

## **Civil and Disciplinary Liability Resulting from the Violation of Banking Secrecy Under Law No. 23/09**

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### **Abstract:**

Commitment to banking secrecy is one of the necessities whose establishment must be ensured by the state. It is regarded as a legal means to protect the client's personal life, preserve the cashier, attract local and foreign funds, in addition to protecting the economic interests of the state. However, disclosing the banking secret can lead to undermining trust between the client and the bank resulting in a reluctance to save and invest money. Therefore, the legal legislations have required banks to adhere to banking secrecy using the criminal penalties, as well as the civil and disciplinary liability. Yet, these liabilities are not absolute, but rather restricted, because the legislator has specified exceptions to the principle of commitment to banking secrecy in order to protect the public order and the public interest.<sup>1</sup>

**Key words:** commitment, principle of banking secrecy, civil penalty, disciplinary liability, public order.

### **Introduction**

Bank secrecy is the mirror reflecting the bank and financial institutions and one of the most important work rules imposed by laws, customs, professional ethics and banking codes of conduct since their inception. Hence, the bank must adhere to banking confidentiality. Customers must perform their work with care and diligence in order to protect the bank and attract a large number of investors. This also has a

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positive impact on the country's economy. Additionally, workers must adhere to the duty of confidentiality regarding all important information for customers and stop at competing institutions as the principle of banking secrecy serves both the interests of the bank and the customer. The law has established legal protection for the bank's secrets, which is represented in civil and disciplinary liability. Bank secrecy is a legal or contractual obligation that provides serious guarantees for confidentiality. It is subjected to civil liability, in case that the customer was affected by a damage, which results in various penalties. The most important of these penalties is the civil penalty, which requires compensation in cases of damages.

Accordingly, the proposed problem is the following: What are the most important civil and disciplinary penalties imposed on the bank in case of breaching the banking secrecy under Law No. 23/09?

To answer this problem, we decided to divide this research paper into two main sections. In the first section, we will discuss the civil penalty that requires compensation in cases of damage. It is one of the most important obligations imposed by the Algerian legislator on banks and financial institutions in order to protect the customers in cases of the bank's violation of the obligations through its employees by revealing the secrets of their customers. This leads to the necessity of disciplining the employee and raising his/her disciplinary responsibility, which will be discussed in the second section of the paper.

## **1. Civil liability of the bank for breaching the banking secrecy**

In every human group, various damages occur as an inevitable result of its members interference with their needs and conflicting interests. This damage increases with the increase in the population activity and density. Responsibility for this damage falls on the perpetrator of the harmful act, whether the latter affects the individual

or the society as whole. This responsibility varies according to its causes and results especially as the banks play an important role in serving the economy of societies by offering many banking services to their customers. When doing so, they are exposed to the rules of civil liability, whether contractual or tortious. The nature of the banking activity itself constitutes a significant economic force in view of the strength of the customer, who represents the weaker party in this relationship and therefore must be protected.

This is what we will try to clarify by addressing both the contractual liability of the bank (the first requirement), and the tortious liability of the bank (the second requirement).

### **1.1 THE BANK'S TORT LIABILITY FOR BREACHING BANKING SECRECY**

The contractual liability of the bank arises as a result of its violation of one of its obligations that are based on a contract linking it to the contracting parties. The bank's failure to fulfil its obligations towards the customer or implementing it in a defective or incomplete manner raises its contractual liability towards him/her<sup>2</sup>. The bank's contractual liability aims to rule in favour of the customer to compensate for the damage resulting from its failure to fulfil its obligation. For this liability to be raised it is sufficient to have a contract between the customer and the bank in addition to a proof that the damage requiring the bank to be liable, which the customer has suffered from, has raised from the bank's breach of any of its contractual obligations. Therefore, this liability is usually related to the bank's customers, but can also involve third parties who do not have a contractual relationship with the bank, provided that the contract concluded between the bank and its customer includes a condition for the interest of the third party<sup>3</sup>. Accordingly, in this requirement, we will

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<sup>2</sup> Dhib Zakaria, The Bank's Responsibility for Executing a Bank Transfer, an article published in the Journal of Legal and Economic Research, Faculty of Law and Political Science, University of Setif 01, Volume 01, Issue 03, 2018, p. 276.

<sup>3</sup> Bay Yazid Arbi and Baghyani Wiam, The Civil Liability of the Bank, an article published in the Journal of the Researcher for Academic Studies, Faculty of Law and

address the elements of contractual liability by tackling the contractual error of the bank in the first section, the contractual damage in the second section, the causal relationship between the contractual error and the damage in the third section, the penalty resulting from contractual liability in the fourth section, and the agreements amending the contractual liability for disclosing banking secrets in the fifth section.

### **Firstly: The bank's contractual error**

The contractual error can be intentional, such as when a bank employee intentionally discloses the customer's secrets to others with the intent to harm him/her. It can also be unintentional due to negligence, such as when a bank employee submits an account statement requested by a person claiming that he is the customer without verifying his identity until it is revealed later that he is not the owner of the account. Another example is when a person requests the balance of a customer's account by phone, and a bank employee provides him with the balance without verifying whether he is actually the account holder or not, which results in harming the customer who owns the account.<sup>4</sup>

The bank's error of disclosing a banking secret must result in a damage to its customer, whether it is material, moral, current or future. Material damage is sometimes embodied in the form of breaching a financial interest of the harmed party, but not a financial right. This occurs when a person financially supports one of his/her relatives or friends without a legal obligation to support him/her. If the supported person loses his/her breadwinner, his/her financial interest will be affected, but not his/her right. In this case, this person will have to prove that the breadwinner was effectively supporting him/her on a

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Political Science, University of Hadj Lakhdar Batna 01, Volume 05, Issue 03, 2018, p. 434.

<sup>4</sup> Mostafaoui Amina, The Commitment of Banks Not to Disclosure Professional Secrets, a thesis for a Master's Degree in Law - Business Law -, Faculty of Law, University of Algiers 01 - Ben Aknoun -, 2011/2012, p. 49.

continuous and permanent basis and that the opportunity to continue doing so in the future was realized so that the judge estimates the opportunities that the harmed party has lost due to the loss of his/her breadwinner to award him/her compensation on this basis, provided that the interest is legitimate.<sup>5</sup>

Moral damage was defined by Professor Belhaj Al-Arabi as: “The damage that befalls a person in other than his/her financial rights or in a non-financial interest. It is what affects a person’s dignity, feelings, honour, religious beliefs, or emotions. It is also the emotional pain that a person may suffer from as a result of losing one of his/her loved people<sup>6</sup>.” This occurs, for example, if the customer’s clients turn away from him/her or if he/she is faced with contempt in his/her family or professional circle. Alternatively, this can also occur if his/her competitors exploit this confidential information to advertise against him/her, which leads to causing his/her bankruptcy and removing him/her from the market, and thus eliminating one of their competitors. It is not enough for the bank to commit an error and cause harm to the customer, but the bank’s error must rather be the direct cause of the harm that befell the customer, which is expressed by the causal relationship between the error and the harm. Proving this causal relationship is the duty of the customer who claimed that the bank has breached the commitment to banking secrecy. In fact, this is an easy matter to prove as it is often supported by circumstantial evidence and proof, which are usually clear.<sup>7</sup>

Violating the obligation imposed by the contract concluded between the customer and the bank is a contractual error because according to the contract, the bank is obligated not to disclose the

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<sup>5</sup> Abdul Razzaq Al-Sanhouri, Al-Wasit in Explaining the Civil Law, Part One, The Theory of Obligation in General, Sources of Obligation, Unlawful Employment Contract, Unjust Enrichment, Law, Dar Ihya Al-Turath Al-Arabi, Lebanon, 1998, p. 858.

