



**TITLE OF THESIS: RIGHT OF ACCESS TO INFORMATION AND ITS LIMITATION  
BY NATIONAL SECURITY IN NIGERIA: MUTUALLY INCLUSIVE OR  
EXCLUSIVE?**

By

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## **Declaration**

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

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**Aaron Olaniyi Salau**

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**Date**

## Abstract

The thesis argues that a different balance should be struck between the right of access to information and national security than the one currently in place in Nigerian law. The key questions it answers are: whether statutory provisions that authorise limitations on access to information pertaining to national security are consistent with constitutional protections for the right of access to information in Nigeria; How, if at all, does the Nigerian Constitution guarantee the right of access to information? To what extent does the Constitution permit limitations to the right to access information, where such information relates to national security? What models of constitutional interpretation have courts employed to ensure that limitations on access to information are reasonably justifiable in a democratic society, and how do these ensure greater protections for access to information? What public interest considerations underlie national security and the right of access to government held information, and how can these be effectively balanced in a democratic society?

The study involves the analysis of various Nigerian, international and African primary and secondary sources of law pertaining to the right of access to information. The study draws on David Held's *models of democracy* as a conceptual and analytical tool to advocate for the right of access to information as a minimum requirement for a functioning democracy and its ultimate protection as a basic value underlying a constitutional democratic State. It analyses normative instruments that provide for the right under the auspices of the United Nations and the African Union and their interpretations developed by authoritative interpretive bodies to understand their influence on Nigerian domestic law. To determine the scope of the right of access to information in Nigeria, the study examines provisions of: section 39 of the Constitution of the Federal Republic of Nigeria 1999 (on the right of access to information); the Freedom of Information Act 2011; the Official Secrets Act 1962 and the National Security Agencies Act 1986 – two main statutes which permit limitations on access to information.

The study recognises that the overall phraseology of sections 39(1) and 39(3) of the Constitution of Nigeria, which respectively guarantees the right 'to receive and impart ideas and information' and permits statutory limitations on access to information on national security grounds, are not fully compliant with international law's protection for the right of access to information. Moreover, 'national security' has no precise meaning in Nigerian law. Notwithstanding, sufficient

legal basis exists for section 39(1) of the Constitution of Nigeria to guarantee access to information. Such can be achieved through a ‘reading in’ into section 39(1) of a positive State obligation to protect access to information pursuant to article 9 of the African Charter, which has been domesticated as Nigerian law. Alternatively, a purposive interpretation of section 39(1) that embraces the citizens’ right to acquire official information to perform roles that democracy assigns to them. This gives effect to the original intent of the Constitution as a living document and also provides such a legal basis.

However, there is need to effectively remedy the defects in the law. First, the study recommends the adoption of clear constitutional provisions on everyone’s entitlement to information held by the State, and that held by private bodies which is necessary for the exercise of any right, subject of course to limited exceptions including national security. Second, it is imperative to redraft sections 39(1), 39(3) and 45(1) of the Constitution to explicitly state the conditions under which national security restrictions to access to information will be necessary or reasonably justifiable. Third, the study proposes the strengthening of existing legal framework on access to information while provisions in other laws such as the Criminal Code Act and Official Secrets Act that protect national security information must be streamlined with a new National Security and Intelligence Agencies Act to be enacted to protect information directly relevant to national security in accordance with good democratic practices. The law should provide for classification rules, classifying authorities, information categories subject to classification and the rules of declassification.

## **Dedication**

To my late father, Alhaji R A, and mother, Mrs Kosenat Salau, whom I lost during the PhD

journey;

Olufunmilola, the love of my life,

And to our children;

Ibukunoluwa, Toluwalopemi and Temiloluwa, for your patience, perseverance and sacrifices

during the journey.

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## **List of Abbreviations/ Acronyms**

1. AFRC (Armed Forces Ruling Council)
2. ACHPR (African Charter on Human and Peoples' Rights)
3. ECHR (European Convention on Fundamental Rights and Freedoms)
4. ECtHR (European Court of Human Rights)
5. AU (African Union)
6. DoP (Declaration of Principles)
7. FOI (Freedom of Information)
8. FOIA (Freedom of Information Act)
9. UN (United Nations)
10. UNGA (United Nations General Assembly)
11. ICCPR (International Covenant on Civil and Political Rights)
12. ICESCR (International Covenant on Economic, Social and Cultural Rights)
13. HRC (Human Rights Committee)
14. HC (High Court)
15. FHC (Federal High Court)
16. SC (Supreme Court)
17. CA (Court of Appeal)
18. SSS (State Security Service)
19. DIA (Defence Intelligence Agency)
20. NIA (National Intelligence Agency)
21. NSA (National Security Agency)
22. OSA (Official Secrets Act)
23. OAU (Organisation of African Unity)
24. LFN (Laws of the Federation of Nigeria)

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## CHAPTER ONE: BACKGROUND TO THE STUDY

### 1.1 Introduction

Since the early 1990s, a growing number of States have either enacted or adopted ‘freedom of information’ or ‘access to information’ clauses in statutes or in their Constitutions.<sup>1</sup> Several international and regional bodies have either incorporated access to information clauses within their respective frameworks, or insisted on greater transparency by governments. These developments are part of a growing insistence on the right of citizens generally to have access to government held information, all of which suggest that a legally enforceable right to (government or State-held) information is fast gaining global acceptance as a basic right.<sup>2</sup>

There are several reasons for the prominence given to the right to information in contemporary times.<sup>3</sup> It has been argued that a right of access to government-held information is essential for the health of a democracy.<sup>4</sup> The quality of democratic governance is improved and strengthened by public participation in the decision-making processes. But in itself, public participation cannot be effective without access to information. Moreover, a legally enforceable right to government held information will enhance efficiency and accountability, and boost public confidence in government.<sup>5</sup> Governments are also prone to abuse public power when their activities are not

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<sup>1</sup> John M. Ackerman & Irma E. Sandoval-Ballesteros ‘The Global Explosion of Freedom of Information Laws’ (2006) 58 *Admin LR* 85 – 130.

<sup>2</sup> David Banisar ‘Freedom of Information: International Trends and National Security’ available at [http://www.humanrightsinitiative.org/programs/ai/rti/articles/foia\\_intl\\_trends\\_and\\_nat\\_sec.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/articles/foia_intl_trends_and_nat_sec.pdf), accessed 20 August 2013.

<sup>3</sup> Though as far back as 1946 the United Nations General Assembly (UNGA) in Resolution 59 (1) had declared that: “freedom of information is the bedrock of all rights to which the United Nations is consecrated”, but attempts to negotiate a global convention on access to information has so far been unsuccessful.

<sup>4</sup> Ibid. See also, ‘The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information and National Security 1995’, available at <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> (Johannesburg Principles); Global Principles on National Security and The Right to Information 2013 (Tshwane Principles), available at <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>, accessed 20 August 2013. Non-Governmental Organizations that have also pushed for more transparency and accountability of governments worldwide include Privacy International; Open Society Institute Justice Initiative; Transparency International; Article 19, Freedom of Expression Institute, Human Rights Watch, Reporters without Borders, Amnesty International, etc.

<sup>5</sup> Preamble to ‘Recommendation No. R(18)19 of the Committee of Ministers to Member States on Access to Information held by Public Authorities’, Adopted by the Committee of Ministers on 25 November 1981 at the 340<sup>th</sup>

subject to the public scrutiny that access to information enhances.<sup>6</sup> It is therefore important for citizens to have access to information that will enable them participate meaningfully in public governance.<sup>7</sup> This claim is predicated on the fact that a democratic government acquires and holds information at public expense, and in the course of exercising its public duties. Therefore, government-held information actually belongs to the people. Unfortunately, the people's ability to access such information is often impeded by the traditional reluctance of government agencies to release information in their possession.

The right to information is a component of the broader right to freedom of expression and of the press enshrined in Article 19 of the Universal Declaration of Human Rights 1948 (UDHR)<sup>8</sup>, Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR)<sup>9</sup>, Article 9 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR or African Charter)<sup>10</sup> and other international human rights instruments.<sup>11</sup>

The right to information is part of the freedom of expression guaranteed by section 39(1) of the Constitution of the Federal Republic of Nigerian 1999<sup>12</sup> (1999 Constitution) which provides that:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

The constitutional provision encompasses freedoms of the press and of information, which are vital to the smooth function of a democracy. However, it has been argued that the provision does

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meeting of the Ministers' Deputies, contained in Appendix to Norman S. March, 'Access to Government-Held Information: an Introduction' in Norman March (ed.), *Access To Government-Held information* (1987) 32 – 4 and Preamble to Council of Europe Convention on Access to Official Documents, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>, assessed on 25 August 2013.

<sup>6</sup> Norman S. March, *ibid.*

<sup>7</sup> G. Olu Onagoruwa, *Civil Liberties under the Constitution of the Federal Republic of Nigeria, 1999* (2006) 94, where the Author referred to two decisions of the Lagos High Court.

<sup>8</sup> G. A. res. 217 A(III), U.N. Doc. A/810 at 71 (1948); David Weissbrodt, Joan Fitzpatrick & Marci Hoffman, et al. *Selected International Human Rights Instruments and Bibliography for Research on International Human Rights Law* 3ed (2001) 24 – 8.

<sup>9</sup> G. A. res. 2200A (XXI), 21 U. N. GAOR Supp. (No. 16) at 52, U. N. Doc. A/6316 (1966), 999 U. N. T. S. 171, entered into force March 23, 1976 *ibid.*, 36 – 50.

<sup>10</sup> Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982), entered into force Oct. 21, 1986

<sup>11</sup> American Convention on Human Rights, Nov, 22, 1969, O. A. S. Treaty Series No. 36, at 1, OAE/Ser. L./V/II.23 doc. Rev. 2, entered into force July 18, 1978, *ibid.*, 200-219 and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U. N. T. S. 222, entered into force Sept. 3, 1953, *ibid.* 245 – 56.

<sup>12</sup> Cap C23 Laws of the Federation of Nigeria (LFN) 2004. It came into effect on 29 May 1999.

not confer a positive right of access to government-held information.<sup>13</sup> Indeed, sections 39(3) and 45(1) of the 1999 Constitution qualify the right to information. Section 39(3) provides:

Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society-

- (a) for the purpose of preserving information received in confidence, maintaining the authority or independence of courts, regulating telephony, wireless broadcasting 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.

Section 45(1) also provides that:

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.

These provisions validate laws that impose restrictions on disclosure of official information by public officials. These restrictions may be in the interest of defence and public safety amongst others. Thus, the State may rely on sections 39(3) and 45(1) to assert the constitutionality of the Official Secrets Act 1962<sup>14</sup> and the National Security Agencies Act 1986,<sup>15</sup> both of which impose severe restrictions on access to information. The above constitutional provisions presumably provide the basis for other pieces of legislation, such as the Evidence Act 2011,<sup>16</sup> which permit limited access to public records for specified purposes.

Recently also, Nigeria enacted the Freedom of Information Act 2011 (FOIA 2011) to give every person the right of access to public documents and information. The fact that these laws have had to be enacted may presuppose that there is no positive right of access to government held

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<sup>13</sup> Morayo Adebayo & Akinyinka Akinyoade, 'Access to information and transparency: Opportunities and challenges for Nigeria's FOI Act 2011' in Fatima Diallo & Richard Calland (eds) *Access to information in Africa: Law, culture and practice* (2013) 261 – 285 at 263 (Adebayo & Akinyoade); Colin Darch & Peter G. Underwood *Freedom of information and the developing world: The citizen, the state and models of openness* (2010) 220 (Darch & Underwood).

<sup>14</sup> Cap O3 LFN 2004 (OSA).

<sup>15</sup> Cap N7 LFN 2004 (NSA Act).

<sup>16</sup> Other examples include the Statistics Act Cap S10 LFN 2004, the Criminal Code Act, section 97 Cap. 38 LFN 2004, the Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2004, the National Archives Act 1992 and the Environmental Impact Assessment Act 1992.

information under the Constitution. In other words, access would have to be specifically conferred by statute for this aspect of the freedom of information to be meaningful. The counterpoint to this position however, is that the express curtailment of access to certain information by the Constitution in fact presumes the very existence of the right. This contrary position finds support in the constitutional limitation on statutes that restrict access to information. According to sections 39(3) and 45(1) of the Constitution, the limitations must be ‘reasonably justifiable in a democratic society’. Of course, these are two very opposed positions; unfortunately, statutes that impose restrictions on access to information have not been tested judicially to see whether they are reasonably justifiable.

Two pieces of legislation expose dimensions of the problem of limitations to access to information in Nigeria. Under the FOIA 2011, public officers who disclose information in good faith may not be criminally liable. However, they may only disclose information to the extent that is permitted by public interest.<sup>17</sup> Under the National Security Agencies Act also, any classified information or information related to security, defence intelligence and other sensitive state information cannot be disclosed at any time either pursuant to the FOIA 2011 or at all. The challenge arises when information is sought to be restricted, either on general grounds of public interest under the FOIA 2011 or on the more specific basis of national security under the National Security Agencies Act, or for some other reasons permitted by other statutes.

Again, when Nigerian legislatures enact laws that curtail disclosure, they presume to act under section 39(3) of the Nigerian Constitution. Under these laws, government agencies that are vested with functions of classifying information may adopt classification systems, regulations, and processes to facilitate their functions. Unfortunately, how these agencies interpret their statutory functions and how information is classified under these laws have not been subjected to any known constitutional scrutiny, using the standard of what is ‘reasonably justifiable in a democratic society’. This gap provides the basis for this thesis.

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<sup>17</sup> Thomas Blanton ‘The World’s Right to Know’ (2002) 131 *Foreign Policy* 50 – 8 (Thomas Blanton).

## 1.2 Statement of Problem

Several statutes in Nigeria impose restrictions on access to government-held information. Many of these restrictions dwell on information allegedly pertaining to ‘national security’. As pointed out above, the National Security Agencies Act 1986 and the Official Secrets Act 1962 are two examples of laws that regulate national security information. The National Security Agencies Act protects and preserves ‘classified matters’ relating to national security. However, it relies on the meaning of ‘classified matter’ provided by section 9 of the Official Secrets Act, which defines it as

‘any information or thing which, under any system of security classification, from time to time, in use by or by any branch of government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria’ (sic).

The problem with these statutes is that they are extremely vaguely worded and confer extraordinarily broad powers on government agencies that are saddled with the responsibility of classifying information on the basis of national security, without setting the parameters for classifying information. The key issues relate to what really constitutes ‘national security’ in Nigerian law, and when information may be classified in the interest of national security.

The National Security Agencies Act creates three agencies, namely the Defence Intelligence Agency (DIA), the National Intelligence Agency (NIA) and the State Security Service (SSS). The agencies are generally referred to as national security agencies. Beyond this however, national security has no precise meaning in Nigerian law, and it has not helped that the Constitution broadly confers power on these agencies to limit access to information in the interest of defense, without clearly specifying the test of reasonable justification that the limitation must fulfill. As a result, the power to classify information in the interest of national security has been broadly abused in Nigeria; it has fostered secrecy around government activities<sup>18</sup> and has been used as a ploy for official corruption,<sup>19</sup> to limit press freedoms and

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<sup>18</sup> See Ndaeyo Uko *Romancing the gun: the press as promoter of military rule* (2004).

<sup>19</sup> Obiamaka Egbo, Ifeoma Nwakoby & Josaphat Onwumere et al ‘Security Votes in Nigeria: Disguising Stealing from Public Purse’ (2012) 111 *African Affairs* 597 – 614.

other civil liberties. The laws and their application have imposed severe restrictions on access to government held information.<sup>20</sup>

A few instances of judicial expositions on the legality of limitations on access to information in Nigeria can be found in seditious cases. The most prominent of these are *DPP v Chike Obi*<sup>21</sup> and *Arthur Nwankwo v The State*.<sup>22</sup> Both cases, based on similar facts, respectively interpreted the Constitution of Nigeria 1960, section 24(1) and the Constitution of the Federal Republic of Nigeria 1979, section 36(1) (similar to section 39 of the 1999 Constitution) and were tried by courts of coordinate jurisdiction. However, their application of the requirement that limitations must be ‘reasonably justifiable in a democratic society’ resulted in conflicting outcomes.<sup>23</sup> There have been no authoritative pronouncements on the subject by Nigeria’s apex court. The interpretative approach to constitutional provision thus remains undeveloped and uncertain. Nonetheless, seditious laws continue to be asserted by the Nigerian government against press freedoms especially.

### 1.3 Aims of the study

Many statutes in Nigeria impose severe limitations on access to government-held information though the African Charter, for instance, which guarantees the right of access to information has been incorporated into its laws.<sup>24</sup> As observed above, these statutes purport to derive validity from sections 39(3) and 45(1) of the 1999 Constitution. However, none of these laws, or measures taken under them to limit access to information has been subjected to constitutional scrutiny. Yet again, there has been debate as to whether the Constitution provides a positive right of access to information, which may have been curtailed by the recognition in sections 39(3) and 45(1) limitations that are reasonably justifiable in a democratic society. This thesis contributes to this

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<sup>20</sup>Ibid.

<sup>21</sup>[1961] ALL NLR 186. (*Obi*).

<sup>22</sup>(1983) FRN 320.

<sup>23</sup> In *Obi* the court held ‘...it must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly’, per Ademola CJF, 196.

<sup>24</sup>See paras 3.1 and 4.2.3 *infra*.

debate. Starting with the premise that the jurisprudence on the interpretation of sections 39(3) and 45(1), and the provisions themselves are deficient,<sup>25</sup> this thesis seeks to achieve the following:

1. Develop standards<sup>26</sup> to guide Nigerian Courts when they interpret these limiting statutes and most especially the term, ‘national security’.
2. Identify, describe and analyse the methods used by government and security agencies to curtail access or withhold information and consider the constitutionality and legitimacy of those methods;
3. Propose safeguards (with reference to the provisions of the constitution) against abuse of executive powers under laws that limit access to information;
4. Propose principles, norms and standards that will allow courts to strike the balance in the conflict between national security needs and the right of access to information;  
and
5. Investigate whether there is need for constitutional reforms.

#### 1.4 Research questions

To achieve the above stated aims, the thesis will seek answers to the following overarching question: To what extent are statutory provisions that authorise limitations on access to information pertaining to national security consistent with constitutional protections for the right of access to information in Nigeria?

The following sub-questions will assist in answering the main research question.

- (1) How, if at all, does the Nigerian Constitution guarantee right of access to information?
- (2) To what extent does the Constitution permit limitations to the right to access information, where such information relates to national security?
- (3) What is the democratic rationale for access to information and does this relate to constitutional application of international legal standards for access to information and national security limitations thereto in Nigeria?

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<sup>25</sup>See paragraph 5.3.2.1 – 5.3.2.2 *infra*.

<sup>26</sup>See paragraph 6.3.2.2 *infra*.

- (4) What models of constitutional interpretation have courts employed to ensure that limitations on access to information are reasonably justifiable in a democratic society, and how do these ensure greater protections for access to information?
- (5) What public interest considerations underlie national security and the right of access to government held information, and how can these be effectively balanced in a democratic society.

### 1.5 Justifications for the study

The extent to which the Nigerian Constitution offers or protects the right of access to information has been the subject of considerable discussion among scholars.<sup>27</sup> Ayo Obe asserts that the provisions are ambivalent,<sup>28</sup> while Adebayo and Akinyoade and Darch and Underwood similarly argue that section 39 of the Nigerian Constitution is ‘quite weak’ or offers very ‘little’ or ‘weak’ basis for the right to access information to be asserted.<sup>29</sup> Their argument is based on the absence of a specific mention of the right ‘to seek’ information as found in Article 19 of the Universal Declaration of Human Rights 1948, and Article 19 of the International Covenant on Civil and Political Rights 1966. The argument appears to be strengthened by section 39(3) of the Nigerian Constitution, which allows statutory prohibitions or restrictions on the disclosure of government information. Section 45(1) of the Constitution also allows restrictions on information in the interest of national defense and public safety, amongst others.

Based on sections 39(3) and 45(1), several statutes have been enacted that effectively shroud government activities in secrecy. Government agencies have also imposed regulations and classified information. If the argument is right that guarantees of the right to access information under sections 39(3) and 45(1) are weak, then government agencies may exercise such absolute powers in classifying information on grounds of national security, without being challenged, as indeed has been the case in Nigeria. However, sections 39(3) and 45(1) enshrine a rider that has often been ignored in the debate, and has not been subjected to thorough judicial and academic analysis in Nigeria. The provisions require that limitations on the disclosure of information must

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<sup>27</sup> See Darch & Underwood, *op cit* note 13 at 220; Adebayo & Akinyoade *op cit* note 13 at 263; Ayo Obe ‘The Challenging case of Nigeria’ in Ann Florini (ed) *The Right to Know: Transparency for an Open World* (2007) 148 (Ayo Obe).

<sup>28</sup> Ayo Obe *ibid*.

<sup>29</sup> Darch & Underwood *op cit* note 27; Adebayo & Akinyoade *op cit* note 27.

be ‘reasonably justified in a democratic society’. This thesis proposes to offer an analysis of what this might mean, and explore how the rider could enhance the right to access government held information in Nigeria. There have been several surveys, assessments and commentaries which interrogate the relationship between the right of access to information and national security,<sup>30</sup> but none of these offer a systematic study of the relationship between the two in Nigeria. None offer in-depth analysis of the tensions between the right to information and national security-related information in Nigeria, and how these could be resolved. The imperative for such an analysis – which this thesis proposes to do – has been intensified increasing by security challenges in Nigeria, and the fact that government continues to be complicit in shielding some of the most egregious violations of human rights before and after the transition to democracy in 1999, from public scrutiny.<sup>31</sup>

Between the collapse of the Soviet Union in 1990 and the 2001 terrorist attack on the World Trade Centre (9/11), the world experienced what Blanton<sup>32</sup> has described as an ‘age of openness’, when governments around the world increasingly made information about their activities available through the adoption of access to information (ATI) laws. However, Blanton also pointed out that the increasing use of executive privilege to withhold information about intelligence services after the events of 9/11 could roll back the successes already achieved. Classifying information on grounds of national security may indeed be inevitable in a democratic society, but to shield decisions to classify information from the constitutional scrutiny of courts could in fact result in the subversion of constitutional democracy. Only recently, the world was gripped by leaked information about a massive surveillance programme by the United States of America. The leakage forced the United States government to admit that there had been breaches and that the regulations

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<sup>30</sup> Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, et al *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999); Thomas Blanton op cit note 17; D. Banisar ‘Freedom of Information and access to government records around the world’ (2002), available at [http://www.forum.mn/res\\_mat/Freedom%20of%20Information%20records%20around%20world.pdf](http://www.forum.mn/res_mat/Freedom%20of%20Information%20records%20around%20world.pdf), assessed on 25 May 2013; D. Banisar ‘the freedominfo.org: freedom of information and access to government information laws around the world’ (2004) available at [http://www.ndi.org/files/freeinfo\\_010504.pdf](http://www.ndi.org/files/freeinfo_010504.pdf), assessed on 25 May 2013; D. Banisar ‘Freedom of information around the world: A global survey of access to government records laws’ (2006).

<sup>31</sup> T. A. Imobighe *Nigeria’s Defence and National Linkages: A Framework of Analysis* (2003); Dapo Adedugba & Philip Ogo Ujomu (eds) *Rethinking Security in Nigeria: Conceptual Issues in the Quest for Social Order and National Integration* (2008).

<sup>32</sup> Thomas Blanton op cit note 17.

would be reviewed. This tendency to abuse the power to classify information underlines the importance of this study.

## 1.6 Research methodology

The research will be drawn from democratic theory and engage in content analysis of primary and secondary sources: Nigerian case-law, Constitution and national legislations; international treaties, statutes and soft law, relevant foreign cases and legislations; jurisprudence, opinions and comments of international human rights bodies; views of textbook writers. As stated above, under sections 39(3) and 45(1) of the 1999 Nigerian Constitution, for any law that imposes restrictions on the right to information to be valid, it must be 'reasonably justifiable in a democratic society'. This phrase occurs in many constitutions in the world. However, the 1999 Constitution does not give any guidelines to the Courts on the approach to adopt in interpreting that phrase. The Courts will have to design a kind of framework to achieve the desired objectives of the limitation provisions.

However, section 36(1) of the South African Constitution 1996<sup>33</sup> provides the basic guidelines on the factors to be taken into consideration to facilitate such an exercise. It says in part that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society... taking into account all relevant factors, including

- a the importance of the purpose of the limitation;
- b the nature and extent of the limitation;
- c the relation between the limitation and its purpose; and
- d less restrictive means to achieve the purpose.

Similar criteria exist in the interpretive jurisprudence of international and regional human bodies like the Human Rights Committee, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The thesis will make use of such criteria especially those developed under the African Charter to develop an analytical framework for determining whether a claim of national security by government or any of its agencies infringes on the right of access to information. The African Charter provisions are being increasingly elaborated upon through soft laws, opinions of text book writers and contributions from various non-governmental organisations. The Charter has the backing of rich African Commission

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<sup>33</sup> Act No. 108 of 1996. See also Constitution of Zimbabwe Amendment (No. 20) Act, 2013, section 86.

jurisprudence on access to information that has been developed over the years and provides a source of materials for research. The Nigerian Bill of Rights could benefit from the African Commission's interpretation of what is reasonably justifiable in a democratic society.

### 1.7 Conceptual and theoretical frameworks

There have been various claims and counterclaims as to the correct source of a positive right of access to (government-held) information. The view often expressed that the right is among the rights guaranteed by the right to freedom of expression has generated wide controversy and burgeoning literature. Claims have been made that except in exceptional instances a positive right to information is derivable only from provisions that explicitly pronounce the 'freedom to seek, receive and impart information and ideas'.<sup>34</sup> There are others who maintain that the use of the words 'freedom to receive and impart information' that appear in human rights instruments, dealing with freedom of expression, without the addition of the word 'seek' is sufficient to invoke such a positive right.<sup>35</sup> Zeno-Zencovich<sup>36</sup> has even taken a totally different position by postulating that the right predates any express recognition of freedom of expression. The latter's position is close to the position taken by the United Nations General Assembly in a Resolution made in 1946 to the effect that, 'freedom of information is a fundamental right and the touchstone of all other human freedoms'.<sup>37</sup> In the United States, various theories of the First Amendment to the American Constitution on freedom of expression have been proposed to ground a right to information.<sup>38</sup> Though such have been rejected by other writers<sup>39</sup> and the US Supreme Court,<sup>40</sup> it is not inconceivable that future judicial decisions may come to align with the principles earlier rejected.

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<sup>34</sup> Darch and Underwood op cit note 13. Lene Johannessen 'Freedom of Expression and Information in the new South African Constitution and its compatibility with international standards' (1994) 10 *SAJHR* 216. The European Court of Human Rights at Strasbourg has consistently maintained this position, see Rolv Ryssdal *the case-law of the European Court of Human Rights on the freedom of expression guaranteed under the European Convention on Human Rights*, Council of Europe (1996).

<sup>35</sup> Sandra Coliver 'Commentary on the Johannesburg Principles' in Sandra Coliver, Paul Hoffman, Jon Fitzpatrick, et al (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999), 12 – 3 (Sandra Coliver's Commentary).

<sup>36</sup> Vincenzo Zeno-Zencovich *Freedom of Expression: A Critical and Comparative Analysis* (2008) 113 – 4.

<sup>37</sup> UNGA Resolution 59 (1) of 14 December 1946.

<sup>38</sup> Thomas I. Emerson 'The Legal Foundations of the Right to Know' (1976) *Washington University Law Review* 1.

<sup>39</sup> W. Gellhorn, 'the Right to Know: First Amendment Overbreath?' (1976) *Washington University Law Review* 25; Louis Henkin 'The Right to Know and the Duty to Withhold: The case of the Pentagon Papers' (1971) 120 *University of Pennsylvania Law Review* 271 – 280.

<sup>40</sup> O'Brien J.C. Goodale 'Legal Pitfalls in the Right to Know' (1976) *Washington University Law Review* 50.

The ‘free speech theories’ propounded by classical liberal theorists like J. S. Mill and Milton have formed the background for some of these controversies and different interpretations.<sup>41</sup>

There is necessity for more in-depth conceptual and theoretical analyses using democratic theory as the underlying rationale of the right of access to information and national security. Security is a basic requirement for human existence and development.<sup>42</sup> National security is a wide and elastic concept, but in this study it means the protection of a country from internal disorders and external invasion. Accountability of government concerns the openness of government activities to the people inclusive of popular control of administrative and executive organs of state in their policy formulation and execution roles. Transparency refers to the level of awareness of ongoing internal, decisional and policy-making processes of a government, agency or institution by the people who are affected by such processes.<sup>43</sup> The concept of ‘public interest’ is a common feature of access to information laws.<sup>44</sup> Access to information laws are meant to protect the interest of the public in the right to information. The study aims to draw out the common thread running through these foregoing concepts.

## 1.8 Structure of the Study

The study is structured into the following six chapters. Chapter One: Background to the Study. The chapter introduces the subject of the thesis and the aims of the study among others. It illustrates the problems of the conflict between the right of access to information and limitations imposed on grounds of national security, and discusses justifications for the study, the conceptual framework and research methodology.

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<sup>41</sup> Joseph E. Stiglitz ‘On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life’ Oxford Amnesty Lecture, Oxford, U.K., January 27, 1999, available at <http://www.internationalbudget.org/wp-content/uploads/On-Liberty-the-Right-to-Know-and-Public-Discourse-The-Role-of-Transparency-in-Public-Life.pdf>, accessed on 12 June 2017; Thomas I. Emerson ‘Toward a General Theory of the First Amendment’ (1963) 72 *Yale L.J.* 877.

<sup>42</sup> Philip Ogo Ujomu ‘The Bounds of Security Theorising: Envisioning Discursive Inputs for the Rectification of a Post-Colonial Situation’ in *Rethinking Security in Nigeria: Conceptual issues in the Quest for Social Order and National integration* Dapo Adelugba & Philip Ogo Ujomu (eds) (2008) 5 – 6.

<sup>43</sup> Ann Florini, ‘Introduction: The Battle Over Transparency’ in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (2008) 1 – 16.

<sup>44</sup> Meredith Cook *Balancing the Public Interest: Applying the Public Interest test to exemptions in the UK Freedom of Information Act 2000* (2003).

Chapter Two: Striking A Balance Between Access to Information and National Security in Nigeria: Conceptual and Theoretical Framework. The chapter draws from democratic theory to analyse the public interest considerations that underpin access to information and national security limitations thereto and how these impede or enhance transparency and accountability in governance. It evaluates the United Nations' normative framework for the right of access to information and national security, and then argues for constitutional safeguards that ensure that limitations on access to information pertaining to national security are reasonably justifiable in a democratic society.

Chapter Three: Right of Access to Information and National Security in African Human Rights System. The chapter deals with the right of access to information and considerations of national security in the African Charter and relevant soft law. It examines African regional framework on the right of access to information and national security with a focus on the provisions of art 9 of the African Charter including elaborations and interpretive jurisprudence thereon by authoritative bodies like the African Commission and the African Court on human and Peoples' Rights. It specifically carries out an analysis of regional principles of access to information and conditions for permissible national security restrictions.

Chapter Four: Right of Access to Information and National Security in Nigerian Law. The chapter examines the linkage between the right of access to information and national security in Nigerian Law. It attempts a critical evaluation of how the Constitution and statutory provisions address issues of national security and the right to information.

Chapter Five: Judicial Control of National Security Limitations on Access to Information in Nigeria. The chapter deals with judicial control of national security restrictions on access to information in Nigeria. It examines the nature of judicial power under the Nigerian Constitution and the extent of this power to prize open national security restrictions on state-held information. It also analyses the judicial approach and models of constitutional interpretation to protect the right of access to information.

Chapter Six: Conclusion and Recommendations. This is the concluding chapter. It sums up the argument in preceding chapters and recommends law reforms. It recommends, among others, various amendments to existing constitutional and statutory provisions on the right of access to information in Nigeria, and the interpretive model for applying the test of reasonably justifiable restriction on access to information in the interest of national security.

## CHAPTER TWO: STRIKING A BALANCE BETWEEN THE RIGHT OF ACCESS TO INFORMATION AND NATIONAL SECURITY: A FRAMEWORK FOR ANALYSIS

### 2.1 INTRODUCTION

Access by citizens to official sources of information is a necessary, even if unwritten, principle of democracy.<sup>1</sup> Accordingly, the right of access to information is one of the hallmarks of an effective constitutional democracy,<sup>2</sup> and a fundamental right on its own.<sup>3</sup> The right is helpful in protecting other rights<sup>4</sup> and imposes a duty on the State to facilitate access by everyone<sup>5</sup> to information held by its agencies and public bodies<sup>6</sup> in any accessible form, retrieval systems and howsoever produced.<sup>7</sup> The right is a component of the broader right to freedom of expression and information enshrined in international and regional human rights instruments,<sup>8</sup> constitutions and other laws.<sup>9</sup>

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<sup>1</sup> Vincent Kazmierski *Something to Talk About: Applying the Unwritten Principle of Democracy to Secure a Constitutional Right to Access Government Information in Canada* (unpublished PhD Thesis, Faculty of Law, University of Toronto, 2008) ch 1.

<sup>2</sup> Joan Fitzpatrick 'Introduction' in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, et al (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) xi.

<sup>3</sup> UNDP *Right to Information Practical Guidance Note* UNDP (2004) 8.

<sup>4</sup> See the United Nations General Assembly in 1946 Resolution 59(1).

<sup>5</sup> The extent to which non-citizens or residents within a country, has a right of access to information, varies from one jurisdiction to another. However, this is the plain meaning of the right, see Colin Darch & Peter G Underwood *Freedom of information and the developing world: the citizen, the state and models of openness* (2010) 76 (Darch & Underwood).

<sup>6</sup> Including private bodies executing public functions or utilising state funds, see Alasdair Roberts 'Structural Pluralism and The Right to Information' in Richard Calland & Alison Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (2002) 28 – 46.

<sup>7</sup> UN Special Rapporteur on Freedom of Opinion and Expression, 1997 Report to the UN Commission on Human Rights. To many writers, 'freedom of information' 'technically' means and is 'commonly understood as the right to access information held by public bodies', see Toby Mendel *Freedom of Information: A Comparative Legal Survey* (2008) iii. In this thesis the 'right of access to information' is used throughout except as otherwise indicated.

