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The Department of Jurisprudence and International Law, Adekunle Ajasin University, Akungba Akoko, Ondo State, Nigeria at this moment invites academics, scholars, jurists, and legal practitioners to contribute well-researched articles on current legal issues in the Nigerian and international context to the *Journal of the Department of Jurisprudence and International Law (JDJIL)*. The journal will be indexed on Google Scholar, African Journal Online, HeinOnline, and other research sites. The journal accepts papers/articles annually that reflect on diverse legal issues of national, regional, and international interest in the areas of public law, commercial law, private law, international law, and jurisprudence particularly issues bothering on the under-listed areas:

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The deadline for submission of articles/papers for the next edition is NOW 15th September 2024 to enable adequate time for review of submitted papers as we look forward to publishing by the middle of the first quarter of the year.

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FOREWORD

The Journal of the Department of Jurisprudence and International Law is a peer-reviewed journal of well-researched articles on current legal issues in the Nigerian and international context to the *Journal of the Department of Jurisprudence and International Law (JDJIL)*. The journal will be indexed on Google Scholar, African Journal Online, HeinOnline, and other research sites. The journal accepts papers/articles annually that reflect on diverse legal issues of national, regional, and international interest in the areas of public law, commercial law, private law, international law, and jurisprudence.

It also aims at addressing issues, problems and contributions to knowledge in areas of jurisprudence and Legal Theory, the jurisprudence of the Supreme Court on constitutional issues and democratic governance, national security and cross-border crimes, international human rights law and Artificial Intelligence, the jurisprudence of courts in Election Petition Adjudication in Nigeria, health law and medical jurisprudence, criminology and Criminal Justice, International Institutions, roles and relevance in Africa, international principles on the use of force, municipal and International Arbitration and Justice Sector reforms, international trade and investment law, international economic laws and international commercial transactions corporate governance theories and comparative corporate practice, the jurisprudence of the National Industrial Court on labour or employment law and Industrial relations, environmental law, legal education and professional development.

This edition of the journal can be cited as AAUA-JDJIL 2023(1)(10). The journal is published both online on the official website and in print version.

The style and mode of review take after Harvard Law Review including the process and stages of peer-review and assessment. Many authors have contributed to this maiden issue on cross-cutting and thought-provoking jurisprudential and international legal issues. Articles reviewed and assessed include but are not limited to customary jurisprudence of the concept of justice, political governance and poverty, international telecommunication laws, criminal law and Justice, human rights, rule of evidence, constitutional law, dispute resolution, sports law and artificial intelligence. It is interesting to know that there are interdisciplinary articles and collaborative research outputs by scholars who are not necessarily legal scholars/researchers. All articles have tremendous contributions to knowledge and highlight of recommendations for issues and problems addressed.

I therefore present and recommend this issue for all philosophers, legal researchers and stakeholders in international law worldwide, whether or not they are in the legal space.

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Conceptual Framework and Regulatory Challenges of Telecommunications Privacy and Lawful Interception in The Nigerian Telecommunications Sector

By

Dauda A. Ariyoosu Ph.D

Abstract

The act of expressing thoughts and ideas by humans is so fundamental that constitutions and laws at international and national levels contain provisions that protect the interest of human beings in expressing themselves via the right to freedom of expression and thought. Due to the effortless ways of communication, however, the avenue is being used to perpetrate serious criminal acts that threaten human lives and property. The aim of this work, therefore, was to examine the conceptual framework and challenges of telecommunications privacy and lawful interception. The objectives of the paper were to: investigate the legal framework for telecommunications interception and the privacy rights of telecommunications subscribers; examine the procedure for lawful interception of telecommunications; and discuss challenges that militate against full actualization of the purpose of telecommunications interception. The work adopted a doctrinal research method with the use of primary and secondary materials such as the Constitution, Laws, Regulations, Journal Articles, and website materials, among other sources. It was found that interception is not only a legal matter but it also involves administrative capacity that will facilitate the successful execution of the interception process. The paper concluded that with the existence of lawful interception of communications regime, there is an established body of laws and regulations that sets the limit and framework under which law enforcement agencies, service providers and intelligence agencies can operate. The paper recommended that since the interception is not only legal matters, administrative capacity should be developed not only by the service providers but also by the regulatory authorities to monitor both technical and legal compliance in any case of telecommunications interception and privacy rights. It was further recommended that ethical concerns and fundamental right to privacy should be central considerations in any lawful interception process.

Keywords: Telecommunications, Privacy, Lawful Interception, Regulation.

