Banker-Customer Relationship under E-banking Regime: Nigeria in Context

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ABSTRACT

Bank in traditional parlance is an institution that accepts money from its customers in the form of deposits and then collects cheques on their behalf, placing those cheques to the customer's credit. The bank is obliged to honour the cheques that are drawn on it or orders drawn on it to pay a third party. Thus, in banking business current accounts for customers and record debits and credits to the account are to be maintained. These services are provided at the bank branch where the customer maintains an account. Despite this broad description, a company might still constitute a bank, even though it did not undertake these activities if it was accepted and recognized as a bank by other bankers. The modern electronic banking otherwise known as e-banking, on the other hand, is that system of banking that provides the financial service for the individual customer by means of Internet[2]. Here bank customer with personal computer and a browser can get connected to his banker's website to carry out any of the virtual banking functions. E-banking has been a radical challenge to both developed and developing economies for a number of reasons. Thus, Nigeria as a developing economy is faced with challenges of how to cope with the e-banking system in terms of provisions of adequate basic infrastructure, social disposition and attitudinal changes. To what extent this globalization trend of development in the banking industry has impacted the traditional banker-customer relations in a developing economy like Nigeria, forms the focus of analysis in this study.

Keywords: Traditional Banking, Banker/Customer Relationship, Electronic Banking, Developing economy

1.0 Introduction

The financial crisis of 2007-2008 was a landmark in the anal of banking and finance. This global incident popularly referred to as the global financial crisis and the 2008 financial crisis had been the worst financial crisis since the Great Depression of the 1930s[3]. It was a historic benchmark. Thus, Asli Demirguc-Kunt has rightly observed that

> "Since the global financial crisis of 2007, international banking has attracted heightened interest from policy makers, researchers, and other financial sector stakeholders. Perhaps no sector of the economy better illustrates the potential benefits – but also the perils – of deeper integration than banking. Before the crisis, international banks (banks that do business outside of the country they are headquartered in) were generally considered to be an important contributor to financial development as well as economic growth. This belief coincided with a significant increase in financial globalization in the decade prior to the crisis, particularly for banking institutions."[4]

Factors underlying pace of globalization include, developments in ICT, rise of social media, electronic payment system, increasing in capital mobility, development of *complex financial products*, such as derivatives, which has augmented global credit markets leading rapid growth. The emergence of *multinational* and *transnational* companies (MNCs and TNCs) and the rise in the significance of global brands such as Microsoft, Apple, Google, Sony, and McDonalds Critical facets of globalization include financial markets which cover capital market, money and credit markets insurance markets, and commodity markets as well as sport and entertainment.[5]

Much as globalisation has been an effective drive in speeding up development, it has been a momentum perspective in Nigeria This is because Nigeria as a developing economy is faced with a number of challenges including political instability and uncertainty characterised by corruption, domestic deficiencies ethnic/dogmatic crisis and social insecurity[6]. Among negative consequences that ensue from these include inadequate basic infrastructure necessary for development which had impacted on e-banking especially in banker-customers relationship in Nigeria

2.0 Banking Traditional Perspective

Bank as a social-economic institution cannot operate in a vacuum The definition of a banker shows clearly that a bank is an institution that needs to maintain relationship with individuals, group of individuals or corporate bodies. This relationship is, of course, regulated by law. J.W. Gilbert says that "a banker is a dealer in capital or more specifically, a dealer in money and to that extent, it is an intermediate party between the borrower and the lender, and he borrows from one party and lends to another."[7]

Herbert L. Hart provides another perspective definition when he says that a banker is a person carrying on a business of receiving money and collecting drafts for customers. At the same time, this person is subject to the obligation of honouring cheques drawn upon him from time to time by the customers to the extent of the amounts available on their current accounts.[8]

Technology came and brought a dramatic change to the traditional system of banking It has been a transformation from one stage to another. Initially it was just mere electronic banking. But now, it has been moving rapidly to a level of cashless economic system. It can then be said that the latter is the concomitant of the former. Also, it is not an overstatement that without e-banking, cashless economic policy would be a mirage

To what extent these new developments are bearing impact on the traditional theory and legislations of banking? What is the position of banking operations, administration and personnel management under the e-banking regime? How interests of the ordinary bank customers are being protected under these technological developments in the banking industry? These are some of the issues expected to be examined in this study.

2.1 Banker-Customer Relationship

The definition of Banker/Customer relationship had gone through several conceptual phases Initially, depositing money with a bank by a customer was viewed as a contract of bailment. Such a contract was thus described as "a depository of customer's money". Thus, the money deposited by the customer with his bank was said to belong to the customer. This was enunciated in several decided cases including the Marzetti v Williams[9]. In this case it was argued that the money that was so deposited with the bank were for 'care and custody' This argument raised a number of questions If the argument was upheld, it will make functions of bank cumbersome as 'money' deposited with bank for 'care and custody' imply keeping the exact notes and delivering same to the depositors on demand. The bank in this situation has to create separate space in the bank's vault so as to ensure that the customers' notes could not be mixed up. Thus, this argument was rejected

Afterwards this relationship was thought to be one of principal and agent, then, one of trustee and beneficiary, and finally one of debtor and creditor. The argument was focused around these notions. However, the notion of debtor and creditor relationship between bankers and customers gained currency and was widely accepted. This position was expressed by some text writers and in a number of court decisions For example, Lord Chorley stated that

> "To have held that the banker was a trustee of the moneys deposited with him would have killed the business of banking as we know it as effectively as to have held that he was a Bailee A trustee is usually severely restricted in the use to which he may put trust funds

and may be confined to investments in a limited class of securities, a banker could not have been a trustee, and retained complete freedom as to the use of the money in commerce."[10]

This position of Lord Chorley was adopted in the Nigerian Court of Appeal case of **FBN v. AP Ltd.**[11] where Ayoola, JCA as then was held that "the banker does not hold moneys or proceeds of bill received as trustee for the customer."

