

## NEW TECHNOLOGIES AND THE RIGHT TO PRIVACY IN NIGERIA: EVALUATING THE TENSION BETWEEN TRADITIONAL AND MODERN CONCEPTIONS\*

### Abstract

Recently, there is the increasing deployment of new technologies by the government and businesses for various purposes like enhancement of service delivery and security purposes. These technologies - new technologies - have immense benefits, especially in this globalized world and digital age. Nonetheless, they also have a side effect, in particular, to fundamental rights and freedom. The worst hit right among the catalogue of fundamental rights is the right to privacy. This is because of the nature of the relationship and/or friction between privacy and advances in technology. New technologies which impact on the right to privacy are laconically termed privacy destroying technologies and these technologies can gather large amount of individuals' personal information and make them available for other purpose not contemplated by such an individual. In Nigeria today, these technologies have silently crept into the system and have indeed enhanced the tasks of government and business. However, no serious thought has been given to how these technologies affect fundamental rights and freedoms. This article is a modest attempt to account for some of these technologies and how they impact on the right to privacy in Nigeria. It examines the legal framework for the protection of privacy against the damaging effects of new technologies. The paper concludes that in spite of the wide use of new technologies, the jurisprudence protecting privacy is still largely underdeveloped in Nigeria. This is largely due to the tension between privacy in the old and new paradigms.

**Key words:** *privacy, new technologies, privacy destroying technologies, Nigerian legal system*

### 1. Introduction

In Nigeria today, the right to privacy is seriously threatened by new technologies which are referred to as "privacy destroying technologies."<sup>1</sup> These technologies have the ability to gather information and process this information with little or no effort and at outrageous speeds. While the benefits of these technologies cannot be denied, especially in terms of making life easy for individuals, the government and business entities, they have significant impact on human rights and fundamental freedoms. In this case, the right to privacy particularly suffers because of its complex relationship which new technologies.

The significance of the right to privacy cannot be overemphasized.<sup>2</sup> It is said to be one of the most important human rights issues of the modern age.<sup>3</sup> This is the reason why the right is contained in the constitution of almost all nations.<sup>4</sup> Consequently, where the right is not expressly provided for, courts

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<sup>1</sup>Term used by AM Froomkin, 'The death of privacy' 52 2000 *Stanford Law Review* 1461.

<sup>2</sup>Weatherly Roberts 'The right to privacy, the right of national security and the challenges posed by new technology in the UK and China' available at <http://www.lexology.com/library/detail.aspx?g=8f33dbaf-9272-4818-82db-d86284ea5313> (accessed 1 February 2016).

<sup>3</sup>Mendel T *et al.* *Global Survey on Internet Privacy and Freedom of Expression* France, UNESCO Publishing, 2012 7. Also available at <http://unesdoc.unesco.org/images/0021/002182/218273e.pdf> (accessed 1 February 2016).

<sup>4</sup>For example, see section 37 of the Constitution of Federal Republic of Nigeria 1999 (as amended) which provides that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected. See D Banisar & S Davies 'Privacy and Human Rights: An International Survey of Privacy Laws and Practice' available at <http://gilc.org/privacy/survey/intro.html#invasion> (accessed 1 February 2016).

have found the right traceable to some provisions in the constitution of a nation.<sup>5</sup> In this light, Birnhack contends that privacy is a fundamental right and a hallmark of democracy.<sup>6</sup> Despite this importance of the right to privacy, Chadwick<sup>7</sup> opined that it “is the quietest of our freedoms... [It] is easily down out in public policy debates...; privacy is most appreciated by its absence, not its presence”.<sup>8</sup>

In Nigeria specifically and developing countries in general, quite a number of emerging technologies have significant impacts on privacy. These new technologies include the internet, social networking sites (SNSs), electronic-Identity Cards, mobile phones. Their privacy implications have, however, not been given serious academic consideration. A major problem in this regard is the failure to properly conceptualize and appreciate the current privacy problem which basically highlights the conflict between the traditional and modern conceptions of privacy. While the traditional understanding of privacy essentially entails protection of individuals’ private life from arbitrary interference or intrusions, the modern conception has far gone beyond merely protection from intrusion. The modern conception of privacy which is conceptualized according to the problem of recent times has more to do with protection of information privacy. It is this conception of privacy that this contribution focuses on.

The article is organized in five major parts. After introducing the issues in contention, the second part examines the traditional and the modern conceptions of privacy. In this part, we argue that although the concept of privacy originally means the protection of the “private” “secret” or “confidential” spheres of an individual’s life, this conception seems to have changed with the proliferation of new technologies which focuses on personal information gathering. The third part gives a brief overview of various new technologies which impact on the right to privacy in Nigeria and which the law has not effectively responded to. Here, an overview is carried out of various activities of information processing which is aided by privacy destroying technologies. Part four assesses the legal framework for the protection of privacy in the light of emerging privacy destroying technologies. Finally, part five concludes the paper and reflects on some practical ways in which the right to privacy can be effectively protected in the digital age Nigeria.

## **2. The Changing Dimension of Privacy: Traditional vs Modern Conception of Privacy**

Privacy is a term without a precise definition.<sup>9</sup> However, its lack of a single definition does not, *ipso facto*, mean it lacks importance<sup>10</sup> as a commentator rightly observes that “in one sense, all human rights are aspects of the right to privacy”.<sup>11</sup> Rationalizing the advantage of a lack of a specific definition for privacy, Bygrave contends that the absence of a precise definition of privacy in privacy instruments allows for the much needed flexibility in application for the proper function of the right.<sup>12</sup> The traditional understanding of privacy has always focused on inviolability of an individual’s home, physical space and property. Thus, privacy was all about protecting individuals from intrusion into his/her private or family life. According to Solove, “traditionally, privacy problems have been understood as invasions

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<sup>5</sup>*Ibid.*, In India for example, this right to privacy is not provided for in the constitution but the courts have tied the right to privacy to the right to “protection of life and personal liberty”. See *Kharrak Singh v. State of Uttar Pradesh* (AIR 1963 SC 129).

