RIGHT TO PRIVACY IN NIGERIA: AN EXAMINATION OF THE LEGAL FRAMEWORK FOR PROTECTING GLOBAL SYSTEM FOR MOBILE COMMUNICATION (GSM) SUBSCRIBERS FROM UNSOLICITED TEXT MESSAGES

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Abstract

Throughout human history, people are concerned about their privacy, and what information about their personal lives is disclosed to third parties. Centuries past, some of these concerns evolved into privacy laws, which led to a gradual transition from the traditional concept of privacy to the modern concept of privacy. However, recent breakthroughs in technology pose a significant threat to the protection of these rights as they bypass traditional securities for protecting human privacy and gain access through virtual realities.[1] In Nigeria, the prevalence of the delivery of unsolicited text messages, including political campaigns and advertisement to GSM subscribers, is one of such breakthroughs. The response to this is the enacting of privacy protection regulations to prevent the violation of subscribers' privacy, especially by giant tech companies. This paper, therefore, discussed the concept of the right to privacy – traditional and modern, and its historical background. It examined the legal framework for protecting the privacy of GSM subscribers against unsolicited messages. The paper also discussed judicial decisions in Nigerian on the violation of privacy through the delivery of unsolicited text messages and examined the legal framework for the protection of data privacy in Nigeria. The researchers found that, despite the availability of laws, regulations, and judicial decisions, there exist cases of violation of the privacy of GMS subscribers by mobile telecommunication operators. These violations are partly attributive to the fact that there is no comprehensive data protection regime in Nigeria that arguably matches up to international standards and the lack of adequate awareness of subscribers to their rights against such messages. The paper, therefore, recommended the need to enact a comprehensive and explicit data protection law and embark on aggressive awareness campaigns on the rights of citizens to the protection of the privacy of their data. The paper also recommended that class action should be encouraged to reduce the financial burden of affected subscribers.

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[1] This includes GSMs, internet and the social media, and electromagnetic devices such as computers, mobile devices and cameras.

Introduction

The right to privacy is a critical human rights issue of the modern age.[2] The importance of the right to privacy cannot be overemphasised. It is for this reason the constitutions of almost all nations expressly provide for it.[3] Moreover, where the right is not expressly provided for, the courts have found it traceable to some provision of the constitution.[4]

The right to privacy centres on the prerogative of individual freedom.[5] Olomojobi opines that the Right to Privacy is a constitutional limit on the powers of the state. He notes, however, that the private zone has now been taken up by infringement of privacy, which is now imputed to the Government.[6] Abdulrauf and Daibu[7] maintain that in Nigeria today, the right to privacy is seriously threatened by the new technologies, which are referred to as destroying technologies. Kearns[8] equally holds the same opinion. He opines that new technological advances make it possible to accomplish tasks previously not possible. However, these task accomplishments come with a cost and create problems. One such problem is the invasion of the right to privacy.

The right to privacy as it is traditionally known is infringed upon when the homes, correspondence, telephone conversation and telegraphic communication of citizens are invaded upon without their requisite consent.[9] However, the invention and use of modern information technologies can process information with little or no effort at excessive speed, impacting the right to privacy.[10] Like most nations of the world, Nigeria adopted the use of media technologies. These new technologies include the internet, social networking sites (SNSS), and mobile phones,[11] which have privacy implications for which operators, regulators, and even academics give little attention.[12] In the twenty-first century, the concept of infringement of privacy has expanded beyond the traditional concepts of invasion of citizen's home, correspondence, telephone conversation, particularly with the introduction and use of new media technologies. The modern conception of privacy, which is conceptualised according to the problems of recent times, has more to do with the protection of information

In 1992, the regime of General Ibrahim Babangida deregulated the Nigerian telecommunication sector and established a regulatory body known as the Nigeria Communication Commission (NCC). After the establishment of NCC, the regulatory body issued various licenses to private telecommunication operators, such as those given to fixed telephone providers that have 90,000 lines,

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[2]Lukman A. Abdulrauf and Adedodum Daibu, 'New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension between Traditional and Modern conception.' *NAUJIL J* (2016) <http://www.ajol.ifo_article> accessed on 20 February 2020.

[3] For instance, Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended.) provides for the right to privacy.

[4]Abdulrauf and Daibu (n2). In India for example the right to privacy is not provided for by the constitution but the courts have tied the right to the protection of life and personal liberty. See *Kharrak Singh v State of Utter Pradesh* (ALR 1963) SC.

[5]Olomojobi Yinka, *Right to Privacy in Nigeria*<https://www.ssrn.com >…> accessed on 20 February 2020.

[6] Ibid

[7] Ibid

[8]Thomas .B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy concerns*, (7wm & Mary Bill Rts J. 975 1999), <https://scholarshiplawmm.edu/wmborj/vol7/iss3/10> accessed on 20 February 2020.

