

The Regulator and the Regulated: An Examination of the Legal Framework for Telecommunication in Nigeria

Tunde Otubu¹

Abstract: The prime objective of any technological revolution is to improve the quality of human life. This can be achieved by successfully assimilating these technological innovations into human society. Technological development in the information and communication technology has found its way into modern human societies for good. However in order to take the full advantage and benefits of this system there is the need to put in place a comprehensive legal and regulatory framework to engender the growth and development of the industry. This paper sets out to examine the legal and regulatory framework surrounding the business of telecom industry in Nigeria. It particularly scrutinizes the provision of the law establishing the National regulator vis a vis the service providers and the consumers of this telecom services. Such laws as the company Act, Nigeria communication Act, Criminal law, law of tort, planning Laws, Land Use act and other regulations tangential to the provision of telecom services in the country. In examining these laws the paper seeks to identify the lacunas, drawbacks and limitations existing in these regulations and proceeds to advance reform and recommendations towards the efficient administration and implementation of telecom laws in Nigeria in the overall benefit of the telecom business in Nigeria.

Keywords: telecommunication; tort laws; criminal laws; regulations

Introduction

Every human society, from the most primitive to the most advanced, depends on some form of telecommunications network. It will be virtually impossible for any group of people to define their collective identities or make decisions about their common and binding interests, without communications. Communication networks make society a reality.² It makes it possible for people to cooperate, to produce and exchange commodities, to share ideas and information and to assist one another in times of need. Indeed, every facet of the basic rights is dependent on telecommunication. Such basic rights of the individual as the right to life, the right to personal liberty and dignity, the right to free expression and information and the

¹ Lecturer; Department of Private and Property Law, Faculty of Law, University of Lagos, Address: Akoka, 234-01, Lagos State, Nigeria, Tel.: +234(1) 493.2660-1, fax: +234(1)493.2660, Corresponding author: bullet20042003@yahoo.com.

² Alabi, G.A.: *Telecommunications in Nigeria*. University of Pennsylvania. African Studies Center.

right to free movement, all of which enhance the quality of life of the individual, are facilitated by telecommunications.

That no modern economy can be sustained today without an integral telecommunications infrastructure is widely acknowledged. Robust telecommunications network is important for the economic growth of nations and constitutes a base infrastructure that supports the world economy. Communication is a vital aspect of human existence and effective telecommunications services enhance living standards and improve productivity and efficiency in other sectors. Thus, communications and the technologies that support it, occupy a strategic position now more than ever in every aspect of human existence; and nations and businesses would become less competitive and lag behind others if they fail to avail themselves of this vital infrastructure of the Information age. (Tooki, 2011)

Telecommunications is both dynamic and capital intensive and in view of its catalytic effect on the development of other sectors of the economy such as agriculture, health, tourism and education and its necessity for the commercial, industrial, socio-economic and political development of the country, the need for an orderly and efficient development of telecommunications infrastructure in Nigeria has now been found more urgent in order to keep pace with the development of the other sectors of the economy.

Nigeria is widely recognized as one of the major markets for telecommunications business opportunities in the world. With a population of over 150 million,¹ Nigeria remains Africa's most populous nation and is in fact home to at least one fifth of the population of Africa.

The country is also blessed with abundance of natural resources and is the 14th largest producer of oil in the World.² The nation therefore has what it takes to attract attention of potential investors to this largely untapped telecommunications market. The government of Nigeria is conscious of the role telecommunications can play in national development and is committed to ensuring that telecommunications facilities and services are expanded rapidly. (Tooki, 2011) Private investment in the sector has grown from about \$50m in 1999 to over \$25 billion by 2010 (Tooki, 2011) with commensurate rapid growth in subscriber lines.

The nation's tele-density stands at about 65 per cent with about 89 million connected lines by end of 2010. (Tooki, 2011) The progress recorded in the industry has been brought about by government's liberalization of the sector and opening up of the market to private investment.

¹ http://en.wikipedia.org/wiki/CIA_World_Factbook accessed 29/01/2013.

² Oteniya. R.K. Is Nigerian An Oil-rich Nation? What Is Its Relevance In The Global Energy Market? Available at: <http://saharareporters.com> accessed 24/07 2012.