<sup>6</sup>MD, Birnhack, ‘The EU Data Protection Directive: An engine of a global regime’ 24, 2008 *Computer Law & Security Review* 508.

<sup>7</sup>Information commissioner of Australian state of Victoria

<sup>8</sup>Banisar & Davies *op cit*.

<sup>9</sup>Even the Nigeria constitution does not define what *privacy* which makes authors opine that it is a term which is better described than defined. ES Nwauche ‘The Right to Privacy in Nigeria’ 1, 1 2007 *CALS Review of Nigerian Law and Practice* 64; See also V Thanarajah, “Regulators’ Challenge in Getting Data Protection Bill Passed in Malaysia: A Legal Analysis” in Saad AR (ed) *Personal Data and Privacy Protection* LexisNexis, Malaysia 2005 83; Mendel *op cit* 7.

<sup>10</sup>Banisar & Davies *op cit*.

<sup>11</sup>V Fernando, ‘Legal personality, privacy and the family’ in Henkin (ed) *The International Bill of Rights* New York: Columbia University Press, 1981. Cited in Banisar & Davies “Privacy and Human Rights: An International Survey of Privacy Laws and Practice” available at <http://gilc.org/privacy/survey/intro.html#invasion> accessed on 13th July 2013.

<sup>12</sup>LA Bygrave, ‘The place of privacy in data protection law’ 24 2001 *UNSW Law Journal* 278.

into one's hidden world. Privacy is about concealment, and it is invaded by watching and by public disclosure of confidential information."<sup>13</sup> With time, technological advances began to place a profound challenge on the right to privacy. Hence, the conception of privacy transformed so as to keep pace the teeming challenges of technological developments. Indeed, Solove contends that "the story of privacy law is a tale of changing technology and the law's struggle to respond in effective ways."<sup>14</sup> Therefore, as new technologies evolved which significantly impacted on private and family life as widely construed, the right to privacy had to transform so as to be suitable to tackle these emerging challenges. In this regard, Finn argues that "privacy is a fluid and dynamic concept that has developed alongside technological and social changes."<sup>15</sup> Indeed, "understandings of privacy have long been shaped available technologies."<sup>16</sup>

In the early 19<sup>th</sup> century, the major privacy related concerns was sensational journalism and the development of new technologies in photography. Two great scholars, Warren and Brandeis feared that the development of photographic technology and newspaper journalism could lead to violation of an individual's private space.<sup>17</sup> The scholars raised an alarm about the development of yellow journalism – "a form of sensationalist reporting that focused on scandals and petty crimes"<sup>18</sup>- especially of public figures. Warren and Brandeis therefore defined privacy as the right to be left alone<sup>19</sup>, a right to be protected from intrusion into ones private life. The main privacy problem in the era is the uncovering of one's hidden world by surveillance or by disclosure of concealed information. Solove refers to this conception of privacy as the "secrecy paradigm" which is heralded by intrusion into ones private life leading to self-censorship, embarrassment and damage to one's reputation.<sup>20</sup> This era is also metaphorically depicted in George Orwell's satirical book *1984* in which state surveillance and censorship prevailed.

The information revolution of the 20<sup>th</sup> century ushered in another era in privacy development. This era was the era advances in communication technologies. Thus, "The advent of the computer, the proliferation of databases, and the birth of the internet have created a new breed of privacy problems."<sup>21</sup> Indeed, with communication technologies, the main privacy concerns were that of proliferation of personal information. Advances in information technology facilitated information collection and use in a way that leads to loss of control by individuals over their information. Thus, the major privacy issue was that of loss of control over personal information. Scholars therefore define privacy in this era in terms of information control. In this regard, Alan Westin, a leading scholar defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."<sup>22</sup> This conception of privacy is what brings about the idea of informational self-determination which underpins information privacy in Europe.<sup>23</sup> The modern conception of privacy is therefore the power of control by individuals over the processing (collection, storage, disclosure) of their personal information. Privacy is thus the rules which are specially crafted to enhance control by individuals over information that relates to them or identifies them.

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<sup>13</sup>DJ Solove, *The digital person: Technology and privacy in the information age*, New York, New York University Press 2004 42

<sup>14</sup>Solove *op cit* 56.

<sup>15</sup>RL Finn *et al* 'Seven types of privacy' in S Gutwirth *et al* (eds) *European data protection: Coming of age*, Heidelberg, Springer, 2009 28.

<sup>16</sup>Mendel *op cit*9.

<sup>17</sup>SD Warren & LD Brandeis, 'The Right to Privacy', 1890 *Harvard Law Review* 195.

<sup>18</sup>Solove *op cit*8.

<sup>19</sup>See SD Warren & LD Brandeis, 'The Right to Privacy' (1890) *Harvard Law Review* P. 195

<sup>20</sup>Solove *op cit* 8.

<sup>21</sup>*Ibid*, 74.

<sup>22</sup>A Westin, *Privacy and freedom* New York, Atheneum, 1967 7. Other scholars like Neethling also define privacy in a like manner. See Neethling J *et al*, *Law of personality*, Durban, Lexis Nexis, 2005 32-33.