[9] CFRN (n3)

[10] Kearns (n8)

[11] What is New Media Technologies <https://ww.igi-global.com> accessed on 23 February 2020; New Media is a generic term used to describe all forms of computer–based or web related communication.

[12] Ibid

35 internet service providers with a customer base of 17,000.[13] With the return to democracy in 1999,[14] the telecommunication sector was fully deregulated. Three GSM licenses were auctioned in 2001 for ₦285,000,000 each while reserving a license for NITEL. At the auction, MTN Communication and ECONET wireless were successful. Communication Investment Limited (CIL), being the third company at the auction, was refused a license due to its failure to meet up with the payment deadline.[15] On 6th August 2001, ECONET Wireless commenced services, followed by MTN Communication two days later. ECONET Wireless and MTN Communication added more lines of over one million within twelve months. On 12th August 2002, the NCC granted a license to Globacom for a second National Operator (NSO), the motive was to create an alternative network to the government-owned Network NITEL.[16] Since then, there has been a phenomenal increase in the number of subscribers. More so, the Nigeria Communication Commission, NCC, says there were 174,012,136 active subscribers on the telecommunication subscribers as of January 2019[17].

The impact of GSM in Nigeria cannot be overemphasised. No doubt, life for Nigerians have been made a lot easier with the introduction of GSM. The gains of GSM in Nigeria are numerous.[18] These gains are itemised by Bakare to include livelihood sustainability, sponsorship of other Business, increased employment, internet services, mobile banking. Despite these gains in Nigeria, the angle of privacy invasion is one which needs to be examined and addressed. Service providers usually send unsolicited text messages to subscribers. The Vice-Chairman of NCC Nigerian Communication commission recently remarked that he also suffers the menace of invasion of his privacy resulting from unsolicited text messages by a service provider.[19] This statement from the vice-Chairman of NCC is a strong indication that there is indeed a need to examine privacy invasion by mobile communication service providers. The Nigerian courts have in two separate cases,[20] held that telecommunication service providers infringed on the rights of citizens to privacy through the delivery of unsolicited text messages to subscribers from unknown third parties. These messages imply that personal data, i.e., telephone number of individual subscribers, have been compromised without their consent. This paper, therefore, focuses on the breach of privacy of mobile Telephone subscriber by the service providers. This paper will be discussed in six parts. The first part deals with introductory matters and the second part will discuss the conceptualisation and the historical background of the right to privacy. Part 3 will examine the traditional and the modern concept of the right to privacy, and the fourth part will be an overview of the first set of Nigerian cases on privacy invasion in the light of new media technology. Part 5 will focus on the legal framework for the protection of data privacy in Nigeria, and part six concludes the paper and make recommendations on ways in which the right to data privacy can be protected.

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[13]B.I.Bakare, I.A. Ekanem and I.O.Allen. 'Appraisal of Global System mobile Communication (GSM) in Nigeria.' *American Journal of Engineering Research (AJER*) [2017] (6) (6) 97-102 <ww.ajer.org> accessed on 20 December 2019.

[14] Ibid

[15] Ibid

[16] Ibid.

[17] Agency Report 'Telephone subscribers increase to 174 million – NCC', Premium Times (1 March 2019) <https://www.premiumtimesng.com/news/more-news/317035-telephone-subscribers-increase-to-174-million-ncc.html>accessed on 9 February 2020.

[18]Bakare, Ekanem and Allen (n14)

19Iheanyi Nwankwo, '*Nigeria Data Privacy First Respondents*' <https://www.samwordpress.com> accessed on 9 February 2020.

[20] Ibid

Conceptualisation Of Privacy Rights And Historical Background

Privacy Rights: The concept of privacy poses much controversy amongst legal practitioners, journalists and academics. This is partly because it is a concept that is difficult to define, and it is better described.[21] The 1972 Younger Committee, an inquiry into privacy similarly hold the view that the term privacy cannot be satisfactorily defined.[22] Legislations have not helped either. In Nigeria for instance, the 1999 Constitution (as amended) delineates specific right as fundamental, one of which is the right to privacy provided for in s.37. Legislations have not helped either. In Nigeria, for instance, the 1999 Constitution (as amended) delineates specific right as fundamental, one of which is the right to privacy provided for in s.37. However, this section did not define the term privacy but rather stated that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications are hereby guaranteed and protected. However, despite the difficulty in defining the term privacy, credible attempts to give insight into the concepts have been made.

Thomas M. Cooley[23] defined privacy as the right to be left alone. Privacy is also defined as the right of the person to be alone and free of unwarranted publicity.[24] The Calcutt committee[25] defined privacy as the right of the individual to be protected against intrusion into personal life or affairs or those of his family, by direct physical means or publications of information. Winfield[26] defined privacy as an unauthorised interference with a person's seclusion of himself or his property from the public.