Foley v. Hill[12] commonly referred to as Clayton's case, was the *loco classicus* on banker-customer relationship It was a House of Lords case where the fundamental nature of a bank was considered The combined effect of the House of Lords decision in this case and **Joachimson v Swiss Bank Corporation**[13] case (to be examined in detail shortly) form the foundational cases relating to English banking law and the nature of a bank's relationship with its customer in respect of his account with the bank[14]. It was decided in this case that a banker does not hold the sums in a bank account on trust for its customer Rather, the sum is held by the bank in a relationship better described as that of debtor and creditor In effect, the customer's money deposit in the account is automatically bank's money But the bank is under an obligation to repay an equivalent sum (and any agreed interest) to the customer or the customer's order.[15]

It has been noted that this decision goes to the root of the modern evolution of banking It implies that had the appellant's argument that the bank should be treated as a trustee was upheld, then a bank would not be entitled to apply the sums deposited with it for lending to other parties as this will run counter to the rule that makes it illegal for trustee to make profit out of the trust property.[16]

In similar vein, Lord Goddard has noted in the criminal case of **R. v. Davenport**[17] that:

> "Although we talk of people have money in a bank, the only person who has money in a bank is the bank itself. If I pay money to the bank the money at once becomes the money of the bank The relationship between the customer and the bank is that of debtor and creditor . "

The uncertainty surrounding the clear definition of the exact nature of banker-customer relationship necessitated a reform to the rules of debtor-creditor relationship. The celebrated case of **Joachimson v Swiss Bank Corporation**[18] was a landmark in this regard. It was a step in bringing the much desired reform to this rule. It also carried a stage further, the implications of **Foley v Hill**

It was in **Joachimson v. Swiss Bank Corporation**, that the simple contract theory of the banker-customer relationship was established. In this case, a business was run in Manchester city under the English Partnership Law and an account was jointly maintained in the name the partnership The members include Siegfried Joachimson, Jacob Joachimson and L E. Marckx L E. Marckx was a naturalized British citizen, but the other two partners were German nationals Swiss Bank Corporation was the partnership banker

On 1 August 1914 Siegfried Joachimson died. Under English partnership law at the time this had the effect of dissolving the partnership However three days later, on 4 August 1914, World was I broke out, and Jacob Joachimson returned to Germany. The firm's account with the bank remained dormant throughout the period of the war. It was observed that this might have been due to legal prohibitions relating to property of enemy aliens. It is noted also that no attempt was made to wind up the partnerships' operations during this period of war. After the war, the English partner, L E Marckx, tried to wind up the affairs of the partnership, and demanded repayment of the £2,312 held in the bank account from the bank. The bank refused to repay the sums in the account The bank contended that either (i) the firm had made no demand for repayment of the sums, and so they were not due; or in the alternative (ii) that if the right to repayment arose upon the death of Siegfried Joachimson, then it was now barred by the statute of limitation [19]

Another contentious issue was the procedural wrangling relating to the question whether the claim could be brought by an individual partner or had to be brought in the name of the firm.

In a unanimous decision of the Court of Appeal, Bankes, L J declared that the claim was not statute barred Until a customer demanded repayment from the bank, the debt was not due and payable, and thus limitation periods would not run. He stated that. "it seems to me impossible to imagine the relation between banker and customer, as it exists today, without the stipulation that, if the customer seeks to withdraw his loan, he must make application to the banker for it . "

Essentially, the case recognized a simple contract as the basis of the banker-customer relationship. It also imposed reciprocal obligations on both sides Atkin, LJ laid down what is considered a clear legal parameter to redefine the relationship between a banker and its customer in this regard. He said:

> "The terms of the contract (between a bank and customer) involve obligation on both sides. They appear upon consideration to include the following provisions: the bank undertakes to receive money and to collect bills for its customer's account The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer... It is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery."

In a nutshell, both the banker and its customer have reciprocal rights and duties enforceable at law This is the position of the law in England from where Nigeria inherited culture of law that governs banking business generally and relationship that exists between the banker and its customer in particular. The recognized reciprocal obligations enunciated by the court in Joachimson case have found expression in various Nigerian court decisions.

The position of the Court in Joachimson's case was reflected and affirmed with approval by Oghobina J of the High Court of Mid-Western Nigeria in the Nigerian case of **Osawaye** v **National Bank of Nigeria Limited** [20] Here the High Court affirmed that the relationship of a banker and its customer is that of debtor and creditor but that there is no obligation on the part of the bank to seek out the customer. The imperative of banker's obligation is only to pay when its customer demands or direct him to pay some other person or apply whatever may be due to him or part thereof in some of other manner

In the case of **Chief Festus Yusuf** v. **Co-operative Bank Nig. Ltd**,[21] the appellant who was the plaintiff at the trial court maintained two current accounts with the respondent bank at their Benin and Ibadan branches from 1969 to 1971 and the two accounts stood credit balances to the tune of =N=2,211,956.35k At trial level the defendant admitted that the plaintiff was a customer of the bank at Benin City but not at Ibadan and that because of the unsatisfactory mode he operated the account, it was closed down. The Court found in favour of the plaintiff and granted his relief. On appeal, the Court of Appeal ordered a retrial of the case. The case went to the Supreme Court. At the Supreme Court, Bello CJN (as then was) stated:

> "The relationship between a Bank and its Customer is that of a Debtor and Creditor and it is founded on a simple contract. This is because a banker is under an obligation to pay his customer on demand the amount standing to the Customer's credit on his current account. However, it is when a customer has made a demand for payment and the banker has failed to meet the demand that a cause of action for recovery of the amount can be said to have arisen."[22]

In **National Bank of Nigeria** v **Maja** and 2 others (1967) NCLR, Alexander J of the Lagos High Court affirmed that: "Banker-customer relationship is contractual, consisting of general ad special contracts arising from particular requirements. The expressed terms override the implied terms and in case of breach it will give rise to a claim."

As earlier stated, banks perform certain subordinate and auxiliary services that create special relationship and of course, are strictly regulated by special legislations These services include among others, agency, bailment and, Trusteeship services The relevant laws in this regard are commercial laws, Banking Act and other banking regulations, the Law of Trusteeship, Agency Laws, Sales of Goods, Property Laws in regard to bailment and professional practices in banking.

