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EXAMINING THE LEGALITY OF CALL INTERCEPTION REGULATION IN NIGERIA

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ABSTRACT

Communication interception is not a new area of development in telecommunication management globally, particularly in the western world. However, this concept is alien to Nigeria as it conflicts materially with the constitutional provision that guarantees privacy of communication. This study examines the on-going efforts by the Nigerian Communication Commission (NCC) to introduce interception of communication in Nigeria vis-a-vis the constitutional provision for citizen's rights to privacy of communication. Being a constitutionally guaranteed right, the study concludes that the process that should mid-wife interception of calls ought not to be through regulations. Among other things, it is recommended that the NCC works with the National Assembly to initiate appropriate legislation or constitution amendment so as not to make the entire exercise a nullity.

INTRODUCTION

The object of law is to solve difficulties, adjust relations in social and commercial life. It must grow with the development of the Nation. It must face and deal with changing or novel circumstances. And unless it can do that, it fails in its function and declines in its dignity and value.¹

The above jurisprudential assertion is informed by the dynamic nature of the society. As a result, the legal fabric that holds the society must periodically examine itself to remain in tune with modern realities and demands. Little wonder then that laws are frequently modified even to the extent of challenging existing laws.

Recently, the law relating to privacy of telephone conversation in Nigeria is one of the laws being confronted with the changing demands of the society. It would be recalled that telephoning in Nigeria only received a boost in the early 2000 when the then President - Chief Olusegun Obasanjo GCFR liberalised the telecommunication sector to usher-in private investors into the sector. The main thrust of the liberalisation exercise was to come to the rescue of the ailing state-owned telecommunication provider, Nigerian Telecommunication Limited (NITEL) which prior to that time had the monopoly, with only about 4,000 telephone lines.² Barely less than two decades into the liberalisation, the hitherto 4,000 wired telephone lines have now multiplied into tens of millions of mobile telephone lines much against the scepticism of many critics and antagonists who thought the privatisation was going to completely cripple the system that was still managing to survive as at that time.

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1. Per Mac Cardie in *Pager v Claspell, Stamp and Hea Cock Ltd* (1924) 1 KB 566 at 570 cited by Ogbuanya, N. S., *Essentials of Corporate Practise in Nigeria* (Novena Publishers Ltd., Lagos 2013).
2. Prior to the liberalization, the beneficiaries of the very few available telephone lines were government-owned institutions, international organizations including foreign missions to Nigeria, top-notch business organisations and high net worth individuals.



At the time of the making of the nation's Constitution,³ it was never contemplated that occasions would warrant check-in into telephone conversations of persons. Even, the few constitutional amendments up to the third alteration⁴ still retain the provision on privacy of telephone conversation. Since the liberalisation, mobile phones have become so popular in Nigeria and thus, pervading different strata of the society. Commenting on how accessible and helpful mobile phones had been to farmers, the immediate past Minister of Agriculture in Nigeria and the current President of the African Development Bank (ADB) - Dr Akinwumi Adesina had revealed:

Those cell phones in the hands of farmers were used to send them their vouchers on their own mobile phones. They used it to buy fertilizer... and that is transparency and accountability.⁵

Obviously, the ex-Minister leveraged on the popularity of the use of mobile phones amongst farmers in achieving this feat. Recently, Nigeria's apex communication regulation body- Nigerian Communication Commission (NCC) began a move to provide for lawful interception of telephone conversations in Nigeria notwithstanding the constitutional provision which guarantees privacy of telephone conversation in Nigeria. It is the objective of this paper to examine the legality of such an exercise and to proffer solution on the possible lawful steps that could be taken by NCC to achieve its novel intention.

Interception of calls allows the interference or monitoring of some or all of the contents of a telecommunication while being transmitted to a person other than the sender or the intended recipient of the communication.⁶ This deviates from the norm which allows only a caller and the recipient to have exclusive privacy to a telephone conversation. On the other hand, illegal interception is prohibited across all jurisdictions while some jurisdictions have actually given a nod to lawful interception. Call interception has become one of the growing activities globally due to the advances in the communication capabilities of nations and the decreasing possibility of combating crimes perpetrated on sophisticated scale using the deployment of Information and Communication Technology (ICT). To this end, many countries have now devised a lawful means of intercepting conversations which may assist in curtailing security breaches as well as other unlawful activities which hitherto could not be wire-tapped due to legal restriction on the interception of communication.