In spite of the liberalization in the sector, government has a vital role to play in catalyzing the development and growth of the nation's telecommunications infrastructure and in ensuring the continued existence of a competitive environment that fosters continuous growth and consumer satisfaction. Government achieves this role through the enactment of progressive policy and legal framework for the sector and the establishment of a strong independent Regulatory authority: thus the establishment of the Nigeria Communication Commission via an Act in 2003.¹ In spite of the enactment of this Act, it is pertinent to take a general overview of the Laws and regulations in this vital area of our National life in order to ensure that law and policy in this area advances the betterment of all.

This paper thus sets out to examine the legal and regulatory framework surrounding the business of telecom industry in Nigeria. It particularly scrutinizes the provision of the law establishing the National regulator *vis a vis* the service providers and the consumers of this telecom services. Such laws as the Company Act, Nigeria Communication Act, Criminal Law, Law of Tort, Planning Laws, Land Use Act and other regulations, tangential to the provision of telecom services in the country. In examining these laws the paper seeks to identify the lacunas, drawbacks and limitations existing in these regulations and proceeds to advance reform and recommendations towards the efficient administration and implementation of telecom laws in Nigeria in the overall interest and benefit of the telecom business in Nigeria. The paper thus sets out seriatim.

The Nigerian Communication Commission Act

The Nigerian telecommunications sector was grossly under-developed before the sector was deregulated under the military regime in 1992² and placed under the jurisdiction of the Nigerian Communication Commission (NCC). This is the regulatory authority for the telecommunications industry in Nigeria. Its major role is to facilitate private sector participation in communication services delivery, coordinate and regulate the activities of the operators to ensure consistency in availability of service delivery and fair pricing. Since then, the NCC has issued various licences to private telephone operators. These licenses allow private telephone operators (PTOS) to roll out both fixed wireless telephone lines and analogue mobile phones. (Wojuade, 2005) However the full weight of deregulation of the sector came to fore with the coming of democratic government in 1999. The Nigerian Communications Act 2003 was signed into law by President Olusegun Obasanjo on the 8th of July 2003 after being passed by both Houses of the National Assembly. The Act strengthens the capacity of the Nigerian Communications Commission to properly carry out its activities as the independent regulator of the

¹ Nigeria Communication Commission Act 2004 Laws of Federation of Nigeria 2004.

² The Nigerian Communications Commission Act 1992.

telecommunications industry in Nigeria. The 158 sections Act repealed the 1992 Decree and all previous enactments.

The Act created the Nigerian Communication Commission (NCC)¹ headed by an executive vice Chairman² and saddled with the responsibility of overseeing the regulation of the telecommunication sector in the country. It provides an elaborate and comprehensive legal regime for the establishment control and management of telecommunication services in the Country. The commission composed of technocrats and professionals is amongst other powers given the power to make regulations in furtherance of the objectives of the Act.³ The rule making powers of the commission is wide and enormous, the objective of which is to enmesh the commission in the performance of its objectives without unnecessary bureaucracy and civil service red-tapism.

However it is this rule making powers of the commission that ought to be subject of control in the interest of the citizens, consumers and investors in this sector. Section 71 of the Act empowers the commission to make rules on so many subject-heads; enjoins it to hold a public enquiry on the subject-matter of rule making and to take into consideration the findings of the inquiry in the making of the regulation. Under section 72 the Commission may review, *as at when it deems necessary*,⁴ any rules, guidelines and regulations made under this Act that are in effect at the time of the review and may in the process modify or vary, or repeal any such rules or regulations; though such review is also subject to public enquiry procedure.⁵

The provision requiring the commission to hold a public enquiry and take cognizance of its outcome in rule making is ordinarily meant to curb the wide discretionary powers of the commission by subjecting it to public participation. However there is no supervisory power to ensure that the recommendation of the public enquiry is considered and reflected in the regulations and guidelines so made. Ordinarily, this lacuna would have been obliterated had there being a National legislation on rule making procedure which would have ensured a parliamentary censorship of the regulation before its implementation; unfortunately there is none.⁶ While it is good and desirable to give rule making powers to the commission in the discharge of its obligations under the Act, it is an act of legislative abandonment for the National Assembly not to exercise some supervisory powers over the exercise. In fact we think is nigh time for the national

¹ See: section 3 of the Act.

² Ibid: s. 5.

³ Ibid: s. 70.

⁴ Emphasis to bring out the wide discretionary rule making powers of the Commission.

⁵ Section 72(2).

⁶ This is unlike the situation in Lagos State where there is a legislation regulating the procedure for the making and validation of Statutory Instruments.

assembly to enact a law on procedures and powers of Statutory Instrument in the Country.

