THE PRINCIPLES OF FREEDOM OF CONTRACT AND LAISSEZ FAIRE VIS-A-VIS THE REGULATION OF THE INTERNET IN NIGERIA

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Abstract

This paper has x-rayed the principles of freedom of contract and laissez faire vi-a-vis the regulation of the internet in Nigeria. The paper aimed at evaluating the existing laws regulating the internet and electronic contracts in Nigeria with a view to ascertaining to what extent such laws have aligned or departed from the principles of freedom of contract and laissez faire. In order to achieve the aim of this paper, the doctrinal method of research was adopted. This involved the retrieval of materials, both primary and secondary materials, relevant to the subject matter in question. In the course of this study, it was discovered that prior to 2015, there was no specific law in Nigeria regulating electronic contracts and sale of goods on the internet but the existing laws appear to favour the Classical Contract Theory and the Classical Economic (Free Market) Theory, the Cybercrime (Prohibition, Prevention, etc.) Act 2015 has provisions which regulate activities on the internet while the draft Electronic Transaction Bill 2015

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contain provisions regulating electronic transactions. Based on the above findings, the paper recommends that the Electronic Transaction Bill should be enacted into law without further delay.

Keywords: Electronic Contract, Freedom of Contract, Internet Regulation, Liassez Faire, Cyber Libertarianism

Introduction

The advent of information and communication technology, particularly the internet, has helped to facilitate an upsurge in economic growth and development. Bieron and Ahmed, have put forward the argument that the internet has facilitated a new wave of economic growth and development and that business across the world, both big and small, have taken advantage of the scale, scope and access that the internet provides to reach new markets and consumers[1]. Nigeria, as a country, is not left out of this global phenomenon[2].

The ease and convenience brought about by the use of the internet to transact business, particularly with regard to the buying and selling of goods, has helped to break down some of the traditional barriers to trade, the major one of which is distance, and has therefore helped to bring both suppliers and buyers of goods in

[1] Bieron, B. and Ahmed, U. 'Regulating E-Commerce through International Policy: Understanding the International Trade Law Issues of E-Commerce' [2012] (46) *Journal of World Trade* 545.

[2] Jessah, J.E., **'**Electronic Commerce: The Validity of Internet Sale of Goods Contract under the Current Nigerian Law' [2019] (1) (2) *International Review of Law and Jurisprudence* 66.

close proximity[3]. With the internet, a seller has a wider reach and has more opportunity to market his products to more potential consumers. Similarly, buyers are no longer constrained to narrow their search for goods of their choice only to their geographical location or to brick and mortar stores or shops they could walk or drive to. Notwithstanding the revolutionary way of doing business introduced by the internet, some business transactions conducted on the internet has been bedevilled by a lot of challenges and shortfalls, some of which border on the process of formation of the contract, fear of cybercrimes like fraud and identity theft, parties not having vital information at their disposal before concluding the contract, the payment system, security of data/information communicated over the internet *et cetera*[4].

Statement of the Problem

The question that formed the basis of this paper is whether the enactment of the Cyber Crime (Prohibition, Prohibition, e.t.c.) Act 2015 and the steps taken so far towards enacting the Electronic Transaction Bill into an Act, could be regarded as an undue interference by the Nigerian Government into commercial activities and whether electronic contracts ought to be left strictly for the parties to determine how such contracts are to be entered into and performed.

[3]Jessah, J.E., 'Electronic Commerce: Contemporary Issues in the Regulation of Sale of Goods in Nigeria', being a
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for the award of Doctor of Philosophy (Ph. D) in Law, January 2020.
[4]Jessah (n 3).

Objectives of the Study

The general objective of this paper is to evaluate the existing laws regulating the internet and electronic contracts in Nigeria with a view to ascertaining to what extent such laws have aligned or departed from the principles of freedom of contract and *laissez faire*, hence the specific objectives are;

i. To analyse some of the theories associated with the regulation of electronic contracts,
ii. Evaluate the existing laws regulating the internet and electronic contracts in Nigeria
iii. Identify to what extent such laws have aligned or departed from the principles of freedom of contract and laissez faire.

Scope and Limitation of Study

This paper focuses on the existing laws regulating the internet and electronic contracts in Nigeria, particularly the Cybercrimes (Prohibition, Prohibition, e.t.c.) Act 2015 and the steps taken so far towards enacting the Electronic Transaction Bill into an Act. However, references were made to the laws of some other countries for the purpose of buttressing the argument as to which side of the pendulum, the legal regime in Nigeria tilts. Some of the limitations or constraints experienced in the course of this research include dearth of reported Nigerian cases on electronic contracts and internet regulation, as well as difficulty in accessing electronic books on cyber-related topics relevant to the research

Research Method

In order to achieve the aim of this paper, the paper adopted the doctrinal method of research. This involved the retrieval of all relevant materials, both primary and secondary materials, dealing with the subject matter in question.