The above definitions suggest that the concept of the right to privacy lacks a unified and acceptable definition. Nwachi[27] Opines that the lack of an acceptable definition of privacy is not fatal to the development of the law of privacy since what is critical is to understand the main issues in the right, as may be found in the concept of privacy. The researchers agree with the view of the learned author on this. Nwachi further opines that the critical issues in the right to privacy are found in the classification of the jurist Prosser of the four torts, which had emerged from the American protection of privacy. These torts are:

(i) Publicity which places a plaintiff in a false light
(ii) Appropriation of plaintiff's name or likeness
(iii) Intrusion upon plaintiff's seclusion or solitude
(iv) Public disclosure of private facts about a plaintiff.

These torts have remained a sign posit for the protection of rights to privacy.[28]

Historical Background Of The Right To Privacy

Privacy has a long development throughout history. Its origin is in the ancient societies, although it only enjoyed general acceptability as a right in the 19th to 20th century.[29] There are notable religious books that graphically capture people's responses to intrusion into their privacy. The Bible, for instance,

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[21] Nwachi E.S 'Right to privacy in Nigeria.' *CACS Review of Nigeria law and practice* (1) (1) 2017 <https://www.nigerialawguru.com> accessed on 20 January 2020.
[22] Privacy in English law <https://en.munkpeche org.> accessed on 21 January 2020.
[23] Thomas Cooley, Rights to Privacy <https//wwwbritannica.com> accessed on 21 January 2020.
[24]Current position on privacy law in UK <https://www.lawteacher.Net> accessed on 21 February 2020.
[25]Calcutt Report (Hansard, 21 June1990) UK Parliament <http://api.parliamentuk.jun.calc> accessed on 21 February 2020.
[26] Ibid
[27]Nwachi (n 21)
[28] ibid
[29] Adrienne .L. *What is Privacy? The history and definition of Privacy.* (biblu.) <https://www.szege.hu.> Accessed 9 March 2020.

records that Adam and Eve "sewed for themselves aprons" with leaves when they discovered they were naked and hid from the presence of God when they heard his voice.[30] In fact, Adrienne avers that the code of Hammurabi contained a paragraph against intrusion.

The modern concept of the right to privacy is connected to the publication of two legal scholars Louis Brandeis and Samuel Warren published in the Harvard Law Review in 1890 titled "The Right to Privacy."[31] This right enjoyed articulated towards the end of the 19th century at a time when America was rapidly becoming an Urban Nation. Pember posits that the streets of big cities were clogged with poor immigrants or first-generation Americans and the big city daily newspapers used a variety of sensational schemes to attract potential readers. Editors often focused their gossips on the lives of the rich and famous, in the society. This kind of journalism pushed the two Boston lawyers to write their article in 1890.[32] Adrienne[33] states that the article of Warren and Brandeis on 'The right of Privacy' became a famous article among legal scholars; the "unquestioned classic."

The article was based on the study of the two writers' theory. They argued that as political, social and economic changes occur in the society, the law has to evolve and create new rights to meet the demands of the society.

The Boston lawyers recognised two phenomena that posed a threat to the right of privacy - technological development (namely instantaneous photographs) and gossip, which becomes a trade in the newspapers. The pair argued that the sacred precincts of private and domestic life and numerous mechanical devices threaten to make right there predictions that what is whispered in the closet shall be proclaimed on the housetops.[34] Warren and Brandeis were not happy with gossips in the press and argued that they overstep in every direction, the apparent bounds of propriety and decency.

Against this argument, the two young lawyers proposed that the courts should recognise the legal right to privacy. According to Warren and Brandeis; the principle of the right to privacy was the "inviolate personality."[35] The right to privacy influenced the law, especially in the US where the article is regarded as the origin of the four-privacy tort which emerged from the US case law. Thirteen years after this article was written, the State of New York recognised the right to privacy. It adopted a law prohibiting commercial exploitation.[36]

Traditional Conception Of Privacy And Modern Conception Of Privacy

Two technological and social developments significantly influenced the development of the right to privacy. The technological development of instantaneous photograph and the growth of (tabloid) Newspaper in which celebrity gossips were published became a norm. This prevailing practice of sensational Newspaper Journalism which led to the violation of personal private space in the early 19th century informed two great Boston scholars, Brandeis and Warren to raise the alarm about the development of yellow Journalism[37] which is a form of reporting that centres on scandals and petty crimes, especially of public figures.[38] On this premise, Brandeis and Warren in their famous article,