1.1 Introduction

Privacy has been a thing of concern for many years.¹⁵³ As far back as 1948 when the Universal Declaration of Human Rights was promulgated, it included 'the right to privacy as a fundamental right'.¹⁵⁴ Human beings value their privacy and the protection of their sphere of life.¹⁵⁵ Human beings value control over who knows what about them and certainly do not want their information to be accessible to anyone, but recent advancement in Information and Communication Technology threatens privacy. Privacy is preventing intrusion into somebody's private affairs, or public disclosure of embarrassing private information about an individual.¹⁵⁶ The Right to privacy is guaranteed by the Nigerian Constitution.¹⁵⁷

Communication plays an important role in this information era.¹⁵⁸ It involves sharing ideas and information among people which leads to cross-fertilisation of ideas and unprecedented innovations.¹⁵⁹ Communication among individuals is part of human nature which is done through socialisation. Interception proves to be an essential mechanism in protection of individuals and the society at large against communication that perpetrates crime.¹⁶⁰ There is, therefore, the need to regulate the extent to which certain communications can be made to maintain peace and order. To ensure social stability, it is vital to prevent, eliminate, or reduce the rate of crimes and criminal activities. Some of these crimes are carried on with active communication through the internet or telephone lines

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¹⁵³Sean W. Carroll, 'The Development of Privacy' <DOI:10.13140/RG.2.1.2573.1603> <https://www.researchgate.net/publication/256767676_The_Development_of_the_Right_to_Privacy> accessed 24 February 2024.

¹⁵⁴Nupur S, 'Right to Privacy and its Infringement by Media' *International Journal of Social Research and Education*, (2017) 5, 6757.

¹⁵⁵Van Den Hoven J., "Information Technology, Privacy, and the Protection of Person Data." In: Van Den Hoven J, Weckert J, (eds.) *Information Technology and Moral Philosophy*. Cambridge Studies in Philosophy and Public Policy. Cambridge University Press.

¹⁵⁶ *Ibid.*

¹⁵⁷Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

¹⁵⁸Loredana Ivan, 'Interpersonal Communication in the Information Era: Opportunities and Disruptions' *American Behavioral Scientist* (2022) 67(2), DOI:10.1177/00027642221092801

¹⁵⁹ *Ibid.*

¹⁶⁰Idacho Richmond, 'Interception of Communication and Right to Privacy: Legality or Otherwise' *This Day Newspaper* (Online, April 17, 2018) <<https://www.pressreader.com/>> accessed 31 March 2023.

¹⁶¹Idacho Richmond, 'Interception of Communication and Right to Privacy: Legality or Otherwise' *This Day Newspaper* (Online, April 17, 2018) <<https://www.pressreader.com/>> accessed 31 March 2023.

Nigeria as a country in recent times has witnessed a rise in the rate of kidnapping, indiscriminate killings and terrorism.¹⁶² This security challenge leads to the emergence of legal framework that allows interception of communication to monitor criminal activities especially those carried out through telecommunications means such as internet and social media.¹⁶³ For interception of communications to be lawful, it must be conducted in accordance with the extant laws.¹⁶⁴ The Nigerian Communication Commission (NCC) explores its powers under Section 70 of the Nigerian Communication Act 2003 to formulate Lawful Interception of Communications Regulation.¹⁶⁵ The Regulation is made up of twenty-four regulations divided into seven parts. The Regulations deal with many issues, including the scope and objective of the Regulations, Interception of Communications, and administration of lawful interception of communications as well as rules relating to protected or encrypted communications.¹⁶⁶

2.1 Conceptual Framework

There is no universal definition of privacy because what may be regarded as "private" differs according to historical background, norms and customs including societal preference.¹⁶⁷ To have a better understanding of the concept, it is pertinent to adopt a working definition for the meaning of privacy. Privacy can be examined from the perspective of differences between private and public based on individual who dissociate their private life from public life.¹⁶⁸ Privacy is considered as right to be left alone and free from any external intervention on the principle of inviolable personality,¹⁶⁹ and it may also include intimacy and secrecy.¹⁷⁰ This simply perceives the individual being as sacred, and who has right to his personality and control over information about himself.¹⁷¹ Simply put,

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ HIPCAR, 'Interception of Communication: Assessment Report' (2012) <cancom.org>document>16583-interception_of_communication_mpg.pdf> accessed 31 March 2023.

¹⁶⁵ Nigerian Communication Commission, Report of the Public Inquiry on the Lawful Interception of Communication Regulations (7 July 2015) https://www.ncc.gov.ng/file/Legal-Reports_Public_Inquiries_Lawful_Interception.pdf> accessed 31 March 2023.

¹⁶⁶ *ibid*

¹⁶⁷ Lukacs, Adrienn. 'What Is Privacy? The History and Definition of Privacy.' In Keresztes, Gábor (Ed.): *TavasziSzél 2016 Tanulmánykötet I.*, Budapest, Doktoranduszok Országos Szövetsége, 2016, 256–65.

¹⁶⁸ *Ibid.*

¹⁶⁹ Samuel D. Warren, and Louis D. Brandeis, 'The Right to Privacy', *Harvard Law Review* (1890) 4(5) 193.

¹⁷⁰ *Ibid.*

¹⁷¹ Lukacs, Adrienn, *op cit.*

privacy refers to someone's right to keep his personal matters and relationships secret.