LIMIT OF THE RIGHT TO TELEPHONE CONVERSATION

Human rights are said to be inalienable and indivisible rights which every human being, and as higher animal with sense of reasoning, ought to enjoy.⁷ The right to privacy of telephone conversation is one of the rights guaranteed under the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The Law provides that every Nigerian shall have right to privacy of telephone conversation made by such person. This right without any qualification is to the

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3. Constitution of the Federal Republic of Nigeria 1999 as amended.
 4. Since the making of the 1999 constitution, there have been successful amendments of the Constitution via Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010; Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010 and Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010. It must be clearly stated that call interception was never part of the areas amended so far.
 5. Phones stopped corruption in fertilizer sector- Adesina, Ifeanyi Onuba, *Punch* (Nigeria, 23 January 2015) <<http://www.punchng.com/business/professionals/phones-stop-corruption-in-fertilizer-sector-adesina/>> accessed 23 October 2015.
 6. Hale A. and Edwards J., 'Getting it Taped' (2006) 12 *Computer and Communications Law Review* 71; Cf. RIPA, s. 2(2).
 7. Dallong-Opadotun Grace, 'Non-justiciability of socio-economic rights in the contexts of the 1999 constitution of the federal republic of Nigeria and the African Charter on Human Rights' (2017) 10 *Journal of Public Law & Constitutional Practice* 276-286.



extent that where there is a breach, the aggrieved person can actually approach the courts for the enforcement of his/her fundamental right just like the other species of fundamental rights contained in the Constitution.⁸

INTERCEPTION LAWS IN OTHER CLIMES

Call interception now assumes an international tool for fighting organised crimes across different territorial boundaries, hence, its growing use amongst different nations. In the light of this, the Ukraine Secret Service in 2014 released a video on YouTube⁹ of a transcribed telephone conversation suggesting pro-Russian rebels were responsible for the drowning of the Malaysian Airlines MH17.¹⁰ The transcribed intercepted conversation was later described as the 'biggest clue so far into who may have shot down Malaysia Airlines Flight 17 might be'.¹¹

By law, Australia¹² frowns at unlawful interception of private telephone conversations while also enumerating condition precedents to be fulfilled before there can be lawful interception. The Act was changed to the *Telecommunications (Interception and Access) Act* by the Telecommunication (Interception) Amendment Act, 2006. The 2006 amendment provides for "stored communications" which include email, SMS and voice mail messages stored on carriers' equipment. The last amendment of the Act was done in 2016.¹³

In the United States of America, the Electronic Communications Privacy Act and the Stored Wire Electronic Communications Act commonly referred together as the Electronic Communications Privacy Act (ECPA) of 1986¹⁴ amended the Federal Wiretap Act of 1968. Although with several other legislation, the United States has made ample provisions for the lawful interception of communication, such that any unlawful interception attracts legal liabilities. The essence of ECPA as amended is to:

protects wire, oral, and electronic communications while those communications are being made, are in transit, and when they are stored on computers... applies to e-mail, telephone conversations, and data stored electronically¹⁵

On the continent of Africa, South Africa has a provision for interception of telephone conversation. The law¹⁶ mandates¹⁷ mobile cellular /electronic communications service providers to record and store the information contemplated under the provision of Act¹⁸ in respect of all customers whose SIM-cards are activated on its system, provided the information in question has not already been recorded and stored. This is to the extent that service providers must comply with this provision to be able to continue with their operations as provided under the Act. Any operator who flouts this provision is to be sanctioned in line with the punishments stated in the law.

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8. Section 46, 1999 Constitution, Federal Republic of Nigeria as amended.
 9. 'Malaysia Airlines crash: intercepted call suggests rebels to blame' *The Telegraph* (17 July 2014) <<https://www.youtube.com/watch?v=gAKPK9d9zVc>> accessed 20 December 2015.
 10. Ukrainian Security Service actually released a conversation identified to be between Igor Bezler- the commander of the rebel forces in the town of Horlivka and another man identified as Vasili Geranin, a Colonel in Russia's GRU Military Intelligence Agency. See further; 'Malaysia Airlines Crash: Intercepted Call suggests rebels to blame' *The Telegraph*, *ibid*.
 11. Castillo M., 'Alleged phone call: We have just shot down a plane' *CNN* (18 July 2014).
 12. Commonwealth Telecommunications (Interception and Access) Act 1979.
 13. Act 95, 2016.
 14. Information Communications Privacy Act of 1986, Justice Information Sharing <<https://it.ojp.gov/privacy-liberty/authorities/statutes/1285>> accessed 6 October 2015.
 15. *Ibid*.
 16. Regulation of Interception of Communications and Provision of Communication-related Act, 2010.
 17. Section 62(a) Regulation of Interception of Communications and Provision of Communication-related Act, 2010.
 18. *Ibid*, section 40(2).