[30] Thomas Nelson, *THE HOLY BIBLE* (King James Edition, Thomas Nelson Inc., 1982) Genesis chapter 3:7-8
[31] Don. R. Pember, *Mass media law* (Mac Graw Hill 2004)
[32] Ibid
[33] Adrienne (n 29)
[34] Ibid
[35] ibid
[36] ibid
[37] Abdulrauf and Daibu (n2)
[38] ibid

Right to privacy defined privacy as a right to be left alone.[39] A right to be protected from intrusion with one's private life. The traditional understanding of the concept of privacy in this era focused on the inviolability of an individual's home, physical space and property. Traditionally, privacy problems were understood as invasions into one's hidden world. Privacy is also about concealment, and it is invaded by public disclosure of confidential information.[40]

The advancement of technology posed many problems on the right to privacy; this will mean that the concept of the right to privacy must change to keep up with technological advancements. Solove argued that the traditional ways of understanding privacy must be rethought to comprehend the challenges with digital dossiers fully.[41] Solove did not, however, suggest that traditional understandings are incorrect.[42]

Historically, technological advancement always creates concerns on the right to privacy. Thus, the world witnessed another era of privacy law development with the information revolution in the 20th century.[43] The emergence of computers, the proliferation of databases, and the birth of the internet created a new set of privacy concerns, prominent amongst which is the proliferation of personal information.[44] The expansion and advancement of information technology have made the collection and use of personal information so easy that individuals have lost control over their information. This problem is the primary concern of privacy law, which led to the modern conception of privacy defined by scholars like Alan Westin 'as the right of individuals, groups, or institution to determine for themselves when, how and to what extent information about them is communicated to others.'[45] Abdulrauf further posits that this conception of privacy evolved the idea of informational self-determination that underpins information privacy in Europe. For instance, Article 8(1) of the European Convention on Human Rights provides for a right to respect for one's private and family life, as was held in the cases of *Lopez Ribalda v Spain*[46] and *Barbulescu v Romania*.[47] The European Court of Human Rights decided these cases in recognition of the modern concept of privacy. In *Barbulescu's* case, the court held that the communication of an employee in the workplace by using his employer's computer for private instant messaging meant for official use is private and, therefore, enforceable under Article 8. The court maintained that if such communication must be monitored, the employer must be informed, failing which a breach of the Article will be found. However, in *Lopez Ribalda's* case, the court appears to insist that as it relates to the right to privacy in a workplace, Article 8 cannot be used to conceal or perpetuate the commission of crimes. In that case, both visible and hidden surveillance cameras were installed in a supermarket upon suspicion of repeated theft by its employees. A few weeks later, some employees were caught on camera stealing from the supermarket regarding which they were dismissed. The court held that the hidden cameras which caught the theft without the notice of the employees were not in breach of Article 8.

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[39] ibid

[40] Solove, Daniel J. *The Digital person Technology and Privacy in the Information Age*. (New York University Press 2004.) <https://www.law.gwu.edu>> accessed on 10 February 2020.

[41] ibid

[42] ibid

[43] ibid

[44] Abdulrauf and Daibu (n2)

[45] ibid

[46] (Application No.'s 1874/13 and 8567/13) <https://hudoc.echr.coc.int> accessed on 20 September 2020.

[47] (Application No 61496/08) <https://hudoc.echr.coe.int> accessed on 20 September 2020.

Thus, the modern conception of privacy is the power of control of individuals over the processing, collection, storage, and disclosure of their information. Information privacy is concerned with the interest of individuals in exercising control over access to information about themselves. The new concept of information privacy relates to how information about an individual is utilised, rather than the secrecy of information. Currently, the world is living in the information age, which can be described as an era where economic activities are mainly information-based. That is the age of 'informationalisation,' due to the development and use of technology.

The use of technology has made privacy control over the use of personal information of an individual, a significant area of interest that now dominates privacy discourse.[48] New technologies have radically changed the concept of privacy, and its use will continue to grow as inventions are made and improved upon daily. Thus, there must be a paradigm shift from the concept of privacy, which covered intrusion on private property and secrecy, to the concept of the individual's right to control the use of this personal information and its use.

An Appraisal Of The Legal Framework For Personal Data Privacy In Nigeria

Data in this digital age has become very important. Data is referred to as the new oil.[49] With so much value placed on data, its protection has consequently taken centre stage in discourse. Nations are therefore, making conscious efforts to ensure that the data and privacy of their citizens are protected. In line with the need to protect data and privacy, the European Union on the 25TH May 2018, released the General Data Protection Regulation (GDPR) to address data protection and violations arising from it.[50] Aderibigbe[51] opines that organisations in the European Union are consumed with activities to ensure compliance with the GDPR before the D-Day. She further adds that compliance with the GDPR comes at a cost, and noncompliance will cost even more. Ketiku and Ibidolapo[52] posit that the GDPR has revolutionised the way data protection and privacy are viewed. The regulation mirrors the GDPR because it makes businesses or organisations liable if they or their third-party contractors handle citizens' or residents' data without complying with the privacy laws. In Nigeria, no data protection regime arguably matches up to international standards. It is observed that despite the fast growth of technology and digitisation in Nigeria, there has been no comprehensive legislation that set out to protect the data of Nigeria citizens.[53]

It should, however, be noted that Nigeria has other data protection laws aside from the provision of section 37 of the Federal Republic of Nigeria (1999) as amended.

