Constitutionality, Privacy Rights and National Security: Developing a legitimate legal framework for Nigeria

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Abstract

The right to privacy under section 37 of the Constitution of the Federal Republic of Nigeria (CFRN) is one of the key human rights provisions of the CFRN and is recognised in most jurisdictions. However, the spate and apparently recurring episodes of violence from terrorist activities has put this right at risk of constant derogation by law enforcement agencies both in Nigeria and other terrorist besieged countries. This has led to questions as to whether protection of human rights should be abandoned in favour of fight against terrorism or whether more robust laws should be enacted to safeguard these rights. A practical instance of where this challenge is exposed is in deciding the extent of the derogation of rights that can be sanctioned by laws that seek to empower law enforcement agencies to intercept telecommunications. This paper attempts to answer the question, to what extent can law derogate the rights to privacy, under the instrument of section 45 of the CFRN 1999 as amended without hurting the purpose of the fundamental human rights provisions of the CFRN.

Keywords: Constitution, Human Rights, Rights to Privacy, National Security, Nigeria

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1. Introduction

The maintenance of law and order through law making is one of the main constitutional functions of the legislature. In Nigeria, this function is carried out by the National Assembly[1], either through initiating legislation itself or through considering legislation initiated by the executive arm. The National Assembly has thus been attempting to use its law making function in quelling some destabilizing events like insurgency, militancy and terrorism which threaten law and order in the country[2]. The vast powers that these laws give to law enforcement agencies in the guise of protecting national security have led to questions as to their constitutionality[3], particularly in respect of human rights provisions of the constitution. The question generally is how to determine the extent the law can limit fundamental rights in the interest of national security. This question is continually raised either with regards to extra-judicial killings[4], property searches and more recently, interception of telecommunication data of Nigerians and in Nigeria.

An escalation of the derogation of human rights, particularly right to privacy and freedom of expression, in the interest of national security (national defence) was recently observed. This was through the groundwork laid for massive data interception, albeit indirectly, by the mandatory requirement of biometric registration of mobile phone users.

[1] National Assembly legislates for the Federation while the State Houses of Assembly legislate for the states within their constitutional jurisdictions.

[2] This includes the enactment of laws like the Terrorism (Prevention) (Amendment) Act, 2013; Economic And Financial Crimes Commission (Establishment) Act 2002; Money Laundering (Prohibition) Act 2011., are all enacted with the view of quelling insurgency by both attacking active perpetrators, their financiers and information providers.

[3]Jolyon Ford "African counter-terrorism legal frameworks a decade after 2001", Monograph 177, March 2011 the Institute for Security Studies, Tshwane (Pretoria), South Africa, Available at: file:///C:/Users/bethel.ihugba/Desktop/RIGHT%20TO%20PRIVACY/MAILED%20DOCUMENTS/African%20counter-terrorism.pdf (Accessed 13th August 2016); Dakas C.J. Dakas, Terrorism in the Aviation Sector: The Human Rights Dimension of the Use of Body Scanners, in *Law and Security in Nigeria*, (Eds) E. Azinge and F. Bello, *Nigerian Institute of Advanced Legal Studies, 2011. Lagos, Nigeria.*

[4] See Human rights abuses: ICC probes Nigerian Army, Boko Haram. APRIL 15, 201612:07 AM, Vanguard News Online. Available at: http://www.vanguardngr.com/2016/04/human-rights-abuses-icc-probes-nigerian-army-boko-haram/ (Accessed 11th August 2016); The Nigeria Army is accused of violation of human rights of alleged Boko Haram terrorists in the North East. Even the Amnesty International does not give the Nigeria military a clean bill in respect of its methods**.**

The Federal Government has made it mandatory for all GSM providers to require their subscribers to conduct biometric registrations. One of the arguments of the government is that it would aid the anti-terrorism programme and thus is in the national security interest to require subscribers to complete a biometric registration before using GSM services in the country[5]. Interestingly, nobody has raised the question of the constitutionality of such requirement. Why biometric registration? Why not simple registration? For how long will people's personal data be kept? What does the government hope to do with such data?

Recently, as if to further escalate the requirement for a biometric registration, there are currently in the National Assembly, Bills seeking to empower law enforcement Agencies to intercept and collect telecommunication data of private individuals from telecommunication providers. Some provisions of these Bills have gone as far as requiring telecommunication service providers to develop interception capabilities or to have electronic apparatus that will allow law enforcement agencies carry out interception whenever they so choose.