NIGERIAN COMMUNICATION COMMISSION REGULATIONS

The power of the NCC to make regulations on governing the activities of the telecommunication industry is provided for under the Nigerian extant law.¹⁹ The Nigerian Communication Commission Act further empowers the Commission to make and publish guidelines on ANY matter for which the Act makes express provision and such other matters as are necessary for giving full effect to the provisions of the Act and for their due administration.²⁰ In exercise of this power,²¹ NCC as part of its administrative procedure in making its regulations produced a draft of a regulation to provide for the lawful interception of calls in Nigeria which was presented to the public for inputs.²² Administratively, upon the successful completion of aggregation of the views of stakeholders, the next step is usually to produce a final official document that would become the regulation of the Commission. The forum meant to give input into the law saw the bill entirely in a different light. Ever since the stakeholder's forum, the proposed regulation had elicited criticism.²³

The call interception regulation becomes inevitable considering the growing incident of insecurity in Nigeria.²⁴ In July 2016, during the annual conference of the Nigeria Computer Society (NCS), Nigeria's Chief of Defence Staff- Air Vice Marshall T.V Udoh²⁵ publicly canvassed for lawful call interception. Speaking on the 'Use of Information Technology in Counter-Terrorism', Udoh remarked that lawful interception, ethical hacking and the forensic analysis of terrorists' handsets and/or laptops will help in boosting the security landscape of the nation.

Many are also of the view that mobile phones have become a veritable tool for perpetuating corrupt activities in Nigeria. Only in 2015, the Legal Practitioners Disciplinary Committee (LPDC) disbarred a senior member of the Nigeria bar²⁶ on an allegation partly relating to unethical use of mobile phone, although the ruling is currently on appeal. Fortunately, NCC has not yet gone beyond making a draft of the regulation and placing of the same in the public domain for input, hence the need to beam a legal search light on the legality or otherwise of the exercise, so that efforts expended in the course of preparing the well-intended regulation would not eventually amount to efforts in futility.

CONTENTS OF THE REGULATIONS

The regulations seek to create legal and regulatory structures for the lawful interception of communication in Nigeria as well as generating the procedure for the collection and disclosure of intercepted communications in Nigeria.²⁷ The Commission is empowered to further modify the regulations from time to time as the need may arise²⁸ pursuant to the inherent powers conferred on

19. Section 70 of the Nigerian Communications Commission Act, 2003.

20. *Ibid*, section 70(2).

21. Preamble to the proposed lawful interception of communications regulation.

22. The essence of presenting proposed laws and regulation is to present a law that would have inputs of various relevant and concerned stakeholders and thus, producing a document that would be widely accepted by all and sundry.

23. The proposed regulation was greeted with heavy criticism on the question of constitutional supremacy by the stakeholders who were invited by the Commission to state their opinions on the proposed regulation.

24. Dr. Eugene Juwah, who is the Executive Vice Chairman of the NCC publicly revealed that the regulation would help improve on the level of security in Nigeria. See Yemi Johnson, 'Nigeria's Government Plans on Intercepting Private Calls & SMS' (2015) <<http://techpoint.ng/2015/07/13/nigerias-government-plans-on-intercepting-private-calls-sms/>> accessed 2 May 2016

25. Oluke Peter, '#NCSAbuja2016: Udoh Canvasses for Lawful Call Interception, Others' (30 July 2016) <<http://www.nigeria-communicationsweek.com.ng/e-business/ncsabuja2016-udoh-canvasses-for-lawful-call-interception-others>> accessed 09 September 2016.

26. 'Lawyers' Disciplinary Committee Disbars Kalejaiye, SAN' *This Day Newspaper* (22 May 2015, <<http://www.this-daylive.com/articles/lawyers-disciplinary-committee-disbars-kalejaiye-san/209960/>> accessed 18 February 2016.