Review of Related Literature

It is conceded that there is a reasonable number of literature on sale of goods and e-commerce, there is however scarcity of materials that specifically addressed the effect of the Cyber Crimes (Prohibition, Prevention, e.t.c.) Act 2015 and the Electronic Transactions Bill when finally enacted into law, would have on the argument as to whether or not the legal regime in Nigeria, on the subject matter, is more in line with regulating the internet than the principles of freedom of contract and laissez faire. While the foreign literature failed to make reference to the state of the law in Nigeria on this subject matter, most of the local literature on electronic contract did not address the theories or arguments for or against internet regulation. This paper will provide a discussion on this area of law Therefore, it is necessary to review some of the literature used as a guide in the preparation of this paper with particular reference to some of the issues earlier highlighted as constituting the statement of the problem.

Chow, Contrera and Hamel have postulated that with the coming of the internet, the procedure for ratifying a contract electronically is so fluid that a bunch of individuals have "signed" contracts on the internet unknowingly[5]. Adam has posited that the problem with electronic contracts or internet based contracts is that they are usually based on electronic documents and they cannot be signed the same way like paper-based contracts[6], hence while it is easy to establish the uniqueness of a person's signature on a paper based contract, that of electronic based contracts posed some difficulty

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[5] Chow, S. Y., Contreras , J. and Hamel, L. *'Transactions'*, Cyber Law, Harvard Law School [2001] <https://cyber.harvard.edu/olds/ecommerce/transactions.html> accessed 23 April 2016.

[6] Adam, K. I. 'E-Commerce: Issues and Challenges for the Nigerian Law', [2010] (1) *University of Ilorin Law Journal* 100.

until the invention of digital signature which may be in the form of Personal Identification Numbers (PIN), or an advanced digital signature involving the use of some encryption system to test the validity of such signature.[7]

On the issue of cybercrime, fraud, identity theft and fear of security of information communicated via the internet[8] between contracting parties, Akomolede has expressed the view that the openness and accessibility of the internet and the protection of data transmitted is a source of concern for internet users thereby constituting a constant threat to electronic commerce. Akintola, Akinyede and Agbonifo[9] identified one of the security objectives that relate to internet transactions to be; confidentiality to ensure that only people who are authorized to have access to information are able to do so, and in this way, only the people who are intended would be allowed access to valuable information. Another objective identified by these authors is integrity, which is geared towards ensuring that the value and state of information is maintained and protected from unauthorized modification or destruction, while a third objective is availability to ensure that information and information systems are available and working when they are needed[10]. Some examples of cybercrime highlighted by Gabrosky, Smith and Dempsey[11], include extortion, fraud, deceptive

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7 *Ibid.*

8 These are issues that have been addressed by the Cybercrimes (Prohibition, Prevention, e.t.c) Act 2015 and are also provided for in the Electronic Transactions Bill.

9 Akintola, K. G., Akinyede, R. O. and Agbonifo, C. O., 'Appraising Nigeria's Readiness for e-commerce Towards Achieving Vision 20:20' [2011] (9) (2) *IJRRAS* 335.

10 *Ibid.*

11 G. Dempsey, P. Gabrosky and R. Smith, *Electronic Theft: Unlawful Acquisition in Cyber Space* (Cambridge University Press 2001).

advertising and other unwholesome business practices, misappropriation and unauthorized use of personal information. Adebayo and Kekere[12] identified some of the forms in which the security risks and threats regarding the electronic transactions are manifested, to include; accessing sensitive data such as price lists, catalogues and valuable intellectual property and altering, destroying or copying it and hacking into financial information about a business and its customers with the aim of using such information to perpetrate fraud. Ha has also asserted that concerns about security on the internet involve two issues, data security and payment security and that security of online payment is one of the main reasons consumers are discouraged from shopping online[13]. Edwin and Agwu have highlighted some of the ways fraud on the internet is perpetrated to include where fraudsters; illegally use genuine credit card details to purchase goods and services online, or set up fictitious websites selling products which do not exist in order to get the credit card details of consumers[14].

Ilobinso[15] has identified the theories opposed to government regulation of the internet to be; the classical contract theory, the

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[12] Adebayo, A. A. and Kekere, A. I. 'Electronic Commerce in Nigeria: The Exigency of Combating Cyber Frauds and Insecurity', [2016] (47) *Journal of Law, Policy and Globalisation* 159.

[13] Ha, H. 'Security and Privacy in e-Consumer Protection in Victoria, Australia' in I.Wakeman, E. Gudes, C. D. Jensen and J. Crampton (eds) Trust Management V (2011) *IFIPTM IFIP Advances in Information Communication Technology* (Springer Berlin, Heidelberge) 240 <https://link.springer.com/chapter/10.1007/978-3-642-22200-9_19> accessed 20 December 2016.

[14] Agwu, E. M. and Murray, P. J. 'Empirical Study of Barriers to Electronic Commerce Adoption by Small and Medium Scale Businesses in Nigeria' [2015] (6) *International Journal of Innovation in the Digital Economy*, 4.

[15] Ilobinso, I. K. 'Paving the Path to an enhanced Consumer Protection in Nigerian Online Market: Theories and Concepts', [2017] (8) (2) NAUJIL, 81-91.

classical economic theory and the digital libertarian theory[16], while the theories in favour of government regulation of the internet include; theory of asymmetric information, exploitation theory and the consumer protection argument. Rosenberg[17] and Eisenberg[18] on their part, highlighted the weaknesses of the classical contract theory.

