Institution Act of Tanizania in this section.[89]

[86] Ibid.
[87] Sub Section 4 of the said section.
[88] Sub section 5 of the above act.
[89] The Banking and Financial Institution Act of Tanizania no.5, (2006)

Also, since there are no specific bank secrecy laws in Burundi, cases related to Breach of bank secrecy laws in the country are not nationally/internationally filed for public viewing and learning purpose, however, if such cases exist, then they have not been published.

2.10 Procedure of disclosure

Disclosure is an act or process of making known something that was previously unknown. In civil matters disclosure is the pre-trial process by which each party to the action can discover the nature of the others case and obtain the disclosure of documents because that other party is ignorant of facts which are known to the opponent. If bank is a party to litigation, it must comply with disclosure orders[90].

Although the roles have traditionally attempted to limit disclosure, the jurisdiction as far as fraud is concerned has been extended markedly by judicial decisions. According to *Bankers Trust Company v Shapira*[91] the court held that a customer who had been guilt of fraud could not rely on his or her confidential relationship with the bank. It was said that because it is strong thing for the court to make such an order, good evidence is needed for thinking that the money on the account belongs to the plaintiff[92].

Moreover, if a bank discloses a customer's confidentiality in any circumstance apart from that required by law or by consent then it is acting in breach of contract and thus should be liable. This is stipulated in Andrew L. and Graham R.[93] on how a bank that owes an implied duty to its customers should not divulge information about its customers to third parties .Although this duty is eroded where there is a compulsion by the law to disclose some information[94], where there is a duty to the public to disclose, disclosure in the banks interest and where is consent of the customer, disclosure in the banks interest and where there is consent of the customer.

[90] See case: *Sunderland v Barclays Bank Ltd* (1938)
[91] *Bankers Trust Company v Shapira* 1980 WLR 1274
[92] Ibid
[93] Andrew L. and Graham R., *Law Relating to Banking Law*, (1992.) London, p.87
[94] Section 6 of *Evidence (Bank Books)* Act Cap 7

However, for the case of Burundi, all workers are expected to handle customer's information secrect. This implies that, the bank employers/employees may decide to or not disclosure the clients information to the third party since there is no specific laws governing disclosure[95].

2.11 Legal Force on Duty of Secrecy and how is operative

Customers rightly expect high standards from their banks and building societies. In case they discover that their private information has been wrongly divulged to someone else, they can be very unhappy even if the disclosure has resulted in little more than a minor frustration or embarrassment. But even a minor mistake by a bank can lead to significant problems particularly if the customer is running a business because in some cases simple clerical errors have led to serious business losses. The concern in this case is for the bank to look at the consequences of its actions for the customer and to distinguish clearly between "loss" and "distress and inconvenience" which all too often banks fail to do it properly. Even where they accept, they have done something wrong, they often try to settle the matter by offering the customer some money without first assessing either:

a) Whether the customer has experienced a true and reasonably foreseeable financial loss or;
b) The real extent to which the customer has suffered distress embarrassment, or inconvenience[96].

2.11.1 Facts covered by bank confidentiality

Banks may not disclose or exploit secrets that were entrusted to them, or to which they received access, solely based on the business relationship with clients[97]. 'Secrets' are understood as any facts known to a limited group of persons only and to which other persons can either not gain access at all or only with difficulty[98]. Typical secrets include information on the composition of a securities account, bank account balances,

[95] Article 117 of the *Banking Law of Burundi (2003).*
[96] Tyree, A. L., Banking Law in Australia, Butterworths, 1990.
[97] Stipulated in Andrew L. and Graham R., *Law Relating to Banking Law*, (1992), London, p.43.
[98] Defination on Section 6 of the bank of Tanzania Act, No.5, (2006)

confirmed lines of credit, their collateralisation and utilisation, but also the fact that a banking relationship as such exists (in the latter case except if the customer has made this information publicly available by, for example, including such information on stationery or invoices)[99]. While 'disclosure' means making a secret known, as well as allowing a secret to become known, to a person that did not know it before, 'exploitation' is the economic usage of a secret to the detriment of the client[100]. Bank confidentiality is unlimited in time; it therefore applies irrespective of the termination of the business relationship with the client and the client's death or liquidation.Bank confidentiality ends when facts previously considered a secret have become public knowledge or when a secret has become known to the bank outside the business relationship with a client.

In regard to Burundi, both the banks and customers need to take a realistic look at any real losses resulting from the bank's breach of confidentiality[101]. The bank should generally be liable for losses that it could reasonably have foreseen when it disclosed the information. Banks regularly fail to pay proper attention to the true costs that customers can incur as a direct result of the breach of confidentiality. The key therefore, is for both parties to analyze and understand the true effects of the bank's actions.

2.12 Conclusion

Form Burundi, Bank secrecy or bank's duty of confidentiality comes into existence when bank enters into a relationship with a customer; upon whom there is no information revealed to any third party before or after concluding a contract provided the bankers ensure professionalism while handing customers information. This however, does not mean that the duty of secrecy is absolute but it is merely a qualified duty by exceptions attached to it. In this case, the banker's duty of confidentiality is embedded within the principles of duty of secrecy where professionalism is required. That secrecy covers all

[99]Section 48(2) of the Banking and Financial Institution Act of Tanizania no.5, (2006)
[100] Bryan A. Garner, "Black's Law Dictionary", (2004), Published by Thomson West Publishing co. p.497.
[101] Supported by Article 117 of law of Burundi (2009)

information gained through the existing relationship between bank and customer and thus limited to information on the account. However, also banks from Burundi experience threats of terrorism and financial crimes, which call for disclosure for banks to carry on their duties effectively. This is because banks are viewed as potential in bridging such crimes, and in this case this may not be possible if the duty of secrecy is absolute. This calls for revision of the duty of confidentiality by the government of Burundi.

CHAPTER THREE
CHALLENGES RELATED TO BANK SECRECY IN BURUNDI

3.0 Introduction

This chapter comprises of the challenges related to Bank Secrecy in Burundi. The chapter will review the challenges in relation to the bank procedures and Exception of Bank Secrecy laws and its challenges.

3.1 Legal frame of bank secrecy

In Burundi, the principle of banking secrecy, as provided by article 110 of the Banking law of 2003; has been faced with many serious problems. On the one hand, the banking secrecy laws and policies are not so specific and given its non specificity, the banking professionals can not translate merely and simply the legal texts relating to professional secrecy in general in so far as they exist in Burundi. According to Robert Hurrio, bank secrets should be considered has a unique professional secret that are really strong in bank sector of Burundi[1]. Further, different principles whose characters are variables according to the profession in question, these are thus the objects and characters of each profession, as they are concluded and understood by the law and practices that shape the secret"[2].

On the other hand, the field of bank secrecy is still unexplored in the banking laws of Burundi. Indeed, neither the law, nor the doctrine and jurisprudence of Burundi clearly state the bank secrecy laws[3]. First of all, according to the Tournier principles a banker's duty of confidentiality is not absolute. The 1924 case of *Tournier v National Provincial and Union Bank of England* sets out for four areas where a bank can legally disclose any information about its customer. These principles are[4]:

a) Where the bank is compelled by law to disclose the information;

[1] Robert Hurrio., *Le secret professionel du banquier*, (1968) 2ème édition, Burundi, Institut de sociologie, , p.46.
[2] Ibid.
[3] Article 110 of the Banking Law of Burundi (2003)
[4] The case of *Tournier v National Provincial and Union Bank of England* (1924)

b) If the bank has a public duty to disclose the information;
c) If a the bank's own interest require disclosure ; and
d) Where the customer has agreed to the information being disclosed.

3.2 The bank's duty of confidence/Bank procedures

The given information, which should be treated as secret will only by protected by banking secrecy if the client has agreed that it should be so, for instance when, signing the contract. In the Tournier case the implied duty of secrecy arose out of the account relationship between the bank and its customer[5]. However, even though the client has not explicitly expressed that, the given information should stay secret; it is normally presumed that it should be so. Presumption can nevertheless be trusted. To be able to understand the nature of the bank's duty of confidence, one should start with the general principles governing breach of confidence. The leading English case on breach of confidence is *Attorney-General v. Guardian Newspapers Ltd. (No. 2),* where Lord Goff summarized these principles as follows:

> *A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information from others.The first is that the principle of confidentiality only applies to information to the extent that it is confidential[6].*
>
> *The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. The third limiting principle is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure[7].*

[5] Ibid.
[6] Leading English case on breach of confidence "*Attorney-General v. Guardian Newspapers Ltd" (No. 2)(1990) 1 AC 109, 2812*
[7] Concept of the case above

With these principles in mind, it is easier to understand what kind of information that should be covered by the banking secrecy. From the Tournier-case, it was pointed out that the information, that the bank was obliged to treat as confidential, was not restricted to facts that it learnt from the state of the customer's account. It was also said that the bank's duty remained intact even after the account had been closed or ceased to be active. Other information that may be of interest to keep confident is information that the bank acquires in the course of providing non-banking services. All confidential information that a bank keep in its records most be well protected, or the bank might be prosecuted for breach of duty. The bank's liability for misuse of confidential information is in general strict and negligence is not relevant to this type of duty. For instance, in today's reality where information are kept in the bank's server system, the bank is obliged to have the best security system available on the market. Whether the best security system is used goes to the issue of whether the bank has misused the information. It cannot be said in principle if the bank has done everything it could to protect the secrets[8].

Also the Bank secrecy in Burundi is in with what was identified by Hapgood (2017) that, the bank's duty of confidentiality covers all customers' information about themselves and their accounts obtained by the bank, irrespective of the information source and for as long as the banker-customer relationship exists.[9] There are many logical reasons for obliging the banks to keep customers' confidential data private before, during, and after their relationship. First of all, information provided to the bank before the beginning of the contractual agreement is possibly the same information that is provided by the customer after that agreement has been instigated; consequently such information falls under the duty of confidentiality. Secondly, information provided to the bank at any period during the banker-customer relationship does indeed fall under the bank's duty of confidentiality according to the common law definition of confidence.[10] Thirdly, in

[8] '*Attorney-General v. Guardian Newspapers Ltd case*
[9] Hapgood M., 2007, p.150.
[10] Ibid.

practice, there is nothing to prevent banks from submitting an explicit duty to the customer to inhibit the disclosure of specific information, even if such information theoretically is not within the ambit of the bank's duty of confidentiality. Fourthly, the customer's right of privacy must certainly be respected and a most important aspect of a person's rights is the right to keep his/her information private. There is the further possibility that disclosure of any confidential information after the termination of the banker-customer relationship may cause loss or damage to the person[11]. Finally, a customer's confidential information could be of a commercially sensitive nature, and disclosure might adversely affect his/her subsequent business or commercial activities. Given the above factors, it seems that the bank's duty of confidentiality should be maintained indefinitely, even after the customer's death, as long as the law does not indicate a specific time for the termination of the duty. In Burundi, Bankers are required to exercise professionalism while handing the customer's information such all the information provided are kept as a secrect.

A bank's duty of confidentiality is not absolute, and is subject to four exceptions, identified in Tournier:[12] Disclosure by compulsion of law; Disclosure under duty to the public interest; Disclosure under the bank's own interest and Disclosure under the customer's approval.

The first two qualifications mean that the disclosure of a customer's privacy data may be required by law in cases where the public interest prevails, as the bank has no power to avoid the rules of law and will be liable if the revelation does not occur. Disclosure under the public interest has been described as 'the difficult and comprehensive meaning of the Tournier qualification'[13]. These difficulties could be due to a lack of clarity regarding the circumstances which would create exceptions in the public interest. Disclosure under the bank's own interest is the third exception to the

[11] Ibid.

