A CRITICAL ANALYSIS OF THE CONSTITUTIONAL LIMITATION OF THE RIGHT TO PRIVACY IN NIGERIA: AN INTERNATIONAL LAW PERSPECTIVE

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Abstract

The textual composition of the right to privacy and the limitation clause in the Nigerian Constitution are such that they minimise the enjoyment of the right for Nigerians and non-Nigerians within the Nigerian territory. This article discusses the inadequacy of the constitutional provision relating to the right to privacy in section 37 of the Nigerian Constitution vis-à-vis international law. It also analyses the effects of the textual composition of the constitutional limitation of the right to privacy in section 45(1) of the Nigerian Constitution and the confusion that arises when it is interpreted in light of international law, other provisions in the Nigerian Constitution and the Nigerian Interpretation Act. The discussion concludes by recommending Nigeria's compliance with international law in its constitutional provision regarding the right to privacy and a textual amendment to section 45(1) of the Nigerian Constitution.

KEYWORDS: Privacy, Nigerian Constitution, International law, Limitation of Rights,

Introduction

The right to privacy is an internationally recognised human right. Several international and regional human rights treaties have provisions on the protection of this right. Some of these treaties include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (ICRMW), the African Charter on the Rights and Welfare of the Child (ACRC), the European Convention on Human Rights (ECHR).[1] Nigeria, having ratified some of these international treaties, has in partial compliance with these treaties, guaranteed the protection of its citizens' privacy.[2] In spite of the seeming protection of the right to privacy in the Nigerian Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution), both citizens and foreigners within the Nigerian territory have struggled to enjoy this right.[3]

The reasons for the minimal actualisation of the right to privacy are diverse. However, this paper seeks to explore two of those reasons. The first relates to the exclusion of foreigners from the Nigeria's constitutional protection of the right to privacy. The second analyses the effect of the constitutional limitation clause on the right to privacy with a particular focus on its

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[1] ICCPR, 16 December 1966, 999 UNTS, 171; CRC, 20 November 1989, 1577 UNTS, 3; ICMW, 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003; ACRC, CAB/LEG/24.9/49, entered into force on 29 November1990.

[2] Nigeria has ratified the ICCPR, the CRC, the ICRMW and the ACRC.

[3] Constitution of the Federal Republic of Nigeria, Act No.24, 5 May 1999.

textual composition. Also, the article critically analyses the confusion that arises from the literal interpretation of the constitutional limitation clause *vis–`a-vis* international law, other provisions in the Nigerian Constitution and the Interpretation Act of Nigeria.[4]

Conceptualising The Right To Privacy

The definitions of privacy are diverse and various societies view the term differently.[5] The Electronic and Privacy Information Center (EPIC) classifies privacy into bodily, territorial, information and communications privacy.[6] Bodily privacy involves the protection from unauthorised invasion of physical bodies, such as genetic testing. Territorial privacy involves protection of a person's property from unlawful search and seizures. Information privacy is the protection of personal information from unauthorised or unregulated use. Communications privacy includes the protection of all kinds of correspondence from unauthorised intrusion.

Warren and Brandeis, the first scholars to argue for a right to privacy, define the right to privacy as "the right to be left alone."[7] Their definition of privacy was coined from the perspective of a person whose private information was exposed to the public by unauthorised persons. Their definition is not satisfactory because it is impossible for a person living within a community to be totally left alone. However, society through its laws must define the boundaries and balance to be given to a person's private life.[8]

Westin defined 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."[9] Westin's definition is focused on the protection of information privacy, thus it excludes other aspects of privacy. Solove and Nwauche argue that privacy is better described than defined and the former prescribes the description of privacy in terms of its problems.[10]

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[4] Interpretation Act, CAP.17, Laws of Federation of Nigeria (LFN), 2004.

[5] A Westin 'The Origins of Modern Claims of Privacy in Philosophical Dimensions of Privacy', in Schoeman (ed) *An Anthropology* (1984) 56*;* C Robert 'Three Concepts of Privacy', (2001) 89 *Georgetown Law Journal* 2089; JQ Whitman 'The Two Western Cultures of Privacy: Dignity Versus Liberty', (2004) 113 *The Yale Law Journal* 1153; A Levin and PS Abril 'Two Notions of Privacy Online', (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1008.

[6] Electronic and Privacy Information Center, Privacy and Human Rights (2006) http://www.privacyinternational.org/survey (accessed on 2017-06-15); D Banisar 'Linking ICTs, the Right to Privacy, Freedom of Expression and Access to Information' (2010) 16 *East African Journal of Peace & Human Rights* 125; AB Makulilo 'One Size Fits All: Does Europe Impose its Data Protection Regime on Africa?' (2013) 7 *DuD.Datenschutz and Datensicherheit* (DuD) 447; LA Abdulrauf and AA Daibu 'New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension between Traditional and Modern Conceptions', (2016) 7 *Nnamdi Azikwe University Journal* (NAUJ) 113; Neethling 'The Concept of Privacy in South African Law', (2005) 122 *South African Law Journal (SALJ)* 20.

[7] SD Warren and L Brandeis 'The Right to Privacy', (1890) 4 *Harvard Law Review* 205; S Gutwirth, Privacy and the Information Age (2002) 24.

[8] J Burchell 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid', (2009) 13 *Electronic Journal of Comparative Law* 1; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ at at 446; *Campbell v MGN Ltd* [2004] UKHL at para 22; *Wainwright v Home Office* [2003] 3 WLR 1137.

[9] A Westin *Privacy and Freedom* (1970) 7.

[10] ES Nwauche 'The Right to Privacy in Nigeria' (2007) 1 *Review of Nigerian Law and Practice* 65; DJ Solove 'Understanding Privacy' (2008) *The George Washington University Law School Public Law and Legal Theory Working Paper No.420* 8; DJ Solove 'I've Got Nothing to Hide and other Misunderstandings of Privacy'(2007) 44 *San Diego Law Review* 745; JW DeCew, In Pursuit of Privacy: Law, Ethics and the Rise of Technology (1997) at 1; L McCreary 'What Was Privacy?' (2008) 86 Harvard Business Review 123; King I 'On-line Privacy in Europe – New Regulation for Cookies' (2003) 11 *Journal of Information and Communication Technology Law* 225; Bamberger KA and KM Deirdre KM 'Privacy in Europe: Initial Data on Governance Choices and Corporate Practices', (2013) 81 *George Washington Law* Review at 1532; Makulilo (2013) *DuD* 447; LA Abdulrauf and AA Daibu (2016) *NAUJ* 113; Neethling (2005) *SALJ* 20.