Telecommunications is the exchange of information over significant distances by electronic means. It refers to all types of voice, data and video transmission. It is a broad term that includes a wide range of information-transmitting technologies such as telephones (wired and wireless), satellites, radio and television broadcasting, the internet and telegraphs.¹⁷² It is the transmission of signs, signals, words, writings, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems.¹⁷³

Telecommunications privacy implies the privacy of communication. This covers, particularly, other than forms of communications, the security and privacy of mail, telephone calls, e-mails, *et cetera*. Telecommunications privacy defines the confidentiality of communications, that is conversations between users which extends to all kinds of computerized information exchange.¹⁷⁴ Telecommunications has its origin in the confidentiality surrounding mail servers such that it is not only the letter (the content of the mail) that is to be kept confidential but also traffic data such as the addressee's name, time of the transmission, and addresses are regarded as sensitive business information to be protected. These aspects have been incorporated into modern laws and regulations in the Data Protection and Privacy Laws of international and regional bodies, including municipal laws of various jurisdictions. For instance, the European Union's General Data Protection Regulations (GDPR) with the main thrust to ensure that personal data enjoys a high standard of protection. It applies to any organization regardless of where it is situated as long as it collects personal data of persons within the European Union's jurisdiction. Traffic Data refers to "any data processed for the conveyance of a communication on an electronic communications network or for the billing in respect of that communication and includes data relating to the routing, duration or time of a communication".¹⁷⁵ This includes information about the routing or timing of any phone call, text or email, whether it relates to an individual or a company.¹⁷⁶

¹⁷²Wesley Chai and Irwin Lazar, 'What is Telecommunications (Telecom)?' *Search Networking* <<https://www.techtarget.com/searchnetworking/definition/telecommunications-telecom>> accessed 25 February, 2024

¹⁷³Constitution of the International Telecommunication Union, Annex 1012. <<https://www.itu.int/council/pd/constitution.html>> accessed 1 April, 2019.

¹⁷⁴Penders Jacques, 'Privacy in (Mobile) Telecommunications Services' <<http://shura.shu.ac.uk/5250/>> accessed 04 April 2023.

¹⁷⁵ICO, 'Traffic Data' <<https://ico.org.uk/for-organisations/guide-to-protect/communications-networks-and-services/traffic-data/#trafficdata>> accessed 04 April 2023.

¹⁷⁶*Ibid.*

A phone call starts with picking up the phone, a user makes a call, the call is routed through the nearest tower, and all these are recorded and stored in the Call Detail Record (CDR) to generate a telephone bill. The bill usually bears itemized details of every phone call and is sent to the subscribers to give an insight into the calls made by the users. The user is anybody using a service whereas the subscriber is the legal entity to a contract.¹⁷⁷ For example, subscribers to the Global System for Mobile Communications (GSM) use different mobile networks of MTN, Globacom, Airtel, *et cetera*.¹⁷⁸

Apart from the conversational aspect of communications via technology, there are other forms of communication through the Internet and computer networks in the form of transactional activities such as ordering a product and making payments on the Internet.¹⁷⁹ The internet, although a very useful tool in the information society, poses threats to the privacy of human beings because every time it is used, the trace of the transaction is recorded in terms of the Internet Protocol Address.¹⁸⁰ In Nigeria, it is required that internet service providers retain internet service-related information, including user identification, the content of user messages and traffic routing data, for a minimum of twelve (12) months or as otherwise directed by the Nigerian Communication Commission from time to time.¹⁸¹

In summary, the privacy issues in this respect are akin to communications data and traffic data.¹⁸² Privacy of communications is a well-established right. Traffic data serves technical purposes which are generated and stored beyond the users' control. Traffic data reveals who and when the users are in contact.¹⁸³ Thus, in telecommunications, the right of privacy mainly relates to being protected against intrusions into one's personal data (traffic data) and communications with others (communication data).

Lawful Interception refers to the facilities in telecommunications and telephone networks that allow law enforcement agencies with or without court orders to selectively wiretap individual subscribers to eavesdrop the

¹⁷⁷Penders Jacques, 'Privacy in (mobile) Telecommunications Services' <<http://shura.shu.ac.uk/5250/>> accessed 04 April 2023.

¹⁷⁸ *Ibid*.

¹⁷⁹Lukman A. Abdulrauf, 'The Legal Protection of Data Privacy in Nigeria: Lessons From Canada and South Africa' (Ph.D. Thesis, Faculty of Law, University of Pretoria 2015)

¹⁸⁰ *Ibid*.

¹⁸¹ Nigerian Communication Commission, Guidelines for the Provision of Internet services <https://www.ncc.gov.ng/docman-main/legal-regulatory/guidelines/62-guidelines-for-the-provision-of-internet-service/file> accessed 25 February 2024.

¹⁸²Penders Jacques, *op. cit*.

¹⁸³ *Ibid*.

conversation between the subscribers.¹⁸⁴ It is obtaining communication network data according to lawful authority for analysis or evidence. Different parties perform different roles in the interception framework.¹⁸⁵ The nature of lawful interception demands cooperation and interaction among these parties and they include government agencies, legislative bodies, law enforcement agencies, service providers or network operators and interception service providers.¹⁸⁶ The legislative bodies define and ratify the rules applicable to lawful interception into their national laws. These laws are enforced by the government agencies. Law enforcement agencies usually request for lawful interception based on court orders or legal requests from a recognized authority. The service providers or network operators provide access to all applicable communications types when there is a request from an authorized body or institution. And lastly, interception service providers are experts appointed by service providers or network operators to manage and fulfil interception requests.