It can be concluded from the above that the relationship between the banker and its customer is that of Debtor and Creditor A banker is not a trustee for money deposited and is therefore not accountable to the customer for its use. Banker is at liberty to make use of the money the way he likes and the customer cannot direct him as to how the money should or should not be used Also, in accepting deposit from its customer, bank is not an agent and thus is not under obligation to deal with that money as the property of its principal. It is only under obligation to repay an equivalent sum on demand by the customer through the legally recognized methods. Similarly, the money deposited with the bank is not considered as being 'in safe custody'. Thus, money collected by the bank through the conventional method such as those collected in the ordinary course of business over the counter is not for 'safe custody'. To that extent, the customer cannot insist on paying him with the exact notes that he has paid in at a point in time.

As a simple contract that exists between a banker and its customer is the basis of the banker-customer relationship which and imposes reciprocal obligations on both sides, what are those reciprocal obligations?

2 1.1 *Contractual Obligations in Banker/Customer Relationship*

Generally, the bank and its customer have mutual obligations to observe in their simple contractual relationship A brief examination of few of them will go to confirm their simplicity and also their criticality especially when that relationship comes to question. The banker's obligations to its customer include the following: duty to receive cash and collect cheques on behalf of customer; duty to abide with Customer's Written Mandate, duty to pay only according to customer's mandate; duty of accurate book-keeping, duty to give reasonable notice before closing the account; duty to demand repayment of overdraft; and duty of secrecy.

Firstly, it is the duty of banker to honour the cheques issued by customers. Also, duty of secrecy is another key obligation of banker to the customers in a banker-customer relationship due to its confidentiality of this agreement A banker should not reveal the secrecy of his customers account. The banker takes care of the property deposited by the customer with or without charge as it is the duty of the banker to look after the property.

To what extent the reciprocal duties and rights of the bank and its customers had been impacted by the modern technology – Electronic Banking, otherwise known as E-banking forms the analysis of the subsequent part of this study.

3 0 **Electronic Banking**

E-banking is a method by which banking businesses are transacted between banks and their customers through the mechanism of electronic devices and procedures in the conduct of all forms of banking operations. It involves the use of automated processes and electronic devices such as computers, telex and fax machines, the internet, card payments, automated teller-machines, telephones and other electronic devices and media It is also defined as the use of electronic delivery channels for banking products and services, and is a subset of electronic finance[26] The term transactional e-banking is also used to distinguish the use of banking services from the mere provision of information[27]. It has been observed and rightly too, that the internet has pervaded the totality of existence presently changing the faces of human endeavours including commerce and particularly banking.[28]

3.1 *Intranet: Banking Beyond Space and Time*

One significant phenomenon of the modern e-banking is the elimination of restriction to banking operation in terms of space and time Hitherto, a bank customer could hardly conduct banking business beyond the branch where a customer originally opened an account. Similarly, a customer could do business with bank only within official hours of his bank All these have been eliminated by the e-banking technology. The network which establishes connection to various locations and provides connectivity to the central office of a bank within the organization is known as 'intranet.'[29] These networks are restricted to organizations for which they are set up A good example of this is SWIFT It is 'Society for Worldwide Interbank Financial Telecommunications - a global communication network that facilitates 24 hours secure international exchange of payment instructions between banks, central banks, multinational corporations, and major securities firms [30]

3.2. *E-Finance*

E-Finance is the provision of financial services and markets using electronic communication and computation It is noted that the use of electronic communication in finance, goes back much further than 1970s. It is recalled that as far back as 1918, the Fedwire payment system had allowed electronic settlement of payment between banks over the telegraph. Online banking began in the mid-1990s and had remained a growing and important phenomenon in the financial sector up till now[31] Though, the internet banking can be said to be new, other e-finance technologies have been in vogue long than the internet particularly in the banking sector For example, Automated Teller Machine (ATMs) which had started changing the trends of consumers' interaction with banks began right from 1970s[32] In the 1980s, application of electronic computation and data analysis transformed the method of taking decision on credit. Thus, the cost of lending was reduced on average and thus, the liquidity and marketability of loans were enhanced[33] E-banking system has brought dramatic improvement to the financial sector in three specific respects namely, price transparency, differential pricing and transformation of distribution channels.[34]

4 0 Variety of e-Banking Services

Banks offer variety of services through electronic systems These services could be categorized into three basic levels:

1. *Level of Information*: Here banks provide information through the platform of their websites. The information is usually connected to the products and services available for the customers They also treat customers' and non-customers' queries through e-mail and other method of electronic communications [35]

2. *Level of Customers' Services* Here banks deal with customers' instructions or applications for the provision of services including deposits, withdrawals, inter-account transfer and payment of linked account at an ATM. It also include buying and paying for goods and services using debit and credit cards or smart cards without having to carry cash or a cheque book.[36]

3 *Level of Business-to Business Transactions*: Here e-banking services entail transfer of funds, bill payments, purchase and redeem securities among others. Thus, e-banking services include ATMs, Credit Cards, Smart Cards, Electronic Fund Transfer Systems (EFT), Check the Truncation

Payment System; Mobile Banking; Internet Banking; Telephone Banking among others[37]

In a nutshell, the two levels of e-banking consist of namely Informational Electronic services and, Transactional Electronic Services. In the former, banks provide general information about themselves, their products and services that are available for the customers and prospective customers. In the latter, customers are enabled to carry out bank businesses via banks websites These businesses range from a simple retails account balance inquiry to a large business-to-business funds transfer[38]

5.0 Merits and Demerits of E-Banking

1. The per-unit cost of services in e-banking system is reduced to the barest minimum as personnel services, provision of physical infrastructure are drastically reduced.

2. Banking businesses become convenient for the customers as they are no longer required to be physically present at the bank facilities Customers can manage their supply-chain network effectively as fund transfer on a real time basis across the banks locations could be effected. Through electronic system, customers can download statements of account. They can also make request online in the management of their accounts. They can settle bills through electronic banking; electronic shopping, and several other banking services.

3. Accuracy of data and information are most likely attainable in the e-banking system as human errors are reduced to the minimum Thus, the incidence of errors is usually low.