Le Fort[19] and Nolen[20] traced the origin of the classical economic theory to Adams Smith and drew attention to the kernel of the arguments of its proponents being free competition and free trade which was whittled down by the position taken by John Maynard Keynes which advocated that the government has a crucial role to play in maximizing social benefits[21]. Golumbia[22], Penny[23], Theirer and Szoka[24] x-rayed the crux of the arguments of the proponents of

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16 The digital libertarian theory is also referred to as the cyber libertarian theory

17 Rosenberg, A. 'Contract's Meaning and the Histories of Classical Contract Law', [2013](59) (1) *MacGill Law Journal* 1.

18 Eisenberg, M. A. 'The Emergence of Dynamic Contract Law' [2001] 2(1) *Theoretical Inquiries in Law* 1-78.

19 Le Fort, B. 'What is "Classical" Economics?' (8 March, 2019) <https://medium.com/impact-economics/what-is-classical-economics-e8f3e2732156> accessed 28 May, 2019.

20 Nolen, J. *Classical Economics* Encyclopædia Britannica <https://www.britannica.com/topic/historical-school-of-economics> accessed 28 May, 2019.

21 Le Fort (n 19).

22 Golumbia, D. 'Cyber libertarianism: The Extremist Foundations of Digital Freedom' [2013](8) (2) *Masaryk University Journal of Law and Technology*,209-221<http://www.uncomputing.org/wp-content/uploads/2014/02/cyberlibertarianism-extremist-foundations-sep2013.pdf> accessed 28 May, 2019.

23 Penney, J. W. 'Virtual Inequality: Challenges for the Net's Lost Founding Value' [2012] (10) (3) *Northwestern Journal of Technology and Intellectual Property*, 207-238.

24 Thierer, A. and Szoka. B., 'Cyber-Libertarianism: The Case for Real Internet Freedom'. August 12, 2009 <https://tech

cyber-libertarianism as being that individuals who use the internet should have the liberty to pursue their desires, including the freedom to enter into contracts, without government interference. On the other hand, Ilobinso[25], Akerlof[26] and Kotona[27] have argued in favour of government regulation of the internet citing consumer confidence and exploitation as justification for the involvement of government in internet based transactions.

In subsequent segments of this paper, reference is made to the above highlighted literature and the views canvassed by their authors. While this paper aligned itself, in some instances, with some of the positions taken by the authors on the legal issues that concern electronic contracts and contracts executed or concluded on the internet particularly where such views can successfully be implemented in Nigeria, in other instances, the paper took a stand either, slightly or completely, different from these views.

The Concept of Electronic Contract

A contract has been defined by Salmond as an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of others[28]. Another English scholarly definition is to the effect that "every agreement and promise enforceable at law is a contract"[29] while Anson sees contract as "a legally binding

liberation.com/2009/08/12/cyber-libertarianism-the-case-for-real-internet-freedom/> accessed 28 May.

25 Ilobinso (n 15).

26 Akerlof, G., cited in Ilobinsi (n 15).

27 Kotona, G. cited in Ilobinso (n 15).

28 J. W. Salmond and J. Winfield, *Salmond Principles of the Law of Contract* (2nd edn, Sweet and Maxwell 1927) 1.

29 H. P. Winfield, *Pollock's Principles of Contract* (13thedn, Stevens & Sons 1950).

agreement between two or more persons by which rights are acquired by one or more to acts or forbearance on the parts of others"[30]. Willis, an American scholar, has defined contract as a legal obligation created by law because of a promise or set of promises[31]. In the Black's Law Dictionary[32], contract is defined as an agreement between two or more parties which creates obligations that are enforceable or otherwise recognizable at law. Another definition, which is not so much different from the one proffered above, is that of Sagay who states that a contract is an agreement which the law will enforce or recognize as affecting the legal obligations and rights of the parties[33].Arising from the above definitions, a common thread that cuts across them is the fact that a contract involves an agreement as well as legal recognition.

Electronic contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer programme, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract[34] It i the implementation of all or some commercial transactions in goods and services between

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[30] J. Beatson, A. Burrows and J. Cartwright, *Anson on Contract* (30th edn, Oxford University Press 2016).

[31] H. E. Willis, *Introduction to Anglo-American Law* cited in Willis, H. E., Rational of the Law of Contract *Indiana Law Journal* [1936] (11) (3) 228.

[32] B. A.Garner, *Black's Law Dictionary* (9th edn, West Publishing 2009) 365.

[33] I. Sagay, *Nigerian Law of Contract* (2nd edn, Spectrum Books Limited 2000) 1.