3.1 Legal Framework

It is no more a gainsaying that there are established international standards for interception and monitoring of communications.¹⁸⁷ The European Convention on Human Rights (ECHR) states that everyone has the right to private life, family life and correspondence.¹⁸⁸ Therefore, there shall not be unnecessary interference and interception into private life and affairs of any person either by public authority or individuals save in accordance with the law and for the purpose of national security, public safety, economic well-being, prevention of crime or the protection of health or morals, the

¹⁸⁴ Olajide Oyewole, 'Lawful Interception of Communications under the Nigerian Communications Act and the Peculiarities of the NITDA Draft Code of Practice for Interactive Computer Platform/Internet Intermediaries' <<https://www.mondaq.com/nigeria/telecoms-mobile-cable-communications/1217040/lawful-interception-of-communications-under-the-nigeria-communications-act-and-the-peculiarities-of-the-nitda-draft-code-of-practice-for-interactive-computer-platforminternet-intermediaries#SnippetTab>> accessed 25 February 2024.

¹⁸⁵ Mathieu Gorge, 'Lawful interception – key concepts, actors, trends and best practice considerations', *Computer Fraud and Security*, (2007) 9, 10-14, <[https://doi.org/10.1016/S1361-3723\(07\)70116-1](https://doi.org/10.1016/S1361-3723(07)70116-1)> accessed 25 February 2024.

¹⁸⁶ Ibid.

¹⁸⁷ Turanjanin V. 'When Does Bulk Interception of Communications Violate the Right to Privacy? The Limits of the State's Power and the European Court of Human Rights Approach'. *International Cybersecurity Law Review* (2023) 4, 115-136 <<https://doi.org/10.1365/s43439-022-00074-7>> accessed 25 February 2024.

¹⁸⁸ Özgür Heval Çınar, 'The Current Case Law of the European Court of Human Rights on Privacy: Challenges in the Digital Age', *The International Journal of Human Rights*, (2021) 25(1), 26-51, <DOI: [10.1080/13642987.2020.1747443](https://doi.org/10.1080/13642987.2020.1747443)> accessed 25 February 2024.

protection of rights and freedom of others.¹⁸⁹ In the Nigeria legal system, the right to privacy is generally recognised under section 37 of the Constitution of Federal Republic of Nigeria, 1999 (as amended). This right together with other rights contained in Chapter IV of the Constitution of Federal Republic of Nigeria, 1999 (as amended) are regarded as Fundamental Rights, subject to section 45 of the said 1999 Constitution.¹⁹⁰ It means that right to privacy can be derogated from in warranting circumstances. There are dicey areas which require special regulation, description and procedure to distinguish between lawful derogation (lawful interception) from unlawful ones. This is the rationale behind the enactment of special laws in various jurisdictions regarding this aspect. Unfortunately, Nigeria does not have a specific legal framework governing the interception of communications at the moment although there are two drafted bills pending before the National Assembly, to wit: the Interception and Monitoring Bill which is before the Senate and the Telecommunication Facilities (Lawful Interception of Information) Bill which is before the House of Representatives.¹⁹¹ In this respect, the extant laws and regulations that govern interception of communication and privacy are traceable to the Nigeria Constitution, the Nigerian Communications Act and the Freedom of Information Act 2011.

3.1.1 Constitution of the Federal Republic of Nigeria, 1999 (As Amended)

The Constitution guarantees privacy of all Nigerian citizens and their homes, correspondence, telephone conversation and telegraphic communications.¹⁹² The Constitution makes no provision for how privacy is to be protected.¹⁹³ However, this right is not absolute as it is subject to

¹⁸⁹ European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, Article 8.

¹⁹⁰ Constitution of Federal Republic of Nigeria 1999 (as amended), s.45 provides for the limitation of fundamental rights. The section states that nothing in sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons.

¹⁹¹ Jurnoke Lambo, 'Intercepting Private Communication' <<https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/Nigeria/Udo-Udoma-Belo-Osagie/Intercepting-private-communications?redir=1#legal>> accessed 04 April 2023.

¹⁹² Section 37 of the Constitution of the Federal Republic of Nigeria 1999.

¹⁹³ Nwauche E.S., 'The Right to Privacy in Nigeria' *CALS Review of Nigerian Law and Practice*, (2007) 1(1), pp. 64 – 65.

any law enacted by the National Assembly in respect of national security, defence, public safety or public order.¹⁹⁴

3.1.2 Nigerian Communications Act of 2003 and its Regulations

This is an Act of the National Assembly that regulates the communications industry in Nigeria. The Act empowers the Nigerian Communication Commission (NCC) to make regulations and guidelines that will instruct the licensees to lawfully intercept communications through their facilities.¹⁹⁵ Similarly, the NCC can issue an order directing that any specified subject shall not be transmitted or intercepted or detained on grounds of national security or in the public interest.¹⁹⁶

By section 146 of the Act, licensees must prevent their facilities from being used to enable communications that will facilitate the commission of criminal acts under any law in Nigeria. But where there is a commission of crime due to the usage of a licensee's facilities, such licensee may be absorbed in liability if it is established that the licensee is acting in good faith.¹⁹⁷

Sequel to the provision of section 70 of the Act, the NCC makes Lawful Interception of Communications Regulations,¹⁹⁸ which comprises twenty-four regulations divided into seven parts. By Regulation 3, it is an offence to intercept any communication in Nigeria except as provided in the Regulations or any other enactment in force.¹⁹⁹

This is a general provision that interception is unlawful. This is to further give regards to privacy right which is protected by municipal and international legislation. As noted earlier that right to privacy is not absolute, the Regulations provide for cases where interception will be lawful with or without warrant. The interception of communications is said to be lawful:

¹⁹⁴ Section 45 of the Constitution of the Federal Republic of Nigeria 1999.