[12] Exceptions, identified in the case Tournier

[13] Ellinger EP, Lomnicka EVA and Hare CVM, *Ellinger's Modern Banking Law* (5th ed, Oxford University Press 2011).p. 135-200

bank's duty of confidentiality identified by Tournier[14]. The fourth qualification in Tournier is the customer's consent, which may be either explicit or implicit. In Tournier, the court held that the best instance of a customer's implicit approval for the revelation of confidential information is where he/she authorises the bank to provide a reference[15]. This approach has been adopted by the banking sector for years.[16] However, it is sensible not to assume that a customer who provides his/her bank details when applying for a credit card is giving implicit approval for the disclosure of confidential information by his/her bank. Tournier has therefore been exposed to criticism in this respect[17]. One of the Banking Committee Report of Burundi (2003) recommendations was that, at the beginning of the bank-customer relationship, the bank should explain and describe very clearly how the banking system works and should invite customers to give or withhold a general approval for their banks to submit opinions on them in response to government enquiries.[18] This however, has also been encougaed in Burundi's banking sector such that the bank customer are informed of how safe and secret their financial information because there are no direct law governing bank secrecy in the country.

Nevertheless, there is nothing to prevent a bank from including in its contract with the customer a term authorising disclosure of information on a customer's creditworthiness[19].

3.3 Exception of Bank Secrecy laws and its challenges

There are various exceptions, limits and qualifications to the basic duty of confidence and contractual confidentiality undertakings contain express exceptions. The limits of the basic duty are to be ascertained in accordance with common sense. It has been held that it was neither sensible nor necessary to impose a duty on a bank to withhold information from a person who the bank would expect to be already in possession of it

[14] As from the case above
[15] Ibid.
[16] Article 250 of the law of Burundi; (2009)
[17] Hapgood, "M *Paget's Law of Banking"*, (1996) 11th ed. London, LexisNexis Butterworths p.124; and also see Chorley L, "*Law of Banking",* (1974) 6th ed. London, Sweet & Maxwell, p.24
[18] As above
[19] Ibid.

under a statutory scheme. The 1924 case of *Tournier v National Provincial and Union Bank of England* sets out the following qualifications where a bank can legally disclose any information about its customer[20] as discussed in details below.

3.3.1 Compulsion by the law to disclose the information

The classic example of compulsion of law is associated with court proceedings. The public interest in the administration of justice has requested that banks reveals information regardless of breach of confidentiality, for what confidence would people otherwise have towards courts if important evidence were withheld.[21] Orders to disclose secret information are mainly made (i) in aid of a third party tracing claim, or (ii) according to a specific statutory jurisdiction[22]. It shall though be noted that this qualification does not permit to be used for "fishing expeditions". There are some case laws on this section. According to one decision, *Bankers Trust v. Shapira*, more known as the so-called Shapira order, this section of qualifications enables a victim of fraud to obtain disclosure against a bank of confidential information concerning customers involved in the fraud[23]. When a disclosure is mandatory by law, the bank does not have to demand the clients to access their information. There are several public-interest grounds where disclosure may be permitted. To mention some of the legitimate public concerns to which bank confidentiality must give way: banking supervision, tax evasion, company fraud, insider dealing, drug trafficking, fight against money laundering and terrorism. A remark, which demands attention, is that no information, which is revealed under these circumstances, becomes available to the public after that they have been disclosed. Those who obtain the information are under a similar duty of confidentiality. A last notice is that this qualification normally is permissive, not mandatory. A bank is normally permitted giving a hint to the police or law enforcement that they suspect

[20] The disclosure is based on the *Tournier's* case.
[21] Cranston, Ross, ibid, p.176, Ellinger, E.P., Lomnicka, E., Hooley, R.J.A., ibid., p. 143-152.
[22] Hapgood QC, Mark, ibid., p. 158
[23] *Bankers Trust v. Shapira (1980), 1WLR 1274.*

that, for instance, certain funds are derived from terrorism before they actually disclose information[24].

These considerations also lead to the conclusion that a bank is under no general obligation to inform the customer that such a request has been made. Public policy also points in this direction, since notification of a customer might hinder a lawful inquiry or actually constitute an offence.[25] However, it may be arguable in particular circumstances that a bank has breached its general duty to exercise care and skill in its handling of request .In particular circumstances failing to use its best endeavors to notify the customer might constitute such a breach.

In the Republic of Burundi, a bank may be compelled by a court order to disclose its customers' information in legal proceedings or by statutory provisions which either require or permit disclosure of confidential information by banks without consent from their customers[26]. These provisions can be broadly divided into three categories: (a) prevention of crime; (b) prevention of tax evasion; and (c) regulation of the financial services industry.

3.3.2 The public Duty to disclose

Duty to the public is the most difficult of Bankes LJ's instances of where a bank might be justified in disclosing information. What does it mean that something must be disclosed to serve the public interest? There is of course a distinction between the public interest and what the public may be interested to know. Sometimes it is in the public's interest to protect the private interest and assure that the private information should stay confident. In other situations, it is in the public's interest to disclose such information.

[24] Cranston, Ross, ibid, p.177-178

[25] Proceeds of Crime Act 2002, s.333.see J.Wadsley, Banks in a bind: Implication of the Money Laundering.

[26] Article 110 of the Banking Law of Burundi (2003)

According to the case *Pharaon v. Bank of Credit and Commerce International SA (in liquidation),* [27] it was held that the public interest in upholding the private interest, meaning the duty of confidentiality between banker and customer, was subject to being overridden by the greater public interest, meaning disclosure of information for the purpose of uncovering that fraud[28]. The Liquidators of *Bank of Credit and Commerce International (*BCCI) SA sued the Bank of England ("the Bank") on behalf of approximately 6,500 depositors who had assigned their claims to the Liquidators for the purposes of the proceedings. The proceedings were commenced in May 1993 but were struck out at first instance by Mr Justice Clarke in July 1997 and this decision was upheld by the Court of Appeal in December 1998. The case was finally allowed to proceed to trial by the House of Lords in March 2001. Since that date there have been regular Case Management Conferences and interlocutory hearings (over 30 in all) dealing with a range of different issues, including two further appeals. The claim is based in the tort of misfeasance in public office (the Bank cannot be sued for negligence). The Liquidators allege that the Bank failed in its statutory duty in its licensing and supervision of BCCI. If the Bank is found liable, then this case will obviously have major implications for regulators in financial and other sectors.

This can be related to Burundi, where the public interest in preserving confidentiality is balanced against other public interests favouring disclosure. This equilibrium does of course reflect a certain type of society. The bank may therefore be in a dilemma: while disclosing information it will affect its reputation in some circles, but to be seen providing a shield for financial crimes it will damage public confidence.[29]

This derogation is the result of legislation. Article 250 of the Penal Code of Burundi stipulates of the case where a person is called to give testimony in court and where the law requires him to know the secrets.[30] Therefore some jurisdictions, some people take

[27] Pharaon and Others v Bank of Credit and Commerce International Sa, Price Waterhouse Intervening; Price Waterhouse v Bank of Credit and Commerce Etc: ChD 17 Aug (1998).
[28] Hapgood QC, Mark, ibid., p. 159, Ellinger, E.P., Lomnicka, E., Hooley, R.J.A., ibid., p. 152-154.
[29] Cranston, Ross, ibid, p.178-179
[30]Article 250 of the Burundi Penal Code, (2009)

the law the right to require banks to disclosure of information or documents covered by secrecy. Before the repressive jurisdictions, private secrets should fade in front of public interest which attaches are the manifestation of the truth: the banker is required to testify in these jurisdictions and, of course, is loosed to banking secrecy[31]. In civil or commercial proceedings, on the other hand, we must distinguish the hypothesis or the banker is heard as a witness and that where he is party to the proceedings: If the banker is heard as a witness in a proceedings where he/she is the principle source of information for the client then he/she testify or provide information about his client with the agreement of the client. However, the banker cannot pretexter without the agreement of his client and bank secrecy to refuse to give information, in case of garnishment carried out on the account of its customer[32].

Indeed, article of the Burundi code of civil procedure stipulates that "when the notification of the seizure is required to release to the bailiff all documents and useful information was the establishment of the Act." So, this text requires the banker, as garnishee, meaning him garnishment, all useful information on his (seized) customer account holdings. In addition, is not different when the tribunal needs to enjoy the economic and financial situation of the debuteur to pronounce the suspension of individual prosecutions and the discharge of the liabilities. In this case, even in the absence of rising text the secret, it is not opposable[33].

An example which is supposed to be covered by this exception is a case where in times of war the where customer's dealings indicate trading with the enemy**.**

A recent example where the exception was said to apply was Lyban *Arab Foreign Bank v Bankers Trust Co*[34], where the defendant bank invoked the exception in relation to disclosure made by it to, and at the request of, the Federal Reserve Bank of New York

[31] The above article
[32] Ibid.
[33] Stated on Article 250 of the Burundi Penal Code of (2009)
[34] [1988] 1 Lloyd's Rep

of payments instructions which the defendant had received from the plaintiff. The court was of the view that the exception was applicable.

The application of the exception may however, be subject to variation in different periods. Thus, in times of war, a bank may be bound to disclose to the authorities information which it receives about customer's dealings with an enemy aliens. Banker L.J doubted that a bank was entitled to disclose to the police information which gives rise to suspicions that the customer was involved in a crime[35].

3.3.3 Information disclosed with customer's authority

Disclosure with the customer's consent needs not many comments. Express consent to disclosure by a customer absolves a bank from responsibility for breach of confident. The case *Sutherland v. Barclays Bank Ltd (1938)* [36] is said to be an example of this qualification. The consent can be either general or qualified. An example of the former case is when the customer accepts that his or her information may be used by other services provided by the bank. When the consent may be valid for a certain time only and / or in specific situations, it is called a qualified consent. However, there are cases where the bank says that the client's consent should not count as a proper one.

This would be the case when the client, while being in one country and at the court, is obliged to tell his or her bank in another jurisdiction to disclose information to a court. However, it shall be understood that it should not matter whether the client has given his consent voluntary or under compulsion of law, because when the client have given his or her consent, the confidence dissolves[37].

According to Central Bank of Burundi report on banking regulations and polices stipulated on Article 250 of the Burundi Penal Code of 2009, Express provisions consenting to the disclosure of information can also be important in documentation for loans[38] where lenders may wish to transfer their interests in the future and in

[35] In *Tournier v National Provincial and Union Bank of England* (1924)1 KB 461
[36] Hapgood QC, Mark, ibid, p. 160
[37] Cranston, Ross, ibid, p.179-181 and Ellinger, E.P., Lomnicka, E., Hooley, R.J.A., ibid, p. 159-160
[38] Ibid.

intercreditor deeds where banks with separate relationships may want to share information on customers.

3.3.4 Bank references

There is little decided case law on what constitutes implied consent in Burundi but rather *Article 177* stipulates that professionals, working in the financial sector, are required to keep the trusted information secret or penalty will be carried out according to either the Civil Code and /or the Penal Code. However, this article does not state when and how bankers should disclose customer's information to another bank. There had been a well-established practice of banks giving references on customers to other banks on the basis of implied consent.

However, *Turner v Royal Bank of Scotland plc* [39]held that the practice was not sufficiently notorious to constitute an implied term of the banker–customer contract. Recent case law shows that bank references should be drafted and given with care to protect the bank. Credit reference agencies collect information on the creditworthiness of individuals and then sell it to subscribers. There is some doubt as to which exception to the duty is applicable. Where the Lending Code applies, it sets out the circumstances in which a bank may give information to credit reference agencies[40].

The implementation of section (4) of the *Business and Employment Act of 2015* of Tanzania; the nine designated banks of Tanzania are obliged to provide information about their small and medium-sized business customers to the three designated credit reference agencies, which are obliged to provide information to finance providers. However, this will only apply if a customer has agreed to these disclosures[41].

Also from Luxembourg, Several exceptions to bank secrecy do exist under which a financial institution has to reveal information to a third party: In connection with the Luxembourg financial institution supervisory body (La Commission de Surveillance du

[39] Jugement *Turner v Royal Bank of Scotland plc*
[40] Ibid.
[41] Section 4 of the Business and Employment Act (2015) of Tanzania

Secteur Financier, CSSF); If provided in specific laws; especially as regards money laundering regulations. According to Article 40 of the Law dated 5 April 1993 on the Financial Sector of Luxembourg, banks are obliged to collaborate with the diferent authorities of Luxembourg in the fight against money laundering and they must inform the State Prosecutor on their own initiative of any fact which may be an indication of money laundering; and also in case of a criminal judicial investigation: Banks are obliged to collaborate and give access to the information to the investigating magistrate[42].