Considering that the National Assembly is working towards passing a law that will allow the derogation of section 37 of the CFRN, the examination of the extent of this becomes necessary. This is to establish how it can be achieved within the limits of the CFRN without unduly breaching fundamental rights, specifically rights to privacy and freedom of expression[6]. This question is very necessary in the Nigerian context, considering that advanced countries like the UK and USA, which have better technological knowhow[7], more robust laws and more accountable governments are yet to properly define the limit of possible derogation of the right to privacy. On this background therefore, this paper examines the manner and limit that legislation may derogate rights to privacy as guaranteed under fundamental human rights provisions of the Constitution of the Federal Republic of Nigeria. This leads us to the purpose of the paper which is to examine and analyse conditions that a law that derogates right to privacy should fulfill.

[5] Vanguard Online (2010) SIM card registration: As the uncertainty continues. Vanguard Newspapers, August 3, 2010 6:33 PM Available online at: http://www.vanguardngr.com/2010/08/sim-card-registration-as-the-uncertainty-continues/ (Accessed 13th August 2016)

[6] Sections 37 and 39 of the CFRN 1999 as amended

[7] Marko Milanovic, "Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age", *Harvard International Law Journal / Vol. 56, pp. 81 -146 at p. 82*

To meet this objective, the paper conducts a critical analysis of Nigerian constitutional enactments on rights to privacy. It specifically examines the question as to what extent the constitutional right to privacy can be derogated by legislation in Nigeria. In support of arguments proffered, the paper references literature and judicial decisions in Nigeria and from other terrorism besieged countries that have tested privacy derogation laws. This approach is to ensure that the context of the law and their application reflect the same or similar priorities. Following this method, the paper has five sections, including the introduction above. The next section undertakes a review of research on the derogation of rights to privacy, both nationally and internationally. This is followed by a presentation and analysis of the right to privacy under the CFRN and its kindred right. Next is an analysis of the provision of section 45 of the CFRN. It discusses, in sequence, the conditions and democratic principles which any law enacted on the power of this section must fulfil. This is then followed by a conclusion of the paper.

2. Literature Review

There are few researches in this area from first world countries but very minimal research in Nigeria. Most Nigerian researches on the issue of rights to privacy have looked at it from the perspectives of data protection[8], civil litigations against individuals and cybercrime[9]. None is yet to fully examine the enforcement of fundamental human rights against government or the derogation of such right through legislation. This research takes a critical look at the later. It suggests an approach for maintaining a balance between maintaining national security and protecting and guaranteeing fundamental human rights in the Nigeria context. This is in recognition that the interpretation, application and enforcement of fundamental rights reflects to a great extent the socio-political milieu of the country, the wording of its constitutional provisions and country's immediate priority[10]. This has been demonstrated by other researches on human rights in western jurisdictions[11].

[8]Bernard Oluwafemi Jemilohun and Timothy Ifedayo Akomolede "Regulations or Legislation for Data Protection in Nigeria? A Call for a Clear Legislative Framework" Global Journal of Politics and Law Research Vol.3, No. 4, pp.1-16, August 2015

[9] Laura Ani "Cyber Crime and National Security: The Role of the Penal and Procedural Law" *in Law and Security in Nigeria, (Eds) E. Azinge and F. Bello, Nigerian Institute of Advanced Legal Studies, 2011. Lagos, Nigeria, at pp. 197 -232.*

[10] In African Human Rights Jurisprudence, this is exemplified by the use of claw back clauses to help maintain some form of sovereignty and recognition of national socio-

A 2005 research[12], that compared EU, UK and Canadian concept of privacy rights protection, argued that although all three countries recognise and demand the protection of privacy rights, their rationale and emphasis are different. It found that they emphasise different aggressor from whom privacy rights need to be protected, e.g. from the government, practised by USA - which emphasises personal liberty devoid of government intrusion[13]; from private bodies practised by the EU – which emphasises personal dignity devoid of private abuse or humiliation[14], and the middle ground practised by Canada which emphasises personal autonomy to control both their dignity and liberty from external intrusion[15]. According to the research, writing from the American perspective, American citizens need "more than ever, to protect their privacy not only from government, but from private sector abuse as well"[16]. This finding highlights the fact that not only does privacy right need to be protected; the legislative requirement for such protection needs further improvement. The paper was published in 2005 and since then a lot has happened that has pushed government to further invade privacy rights, therefore making the necessity for exploring ways of improving guarantees to human rights more pertinent[17]. Seemingly flowing from this finding, subsequent research have sought to examine the extent, given the

political peculiarities- see A. O. Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 African Human Rights Law Journal 1-28, at p.25, available online at: http://dx.doi.org/10.17159/1996-2096/2016/v16n1a1 (Accessed 12th August 2016).