¹⁹⁵ Section 147 of the Nigeria Communications Act of 2003.

¹⁹⁶ Section 148 of the Nigeria Communications Act of 2003.

¹⁹⁷ Jumoke Lambo, 'Intercepting Private Communication' <<https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/Nigeria/Udo-Udoma-Belo-Osagie/Intercepting-private-communications?redir=1#legal>> accessed 04 April 2023.

¹⁹⁸ Nigerian Communication Commission, Report of the Public Inquiry on the Lawful Interception of Communication Regulations (2015) <https://www.ncc.gov.ng/fileLegal-Reports_Public_Inquiries_Lawful_Interception.pdf> accessed 31 March 2023.

¹⁹⁹ Nigerian Communications Act, Lawful Interception of Communications Regulations, Regulation 3.

- i. if done by a person who is a party to a communication, who in the ordinary course of business is required to record or monitor communication;²⁰⁰ or
- ii. if it takes place for purposes connected with the provision or operations of a communication service or with the compliance, in relation to that service, or of any enactment relating to the use of communications services in Nigeria.²⁰¹

In the following circumstances, interception may be done without a warrant:

- a. where one of the parties to the communication has consented to the interception, provided that an incontrovertible proof of such consent is available;²⁰² or
- b. where the intended recipient of that communication has consented to the interception by another party, provided that proof of such consent is available.²⁰³

Interception with warrant requires that the licensee shall act upon a warrant issued by a Judge authorizing or requiring a licensee to whom it is addressed to comply with the provisions of the warrant, to secure any one or more of the following;

- a. The disclosure, in such manner as may be described in the warrant of such intercepted communication;
- b. Assistance to a foreign authority per an international mutual assistance agreement.²⁰⁴

3.1.3 Application for a Warrant under the Regulations

Pursuant to the provisions of section 148 (c) of the Act, an application for a Warrant can be made to the Judge by any of the following law enforcement agencies:

1. The National Security Adviser or his designee who shall not be below the equivalent of an Assistant Commissioner of Police;
2. The Director of the State Security Services or his designee who shall not be below the equivalent of an Assistant Commissioner of Police;

But where a Warrant is required pursuant to any international mutual assistance or agreement, the application shall be made through the

²⁰⁰ Nigerian Communications Act, Lawful Interception of Communications Regulations, Regulation 4 (2)(a).

²⁰¹ Nigerian Communications Act, Lawful Interception of Communications Regulations, Regulation 4 (2) (b).

²⁰² Nigerian Communications Act, Lawful Interception of Communications Regulations, Regulation 4(1) (a).

²⁰³ Nigerian Communications Act, Lawful Interception of Communications Regulations, Regulation 4(1) (b).

²⁰⁴ Nigerian Communications Act, Lawful Interception of Communications Regulations Regulation 5.

National Security Adviser; provided that the person making the application shall show evidence of authority from relevant country or jurisdiction.²¹⁵ An application for a Warrant shall:

- a. be in writing;
- b. contain full particulars of all the facts and circumstances alleged by the relevant law enforcement agency in support of the application for the issuance of a Warrant;
- c. state any of the grounds mentioned in Regulation 5(3), which includes national security, investigation, public emergency, public safety, etc.
- d. state the names of the licensee;
- e. state the place at which interception is to take place; and
- f. state that interception of communication is the only means of obtaining the information mentioned in the Warrant.²¹⁶

However, the National Security Adviser may initiate and request interception of communications from the licensees without warrant in an emergency that involves:

- a. immediate danger of death or serious injury to any person;
- b. conspiratorial activities threatening national security; or
- c. conspiratorial activities characteristics of organised crimes,²¹⁷

provided that the National Security Adviser shall make an application to the judge within 48 hours after the interception started, for the judge to sanction and issue a warrant for such interception. If this is not complied with, the interception shall be terminated immediately and treated as unlawful.²¹⁸

The Warrant may authorise the relevant law enforcement agency to do all or any of the following:

- a. To enter into any premises, or board any vessel, vehicle or aircraft for the purpose of enforcing the Warrant or to install, maintain or remove a monitoring device or to intercept or take possession of any communication or to install, maintain or remove a device by means of which any communication can be intercepted for the purpose of these Regulations;
- b. To take possession of and examine any communication, or as the case may be, listen to or make recording of any communication to which the Warrant applies;

²¹⁵ Regulation 7 of Nigerian Communications Act, Lawful Interception of Communications Regulations.

²¹⁶ Regulation 7 (3) of Nigerian Communications Act, Lawful Interception of Communications Regulations.

²¹⁷ Regulation 7 (4) of Nigerian Communications Act, Lawful Interception of Communications Regulations.