27. Section 1, proposed lawful interception of communications regulation.

28. *Ibid*, section 21.



the Commission by the Act establishing the Commission. As conflicting as the regulation may appear on its face, the proposed regulation actually frowns at the unlawful interception of communication in a manner akin to the Constitution's position on same. This is however with the proviso that there can actually be a lawful interception only if the conditions stated in the regulation and other similar law(s) have been strictly adhered to.²⁹

Incidentally, the Evidence Act³⁰ has opened a new vista in terms of admissibility of evidence before a court of law. The position of the law³¹ is that evidence obtained improperly or in contravention of a law; or in consequence of an impropriety or of a contravention of the law shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained. Therefore, even if we assume that this provision³² can avail a person who seeks to tender evidence obtained through interception, it must be borne in mind that the court is not duty bound to admit all evidence so improperly obtained. As a result, it may be unsafe to rely on the provision of the Evidence Act or any other law(s) that accord the courts the discretionary powers to admit or decline improperly obtained evidence in its proceedings. One may then ask: what would happen when the court exercises this discretion in favour of the person whose right of privacy is being sought to be infringed?

Similarly, it is provided that the information intercepted through this process can be admitted in evidence by a court of competent jurisdiction where the presiding Judge rules in favour of a prayer seeking the tendering of the information by the applicant.³³ It must however be borne in mind that the admissibility of any evidence tendered before a court is at the discretion of the presiding judge³⁴ to admit such evidence, provided the evidence is genuine, not falsified and well tendered.³⁵

Certain law enforcement agents³⁶ are permitted to access certain communication if the use of such information relates to information by a communication service provider to a person either within³⁷ or outside³⁸ the shores of Nigeria. Specifically, request for call interception can be made by the office of the National Security Adviser in so far as the application has been made within 48 hours after the interception or begins to occur³⁹ provided that the intent of the interception is to halt the occurrence of an action that could pose immediate danger of or death or severe injury to any person;⁴⁰ occasion an act of conspiracy which is of threat to national security⁴¹ or culminate into organised crimes.

29. *Ibid*, section 3. See also, section 84 of Nigeria's Evidence Act.

30. Section 14, Evidence Act 2011.

31. *Ibid*.

32. *Ibid*.

33. Section 14, proposed lawful interception of communications regulation.

34. *Chedi & Anor v AG Federation* (2006) LPELR- 11806 (CA) pg 9.

35. *Baban-Lungu & Anor v Zarewa & Ors* (2013) LPELR-20726(CA) pg 54, para B and pg 45-50, *Kubau v Rilwanu* (2013) LPELR-2346(CA) p. 34 para G-E (CA).

36. The category of the law enforcement agents are contained in Section 7(1), proposed lawful interception of communications regulation.

37. Section 6(1)(a), proposed lawful interception of communications regulation.

38. *Ibid*, section 6(1)(b).

39. *Ibid*, section 7(4)(c).

40. *Ibid*, section 7(4)(a).

41. *Ibid*, section 7(4)(b).



Information obtained under the provisions of the regulations shall not be divulged to any other party except:

- a. to any other person who of necessity requires it in the performance of his or her function under these Regulations or the Act;⁴²
- b. if he or she is a person who of necessity provides the information in the performance of his or her functions under these Regulations or the Act;⁴³
- c. such information is required in terms of any law or as evidence in any court of law;⁴⁴ or
- d. to any competent authority which requires it for any criminal investigation or prosecution.⁴⁵

Communication intercepted shall be kept in confidence and only shared for the purpose of investigation.⁴⁶ Upon completion of the investigation⁴⁷ and admission in evidence, all the copies of intercepted communication shall be destroyed.⁴⁸ Also, communication providers shall keep intercepted communication in their systems for a period not more than three years.⁴⁹

There is to be opened a confidential log book⁵⁰ in both hard and electronic formats⁵¹ which would chronicle warrants issued, renewed or cancelled. Such log book maintained for the purpose shall not be disclosed to any person except those authorised by law.⁵² In order to keep track of the effectiveness of the provision of the regulation, the Commission is to further keep an annual report of the number of warrants issued, renewed or cancelled the preceding year, the number of interceptions made, details of interceptions that could not be implemented, the importance of communication for the investigation and the complaints from licensees on interception of communications.⁵³