<sup>6</sup> Belhaj Al-Arabi, The General Theory of Obligation in Algerian Civil Law, Unlawful Act - Unjust Enrichment - Law, Part Two, Office of University Publications, Algeria, 2001, p. 14.

<sup>7</sup> Mostafawi Amina, the previous reference, p. 50

secrets of its customers, but rather to preserve them. Thus, their disclosure by the bank or one of its affiliates represents a breach of the contract.

### **Secondly: Contractual damage**

Contractual damage refers to the harm that befalls the creditor as a result of breaching a legitimate interest of the harmed party in his/her money or person, i.e. the harm that befalls the person in one of his/her rights or legitimate interests. The damage is a fundamental element for the contractual liability of the bank as it is the main reason of the obligation to compensate, i.e., there is no compensation without harm. The availability of a contractual error alone is not sufficient to achieve contractual liability. This error must rather result in a damage to the creditor.<sup>8</sup> Moreover, for the contractual liability of the bank to be established, the customer must prove the harm that occurred to him/her because the mere failure of the bank to implement its obligations is not sufficient for the establishment of contractual liability towards him/her. The contractual damage that the bank is obligated to compensate the customer for appears in two types: material damage, which befalls the person in his/her body or money, and moral damage, which is represented in the harm that affects the person in his/her honour, reputation, esteem or emotion.<sup>9</sup>

The possibility of the material damage, resulting from the bank's error towards the customer, to interfere with a moral damage to the latter is frequent in many cases. The customer's reputation, as a merchant enjoying a certain position within an economic framework, would certainly be affected by any negative material repercussions on

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<sup>8</sup> Khaled Daw and Fatima Maarouf, *The Elements of Contractual Liability and the Conditions for Its Establishment - An Authentic Study - An article published in Al-Bayan Journal for Legal and Political Studies, Faculty of Law and Political Science, University of Mohamed El-Basheer El-Ibrahimi, Bordj Bou Arreridj, Volume 08, Issue 01, 2023, p. 120.*

<sup>9</sup> Khaled Daw and Fatima Marouf, the previous reference, p. 121.

him/her as a result of the bank's error. Additionally, moral damage can potentially extend into his/her future.

Therefore, the basic condition for the establishment of contractual liability is that the damage must be certain and actual, not hypothetical or potential. In other words, the damage must have actually occurred or will definitively occur in the future as an inevitable result of the committed error.

### **Thirdly: The causal relationship between the contractual error and the damage**

The fact that the causal link is an independent element within the framework of liability entails proving the relationship between the error and the damage. The harmed party does not only have to prove the error of the other party, but has to also to prove the existence of a direct link between the error and the damage because the error can appear within the preliminaries of the damage without being the reason for it to happen. According to the general rules, it is the duty of the harmed party to prove the causal relationship between the damage that occurred to him/her and the breach of the obligation; while, the other party has to prove the opposite. Moreover, it is permissible to prove the causal relationship by all means of proof since they are material facts. The most important means to do so is the legal presumption that assumes the existence of the causal relationship once the error and damage are proven, leading the burden of proof to shift to the defendant.<sup>10</sup>

Failure to implement the obligation of banking secrecy results in the right of the customer who is harmed by the disclosure to claim compensation, in addition to his/her right to terminate the contract that binds him/her to the bank in other cases. The victim has the right to file a legal claim to obtain a compensation for the damages, which is an amount allocated to the creditor as a compensation for the damage that he/she has suffered from as a result of not implementing the obligation.

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<sup>10</sup> Mohameddeen Jalal Wafaa, *The Role of Banks in Confronting Money Laundering*, no edition, The New University House for Publishing, Egypt, 2001, p. 87.

This is because the bank is obligated to compensate for the damage resulting from its violation of the duty of confidentiality in case that the harmed customer loses opportunities to contract with others.<sup>11</sup>

Contractual liability is characterized by being based on the contract, because its extent is determined by the will of the contracting parties. The law assumed that this will was directed towards making the liability for damages limited to the amount expected when contracting<sup>12</sup>. The same was adopted by the Algerian legislator, in the text of Article 182, paragraph two of the Algerian Civil Code.<sup>13</sup>

Compensation within the framework of contractual liability includes the damages that were expected on the day in which the contract was concluded, unless the debtor has committed a serious error. In addition, the customer has the right to terminate the contract that binds him/her to the bank as a result of the latter's failure to fulfil its contractual obligation. The Algerian Civil Code has included the termination of the contract and has listed its forms as a legal means of dissolving it. The termination of the contract may either be judicial, consensual, or by the force of law as the bank's disclosure of its customer's secrets can put an end to the contract concluded between them. In most cases, banks resort to including conditions in the contracts concluded with their customers in order to determine their liability or exempt themselves from it. In such cases, given the absence of special texts applicable to them, the general rules of the civil law are applied.

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<sup>11</sup> Bakhwiya Dris, *The Reality of Banking Secrecy in Algeria and Its Impact on Combating the Crime of Money Laundering*, an article published in *Al-Mofaker Magazine*, Issue 07, Faculty of Law and Political Science, University of Mohamed Kheider Biskra, p. 314.

<sup>12</sup> Bakhwiya Dris, the previous reference, p. 314.

<sup>13</sup> Article 182, paragraph two, Civil Code: "However, if the obligation stems from a contract, the debtor who has not committed cheating or a serious error shall only be obligated to compensate for the damage that could normally be expected at the time of contracting"

#### **Fourthly: The penalty resulting from contractual liability**

Contractual ties justify the customer's trust in his/her bank; thus, the duty of confidentiality must be implemented in accordance. The debtor must carefully protect the interests of creditors. Yet, if the debtor fails to fulfil his/her obligation, the other party would have the right to prove so, and in case this was realized, a decision of compensation may be ruled.

If the customer suffers a damage as a result of the disclosure process, he/she can either claim compensation from both the bank and the employee as long as the bank is a joint stock company, or from one of them. In case that he/she claims compensation from the bank, the latter may claim compensation from the employee who made the error so that he/she pays the customer's compensation. Nevertheless, the judge may also reduce the amount of compensation or cancel it in case that the creditor, through his/her error, has participated in causing the damage or increasing it. This is confirmed by the text of Article 177 of the Civil Code.<sup>14</sup>

In some cases, the bank's violation of the banking secrecy results in the possibility of the harmed party to terminate the contract since, by breaching this obligation, he/she is dealing with a bank that has breached his/her trust, which prompts him/her to terminate the contract due to the non-implementation.

In the case of bilateral contracts, if one of the contracting parties does not fulfil his/her obligation, the other contracting party may, after notifying the debtor, demand the implementation of the contract or its termination. This is in addition to a compensation in both cases if required. Add to that, the judge may set a deadline based on the circumstances as he may, also, refuse the cancellation if what the

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<sup>14</sup> Article 177 of Order 75-58, dated on September 26, 1975, which contains the Civil Code, Official Journal, No 78, published on September 30, 1975, amended and supplemented.

debtor has not fulfilled is of little importance compared to all the obligations.<sup>15</sup>

### **Fifthly: Agreements amending the contractual liability for disclosing banking secrets**

Agreements on the liability for disclosing the banking secret are intended to regulate the effects of the bank's liability in another manner than that in which it is regulated by law. Contractual liability is based on the bank's breach of the obligation of the banking secrecy imposed by a contract. Consequently, it is permissible to agree in this contract to amend its provisions based on the fact that the contract is the legislation of the contracting parties. This refers to the agreements that relate to disclosing the secret of specific facts, to specific persons, or at a specific time<sup>16</sup>. Additionally, Article 178, paragraph two of the Civil Code<sup>17</sup> states that it is not permissible to agree on the exemption from liability in the cases of intentional or serious errors committed by a third party whom the debtor uses to implement his/her obligations. Minor errors are the only type of errors that can be valid for agreement or mitigation based on the principle of the authority of the will, provided that the damage affects the property not the person; otherwise, the condition would be void. As for intentional and serious errors, it is not permissible to agree to exempt or mitigate them because that would

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<sup>15</sup> Article 119 of Order 75-58 containing the Civil Code, previously mentioned.