Another area for review of this Act is to be found in part XII on notification and resolution of disputes. Section 73 of the Act provides that ‘The Commission shall have powers to resolve disputes between persons who are subject to this Act (“the parties”) regarding any matter under this Act or its subsidiary legislation. This provision is ordinarily good as its essence is to foster the growth of alternative dispute mechanism through consultation, mediation, arbitration and conciliation. It is however saddening that the Act did not recommend the use of professionally qualified personnel in this exercise; though it provides that the decision of the commission shall be enforceable before the court without more.¹

The worrisome part of this provision is that the commission; ordinarily an administrative outfit, is indirectly turned into a judicial organ ranking *parri -passu* with the Federal High Court since reference to court under the Act means the federal high court.² In as much as it is considered good to incorporate alternative dispute resolution scheme into the Act to fast track dispute resolution; it amounts to negation of the doctrine of separation of powers if such quasi judicial function of the administrative organ is not subject to judicial review of the superior courts *a-priori*. In fact the golden rule of administrative law is that quasi judicial powers of the administration are subject to judicial review espoused in the twin judicial control mechanism: prohibition and certiorari. (Borokini & Adefi, 2007; Iluyomade & Eka, 1980; Oluyede) Furthermore the Act provides that a decision made by the Commission under this Part may be enforced by the Court as if the decision is a judgment of such Court provided that the Commission has issued a certificate to the complainant for leave to proceed to the Court for the enforcement of the decision. However, no certificate is required if the action is taken by the Commission under this section.³ The import of this provision is to make the commission a judge in its own cause contrary to the hallowed principle of law: *Nemo iudex in causa sua*, which is you shall not be a judge in your own cause.

Section 88 of the Act seems to have addressed the problem of judicial review of the commission’s actions as it permits a party to seek for judicial review of the commission’s action. However the exercise of the powers of judicial review under the Act is circumvented with a lot of qualifications, which qualifications may eventually defeat the essence of the exercise of the powers. For example, it is mandatory for a complainant against the decision of the commission to appeal to the commission for review of its decision, a process that could take 90days to complete.⁴ Meanwhile the initial decision of the commission remains valid and

¹ Section 78.

² Section 157 on interpretation.

³ Section 78(2) & (3).

⁴ Section 87.

subsisting. The Act sought to introduce the doctrine of exhaustion and ripeness via the provision that the aggrieved party must exhaust all remedies provided under the Act before seeking for judicial review of the commission's action.¹ However, the essence of seeking judicial review may have been defeated if there is no way for quick judicial intervention. In fact the fundamental rights of a party may have been suspended and good business opportunity lost while waiting to exhaust all the internal remedies provided by the Act. Given the current provision under the Act a party cannot anticipate the commission and pray the court for an order of prohibition precluding the commission from taking a decision on a dispute placed before it. It is imperative to remove all inhibitions in the Act militating against the exercise of the powers of judicial review by the courts.

The Act in trying to empower the commission uses some subjectively worded expressions which cannot be empirically determined and or objectively construed. The use of these expressions gives so much latitude and leverage to the commission which can be easily abused and used to subvert the interest of a party. Such expression as 'as the commission deems fit', as the Commission thinks fit,² 'at the discretion of the commission' are subjectively worded and may be used to impugn on rights of others if not checked. Save for these observed lapses the Act remain a vibrant legislation in the regulation of telecommunication industry in Nigeria.

It is also observed that the compliance level of the service providers to the commission's regulations is on the low ebb. The commission has mostly turned lukewarm attitude towards monitoring and enforcement of its regulations. This present posture is not unconnected with the commission's perceived harsh business environment within which these companies operate. It would therefore appear that the service providers have taken this soft approach towards enforcement and compliance to regulations for granted in the discharge of their responsibilities to the nation, the Commission and the consumers. (Tooki, 2011) A lot of consumer issues prevalent in the industry today are as a result of tardy compliance to regulations instituted by the regulator. There is therefore the need for all the stakeholders in the industry to inject a new corporate governance approach towards compliance to existing regulations and directions. To give impetus to this aspiration, the monitoring and compliance department recently set up by the Commission should be equipped with the human and material resources needed for effective performance of their jobs in line with the new focus of the Commission.

¹ Section 88(3).

² Section 63(6)d.

The Companies Act¹

While the Nigerian Communication Act sets the standards for the operation of the telecommunication industry in Nigeria, there are other relevant legislations and regulations that must be complied with by any would be service provider in the Country. One of such relevant legislation is the companies and allied matters Act.