<sup>23</sup>See German *Population census decision*, Judgment of 15 December 1983 *Bundesverfassungsgericht* decisions vol 65. See also G Hornung, & C Schnabel, 'Data protection in Germany I: The population census decision and the right to informational self-determination' 25, 1, *Computer Law & Security Review* 2009 84.

The idea of privacy as control over personal information now appears to dominate privacy discourse. This is more so with the invention of more and more privacy intrusive technologies that have the capacity to gather vast amounts of personal information with so much ease and speed. Besides, the internet has aided the processing of personal information in ways that was never envisaged years ago. Contemporary privacy scholars therefore contend that there is the urgent need for a paradigm shift in our approach to privacy protection. For example, Richards contends that ‘our understanding of privacy must evolve; we can no longer think about privacy as merely how much of our lives are completely secret or about privacy as hiding bad truth from society.’<sup>24</sup> He continues that “privacy must be understood as the rules we have as a society for managing the collection, use and disclosure of personal information.”<sup>25</sup>

While we acknowledge the importance and value of the other categories of privacy,<sup>26</sup> particular emphasis is placed on information privacy.<sup>27</sup> This is because information privacy has provoked more attention recently and is arguably the worst hit by new technologies. A number of explanations may be adduced as reasons for tension between new technologies and privacy. Firstly, there is the increasing realization by governments and business entities that “information is power and personal information is personal power”.<sup>28</sup> In other words, “information is power, and knowing information about someone gives power over them.”<sup>29</sup> Froomkin therefore observes that “both collecting and collating personal information are means of acquiring power, usually at the expense of the data subject.”<sup>30</sup> Secondly, there is also the realization of the economic benefits of personal information exploitation which serves as an incentive for the creation of various means to facilitate its collection and use.

### **3. Reflections on New Technologies (or New-Technology- Driven activities) that affect Privacy in Nigeria**

The brief overview of the development of privacy has shown how advances in technology have affected the right to privacy. Nigeria is also in a development phase that is largely driven by ICTs and globalization. Thus, there are a number of technological developments which have had significant impact on the right to privacy. In other words, quite a number of privacy destroying technologies have found their way into Nigeria because of the influence of globalization and spread on ICTs. We must stress the point here that these technologies (or technology facilitated activities) are not *per se* undesirable for the country. Indeed, these new technologies come with numerous benefits such as enhancing security of life and property by the state, facilitating exchange of information and knowledge, etc. However, the wide use of these technologies has sometimes inadvertent or unintended consequences which may impact on the protection of fundamental rights and freedoms. Indeed, a commentator observes that:

Many countries especially in the developing world are always quick to adopt and acquire technological means of solving problems developed in the

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<sup>24</sup>NM Richards, ‘Four privacy Myths’ in A Sarat (ed) *A world without privacy*, New York, Cambridge University Press, 2015 35.

<sup>25</sup>*Ibid*

<sup>26</sup>Such as bodily privacy, privacy of communications and territorial privacy. See Clarke R, ‘Introduction to Dataveillance and Information Privacy, and Definitions of Terms’ <http://www.rogerclarke.com/DV/Intro.html> (assessed 1 February 2016). See also Abdulrauf, LA, ‘Do we need to bother about protecting our personal data? Reflections on neglecting data protection in Nigeria’ 5(2), 2014 *Yonsei Law Journal* 71-73.

<sup>27</sup>Indeed, Richards contends that “The important point I want (sic) make here is this: however, we define privacy, it will have to do with information. And when we think of information rules as privacy rules...we can see that digital technologies and government and corporate practices are putting many notions of privacy under threat.” See Richards *op cit*49. There are various arguments on whether information privacy is the same as the European concept of data protection. In this article, we will not go into details on the merits or otherwise of these arguments. For more elaborate discussions on this issues however, See Abdulrauf *op cit*. See also DW Schartum, ‘Designing and formulating data protection laws’ 18(1) *International Journal of Law and Information Technology* 1-27.

<sup>28</sup>Richards *op cit*34.

<sup>29</sup>*Ibid* 65.

<sup>30</sup>Froomkin *op cit* 1462.

industrialized world or technologically advanced countries. Potential beneficial uses, rather than the domestic issues surrounding the use of such devices in the countries of invention are usually the focus of attention.<sup>31</sup>

This part of the paper gives a brief overview of some of these technologies or technological facilitated activities and some of their side effects. It is however important to stress that the discussion here is not exhaustive as we deliberately focus on selected technologies that affect the right to information privacy. In other words, we focus on technologies that facilitate the collection and use of individuals' personal information in such a manner as to lead to loss of control by individuals over their personal information. In this respect, we have selected the internet, social networking services, mobile phone services, national e-ID card systems, surveillance technologies, and electronic health records.

### 3.1. The Internet

The internet is a very important tool for globalization. It facilitates almost every aspect of modern life. The internet is a tool for economic development as most commercial activities are carried out online.<sup>32</sup> It is with the aid of the internet that economic activities such as online marketing, electronic banks and electronic commerce are carried out. The internet is particularly significant for developing countries like Nigeria as it has the capacity to unlock vast economic resources and connect them to the global grid of development. The recent call for the right of access to the internet to be recognized as a fundamental right is an indication of the value of the internet in recent times.<sup>33</sup> In spite of the importance of the internet, its use has come with a number of challenges. Some of these challenges include cybercrime, identity thefts, online pornography and cyber bullying. Of all the challenges of the internet, the most widely discussed is its impact on fundamental rights especially the right to privacy. According to Sarat, "the internet ... poses yet other and perhaps more fundamental threats to privacy."<sup>34</sup> Lessig summarizes the effect of the internet on privacy in apt words. He states that:

That relative anonymity of the "old days" is now effectively gone. Everywhere you go on the Internet, the fact that IP address xxx.xxx.xxx.xxx went there is recorded. Everywhere you go where you've allowed a cookie to be deposited, the fact that the machine carrying that cookie went there is recorded—as well as all the data associated with that cookie. They know you from your mouse droppings. And as businesses and advertisers work more closely together, the span of data that can be aggregated about you becomes endless.<sup>35</sup>

Recent statistics show that the internet is becoming an inevitable tool in Nigeria. Nigeria has achieved a feat of about 51% internet penetration as of late 2015 with about 90 million internet users.<sup>36</sup> Nigeria also recorded a user growth rate of about sixteen percent (16%) with an estimated 10 million new users that year, making it the 8<sup>th</sup> country with the most internet users in the world.<sup>37</sup> While this is a significant feat for a developing country, it raises concern to human rights activists, especially because developing countries rarely have sufficient legal frameworks to tackle emerging challenges of these new technologies.

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<sup>31</sup>AOA Yusuf, 'Legal issues and challenges in the use of security (CCTV) cameras in public places: Lessons from Canada' 23, 2011 *Sri Lanka Journal of International Law* 35.

<sup>32</sup>A Rengel, 'Privacy-invading technologies and recommendations for designing a better future for privacy rights' 8, 2013, *Intercultural human rights law review* 204.

<sup>33</sup>'U.N. report declares internet access a human right' <http://www.wired.com/2011/06/internet-a-human-right/> (accessed 1 February 2016).

<sup>34</sup>Richards *op cit* 16.

<sup>35</sup>L Lessig, *Code 2.0*, New York, Basic Books, (2006) 203.

<sup>36</sup>Internet Live Stat 'Internet Usage Statistics for Africa' <http://www.internetworldstats.com/stats1.htm#africa> (accessed 1 February 2016).

<sup>37</sup>Ranked after countries like China, United States (US), India, Japan, Brazil, Russia and Germany who are classified 1<sup>st</sup> -7<sup>th</sup> respectively.

The internet is based on an advertising model where personal information of individuals is harvested and traded to business entities for the purpose of direct marketing and targeted advertising. This is in turn based on the concept of “one-to-one marketing”.<sup>38</sup> As such, search engines, website and online advertising agencies have adopted various tools to track users and harvest their personal information. These tools include web bugs, cookies, and clickstreams. These devices fetch personal information of individuals and send them to the website owner. Users do not know that their information is being collected, who collects them and what it is to be used for. Thus, information which users supply to a website to facilitate access to certain services are aggregated and sold for other purposes. The threat to privacy brought about by the internet is further exacerbated by the increasing government surveillance and access to private sector data and citizen’s online activities. For example, there have been reports recently that the Nigerian government is setting up a surveillance machinery to monitor citizens’ activities online.<sup>39</sup> On the whole, the main issue with the internet is that it leaves individuals at a loss as to what is being done with their personal information which is an abuse on the right to information privacy.

### 3.2 Social Media

Social networking sites (SNSs) have a lot of social benefits, especially to youths that have over time used them as media to meet friends and keep up with old contacts. They also present an important platform for academic networking. With SNSs, people are now encouraged to disclose information which should ordinarily be private. Individuals are more willing to give out their personal information than ever before so as to enjoy the advantages of these social services. It is paradoxical that people really believe that what they post on social networks can only be seen by those for whom it is intended when in fact, anything posted can be seen by the whole world.

Nigeria is home to one of the largest state users of SNSs. It has more than 15 million active Facebook users making it the second largest in Africa.<sup>40</sup> Other SNSs like twitter also have a huge patronage from Nigerians so much so that it recently “opened its advertising channel to Nigerian buyers, allowing the use of local addresses and credit cards to purchase spaces on Twitter.”<sup>41</sup> Like other websites and search engines, SNSs are also driven by a lucrative online marketing model which largely depends on individuals’ personal information. With the huge percentage of users, it is a very important source of capital for SNSs. Facebook has been on the news more often for violation of privacy policies. Thus, there is significant pressure on it to improve its privacy practices.<sup>42</sup> It may be difficult to make an SNS like Facebook strictly comply with information privacy rules because of the huge profit they make in advertising. Unfortunately, the right to information privacy becomes an issue. To further complicate matters, users and policy makers do not appreciate the nature of the problem involved.

### 3.3 Mobile Phone Services

Mobile telephony services have radically transformed Nigeria in the last few years. Recent statistics show that as of August 2015 the total number of active mobile telephone line is more than 152 million, which is about 90% penetration as against less than 1% in 2000. Like the internet and SNSs, the proliferation of mobile phone services has implication on the right to privacy. This is because many reports have it that most internet and SNSs users in Nigeria connect to the platform through their mobile

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<sup>38</sup>For more on this concept, see C Chester, ‘Cookie wars: how new data profiling and targeting techniques threaten citizens and consumers in the “Big Data” era’ in S Gutwirth *et al* (eds) *European data protection: In good health?* Hielderberg, Springer 2012 56.

<sup>39</sup>O Emmanuel, ‘Exclusive: Jonathan awards \$40million contract to Israeli company to monitor computer, Internet communication by Nigerians’ *Premium Times* Thursday, February 11, 2016.

<sup>40</sup>Internet World Stats: Usage and population statistics’ <http://www.internetworldstats.com/africa.htm#ng> (accessed 1 February 2016).