In spite of the various definitions and/or descriptions of privacy, scholars agree that privacy is a valuable right that should be protected.[11]The nature of the protection that should be accorded to privacy is another arguable issue. Whilst international law through the United Nations (UN) conventions protects privacy as a human right, some regional and national laws recognise privacy both as a human right and an economic right. For example, the United States of America protects information privacy as an economic right, but recognises other aspects of privacy as a human right. Regional conventions either protect the right to privacy strictly as a human right or as both an economic and human right.[12] The European conventions, such as the European Convention on Human Rights (ECHR) and the European Union Charter of Fundamental Rights (EU Charter), protect privacy as a human right. The EU Charter further protects the information privacy as a separate category of human right from the right to private life.

On the other hand, the African Charter on Human and Peoples Rights (ACHPR) does not provide for a right to privacy.[13] However, the African Charter on the Rights and Welfare of the Child (ACRC) protects the privacy of a child as a human right subject to a parent or legal guardian's supervision.[14] Various Member States of the African Union, including Nigeria uphold the notion of the protection of privacy as a human right thereby protecting privacy in their Constitutions. Although the ACHPR does not provide for a right to privacy, the African Union Convention on Cyber Security and Personal Data Protection (AUCCP) regulates the use of personal information for economic purposes.[15] Also, the recent Declaration of Principles on Freedom of Expression and Access to Information in Africa provided guidelines for the protection of personal information and communications privacy.[16]It can thus be argued that the African Union protects the right to privacy both as a human right and as an economic right. Nigeria is yet to ratify the AUCCP and as such has no obligation to domesticate its provisions but she has obligations arising from the treaties that she has ratified. Also, the Declaration of Principles on Freedom of Expression and Access to Information in Africa is not a treaty as such it is also not binding on Nigeria.

International Law On The Right To Privacy

Nigeria and several other African States are Member States of the UN. There are obligations in the form of laws, resolution and rules that Member States must adhere to upon their ratification.[17] The compliance of Member States' with international treaties does not impose an

[11] Makulilo (2013) *DuD* n9 448; The protection of the right to privacy from the United States' view is that privacy should stem from a concept of liberty thus its protection should be as an economic right. The European Union views privacy from a concept of dignity and so protects privacy as a human right.

[12] Such as the Universal Declaration on Human Rights (UDHR), (ICCPR), Convention on the Rights of a Child and the ICRMW; O Diggelmann and MN Cleis 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Rights Law Review* 451.

[13] The ACHPR was adopted by the Organisation of African Unity (now African Union) on the 1 June 1981. It entered into force on the 21 October 1986, 21 I.L.M 58; Article 10 of the ACRC.

[14] Organization of African Unity (OAU), The African Charter on the Rights and Welfare of the Child (ACRC) was adopted by the OAU on the 11 July 1990, CAB/LEG/24.9/49.

[15] The African Union Convention on Cyber Security and Personal Data Protection, 27 June 2014 *(*EX.CL/846 (XXV).

[16] Principle 40 and 41Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted by the ACHPR at its 65th Ordinary session held from 21st October-10th November, 2019 in Banjul, Gambia.

[17] M Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *The European Journal of International Law* 912; The protection of the right to privacy from the United States' view is that privacy should stem from a concept of liberty thus its protection should be as an economic right. However, American Courts has imputed a right to privacy to the American Constitution though there was no literal protection in the Constitution. The European region through their charters, the ECHR and the EU Charter provided for the right to privacy as a human right. The EU Charter goes further to provide for an additional right to data privacy from a concept of dignity and so protects privacy as a human right.

obligation to incorporate the specific wordings of the texts in their domestic legislation.[18] However, legislation of the Member States must reflect their obligation in international law so that all beneficiaries and parties to the agreement can mutually benefit from it.[19]

The UN's major treaty on the right to privacy is the ICCPR, which in itself is a development of the UDHR. The UDHR is a UN declaration on human rights and it is not binding on Member States of the UN. However, it has been argued to have universal application because its provisions are fundamental to the protection of the inherent rights of all humans.[20] The ICCPR is a treaty and so it is binding on the Member States of the UN that ratify it. Other UN treaties on the right to privacy are the CRC and the ICRMW, but they relate to children and migrant workers respectively. As such, they are not applicable to everyone. Also, the CRC and the ICRMW are similar to the ICCPR.

The difference is that the ICRMW includes the protection of "other communications" as separate protection from that of "correspondence" although the latter has been interpreted to include all types of communication.[21] Therefore, the ICCPR will be utilised in this article as the major international treaty on the right to privacy. However, since the ICCPR derives its provisions from the UDHR, it is important to consider the provisions of the UDHR on the right to privacy before analysing the ICCPR.

The Right to Privacy in the Universal Declaration on Human Rights

The UDHR was adopted by the UN in 1948 and it serves as a template for an international standard on human rights globally.[22] Prior to the UDHR, the UN Charter, 1945 (UN Charter) had provided for the protection of fundamental human rights of all persons as one of its objectives.[23] However, the UN Charter did not provide for a Bill of Rights, hence the UDHR was prepared as a catalogue of human rights that are fundamental to a person. The UDHR is a declaration, as such, it lacks a legally binding force of a treaty. Nevertheless, the subsequent UN treaties on human rights such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CRC, reflect the principles contained in the UDHR.[24]

The UDHR also serves as a harmonised global consensus for human rights hence States that have not ratified the UN treaties on human rights can refer to the UDHR for guidance on the international standards for human rights.[25] The UDHR is argued to apply globally but its

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[18] The two routes for the incorporation of treaties in domestic legislation are the monist and dualist views. The monist view holds the theory that treaties should be adopted directly as part of domestic legislation while the dualist theorist supports the view that treaties must be enacted as law before they are recognised as a domestic law; J Coyle 'Incorporative Statutes and the Borrowed Treaty Rule' (2010) 50 *Virginia Journal of International Law* 655, 656.

[19] R Brewster 'The Domestic Origins of International Agreements' (2004) 44 *Virginia Journal of International Law (VJIL)* 501, 540; O Hathaway 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal (YLJ)* 1935-1940.

[20] UDHR, 10 December 1948, General Assembly Resolution (GA Res.) 217 A (III); ICCPR, 16 December 1966, 999 United Nations Treaty Series (UNTS), 171; M Shaw *International Law* 7ed, (2012) 33; NJ Udombana 'Mission Accomplished? An Impact Assessment of the UDHR in Africa', (2008) 30 *Hamline Journal of Public Law and Policy (HJPLP)* 337; E Engle 'Universal Human Rights: A Generational History' (2006) 12 *Annual Survey International and Comparative Law (ASICL)* 219, 220.