<sup>8</sup> The Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III), 10 December 1948, article 19 (1); International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A (XXI), article 19(1) of 16 December 1966, entered into force 23 March 1976; American Convention on Human Rights, adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978, article 13(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953, article 10(1); and African Charter on Human and Peoples' Rights (ACHR), adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, article 9.

<sup>9</sup>The critical importance of political communication, openness and governmental accountability to democracy underlie the adoption of the first world's constitutional right to information based on the Swedish Freedom of the Press Act 1766 and of the United States' Freedom of Information Law 1966.

However, human rights discourse makes salient a tension between the right and the need of States to protect national security: in some instances, national security concerns may be invoked to justify the limitation of the exercise of right to access State information. But to what extent may the right be limited in a democracy and an appropriate balance struck which favours public scrutiny of government actions to safeguard against abuses.<sup>10</sup>

International instruments including the International Covenant on Civil and Political Rights 1966 (ICCPR) and the African Charter on Human and Peoples' Rights 1981 (ACHPR) create binding obligations on the access to information and prescribe a cumulative three-part test of legality, legitimacy and necessity for permissible national security limitations thereon.<sup>11</sup> Therefore, States that have either signed, ratified and/or domesticated such instruments are both morally and legally bound to implement such.

Concerning Nigeria, section 39(1) of the 1999 Constitution<sup>12</sup> guarantees the right to receive and impart information. Unfortunately, the development of Nigeria's Constitution and laws enables the State to excessively restrict the scope of access to information on national security grounds.<sup>13</sup> Again, the overall phraseology of section 39, its interpretation and official practices in Nigeria do not yet conform with minimum international human rights requirements for the protection of access to information.

Consequently, part 1 of this chapter introduces the subject. Part 2 engages with an understanding of democracy based on an enforceable right of access to State-held information. Part 3 reviews the international standards for the right; defines national security; and considers the problematic need for States to sometimes restrict access to information based on this security while also safeguarding the right. Part 4 briefly explains the influence of Nigeria's constitutional history on the right of access to information and national security laws that restrict it. Part 5 concludes.

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<sup>10</sup>Sandra Coliver 'Commentary on the Johannesburg Principles' in Sandra Coliver, Paul Hoffman, Jon Fitzpatrick, et al (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999), 12 – 3 (Sandra Coliver's Commentary).

<sup>11</sup> United Nations *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003)15, 34 – 5.

<sup>12</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999 (Cap C23 Laws of the Federation of Nigeria (LFN) 2004.

<sup>13</sup> Paragraphs 4.2.1, 4.2.4 and 4.2.4.1 – 4.2.4.2 *infra*.

## 2.2 CONCEPTUALISING DEMOCRACY

It is a common assumption among human rights bodies and activists that ‘freedom of information’ or access to information underpins democracy, that the right to information is a fundamental principle of democracy<sup>14</sup> or that ‘it is well-established under international law that democracy requires that the public has access to ... information’.<sup>15</sup> However, critics have cast serious doubts on the rationales for the right of access to information including its linkage with the proper functioning of a democracy. Darch and Underwood argue that such claims are tenuous, overstated and lacking conceptual depth.<sup>16</sup> They are joined by Professor Calland who argue that despite the widely acclaimed liberal origins of the right of access to information, its real nature and conceptual linkages with democratic theory remains yet undertheorized.<sup>17</sup> Yet, there is a flood of literature which portray an overwhelming lack of consensus among scholars as to what the basic indicators of democracy are, but rather that ‘democracy’ is a contested concept or that it has no generally acceptable definition: nowhere does fact approximate to norm, or theory to experience.<sup>18</sup> As Sartori asks, ‘How can the people, however understood and defined, be effective wielders of power?’<sup>19</sup>

Consequently, in this section, I argue that citizens to State-held access to information is the irreducible minimum requirement for a functioning democracy and differentiates the democratic way of governing from its antithesis. In categorizing democracy, I draw heavily from David Held’s *Models of Democracy*,<sup>20</sup> and from democratic theory generally, as a framework for analysis and the proposals that follow. I have aggregated Held’s nine models into six, based on what I consider to be their three key features. These are: processes of decision-making; the relationship between the individual and the State; the roles assigned to the *demos* and institutional designs for achieving

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<sup>14</sup> Toby Mendel ‘Freedom of Information as an Internationally Protected Human Right’, available at <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>, accessed 10 September 2016; R Peled & Y Rabin ‘The constitutional right to information’ (2010); Anthony Mason ‘The relationship between freedom of expression and freedom of information’ in Anthony Mason (ed.) *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams* (2000).

<sup>15</sup> Article 19 Letter to the Secretariat of the Constitutional Review Commission of Zambia, available at <http://www.article19.org/pdfs/letters/zambiaconstitution-letter.pdf>, accessed 12 September 2016.

<sup>16</sup> Darch & Underwood op cit note 5 at 46.

<sup>17</sup> Richard Calland ‘Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation’ (2014) 61 *Theoria* 70–2.

<sup>18</sup> See Ian Shapiro *the State of Democratic Theory* (2003); Jack Lively *Democracy* (1975) 30; Michael Coppedge, John Gerring, David Altman et al ‘Conceptualizing and Measuring Democracy: A New Approach’ (2011) 9 *Perspectives on Politics* 247 – 267.

<sup>19</sup> Giovanni Sartori *Democratic Theory* 1<sup>st</sup> Indian ed (1965) 22.

<sup>20</sup> David Held *Models of Democracy* 3 ed (2006).

people's rule. I will elaborate on the models as they relate to public interest consideration that underpin access to information and national security limitations thereto and how these may impede or enhance democratic governance. Ultimately, the objective is to demonstrate that the exercise of popular power which democracy signifies is not feasible without a legally enforceable right of access to State information.

### 2.2.1 Models of democracy

The discussion concerning models of democracy attempt to capture the basic assumptions, normative framework, similarities and dissimilarities that underlie each conception. These conceptions are complimentary to each other in major respects. Each of the models is circumscribed by the need for a participatory, people-regulated and accountable system of government. Yet, they portray conflicts of ideas among theorists often pertain to the conceptualisation of popular participation, the extent of power to be conferred on elected representatives, and how to achieve the common good. I begin to examine these differences and commonalities beginning with Athenian democracy – usually the starting point in any inquiry into the meaning of democracy due to its ancient Greece origin.

#### 2.2.1.1 *Athenian democracy*

*Demokratia*, the Greek root-word for 'democracy' – a combination of *demos* (people-citizens) and *kratos* (rule) – translated to 'political power of the ordinary people'<sup>21</sup> or rule by the (many) people,<sup>22</sup> and was the 'closest possible approximation to a literal democracy'.<sup>23</sup> In the ancient Athenian *politeia* (city-states), democracy connotes the entitlement of citizenship (*politikē*) by all equals (*homoi*) and free (*eleutheroi*) to participate (*metechlein*) or share in governing the *polis*.

Direct participation in governing the State affairs was regarded as a public duty by every self-governing Athenian, that is: the enfranchised free, adult and male citizen.<sup>24</sup> Government consisted

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<sup>21</sup> J. Peter Euben, John R. Wallach & Josiah Ober (eds) *Athenian Political Thought and the Reconstruction of American Democracy* (1994) 150 (Josiah Ober & Others).

<sup>22</sup> Gunter Frankenberg 'Democracy' in Michel Rosenfeld & András Sajó (ed) *The Oxford Handbook of Comparative Constitutional Law* (2012) 250.

<sup>23</sup> Giovanni Sartori op cit note 19.

<sup>24</sup> David Held op cit note 20.

in the gatherings by the *demos* as a sovereign authority to deliberate, legislate and judge on matters pertaining to the common interest.<sup>25</sup> Specifically, these matters related maintenance of public order and foreign affairs including levying of war, performance of naval and military forces, etc.<sup>26</sup> Plato's *Protagoras* contains some of the elements of open government as may be conceived today:

Now when we meet in the Assembly, then if the State is faced with some building project, I observe that the architects are sent for and consulted about the proposed structure, and when it is a matter of shipbuilding, the naval designers, and so on with everything which the Assembly regards as a subject for learning and teaching...But when it is something to do with the government of the country that is to be debated, the man who gets up to advise them may be a builder or equally well a blacksmith or a shoemaker, merchant or shipowner, rich or poor, of good family or none...

The Assembly also acted as a public sphere designed by the State for considering, weighing and sifting information by the *demos* before they could be acted upon by the State with the only precondition for citizenship or entitlement to rule being liberty – to be a free-born and not a slave. But in classical Athens, democracy was laden with a restricted perception of freedom and equality whereby women, slaves and underage men were excluded from the political process.<sup>27</sup> Equality among enfranchised citizens, liberty, freedom of expression and association, respect for the law including the cultivation of civic virtue – commitment and subordination of private to public life of the State or Republic epitomised the ends of Athenian democracy.<sup>28</sup> The Constitution of Athenian democracy was confirmed in Pericles' famous funeral oration as recomposed by Thucydides *The Peloponnesian War*, which reads in part,

Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. when it is a question of settling private disputes, everyone is equal before the law; when it is a question of putting one person before another in positions of public responsibility what counts is not membership of a particular class, but the actual ability which the man possesses.... We are free and tolerant in our private lives; but in public affairs we keep to the law. This is because it commands our deep respect. ... Here each individual is interested not only in his own affairs, but in the affairs of the state as well ... We Athenians, in our own persons, take our decisions on policy or submit them to discussions ....<sup>29</sup>

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<sup>25</sup>Ibid 14, 17.

<sup>26</sup>Ibid.

<sup>27</sup> Michael Rosenfeld & Andras Sajó (ed), *The Oxford Handbook of Comparative Constitutional Law* (2012) 250.

<sup>28</sup>See Aristotle *the Politics* 198I) 169; David Held op cit note 21 at 15 – 7.

<sup>29</sup> Referred to in David Held *Models of Democracy* ibid, 13 – 4.

As the above quotations reveals, the idea of constitutional government and the State in classical Athens merged in an active citizenship having both rights and obligations, but constrained only by law which enhanced accountability, control of officials and was sustained by widespread availability of political knowledge.<sup>30</sup>

Athenian democracy thrived in as much as matters of State were openly discussed by citizens in the Assemblies before decisions were taken, a factor made possible due to the manageable number of citizens. In the course of time, Athenian democracy faltered due partly to the foibles of mass decision-making and was absorbed into more stable republics. After many centuries, there was a resurgence of republican virtues in Europe towards constitutionalising political participation by all societal groupings, but one which deemphasized the overarching devotion of the majority *demos* to the *polis*.<sup>31</sup> The concept of republicanism attracted much attention in the framing of the Constitution of the American Federation by James Madison and others in the late 1700s – a development which can be better appreciated against the background of the emergence of liberalism within American and European intellectual thought.<sup>32</sup> Liberalism was founded on classical ideas on popular control of government such as John Locke's *Two Treatises of Government*<sup>33</sup> and J S Mill's classic defence of individualism,<sup>34</sup> which later roused revolutionary fervour concerning individual rights in 18th century America and France. I engage next with Madison's influence on republicanism as a democratic form in America.

### 2.2.1.2 Madisonian-Republican democracy

James Madison is one of the notable founders of the American Union and republican democracy,<sup>35</sup> which he described as 'a government which derived all its powers directly or indirectly from the great body of the people'.<sup>36</sup> The basic principles of Madison's political theory were that 'the

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<sup>30</sup> Josiah Ober & Others op cit note 21 at 92 – 3.

<sup>31</sup> Nicollo Machiavelli *the Discourses* (1983) 104 – 11.

<sup>32</sup> David Beetham 'Liberal Democracy and the Limits of Democratization' (1992) XL *Political Studies* 40 – 53 at 41 – 42, who specifies five key components of classical liberalism to be constitutional guarantee of individual rights including freedom of expression and access to information; separation of powers; an elected representative assembly; the principle of limited State, pluralism and public/private divide; and a notion of common good based on popular consensus.

<sup>33</sup> John Locke's *Two Treatises of Government* (1967) 365 – 81.

<sup>34</sup> C. L. Ten 'Mill and Liberty' (1969) 30 *Journal of the History of Ideas*, 47 – 68.

<sup>35</sup> Neal Riemer 'The Republicanism of James Madison' (1954) 69 *Political Science Quarterly* 45 – 64 (Neal Riemer).

<sup>36</sup> Gaillard Hunt (ed) *the Writings of James Madison* (1900) (Gaillard Hunt).

interests and rights of every class should be duly represented and understood in public Councils<sup>37</sup> and that ‘men cannot be justly bound by laws in making which they have no part’.<sup>38</sup> In Madison’s view then, popular sovereignty translated to supremacy of the constitution and ‘ongoing sovereignty’ of public opinion – an act of responsible citizenship through deliberation and active participation in public affairs.<sup>39</sup> Based on the foregoing, the people are entitled to play an active role in government. His version of republican democracy is thus a limited government based on the principle of the will of the majority who rule to safeguard the public good and private rights, whereby the people reserve ‘an ...inalienable ... right to reform or change’ a government found ‘adverse or inadequate to the purposes of its institution.’<sup>40</sup> The ends of democracy then, as conceived by Madison were ‘life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety’.

Madison is notable most especially for ‘his adaptation of a traditional republican theory’ to solve the problem of ‘factional majorities’<sup>41</sup> identified as the bane of popular governments especially as it relates to ‘establishing and maintaining republican government in a federal state’ – America precisely.<sup>42</sup> He traced ‘the most common and durable source of factions’ defined as a ‘number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community’<sup>43</sup> to ‘the various and unequal distribution of property’.<sup>44</sup> Madison was concerned about the dangers inherent in the formation of factional minorities among elected officials and even among the people. The question to which Madison sought answers was, ‘was it possible to secure the public good and private rights against the danger of . . . faction, and at the same time to preserve the spirit and the form of popular government?’<sup>45</sup> In his view, because the political man always acts in his self-interest, not the public good ‘measures

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<sup>37</sup> Gaillard Hunt & J B Scott (eds) *The Debates in the Federal Convention of 1787* (1920) 329.

<sup>38</sup> *Ibid*, 169.

<sup>39</sup> Colleen A. Sheehan ‘Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion’ (2004) 98 *The American Political Science Review* 406.

<sup>40</sup> Gaillard Hunt op cit note 36, V at 376 – 7.

<sup>41</sup> *Ibid*, 366 – 7.

<sup>42</sup> Neal Riemer op cit note 35 at 34.

<sup>43</sup> J. E. Cooke *The Federalist* (1961).

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority'.<sup>46</sup> Madison noted,

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.<sup>47</sup>

In David Held's view, Madison's found the solution to the problem of faction in a large federal State in a representative democracy, not in

... the rightful place of the active citizen in the life of the political community but, instead, the legitimate pursuit by individuals of their interests, and government as a means for the enhancement of these interests. ... his position signals a clear shift from the classical ideals of civic virtue and the public realm to liberal preoccupations. He conceived the representative state as the chief mechanism to aggregate individuals' interests and to protect their rights. In such a state, he believed, security of person and property would be sustained and politics could be made compatible with the demands of large nation-states ....<sup>48</sup>

This republican remedy consists in establishing a republican constitution based on 'popular, representative, responsible, limited government, utilising the principles of majority rule, short elective terms, and rotation in office' in America.<sup>49</sup> As part of the remedy Madison never lost sight of the fact that 'a fundamentally capable electorate was the prime safeguard of republican institutions'<sup>50</sup> because dependence on the people is . . . the primary control on the government'. Madison proposed,

an extensive, representative, federal republic, utilizing the principle of separation of powers, and under a Constitution armed with requisite powers of governance, denying certain powers to the states, and resting upon a fundamentally capable electorate.<sup>51</sup>

The model integrates both State and society, but constitutionally constrains the power of an elected majoritarian government through the rule of law and popular sovereignty.<sup>52</sup> The American aversion for absolute powers of a monarchy found in Greek democracy and later in John Locke's theory of government was etched by James Madison and other 'fathers' of American democracy

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> David Held *Models of Democracy*, op cit note 20 at 15 – 6.

<sup>49</sup> Neal Riemer op cit note 35.

<sup>50</sup> J. E. Cooke op cit note 43.

<sup>51</sup> Clinton Rossiter (ed) *The Federalist papers* (1999).

<sup>52</sup> Robert A Dahl *a Preface to Democratic Theory* (1956) ch 2.

in the American Declaration of Independence 1776. The Declaration emphasises the notion of ‘equality’ of ‘all Men’ to ‘their inalienable rights’, among which are the Rights to ‘Life, Liberty, and the Pursuit of Happiness’ and ‘that to secure these Rights, Governments are instituted among Men’. What the equal application of laws in the American Declaration means to American citizens was for the cosmopolitan Greeks the notion of justice that no one citizen is above the other. In Athens, the *demos* were equal because they were free-born, in James Madisonian terms, they are free because they are free.

Most outstanding in Madison’s political philosophy of popular government was his recognition of a well-informed citizenry as the minimum requirement of a functioning democracy.<sup>53</sup> In the popular words of Madison,

A popular Government, without popular information, or the means of acquiring it, is but prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.<sup>54</sup>

In a nutshell, Republican-Madisonian model, gives emphasis to direct interaction between the political system and citizens, firm civic commitment to the State and political equality – virtues of citizenship borrowed from Athens by erstwhile Roman republics. It also focuses on political equality (the right of the people to govern themselves).

### *2.2.1.3 Liberal-Representative democracy*

Liberal democratic theory of the State evinces an attempt to balance a profound commitment to individual rights and political rule by a majority which centre on the ‘consent of the governed’ and the related concepts of representation, minority rights as a solution to the problem of political domination.

‘Consent’ of the governed or the people signifies that ‘government’s legitimacy and moral right to use State power’ must derive from the people or society over which that political power is

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<sup>53</sup> James Madison Letter to William T. Barry of 4 August 1822, available at [http://www.constitution.org/jm/18220804\\_barry.htm](http://www.constitution.org/jm/18220804_barry.htm), accessed on 20 July 2016. Referred to by Darch & Underwood op cit note 5 at 31 – 2.

<sup>54</sup> Ibid.

exercised.<sup>55</sup> Bentham, for example, believed that ‘general consent’ provides ‘the surest visible sign and immediate evidence of general utility’.<sup>56</sup> In Rousseau’s theory, majority decisions reflect the ‘general will’, which aims at the common good or the public interest though he denied ‘that the people’s deliberations always have the same rectitude’ in view of inequality of information, conflict of interests, economic inequality, etc., though he also believed that different majorities are needed to achieve different purposes.<sup>57</sup> According to Joshua Cohen’s reading of Rousseau and Bentham, though both writers disagree as to whether voting can express the common will, they concede that voting is imperfect to arrive at the ‘general will’.<sup>58</sup> For Riker, his thesis of populist democracy is that ‘the popular will is revealed through voting’ and ‘the opinions of the majority must be right and must be respected because the will of the people is the liberty of the people’.<sup>59</sup>

The representative aspect of liberal democracy emerged mainly from European political and social traditions a system of rule embracing elected ‘officers’ who undertake to ‘represent’ the interests or views of citizens within the framework of the ‘rule of law’.<sup>60</sup> In liberal political thought, representation is based on equality of rights and consent of the people whereby ‘[e]very man has a right to one vote and no more in the choice of representatives’.<sup>61</sup> Dahl,<sup>62</sup> Schumpeter,<sup>63</sup> Lipset,<sup>64</sup> and a host of other proponents of democratic elitism politics came to be restricted to a process or method of choosing decision-makers from among political elites who freely compete for the people’s vote, but ‘not [for the people] to engage in discussion or resolution of issues of society

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<sup>55</sup>Ibid.

<sup>56</sup> Ross Harrison *Bentham* (1983) 214.

<sup>57</sup> Jean-Jacques Rousseau, *Social Contract*, ed. Roger D. Masters (1978) ch 3 61.

<sup>58</sup> Joshua Cohen ‘Autonomy and democracy: reflections on Rousseau’ (1986) 15 *Philosophy and Public Affairs* 275 – 97.

<sup>59</sup>William H. Riker’s *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (1982) 14.

<sup>60</sup>David Held ‘Democracy: From City-states to a Cosmopolitan Order?’ (1992) XL *Political Studies* 10 – 39 at 12; Carole Pateman *Participation and Democratic Theory* (1970) 3.

<sup>61</sup> Thomas Paine ‘Dissertation on First Principles of Government’ in Nelson F Adkins (ed.) *Common Sense and Other Political Writings* (1953) 155 – 74.

<sup>62</sup> Robert A Dahl *a Preface to Democratic Theory* op cit note 52.

<sup>63</sup> The Schumpeterian conception is that ‘the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’ – Joseph Schumpeter *Capitalism, Socialism and Democracy* 3 ed. (1950) 250. The Schumpeterian model itself is said to have been based on ‘British praxis’ or ‘English conception of democracy’, which discouraged ‘the people’s active political participation’, see Percy Allum *State and Society in Western Europe* (1995) 99.

<sup>64</sup> Seymour Martin Lipset *Political Man: The Social Bases of Politics* (1969) 27 (Lipset).

and government'.<sup>65</sup> But their opinions of representation contrast sharply with those of liberal thinkers like Rousseau and J S Mill who regarded active participation in politics (voting) and discussions by the people as a method of discovering the common good.<sup>66</sup> For instance, Lipset writes,

Representation is neither simply a means of political adjustment to social pressures nor an instrument of manipulation. It involves both functions, since the purpose of representation is to locate the combinations of relationships between parties and social bases which make possible the operation of efficient government.<sup>67</sup>

But the core of the elitist principle of representation endorsed by Lipset and other theorists is that the success and security of a democracy depends on a disinterested and apathetic masses or citizens not in 'profoundly anti-democratic tendencies in lower class groups'.<sup>68</sup> They argue that widespread ignorance among the people is good for democracy so far some minority elements of the population are active in politics. Their view of democracy is 'minimalist' in nature because they consider politics simply to consist of competition a minority ruling elite for majority of votes. The aim of elitist theory is thus 'to combine a substantial degree of popular participation with a system of power capable of governing effectively and coherently'.<sup>69</sup> From this elitist perspective then, the elites offer minimal or little accountability to the *demos*, and democracy is simply a process of legitimising future government decisions through the ballot box.

However, the bane of liberal-representative democracy is the over-reliance on elections as the minimum requirement for democracy to exist. The thesis of periodic elections as an institutional means of changing, and constraining the exercise of power by political leaders has been subject to varying criticisms, among which is that voting outcomes do not necessarily reflect the people's preferences or 'general will'.

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<sup>65</sup> Julie King 'Democracy in the Information Age' (2006) 65 *Australian Journal of Public Administration* 16 – 32 at 18; Elmer Eric Schattschneider *the Semisovereign People: A Realist View of Democracy in America* (1960) 138.

<sup>66</sup> Richard R. Lau Rutgers & David P. Redlawsk 'Voting Correctly' (1997) 91 *The American Political Science Review* 585 – 598 at 586.

<sup>67</sup> See Introduction by Lipset to the Collier Books paperback edition of Robert Michel's *Political Parties* (1962) 34. Referred to by Jack L. Walker 'A Critique of the Elitist Theory of Democracy Author' (1966) 60 *The American Political Science Review* 286.

<sup>68</sup> Lipset op cit note 64.

<sup>69</sup> Samuel Beer 'New Structures of Democracy: Britain and America' in Chambers and Salisbury (eds) *Democracy in the Mid-20<sup>th</sup> Century* (1960) 46.

Nevertheless, a remarkable degree of agreement as to minimum necessary conditions for liberal democracy though they may disagree as to the nomenclature, manner or founding by the people of government, a mode of participation of the people in government. Marc F. Plattner refers to liberal democracy as the coupling of liberalism – government limited by a constitution, the rule of law, and the protection of individual rights, and democracy - the selection of government officials by universal suffrage.<sup>70</sup>

A wide range of commentators suggest that all or some of the following conditions must be present in a liberal democracy worth its name: protection of individual (civil and political rights) – freedom of speech, freedom of peaceful assembly, freedom of association, free and fair periodic elections and political pluralism.<sup>71</sup> Periodic free and fair elections for the election of political representatives – either of the presidential or parliamentary type – are at the heart of liberal democracy. Periodic elections serve key democratic purposes to reveal the people’s will in producing government, change an underperforming government and control political behaviour.<sup>72</sup> Liberal-representative democracy also concentrates on achieving political legitimacy and popular control of power through constitutionalism, separation of powers, adherence to the rule of law and extensive public deliberations.<sup>73</sup>

But liberals and democrats of different shades of persuasion continue to make contrary assertions pertaining to the importance of one basic institution or the other or to emphasise some characteristics of liberal democracy over the others. There are those who see the representative assembly as a forum for governmental accountability to the people based on the strict requirements of delegation, and the need for more direct political participation.<sup>74</sup> Even when a respected theorist like Macpherson asserts that protection of individual and minority rights is one of the identifying characteristics of modern liberal democracies,<sup>75</sup> liberal feminists continue to argue that protection

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<sup>70</sup>Marc F. Plattner ‘From Liberalism to Liberal Democracy’ *Journal of Democracy* (1999) 10 121.

<sup>71</sup> David Held *Models of Democracy* op cit note 20 at 2; Robert A Dahl *Democracy and Its Critics* (1989) 221, 233.

<sup>72</sup> Adam Przeworski, Susan C. Stokes & Bernard Manin (eds) *Democracy, accountability, and representation* (1999).

<sup>73</sup> Dimitris N. Chrysochoou *Democracy in The European Union* (1998) 12, 50; Ralf Dahrendorf ‘A Definition of democracy’ *Journal of Democracy* (2003) 14 103. For a contrary view, see Anthony Arblaster *Democracy* (2002) 24.

<sup>74</sup> B. Barber *Strong Democracy* (1984); J. Burnheim *Is Democracy Possible?* (1985) C. C. Gould *Rethinking Democracy* (1988).

<sup>75</sup> C B Macpherson *the Life and Times of Liberal Democracy* (1977) 2.

of minority rights is sexist and inconsistent with equality of women with men.<sup>76</sup> In similar vein, social democrats view political equality to be of little value in a situation whereby the influences of unaccountable private economic concerns are allowed to control political decision-making processes.<sup>77</sup>

#### 2.2.1.4 Direct democracy

Direct democracy is a system of government by direct involvement by the people rather than representatives or political parties in political decision-making.<sup>78</sup> Direct democracy entails a continuous participation of the people in the direct exercise of power, whereas indirect (or representative) democracy amounts to a system of limitation and control of power. Direct democracy – involvement by citizens in policy making has occurred in several historical formats, and can be identified along two major streams: the Athenian and contemporary constitutional designs.

The most widely-acclaimed form of direct democracy arose in ancient Athens.<sup>79</sup> it was ‘the right to participate directly in the process of debate, deliberation and decision-making’<sup>80</sup> or the exercise of ‘political power wielded actively and collectively by the *demos*’.<sup>81</sup> Among scholars, the general view is that outside its historical contingency in Athenian city-states, direct policy-making by the *demos* is impracticable in societies ‘marked by a high degree of social, economic and political differentiation’ such as those under which modern liberal democracies emerged.<sup>82</sup> Sartori, for instance, says that

... if direct democracy were preferable, it is nonetheless impossible. For it can exist only within a city-community, only *intra moenia*. Real self-government cannot be presumed: it requires the actual presence and participation of the people concerned.<sup>83</sup>

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<sup>76</sup> C. Pateman ‘Feminism and democracy’ in G. Duncan (ed.) *Democratic Theory and Practice* (1983) 204 – 1; A. Phillips *Engendering Democracy* (1991).

<sup>77</sup> S. Bowles and H. Gintis, *Democracy and Capitalism* (1986).

<sup>78</sup> Susan E. Scarrow ‘Direct Democracy and Institutional Change: A comparative investigation’ (2011) 34 *Comparative Political Studies* 651 – 64.

<sup>79</sup> It is however of currency in Swiss cantons.

<sup>80</sup> Julie King op cit note 65 at 16.

<sup>81</sup> Josiah Ober op cit note 1.

<sup>82</sup> David Held *Models of Democracy* op cit note 71.

<sup>83</sup> *Ibid*, 252 (footnote omitted)

Nonetheless, the lessons on the ideals of freedom and involvement in the affairs of one's State are still relevant for today's democratic practice.<sup>84</sup> Julie King ruminates on Athenian democracy thus:

The views of the people, although diverse, were significant in the development of good government. Debate was encouraged and knowledge shared as private individuals participated in community discussion, thereby building a sense of community among the members of the city-state and engaged directly in creating the outcomes of the governance process. This aspect of democratic government is of particular significance in the modern context.<sup>85</sup>

Lately, with the collapse of communism around 1991, contemporary constitutional designs reveal a resurgence of interest 'in new ways' of institutionalising citizen participation 'in the political decisions that affect their lives' given the 'growing disillusionment with the institutions of [supposed dominant]<sup>86</sup> advanced industrial democracies'.<sup>87</sup> Thus, with the thinking that ritualistic periodic voting and representation have failed to deliver on their promises such as accountability considering the emergence of the bureaucracy and other *loci* of unelected power came the need to stimulate direct participation by the people in political decision making. Direct participation in a democratic government is now secured one way or the other, through mechanisms such as e-voting, referenda, public hearings and submission of memoranda, etc.

#### 2.2.1.5 Participatory democracy

Participatory democracy was born out of protest and social movements that aim to attenuate the negative effects inherent in the majority principle associated with liberal representative democracy.<sup>88</sup> The aim is to complement and make majoritarian decisions more agreeable to minority interests by injecting participatory practices into decision making process.<sup>89</sup> As democratic politics spread into modern and more populous States, the concept of people's power (the ability of individuals or groups to influence decisions in a society<sup>90</sup>), and other ideals of

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<sup>84</sup>Julie King op cit note 65 at 16.

<sup>85</sup> Ibid, 18.

<sup>86</sup>Francis Fukuyama 'The end of history?' (1989) 16 *The National Interest*.

<sup>87</sup> Graham Smith *Democratic Innovations: Designing Institutions for Citizen Participation* (2009).

<sup>88</sup>B Mcgee 'The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development' Berkeley (2009) 27 *Journal of International Law* 570.

<sup>89</sup> Francesco Palermo & Elisabeth Alber *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015) 503.

<sup>90</sup> Kenneth A Bollen & Pamela M Paxton 'Democracy before Athens' in Manus I Midlarsky(ed.) *Inequality, Democracy, and Economic Development* (1997) ch 1.

democracy, upheld in classical democratic theory became more of a ‘logical fiction’.<sup>91</sup> For instance, the theory of democratic elitism, considered undemocratic, posit that the average person or the masses collectively are incapable of making competent political decisions or perfectly understanding their own interests hence the need to entrust State matters to those trained in the art of governance.<sup>92</sup>

Participatory democracy offers consensus decision making, and attempt not only to reach a majority decision, but to also resolve some of the points of disagreement along the way.<sup>93</sup> Participatory democracy endorses active citizens’ engagement with political processes and decision making that affects them, especially by involving those who feel excluded from power in the decision-making processes. A society that embraces participatory democracy then, places premium on a well-informed citizenry or members of the public that are knowledgeable about matters of public interest.<sup>94</sup> Hence, the role accorded citizens in a participatory democracy cannot be performed without a strong ethos of civic citizenship. According to Jesper Strömbäck:

To fulfil the role ascribed to them in the participatory model of democracy, people need the kind of knowledge and information that facilitates collective action, participation and engagement ... knowledge about what problems their country is facing, the opinions and electoral platforms of the political alternatives in an election ....<sup>95</sup>

In reality, large scale representative democracies are often constitutionally imbued with some participatory elements to prevent the decision making processes and governance from becoming ossified.<sup>96</sup> But as Sartori says, the modern infusing of more direct forms of participation such as referendum or popular legislative initiatives only makes a ‘representative system more cumbersome’ or some kind of self-delusion since they are ‘very rudimentary techniques that can function only in very simple situations for solving elementary problems’.<sup>97</sup>

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<sup>91</sup>Giovanni Sartori op cit note 19 ch XII. Even when the gap between the governed and the governors has been abridged with the aid of practices and concepts such as ‘popular will’, ‘representation’, ‘constitutionalism’, ‘limited government’, etc., ‘democracy’, as an ideal (defined as the people’s rule), no longer corresponds with reality.

<sup>92</sup> Philippe C. Schmitter & Terry Lynn Karl ‘What Democracy Is . . . and Is Not’ (1991) 2 *Journal of Democracy* 76.

<sup>93</sup>Julie King op cit note 65 at 28.

<sup>94</sup> Jesper Strömbäck ‘In Search of a Standard: four models of democracy and their normative implications for journalism’ (2005) 6 *Journalism Studies* 331 – 45 at 335 – 6.

<sup>95</sup> Ibid, 336.

<sup>96</sup> Michel Rosenfeld & Andrés Sajó (ed.) *The Oxford handbook of comparative constitutional law* (2012) 253.

<sup>97</sup> Giovanni Sartori op cit note 19 at 256 – 66.

Within the critical and socialist traditions of liberal democracy also exist the last model to be considered. These intellectual traditions posit that in a well-ordered society justice demands that the interests of persons operating in the political scene must accord with conceptions of the common good argued for openly.<sup>98</sup>

### 2.2.1.6 *Deliberative democracy*

Just like participatory democracy, deliberative democracy posits an open, rational, unforced political discourse and communication of ideas among equals within an autonomous public sphere which plays a decisive role in enabling citizens achieve a common interest. Hence, deliberative democracy aims at ‘giving the public an active and critical role in the political process’.<sup>99</sup> For what is ‘public sphere’ is or what deliberative democracy best signifies, reference can be made to Jürgen Habermas<sup>100</sup> and Seyla Benhabib,<sup>101</sup> considered to be the most authoritative sources of the model.<sup>102</sup> The public sphere is the ‘the public space within which citizens can raise and discuss issues they consider relevant, and resolve disputes in a free and equal manner’.<sup>103</sup> It is the process of critical deliberations within civil society which aim to transform the public opinions, ideas and knowledge generated thereby into legally binding political decisions and, like participatory democracy, supplement existing institutions and legislative processes of representative democracy.