<sup>16</sup> Mohammad Abd El-Hay Ibrahim, *Disclosing Banking Secrets between Prohibition and Permissibility - A Comparative Study - 1st ed.*, Wael House for Printing and Publishing, Amman, 1999, p. 253.

<sup>17</sup> Article 178 of the previously mentioned civil code, paragraph two: "It is also permissible to agree to exempt the debtor from any liability resulting from the failure to perform his/her contractual obligation, except for what arises from his/her cheating or serious error. However, the debtor may stipulate his/her exemption from liability resulting from cheating or serious errors committed by persons that he/she uses to perform his/her obligation.

link the obligation to a voluntary condition from the debtor, which voids the contract.<sup>18</sup>

In the field of banking secrecy, the accepted agreements determine the obligation, but do not exempt from it. In most cases the obligation of confidentiality is stipulated in the contract that is concluded between the bank and the customer; hence, it is difficult to find in the contract any clauses stipulating an exemption from the obligation of banking secrecy. However, it is acceptable to stipulate in the contract that the bank has the authority to disclose specific secret acts for the benefit of specific persons. The customer also has the right, when contracting with the bank, to specify the facts that must be concealed or the persons who are permitted to know the secret, even if they are among the people from whom the secret was supposed to be withheld, (except for public persons) even if they are among the persons who are permitted to know the secret. The customer can additionally specify some facts to be concealed from some of these persons as long as the agreement does not conflict with the public order.<sup>19</sup>

The effect of the exemption condition, if it is invalid and was the motive for the contract, is that the condition and the contract are both invalid. If it was not the motive for the contract, the condition is invalid and the contract is valid. If the exemption condition is valid, the debtor must be exempted from liability in accordance with what was agreed upon and in application of the principle of the authority of the will.

## **1.2 The bank's tort liability for breaching banking secrecy**

The bank's tort liability is established in the following cases: when there is no contract between the bank and the customer, a void contract is established between them, their contract is decided to be

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<sup>18</sup> Bouzidi Elias, Confidentiality in Banking Institutions: a comparative study, a PHD thesis specialized in private law, Faculty of Law and Political Sciences, Abou Bakr Belkaid University, Tlemcen, 2018/2019, p. 201.

<sup>19</sup> Mohamed Abdel-Hay Ibrahim, previous reference, p. 254.

void, or when there is a valid contract between them but the damage did not result from breaching an obligation arising from it but rather due to breaching a legal obligation.<sup>20</sup>

The bank's tort liability for disclosing banking secrecy is based on the availability of three elements, which will be explained below. The tortious error will be explained in first section, the damage in the second section, the causal relationship between them in the third section, the penalty resulting from tortious liability in the fourth section, and finally the agreements amending tortious liability for disclosing banking secrecy in the fifth section.

### **Firstly: Tortious error**

Tortious error is defined as breaching a legal obligation or duty or infringing on the rights of others without right. This legal duty is to be careful for the one's behaviour not to harm others; thus, if it deviates from this behaviour, it would require tortious liability.<sup>21</sup>

The bank's commitment not to disclose banking secrets in the field of tort liability is regarded as a commitment to exercise care or a commitment to a means that require the employee to adopt a cautious and careful behaviour so as not to harm others.

It is worth to note that the error in tort liability is presented by the presence of two elements: the first is material, which is aggression, and the second is moral, which is awareness and discrimination.

The material element refers to aggression, which is the deviant behaviour that harms others, whether intentional, i.e. with a bad purpose, or unintentional, i.e. due to negligence. It can also take a positive form, such as a person hitting another person with his car, or a

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<sup>20</sup> Mohamed El-Naji, an investigation of the Rules of Civil Liability of the Bank for Disclosing Professional Secrets, Law Magazine, House of Moroccan thoughts for Publishing and Distribution, Morocco, 2008, Issue 06, p. 143.

<sup>21</sup> Bouzidi Elias, the previous reference, p. 18.

negative form, such as someone riding his bike at night without lights<sup>22</sup>. It can be said that the material element of the error is the deviation from the behaviour of an ordinary man who is in the same circumstances in which the responsible person is found. It is an aggression committed by a person who exceeds the limits that he/she must adhere to in his/her behaviour. This person's behaviour is measured on the behaviour of the ordinary person, who is the bank employee that represents the generality of ordinary employees, as he/she is neither exceptionally intelligent nor fully motivated.

The tort liability is raised even if the bank has committed a minor error or a mere negligence and lack of caution, such as giving false information about the customer indicating that his/her financial status is excellent. While, the customer would have to prove that the bank has violated its legal obligation and committed an illegal act.<sup>23</sup>

The bank's error in disclosing the customer's secret is considered a tort error as long as it is not bound to the customer by a contractual relationship. This may occur in several cases:

- When the contract is void due to the customer's incapacity or for one of the reasons for the invalidity of the contract that are related to consent, subject matter or reason.
- When a person makes contract negotiations with the bank, in which he/she discloses some secrets to it, then the negotiations fail and the contract is not concluded. It occurs also if the bank makes a mistake in the stage prior to the conclusion of the contract.
- When a customer concludes a contract with the bank, which is then terminated leading to the end of the relationship between the bank and the customer. However, the termination of the contract does not

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<sup>22</sup> Aissat Al-Yazid, Lectures on Tort Liability (Unlawful Act or Harmful Act), Faculty of Law and Political Science, Abdel Rahman Mira University - Bejaia - Second Year L.M.D., 2019/2020, p. 11.

<sup>23</sup> Abdel-Mawla Ali Metwally, The Legal System of Secret Accounts, A Comparative Study, 2nd ed., Dar Al-Nahda Al-Arabiya, Egypt, 2001, pp. 279-280.

mean the end of the obligation to maintain the banking secret<sup>24</sup>. Consequently, if the bank, after the end of the contract, commits an act that would disclose the customer's secrets resulting in a damage to the customer, it would be responsible for compensating him/her in accordance with the rules of tort liability.<sup>25</sup>

The provisions of tort liability are also applied in the case of an investigation, i.e. when the bank obtains information about the customer from other banks within the framework of banking work. Despite the absence of any contract between them, the bank would bear the tort liability in case of disclosing such information, which it obtained indirectly.<sup>26</sup>

In addition to the breach and violation, the elements of awareness and discrimination (moral) must be present for the tort error to be achieved. In order for a person to be tortiously liable for his/her actions, he/she must be aware. If this person is not aware, he/she will not be held accountable. Instead, the person legally responsible for him/her must be held accountable. In this case, the bank, as the one responsible for supervision, would be liable for them according to the text of Article 134, paragraph one of the Civil Code. As long as the bank employee will obviously be sane, adult, fully aware, and responsible for his/her actions in view of his/her academic and personal qualifications, upon which he relies when being appointed to this position, any tortious error that he/she commits would require tort liability.<sup>27</sup>

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<sup>24</sup> Bouzidi Elias, the previous reference, p. 186.

<sup>25</sup> Mohamed Abdel-Hay Ibrahim, the previous reference, p. p. 247.