[21] D Harris, M O'Boyle and E Bates *Laws of the European Convention on Human Rights* 2ed (2009) 380; I Georgieva 2015 *Utrecht Journal of International and European* Law 115.

[22] Shaw *International Law* 33; NJ (2008) *HJPLP* 337; E Engle *ASICL* 219, 220.

[23] Preamble and article of the UN Charter, 24 October 1945, 1 UNTS XVI.

[24] ICESCR, 16 December 1966, 993 UNTS, 3; Siracusa Principles par [B-21].

[25] T Li-Ann 'Reading Rights Rightly: The UDHR and its Creeping Influence on the Development of Singapore Public Law' (2008) *Singapore Journal of Legal Studies (SJLS)* 268; P Laurens, The Evolution of Human Rights: Visions Seen, (1998) at 205-257; R Sloane 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights' (2001) 34 *Vanderbilt Journal of Transnational Law* 531.

universal acceptance is debatable. The claim of universality of the UDHR is supported by the evidence of its influence on the Bill of Rights in the Constitution of several countries.[26] The interpretation of the UDHR varies in the texts of domestic laws. However, the notion that everyone or the very least their citizens are entitled to fundamental human rights remains in the fabric of most of these laws.[27] The argument for the universal application of the UDHR is also because it consists of aspirational goals for the protection of human rights. Hence, it is argued that the absence of affirmation of the UDHR does not exempt a State from adhering to its provisions.[28]

On the other hand, the universality of the UDHR has been refuted by scholars who argue that many countries were not represented during the drafting and signing of the UDHR.[29]However, countries that were not represented earlier were given a choice to affirm or deny the UDHR. Another diverging argument against the universality of the UDHR stated that its provisions cannot be given a status of universality because of varying cultural, political and religious beliefs that do not align with the provisions of the UDHR.[30] However, the discussion and debates prior to the final draft of the UDHR show that different cultural, political and religious beliefs were considered, hence the UDHR can be argued to represent a common statement of concession of rights that are fundamental to humans.[31] It can be deduced from the various scholarly arguments that although the UDHR may not be universally applicable, the notions of human rights are inherent in all persons and as such is universal.[32]

Article 12 of the UDHR provides as follows:

> No one shall be subjected to arbitrary interference, with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 12 of the UDHR did not prohibit interference with privacy, home, family or correspondence altogether rather the prohibition is against arbitrary interference. Therefore, article 12 of the UDHR recognises the need for circumstances where interference with privacy, family, home or correspondence may be necessary. In other words, if interference with privacy, family, home or correspondence is not arbitrary, then there is no violation of article 12 of the UDHR.

The UDHR also provides for a right to the protection of the law against arbitrary interference of privacy, family, home or correspondence. The protection of the law can occur

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[26] MA Glendon, A Whole Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, (2001) 228. It is estimated that the UDHR influenced about 90 Constitutions.

[27] J Morsink, The Universal Declaration of Human Rights and the Holocaust: An Endangered Connection (2019) 44.

[28] T LI-Ann *SJLS* 272; Lindgren 'The Declaration of Human Rights in Postmodernity', (2000) 22 *Human Rights Quarterly* 478*;* Charney J "Universal International Law" (1993) *American Journal of International Law* 529, 541.

[29] Morsink J, The Universal Declaration of Human Rights: Origins, Drafting, and Intent, (1999) xiv; Z Elkins, T Ginsburg and B Simmons 'Getting to Rights: Treaty Ratification, Constitutional Convergence and Human Rights Practice' (2013) 54 *Harvard Law Journal* 75.

[30] N Le 'Are Human Rights Universal or Culturally Relative?' (2016) 28 *Peace Review* at 204-206; FR FR Tesón 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 878; R Adami 'Reconciling Universality and Particularity through a Cosmopolitan Outlook on Human Rights' (2012) 4 *Cosmopolitan Civil Societies Journal* 24.

[31] S Benhabib, Another Cosmopolitanism, (2008) 71; Li, Ethics, Human Rights and Culture – South East Asia and Universalist Theory (2006) 401.

[32] T Finegan 'Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood' (2012) 37 *Australian Journal of Legal Philosophy* 184.

before an infringement of a right by setting up safeguards against such infringement. Also, protection of the law can occur after an infringement of article 12 of the UDHR by ensuring that there are appropriate remedies to compensate for infringement of rights. This means that there must be adequate safeguards ensuring that a person whose "article 12" rights have been interfered with can seek redress.[33]

As shown by article 12 of the UDHR, the right to privacy is not absolute, hence it is subject to interferences where necessary. However, such interference must be regulated by law as provided by article 29 of the UDHR which provides as follows:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 29(2) of the UDHR provides for the manner and circumstances in which human rights may be limited. While article 12 of the UDHR does not provide for the regulatory mechanism for the limitation of the right to privacy, article 29 of the UDHR provides that limitation of rights must be statutorily regulated therefore the right to privacy may only be limited by statute. Article 29 of the UDHR further provides that laws limiting human rights must be for specified purposes. These specified purposes are the protection of the rights of others and the preservation of the just requirements of morality, public order and the preservation of the welfare of a democratic society.

The Right to Privacy in the ICCPR

The International Covenant on Civil and Political Rights provides for the right to privacy as one of the recognised fundamental human rights.

Article 17 of the ICCPR provides as follows:

(a) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(b) Everyone has the right to the protection of the law against such interference or attacks.

The protection in article 17(1) of the ICCPR, just like the UDHR, protects not only privacy, but also family, home, correspondence, reputation and honour. However, ICCPR, unlike the UDHR, includes the prohibition of unlawful interference with privacy in addition to the prohibition of arbitrariness of interference with privacy provided by the latter. Hence, article 17 of the ICCPR consists of four categories of protection. The first is the protection against unlawful interference to privacy while the second category is the protection against the arbitrariness of any interference to privacy. The third category is the protection of the law against the interference of privacy, home and correspondence while the fourth category is the protection of the law against attacks on a person's honour and/or reputation.

[33] E/CN.4/1985/4, annex; Siracusa Principles par B-[i][15] (April, 1985) https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf (accessed 2019-06-10).

To understand the full import of the first and second category of protection provided by article 17 of the ICCPR, it is important to understand the meanings of the words "arbitrary" and "unlawful" utilised in article 17 of the ICCPR. This is because the protection provided in article 17 of the ICCPR is to the extent that interference with privacy, family, home and correspondence is arbitrary or unlawful. Therefore, where such interference to privacy is lawful or non-arbitrary, then the interference is permitted by the ICCPR. In understanding the meaning of the terms "unlawful" and "arbitrary interference" in article 17 of the ICCPR, the General Comment 16 (GC 16), the Siracusa Principles, UN resolutions and reports serve as reference for the exposition.