4 Availability and accessibility of funds is important characteristic of e-banking as customers can obtain funds at any time from ATM machines.

5 Dangers associated with cash-economy are safeguarded as customers can easily transfer funds from one location to another electronically.

In spite of these advantages, there are certain inherent disadvantages of e-banking These include the followings:

1. Vulnerability of e-banking devises to dangers For example ATM machines and bank customers using them may likely be vulnerable to dangers around the locations of such machines that are usually stocked with cash. There have been incidents of attacks launched against these machines at various locations.

2. Abuse of bank cards by fraudsters at ATMs.

3. There is also the challenge of digital mentality with customers These customers have to keep passwords and code numbers with them always. It has been a common incident that customers could not remember their passwords and thus they got stocked and unable to carry on banking business

4 Third party interference in banking business is most likely to happen in e-banking. Fraudsters can have access to critical information about customers and their accounts especially when giving their card number to a third party for purposes of doing business transactions online.

6.0 Impact of E-banking on Traditional Banking System

The advent of information technology has radically transformed every facet of human affairs including banking and finance It started with the introduction of automatic teller machines (ATMs) This was followed by telephone banking, direct bill payment, electronic fund transfer and online banking. E-banking is gaining more importance by the passing time as it found to be satisfactory and expeditious in terms of credit cards, funds transfer, cheque payment, funds deposit, balance enquiry, utility bills payment, statement of account, remittance, draft, pay order, phone banking, mobile banking, PC banking etc. Traditional banking or manual system of banking on the other hand, was cumbersome, time-consuming and vulnerable to errors and inaccuracy due to human oversights beside considerable labor cost

To what extent e-banking regime has impacted the traditional system of banking? Attempt will be made interrogate this development against the background of some services which banks are legally obliged to carry out in serving their customers These include duty to receive cash and collect cheques on behalf of customers; duty to abide with Customer's Written Mandate, and, duty of secrecy and confidentiality

6.1 Duty to receive cash and collect cheques on behalf of customer

Collection of cash, cheques and other payable instruments deposited by bank's customer is a fundamental obligation a bank must discharge in favour of its customer The bank impliedly undertakes to borrow from his customer any excess monies the latter chooses to lend and to repay same or part thereof upon demand. This contractual obligation is imposed on banks all over the world including Nigeria

Under e-banking system, collection of cash, cheques and other payable instruments are carried out electronically through the channels of internet, wireless communication networks, automatic teller machines (ATMs), and telephone systems. These take two forms namely, (i) combination of (traditional brick and mortar banks) – physical presence of a bank business in a building or other structure with (brick and click banks) – electronic delivery channels, and, (ii) bank products and services provided only or predominantly through electronic distribution channels without having a branch network (other than a physical presence as an administrative head office or non-branch facilities such as kiosks or ATMs). These are referred to as "virtual banks" "branchless", or "internet-only" banks.[39]

Electronic money otherwise referred to as e-money is a variety of modern e-banking services. E-money has been defined as "stored value or prepaid payment mechanisms for executing payments via point of sale terminals, direct transfer between two devices, or over open computer networks such as the Internet."[40] Electronic Cheque otherwise referred to as e-check, on the other hand, is a form of payment made via the Internet, or another data network, designed to perform the same function as a conventional paper check.[41]

Unlike the traditional system which requires person-to-person undertaking, in the e-banking system, collection of cash, cheques and other payable instruments are carried out electronically through the channels of either ATMs, or internet, wireless communication networks, and telephone systems as case may be. In most cases, the presence of the Customers in the bank branch where the account is kept may not even be required.

6.2 Duty to abide with Customer's Written Mandate

Traditionally, customer's written mandate is sacrosanct The bank is under an obligation to honour the customers' mandate, for instance, cheques In other words, the bank is under a duty to repay upon the customer's written request either to the customer or to a named beneficiary during business hours and at the branch where the account is kept. This point was emphasized by Lord Mac Naughten in the old English case of Bank of *England v Vagliano Brother's*[42] that

> "a banker must pay off-hand as a matter of course bills presented for payment, duly accepted and regular and complete on the face of them and a general rule this doctrine would appear to apply with equal force to cheques presented for payment. With regard to cheques, the paying banker's binding obligation is to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time funds of the customer sufficient and available for the purpose."

The same point was enunciated in the Nigerian cases of *Yesufu v African Continental Bank Ltd.*,[45] *Diamond Bank Ltd v Ugochukwu,*[46] and, *Nigerian Maritime Administration and Safety Agency v. Stephen Adi Odey & Ors.*[47]

Under e-banking system, customer's mandate is carried out by means of e-mandate which is a method of issuance of authority by electronic means by a bank customer permitting the debit order to the bank[50]. E-mandate enables the bank customer to authorize the bank online for the debits of his Systematic Investment Plan (SIP). It uses an electronic validation instead of a physical signature and is offered directly by individual banks.[51]

Electronic Funds Transfer (EFT) is the most modern kind of payment system which makes it easy to transfer funds electronically from a customer's bank account to another account Such a transfer is classified as either a credit transfer or a debit transfer[52] . A credit transfer instruction is initiated by the payer who orders his/her bank to move funds from his/her account to the payee's bank account [53]

For example, a debit transfer instruction can be initiated by the payer and passed on to the payee, as for instance in a payment by cheque[54] Under the e-Mandate system, a bank or its customer initiates the mandate to the sponsor bank to which the amount needs to be paid or the customer and the corporate move the mandate through the sponsor bank to the destination bank along with the attributes of customer authentication as may be defined and regulated by the appropriate National Payment regulatory bodies in which the bank is based [55] This is determined according to the particular form of the e-mandate.