<sup>26</sup> Al-Hassi Mariam, *The Bank's Commitment to Maintaining Professional Confidentiality*, Master's Thesis, Faculty of Law and Political Science, Abu Bakr Belkaid University, Tlemcen, Algeria, 2011/2012, p. 140.

<sup>27</sup> Article 134: "Anyone who is legally or contractually obligated to supervise a person in need of supervision due to his/her minor or his/her actual or physical condition shall be obligated to compensate for the damage caused by that person to others through his/her harmful act."

## Secondly: Damage

It is the second element of the tort liability's elements. There is no liability without damage, and no claim without interest. Damage is what befalls a person in one of his/her rights or legitimate interests<sup>28</sup>. In other words, it is the bank's failure to fulfil its legal duty to preserve the secrets of its clients and those dealing with it, in addition not to disclose the secrets of their accounts, deposits, trusts, safes, or any work related to them. The damage can be either material or moral. Material damage in tort liability is what befalls a person in his/her body or money. It is represented in the financial loss that results from the violation of a right or interest, such as real or personal rights and intellectual or industrial property<sup>29</sup>. For example, the bank's failure to fulfil its obligation of confidentiality by disclosing the secrets of its client's accounts or the person dealing with it would lead to breaching the client's material interest. This indicates that the disclosure process leads to material damages for the harmed party, such as when the bank publishes a statement about a client's balances in newspapers or provides information to others through the investigation process. This would lead other banks to refrain from implementing a loan that had been agreed upon as a result of this publication or disclosure. In all cases, when ruling on the compensation claim, the compensations are estimated based on the amount of damage that is realized at that time. As for the moral damage, it is represented in the bank's breach of its obligation to maintain the secret and disclosing it in a way that may affect the honour, feelings, esteem or reputation of the customer or person dealing with the bank among traders in a way that affects their trust in him/her. Thus, the right to compensation for the moral damage is for the bank's customer.<sup>30</sup>

As for proving the damage resulting from the tort error, the harmed customer must prove the damages that he/she suffered from as a result of the disclosure of his/her secrets. He/she should also prove

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<sup>28</sup> Aissat Al-Yazid, the previous reference, p. 24.

<sup>29</sup> Aissat Al-Yazid, the same reference, p. 24.

<sup>30</sup> Abdelmawla Ali Metwally, the previous reference, p. 283.

the occurrence of the damage by all means of proof, including written or circumstantial evidence. Proving the damage is a subject matter that is subject to the authority of the judge.<sup>31</sup>

### **Thirdly: The causal relationship between tort error and damage**

For tort liability to be established it is not enough that harm has occurred to a person. This harm must rather be caused by the committed error in a direct manner, otherwise, liability would be void. When the three elements are available, liability is established and the responsible person is asked for compensation. The latter is monetary and subject to the authority of the judge. One of the Supreme Court's decisions stated that: "It is legally decided that the civil liability's determination of its damage and assessment of the severity of that damage is subject to the discretionary authority of the judge. Hence, in order to assess the compensation, the judge may resort to expertise or may rely on the necessary documents to make the assessment."<sup>32</sup>

In tort liability, compensation is for direct harm, whether expected or unexpected, while indirect harm is not compensated for. Compensation here includes the loss endured by the harmed party and the gain that he/she has missed, provided that it is a natural result of the harmful act.

Proving the occurrence of a damage is the duty of the client suffering from it. It does not matter whether the error was serious, minor, intentional or unintentional. Therefore, the client must prove that the error was committed by the bank<sup>33</sup> and that he/she suffered from the damage as a result of this disclosure. In addition, it is necessary to prove the causal relationship between the error, represented by the disclosure of the banking secret, and the damage. In

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<sup>31</sup> Bouzidi Elias, the previous reference, p. 188.

<sup>32</sup> Supreme Court Decision No. 1165355 dated 12/21/2017.

<sup>33</sup> Dar Al-Sabaa Mokhtaria, The Bank's Responsibility for Maintaining Banking Secrecy, an article published in the Journal of Leasing and Development for Research and Studies, Issue 07, University of Djilali Al-Yabes - Sidi Bel Abbes -, p. 195.

fact, the bank's responsibility stems from the responsibility of its employees, because the bank, as a legal entity, performs its activity through normal persons, such as managers, board members, employees and users, who are the ones who express its management. If one of them commits the misdemeanour of disclosing the customer's secrets, the bank would be considered responsible for that. The bank's responsibility for the actions of its employees is realized whenever the bank has an actual authority to supervise the one who caused the damage. If the bank wanted to absolve itself from responsibility, it must prove that it did not make a mistake in supervising and directing the employee, or that the employee violated the duty of confidentiality outside the scope of his/her job in the bank. The basis of the bank's responsibility is the relationship of subordination based on supervision and direction. Thus, whenever this relationship ends, the bank would not be responsible for the errors of its subordinate. Instead, the user would be exposed to personal accountability, and the harmed party may claim compensation from the bank or the employee for the damage that he/she suffered from as a result of the disclosure of his/her banking secrets due to the actions of one of the bank's subordinates<sup>34</sup>. The harmed person has also the right to claim compensation from both the bank and the subordinate, even though he/she often holds the bank accountable for the resulted damage. Subsequently, the bank that paid the compensation has the right to claim compensation from the subordinate because the norm is that every harm caused to others obligates its perpetrator to guarantee the damage.<sup>35</sup>

#### **Fourthly: The penalty resulting from tort liability**

With the availability of an error, a damage and a causal relationship, which are the elements of tort liability, the responsible party must compensate for the damage caused by his/her error. If this error is proven against the bank, this latter will be required to

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<sup>34</sup> Dar Al-Saba Mokhtaria, the previous reference, p. 196.

<sup>35</sup> Dar Al-Saba Mokhtaria, the same reference, p. 196

compensate for the damage suffered by the customer, who in turn can file a lawsuit against the bank as the manager. The customer can also file a lawsuit against the employee on the basis of the manager's responsibility for the actions of his/her subordinate so that the bank, after paying the compensation ruled by the court, can claim compensation from the employee who committed the crime in accordance with the text of Article 137 of the Civil Code. This latter states: "The manager has the right to claim compensation from his/her subordinate in the case of committing a serious error."<sup>36</sup>

It is worth noting that the disclosure of banking secrets by the bank employees who are exposed to these secrets by virtue of their profession entails the state's responsibility to compensate for their error as they are public employees and subordinate to it. If he/she proves that the disclosure occurred based on the orders of his/her superior, the public employee can file a lawsuit against his/her claim of compensation, in accordance with the text of Article 129 of the Algerian Civil Code<sup>37</sup>, provided that these orders were obligatory for him/her.

### **Fifthly: The agreements amending the tort liability for disclosing banking secrets**

The text of Article 178, paragraph three of the Civil Code, states: "Any condition that indicates exemption from the liability arising from a criminal act is void." Accordingly, it is not permissible to agree to exempt from liability or to mitigate it. Add to that, any agreement in this regard shall be considered absolutely null and void. The reason for the impermissibility of agreeing on exemption from tort liability is that it is considered a mandatory provision of law and is related to public

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<sup>36</sup> Article 137 of Order 75-58, mentioned above.

<sup>37</sup> Article 129 of the previously mentioned Civil Code: "Public employees and agents are not personally responsible for their actions that harm others if they perform them in implementation of orders issued by the president, provided that they are obligated to obey these orders."

order. Additionally, its source is law, unlike contractual liability, whose source is agreement.