Deliberation – exchange of opinion and information and participation in dialogue – like the principle of ‘consent of the governed’ associated with liberal-representative democracy – legitimises the exercise of power (public decision-making). According to Dryzek, another acclaimed expert on the subject, ‘outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by *all* those subject to the decision in

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<sup>98</sup> John Rawls *a Theory of Justice* (1972) 226, 472.

<sup>99</sup> Antje Gimmler ‘Deliberative democracy, the public sphere and the internet’ (2001) 27 *Philosophy & Social Criticism* 21-39 at 22.

<sup>100</sup> Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1998).

<sup>101</sup> Benhabib, Seyla ‘Toward a Deliberative Model of Democratic Legitimacy’ in S. Benhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 67 – 94.

<sup>102</sup> William Rehg ‘Habermas’ Discourse Theory of Law and Democracy: An Overview of the Argument’ in David M. Rasmussen (ed.) *The Handbook of Critical Theory* (1999) 166 – 89.

<sup>103</sup> Antje Gimmler op cit note 99 at 24.

question'.<sup>104</sup> Legitimacy is three-fold and integrates notions of legality, justifiability and consent.<sup>105</sup> It has been argued that 'legitimacy also has instrumental value: legitimacy makes political processes more efficient by reducing the costs of enforcing compliance'.<sup>106</sup>

Invariably, the different formulations or models of democracy in paragraphs 2.2.1.1 – 2.2.1.6, whether deliberative, direct, republican, liberal-representative, or participatory aim to achieve certain things: to legitimise the exercise of political power by institutionalising an accountable, people-centred and public good producing decision-making-processes under the rule of law to forestall any possible encroachment on liberty or resort to tyranny.<sup>107</sup> Drawing together the various strands of the discussion, it is also certain that the ultimate object of democracy is to create a society of equals who can participate effectively in decision-making processes of their State either directly or through their elected representatives.<sup>108</sup> For instance, deliberative democracy's main concern is that the legitimate source of authoritative governmental decisions be located in those affected such that decisions pursue the common interest or the ends of political life – liberty, justice, equality, etc. Participatory democracy, just like deliberation, focuses on wider public decision-making by political equals through public discourse and rational argumentation. Distinguished from liberal democracy, deliberation entails public discourse within an inclusive sphere of political actors as against the furtherance of minority interests of political representatives the towards achieving political equality.<sup>109</sup>

As against the total subordination of individual interest to the State's under direct democracy of Athens or even communism, republican democracy attempts to balance the interest in a strong State with the protection of civil liberties. Compared with deliberative, participatory and direct democracy, liberal democracy only assigns a passive role to the citizen outside of periodic elections, but places greater emphasis on the intellect of an interchanging and professionalised crop of elite leaders to protect the common good. But unlike liberal democracy then, republicanism

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<sup>104</sup> Dryzek *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2001) 651 (emphasis supplied).

<sup>105</sup> John Parkinson 183.

<sup>106</sup> *Ibid*, 182.

<sup>107</sup> Seymour Martin Lipset 'The Social Requisites of Democracy Revisited: 1993 Presidential Address' (1994) 59 *American Sociological Review* 9 – 12.

<sup>108</sup> Claude Ake *the Feasibility of Democracy in Africa* (2000) 13 (Claude Ake).

<sup>109</sup> Jürgen Habermas 'Foundations and Perspectives' in Seyla Benhabib (ed.) *Democracy and difference: contesting the boundaries of the political* (1996); John Elster (ed) *Deliberative Democracy* (1998) 1, 3, 8.

provides for a more robust conception of access to information that underlies the rights and obligations of civic citizenship.

Ultimately, democracy seeks to overcome the challenge, in spite of differing nomenclature and historical contingencies, of how to ensure a legitimate, transparent and accountable exercise of public power either directly or through elected representatives and thereby create an egalitarian society.<sup>110</sup> The relevant question consequent upon the above analysis of the aggregated six models of democracy, the pertinent question is, considering the purposes that democracy aim to achieve what role does access to information play? The answer to the question is embedded in the basic principles of a democratic rule that emanate from the discussion in paragraphs 2.2.1.1. – 2.2.1.6.

## 2.2.2 The Basic Principles of Democracy

### 2.2.2.1 *Informed consent*

A foremost principle of democracy is that of informed consent. A general idea common to theories of democracy is that legitimate government is based on consent of the governed – a major contribution of the Enlightenment philosophers such as Thomas Hobbes (1588–1679), John Locke (1632–1704),<sup>111</sup> and later, Jean-Jacques Rousseau (1712–1778).<sup>112</sup> By the notion of ‘consent’, the exercise of political authority is legitimate and legal only if built on the express consent or ‘will’ of the people to be governed, who are sovereign, and is directed towards the achievement of the common good.<sup>113</sup> The idea of the ‘general will’ or ‘popular sovereignty’ for which Rousseau’s writings are particularly acclaimed have been further extended and can be contrasted with other consent-less modes of rulership such as monarchy, totalitarianism and colonialism. For instance, to distinguish a democracy in which the people govern from dictatorship Meiklejohn argues:

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<sup>110</sup>Claude Ake op cit note 108.

<sup>111</sup>John Locke *Second Treatise of Government*, ed. Thomas P. Peardon (1952) ch. 8, sec. 95, p. 54, ch. 10, sec. 132, 74 (men are ‘by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent’) (consent of the propertied class!).

<sup>112</sup>Jean-Jacques Rousseau *Discourse on Political Economy and The Social Contract* (1994) 63.

<sup>113</sup> Carl Cohen *Democracy* (1971); Anne Phillips *Engendering Democracy* (1991) 24, 36 (referring to the problematic nature of ‘consent’).

Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.<sup>114</sup>

In most conceptions of democracy periodic voting is generally accepted to be a reflection of consent of the governed or the legitimising will of the people.<sup>115</sup> Hence, it can be argued that most models of democracy recognise that effective consent, as the above Tocqueville quote reveals, can only be genuine and lawful if based on the appraisal of relevant issues of the day based on freely accessible information. For instance, citizens are expected to obey the decisions ensuing from such a process of competition, provided its outcome remains contingent upon their collective preferences as expressed through fair and regular elections or open and repeated negotiations.

The principle of consent operates in a contingent, but dynamic fashion according to some recognised ‘rules of the game’ of democracy. In a majoritarian democracy the people must at least informally agree that the majority who win greater electoral support or influence over policy will not use their temporary superiority to bar the losers from taking office or exerting influence in the future. This unwritten rule keeps open the opportunity for continuous competition for power such that momentary losers will respect the winners' right to make binding decisions provided they have full information and knowledge of the basis of the winners' decisions.

Again, the ascription of sovereignty to parliament is based on the presumption that it would act in accordance with the people's will.<sup>116</sup> Parliamentary sovereignty has however progressively become weakened due to the emergence of the administrative state.<sup>117</sup> The challenge then for modern democracies is how to rejuvenate democracy closer to what obtained in Athenian practice of participatory and direct democratic decision-making based on publicly available information.<sup>118</sup> A legally enforceable right of access to state information provides an innovative solution to this challenge.

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<sup>114</sup> Alexander Meiklejohn *Free Speech and Its Relation to Self-Government* (1948) 3.

<sup>115</sup> Fareed Zakarias ‘The Rise of Illiberal Democracy’ (1997) 76 *Foreign Affairs* 22 – 43.

<sup>116</sup> Karl Loewenstein *Political Power and the Governmental Process* (1965) 40.

<sup>117</sup> Robert A Dahl *Democracy and its Critics* (1989) 30.

<sup>118</sup> Michel Crozier, Samuel P. Huntington, Joji Watanuki, et al *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission Reports of task forces of the Trilateral Commission* (1975).

### 2.2.2.2 *Accountability and responsiveness*

Responsiveness relates to the obligation of political leaders in a democracy to carry out the preferences or wishes of citizens or voters through public policy instead of their own self-interest. Accountability, is a condition for ‘answerability’ – the right of citizens to demand that political representatives justify their decisions and sanction erring officials.<sup>119</sup> Thus accountability by implication incorporates transparency in government policy, that is, a pre-existing yardstick with which to determine rightful conduct. Bobbio described transparency as a ‘distinguishing feature’ of democracy:

Only when a record becomes public are citizens in a position to judge it, and hence to exercise one of the fundamental prerogatives of any citizen in a democracy: the control of his rulers.<sup>120</sup>

Regardless of whether it is the delegate or trustee model of representative democracy that one subscribes to, the principle of representation presupposes that a representative must act in the principal’s – the people’s interest.<sup>121</sup> Ultimately, representative democracy essentially requires government to be responsive to the people which must be guaranteed by free and regular elections.<sup>122</sup>

Yet, the presupposition that representatives do follow the instructions of their political constituency is difficult to sustain in a real world of politics of consensus and compromise. Thus, in voting upon issues presented in a representative assembly representing multiple political interests each delegate cannot always insist on holding unto pre-determined preference of her constituency on any particular issue.

Again, in principle, democratic elections offer the promise of producing a government of representatives that will be accountable, responsible and responsive to public opinion, by acting to condition the behaviour of political office holders. In this wise, elections and other decision-making processes are thought to condition political leaders to be very receptive to the people’s

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<sup>119</sup> Jonathan Fox ‘The uncertain relationship between transparency and accountability’ (2007) 17 *Development in Practice* 668.

<sup>120</sup> Bobbio Norberto ‘Democracy and the International System’ in D Archibugi & D Held *Cosmopolitan Democracy* (1995) 36.

<sup>121</sup> Hannah Fenichel Pitkin *the Concept of Representation* (1967) 38 – 9, 57.

<sup>122</sup> *Ibid*, 283.

‘will’ or preferences of the electorate in a democratic system,<sup>123</sup> and accords with ‘the general principle that greater information normally enables anyone to make better decisions’.<sup>124</sup> However, the logic behind the argument that public officials always have regard to public opinion is based on many falsifiable assumptions.<sup>125</sup> Behavioural research in Western societies on voter behaviour cut the picture of apathetic voters having no pre-determined will, but are subject to economic, familial, religious and other pressures.<sup>126</sup> Political scientists have similarly shown that most people are uninformed about public affairs; that because people lack expert information of changing conditions of social life usually available to officials, public opinion or voting preferences may be based on ignorance of existing political climate.<sup>127</sup> The short answer to these criticisms is that they reveal an increasing frustration by the people of their impotence to affect matters of political interest and awareness of their right of involvement in such matters.<sup>128</sup> The converse of the forgoing criticisms is that what makes democracy a going concern is that political leaders are compelled to consult the people at periodic elections in order to renew their mandates even if elections are not the perfect measure of the ‘general will’.<sup>129</sup>

Nevertheless, the fact remains that regular elections alone cannot nip the accountability deficit of liberal democracy in the bud,<sup>130</sup> but as Bunker, Splichal, Chamberlin, et al observe, ‘[i]n a democratic system based on popular sovereignty, citizens have an interest in the workings of their government.’<sup>131</sup> Hence, it is only when public authority delegated to a representative government is accompanied by the institutional capacity of the *demos* to control its actions that sufficient levels of democratic accountability can exist.<sup>132</sup> Again, considering liberal democracy as a political system characterised completely or almost completely by responsiveness to all citizens<sup>133</sup> depends

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<sup>123</sup>Robert A Dahl *A Preface to Democratic Theory* op cit note 56 at 133.

<sup>124</sup>Anthony Downs op cit note 188 at 20.

<sup>125</sup> See Joshua Cohen ‘An Epistemic Conception of Democracy’ *Ethics* (1986) 97 26 – 38 referring to William H. Riker op cit note 59.

<sup>126</sup> Berelson, Bernard R., Paul F. Lazarsfeld, and William N. McPhee *Voting: A Study of Opinion Formation in a Presidential Campaign* (1954).

<sup>127</sup>Walter Lipmann *the Public Philosophy* (1955).

<sup>128</sup> Bernard Berelson ‘Democratic Theory and Public Opinion’ (1952) 16 *The Public Opinion Quarterly* 313 at 316-17.

<sup>129</sup> Joseph Schumpeter op cit note 63.

<sup>130</sup> See Wright, Tony, *Citizens and Subjects* (1993) 101, 104; Robert A Dahl *Democracy and its Critics* (1989) 30.

<sup>131</sup> Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin, et al ‘Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology’ (1992 – 1993) 20 *Fla. St. U. L. Rev.* 543.

<sup>132</sup> Dimitris N. Chrysochoou op cit note 73 at 58.

<sup>133</sup> Robert A Dahl *Polyarchy: Participation and Opposition* (1971) 2.

on the *demos*' ability to adequately to shape the political environment and exercise control over political governors.<sup>134</sup> But what about the need to restrain government misconduct in-between elections?

In a modern democracy the availability of channels for contestation, competition and opposition within and against the State by the civil society that exist independently of the State is an integral aspect of the democratic culture.<sup>135</sup> Such civil participation can help to check government arbitrariness and produce better informed citizens through deliberation among their members and cooperation with the State. Schmitter and Karl articulate this point robustly:

During the intervals between elections then, citizens can seek to influence public policy through a wide variety of other intermediaries: interest associations, social movements, locality groupings, clientelistic arrangements, and so forth.<sup>136</sup>

The civil society gains invaluable access to official information relevant to their operations through such interactions described above.

#### 2.2.2.3 *Respect for human dignity*

The third principle underlying a free and democratic society is respect for the dignity or the equal moral worth of all human beings – a core offshoot of the conjunction of 'liberalism' and 'democracy' into liberal democracy. For instance, the American Declaration of Independence signed on July 4 1776 state certain 'truths' to be 'self-evident': 'that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness'. The Declaration goes further, it is 'to secure these rights', that 'Governments are instituted among Men'. Rights guaranteed in the United Nations (UN) Declaration of Human Rights 1948 and the UN human rights system, and under regional human rights systems ultimately owe their formulation to influences of notable writers like Mill and Locke on the trajectories of liberal democracy.

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<sup>134</sup> Dimitris N. Chrysochoou op cit note 132.

<sup>135</sup> Philippe C. Schmitter & Terry Lynn Karl op cit note 92.

<sup>136</sup> Ibid, 78.

An implication of the foregoing developments is that ultimately self-government or democracy can be justified on the account that it promotes and is, in turn re-enforced, by the autonomy of citizens – the ability to make meaningful life choices and exercise control over one’s life. This enables an individual to share responsibility with others, as equals, in participating in decisions over decisions that affect personal and collective interests.<sup>137</sup>

#### 2.2.2.4 *Citizen participation in government*

Citizen participation towards the exercise of democratic control over the activities of their governors is a veritable democratic principle.<sup>138</sup> Participation in competitive elections, political contestation, deliberation and in referenda requires a well-informed electorate, which in turn means that a democracy must guarantee civil and political rights.<sup>139</sup> If people are unaware of what their government is doing because of secrecy, then they cannot be expected to participate meaningfully in affairs of society.<sup>140</sup> At the minimum then, access to state information is indispensable within the matrix of an accountable and responsive democracy based on human dignity, equality and fundamental freedoms. I discuss at length the underlying democratic rationales for access to information in the next section.

The different models are largely complementary; though potential conflicts exist based on different theoretical approaches across and even within models. A key requirement of the different models is the availability of standard information to enable citizens form opinions on the conditions of their society and be informed participants in the process of decision-making as previous discussions show. However, previous discussion of the models of democracy also reveal a significant level of disillusionment with the dominant model – liberal-representative democracy – given its elitist framework and low level of participation in it by the *demos*. Hence, the fundamental role of access to information in the reinvigoration of democracy cannot be over-emphasised, and is a function of the question: what form of democracy does this study set out to propose? It is the

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<sup>137</sup> David Beetham op cit note 42 at 43. For a fuller discussion of autonomy, see David Held *Models of Democracy* op cit note 20 at ch 9.

<sup>138</sup> Robert A Dahl ‘A Democratic Dilemma: System Effectiveness versus Citizen Participation’ (1994) 109 *Political Science Quarterly* 28.

<sup>139</sup> R James, B Hollyer & Peter Rosendorff, *et al.* ‘Democracy and Transparency’ (2011) 73 *The Journal of Politics* 1192.

<sup>140</sup> Article 19 *The Public's Right to Know Principles On Freedom of Information Legislation* (1999), available at <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>.

exercise of public power that is legitimised and constrained by widely available public information in order to forestall arbitrariness. Having derived a six-part typology of democracy out of major conceptions including the various assumptions and prescriptions that underlie each, it will be easier to focus on how access to information enhances the smooth functioning of a democracy.

### 2.2.3 Access to information as irreducible minimum of a functioning democracy

Access to information is integral to the realisation of the principles of transparency and accountability, to the right to vote and to the formation of public opinion, and the for the development of individual agency indispensable for the realisation of democracy.

#### 2.2.3.1 *Access to information creates a well-informed society*

The political power ascribed to the people in a democracy is attainable to the extent that citizens possess full knowledge of the running of their government.<sup>141</sup> To engage meaningfully in public debate and set agenda for governance in accordance with the public interest requires that citizens been titled as of right to information on policy options available to government to tackle societal problems.<sup>142</sup> All the six models of democracy regard a free media and freedom of expression as the engine rooms of public discourse and the formation of public opinion, they therefore support a concept of access to government information which is indispensable in exerting influence politically and in the making of informed choices. Lessons abound from different democracies. David Cohen, for example, pointedly argues for the recognition of a constitutional doctrine of the First Amendment to the U S Constitution based on access to information:

implicit within our particular democratic form of constitutional government is the principle that the public as well as the individual has a right of access to information within the control and custody of the government.<sup>143</sup>

Thomas Emerson toes the same line when argues forcefully that the First Amendment to the United States Constitution offers a basis for citizens' right of access to official information as follows:

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<sup>141</sup> Mark Bovens 'Information Rights: Citizenship in the Information Society' (2002) 10 *J. Pol. Phil.* 317 – 41.

<sup>142</sup> Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin, et al (And Linda M. Perry) 'Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology' (1992 – 1993) 20 *Fla. St. U. L. Rev.* 543.

<sup>143</sup> David S. Cohen 'Public 's Right of Access to Government Information under the First Amendment' (1974) 51 *Chi.-Kent. L. Rev.* 164

In my judgment the greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government ... The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision-making by the people, to whom that function is committed, becomes impossible.<sup>144</sup>

Similarly, the American Civil Liberties Union has argued that

Citizens of a democratic country must be informed: they must know what their government is doing and has done in the past, so that they may decide intelligently what their government shall do in future. This is the “right to know.” It is based on First Amendment, which guarantees not only the right of citizens to *express* ideas and information, but also their right to *receive* ideas and information.<sup>145</sup>

Ultimately, official information belongs to the people for whose benefit public institutions exist, who fund government institutions and pay salaries of officials.<sup>146</sup> Hence citizens can only make democracy real and participate freely in it if they are well-informed. A healthy democracy is founded on a well-informed citizenry based on ‘uninhibited, robust and wide-open’ appraisal of official actions.<sup>147</sup> Public debate and democratic citizenry will pale into insignificance if citizens are unable to appraise official actions for themselves, but have to rely on one-sided official versions of events.<sup>148</sup> The press, civil society and watchdog organisations that play constitutional roles in enforcing government accountability will therefore be more effective with the legal teeth that a right to information gives.

Furthermore, government respects citizens’ autonomy when it involves them in decision-making processes that affect their lives. Citizens’ involvement ensures that government does not simply impose policies on people, and therein lies the essence of democracy – affording people direct opportunities to govern themselves and make meaningful political choices.<sup>149</sup> Broad citizens’

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<sup>144</sup> Thomas I. Emerson ‘Legal Foundations of the Right to Know’ (1976) 1 *Washington University Law Quarterly* 1 at 14.

<sup>145</sup> Quoted from a ACLU pamphlet on the ‘how and why to use the [US FOI] law’. See John H F Shattuck *Rights of Privacy* (1968) 168.

<sup>146</sup> Maureen Henninger ‘The Value and Challenges of Public Sector Information’ (2013) 5 *Cosmopolitan Civil Societies Journal* 76; ‘Re Eccleston and the Department of Family Services and Aboriginal and Islander Affairs’ (1993), 1 *QAR* 60 at 73. Quoted in Australian Law Reform Commission, Report Number 77 (1995) available at <http://www.alrc.gov.au>, accessed 20 July 2016.

<sup>147</sup> Justice Brennan in *New York Times v Sullivan* 376 US 254 (1964); Maeve McDonagh ‘The Right to Information in International Human Rights Law’ (2013) 13 *HRLR* 38.

<sup>148</sup> M.A.P. Bovens ‘Public Accountability’ in E. Ferlie, L. Lynne & C. Pollit (eds) *The Oxford Handbook of Public Management* (2005) 185.

<sup>149</sup> Toby Mendel op cit note 7 at 3.

involvement in policy formulation and implementation gives room for informed debate and citizens' understanding of public policies. Participation extends beyond freely electing political representatives to civic dialogue and deliberation. Access to reliable information facilitates political dialogue and the exercise of the right to influence decision making.<sup>150</sup>

### 2.2.3.2 *Access to information strengthens electoral politics*

Information is a basic component of electoral decisions. According to Berelson,

The first requirement of electorate decisions is the possession of information and knowledge; the electorate must be informed about the matters under consideration. Information refers to facts and knowledge to general propositions; both of them provide reliable insight into the consequences of the decision.<sup>151</sup>

In democratic theory and practice, genuine periodic election is the main democratic method of producing government. International law also recognises election as a valid means of expressing the people's will.<sup>152</sup> But elections cannot only serve to change government representing different political platforms every four or five years. The choice of representatives must involve a conscious effort to assess political capabilities of candidates for office through records of accomplishments. Consequently, if election must achieve its purpose voters must be able to independently assess the performance of an incumbent seeking re-election and her challenger's records which access to information makes possible.

But as Sartori observes, democracy cannot be measured in terms of periodic elections alone. Elections are only an outward manifestation or more intricate, but inaccessible will-formation and opinion-making activities in the over-all democratic process, for

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<sup>150</sup> Anne Nderi 'Freedom of information is democracy's cornerstone', available at <http://allafrica.com/stories/200809250776.html>, accessed 20 July 2016.

<sup>151</sup>Berelson op cit note 128 at 317 – 318.

<sup>152</sup>Section 25(1) of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

... we must still consider that elections are a discontinuous and very elementary performance. Before elections the people's power remains quiescent, and there is also a wide margin of discretion before elementary electoral choices and the concrete governmental decisions that follow'.<sup>153</sup>

### 2.2.3.3 *Access to information promotes accountability and better government*

The democratic principle of accountability of the political representatives to the ruled presupposes that those being ruled have given a mandate to their rulers to rule over them. This can only happen whereby the rulers are subject to a selection process designed and or monitored by the people to ensure that only those whom they have selected or appointed by them occupy or have access to political office or positions of authority. This should accord with the reason why in a political system like oligarchy, aristocracy, monarchy, military rule whereby leaders get into office without the peoples' consent, through force, subterfuge or a claim to divine right consider themselves immune from any form of political control. For instance, in Athens, the taking of turns by citizens to participate in government and the making of government records available for public scrutiny were considered very important to make government accountable. And freedom of every citizen to contribute to public debate on every matter of governance made them to be self-ruled. Since another term for democracy is self-rule, it is unlikely that democracy can thrive where governance is opaque.

When the people do not know what their government is doing, those who govern are not accountable for their actions-and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion.<sup>154</sup>

Persons, who are to be active in viable and productive engagement with political authorities and in enforcing their rights, must be aware of the benefits accruable to them, value those benefits to the extent of being ready to pay the costs to attain the benefits and have the capacity to do so. Accountability as a democratic principle therefore compels representatives to justify their actions to their political equals – the *demos*, through parliament. Government cannot be a repository of knowledge, but constant openness, respect for the people's preferences and exposure of policy-

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<sup>153</sup>Giovanni Sartori op cit note 19 at 73.

<sup>154</sup> 'Secrecy in a Free Society', 213 *The Nation* 454, 456 (1971) quoted in *Gravel v. United States*, 408 U.S. 606, 640-41 (Douglas, J., dissenting).

making processes to the sunlight of public scrutiny could actually help government perform better and make better decisions.<sup>155</sup>

Lately, the inclusion of right to information clauses in constitutions of many democracies has raised awareness and hope that access to information can re-invigorate democratic politics. In these days of ‘functional pluralism’, the adoption of access to information laws has come to be seen as a fall-out of the accountability deficits of modern democracies.<sup>156</sup>

#### 2.2.3.4 *Access to information helps to check abuse of power and official corruption*

Secrecy and lack of transparency by political administrators have been described as the hiding place for corruption and political improprieties. Access to state information including policies that provide for open publication and access to official documents are a principal guarantee of transparency and a vital tool in combating government corruption.<sup>157</sup> Indeed, governmental accountability is a meaningless theoretical construct without people having first-hand knowledge of official matters or being able to monitor what officials do.<sup>158</sup> For instance, in many State-controlled economies where official corruption is rife, lack of accountability results in funds earmarked for public projects ending up in private pockets.<sup>159</sup> But a legally enforceable duty on government corporations and private companies to disclose official information on developmental projects can provide a preventive step against corruption, which if diligently pursued will result in actual exposure of corrupt officials. As experience has shown, in some countries, official information obtained by citizens through freedom of information requests resulted in exposure of official corruption, financial impropriety and other forms of misconducts.<sup>160</sup> Sustained public scrutiny of government economic and other policies that access to government information thus makes possible makes it an effective means of checking corrupt officials.

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<sup>155</sup> Norman Marsh *Public Access to Government-Held Information: A Comparative Symposium* (1987); Article 19 *Freedom of Information Training Manual for Public Officials*, available at <https://www.article19.org/data/files/pdfs/tools/foitrainersmanual.pdf> accessed 20 December 2016.

<sup>156</sup> Alasdair Roberts ‘Structural Pluralism’ op cit note 6.

<sup>157</sup> Rob Jenkins & Anne Marie Goetz ‘Accounts and accountability: Theoretical implications of the right-to-information movement in India’ (1999) 20 *Third World Quarterly* 603 – 622.

<sup>158</sup> Samia Costa Do Freedom of Information Laws Reduce Corruption? Available at [http://www.biu.ac.il/soc/ec/seminar/data/29\\_12\\_2009/costa\\_foi.pdf](http://www.biu.ac.il/soc/ec/seminar/data/29_12_2009/costa_foi.pdf) accessed 20 December 2016.

<sup>159</sup> Darch & Underwood op cit note 5.

<sup>160</sup> Maurice Frankel ‘Freedom of Information and Corruption’, available <http://cfoi.org.uk/pdf/corruptionmf.pdf> accessed 20 December 2016.

### 2.2.3.5 *Access to information gives impetus to citizens' claim to other democratic rights*

The force of the argument that democracy provides one of the philosophical foundations for human rights<sup>161</sup> has greater impact for the right of access to information. The whole concept of human rights revolves around duties which State entities owe individuals to respect, protect and fulfil their inherent dignity.<sup>162</sup> States carry enormous responsibilities concerning the welfare, liberty and property of individual citizens. In performance of public duties, States establish procedures and processes through which they accumulate information such as medical files, employment and tax records, and other personal details. Access to such information can greatly assist citizens to ensure that they receive benefits to which they are entitled, and where they have been unjustly denied, to seek appropriate remedies.<sup>163</sup>

Again, due to human imperfections, government agencies sometimes make avoidable errors in the course of keeping or further disseminating information which can harm individual right to privacy, reputation or result in pecuniary loss. Because modern record keeping and information retrieval systems operate so quickly such mishandling or unauthorised use of information have far reaching consequences. For the ordinary citizen then, access to information held on them by public bodies is most useful to correct errors in official files or to set out their views about a disputed matter notwithstanding countervailing interests such as confidentiality, public security or executive privilege. For instance, the Human Rights Committee (HRC) says:

Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified.<sup>164</sup>

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<sup>161</sup> Manfred Nowak *Introduction to the international regime for Human Rights* (2003) 46; in 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders).

<sup>162</sup> Karel Vasak & Philip Alston (eds) *The International Dimensions of Human Rights* (1982).

<sup>163</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6.

<sup>164</sup> Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34) para 18.

Therefore, when people have a right to demand for access to official records and information it can assist them to put records straight or correct erroneous decisions made against them by government institutions and enhances control by individuals over their privacy.

Furthermore, protection of socioeconomic rights such as right to housing, education, healthcare, etc., by states makes for a just and egalitarian society which democracy aims at.<sup>165</sup> The effective realisation of such a society depends on States' equitable and conscious prioritisation of available resources to fulfil its socioeconomic obligations.<sup>166</sup> Compelling the State to make the right choices in allocating resources is itself a function of how knowledgeable people are about national resources.<sup>167</sup> Sartori confirms the foregoing,

... political freedom requires action, active resistance, and positive demands. Where there is lifelessness and apathy there can never be liberty. But we must not forget that the relation of forces between citizens and State is unequal. ... In relation to the State the citizens are the weaker party...<sup>168</sup>

Thus, the right of access to information comes to the citizens' rescue in imposing a duty on the State to make available to the people information held by public institutions and private bodies performing public functions.<sup>169</sup> Without such imposition the people cannot fully enjoy the body of rights, especially socio-economic rights, guaranteed to them by law. Hence, Darch and Underwood argue that freedom of information is important as a leverage right.<sup>170</sup> The concept of a leverage right is traceable to Jagwanth who argued that access to information plays an enabling role in the substantive enjoyment of other rights especially the realisation of socio-economic rights.<sup>171</sup> The people's right of access to State information and the active use thereof to demand government's performance of its social obligations acts equalise the unequal power relations between government and the people and make them equal partners in progress.<sup>172</sup>

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<sup>165</sup> Sandra Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010).

<sup>166</sup> Pierre De Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' *SAJHR* (1997) 13 67 at 86 – 91.

<sup>167</sup> Richard Calland 'Access to information is 'a right to a right' in Richard Calland & Alison Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (2002).

<sup>168</sup> Giovanni Sartori op cit note 19 at 287.

<sup>169</sup> Alasdair Roberts 'Structural Pluralism' op cit note 6.

<sup>170</sup> Darch & Underwood op cit note 5 at ch 2.

<sup>171</sup> Saras Jagwanth 'The Right to Information as A Leverage Right' in Richard Calland & Alison Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* (2002) 3.

<sup>172</sup> Wildeman, Russell Andrew 'Access to Information Can Fundamentally Alter Society's Power Relations' Pretoria: Idasa Economics Governance Programme (2009) 3.

Lastly, multinationals and government corporations handle developmental projects that pose long term hazards to the environment, human health and livelihoods. In many instances, official insensitivity results in denial or non-disclosure of information which persons adversely affected by such projects require to enable them take precautions or measures to avoid harm. Access to official information on such matters is vital to enforce the social responsibilities and accountability of corporate entities to the people.<sup>173</sup>

### 2.2.3.6 *The right of access to information helps to protect the public interest*

It is a basic assumption common to citizens in a democratic system that government must act in furtherance of the ‘common good’ or greatest benefit of society as a whole.<sup>174</sup> In simple terms, the public interest consists of those critical aspects of human existence such as judicial administration, crime control, public security, etc., the furtherance of which the effectiveness and legitimacy of a State hinge.<sup>175</sup> Whereas in the private realm, such as contracts, marriage, etc., the individual is supposed to be free from all regulatory powers of the State. Within the framework of government decision-making therefore, ‘the public interest’ consists of those government actions pertaining to the ‘good of society as a whole’ or which benefit the whole society most as against the self-interest of rulers, officials or other parochial interests.<sup>176</sup> Since it represents those ‘most critical values’ on which public welfare depends,<sup>177</sup> there could be need to balance done aspect of the public interest against another.<sup>178</sup>

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<sup>173</sup>See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (Aarhus Convention), the Preamble, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>; Toby Mendel op cit note 7 at 16; Principle 10 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development held from June 3 to 14, 1992.

<sup>174</sup>Anthony Downs ‘the Public Interest: Its Meaning in A Democracy’ (1962) 29 *Social Research* 1 – 36 at 3.

<sup>175</sup> Morton J. Horwitz ‘The History of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 130 1423 – 1428.

<sup>176</sup> Anthony Downs op cit note 174 at 2.

<sup>177</sup> Gintarė Makauskaitė ‘Public Interest in the Context of the Right to Access Official Information’ (2011) *Baltic Yearbook of International Law* 281–306 at 284.

<sup>178</sup> Amitai Etzioni *the Limits of Privacy* (1999); Stone ‘Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?’ (1982) 130 *U. PA. L. Rev.* 1441.

Protection of the public interest underlies the right to access to information in a democratic society.<sup>179</sup> In a democracy, there is public interest per se in access to State-held information since ‘public bodies hold information not for themselves but as custodians of the public good’.<sup>180</sup> This is because public institutions or private agencies acting on behalf of government collect information while performing public duties, utilising public funds or allocating State resources that prove useful in assessing government’s performance. The preservation and enlargement of an informed public opinion is also a critical aspect of the public interest since it relates to the whole range of factors that public officials must be mindful of when performing their duties.<sup>181</sup> This makes a free press that provides information, offers criticisms of government conduct and beams the searchlight of public opinion on government activities integral to the public’s right of access to information in a democracy.<sup>182</sup>

Again, because government officials occupy a fiduciary position, the tendency of most governments officials to hide official information from the people is against the public interest.<sup>183</sup> Access to information ensures they are made accountable for the management of public resources. They must act in good faith in ensuring maximum access to information that can inform the people about government decisions. Most importantly, since government exists to serve the people, the fundamental premise of democratic governance must be public access to official information unless there is an overriding public interest in secrecy, such as within the context of an insurgency, war, terrorism and the likes.

Happily, there are bright prospects for global respect the fundamental principle of access to information given the increasing attention, efforts and resources being devoted by international human rights bodies to lay down basic principles of transparent and accountable governance.

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<sup>179</sup> Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain, E/CN.4/1999/64, 29 January 1999, para 22(d).

<sup>180</sup> Toby Mendel op cit note 7 at 4.

<sup>181</sup> David Williams *Not in The Public Interest: The problem of Security in Democracy* (1965) 68.

<sup>182</sup> Berelson op cit note 143.

<sup>183</sup> Anthony S Mathews op cit note 75 at 165 – 6.

## 2.3 INTERNATIONAL LAW STANDARDS AND BEST PRACTICES ON ACCESS TO INFORMATION

In this section I identify and analyse international standards and best practices on the fundamental right of access to information developed under United Nations (UN) human rights system.