Every licensee shall as may be directed by Nigerian Communication Commission, take reasonable steps to install interception facility that would facilitate call interception of communications made on their respective networks. This implies that licensees must deploy the needed technological and managerial requirements for successful interception.⁵⁴ The Commission is empowered to stipulate the required technology and equipment for purchase and deployment by telecommunication providers⁵⁵ as well as the minimum standards to be observed during transmission and archiving of the information.⁵⁶

Cleverly on the part of the NCC, the cost of installation and monitoring of calls shall be solely borne by the provider.⁵⁷ However, while this will ensure that the financial burden associated with the deployment of the interception technology is taken off the shoulders of the Federal Government of Nigeria, the burden will be transferred to the customers of the telecommunication firms whose service charge could be increased as a result of this. Where the communication sought to be tendered

42. *Ibid*, section 15(1)(a).

43. *Ibid*, section 15(1)(b).

44. *Ibid*, section 15(1)(c).

45. *Ibid*, section 15(1)(d).

46. *Ibid*, section 19(3).

47. *Ibid*, section 19(1).

48. *Ibid*, section 19(2).

49. *Ibid*, section 18.

50. *Ibid*, section 16(2).

51. *Ibid*, section 16(1).

52. *Ibid*, section 16(2).

53. *Ibid*, section 16(3).

54. *Ibid*, section 11(1).

55. *Ibid*, section 11(2)(a).

56. *Ibid*, section 11(2)(c).

57. *Ibid*, section 12.



is encrypted or protected, the provider shall avail the National Security Adviser (NSA) or State Security Service (SSS) with the code, key or access to such encrypted or protected communication⁵⁸ and where the said code or key is in the possession of another person, the provider shall request such person to relinquish same to the NSA or SSS as directed in the warrant.⁵⁹

Compliance with the provisions of the regulations is important such that any provider or its officers⁶⁰ who fail to adhere to the provisions of the regulations shall upon conviction be liable to a fine of N5,000,000.00⁶¹ and if such an offence is continuing, the defaulting provider shall be liable to a daily default penalty of N500,000.00.⁶² In extreme cases, the commission may revoke the licence given to the provider, and shall notify the provider in not more 30 days after the revocation of licence had been effected.⁶³ This is in addition to other options which include obtaining injunction for specific performance or any other lawful action to enforce compliance by the licensee as contained in the regulation⁶⁴ which could be explored.

A person who is aggrieved by an interception activity may apply to court for judicial review.⁶⁵ However, such aggrieved person must have, as a condition precedent; first notified the Commission of his displeasure.⁶⁶ The Supreme Court of Nigeria gave an insight on the importance of pre-action notice in the case of *Godwin Ugwuanyi v Nicon Insurance Plc*⁶⁷ where the apex court held inter alia that:

pre-action notices are recognised procedural provisions. They give a defendant time to enable the defendant determine whether or not to make reparation of the plaintiff.⁶⁸

The court went further to declare that:

The suit would be incomplete if the courts do not ensure that there is compliance with the condition precedent.⁶⁹

CONFLICT WITH PROVISIONS OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (AS AMENDED)

Section 37 of the 1999 Constitution of the Federal Republic of Nigeria⁷⁰ provides as follows:

The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

It would appear that the consequences of having absolute privacy to telephone conversation can be likened to Thomas Hobbs' description of the state of nature which is 'short, brutish and nasty' hence the need to exercise a measure of restraints. In the like manner, there has been calls to strengthen the

58. *Ibid*, section 13(1).

59. *Ibid*, section 13(2).

60. The officers include the Manager, Chief Executive Officer, Secretary or other similar officers.

61. Section 20(a) proposed lawful interception of communications regulation.

62. *Ibid*

63. *Ibid*

64. *Ibid*

65. Section 17(1), proposed lawful interception of communications regulation.

66. The authors are of the view that such a condition precedent is to provide a window for the Commission to explore other possibilities to resolve the differences between parties before eventually resorting to litigation. Such brilliant provision is also in tandem with the agitation for increased space for Alternative Dispute Resolution (ADR) in the Nigerian administration of justice system.

67. *Godwin Ugwuanyi v Nicon Insurance Plc*, 11 NWLR (Pt 1366) pg. 546.