²¹⁸ *Ibid.*

- c. To return any communication that was taken into possession in terms of paragraph b or cause it to be returned to the licensee or the interception subject if such communication or recording of communication is without prejudice to the maintenance of law and order or other compelling national interest;
- d. To request the assistance of any person for the purpose of enforcing the Warrant.²⁰⁹

A warrant shall be granted for an initial period of 3 months or less as the judge may deem necessary based on the circumstances of the application. At the expiration of such period granted, the warrant shall cease to have effect unless it is renewed. A warrant may be renewed before the expiration of the time stated on the warrant for a maximum period of 3 months or such lesser period as the judge may deem necessary based on the circumstances of the application. A warrant may be amended upon application to the judge, provided the application states the reasons for the amendment.²¹⁰

3.2 Freedom of Information Act of 2011

The Freedom of Information Act (FOI Act) was signed into law in May 2011. It aims at creating free access to the public records and information when it provides that "Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described is established."²¹¹ But certain pieces of information are not openly accessible save in the specified circumstance in the Act. The Act defines 'information' to include any record, document and information stored in any form, including written, electronic, visual images, sound and audio recordings. With regard to the disclosure of information, the Act provides that an application for information shall not be denied where the public interest in disclosing the information outweighs any injury that the disclosure would bring about.²¹²

The FOI Act allows public institutions to disclose personal information where the person to whom it relates consents to such disclosure or where it is in the interest of the public to disclose such information.²¹³ Under the Act, 'public institutions' includes private bodies providing public services

²⁰⁹ Regulation 8 of Nigerian Communications Act, Lawful Interception of Communications Regulations.

²¹⁰ Regulation 9 of Nigerian Communications Act, Lawful Interception of Communications Regulations.

²¹¹ Section 1 of the Freedom of Information Act 2011.

²¹² Section 11 (2) of the Freedom of Information Act 2011.

²¹³ Section 14(2) of FOI Act 2011.

or performing public functions. This definition includes limited liability companies that are providing services affecting the interest and affairs of the public.²¹⁴ It is, therefore, apposite to conclude that telecommunications industries render services that affect the interest and affairs of the public as regards right to freedom of communications. It is also important to note that these telecommunications industries have obligation to safeguard the secrecy and privacy of the communications and information that may have passed through their platform in the course of using their services by the members of the public as subscribers.

In view of the provisions of this Act, a request may be made to intercept communications for the purpose of accessing information about a person or institution. Telecommunications industries will be on the fence on which duties to uphold between the obligations to protect the secrecy and privacy of their subscribers and the one on creating access for information under FOI Act.

3.3 Proposed Legislation

Interestingly, there are two pending legislations before the National Assembly to wit: the Interception and Monitoring Bill 2012 and the Telecommunications Facilities (Lawful Interception of Information) Bill 2019.²¹⁵ If enacted, these laws will empower various security agencies to intercept phone calls, emails and telegraphic communications, as well as prohibiting certain telecommunications services which cannot be monitored.²¹⁶

3.3.1 Interception and Monitoring Bill

The Interception and Monitoring Bill applies to all forms of communications. The aim of the Bill is to:

provide for the interception and monitoring of certain communications, to provide for the interception of postal articles and communications and for the monitoring of communications in the case of a serious offence or if the security or other compelling national interest is threatened, to prohibit the provision of certain telecommunication services which do not have the capacity to be monitored

²¹⁴Jumoke Lambo, 'Intercepting Private Communication' <<https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/Nigeria/Udo-Udoma-Belo-Osagie/Intercepting-private-communications?redir=1#legal>>accessed 04 April 2023.

²¹⁵ Pending before the National Assembly.

²¹⁶*Ibid.*

and to regulate authorised telecommunications monitoring.²¹⁷

The Bill provides that no one may on their own volition and without the consent of the carrier, intercept a communication which has been or is to be transmitted by telephone or in any other mode over a telecommunications system, or to monitor any communication by means of a monitoring device, in order to gain confidential information on any person, body or organisation.²¹⁸ The Bill also provides that an interception may be lawfully carried out by a police officer or a member of the armed forces or the State Security Service where an application is made to a judge.²¹⁹

3.3.2 Procedure for Interception Under the Bill

The Bill provides that before one can make an *ex-parte* application to a judge, the applicant who wants to execute the interception must have first sought and obtained the approval of a senior officer not below the rank of an Assistant Commissioner of Police or a Major General in the Armed Forces. The said high ranking officer should be specifically authorised for that purpose by either the Inspector General of Police, the Chief of the Defence Staff or an Officer in the State Security Service, as the case may be, not below the equivalent rank of an Assistant Commissioner of Police.

3.3.3 Conditions for grant of Direction

A judge shall have the mandate to issue a direction only if he or she is satisfied, on the facts contained in the application, that there are reasonable grounds to believe that:

- (a) A serious offence has been, is being or is likely to be committed which cannot be investigated in another appropriate manner; or
- (b) Security or other compelling national interests are threatened or the gathering of information in relation to the threat is necessary.

Where these conditions are met, the judge may direct that a particular communication which has been, is being or is to be transmitted by telephone or in any other mode over a telecommunications system be intercepted. The application to the judge must be in writing and should contain full details of all facts and circumstances alleged by the officer or member concerned.²²⁰

²¹⁷ *Ibid.*

²¹⁸ Section 2 of Interception and Monitoring Bill.