[11]See Avner Levin and Mary Jo Nicholson(2005); Federico Fabbrini (2015) and A. O. Enabulele (2016).

[12] Avner Levin and Mary Jo Nicholson(2005) Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground, university of ottawa **law & technology** journal, www.uoltj.ca

[13] Ibid at p.384

[14] Ibid at p.389

[15] Ibid at p.392

[16] Ibid at p.359

[17] The revelation by Edward Snowden, a former USA NSA staff demonstrates the desperation of governments with combating terrorism and the like through invasion of privacy of individuals, including the invasion of the privacy of people who are not even suspected of any crime.

global anti-terrorism campaign, governments could derogate from fundamental rights to privacy[18].

According to a research from Europe, the legal regime[19] established by the EU to protect data while retaining information considered relevant for anti-terrorism campaign failed the standard for protecting rights to privacy[20]. It examined and supported the reasons for the *European Union Court of Justice ("ECJ")* striking down of the directive for violating privacy rights[21]. The research suggests that other jurisdictions like the US which are also facing similar terrorism concerns faced by Nigeria may do well to heed to the judgement of the EU Court while developing their own laws. The research found that from its reading of the ECJ judgment, any law that purports to derogate the constitutional rights to privacy must meet the constitutional requirements stipulated in the authority that creates those rights. In the case of the EU and the right to privacy, this means that such laws must adhere to the terms of Article 52[22] of the EU Charter of Fundamental Rights stipulating the potential limitations of the rights enshrined in the Charter[23]. A similar paper also found that right to privacy is a constitutional right that must not be limited except in exceptional circumstances and in accordance with specific procedure[24]. The paper concludes that from the reading of the ECJ, such conditions include "objective criterion . . . to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are

[18] Federico Fabbrini (2015) Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States, *Harvard Human Rights Journal / Vol. 28.*

[19] Council Directive 2006/24/EC, Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks, 2006 O.J. (L 105) 54 [hereinafter Data Retention Directive].

[20] Federico Fabbrini (2015) Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States, *Harvard Human Rights Journal / Vol. 28, at pages94 -95.*

[21] Joined Cases C-293/12 & C-594/12, Digital Rights Ir. Ltd. v. Minister for Communication et al, and K¨ artner Landesregierung, 2014 E.C.R. I-238.

[22] Article 52 of the ECHR provides for the conditions for the derogation of fundamental human rights. It introduces the principles of genuineness of purpose, necessity and proportionality.

[23] Note 19 above page 77.

[24] Bignami, Francesca, Transatlantic Privacy Regulation: Conflict and Cooperation (2015). Law and Contemporary Problems, Vol. 78 (Fall 2015); GWU Law School Public Law Research Paper No. 2015-52; GWU Legal Studies Research Paper No. 2015-52. Available at SSRN: http://ssrn.com/abstract=2705601

specific, strictly restricted and capable of justifying the interference."[25] More importantly, the determination of whether these requirements have been met must be left to the courts, that is to say granting the courts power to excuse limitation of privacy rights through warrants or court order. In other words, the decision as to whether a government agency has met the requirements for derogating a fundamental right, even when excused by legislation, must be decided by a court of law.

Other African and Nigerian researchers have also sought to explore the balance between national security and rights to privacy. Interestingly, some authors[26] have equated the provision of section 37 of the CFRN as favouring the principle of respect for autonomy and dignity, i.e. the Canadian model[27]. The argument is that by guaranteeing rights to privacy in communications and home, it means that the law wants Nigerians to be left alone and not harassed because of how they live their lives in the privacy of their home, e.g. their personal life, sexual life and other family peculiarities.[28] They have all concluded that the right to privacy is not absolute but its derogation must abide by constitutional provisions, specifically, the provision of section 45 of the CFRN, which provides for the conditions, circumstances and purposes that can legitimately derogate the rights to privacy.[29]