[34] 'E-Contract Law and Legal Definition'<https://definitions.uslegal.com/e/e-contracts/> cited in Ezeigbo, B., 'E-Contracts. Essentials, Variety and Legal Issues'<https://www.grin.com/document/427203> accessed 29 January 2020.

business and other or between business and consumer by using information technology and communication[35]

Theoretical Analysis of Freedom of Contract, Laissez Faire and Internet Regulation

The major theories that form the bedrock of the bulk of argument on transacting business on the internet have been classified on the basis of which side the argument tilts; whether in favour of, or in opposition to, government intervention and/or regulation of the internet. In this regard, Ilobinso[36] has identified the theories opposed to government regulation of the internet to be; the classical contract theory, the classical economic theory and the digital libertarian theory[37], while the theories in favour of government regulation of the internet include; theory of asymmetric information, exploitation theory and the consumer protection argument.

According to Markovits, contract is a branch of private law. It thus concerns private obligations that arise in respect of symmetrical relations among natural and artificial persons rather than public obligations that arise in respect of hierarchical relations between persons and the state[38]. Thus, as canvassed by Rosenberg, classical contract law embodied a specific version of individualism; that

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[35] Fawaz al –Matlaqah, M., 'Electronic Commerce Contracts' [2006] (1) *Dar al Thaqafa* 28, cited in Shnikat, M., and others, 'The Legal; Framework of Electronic Contract in the Jordanian Legislation [2017] (5) (5) *Journal of Politics and Law Research* (2017) 48.

[36] Ilobinso (n 15).

[37] The digital libertarian theory is also referred to as the cyber libertarian theory.

[38] D. Markovits, *Theories of the Common Law of Contract* (Stanford Encyclopedia of Philosophy 2015).

version, in its idealist articulation, treated contract as an act of the will of an autonomous, economically rational individual[39].

The doctrine of freedom of contract served as the foundation for the classical contract theory. Proponents of this theory posit that parties of equal bargaining power, skill and knowledge should have the freedom to choose, with whom to contract with; whether to contract; and on what terms the contract should be, without restrictions or government intervention[40]. Classical contract law has been criticized by Eisenberg as being rigid, rather than a supple, instrument and that its rules were often responsive to neither the actual objectives of the parties, the actual facts and circumstances of the parties' transaction, nor the dynamic character of contracts[41]. Instead, the rules of classical contract law were centered on a single moment in time, the moment of contract formation hence, classical contract law doctrines were almost wholly static leading to its overthrow by modern contract theory, which has reversed or fundamentally modified the rules of classical contract law. Thus, where classical contract law had an overriding preference for rules that were objective and standardized, modem contract law has been highly flexible in adopting rules that are individualized and even subjective and where classical contract law was largely static, modern contact law is, in large part, dynamic[42].

The classical contract theory has also been criticised as not reflecting the harsh realities of the marketplace. The reason, as adduced by Ilobinsi, is because in today's market, equal parties do not always exist and strong parties usually impose unfair and

[39] Rosenberg (n 17).
[40] Ilobinso, (n 15).
[41] Eisenberg (n 18).
[42] *Ibid*.

oppressive bargains upon those who are vulnerable and weak[43]. This is particularly glaring with the development of information technology and the emergence of standard form contracts, thus, transactions are concluded at a distance, with parties not having the opportunity to individually negotiate the terms of the contract they agree to.

Classical economics refers to the school of economics adopted by Western democracies in the 18th and 19th centuries. Classical economic theory was brought into the mainstream by Scottish economist Adam Smith, who many refer to as the "father of economics". Proponents of this theory, who were largely in favour of free trade, objected to the idea of government intervention in the market place and their argument is that any problem would eventually be sorted out by the markets[44].Smith was strongly opposed to the mercantilist theory and policy that had prevailed in Britain since the 16th century and his argument was that free competition and free trade, neither hampered nor coddled by government, would best promote a nation's economic growth[45].

The classical economic theory stressed the importance of competition, and frowned against monopoly. Proponents of the theory, led by Smith, postulates that in a competitive market, the 'invisible hand' tends to correct demand/supply and moves the markets towards their natural equilibrium where buyers are able to choose between various suppliers; and businesses that do not compete successfully are allowed to fail[46]. Basically, the free market is one where parties compete freely through voluntary

[43] Ilobinsi (n 15).
[44] Le Fort (n 19).
[45] Nolen (n 23).
[46] Ilobinso (n 15).

exchange on terms settled by agreement, on their own or with others, free from interference.

The theory of free market economy has been criticised as flawed because it is based on the assumption that competition and information is perfect, whereas, the reality show the market is far from perfect, particularly in emerging economies, where market failures are perhaps more pronounced thus requiring stronger government intervention. Classical economic theory eventually lost its appeal following the great depression, and was eventually replaced by Keyesian Economics, a school of thought popularised by British economist John Maynard Keynes which advocated that the government has a crucial role to play in maximizing social benefits[47].

In the early 1990s, internet was seen as some kind of mythological space, existing outside of the physical boundaries of the "real space" providing its users with unprecedented freedom and any type of state´s coercion was seen as the biggest threat to both political and economic freedoms of individuals within the new digital space[48]. Freedom, liberty, and autonomy were the ideals heralded by cyberspace's first generation of thinkers, the cyber-libertarians like John Parry Barlow, who helped forge the early technological and intellectual foundations for "cyberspace[49]."