General Comments (GCs) elaborate on the provisions of UN treaties and so should be read together with the treaties. Also, the Human Rights Committee (HR Committee) utilises GCs in their decisions, hence GCs are highly persuasive documents. However, they are not legally binding on the Member States. In addition, the GC 16 was a report of the HR Committee that was made in response to the inadequacies of the reports of the Member States on the implementation of article 17 of the ICCPR.[34] Likewise, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles) is a definitional document to the ICCPR that is neither a treaty nor a resolution, hence not binding on Member States, yet it is a useful explanatory document to the ICCPR. The usefulness of the Siracusa principles is emphasised by the reference made to it in a report of the Human Rights Council (HR Council) on the right to privacy in the digital age to explain the various terms contained in the ICCPR.[35]

UN resolutions have been listed as one of the sources of international law because the agreements of Member States who sign the resolution signify evidence of their current State practice or intended State practice.[36] Hence, they are important in fitting human rights treaties in the current international realities. A collaboration of the above documents will assist in defining the terms "unlawful" and "arbitrary" utilised in the ICCPR.

Unlawful Interference of Correspondence and/or Privacy: The General Comment 16 emphasised that any interference to privacy not provided for by legislation is unlawful. The report stressed that "unlawful means that no interference can take place except in cases envisaged by law".[37] Hence, there must be a statutory regulation that enables any interference to correspondence and/or privacy otherwise such interference is unlawful.[38] Hence, domestic legislation of Member States must regulate any interference with privacy, home, family or correspondence. Although the General Comment 16 asserted that Member States must "specify in detail the precise circumstances in which such interferences may be permitted", it did not elaborate on the effects of domestic law omitting to specify the circumstances of interference to

[34] GC 16 at para 2.

[35] Annual report of the UN High Commissioner for Human Rights on the Right to Privacy in the digital age, 27th session, agenda items 2 and 3, A/HRC/27/37, 30 June 2014, para 22.

[36] Shaw *International law* 59; ICJ's Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Preoccupied Palestinian Territory, ICJ Reports, 2004 136 and 171; M Fitzmaurice 'History of Article 38 of the Statute of ICJ' in Besson and D' Aspremont (eds) *The Oxford Handbook of the Sources of International Law* (2017) 188; J D'Aspremont 'The Idea of 'Rules' in the Sources of International Law' (2013) 84 *British Yearbook of International Law* 105; Brewster *VJLJ* 501, 540; Hathaway *YLJ* 1935-1940.

[37] General comment No.16 para 3; J Michael, Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology, (1994) 5.

[38] *P.G and J.H* v *United Kingdom*, application no 44787/98 at para 37-38 Judgement of the ECtHR on 25 December 2001; *Kruslin v France* (1990) Series A, No.176-A at para 30, 32-36; *Huvig v France* (1990) Series A, No.176-b at para 29, 31-35; K Aquilina 'Public Security Versus Privacy in Technology Law: A Balancing Act?', (2010) 26 *Computer Law & Security Review* 134-136; Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 381.

privacy. Also, the General Comment 16 failed to specify other provisions that must be included in a domestic law in order for it to qualify as lawful within the definition of article 17(1) of the ICCPR.[39]

Building on General Comment 16 and in consideration of the advancement in information and communications technology (ICT) since the adoption of the ICCPR, the UN General Assembly adopted several resolutions that asserted the need for interference with privacy to be regulated by legislation.[40] The UN General Assembly at its 71st session adopted a resolution on the right to privacy in the digital age that provides some requirements for legislation on the interference to privacy.[41] The UN resolution of the 71st session stipulates that legislation providing for interference with the right to privacy must be "publicly accessible, clear, precise, comprehensive and non-discriminatory". Furthermore, articles 12(3), 18(3), 19(3), 21 and 22(2) of the ICCPR, which are the provisions with explicit limitation clauses all stated that permissible limitations must be provided for by law. Although article 17(1) of the ICCPR did not define "unlawful" yet it can be defined in light of other articles of the ICCPR as limitation of a right that is not provided for by domestic law.

The Siracusa Principles defined the term "prescribed by law" to mean a national law of general application that is in force at the time of the limitation of the right.[42] Such law must also be reasonable, non-arbitrary, clear and accessible. Also, the domestic law must provide for effective remedies and safeguards against abuse. Therefore, the term lawful in article 17 of the ICCPR refers to interferences with privacy, family, home or correspondence that are provided for in a national law of general application that is in force at the time of the interference. Also, the said law regulating interference to privacy must be reasonable, "publicly accessible, clear, precise, comprehensive and non-discriminatory".[43]

In defining the term "discriminatory" article 2(1) of the ICCPR provides as follows:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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[39] A Deek 'An International Legal Framework for Surveillance' (2015) *Virginia Journal of International Law* 348, 352.

[40] UN General Assembly Resolution on the Right to Privacy in the digital age, 68th session, agenda 69(b), A/RES/68/167, 21 January 2014, 2; UN General Assembly Resolution on the Right to Privacy in the digital age, 69th session, agenda 68 (b), A/RES/69/166,10 February 2015, 2; UN Human Rights Council Resolution on the Right to Privacy in the digital age, 34th session, agenda 3, A/HRC/34/L.7/Rev.1, 22 March 2017, 3; Annual report of the UN High Commissioner for Human Rights on the Right to Privacy in the digital age, 27th session, agenda items 2 and 3, A/HRC/27/37, 30 June 2014, at 2, 6,25; UNs document "The Right to Privacy in the Digital Age" (undated) https://www.ohchr.org/en/issues/digitalage/pages/digitalageindex.aspx (accessed 5 November 2018).

[41] UN General Assembly Resolution on the Right to Privacy in the digital age, 71st session, agenda 68 (b), A/RES/71/199, 25 January 2017, 3.

[42] Siracusa Principles par [B-15].

[43] UN General Assembly Resolution on the Right to Privacy in the digital age, 71st session, agenda 68 (b), A/RES/71/199, 25 January 2017, 3; UN General Assembly Resolution on the Right to Privacy in the digital age, 68th session, agenda 69(b), A/RES/68/167,21 January 2014, 2; UN General Assembly Resolution on the Right to Privacy in the digital age, 69th session, agenda 68 (b), A/RES/69/166,10 February 2015, 2; UN Human Rights Council Resolution on the Right to Privacy in the digital age, 34th session, agenda 3, A/HRC/34/L.7/Rev.1, 22 March2017, 3; Annual report of the UN High Commissioner for Human Rights on the Right to Privacy in the digital age, 27th session, agenda items 2 and 3, A/HRC/27/37, 30 June 2014 para 2, 6 and 25; UN document "The Right to Privacy in the Digital Age" (undated), https://www.ohchr.org/en/issues/digitalage/pages/digitalageindex.aspx (accessed 5 November 2018).