<sup>41</sup>O Emmanuel, ‘Facebook’s daily users more in Nigeria than South Africa, Kenya, others’ *Premium Times* September 11, 2015 <http://www.premiumtimesng.com/business/189835-facebooks-daily-users-more-in-nigeria-than-south-africa-kenya-others.html> (accessed 1 February 2016).

<sup>42</sup>See Chester *op cit* 66.

phones.<sup>43</sup> With the rapid improvement of mobile telephone infrastructure, it becomes very easy for the government through the Nigeria Communications Commission (NCC) to collect and retain individuals' personal information. Indeed, this seems to be the situation with the recent compulsory requirement for SIM Card registration and its potential impact on individuals' right to privacy in the digital age and the information society.<sup>44</sup>

### 3.4 Electronic Identity Card System

Many African countries are in the process of developing comprehensive electronic identity card schemes (e-ID Card). Nigeria, through the National Identity Management Commission (NIMC), has also put in place such initiative.<sup>45</sup> This card serves a multiplicity of purposes. It could serve as an ATM Card and it can be used for voting. Beyond these purposes, the main objective of the e-ID card is to facilitate identification of citizens and foster security. Thus, the e-ID card uses a unique identification based on biometric information on individuals such as their fingerprints, and other personal information. The e-ID card scheme in Nigeria is carried out with collaboration with MasterCard, a financial institution with headquarters in the US. This collaboration certainly has implications for the sovereignty of Nigeria as vital information of its citizens will be transferred to the US. That notwithstanding, what generates so much concern is the effect of this scheme on the right to privacy.<sup>46</sup> This is more so with the massive surveillance activities of the US National Security Agency (NSA) where it has access to almost every database in the US. In this situation, there is substantial loss of control by Nigerians over their personal information.

### 3.5 Electronic Surveillance Technologies

Electronic surveillance technologies are becoming very common in Nigeria that almost every public place is being monitored. This is not a feature of the Nigerian society alone but worldwide feature associated with the digital age as it is aptly noted that "Unless social, legal, or technical forces intervene, it is conceivable that there will be no place on earth where an ordinary person will be able to avoid surveillance."<sup>47</sup> No doubt, surveillance technologies (CCTV) have immense value in this age of global terrorism and violent crimes. The use of CCTVs is the most common means by which public spaces are monitored in Nigeria. Nowadays, surveillance technologies such as CCTV have far reaching implications for the right to information privacy. This is because unlike before, CCTV cameras can not only monitor people's activities but can also retain with the aid of computers this information for a very long period of time. Moreover, advances in technology make surveillance technologies such as CCTV to be able to carry out complex functions like zooming, sorting and aggregation of information.<sup>48</sup>

### 3.6 Electronic Health Records (EHR)

While EHRs are uncommon in Nigeria, there are intensified calls for its adoption so as to simplify healthcare service delivery in the health sector.<sup>49</sup> EHR (or Electronic Medical Record (EMR)) "is a systematic collection of electronic health information about individual patients or populations."<sup>50</sup> EHR

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<sup>43</sup>Facebook rakes in users in Nigeria and Kenya, eyes rest of Africa' *Reuters* Thursday September 10, 2015 <http://www.reuters.com/article/us-facebook-africa-idUSKCN0RA17L20150910> (accessed 1 February 2016).

<sup>44</sup>See Nigerian Communications Commission (NCC) 'SIM registration' [http://www.ncc.gov.ng/index.php?option=com\\_content&view=article&id=122&Itemid=113](http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=122&Itemid=113) (accessed 1 February 2016).

<sup>45</sup>T Rapheal, 'The benefits of Nigeria's new electronic ID cards' <http://www.cnbcfrica.com/news/western-africa/2014/09/02/electronic-id-card-launched/> (accessed 1 February 2016).

<sup>46</sup>T Olagunju 'Mr President and the National Assembly: Data protection for Nigerians first' <http://saharareporters.com/2014/09/02/mr-president-and-national-assembly-data-protection-nigerians-first> (accessed 1 February 2016).

<sup>47</sup>Froomkin *op cit* 1475.

<sup>48</sup>See Yusuf *op cit* for more elaborate discussions on CCTVs.

<sup>49</sup>A Funmilola *et al*, 'Development of an electronic medical record (EMR) system for a typical Nigerian hospital' 2(6), 2015, *Journal of Multidisciplinary Engineering Science and Technology* 1253. See also MO Akanbi, *et al* 'Use of electronic health records in sub-saharan Africa: Progress and challenges' <http://www.jmest.org/wp-http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4167769/> (accessed 1 February 2016).

<sup>50</sup>Funmilola *op cit*

is being compiled in digital form and is capable of being shared with ease across many health care providers. No doubt, this is a laudable invention of the health sector; however, implementing such an initiative without adequate legal frameworks may jeopardize the right to privacy of individuals. This is because inadequate security measures on such records by health care givers may lead to unlawful access, thereby infringing the right to privacy of patients.

#### **4. Applicable Legal Frameworks for the Protection of Privacy in the Light of New Technologies in Nigeria**

The paramount question in this section is to what extent has the Nigerian jurisprudence responded to threats to the right to privacy brought about by new technologies? In other words, what legal frameworks enable individuals to assert their right to control the access and usage of their personal information? Protection of individuals' personal information can be found in constitutional law, common law, criminal laws, soft laws and regulations and international laws. Discussions in this part will focus broadly on these bodies of law.