The United Nations General Assembly laid the premise for discourse on the right of access to information when it stated: ‘Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.’<sup>184</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, confirmed this in his 1995 Report to the UN Commission on Human Rights (UNCHR) thus: ‘Freedom will be bereft of all effectiveness if the people have no access to information.’<sup>185</sup> Similarly, access to justice demands that litigants have the opportunity to obtain evidence held by public agencies, if vital to success of their claims or defence.<sup>186</sup>

The right to access state information is encapsulated in the right to freedom of expression guaranteed in article 19 of the Universal Declaration of Human Rights (UDHR) 1948 – confirmed in article 19 of the International Covenant on Civil and Political Rights (ICCPR) and comparative regional human rights instruments.<sup>187</sup> The ICCPR imposes binding obligations on states-parties to take concrete steps, including through legislation, to protect, respect and fulfil rights guaranteed by it.<sup>188</sup> The jurisprudence, commentaries and periodic reports of some UN bodies explicate the nature and scope of right of access to information in article 19 of ICCPR, which provides that:

1. Everyone shall have the right to hold opinions without interference.

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<sup>184</sup> UNGA Resolution 59 (1) of 14 December 1946.

<sup>185</sup> UN Document E/CN.4/1995/32, para 35. See further the Special Rapporteur’s annual reports to the UNCHR since 1995.

<sup>186</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007); Human Rights Committee, General Comment No. 34, para 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, 12 September 2011, para 18-19; Communication No. 1413/2005, *José Ignacio de Jorge Asensi v Spain* Views: 25 March 2008 (Irregularities in the decision-making process of promotion of military personnel); Communication No. 1985/2010 (CCPR/C/111/D/1985/2010), *Koktish v. Belarus*, Views adopted 24 Jul 2014. See also United Nations General Assembly Resolution on the Report of the UN Rapporteur on Freedom of Expression 2013.

<sup>187</sup> Toby Mendel op cit note 7.

<sup>188</sup> ICCPR, article 2(2). See also Vienna Declaration and Plan of Action 1993.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Freedom to seek, receive and impart information is not merely a corollary of freedom of expression; it is a right in and of itself, and imposes a positive obligation on states to ensure access to information. According to the United Nations Special Rapporteur on Freedom of Expression, the right of access to information is basic to the democratic way of life<sup>189</sup> and gives meaning to the right to participation in a democracy.<sup>190</sup> The UN stance was confirmed in 1999 by the three international mechanisms for freedom of expression, who in their first Joint Declaration, stated:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.<sup>191</sup>

Moreover, the public interest that underpins right of access to information encompasses both the general public's and individuals' right to have access to information that may affect their rights from a variety of sources<sup>192</sup> and gives individuals the right to information of public concern, including that held by the State.<sup>193</sup> The Human Rights Committee in its General Comment No. 34 (authoritative statement on freedom of expression), stated that article 19, paragraph 2 of the ICCPR embraces a right of access to information held by public bodies regardless of the form in which the information is stored, its source and the date of production.<sup>194</sup>

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<sup>189</sup> Report of the UN Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, UN Doc. E/CN.4/1995/32, 14 December 1994, para 35.

<sup>190</sup> Commission On Human Rights, Civil and Political Rights Including the Question of: Freedom of Expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36, UN Doc. E/CN.4/2000/63 of January 2000, paras 42-44.

<sup>191</sup> International Mechanisms for Promoting Freedom of Expression Joint Declaration, adopted 26 November 1999. 'Joint Declaration on the right to freedom of expression generally, regulation and responsibility of the media, access to information, defamation and prevention and investigation of attacks against freedom of expression', available at <https://www.article19.org/resources.php/resource/3042/en/>, accessed 8 June 2017.

<sup>192</sup> Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted in accordance with Human Rights Council resolution 16/4, UN Doc A/68/362 of 4 September 2013, para 19.

<sup>193</sup> Commission on Human Rights op cit note 102 at para 44. Cf. Report of The OAS Special Rapporteur for Freedom of Expression, Dr. Santiago A. Canton, OEA/Ser.L/V/II.106 Doc. 3 rev. April 13, 2000, para 46 and the illuminating decision of the Inter-American Court in *Claude Reyes et al. v Chile*. Available at [http://www.opensocietyfoundations.org/sites/default/files/d\\_decision-en\\_20060919.pdf](http://www.opensocietyfoundations.org/sites/default/files/d_decision-en_20060919.pdf), accessed 30 May 2015.

<sup>194</sup> Human Rights Committee, General Comment No. 34 op cit note 98 at para 18.

From the foregoing discussions one can see that the underlying principle of the very concept of access to information is maximum disclosure. Ideally, it should be explicitly specified in the Constitution of every democracy to make it clear that access to official information is a basic right which may not be restricted except in very limited circumstances.<sup>195</sup> The principle establishes the presumption that all information held by government must be accessible to the public. States are obliged to disclose all information they hold without requesters having to justify any specific interest in the information.

Furthermore, States must enact access to information legislation to give effect to this presumption, and such legislation must override inconsistent secrecy laws to the extent of their inconsistency, a prescription many States are yet to come to terms with in the supposed defence of national security and other interests. It is therefore to democracy's concern that every limitation of access to information rights in the interest of national security be reasonable and justifiable that I now turn.<sup>196</sup>

### 2.3.1 National Security Limitations On Right of Access to Information

In this section, I attempt a definition of 'national security' and draw out principles that show how interests that underpin it may sometimes justify restrictions to access to information. I highlight the problematic nature of such restrictions, and specify the international criteria that permissible restrictions must meet. Essentially, the conclusion reached is that in a democracy, the just demands of the polity must guide the conception and practices pertaining to national security restrictions on access to information.

National security is a necessary condition for political stability and the enjoyment of democratic rights including access to information, which it also constrains in that the exercise of the right to information entails responsibilities towards other individuals and the State. The claim that access to information enhances the quality of democracy because democratic governments are open and accountable to their citizens in decision-making is usually put to test when the security of a polity is at stake. The models of democracy expatiated upon in paragraphs 2.2.1.1 to 2.2.1.6 also exhibit a public interest in different proportions in the protection of individual rights, accountable and

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<sup>195</sup>Article 19 The Public's Right to Know Principles On Freedom of Information Legislation op cit note 140.

<sup>196</sup> See K R Popper *the Open Society and Its Enemies* 2 ed Vol. II (1952).

transparent governance and majority rule through public decision-making by political equals. In another vein, liberal democratic theory posits a conception of access to information whereby governmental accountability inheres in parliamentary sovereignty for the sake of efficient governance.

International law thus makes the protection of individual rights the minimum standard of human development, but permits States to restrict the right of access to information in the interests of national security.<sup>197</sup> The ICCPR, for instance, provides that the exercise of the right to seek information may be subject to certain restrictions, which shall be only as ‘provided by law’ and ‘necessary’ ‘for the protection of national security’.<sup>198</sup> Traditional analysis of national security has often centred on threats or use of force through military and political actions, though States currently grapple with changing existential threats.<sup>199</sup> The emerging concerns relate to what exactly constitutes a threat to the security of a State and how such may be dealt with in a democratic State based on human rights and fundamental freedoms.<sup>200</sup>

The general principle of international law is that public authorities bear the burden to justify every refusal of access to public information.<sup>201</sup> Except in narrow exceptions specified in law, to protect overriding public and private interests including national security, States may not withhold access to information of public interest.<sup>202</sup> Permissible restrictions must relate to a risk of substantial harm to the protected interest and where the harm is greater than the overall public interest in access to the information. States must therefore put in place effective judicial review to remedy

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<sup>197</sup>Alison Dundes Renteln ‘The Concept of Human Rights’ (1988) 83 *Anthropos* 343 at 343 – 7.

<sup>198</sup>Article 19(3)(b).

<sup>199</sup>Barry Buzan, Ole Wæver & Jaap de Wilde *Security New Framework for Analysis* (1998).

<sup>200</sup>Sandra Coliver’s Commentary op cit note 10.

<sup>201</sup>Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, U. N. Doc. CCPR/C/GC/34, para 19 (2011).

<sup>202</sup> Sandra Coliver’s Commentary cit note 10; Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 6 December 2004, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>, accessed 20 July 2016 (Joint Declaration 2004).

unreasonable access denials,<sup>203</sup> also strictly define the criteria that existential threats must meet to count as threats to national security.<sup>204</sup>

National security covers -

measures to prevent or respond to serious threats to the country as a whole, whether from an external source, such as military threat, or an internal source, such as incitement to violent overthrow of the government.<sup>205</sup>

The foregoing excludes ‘restrictions in the sole interest of a government, regime or power group’ and limitations set only to avoid riots or other troubles that do not threaten the life of a whole nation.<sup>206</sup> Again, the understanding of ‘national security’ can be subsumed under its constituent elements of ‘nation’ and ‘security’. A nation or nation-state consists of individuals, territory and government. States’ emphasis on national security must not trivialise the needs of individual security and good government as implied by notions of a social contract.<sup>207</sup> National security then means measures to protect territorial integrity of a nation, to prevent violent overthrow of its government by internal rebellion or external forces, but excluding ordinary needs of crime detection, public order, public safety and similar issues. It would help to categorise information that may or may not be subject to national security regulation.

### 2.3.1.1 *Military secrets that may pose serious military threats to an entire nation*

The discussion of certain ‘good’ practices’ and rich elaborations on information that may be subject to national security regulation by States, including the important roles of intelligence agencies, deeply enrich international law norms and are standards applicable to modern day national security challenges.<sup>208</sup> For instance, States understand the functions of intelligence agencies differently,

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<sup>203</sup> Communications No. 2202/2012, *Rafael Rodríguez Castañeda v Mexico*, Views adopted on 18 July 2013, paras 7.3, 7.4 and 7.5. (Access to the ballot papers used in the presidential election).

<sup>204</sup> Barry Buzan, Ole Wæver & Jaap de Wilde op cit note 199.

<sup>205</sup> Elizabeth Evatt ‘The International Covenant on Civil and Political Rights’ in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, et al (ed.) *Secrecy and Liberty* op cit note 114 at 84; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 29, U. N. Doc. E/CN.4/ 1985/ 4, Annex, para 30 (1985).

<sup>206</sup> Alexandre Kiss ‘Commentary by the Rapporteur on the Limitation Provisions’ (1985) 7 *Hum. Rts. Q.* 15 at 21.

<sup>207</sup> Barry Buzan *People, states and fear: an agenda for international security studies in the post-cold war era* (1991).

<sup>208</sup> See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, UN Doc. A/HRC/14/46, (2010), para II A 9.

but basically they collect, analyse and disseminate information to policy makers to enable them devise measures to protect national security.<sup>209</sup> Intelligence agencies are usually established to guide against espionage by ensuring that information on processes and measures vital to national security do not fall into the wrong hands, including those of foreign adversaries.<sup>210</sup> However, they may only prohibit access to information that directly has a bearing on national security, such as military secrets the disclosure of which may pose serious political or military threats to the entire nation.<sup>211</sup> To the list can also be added technological data on the manufacture or activation of nuclear weapons.

### 2.3.1.2 *Information on codes, sources and methods used by intelligence services*

States may restrict access to personal data files only to safeguard ongoing investigations and protect sources and methods of the intelligence services including identities of covert agents. Such restrictions must, however, be outlined in existing law, and be proportionate and necessary to protect legitimate national security interests.<sup>212</sup> But therein lies a problem because State often argue that the effectiveness of national security measures lie in secrecy.

### 2.3.2 The problematic nature of national security restrictions

Paradoxically, in executing its functions, the State may become a potential source of threat to individual interests.<sup>213</sup> This can occur even when States may legitimately keep information secret on grounds of national security, because a minimal showing by government that a national security risk exists often triggers secret classification of official information and judicial deference.<sup>214</sup> The process of classification itself is often secretive and creates fertile ground for arbitrary

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<sup>209</sup> Basic Law for the Federal Republic of Germany(Grundgesetz) (as amended) Adopted on: 23 May 1949, article 96(5); section 5(1); Croatia Act on the Security Intelligence System, article 23 (2); Argentina, National Intelligence Law, article 2 (1); Romania, Law on the Organisation and Operation of the Romanian Intelligence Service, article 2; South Africa, National Strategic Intelligence Act, section 2 (1).; Australia, Security Intelligence Organisation Act, section 4.

<sup>210</sup> Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, section 2 ('threats to the security of Canada'); Australian Security Intelligence Organisation Act 1979 No. 113, 1979, section 17(1)(e) (obtaining foreign intelligence through interception of communications).

<sup>211</sup> Manfred Nowak *U. N Covenant on Civil and Political Rights: CCPR Commentary* (1993) 355.

<sup>212</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, op cit, para 40.

<sup>213</sup> Barry Buzan *People, states and fear Individual Security and National Security* op cit note 207 at chap 1

<sup>214</sup> Sandra Coliver's Commentary op cit note 10.

classifications of information as secret or confidential.<sup>215</sup> There is usually lack of external or judicial control of the classification process.<sup>216</sup>

Again, widespread restrictions imposed on human rights by States when implementing national security measures such as information classification often harm the public interest and thus give rise to threats meant to be obviated initially.<sup>217</sup> Even when violations occur, states often prohibit legal challenge or refuse to justify the purpose for classification.<sup>218</sup> Secrecy imperils governmental accountability because it allows official corruption to thrive. Secrecy is sometimes a pretext to cover up inefficiencies, waste, official wrongdoings, embarrassing blunders and evidence of human rights violations.<sup>219</sup> As Sandra Coliver suggests,

... most claimed conflicts [between national security and access to information, for instance] arise because national security and related concepts (such as “state security, “internal security”, “public security”, and “public safety”) are so imprecise that they may be, and frequently have been, invoked by governments to suppress precisely the kinds of speech that provide protection against government abuse, such as information or expression exposing circumvention of the democratic process, ... corruption, wasting of public assets, and other forms of wrongdoing by government officials ...<sup>220</sup>

The above view, was later re-echoed by the author,

While there is an undeniable tension between national security and freedom of expression and information, a clear-eyed review of recent history suggests that legitimate national security interests are, in practice, better protected when the press and public are able to scrutinize government decisions than when governments operate in secret. Freedom of expression and information, by enabling public scrutiny of government action, serve as a safeguard against government abuse and thereby form a crucial component of genuine national security. Equally, national security is a pre-condition for the full enjoyment of all human rights, including freedom of expression.<sup>221</sup>

Other leading human rights and security experts concur with the above view:

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<sup>215</sup> Communication No. 1470/2006 *Toktakunov v Kyrgyzstan*, CCPR/C/101/D/1470/2006, Views adopted 28 March. 2011 Human Rights Committee One hundredth and first session 14 March - 1 April 2011 CCPR/C/101/D/1470/2006 (inaccessible secret by-law which classified information on number of individuals on death row as ‘confidential’ and ‘top secret’ not a ‘law’ under article 19(3)).

<sup>216</sup> UN Special Rapporteur Report to the UN General Assembly 2013, para. 56.

<sup>217</sup> Laurence Lustgarten & Ian Leigh *in from The Cold: National Security and Parliamentary Democracy* (1994) 39 – 164.

<sup>218</sup> UN Special Rapporteur Report to the UN General Assembly 2013, paras 56-62.

<sup>219</sup> Article 19 *The Public's Right to Know Principles on Freedom of Information Legislation* op cit note 140.

<sup>220</sup> Sandra Coliver’s Commentary op cit note 10.

<sup>221</sup> *Ibid.*

While there is at times a tension between a government's desire to keep information secret on national security grounds and the public's right to information held by public authorities, a clear-eyed review of recent history suggests that legitimate national security interests are, in practice, best protected when the public is well informed about the state's activities, including those undertaken to protect national security.<sup>222</sup>

Hence, what measures states decide upon, and how State organs construe their role and exercise public power under laws enacted to protect national security, often determine the legitimacy of national security measures. However, the following information ought not to be subject to national security restrictions:

#### *2.3.2.1 Information that does not harm national security*

According to the HRC, information that does not harm national security, such as those relating to the commercial sector, banking and scientific progress should not be classified on national security grounds or withheld from the public.<sup>223</sup> Persons who obtain and publish such information in the public interest without committing crimes such as burglary or theft, and not being public servants originally entrusted with the information, should not be prosecuted. Economic matters in many quarters are being increasingly considered to be pertinent aspects of national security.<sup>224</sup> Nevertheless, if information is likely to pose real or substantial risk of harm to the economic interests of a nation if disclosed, it could be withheld on such ground, but not on national security grounds.<sup>225</sup>

#### *2.3.2.2 Information relating to violations of the law, human rights and official wrongdoings*

Information relating to violations of the law or human rights; gross human rights abuses and breach of humanitarian law involving torture, genocide and war crimes; official wrongdoings; serious threats to health, public safety and the environment should not be kept secret under national security laws.<sup>226</sup> The United Nations Commission on Human Rights (UNCHR) and General

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<sup>222</sup> Tshwane Principles op cit note 4, 'Background and Rationale'

<sup>223</sup> General Comment No. 34 2011 on Article 19, especially paras 18-19, 30.

<sup>224</sup> See President Obama's National Security Strategy, 2010, Page 2. Available at: [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>225</sup> Tshwane Principles, op cit note 4, Principle 3(c).

<sup>226</sup> Joint Declaration on Access to Information by the UN Special Rapporteur, the OAS and the OSCE Special Rapporteurs on Freedom of Expression Joint Declaration 2004.

Assembly have urged states not to classify as national secret information which relates to secret or administrative detentions, torture and cruel, inhuman and degrading treatment of detainees by intelligence agencies.<sup>227</sup> States should also desist from criminalising expressions that do not constitute incitement to violence considering the importance of robust and unhindered public debate in a democracy.<sup>228</sup> Excessive secrecy to protect state security is of itself counterproductive because it can shield abuses and divert public attention away from issues of public concern.

### 2.3.2.3 *Information of high public interest*

Information related to the following: declaration of assets by public officers;<sup>229</sup> natural resource exploitation and receipts of revenue therefrom;<sup>230</sup> the spending of public funds; official corruption, management of public funds, abuse of power and official conduct of public officers; the integrity of candidates standing for elections; information related to environmental health and human safety concerns arising from resource extraction.<sup>231</sup> Others include possession of nuclear arsenal; deployment of troops in combat duty; financial information that gives the public better understanding of budgets, procurements and financial management rules pertaining to the agencies, at least in summary form where necessary. Given the dynamics of modern governance, the categories of information in this list are not closed.

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<sup>227</sup> International Convention for the Protection of All Persons from Enforced Disappearances, article 24(2), adopted by the UN Commission on Human Rights, September 2005, entered into force 2010 and UN Commission on Human Rights, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, para 55 of 8 February 2006, E/CN.4/2006/91, available at: <http://www.refworld.org/docid/46822b6c2.html> [accessed 14 July 2016]; Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Commission on Human Rights, Resolution 2005/81 (2005); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN GA Resolution 60/147 (2005). Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission on Human Rights, Resolution 2005/81 (2005).

<sup>228</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *ibid*, UN Doc. A/HRC/31/65 (2016), para 39.

<sup>229</sup> The World Bank 'Regulating Conflict of Interest: International Experience with Asset Declaration and Disclosure', available at <http://www.right2info.org/resources/publications/publications/messickreconflictinterest.pdf>.

<sup>230</sup> *Claude Reyes et al. v Chile*

<sup>231</sup> RIGHT2INFO 'Information of High Public Interest', available at <http://www.right2info.org/information-of-high-public-interest>, accessed 23 October 2016.

#### 2.3.2.4 *Legal framework on national security, military intelligence or surveillance*

Even when secret methods, sources in use by secret intelligence agencies are not to be disclosed, the existence of such bodies and legal framework authorising their activities, budget, overall headship and limits of powers exercisable by them must be made public.

Considering that the implementation of national security policy is often shrouded in secrecy and the exercise of discretionary power by States with negative consequences, some authoritative international human rights bodies and legal experts have stepped in prescribe minimum standards of conduct for States' practice in this regard.

#### 2.3.3 International standards on national security restrictions on access to information

UN treaty bodies, Commissions and Rapporteurs have developed standards based on the ICCPR against potential abuses of national security measures. International NGOs have also adopted principles and guidelines to circumscribe national security restriction on access to information.<sup>232</sup> Restriction must fulfil a cumulative three-part test of permissible limitations.<sup>233</sup> Adherence to the principle of maximum disclosure forms the basis of limitation analysis of article 19(3) by bodies such as the HRC and UN Special Rapporteur on Freedom of Expression. States may not therefore withhold information except in clearly, but narrowly, defined circumstances.<sup>234</sup> To ensure that reasonable and sufficient grounds exist for imposing restrictions and that restrictions serve the public interest, article 19(3) embody three main principles.

##### 2.3.3.1 *Provided by law (the principle of legality)*

A restriction on access to information must have some basis in law. This is to ensure legal certainty and restrictions are not subject to the sole discretion of State officials. The absence of law gives room for legal uncertainty as to exercise of the right to information, the extent of state's powers to limit it, and discretionary and arbitrary classifications of information as 'secret' based on vague or

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<sup>232</sup> See Joint Declaration, FOE Special Rapporteurs 2004.

<sup>233</sup> Sandra Coliver 'Commentary to Johannesburg Principles op cit note 8.

<sup>234</sup> Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34) para. 22 and UN Special Rapporteur Reports (A/HRC/14/23, para. 79, and A/67/357, paras 41-46.

non-existent criteria.<sup>235</sup> To obviate arbitrary interference with access rights discretionary rules may pass if they give clear indication as to conditions, manner and scope of their exercise.<sup>236</sup> ‘Law’ in this context refers to enacted law, judicial precedent or administrative rules based on existing law, but not unwritten rules such as uncodified customs. Not every legal norm would pass.

A legal norm must be sufficiently precise and not allow unfettered discretion by State officials acting under official secrecy laws to vaguely or broadly define criteria for secret information.<sup>237</sup> Such laws must be precise and specific with regard to all the constituent elements of the restriction and the offense, especially the element of intent. The nature or importance of right infringed also determines how strict the scrutiny of the law impugned will be. The law must be accessible; it must give notice of its requirements as to conditions under which disclosure of state information attracts criminal sanctions or the conduct it restricts. Danilo Türk and Louis Joinet noted,

If sanctions are based on laws that are vague or manifestly imprecise or formulated with clear intent to provide a "legal" basis for silencing people, they come close to "informal" or arbitrary sanctions.<sup>238</sup>

Again, to prevent abuse of the label ‘secret’, a State secrecy law must pass through normal parliamentary processes involving public debate and meet certain criteria.<sup>239</sup> It must clearly define the following: ‘national security’ including threats thereto; the criteria to be used in determining information that can be kept secret; the officials entitled to classify information; the overall length of time during which recorded information may remain secret.<sup>240</sup> Defining national security can motivate intelligence agencies to focus on national security protection instead of duplicating

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<sup>235</sup>Reyes para 98, 45.

<sup>236</sup> Human Rights Committee, General Comment No. 34, para 19.

<sup>237</sup>*Marina Kockish v. Belarus*, Communication No. 1985/2010, U.N. Doc. CCPR/C/111/D/1985/2010 (Views adopted 24 July 2014). See also Turk & Joinet, UN Sub-Commission Special Rapporteurs on Freedom of Expression, para 30

<sup>238</sup> The Right to Freedom of Opinion and Expression: Final Report by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs, U.N. ESCOR, Comm'n on Hum. Rts., 44th Sess., ¶ 77, UN Doc. E/CN.4/Sub.2/1992/9 (14 July 1992).

<sup>239</sup> OSCE Representative on Freedom of the Media Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression 6 December 2004. See also Australian Security Intelligence Organisation Act, sect. 4.

<sup>240</sup> 2004 Joint Declaration; Mendel, T. The Public’s Right to Know: Principles on Freedom of Information Legislation. Article 19; London, 1999, available at <http://www.article19.org/docimages/512.htm>, assessed 1 July 2016. See also Canada, Security Intelligence Service Act, section 2; Malaysia, report of the Royal Commission to enhance the operation and management of the Royal Malaysia Police of 2005, (hereafter Malaysia – Royal Police Commission), para 2.11.3, 316; Croatia, Act on the Security Intelligence System, article 23(1); Australia, Security Intelligence Organisation Act, section 4; Germany, Federal Act on Protection of the Constitution, sections 3(1) and 4; United States of America, Executive Order 12333, article 1.4 (b).

related functions of other public bodies, which may result in human rights violations when undertaken by intelligence agencies.<sup>241</sup>

Also, the law or measure specifying restrictions must not violate international human rights norms. Intelligence agencies must not use measures that violate international human rights norms, such as denying access to personal data, but measures adopted must be reasonably justifiable in a democratic society.

### 2.3.3.2 *The principle of legitimacy*

A restrictive measure based on national security grounds must truly serve legitimate or overriding national security not unrelated interests, and it should apply only where the harm to national security is greater than the public interest in disclosing information.<sup>242</sup> States may not enact laws that permit, on national security grounds, the withholding of information on gross violations of human rights or serious violations of international humanitarian law or crimes under international law such that the withholding would prevent accountability for violations or deprive a victim of access to an effective remedy.<sup>243</sup> National security laws such as treason laws, official secrets or sedition laws or measures which invoke such laws to withhold information of legitimate public interest that does not harm national security or to criminalise disclosure of public interest information, violate article 19(3).<sup>244</sup>

### 2.3.3.3 *The principle of necessity*

The principle of ‘democratic necessity’ embodies the requirement that government must substantiate a claim or sufficiency of reasons canvassed by authorities for measures adopted that

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<sup>241</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Un Doc. A/HRC/14/46, (2010), para II A 9.

Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight

<sup>242</sup> Patrick Birkinshaw ‘Freedom of Information and Openness: Fundamental Human Rights?’ *Administrative Law Review* (2006) 58 177 at 189.

<sup>243</sup> Report of UN Special Rapporteur to the UN General Assembly () para 66(a)-(b).

<sup>244</sup> See the Concluding Observations on the Russian Federation (CCPR/CO/79/RUS) Communication No. 1470/2006 *Toktakunov v Kyrgyzstan*, CCPR/C/101/D/1470/2006, Views adopted 28 March 2011 at the Human Rights Committee One hundredth and first session 14 March - 1 April 2011 CCPR/C/101/D/1470/2006 (inaccessible secret by-law which classified information on number of individuals on death row as ‘confidential’ and ‘top secret’ with no negative effects on defence, economic or political interests not a ‘law’ under article 19(3) and unnecessary to protect defence).

a restriction protects national security. ‘Necessary’ does not mean what is advisable, expedient or convenient, but what is acceptable according to the values and principles characteristic of a democratic society.<sup>245</sup> First, ‘necessity’ connoted that laws in their design and application and even when they relate to permissible restrictions must not suppress or withhold information of public interest not related to the legitimate interest to which they apply.<sup>246</sup> Second, a restriction is necessary only if it is proportionate to the aim invoked and is not more restrictive than is required to achieve the desired purpose.<sup>247</sup> Third, a restrictive measure must be rationally connected with protection of legitimate national security interest as defined in national law.<sup>248</sup> Lastly, a restriction must be ‘the least restrictive means possible for protecting a [national security] objective (among various options, if many) to be selected.’<sup>249</sup> Overall, it is essential that a restriction enhances a legitimate national security interest and must not be so excessive as to jeopardise the public interest in the right to access information.<sup>250</sup>

Moreover, international human rights mechanisms have consistently held that where application of restrictive laws which conflict with fundamental right to information must allow recourse to judicial review, by an independent court or tribunal.<sup>251</sup> State laws must establish and grant access to all sensitive information to oversight bodies to enable them monitor and publicly report ill-treatment of detainees by all intelligence agencies.<sup>252</sup> Oversight bodies, whether parliamentary,

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<sup>245</sup> Communication No. 1470/2006, *Nurbek Toktakunov v Kyrgyzstan* Views adopted 28 March 2011, para. 10. (CCPR/C/101/D/1470/2006).

<sup>246</sup> Human Rights Committee, General Comment No. 34 op cit at note 98, para 30.

<sup>247</sup> The UN Special Rapporteur report to the UN General Assembly (‘Promotion and protection of the right to freedom of opinion and expression’ A/68/362 of 4 September 2013), para. 52.

<sup>248</sup> Ibid, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, “Good practices on legal and institutional frameworks for intelligence services and their oversight”, UN Doc. A/HRC/14/46, paras 29-31; Johannesburg Principle on National Security, Freedom of Expression and Access to Information, Principle 2(b).

<sup>249</sup> Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 1.3(b) (1998) available at, 20 *Hum. Rts. Q.* 1–11; Tshwane Principles op cit note 4. See however, Constitution of the Republic of South Africa 1996, s 36(1) (e) which otherwise provides for ‘a less restrictive means’ principle.

<sup>250</sup> Joint Declaration by Special Rapporteurs in their 1999 Declaration of freedom of expression op cit note 1092004.

<sup>251</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue (Human Rights Council Fourteenth session, A/HRC/14/23, 20 April 2010), para. 79(e) and A/HRC/16/48, para. 39).

<sup>252</sup> UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, UN Joint Study on global practices in relation to secret detention in the context of countering terrorism, UN Doc. A/HRC/13/42 (2010).

quasi-judicial or administrative must also be independent of the executive and agencies vested with national security powers and empowered to scrutinise the sources of funding and expenditure of intelligence and national security agencies. The outcome of judicial scrutiny will depend on the extent to which the information, access to which is restricted, is crucial to public scrutiny of government actions.<sup>253</sup>

But ICCPR signatory or ratifying States, like Nigeria,<sup>254</sup> may repudiate their obligations based on non-domestication of human rights treaties according to their constitutions. The legal position, which I adopt, is stated in *Attorney General v Dow*.<sup>255</sup> Constitutional construction should be generous and meet ‘the just demands’ of a society based on human dignity unless by clear and unambiguous words a contrary interpretation is compelling.<sup>256</sup> Again, pending parliamentary approval international conventions should be used as aid to statutory interpretation.

#### 2.4 CONSTITUTIONAL HISTORY, ACCESS TO INFORMATION AND NATIONAL SECURITY IN NIGERIA

Before return to democratic rule on 29 May 1999, the British had ruled the territories called ‘Nigeria’ for virtually a hundred years (1860 – 1960).<sup>257</sup> Nigeria’s brief post-independence parliamentary democracy (1960 – 1966), was tied to the British Monarchy,<sup>258</sup> but followed by almost 29 years of military rule.<sup>259</sup> The post-independent government, like the British, claimed authority to protect public security through sedition laws.<sup>260</sup> But as a political survival strategy, the military gave undue emphasis to State security at the expense of liberty,<sup>261</sup> which propensity for survival pervades constitutional provisions on access to official information.<sup>262</sup> The National Security Agencies Act, for instance, was promulgated a Decree in 1986 by The Armed Forces

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<sup>253</sup> *Jorge Asensi v Spain*, Communication No. 141/2005, U.N. Doc. CCPR/C/92/D/1413/2005 (25 March 2008), para 8.3.

<sup>254</sup> See ‘Ratification of International Human Rights Treaties – Nigeria’, available at <http://hrlibrary.umn.edu/research/ratification-nigeria.html>, accessed 10 May 2017.

<sup>255</sup> 1992 BLR 119 (CA, Botswana).

<sup>256</sup> *Ibid* 165 – 166.

<sup>257</sup> K Onwuka Dike *100 Years of British Rule in Nigeria 1851 – 1951* (1960).

<sup>258</sup> T O Elias *Nigeria: The Development of its Laws and Constitution* (1966) 1 – 47.

<sup>259</sup> Olayiwola Abegunrin *Nigerian foreign policy under military rule, 1966-1999* (2003).

<sup>260</sup> See *DPP v Chike Obi* [1961] 1 ALL NLR 186.

<sup>261</sup> State Security (Detention of Persons) Decree No. 2 of 1984 (as amended, repealed and re-enacted).

<sup>262</sup> See paragraph 4.2.1 ante.

Ruling Council which acted under the unilateral will of the military Head of State. The Act was written into the Constitution and made unalterable except by a cumbersome procedure.<sup>263</sup> The professed objective of the Act was the establishment of specialised agencies to protect ‘national security’. But its real effect has been to render all information held by National Security Agencies secret irrespective of content or effect on national security.<sup>264</sup>

## 2.5 CONCLUSION

The right of access to government-held information is a basic condition for an accountable and responsive democracy. But the duty to protect citizens, the government from violent overthrow, and the state from military attacks sometimes requires some secrecy. Attenuating information rights with secrecy measures is however very problematic. Secrecy and concealment in government decision-making provide refuge for authoritarian rulers; it facilitates corruption and enables official misconduct to go unchecked. International law of the ICCPR 1966 mediates the interplay of access to information and national security; the withholding of national security information must be justifiable in a democratic society. Nigeria is yet to domesticate the ICCPR 1966 as its Constitution demands,<sup>265</sup> but it cannot morally renege from its obligations thereunder.

In the next chapter, I intend to probe deeply the extent to which the principle of access to information is espoused by the African human rights system and the constitutional implication for States, especially Nigeria, that has incorporated the ACHPR into domestic law.

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<sup>263</sup> 1999 Constitution, s 315(5).

<sup>264</sup> See paragraph 4.2.4.2 ante.

<sup>265</sup> See paragraphs 4.2.3, 6.2.3 and 6.3.2.1 ante.

## CHAPTER THREE: THE RIGHT OF ACCESS TO INFORMATION AND NATIONAL SECURITY IN AFRICAN HUMAN RIGHTS SYSTEM

### 3.1 INTRODUCTION

As argued in chapter 2, international human rights law dictates that restrictions to the right of access to state-held information, including on grounds of national security, must be prescribed by law, serve a legitimate public interest and be necessary in a democratic society.<sup>1</sup> These requirements are quite significant and have been followed generally by regional bodies that monitor States' compliance with freedom of expression and access to information rights guaranteed in normative human rights documents.<sup>2</sup>

However, international human rights law recognises the significance of varied historical and cultural backgrounds and systems in which human rights must be protected.<sup>3</sup> 'The 'African human rights system', in other words, the totality of human rights protection under the auspices of the African Union<sup>4</sup> ('the AU'), its affiliated core multilateral instruments and their implementation bodies,<sup>5</sup> is of such historical and cultural background.<sup>6</sup> The African Charter on Human and People's Rights (African Charter or ACHPR) 1981<sup>7</sup> is regarded as the flagship or 'parent' instrument within the system.<sup>8</sup> The ACHPR is the youngest of all comparative regional human rights instruments, but some of its more restrictive provisions as regards political rights call for expansive interpretations or further elaborations as are progressively ongoing through the

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<sup>1</sup> See further, Lene Johannessen 'Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards' (1994) 10 *SAJHR* 216.