The invalidity of the condition exempting from tort liability covers all its forms, whether the liability arises from personal error, act of others or from things, regardless of the error's degree of seriousness.<sup>38</sup>

### **Sixthly: Cases of non-entitlement to compensation**

The compensation requested from the bank as a result of the disclosure process is negated by denying the causal relationship, such as proving the foreign cause, or when the act is ordered or authorized by law. These are the exceptions stipulated in Article 133 of Law 23-09 of the Civil Code.<sup>39</sup>

- Denying the causal relationship by proving the foreign cause

The causal relationship between the bank's error and the damage caused to the victim is negated by proving the foreign cause beyond the bank's control. The Algerian legislator did not define the foreign cause

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<sup>38</sup> Bouzidi Elias, the previous reference, p. 203.

<sup>39</sup> All authorities are required to adhere to confidentiality, taking into account the explicit provisions of the laws, except for:

\* the public authorities that are allowed to appoint managers for banks and financial institutions, \* the judicial authorities operating within the framework of a criminal procedure, \* Public authorities obligated to report information to qualified international institutions, especially in the framework of combating bribery, money laundering and terrorist financing, - The Banking Commission or the Bank of Algeria that works on behalf of the latter in accordance with the provisions of Article 120 mentioned above. The Bank of Algeria and the Banking Commission can communicate information to the authorities responsible for supervising banks and financial institutions in other countries, taking reciprocity into account, provided that these authorities are themselves subject to professional secrecy with the same guarantees as those in Algeria. The subject liquidator can also receive the information necessary for his/her activity.

but rather mentioned its forms according to the text of Article 127 of the Civil Code<sup>40</sup>, which are as follows:

a- Force majeure or sudden accident

Force majeure or sudden accident is defined as an accident that cannot be anticipated or prevented, such as an earthquake, fire or flood. It can also be an administrative order that must be executed, provided that it is impossible to pay. This force majeure or sudden accident terminates the debtor's obligation to contractual liability and negates the causal relationship between the error and the damage in tort liability.<sup>41</sup>

b- The error of the harmed party:

In this case, the bank must prove that the act of disclosure would not have happened without the harmed party's own act, such as the case in which the customer sends the documents related to his/her bank account with a representative. During the journey the latter can review them and learn what is in their content. In such a case, the customer cannot claim a compensation for the disclosure of secrets and the latter, in turn, is not obligated to compensate the erring customer.<sup>42</sup>

c- The error of a third party

If the bank proves that the damage suffered by the harmed party is due to an error of a person foreign to the bank who disclosed the

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<sup>40</sup> Article 127 of the Civil Code "If a person proves that the damage resulted from a cause that is beyond his/her control, such as a sudden accident, force majeure, an error committed by the harmed party, or an error committed by a third party, he/she would not be obligated to compensate for this damage unless there is a legal text or agreement to the contrary."

<sup>41</sup> Nadir Artbas, Banking Secrecy between the Principle and the Responsibility for Disclosing It, Master's Thesis in Law - Business Law Department - Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2007, p. 20.

<sup>42</sup> Mostafaoui Amina, the previous reference, p. 54.

secret, then the bank in this case has proven the foreign cause that negates the causal relationship.<sup>43</sup>

We conclude in the end that if the bank proves the foreign cause, it would be exempted from all liability, provided that this foreign cause is the sole reason for the occurrence of the damage. Whereas, in case that the bank's error is involved with one of the above-mentioned cases, then the seriousness of each of them is taken into account and each of the bank and the third-party bears part of the responsibility based on the extent of its contribution to causing the damage.<sup>44</sup>

- An act ordered or authorized by law

Article 39, paragraph one, of the Algerian Penal Code states: "The act is not a crime when it is ordered or authorized by law."<sup>45</sup> Accordingly, the bank is not liable for the disclosure it makes in implementation of the law. The latter has specified some exceptions where the disclosure of a banking secret is permissible in accordance with the text of Article 133 of the Monetary and Banking Law, which we discussed in the first chapter.

## **2. The disciplinary liability for breaching the banking secrecy**

Disciplinary liability is considered a fundamental element for the legal protection of banking secrecy. A disciplinary punishment may be imposed on the secret keeper as a result of his/her failure to maintain the banking secrecy since it is an act that represents a violation of the duties of the job or profession. There is no doubt that violating the duty of banking secrecy by disclosing information and data of a confidential

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<sup>43</sup> Article 126 of the previously mentioned Civil Code "If there are multiple persons responsible for a harmful act, they are jointly and severally liable to compensate for the damage."

<sup>44</sup> Mostafaoui Amina, the previous reference, p. 54.

<sup>45</sup> Article 39 of Order 66-156, dated on June 8, 1966, Official Journal No. 34, containing the Penal Code, issued on June 8, 1966, amended and supplemented

nature, whether related to the customer or to the bank, is not only a violation of the legislative texts, but also of the internal regulations established by banks and financial institutions. Accordingly, the source of disciplinary sanctions is the internal regulations of the banks or the regulations established by banking associations. In this regard, when organizing the banking profession, the Algerian legislator has referred to the content of Article 105, paragraphs one and five of the Monetary and Banking Law No. 23-09. This latter stipulates establishing an association of Algerian bankers that can propose to the Governor of the Bank of Algeria or the Banking Committee, within the framework of professional ethics and according to the case, to impose penalties against one or more of its members. To elaborate on this topic, we will divide it into two requirements. In the first requirement we will address the concept of disciplinary responsibility, while, in the second requirement we will address the supervisory measures of the Banking Committee.

## **2.1 The concept of disciplinary liability and its elements**

Disciplinary liability is established in the case of violating the requirements and controls of the profession that are specified by the organization while the employee is performing his/her duties. This violation can either take the form of a positive act, such as performing an action, or a negative act, when he/she refrains from performing a duty leading to the establishment of his/her disciplinary liability. Therefore, every member of the board of directors, every accountant and every person who participates or has participated in any way in managing a bank or financial institution or was one of its employees, and every person who participates or has participated in the supervision of banks and financial institutions must adhere to banking

confidentiality. Otherwise, his/her disciplinary responsibility will be established in the case of violating this obligation.<sup>46</sup>

### **Firstly: Definition of Disciplinary Liability**

Disciplinary crime was defined by jurisprudence as any act or omission of an act that is committed by an employee. Hence, the disciplinary crime is a property crime committed by an employee when violating the duties stipulated in laws and regulations. It involves performing acts that conflict with the employee's duties leading to a failure in performing them and a breach of the rules of the job. In this type of responsibility, we noticed that the Algerian legislator has included various jobs in the obligation to well perform the one's profession.<sup>47</sup>

### **Secondly: The Elements of Disciplinary Liability**

In general, for disciplinary liability to be established, the following three elements must be available to achieve the bank's responsibility for its disciplinary errors.

#### **1-Error**

Most legislations contain a legislative gap in the field of defining the disciplinary error, unlike criminal error. For this reason, the disciplinary error was regarded as a general rule. The Algerian legislator also did not provide a precise definition for it, but rather used the term disciplinary error in the text of Article 160 of Order 06-03 containing the Basic Law of the Civil Service. This latter states: "Any neglect of professional duties, breach of discipline, error or violation during or in relation to the performance of the employee's duties constitutes a professional error and exposes its perpetrator to

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<sup>46</sup> Dris Bakhouya, **Banking secrecy and its Impact on the Ways of Combating Money Laundering in Algeria**, an article published in the Journal of Legal and Political Sciences, Issue 16, University of Martyr Hama Mohamed Lakhdar - El Oued -, Algeria, 2017, p. 78

<sup>47</sup> Nadir Artias, the previous reference, p. 176.

disciplinary punishment, without prejudice, to criminal prosecutions when necessary.”<sup>48</sup> By examining this text, we find that the legislator did not define the error, but rather used expressions that indicate it, such as: negligence, breach of job duties, refusal to implement instructions<sup>49</sup>, violation, etc. Based on this, we deduce that for disciplinary liability to be established, it is not necessarily required that the employee intentionally commits an error by disclosing a professional secret. A mere neglect in maintaining the secret is, also, considered a justification for the establishment of this responsibility as it affects the honour of the profession. Besides that, a bank employee must respect all written rules.