²¹⁹ Section 4 of Interception and Monitoring Bill.

²²⁰ *Ibid.*

3.3.4 Duration of Direction

The Bill provides that a written direction may be issued for a period not exceeding three months. In matters of urgency, a judge may make an oral direction upon hearing an oral application, which must be confirmed in writing within 48 hours. A three-month extension of the period may be granted upon an application to the judge.²²¹

3.3.5 Penalty for Unlawful Interception

If the Bill is signed into law, it will provide for the imposition of either a monetary fine or imprisonment for a period for up to two years on anyone who unlawfully intercepts a communication. There is also prescribed penalty for any person executing a direction who unlawfully discloses any information which he or she obtained in the performance of a function under the Act.²²²

The Bill also provides that if, in a specific case, only call-related information without actual monitoring of a communication is required, an authorised person (i.e., an officer of at least the rank of Assistant Commissioner of Police, Major-General in the Armed Forces or a member of the State Security Service holding a post equivalent to an Assistant Commissioner of Police) may, in writing, request the telecommunications service provider to provide such call-related information in respect of the relevant customer.²²³ 'Call-related information' includes switching, dialling or signalling information that identifies the origin, destination, termination, duration and equipment of each communication generated or received by a customer or user of any equipment, facility or service provided by a service provider and, where applicable, the location of the user within the telecommunications system.²²⁴

A request for call-related information may be made only if the person making such request is satisfied that there are reasonable grounds to believe that information is necessary in an investigation relating to:

- a. The commission or alleged commission of a serious offence; or
- b. A threat or alleged threat to the security or other compelling national interest of the nation.²²⁵

²²¹ Interception and Monitoring Bill, s.4(2).

²²² Interception and Monitoring Bill, 15.

²²³ Interception and Monitoring Bill, s.9.

²²⁴ Jumoke Lambo, 'Intercepting Private Communication'
<<https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/Nigeria/Udo-Udoms-Belo-Osagie/Intercepting-private-communications?redir=1#legal>> accessed 04 April 2023.

²²⁵ Ibid.

This draft provision seem to suggest that call-related information may be obtained by any of the authorised representatives indicated without an application being made to a judge or any further approval being obtained.²²⁶ By section 10 of the Bill, notwithstanding the fact that a direction has been issued, a judge may, upon an application, issue a supplementary direction in which the service provider concerned is directed to provide call-related information on an ongoing basis for a specific duration, as it becomes available.²²⁷

3.5.0 TELECOMMUNICATIONS FACILITIES (LAWFUL INTERCEPTION OF INFORMATION) BILL

The Telecommunications Facilities (Lawful Interception of Information) Bill applies only to telecommunications industries, excluding all other kinds of communication means. The Bill's main thrust is to guarantee that the providers of telecommunications services can allow national security and law enforcement officials to exercise their authority to monitor communications and to demand service providers to provide subscriber and other information, without unreasonably hindering the privacy of individuals, the provision of telecommunications services to Nigerian citizens and the competitiveness of the Nigerian telecommunications industry.

Also, under the Bill, telecommunications service providers have to buy and implement hardware or devices to facilitate communication interception. The lone exemption is a telecommunications service provider with less than 100,000 subscribers.²²⁸ By section 2 of the Bill, the following actions are exempted from the application of the Bill:

- a. Where the service is for the use of its provider, his household and/or his employees and not for the use of the public;
- b. Telecommunications service providers whose principal function is operating;
- c. A registered charity within the meaning of that expression in the Income Tax Act;
- d. An educational institution, other than a post-secondary institution;
- e. A hospital, a place of worship, a retirement home or a telecommunications service that are provided ancillary to their principal function; and
- f. Telecommunications service providers that also provide broadcasting undertakings, as defined in the Broadcasting Act.²²⁹

²²⁶Ibid.

²²⁷Ibid.

²²⁸Telecommunication Facilities (Lawful Interception of Information) Bill, s.9.

²²⁹Telecommunication Facilities (Lawful Interception of Information) Bill, s.2.

Under the Bill, the telecommunications service providers are empowered with capability in accordance with any regulation to:

- (a) Provide intercepted communications to authorised individuals (e.g. those with power to intercept under the Police Act, National Security Agencies Act, Criminal Code, or Penal Code).
- (b) Where the intercepted communication is encoded, compressed, encrypted or otherwise treated:
 - i. Where the service provider has applied the treatment, either remove the treatment or, if the treatment cannot easily be removed using telecommunications facilities controlled by the service provider, provide the authorised person with the means to remove it; or
 - ii. Where the treatment has been applied by another, either remove the treatment or, if the service provider does not control all means necessary to remove it, provide the authorised person with the means (other than transmission apparatus) to remove the treatment that the service provider controls;
 - iii. Provide the authorised person with prescribed information that is in the possession or control of the service provider in respect of the location of equipment used in the transmission of the communication; and
- (c) Comply with any prescribed confidentiality or security measures in respect of interceptions.²³⁰

3.5.1 Procedure for Interception

The procedure for interception commences with a request made by either police officer or member of the State Security Service to a person who is designated by the Inspector of General Police or Director-General of the State Security Service as the case may be. The person with authority will approach the service provider with a written request for any information in the service provider's possession or control regarding the name and address of any subscriber.²³¹

The authority from a designated person may be dispensed with in cases of real urgency, necessity, or where there is a reasonable belief that in the circumstance²³² the information that is provided by the service provider in response to the request shall not, without the consent of the individual to whom it relates, be used by the agency in which the designated person or police officer is employed, except for the purpose for which the information was obtained or for a use consistent with that purpose.²³³

²³⁰ Telecommunication Facilities (Lawful Interception of Information) Bill, s.3.