<sup>2</sup> See Manfred Nowark *Introduction to the International Human Rights Regime* (2003) 57 – 9.

<sup>3</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paras 2, 5, 8, 18, 19, 27, 38; Jack Donnelly *Universal Human Rights in Theory and Practice* (2013).

<sup>4</sup> Established to replace the Organisation of African Unity (OAU) through the Constitutive Act of the African Union, adopted by the OAU Assembly of Head of States and Governments (AHSG) at the 36<sup>th</sup> Ordinary Session of the OAU held on 11 July 2000 in Lomé, Togo, OAU Doc. CAB/LEG/23.15 (entered into force 26 May 2001) (CAAU), article 2.

<sup>5</sup> See for example, C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2013).

<sup>6</sup> Sisay Alemahu Yeshanew & Sisay Alemahu *the Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (2013); Chidi Anselm Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *AHRLJ* 225–246.

<sup>7</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, Reprinted in 21 *ILM* 58 (1982 (entered into force 21 October 1986)).

<sup>8</sup> See also Amos 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 *AHRLJ* 1–28.

authoritative pronouncements, binding instruments and soft laws being put in place by regional bodies.<sup>9</sup>

For instance, as against the liberal political ethos that underpin the intersection of democracy and human rights in the International Covenant on Civil and Political Rights (ICCPR) 1966, the ACHPR was the product of a compromise having being midwifed under difficult political circumstances. Hence, the final outcome could only pay scant attention to the context of a democratic society within which human rights is best protected.<sup>10</sup> Nevertheless, the Charter represents the promise of a new course for human development through an autochthonous human rights charter more in tune with the communal culture, diversities and the socioeconomic realities of the African peoples.<sup>11</sup>

Again, contrasted with ICCPR's protection of individual rights, the African Charter accentuates human and peoples' rights,<sup>12</sup> African values,<sup>13</sup> individuals' duties to the community,<sup>14</sup> and the common interest.<sup>15</sup> The African Charter also epitomises the interrelatedness of civil, political, socioeconomic and group rights as against the separation of civil/political and socioeconomic rights in the UN and other regional human rights systems.<sup>16</sup>

Thus, there are significant similarities, but also marked differences, in the texts of the ICCPR, for instance, and the ACHPR. Differing cultural or historical contexts apart, differences also relate to how the human rights provisions in the instruments of each system are phrased and how these different texts are interpreted by various authoritative interpretive bodies. These variations mean

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<sup>9</sup> See, for instance, Durojaye E & Foley E A 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) *AHRLJ* 12.

<sup>10</sup> This could be attributed to reasons of political expediency since most of these African leaders were accused, and rightly so, of being 'sit-tight despots' who ruled their countries with an iron fist under one-party States or totalitarian military regimes. This aspect of the ACHPR has now been remedied by the AU Charter.

<sup>11</sup> A Bolaji Akinyemi 'The African Charter on Human and Peoples' Rights: An Overview' (1985) *The Indian Journal of Political Science* 46 207–238.

<sup>12</sup> Sisay Alemahu Yeshanew & Sisay Alemahu op cit note 6.

<sup>13</sup> Article 29(7).

<sup>14</sup> Articles 10(1), 11, 27, 28 and 29; Morris Kiwinda Mbondenyei *International Human Rights and their Enforcement in Africa* (2011) 218.

<sup>15</sup> Articles 17(3), 19–24, 27–29.

<sup>16</sup> See Manisuli Ssenyonjo 'Economic, Social and Cultural Rights in the African Charter' in Manisuli Ssenyonjo (ed.) *The African Human Rights System* (2012) ch 3; Durojaye E & Foley E A 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) *AHRLJ* 12.

the content and scope of rights protected differ. Moreover, the extent to which entrenched rights are respected in practice will differ depending on the region.<sup>17</sup> Regional human rights instruments set standards of accountability for national governments, they steer national systems to a common consensus and enable individuals to ventilate grievances otherwise stifled at the national level.<sup>18</sup> These differences in contexts within which the ACHPR and other regional instruments must be given effect to. This necessitates an analysis of the guarantee of the right of access to State information in the African human rights system to which Nigeria subscribes. Nigeria is the only African nation to have domesticated the African Charter.<sup>19</sup>

As noted in chapter 2, article 19 of the ICCPR is an expansive provision that gives strong protection to the right to hold opinions, freedom of expression and the right to seek, receive and impart information which may be narrowly restricted only in clearly enumerated circumstances.<sup>20</sup> By contrast, the scope of protection given by article 9 of the ACHPR is narrower.<sup>21</sup> Article 9 does not expressly guarantee the right of access to information, but tends to accentuate state powers to

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<sup>17</sup> Pierre de Vos ‘Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 *SAJHR* 258, 261–2. Also, some writers have argued that the regional human rights instruments of European and American origin provide in similar terms for the right of access to information in their freedom of expression guarantees. But differences in wording and interpretative gloss in both instruments have produced diverging results. The interpretation of the American Convention has produced results in favor of a positive right of access to information. By contrast, the exclusion of the word ‘seek’ in the European Convention of Human Rights, article 10 has resulted in judicial pronouncement that the Convention does not place an obligation upon government to deliver official information to citizens. See D Voorhoof, H Cannie ‘Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights’ (2010) 72 *International Communication Gazette* 407 – 423 at 416; Council of Europe, Directorate of Human Rights *Case-law concerning article 10 of the European Convention on Human Rights: forty years of case-law, 1959-1999* (1999); Wouter Hins and Dirk Voorhoof ‘Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights’ (2007) 3 *European Constitutional Law Review* 114 – 126 at 117 – 8. Furthermore, in interpreting the European Convention, article 10, the European Court of Human Rights has consistently pointed out that:

‘[T]he right to freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.’ See *Leander v. Sweden* ECtHR 26 March 1987, para 74; *Gaskin v. United Kingdom* ECtHR 7 July 1989, para 52 and *Guerra and others v. Italy* ECtHR 9 Feb. 1998, para 53. Similar position obtains under the First Amendment to the United States Constitution 1787. See *Houchins v. KQED, Inc.*, 438 US 1 (1978) 15.

<sup>18</sup> Frans Viljoen *International Human Rights Law in Africa* 2 ed. (2012)267; Amos O Enabulele op cit note 8 at 21.

<sup>19</sup> See The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap. A9 Laws of the Federation of Nigeria 2004.

<sup>20</sup> Claude E Welch, Jr ‘The African Charter and Freedom of Expression’ in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, et al *Secrecy and Liberty: National Security, Freedom and Access to Information* (1999) 145, 151 –153.

<sup>21</sup> The African Commission on Human and Peoples’ Rights, Resolution on Freedom of Expression, 29th Ordinary Session, held 23rd April to 7th May 2001 in Tripoli, Libya available at <http://www.achpr.org/sessions/29th/resolutions/54/>, accessed on 21 September 2016; Colin Darch & Peter G Underwood *Freedom of Information and the Developing World: The citizen, the state and models of openness* (2010).

heavily regulate freedom to express and disseminate opinions ‘within the law’.<sup>22</sup> This limiting ‘claw back’ clause in article 9(2) seemingly permits restrictions to the exercise of article 9 rights in a vague and open-ended manner since it specifies no criteria of legitimate purpose or necessity that potentially restrictive State laws must meet.<sup>23</sup> Indeed, that clause, as well as other similarly worded ones,<sup>24</sup> has mostly been relied upon by states to prop up arguments that Charter rights are subservient to state security interests in terms of restrictive laws.<sup>25</sup> Such arguments lack substance, considering the interpretative stand of the African Commission on Human and People’s Rights<sup>26</sup> to the effect that the ACHPR must be interpreted in light of international standards.<sup>27</sup>

The pertinent questions then are the following: to what extent is the right of access to information respected in the African human rights system? Can the right be restricted in the national security interest of States? The African Commission has endeavoured to supplement the right of access to information in the Charter with soft law. This move gives impetus for its in-depth examination in this chapter and to develop further the African Commission’s logic and reasoning to ensure a substantive protection for the right of access to information in the Charter.<sup>28</sup> Therefore, this chapter makes the claim that the African human rights system recognises the right of access to state information, which may not be restricted in the interest of national security except as provided by a law that serves a legitimate interest and necessary in a democratic society.

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<sup>22</sup> Sandra Coliver ‘Commentary on the Johannesburg Principles’ in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick, et al, Sandra Coliver, Paul Hoffman, Joan Fitzpatrick et al. (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999).

<sup>23</sup> I Osterdahl *Freedom of information in question: freedom of information in international law and the calls for a New World Information and Communication Order* (NWICO) (1992) 112; Morris Kiwinda Mbondenyei op cit note 14 at 217.

<sup>24</sup> Like phrases are ‘except for reasons and conditions previously laid down by law’, ‘subject to law and order’, ‘within the law’, ‘provided he abides by the law’, ‘subject only to necessary restrictions provided for by law’, ‘in accordance with laws of those countries’, ‘in accordance with the law’, ‘in accordance with the provisions of the law’ and ‘in accordance with provision of appropriate laws’. See respectively articles 6, 8, 9(2), 10(1) - (2), 11 and 12(1) - (4), 13(1) and 14 of the African Charter.

<sup>25</sup> See *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 40.

<sup>26</sup> Hereinafter ‘the African Commission or the Commission’.

<sup>27</sup> Chidi Anselm Odinkalu ‘The role of case and complaints procedures in the reform of the African regional human rights system’ (2001) 2 *AHRLJ* 225–246; The Protocol on the Establishment of an African Court on Human and Peoples’ Rights, adopted 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004) (the Protocol), articles 2, 3 & 7. See further, Part III of this chapter.

<sup>28</sup> This is crucial for dualist countries like Nigeria that have not yet domesticated the ICCPR nor its First Optional Protocol, but have domesticated the African Charter. The implication is that their citizens can enforce the right of access to information in the Charter that they may have been denied under the ICCPR 1966.

Part 1 introduces the subject and argues that African Charter, article 9, as formulated, does not explicitly support public right of access to state information. Part 2 argues that despite lack of substantive right of access to information in the ACHPR, the African Commission has, through the concept of positive obligations and interrelatedness of human rights, demonstrated that the right of access to information underlies human rights protection. The African Court on Human and Peoples' Rights has also shown a proclivity to follow suit. Based on relevant provisions of the African Charter, other treaties, Concluding Observations and soft laws within the African Human Rights system, I engage with the logic and reasoning of the African Commission to justify a substantive guarantee of right of access to information. Part 3 argues that national security restriction may be placed upon the exercise of the right, but it must be provided by law, serve a legitimate purpose and be strictly proportionate to and absolutely necessary for its objective. Part IV concludes that these clarifications of the normative scope of the right of access to information go a long way towards ensuring that group and individuals across the continent will enjoy this right.

### 3.2 CONCEPTUALISING THE RIGHT OF ACCESS TO INFORMATION IN THE AFRICAN CHARTER

This part, subdivided into four, reviews the evolution of the right of access to information through the exercise by the African Commission of its promotional and protective mandates despite the restrictive phrasing of article 9 of the ACHPR.

Sub-part 1 focuses on the creative use of the concepts of positive obligations, interrelatedness of human rights and implied rights developed by the African Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>29</sup> as pedestal for the recognition of access to information in the ACHPR. Sub-part 2 appraises the rationales for access to information embedded in *SERAC* as a necessary condition for the enjoyment of socio-economic rights subsequently elaborated upon by the Commission in its soft laws and Concluding Observations. Sub-part 3 appraises the elaborations and actual crystallisation of the right of access to information in article 9 through the promotional mandate of the Commission. Sub-part 4 assesses the recognition of access to information of public interest in the African Court on Human and Peoples'

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<sup>29</sup> (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).

Rights embryonic, but epochal decisions that have remarkably broadened the scope of freedom of expression.

### 3.2.1 The promotional and protective mandates of the African Commission

Inaugurated by the OAU Assembly of Head of States and Government (AHSG) in 1987, the Commission was established essentially ‘to promote human and peoples’ rights and ensure their protection in Africa’.<sup>30</sup> The mandate of the Commission can be separated into two broad categories, namely, promotional and protective mandates.<sup>31</sup> To promote human rights, the Commission is enjoined to undertake studies and organise seminars, formulate principles and rules, and co-operate with other African institutions towards solving peculiar African human rights problems.<sup>32</sup> The Commission has jurisdiction to hear Communications from states and ‘other’ Communications submitted to it under conditions laid down by the Charter.<sup>33</sup> Hence, the Commission’s protective mandate extends over state-parties and persons subject to the African Charter.<sup>34</sup>

Furthermore, the Commission generally monitors the implementation of the body of rights guaranteed by the Charter through its protective mandate (including quasi-judicial functions) and innovate promotional techniques including state reporting, missions, principles and resolution-making, special rapporteurs, etc.<sup>35</sup> The Commission has adopted a purposive and broad interpretive approach in determining allegations of rights violations, and thus gives effect to otherwise vague and narrow provisions including article 9.<sup>36</sup> Article 9 of the Charter provides that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

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<sup>30</sup> The African Charter, article 30.

<sup>31</sup> Frans Viljoen *International Human Rights Law in Africa* 2 ed (2012) 300-390; Magnus Kilander ‘The African Commission on Human and Peoples’ Rights’ in *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights* (2011) 237 – 40.

<sup>32</sup> The African Charter, article 45(1)(a)(b)(c).

<sup>33</sup> The African Charter, articles 47 – 54 & 55 – 6. See Magnus Kilander ‘The African Commission on Human and Peoples’ Rights’ in Manisuli Ssenyonjo *the African Regional Human Rights System: 30 years after the African Charter on Human and Peoples’ Rights* (2012) 238.

<sup>34</sup> Frans Viljoen *International Human Rights Law in Africa* 2 ed. (2012) 204 – 5.

<sup>35</sup> See Frans Viljoen *International Human Rights Law in Africa* 2 ed. (2012) ch 8.

<sup>36</sup> See Olufemi Amao ‘Civil and Political Rights in the African Charter’ in Manisuli Ssenyonjo (ed) ch 2.

As rightly observed by several Scholars, article 9 unlimitedly protects the right to receive information, but the claw-back clause in article 9(2) does not obligate government to deliver up state information; it rather gives states wider discretion to restrict freedom of expression in terms of domestic law.<sup>37</sup> However, this harsh reality of article 9 concerning protection for the right of access to information has gradually been moderated through the Commission's expositions on article 9 rights as a means of protecting other rights guaranteed by the Charter. Thus, the eventual crystallisation of a positive right of access to information in article 9 was a result of the African Commission's creative interpretive stand in its protective (and promotional) mandates.

The Commission's creative interpretive stance has been, in accordance with international law, to give effect to all rights guaranteed by the Charter. Hence the Commission has been able progressively to develop the meaning, normative content and scope of otherwise poorly and narrowly formulated socio-economic (ESC) rights.<sup>38</sup> For instance, concerning the right to property in article 14, the Commission has held that the state has a duty to respect and protect private property and the principle of non-arbitrary encroachment.

Similarly, the rights to health, clean environment, housing and food received a boost in *SERAC*<sup>39</sup> such that the Commission held that the Nigerian government failed to observe the minimum obligations to protect, respect and fulfil these rights despite the paucity of Charter provisions.<sup>40</sup>

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<sup>37</sup> See Olufemi Amao 'Civil and Political Rights in the African Charter' in Manisuli Ssenyonjo (ed) *the African Human Rights System* at 13. Colin Darch & Peter G Underwood *Freedom of Information and the Developing World: The Citizen, the State and models of openness* (2010) 76. Claude E. Welch Jr. argues that article 9 delivers the weakest protection of freedom of expression and information among major international human rights instruments. Claude E. Welch Jr 'The African Charter and Freedom of expression in Africa' (1998) 4 *Buff. Hum. Rts. L. Rev.* 103 – 122 at 112 – 3, who says, 'The ICCPR the European Convention on Human Rights, and the American Convention on Human Rights are all treaties more rigorous, and systems more vigorous, in protecting freedom of expression.' He went on, "The limitations of the African Charter are striking; even more, in the case of freedom of expression, the political will to interpret the wording of the African Charter broadly has not been present." Similarly, Sandra Coliver argues that article 9 is more restrictive than comparative instruments because the phrase "within the law" occurring in article 9(2) gives a wider ambit for States to limit freedom of expression and information. See Sandra Coliver 'Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick et al. (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 17.

<sup>38</sup> Pierre De Vos 'A New Beginning - The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights' (2004) 8 *Law, Democracy & Dev.* 1 – 24.

<sup>39</sup> See also *Centre on Human Rights and Evictions v The Sudan* (COHRE case) (expanding on the normative content on the right to health in article 16 of ACHPR in terms of UN Committee on ESR Comment No. 14, available at <http://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>40</sup> Manisuli Ssenyonjo 'Economic, Social and Cultural Rights in the African Charter' in Manisuli Ssenyonjo (ed) ch 3.

This approach, which has yielded encouraging results, is itself founded *inter alia* on the principles of the interconnectedness of civil/political, socioeconomic and cultural rights/group rights embedded in the Charter.<sup>41</sup> Thus, the Commission has effectively drawn upon the principles of international law as interpretive aid to emphasise the nature of general state obligations under the Charter.<sup>42</sup> This encompasses principles embedded in the ACHPR itself, the international bill of rights, international instruments ratified by African States and the jurisprudence of authoritative international and regional bodies. As the Commission rightly observed in *SERAC*:

Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.<sup>43</sup>

In addition, the Commission, through its evolving theory of implied rights, is able to strengthen Charter protections by giving effect to a penumbra of rights essential to enable right-bearers to enjoy expressly guaranteed rights. The Commission has decided that rights not expressly excluded by the Charter can be implied or read into it.<sup>44</sup> It was the Commission's creative reasoning on justiciability of (socio-economic) rights in *SERAC*, and related communications, based on the trilogy of rights interrelatedness, implied rights theory and positive obligations that ultimately helped to enliven the otherwise weak support of article 9 for access to information.

### *3.2.1.1 The African Commission's typology of positive obligations, rights' interrelatedness and implied rights*

The concept of positive obligation emanates from article 1 of the Charter which provides that:

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

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<sup>41</sup> The Charter recognises all rights equally without distinction. See the 8th Preambular paragraph, articles 1 – 13, 14 – 26.

<sup>42</sup> See the African Charter, article 60. Article 61 requires '[t]he Commission ... [to] take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine'.

<sup>43</sup> *SERAC* op cit note 29 at para 68.

<sup>44</sup> *Ibid*, paras 59 – 66.

The Commission constantly re-iterates that article 1 places legally binding obligation on states similar to that emanating from comparative international treaties. According to the Commission: '[a]rticle 1 places the States Parties under the obligation of respecting, protecting, promoting and implementing the rights.'<sup>45</sup> Based on article 1, the Commission in a plethora of communications maintains that states have a general obligation of inherent negative undertakings of non-interference that intertwine with positive obligations.<sup>46</sup> The law is now settled as to the nature of negative and positive obligations emanating from article 1 except that the Commission is sometimes not consistent in their application.<sup>47</sup>

In *Association of Victims of Post Electoral Violence and Another v Cameroon*<sup>48</sup> the Complainants were injured and had their property damaged in post-electoral violence following the judicial confirmation of Paul Biya's victory in Cameroon's presidential elections of October 1992. The Commission held that Cameroon had failed in its obligation of 'due diligence' imposed by article 1 even when it was established that state officials were not directly responsible for violations. The Commission said:

This Article places on the State Parties the positive obligation [of 'due diligence'] to prevent and punish the violation by private individuals of the rights prescribed by the Charter.<sup>49</sup>

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<sup>45</sup>*Association of Victims of Post Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) para 87. At para 88 where the Commission remarked:

'The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights'. See further Communication No. 288/04 *Gabriel Shumba v Zimbabwe* (decided 2 May 2012) para 136 available at <http://caselaw.ihra.org/doc/288.04/view/en/>, accessed on 17 October 2016.

<sup>46</sup> The summary of the jurisprudence is that in appropriate circumstances the state's negative obligation not to interfere intentionally with enjoyment of rights also involves a primary duty to secure (or fulfil) rights through laws backed up by effective legal machinery to deter violations. Furthermore, it involves a further responsibility to take positive action which involves putting in place reasonable measures to prevent rights violations, but if violations occur whether or not they are caused by state agents, to provide effective remedies to victims, including fair compensation. See *Association of Victims of Post Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) paras 122 – 130; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 7.

<sup>47</sup> See *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) ('the COHRE case') paras 191 and 248, and note 41 *infra*.

<sup>48</sup>*Association of Victims of Post Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009).

<sup>49</sup> At para 89. The Commission held that measures adopted by Cameroon to prevent the violence were not reasonable enough and did not prevent the post-electoral violence. INTERIGHTS has criticised what the Commission described as obligation of due diligence and not of means as a strict interpretation which imposes an obligation that states might have difficulty meeting. It similarly said it 'deviates from the positive obligation principle which imposes upon the state a duty to take positive action in order to ensure the effective enjoyment of rights are protected'. See INTERIGHTS, the international centre for the legal protection of human rights, available at [www.interights.org/our-](http://www.interights.org/our-)

Previously, in *SERAC*, the Commission had seized the opportunity afforded by the communication to affirm the nature of positive obligations undertaken by state parties to the Charter. The Commission decided that all rights generate at least four levels of duties in terms of article 1<sup>50</sup> — ‘the duty to respect, protect, promote, and fulfil these rights’ which ‘entail a combination of negative and positive duties’.<sup>51</sup> First, the duty to respect entails that states should abstain from interfering in the enjoyment of rights or depriving people the opportunity to use their resources.<sup>52</sup> Second, the duty to protect requires states to move from non-intervention to take appropriate measures including through legislation, provision of effective remedies and other positive steps to ensure the enjoyment of rights is not interfered with by private persons.<sup>53</sup> Third, the duty to promote means that states should actually facilitate the enjoyment of rights by, for instance, promoting tolerance, raising awareness, and even building infrastructures, if need be.<sup>54</sup> The obligation to fulfil rights implies an expectation from states to take concrete or positive steps towards the actualisation of rights such as the direct provision of basic needs and social services.<sup>55</sup> The Commission then proceeded from the foregoing basis to determine the nature and content of rights allegedly violated, the kinds of obligations arising therefrom, and whether the Respondents actually violated these rights.

First, the Commission held that articles 16 and 24 are closely related and both ‘recognise the importance of a clean and safe environment’ because a degraded environment is as unsatisfactory for human habitation and development as it is harmful to human health.<sup>56</sup> The Commission found Nigeria to be in violation of its positive obligations in terms of both articles. It said:

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cases/26/index.html, accessed 5 October 2016. See also *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) paras 143 – 7 (Extent of a state’s responsibility for acts of non-state actors).

<sup>50</sup> *SERAC* op cit note 29 at paras 44 – 7.

<sup>51</sup> *Ibid*, para 44.

<sup>52</sup> *Ibid*, para 45.

<sup>53</sup> *Ibid*, paras 46, 57.

<sup>54</sup> *Ibid*, para 46.

<sup>55</sup> *Ibid* at para 47.

<sup>56</sup> Para 51. Article 16 of the African Charter reads:

‘(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick’.

Article 24 of the African Charter reads:

‘All peoples shall have the right to a general satisfactory environment favourable to their development’.

Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>57</sup>

In the same vein, the Complainants held that Nigeria violated article 21<sup>58</sup> by allowing harmful practices by oil companies which caused environmental devastation and not affording the Ogonis a right to participate in decisions that affected the development of Ogoniland.<sup>59</sup> The Commission found that the right in question imposes an obligation on the State to provide information in advance to people exposed to oil pollution of the likely health problems from such exposure.

Concerning the argument that the right to adequate housing is implicitly recognised by articles 14 (right to property),<sup>60</sup> 16 and 18(1) of the African Charter, the Communication agreed with the Complainants. Article 18(1) provides that ‘[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral’. Though the right to ‘housing’ is not expressly guaranteed in the Charter, the Commission read a right to housing or shelter into the Charter considering the combined effect of articles 14, 16 and 18.<sup>61</sup> The Commission reasoned that protection of the family ‘forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected’ and vice versa.<sup>62</sup> Concerning Nigeria’s obligation on the right to housing the Commission observed:

Its obligations to protect obliges it to prevent the violation of any individual’s right to housing by any other individual or non-state actors like property developers ... and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.<sup>63</sup>

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<sup>57</sup> *SERAC* at para 53.

<sup>58</sup> Right to free disposal of wealth and natural resources.

<sup>59</sup> *SERAC* op cit note 57 at paras 55 – 8.

<sup>60</sup> Article 14 provides:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’.

<sup>61</sup> *SERAC* op cit note 59 at paras 59 – 63.

<sup>62</sup> *Ibid*, para 60.

<sup>63</sup> *Ibid*, 61. It also remarked at para 62 that: ‘[t]he government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter’.

Again, the Commission accepted that Nigeria violated the right to food, which the Complainants argued is implicit in the right to life (article 4) and right to health (article 16). Though from the summary of facts, the exact nature, the direct nexus of the right to adequate food with the right to work and political participation, for instance, and its normative scope do not appear to have been well-conceptualised, the Commission held that:

The right to food is inseparably linked to the dignity of human beings and *is therefore essential for the enjoyment and fulfilment of such other rights* as health, education, work and political participation. [Emphasis supplied]. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. . . . It [the Nigerian Government] should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.<sup>64</sup>

Consequently, as the foregoing discussion reveals, there exists an intricate link among all the socio-economic rights in the Charter. Underlying this link is the protection of human dignity. However, as the next discussion will reveal, the right of access to information is actually the linchpin of the rights protected by the Charter.

### 3.2.2 Positive obligations and access to information as a means of human rights protection: an emerging prospect?

In *SERAC*, the Commission recognised access to information as a mechanism for realising the right to an environment conducive to development, property, health and family life rather than as a stand-alone right. In this section, I argue that the rationales for the right of access to information existed in *SERAC* though the Commission did not read the right into the Charter. Though grounds for such a 'reading into' existed, they might have rendered the right normatively weak, if not based on article 9. Hence, the Commission's decision to elaborate on the right later on was in the right direction. I now analyse below the narrow, though definite, justifications for the right of access to state information that can be deduced from *SERAC*.

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<sup>64</sup> Ibid, para 65.

### 3.2.2.1 Access to information and right to health

The Commission has made encouraging pronouncements that can boost enjoyment of the right to health in view of its recognition of right to access to health-related information.<sup>65</sup> Quite clearly, as borne out the facts of *SERAC*, the violations of rights of the Ogonis occurred *inter alia* due to denial of access to official data on the deleterious health and environmental effects of oil exploration.

### 3.2.2.2 Access to information and right to a generally satisfactory environment

The right to enjoy the best attainable state of physical and mental health is directly linked to a generally satisfactory environment. In *SERAC*, the Commission found that oil exploration activities carried on by the Respondents had negative effects on the environment which, in turn, led to destruction of food sources and negatively affected human dignity.<sup>66</sup> In a comparative holding, the Commission held that the Complainants had a right to live in an environment conducive to their health. The Respondents had therefore breached article 24, which guarantees the right to a satisfactory environment, when they denied the Complainants access to information that would have alerted them about the impact of oil contamination on their land, air and water.<sup>67</sup>

### 3.2.2.3 Access to information and right to participate in developmental decision-making

In *SERAC*, the communication alleged that the Nigerian government and its joint venture partners failed to consult the Ogoni people before embarking in oil exploration activities in Ogoniland,

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<sup>65</sup> The critical importance of access to information in protecting the right to health is exemplified by the African Commission's extensive elaboration on the normative content on the right to health including women's sexual and reproductive rights. See African Commission on Human and Peoples' Rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014), available at [http://www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comment2\\_rights\\_of\\_women\\_in\\_africa\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf). Paragraph 28 of the General Comment states: 'State parties are required to provide complete and accurate information which is necessary for the respect, protection, promotion and enjoyment of health, including the choice of contraceptive methods'. The right of access to information is also intrinsically linked with women's right to be protected from HIV and sexually transmitted infections and to be informed of one's health status. See African Commission on Human and Peoples' Rights, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012), paras 11, 26 and 39, available at [http://www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comments\\_art\\_14\\_rights\\_women\\_2012\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comments_art_14_rights_women_2012_eng.pdf), accessed on 21 September 2016.

<sup>66</sup> *SERAC* op cit note 61 at paras 64–65.

<sup>67</sup> *Ibid.*

contrary to article 21 of the Charter. The Commission found that government's obligation to protect enjoins government to give '*meaningful* access to regulatory and decision-making bodies' (emphasis supplied).<sup>68</sup> This presupposes a fair, accessible, transparent and well-established procedure which gives people room for constructive engagement with public authorities. The engagement will involve explanations from government on how developmental activities can be carried out safely or their harmful effects mitigated. In relation to the right to property (article 14), any arbitrary government expropriation of peoples' natural resources without giving them access to details of whatever public interests underlie such decisions, amounts to a violation of article 21. This goes to prevent the general invocation of 'public interest' itself to suppress or withhold information of legitimate concern from the public.

#### *3.2.2.4 Access to information of general public interest*

It is explicit from the specific facts, findings and final recommendations within the context of *SERAC* that the state had a positive obligation to make official information publicly available, to create or allow an independent process through which citizens could obtain information of public interest. The Commission found that Government failed to provide the Complainants with the information necessary to express their concerns and assess the risks of living in Ogoniland where high risk petroleum exploration had taken place. This would have enabled government, the state oil company and Shell to respond and take due account of such concerns by making relevant information on the project publicly available.

However, there was no alleged breach of article 9 in *SERAC*, though it appears from facts alleging suppression of Ogoni activists that the Commission might have found such a breach.<sup>69</sup> The making of such a finding, if not based on article 9, would have created a weak normative basis for the enjoyment of the right like other implied rights given effect to in *SERAC*. Nevertheless, the normative content and scope of the right of access to information in the Charter remained vague and undeveloped until the Commission began to elaborate upon it.

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<sup>68</sup> Ibid, para 55.

<sup>69</sup>On this, see the related communication, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 110.

### 3.2.3 Elaborations on content and scope of right of access to information in article 9

The elaborations on and crystallisation of the right of access to information in article 9 through the work of the Commission has taken shape through two broad processes. First, access to information principles were firmly laid down through the promotional mandate of the Special Rapporteur on Freedom of Expression and Access to Information in Africa established by the Commission (the Special Rapporteur). It can be observed that the Special Rapporteur drew upon the principles of rights interrelatedness and positive obligations already invoked by the Commission to fashion a Declaration of principles on access to information. Secondly, the Commission has through its resolutions and Concluding Observations on State-party reports continuously harped on the need for domestic laws to comply with access to information principles.<sup>70</sup>

#### 3.2.3.1 Declaration of Principles on Freedom of Expression in Africa

As discussed above, article 9 offers a narrow scope of protection which the Commission itself is mindful of. Consequently, in order ‘to elaborate and expound the nature, content and extent of the right to freedom of expression provided for under article 9 of the African Charter’ the Commission set in motion a process,<sup>71</sup> which culminated in the adoption of a non-binding Declaration of Principles on Freedom of Expression in Africa (Declaration or DoP).<sup>72</sup>

The Declaration embodies the Commission’s existing jurisprudence on article 9, for instance, it echoes the justifications for the rights guaranteed by the provision and conditions for their limitation.<sup>73</sup> Most significantly, it synchronizes article 9 with international law principles and

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<sup>70</sup> Malcolm Evans & Rachel Murray ‘The reporting mechanism of the African Charter on Human and Peoples’ Rights’ in Malcolm Evans & Rachel Murray (eds) *The African Charter on Human and Peoples’ Rights. The system in practice, 1986-2000* (2002) 36 – 60; GW Mugwanya ‘Examination of State Reports by the African Commission: A Critical Appraisal’ (2001) 2 *AHRLJ* 268 – 284.

<sup>71</sup>Resolution on Freedom of Expression. Adopted by the African Commission on Human and Peoples’ Rights meeting at its 29th Ordinary Session in Tripoli, the Great Socialist People's Libyan Arab Jamahiriya, from 23rd April to 7th May 2001. Available at <http://www.achpr.org/sessions/29th/resolutions/54/>, accessed on 5 October 2016.

<sup>72</sup>Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa. Adopted by The African Commission on Human and Peoples’ Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002. Available at <http://www.achpr.org/sessions/32nd/resolutions/62/>, accessed on 5 October 2016.

<sup>73</sup>For instance, in *Law Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR 2003) para 41, re-iterated its holding in *Media Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 54 that article 9 ‘reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country’.

jurisprudence regarding the nexus between freedom of expression and the right of access to information. The Declaration sets out important benchmarks, it elaborates on the precise meaning and scope of freedom of expression in article 9 and right of access to information. The Declaration establishes the right of access to information as a touchstone for effective protection of all other human rights.<sup>74</sup> Principle I (1) of the Declaration declares:

Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

Apart from this definitive commitment to access to information above, the Declaration agrees with the general presumption to disclose public interest information (principle of maximum disclosure) and other internationally acceptable principles of freedom of information. For instance, the Principle IV (1) acknowledges that:

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, information, subject only to clearly defined rules established by law.<sup>75</sup>

Furthermore, Principle IV (2) affirms the positive obligation of states to guarantee the ‘right [of access] to information by law in accordance with the ... [Declaration’s] principles’.<sup>76</sup> This principle provides grounds for a public interest test of any state law that exempts information from disclosure pursuant to state interests.

Again, the Declaration re-asserts a key principle of access to information as a human entitlement capable of both vertical and horizontal enforcement in that:

‘everyone has the right to access information held by public bodies’ [and] ‘everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right’.<sup>77</sup>

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<sup>74</sup> Report of The Special Rapporteur On Freedom of Expression and Access to Information in Africa ‘Viewed in 25 Years of The Commission’ presented by Adv. Pansy Tlakula at the 52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights held from 9 to 22 October 2012 in Yamoussoukro, Côte d’Ivoire, available at [http://www.achpr.org/files/sessions/52nd/inter-act-reps/183/activity\\_report\\_sp\\_freedom\\_expression\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/inter-act-reps/183/activity_report_sp_freedom_expression_eng.pdf). accessed on 7 October 2016 (Report on 25 Years of the Commission).