The investigation by a Luxembourg investigating magistrate may be launched by the any magistrate or may be launched on the basis of a request of a rogatory commission by a foreign magistrate in accordance with international bilateral or multilateral assistance agreements. Rogatory commissions in relation to an offence qualifying as a tax swindles (« escroquerie fiscale ») are possible in Luxembourg banks. Tax swindle is a criminal offence for which a Luxembourg investigating magistrate may launch a criminal investigation. Tax swindle is defined by the law dated 22 December 1993 (article 396(5) of the General Tax Law) as a tax fraud deriving from the systematic use of fraudulent manoeuvres in order to conceal relevant facts vis-à-vis the tax authorities or to persuade them of incorrect facts and relating to a significant amount of tax, either in general terms or in terms of the annual tax payable[43].

With regards to taxation, the powers of the tax authorities cannot request any information for the purpose of taxation of a specific c taxpayer to: a financial institution and other professionals of the finance sector[44]; a tax exempt holding company governed by the law dated 31 July 1929; an investment fund.

No assistance is given to foreign authorities in other cases of tax fraud. In case of death of a Luxembourg resident client of a bank, the bank must send an inventory of the financial assets to the Luxembourg tax authorities in charge of levying inheritance tax[45].

[42] Article 40 of the Law dated 5 April (1993).
[43] Article 396(5) of the General Tax Law of Luxembourg (1993)
[44] *Grand-Ducal Decree* of Luxembourg of 24 March (1989)
[45] Ibid.

3.3.5 The Disclosure under bank's own interest

The third qualification is about the bank's interest. *Sutherland v. Barclays Bank Ltd*[46] is one case where the bank's own interest in disclosing confidential information has been in focus, although it is very controversial. The bank dishonored the claimant's cheques on the reasons that they knew that the claimant was betting and that the account had insufficient credit balance[47]. The claimant complained to her husband who, during a conversation with the bank, was told that most cheques passing through his wife's account were in favour of bookmakers. The wife then sued the bank for breach of duty to maintain secrecy. The Court thought the interest of the bank required disclosure and that it had, more or less, the customer's implied consent to reveal information. The bank had an interest in advising the husband that it had good reasons for refusing to meet the wife's cheques[48]. The bank had to do so in order to protect its own reputation. However, some legal authors argue that the bank could have explained the reasons differently, without having to disclose the information about the bookmakers[49]. After all; the claimant did not suffer much damage[50]. It is interesting to know that in the Tournier case, the branch manager was held to have no justification for disclosing the claimant's gambling activities.

From Burundi, banks can disclosure customer's information based on their own interest since there is no specific law governing bank secrecy in the country insteady the law requires professionals working in the financial sector to keep the trusted information secret[51].

3.3.6 Disclosure to group companies

Questions which have arisen is whether a bank is allowed to pass on information about its clients to other groups within the same company, either to use the information for

[46] *Sutherland v. Barclays Bank Ltd, (1938)*
[47] *Sutherland v. Barclays Bank Ltd* case
[48] The above case
[49] Ellinger, E.P., Lomnicka, E., Hooley, R.J.A.,ibid, p.154.
[50] Hapgood QC, Mark, ibid, p.159-160
[51] Article 250 of the Penal Code of Burundi (2009)

marketing purpose or to protect the other groups from the customer's default in repayment of indebtedness.

According to article 250 of the *Penal Code of Burundi*, disclosure of this type is not acceptable if the customer has not explicitly given his or her consent to it[52]. Concerning disclosure in order to protect a group member, it is not explicitly accepted but the Banking Code neither banishes it[53]. Other legal authors have, however, concluded that a disclosure to another branch or subsidiary company would be treated as a breach of duty[54]. In Burundi, there are no recongnised cases related to disclosure of the customer's bank information/secrects to group companies since Article 177 erequires professionals to keep the trusted information secret or or else a penalty will be carried out according to either the Civil Code and /or the Penal Code[55]. This means that, bank secrecy disclosure laws are not enacted in Burundi.

Further more, under *the companies Act, 2012 Cap 110* of Uganda, the companies act authorises their inspection of companies[56]. Section 168 provides that it shall the duty of all officers and agents of any other body corporate whose affairs are being investigated to produce to the inspector all books and document. And for the purposes of this section 168 defines an agent in relation to accompany or other body corporate to include bankers. But the act make it clear in that the company banker are required to disclose any information as to the affairs of any other of their customers other than the company[57].

Concerning marketing purposes, disclosure means a huge profit for the branches. A bank's customers form a specialized market that can be targeted with a degree of precision, since the bank knows almost "everything" about its client. There are two points of view in this matter: On the one side, a disclosure would interfere with the

[52] Ibid.
[53] Hapgood QC, Mark, ibid, p.161
[54] Ellinger, E.P., Lomnicka, E, Hooley, R.J.A., ibid, p.154-156
[55] Ibid.
[56] Cap 110 of companies Act, 2012 of Uganda,
[57] Section 168 of companies Act, 2012 of Uganda,

concept of keeping information secret, on the other hand, some banks argue that such disclosure is part of the bank's interest and would therefore be acceptable.

3.3.7 Disclosure to Credit Reference Agencies/Bureau for Legal Issues

Internationally, the development of banking, and in particular the growth of Electronic Fund Transfer, makes it possible for banks to execute increasingly sophisticated analyses of their customers' saving and spending habits, enabling banks to market their own products more effectively and also providing a potentially very valuable source of marketing information for Credit Reference Agencies. Scant attention has been paid to some significant issues arising from this situation, namely the ambiguity surrounding the disclosure and exchange of customer data with the Credit Reference Agencies and whether these disclosures and exchanges fall within the bank's interests or the public interest, and whether they are subject to the customer's approval[58].

Avery good example of the Credit Reference Bureau system in East Africa is the one which was introduced in Uganda which permits banks or other money lenders to provide information of a borrower to another bank or money lender. Credit Reference Bureau is new credit applications that are being designed to enable banks to collect relevant data about existing and potential borrowers. One of the fundamental aspects of running a Credit Reference Bureau is to ensure integrity of information. In Uganda, the first Credit Reference Bureau is a product of the Financial Institutions Act of 2004 that mandated Bank of Uganda to establish it in an effort to raise the quality of lending activities in the country's financial sector. Under this new scheme, the Credit Reference Bureau will provide timely and accurate information on potential borrower's debt profile and history of repayment. It compiles records of performance of individual and businesses and provides relevant information to potential lenders. Therefore, where a

[58] Wadsley J and Penn AG, "*The Law Relating to Domestic Banking",* (2000) 2nd ed. London, Sweet & Maxwell, pp.137-199; and also see Ferretti F, 'Consumer credit information system: A critical review of the literature too little attention paid by lawyers?', (2007) 23 *European Journal of Law and Economics p.*71-96.

banker discloses information about his customer under this new scheme does not breach his duty of confidentiality.

3.4 International Legal Basis of the Bank's Right to Disclose Confidential Information to the Credit Reference Agencies

Futher on the side of the Electronic fund transfer system, confidentiality is violated when a customer's information is, without legal authority, made available to and exchanged by a third party who is not a party to the Electro fund transfer transaction, for goals other than those required to achieve the transaction. These goals other than those required to achieve the Electronic Fund Transfer transaction could be the exchange and disclosure of customer data to the Credit Reference Agencies.

Credit Reference Agencies are self-governing institutions which obtain and collect various financial data about both customers and businesses. They also collect and issue records of individuals' financial affairs. There is no doubt that disclosure of customers' private data to the Credit Reference Agencies is not mandatory or obligatory and that it occurs on a voluntary basis. There needs to be an examination, based on the results of the first analysis, of the actual function of the Credit Reference Agencies in order to discover whether they are implements of the public interest[59] or whether they merely supply services in the interest of the banks; also whether proposals for Burundi laws apply to all the different subjects that consumer credit recording entails. A connected argument is that data credit exchanges through Credit Reference Agencies are executed in the interest of the parties involved. Assuming the validity of Credit Reference Agencies services, introducing worthwhile business would indeed be in a party's interest. However, the best argument is that if the Credit Reference Agencies evolved procedures similar to those of the private sector institutions such as banks, an evaluation of the right compliance of consumer credit recording with the necessities of data protection would result in better regulation. If Credit Reference Agencies services

[59] Ferretti F, 'Consumer credit information system: A critical review of the literature too little attention paid by lawyers?', (2007) 23 *European Journal of Law and Economics p.*71, p.72.

worked in a manner similar to that of government institutions and under a government umbrella then they would serve a public interest. There is a difference, however, between an action which is in the public interest and an action which is obligatory.[60] It seems that Credit Reference Agencies do not operate in the public interest and therefore banks cannot justify the disclosure of customer's private information to the Credit Reference Agencies on public interest grounds, because in this context the public interest applies only to matters involving the safety of the state or the prevention of criminal activity.

It is important to assess the functions of Credit Reference Agencies in order to ascertain whether the existing law sufficiently defends against one interest prevailing over the other. At the very least some attempt should be made to find a balance between the interests of the parties involved. In the final analysis, Credit Reference Agencies are private organisations working under government regulations. Thus, the next issue is whether banks are pursuing their own interest in their justification of disclosure of customer data to Credit Reference Agencies. Disclosure under the bank's own interest is subject to wide interpretation and therefore, the bank could justify any disclosure under its own advantage or interest[61]. There is no general acceptance of disclosure under the bank's own interest, unless it relates to the public interest and not only that of the bank, since such qualifications may offer the bank opportunities for abuse.[62] The banks therefore have no right to disclose information to the Credit Reference Agencies on the basis of the bank's own interest. With regard to Credit Reference Agencies as 'private organisations', it is clear that the existing law is insufficient to protect customers against the disclosure of private information and against Credit Reference Agencies acting in their own interests. This then leaves banks dependent on customer approval, which could be either express or implicit[63].

[60] Howells G, 1995, p.349.
[61] (Alhosani W, 2012, p.16).
[62] Cranston R, *"Principles of Banking Law",* (2002) 2nd end. Oxford University Press, pp.174-176

[63] As above

There are two types of customer data, positive and negative. The bank's right to disclose private data belonging to its customer differs according to the data type. The Lending Code 2012 of Luxembourg permits the bank to pass negative information without a customer's approval,[64] although, the customer must be given notice of the release of that information at least 28 days before the disclosure is made. Within this period, the customer must be given clarification of the ways in which this negative data might affect his/her right to obtain credit. This 28 day period will allow the customer time to make repayments or come to some arrangement with the bank before negative information is passed to the third party. Conversely, the customer's approval must be obtained before the bank provides positive information in a reference. Nevertheless, the Lending Code 2012 fails to stipulate whether the approval required of the customer should be express or implicit. As seen above, the law has been changed and the bank has no right to disclose or exchange customer's confidential information by relying on the customer's implied consent[65].

In practice, the banks have a right to pass and exchange their customers' confidential financial data by giving facts about the customer in terms of his/her capacity to enter into and fulfil a specific financial commitment. These disclosures and exchanges fall completely under the general terms and conditions of the banker-customer contract and are subject to the customer's general approval[66]. However, these general terms and conditions of the customer contract leave the customer without any real option to accept or reject exchange and disclosures of his/her data, because rejection by the customer to those terms and conditions will cause the banks to refuse to open an account with him/her. It would be salutary to bring the sophisticated electronic technology involved in personal data exchange into the ambit of a data protection regime. As a consequence, the customer data subject to transfer would not be available to the public and transfers would be made using secure encryption.

[64] Lending Code of Luxembourg (2012)
[65] Ibid.
[66] Tribunal d'arrondissement de Luxembourg, ibid

3.5 The Legal Basis of the Bank's Right to Disclose Confidential Information in Burundi.

The Legal Basis of the bank's right to disclose confidential information according to the Burundi legal systems is Under the Anti-Money Laundering and Terrorism Financing Act, 2008 of Burundi.