Article 2(1) of the ICCPR indicates that Member States to the ICCPR must ensure that all the rights provided in the ICCPR must be provided to all persons within their territory. Article 2 (1) of the ICCPR also means that any limitations on the rights provided in the ICCPR must apply in equal proportion to everyone within the territory of the Member States. Hence, the same human rights that apply to citizens of a Member State of the ICCPR must also apply to non-citizens within the territory of such Member State.

Arbitrary Interference with the Right to Privacy: The GC 16 did not give the meaning of arbitrary interference, but it explained that the inclusion of the word "arbitrary" in addition to "unlawful" in article 17(1) of the ICCPR was to ensure that domestic legislation of Member States conforms to the aims and objectives of the ICCPR.[44] This signifies that domestic legislation can provide for interference with privacy, family, home or correspondence and still be arbitrary. However, in paragraphs 4 and 8 of the GC 16, there were some requirements that legislation permitting interference to privacy must adhere to be non-arbitrary. These requirements are reasonableness, detailed provisions on the circumstances in which interference may be permitted, the designated authority to permit such interference and the determination of interference on a case by case basis.

The HR Committee, after ascertaining its jurisdiction under rule 87 of its procedures and article 5 of the Optional Protocol to the ICCPR to determine the case of *Hulst v Netherland* and referring to paragraph 8 of the GC 16 in respect of legislation permitting interference to privacy stated that:

> The Committee recalls that the relevant legislation authorizing interference with one's communications must specify in detail the precise circumstances in which such interference may be permitted and that the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis.[45]

Therefore, the GC 16 and the HR Committee in interpreting article 17 of the ICCPR provided guidelines to determining whether the legislation of a Member State permitting interference with privacy fulfils the "non-arbitrariness" requirement of the ICCPR. This signifies that legislation on interference to privacy must, at the very least, provide for the requirements stated in paragraphs 4 and 8 of the GC 16 for such legislation to be non-arbitrary.[46]

The 2014 annual report of the Human Rights Commissioner to Human Rights Council (2014 report) further explained that in addition to compliance with the ICCPR objectives, limitations on the right to privacy must also be reasonable in the particular circumstances.[47] The report defined "reasonableness in the circumstances" to mean that interference with the right to

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[44] General Comment 16 par [4].

[45] *Hulst v Netherland* Communication No. U.N.Doc.CCPR/C/82/D/903/1999 par [7.7] (2004).

[46] In *Halford v United Kingdom*, (1997) Reports of Judgements and Decisions, 1997-III, 1004, the ECtHR stated as follows in regard to interception of communications: "[i]n the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to circumstances in and conditions on which public authorities are empowered to resort to any such secret measures." This statement is in line with the UNHRCt's requirement for legislation permitting interference with privacy; *Klass v Germany* (1978) Series A, No. 28 par [36-55]; *Malone v United Kingdom* (1984) Series A, No.82 para 79.

[47] Human Rights Commissioner's Annual Report on the Right to Privacy in the digital age, 27th session, agenda 2 &3, A/HRC/27/37, 30 June 2014, 21.

privacy must be proportional and necessary. Hence, proportionality and necessity of the interference to the right to privacy must be ascertained for arbitrariness to be disproved.

The 2014 report further refers to the Siracusa Principles as a document that defines the term "arbitrary" in the ICCPR whereas the authors of the Siracusa Principles specifically excluded the definition of the term "arbitrary" because of time constraints.[48] However, they defined "necessary" as implying that limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
(b) responds to a pressing public or social need;
(c) pursues a legitimate aim; and
(d) is proportionate to that aim.

Thus, a limitation on the right to privacy must, in addition to being lawful, be proportionate, pursue a legitimate aim and respond to a pressing public need.

Summing up the provisions of articles 2(1) and 17(1) of the ICCPR, the Member States to the ICCPR must ensure the protection of the privacy of everyone within its territory. In the event of interference with privacy, such interference must be provided for by a law of general application that is in force at the time of the interference. Such law must be publicly accessible, clear, precise and non-discriminatory. Also, the application of such law must be non-arbitrary, in other words, the interference with privacy must be reasonable, necessary in the circumstance and proportionate.

The Right To Privacy In The 1999 Constitution Of Nigeria

The Federal Republic of Nigeria (Nigeria) has ratified the ICCPR thus she is bound by its provisions and one of which is the protection of privacy.[49]The Nigerian National Assembly has the obligation to domesticate treaties by enacting them as laws. Nigeria has a dualist approach to the domestication of treaties and section 12(1) of the Nigerian Constitution provides for the power of the Nigerian National Assembly to enact international treaties into laws.[50] Therefore, treaties that are ratified are not enforceable as laws in Nigeria until they have been domesticated by the Nigerian National Assembly either wholly like the ACHPR or by inserting the provisions into domestic laws like the ICCPR.

With regard to the right to privacy, the Bill of Rights in the Nigerian Constitution provides for the protection of this right. As a result of the supremacy of the Nigerian Constitution, any statute that is inconsistent with the Nigerian Constitution will be invalid to the extent of its inconsistency.[51]

Section 37 of the Nigerian Constitution provides for a right to privacy as "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

The Nigerian Constitution provides for the protection of privacy of all Nigerian citizens, hence Nigerians whether within or outside Nigeria are guaranteed of their right to privacy. However, the right to privacy of non-citizens of Nigeria is not protected hence section 37 of the

[48] Siracusa Principles, 3.
[49] Nigeria acceded to the ICCPR on 29 July 1993.
[50] Section 12 (1) of the Nigerian Constitution provides that: "No treaty between the Federation or any payment thereof with respect to matters not included in the Executive Legislative List for the purpose of implementing a treaty".
[51] Section 1 (3) of the Nigerian Constitution; *The Federal Republic of Nigeria v Osahon* (2006) Law Pavilion Electronic Law Report (LPELR)-3172 (Supreme Court (SC)) 27 [a-c].

Nigerian Constitution is discriminatory in light of article 2(1) and 17(1) of the ICCPR.[52] This is because as discussed above, article 2(1) of the ICCPR provides that the rights of everyone in the territory of an ICCPR Member State must be protected irrespective of certain distinguishing factors including nationality and birth. Excluding a person from the protection of privacy as a result of his/her nationality is discriminatory. Therefore, section 37 of the Nigerian Constitution is discriminatory and not in line with international law.