Cyber-libertarianism propounds that individuals, in whatever capacity they choose to act whether as citizens, consumers, companies, e.t.c, should be at liberty to pursue their own tastes and

[47] Le Fort (n 19).
[48] Golumbia (n 22).
[49] Penney (n 23).

interests online, hence their motto is "Live & Let Live" and "Hands off the Internet!"[50] The aim of cyber-libertarian is to minimize the scope of state coercion in solving social and economic problems and they believe true "internet freedom" is freedom from state action which, in the context if social freedom, translates to individuals being granted liberty of conscience, thought, opinion, speech, and expression in online environments, while in the context of economic freedom it denotes that individuals should be granted liberty of contract, innovation, and exchange in online environments[51]. The prevailing mantra of cyber libertarianism, as highlighted by Vardi, is "regulation stifles innovation"[52].According to Golumbia Cyber libertarians focus a great deal on the promotion of tools, objects, software, and policies whose chief benefit is their ability to escape regulation and even law enforcement by the state, including surveillance-avoidant technologies and applications[53].

With regard to electronic contracts and internet based contracts, on the issue of whether government should intervene in the activities in the online market, cyber libertarians have put forward the view that activities on the internet cannot, and should not be regulated by any government. It is further argued that online market is better governed by itself through ethics, informal rules and unwritten codes which have been developed and accepted overtime by cyberspace participants and that, where conflicts and wrongdoings arise, the online market is in the best position to identify and

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50 Thierer and Szoka (n 24).

51 *Ibid*.

52 Vardi, M. Y., 'Cyber Insecurity and Cyber Libertarianism' [2017] (60) (5) *Communications of the ACM* 5.

53 Golumbia, G., 'Cyberlibertarians' Digital Deletion of the Left' (4 December 2013**)** <https://www.jacobinmag.com /2013/12/cyberlibertarians-digital-deletion-of-the-left/> accessed 28 May, 2019.

address them[54]. They point out the borderless nature of cyberspace, as justification for their argument that any attempt by the government to regulate the cyberspace will prove futile, and so assert that to promote economic efficiency and facilitate e-commerce, the relationship between the producers and the consumers should be voluntary and unhindered by government intervention.

They further assert that consumers in the online market should be able to protect their interests with the range of resources available to them online and offline, such as professional advice, online ratings and reviews. The position of the libertarians is based on the anonymous nature of the internet and the difficulty to enforce any law on the internet[55]. However, recent activities have shown that the arguments of the cyber libertarians may not be entirely without shortcomings as a lot of countries have enacted laws which show that it is possible to regulate activities on the internet[56].

Arguments in favour of government intervention in the market, especially in consumer contracts, is premised on market failures and the vulnerability of consumers. One of such argument is premised on the theory of information asymmetry. Information asymmetry is about the study of decisions in transactions where one party has more information than the other, creating an imbalance of power in transactions, which can lead to the transaction going bad. The theory of information asymmetry is based on the assumption that at least, a party in a transaction has

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54 Ilobinsi, (n 15).

55 *Ibid*.

56 In the case of Nigeria, it is the Cybercrime (Prohibition, Prevention, e.t.c.) Act 2015.

better information than the other parties, and that information asymmetry leads to adverse selection[57].

George Akerlof has postulated that in a market, the owner/seller has more information about the quality of the goods than the potential buyer and might place the price of his low quality/bad goods (lemons) at the same price as the good quality ones and that the ignorance of the buyer will lead him to assume that all goods in the market have the same quality, most often, bad quality[58]. He therefore argued that a party who suffers adverse selection should protect himself by screening potential buyers/sellers or by looking out for signals of quality. He explained signaling to be a means through which a party can protect himself in the market by looking out for signals of quality such as warranties, advertisements and prices, while screening refers to a mechanism through which an under-informed party can gain more information by inducing the other party to provide more information[59]. Ilobinsi has, however expounded the view that, in reality, the signalling and screening mechanisms would not be able to correct the problem of information asymmetry because of the prevalence of moral hazards and that the cost of applying these mechanisms will be borne by the consumer and may serve as a discouragement to him, in addition to warranties, advertisements and reviews being used to mislead consumers.

Another theory that advocates for government intervention in cyber space is the Exploitation Theory. The classical contract theory had assumed, wrongly, that contracting parties have equal bargaining

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[57] Ilobinsi (n 15).
[58] Akerlof cited in Ilobinsi (n 15).
[59] *Ibid*.

power and therefore should be left to exercise their will voluntarily because, in reality, contracting parties do not always have equal bargaining power, especially in consumer contracts where standard forms are mostly used without any prior negotiation or input from the consumer. For instance, in standard form contracts of sale of goods, the buyer's freedom of contract is hampered because the terms of the contract were exclusively drafted by the seller and only involuntarily accepted by the buyer[60].

It has been pointed out that restrictions on the buyer's freedom are not principally because the buyer has options and so can choose whether to go on with the contract or not, but because in certain industries, the terms are practically the same among sellers, so that the consumer is, in reality, not in a position to shop for better terms and so, the consumer has no meaningful freedom of choice[61]. Proponents of the exploitation theory have, therefore, argued that modern capitalism and market imperfection have contributed to the inequality of bargaining power resulting in producer/supplier sovereignty instead of consumer sovereignty, and that consumers need protection because they have few options aside purchasing and contracting on the terms set by large and powerful businesses who can impose whatever terms they want on consumers. Additionally, these businesses are capable of exploiting significant information in their favour by limiting their legal obligations to the consumers as much as possible[62].