## 2-The commitment of an error by a bank employee

For disciplinary liability to be raised, one of the bank employees must violate the obligations stipulated in the banking law. This refers to performing an act that is inconsistent with their duties and responsibilities, or committing professional errors that must not reach the point of demanding compensation because the basis of disciplinary responsibility is the existence of the employment relationship.

Therefore, the employee is obligated to maintain the banking secret because it is a legal duty that should not be transferred to others, neither at the time of the work nor after the termination of his/her relationship with the bank.

The Chairman of the Board of Directors, the General Manager and the employees are all obligated to maintain the bank’s secrets that they acquire by virtue of their positions.<sup>50</sup>

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<sup>48</sup> Order No. 06-03 dated on July 15, 2006, including the general basic law of the civil service, Official Journal No. 46 published on July 16, 2006.

<sup>49</sup> Othman Talouti and Maryam kasoul, Disciplinary error and the beginning of legitimacy, an article published in the Journal of Law and Political Science, University of Khenchela, Volume 10, Issue 02, 2023, p. 1054.

<sup>50</sup> Nadir Artias, the previous reference, p. 177.

### 3-The availability of a causal relationship

The causal relationship is an element that is independent from the error. This element would be invalidated if the error was not due to the employee, but due to another reason. An example of this is when the employee executes an order issued by his superior as obeying these orders is obligatory for him. In this case he is exempted from personal responsibility provided that he proves that he was careful and cautious. The causal relationship is supposed to exist between the error and the employee. Accordingly, the entity does not charge its employee with proving the error, but the employee is rather charged with denying the relationship if he claimed that it does not exist.<sup>51</sup>

## **2.2 The disciplinary role of the banking committee**

The Monetary and Banking Law has granted the Banking Committee a set of powers within the framework of exercising its supervisory activity over banks. These powers are represented in determining a set of administrative measures as well as imposing a set of penalties against banks and financial institutions. They are executed in the case of neglecting or breaching the administrative and regulatory legislative texts as this committee represents the nerve of control in the banking field. Before identifying the disciplinary role of the Banking Committee, we must know its legal framework.

### **firstly: The Legal Framework for the Work of the Banking Committee**

The Algerian legislator has stipulated several bodies in the field of supervising the activity of banks and financial institutions. Yet,

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<sup>51</sup> Ahmed Kamel Salama, Criminal protection of professional secrets: Secrets of free professions - Secrets of public service - Secrets of the state, no edition, Dar Al Nahda Al Arabiya, Cairo, 1988, p. 439.

before addressing the Banking Committee as one of these bodies, we must first define supervision.

### 1- The Definition of Banking Supervision

It is an administrative process that primarily aims to ensure that the operations performed by banks and financial institutions comply with the determined rules and standards. This is in addition to identifying areas of error and negligence in order to correct them.

The supervisory bodies in the Algerian system are: the Monetary and Banking Council, the Risks Center, the Unpaid Receivables Center, the Accountants, in addition to the Banking Committee, which were included in the Monetary and Banking Law. This latter has determined the position of the Banking Committee by defining its tasks and its formation as a body entrusted with the supervision of banks and financial institutions. It also authorized it to take the appropriate disciplinary measures in case of a violation<sup>52</sup> in accordance with the third section entitled the Banking Committee from Articles 116 to 132 of the Monetary and Banking Law.

### **Secondly: The Preventive Measures**

Preventive measures are a set of procedures aimed at ensuring the smooth running of banks and financial institutions as well as protecting depositors in particular and the financial system in general. If it appeared that there is a breach of the profession's rules of good conduct, it would not aim to impose punishment, but rather correct and

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<sup>52</sup> Lamari Walid, Boulahis Samia, The Role of the Banking Committee in Supervising Banking Operations, an article published in the Journal of the Researcher for Academic Studies, Volume 03, Issue 05, University of Batna 01 Al-Hajj Lakhdar, 2018, p. 412.

improve the position of the bank. <sup>53</sup>However, in case that the violation continues or the preventive measures are insufficient, disciplinary sanctions would be imposed, which we will discuss below.

The Algerian legislator has stipulated preventive measures in Articles 123 to 126 of the Monetary and Banking Law. These measures are represented in warning and order procedures, in addition to measures for the case of management crisis.

- Warning and order procedures

a- Warning:

It is a preventive procedure directed by the committee to one of the banking or financial institutions that are subject to the committee's supervision of the profession's rules of good conduct. It is conducted after giving the managers of these institutions the opportunity to provide their explanations. Even though this procedure is devoid of the institution's deterrent nature, it affects its reputation and fame in front of the public of customers and depositors.

It should be pointed out that the scope of the profession's rules of good conduct is unlimited. Additionally, in the absence of a special law on professional ethics, the Banking Committee has broad discretionary power to suppress the development of practices that are offensive to the profession. An example in this context is when a bank obliges a customer to transfer all of his/her bank account in his/her windows in order to approve granting him/her a loan. <sup>54</sup>

Therefore, given the specificity of the banking profession and the special responsibilities it entails towards third parties, the Banking

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<sup>53</sup> Hawalef Abdel Samad, Lessons in the Algerian Banking Law, Faculty of Law, Abu Bakr Belkaid University, Tlemcen, 2017/2018, p. 137.

<sup>54</sup> Hawalef Abdel Samad, the same reference, p. 138.

Committee examines the feasibility of submitting comments to the institution that violated these rules. Article 123 of the Monetary and Banking Law No. 23-09 indicates: "If an institution subject to the supervision of the Committee violates the profession's rules of good conduct, the Committee may issue a warning to it after giving the opportunity to the managers of this institution to submit their explanations."

#### b-Order

The committee may allow any bank or financial institution, that has justified its situation, to take measures that would restore or support its financial balance or correct its management methods. This is what Article 124 of the Monetary and Banking Law states<sup>55</sup>. Unlike the warning procedure, this procedure targets the financial balance and management methods of the concerned banking institution, i.e. all inappropriate situations that affect its suitability and liquidity.<sup>56</sup>

It is not necessary that the bank violates the regulations in force from the text of Article 124 mentioned below in order for the Banking Committee to direct it to take a specific action through measures aimed at restoring financial balance or correcting its management methods. It is sufficient for the bank's financial situation to reflect its imbalance, which can lead in the future to certain disorders in the financial resources.

- Tips for the case of a management crisis

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<sup>55</sup> Article 124 of the previously mentioned order No23/09: "The Committee can order any subject, when his/her situation justifies so, to take, within a specified period, all the measures that would restore or support his/her financial balance or correct his/her management methods."