²³¹ Section 13 of Telecommunication Facilities (Lawful Interception of Information) Bill.

²³² *Ibid.*

²³³ Section 15 of Telecommunication Facilities (Lawful Interception of Information) Bill.

By section 12 of the Bill, the Minister of Justice can also direct a service provider to transmit an intercepted communication to an approved individual.²³⁴

3.5.2 Conditions for Grant of Authority to Make Request

The conditions that must be met before a request can be made are not specified in the Bill. However, Section 14 of the Bill states that in issues involving genuine urgency or need, or where a police officer reasonably believes that an inquiry under Section 13 cannot be made with reasonable diligence in the circumstances, the officer may request that a telecommunications service provider provides the officer with the name and address of any subscriber without first obtaining the designated person's authorisation. The Bill assumes that the appropriate security authorities have a regular obligation to receive a request from a service provider.

From the foregoing, it can be seen that Nigeria as a country does not have that single *visi generis* law that bothers solely on telecommunications privacy and lawful interception, and unless the proposed legislation are given statutory stamp, what Nigeria has are contained in different legislation and statutory instruments.

4.0 Interception Capability

It is a responsibility upon the service providers or licensees to ensure that the telecommunications network and facilities they operate have interception capability.²³⁵ Such facilities may include technical requirements of equipment to be installed by the licensees, including security to protect any information during transmission or when archived.²³⁶ A service provider or licensee will not be allowed to carry out communication services where such service provider does not have interception capability.²³⁷

5.0 Challenges Associated with Lawful Interception

Having an interception of communication law regime is a task that presents a lot of issues and challenges, some of which result from

²³⁴Jumoke Lambo, 'Intercepting Private Communication' <<https://www.internationallawoffice.com/Newletters/Tech-Data-Telecoms-Media/Nigeria/Udo-Udoma-Belo-Osagie/Intercepting-private-communications?csdir=1#legal>> accessed 04 April 2023.

²³⁵ Nigeria Communications Act, Lawful Interception of Communications Regulations.

²³⁶ Nigeria Communications Act, Lawful Interception of Communications Regulations, Regulation 11 (2).

²³⁷ Nigeria Communications Act, Lawful Interception of Communications Regulations, Regulation 12.

upsurge in technological sophistication, while others relate to the difficulty of harmonising different legal systems and national laws within a single region.²³⁸ Cloud computing, re-mailing techniques, cryptography, and stenography, are examples of technological means which can be used by criminals and make it difficult to intercept communication or to analyse it. Therefore, the use of these technologies for illicit purposes is of great concern.²³⁹ On the other hand, the required balance between interception requests and privacy rights is another challenge for implementing interception of communication as it may be subject to appraisal on a case-by-case basis. Difficulties for implementing interception are also associated with complex management control. Huge amounts of accumulated data and multiple parameters for storage keeping and discard illustrate the point that intercepting communication is not only a legal matter, but also an administrative task.²⁴⁰

6.0 Conclusion and Recommendations

Interception of communications generates a controversy among the law makers and citizens seeking a balance between national security and privacy rights. A major reason for interception of communication is to ensure national security and public safety which are primarily the responsibility of the government. Many countries of the world including Nigeria give recognition to individual right to privacy. As such, ethical concerns and fundamental privacy rights must be central considerations in any lawful interception process.

With the existence of a lawful interception of communication regime, there is a clearly established body of laws and regulations that sets the limit and framework under which law enforcement agencies, service provider and intelligence agencies must operate. In the Nigerian society of today, this legal framework has gained recognition as an important method for investigating, prosecuting crime and detecting potential terrorist acts before they occur. To tackle the challenge posed by trying to strike a balance between national security and privacy rights, a technical mechanism should be developed to monitor the compliance with data protection laws by any organisation, regardless of where it is located as long

²³⁸ HIPCAR, 'Interception of Communication: Assessment Report' (2010) <https://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipcar/reports/wg2/docs/HIPCAR_1-4-A_Assessment_Interception_of_Communications_V1.pdf> accessed 25 February 2024.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

as it collects personal data of the persons including details of their telephone conversations and correspondences.

There is need for the establishment of a Data Protection Board or Agency with special training, background and facilities. The Agency would monitor how information is being processed, and provide rules for handling data. The agency or board would be able to exercise oversight functions, conduct investigations, act on complaints, and report to the appropriate authorities in the event of breach by any law enforcement agency, service provider or other persons. It will also be able to handle the administrative tasks relative to personal data protection and interception. Also, since most constant thing in life is change, life evolves and technology advances every day, provisions should be made to tackle problems resulting from technological sophistication.

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