Any operator of telecommunication services or service provider must be a corporate entity registered as such under Nigerian law. The Nigerian law provides that a corporate body or a partnership of such is the recognized entity to hold communication license.² Such entity must be incorporated and registered in Nigeria under the Companies and Allied Matters Act.³ A non-Nigerian is at liberty, and indeed encouraged to invest and participate in the operation of any enterprise in Nigeria. However, the promoters or investors would have to register a company in Nigeria. This company will be a separate and distinct entity from its parent company. Until so incorporated, a foreign company may not carry on business in Nigeria or exercise any of the powers of a registered company.⁴ A foreign investor may incorporate a Nigerian branch or subsidiary of the parent company by giving a Power of Attorney to a qualified solicitor in Nigeria for this purpose. The incorporation documents in this instance would, disclose that the Solicitor is merely acting as an "agent" of a "principal" whose name(s) should also appear in the document. The Power of Attorney should be designed to lapse, thus indicating that the appointed Solicitor shall be cease to function upon the conclusion of all registration formalities. When this is accomplished, the locally incorporated branch or subsidiary company must then apply to the Nigerian Investment Promotion

¹ Cap C20 LFN 2004.

² See section 157 Nigerian communication Act 2003.

³ Cap C20 LFN 2004 The Companies and Allied Matters Act, 1990 [CAMA] is the principal statute governing the registration of enterprises in Nigeria. The administration of CAMA is the responsibility of the Corporate Affairs Commission (CAC), with headquarters in Abuja, and zonal offices all over the country. The functions of the CAC among other things include the following: The regulation and supervision of the formation, incorporation, registration, management and winding up of companies; the establishment and upkeep of a suitable and well equipped Companies Registry; the conduct of investigation into the affairs of any company where the interests of shareholders and the public so demand; etc.

⁴ It is worthy to note however that a foreign company may engage in business without registration in Nigeria, if the foreign company applies for exemption from local incorporation in accordance with Section 56 of the Companies Act, to the National Council of Ministers for exemption if such a foreign company belongs to one of the following categories:- "foreign companies invited to Nigeria by or with the approval of the Federal Government of Nigeria to execute any specified individual project; foreign companies which are in Nigeria for the execution of a specific individual loan project on behalf of a donor country or international organization; foreign government-owned companies engaged solely in export promotion activities, and; engineering consultants and technical experts engaged on any individual specialist project under contract with any of the Governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

Commission¹ ("NIPC") for a Business Permit, Expatriate Quota, and other requisite approvals and licences. The NIPC is the only legally empowered Federal Government agency in Nigeria established by law to promote, coordinate and monitor all investment in Nigeria. It is therefore a condition precedent for any would be foreign investor to register with the commission after registering the enterprise with the corporate affairs commission. Section 20 of the Act provides that an 'enterprise in which foreign participation is permitted under section 17 of this Act shall, before commencing business, apply to the Commission for registration and the Commission shall, within fourteen working days from the date of receipt of completed registration forms, register the enterprise if it is satisfied that all relevant documents for registration have been duly completed and submitted or otherwise advise the applicant, accordingly.

To assure would be investors of their investments in the country, the NIPC Act also provides² that: No enterprise shall be nationalized or expropriated by any government of the Federation, and no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other persons. There will be no acquisition of an enterprise by the Federal Government unless the acquisition is in the national interest or for a public purpose under a law which makes provision for: Payment of fair and adequate compensation and a right of access to the courts for the determination of the of the investor's interest of right and the amount of compensation to which he is entitled.

It is therefore obvious that the telecommunication companies operating in the country mostly with foreign investment content were subjected to the regulation and procedures as spelt out by the commission.

Tort Law and Telecommunications

The fear of invasion of privacy lies in the real possibilities and/or occurrences of misuse of advancing technology. The abuse from either a big institution, such as the government, or a private individual can easily deprive unsuspecting victims of privacy. Although the types of intrusion may differ depending on the size, number, and the intention of invaders, the results all point to the common denominator--privacy loss. The large organizations generally focus more on electronic surveillance of individuals. Telecommunication technology allows one to gain more information about an individual for the sake of knowledge or to manipulate private information for the organization's profit. On the other hand, private individuals may simply invade one's privacy for amusement or for the pleasure of

¹ Provided for under the Nigerian Investment Promotion Commission Act No.16 of 1995.