Constitutional Limitation on the Right to Privacy

The Nigerian Constitution protects the rights of all citizens of Nigeria, however, the rights to privacy, correspondence, home, telephone conversation and telegraphic communications that are protected in section 37 of the Nigerian Constitution are not absolute. The rights in section 37 of the Nigerian Constitution together with the rights in sections 38, 39, 40 and 41 of the Nigerian Constitution are all limited by section 45(1) of the Nigerian Constitution. The rights in sections 38, 39, 40 and 41 of the Nigerian Constitution are the right to conscience, thoughts and religion, right to the freedom of expression, right to assemble freely and/or associate with other persons and the right to freedom of movement respectively.

Section 45(1) of the Nigerian Constitution, which is the limitation clause provides as follows:

> 45. (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society
>
> (a) in the interest of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the rights and freedom or other persons.

Accordingly, section 45(1) of the Nigerian Constitution implies that the right to privacy as one of the protections guaranteed in section 37 of the Nigerian Constitution, shall not render void any law that is reasonably justifiable in a democratic society and that is for the legitimate purposes stated in sections 45(1)(a) and (b). Two issues arise from this provision when considering the limitation of rights as provided for by the UDHR and the ICCPR. Firstly, what kind of law can invalidate sections 37 and 41 of the Nigerian Constitution? Secondly, what does the term "reasonably justifiable in a democratic society" mean in the context of section 45(1) of the Nigerian Constitution?

Permissible Statutory Limitation to the Right to Privacy in Nigeria: In answering the first question, a distinction must be made between the words "Law" and "Act" in the Nigerian Constitution.[53] The provision of section 45(1) of the Nigerian Constitution, which enables "any law" to limit the right to privacy, is at odds with the definition of the term "law" in the Nigerian Constitution.[54] Section 318 of the Nigerian Constitution being the interpretation section to the Nigerian Constitution, defines the terms "Law" and "Act" utilised therein. Section 318 of the Nigerian Constitution defines an "Act" as "any law made by the National Assembly…" and a

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[52] A Kusamotu 'Privacy law and technology in Nigeria: The legal framework will not meet the test of adequacy as mandated by Article 25 of European Union Directive 95/46', (2007) *16 Information & communications Technology Law* at 154; LA Abdulrauf 'Do We Need to Bother about Protecting Our Personal Data: Reflections on Neglecting Data Protection in Nigeria', (2014) 5 *Yonsei Law Journal* 182.

[53] The word "Law" in the upper case refers to Nigerian Constitutional definition of a laws enacted by State Houses of Assembly while "law" in the lower case refers to law in the general usage of the word.

[54] Ezeanokwasa, Ewulum, Mbanugo 'Religious Freedom and its Limitation Under the1999 Constitution of Nigeria', (2016) 7 *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 63.

"Law" as "a law enacted by the House of Assembly of a State".[55] Therefore, "Law" in the Nigerian Constitution must be interpreted to refer to laws enacted by the House of Assembly and an "Act" must be interpreted to refer to "laws" enacted by the National Assembly".

Also, section 18 of the Interpretation Act of Nigeria defines a Law as "any law enacted or having the effect as if enacted by the legislature of a State…"[56] Consequently, section 45 of the Nigerian Constitution must be interpreted to mean that sections 37, 38, 39, 40 and 41 of the Nigerian Constitution can only be limited by a "Law". Hence, an "Act" cannot limit the right to privacy and the other rights referred to in section 45(1) of the Nigerian Constitution.

The Supreme Court in *Kalu v Odili* decided as follows:

> It is a well-established principle of the construction of statutes, and indeed the [Nigerian] Constitution, that where the definition section, therein has defined a particular word or expression, the meaning so given to the word, unless the context otherwise requires, shall be used throughout that statute.[57]

Arguably, the intention of the interpretation of the draftsmen is that an Act may limit the right to privacy. This is because some of the legitimate aims in section 45(1)(a) and (b) of the Nigerian Constitution are on the exclusive legislative list.[58] This means that laws protecting issues such as national security and defence can only be enacted by the National Assembly. Nevertheless, section 45(1)(a) of the Nigerian Constitution provides that "Laws" enacted in the interest of defence are permissible limitations of sections 37, 38, 39, 40 and 41 of the Nigerian Constitution when only an "Act" can legislate on issues of defence. The above shows the inconsistency between the intention of the draftsmen of the Nigerian Constitution and the actual provisions of section 45(1)(a) and (b) of the Nigerian Constitution. In spite of the inconsistency, legislation must be interpreted as it is and not as it ought to be.[59]

Consequently, section 45(1) of the Nigerian Constitution must be interpreted to mean that sections 37, 38, 39, 40 and 41 of the Nigerian Constitution can only be limited by a Law. Hence, an enactment of the National Assembly cannot limit the right to privacy and the other rights referred to in section 45(1) of the Nigerian Constitution. It can, however, be argued in line with the Supreme Court's decision in *Kalu v Odili,* that "Law" in the context of section 45(1) of the Nigerian Constitution does not refer to an enactment of a House of Assembly but to all types of enactments including Federal and State enactments. Hence, Acts of the National Assembly and the Laws of the State House of Assemblies qualify as "Law" in the context of section 45(1) of the Nigerian Constitution. However, section 18 of the Interpretation Act is very clear that expressions therein defined shall have the meaning assigned to them in any Act. Therefore, the meaning assigned to the term "Law" in section 18 of the Interpretation Act and section 318 of the Nigerian Constitution should be the contextual meaning in section 45(1) of the Nigerian Constitution.

Another argument that may be proffered for the interpretation of the term "Law" in section 45(1) of the Nigerian Constitution including enactments of the National Assembly is the

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[55] Nigeria is a Federal Republic made up of 36 states and the Federal Capital Territory. The Legislative arm of Government in Nigeria is divided into the Federal legislature and the State legislature. The Federal legislature consists of the National Assembly and the House of Representatives and they make laws that are applicable to the whole country. The State legislature is the House of Assembly and they make laws that are applicable in the States only.

[56] Interpretation Act Chapter (CAP) 121 Laws of Federation of Nigeria (LFN) 2004.

[57] The court in *Kalu v Odili* (1992) LPELR – 1653 (SC).

[58] Exclusive Legislative list, Second schedule, Part I, Nigerian Constitution.

[59] The court in *Kalu v Odili* (1992) LPELR – 1653 (SC) stated as follows: "It is a well established- principle of the construction of statutes, and indeed the [Nigerian] Constitution, that where the definition section, therein has defined a particular word or expression, the meaning so given to the word unless the context otherwise requires, shall be used throughout that statute";

application of the rules of interpretation. The literal rule of interpretation of statutes suggests that the plain meaning of a word be used in its interpretation while the golden rule of interpretation of statutes provides that regard be had for the intention of draftsmen in the interpretation of statutes.[60] The literal rule of interpretation of statutes when applied to the term "Law" in section 45(1) of the Nigerian Constitution also suggests that "Law" means an enactment of both Federal and State legislature.