3. The Right to Privacy under section 37 of the CFRN 1999 as amended

This right to privacy is enshrined in ***Section 37*** of the CFRN 1999 as amended. According to the provision:

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

[25] Ibid at page 132.
[26] E.S Nwauche (2007) ***The Right to Privacy In Nigeria*** Review of Nigerian Law and Practice Vol. 1(1) 2007
[27] Avner Levin and Mary Jo Nicholson (2005) note 11.
[28] E.S Nwauche (2007) ***The Right to Privacy In Nigeria*** Review of Nigerian Law and Practice Vol. 1(1) 2007, at p.84
[29] Ibid at p.84

3.1. Meaning of the right to privacy

The terms privacy, homes, correspondence, telephone conversation and telegraphic communications as used in the CFRN 1999 are not defined. However, some have attained regular usage and technical meaning while some have been decided upon by courts of law. In other words, from these decisions and practice we can safely infer their meaning. For instance, in referring to the control and management of information about oneself, across jurisdictions and in international conventions the terms used vary from "right to privacy[30]" to "right to private life[31]". Both however, have been adjudged to mean the same[32]. In Nigeria, the term used is privacy, which is the same term used in Art. 17 of the International Covenant on Civil and Political Rights (ICCPR). Although no distinct definition is provided by either the CFRN or the ICCPR, it is generally accepted to mean both the "right to be left alone"[33] and the right to decide, whether, to whom, when and how to deal with information about oneself[34]. This is adjudged to be less about whether or not to disclose information and more about the right of autonomy and non-interference or imposition[35]. Thus, an insightful and generally accepted definition of privacy is that it is 'freedom from unwarranted and unreasonable intrusion into activities […] belonging to the realm of individual autonomy'[36].

The CFRN 1999 appears to have gone further to stipulate examples of personal space within which there should be no unwarranted intrusion. This is evident in the specific mention of homes, correspondence and communications. These are places and concepts that are personal to an

[30] Section 37 of the CFRN 1999 as amended and Art. 17 International Covenant on Civil and Political Rights (adopted16 December 1966, entered into force 23 March 1976) 999 UNT 171 (ICCPR)

[31] Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights(ECHR) as amended)

[32] Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' (2015) 31(80) Utrecht Journal of International and European Law 104, at p. 116, DOI: http://dx.doi.org/10.5334/ujiel.cr (Accessed 17th August 2016).

[33] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1980) 4 Harvard Law Review 193, 195

[34] Alan F. Westin, *Privacy and Freedom* (Athenaeum 1967) 7; Charles Fried, 'Privacy' (1968) 77 Yale Law Journal 483

[35] Ilina Georgieva (2005) note 30 above at p. 115

[36] See Ilina Georgieva (2005) note 30 above at p. 117, quoting Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP 2004) p. 477

individual and generally speaking which an individual has control over. Thus an intrusion of one invariably diminishes the other. Put in another way, your home is where you live your private life and where personal information about you can be gathered. It is also a place of personal safety, rest, and personal authority. This is one of the reasons why the violation of one's home, for example through trespass, is illegal and the law allows one to defend ones home by proportionate force in the event of unwarranted intrusion[37].

3.2. Kindred Rights to the Right to Privacy

Right to privacy have other rights which may be regarded as kindred rights in the sense that the enjoyment of the one promotes the enjoyment of the other. In the case of right to privacy, its kindred rights include right to freedom of thought, conscience and religion[38]; freedom of expression and the press[39]; peaceful assembly and association[40] and freedom of movement[41].One of these rights, without prejudice to other rights, is however most directly affected by any derogation of rights to privacy, especially in relation to interception of telecommunication data. This kindred right is the right to freedom of expression and the press provided under section 39 of the CFRN 1999, thus:

> *(1) Every person shall be entitled to freedom of expression, including freedom* to hold opinions and ***to receive and impart ideas and information without interference***.
>
> *(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:*
>
> *Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever.*

[37] Section 289 -298 of the Criminal Codes Act, Chapter 77, Laws of the Federation of Nigeria 1990.
[38] Section 38 of the CFRN 1999 as amended
[39] Section 39 of the CFRN 1999 as amended
[40] Section 40 of the CFRN 1999 as amended
[41] Section 41 of the CFRN 1999 as amended

> *(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -*
>
> > *(a) for the purpose of preventing the disclosure. of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or*
> >
> > *(b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.*