²section 25 (1) N.I.P.C. Act

manipulating the technology. With the integration of the computer into the telecommunication information highway, more threats to privacy invasions arise.¹

A veritable law in the regulation and use of telecommunication services vis a vis right to privacy is the law of torts which seeks to regulate the civil relationship among members of the society through the mechanism of payment of compensation for breach of legal duties or infringement on the rights of others. A tort is wrongful act, not including a breach of contract or trust, that results in injury to another's person, property, reputation, etc and for which the injured party is entitled to compensation.² It is a branch of the law which covers civil wrongs, such as defamation and trespassing, among many other transgressions. The main purpose of tort law is to compensate the victims of wrongdoing for the injuries they suffer as a result.

It is not generally concerned with punishing, or casting moral judgment on, the wrongdoer - it simply compels the person who caused the harm to compensate the person who suffered the harm.

A tort does not have to cause physical injury or distress. It might cause economic damage, by forcing someone to replace something, interfering with someone's business, or causing someone to miss work. Or it may cause damage to someone's reputation or quality of life. In order for a tort case to succeed in court, the lawyers must generally be able to prove that the accused party had committed the wrong in question, and that the client suffered as a result. Damages may be awarded by a jury or a judge, depending on the case. (Deakin, Johnston, & Markesinis, 2008; Williams, 1951)

The thorny nexus between telecommunications and tort law can be found in the provisions of the Constitution³ on fundamental rights. On one hand there is the constitutional guaranty of the individual right to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference and every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.⁴ On the other hand there is also the provision of section 37 of the constitution on right to privacy. The section provides: The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected. It is however to be noted that whilst the provision of section 39 is subject to the provisions on derogation of rights and to law regulating telephony, wireless broadcasting, television or the exhibition of cinematograph film; the provision of

¹ Madhavi Divan: The Right to Privacy in the Age of Information and Communications (2002) 4 SCC (Jour) 12 Available at: <http://www.ebc-india.com/lawyer/articles/2002v4a3.htm> accessed 29/01/2012.

² See: <http://dictionary.reference.com/browse/tort> accessed 24/07/2012.

³ Constitution of the Federal Republic of Nigeria 1999.

⁴ Section 39(1) & (2).

section 37 on right to privacy is only subject to the provisions on derogation of rights under section 45 of the constitution.(Bygrave, 2004; Froomkin, 2000; Hoofnagle, 2002)¹

The Nigerian Communications Act remains silent on the role of the Nigerian Communications Commission to deal with privacy issues in communications, although this can be implied from analysing one of its functions. The Commission has a duty to carry on any other functions related to communications services and operations in Nigeria and also ensure compliance with international standards and obligations relating to communications.² Save for this omnibus provision the Act is silent on the protection and enforcement of right to privacy; the only other provision bordering on this issue is found in section 106 which left the issue of protection of consumer information in the hand of service providers. This is unlike the provision of Section 67 of Uganda Communication Act³ which makes it an offence for an operator of a communications service or system or employer of the same to disclose any information in relation to a communication unless done in accordance with a court order. Or Section 73 which provides that;

“any person who without lawful excuse intercepts and divulges any communication except where permitted by the originator commits an offence and liable on conviction to a penalty”.⁴

The objectives of NCC indicate government’s emphasis on developing investment in the sub-sector rather than focus on consumer interests related thereto –it does not give direct focus on consumer interests such as the right to privacy but emphasises competition, network development among others. Save for the provisions in the NCC and licence terms and conditions requiring respect for privacy, presently, there are no regulations or guidelines. Operators are expected to respect consumer privacy through the mastermind operator/customer agreement.

However with the constitutional provision guarantee of right to privacy of the individual, an aggrieved party can use the agency of the court and the machinery of the tort law, to control and regulate the activities of the service providers viz a viz the protection and enforcement of right to privacy of the individual. Such tort as defamation, negligence and economic torts of passing off⁵ and others can be called

¹ E. Noam; ‘Privacy in Telecommunications: Markets, Rights and Regulations-Policy Approaches; New Telecom Quarterly; see also: Threats to Privacy’ *Privacy International: ‘Privacy and Human Rights* 2003; <http://www.privacyinternational.org/survey/phr2003/threats.htm> accessed 15/07/2012.; <http://personal.law.miami.edu/~froomkin/articles/privacy-deathof.pdf> accessed 15/07/2012; <http://www.epic.org/epic/staff/hoofnagle/plidraft2002.pdf> accessed 15/07 2012.

² Section 4.

³ Uganda Communications Act 1997. Contra the provision of Section 230 of the Communications Decency Act of 1996 USA which provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by others.