68. At page 558.

69. Page 561. See also *Maduloku v Nkemdilim* (1962) 2 SCNLR 341.

70. CAP C23, Laws of the Federation of Nigeria.



capacity of the police and other law enforcement agents in Nigeria to be able to combat crimes in the country using modern technology just like their counterparts in other climes. Since desperate times require desperate measures, one of the technologies that readily came to mind was the need to deploy call interception facilities. Apparently, this is in line with the practise in other climes that have advanced their technologies to be able to monitor and intercept calls.

The call for this incursion is apparently without paying due attention to the legal implication of infringing on a constitutional right. It is a fact that the constitution guarantees its supremacy over other laws in Nigeria.⁷¹ The Supreme Court of Nigeria had earlier cautioned.

It is necessary to get our bearings right. The constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to questioning in ordinary circumstances.⁷²

This is to the extent that where there is any form of conflict between any of the provisions of the constitution and any other law, that other law shall to the extent of its inconsistency be declared void.⁷³ In a recently decided matter⁷⁴ the court while emphasising the place of constitutional dominance on other law declared where a legislation:

attempts to add, alter, duplicate or even repeat what was already in the Constitution, the court *will not be left out during this exercise of striking down the offending provision...* (Emphasis added)

By this provision, all other legislations take their legitimacy from the provisions of the constitution.⁷⁵ The supremacy of the constitution becomes relevant where there is need to choose the law that would have primacy of authority between the various contending laws.⁷⁶ Jurisprudentially, constitutional supremacy can be related to granting the constitution the status of the *grundnorm*.⁷⁷ The clause is usually inserted into constitution to confer its primacy or supremacy far and above any other conflicting law. For example, in the Constitution of the United States of America, the supremacy clause contained in its Article declares that any law made under the authority of the United States are the 'supreme law of the land' and takes legal superiority over any conflicting provision of a state law or constitution.⁷⁸ In Nigeria, the concept of supremacy clause dates back to the 1960 Independence Constitution and has remained a common feature of all subsequent constitutions.⁷⁹ The court gave credence to this in *Nigerian Army v Warrant Officer Banni Yakubu* where it was held that:

the Constitution of the Federal Republic of Nigeria is the supreme law of the country and it overrides all other laws in the country. Where any conflict exists between the constitution

71. Section 1(1) & (3) 1999 Constitution, Federal Republic of Nigeria as amended.

72. *Abacha v Fawahinmi* (2001) 51 WRN 29.

73. Section 1(3) 1999 Constitution, Federal Republic of Nigeria as amended, Akande, J. O., *The Constitution of the Federal Republic of Nigeria 1999* (MIJ Professional Publishers Limited 2000) 16.

74. *National Conscience Party v State Independent Electoral Commission Ekiti State* (2015), 1 Nigerian Human Rights Law Reports (Pt 1).

75. Akande, (n 72).

76. Yakubu J. A., *Constitutional Law in Nigeria* (Demyaxs Law Books, Ibadan 2003).

77. Dias, 'Jurisprudence' (Butterworths 1985) Chapter 17 cited by Yakubu, J. A., *Constitutional Law in Nigeria* (Demyaxs Law Books, Ibadan 2003).

78. Garner B. A., *Supremacy Clause* (Black's Law Dictionary, 10th edition 2009) 1669.

79. Asein J. O., *Introduction to Nigerian Legal System* (2nd edition, 2005) 2.



and any other statute, the court or tribunal has the duty to interpret or apply such statute in a way as to bring the statute in line with the letters and intendment of the constitution.⁸⁰

Also, commenting on the principle of the primacy of the constitutional rights where the provision of a constitutional guaranteed right conflicts with the provision of any other statute, the court has held inter alia that:

In the interpretation of statute which restricts a citizen's right if there should be a doubt, gap, duplicity or ambiguity as to the meaning of the words used in the enactment, it should be resolved in favour of the person who would be liable to the penalty or deprivation of his right. If there is a reasonable construction which will avoid the penalty in any particular case, the court will adopt that construction. If there is any doubt as to whether the person to be penalized or to suffer has of a right come fairly and squarely within the plain words of the enactment, he should have the benefit of the doubt.⁸¹