The Consumer Confidence Argument also favours the intervention of government in cyber space. According to George Kotona[63], one

[60] Ilobinsi (n 15).
[61] *Ibid.*
[62] *Ibid.*
[63] Kotona, cited in Ilobinso (n 15).

of the proponents of this argument, there are two important factors that influence consumer decision making process about purchasing, the first of which is, an objective factor called 'ability or capacity to buy' and the second one is, a subjective factor called the 'willingness to buy'. He therefore suggests that the rationale for consumer protection in the online market should be to promote the 'willingness to buy' which translates to consumer confidence and consequently, facilitate electronic commerce, and that the type of protection that enhances consumer confidence in the online market can only be achieved through regulatory intervention. The next issue to be considered is whether the available legislation in Nigeria regulating activities on the internet and electronic contracts provide sufficient ground for the argument that the freedom of contract and laissez faire principles, which is the bedrock of cyber libertarianism, have been jettisoned in favour of government regulation.

Some Legislation Aimed at Regulating the Internet in Nigeria

For years, as noted by Udotai, the Nigerian economy carried on without a legal framework for cybercrime[64] until the Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015 was enacted. Ibidapo-Obe expressed the view that section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees and protects the privacy of Nigerian citizens including the privacy of their homes, correspondence, telephone conversations and telegraphic communications,[65] hence data privacy is a

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[64] Udotai, B., 'Nigerian Cyber Crime Act 2015: A Legal Review Focusing on Compliance and Enforcement Challenges' (Technology Times, 16 August 2015) <http://technologytimes.ng/wp-content/uploads/2015/08/Nigeria-Cybercrimes-Act-2015-Review-.pdf>accessed 24 April 2017.

[65] Ibidapo-Obe, T. B., 'Online Consumer Protection in e-commerce Transactions in Nigeria: An Analysis' (2011)

constitutional right in Nigeria for which an aggrieved person can seek redress under Sections 37-40 of the Constitution[66].

The Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015 has had a long, tortuous and complicated legislative history[67]. This can be seen from the processes that led to its eventual passage into law[68]. The Act creates the following offences, amongst others; fraudulent issuance of e-instructions; identity theft and impersonation; manipulation of ATM/POS terminals; electronic cards related fraud; dealing in card of another; purchase or sale of card of another; use of fraudulent device attached e-mails and websites[69]. Sections 37-40 imposes certain duties on financial institutions and service providers particularly on the issue of data protection, sections 42 and 43 establish the Cybercrime Advisory Council, its powers and functions, while section 44 establishes the National Cyber Security Fund. Interestingly, section 48 empowers the court to order for the forfeiture of assets acquired through cybercrime or the proceeds of cybercrime, while section 49 empowers the court to

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<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683927.html> accessed 12/09/2017.

66 This supports the point that privacy being a constitutional right, issue of protection of data privacy is one which it is proper for the government to legislate on.

67 Udotai (n. 64).

68 The first step towards enacting the Act was the introduction of the Cybercrime Bill of 2004/2005. Between 2006 and 2008, the Computer Security Bill emerged. From 2009 to 2010, more than 10 different Bills were projected including the Electronic Fraud Protection Bill. In 2011, the various Bills were harmonized by the ONSA[68] to form the Cyber Security Bill 2011. From 2012-2015, the process initiated by the Attorney General of the Federation led to the emergence of the Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015.

69 Cybercrime (Prohibition, Prevention, e,t,c,) Act 2015 s 20, 22, 30, 33, 34, 35 and 36 respectively.

compel an offender to pay compensation or make restitution to the victim of his cybercrime.

Section 17 of the Act, with reference to electronic signature, provides as follows;

> (1)(a)Electronic signature in respect of purchases of goods, and any other transactions shall be binding.
>
> (b)Whenever the genuineness or otherwise of such signatures is in question, the burden of proof, that the signature does not belong to the purported originator of such electronic signatures, shall be on the contender.[70]

From the above section 17(1) (b) of this Act there appears to be a presumption of genuiness in favour of an electronic signature and the burden is on the party who alleges otherwise to prove same. In addition, section 17(2) specifies the nature of transactions that would not be valid if an electronic signature is used and they include wills, death certificate, birth certificate, matters of family law such as; marriage, divorce, cancellation or termination of utility services, et cetera[71].

However the objectives of the Act, as highlighted in section 1(1) indicate that it is primarily aimed at penalizing cybercrimes.[72] It is

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[70] Cybercrime (Prohibition, Prevention, e,t,c,) Act 2015 s 17.

[71] See Cybercrime (Prohibition, Prevention, e,t,c,) Act 2015 s s 17(2).