This act may allow disclosure of information. On 2nd October 2008, Burundi joined its East African neighbours by passing a law against money laundering. The Anti-Money Laundering and Terrorism Financing Act, 2008, which came into force on 1st November 2008, provides a firm legal avenue through which the Government and key role players in the economy works together to combat money laundering and related crimes.[67] Article 1of this Act says that the purpose of this act is to the fight against money laundering and terrorist financing.

It helps support the international effort to fight against all forms of terrorism, to address the sources of funding related thereto and money laundering in the context of international conventions ratified by Burundi.[68] Therefore disclose can be done under the *Anti-Money Laundering and Terrorism Financing Act, 2008* as means of fighting money laundering in the country and the entire East Africa.

From Uganda, disclosure is support under the anti terrorism act of 2005.The Anti Terrorism act[69] permits disclosure where there is reasonable belief of terrorism. Thus the act provides:

> *a person not withstanding any restrictions on disclosure of information imposed by contract or law, disclose to the director of public prosecution or police officer or other public officer authorized in writing by the direct of public persecution, a suspicious or belief that any money or other property is on is delivered from terrorist funds or any matter on which such a suspicion or belief is based*.

[67]Healy, A Improving Global AML/CFT Compliance:.2011

[68]Law N 1/02 OF February (2008). Combating money laundering and terrorism financing,2008, Burundi

[69] Section 15, of 2005

This section even permits bankers to disclose their customer information where they suspect any terrorism arrangements with their funds. However, in practice, there is no known evidence where bank was compelled to disclose its customers account information on suspicion of the customer involving in terrorism.

3.6. Observations on the implementation of the articles of Burundi under review

The authorities of Burundi have confirmed that a conviction for a predicate offence (independent offence) is not required for the investigation and prosecution of laundering of funds resulting from breach of bank secrecy laws. Similarly, where a person has been convicted for a predicate offence, he or she may also be investigated for laundering of funds where abank may be reqired to disclose the customer bank information to aid investigations. Act No. 1/12 of 2006 applies the laundering of funds to all predicate offences, in accordance with article 23, subparagraphs 2(a) and (b), of the Convention. Predicate offences committed outside the territory of Burundi are not explicitly covered; however, the authorities of the country have confirmed that in cases of suspected commission of a predicate offence outside the country, a prosecution may be brought for laundering of funds in Burundi even if the person has not been convicted for the predicate offence by a court in the other country (article 23, paragraph 2(c))[70].

In Burundi, if not prevented, money laundering can undermine the integrity of Burundi financial institutions and thus public confidence in the country's banking industry, undermine financial stability and cause highly destabilizing financial flows across borders[71].

[70] Review of implementation of the United Nations Convention against Corruption p 4.

[71] Burundi Direct Report (2010) Observance of Standards and Codes-FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism, pg, 25

3.7. Law enforcement cooperation

3.7.1. Observations on the implementation of the bank secrecy

Burundi has no legislation on law enforcement cooperation; however, the Protocol on Judicial Cooperation to the Pact on Security, Stability and Development in the Great Lakes Region contains provisions on the subject. Burundi is unable to combat corruption using modern technology; the Anti-Corruption Brigade noted in particular that it does not have an information technology specialist[72]. Meaning bank secrecy laws in Burundi are also still pending and they require to be amended.

3.7.2 Capacity-building

Most of the entities involved in combating corruption indicated the need for training on many aspects of combating corruption. Such training must cover a wide range of subjects relating to the implementation of laws, investigations and prosecutions relating to corruption. In particular, the need for training in economic and financial investigations and in international cooperation in criminal matters (extradition, mutual legal assistance and law enforcement cooperation) was highlighted. Priority for such training should be given to judges and prosecutors of the Public Prosecutor's Office and the Anti-Corruption Court as well as members of the Anti-Corruption Brigade, and could later be extended to other bodies[73]. This implies that if the laws governing Bank secrecy were strongly in Burundi, fraud would be delet with in aprofessional manner.

3.8 Conclusion

This chapter discused the qualifications which are also the challenges related to breach of the duty of banking confidentiality/secrecy which are regularly treated as those spelt out in the judgement of Banks LJ in the Tournier-case. These challenges/qualifications, which are almost universally regarded in the jurisprudence as *exceptions to the duty*, are incorporated as section 13.1 of the well-known *Banking Code* of Scotland. The Banking Code is a "good banking code of practise", formed in 1992 by the British Banker's Association, the Building Society's Association and the Association for Payment

[72] Section 7 of Burundi Anti-corruption Act.
[73] Section 12 of the above Act

Clearing Services. However, for the case of Burundi disclose mostly supported by the Anti-Money Laundering and Terrorism Financing Act, 2008 where disclosure may be done for security puposes. Also for the case of Burundi, the main legislation of banking secrecy is laid down in article 110 of the *Banking Law of Burundi* and in article 250 of the *Penal Code of Burundi* stipulates that professionals, working in the financial sector, are required to keep the trusted information secret or else penalty will be carried out according to either the Civil Code and /or the Penal Code. The qualifications which are challenges on side of managing banking secrecy where disclosure of banker's secrets may be made to the third party are: (i) where disclosure is under compulsion of law, (ii) where there is a duty to the public to disclose, (iii) where the interests of the bank require disclosure and (iv) where the client had consented, even implicitly, to disclosure[74].

[74] Conclusion based on chapter 3.

CHAPTER FOUR

APPLICABILITY OF THE LAW RELATING TO BANK SECRECY

4.0 Introduction

This chapter discusses the applicability of the law relating to bank secrecy in Burundi and also from other jurisdictions. Therefore, the chapter discusses the Nature of the Banker and Customer Relationship, when the banker-customer relationship starts, the obligations owed by a bank to its customer, the Bank Secrecy Laws and Regulation, Nature of Banking secrecy Laws and policies of other countries, the position of other countries in regard to applicability of Bank secrecy laws and then finally the Conclusion of the chapter.

4.1 The Nature of the Banker and Customer Relationship

The nature of the banker-customer relationship defines the obligations which arise from it. The traditional view has been that the bank is not the custodier of the customer's money[1] nor is the relationship fiduciary but of debtor and creditor.[2] In the case of *Joachimson v Swiss Bank Corporation*[3], it was examined in detail and held that the relationship was primarily contractual in nature[4]. As Paget notes, *"It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or bankingservices"*[5].

If the relationship is of a contractual nature, then understandably, the terms of the contract signed will govern the relationship between the two and the banker will be obliged to follow the customer's mandate[6].

The banker-customer relationship is an agency contract and the element of privacy stems from this contract. Generally, an agent is under a duty of care and privacy to his

[1] *Royal Bank of Scotland v Skinner* (1931) SLT 382
[2] Foley v Hill (1848) 2HL Cases 28
[3] (1921) All ER 92
[4] (1921) All ER at p 100 per Lord Justice Atkin
[5] Paget at p 110
[6] However, this subject to certain exceptions, some of which were illustrated above.

principal.[7] The bank's duty of confidentiality implies a legal obligation to maintain the customer's information securely. The case of *Tournier v National Provincial and Union Bank of England*[8], identified the principles of a bank's duty of confidentiality. The Tournier principles, however, left some issues unconsidered. The banks' duty of confidentiality is implied by the claim that it is difficult to set general rules dealing with breaches of confidentiality. In view of the intense competition within the sector, a bank's profitability depends on its ability to maintain its reputation and inspire its customers with confidence[9].

Confidentiality is implied therefore from the very beginning of the banker-customer relationship. Furthermore, the bank's obligation of confidentiality is a legal one, and banks have recently started to include in their contracts with customers terms dealing with confidentiality under different headings, such as the use of customers' personal information, personal information, or simply by reference to term confidentiality.[10] Thus, confidentiality has become an explicit legal term in the banker-customer contract.
In compliance with the provisions of the Law n°1/017 of October 23rd, 2003 stipulating the regulations of Banks and Financial Institutions in Burundi in accordance to management of Customer's bank information, banker-customer relationship is stated and guaranteed in law.[11] However there are no directed satute or cases related to the banker-customer relationship in Burundi since there is no direct Bank secrecy law in the country.

4.2 When the banker-customer relationship starts

A duty of care is owed to the customer when the banker-customer relationship begins. A banker does not owe a duty of care to every person who passes through his doors yet at the same time, special circumstances can lead to the relationship arising where

[7] *Supra Note 194.*
[8] Case of *Tournier*
[9] Ibid.
[10] Spielmann, Dean, *"Le secret bancaire et l'entraide judiciaire international pénale au Grand-Duché de Luxembourg"*, p. 24
[11] The Law n°1/017 of October 23rd, (2003) of Burundi

there is no bank account. In *Great Western Railway v London and County Banking Co.*[12], Lord Lindley opined that,

"I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank"[13].

However, in *Woods v Martins Bank Ltd*,[14] despite the fact that the plaintiff did not have an account with the defendant bank on the date in question, Justice Salmon held that he was in essence a customer of the bank. The court decided that there had been a special relationship created when the manager had agreed to provide financial advice to Woods:

"No doubt the defendant could have refused to advise the Plaintiff, but, as he chose to advise him, the law in these circumstances imposes an obligation on him to advice with reasonable care and skill." The fact that he did not as yet have an account with the bank was immaterial. What was material was that the manager had acted in his capacity as manager of a bank when advising Woods, and that the bank advertised itself as an institution which would engage in such activities.

From Burundi, the Banking Laws binds all financial entities regulated by the Central Bank of Burundi to absolute secrecy with respect to clients' personal and account-related information, and provides that banking secrecy can be lifted in only very limited circumstances since there is directed bank secrecy law. However, since the enactment of the Banking Law, cross-border banking services have evolved substantially. The banking sector has become a powerful player in cross-border transactions and a new era of global monitoring and supervision has dawned, in which the sector is continually fighting against the criminal and unlawful use of the worldwide banking network. The Burundian authorities have managed to resist pressure from the global community to enact the Banking Secrecy Laws. However, new laws and regulations have been gradually enacted and special commissions have been established (ie, the Special

[12] (1901) AC 414
[13] As above, at p 425.
[14] (1958) 1 QBD 55

Investigation Commission and the Banking Control Commission) to combat money laundering, tax evasion and other forms of criminal activity in the country. This all is done to build a strong a banker-customer relationship such both parties enjoy bank service and protected by the law.

4.3. The obligations owed by a bank to its customer

The ordinary relationship of banker and customer has the effect of imposing certain added obligations upon bankers in the performance of their duties. Specific duties arise only where special arrangements have been made or special circumstances[15] exist and in the absence of this, more general duties of care are owed. For instance, there exists a duty of confidentiality and also a duty to take reasonable skill and care in dealing with its customer's financial matters. The duty of confidentiality arose in *Tournier v National Provincial and Union Bank of England*[16] in which states that the duty was binding on the bank unless it could demonstrate that it came within one of the following four exceptions: 1) Where the bank is under a compulsion by law to disclose. 2) Where the bank owes a duty to the public to disclose[17]. 3) Where the interests of the Bank require disclosure. 4) Where the bank has obtained the consent of its customer.

On the side of Burundi there are no specific laws governing Bank sececrcy however, Article 250 of the law of 22 April 2009 of the Penal Code of Burundi, which requires employees/employers to proffessionalism in regard to the customer's secrets that they're given, except in the senorias where they are called to give evidence in court and that where the law allow the third party to know these secrets[18].

4.3.1 The duty of care owed by a bank to its customer

From Burundi banking sector, the specific duties of care that can be owed are far too numerous to mention but instead the growing expansion in the law of negligence in the banker-customer relationship should be examined in more depth. The most important

[15] See Kpohraror v Woolwich Equitable Building Society (1996) 4 All ER 119.
[16] (1924) 1KB 461
[17] Libyan Arab Foreign Bank v Bankers Trust Co (1989) QB 728
[18]This statement is Supported by Article 250 of the law of 22 April (2009) of the Penal Code of Burundi.

of these arise when giving advice on financial matters, providing a reference of a customer and when giving advice on securities[19].