<sup>75</sup> The Liberian Freedom of Information Act, section 2.2(b) contains an almost verbatim version of this rationale.

<sup>76</sup> See Osita Mba ‘Positive Obligations Under the African Charter on Human and Peoples’ Rights: The Duty of the Nigerian Government to Enact a Freedom of Information Act (2009) 35 *Commonwealth Law Bulletin* 215 – 249.

<sup>77</sup> DoP, Principle IV (2).

To remedy infringement of the right or abuse of state power to regulate access to information, the withholding information or ‘refusal to disclose information’ by state-parties is made ‘subject to appeal to an independent [administrative] and/or the courts’.<sup>78</sup> The Declaration also preserves the principle of proactive disclosure by requiring public bodies to actively ‘publish important information of significant public interest’ ‘even in the absence of a request’.<sup>79</sup>

Principle IV (2) also upholds the protection for anyone who makes a public interest disclosure by ‘releasing, in good faith, information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment’ to the extent necessary in a democratic society. The relevant categories of information and conditions relating to such protected disclosures should be clearly set out in domestic law.<sup>80</sup> This is a progressive principle though problematic in practice. It affords public personnel a ‘public interest defence’ against civil or criminal sanction for leaking classified information showing alleged official wrongdoing.<sup>81</sup>

Most importantly, the drafters of the Declaration were mindful that an entrenched culture of secrecy within governments would undermine efforts to promote openness. Hence, the Declaration articulates the positive obligation of state-parties to amend their secrecy laws ‘as necessary to comply with freedom of information principles’.<sup>82</sup>

Lastly, Principle 3 of the Declaration protects the right to access to personal information, ‘whether it is held by public or by private bodies’, to ‘update or otherwise correct’ it. Hence, by virtue of principles 2 and 3, the courts or other independent oversight bodies, having taken necessary protective measures, must be able to inspect officially-exempt information including classified documents to enable them discharge their responsibilities to protect the exercise of the right.

The Commission has consistently used the opportunity to issue Concluding Observations on periodic reports to encourage states to implement access to information standards including the above principles. State-parties to the Charter are required to submit, every two years, a report on

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> See further Global Principles on National Security and the Right to Information (Tshwane Principles), Principle 37.

<sup>81</sup> The principles combine both objective and subjective tests. See Tshwane Principles 38, 40, 41, 43, 46(b).

<sup>82</sup> DoP op cit note 77; *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 118 (the obligation to annul the Nigerian State Security (Detention of Persons) Decree of 1984 and State Security (Detention of Persons) (Amendment) Decree No. 14 of 1994 Decree which violated article 6 of the ACHPR).

the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter.<sup>83</sup> The periodic reporting procedure places at the disposal of the Commission a means of verifying States' commitment to obligations outlined in article 1 of the Charter.<sup>84</sup>

The Commission found only few AU Member-countries to have adopted comprehensive Access to Information laws.<sup>85</sup> Even among some of these, Nigeria and Uganda inclusive, the Commission found slow implementation of their FOI laws due to administrative bottlenecks<sup>86</sup> while others like Rwanda, Cote d'Ivoire, South Africa and Niger have elicited the Commission's commendations as models of compliance.<sup>87</sup> However, the overall evidence suggests an increasing awareness among many AU States of the fundamental importance of access to public interest information. Mauritius and Ethiopia, for instance, have taken initial steps to adhere to some non-binding access-to-information agreements as prelude to fulfilling their article 9 obligations.<sup>88</sup> The overall picture is more or less that of partial compliance. Hence, the Commission, in its Concluding Observations,<sup>89</sup> and Recommendations in its Annual Activity Reports, continues to re-iterate its call upon defaulting African States to:

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<sup>83</sup> The African Charter, article 62.

<sup>84</sup> See for instance, Nigeria's 5th Periodic Report, 2011-2015, submitted at the Commission's 56th Ordinary Session, 21 April - 7 May 2015.

<sup>85</sup> 39th Activity Report, adopted by the African Commission at its 57th Ordinary Session Gambia, Banjul, 4 - 18 November 2015, para 44(b)(ii) ('39th Activity Report').

<sup>86</sup> Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria (2011 - 2014), 57th Ordinary Session, *ibid*, available at [http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding\\_observations\\_nigeria\\_5th\\_sr\\_eng.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf), para 78; Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 - 2012), 57th Ordinary Session, *ibid*, available at [http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding\\_observations\\_5th\\_state\\_report\\_uganda.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/5-2010-2012/concluding_observations_5th_state_report_uganda.pdf), para 101(i).

<sup>87</sup> See Recommendation XXI of Cote D'ivoire Periodic Report, 2012-2015, submitted 28 June 2016, available at [http://www.achpr.org/files/sessions/59th/state-reports/2nd-2012-](http://www.achpr.org/files/sessions/59th/state-reports/2nd-2012-2015/cote_divoire_periodic_report_2012_2015_eng.pdf)

[2015/cote\\_divoire\\_periodic\\_report\\_2012\\_2015\\_eng.pdf](http://www.achpr.org/files/sessions/59th/state-reports/2nd-2012-2015/cote_divoire_periodic_report_2012_2015_eng.pdf); Rwanda 11th, 12th & 13th Periodic Report, 2009 - 2016, submitted 22 March 2017, available at [http://www.achpr.org/files/sessions/60th/state-reports/11th-16th-2009-2016/rwanda\\_11th\\_3th\\_periodic\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/60th/state-reports/11th-16th-2009-2016/rwanda_11th_3th_periodic_report_eng.pdf); Niger Second and Combined Periodic Reports, 2003-2014 Submitted: 15 August 2015 (Adoption of the Charter on Access to Information and Administrative Documents, available at [http://www.achpr.org/files/sessions/56th/state-reports/3-2003-2014/starep2\\_niger\\_2014\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/3-2003-2014/starep2_niger_2014_eng.pdf).

<sup>88</sup> See Mauritius 6th to 8th Combined Periodic Report, 2009-2015, submitted 5 May 2016, para 42.0, available at [http://www.achpr.org/files/sessions/59th/state-reports/6th-2009-2015/staterep6\\_mauritius\\_2009\\_2015\\_eng.pdf](http://www.achpr.org/files/sessions/59th/state-reports/6th-2009-2015/staterep6_mauritius_2009_2015_eng.pdf); Concluding Observations and Recommendations on the 5<sup>th</sup> and 6<sup>th</sup> Periodic Report of the Federal Democratic Republic of Ethiopia, para 17, 56<sup>th</sup> Ordinary Session 21 April to 7 May 2015, Banjul, The Gambia, available at [http://www.achpr.org/files/sessions/18th-eo/conc-obs/5-2009-2013/concluding\\_observations\\_ethiopia\\_eng.pdf](http://www.achpr.org/files/sessions/18th-eo/conc-obs/5-2009-2013/concluding_observations_ethiopia_eng.pdf).

<sup>89</sup> Concluding Observations and Recommendations on Sixth Periodic Reports of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples' Rights (2011 - 2013), adopted at its 20th Extra-

Expedite the process of enactment of Access to Information Laws, in accordance with regional and international standards on access to information as embodied in the Model Law on Access to Information for Africa.<sup>90</sup>

In addition, the Commission has created a special mechanism to promote the adoption of the Declaration by AU Member-States.

### *2.2.3.2 Mandate of the Special Rapporteur on Freedom of Expression and Access to Information in Africa*

Considering the need '[t]o initiate an appropriate mechanism to assist it review and monitor adherence to freedom of expression standards',<sup>91</sup> the Commission, pursuant to its promotional mandate, established the Special Rapporteur on Freedom of Expression and Access to Information in Africa to fulfil a 6-point mandate.<sup>92</sup> The Special Rapporteur is mandated to monitor states' compliance with access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular.<sup>93</sup> It is empowered to generally promote and monitor compliance with access to information principles in Africa.<sup>94</sup> Thus, it is mandated to document violations, publish and submit an annual status report on compliance with access to information

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Ordinary Session held from 9 to 18 June 2016 in Banjul, The Gambia, available at [http://www.achpr.org/files/sessions/20th-eo/conc-obs/6th-2011-2014/co\\_namibia\\_6th\\_sr\\_eng.pdf](http://www.achpr.org/files/sessions/20th-eo/conc-obs/6th-2011-2014/co_namibia_6th_sr_eng.pdf).

<sup>90</sup> The African Commission on Human and Peoples' Rights, 39th Activity Report of the African Commission on Human and Peoples' Rights, adopted at the 57th Ordinary Session held 4 to 18 November 2015 in Banjul, The Gambia, para 57 (iii), available at [http://www.achpr.org/files/activity-reports/39/actrep39\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/39/actrep39_2015_eng.pdf), accessed on 18th September 2016 (39th Activity Report).

<sup>91</sup> Resolution on Freedom of Expression, adopted by the African Commission on Human and Peoples' Rights at its 29th Ordinary Session held 23rd April to 7th May 2001 in Tripoli, Libya.

<sup>92</sup> 'Hereinafter 'the Special Rapporteur', formerly established as the Special Rapporteur on Freedom of Expression by the African Commission on Human and Peoples' Rights, Resolution ACHPR/Res.71 (XXXVI) 04, Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights at its 36th Ordinary Session, 23 November to 7 December 2004, Dakar, Senegal. The mandate was subsequently extended to include access to information and the title of the Special Rapporteur amended accordingly to read 'Special Rapporteur on Freedom of Expression and Access to Information in Africa' by the African Commission on Human and Peoples' Rights Resolution ACHPR/Res.122 (XXXXII) 07: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, adopted at the 42nd Ordinary Session of the Commission, 15 to 28 November 2007, Brazzaville, Republic of Congo (ACHPR/Res.122 (XXXXII) 07).

<sup>93</sup> ACHPR/Res.122 (XXXXII) 07.

<sup>94</sup> The African Commission on Human and Peoples' Rights Resolution ACHPR/Res.122 (XXXXII) 07: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, adopted at the 42nd Ordinary Session of the Commission, 15 to 28 November 2007, Brazzaville, Republic of Congo.

standards in Africa to the Commission,<sup>95</sup> all which requires a soft law that supports article 9.

Since her appointment in 2005 as the Special Rapporteur on Freedom of Expression and Access to Information, Faith Pansy Tlakula,<sup>96</sup> has facilitated the drafting, and adoption by the African Commission, of a Model Law on Access to Information in Africa.<sup>97</sup> Tlakula has undertaken promotion and advocacy missions to promote the Declaration on Freedom of Expression in Africa and encourage states to adopt an access to information law according to international and African Charter standards embodied in the Model Law.<sup>98</sup> In 2015, the Special Rapporteur undertook such visits to Kenya, Seychelles, Mauritius, Malawi and other countries, and to Nigeria to advocate for the effective implementation of the Freedom of Information Act of 2011.<sup>99</sup> She has also written several appeal letters to AU member nations where rights violations related to access to information have allegedly taken place, asking the Government for clarifications.<sup>100</sup> I shall highlight the salient provisions of the Model Law especially as regards its definition of national security in Part 3 below.

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<sup>95</sup> ACHPR/Res.122 (XXXXII) 07. See further On Special Rapporteur on Access to information and Working Groups, see J Harrington 'Special rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *AHRLJ* 247; Malcolm Evans & Rachel Murray 'The Special Rapporteurs in the African System' in Malcolm Evans & Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000* (2002), ch 9.n

<sup>96</sup> Appointed as the second Special Rapporteur on Freedom of Expression pursuant to ACHPR/Res.84 (XXXXV) 05: Resolution on Freedom of Expression in Africa, adopted at the 38th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21 November to 5 December 2005 in Banjul, The Gambia.

<sup>97</sup> The Special Rapporteur is authorised to 'develop a Model Law on Access to Information for African Union (AU) Member States is [inter alia] to assist them in formulating, adopting or reviewing access to information legislations and their implementation'. See ACHPR/Res.167 (XLVIII) 10: Resolution on Securing the Effective Realization of Access to Information in Africa (mandating the drafting process), adopted by the African Commission on Human and Peoples' Rights during its 48th Ordinary Session held from 10 to 24 November 2010 in Banjul, The Gambia available at <http://www.achpr.org/sessions/48th/resolutions/167/>, accessed on 5 October 2016. The African Commission officially launched the 'Model Law on Access to Information for Africa' during its 53rd Ordinary Session held 9 to 23 April 2013 in Banjul, The Gambia.

<sup>98</sup> See Press Release Advocacy Visit of the Special Rapporteur on Freedom of Expression and Access to the Republic of Senegal, 6 October 2015 available at <http://www.achpr.org/press/2015/10/d278/>, accessed on 22 September 2016. Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Kingdom of Swaziland 14 March 2016 available at <http://www.achpr.org/press/2016/03/d291/>, accessed on 22 September 2016; Joint press release by the Special Rapporteur on Human Rights Defenders in Africa and the Special Rapporteur on Freedom of Expression and Access to Information regarding the situation of human rights' defenders and freedom of expression and assembly in Burundi, 1 May 2015 available at <http://www.achpr.org/press/2015/05/d257/>, accessed on 22 September 2016.

<sup>99</sup> 39th Activity Report.

<sup>100</sup> Report on 25 Years of the Commission op cit note 74, paras 61 – 5.

It is noteworthy that scholars have expressed mixed feelings on the Commission's competence to protect human rights, despite its copious jurisprudence and elaborations on the normative content of rights including article 9 rights, since its inception in 1987.<sup>101</sup> The Commission itself is concerned with the disregard for its recommendations by some state-parties and apparent lack of power to implement its recommendations.<sup>102</sup> As part of the solution to the lack of binding legal force of the Commission's recommendations, an African Court was conceived and birthed to provide effective remedies for human rights violations on the continent.<sup>103</sup>

### 3.2.4 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights ('the African Court') was established under art 1 of its enabling instrument.<sup>104</sup> The African Court's mandate is to complement and re-inforce the protective mandate of the African Commission under the African Charter.<sup>105</sup> Articles 5 and 34 (6) deal with the Court's personal jurisdiction (*ratione personae*) while articles 3(1) and 7 provide its material jurisdiction (*ratione materiae*).<sup>106</sup> The African Court is thus entitled to assume jurisdiction over cases submitted to it: concerning the interpretation and application of the African Charter, its Protocol and any other human rights instrument ratified by the State-party concerned;<sup>107</sup> by an AU member-state, the AU or any of its organs or any AU-recognised African organisation requesting

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<sup>101</sup> Obiora Chinedu Okafor 'Modest harvests: on the significant (but limited) impact of human rights NGOs on legislative and executive behaviour in Nigeria' *Journal of African Law* (2004) 48 23 – 49; Frans Viljoen & L Louw 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48(1) *Journal of African Law* 1–22 at 19; George Mukundi Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 2 *AHRLJ* 465–493.

<sup>102</sup> 39th Activity Report, para 44(b) (xxiv) & (xxv). As a palliative, the AU Executive Council took a decision calling 'upon the Commission to brief the Policy Organs on the human rights situation on the continent'. See Executive Council Decision EX.CL/Dec.639 (XVIII). Thus, any of the Commission's recommendations adopted by the AU Assembly as its decision in line with article 59(1) of the African Charter become binding decisions that are enforceable politically by the AU itself.

<sup>103</sup> Elise G Nalbandian 'The Challenges Facing African Court of Human and Peoples' Rights' (2007) *Mizan L. Rev* 75.

<sup>104</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ('the Protocol or the Court's Protocol'), adopted 9 June 1998 by the OAU in Ouagadougou, Burkina Faso, came into force 25 January 2004.

<sup>105</sup> The Protocol, article 2.

<sup>106</sup> Application No. 003/2011: *Urban Mkandawire v. Malawi*, paras 34 – 35; *Mtikila* (separate opinion by Judge Fatsah Ouguergouz), paras 5–8 available at <http://en.african-court.org/images/Cases/Judgment/Judgment%20Application%200009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf>, accessed on 12 October 2016.

<sup>107</sup> The Protocol, articles 3 & 7.

the Court to provide legal advisory opinion on relevant human rights instruments or African Charter related matter;<sup>108</sup> by the Commission, states party to the Protocol, and African inter-governmental organisations;<sup>109</sup> and by NGOs with observer status before the Commission, and individuals against state-parties that have made the Declaration under article 34 (6) accepting the Court's individual jurisdiction.<sup>110</sup>

Unlike the African Commission, the Court can make binding decisions, including orders of compensation or reparation.<sup>111</sup> Despite its jurisprudence being as yet incipient, the Court has already created a huge impact on two fronts. First, its first decision in 2014 on article 9 of the African Charter prohibits the use of criminal sanctions to suppress freedom of expression, and confirms the Commission's three-part test of permissible restrictions to article 9 rights. Second, in its first decision on the merits in 2013 the Court adopted a position analogous with the Commission's on interpretation of claw back clauses,<sup>112</sup> and limitation of rights analysis.

#### *3.2.4.1 The African Court's standards of permissible restrictions to article 9 of the African Charter*

Out of 24 or more cases finalised by the Court since inauguration in 2006, only four relate to violation of access to information, including two which it ruled inadmissible.<sup>113</sup> In *The Beneficiaries of the Late Norbert Zongo et al. v Burkina Faso*,<sup>114</sup> the African Court held that freedom of expression is directly linked with and enhances the right to have one's cause heard before competent judicial organs,<sup>115</sup> which the state has a positive obligation to protect with

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<sup>108</sup>The Protocol, article 4.

<sup>109</sup>The Protocol, article 5 (1) (a – (e), (2).

<sup>110</sup>The Protocol, article 5 (3). See further 001/11 *Femi Falana v. The African Union* (majority judgement) June 26, 2012; Namibia Report op cit note 354.

<sup>111</sup>The Protocol, article 27 (1).

<sup>112</sup>See Oliver Windridge 'A Watershed Case for African Human Rights: Mtikila and others v. Tanzania' available at <http://ohrh.law.ox.ac.uk/a-watershed-case-for-african-human-rights-mtikila-and-others-v-tanzania/>, accessed on 12 October 2016.

<sup>113</sup>Application No. 013/2011: *The Beneficiaries of the Late Norbert Zongo et al. v Burkina Faso* (judgement delivered 28 March 2014); Application No. 004/2013: *Lohé Issa Konaté v. The Republic of Burkina Faso* (decided 2014); Application No. 002/12: *Delta International Investments SA, Mr. AGL De Lange and Mrs. M. De Lange v. The Republic of South Africa* (decided 13 March 2012) (declared inadmissible) available at <http://caselaw.ihlda.org/doc/2.12/>, accessed 17 on October 2016; Application No. 445/13: *Human Rights Council and Others v. Ethiopia*, (decided 8 August 2015) (declared inadmissible) available at <http://caselaw.ihlda.org/doc/445.12/>, accessed on 12 October 2016.

<sup>114</sup>*Ibid.*

<sup>115</sup>*Ibid* at para 183.

legislative and other measures.<sup>116</sup> Furthermore, the Court agreed that, in appropriate circumstances, the state owes a positive obligation to protect the infringement on the right by others including State actors, and to provide effective judicial remedies.<sup>117</sup>

But in *Konote v Burkina Faso*,<sup>118</sup> its first freedom of expression judgment, the Court had admirably expanded the normative scope of freedom of expression in art 9 to protect the publication of information critical of public officials, while at the same time it constrained state restrictions to it by criminal sanctions. In that case, the Applicant, a journalist, Lohé Issa Konaté, was fined US \$ 12000 and jailed for one year by the Burkina Faso state for criminal defamation, based on Burkina Faso Information Code, for publishing articles accusing a state prosecutor of corruption. The Court held the imprisonment and fines were an excessive or disproportionate interference with Konate's freedom of expression rights and violated the state's obligation to protect the right under art 9.<sup>119</sup> In its proportionality analysis, the Court held that restrictions should only go as far as strictly necessary to achieve an objective, and there should even be lesser degree of interference in the context of public debate. The Court found the state laws in question, which imposed criminal sanctions against freedom of expression, were illegal and contrary to the spirit of art 9 and international law.

In Application *Tanganyika Law Society, Legal and Human Rights Centre & Rev C Mtikila v. Tanzania (Mtikila)*,<sup>120</sup> the African Court's first judgment on the merits, the second Applicant complained that the prohibition of independent candidacy in elections the Tanzanian Constitution was discriminatory and violated article 13 of the Charter.<sup>121</sup> The Respondent argued that the prohibition was necessary to protect national security, defence, national unity, etc., and to avoid tribalism. Quoting copiously from the Commission, the Court said:

... the Commission has stated that the "*only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27 (2) of the African Charter*". After assessing

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<sup>116</sup>At paras 156, 199.

<sup>117</sup>At paras 183, 186.

<sup>118</sup> App. No. 004/2013, *Lohé Issa Konaté v. The Republic of Burkina Faso*.

<sup>119</sup>Constitution of Burkina Faso 1991, article 8 also guarantees 'freedom of expression, the press, and right to information'.

<sup>120</sup> Application Nos. 009/2011 & 011/2011. Reported in Christof Heyns & Magnus Killander *Compendium of key human rights documents of the African Union* (2013).

<sup>121</sup> Article 13 (1) provides: 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

whether the restriction is effected through a “*law of general application*”, the Commission applies a proportionality test, in terms of which it weights the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be “*proportionate with and absolutely necessary for the advantages which are to be obtained.*”<sup>122</sup>

The Court held that limitation to rights must be by a law of general application, pursue a legitimate aim and be proportionate to the legitimate aim pursued, though it did not consider how prohibition of independent candidacy could enhance national security.<sup>123</sup> Nevertheless, it held that proportionality requires that a fair balance be struck between the general interest of the community (Tanzania’s security interest) and the protection of individual rights in terms of article 27 (2).<sup>124</sup> In the next section I engage in a more detailed analysis of restriction on the right of access to information on grounds of national security. The African Commission has dealt extensively with this issue.

### 3.3 NATIONAL SECURITY RESTRICTION ON ACCESS TO INFORMATION

This section has a dual purpose. First, it examines the definition of national security in the African Commission’s jurisprudence and Model Law. Second, it reviews relevant provisions of the Charter and the Commission’s jurisprudence which demonstrate that the right of access to information may only be restricted on grounds of national security if clearly provided by law, the restriction serves a legitimate interest and is necessary in a democratic society.

#### 3.3.1 The African Commissions’ National Security Benchmark in its Model Law

The roots of the Model Law lie specifically in articles 1 and 9 of the African Charter.<sup>125</sup> Essentially, the Model Law is a guide to assist African states to adopt legislative measures in perfecting their positive obligations, to amend existing secrecy laws and to give concrete effect to access to information principles.<sup>126</sup>

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<sup>122</sup>At para 106.

<sup>123</sup>At para 107 – 109.

<sup>124</sup>At para 107.

<sup>125</sup> Frans Viljoen, Director, Centre for Human Rights, University of Pretoria, Statement at the Launching of the Model Law On Access to Information in Africa at the 53rd Session of The African Commission on Human and Peoples’ Rights, 12 April 2013 available at <http://www.chr.up.ac.za/index.php/ati-news.html>, accessed on 9 October 2016.

<sup>126</sup> See Model Law, articles 2 (‘Principles’), 3 (‘Objectives’) and 4 (‘Primacy of Act’); Centre for Human Rights News Menu, University of Pretoria, ‘Final Draft of the Model Law on Access to Information’ available at

According to Frans Viljoen:

... the Model Law aims to guide national legislators in ‘converting’ or ‘transforming’ the open-ended formulation in article 9 into detailed legislative provisions, allowing for an effective national system for accessing information, held primarily by the states, but also by private entities performing public functions.<sup>127</sup>

Since the adoption of the Model Law, many African states have either adopted constitutions or enacted laws giving effect to the right of access to information,<sup>128</sup> but some of these are inoperable, deficient or not fully compatible with African and international standards.<sup>129</sup>

Again, many democratising States in Africa are still entangled with colonial-style secrecy laws which severely restrict access to government information and detract from an effectively functioning judicial system. The effort to bring secrecy provisions in line with transparency principles therefore brings into sharp focus the exemption provisions in part III of the Model Law including articles 25, 26 and 30 and could not be more salient to this study. Article 25 of the Model Law provides that, subject to a public interest override,<sup>130</sup> classified information is not exempt from disclosure merely because of its characterisation as such.<sup>131</sup> Again, information whose disclosure would cause *substantial prejudice* to the security or defence of the state, in terms of the meaning of ‘security or defence of the state’ in sub-articles 30(2) and (3), *may* be exempt from disclosure under article 30 (1) (emphasis supplied). Article 30(2) presents seven sub-categories including war strategy, military and defence intelligence methods to suppress subversive activities, capabilities of military and weapons systems excluding nuclear weaponry, counter-subversion intelligence, disclosure of intelligence sources and methods. Article 30 (3) further defines subversion to encompass attacks from external forces,

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<http://www.chr.up.ac.za/index.php/ati-news.html>, accessed on 9 October 2016 & Report on 25 Years of the Commission.

<sup>127</sup> Frans Viljoen, op cit note 114.

<sup>128</sup> See South Africa: The Constitution of the Republic of South Africa No. 108 of 1996, section 32, Promotion of Access to Information Act (PAIA) No. 2 2002; Uganda: Constitution of Uganda 1995, article 41; Mozambique: Access to Information and Protection of Privacy Act (AIPPA) 2002; Ghana: Constitution of Ghana 1992, article 21(f); Kenyan Constitution 2010, article 35; Constitution of Burkina Faso 1991, article 8; Nigeria: Freedom of Information Act 2011.

<sup>129</sup> Matilda Lasseko Phooko ‘An Actionable Constitutional Right of ATI: The Case of Southern Africa’ in Fatima Diallo & Richard Calland (eds) *Access to Information in Africa: Law, Culture and Practice* (2013) 171 – 189.

<sup>130</sup> Model Law, article 25 (1) (2).

<sup>131</sup> Model Law, article 26.

destruction of strategic infrastructure through sabotage and terrorism, and hostile or foreign intelligence.

Explicitly defining national security in law is an important practice in democratic societies, but since the Model Law is only a guide, these categories could be further clarified, for instance, concerning nuclear weaponry. It is presumed that such matters would be better addressed by an appropriate national security law or provision enacted in accordance with democratic principles. Nonetheless, the above provisions do provide a framework for analysis of national security restrictions on access to information. I now examine the Commission's jurisprudence on article 9 in this regard.

### 3.3.2 The three-part test of national security restrictions on the right of access to information

The whole architecture of article 9 including the phrase '*within the law*' in article 9(2) prescribes no specific criteria, but *prima facie* gives leeway for open-ended qualifications and restrictions unlike what obtains under comparative law.<sup>132</sup> As a way forward, the Commission has admirably curtailed undue restrictions, the exercise of unfettered discretion or attempts by states to avoid or override their article 1 obligations based on the provisions of article 9 (2).<sup>133</sup> The Commission has however acknowledged that:

Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase "within the law", under Article 9 (2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation.<sup>134</sup>

Furthermore, based on the Commission's evolutionary jurisprudence on the nature of duties imposed by the Charter, article 27(2) has become the general limitation clause of the Charter.<sup>135</sup> Article 27 (2) provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

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<sup>132</sup> Claude E Welch, Jr. *op cit* note 20.

<sup>133</sup> See *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 78 – 82; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 70, 71.

<sup>134</sup> *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 188.

<sup>135</sup> Christof Heyns 'the African Regional Human Rights System: The African Charter' (2004) *Penn St. L. Rev.* 108 679–702 at 692.

Consequently, the totality of the African Commission's elaborations, including the burgeoning African Court's jurisprudence on article 9, reveal a concurrence regarding the grounds and justificatory conditions for permissible restrictions to article 9 rights. These conditions mirror those found in international human rights law and jurisprudence.<sup>136</sup>

Moreover, the Commission has interpreted and applied relevant limiting provisions through the lens of international law as underscored by states' obligation to protect rights enshrined in the Charter. Thus, the legal requirements, and nature of analysis, of a justifiable restriction to the right of access to information in article 9 are now fairly well-settled. Consequently, a limitation analysis involves a two-stage process: 'First, the recognition of the right and the fact that such a right has been [*prima facie*] violated. Second, that such a violation is justifiable in law'.<sup>137</sup> The analysis is also based on the requirements of a cumulative three-part test: to be justifiable the restriction must be found in a law properly so-called; serve a legitimate public interest; and be strictly necessary to achieve that legitimate interest. I now analyse each requirement in more detail.

### 3.3.2.1 'Within the law' (the principle of legality)

Article 9(2) admits of state jurisdiction to regulate access to information and freedom of expression rights 'within the law'. It is now clear from the decisions of the Commission that the phrase 'within the law' only accommodates national law that conforms to international standards and does not allow African states to evade their Charter obligations.<sup>138</sup> The phrase provides standards to which

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<sup>136</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras 4–6; Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4 (2014), para 22 ('National Security Agency surveillance').

<sup>137</sup> *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 67 & *Mtikila* supra.

<sup>138</sup> See *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 10 concerned the Robbery and Firearms (Special Provisions) Act, section 11(4); *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995) para 11 concerned the Civil Disturbances (Special Tribunal) Act, part IV, section 8(1); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) para 10 concerned the Legal Practitioners' (Amendment) Decree No. 21 of 1993, section 23A(1); *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) concerned the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the Political Parties (Dissolution) Decree No. 114 of 1993, section 13(1). In these decisions concerning Nigeria, the Commission found that laws with ouster clauses violated articles 7 and 26 of the Charter, and allowed the executive branch to operate without judicial check. All the decrees in question in the above communications contain 'ouster' clauses.

national laws must conform<sup>139</sup> and does not allow states to adopt limiting laws inconsistent with their Charter obligations.<sup>140</sup>The Commission, in *Media Rights Agenda and Others v Nigeria*,<sup>141</sup> applied the standard already set in *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,<sup>142</sup> to article 9(2) to the effect that:

Competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.<sup>143</sup>

The Commission holds the view that the Charter does not displace national constitutions and laws, but that they must conform to international laws and standards by which a State-party is bound.<sup>144</sup> In *Good v Republic of Botswana*,<sup>145</sup> the Applicant, an Australian national was expelled from Botswana pursuant to a Presidential Order under Botswana's Immigration Act. Section 36(2) of the Act denies a prohibited Immigrant the right to demand reasons for expulsion or a right to judicial review of grounds for expulsion. Botswana's highest court agreed with the Respondent that these were necessary to protect national security and refused judicial review. The Respondent also argued that it has absolute prerogative on national security matters based on articles 23(1) and 12(2) of the Charter. The Commission, relying on its earlier jurisprudence,<sup>146</sup> held that the President's action violated Applicant's right to information under article 9(1). The violation in turn negated other rights such as freedom of expression (article 9 (2)), access to justice (article 7), non-

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<sup>139</sup> See *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 40-44; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 66, 69; *Law Office of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003).

<sup>140</sup>*Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) para 15.  
<sup>141</sup>(2000) AHRLR 200 (ACHPR 1998).

<sup>142</sup>At para 15.

<sup>143</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 64.

<sup>144</sup>*Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 50; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 44; *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 204.

<sup>145</sup>*Good v Botswana* (2010) AHRLR 43 (ACHPR 2010).

<sup>146</sup>*Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 176 – 180.

(2009) AHRLR 235 (ACHPR 2009); *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996); *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999); *Organisation Mondiale Contre la Torture and others v Rwanda* (2000) AHRLR 282 (ACHPR 1996); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46; *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 116, etc.

arbitrary expulsion (article 12(4)), non-discrimination (article 2), obligation to respect, protect and fulfil Charter provisions (article 1), etc.<sup>147</sup>

Similarly, in *Law Office of Ghazi Suleiman v Sudan(I)*,<sup>148</sup> the Supreme Court of Sudan had declared Sudan's National Security Act of 1994 to have precedence over individual rights protected internationally and by the African Charter. The Commission stated that the Charter allows states to take legitimate security concerns into account in fulfilling their obligations, but they cannot erode the essence of Charter rights and those protected by international law.<sup>149</sup>

The Commission has further affirmed that the phrase 'within the law' must be interpreted with reference to international norms which can provide grounds of limitation on freedom of expression.<sup>150</sup> In *Scanlen and Holderness v Zimbabwe*,<sup>151</sup> buoyed by its growing 'Declaratory' activities, the Commission asserted that the phrase

...within the law' in article 9(2) must be interpreted in the context of Principle II as elaborated under the Declaration of Principles on Freedom of Expression stated hereinabove. In other words, the meaning of the phrase 'within the law', must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the concept of 'within the law' employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

The implication of the foregoing is that access to information may be subjected to restrictions in the interest of national security in appropriate circumstances. Such national security restriction must be found in a rule of law which gives clear notice of restrictions within its scope.<sup>152</sup> The law must not confer unfettered discretion to effect restrictions upon persons entrusted with its execution and should be easily accessible to persons likely to come within its purview to enable them adjust their conducts accordingly.<sup>153</sup> To meet the tests of predictability and accessibility, a

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<sup>147</sup>At paras 160 – 242. See also Application No 013/2011: *The Beneficiaries of the Late Norbert Zongo et al. v Burkina Faso* (judgement delivered 28 March 2014), paras 183 and 199.

<sup>148</sup>*Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003).

<sup>149</sup>At paras 37, 42-53, 56-67.

<sup>150</sup>*Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 102.

<sup>151</sup>*Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 112.

<sup>152</sup>*Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 107 (a vague law which created a national security offence of belonging to a secret association without specifying the ingredients of the offence failed the test of legality).

<sup>153</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 57 – 59; *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) (absolute discretion given to the executive to determine the interest of state security was held not to be 'within the law').

limiting law must therefore be of general application.<sup>154</sup> Furthermore, the Commission also holds that the Charter requires that a restriction be legitimate and necessary.