In the same vein, the golden rule of the interpretation of statutes suggests that the intention of draftsmen with respect to section 45(1) of the Nigerian Constitution is that the enactment of Federal legislatures should limit the rights therein. Also, the *ejusdem generis* rule provides that general words are limited to the same kind of interpretation as the particular words that it follows.[61] As explained above, words in section 45(1)(a) – (e) of the Nigerian Constitution suggests a reference to an "Act" being the limiting statute and Law. Hence, the rules of *ejusdem generis* support the interpretation of the term "Law" in section 45(1) of the Nigerian Constitution as an Act.

In spite of these rules of interpretation of statutes supporting the definition of the term "Law" in section 45(1) of the Nigerian Constitution as an Act, section 318 of the Constitution is an in-built interpretation section of the Nigerian Constitution that specifically defines the term "Law" in the Nigerian Constitution as an enactment of a House of Assembly. Hence, the application of the rules of interpretation of statutes will conflict with section 318 of the Nigerian Constitution.[62]

The Nigerian Court of Appeal in *Nyame v Federal Republic of Nigeria* held that "[c]ourts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself".[63] In the instance of section 45(1) of the Nigerian Constitution, the courts are not allowed to read alternative words into a provision when there is a clear definition of such word in the Act itself. Therefore, the term "Law" as utilised in section 45(1) of the Nigerian Constitution refers to enactments of a State House of Assembly. However, the Nigerian Courts have interpreted section 45(1) of the Nigerian Constitution to mean an Act thereby applying the rules of interpretation of statutes instead of the constitutional definition of the term "Law".[64]

It is trite that the Laws of a House of Assembly are only applicable in the State where such enactment is made hence it is not a law of general application. In the light of articles 12 and 29 of the UDHR and article 17 of the ICCPR, any legislation in Nigeria that seeks to limit the right to privacy is unlawful. This is because if such legislation is an enactment of the National Assembly then it is not a lawful limitation as provided by section 45(1) of the Nigerian Constitution, wherein a "Law" and not an "Act" can limit sections 37 to 41 of the Nigerian Constitution. However, if an enactment of a House of Assembly provides for a limitation of rights in section 37 to 41 of the Nigerian Constitution, such law, although not lawful with respect to compliance with the ICCPR, must be followed by the courts. The Supreme Court in *Abacha v*

[60] *Okotie-Eboh v Manager* (2004) 18 Nigerian Weekly Law Report (NWLR) (Pt.905) 242; *Awolowo v Shagari* (1979) 6-9 SC 73; *Amaechi v Independent National Electoral Commission* (2008) 5 NWLR (Pt.1080) 227 SC; *Chigbu v Tonimas Nig Ltd* (2006) NWLR (Pt.984) 189; *Onashile v Idowu* (1961) 2 SCNLR 53; *Adejumo v Military Governor of Lagos State* (1972) 3 SC 45 @54; *Fidelity Bank PLC v Monye* (2012) Law Pavilion Electronic Law Report (LPELR)-7819 (SC).

[61] *Okotie-Eboh v Manager* fn 51; *Buhari v Yusuf* (2003) 14 NWLR (Pt.841) 44 @ 536.

[62] *A.G Federation v Abubakar* (2007) 10 NWLR (Pt.1041) 1; *Ifezu v Mbadugha* (1984) 5 SC 79@101; *I.M.B V Tinubu* (2001) 16 NWLR (Pt.740) 670 @ 690.

[63] 2009 LPELR-8872 (CA); *Egbue v Araka* (1996) 2 NWLR (pt. 433) 694 @ 702.

[64] *A.G of Kebbi State v Jokolo* (2013) LPELR-22349 (CA) 46-47.

*Fawhimi*stated as "… a State is always at liberty if it deems desirable due to domestic circumstances or international considerations to legislate a law inconsistent with its treaty obligations."[65]

On the other hand, if an Act limits any of the rights in sections 37 to 41 of the Nigerian Constitution, then such Act will be inconsistent with the sections 45(1) and 318 of the Nigerian Constitution and as such void. Ordinarily, such law will be a law of general application and may comply with the ICCPR but not applicable in the court. Nonetheless, the Nigerian courts in its interpretation of section 45(1) of the Nigerian Constitution employed the rules of interpretation of statutes and interpreted "Law" in section 45(1) of the Nigerian Constitution to mean enactment of the National Assembly.[66]

Reasonably Justifiable: The second question for consideration is the meaning of the phrase "reasonably justifiable in a democratic society" in section 45(1) of the Nigerian Constitution. It is also helpful to disintegrate the phrase by defining the words "reasonably justifiable" and "democratic society" differently. The Siracusa Principles defined a "democratic society" as one that incorporates and respects the rights set out in the UDHR and the UN Charter.[67] This definition applies to Nigeria because she is a Member State of the UN and a signatory to the ICCPR. The Siracusa Principles is a definitional document to the ICCPR hence Nigeria may receive guidance on similar terms.

The term "reasonably justifiable" was neither defined in the Siracusa Principles nor in the Nigerian Constitution. As such, courts have a duty to interpret and apply the terms based on their own understanding. In interpreting section 45(1) of the Nigerian Constitution in *A.G of Kebbi State v Jokolo*, the Nigerian Court of Appeal while not defining the term "reasonably justifiable" held that the action of a State must be backed by a law that is reasonably justifiable in a democratic society. As such, courts must scrutinise laws, executive and/or administrative orders to ensure that they are reasonably justifiable in a democratic society. The Court of Appeal held as follows:

> the powers of the Governor of any State must be exercised in accordance with law else the Courts will not shy from holding as invalid any law, an executive or administrative action that is not reasonably justifiable in a democratic society, be it in the interest of defence, public safety, public order, public morality, or public health, or that is not for the purpose of protecting the rights and freedoms of persons in any part of the Federation.[68]

The Court of Appeal in *A.G of Kebbi State v Jokolo*, however, did not need to consider the term "reasonably justifiable" because the action of State in dispute was not backed by law, thus there was no law which the court could scrutinise. Nevertheless, the court pointed out the correct order of scrutinising an action that seeks to limit a fundamental right. The court must first determine if such action is backed by a law, then the court will further consider whether such law is reasonably justifiable in a democratic society. Thereafter, the court will determine whether the

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[65](2000) 6 NWLR (Pt.660) 228; *Macarthys Ltd v Smith* (1979) All ER 325 @ 329; The word "State" in *Abacha v Fawehimi* refers to a country being a Member State of a treaty.