##### **4.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)**

The Nigerian Constitution is *grundnorm* of the land from which other laws derive their validity. It proclaims that the Constitution is supreme and its provisions shall be binding on all persons and authorities within the Federal Republic of Nigeria.<sup>51</sup> Any law that is inconsistent with the constitution is void to the extent of its inconsistency.<sup>52</sup> Chapter IV of the Constitution contains the Bill of rights. One of the key fundamental rights in the Bill of Rights is the right to privacy. Thus, section 34 provides that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected." The Constitution does not, however, define privacy within the context of its provision. This therefore makes it *prima facie* unlikely to be applicable for the protection of personal information based on the modern conception of privacy earlier mentioned. Our view in this regard is held based on the literal interpretation of section 37 which largely promote privacy in the secrecy paradigm. In trying to contextualize privacy in the Constitution, Nwauche posits that there could be a general and specific understanding of privacy.<sup>53</sup> He further argues that the use of the word "the privacy of citizens" is the general right in the section and the use of the words "their homes, correspondence, telephone conversations and telegraphic communications" are specific enumerations of the general right.<sup>54</sup> Nwauche contends that privacy can be further deconstructed by borrowing from the torts of breach of confidence and privacy in torts law. From such construct, the constitutional provision protects information privacy as:

Informational privacy as a defining feature would then contextualise homes, correspondence, telephone conversations and telegraphic communications. On the other hand, the nature of the interests that these specific words connote is predominantly that of information. Even though 'homes' could be ambiguous, 'correspondence, telephone conversations and telegraphic communications' clearly refer to information.<sup>55</sup>

Allotey also seems to be in support of Nwauche's interpretation as he argues that reference by the Constitution to correspondence, telephone and telegraphic communications envisages an intention to protect information privacy.<sup>56</sup> Be it as it may, it is submitted that the constitutional provision is narrow and may not be a sufficient legal instrument for individuals to adopt for to enforce their right to control the access and the use of their personal information. The Kenyan Constitution of 2010 seems more apt

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<sup>51</sup>Section 1(1).

<sup>52</sup>Section 1(3).

<sup>53</sup>ES Nwauche, 'The right to privacy in Nigeria' 1(1), 2007, *Review of Nigerian Law and Practice* 84.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*

<sup>56</sup>AKE Allotey, *Data protection and transborder data flows: Implication for Nigeria's integration into the global network economy* unpublished LLS thesis, University of South-Africa, South Africa 2014 175. Also available at <http://uir.unisa.ac.za/handle/10500/13903>

in this regard as information privacy is specifically provided as part of the sub-category of the right to privacy.<sup>57</sup>

#### 4.2 Common Law/ Law of Tort

Although Nigeria attained independence in 1960, the English common law is still applicable in the country.<sup>58</sup> The English common law is applicable in Nigeria “so far... as the limits of local jurisdiction and local circumstances shall permit.”<sup>59</sup> Unlike the common law of England, the common law applicable in Nigeria does not recognize an independent tort of privacy.<sup>60</sup> What is applicable in Nigeria is an equitable action of breach of confidence. An action for breach of confidence appears also to be limited in protecting privacy based on the new conception as breach of confidence involves a violation of trust within a particular relationship. As shown in the previous section, there is rarely any relationship of trust between individuals and entities that collect and use their personal information thereby violating their right to privacy. Laosebikan, however, argued that some principles of information privacy may be gleaned from various tort actions, such as trespass, defamation, nuisance, passing-off etc.<sup>61</sup> Hence, it is obvious that the common law may hardly be able to give individuals sufficient control over the processing of their personal information as actions under the common law largely prohibits the unlawful interference in a person’s private sphere. The contemporary privacy however goes beyond mere intrusion into the privacy spaces of an individual.

#### 4.3 Certain Criminal Laws

Unlike other countries like Canada, Nigeria does not have a general provision prohibiting interference with privacy under her criminal laws.<sup>62</sup> Nevertheless, provisions which prohibit violation of information privacy may be found in certain criminal legislation in Nigeria. For example, the Cybercrimes Act of 2015 provides in section 38 that:

Anyone exercising any function under this section shall have due regard to the individual’s right to privacy under the Constitution of the Federal Republic of Nigeria, 1999 and shall take appropriate measures to safeguard the confidentiality of the data retained, processed or retrieved for the purpose of law enforcement.<sup>63</sup>

It is submitted that the provision above, although not explicit, places an obligation on a person in possession of an individual’s personal information to ensure that appropriate security measures are put in place for its protection. Thus, we are of the view that criminal laws are merely penal legislation that

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<sup>57</sup>See section 31(c) of the Constitution of Kenya 2010.

<sup>58</sup>The Common law is defined as the basic law of England which was developed by judges of the old common law courts out of the general customs and practices among the English communities in the early centuries. It is one of the received English laws applicable in Nigeria, others being doctrines of equity and Statute of General Application. The three English laws were received by the Interpretation Act Cap 89 Laws of the Federation and Lagos. See generally N Tobi, *Sources of Nigerian law*, 1996 17-58; AO Obilade, *The Nigeria legal system*, 1979 69-82; AEW Park, *The sources of Nigeria law* 1963 5-14. G Ezejiofor, ‘Sources of Nigeria law’ in CO Okonkwo (ed) *Introduction to Nigerian law* 1980 1-54; AM Olong, *The Nigerian legal system* 2<sup>nd</sup>ed 2007 11-20; C Mwalimu, *The Nigerian legal system* 2009 27-29. The confluence of various laws under the Nigerian legal system makes a commentator describe law in Nigeria as a ‘plural complex’. AA Oba, “‘Neither fish nor fowl’: Area courts in the Ilorin emirate in Northern Nigeria’ 58, 2008 *Journal of Legal Pluralism* 69.