The expansion in the law of negligence here has been partly due to the change in the nature of the banker-customer relationship. The Jack Report[20] remarks that in the past,

> *The banker-customer relationship of those times was "based on a combination of service and friendliness amounting almost to paternalism". It was all very much in the context of the times; there was a climate of mutual trust and confidences, mistakes by banks were a most unusual occurrence and frauds on banks very rare[21].*

Nowadays, instead of the more paternal image, the bank has taken on a more business like one, its staff acting as salesmen for a wide range of financial products and services. This also affect the bank customer relationship in Burundian banks hence minimizing/limiting the duty of care owed by a bank to its customer.

4.3.2 Advice on financial matters without breaching the bank secrecy law

As part of the change in perception of the banking industry, an increasingly important part of the banker's job is to provide advice on financial matters with out breaking the bank secrecy law. As already discussed, the duty of care owed varies with the degree of proximity between the parties, for instance the bank will not owe a duty of care to a third party who reads advice intended for another.[22] The leading decision in this area is the *Woods Case,*[23] in which Justice Salmon opined that,

> *I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill.*[24]

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[19] There exists also a duty on a banker of safe custody when he accepts articles for deposit but this is unrelated to proximity and explained further in *Langtry v Union Bank of London* (1896) 1 LDAB 229.

[20] Banking Services: Law and Practice Report by the Review Committee Feb 1989, Cm 622 HMSO Chairman - Professor R B Jack CBE (The Jack Report)

[21] The Jack Report Chapter 2 Para 18 quoting a statement by one of the consultees to the report.

[22] McInerny v Lloyds Bank Ltd (1973) 2 Lloyd's Rep 389

[23] (1958) 1 QBD 55

[24] As above at p 71

In that case, special circumstances contributed to the decision which nowadays would not be required.

The bank in that case had gone out of its way to advertise the fact that it was in the business of offering financial advice but in today's banking industry in Burundi, this has become so common place that it is likely to be within the realm of judicial knowledge.[25] The duty of care owed extends to the,

> *Ordinary care and skill which the ordinary bank manager in his position might reasonably be expected to possess*[26].

This skill of an ordinary bank manager in financial matters is presumed to be greater than that of the reasonable person, for the professional nature of their job inevitably demands this.[27] If the bank is paid for the advice, the duty is somewhat more onerous. In this case bank secrecy law is applied while offering Advice on financial matters to customers in Burundi.

4.3.3 Providing a reference on a customer

The banking secrecy law is also applicable where a bank may also be liable when giving a reference about the financial status of a customer, firstly to the customer who is the subject of the information and secondly to the recipient of the information. In providing a reference about a customer, there exist several possibilities. Where the statement is inaccurate or false in any way, an action is available to the customer in negligence based on the bank's failure to exercise reasonable skill and care in compiling the information[28]. Where it is not inaccurate, a breach of the confidentiality between banker and customer may arise unless the bank can show that the customer did consent to the provision of the information to a third party.[29] Confusion is arising on this issue for the *Tournier* case suggests that this consent may be either express or implied and a

[25] In fact, it may be harder for a bank to establish that it does not give financial advice.

[26] Woods v Martins Bank Ltd (1958) 1 QBD at p 73 per Justice Salmon

[27] Box v Midland Bank Ltd (1981) 1 Lloyd's Rep 434 where the customer was entitled to rely on an 'opinion' the bank manager had stated.

[28] This is an extension of the duty found in Spring v Guardian Assurance plc (1995) 2 AC 296 which related to an employer-employee relationship based upon the employee's reliance on the employer to take reasonable care. The same is true of the banker-customer relationship.

[29] See Tournier Case (1924) 1 KB 461.

customer will be deemed to have consented unless they have expressly withdrawn their permission. However, more recently, section 4.5 of the Banking Code of England[30] states that,

> *If a banker's reference about you is requested, we will require your written consent[31].*

Furthermore, an action in defamation may exist where the customer's business or other reputation suffers as a result of a reference. However the onus is on the customer to show that the bank acted with malice in providing the reference. The proximity between the parties is not required in the defamation cases but in elsewhere, it will be relatively simple to establish for the bank is unlikely to give a reference about a person whose affairs it does not handle.

When considering, the recipient, *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*[32] extended the duty of care to cases where a contractual or fiduciary relationship did not exist between the parties. Here, unlike in *Woods,* the appellants were not he customers or potential customers of the bank. The judgment revolved around the circumstances surrounding the actual giving of the reference and it was emphasized that: *The law must treat negligent words differently from negligent acts[33].*

This is significant when we consider the potential effect of the negligence, for a negligent act can only really cause one accident, thus creating the necessary degree of proximity between the parties.

However, negligent words can be recorded, copied, repeated and broadcast many times after they are originally made. To include in the degree of proximity every ultimate consumer who acts to his detriment would take this idea too far.

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[30] 3rd Edition, March 1997 and also in 4th edition

[31] However, it is as yet unclear as to the binding nature of this code in a court.

[32] (1964) AC 465 hereinafter referred to as 'Hedley Byrne'.

[33] As above at p. 482 per Lord Reid

Hedley Byrne sought to make negligently uttered or written words to be binding in certain circumstances. There are a few criteria to which must be met first and these are:
If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference.

Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise[34].

There are three conditions which can be ascertained from this. 1) The advisor must be possessed with some special skill, for example a solicitor, bank manager or other professional occupation. 2) They must voluntarily undertake to provide the information or advice and must also have consented to its distribution. 3) The advisor must know or ought to know that the advisee will rely upon the information and consequently, they are not liable if someone unknown to them relies upon the information[35].

For the the case of Burundi, there is no specific national filed case in regard to bankers providing a reference on a customer which resulted to breach of confidencality laws. Therefore, study did not cite any case in regard to providing a reference on a customer as it's applied to bank secrecy laws.

[34] As above at p. 502 per Lord Morris of Borth-y-Gest
[35] See McInerny v Lloyds Bank Ltd (1973) 2 Lloyd's Rep 389 although complications may arise if they choose to publish the information.

4.3.3.1 Banking practice in customer's reference

The Court of Appeal in the *Turner v Royal Bank*[36] however, it was held that a bank could not depend on banking practice to justify the assumption of its customer's implied approval for the use of private details in providing other banks with references[37]. Therefore, the theory that the bank could pass on its customer's confidential information on the grounds that the bank has its customer's implied consent was rejected. Hooley (2000) argues that Turner's decision presents a clear explanation in the area of implied consent theory. In this regard, the best recommendation is that the principles governing the bank's duty of confidentiality should be regulated by statute in order to avoid any ambiguities. Given the above position, it seems that the law has been changed, since the Court of Appeal held that the bank has no right to disclose or exchange customer's confidential information depending on the customer's implied consent. There are, however, double limitations upon the scope of Turner[38].

First, Turner presents no final norms to determine whether a bank can depend on its customer's general approval in responding to status enquires, or whether a customer's particular approval is required. Ellinger EP, Lomnicka EVA and Hare CVM (2011) agree that a bank may depend on its customer's general approval in responding to status enquires, although the consequence of allowing a bank to depend on a customer's general approval must be that the bank bears the burden of confirming that the customer is informed of the way in which the bankers' reference scheme operates[39]. Secondly, Turner surely expands a customer's right to establish liability against a bank for breaching its duty of confidentiality by reporting its customer's private data to a third party without customer's approval, although the customer may find difficulty recovering essential losses in subject of that breach[40]. General damages will usually be available but particular damages will not always be easy to recover. If the bank reveals

[36] Case of *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664 CA(20).
[37] Jugement of the case: '*Turner v Royal Bank of Scotland plc'* [1999].
[38] Suggestion of Hooley (2000) on the above case
[39] Ibid sess Hooley R, (2000), p.23; and Ellinger EP, Lomnicka Eva and Hare CVM (2011).
[40] See Ellinger EP, 2011, p.197

accurate data that is positive to the customer it is improbable that the customer will suffer any adverse consequences resulting in loss; nevertheless this is not an absolute norm.[41] If the data is accurate but negative, it would be difficult for the customer to prove that the disclosures without his/her approval caused such losses. The only case where particular damages would probably be easily recoverable is where the data provided by the bank proves to be inaccurate: in such a case the customer will also have a concurrent claim based upon the breach of the bank's duty of skill and care[42].

For the case of Burundi, the bank are required to notify its customer about any reference before it is transmitted and is moreover, required to obtain the customer's written consent before any action is taken with regard to the reference has part of exercising professionalism to ensure customer statisfaction[43]. Overall, it is fair practice to obtain the customer's express consent before passing any confidential information to another party and if the bank fails to do so it will be liable for breach of a duty of confidentiality. This is supported by *Article 250 of Penal Code of Burundi (2009)* which requires employees and employers to practice professionalism while handoling customer's information. Moreover, unless there is a legal reason the bank has no right to refuse to disclose customer's information if such disclosure is in accordance with the customer's request. In practice, the bank could give advice to the customer, explaining that the bank could not act on the customer's request, as long as there are good reasons for not so acting[44].

Regarding 'the bank's duty to exercise reasonable care and skill and the confidentiality of Electrionic Fund Transfer systems', banks must adopt highly sophisticated encryption systems[45] to prevent hackers from gaining access to its own and its customers' data. The bank is under strict liability to employ reasonable and secure software programs for

[41] Ibid.
[42]Toulson RG and Phipps CM, 2006, paras.3-092-3-097
[43] Article 250 of Penal Code of Burundi (2009)
[44] As above
[45] Encyclopedia of '*Electrionic Fund Transfer systems*'

executing its intended purposes and such liability does not depend on proof that the bank was negligent. Azzouni (2003) considers encryption systems one of the most significant problems associated with electronic banking confidentiality. Such a problem can be solved by adopting a highly secret system to prevent any unauthorised access to the bank's electronic data[46]. Nonetheless, the first step in protecting a customer's information must be through the privacy of the information about each party involved in the EFT transaction[47]. Neither payers nor payees have access to each other's personal transactions, irrespective of which type of Electrionic Fund Transfer method is used, thus ensuring their privacy is protected[48].

4.3.4. Provides Advice on Securities issues

As long secrecy is concerned, a duty of care can arise where the bank asks a customer to execute some form of security to guarantee the debts of another customer. The most common scenario is where a wife is asked to sign a standard security in favor of the bank to guarantee her husband's business debts. The cases arise where the husband has bee misrepresented/misinterpreted his financial position to his wife or exercises some undue influence in obtaining her signature.

In *Lloyds Bank v Bundy*,[49] the situation arose but between a father and son. The father was aged and naive in business matters, placing heavy reliance upon the advice of the bank manager. Lord Denning opined that,

There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands - for nothing without his having independent legal advice[50].

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[46] Azzouni A 'Internet Banking and the Law: A Critical Examination of the Legal Controls over Internet Banking in the UK and their Ability to Frame, Regulate and Secure Banking on the Net', (2003) 18 *Journal of International Banking Law and Regulation* 351.

[47] Ibid.

[48] Sadeghi AR and Schneider M, 'Electronic Payment Systems' in Becker E, *Digital Rights Management* (2003) V. 2770, Springer-Verlag Berlin Heidelberg, p.118

[49] (1975) 1 QB 327 hereinafter referred to as 'Bundy.

[50] As above at p. 340

Mr Bundy had been a customer of long standing relying strongly on the bank's advice and the bank knew of this reliance and therefore, owed him a duty to warn him of the consequences and to advise him to take independent advice. Where the bank has a conflict of interests it appears there is a stronger onus on the bank to advise independently.

In the case of *National Westminster Bank Plc v Morgan*,[51] the bank obtained no advantage from the transaction which was necessary to save their home, however the bank manager had not correctly informed Mrs Morgan as to the full extent of the document. In summing, Lord Scarman held that the bank manager, *"never crossed the line". Nor was the transaction unfair to Mrs Morgan. The bank was, therefore under no duty to ensure that she had independent advice*[52]*.*

The presumption of undue influence could not therefore apply where no advantage had been obtained by the bank and could be rebutted if no influence was unduly exercised[53].

From Burundi it's the obligation of banks to provide the advices to its customers in relation to securities purposes. This may partially be supported by the Anti-Money Laundering and Terrorism Financing Act, 2008 of Burundi, which provides a firm legal avenue through which the Government and key role players in the economy works together to combat money laundering and related crimes.[54] Article 1of this Act says that the purpose of this act is to the fight against money laundering and terrorist financing. Therfore, with respect to this article, Banks can contact the respective client and were neccssay the bank manager may provide advice to such customer. This implies that banks should first provide security Advice to their customer whom they suscpect to practicing tererorism faninicig before breaching the bank secrecy.