In *Nigerian Army v Yakubu* (supra), the respondent and other soldiers were convicted by a General Court Martial on 20th December, 2007. The verdict of the conviction was confirmed on 9th August, 2008 and published on 13th August, 2008. The respondent wrote a letter to the Chief of Army Staff for a review of his conviction, but there was no official response to his letter. He then approached the Court of Appeal with prayers for the extension of time within which to apply for leave of court, leave to appeal against the decision and the extension of time within which to appeal against. In his affidavit, and as well as the further and better affidavit, he pointed out that his delay in appealing was due to the fact that he was not in the know of the confirmation of his conviction until a co-convict informed him at a later date and that he became traumatised as a result of his ordeal to the extent that he could not file his application on time. The appellant argued that the respondent did not fulfil the condition precedent by filing out of time. The appellant further contended that the matter had become statute-barred as provided for by section 2(a) of the Public Officers Protection Act. The Court of Appeal found merit in the respondent's argument and granted his prayers. Dissatisfied with the ruling, the appellant appealed to the Supreme Court.

The court in upholding the primacy of the constitution above any other law, even though the case did not actually present a situation of conflict of law, held that:

were same to exist, the duty of a reasonable court or tribunal would be to interpret or apply the Act in such a way as to bring it in line with the letters and intendment of the constitution.⁸²

In *National Conscience Party (NCP) v State Independent Electoral Commission*,⁸³ the Ekiti State electoral body made some guidelines which were extra requirement for the conduct of election in Ekiti State. The plaintiff contended that such requirements in the guidelines were not specified amongst the conditions expressly provided for under the 1999 Constitution. The Defendant had requested for Tax Clearance Certificate and the payment of between N5,000 to N10,000 for candidates contesting for Local Government Elections in the State. While delivering the judgement

80. *Nigerian Army v Warrant Officer Banni Yakubu*, 8 NWLR (Pt 1355) pg. 7.

81. *Major General Ovo Adhekegba v Minister of Defence*, (2013) 17 NWLR (Pt 1382) pg. 126.

82. Per M.D. Muhammad J.S.C. in *Nigerian Army v Warrant Officer Banni Yakubu*, 8 NWLR (Pt 1355) pg. 26. See also *Ohuka v The State* (1988) 1 NWLR (Pt 72) 539.

83. Supra.



in favour of the plaintiff, the court held that though the State Electoral Body was a creation of section 7(4) of the Constitution, its activities must be within the ambit of the law. The court declared that the act of Ekiti State Independent Electoral Commission by making conflicting provision in its guidelines was ultra vires and therefore amounted to nullity. The court went further to clarify that where the source of the law conflicting with the constitution is even an '*Act or legislation by the National Assembly*' such conflicting Act or legislation '*would definitely be struck out*' in favour of the provision in the constitution.

It is to be noted that the power of the NCC to make guidelines and regulations to govern its affairs is itself derived from the Act of the National Assembly establishing the body⁸⁴ and at best, the regulations made pursuant to such delegated power cannot be said to wield more prominence than the constitution.

It is important to state that if the instrument of power delegation to NCC was derived actually from the constitution, the status of such regulation would have been elevated from that of a mere regulation. The law is settled: where the constitution delegates powers to make laws/regulations to another individual or body, the law eventually made by the individual or body to whom the power has been delegated could be said to have the strength of the constitution that granted the power in the first instance. This was the holding of the court in the case of *Akanbi v Alao*⁸⁵ where the court held that the Fundamental Rights (Enforcement Procedure) Rules, 1979 made by the Chief Justice of Nigeria (CJN) pursuant to the powers conferred on the CJN by section 42 of the Constitution⁸⁶ had the full weight of the constitution. The court further contended that the rules wielded the same powers just like the constitution. In fact, such rules are said to constitute 'part of the constitution'.⁸⁷

Therefore, on the strength of *National Conscience Party (NCP) v State Independent Electoral Commission*,⁸⁸ it would therefore be safe to assert that the proposed regulation of the NCC for the lawful interception of telephone conversation to the extent of its inconsistency with the constitutional provision on the right to telephone conversation may likely be declared null and void to the extent of its inconsistency with the constitution, if tabled before a court of law.