The above right is kindred to right to privacy because it is through the expression of free speech and opinion that the right to privacy, especially with regards to telephone and telegraphic communication, is manifested. This is because the right to freedom of expression also means the right to keep silent or keep confidential your communication. More importantly, it is a right not to be afraid to speak when you so choose. It is this right to exercise choice that imbue freedom into the capacity to speak, stay silent, keep confidential or broadcast your communication. Once this choice is removed, the freedom collapses. Put in legalese, the breach of right to privacy, .e.g. through undue and illegitimate interception of telephone or telecommunication data restricts the right to freedom of expression. That is to say, other than the protection of the autonomy and dignity of an individual, the protection of the right to privacy helps actualise and promote the right to freedom of expression, specifically, the freedom "***to hold opinions and to receive and impart ideas and information without interference***[42]***".***

The above analysis demonstrates the importance of the human rights to each other and why its derogation may only be legitimated when it is absolutely necessary and in accordance with strict constitutional and statutory conditions. Anything short of strict adherence to constitutional conditions for the derogation of any particular right would amount to violation of human rights provisions. It would also open the door to the violations of other rights and possible degeneration of society to chaos and

[42] Section 39(1) of the CFRN 1999 as amended. Italics is for emphasis.

anarchy. In any case, such society cannot be regarded as a democratic society.

4. Analysis of Section 45 of the CFRN 1999 on the derogation of right to privacy

As demonstrated in the literature review, it is accepted principle that right to privacy is not absolute. This however, does not mean that it can be derogated at will by the State. Rather its derogation must meet laid down criteria as enshrined in the constitution or statutory enactments of the country in question. In the case of Nigeria, this is the condition stipulated in section 45 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is only upon the fulfilment of this provision that any action carried out towards the derogation of the right to privacy may be legitimate and allowed. The section provides thus:

> ***Section 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 of other persons".*

The question therefore is how legislation can meet this requirement. Following the principles enunciated in the forgoing research and in line with the principles of constitutional democracy, the salient elements of these provisions are examined. For purposes of clarity, these elements could be divided thus;

i. The legislation must be justifiable in a democratic society. In other words the environment for creating the law, the process of making the law, and the provisions of the law must be justifiable and democratic.
ii. The law must have been made:
    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 of other persons.*

4.1. The law must be justifiable in a democratic society

This is the first criterion that any law that limits rights to privacy must meet. As stated in section 45 of the CFRN, such law must be justifiable in a democratic society. Three elements of the above phrase is ***law,***

justifiable and democratic society. These three elements must subsist to meet the conditions in section 45(1) a. In Nigeria, the power to make law[43] for the Federation is vested in the National Assembly, and State Houses of Assembly have the power to make Laws for the States. It is only laws made by either of these Assemblies, State Houses of Assembly or National Assembly, following the due process of law making (including jurisdictional limits as stipulated in the legislative lists[44]) that can be regarded as law. For the purpose of this paper, although the National Assembly is used as point of reference, laws or legislation here include laws made by a House of Assembly of a state.

Law making include, amendment or repealing of existing law and enactment of a new law. This includes the constitution, although some may argue that, chronologically speaking, the Nigerian Constitution precedes the National Assembly. This may be so but its legitimacy is enshrined by an Act of the National Assembly. Secondly, we have one Constitution regardless of how many times it is altered and by exercising the power to amend the Constitution[45], the National Assembly exercises its power to make law, albeit, the Constitution. Thus, the CFRN is a law of the National Assembly[46]. This means therefore that mere presidential directive is not law[47]. This is expressly provided in the Constitution as follows:

> ***4.*** *(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which … (2)… shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.*

[43] The constitution differentiates between law starting with a small letter "l" and one starting with a big letter "L". When a small letter "l" is used, as is the case in section 45 of the CFRN, it includes laws made by either the National Assembly or State Houses of Assembly. This is defined in Section 318 of the CRFN 1999 and section 18 of the Interpretation Act CAP. 192 LFN 1990.

[44] Section 4 and second schedule of the CFRN 1999 as amended.

[45] Section 9 of the CFRN 1999 as amended.

[46] See E.S Nwauche (2007) The *Right to Privacy in Nigeria* Review of Nigerian Law and Practice Vol. 1(1) 2007, at p.86 -87 for a different perspective but the same conclusion to this analysis.

[47] Including the directive of a governor unless made under the power of a law see section 18 (1) Interpretation Act, CAP 192, LFN 1990.