<sup>56</sup> Ajroud Wafa, Banking Committee and Control of Banking Activity, First Edition, House of Al-Hamed Library for Publishing and Distribution, Jordan, 2014, p. 117.

a-Appointing a temporary manager:

The Banking Committee can appoint a temporary manager, who shall be granted the necessary powers to manage and administer the business of the concerned institution or its branches in Algeria. This is required when it finds that it is no longer possible to manage the concerned institution according to the rules, or when it decides the penalties stipulated in Article 126, paragraphs 04 and 05 of the Monetary and Banking Law<sup>57</sup>. Based on the text of Article 125, paragraph 1 of the same law<sup>58</sup>, the Banking Committee has also the right to declare a cessation of payment whenever it appears that it is not possible to manage the concerned institution under normal conditions after this appointment. It must be noted that the Banking Committee, in its internal procedures for supervision in the field of reporting the suspicions related to money laundering operations has the right to appoint a temporary manager. Among the banks for which a temporary manager has been appointed is the following:

- Al-Khalifa Bank: on 01/03/2003 Mr. Mohamed Jalab was appointed as a temporary manager and has been assigned with the necessary powers. As a head of the business of the bank concerned, he had the right to declare a cessation of payment when necessary.<sup>59</sup>

Some banks were liquidated directly without resorting to appoint a temporary manager, such as the case of the Commercial and Industrial

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<sup>57</sup> Article 126/04 of the previously mentioned order No23/09: "Temporary suspension of one or more managers with the possibility of appointment of a temporary administrator"

<sup>58</sup> Article 125/01 of the previously mentioned order No23/09: "The committee may appoint a temporary administrator to whom all the necessary powers to manage and run the business of the institution concerned or its branches in Algeria are transferred. This administrator has the right to declare a cessation of payment."

<sup>59</sup> Halawef Abdel Samad, the previous reference, p. 139-140.

Bank on 05/31/2003, which is considered a non-compliant procedure. It was necessary to respect the legal provisions and regulations that were in force before resorting to liquidation, such as appointing a temporary manager.

#### b-Appointing a liquidator:

The Banking Committee has to appoint a liquidator for the bank or financial institution in the following cases:

- If its accreditation has been withdrawn.
- If it practiced the operations authorized for banks and financial institutions in an illegal manner.
- If it impersonates a financial institution. In this context the text of Article 88, paragraph one of the Monetary and Banking Law<sup>60</sup> has stated that it is prohibited for any institution other than banks, financial institutions, independent brokers, exchange offices or payment service providers to use a logo, trade name, a means of advertisement, and in general any phrase that could give the impression that it has been licensed as a bank or financial institution. In case that a liquidator is appointed for the financial institution or bank, the latter shall be removed from the list of banks and financial institutions.

The Banking Committee can also appoint a liquidator for cooperatives of savings if they were dissolved. In case this was impossible, the regionally competent court starts the liquidation procedures in accordance with the liquidation rules for companies in

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<sup>60</sup> Article 88/01: “It is prohibited for any institution, other than a bank, financial institution, independent brokers, exchange office, or payment services provider, to use a logo, trade name, advertisement, or in general any expressions that would lead to the belief that it is approved as a bank, financial institution, independent broker, exchange office, or payment services provider.”

the general rules. This was stipulated in Article 60 of the law No. 07 - 01 dated on 27th February, 2007 that is related to the cooperatives of savings and loan<sup>61</sup>. Additionally, the Algerian legislator has provided the committee with a discretionary authority to determine how to perform this liquidation and did not address the powers of the liquidator.

During the publication of their liquidation, banks and financial institutions are committed to only undertake the necessary operations for the liquidation of the financial situation, to mention that they are under liquidation and to remain subject to the supervision of the Banking Committee. It is noted in this regard that there is no specific text to determine the system and methods of liquidation that are stipulated in Article 131 of the Monetary and Banking Law<sup>62</sup>. However, this article shows the desire of the Algerian legislator to subject the liquidation of banks to a special system whose provisions are monopolized by the banking committee. It is worth noting that the liquidation in the banking law is not the result of the bank's cessation from payment. It is rather applied in all cases where the credit is withdrawn, which is what is called in the banking field without ceasing from payment.<sup>63</sup>

### **Thirdly: The disciplinary penalties for violating the banking secret**

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<sup>61</sup> Article 60 of Law 07-01 dated on February 27, 2007 relating to savings and loan cooperatives, official journal, number 15, published on February 28, 2007: "In the case of the dissolution of a cooperative, the liquidation process shall be carried out by a liquidator appointed by the banking committee. If this was not possible, it shall be carried out by the regionally competent court. The company's shares owned by the members shall be paid from the potential surplus. The available balance shall, if possible, be transferred to another cooperative or to services of social or humanitarian benefit".

<sup>62</sup> Article 131: "The Banking Committee shall determine, by means of directive instructions, the methods of temporary management and liquidation."

<sup>63</sup> Ajroud Wafa, the previous reference, p. 121-122

After taking all preventive measures by the banking committee, according to Article 123 of the Monetary and Banking Law, punitive measures can be taken if a bank or a financial institution has violated one of the legislative and regulatory provisions related to its activity, has breached an order or has not taken the warning into account. In this case the Banking Committee may take a set of measures, some of which are imposed on the representatives of the banking institution (first), while others are signed against the bank (second).

1-The penalties imposed on the representatives of the banking institution

a-The temporary suspension of the manager or termination of his/her employment:

According to the fourth paragraph of Article 126, mentioned above, the suspension of the manager may or may not result in the appointment of a temporary administrator, based on the circumstances. As for the duration of the suspension, it was neither addressed in Law 90-10 nor in Law 23-09. Nevertheless, the Monetary and Banking Council has remedied this deficiency as it included in Article 10, paragraph two, of the regulation No. 92-0564: “For this purpose, the Banking Committee can announce the suspension of one or two managers from work for a period that ranges between three months and three years. Moreover, such a decision shall particularly announce the committed management error. It can also permanently expel, from the banking and financial sector, any manager that has been suspended from work in case of repeating the error.”

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<sup>64</sup> Regulation No. 92-05 of March 22, 1992 relating to the conditions that must be met by the founders of banks and financial institutions, their representatives and managers.

Since the bank is a financial institution that protects the depositors' money, the suspension of managers leads to the cessation of the bank's movement and activity. As a result of this penalty, a temporary manager may or may not be appointed. Thus, the penalty of suspending one manager does not require the appointment of a temporary manager as the bank continues its activity in a normal manner.<sup>65</sup>

b- Revocation of the status of bank representative:

Article 11 of the previously mentioned regulation 92-05 stipulates: " according to the concept of Article 10 that is mentioned above, a person who commits a serious professional error during the general exercise of his/her duties cannot be one of the users managing an institution for a period of no less than three years without prejudice to the application of the penalties stipulated by law."

Accordingly, the status of the bank representative shall be revoked for a period of not less than three years due to a serious error that he/she has committed or in case that one of the obstacles stipulated in Article 87, paragraph one of the Monetary and Banking Law, was available. This article stipulates: "Without prejudice to the conditions determined by the board through regulations for the workers governing these institutions, no one has the right to be a founder of a bank or financial institution or a member of its board of directors, or to assume; directly or through another person, the management, administration or representation of a bank or financial institution, in any capacity" Add to this the case of his/her failure to meet certain conditions. The effects of this procedure may or may not include the appointment of a temporary administrator.

2- The penalties imposed against the banking institution

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<sup>65</sup> Ajroud Wafa, the previous reference, p. 124.

a-Warning and reprimanding:

A warning is the first disciplinary measure of a preventive nature that is directed by the committee if the bank or financial institution subject to the committee's supervision violates the simple rules of the profession's good conduct. Even though this measure is not of a deterrent nature for the institution, it affects its reputation and fame in front of the public of customers and depositors in case of its publication. Additionally, it is in itself a moral penalty.