[51] (1985) 1 AC 686
[52] As above at p 709
[53] As in Cornish v Midland Bank plc (1985) 3 All ER 513
[54] Healy, A Improving Global AML/CFT Compliance:2011

4.4 The Bank Secrecy Laws and Regulation

One reason why financial institutions have to comply with many often confusing and conflicting requirements is that the bank secrecy laws and regulations were developed at different times in response to varying problems. Thus, it is useful to briefly review this chronology and summarizes briefly the chronology of the many related regulations[55].

4.4.1 The Chronology of Bank Secrecy Laws

The bank secrecy or the duty of confidentiality arises from bank customer relationship in the case of *Tournier* it was held that confidentiality comes into existence along with the bank customer relationship and after that, the bank must release no information acquired before or after concluding a contract, similarly it has been said that the principle of confidentiality lay at the heart of the bank customer relationship and warned the danger of loss of customer confidence in the banking system if the principle was undermined by uncertainty as to the extent of its application in the light of modern banking practice.

However, that duty of secrecy is not absolute but a qualified duty. The duty of secrecy is qualified by the exceptions attached thereto. The duty extends to all information gained by virtue of the banking relationship. The duty of secrecy is not limited to information about the account only but also information is obtained from other sources than the customer's actual account[56].

Assuming that a duty of confidence arises when confidential information comes to the knowledge of a person (the confident) in circumstances where he has notice, or is held to have agreed that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others…to this broad general principle there are three principles. The first is that the principle of confidentiality applies to information to the extent that is confidential. The second limiting principle is that the duty of confidence applies neither to useless

[55] [1924] 1 KB 461

[56] Duty of secrecy is not absolute but a qualified duty as in the of case "*Tournier".*

information nor trivia. The third limiting principle is that although the basis of the laws of protection of confidence should be preserved and protected by the law nevertheless the public interest may be outweighed by some countervailing public interest which favours disclosure[57].

Furthermore the duty of secrecy is not absolute but a qualified duty. The duty is qualified by the exceptions attached thereto *Tournier v National Provincial and Union Bank of England.* It would seem that like other fiduciary duties, it is merely a duty of reasonable care. The banker's duty of confidentiality is located within the general principles governing breach of confidence rather than treated as a discrete area of law.

In Finland bank secrecy has been a legal concept from the beginning of the 1970s. Nowadays, bank secrecy is regulated under the *Credit Institutions Act[58].* According to the principle of bank secrecy, an employee of a bank or a credit institution who has obtained information on the fi nancial position or private personal circumstances of a customer, or of any other person, or on a trade or business secret, must keep such information secret, unless the person for whose benefi t the duty of secrecy has been provided agrees to its disclosure. According to paragraph 94 of the *Credit Institutions Act of 1970* of Finland, anyone who, in his or her capacity as a member or deputy member of a governing body of a credit institution or a consolidated group undertaking or belonging to a consortium of credit institutions or as a representative of a credit institution or another undertaking operating on behalf of the credit institution or as their employee or agent, in performing his or her duties, has obtained information on the financial situation or private personal circumstances of a customer of the credit institution or of a consolidated group undertaking or a conglomerate referred to in the *Act on the Supervision of Financial and Insurance Conglomerates* or of another person connected with its operations or on a trade or business secret must keep it confi dential unless the person for whose benefi t the secrecy obligation has been provided agrees to its disclosure. Confi dential information may not be disclosed to a general meeting of

[57] Attorney- General v Guardian Newspapers Ltd. (No 2) [1990] 1 AC 109, 281-2.
[58] Finland *"Credit Institutions Act" (1970).*

shareholders, a general meeting of trustees, a general meeting of a cooperative or a general meeting of the delegates or a general meeting of a mortgage society or to a shareholder or member attending the meeting[59].

4.4.2 The Chronology of the Bank sececy laws and regulations of USA

Congress passed the Currency and Foreign Transactions Reporting Act commonly known as the "Bank Secrecy Act of 1970 of USA,"[60] which established requirements for recordkeeping and reporting by private individuals, banks, and other financial institutions. It was designed to help identify the source, volume, and movement of currency and other monetary instruments transported or transmitted into or out of the United States or deposited in financial institutions. Terrorist networks can use the criminal proceeds to facilitate their activities, corrupt and possibly destabilize communities or entire economies. In both money laundering and terrorist financing, criminals can exploit loopholes and other weaknesses in the financial system to launder criminal proceeds, and support terrorism. Bank Secrecy Act was intended to safeguard in this case the U.S. financial system and U.S. financial institutions from the abuses of financial crime including money laundering, terrorist financing, and other illicit financial transactions[61].

According to the Bank Secrecy Act of 1970 of USA, the Money Laundering Control Act augmented the effectiveness of BSA[62], and imposed criminal liability on a person or financial institution that knowingly assists in the laundering of money, or that structures transactions to avoid reporting them. It directed banks to establish and maintain procedures reasonably designed to ensure and monitor compliance with the reporting and recordkeeping requirements of the BSA. On January 27, 1987, all federal banking agencies issued essentially similar regulations requiring banks to develop programs for

[59] The Finland *'Credit Institutions Act'* of (1970) paragraph 94.
[60] Bank Secrecy Act of 1970 of USA
[61] The Role of Banking Secrecy Law in the (USA 1970)
[62] Ibid.

BSA compliance by the interrelated sections 8(s) and 21 to the Federal Deposit Insurance Act (FDI Act) of 1987, which apply equally to banks of all charters[63].

Federal Deposit Insurance Act act required banks to document, evaluate, and report on the effectiveness of their internal controls. Independent accountant must attest to management's assertions about internal controls.

In 1992, Annunzio-Wylie Anti-Money Laundering Act (AML) strengthened US Treasury's role and the sanctions for BSA violations[64]. In 1996 Suspicious Activity Report (SAR) required to be filed by any U.S. banking organization that detects a known or suspected criminal violation of federal law or auspicious transaction related to money laundering activity or a violation of the BSA. In response to the September 11, 2001 terrorist attacks Congress passed the Patriot Act. Title III of the Patriot Act is the International Money Laundering Abatement and AntiTerrorist Financing Act of 2001[65]. The Patriot Act was probably the single most significant anti money laundering legislation since the enactment of BSA[66].

The implementation of the Patriot Act accomplished the following: Expanded the bank secrecy laws (BSL) program requirements to all financial institutions: Increased the civil and criminal penalties for money laundering; Provided the Secretary of the Treasury with the authority to impose "special measures"; Facilitated records access and required banks to respond to regulatory requests for information within 120 hours; Required federal banking agencies to consider a bank's, Anti-Money Laundering (AML) record when reviewing bank mergers, acquisitions, and other applications for business combinations[67].

In 2002 response to the public outcry over the accounting scandals, the Sarbanes Oxley Act (SOX) was enacted[68]. It required verification of adherence to enhanced financial

[63] Sections 8(s) and 21 to the Federal Deposit Insurance Act (FDI Act) of (1987) USA
[64] Annunzio-Wylie Anti-Money Laundering Act (1992).
[65] USA; Anti-Terrorist Financing Act of (2000).
[66] USA; The Patriot Act of (2001).
[67] Ibid.
[68] The USA, Sarbanes Oxley Act (2001)

reporting requirements, audit procedures, board composition etc; Develop process for documenting risks and controls relating to financial integrity; Buy or build supporting information technology; Monitor off-balance sheet transactions and use of special purpose entities.

In 2003, the Inter-agency Operational risk Supervisory Guidance on Operational Risk Advanced Measurement Approaches issued in 2003 which was based on Basel II operational risk framework, and extends the same approach by assigning risk based capital to businesses/products based on internal controls[69]. Banks are expected to: Implement systems and processes to capture and assess operational risks; Develop and refine Advanced Measurement Approaches (AMA) qualifying capital model for operational risks; Banks adopting the Advanced Measurement Approaches (AMA) and Internal Ratings Based (IRB) approaches are required to conduct parallel calculations with current accord for 1 year prior to implementation[70].

According to the Inter-agency Operational risk Supervisory Guidance on Operational Risk Advanced Measurement Approaches issued in 2003, the current set of Bank secrecy laws and regulations are a composite of a number of different legislative acts and regulatory documents developed over time often with imperfect coordination between the latest and earlier regulations[71]. This somewhat disjointed process cannot be expected to result in an optimal or fully consistent set of regulations. The nature of regulation has also been influenced by the effectiveness (or lack thereof) of existing regulation. For example, BSL of U.S of 1970 requires banking organizations to develop, implement, and maintain effective programs to address ever changing strategies of money launderers and terrorists who attempt to gain access to the U.S. financial system[72].

[69] The USA, Inter-agency Operational risk Supervisory Guidance (2003).
[70] Ibid.
[71] Composition of Bank secrecy laws
[72] Requirements of Bank Secrecy Laws of U.S of (1970) to the Banking organizations

4.5 Nature of Banking secrecy Laws and policies of other countries

In order to understand the nature of Bank secrecy Laws and policies and to fill the gaps in the existing information/literature of the Bank secrecy Laws and policies of Burundi, the researcher reviewed the Banking secrecy Laws and policies of other countries which have a clear legal description of the study topic.

4.5.1 Nature of banking secrecy Laws in France

From France**,** Bankers are subject to an obligation of professional secrecy, sanctioned by penal law. The courts moreover impose a "duty of discretion", sanctioned by civil law.[73]

a) Context in the penal

Article 226.13 of the Penal Code covers all individuals who - by their status or profession have access to confidential information and who have revealed this information in cases other than those permitted by the law. This law applies to bankers[74].

Article L511-33 of the *Financial and Monetary Code* actually imposes the obligation of professional secrecy punished by in Article L571-4 of the same Code and in Article 226.13 of the Penal Code, on any individual who participates in any capacity in the management or the administration of a credit institution or who is an employee of such an institution[75].

b) In the civil context

Independently of any penal aspect, the banker is subject to a duty of discretion under civil law, which does not depend on awareness of having breached the duty of professional secrecy. This civil context applies to the bankers of Burundi, where bankers are required by the law to ensure professionalism to avoid disclosing the customer's secrects[76].

[73] Banking Act of 1984 (the cornerstone of the French financial regulation)
[74] Article 226.13 of the Penal Code of France
[75] Article L511-33 of the *Financial and Monetary Code*
[76] *The civil context of the penal code of Francise,* 'the banker is subject to a duty of discretion under civil law.

Dispensations: Article L511-33 of the *Financial and Monetary Code*[77] only dispenses banks from their obligation of professional secrecy in three cases: cases covered by specific laws (right of communication to tax or customs authorities, disclosure of suspicion by banks to trace financial records in the context of the prevention of the laundering of money derived (from drug trafficking or organized crime); in relations with the Bank of France, the Banking Commission and the Commission for Stock Exchange Operations; and Requests by judicial authorities acting in the framework of a penal procedure[78].

It goes without saying that, in any situation, banks can be released from their obligation of professional secrecy by the person concerned who may authorise the bank to communicate information about him to third parties[79].

4.5.2 Nature of banking secrecy Laws in German

Furthermore, the concept of German bank secrecy is based primarily on the civil law contractual agreement between the bank and the customer which obliges the bank to maintain customer confidentiality.

Beyond this concrete relationship between the bank and its customer, bank secrecy is also an important cornerstone of the capital markets; and, as such, is also protected by German tax provisions whose purpose is to safeguard the trust relationship between citizens and the state in order to ensure the proper functioning of the capital markets[80].

The duty of confidentiality and general bank secrecy imposed on German financial institutions may be breached only by specific Government laws or if the customer waives his right to bank secrecy. The tax authorities, for example, may only request information from banks on customers in individual non-routine cases where there is a legitimate reason for doing so. A deviation from this rule, e.g., a contractual agreement waiving bank secrecy for routine and general application, is inconsistent with these

[77] Article L511-33 of the *Financial and Monetary Code*

[78] Bank of France requires the Banking Commission and the Commission for Stock Exchange Operations to act by the penal procedure.