LIMIT TO ABSOLUTE RIGHT TO TELEPHONE CONVERSATION

Having addressed the question of constitutional superiority over the subsidiary legislation, it is essential to address the pertinent question of whether there could per chance be possibility of the constitutional right of privacy of conversation being set aside. Better put, can the right to privacy of telephone conversation be waived under certain conditions? To put this in the right perspective, it is essential to examine the relevance of the term 'limit' to the current discourse. The term 'limit' in relation to human rights has been described as the lawful extent to which a beneficiary can enjoy his right; beyond which there may be lawful deprivation.⁸⁹ Under the current legal order in Nigeria as it is in other climes as well, fundamental rights which though are inalienable rights do have certain limits.

84. Section 1, Nigerians Communications Act, No. 19, 2003.

85. *Akanbi v Alao* (1989) 3 NWLR (Pt 108).

86. Section 42(3), Constitution Federal Republic of Nigeria 1979.

87. Yerokun Olusegun, *Casebook on constitutional law: cases and materials* (Princeton Publishing, Lagos 2016).

88. *Supra*.

89. Mendie A., 'Status and limit of human rights: right to life under Nigerian constitution, 1999 with focus on rural women in Akwa Ibom State' (2014) *Mediterranean Journal of Social Sciences* 5(26).



Right to privacy of telephone conversation could be derogated from under section 45 of the 1999 Constitution by any law “that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health”. Although there are no available judicial pronouncements on limits of right to privacy of telephone conversation in Nigeria, in line with the provision of the Evidence Act, the courts are empowered to admit a piece of evidence presented before it in as much as the evidence is relevant to the case. The Evidence Act⁹⁰ provides that evidence obtained improperly or in contravention of a law; or in consequence of an impropriety or of a contravention of the law shall be admissible unless the court in its wisdom is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

It is our humble opinion that since the right to telephone conversation can be categorised under the second specie of fundamental rights, the violation of right to telephone conversation may not be viewed as grievous relative to other rights such as rights to life, personal liberty, fair hearing, presumption of innocence etc. Certainly, if right to life could be lawfully violated when reasonably necessary for the purposes of suppressing a riot; insurrection or mutiny,⁹¹ then, one can reasonably expect that the right to privacy of telephone conversation may be derogated from to unravel the mystery surrounding the commission of serious offences like insurrection, terrorism, kidnapping and corruption. In this case, the onus would be on the person relying on the use of the intercepted communication to prove before the court that the desirability of waiving the right of privacy to telephone conversation outweighs the undesirability of waiving such right.

Suffice to state that even though Evidence Act⁹² has given the court the power to admit improperly obtained evidence in court, the power may not be exercised in favour of the applicant who seeks to rely on the evidence emanating from the call interception. As a result, it may be unsafe to rely on the provision of the Evidence Act or any other law(s) that accord the courts the discretionary powers to admit relevant evidence even if improperly obtained. One may then ask: what would happen when the court exercises this discretion in favour of the person whose right of privacy is being sought to be infringed?

CONCLUSION

No doubt, the need for the enactment of law that would intercept telephone conversation is long-overdue in Nigeria as this would help in reducing the level of corruption in Nigeria⁹³ while also galvanising the needed intelligence towards combating insurgency and other security concerns facing the country at the moment. It has been clearly established that the legal framework for the interception of calls could be more effective if passed by the National Assembly and not as subsidiary legislation as being contemplated at the moment. Best practices as seen for example in the case of the United States of America suggests that interception laws should be passed by the national parliament.

90. Section 14 Evidence Act.

91. Section 33(2)(c) Constitution of the Federal Republic of Nigeria 1999 as amended.

92. Section 14 Evidence Act.

93. Nigeria is currently rated as 136 out of 176 countries in the Transparency International Corruption Index released in January 2017. See 'Corruption: Again, transparency International ranks Nigeria low' *Punch Newspaper*. <<http://punchng.com/corruption-transparency-international-ranks-nigeria-low/>> accessed 8 May 2017



It is our humble view that the National Assembly should, in the spirit of section 45 of the Constitution, make a comprehensive and robust law providing for, and regulating call interception in Nigeria. Also, it is suggested that the definition section of the regulation should be expanded to provide a broader definition of what interception connotes. Similarly, although the regulation seeks to concern itself with telephone conversation alone, it would appear that for there to be an effective law, it should include other forms of communications⁹⁴ including e-mail, chats and messages.

94. The popular trend now is that interception of communication now transcend mere telephone conversations.