[72] These objectives are to;

(a) Provide an effective and unified legal regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria;

(b) Ensure the protection of critical national information infrastructure; and

therefore clear that this Act is a penal law and as such cannot be said to apply to civil cases. It is canvassed here that section 17, which recognizes the validity of electronic signature in sale of goods, would apply in a criminal case where a party is being prosecuted for a crime such as identity theft, fraud (obtaining by false pretence) e.t.c., arising from or connected with electronic transactions like buying goods over the internet, and the authenticity or otherwise of the electronic signature becomes a fact in issue.

Where the case is purely civil, it appears that the Cybercrimes Act 2015 would not be applicable. It can however still be argued that the Act nevertheless serves a useful purpose, even in a civil case and in the absence of an electronic transactions Act, as an aggrieved party would have the option of either exploring a civil remedy or having the other party, in breach of the contract, prosecuted for any of the cybercrimes under the Cybercrimes (Prohibition, Prevention, e.t.c.) Act 2015[73]. But where there is no criminal element to the transaction, there appears to be no extant Nigerian Law to rely on which gives legal recognition/validity to electronic signatures or electronic contracts, as the Electronic Transaction Bill 2015 which would have filled this lacuna, is yet to be signed into law. The objective of the Electronic Transactions Bill (ETB) is to provide a legal and regulatory framework for;

(a) Conducting transactions using electronic and related media;

Promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights. (Emphasis supplied).

[73] Federal Competition and Consumer Protection Act 2018 s 114-155 could be relied on by a person who buys as a consumer. Non-consumer buyers may not be able to take advantage of these provisions.

(b) The protection of the rights of consumers and other parties in electronic transactions and services;
(c) The protection of personal data;
(d) Facilitating electronic commerce in Nigeria[74].

As stated in the Electronic Transaction Bill, an electronic record is valid and enforceable and information shall not be prevented from having legal effect, being valid or enforceable, simply because of the medium in or on which the information is represented, the technology in which the representation of the information was made and in which the information is being communicated[75]. In the same vein, with regard to the validity of electronic contracts, section 26(2) of the Bill provides that the mere fact that a document was used in a contract's formation would not deny such document validity or enforceability*".* By virtue of this provision, therefore, an electronic contract is recognized as valid and enforceable.

The Bill also provides that an electronic signature is valid[76]. The Bill empowers the National Information Technology Development Agency (NITDA) to make rules, guidelines and standards for the administration of electronic signature[77]. A new subsection was added to section 12 of the Bill before it was passed by the Senate and the said subsection empowers the NITDA to review the activities, establish, maintain and publish a register of electronic signature certification services[78]. Electronic signature is defined in

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74 ETB 2015 s 1.
75 ETB Bill 2015 s. 3.
76 ETB 2015 s. 11.
77 *Ibid.* s 12. The NITDA is an agency established pursuant to the NITDA Act 2007 to implement the ICT policy of the Federation of Nigeria.
78 ETB 2015 s 12(2).

the Bill as data in electronic form attached to, incorporated in, or logically associated with other electronic data and which is intended by the user to serve as a signature[79]. What would qualify as electronic signature is stated in section 11 of the Bill. The section provides thus;

> (1) Where the signature of a person is required, that requirement shall be met in relation to an electronic communication if;
>
> (a) Any method used to identify the person and to indicate the person's approval of the information communicated.
>
> (b) Having regard to all the relevant circumstances at the time the method is used, the method was as reliable as was appropriate for the purposes for which the information was communicated, and
>
> (c) The person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in Paragraph (a).

From the foregoing, the intention of the Legislature, in the Electronic Transactions Bill 2015 to make an electronic contract valid, is clear and this validity is to be extended beyond contracts concluded between natural persons to contracts formed from the interaction of electronic agents[80] and between an electronic agent and a natural person[81]. Similarly, from the wordings of section 11

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[79] *Ibid.*s 45.
[80] ETB s 26(3).
[81] *Ibid.* s 26(4)(a) and (b).

of the Bill the Draftsman also intends that an electronic signature should be valid and could take the form of any method used to identify a person and to show that the person approves the information communicated; the method used must however be reliable and fit for the purposes for which the information is communicated.

The Bill also provides for the certification of electronic signature by a certification authority and the certification must be in accordance with electronic signature administration, i.e. in line with the rules, guidelines and standards prescribed by the NITDA[82]. Similarly, the Bill permits an electronic signature created or used outside Nigeria would be given the same legal effect as if it was created or used in Nigeria provided it satisfies the Nigerian Certification Standards[83].

Part 4 of the Bill, that is sections 17-25, makes extensive provisions on data protection. However, Part 4 is exempted from applying to the processing of personal data;
In order for personal data to be processed, the conditions highlighted in section 18 of the Bill must be met and these include obtaining the consent of the data owner, processing the data for the purpose of performing a contract to which the data owner is a party or for enabling the data owner, at his request, enter into a contract, to protect the owner's vital interest, to protect good governance and public interest[84]. Thus, a person's data may be processed, even without his consent, where it would protect his vital interests or where protecting the interest of the public makes it necessary.

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[82] ETB 2015 s 12(1).
[83] *Ibid.*s 14.
[84] *Ibid.*s 18(1).