### 3.3.2.2 *Legitimate purpose (principle of legitimacy)*

Human beings are inviolable. This means that guaranteed rights cannot be lightly interfered with and not every plausible reason for interference is justifiable or acceptable in a democratic society; states therefore carry a high burden to justify a right restriction.<sup>155</sup> Thus, a measure in a law that restricts access to information must serve a legitimate public interest. As regards the Charter, the general limitation clause is article 27(2), in terms of which rights may only be restricted for a purpose that fits into any of the categories of public and private interests enumerated therein.<sup>156</sup> In *Constitutional Rights Project and Others v Nigeria*,<sup>157</sup> the Nigerian Military Government passed three Decrees which the Commission deemed to have abrogated the right to know by proscribing certain named newspapers and sealing off their premises for security reasons without trial. Government had argued that the measure was taken for unsubstantiated security reasons. The Commission, in a statement which combines both the international law principles of legality and legitimacy and necessity circumscribing permissible limitations of human rights, stated that:

The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest.'<sup>158</sup>

In another vein, the Commission said,

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<sup>154</sup>*Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998)/ *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 44 (ad hominem and retroactive Decrees cannot be 'within the law'); *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 117 (ad hominem provisions of the Zimbabwean Access to Information and Protection of Privacy Act).

<sup>155</sup> Manisuli Ssenyonjo ch 3 95;

<sup>156</sup> C Heys & M Killander 'The African Human Rights System' in F Gomez Isa & K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (2006) 520; Manisuli Ssenyonjo ch 3 94 – 95; Chidi Anselm Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 2 *AHRLJ* 225 – 246 at 101 – 103.

<sup>157</sup> *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999)

<sup>158</sup>*Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41; *Constitutional Rights Project v Nigeria* AHRLR (2000) 227; *Interights, Institute for Human Rights and Development in Africa and Association Mauritanienne des droit de l'Homme v Mauritania* AHRLR (2004) 87; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) ('the COHRE case') para 165.

The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.<sup>159</sup>

The Commission has thus established the complementary nature of access to information and national security: the protection of genuine interest of national security may serve as a legitimate ground for restricting the right of access to information, provided the right is not undermined.<sup>160</sup>

The Commission has further enjoined states not to conflate their national security with interests of public order, public safety and civil security or to excuse gross violations of people's rights in the interests of national security.<sup>161</sup> This brings to fore the third requirement for a justifiable restriction on access to information.

### 3.3.2.3 *Necessary in a democratic society*

'Necessity' relates to the concern for proportionality between the extents of the limitation measured against the nature of right involved (in this instance, a right that helps in enforcing other rights), all other relevant factors being taken into consideration. Considering the importance of this particular right in a democracy, the Commission has established the principle that, to be justifiable, restrictions including on grounds of national security must be as minimal as possible, such that a right's infringement is not more than strictly necessary to achieve its desired objective.<sup>162</sup> The requirement of necessity embodies and is the culmination of a three-part test of justifiable or non-justifiable restriction.<sup>163</sup> With the exception of article 11, in which the term 'necessary' is found, the Charter omitted terms such as 'necessary', 'necessary in a democratic society' or 'reasonably

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<sup>159</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 69; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) 105 para 43; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) paras 78 – 79; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 72.

<sup>160</sup> See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 42. For instance, in *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 171, the Commission decided that the right to security of the person is an aspect of both individual and national security. The Commission said: 'national security examines how the state protects the physical integrity of its citizens from external threats such as invasion, terrorism, and bio-security risks to human health'.

<sup>161</sup>*Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) paras 109–110.

<sup>162</sup>*Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 80.

<sup>163</sup>The three-part test and limitation analysis were extensively articulated in the following: *Law Office of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003, paras 46–66; Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34 (2011), paras 33–36; Pierre De Vos 'Freedom of Religion v drug Traffic Control: The Rastafarian, the Law, Society and the Right to Smoke the Holy Weed' (2001) 5 *Law Democracy & Dev.* 84–106 at 88–91 & 94–96.

justifiable in a democratic society' to qualify permissible restrictions to rights in article 9, or elsewhere, as expressly stated in article 19(3) of the ICCPR, for instance.

However, the Commission has through its interpretive function been able to bring Charter provisions into conformity with established international law and jurisprudence in that regard.<sup>164</sup> The Commission has consistently affirmed that a relationship of proportionality must exist between the limitation and its purpose. Starting with its earliest decisions, the Commission laid down the standard of necessity by pronouncing that the reasons for possible limitations must be based on legitimate public interests, and the effect of the limitation must be strictly proportionate to its object.<sup>165</sup>

In *Media Rights Agenda and Others v Nigeria*,<sup>166</sup> the Commission set the standard that barring the publication of information that creates a real danger to national security, the prohibition of criticisms of official policy or opinions deemed insulting to government violates article 9(2) and is non-compliant with article 27(2).<sup>167</sup> It explained further

The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.<sup>168</sup>

In *Constitutional Rights Project and Another v Nigeria*,<sup>169</sup> the State security law in question<sup>170</sup> gave sole discretion to the executive to determine whatever it thought to be in the interest of State security and permitted indefinite detention of individuals for acts 'prejudicial to state security or the economic adversity of the nation'. The law denied the right to habeas corpus and judicial remedy for infringement of rights. These measures were held to be unlawful and unnecessarily extreme to fulfil the objective of maintaining public peace and thus a violation of articles 5, 6, 7(1)(a)(c)(d), 18 and 26 of the Charter.<sup>171</sup>

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<sup>164</sup>*Law Office of Ghazi Suleiman v Sudan (II)* (2003) AHRLR 144 (ACHPR 2003 paras 46-66).

<sup>165</sup>*Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 54.

<sup>166</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

<sup>167</sup>At paras 73–75.

<sup>168</sup>At para 69.

<sup>169</sup>*Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).

<sup>170</sup>The State Security (Detention of Persons) (Amendment) Decree No. 14 of 1994.

<sup>171</sup>At paras 33–35.

In various communications alleging violations of article 9, the Commission has upheld the above standards. It has consistently held that any measure proposed by a limiting provision which excessively invades a right cannot be reasonably necessary in a democratic society.<sup>172</sup> Furthermore, ‘any limitation on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible’ to achieve that need,<sup>173</sup> though the Commission sometimes endorses the ‘less restrictive means’ approach of putting into effect the legitimate aim sought by the limitation.<sup>174</sup> Also, the Commission agrees that government may restrict rights for a legitimate public purpose as long as the measure adopted has a rational relation with its purpose.<sup>175</sup>

### 3.4 CONCLUSION

The protection of the right of access to information at the African regional level favourably compares with international standards. The African Commission through creative interpretations of the open-ended provisions of article 9 of the African Charter has succeeded in clarifying the normative content of the right of access to information as a basic right and a means of protecting other rights, particularly socio-economic rights.

The Commission in deciding Communications, and through its Special Rapporteur on Freedom of Expression and Access to information in Africa, has elaborated on the normative scope and permissible restrictions on the right of access to information under article 9 in Declarations and other soft laws. Article 9 of the African Charter certainly permits States to adopt restrictive measures ‘within the law’, the normative requirements of which are not enumerated, unlike comparative human rights provisions. Furthermore, national security protection is not expressly mentioned as a ground for restrictions on access to information and the Charter nowhere requires limitations of rights to be necessary in a democratic society.

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<sup>172</sup> In *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR) 2009, paras 94–98 (Zimbabwean Government’s compulsory yearly licencing scheme for journalists aimed at preventing journalists from ‘spreading falsehood’ was found to disembowel the right of access to information and to be excessive).

<sup>173</sup> Communications 279/03, 296/05: *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (‘the COHRE case’) para 214.

<sup>174</sup> *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), paras 64–75 (dissolution of a newspaper and seizure of its properties found to be disproportionate to the nature of national security offence committed when lesser punishments available); *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) (a ‘less restrictive means’ required in the Constitution of the Republic of South Africa No. 106 of 1996, section 36).

<sup>175</sup> *Interights and others v Mauritania* *ibid.*

Notably, the Commission has developed a notion of national security compatible with international human rights law. The Commission has established that assertion of national security interests by States must be strictly scrutinised. The Commission has, albeit spasmodically, creatively laid down criteria comparable with those developed in international human rights law for permissible restrictions on access to information, including on grounds of national security.

As can be deduced from its jurisprudence, the Commission has decided that restrictions on access to information in the interest of national security must be within the law, serve a legitimate public interest and are necessary in a democratic society. The potential of the Commission's recommendations and Declarations to protect the right of access to information is seriously hampered by their non-legally binding effects. Happily, the African Court has begun to provide effective remedies for denial of access to information based on copious references to the Commission's jurisprudence. Hopefully, State-parties will now be more serious in complying with the Commission's promptings to adopt measures to implement its recommendations, ratify relevant Conventions, adopt or amend relevant domestic laws in compliance with access to information principles.

## CHAPTER FOUR: RIGHT OF ACCESS TO INFORMATION AND NATIONAL SECURITY IN NIGERIAN LAW

### 4.1 INTRODUCTION

A crucial finding in chapter three is that State-parties to the African Charter on Human and Peoples' Rights (African Charter) have a positive obligation to protect the right of access to information by adopting legislative and other measures to give effect to the right in domestic law.<sup>1</sup> Legitimate restrictions on access to information by a State-party on national security grounds must be rooted in democratic checks and balances. Hence, such must be prescribed by law, serve a legitimate interest and be necessary in a democratic society.<sup>2</sup> The foregoing correspond with international principle of maximum disclosure or presumption that government information should always be made public, except in narrowly defined circumstances where secrecy would prevent greater harm than the benefit that disclosure would confer.

Nigeria has ratified and incorporated the African Charter into its domestic law<sup>3</sup> in terms of the Constitution of the Federal Republic of Nigeria 1999,<sup>4</sup> which is binding on all persons and authorities.<sup>5</sup> By virtue of the Constitution, Nigeria is a democratic State founded on the ideals of freedom, equality and justice.<sup>6</sup> The Constitution upholds the right of political participation and establishes the framework for a democratic government.<sup>7</sup>

Section 39(1) of the 1999 Constitution guarantees 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'. But scholars

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<sup>1</sup> See Osita Mba 'Positive Obligations Under the African Charter on Human and Peoples' Rights: The Duty of the Nigerian Government to Enact a Freedom of Information Act' *Commonwealth Law Bulletin* (2009) 35 215.

<sup>2</sup> *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 42 & 44 (*Constitutional Rights Project* (2000)); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 113 & 116.

<sup>3</sup> African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.) Act 2 of 1983. This Act came into effect on 17 March 1983 and is now Cap. A9 Laws of the Federation of Nigeria (LFN) 2004 (African Charter Act).

<sup>4</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Act 24 of 1999, section 17, Cap C23 LFN 2004 (the 1999 Constitution).

<sup>5</sup> *Ibid*, section 1(1) & (3).

<sup>6</sup> *Ibid*, section 14(1).

<sup>7</sup> *Ibid*, section 14(2).

have argued that 39(1) does not confer a right of access to information.<sup>8</sup> Undeniably, sections 39(3) and 45(1) of the Constitution qualify the right to information and validate laws that restrict access to state information to protect several interests as may be justifiable in a democratic society. Invariably, the State relies on sections 39(3) and 45(1) to affirm the constitutionality of statutes that excessively restrict access to information,<sup>9</sup> the Official Secrets Act 1962<sup>10</sup> and the National Security Agencies Act 1986<sup>11</sup> being the two most disturbing. Both statutes confer broad powers on the executive branch to restrict access to State information pertaining to ‘national security’ without defining what ‘national security’ means. The National Security Agencies Act voids the provisions of other laws that would have permitted access to public interest information held under it.<sup>12</sup>

Contrary to the latter provisions, the Freedom of Information Act 2011 (FOIA 2011)<sup>13</sup> protects the right of access to information,<sup>14</sup> but permits public institutions to withhold vaguely defined national security information.<sup>15</sup> Thus the Act leaves undisturbed the unsatisfactory situation as regards what ‘national security’ means in Nigerian law.<sup>16</sup> Therefore, this paper contends that the Nigerian State has not satisfactorily complied with its obligation under the African Charter to protect the right of access to information.

Aside the introduction, the rest of the paper is in three parts. Part 2 critically evaluates the scope of Nigeria’s legal framework on access to information and contends that it is not fully compliant with the State’s positive obligation under the African Charter. It finds also that the entrenched culture of official secrecy and the imprecise notions of ‘national security’ in Nigerian law allows for political manipulations by the executive to suppress access to public interest information. Part

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<sup>8</sup> Colin Darch & Peter G. Underwood *Freedom of information and the developing world: The citizen, the state and models of openness* (2010) 220; Morayo Adebayo & Akinyinka Akinyoade ‘Access To Information And Transparency: Opportunities And Challenges For Nigeria’s FOI Act 2011’ in Fatima Diallo & Richard Calland (eds.) *Access to Information in Africa: Law, Culture and Practice* (2013) 265; Ayo Obe ‘The Challenging case of Nigeria’ in Ann Florini (ed) *The Right To Know: Transparency For An Open World* (2007) 163.

<sup>9</sup> See Immigration Act No. 8 2015 LFN 2015, section 45(2); Statistics Act Cap. S10 LFN 2004, Criminal Code Act, Cap. C38 LFN 2004, s 97(1) & (2); Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007; Public Procurement Act 2007; National Archives Act No. 30 1992; Environmental Impact Assessment Act No. 86 1992.

<sup>10</sup> Cap O3 LFN 2004 (OSA).

<sup>11</sup> Cap N7 LFN 2004 (NSA Act).

<sup>12</sup> NSA Act, section 7(2).

<sup>13</sup> LFN 2011.

<sup>14</sup> FOIA 2011, section 1(1).

<sup>15</sup> *Ibid*, section 11(1).

<sup>16</sup> *Ibid*, section 28(1).

3 subjects the National Security Agencies Act 1986 and the Official Secrets Act 1962 to the three-part test of restrictions on the right of access to information, of which these laws fall short. Part 4 concludes that a precise concept of national security would lead to reasonably justifiable and balanced interplay between the right of access to information and national security in Nigerian law.

## 4.2 NIGERIA'S LEGAL FRAMEWORK ON THE RIGHT OF ACCESS TO INFORMATION

This section argues that Nigeria's legal framework on access to information is not fully compliant with its African Charter on Human and People's Rights obligation<sup>17</sup> read into its 1999 Constitution to respect and promote the right of access to information. It starts with a background to the culture of official secrecy that has shaped Nigeria's access to information experience and persists till date. It examines section 39 of the 1999 Constitution on access to information. It argues the provision must undergo a creative interpretation and be read together with article 9 of the African Charter to confer meaningful protection to access to information. It then juxtaposes the Nigeria's secrecy statutes with the FOIA 2011.

### 4.2.1 The (civil service) colonial culture of official secrecy

Nigeria's legal history offers a case study of countries where an inherited colonial culture of secrecy has bolstered an ambivalence in constitutional provisions on access to information and continues to shape the experience of Nigerians thereof.<sup>18</sup> From 1861–1960, the British colonised the peoples of the territories that later became Nigeria.<sup>19</sup> To protect their commercial, security and other interests, the colonists imported the British administrative system into Nigeria.<sup>20</sup> Of course, the colonial power neither recognised the duty to make official information widely available nor

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<sup>17</sup> The African Charter Act, section 1.

<sup>18</sup> Ayo Obe op cit note 8 at 147 – 8.

<sup>19</sup> Ndaeyo Uko *Romancing the Gun: The Press as Promoter of Military Rule* (2004).

<sup>20</sup> Akintunde Olusegun Obilade *the Nigerian legal system* (1979).

the right of colonised peoples to such.<sup>21</sup> Colonial administration established in Nigeria therefore came with a complete package of British tradition of civil service secrecy.<sup>22</sup>

At independence, the tradition of official decision-making based on secrecy was not dismantled: the succeeding parliamentary government perfected the inherited culture of secrecy.<sup>23</sup> Successive military juntas who hijacked power between 1966 and 1999 never pretended to be accountable.<sup>24</sup> The publication of unpublished government records or information considered embarrassing to government was therefore heavily restricted.<sup>25</sup> This tradition of secrecy persists in Nigeria till today despite the establishment of a democratic government since 29 May 1999. Lamenting the difficulty of making government accountable, Ayo Obe comments:

It is these habits of secrecy that have held sway rather than constitutional provisions and international and regional agreements, by which Nigeria purported to guarantee freedom of information and which it took no concrete steps to actualize.<sup>26</sup>

There is therefore need to examine the extent to which Nigeria's constitutional and statutory provisions protect the right of access to information.

#### 4.2.2 The phraseology of section 39 of the 1999 Constitution on access to information

Section 39 of the 1999 Constitution guarantees freedom of expression including other rights essential to a healthy democracy; it provides:

- (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.
- (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society

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<sup>21</sup> Samuel Oguche 'Freedom of Information and national Security in Nigeria: Practices of the United Kingdom' in Epiphany Azinge & Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (2013) 92 – 3.

<sup>22</sup> See Franks Report, Report of the Committee under the Chairmanship of Lord Franks on Section 2 of the Official Secrets Act 1911 (HMSO, London 1972) Cmnd 5104 Vol 1 para 50; David Williams *Not in the Public Interest: The Problem of Security in a Democracy* (1965); Ayo Obe op cit note 8 at 148.

<sup>23</sup> Ayo Obe *ibid*.

<sup>24</sup> Tony Momoh *Nigerian Media Laws* (2002).

<sup>25</sup> Tony Momoh *ibid*.

<sup>26</sup> Ayo Obe op cit note 8 at 165.

- (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.

Section 39 is the underlying basis for an open and accountable democracy.<sup>27</sup> Section 39(1) guarantees individual liberty of democratic choices,<sup>28</sup> which underpins other fundamental freedoms.<sup>29</sup> Consequently, section 39 subsections (1) and (2) guarantee the liberty to receive and impart knowledge through any medium.<sup>30</sup> Section 39 protects the public’s right to be informed about matters of public concern, hence journalists’ cannot be forced to disclose confidential sources of information.<sup>31</sup>

Scholars have argued that section 39(1) is too ‘weak’ to confer the right of access to information considering the omission of the word ‘seek’ that exists in comparative international provision like the International Covenant on Civil and Political Rights 1966.<sup>32</sup> However, a plausible interpretation of section 39(1) is that it encompasses or implies the right. This assertion is supportable on several grounds. First, because the word ‘including’ in the section means ‘part of’ or ‘not limited to’<sup>33</sup> it can support an expansive meaning of the generic concept – ‘freedom of expression’ in section 39(1). Secondly, the Constitution is a living document which must be interpreted broadly to fulfil its original intent.<sup>34</sup> Hence the word ‘including’ must by implication encompass the right to acquire official information to perform the roles that democracy assigns to citizens.

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<sup>27</sup> B O Nwabueze *the Presidential Constitution of Nigeria* (1982) 457; Oyelowo Oyewo *Constitutional Law in Nigeria* (2012) 129.

<sup>28</sup> *Adewole & Others v Jakande & Others* [1981] 1 NCLR 262 (HC) (*Adewole v Jakande*).

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

<sup>30</sup> *Ibid*; *Okogie v The Attorney-General of Lagos State* [1981] 2 NCLR 337 (CA). The outcome was based on the Constitution of the Federal Republic of Nigeria 1979, section 36(1) & (2) (the 1979 Constitution), which is exactly the same with section 39(1) & (2) of the 1999 Constitution.

<sup>31</sup> *Tony Momoh v Senate of the National Assembly* [1981] 1 NCLR 105 (HC). The Lagos High Court reached similar conclusion in *Olusola Oyegbemi & Others v AG of the Federation & Others* [1982] 3 NCLR 895 and *Innocent Adikwu & Ors v Speaker, Hose of Representatives* (1982) 3 NCLR 394 – 418.

<sup>32</sup> Colin Darch & Peter G. Underwood op cit note 8.

<sup>33</sup> Bryan A. Garner (ed) *Black’s Law Dictionary* (2014).

<sup>34</sup> *Adewole v Jakande* op cit note 28; *Nofiu Rabiou v The State* (1980) 1 SC.

But again, scholars have argued that section 39 does not guarantee the right of access to information due to the clumsy and restrictive wording of sections 39(3) and 45(1) of the 1999 Constitution.<sup>35</sup> This is a more substantial argument than the one addressed in the preceding paragraph, but requires further clarification of the scope of the two sections implicated.

#### *4.2.2.1 The qualification of access to information in sections 39(3) and 45(1)*

Section 39(3) internally qualifies section 39(1)(2) while section 45(1) is the omnibus limitation clause. Both sections 39(3) and 45(1) both qualify the right to information, but their clumsy – and restrictive wording, appear to strengthen the case that section 39(1) does not guarantee the right of access to information. Section 45(1) provides:

- (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.

Sections 39(3) and 45(1) exempt laws aimed at the prevention of disclosure of information received in confidence from the operation of section 39(1), but in reality, only exempt confidential information relating to defence, public safety, etc., if provided by a law that is reasonably justifiable (or necessary) in a democracy. Thus, the express intent of these provisions is that no law, proposed measure or government action may infringe on the right of access to information (implied in section 39(1)) except it passes the test of necessity. This is more so that section 39(3) does not clearly specify the test of a restriction that is ‘reasonably justifiable in a democratic society’ which a limiting law or measure must pass.<sup>36</sup>

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<sup>35</sup> Ayo Obe op cit note 8 at 143.

<sup>36</sup> This has been a recurring problem with Nigerian Constitutions since independence. See Nigeria Constitution (Order-in-Council) 1960, section 4; The Constitution of the Federal Republic of Nigeria 1963, section 23(4)(a)(b); The Constitution of the Federal Republic of Nigeria 1979, s 36(3); The Constitution of the Federal Republic of Nigeria 1989, section 39(3) and The Constitution of the Federal Republic of Nigeria 1999, sections 39(3) & 45(1); O Mba op cit note 1.

However, it will be recalled that chapters two and three argue that phrases similar to the latter phrase involve a three-part test which requires that a restriction be prescribed by a clear and accessible law, serve a legitimate public objective, and be proportionate to the interest pursued.<sup>37</sup> So, apart from their lack of clarity, the wide scope of permissible limitations in sections 39(3) and 45(1) – the interests of defence, confidentiality, public order, etc., – motivates the adoption of laws that impose criminal penalties for unauthorised disclosure of official information. Concerning the clumsiness of section 45(1), Nwabueze argues:

First, the wording of the qualification seems to shift emphasis from liberty to the authority of the legislature to interfere with them, from protection of liberty to qualification on it. It fails to emphasize as clearly as would be desired that liberty is the rule and governmental interference the exception. It seems to place on the individual the onus of showing that the interfering law is not reasonably justifiable in the specified public interests rather than on the state to show that it is. In short, it fails to strike the balance in favour of liberty, which ... is “the true mark of a free society”.<sup>38</sup>

The author also observes rightly that:

[T]he provisions fail to specify in explicit terms the kind of relations that must exist between an interfering law and the prescribed public interests to make interfering law reasonably justifiable in a democratic society in those interests.<sup>39</sup>

The statement above posits the existence of a proximate relation, which must also be rational not arbitrary, between any law that limits section 39(1) and any of the enumerated interests in sections 39(3) and 45(1).<sup>40</sup> Regrettably, within official circles, section 39(3) is invariably misconstrued as a blank cheque to determine what the public must know, to keep official information secret and punish its unauthorised disclosure as a crime against public order or national security.<sup>41</sup> But this is highly disturbing considering the fact that ‘national security’ has no precise meaning in Nigerian law, thus making the executive the sole judge of what state or national security entails.<sup>42</sup> I engage more with this matter next.

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<sup>37</sup> *Constitutional Rights Project* (2000) op cit note 2.

<sup>38</sup> Ben Nwabueze *Constitutional Democracy in Africa* Vol 1 (2003) 389.

<sup>39</sup> Ben Nwabueze at 392–393.

<sup>40</sup> *Ibid* at 393.

<sup>41</sup> Tony Momoh *Democracy Watch: A Monitor's Diary, Volume 2* (2003) 14.

<sup>42</sup> See *Wang Ching-Yao and 4 Others v Chief of Staff Supreme Headquarters* Reported in G Fawehinmi *Nigerian Law of Habeas Corpus* (1986) 437.

### 4.2.3 African standards on the right of access to information

Because of the inelegant and restrictive formulation of sections 39(3) and 45(1) highlighted above, the African Charter provides a way forward. According to interpretations of article 9 of the Charter, any restriction on the right of access to information protected by article 9 on grounds of national security must be provided by law, serve a legitimate interest and be necessary in a democratic society.<sup>43</sup> The African Charter Act<sup>44</sup> incorporates the African Charter into Nigerian domestic law pursuant to section 12 of the Constitution, which provides:

- (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

By coming into effect in 1983, the African Charter Act makes the African Charter together with the interpretations of its provisions by authoritative bodies to become applicable in Nigeria. Section 1 of the Act states:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

The African Commission on Human and Peoples' Rights (African Commission) has established that access to information underpins the protection of human rights.<sup>45</sup> The Commission has also established that in terms of article 1 of the Charter, a State's negative duty of non-interference with rights includes an 'obligation to protect' by taking positive steps to actualise rights through laws and enforcement mechanisms.<sup>46</sup> Consequently, the right of access to information fulfils the enjoyment of freedom of expression in article 9 of the African Charter and section 39 of the 1999 Constitution, which the state has an obligation to protect. Again, State-parties to the Charter are

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<sup>43</sup> *Constitutional Rights Project* (2000) op cit note 2.

<sup>44</sup> Section 1.

<sup>45</sup> *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>46</sup> *Association of Victims of Post Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) paras 122 – 130; *Interights, Institute for Human Rights and Development in Africa and Association Mauritanienne des droit de l'Homme v Mauritania* AHRLR (2004) 87.

expected to repeal secrecy laws or adopt new laws or otherwise bring existing laws in compliance with access to information principles.<sup>47</sup>

The summary of the Commission's limitation jurisprudence shows that the right of access to information may not be restricted on grounds of national security except by a law that is necessary (reasonably justifiable) in a democratic society.<sup>48</sup> The jurisprudence incorporates a three-part test to curtail excessive restrictions.<sup>49</sup> First, to be permissible a restriction must: be prescribed by a precise law of general application, which not undermine national Constitution, the Charter and international law.<sup>50</sup> It must not also eviscerate the right.<sup>51</sup> Secondly, it must serve a legitimate interest, and thirdly, be strictly proportionate and rationally connected with its objective being the least restrictive means to achieve the objective.<sup>52</sup> In practice, the application of the limitation standards involves the balancing of any restriction with the public interest in access to official information.<sup>53</sup> The Nigerian Supreme Court has confirmed the direct enforceability of the Charter in Nigerian courts like other domestic statutes, including its primacy over inconsistent laws except the Nigerian Constitution.<sup>54</sup> According to the Court, it is presumed that the legislature does not intend to breach an international obligation.<sup>55</sup> In *Abacha and Others v Fawehinmi*,<sup>56</sup> the Court held that:

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<sup>47</sup> Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17–23 October, 2002: Banjul, The Gambia, Principle IV (2).

<sup>48</sup> *Law Office of Ghazi Suleiman v Sudan(I)* (2003) AHRLR 134 (ACHPR 2003) paras 37, 42 – 53, 56 – 67. The African Court on Human and Peoples' Rights has followed suit, see Application Nos. 009/2011 & 011/2011, *Mtikila v Tanzania (Mtikila)* para 106.1. Reported in Christof Heyns & Magnus Killander (eds) *Compendium of Key Human Rights Documents of the African Union* 5 ed (2013) 482.

<sup>49</sup> *Interights and others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) (International law obligations take precedence over domestic legislation); *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

<sup>50</sup> *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995); *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998); *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999); *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003). But failure to implement international law obligations may be blamed constitutional grounds.

<sup>51</sup> *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) (sole discretion given to the executive to determine the interest of state security); *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR) 2009 paras 94 – 8 (compulsory yearly licencing scheme to prevent journalists from 'spreading falsehood' disemboweled the right of access to information).

<sup>52</sup> *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) ('the COHRE case') para 214.

<sup>53</sup> See the African Court decision in Application No 004/2013, *Lohé Issa Konaté v. Burkina Faso* (5 December 2014) para 123.

<sup>54</sup> *Abacha and others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000).

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

<sup>56</sup> *Ibid.*, para 15.

Where, however, [a] treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (ie domestic) law by ... Cap [9] ..., it becomes binding and our Courts must give effect to it like all other laws falling within the judicial power of the Courts. By Cap [9] the African Charter is now part of the laws of Nigeria and like all other laws the Courts must uphold it. The Charter gives to citizens of member states of the [African Union] rights and obligations, which rights and obligations are to be enforced by our Courts, if they are to have any meaning. ... the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in ... Chapter IV of the 1979 and 1999 Constitutions. ... But that is not to say that the Charter is superior to the Constitution. ... Nor can its international flavour prevent the National Assembly ... removing it from our body of municipal laws by simply repealing Cap [9].<sup>57</sup>

The decision has been criticised.<sup>58</sup> In reality, while it subsists, ‘the government of Nigeria cannot enact a domestic law inconsistent with the Charter’.<sup>59</sup> Notwithstanding the technically lower status of the Charter, sections 39(3) and 45(1) of the Constitution do not trump article 9 of the African Charter. Both the African Charter and these sections can co-exist since the Charter complements these sections by expanding protection for the right of access to information and does not limit the right in contravention of these sections. Importantly, it is generally accepted by states that international human rights norms form part of constitutional liberties which judges have a have a task of expanding even beyond the minimum requirements of the constitution.<sup>60</sup>

Moreover, the Charter is, in practice, being enforced contemporaneously with the Nigerian bill of rights pursuant to relevant procedural rules.<sup>61</sup> African Charter principles on the right of access to information thus effectively became part of Nigerian domestic law since the African Charter Act came into effect in 1983.<sup>62</sup> Thus, the Nigerian state must amend secrecy laws, adopt legislation and take other measures according to its positive obligation under articles 1 and 9 of the Charter

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<sup>57</sup> Ibid, at 285. 1. ‘If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice ...’. See *Civil Liberties Organisation v Nigeria*, supra note 4 at para 12.

<sup>58</sup> AA Oba ‘The African Charter on Human and Peoples’ Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11’ (2004) 2 AHRLJ 275.

<sup>59</sup> Ibid para 23. See also *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) paras 12 & 17 and *Civil Liberties Organisation v Nigeria* op cit, note 4 at para 12, where the African Commission said: ‘If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice ...’.

<sup>60</sup> Statement of Mohammad Heleen ‘Developing Human Rights Jurisprudence’ Judicial Colloquium, Bangalore Pakistan, 24 February – 26 1988; Suit Appeal No. C. APP 4/91 *The Attorney-General v Unity Dow* (delivered 7 July 1992).

<sup>61</sup> *Abacha and Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000); *Ogugu v The State* (1994) 9 NWLR (Pt. 366) 1; Abiola Sanni ‘Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The need for far-reaching reform’ (2001) 2 AHRLJ 511–531.

<sup>62</sup> AA Oba op cit note 58 above.

to protect the right of access to information.<sup>63</sup> Complementary Charter interpretations by the African Commission and the African Court on Human and Peoples' Rights must also be used as standards against which to test whether restrictions to access to information are reasonably justifiable under sections 39(3) and 45(1) of the Constitution. This matter is the focus of discussions below.

#### 4.2.4 Executive secrecy and national security in Nigerian law

The repeal of a few military laws on return to democratic rule on 29 May 1999<sup>64</sup> and the enactment of some sectoral transparency laws thereafter suggest a desire to break with the authoritarian past.<sup>65</sup> However, the main colonial and military secrecy laws were left intact. Government secrecy in Nigeria is thus effected in two broad ways. First, through operation of the common law rules, for instance, regarding 'the public interest' and 'executive privilege', and statutes that permit the withholding of official information on grounds of "state matters", confidentiality, national security, etc., whether classified or not.<sup>66</sup> Second, through the statutory criminalisation of unauthorised disclosure of government information.<sup>67</sup> However, the Official Secrets Act 1962 and the National Security Agencies Act 1986 are the most severe of such statutes.

##### 4.2.4.1 *The Official Secrets Act 1962*

Apparently enacted for securing 'public safety',<sup>68</sup> a term not defined by it, the Official Secrets Act 1962 severely hinders transparent and accountable governance guaranteed by section 39(1) of the Constitution, article 9 of the African Charter and the FOIA 2011. The Official Secrets Act 1962 is one of two main laws enacted to protect the country against espionage through unauthorised disclosure of official information in Nigeria. According to Ohonbamu, the statute was enacted 'to prevent espionage and the communication or transmission of information vital to the security of

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<sup>63</sup>*Law Office of Ghazi Suleiman v Sudan (I)* op cit note 448; *Constitutional Rights Project v Nigeria*; DoP note 47, Principle IV.

<sup>64</sup> Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 1999.

<sup>65</sup> See Public Procurement Act 14 2007; Nigeria Extractive Industries Transparency (NEITI) Act 2007, etc.

<sup>66</sup> See Official Secrets Act 29 of 1962 (as amended), sections 1, 2, 9 National Security Agencies Act 19 of 1968, Evidence Act 2011, Statistics Act 9 of 2007, etc.

<sup>67</sup> See Official Secrets Act 1962 (as amended), sections 1(1)(2)(3); Criminal Code Act Cap. C38 LFN, sections 96-97, Statistics Act 9 of 2007, section 28.

<sup>68</sup> Official Secrets Act, long title. For a full text of the Act, see Appendix II, 149 – 153.

the State from falling into the hands of an enemy'.<sup>69</sup> Dare Babarinsa corroborates Ohonbamu; he says the Official Secrets Act was directed against acts of spying for a foreign power, but in his opinion, not against the press.<sup>70</sup> But the key to understanding the Act is the British Official Secrets Act 1911 – 1939, which it repealed and re-enacted in a modified form,<sup>71</sup> considering the paucity of prosecutions under it. The British Official Secrets Act 1911 – 1939 created offences against espionage and unauthorised leakage of official information.<sup>72</sup> Thomas explained the links between espionage and Official Secrets Act,

Espionage concerns spies and others who intend to help an enemy and deliberately harm the security of the nation. "...” Rather the Official Secrets Acts are invoked in cases of espionage. Espionage relates to another distinct but overlapping problem: that of the unauthorized leakage of official information. Harm may befall the country from information getting into the wrong hands, whether by espionage or leakage. A crucial distinction between the two is that damage to the State is *intentional* in the case of espionage, whereas leaks may involve persons having no such purpose.<sup>73</sup>

The Official Secrets Act 1962 consists of ten sections. Section 1 creates offences analogous to unauthorised disclosure of official information prejudicial to national security described in the above quote. It provides:

- (1) Subject to subsection (3) of this section, a person who: —
  - (a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or
  - (b) obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, reproduce or retain, as the case may be, is guilty of an offence.
- (2) A public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control is guilty of an offence.