⁴ *Supra*.

⁵ Winfield & Jollowitc on Tort 17th edition Sweet & Maxwell 2006.

upon to redress any infringement of the right to privacy as enshrined in the constitution.

It is also worthy to note that the provisions of the Copyright Act,¹ Patent and Design Act² and Trademarks Act³ can also be used to enforce protected rights under our constitution.

Criminal Law and Telecommunication

The emergence of low-cost computing, the Internet, and advances in wireless telecommunications has fueled one of the most significant developments of our time - the information age. But, in addition to the numerous advantages of this progress, significant challenges face society today. (Grabosky & Smith, 1998) The impact of telecommunication on the development of economic and social life has had some unwelcomed effect, as some individuals have taken advantage of technology to commit crime. Crime in the Digital Age catalogs current and emerging criminal techniques involving telecommunication systems and the Internet, in addition to identifying measures that potentially can mitigate future risk to society.⁴ Today there are so many communication related crimes including theft of services; communications in furtherance of criminal conspiracies; information piracy; the dissemination of offensive materials (including extortion threats); electronic money laundering; electronic vandalism and terrorism; telemarketing fraud; illegal interception; and electronic funds transfer fraud amongst others. (Longe & Chiemeké, 2008, pp. 132-139)

In Nigeria there are many laws in the area of crime regulation, but the primordial law in this regard is the Criminal/Penal code. Our criminal code provision is grossly inadequate to address the criminal conduct arising from the modern telecommunication system. Chapter 17 of the criminal code⁵ on Offences Relating to Posts and Telecommunications failed woefully to address the problem as its provisions is outdated and a relic of past colonial history. The Penal code did not fare better. The NCC Act stipulates no specific provision or penalty for telecommunication offences save that it provides for the immunity of the service providers in cases of disclosure of customers' information in furtherance of

¹ Copyright Act, Cap C28 Laws of the Federation of Nigeria, 2004.

² Patent & Design Act, Cap P2, LFN, 2004. See also: Deji Olatoye: 'Copyright Law & Piracy – Legal Issues in the Information Society' Lecture Delivered at Public Lecture Day of Association of Information Resources Management Students Babcock University Ilishan, Ogun State On Wednesday 7th October, 2009 Available at: www.thelodt.com. Accessed 24/07/2012.

³ Cap T13, LFN, 2004.

⁴ Grabosky. P. Computer Crime in a World Without Borders. Available at: <http://www.crime-research.org/library/Peter.htm> accessed 24/07/2011

⁵ Chapter 77 Laws of the Federation of Nigeria 1990.

national security.¹ Section 146(1) of the Act provides that ‘A licensee shall use his best endeavor to prevent the network

facilities that he owns or provides or the network service, applications service or content application service that he provides from being used in, or in relation to, the commission of any offence under any law in operation in Nigeria.’ However the pertinent question at this juncture is to ask whether presently there is any law or regulation on telecommunication offences in Nigeria? In all the regulations and guidelines made by the NCC there is none that touches on the issue of telecommunication crimes. The Advance Fee Fraud and other Fraud Related Offences Act² only provides a tangential provision that bothers on telecommunication offences; in fact it only concerns itself with the fraudulent use of communication device to achieve economic fraud.³

Given the present legal framework and the current lacuna in the law, it is our opinion that the provision of the UK law on the subject will be a relevant guide to Nigerian legislators for adaptation and adoption. Sections 125 and of the subsequent sections of the UK Communications Act 2003, provides several sanctions for telecommunication offences ranging from dishonestly obtaining electronic communications services; Possession or supply of apparatus etc. for contravening,⁴ cloning, reprogramming to Improper use of public electronic communications network.⁵ A person guilty of an offence under section 127 shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine or to both.

Planning Law and Telecommunication

Telecommunication masts are ordinarily installed or placed on land or on any structures permanently attached thereto and are therefore subject to the operative land law and land use policy in the federating units/ States in the country, as a residual matter. All transactions in respect of leases, sub-leases and any assignment arising thereon are therefore subject to the provisions of the Land Use Act which is the operative land law in the Country. In line with the provisions of the Land Use Act, telecommunication operators are to obtain the necessary Governor’s consent to any lease or sub-lease of land on which to cite telecom mast.⁶ They are required to apply for State grant for Land and where their interest in the land pre-dates the Act as a Deemed grantee, their absolute ownership is technically converted to a

¹ Section 146 NCC Act.