However, where personal data has been obtained to be processed for a particular lawful purpose, it shall not be further processed for any other purpose incompatible with those for which the data was obtained[85]. When it comes to transferring personal data to a country outside the territory of Nigeria, as is most often the case with contracts for the purchase of goods over the internet, it is permissible only where that country provides adequate protection for the freedom and rights of data owners[86].

The Organisation for Economic Co-operation and Development (OECD) has come up with recommendations on some guidelines to be followed to ensure that consumers who transact online are adequately protected[87].Countries are encouraged to enact their consumer protection laws to reflect these guidelines. Part 7 (Sections 33-36) of the Electronic Transactions Bill deals with consumer protection. It applies to both service providers and vendors. Though the Consumer Protection Council Act 1992 has been repealed by the Federal Competition and Consumer Protection Act 2018, which make provisions on consumer protection in Part XV[88] and imposes obligations on manufacturers, importers, distributors and suppliers of goods and services in Part XVI[89], yet the new Act did not specifically make provisions to regulate electronic contracts and protect online consumers. The Federal Competition and Consumer Protection Act 2018 did not address some of the legal issues that come up in the course of online

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85 *Ibid*.s 18(2).

86 ETB s 18(7).

87 Organisation for Economic Co-Operation and Development Revised Recommendation on Consumer Protection in e-commerce (OECD, 24 March 2016) <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> accessed 17 May 2017.

88 Sections 114-133 Federal Competition and Consumer Protection Act 2018.

89 Federal Competition and Consumer Protection Act 2018 ss 134-155.

transactions, such as, the challenge of cyber fraud, identity theft and fear of security of information communicated via the internet between the buyer and the seller being compromised, the trans-border nature of internet based transactions and the attendant issues of jurisdiction and choice of law. Thus, in the absence of an extant Electronic Transaction Act, or the inclusion of specific provisions in the Federal Competition and Consumer Protection Act 2018, which address the legal issues, mentioned above, facing online transactions, one can venture to state that Nigerian law has not been sufficiently updated to reflect the OECD guidelines that are particularly directed at the protection of online consumer buyers. The Electronic Transactions Bill 2015 has incorporated some of these guidelines in its provisions. Until the Bill is signed into law, Nigeria's extant law on consumer protection does not effectively protect online consumer buyers.

Regulating the internet, particularly electronic contract, is not peculiar to Nigeria as it is now a global trend. This observation can be supported with the fact that the following countries have enacted their respective laws on this issue; Ghana[90], Singapore[91], South Africa[92], the United Kingdom[93], the United States of America[94].

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[90] Electronic Transactions Act 2008 Ghana.

[91] Computer Misuse Act 1993, Computer Misuse and Cyber Security Act 2007, Electronic Transactions Act 2010, SPAM Control Act 2007.

[92] Electronic Communications and Transactions Act 2002 South Africa.

[93] Computer Misuse Act 1990, Data Protection Act 2018, Digital Economy Act 2010, Electronic Communications Act 2000, Electronic Identification and Signature Regulation 2016 (eIDAS Regulation), EU Directive on Electronic Commerce 2000**,** European Convention on Cybercrime 2011 (Budapest Convention).

[94] Computer Fraud and Abuse Act 2000, Electronic Communications and Privacy Act 1988, Uniform Computer Information Transactions Act 2000, Uniform Electronic Transactions Act 1999.

Conclusion

Prior to 2015, there was no specific law on the regulation of sale of goods on the internet. The Sale of Goods Act 1893 and its equivalent in the various states in Nigeria contain a lot of principles which appear to favour the Classical Contract Theory and the Classical Economic (Free Market) Theory that contracting parties having equal bargaining power, skill and knowledge and having the freedom to choose, with whom to contract; whether to contract; and on what terms, should be left to do so with no or minimal government intervention. Thus those terms in the Sale of Goods Act and Sale of Goods Law, implied in favour of the buyer, could be regarded as the "minimal intervention of the government" in the contractual obligations of the parties which ordinarily should be decided by them.

Enacting the Evidence Act 2011, particularly section 84 allowing for the admissibility of computer-generated evidence, was a bold step that shows Nigeria's readiness to keep abreast of modern times in recognition of the existence of a new realm known as "cyber space". A bigger step was the enactment of the Cybercrime (Prohibition, Prevention, e.t.c.) Act 2015, by the Nigerian Government, to salvage the country's image in the international community which has been severely dented by the activities of internet fraudsters.

Another finding is that the Draft Electronic Transaction Bill, as earlier highlighted, by having a lot of provisions aimed at the protection of online consumer buyers, particularly the provisions that enjoin the seller to make certain information about his products available to the buyer, aligns with the theory of information asymmetry and consumer confidence. When the Bill is eventually

enacted, it would portray that that Nigerian jurisprudence on electronic and internet based contracts tilts away from the theory of cyber libertarianism while leaning in favour of government intervention through legislation.

Recommendations

Based on the above findings, the paper recommends that the Electronic Transaction Bill should be enacted into Law without further delay to ensure that Nigeria has a law that is specifically directed at electronic and internet based contracts, thereby making it clear on the position of the country as regards whether or not it leans in favour of regulating the internet.