It must be noted however that under the British Law of the banker-customer relationship in the EFT, the relationship is that of an agent- principal[56]. Authors and text writers appear to be unanimous in that the banks act as an agent to their customers in the EFT transaction[57] . The agent-principal relationship rule in EFT is affirmed in the decision of Webster J. in *Royal Products Ltd v Midland Bank Ltd*[58]. where his Lordship held that one of the bank's duties as its customer's agent was strict adherence to the customer's mandate. Another interesting angle of the banker-customer relationship in the EFT is the debtor-creditor relationship This relationship is founded on the fact that when the customer's account is in credit the customer acts as creditor to the bank, and conversely the bank acts as creditor when the customer's account is debited or overdrawn[59]. A further legal implication is that the customer's funds deposited in the bank's account are owned by the bank, such that the customer is under a duty to make a request for the funds from the bank as a creditor [60]

The position of the Nigerian courts in this regard is not yet clear as the legislative rules on e-banking is still at its developmental stage.

6 3 Duty of Secrecy and Confidentiality

Generally and traditionally, it is an implied term of the contract between a banker and his customer 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 It follows that the simple contract that underlies the banker-customer relationship imposes a duty of secrecy and confidentiality It is a legal duty which extends to all information the bank may have obtained either directly from the customer or from third parties and to information that may be adduced indirectly in the course of its transactions with the customer not only during the life of the account but also after the closure of the account

At the inception of banking as a concept, particularly at the time of the goldsmith this duty was seen as a moral duty which had no legal implication or attracts sanction. Despite that, it was still considered sacrosanct as demonstrated in the old case of **Foster v Bank of London**[61] a bill was accepted and made payable at the defendant bank. Payment was refused on presentation and the payee was allegedly told that the balance was insufficient by certain amount upon which he paid into the account concerned, a sum to make up the amount short of in the account and obtained payment of the bill In the course of an action against the bank, the bank denied disclosure of the plaintiff account The court however held that it was obvious that it had revealed the state of its customer's affairs and the customer succeeded in an action for damages

It was the decision of the court in the case of **Tournier v. National Provincial and Union Bank of England**[62] that marked the turning point in the moral perception of duty of secrecy in the banker-customer relationship It was established in this case that the duty of observing secrecy on the part of the banker is not a moral one but a legal one arising *ex contractu*, the breach of which will attract nominal or substantial damages depending on whether or not such breach resulted in injury to the customer

In this case the plaintiff was a customer of the defendant bank A cheque was drawn by another customer of the defendants in favour of the plaintiff, who instead of paying it in to his own account indorsed it to a third person who had an account at another bank. On the return of the cheque to the defendants their manager inquired of the last named bank that the person was to whom it had been paid, and was told it was a bookmaker That information the defendants disclosed to third persons:– Held, (by Bankes and Atkin L JJ.), that that disclosure constituted a breach of the defendants' duty to the plaintiff, for though the information was acquired not through the plaintiff's account but through that of the drawer of the cheque, it was acquired by the defendants during the currency of the plaintiff's account and in their character as bankers

However, the British Court of Appeal (Per Bankes, L JJ) qualified this duty under four heads namely that. a) where disclosure is under compulsion of law, b) where there is a duty to the public to disclosure; c) where the interests of the bank require disclosure; and, d) where the disclosure is made by the express or implied consent of the customer. .. it may be asserted with confidence that the duty (of non-disclosure) is a legal one arising out of contract and that they duty is not absolute but qualified "

These exceptions may not be discussed in this work for lack of space.

7 0 Duty of Secrecy and Confidentiality under E-banking

Under e-banking, confidentiality is in reference to protecting information from being accessed by unauthorized parties. It follows that only the authorized people can have access to sensitive electronic data that relate to customers' accounts[63]. When it comes to the bank's duty of secrecy and confidentiality in e-banking generally and EFT systems in particular, banks are required to adopt highly sophisticated encryption systems[64], with a view to check and avert potential hackers from gaining access to its own and its customers' data[65]. Banks are obliged to employ reasonable and secure software programs for executing their intended purposes and such obligation does not depend on proof that the bank was negligent[66]. Azzanni observes that encryption systems constitute one of the most significant challenges relating to electronic banking confidentiality, however, adoption of a highly sophisticated secret system can prevent any unauthorized access to the bank's electronic data[67]. The most important step to be taken in protecting a customer's information must be through the privacy of the information about each party involved in the EFT transaction[68]. Banks must ensure that none of the two parties in EFT, namely, payers and payees have access to each other's personal information connected to the transactions between them, regardless of the classified format of EFT method used Banks must ultimately ensure that privacy and confidentiality of their customers are adequately protected [69]

The implication of failure to maintain confidentiality is that someone who shouldn't have access has managed to get it, through intentional behaviour or by share accident. Such a failure of confidentiality known as a *breach* typically cannot be remedied. Once the secret has been revealed, there's no way to 'un-reveal' it[70]. A good example is when bank records such as bank account number, balance, etc. are posted on a public website. Such records become accessible to the public. As soon as that happens, that information cannot be erased from their minds, papers, computers, and other places. Nearly all the major security incidents reported in the media today involve major losses of confidentiality[71]. In a nutshell, a breach of confidentiality means that someone who shouldn't have access to certain information about banks' customers has now gained access to such information.

8.0 Matters Arising from E-banking Regime

The above analyses are illustrative of a number of developments that have arisen from the e-banking regime and which have brought radical changes to the traditional way of banking. These developments include the following.

1. Proximity and Accessibility of Services. The e-banking system has removed the challenges of time and distance in the banking operation between banks and their customers. In the first instance, customers can now carry out some banking transactions as required without the intervention of their banks. All they need to do is to understand the operational technique to carry out such transactions from their personal machines such as computers, phones or other tools provided by the bank including ATMs. Thus, the new system saves a lot of time and energy. Similarly, customers' presence in the banks' branches where their accounts were originally opened and maintained may no longer be necessary except in certain circumstances. Apart from making banking easy for the customers, it reduces the personnel employment cost for the banks.