² Advance Fee Fraud and other Fraud Related Offences Act 2006.

³ Sections 6,7,11 of the Act

⁴ Section 126 Communication Act (UK) 2003.

⁵ Ibid Section 127.

⁶ See Section 21& 22 Land Use act 1978.

right of occupancy of a definite period with the promulgation of the Act. They are also subject to the Governor's power to grant easement and other rights appurtenant to land in respect of passages, right of way and installation of telecom masts and base stations.¹

The fact that the telecom companies obtained their licences from the Federal government but have to subject their operation licences to State Land policy, particularly the operation of the Land Use Act, could engender conflict between the States, Local Governments and the federal agency empowered to regulate the telecommunication industry in Nigeria to the detriment of industry operators and ultimately the consumers of these services. Refusals by the State Governors/Local Government authorities to grant right of occupancy, leases and or consent to subsequent transactions involving assignment, leases or sub-leases for the erection and installation of telecom mast² or the revocation of existing right of occupancy over which a mast stands could provoke the failure of the industry in the country. It is therefore imperative to have a synergy of law and administrative process to fine-tune this overlapping functions and responsibilities of the various arms of government in order to untangle the maze into which this area may fall.

Recently the federal High court in Lagos had course to resolve a dispute bordering on this area in Registered Trustees of the Licensed Telecommunications Operators of Nigeria and Others V Lagos State Government and Others.³ In that case the Lagos State Government promulgated the Infrastructure Maintenance and Regulatory Agency Law to regulate and control the erection and installation of Masts, Towers and for connected purposes.⁴ In line with the provisions of Section 16 of the law, the State sought to regulate the construction and installation of telecommunication masts in Lagos State. The Claimant/Applicant challenged the legality and validity of the State legislation on this matter. The Claimant's argument was hinged on the constitutionality of the contending legislation and its duplicity *vis a vis* the Nigerian Communications Commission Act. In a well reasoned judgment, the court affirmed the exclusive powers of the Federal government to legislate on telecommunication matters and struck out the Lagos state law to the extent that it sought to impose quality control and environmental standards in the citing of telecomm mast within the State. The court reasoned that 'it will be difficult to do Telecommunication business in Nigeria if every State in

¹ Land use Act.

² There is no provision in the Land Use Act to compel the Governor/local Government to grant a right of occupancy or give consent to any applicant. The power to grant same is totally at the discretion of the Governor.

³ Unreported suit No. FHC/L/CS/517/06.

⁴ Lagos State of Nigeria Official Gazette No. 23 Vol.37 dated 27th August, 2004.

the federation, which is not unlikely, if this case succeeds, to enact their own laws, to take a piece of the action.¹

There is no doubt that the State law in contention in this case encroached on Federal legislative powers by seeking to regulate matters beyond its legislative competence. It is however incorrect to state that the State has no role to play in the whole exercise. The provision of section 135 of the NCC Act is not meant to be cosmetic or a façade; it is in recognition of the constitutional legislative powers vested in the Federating units exercisable over land and physical planning matters. It is argued hereunder that the State have the legislative right to regulate the indiscriminate citing of mast within its territory using the agency of appropriate law, particularly its zoning policy. It is therefore outlandish and an over-generalization to argue that the power is at variance with section 4(2) Of the constitution and items 46, 66 and 68 of the exclusive list of the constitution.²

It is important to put in place a workable administrative mechanism to avert this type of conflict particularly when the regulatory law on the subject ordinarily recognizes the important role of the State in this area. In fact the need to have in place a workable arrangement in this area cannot be over emphasized as it will act as the administrative melting point for all sorts of dispute on the matter. It is therefore recommended that a joint committee of the 3 arms of government in the country be set up to oversee the trouble spots in the whole exercise and set an equitable agenda for all parties and stakeholders concerned. The committee should particularly work towards recommending a uniform procedure and administrative levies applicable throughout the country with respect to application and approvals required for the installation of Telecommunication mast and towers. If necessary, a legal framework for the implementation of this recommendation should be put in place by inserting an amendment into the current law.

Conclusion

This paper examined and explored the legal and regulatory framework surrounding the business of telecom industry in Nigeria, particularly such laws as the company Act, Nigeria communication Act, Criminal law, law of tort, planning Laws, Land Use act and other regulations tangential to the provision of telecom services in the country.

The paper identified the lacunas, drawbacks and limitations existing in these regulations and proceeded to advance reform and recommendations towards the efficient administration and implementation of telecom laws in Nigeria in the overall benefit of the telecom business in Nigeria.