<sup>59</sup>Interpretation Act Cap 192, LFN 1990 now Cap I23 LFN (2004), sec 32(2).

<sup>60</sup>D Lindsay & S Ricketson, ‘Copyright, privacy and digital rights management’ in AT Kenyon, & M Richardson, (eds) *New dimensions in privacy law: International and comparative perspectives*, New York, Cambridge University Press, 2006 121.

<sup>61</sup>FO Laosebikan, *Privacy and technological development: A comparative analysis of South African and Nigerian Privacy and Data Protection Laws with particular reference to the protection of privacy and data in internet cafes and suggestions for appropriate Legislation in Nigeria* unpublished Ph.D. thesis, University of Kwazulu-Natal, South Africa, 2007 340-345.

<sup>62</sup>See Canadian Criminal Code, section 184 which prohibits interception of private communications.

<sup>63</sup>Cybercrime Act, sec 38(5).

prescribe punishments for offences committed and may not be the best of instruments for the protection of the right to privacy from threats resulting from the proliferation of new technologies.

#### **4.4 Laws of Different National Sectors**

A number of laws applicable to particular sectors also have provisions that could foster individuals' right to privacy in this digital age and information society. For example, the National Health Act<sup>64</sup> has certain provisions which may grant individuals' control over their personal information, although, the Act basically protects confidentiality of information.<sup>65</sup> Similarly, the Statistics Act of 2007<sup>66</sup> has provisions which protect the privacy and confidentiality of private information.<sup>67</sup> It is submitted that while these laws protect privacy, they lack provisions granting individuals' active control over the access, usage and disclosure of their information by various entities. The Nigerian Identity Management Commission Act (NIMC Act)<sup>68</sup> which establishes the NIMC, however, has provisions which, arguably, grant an individual active control over his/her personal information. While the NIMC Act mandates the NIMC to establish and maintain a national database, it contains some provisions on information privacy.<sup>69</sup> To further ensure that the NIMC meets its obligation under the NIMC Act, it further established a privacy policy.<sup>70</sup> It must however be stated that these laws are of sectoral application and therefore extremely limited.

#### **4.5 Soft Laws and Regulations**

Quite a number of institutions that are in the business of handling individuals' personal information have certain regulations or guidelines for information processing. For example, the Nigerian Communications Commission (NCC) made the SIM Card Registration Regulations of 2010<sup>71</sup> with extremely limited provision on information privacy.<sup>72</sup> This is so in spite of the fact that the Regulation authorizes the NCC to establish 'a central database of all recorded subscriber information'.<sup>73</sup> Another regulation of the NCC, Registration of Telephone Subscribers Regulation (RTS Regulation) 2011,<sup>74</sup> has more explicit provision on information privacy. Section 9 of the Regulation is titled 'data protection and confidentiality' and provides that:

In furtherance of the rights guaranteed by section 37 of the Constitution of the Federal Republic of Nigeria, 1999 and subject to any guidelines issued by the Commission including terms and conditions that may from time to time be issued either by the Commission or a licensee, any subscriber whose personal information is stored in the Central Database or a licensee's

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<sup>64</sup>Available at [http://www.unicef.org/nigeria/ng\\_publications\\_national\\_health\\_bill\\_2008.pdf](http://www.unicef.org/nigeria/ng_publications_national_health_bill_2008.pdf) (accessed 1 February 2016).

<sup>65</sup>See generally part III of the Act

<sup>66</sup>A copy of the Act is available at [http://www.nassnig.org/nass/includes/tng/pub/tNG\\_download4.php?pageNum\\_bill=4&totalRows\\_bill=193&KT\\_download1=8bc66b39f7076b83664721f21bd48ac4](http://www.nassnig.org/nass/includes/tng/pub/tNG_download4.php?pageNum_bill=4&totalRows_bill=193&KT_download1=8bc66b39f7076b83664721f21bd48ac4) (accessed 1 February 2016).

<sup>67</sup>See section 26

<sup>68</sup>NIMC Act No 23 2007 available at <http://resourcedat.com/wp-content/uploads/2013/03/National-Identity-Management-Commission-Act-2007.pdf> (accessed 1 February 2016).

<sup>69</sup>For example, sections 22, 23

<sup>70</sup>NIMC Proposed Privacy Policy available at [https://www.nimc.gov.ng/sites/default/files/pia\\_policy.pdf](https://www.nimc.gov.ng/sites/default/files/pia_policy.pdf) (accessed 1 February 2016).

<sup>71</sup>See NCC Draft Regulation for the Registration of All Users of Subscriber Identity Module (SIM) Cards in Nigeria available at [http://www.ncc.gov.ng/index.php?option=com\\_docman&task=doc\\_download&gid=72&Itemid=](http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=72&Itemid=) (accessed 1 February 2016).

<sup>72</sup>See section 10 of the regulation

<sup>73</sup>NCC Draft Regulation for the Registration of All Users of Subscriber Identity Module (SIM) Cards in Nigeria, sec 4.

<sup>74</sup>NCC (Registration of Telephone Subscribers) Regulation, vol 98, No 101 2011. A copy of the regulation is available at [http://www.ncc.gov.ng/index.php?option=com\\_content&view=article&id=74&Itemid=89](http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=74&Itemid=89) (accessed on 1 February 2016).

database, shall be entitled to view the said information and to request updates and amendments thereto.<sup>75</sup>

The National Information Technology Development Agency (NITDA) which is a body responsible for creating a framework for the implementation of Information technology (IT) practices in Nigeria issued the Guidelines for Data Protection which contains far reaching provisions on information privacy in line the EU Directive on Data Protection. Soft laws such as regulations and guidelines have limited application as they do not have sufficient binding force as legislation. This is a reason while soft laws may not be all that useful to protect individuals from information privacy violations in Nigeria.