A brief overview of these laws and regulations on data protection in Nigeria are examined hereunder:

Nigerian Legislations On Privacy

The Constitution of the Federal Republic of Nigeria 1999 (as amended): Nigeria's data privacy regime takes its earliest protection from the 1999 constitution of the Federal Republic of Nigeria as

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[48] Britz I.J, *Technology as a Threat to Privacy: Ethical Challenges to Information Profession*. <https://www.web.simmons.ed>nit> 96-025-Britz> accessed on 10 March 2020.

[49]Yimika Keiku & Ibidolapo Bolu. *Nigeria: Data Protection Regulation 2019-The new law* <www.spajibade.com> accessed on 2 March 2020.

[50] ibid

[51]Aderibigbe N, *Nigeria has a Data Regime.* <https://www.jacksonetti.edu.com> accessed on 20 March 2020.

[52]Ketiku& Ibidolapo (n50)

[53]Aderibigbe (n52)

amended. Section 37 of the Constitution provides that the privacy of citizens, their homes, correspondence, telephone conversation, and telegraphic communications are hereby guaranteed and protected. Although this provision omits the definition of the term privacy and its scope appears to be limited, it can be argued that this provision incorporates both the traditional and modern concept of privacy. This is because section 37 is similar to Article 8 of the European Convention on Human Rights on which *Lopez* and *Babulescu's* cases[54] were decided. These cases relate to the modern concept of privacy. The right in Article 8 is, however, subject to certain restrictions imposed by the law and such restrictions as are necessary in a democratic society.

The National Information technology Agency Act 2007: The National Information Technology Agency (NITDA) was established pursuant to the National Information Technology Agency Act 2007. Under the Act, NITDA was established as the Primary Regulatory Agency responsible for the administration of electronic governance and monitoring of electronic data and other forms of electronic communication.[55] The NITDA Act empowers the Agency to develop guidelines for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in Government, commerce, and education. This monitoring also includes the private and public sectors, labour, and other fields, where the use of electronic communication may increase the exchange of data and information. Pursuant to the powers of the Act, the call by stakeholders for the development of an efficient data protection regime in Nigeria and in line with international global standards, NITDA issued the Nigeria Data Protection Regulation 2019 (the regulation) on 25th January 2019. This is aimed at protecting the personal data of Nigerians and non-Nigerians, resident in Nigeria.[56] The regulation is about the most comprehensive for personal data protection in Nigeria. It prescribes the minimum legal protection requirement.[57] The regulation is aimed at protecting the personal data of all Nigerians and non-Nigerians, resident in Nigeria.[58] Udoma and Bello-Osagie[59] opine that the regulation prescribes the minimum data protection requirements for collecting, storage processing, management, operation, and technological controls for information. It is the only regulation that contains specific and detailed provisions on the protection, storage, transfer, or treatment of personal data. The regulation has been judged a game-changer in data protection in Nigeria, as it is contemporary and a replica in some respects of the European Union (EU) General Data Protection Regulation (GDPR).[60]

The guideline defines personal data as any information relating to an identifiable natural person (data subject), information relating to an individual, whether it relates to their private, professional or public life. It can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information or a computer's IP address.[61]

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[54] See the discussion on the cases in (n47 and n48)

[55] S. 6 of the National of Information Technology Development Act 2007 (the Act)

[56] S.6 of the National of Information Technology Development Act, 2007

[57] Nigeria Data Protection Regulation (2019) –Templars law firm <https://www.templars .law.com> accessed on 2 March 2020.

[58] S.1.2 (a) of the Nigeria Data Protection Regulation, 2019 (NDPR).

[59] Udoma and Bello –Osagie, *Data Privacy Protection in Nigeria*<https://www.uudo.org>. accessed 2 March 2020.

[60] AELEX, *An overview of Big Data and Data Protection in Nigeria* (April 2019) <https://www.aelex .com> accessed on 3 March 2020.