9.0 E-Banking in Nigeria

Nigeria, as a developing economy, as earlier noted, faces several challenges. In spite of prevalence of the e-banking system across the globe, the Nigeria is one of the African cash-based economies as a large percentage of its population has remained unbanked and thus, the main system of payment is by cash[72]. The cost of producing cash to Nigeria financial system is enormous and had remained on the increase which has been estimated at about fifty billion naira in 2008[73]. In 2012, the direct cost of producing cash to run the Nigeria economy was estimated to reach a staggering sum of one hundred and ninety two billion naira[74]. As a result of this over-dependence on cash economy system, Nigeria has become vulnerable to social-economic challenges such as robberies and cash-related crime, revenue leakage as a result of too much of cash handling; inefficient treasure management due to nature of cash processing, high subsidy, high informal sector among others.[75]

In view of this the Central Bank of Nigeria (CBN) launched the cashless policy in April, 2011 with a view to promote electronic system of payment even on a gradual basis. Thus, in 2012, CBN embarked on a pilot scheme of this policy in the Nigeria economic capital – Lagos. This was followed by a rollout implementation in some other country's principal cities including Port Harcourt, Kano, Aba and Abuja Federal Capital Territory.[76]

It has been reported that e-payment has been taking significant growth in the Nigeria market with banks, switching and transaction companies, vendors and ATMs, Point of Sale (PoS) and third party companies all scrambling to bloat their capacities in the electronic banking sector. For example, CBN reports revealed that the volume and value of electronic card (e-card) transactions has increased significantly from 195,525,568 and N1,072.9 billion in 2010 to 355,252,401 and

N1,671 4 billion, in 2011 reflecting an increase of 81.5 and 55 8 percent, respectively[77] This was a period preceding the official launching of cashless policy. As significant as this development, it is noted that Nigeria still remains in the regime cash-based economy Thus, a large percentage of its monetary liquidity resides outside the banking sector at about 66% as against the developed economies where the money in circulation is for example 4 percent in US and 9 percent in UK.[78]

Be that as it may, the e-banking is witnessing a steady growth in Nigeria For example, in 2014 alone, electronic transactions processed by the Central Switch, Nigeria Inter-Bank Settlement system ("NIBSS"), through electronic platforms (i.e. non-cheque) accounted for 86% of the overall transactions in terms of volume[79]. This is an indication that more people are adopting the use of electronic payment systems[80]. During the same financial year, NIBSS alone handled over 100million electronic transactions in terms of volume with an equivalent value of over NGN 40 Trillion[81] Despite the advantages of e-banking and the significant successes it has recorded in Nigeria, the system is faced by a number of challenges. These challenges include security, social, legal and infrastructure

10.0 Challenges of Security – Nigeria

Online security is generally a global challenge facing e-banking system. It is more challenging in a developing economy like Nigeria. Stakeholders around the world including banks, e-retailers and other users of electronic banking systems across the globe are expressing serious concerns about the menace of online frauds resulting in significant losses of money through a number of channels including payment cards, online and telephone banking and cheques.

Nigeria is not an exception to the menace of online financial frauds and fraudulent practices It has been reported that Nigeria lost about N6 2 billion in 2014 due, in most cases, to internet banking and ATM frauds[82]. It was also reported that within the 2013 and 2014 financial year, cases of electronic frauds grew astronomically from 3,786 cases to about 10,612 cases.[83]

10 1 *E-Banking Frauds in Nigeria*

A Nigeria Deposit Insurance Corporation '2013s report revealed that there are 14 types of electronic fraud (e-fraud) in Nigeria. Automated teller machine (ATM) fraud was one and in the forefront of this e-banking variety of frauds[84]. According to the report, this accounted for just under 10% of the total value of funds lost to e-fraud and 46.3% of the reported number of cases The report further revealed that the agency's 2015 report points to an increase in the incidence of ATM fraud in Nigeria.[85]

The e-banking frauds in Nigeria like in the traditional systems occur through different channels. These include internal, external channels and sometimes collaboration between the two channels Here are some examples.

10 2 *E-Banking Frauds*

Banking fraud according to a report of the US Association of Certified Fraud Examiners' (ACFE) *to the Nations on Occupational Fraud and Abuse*, the average occupational fraud scheme goes on for 18 months before being detected. Unfortunately, it is most often the long-time employees and top performers who abuse their positions of trust and exploit their access to multiple areas and systems of the bank[86] The report revealed further that the same qualities of infrastructure that facilitate effective performance of the bank employees work well can also embolden them commit fraud Internal banking frauds are critically focused on four areas namely, general ledger fraud, identity theft, account takeover, and collusion with external fraudsters and criminals.[87]

A typical example of a collaboration of internal and external factors in e-banking fraud is the

Nigerian case of the defunct Keystone Bank Plc worker, Mrs Chinonye Okafoagu, 33, who was alleged to have stolen N3 million from an Automated Teller Machine (ATM)[88]. She was arrested and investigated by the Nigerian State Criminal Investigation and Intelligence Department (SCIID), Panti-Yaba, Lagos and was arraigned before an Ebute-Meta Chief Magistrates' Court, on a four-count charge of conspiracy, stealing, forgery and false modification of ATM data[89]. The police, in the charge, it was alleged that 'the banker and others now at large', committed the offence at the FESTAC branch of the bank. The defendant allegedly, without lawful authority, modified the ATM's data and stopped the machine from dispensing money, "in a bid to steal the N3m".

According to the police, she misrepresented herself as Elizabeth – the woman authorized to handle the bank's ATM on the said date, and appended her signature in the ATM loading staff register, which she presented to the bank's management. The alleged offences contravene and are punishable under sections 409, 285(7), 389(1), and 365(1) of the Criminal Laws of Lagos State, 2015.[90]

The case of Mrs Ogundiran Adebisi who was a customer of Sango-Ota branch of Skye Bank is another typical example of e-banking fraud in Nigeria. She was to get a new ATM card following the expiration of her former card Unlike the usual method where customers with new ATM cards were issued with new Personal Identification Number (PIN) in sealed envelopes, the bank's staff informed her that the One Time Password would be sent to her phone which was actually received later that same day She followed the procedure and activated her new card However, barely 24 hours after getting the new ATM card she received an SMS alert of N20, 000 withdrawal from her account The details of the transaction showed that the withdrawal was made at Imo Polytechnic (located at a distance of about 511 kilometres and a journey of about 10 hours by road). While she was ruminating on what step to take, she received two more debit alerts indicating that additional N40,000 had been withdrawn from her same account amounting to N60,000 losses to e-banking fraudsters that day.[91]