The above provision echoes and puts into force the declaration in the preamble of the Constitution, to the effect that the C*onstitution is "for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people*". In other words, as stated in section 4(2) the power to make legislation for the Federation is exercisable only by the National Assembly and such laws must be in furtherance of good governance which can be exemplified by *"principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people*". Thus proclamations, by whatever name so called, that are not made by the National Assembly and do not promote these principle can in effect be declared not to be legislation.

The next question is whether such legislation *is reasonably justifiable*. The justifiability of legislation in Nigeria is already predetermined by the provisions of the preamble, sections 1, and 4. At the risk of repetition, the only factors that can justify legislation in Nigeria are that such legislation is made in furtherance of "*good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people".* These are the only justification. Any law therefore that by its nature, either intentionally or not, derogates these objectives, may be declared not to be justifiable. It must however, be noted that the achievement of these objectives must be read in the context and circumstance of the country and the time when the law is passed. Thus, a law that is passed during an emergency period or war may appear to derogate or contradict these principles but may in fact have the higher motive of sustaining a country at the time so that majority of its citizens would exist to enjoy those benefits.

The third element is whether such law is one that is expected in *a democratic society***.** Democratic society is generally regarded as a society that elects its government and one that abides by rule of law. This provision does not necessary require that Nigeria at the time the law is enacted is a democratic society but whether the law at the time it is made is one that would be expected and justifiable in a democratic society. What this implies is that Nigeria would not be the benchmark for determining the practice of democracy for purposes of determining the "reasonable justifiability" of an Act of the National Assembly. Rather, the question is, would the law be one that would apply in a country that practices democracy? Would the particular law in question support the concept of rule of law, separation of powers and representative government? Where

the answers are in the affirmative, then the law can be regarded as one that is reasonably justifiable in a democratic society. The establishment of these requirement is necessary because without them (without the law being one that is reasonably justifiable in a democracy), it would be impossible to meet the next test of the law, i.e. the purpose of the law. This is important because, the only procedure and institution to conduct this test is best available in a democratic society, i.e. the courts of law.

This brings us to the next test for determining the legitimacy of a law that derogates human rights provisions as enshrined in section 37, 38 and 39 of the CFRN. This is whether the law was enacted in the "*interest of defence, public safety, public order, public morality or public health".*

4.2. In the interest of defence, public safety, public order, public morality or public health

The determination of the satisfaction of these requirements is not general but specific. The question is whether the particular provision of the law that seeks to derogate the rights enshrined in the human rights provision of the constitution are reasonably necessary for safeguarding any of public safety, national defence, public order, public morality or public health. In other words, there must be direct correlation between the limitation of the specific right in question and the promotion of any of these purposes. Where there is no direct relationship or correlation, it cannot be said that the right was derogated for any of these purposes. Another interesting aspect of this requirement is that the defence, safety, order, moral and health in question does not relate to that of an individual but the general public. In other words, the law cannot be made in the interest of the defence, safety etc., of any particular individual. It must be a benefit which is open to all members of society and not limited by any arbitrary classification.

Also as earlier alluded to in the discussion of democratic society above, the determination of the satisfaction of these objectives is conducted by the courts of law in a judicial process. This is because, apart from the National Assembly which can by a subsequent enactment amend or repeal a law, it is only the courts of law that can rightly determine and declare that there is a contradiction of the constitution by an Act of the National Assembly. Such declaration, in effect nullifies the Act in question[48]. The courts however, do not reach such determinations in vacuum and must

[48] Section 1 of The CFRN 1999 as amended.

also be mindful of ethno-religious concerns[49]. Certain principles have been accepted as international best guidelines amongst democratic societies. These are principles of necessity and proportionality to the derogation occasioned[50]. This is discussed below.

4.3. For the purpose of protecting the rights and freedom of other persons.

Aside the interest of the public, the alternate criterion upon which a law derogating human rights to privacy may be justifiable is when such law is enacted to protect the rights and freedom of other persons. Unlike the earlier criteria under section 45(1) a., of the CFRN, this provision includes individualised legislation or legislation that relates to a particular group, e.g. a minority, unborn children, children, women, the disabled, the vulnerable, the old and infirm and the dead. This includes legislation with provisions that seeks to protect the rights of any particular group of persons whose rights would otherwise not have been protected but for the legislation.