[61] S.1 .3(q) of the Nigeria Data Protection Regulation, 2019 (NDPR)

The regulation also defines Data controller as a person who either alone, jointly with other persons or in common with other persons or as a statutory body determines the purposes for and how personal data is processed or is to be processed.[62]

The NITDA guidelines stipulate that personal data may be processed if at least, the following principles are met:[63]

1. That the 'data subject' consents[64]or if the processing is necessary.
2. To the performance of a control. [65]
3. To meet a legal obligation.[66]
4. To protect the vital interests of the data subject.[67]
5. For the performance of a task caused out in public interest.[68]

The guidelines also stipulate that in determining the adequacy of the level of protection afforded another country in relation to the transfer of data, consideration must be given to the operation of the rules of law, both general and senatorial, in force in the receiving country in question and professional rules and security measures which are compiled within that country which should not be lower than the content of the guidelines. The provisions of NITDA guidelines are not mandatory for private companies.[69] They only serve as a point of reference for data collection and the minimum data protection requirements for the collection, storage, processing management operation, and technical controls of personal data.[70]

Freedom of Information Act 2011 (FOI Act): The freedom of information Act provides for personal privacy. Section 14 of the Act provides that a public institution must deny an application for information unless the individual involved consents to the disclosure or where such information is publicly available. Section 16 of the Act provides that a public institution may deny an application for disclosing any information subject to various forms of professional privileges as protected by law.

The Child's Right Act: Section 8 of the Child's Right Act guarantees a child's right to privacy, subject to the parent or guardian's rights to exercise supervision and control over their child's conduct.

National Identity Management Commission (NIMC) Act 2007: Section 26 of the NIMC Act provides that no person or corporate body shall have access to data or information contained in Databases concerning a regulated individual without authorisation of the commission. The commission can only provide information about a person to a third party without consent in the interest of National Security.

National Health Act of 2014: The Act requires healthcare establishments to maintain the health records of every health user and confidentiality of such records. The Act requires health establishments to set up control measures for preventing unauthorised access to information.

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[62] S.I 3(g) of the Nigeria Data Protection Regulation, 2019 (NDPR)
[63]Hunton Andrew Keith, Nigeria issues New Data Regulation huntonprivacylog.com accessed on 10 March 2020.
[64] 5.2 (a) (NDPR)
[65] 52. 2(b) (NDPR)
[66] 52 (c) (NDPR)
[67] 52. (d) (NDPR)
[68] S .22 (e) (NDPR)
[69]Udoma and Bello-Osagie (n 61)
[70] Ibid

Consumer Protection Framework 2016: The Consumer Protection Framework 2016 was enacted under the Central Bank Act 2007. The framework contains provisions that prohibit financial institutions from disclosing customer's personal information. The framework also requires a financial institution to put in place measures to prevent unauthorised access and accidental disclosure of information to a third party.

Nigerian Regulations On Privacy

Consumer Code of Practice Regulation 2007: The Nigeria Communication Commission issued this regulation in 2007. It is a regulation made for the Telecommunication Industry in Nigeria. Nigeria Communication Commission (NCC) is the regulator of the telecommunication industry in Nigeria.[71] The regulation requires all licensees to take reasonable steps to protect customer information against improper or accidental disclosure and ensure that such information is securely stored and kept no longer than necessary. The NCC regulation also prohibits the transfer of customer's information to any other person except with the consent of the customer. The section provides among other things.

A licensee may collect and maintain information on individual consumers reasonably required for its business purposes. However, the collection and maintenance of information on an individual consumer shall be:

(a) Fairly and lawfully collected and processed.
(b) Processed for limited and identified purposes.
(c) Relevant and not excessive.
(d) Processed in accordance with the consumer's other rights.
(e) Protected against improper or accidental disclosure and not to transfer to any party except as permitted by any term and condition agreed with the consumer as by any permitted by any permission or approval of the commission or otherwise as required by any other applicable laws or regulation[72]

It should be noted that the provision of 35(1) of the regulations is not restricted to only Nigerian citizens. They also apply to all other nationalities using a licensed network in Nigeria.[73]

Consumer Code of Practices regulation 2007 (NCC Regulation): The NCC issued the Regulations, which require all licensees to take reasonable steps to protect customer information against improper or accidental disclosure, ensure that such information is securely stored and not kept longer than necessary. The regulation also prohibits the transfer of customer's information to any other party except with consent or permission of the customer.

Nigeria Communication Commission (Registration of Telephone Subscribers Regulation 2011): Section 9 and 10 of the 2011 Regulation by NCC provide confidentiality for telephone subscribers' records maintained in the NCC database. The regulation also gives subscribers the right to view and update personal information held in the NCC central database of a communication company.