Mr. Olufemi, another victim of e-banking scam, is another example. He gave his Guaranty Trust Bank's ATM card to his wife to help get some cash His wife, Mrs Olufemi decided to use the ATM at Abule Egba branch of Stanbic IBTC Bank Plc She joined the queue and few minutes later it was her turn to use the machine. "Since it wasn't possible to withdraw N65,000 at once," Mrs Olufemi began, "I decided to withdraw the money three times. Unfortunately my card got trapped as I attempted to make the second withdrawal, perhaps owing to network problem because I observed that the machine went blank

After long waiting to retrieve the card from the machine proved abortive, she decided to report to the bank the next day The Olufemis were surprised when they were told by a staff of the bank that their card was not among the cards recovered from the ATM that morning At this point, Mr. Olufemi intuitively went online to check his account balance and discovered that his account had been drained. According to the details of the transaction, the money was withdrawn midnight of the day at a GTB branch in Iju (a distance of about 29 kilometres apart and about one and half hour journey). 'Curiously, however, while the Iju branch of GTB where the money was withdrawn was able to play the CCTV footage of the transaction, the couple told Sunday Sun that the Abule Egba branch of Stanbic IBTC, where the ATM card was reported to have been trapped refused to show them the footage of their CCTV recordings for the day '[92]

Commenting on Mrs. Ogundiran who received debit alerts which indicated that the withdrawals were made through ATM in Imo State while she was in Ifo with her card, a forensic Accountant, Mr Ori Adeyemo noted, "It is very possible. It is a usual fraud some unscrupulous elements in banks do.[93]" Another expert observed that when someone received debit alerts right in the presence of a banker in the banking hall with his ATM card right there with him, the perpetrators are right in the bank. Those in the banks have the code, they are the ones who give out the ATM cards. They may have cloned the cards,"[94] Mr Michael Wona, a computer scientist however observed that 'bank frauds perpetrated via the ATM may be more complex and may have gone far beyond the cloning of ATM cards as noted by He contended that criminals may attach devices to ATM machines to record the account data stored on the magnetic stripe on the back of the card. This is known as skimming. "The card's PIN can be spied with a secret camera or a fake number pad overlay[95]

It should be noted that most of the victims of these e-banking fraud cases in Nigeria usually bear the brunt But, in advanced economies, the victims can sometime prove to their banks that they didn't do a transaction because cash cards contain what is known as an Application Transaction Counter (ATC), which records the number of times a card has been used[96]. Thus, banks in those climes are likely to be held responsible especially where they are supposed to put in place necessary devises to prevent manipulation beyond the acts of their customers.

10.3 Challenges of Infrastructure Deficiency

Unlike the traditional system of banking services that are carried out through manual and analogue systems, the e-banking services is heavily dependent on modern technologies that require a great deal of basic infrastructure facilities sufficient to meet the required capacity for electronic services of e-banking The infrastructures include reliable, effective and consistent electric power supply; effective internet connectivity and developed telecommunication network services. Without these basic infrastructure, e-banking services and its varieties such as e-payment, e-commerce etc cannot be effectively implemented

10.4 ***Power Supply***

The Nigerian power sector has been in crisis of inability to provide adequate electricity supply to domestic households and industrial sector despite its abundant human and material resources. The country is endowed with some of the world's largest deposit of coal, oil and gas. Presently, only 40% of Nigerians are connected to the electricity power grid[97]. The erratic power supply is prevalent for the consumers at around 60% of the time[98] Energy experts put the average daily power supply in Nigeria at four hours[99], while, for several days people can go by without any power at all. Nigeria generated approximately 5,000 MW of power in 2012 for the population of over 150 million people South Africa, on the other hand, considered the second largest economy in the continent produces over 40,000 MW of energy for 62 million people[100] Nigeria provides its energy through the four main sources: coal, hydro, oil and natural gas. It follows that whole energy sector is dependent on the petroleum which slows down the development of alternative forms of energy.[101]

10 4 ***Internet Connectivity***

Broadband Internet connectivity has been identified by the World Bank as a key catalyst for economic growth with every 10 per cent increase in connectivity enabling a 1.38 per cent growth in Gross Domestic Product (GDP). This perhaps describes the criticality of internet to the e-banking Unfortunately, with Internet speed put at 3.9 Mbps, against global standard of 7 2Mbps, Nigeria still has a long way to go in catching-up with the global trend Other African countries including Kenya, South Africa, and Morocco with 12.2Mbp, 6.7Mbps, and 5 2Mbps respectively, are in the lead in the continent, with Singapore maintaining a global lead with 184 5 Mbps.[102]

Average Nigerian internet users are suffering from the very poor Internet access service offered by many of the ISPs in Nigeria[103]. The abysmal performance of the internet providers cuts across the spectrums of Internet Connectivity solution providers in Nigeria All the four GSM networks offer Internet access solutions using GPRS, EDGE and/or 3G (3.5G?)[104]. Already their voice networks almost always underperform and so their Internet services are nothing to write home about – either the speed is terribly slow or too expensive or a horrible combination of both! The GSM networks are busy trying to out-do each other with adverts and promos, instead of concentrating on their core areas – quality service delivery and ultimately customer satisfaction [105]

11.0 Social Predisposition Factors

Certain social factors make bank customers under the e-banking system more susceptible to falling victims of fraud than under the traditional system of banking. These factors include illiteracy, health challenges, and coercive attack. There was an example of an elderly illiterate customer of a Nigerian commercial bank. He was given an ATM card without adequate explanation of how the card should be used The elderly man sought assistance of a young man at the ATM point to help him withdraw cash The young man assisted him but, a few days later, it was discovered that the whole amount in this elderly man's account had gone. On reporting the incident to his bank, he was simply told that the young man had swapped his card

There was also a story of a young man who, while he was indisposed due to illness asked a friend to assist him to buy prescribed medication. He gave his ATM card to him. It turned out later that this trusted friend had withdrawn almost the entire balance in his account. It is also noteworthy that the crime rate is very high in Nigeria. There have been reported cases of physical attacks and armed robbery at several number of ATM cash point in Nigeria. In most of these attacks, the victims lost not only their money but also suffered physical and psychological injury and trauma [107]

The point is that all these social predispositions are not exclusive to a particular system of banking – traditional and modern e-banking. But the difference lays in the magnitude of losses the bank customers are likely to sustain under the two systems

12.0 Legislative Challenges and Impacts

The e-banking culture has raised a number of social, financial and legal issues that are to be adequately addressed by the law and judicial trials. For example, the issues of rights and obligations of the Banks and their customers, the effects of electronic mistakes and parties to bear the legal consequences of all these as well

Historically, the development of legal and regulatory framework on e-contract, e-banking as well as e-payment had been noted for its slow pace in Nigeria However, it is interesting to note that as far back as 1969, the Nigerian judiciary had recognized the potential impact of the electronic system on the Nigerian social, economic and justice systems. His Lordship Esso West was quoted to have remarked in the case of *Africa Inc* v. T. Oyegbola[108] that. "*The Law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of computer*".