[79] Ibid.

[80] Important of Bank Secrecy Laws

principles. On the other hand, bank secrecy does not apply in the case of established investigations by governmental authorities of criminal tax cases under criminal law[81].

4.5.3 Nature of banking secrecy Laws in Luxembourg

Also from Luxembourg, banking secrecy is considered to be a manifestation of a more general duty of professional secrecy as governed by article 458 of the Penal Code[82]. Therefore, from Luxembourg, the protecting legislation of banking secrecy is laid down in article 41 of the Banking Act and in article 458 of the Criminal Code. Article 41 stipulates that professionals, working in the financial sector, are required to keep the trusted information secret or penalty will be carried out according to either the Civil Code and / or the Criminal Code[83]. Moreover, Luxembourg banking secrecy is expressly governed by Article 41 of the Law dated 5 April 1993 on the Financial Sector[84]. It imposes a general duty on any employees and other persons working for a financial institution to maintain secret any information gained in connection with their professional activity, under penalty of sanctions provided for under article 458 of the Penal Code (up to six months imprisonment and payment of penalties)[85].

4.5.4 Nature of banking secrecy Laws in Denmark and Austrian

From Denmark: *Pursuant to Art. 117 of the Danish Financial Business Act of 2009,* members of the board of directors, managing directors, auditors and any employee and others are obliged to respect banking secrecy[86]. Any breach of this obligation is punishable by sanctions. The said persons must not disclose or use confidential information obtained during the performance of their duties without due cause."Due cause"[87] means that confidential information may be disclosed in specific cases where it is justified, for instance in lawsuits (customer complaints involving a third-party customer), and for data processing purposes in central computer service centers. Banks

[81] Bank Secrecy does not apply in the case of establishing investigations by Governmental Authorities of Criminal. Tax Cases under Criminal Law of Luxembourg (1993)
[82] Article 458 of the Penal Code of Luxembourg (1993).
[83] Article 41 of the Banking Act and in article 458 of the Criminal Code Luxembourg (1993).
[84] Article 41 of the Law of 5 April (1993) Luxembourg penalty.
[85] Penalty of Sanctions Provided Under Article 458 of the Penal Code of Luxembourg.
[86] *Artical 117 of the Danish Financial Business Act of (2009).*
[87] Meaning of Due cause.

are also allowed to give information to other banks regarding the economic status or creditworthiness of their customers according to guidelines issued by the Danish Bankers Association[88].

The principle of banking secrecy is waived as regards the provisions laid down for instance in the Danish legislation on tax control, the money laundering legislation and the banking legislation. The Danish Financial Supervisory Authority is entitled to obtain full information from banks[89].

The Tax Control Act of 1990 [90] of Danemark makes it mandatory for banks to supply annually to the tax authorities details about the accounts of their customers, including interest on deposits, acquisition of bonds and interest coupons held. The tax authorities are also entitled to obtain information from banks about transactions over the accounts of their customers for use in assessing tax in concrete cases.

Routine information on customer matters may be disclosed for the performance of administrative tasks. Apart from this exception, customer information must not be disclosed to other companies, including group companies, for the purpose of marketing or advisory services unless the customer's prior written consent has been obtained[91].

Finally, banking secrecy may be lifted by a court order, for instance in connection with a criminal investigation and subpoenas[92].

From Austrian, the rules on bank confidentiality are contained in section 38 of the Austrian Banking Act of 1986[93]. While this provision is materially not part of constitutional law, its amendment requires a quorum of at least 50 per cent and a majority of two-thirds of the deputies of the first chamber of the Austrian Parliament (Nationalrat), that is, procedural safeguards that are usually reserved for changes of Austrian constitutional law[94].

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[88] Guidelines issued by the Danish Bankers Association.
[89] Danish Financial Supervisory Authority of 1 Jan (1988).
[90] *The Tax Control Act of Demark (1990)* .
[91] Ibid
[92] Lifting of Bank Secrecy by Court Orders.
[93] section 38 of the Austrian Banking Act of (1986).
[94] Ibid.

4.5.5 Nature of bank secrecy laws and policies from Japan

Just like in Burundi, also in Japan, there are no specific laws on banking secrecy that stipulate a duty of secrecy and specific violations. However, banking secrecy is recognized as a legal obligation, both in practice and in judicial precedent. Thus, banks are considered to be legally bound to keep secrets concerning their dealings with customers as well as any information derived from such transactions. This duty of confi dentiality is generally acknowledged to be based on the following legal principles: Standard commercial practices implemented by banks for a long period of time; A duty derived from the principle of good faith, and trust; Contracts between banks and their customers, which contain, explicitly or implicitly, bank obligations to maintain secrecy[95].

From Burundi, the duty of secrecy covers all financial data/information concerning customers, except for those widely known or publicised. These include details of assets/ liabilities, busineness equipment and staff, business performance, accounting and fi nancial affairs etc.

Banks are exempted from the duty of secrecy when there is due reason:

When the customer consented to the disclosure; For example, data possessed by the Personal Credit Information Centre are filed by member financial institutions and shared by the members with the borrower's prior consent[96]; when mandated by law, investigations by tax authorities, criminal investigations, inspections by bank supervisors and court orders fall under this category. The reporting of suspicious transactions to the competent authorities, required by anti-money laundering legislation, also falls under this category.

When required in the due course of the bank's business; a typical instance is when a bank as a litigant claims or waives its right. Investigation by tax authorities is a vexing issue for banks and controversial in judicial decisions. There are two types of investigation: compulsory investigations stipulated by law and non-compulsory investigations[97].

[95] Bank Secrecy Laws and Policies of Japan
[96] Edouard K., *Professional Secrecy of Burundian Banks*, University of Burundi, 2014 p.68.
[97] Supra note 83.

In the former, banks are exempted from a duty of secrecy vis-à-vis the customer. In the latter, the tax authorities require bank consent for investigation. However, the law stipulates that the bank cannot refuse this without due reasons, which include failure by the investigation to satisfy legal requirements. Concerning this point of contention, the courts have ruled that an investigation satisfies legal requirements if objective evidence is shown to indicate the necessity of the investigation. In such a case, banks have to comply, and therefore bank secrecy is not an issue.

In connection with the prevention of money laundering, the *Law for Punishment of Organized Crime*, *Control of Crime Proceeds and Other Matters* was enacted in February 2002.[98]

This law requires banks to submit suspicious transaction reports when banks suspect that the money banks accept is derived from illegal activities. Banks are exempt from a duty of secrecy with regard to this reporting as long as banks follow the legal requirements.

4.6 The position of other countries in regard to applicability of Bank secrecy laws

4.6.1 The position in England

The law in England was extended dramatically by the House of Lords decision in *Barclays Bank v O'Brien*[99] in which the English concept of constructive notice was applied. Furthermore, the notion was created that where a wife offers to stand as cautioner for her husband's debts in a transaction which is not to her financial advantage, the creditor will be put on inquiry and must discover the circumstances in which the cautioner agreed to give the security.[100] This is not the law of Scotland[101].

[98] The *Law for Punishment of Organized Crime*, *Control of Crime Proceeds and Other Matters* enacted in February (2002) in Japan.

[99] (1994) 1 AC 180

[100] See also the cases of Massey v Midland Bank Plc (1995) 1 All ER 929; Banco Exterior International v Mann (1995) 1 All ER 936; TSB Bank plc v Camfield and Another (1995) 1 All ER 951 for a guide to the further development of English Law along quite strict lines.

[101] CEF Rickett in his article entitled "" that the Scottish position is far more preferable to the English one.

4.6.2 The position in Scotland

In *Young v Clydesdale Bank Plc*[102] it was held that error induced by the representations of third parties was no ground for reduction in a question with the bank even where the cautioner had not read the document prior to signing. In Royal Bank of Scotland v Greenshields[103]:

A bank-agent is entitled to assume that an intending guarantor has made himself fully acquainted with the financial position of the customer whose debt he is about to guarantee. And the bank-agent is not bound to make any disclosure whatever regarding the customer's indebtedness to the bank[104].

A creditor may, though, be bound to inquire further where the circumstances are such that would lead a reasonable man to believe that fraud had been used[105]. However fraud is very much different to undue influence or misrepresentation in this context.

So stood the law in Scotland for many years, until the case of *Mumford and Smith v Bank of Scotland[106]* reached the House of Lords. The facts were very similar to the *O'Brien* case and the wives actions for partial reduction of the standard securities to the extent of their debt failed in all the lower courts but it was allowed in the House of Lords. There are a few important facts in the case which must be noted.

The wives had no financial interest in the transaction, had not been warned of the implications or advised to take independent advice. They both argued that they had been induced to sign as a result of misleading statements made by their husbands.

The House of Lords reached the same result as in *O'Brien* but for different reasons. As we see from Lord Jauncey, this was an entirely deliberate case of judicial legislation[107];

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[102] (1889) 17 R 231
[103] (1914) SC 259
[104] As above at pp 266-267 per Lord President Strathclyde
[105] Owen and Gutch v Homan (1853) 4 HL Cases p 1035
[106] (1996) SLT 392 on appeal in the Court of Session and in the House of Lords - Smith v Bank of Scotland (1997) SLT 1061 and (1997) SC(HL) 111 hereinafter referred to as 'Smith'.
[107] A more scathing approach is taken in "The House of Lords "Applies" O'Brien North of the Border" by Laura MacGregor in Edin LR 1998 2(1) 90.

Applying the principles of Scots Law alone, I would therefore have been disposed to dismiss this appeal. Nevertheless I am conscious that your lordships do not share my difficulties and I appreciate the practical advantages of applying the same law to identical transactions in both jurisdictions[108].

Had Mrs Smith's case been decided on the principles of Scots Law at that time, she would have been unsuccessful. Lord Clyde in *Smith* considered the obligations on a creditor in a contract of caution to disclose the financial position of the debtor. He found four circumstances in which such an obligation could exist, not one of which applies in this case. Instead, he found an underlying principle in each of the cases of, *the basic element of good faith*[109].

This, as he continues much later leads to a duty to give the cautioner certain advice,
where the creditor should reasonably suspect that there may be factors bearing on the participation of the cautioner which might undermine the validity of the contract through his or her intimate relationship with the debtor the duty would arise and would have to be fulfilled if the creditor is not tobe prevented from later enforcing the contract[110].

This is possible by creating a legal fiction deeming the bank to be a party or a participant in any misrepresentation by the debtor. This arises where the reasonable man on an examination of the facts would come to the conclusion that owing to the personal relationship between debtor and cautioner, the cautioner's consent may not be fully informed or freely given. Where this occurs, the creditor must warn the potential cautioner of the effects of the proposed transaction and advise them to take independent legal advice.

The decision may not have been decided in line with Scots Law at that time[111] but it becomes necessary now to examine the actual and possible effects of the new law.

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[108] (1997) SC at p 115
[109] (1997) SC at p 118 B-C.
[110] (1997) SC at p 121 F-G
[111] Although the Jack Report had recommended such a result at Section 13.22 of its 1989 Report

4.6.3. The position in Sweden

From Sweden, if a public prosecutor or the police in charge of investigating a crime ask the bank for information concerning a customer, this is regarded as a legal cause which justifies disclosure of information by the bank[112]. A special decision has to be taken by the authorities to start such an investigation. In a bill to the parliament the Government has suggested an amendment to the *Banking Business Act* stating that a credit institution is obliged to give information concerning an individual´s banking relationship when a request is made by the prosecutor during a criminal investigation (the amendment will enter into force 1 July 2004). The bank has also to provide information to the bailiff (the executory authority) concerning a customer's deposits and other assets with the bank[113]. The bank must, pursuant to the Money Laundering Act and the act concerning measures against terrorist fi nancing, inform the National Financial Intelligence Police of suspicious transactions and is not allowed to execute such transactions. Provided that the bank has acted in good faith it cannot be held liable for any breach of banking secrecy in this respect[114].