Another interpretation of this provision is the recognition that there are possibilities of circumstances where the rights of individuals may conflict, e.g., An individual's right to privacy does not mean that another should be deprived his right to liberty, freedom of movement or expression in other to protect the former's right to privacy. For instance, whereas everyone's freedom of expression is guaranteed by the Constitution, it does not stop the State from making a law against libel or law against inciting violence. In such cases, laws against inciting violence against another because of another's religion, race, gender or age may be justifiable as being for the purpose of protecting the rights to personal liberty, life, dignity of human persons or even right to acquire and own property. Thus a law that empowers law enforcement agencies to intercept telephone conversation of an individual, who is suspected or demonstrated to be, using telephone communication to incite violence, would have met the purpose requirement.

[49] Alan Travis, The Guardian UK Online, New scanners break child porn laws. Monday 4 January 2010 22.14 GMT http://www.theguardian.com/politics/2010/jan/04/new-scanners-child-porn-laws (Accessed 16th August 2016); Dakas C.J. Dakas, Terrorism in the Aviation Sector: The Human Rights Dimension of the Use of Body Scanners, in *Law and Security in Nigeria,* (Eds) E. Azinge and F. Bello, *Nigerian Institute of Advanced Legal Studies, 2011. Lagos, Nigeria. At p. 11*

[50] Ibid Dakas C.J. Dakas at 14

5. The tripod principles of rule of law, necessity and proportionality

Merely stating that a law is enacted in order to fulfil conditions stated in section 45(1) a and b, of the CFRN, is not sufficient. The actions authorised must be very specific and promote the purpose alleged. The best way to describe this is to say that the law and conduct it mandates must adhere to principles of ***rule of law, necessity and proportionality***. Although these terms are not stated in the Constitution, a combination of sections 4, 5, 6, 37 and 45 of the CFRN can be interpreted to impose these conditions. By establishing independent executive, legislative and judicial arms of government with each having a degree of oversight over the other, the principles of rule of law is inevitably made intrinsic to the survival of the Constitution. A successful and legitimate practice of rule of law also means that laws enacted, especially laws that seek to derogate human rights, must be necessary and proportional to the derogation imposed. The importance and logic of this interpretation is supported by the fact that it is provided in the ECHR and has been variously upheld by several ECJ judgments and applied in an African Court on Human and Peoples' Rights judgment[51] that interpreted the African Charter on Human and Peoples' Rights. Taking into cognisance these provisions and judgments and the fact that Nigeria faces similar terrorist challenges as the EU countries, we can safely apply the same interpretation to the conditions stated in section 45(1) of the CFRN.

In the EU jurisdiction, it is established by several judicial decisions that the law which seeks to derogate the rights to privacy or the conduct which derogates the right to privacy, must promote the rule of law, necessary and proportionate to the derogation occasioned[52]. In Nigeria on the other hand, the condition of promoting the rule of law can be demonstrated by the presence of a framework for accountability. This is because the framework is intended to eschew arbitrariness (i.e. install necessity and proportionality) and provide means for redress in cases of unlawful breach[53]. Accountability here means that individuals must have the

[51] Application 009/2011 *Tanganyika Law Society & Another v Tanzania* (consolidated with *Mtikila v Tanzania* Application 011/2011)

[52] Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' (2015) 31(80) Utrecht Journal of International and European Law 104, at pp.121- 122., DOI: http://dx.doi.org/10.5334/ujiel.cr (Accessed 17th August 2016)

[53] Ihugba, B. U. (2016) "An examination of the good governance legal framework of Nigeria Extractive Industry Transparency Initiative (NEITI) Act 2007", Law and

opportunity and right to approach an independent body, most appropriately the court, to seek for redress in instances of alleged breach. The court is thus the reference point for determining whether a derogation of right to privacy is necessary and the extent to which such derogation is permissible under the law in a democratic society (proportionality). Accountability therefore, can only be valid and legitimate when rule of law applies through the existence of established set of rules, an independent body to interpret its application, an independent body to enforce sanctions or uphold breach and available rewards for individuals whose right is derogated[54].