Until 2014, there were no dedicated legislative frameworks that clearly spell out the rights and obligations, penalties for infractions attendant with the use of the internet for commerce or any other purpose[109]. But, there are clear connecting nexus between the banking industry and Electronic Contract and its enforceability in modern time. Despite that, Nigerian trade practice has advanced from the concept of a physical market to a cyberspace market, which is now today's dominant market place as all kinds of goods, applications and services can be acquired at the click of a button[110]. Thus, it can be argued that there has been synergy of efforts among the three arms of government – the legislature, the executive and the judiciary as well as writers and practitioners to ensure that specific attention is paid on necessary legislative framework on this radical development. For example, Andrew D Murray identified two main methods of electronic contracts, namely, Electronic mail, or E-mail and, Click – Wrap Method.

Though, the legislature has passed into law the National Information Technology Development

Agency Act, 2010 and the Cyber Crimes (Prohibition, Prevention, Etc.) Act, 2015, a number of bills that are critical to regulating electronic transactions and contracts are still pending. These include Electronic Transactions Protection Bill of 2010, Electronic Commerce (Provision of Legal Recognition) Bill 2008, Electronic Fraud (Prohibition) Bill of 2008, Computer Security and Protection Bill of 2009; Nigerian Antitrust (Enforcement, Miscellaneous Provisions, etc.) Bill 2008; Security Communication Interception and Monitoring Bill of 2009, National Internal Security Bill of 2009, and, Cyber Security and Data Protection Agency (Establishment) Bill of 2008.

It is argued that in spite of the absence of a legal framework to regulate electronic contracts and transactions in Nigeria, electronic contracts can be enforced in the light of a number of legislative provisions. These include Section 4 of the Statute of Frauds 1677 which provides that no action shall be brought on some types of contract unless it is in writing and signed. Section 84 of the Evidence Act 2011 which provides for the admissibility of computer generated evidence. Section 93(3) of the Evidence Act 2011 which provides that electronic signature satisfies the rule of law as to signature. Section 17 of the Cyber Crimes Act 2015 provides for effective legal recognition of Electronic Signature as well as legal sanction for forgery, misrepresentation and falsification

The provisions of the Cybercrimes Act are a welcome development and bold step in tackling the issues of cyber-security particularly in relation to e-banking. However, experts maintain that there is need for stricter and more proactive legislative interventions to ensure that the rights of consumers who use the e-banking medium are well protected[111]. Some of the areas that require legislative intervention include Data Protection and Privacy Laws, and particularly legislation on e-payment Finality Issues. Here, it is noted that certainty of rights and obligations are of great significance to e-payment especially as relates to (i) when an e-payment is considered to be complete ("Time of Completion"), (ii) whether e-payment operates to discharge payment obligation under underlying commercial transaction ("Discharge of Underlying Obligation"), (iii) payment beneficiary's access to funds transferred by e-payment ("Beneficiary's Access to Funds"), (iv) revocability of e-payment transaction ("Revocability") - collectively referred to as "payment finality" issues[112] In the absence of clear legislative regime on this issue, the rights of the parties to an electronic banking transaction will remain elusive, uncertain and un-justiciable In the absence of clear legal framework on E-payment Finality, numerous bank customers' rights will not be adequately protected

13.0 Conclusion and Recommendation

It can be concluded from this study that

1. Technology has inevitably brought radical changes to the traditional system of banking It has been a transformation from one stage to another making cashless economic system imminent
2. E-banking is a method by which banking businesses are transacted between banks and their customers through the mechanism of electronic devices and procedures in the conduct of all forms of banking operations It involves the use of automated processes and electronic devices such as computers, telex and fax machines, the internet, card payments, automated teller-machines, telephones and other electronic devices and media. It is also defined as the use of electronic delivery channels for banking products and services, and is a subset of electronic finance.
3. In spite of radical transformation that technology has brought to banking business, e-banking has its merits and inherent demerits.
4. E-banking had impacted Banker/Customer relationship in most aspects of banking

transactions particularly in the areas of banks' duty to receive cash and collect cheques on behalf of customer; duty to abide with Customer's Written Mandate; duty of Secrecy and Confidentiality which has now become vulnerable to third parties access and interference.

5. E-banking faces the challenges of inadequate basic infrastructures in a Nigeria developing economy due to political instability and uncertainty characterised by corruption, domestic deficiencies ethnic/dogmatic crisis and social insecurity.

Recommendations

For the success and effectiveness of e-banking in a developing economy like Nigeria, the following are recommended for consideration.

1. Stricter and more proactive legislative interventions should be introduced to ensure adequate protection of the rights of consumers who use the e-banking medium. In this regard, specific attention should be paid to Data Protection and Privacy Laws; and particularly legislation on e-payment Finality Issues
2. The Nigerian government as well as stakeholders in the banking and finance industries should address squarely the problem of inadequate basic infrastructure such as inadequate supply of electricity, unstable and unreliable internet services and inaccessibility of the citizens to functional and effective electronic gadgets including computer and modern phones Average Nigerians use second-hand electronic gadgets that were imported from foreign countries most of which were not suitable and durable
3. Education and awareness campaign should be promoted to educate the teeming population of bank customers majority of who are knows next to nothing about the use of e-banking

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