#### **4.6 Case Law**

There is a dearth of cases on privacy in general and information privacy specifically in Nigeria. In fact, to the best of our knowledge, there is as yet no case law on information privacy till date. A number of issues could be a reason for this gap in the Nigerian jurisprudence. Firstly, is the weak notion of privacy and privacy related issues in the country.<sup>76</sup> Secondly, there is the issue of low level of awareness of privacy and information privacy in Nigeria. A third reason which is adduced by Allotey is the limited exposure of the Nigerian people to telecommunication infrastructure. Based on the discussions in the previous section of this paper, we disagree with this reason. While telecommunication facilities were extremely limited years back in Nigeria, the situation has drastically changed recently.

#### **4.7 International/ Regional Law**

There is still no binding treaty on information privacy at the international level. However, quite a number of information privacy instruments exist under international law. Nigeria is a member of the United Nations (UN) which has a Guideline on information privacy. The United Nation's Economic and Social Council agreed to the Guidelines Concerning Computerized Personal Data files ('the UN Guidelines')<sup>77</sup> which contains far reaching provisions on the information privacy. The problem with this instrument, however, is that its soft law status has limited its binding force. The UN Guidelines merely encourages member states to develop a framework in line with the Guidelines. At the regional level, the African Union (AU) recently passed a Convention – the African Union Convention on Cybersecurity and Personal Data Protection ('AU Convention').<sup>78</sup> Although, Nigeria is a member state of the AU, it is yet to ratify the Convention. Similarly, the Economic Community of West African States (ECOWAS) to which Nigeria belongs also has an information privacy instrument. This instrument is the ECOWAS Supplementary Act 2010 on Data Protection.<sup>79</sup> Unlike the AU Convention, the ECOWAS Supplementary Act is meant to be directly applicable in member states.<sup>80</sup>

The above international/ regional instruments may not be so much influential in Nigeria because of the provisions of section 12 of the Nigerian Constitution which require that until an international/regional treaty is domesticated, it is not legally enforceable in Nigeria. This means no individual can use the provisions of these international instruments to enforce his right to information privacy unless they ratified but domesticated in Nigeria.

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<sup>75</sup>NCC (Registration of Telephone Subscribers) Regulation, sec 9(1).

<sup>76</sup>Allotey *op cit*188.

<sup>77</sup>Guidelines for the regulation of computerized personal data files A/RES/45/95 adopted by the UN General Assembly (GA) on 14 December 1990. Available at <http://www.refworld.org/docid/3ddcafaac.html> (accessed 1 February 2016).

<sup>78</sup>This was at the AU submit in Malabo, Equatorial Guinea. The Convention is available at [http://pages.au.int/sites/default/files/AU%20Cybersecurity%20Convention%20ENGLISH\\_0.pdf](http://pages.au.int/sites/default/files/AU%20Cybersecurity%20Convention%20ENGLISH_0.pdf) (accessed on 1 February 2016).

<sup>79</sup>A/SA.1/01/10. Also available at [http://www.ecowas.int/publications/en/actes\\_add\\_telecoms/SIGNED-Personal\\_Data.pdf](http://www.ecowas.int/publications/en/actes_add_telecoms/SIGNED-Personal_Data.pdf). (accessed 1 February 2016).

<sup>80</sup>See section 48, ECOWAS Supplementary Act.

## 5. Conclusion and Recommendations

It is unfortunate that the right to privacy, in its modern conception, has not received much legal attention in Nigeria, which makes it seem like Nigerians are not in need of their privacy.<sup>81</sup> The brief review of the legal framework for the protection of information privacy in the light of the recent proliferation of privacy destroying technologies shows that the *status quo* still leaves a lot to be desired. While there is quite a number of legal instruments that protect privacy based on the old paradigm of fostering secrecy and confidentiality, there is no sufficient framework for the protection of individuals from the threats resulting from new technologies which have the capacity to take away individual power of control over an important aspect of their personality and personal information. While there is the proliferation of privacy destroying technologies, the jurisprudence has still not kept pace with rapid advances in technology in this respect.

In concluding, we suggest that there is the need for clear norms governing the collection and use of information which is considered personal, private or confidential. Enacting an explicit information privacy law which grants individuals maximum control over their personal information is necessary in Nigeria. While some efforts of the Nigerian legislature in this respect are acknowledged, especially with a number of draft bills on information privacy, yet none of these efforts has seen the light of the day. Similarly, Nigeria needs to become signatory to international information privacy instruments such as the AU Convention, and the Council of Europe Convention on Data Protection which allows non-member states to ratify. Although, the ECOWAS Supplementary Act is directly applicable, Nigeria still needs to respect her obligations under the instrument and establish an information protection agency. As the common saying goes, “a problem understood is a problem half-solved”. There is the urgent need for us to understand the nature of the harm these technologies present before we can begin to start taking the problem seriously. If we do not appreciate the nature of the problem, it can never be solved. This contribution is a modest attempt to expose the problem as a first step towards a solution. Comments such as ‘*privacy is dead*’, ‘*people don’t care about privacy*’, ‘*people with nothing to hide have nothing to fear*’ and ‘*privacy is bad for business*’<sup>82</sup> have no place in any typical democratic setting as they undermine the power of personal information and the influence it wields over individuals.

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<sup>81</sup>Nwauche *op cit* 63.

<sup>82</sup> See Richards *op cit* 33.