[71] S. 3 of the Nigerian Communications Act 2003.
[72] S.35.1 General Consumer Code of Practice Regulation 2007
[73] S.3 General Consumer Code of Practice Regulation 2007

An Overview Of Nigeria's First Data Privacy Infringement Cases

The rate at which telecommunication subscribers are bombarded with unsolicited text messages from telecommunication service providers is annoying and frustrating. Telecommunication service providers in Nigeria blatantly disregard laws and regulations protecting subscribers from unsolicited text messages. Challenging the action of infringement by Telecommunication service providers appears not to be popular among Nigerians. It is the position of this paper that many Nigerians are not aware that the service providers are violating their rights to privacy. The lack of awareness of telecommunication consumers is the main reason why many Nigerians whose rights are being violated do not seek legal redress. However, even when citizens are aware of their rights, litigation is expensive and allows the infringement on their right to continue. It is interesting to note that the first persons to challenge infringement by service providers are legal practitioners. They sued their telecommunication service providers and secured judgments in their favour. The decision of the courts is that the unauthorised disclosure of their mobile number and subsequent unsolicited text messages they received from unknown third parties were a violation of their constitutional right to privacy. The suits are MTN Nigeria Communication Limited v Barr. Godfrey Nya Eneye[74]and Barr Ezugwu Emmanuel Anene v Airtel Nigeria Ltd[75].

In this part, the paper will analyse these cases as these cases could be regarded as Nigeria's data privacy infringement first responders because their suits are the first of their kind and have at least led to policy reform by NCC on consumer protection regarding unsolicited text messages and calls.[76]

We will now consider the facts of the case of Godfrey Nya Eneye v MTN Nigeria Communication Ltd.

Mr Eneye, a legal practitioner, instituted an action against MTN Communication limited. In the suit, he contended that MTN disclosed his mobile telephone number to unknown third parties without his consent, and these unknown parties usually send unsolicited text messages to him. He claims that this action violates his fundamental right to privacy as guaranteed under S.37 of the 1999 Constitution of the Federal Republic of Nigeria as amended. He also claimed his right to freedom of association under s.40 and right to liberty under s.35 of the 1999 constitution (as amended) had been infringed by the service provider, i.e., MTN. He sought an injunction compelling MTN to cease granting further unauthorised access of his mobile phone number to unknown third parties. Mr Eneye claimed that he suffered harm due to the disturbances from the text messages sent to him by third parties at any time of the day, especially during his work and late at night. He further claimed that he also suffered financial losses as his airtime suffered deduction from unsubscribing.

MTN on its part denied any infraction on the constitutional right of Mr Eneye. In its defence, MTN argued that they did not directly interfere on Mr Eneye's privacy as it was not the sender of those unsolicited text messages and as such were not liable. That, Mr Eneye's phone number is not confidential since he must have exchanged it with friends, relatives, associates and clients who in turn must have disclosed the numbers to third parties who would send the annoying unsolicited text messages. MTN also argued that Mr Eneye did not prove that it was MTN that divulged his number to these third parties who sent those messages. It was also the position of MTN that a breach of privacy did not occur since a breach of privacy involves the invasion of a home without permission, secretly watching a person in

[74]Appeal No CA/A/689/2013 (unreported).

[75] FCT/HC/CV/545/2015(unreported)

[76]Iheanyi Nwankwo, *Nigeria's Data Privacy First Responders*<https://www.iheanyisam.wordpress.com> accessed on 3 March 2020.

private quarters eavesdropping on the conversation of others, taking an unauthorised blood test and improperly interrogating a detainee, none of which Mr Eneye alleged that MTN called out directly. MTN, also posited that e-marketing is a common practice in the telecommunication. The trial court dismissed the arguments of MTN Nigeria Ltd on the grounds that its arguments were more evasive and did not amount to a defence against the claim of privacy violation. The court also held that MTN argument that e-marketing was a common practice in the telecommunication sector is not a licence for a breach of a person's fundamental right to privacy. The trial court found in favour of Mr Eneye, gave an order of injunction restraining MTN from further unauthorised access to Mr Eneye's phone number to unknown third parties as well as five million (₦5,000,000.00) award against MTN as exemplary/aggravated damages. The court, however, dismissed Mr Eneye's case of violation of his freedom of association and right for liberty. MTN was dissatisfied with this decision and appealed to the Court of Appeal. The court of Appeal dismissed the appeal and held that the disclosure of Mr Eneye's phone number without his consent and the resultant effect of unsolicited text messages were a violation of his constituted right to privacy. MTN's appealed to the Supreme Court still awaits judgment.

The second case on data privacy is the case of Ezugwu Emmanuel Anene v Airtel Nigeria Ltd.[77]In this case, Mr Ezugwu Emmanuel Anene sued his service provider, Airtel at the FCT High Court in 2015. The plaintiff instituted the action under the undefended claims, alleging that the countless unsolicited calls and text messages by Airtel and third parties who gained access to his number because Airtel disclosed it to them, breached his constitutional right to privacy among other claims. Airtel did not enter a defence, the court relied on the evidence of the plaintiff and delivered judgment for him awarding five million Naira (₦5, 000,000.00) damages to him for violation of his privacy right.