The principles of necessity and proportionality, for instance, in relation to interception of telephone communication or data, operate to determine questions like the amount of time an individual's personal data could be retained by a law enforcement agency, the type of communication data that may be retained by a law enforcement agency and the quantity of data that may be intercepted and retained. The principle of necessity and proportionality is now an internationally accepted standard for the derogation of human rights, and for the purpose of this paper, the rights to privacy and freedom of expression. Thus, in *Tanganyika Law Society & Another v Tanzania*[55], the African Court of Human and People's Right after finding that a derogation of human rights was in accordance with law, went further to ask whether such derogation was necessary and proportionate. The court found that the exercise of the provisions of the law were in violation of human rights provision because it failed to meet the necessity and proportionality test. According to the court:

> *After assessing whether the restriction is effected through a "law of general application", the Commission applies a proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be "**proportionate***

Development Review. Volume 9, Issue 1, Pages 201–222, at p. 208, DOI: 10.1515/ldr-2015-0044**,** (Accessed 17th August 2016); Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' (2015) 31(80) Utrecht Journal of International and European Law 104, at p. 120, DOI: http://dx.doi.org/10.5334/ujiel.cr (Accessed 17th August 2016)

[54] Ihugba, B. U. (2016) no 53 above at p. 208.

[55] Application 009/2011 *Tanganyika Law Society & Another v Tanzania* (consolidated with *Mtikila v Tanzania* Application 011/2011)

with and absolutely necessary for the advantages which are to be obtained"[56].

Similar positions have been held by other courts, including the European Union Court of Justice. Although, this test is not part of the constitutional condition of section 45, it opined and rightly so that it is the hall-mark of a democratic society to eschew arbitrariness as much as possible. It would be tantamount to a dictatorship and undemocratic to empower law enforcement agency to arbitrary decide whose right is to be derogated and for what purpose. It is this concept of the rule of law that has led to the courts of law to further impose the twin test of necessity and proportionality. The logic of this test is "why intrude if not necessary?" In other words, the question an individual in a democratic society may ask as to why their right is derogated should be able to receive a distinct, rational, legitimate and predictable response. Thus, where intrusion cannot solve the problem or obtain the information for which it was allegedly set out, then intrusion is not necessary. The other aspect is that of proportionality. There is a saying that "you don't use hammer to kill fly". The logic is not that you will not be able to kill the fly but that you are most likely to damage other things in the process. Imagine swatting a fly that is on your arm with a hammer or sharp matchet!

[56] Application 009/2011 *Tanganyika Law Society & Another v Tanzania* (consolidated with *Mtikila v Tanzania* Application 011/2011), at paragraph 106.1.

6. Conclusion

Terrorism is neither abating soon nor is there a one-size-fits-all approach at curbing it, particularly in Nigeria. Therefore, in developing laws whose objective is to protect Nigerian citizens from the violation of human and political rights occasioned by terrorist activities, e.g. kidnapping, murder, false imprisonment, deprivation of right to freely profess a religion or profess none, and right to the privacy of one's home and communications, care must be taken that the approach chosen does not cost the citizens the same right intended for protection. The only way this can be achieved is by strict adherence, through the rule of law, to the protection of human rights as enshrined in the Constitution. Any deviation from this approach will defeat the ultimate objective.

Taking this into cognizance, the National Assembly, in making laws that may derogate right to privacy for the purpose of good government, must be guided by the Constitution and the principles of democracy. In practical terms, the National Assembly should first ask the following questions: Will the law empower the derogation of rights? Is it a law necessary in a democratic society? Are there provisions for promoting and protecting rule of law? Is the law enacted to promote any or all of the specific objectives mentioned in section 45 of the CFRN? Does the law state when and who determines the existence of any of these factors? Does the law stipulate a procedure applicable in a democratic society? Is there a remedy for illegitimate breach? Are the consequences of the derogation of those rights less damaging and more desirable, both in the short and long term, than the harm feared? These and many more questions need to be answered by any law that proposes to derogate human rights. The best time to ensure that these conditions are met is during the law making process and not at its interpretation. By enacting a clear, transparent, legitimate, predictable and accessible legislation, the National Assembly would have gone a long way in meeting its mandate of legislating for good governance.

The position of this paper therefore, is that while the right to privacy as enshrined in section 37 of the CFRN is not absolute, its derogation must be legitimate and constitutional. Constitutionality is achieved by ensuring that the law by which the right is sought to be derogated meets the conditions stipulated in section 45 of the CFRN. Legitimacy on the other hand is achieved when the citizens whose right the law purportedly wishes to protect accept it and do not lose those rights by means of the same law. In other words, legitimacy is achieved when the concept, i.e., principles of

rule of law and democracy (Transparency and accountability), are not jettisoned but fully regulate and inform the process.

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