[66] *Hassan v Economic and Financial Crimes Commission* (2013) LPELR-22595 (CA) 18-19; *Ukpabio v National Films and Video Censors Board* (2008) LPELR-4129 (CA) 34-36; *Inspector General of Police v All Nigeria People's Party* (2007) LPELR-8217 (CA) 37-50.

[67] Siracusa Principles par [B-21].

[68](2013) LPELR-22349 (CA) 72-74.

limiting law is enacted for the legitimate aims provided for that specific right in the Nigerian Constitution. The legitimate aims for the limitation of the right to privacy are provided in section 45(1)(a) and (b) of the Nigerian Constitution. On the other hand, the right to freedom of expression has the legitimate aims for its limiting law in sections 39(3) and 45(1)(a) and (b) of the Nigerian Constitution. In spite of this decision, some case laws have inferred validity of some limiting laws on sections 37 to 41 of the Nigerian Constitution simply because the limitation is backed by an Act. This interpretation of section 45(1) of the Nigerian Constitution is to the effect that the test for the validity of a limiting law on sections 37 to 41 of the Nigerian Constitution is not the content of such Act but its mere existence.

In *Hassan v Economic and Financial Crimes Commission*, the Court of Appeal held that section 45(1) of the Nigerian Constitution has watered down the effect of section 37 of the Nigerian Constitution.[69] The court in this case, however, only considered the effect of a warrant to search a premises hence it can be deduced that by "watered down" the court meant the right to privacy as provided by section 37 of the Nigerian Constitution is not absolute because there are laws that authorise searches of premises with a warrant.[70]

The court, however, did not consider whether the particular Act that purportedly empowered the Magistrate Court to issue a search warrant to the Economic and Financial Crimes Commission (EFCC) is "reasonably justifiable in a democratic society" in this case. In fact, there was no mention of the Act or Law provided for the issuance of the search warrant. The court only confirmed that there was an authorised search warrant from a Magistrate Court and then concluded that the search of the applicant's premise was valid based on the authenticity of the search warrant. The court further justified the validity of the search on the applicant's property by the EFCC by asserting that an accusation of a criminal offence is a legitimate aim for the limitation of the right to privacy. Hence, the court considered the aim for the action of the EFCC first rather than considering whether the law authorising the EFCC to obtain a search warrant was reasonably justifiable in a democratic society.[71]

Also, in *Ukpabio v National Films and Video Censors Board*, the Court of Appeal's decision was in favour of the validity of the National Films and Video Censors Act (NFVCA), 1993.[72] The decision of the court on the validity of the NFVCA was as a result of the Act, fulfilling one of the legitimate purposes for the limitation of freedom of expression as provided in section 39(3) of the Nigerian Constitution. The court considered whether the purpose of the NFVCA was in line with section 39(3)(a) of the Nigerian Constitution without determining whether the NFVCA was reasonably justifiable in a democratic society as provided by section 39(3) and 45(1) of the Nigerian Constitution. Therefore, the Court of Appeal's determination of the validity of the NFVCA was based on the mere existence of the Act. The decision of the Court of Appeal in the cases discussed above points to the interpretation of section 45(1) of the Nigerian Constitution as purporting to eliminate constitutionally guaranteed rights through legislation. The Court of Appeal held *obiter* in *Osadebay v A.G Bendel State* as "One of the basic principles of interpretation of the Constitution and Statutes is that the legislature will not be presumed to have given a right in one [s]ection of a statute and then take it in another".[73]

[69] (2013) LPELR-22595 (CA) 18-19.
[70] Examples of such Acts are section 28 of the Police Act and section 150(1) of the Customs and Excise Management Act.
[71](2013) LPELR-22595 (CA) 20.
[72](2008) LPELR-4129 (CA) 34-36; Act 85 of 1993.
[73] (1991) 1 NWLR (pt.169) 525.

The court in *Inspector General of Police v All Nigeria People's Party* deviated from the above interpretation of section 45(1) of the Nigerian Constitution and it did not consider the mere existence of the Public Order Act (POA) as a conclusive limitation on the right to freedom of peaceful assembly rather the court considered whether the law was reasonably justifiable in a democratic society.[74]

Hence, the court held that the provisions of section 1(2) to (6) of the Police Order Act in which persons who intend to hold a public protest must obtain a permit from the police was unreasonable and unjustifiable in a democratic society. In the opinion of the court, the aim of section 1(2) to (6) of the POA was to stifle the right to freedom of association and assembly as provided in section 40 of the Nigerian Constitution. Hence, the court held that section 1(2) (6) of the POA is inconsistent with the Nigerian Constitution because: "The constitutional power given to the legislature to make laws cannot be used by way of condition to attain unconstitutional result."[75]

Therefore, any provision of an Act or law that seeks to set conditions for the enjoyment of the fundamental human rights in Chapter 4 of the Nigerian Constitution is void and inconsistent to the extent of its inconsistency.

Based on the decision of the court in *Inspector General of Police v All Nigeria People's Party*, it can be deduced that the test of whether an Act is reasonably justifiable in a democratic society is an analysis that should be done on a case by case basis. The analysis should consider whether the law limiting sections 37 to 41 of the Nigerian Constitution is reasonably justifiable in the circumstance. Thereafter, the court must consider whether such law fulfils the legitimate aim provided in the Nigerian Constitution.

Conclusion

The culmination of the above argument is that Nigeria's jurisprudence on the right to privacy is not compliant with international law. This is because section 37 of the Nigerian Constitution is discriminatory and therefore, contrary to articles 2 and 17 of the ICCPR and article 12 of the UDHR. Also, section 45(1) of the Nigerian Constitution provides for the limitation of the right to privacy by a Law of the State legislature which is not of general application, hence such laws of State legislature are unlawful in the light of the UDHR and the ICCPR.

Furthermore, where the courts wrongly interpreted "law" in section 45(1) of the Nigerian Constitution to mean "Act", the application of such Acts in limiting the right to privacy is mostly devoid of the consideration of whether the Act is "reasonably justifiable" in a democratic society. Thus, the overreaching nature of these Acts is largely against the international law requirement of non-arbitrariness of laws limiting the right to privacy. Therefore, the Nigerian jurisprudence on the right to privacy does not comply with international law.

[74] (2007) LPELR-8217 (CA) 37-50; (Cap 382) Laws of Federation of Nigeria 1990.
[75] *Inspector General of Police v All Nigeria People's Party* (2007) LPELR-8217 (CA) 42.