A perusal of these judgments reveals that Nigeria courts have given judicial backing to breach of privacy by telecommunication services providers who disclose telephone Number of subscribers to third parties without their consent.

The disclosure of a person's telephone number violates a person's privacy. Nwankwo[78] posits that in any jurisdictions where data privacy law exists, it is straightforward to determine if a person's data privacy has been breach because the extant law defines personal data, what amount to processing personal data and what conditions must be fulfilled to process a personal data lawfully. In the case of Nigeria, the NITDA regulation is useful. It defines data to include a name, a photo, an email address, bank details, medical information, computer interment protocol (IPO) address, and any other information, whether physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person.[79]

The regulation further defines personal data as the information relating to an identified or identifiable natural person[80]. These provisions of NITDA guidelines are similar to article 4 of the General Data Protection Regulation 2019.

Article 4 provides that a personal data is any information relating to an identified or identifiable natural person (data). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identification number, location data, an online identifier or to one or more factors specific to physical physiological, genetic mental economic, cultural or social identity of that natural person.

[77]Ezugwu Emmanuel (n 80)
[78] Ibid
[79] S.1.3(d) of NITDA Protection Regulation, 2019
[80] 1.3 (q) NITDA Protection Regulation, 2019

It is submitted that these definitions cover a mobile phone number. However, it must be explained that the court heard the first cases discussed on data privacy in Nigeria when the NITDA guidelines were not in force. With the NITDA guidelines, it simplifies the task of any subscriber whose data privacy has been violated by a service provider to seek legal remedy without much ado.

It is also important to mention that the NCC's General consumer code of practice Rules (GCCPR), especially Part VI, which gives protection to consumer information, was heavily relied on by Mr Eneye to buttress his case that MTN disregarded the proper procedure disclosing his phone number to a third party.[81] It was Mr Eneye's case that MTN Limited failed to follow the proper safeguards before disclosing his number to third parties. It is worthy of note that the Court of Appeal did not make reference to the MTN's consumer code of practice but rather placed heavy reliance on NCC's License framework for value-added service.[82]The framework provided guidelines that the value-added service licensee should adhere to, including the obligation to ensure that[83] subscribers have a right to privacy. Therefore, on no circumstances should any service provider send an unsolicited message to a subscriber. Approval must be obtained before sending commercial SMS messages and other Value Added Services. Subscriber approval pertains only to the specific programme to which the consumer subscribed"

Conclusion And Recommendation

The two cases examined above illuminates the position of Nigeria courts in the interpretation of the law with respect to a breach of privacy by Global System for mobile Telephone Service Providers through the sending of unsolicited text messages to subscribers by unknown persons.

The court's position in these two cases, that is, the case of Eneye and Anene is that unsolicited text messages delivered to a GSM subscriber are an infringement on the subscriber's right to privacy.

The Nigerian Communication Commission in the aftermath of these judgments published Rules on unsolicited calls and text (SMS). The decisions in these cases are quite significant to the development of the law of privacy in Nigeria. The position of the court confirms that the law on privacy in Nigeria has grown to include the protection of the modern concept of privacy, which is information privacy. The informational aspect of privacy has been receiving global attention with the development of technology and the Global System for mobile telephone is one of such new technologies.

This work attempted to give a brief overview of the legal framework for the protection of information privacy or data privacy, which also covers data information of GSM such as telephone number of subscribers. This overview reveals that Nigeria has laws that protect data privacy, but these laws are not comprehensive. The average Nigerian is hardly aware of his/her right to privacy and even more ignorant when it comes to personal data information. The lack of awareness of the fundamental right to privacy is probably the reason why the right to privacy has not received much legal attention. It is therefore sometimes tempting to say that Nigerians do not require the right to privacy.[84] Despite the laws and court decisions protecting GSM subscribers from unsolicited text messages, GSM services providers are still in the habit of sending unsolicited messages, and many Nigerian subscribers just overlook these annoying texts. They do not even contemplate seeking legal protection.
Consequently, this work makes the following Recommendations:

[81] S. 34-s.38 of General consumer code of Practice Regulation, 2007
[82] Ibid
[83] ibid
[84]Nwachi (n 21)

i That the National Assembly should as a matter of urgency enact a comprehensive and explicit data protection law that contains data principles consistent with International standards like the EU General Data Protection Regulation (GDPR) and African Union Convention on Cyber Security.

ii. The civil society organisation and the Nigerian Communications Commission should embark on awareness and sanitisation of human rights campaign to get Nigerians to be more aware of their rights to privacy.

iii. The civil society organisation can also assist the subscribers whose rights have been infringed upon to bring action collectively. This will help overcome the financial challenge.

vi. Subscribers should be encouraged to commence legal action against their service providers collectively, to overcome the issue of finance.