As for the reprimanding, it represents the second step that follows the warning. It is also a disciplinary measure of a preventive nature that is directed by the committee in case that the bank or the financial institution subject to the committee's supervision violates the profession's rules of good conduct.<sup>66</sup>

These two penalties are of a disciplinary nature as they aim to instill a sense of caution within the bank or financial institution and its managers that would intend to violate the duties of the profession. Although the monetary and banking law did not specify the cases that require a warning from those that require reprimanding, the fact that the first procedure occupies the first place in the scale of disciplinary penalties gives an insight of the nature of errors based on which the type of punishment is chosen. The simpler is the error, the more appropriate is the warning report and the more severe is the error, the more necessary it is to move to reprimanding. Al-Khalifa Bank, for instance, was initially subjected to a warning before other penalties were imposed on it. Yet, despite being considered relatively important penalties, they may deeply affect the reputation of the financial institution.<sup>67</sup>

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<sup>66</sup> Halawef Abd el Samad, the previous reference, p. 141-142

<sup>67</sup> Ajroud Wafa, the previous reference, p. 125.

## b-Prohibition from engaging in some operations and activities:

In some cases, the committee imposes a penalty on the bank by restricting or completely banning a certain activity, which reduces the bank's profitability and may expose it to other losses and risks. It must be indicated that this prohibition includes part of the banking operations, not all of them, while, the penalty is the exclusive jurisdiction of the banking committee. The ban does not include the basic banking operations stipulated in Article 68 of the Monetary and Banking Law<sup>68</sup>, but also includes the banking operations related to the banking activity stipulated by the Algerian legislator in Article 79 of the Monetary and Banking Law.<sup>69</sup>

This procedure is resorted to when a bank or financial institution violates legal or regulatory rules in the field of its activities. However, from a legal perspective, this procedure cannot be regarded as a penalty to the banking institution for a process that it does not have the right to engage in. The procedure must be a real penalty, i.e., the withdrawal of a right or freedom granted by law. For example, it would be useless for the Banking Committee to issue the penalty of preventing

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<sup>68</sup> Article 68: "Banking operations include receiving funds from the public, loan operations, banking operations related to Islamic banking, as well as placing all means of payment at the disposal of customers and managing these means."

<sup>69</sup> Article 79: "Banks and financial institutions may conduct all operations related to their activity, such as the following operations:

- Exchange operations,
- Operations on gold, precious metals and precious metal coins,
- Investing, subscribing, purchasing, managing, preserving and selling transferable securities and any financial product,
- Consulting and assistance in the field of property management,
- Consulting, management, financial engineering, and in general all services directed to facilitate the establishment and development of institutions and equipment, taking into account the legal provisions in this field.

These operations must not exceed the limits set by the Monetary and Banking Council."

the receipt of funds from the public as a penalty stipulated on the basis of Article 126, paragraph three of the Monetary and Banking Law<sup>70</sup>, against a financial institution that violated the law in this regard.

c- Withdrawal of the authorization:

Withdrawal of authorization means revoking the permission to practice the activity. One of the effects resulting from this procedure is placing the financial institution under liquidation. Here appears the seriousness of such a penalty as the institution loses its activity and moves towards dissolution, which negatively affects the national economy. For this reason, the legislator ranks this penalty as the last resort in the scale of penalties, implying that all possible solutions must be met to address the financial institution's situation before considering such a penalty. There are many examples in this field, including the decision of the Banking Committee on 02/02/2006 to withdraw the authorization of the Mediterranean Public Bank (accreditation No. 2002-02 dated on April 30, 2002) and place it under liquidation and appoint a liquidator for it.

With reference to Article 129 of the Monetary and Banking Law<sup>71</sup>, when the bank's authorization is withdrawn, a liquidator must be appointed for each entity that is illegally engaged in the operations authorized for those on whom this law is applicable or that violates one of the prohibitions stipulated in Article 88 of this law.

d-Financial penalties:

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<sup>70</sup> Article "Prohibition of practicing certain operations and other types of restriction of practicing the activity",

<sup>71</sup> Article 129: "The committee may place under liquidation and appoint a liquidator for any entity that illegally practices the operations authorized for the people subject to its supervision or that violate one of the prohibitions stipulated in Article 88 of this law".

Financial penalties are the most important penalties used to confront violations of laws and regulations. In this context, the Banking Committee can impose them either instead of the penalties mentioned in the text of Article 123 or in addition to them. However, in order to subject the latter to the disciplinary penalties system issued by the Banking Committee, it is necessary to remove the ambiguity surrounding them.

In fact, the administrative fine is considered, like the criminal fine, a financial penalty involving the payment of an amount of money to the state treasury. However, there are some differences between them, the most important of which is that the criminal fine is only decided by the judicial authority, while the administrative fine is decided by administrative authorities.

This applies to the Banking Committee, although its jurisdiction is of a judicial nature, it remains an administrative authority. Moreover, it is not considered in any case to be a civil penalty as it is imposed in favor of the state, not in favor of the victim. However, the administrative financial penalty generally includes the meaning of punishment and deterrence as it is imposed on every financial institution that neglects to comply with the laws and regulations. The legislator has stipulated a maximum limit for this fine, which is equal to the minimum capital that the bank or financial institution is required to provide. In this regard, it allocated the discretionary authority to the Banking Committee. Accordingly, the role of the Banking Committee is not limited to merely pronouncing penalties, but also extends to evaluating them. The fact that the Monetary and Banking Law determines the maximum limit for the financial penalty does not mean that the committee is free from all restrictions. <sup>72</sup>

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<sup>72</sup> Ajroud Wafa, the previous reference, p. 128

Through what was previously mentioned about the disciplinary penalties issued by the Banking Committee and stipulated in the Monetary and Banking Law, we note that these penalties were not related to the nature of the violation committed by commercial banks. Therefore, the Banking Committee has the full authority in imposing penalties, as well as imposing disciplinary penalties instead of financial penalties or in addition to them. In all cases, the law did not specify the nature of the violation, hence, it remains the responsibility of the Banking Committee members to determine the appropriate penalty according to the nature of the violation. Consequently, it can be said that although the legislator has determined the penalties issued by the Banking Committee, their application was very broad as it is not adhered to any legal restrictions.<sup>73</sup>

### **3. CONCLUSION :**

What we finally conclude through this research paper is that banking secrecy is a fundamental right of customers, which banks and other financial institutions must respect. The state must also take all necessary measures to ensure that banking secrecy is not violated.

#### **Results:**

##### **Civil Liability:**

- Law N° 23/09 stipulates that anyone who violates banking secrecy exposes him/herself to civil liability and that the affected customer has the right to claim compensation for the damages that he/she has suffered from.
- The damages that can be claimed for compensation include material and moral damages.
- The amount of compensation is determined by the judge

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<sup>73</sup> Halawif Abd El Samad, the previous reference, p. 144

#### Disciplinary Liability:

- Law 23/09 stipulates that anyone who violates banking secrecy exposes him/herself to disciplinary liability.
- Disciplinary sanctions range from warning to dismissal from work.
- The disciplinary penalty is determined by the employer.

#### **4. Suggestions**

##### Promoting the culture of banking secrecy:

- Banks and other financial institutions must promote a culture of banking secrecy among their employees.
- Banks and other financial institutions must establish strict policies and procedures to prevent the violation of banking secrecy.

##### Employee Training:

- Banks and other financial institutions must train their employees on the provisions of Law 23/09 relating to banking secrecy.
- Training should include how to deal with confidential information and how to prevent the violation of banking secrecy.

##### Activating the supervision system:

- Banks and other financial institutions should activate the supervision system to prevent the violation of banking secrecy.
- The supervision system should include supervising the behaviors of the employees and detecting any violations of Law 23/09.

##### Tightening the penalties:

- Penalties should be tightened for those who breach the banking secrecy.
- Penalties should include fines and imprisonment.

##### Raising awareness:

- It is necessary to raise the public awareness of the importance of banking secrecy.
- The state should conduct awareness campaigns to inform the public of the provisions of Law N.23/09 related to banking secrecy.

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