¹ Page 24 of the judgment.

² This is one of the arguments canvassed by counsel to the applicant in the case. See p. 9.

References

- Alabi, G.A., *Telecommunications in Nigeria*. University of Pennsylvania. African Studies Center.
- Borokini, A. A & Adefi, Olong (2007). *Administrative Law in Nigeria*. Malthouse Press.
- Deakin, Johnston & Markesinis (2008). *Markesinis & Deakin's Tort Law*. Oxford:Oxford University Press.
- Grabosky, P & Smith R. G. (1998). *Crime in the Digital Age: Controlling Telecommunications and Cyberspace Illegalities*. Australia: Rutgers University press.
- Iluyomade & Eka (1980). *Cases and Materials on Administrative Law in Nigeria*. Ile-Ife, Nigeria: University of Ife Press.
- Longe, O.B & Chiemeké, S. C (2008). Cyber Crime and Criminality in Nigeria – What Roles are Internet Access Points in Playing? *European Journal of Social Sciences, Volume 6, No 4, 132-139*.
- Oluoyede, P.A. *Nigerian Administrative Law*. Ibadan: University Press.
- Tooki, Abimbola (2011). A New Dimension to Nigeria's Telecom Revolution. *Business World Newspapers April 11th*.
- Williams, G. (1951). The Aims of the Law of Tort. *Current Legal Problems*, 137.
- Winfield & Jollowitc on Tort 17th edition Sweet & Maxwell 2006.
- Wojuade, J.I. (2005). *Impact of global system for mobile telecommunication on Nigerian Economy: A case of some selected local government areas in Oyo State, Nigeria. A Med Thesis*. Nigeria: University of Ibadan.
- *** (1978). Land use Act.
- *** (1990). Chapter 77 Laws of the Federation of Nigeria.
- *** (1992). The Nigerian Communications Commission Act 1992.
- *** (1993). NCC Act
- *** (1997). Uganda Communications.
- *** (1999). Constitution of the Federal Republic of Nigeria.
- *** (2003). Communication Act (UK) 2003.
- *** (2004). Cap T13, LFN, 2004.
- *** (2004). Copyright Act, Cap C28 Laws of the Federation of Nigeria.
- *** (2004). Lagos State of Nigeria Official Gazette No. 23 Vol.37, 27th August.
- *** (2004). Laws of Federation of Nigeria.
- *** (2004). LFN. Chapter 20.
- *** (2004). Nigeria Communication Commission Act.
- *** (2004). Patent & Design Act, Cap P2, LFN.
- *** (2006). Advance Fee Fraud and other Fraud Related Offences Act 2006.

Online sources

Deji Olatoye: *Copyright Law & Piracy – Legal Issues in the Information Society*. Lecture Delivered at Public Lecture Day of Association of Information Resources Management Students Babcock University Ilishan, Ogun State On Wednesday 7th October, 2009 Available at: www.thelodt.com. Accessed 24/07/2012.

Froomkin; M. The Death of Privacy? 52 *Stanford Law Review* (May 2000) 1501 available at <http://personal.law.miami.edu/~froomkin/articles/privacy-deathof.pdf> accessed 15/07/2012.

Grabosky. P. *Computer Crime in a World Without Borders*. Available at: <http://www.crime-research.org/library/Peter.htm> accessed 24/07/2011.

Hoofnagle, Chris J. Consumer Privacy In the E-Commerce Marketplace 2002, *Third Annual Institute on Privacy Law* 1339, Practising Law Institute G0-00W2 (June 2002), available at <http://www.epic.org/epic/staff/hoofnagle/plidraft2002.pdf> accessed 15/07 2012.

<http://dictionary.reference.com/browse/tort> accessed 24/07/2012.

http://en.wikipedia.org/wiki/CIA_World_Factbook accessed 29/01/2013.

Madhavi Divan: The Right to Privacy in the Age of Information and Communications (2002). 4 SCC (Jour) 12 Available at: <http://www.ebc-india.com/lawyer/articles/2002v4a3.htm> accessed 29/01/2012.

Oteniya. R. K. Is Nigerian An Oil-rich Nation? What Is Its Relevance In The Global Energy Market? Available at: <http://saharareporters.com> accessed 24/07 2012.

Threats to Privacy' *Privacy International: 'Privacy and Human Rights* 2003: available at <http://www.privacyinternational.org/survey/phr2003/threats.htm> accessed 15/07/2012.