Other authorities which can obtain information from a bank are the Financial Supervisory Authority (FSA) and the Central Bank (the Swedish Riksbank). Information on a customer's financial or personal circumstances which has been passed on to the FSA is deemed to be confidential. The bank is allowed to provide information to other banks and credit information agencies for the purpose of facilitating the assessment of the customer's creditworthiness.

Also from Sweden, it is of course possible for the person concerned to give his consent to the bank to disclose information. Access to confidential information within a bank may only be authorised for those employees who need it for the purpose of their work[115].

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[112] The *Banking Business Act* (Chapter 1, Article 10) on Sweden amended on 1 July 2004.
[113] Swedenm *Banking Business Act, (2004).*
[114] Ibid.
[115] Ibid.

4.7 Conclusion

This chapter discussed the applicability of the law related to bank secrecy from Burundi and also makes a comparative analysis from other developed countries. Under the applicability of the law related to bank secrecy, the nature of the banker and customer Relationship defines the obligations which arise from the bank secrecy law. Confidentiality is implied therefore from the very beginning of the banker-customer relationship. Furthermore, the bank's obligation of confidentiality is a legal one, and banks have recently started to include in their contracts with customers terms dealing with confidentiality under different headings, such as the use of customers' personal information, or simply by reference to term confidentiality. However, a duty of care is owed to the customer when the banker-customer relationship begins. The obligations owed by a bank to its customer are; Advice on financial matters without breaching the bank secrecy law, providing a reference on a customer and provides advice on securities issues to the customer. In Burundi, efforts related to enaction of Bank secrecy laws are still weak and low. This makes Burundi one of the African countries which does not have directs laws and policies related to Bank secrecy. Hence the status of applicability of the law related to bank secrecy in Burundi has been discussed in relation to how other countries have applied them.

CHAPTER FIVE
CONCLUSION

5.1 Summary

The chapter deals with the general summary and conclusion of the research. The summary is comprised general finding and recommendation. The findings are pointed out on clause 5.2 and in recommendations the researcher gives some ideas on how to solve the weaknesses found in order to improve the bank secrecy laws in the banking sector in Burundi while conclusion covers only general conclusion of the research. This is due to the fact that bank secrecy is growing concern for the financial safety of any bank transections within and outside the country.

5.2. Findings

Findings of this study are as follows:-

According to the finding for the first objective which was to identify the law and policy of the bank secrecy in Burundi, there are no laws governing the whole process relating to the bank secrecy in Burundi; However, the legal element of the crime of violation of banking secrecy provided by Article 250 of the Law of 22 April 2009 on the revision of the Penal Code of Burundi, and is drafted in these terms: People must deal by State or by profession in regard to the secrets that they're given, except in the case where they are called to give evidence in court and that where by law to know these secrets, has revealed to them, are punishable by penal servitude from one month to one year and a fine of twenty thousand francs to francs. This article meets the principle of the legality of offences and penalties that no offence, penalty cannot exist without having been provided for in a text from public authorities and preventing the citizens of what ' they must do or not do on pain of criminal sanction. It has meant that, it cannot serve the basis in criminal proceedings that the violation of a legislative or regulatory text and not contrary to the application of *article 177 of the Penal Code of Burundi (Book II)* without prejudice to disciplinary proceedings. Article 68 stipulates that: "all executives and officers of the Bank are bound by the obligation of professional discretion for facts and information which they have knowledge in the exercise or on the occasion of the

exercise of their function". The law therefore implies that, all works should ensure professionalism while delivering service but they ensure that their clients information are kept secret.

Basing on the finding for the applicability of the laws related to bank secrecy in Burundi; the study as also found that, in order to keep bank secrecy laws without breaking them, Article 250 of the Penal Code of Burundi of 2009 requires every director and every member of any committee, auditor, advisor, manager, officer and employee of a Bank or financial institution shall, before assuming his duties, make a written declaration of fidelity and secrecy, which shall be witnessed by the Chief of Executive officer or the Secretary of the bank or financial institution concerned. There is no disclosing of information of cyber criminals to the laws enforcers in most of the companies dealing with money business; and there are no investments to set-up proper information communication technology related to risk management in most of financial institutions of Burundi.

Findings on the challenges related to bank secrecy in Burundi have shown that: In Burundi, the principle of banking secrecy, as provided by article 110 of the Banking law of 2003; has been faced with many serious problems. On the one hand, the banking secrecy laws and policies are not so specific and given its non specificity, the banking professionals can not translate merely and simply the legal texts relating to professional secrecy in general in so far as they exist in Burundi. According to Robert Hurrio, bank secrets should be considered as a unique professional secret that are really strong in bank sector of Burundi[1]. Further, different principles whose characters are variables according to the profession in question, these are thus the objects and characters of each profession, as they are concluded and understood by the law and practices that shape the secret.[2] On the other hand, the field of bank secrecy is still unexplored in the law of Burundi.

[1] Robert Hurrio., *Le secret professionel du banquier*, (1968) 2ème édition, Burundi ,Institut de sociologie, p.46.
[2] Ibid

This study has also found out that, there are four recognized situations in which a bank may be relieved from its duty of confidentiality or secrecy. The four headings under which disclosure may be permissible are: Where disclosure is made under compulsion of law for example, under court orders, subpoenas, exercise of powers of inspection and requiring production of documents in connection with investigations under *Income Tax Acts*, orders in civil and criminal proceedings made under Bankers Books Evidence Acts and in relation to the discovery of documents; Where there is a duty to the public to disclose, for example, where bank officials assist the police in trying to find a missing person; Where the interests of the bank require disclosure, for example, disclosure by the bank of loan facilities to a customer in proceedings to recover payment; Where disclosure is made with the express or implied consent of the customer, for example, where a borrower gives the name of a bank as referee as to his creditworthiness; It is conceivable that in suitable cases the court could build on or add to these exceptions. The limits of the duty must be ascertained according to common sense.

5.3 Conclusion

The main purpose of this researcher report was to critically examine the laws governing bank secrecy in Burundi. This research topic was guided by the following objective to identify the level of the laws and policy of bank secrecy; to analyse the challenges of the laws related to bank secrecy in Burundi; and to analyze the applicability of the laws related to bank secrecy in Burundi. However, as per the findings of this study, there seem to be no direct law governing bank secrecy instead as its provided by Article 250 of the Law of 22 April 2009 on the revision of the Penal Code of Burundi, it encourages workers from different organisations to practice professionalism during work and keep customer information secret.

Bank Secrecy or bank's duty of confidentiality comes into existence when bank enters into a relationship with a customer upon whom no information is revealed before or after concluding a contract. This however does not mean that the duty of secrecy is absolute but it is merely a qualified duty by exceptions attached to it. In this case banker's duty of confidentiality is embedded within the principles of duty of secrecy.

That secrecy covers all information gained through the existing relationship between bank and customer and thus limited to information on the account. However, banks experience threats of terrorism and financial crimes, which call for disclosure for banks to carry on their duties effectively, this is because banks are viewed as potential in bridging such crimes, and in this case this may not be possible if the duty of secrecy is absolute. This calls for revision of the duty of confidentiality by the government of Burundi.

5.4. Recommendations

This research makes several specific recommendations for further improvement of Bank secrecy laws. It is meaningful to note that bridging the gaps arose in secrecy laws requires cooperation of different sectors including the government, legislators, regulators, media, private and community services organizations. Collaboration between these institutions is very crucial so as to play a supportive role on modernizing our laws in order to cope with current situation under banking industry.

5.4.1 Government should Strengthen and amend the bank secrecy laws

This study recommends that in order to encourage effectiveness in bank secrecy, Government of Burundi must be able to strengthen and amend the bank secrecy laws in its capacity, support committed reformers, and strengthen the ability of citizens to monitor public functions and hold leaders accountable for providing safety, effective public services, and efficient use of public resources. This can be achieved through; the practical implementation of new and ground breaking conventions and protocols that define and promote international standards and create roadmaps for domestic implementation and improvement of banking laws. And also, through the use of a broad range of bilateral, regional and global training and technical assistance programs aimed at strengthening the law enforcement and its capacity to implement those shared standards and best practices such customer secrecy respected.

5.4.2 Provision of bank Secrecy and penal sanction

Penal provision should be introduced by the new act for example Bank Secrecy Act such that a banker who violates the order and duty of Secrecy is sentenced to imprisonment for the stipulated period or pay a fine which is provided in Act such that it deters the rest of the bankers from unnecessary disclosures of the coustomer's information.

5.4.3 Provision of how Secrecy procedures and exception of disclosure

Like in Singapore, a section should be included in the proposed newlaw to cater for all the exceptions where a banker is allowed to disclose customer's information to make it simpler for banks to know the circumstances under which banks must disclose to avoid breaking other laws by not disclosing even where disclosure in mandatory. However, this section should resemble the instance listed by Banks *LJ in Tournier's* case[3].

5.4.4 Provision Secrecy and information leakage

The new act therefore should have provisions to the effect that a bank handling customer's confidential information must take necessary and proper measures for prevention of leakages, loses or damages and for other control of security of the confidential data so as to avoid the excuses of new technological advancements.

5.4.5 Strengthen of Secrecy and credit reference systems

For effective reference bureau system, it is recommended that a section should be included in the proposed law which allows a bank to give information about a customer to a third party for the purpose of assessing the credit worthiness of the information given its of the general nature and does not give details about the customer's account. However, it is suggested that even where a banker is allowed to disclose information related to customer credit worthiness under the proposed section of the law, the banker may still have to truly get the consent of the customer.

[3] Ibid.

5.4.6 Strengthening of how Disclosure and time of disclosure

Where the law requires disclosure, does that mean that a banker must disclose at its will at any time it wishes and any one; this likely to cause delay especially where disclosure is for public interest like where a customer is suspected of being involved in terrorism activities. To this therefore, it is suggested that the banker must be compelled to disclose information concern without delay; but it is recommended that the relevant minister should be given powers to prescribe the time within which to disclose and the method to be used.

5.4.7 Joint efforts of enacting bank secrecy laws

There should be joint efforts between lawyers, information and communication technology expert's institutions and Government to enact new laws which will cover the whole processes relating to bank secrecy laws in banking transactions in Burundi. This will provide an opportunity for the Banking sector to grow well and attract investors to invest in Burundi. With the current situation some investors have doubts on how the country will handle legal and practical challenges in relation to customers banking acctivities since there are no adequate Bank secrecy laws in the Banking sector. Normally, cyber criminals look for a loophole to play their role, without proper and strong laws Burundi will be a playing ground for cyber criminals and this will affect the economy of the country. Reports by English laws from European countries show that Bank secrecy laws helps different populations to access banking services when their information is prevented from getting in to the hand of the third party.

5.4.8 Bank Secrecy and foreign disclosure

It is not clear whether a bank operating in Burundi can disclose its customer's information to its foreign offices, but because it is taken to be one bank with different offices, disclosure should be permitted. A section should therefore be inserted in the proposed new law to govern communication with foreign office of a bank operating in Burundi. Under this, it is submitted that, disclosure should be authorized if the information relates solely to credit facilities granted by a branch of a bank incorporated outside Burundi and the information is required by its head office. For example, if

Stanbic bank operating in Uganda requires some information from Stanbic bank operating in Burundi.

5.4.9. Banks should have adequate staff

The bank should assign adequate staff to the identification, evaluation, and reporting of potentially suspicious activities, taking into account the bank's overall risk profile and the volume of transactions. Additionally, a bank should ensure that the assigned staff possess the requisite experience levels and are provided with comprehensive and ongoing training to maintain their expertise. Staff should also be provided with sufficient internal and external tools to allow them to properly research activities and formulate conclusions.

5.4.10. Strengthening of communication lines

When multiple departments are responsible for researching unusual activities (i.e., the BSA department researches BSA-related activity and the Fraud department researches fraud-related activity), the lines of communication between the departments must remain open. This allows banks with bureaucractic processes to gain efficiencies by sharing information, reducing redundancies, and ensuring all suspicious activity is identified, evaluated, and reported. If applicable, reviewing and understanding suspicious activity monitoring across the organizations' affiliates, subsidiaries, and business lines may enhance a banking organization's ability to detect suspicious activity, and thus minimize the potential for financial losses, increased legal or compliance expenses, and reputational risk to the organization.

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