The only apparent defence for section 1 offences is provided for in subsection (3), which provides that:

- In proceedings for an offence under subsection (1) of this section relating to any classified matter, it shall be a defence to prove that: —
- (a) when the accused transmitted, obtained, reproduced or retained the matter, as the case may be, he did not know and could not reasonably have been expected to believe that it was classified matter; and

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<sup>69</sup>O Ohonbamu 'State Security and the Press' in T O Elias (ed) *Nigerian Press Law* (1969) 40.

<sup>70</sup>*Newswatch Magazine*, September 14, 1987, p.20, referred to by I Bayo Oloyede *Freedom of Expression and National Security in Nigeria: An Appraisal of State Security (Detention of Persons) Decree (Decree No. 2) 1984* (2012) 36.

<sup>71</sup> A Aguda *Criminal Law and Procedure in Southern Nigeria* (1982); S Oguche 'Freedom of Information and National Security in Nigeria: Practices of the United Kingdom' in E Azinge & F Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2012) chapter 5.

<sup>72</sup> See, for an analysis of these Acts, R M Thomas *Espionage and Secrecy: The Official Secrets Acts 1911 – 1989 of the United Kingdom* (Routledge, 1991) 2 – 3.

<sup>73</sup> At 2 – 3.

- (b) when he knew or could reasonably have been expected to believe that the matter was classified matter, he forthwith placed his knowledge of the case at the disposal of the Nigerian Police Force.

It does not matter whether the classified matter was in the public domain through other means before a third party innocently receives or it reveals official wrongdoing or abuse of office. So long it is not delivered to the police, it is a crime to retain it. Section 1 applies to individuals, the press and both serving and retired “public officers” according to the definition of that term in the section 9. The test of section 1 offences is the term “classified matter”, which is vaguely defined in section 9(1) to mean:

any information or thing which, under any system of security classification, from time to time, in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria.

The ‘definition’ is ‘a moving target’, but actually a recipe for blanket secrecy considering the wide discretionary powers it gives to government. Hence, government has cashed-in on the provision to suppress public access to virtually every information in its possession. Public officers often prefer to err on the side of caution because they cannot give out any official information without receiving ‘orders from above’. The absurdity of administrative secrecy in Nigeria is such that some classified files contain old newspapers cuttings<sup>74</sup> and that the number of cups of tea drunk in a government office cannot be revealed without permission! But this is unfortunate because the acts or omissions which constitute the *actus reus* in section 1 such as to “transmit”, “reproduce”, “retain”, etc., must have been done with the *mens rea* or intent ‘prejudicial to the security of Nigeria’.<sup>75</sup> Yet, the phrase is nowhere defined in the Act, but is the commonest ground for refusal both to disclose and to penalise the unauthorised disclosure of official information.<sup>76</sup> Again, “prejudicial to the security of Nigeria” is often conflated with ‘public safety’ or ‘public order’ within Nigerian official circles.<sup>77</sup> At worst, it is an euphemism for “security risk”, which means whatever government construes it to mean. However, to be prejudicial, a disclosure of information must be shown to

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<sup>74</sup>F Adeleke ‘Prospect and challenges of FOI bill in Nigeria’, available at <http://www.elombah.com/index.php/articles-mainmenu>, accessed 20 February 2017.

<sup>75</sup>For a similar argument as regards the British Official Secrets Act 1911, see Anthony S Mathews *the Darker Reaches of Government* (1978) 103 – 4.

<sup>76</sup>Babatunde Olugboji, Frank Aigbogun & Clement Nwankwo *the Press and Dictatorship in Nigeria* (1994) 2, 79.

<sup>77</sup> *Ibid.*

create a demonstrable and substantial risk to national security, not merely because it is related to it.<sup>78</sup>

Section 2 bars physical public access and to information relating to a ‘protected place’ like section 1 of the British Official Secrets Act 1911 except that the words ‘calculated to be or might be or is intended to be directly or indirectly useful to the enemy’ occurring in the latter Act is omitted in the Nigerian version.<sup>79</sup> It is a crime under section 2: to enter or be in the vicinity of; make a record of anything in; interfere with or obstruct anyone guarding; or obtain a sketch, photograph or model, of a ‘protected place’ for ‘any purpose prejudicial to the security of Nigeria’.<sup>80</sup> The section protects information about military installations, defence hardware and software which might be useful to the enemy if disclosed, but there is no requirement that it be classified. Subsection (2) provides that:

A person charged with an offence under the foregoing subsection shall, unless the contrary is proved, be deemed to have acted for a purpose prejudicial to the security of Nigeria...

A similar provision in the British Official Secrets Act 1939 was construed to mean that a public interest motive or actual effect of the action was irrelevant so long the action is capable of harming the security of the State.<sup>81</sup> A pertinent issue is whether such a reverse onus in section 2(2) above violates the constitutional presumption of innocence in favour of an accused. Section 36(5) of the Constitution provides:

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<sup>78</sup> Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 – 23 October, 2002: Banjul, The Gambia., Principles XIII (2).

<sup>79</sup> Defined by s 9(1) of the Official Secrets Act 1962 to mean:

- “(a) any naval, military or air force establishment in Nigeria, any other place in Nigeria used for or in connection with the production, storage or testing, by or on behalf of the government, of equipment designed or adapted for use for defence purposes, and any other building, structure or work in Nigeria used by the government for defence purposes; and
- (b) any area in Nigeria or elsewhere for the time being designated by an order made by the Minister as being an area from which the public should be excluded in the interests of the security of Nigeria, and includes a part of a protected place within the meaning of paragraph (a) or (b) of this definition”.

<sup>80</sup> Based on section 1 of the British Official Secrets Act 1939 similar to section 2 of the 1962 Act, but with the addition of ‘directly or indirectly useful to the enemy, the English case of *Chandler v Crane* [1962] 3 All E R 142 (HL) held that ‘any purpose prejudicial to the security of the State’ encompasses sabotage, but with intent to aid the enemy. Because the 1962 Act is not so qualified it will cover any prejudicial disclosure. But the test is subjective not objective.

<sup>81</sup> See *Chandler v DPP* in which some anti-nuclear protesters had entered a British RAF airfield to immobilise an aircraft not for espionage, but to draw attention to the dangers of stockpiling nuclear weapons. The effect of the decision has since been modified. See R Thomas *Espionage and Secrecy* 52 – 53.

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty: Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person *the burden of proving particular facts*. (Emphasis supplied).

Based on a joint reading of the first limb of section 36(5) above and section 135 of the Evidence Act, the onus lies on the prosecution in criminal cases to prove the commission of an offence beyond a reasonable doubt.<sup>82</sup>

Based on concerns for effective prosecution of corruption cases; the need to balance community interests with protection of the individual; proof of facts peculiarly within the knowledge of an accused, etc., a reverse onus which places evidential burden on the accused is not unconstitutional or illegitimate per se.<sup>83</sup> Thus, South African case law<sup>84</sup> and legal experts, Schwikkard and Van der Merwe<sup>85</sup> contend, on good authority, contend that a reverse onus may be constitutionally valid based on cogent and compelling reasons though the application is fraught with difficulties.<sup>86</sup> South African highest courts have held that for a reverse onus to be constitutionally justified, ‘there must not be less intrusive means for achieving the desired end such as the imposition of an evidentiary burden’, it must not have ‘a disproportionate impact on the right in question’, and must not eviscerate the right in question.<sup>87</sup> The justifiableness of reverse onus ultimately depend on statutory text, its reasonableness, who proves the essential ingredients of the offence, etc.<sup>88</sup> In the final analysis, it is doubtful that the validity of section 2(2) of the Official Secrets Act is saved by the proviso to section 36(5) of the Constitution.

Section 3 permits the President to make an order during an emergency declared under section 305 of the Constitution that no one shall without the President’s written permission make a sketch or record of any thing designed for defence purposes without his permission.<sup>89</sup>

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<sup>82</sup> Eric A. Okojie ‘Corporate Fraud in Nigeria and the Dialectics of Management of Evidential Burden in Litigation’ (2015) 38 *Journal of Law, Policy and Globalization* 105-114 at 108.

<sup>83</sup> Ndiva Kofele-Kale ‘Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes’ (2006) 40 *the International Lawyer* 909 – 944.

<sup>84</sup> See *S v Zuma* 1995 (2) SA 642 (CC); *S v Singo* 2002 (4) SA 858, para 43 (CC).

<sup>85</sup> See *Principles of Evidence* 4 ed (2016) ch 29.

<sup>86</sup> See Schwikkard, PJ and Van der Merwe, SE *Principles of Evidence* 4 ed (2016) ch 29.

<sup>87</sup> M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of Rights* (2005).

<sup>88</sup> *Ibid.*

<sup>89</sup> Sandra Coliver ‘Commentary on Johannesburg Principles’ in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick et al *Secrecy and Liberty: Freedom of Expression, Access to Information and National Security* (1999) ch 2.

Sections 4, 5, 6, 7 and 8 enact provisions to enforce the Act. Some of these provisions have the potential to violate personal communications. For instance, under section 4, the responsible Minister may make regulations to require postal, telephone and telegraph companies to furnish government with information and records of their operations.<sup>90</sup>

Section 5 permits the concerned Minister to authorise a superior police officer (SPO) to issue a warrant, or where impracticable, the SPO may issue a warrant, to enable the police obtain evidence from anyone or premises as to a suspected commission of an offence under sections 1 – 3 of the Act. The security services and police usually have this provision in mind whenever they attempt to force journalists to reveal the source of confidential information.<sup>91</sup>

Section 6 permits a SPO, upon suspicion of commission of any offence in sections 1-3, to issue a warrant to a junior officer to enter, search, remove any suspected incriminating evidence from any premises and use reasonable force to execute the warrant. Sections 5 and 6 go against the normal safeguards for obtaining search warrants which is by a statement on oath laid before a judicial officer.<sup>92</sup>

Section 7(1)(a) provides for prison sentences. Upon conviction on indictment for any offence in sections 1-3, a person is liable to 14 years' imprisonment, but on conviction after summary trial to 2 years' imprisonment or N200 fine (\$0.54 US Dollars) (\$1 equals N370), or to both such fine and imprisonment.<sup>93</sup> A summary conviction for a section 5 offence attracts three months imprisonment or N100 fine (\$0.27 US Dollars) or to both such fine and imprisonment.<sup>94</sup> Also, a person who attempts to commit; aids, abets, counsels, procures, incites; being accessory before or after the fact, conceals or procures the commission of an offence punishable under the Act also commits a crime punishable as the main offence.<sup>95</sup>

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<sup>90</sup>Related provision on control of communications can be found in the Terrorism (Prevention) Act, 2011, Terrorism (Prevention) (Amendment) Act, 2013 and the National Communications Commission SIM Card Registration Policy 2010.

<sup>91</sup>See *Hurilaws v Nigeria* and the prosecutions of Dele Giwa and Jerry Needam referred to in chapter four of thesis.

<sup>92</sup>Fidelis Nwadialo *the Criminal Procedure of the Southern States of Nigeria* (1976) 49.

<sup>93</sup>OSA, section 7(1)(b).

<sup>94</sup>OSA, section 7(2).

<sup>95</sup>OSA, section 8(1)(a)(b)(c)(d). Section 8(2) extends the Act's coverage to offences committed outside Nigeria while section 8(3) preserves the normal powers of police officers to arrest without warrant upon reasonable commission of an offence.

To attenuate the harshness of the law, prosecution for an offence under the Act cannot be initiated without the consent of the Attorney-General (AG) or authority of Director of Public Prosecutions (DPP) of the Federation or a State.<sup>96</sup> The AG is the Chief Law Officer of the State<sup>97</sup> and is constitutionally entitled to initiate, continue or discontinue a criminal prosecution independently of external opinions except by public policy and the public interest.<sup>98</sup> Thus, the AG should decline her consent where the information disclosed simply embarrassed the government or where available evidence does not establish a *prima facie* case or where lesser punishment or alternative charges to that provided under the Act exists in another law.<sup>99</sup> But in Nigeria, the exercise of the AG's power is not subject to any legal controls, but to her conscience and regard for the public interest only.<sup>100</sup> Three hurried prosecutions illustrate how the power has been exercised.

In the first case, the Nigerian Military Government by Decree proscribed the *Newswatch* Magazine for six months in April 1987. The Magazine had published an unpublished report of the 'Political Bureau' set up to design a political future for Nigeria.<sup>101</sup> The Government claimed the report was a 'classified and confidential matter' hence it decided to 'take appropriate measure to prevent further disclosure of classified and confidential matter in the interest of public safety and public order'.<sup>102</sup>

In the second case, in October 1982, the *Sunday Concord* serialised a yet to be released report of a government panel set up to investigate a fire accident in Lagos. The Government claimed the document was classified and the Attorney-General of the Federation initiated a three-count charge against Mr. Dele Giwa and Concord Press of Nigeria Limited. The charge read in part thus:<sup>103</sup>

That you Dele Giwa ... did reproduce a classified matter, to wit-draft of the Federal Government Views On the Report of the Republic Building Fire Incident Tribunal of Inquiry – on the Sunday Concord Newspaper Volume 3 No. 86 of 24 October, 1982, which matters you are not authorised on behalf of the government to reproduce and thereby committed an offence contrary to Section 1 (1) (b) and punishable under Section 7(1) (a) of the Official Secret Act 1962 (No. 29 of 1962 Laws of

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<sup>96</sup> OSA, section 7(3),

<sup>97</sup> 1999 Constitution, section 150(1).

<sup>98</sup> 1999 Constitution, section 174(1)(a)(b)(c) and the Administration of Criminal Justice Act 2015, sections 104, 106, 107.

<sup>99</sup> See R Thomas 115.

<sup>100</sup> *The State v Ilori & Others* (1983) 2 SC 155.

<sup>101</sup> The Newswatch (Proscription and Prohibition from Circulation) Decree 6 of 1987.

<sup>102</sup> *Ibid.*

<sup>103</sup> Charge No. FHC/L/390c/82 (Federal High Court Lagos).

the Federation), as amended by the Criminal Procedure (Amendment) Act 1966 (No. 12 of 1966 Laws of the Federation).<sup>104</sup>

The DPP subsequently entered a *nolle prosequi* to discontinue the prosecution.<sup>105</sup> But Dele Giwa was again arrested on February 2, 1983 for allegedly flouting the Official Secrets Act and charged before Fred Anyaegbunam J of the Federal High Court, Lagos. This time, it was for reproducing two classified correspondences in the *Sunday Concord* Newspaper of 30 January 1983. One of the letters was a copy of a letter dated 14 December 1982 written by the Attorney-General, Chief Akinjide to Mr. Adewusi, the Inspector-General of Police. Government later withdrew the charges thus denying the courts an opportunity to pronounce on the scope of constitutional right of access to information and the constitutionality of security classifications.

In the third matter, the police charged Mr. Jerry Needam, acting editor of the *Ogoni Star*, to court on 2 November 1999, for "being in unlawful possession of a classified document" thereby committing "an offence punishable under Section 7(1) of the Official Secrets Act Cap. 335 Law of the Federation 1990".<sup>106</sup> The publication was a police operational order containing detailed plans of an impending clampdown on Ijaw ethnic militants in the Niger Delta.<sup>107</sup> The prosecution was subsequently abandoned. Thus, the foundation for official secrecy laid during colonial times was vigorously pursued by the military. The next law analysed below bears out this assertion.

#### 4.2.4.2 *The National Security Agencies Act 1986*

The Act established three national security agencies namely, the Defence Intelligence Agency (DIA), the National Intelligence Agency (NIA) and the State Security Service (SSS) and assign functions to them 'for the effective conduct of national security'.<sup>108</sup> Beyond this, "national security" has no specific description under the Act.<sup>109</sup>

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<sup>104</sup> 'How Dele Giwa was charged with Official Secrets Act' *National Mirror*, available at <http://nationalmirroronline.net/new/how-dele-giwa-was-charged-with-official-secrets-act/>, accessed 29 October 2016.

<sup>105</sup> *Ibid.*

<sup>106</sup> Media Right Monitor 'One Year of the Nigerian Media under Obasanjo: An Orphan Left to Fate', available at <http://mediarightsagenda.org/mrm/june00/oneyear.htm>, accessed on 29 October 2016.

<sup>107</sup> Linus Nnabuike Mba *Media Law and Policy in Nigeria* (2016) 160.

<sup>108</sup> NSA Act, section 1(1) (a) (b) (c).

<sup>109</sup> For a full text of the original version of the Act, see Appendix I, 145 – 158.

The DIA is responsible for the prevention and detection of military crimes against Nigeria, the protection and preservation of all military classified matters pertaining to Nigeria's security and defence intelligence of a military nature.<sup>110</sup> The NIA is responsible for national intelligence relating to Nigeria's external security.<sup>111</sup> The SSS is responsible for the detection of crimes that affect Nigeria's internal security.<sup>112</sup> It is also responsible for the protection and preservation of all non-military classified matters affecting Nigeria's internal security.<sup>113</sup>

What to classify or how to classify information is not provided for, but the Act relies on the vague description of 'classified matter' provided by section 9(1) of the Official Secrets Act.<sup>114</sup> Thus it clothes the National Securities Agencies with absolute discretion to ascribe meanings to 'national security'. Under the Act, the activities, budget and appointments into the National security Agencies are state secrets not subject to parliamentary oversight.<sup>115</sup> The Act trumps access to information under the FOIA 2011 and Evidence Act 2011 because it specifically voids other provisions inconsistent with it.<sup>116</sup> Because it has no specific meaning, the invocation of 'national security' was a tool used by the military to intimidate journalists who publish official information considered embarrassing to the military and government officials.<sup>117</sup>

But the accountability of the national security agencies cannot be gainsaid considering their mode of operation and vast powers invested in them to ensure public safety and national security. Subjecting the exercise of these powers to scrutiny will help curb potential abuses of civil liberties. Surely, the Act was promulgated during the Cold War era when national security involved use of state surveillance by dictators to suppress political opponents.<sup>118</sup> But 'national security' has since

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<sup>110</sup> NSA Act, section 2(1)(a)(b)(c).

<sup>111</sup> NSA Act, section 2(2)(a)(b).

<sup>112</sup> NSA Act, section 2(3)(a).

<sup>113</sup> NSA Act, section 2(3)(b).

<sup>114</sup> NSA Act 1986, section 2(5).

<sup>115</sup> NSA Act, section 3.

<sup>116</sup> NSA Act, section 7(2).

<sup>117</sup> Obiamaka G Araka 'Freedom of Information and National Security' in Epiphany Azinge & Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (2012) 135 – 8; Bayo Oloyede *Freedom of Expression and National Security in Nigeria* (2012).

<sup>118</sup> See Alasdair Roberts *Blacked Out: Government Secrecy in the Information Age* (2006) ch 2.

evolved a more human-centred approach incorporating good governance, democratisation, respect for human rights and the rule of law.<sup>119</sup>

Hence, since 1993, the Press and civil society groups began to advocate and to draft a law to lay down a general principle for a right of access to information in Nigeria.<sup>120</sup> At a workshop organised in 1995 to revise the first ‘Draft Access to Public Records and Official Information Bill’. At the end of the workshop, the participants agreed *inter alia*:

That the Access to Public Records and Information Bill should be enacted into law to give effect to Section 36 of the 1979 Constitution of the Federal Republic of Nigeria, which guarantees every person the right to hold opinions and to receive and impart ideas and information without interference.<sup>121</sup>

Consequently, upon Nigeria’s return to democracy in 1999, the Press and other civil society organisations submitted a freedom of information bill conceived and elaborated upon since 1993 to the National Assembly. The Bill was eventually passed into law in 2011.<sup>122</sup>

#### 4.2.5 The FOIA 2011: opportunities and challenges

The objective of the FOIA 2011 is to engender a decisive shift from administrative secrecy and concealment to one of transparency and accountability in the conduct of state affairs by guaranteeing access to official information and records.<sup>123</sup> Yet, it fails to reform all existing laws that permit vague national security exemptions to access to official information. Hence, the Nigerian state has not satisfactorily discharged its positive obligation to protect the right of access to information against unjustifiable national security restrictions.<sup>124</sup>

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<sup>119</sup>United Nations Secretary-General Kofi Annan. Millennium Report, Chapter 3, 43 - 4. <http://www.unmillenniumproject.org/reports/fullreport.htm>, accessed 29 October 2016; Norman Mlambo (ed.) *Violent conflicts, fragile peace: perspectives on Africa’s security problems* (2008).

<sup>120</sup> See Freedom of Information Coalition ‘Origins of the Freedom of Information Campaign’, available at [http://www.foicoalition.org/publications/foi\\_advocacy/background.htm](http://www.foicoalition.org/publications/foi_advocacy/background.htm), accessed 20 December 2016.

<sup>121</sup> *Ibid.*

<sup>122</sup> Talatu O Ocheja ‘Freedom of Information Versus the Issue of Official Secret’ in Epiphany Azinge & Fatima Waziri (eds) *op cit* note 461 at 165.

<sup>123</sup> Morayo Adebayo & Akinyinka Akinyoade *op cit* note 8 at 274.

<sup>124</sup> For instance, DoP, Principle IV (1) states that:

‘Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.’

#### 4.2.5.1 Background

The background history of freedom of information legislation in Nigeria shows that since the earliest days when the idea for such a law was first broached:<sup>125</sup>

There was a common understanding among the various interest groups represented at the workshop that the legal regime governing access to government held information in Nigeria must undergo a structural transformation. Their conclusion was that since statutes which permit access to official information in Nigeria were few, the overall effect is that a culture of secrecy prevails in all government institutions, nurtured and given legal effect to by such laws as the Official Secrets Act and some provisions in the Criminal Code which make it an offence to disclose certain types of government held information.

The FOIA 2011, a 32-section law, came into effect on 28 May 2011. The Act was enacted to do away with administrative secrecy of the past;<sup>126</sup> enable the people effectively participate in the making of laws and public policy and hold government accountable;<sup>127</sup> enhance transparency and public participation in government through access to official records and information.<sup>128</sup> Idris J of the Federal High Court in Lagos confirmed the importance of the FOIA when he held as follows:

The Freedom of Information Act is meant to enhance and promote democracy, transparency, justice and development. It is designed to change how government works, because we have all resolved that it will no longer be business as usual. Therefore, all public institutions must ensure that they prepare themselves for the effective implementation of the Freedom of Information Act.<sup>129</sup>

Thus, contrary to the Official Secrets Act which makes all unauthorised disclosure of state information illegal, the FOIA legalises the disclosure of official information unless specifically exempted. The FOIA specified objectives are to protect access to and protect public records and information to the extent consistent with the public interest including personal privacy and protect

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<sup>125</sup>Freedom of Information Coalition 'Origins of the Freedom of Information Campaign', available at [http://www.foicoalition.org/publications/foi\\_advocacy/background.htm](http://www.foicoalition.org/publications/foi_advocacy/background.htm), accessed 17 December 2016.

<sup>126</sup>*Boniface Okezie v Attorney-General of the Federation and The Economic and Financial Crimes Commission*; available at [http://www.right2info.org/resources/publications/case-pdfs/nigeria\\_okezie-v.-attorney-general-of-the-federation-and-the-economic-and-financial-crimes-commission\\_2013\\_summary-of-judgment](http://www.right2info.org/resources/publications/case-pdfs/nigeria_okezie-v.-attorney-general-of-the-federation-and-the-economic-and-financial-crimes-commission_2013_summary-of-judgment), accessed 5 December 2016 (*Boniface*).

<sup>127</sup>R2K Nigeria 'Understanding the FOIA 2011', available at: <http://r2knigeria.org/index.php/component/content/article/2-uncategorised/218-understanding-the-foia-2011> (last accessed 5 December 2016).

<sup>128</sup>See 'The FOI Act Should Be the Envy of Any Democracy, Says Judge' (FOI Law Report 9), available at <https://lawyersalert.wordpress.com/2013/09/25/the-foi-act-should-be-the-envy-of-any-democracy-says-judge-foi-law-report-9/> (last accessed 5 December 2016); Morayo Adebayo and Akinyinka Akinyoade op cit note 8 at 274.

<sup>129</sup> *Boniface* op cit note 126.

serving public officers from adverse consequences of disclosing public interest information without authorisation.<sup>130</sup> The Act is designed to achieve these objectives through various provisions.

#### 4.2.5.2 Access to information as an individual right

The Act extends to *any person* (emphasis supplied) a legal right of access to information under the control of all public institutions<sup>131</sup> and ‘private bodies providing public services, performing public functions or utilizing public funds’ irrespective of the form in which it is kept.<sup>132</sup> A requester needs not demonstrate any specific interest in the information requested for,<sup>133</sup> and is entitled to institute legal action to compel the performance of positive obligations imposed by the Act.<sup>134</sup>

#### 4.2.5.3 Duties of public institutions to release information

The Act incorporates good corporate practices and the ethics of public record-keeping and mandates public institutions to keep records of operations, businesses and activities in a manner that facilitates access.<sup>135</sup> In *Rommy Mom v The Executive Secretary Benue State Emergency Management Agency and The Attorney-General of Benue State*,<sup>136</sup> it was held that

Section 2 of the Act particularly imposes a duty on every public institution to keep account of its stewardship and so to ensure that the records of all its activities, operations and businesses are properly available for purposes of meeting prospective demands of those who may seek for such information.

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<sup>130</sup> FOIA 2011, ‘Explanatory Memorandum’.

<sup>131</sup> These include ‘executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government together with all corporations established by law and all companies in which government has a controlling interest’. See FOIA 2011, section 2(7).

<sup>132</sup> FOIA 2011, sections 1(1) & 29(9)(a). In section 31 of the FOIA, ‘public institution’ ‘means legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds’.

<sup>133</sup> FOIA 2011, section 1(2). FOIA 2011, section 1(2), confirmed in Suit No. MHC/137/2013, *Rommy Mom v The Executive Secretary Benue State Emergency Management Agency and The Attorney-General of Benue State* (High Court Markudi judgement of 15 July 2013), available at: <https://lawyersalert.wordpress.com/2013/09/25/the-foi-act-should-be-the-envy-of-any-democracy-says-judge-foi-law-report-9/> (last accessed 5 December 2016); *Boniface* op cit note 126.

<sup>134</sup> FOIA, sections 1(3) & 2(6).

<sup>135</sup> FOIA 2011, sections 2(1) (2) & 9(1) (2).

<sup>136</sup> (High Court, Markudi judgement of 15 July 2013), available at <https://lawyersalert.wordpress.com/2013/09/25/the-foi-act-should-be-the-envy-of-any-democracy-says-judge-foi-law-report-9/>, accessed 5 December 2016.

Nonetheless, the Act is not restricted to existing printed information or records, but extends to public interest information obtainable through any retrieval system whatsoever.<sup>137</sup> Public institutions are mandated to proactively publish, update and widely disseminate their organograms, employment records, rules and records of proceedings, financial statements, and other public interest information through manuals, electronic formats, official websites, etc.<sup>138</sup> Hence, the Act ‘is intended to act as a catalyst for change in the way public authorities approach and manage their records’.<sup>139</sup> Requests for information can be made either orally or in writing, and by disabled or illiterate applicants with the help of a third party.<sup>140</sup>

A public institution must within seven days of receiving a request for access release the information, transfer the request to an appropriate institution or by written notice extend the time for another 14 days if the request cannot reasonably be attended to within the statutorily stipulated time.<sup>141</sup> The Act provides for training of public officials in mechanics of the right to know as a way of weaning them from the endemic secrecy in public administration and promote the objectives of the law.<sup>142</sup>

#### 4.2.5.4 Exemptions to public disclosure

The Act permits exemptions from disclosure of twelve broad categories of information to protect specified interests, some are absolute while others are qualified. These include international affairs and defence,<sup>143</sup> security, law enforcement and criminal investigation,<sup>144</sup> privacy,<sup>145</sup> commercial confidentiality,<sup>146</sup> professional and other privileges including legal practitioner-client privilege,<sup>147</sup>

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<sup>137</sup> FOIA 2011, sections 3(2.) & 31.

<sup>138</sup> FOIA 2011, section 2(3)(a)(b)(c)(d)(e)(f), (4) & (5).

<sup>139</sup> See Media Rights Agenda ‘Public Institutions Have No Power under the Law to Keep Mute when an FOI Request is Made to Them, says Judge’, available at:

[http://www.right2info.org/resources/publications/case-pdfs/nigeria\\_okezie-v.-attorney-general-of-the-federation-and-the-economic-and-financial-crimes-commission\\_2013\\_summary-of-judgment](http://www.right2info.org/resources/publications/case-pdfs/nigeria_okezie-v.-attorney-general-of-the-federation-and-the-economic-and-financial-crimes-commission_2013_summary-of-judgment), accessed 5 December 2016.

<sup>140</sup> FOIA 2011, section 3(3) & (4).

<sup>141</sup> FOIA, sections 3, 4, 5 & 6; *Boniface* op cit note 126 (public institutions must comply with requests for information within seven days. If they refuse to comply, they must supply specific bases for refusal under the FOI Act in a notice to the applicant within seven days of the request.).

<sup>142</sup> FOIA 2011, section 13.

<sup>143</sup> FOIA 2011, section 11(1).

<sup>144</sup> FOIA 2011, section 12(1).

<sup>145</sup> FOIA 2011, section 14(1).

<sup>146</sup> FOIA 2011, section 15(1)(a)(b)(c).

<sup>147</sup> FOIA 2011, section 16.

etc.<sup>148</sup> But to fulfil the public interest, the Act permits ‘redaction’ whereby a public institution must disclose any part of an exempted information not otherwise exempted.<sup>149</sup>

#### *4.2.5.5 Exemption of secret and classified information from disclosure*

The FOIA 2011, as exemplified by many of its provisions, claims primacy over other inconsistent and secrecy laws. For instance, section 11(1) permits public institutions to withhold information the disclosure of which may be injurious to the conduct of international affairs and the defence of the Federal Republic of Nigeria. Though in fulfilment of the public interest, the Act permits ‘redaction’ relevant agencies may still easily sidetrack this provision since the law does not specify the categories of information that fit the description of ‘the conduct of international affairs and the defence of the Federal Republic of Nigeria’. Section 28 is of great importance to ensuring the often touted reason for administrative secrecy – ‘national security’ – is stripped of its esoteric garb, but not so quite! It provides:

- (1) The fact that any information in the custody of a public institution is kept by that institution under security classification or is classified document within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to an application for disclosure thereof under the provisions of this Act, but in every case the public institution to which the application is made shall decide whether such information is of a type referred to in Sections 11, 12, 14, 15, 16, 17, 19, 20 or 21 of this Act.
- (2) If the public institution to which the application in subsection (1) is made decides that such information is not a type mentioned in the sections referred to in subsection (1), access to such information shall be given to the applicant.
- (3) if the public institution, to which the application mentioned in subsection (1) is made, decides that such information is of a type mentioned in sections referred to in subsection (1), it shall give notice to the applicant.

Section 28 draws from article 26 of the Model Law, and attempts to whittle down section 9 of the Official Secrets Act which permits indiscriminate classification of official records by mere stamping with markers such as ‘top secrets’, ‘secret’, etc., regardless of content or effect of disclosure on national security. This is in consonance with many Freedom of Information Laws which to varying degrees exempt from disclosure information that can prejudice military defence and national security interests.<sup>150</sup>

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<sup>148</sup> Morayo Adebayo & Akinyinka Akinyoade op cit note 8 at 282.

<sup>149</sup> FOIA 2011, section 18.

<sup>150</sup> A Abioye ‘Confidentiality and protection of official records in the freedom of information era: Nigeria's situation’ (2010) 20 *Afr. J. Lib, Arch. & Inf. Sc.* 29 – 39 (Abioye).

Similarly, section 27 of the FOIA limits the scope of section 1 of the Official Secrets and aims to protect serving officials from the adverse consequences of unauthorised disclosure of information for legitimate purposes. Section 27 states:

- (1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice.
- (2) Nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an information which he reasonably believes to show-
  - (a) mismanagement, gross waste of funds, fraud, and abuse of authority; or
  - (b) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act.
- (3) No civil or criminal proceeding shall lie against any person receiving the information or further disclosing it.

But it is arguable whether the provision adequately serves its intended purpose of ‘bringing the restrictive provisions of the Official Secrets and Criminal Code Acts, albeit under the supervisory institutional frameworks that a FOI law normally provides’.<sup>151</sup> This is because aside not going far enough to clarify the categories of information that may be classified under the Official Secrets Act, it unexplainably side-stepped the National Securities Agencies Act 1986, which voids all statutes inconsistent with it.<sup>152</sup> The implication is that the military and national security agencies are still completely shielded from accountability. This observation is discussed further in part 3 of this chapter.

#### *4.2.5.6 Public interest and harm tests*

Whereas classification is the test of unauthorised disclosure under section 1 of the Official Secrets Act, a harm test is the specific determinant of authorization to grant or deny request for access to classified information under the FOIA. The Act explicitly provides for both an intertwining harm (and ‘injury-based’)<sup>153</sup> and public interest tests of non-disclosure or exemptions to access to certain

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<sup>151</sup>Abioye *ibid.*

<sup>152</sup>FOIA 2011, section 7.

<sup>153</sup> The Honourable Attorney-General of the Federation and Minister of Justice *Guidelines on the Implementation of the Freedom of Information Act 2011 (Revised Edition 2013)* ch 4 (FOIA Guidelines 2013).

types of information, including international affairs and defence.<sup>154</sup> First, for a limitation to be justifiable, the harm test requires proof of a direct and substantial risk of harm to a legitimate interest from a public body that withholds information. Secondly, the public body that withholds information is expected to weigh the potential harm to a legitimate interest that disclosure may occasion as against the good to the public interest that disclosure will do. Where risk of harm exists, albeit minimal, but the public interest predominates, then access should be granted.<sup>155</sup> A public body must give due consideration to the public interest in making a refusal decision by balancing the potential harm of disclosure to the protected interest against the public interest served by disclosure.

The Act neither defines nor gives any guidance as to relevant matters that may favour the ‘public interest’. For instance, in accessing the risk of harm to defence and international affairs under section 11(1), the Act says:

- (2) Notwithstanding subsection (1), an application for information *shall not be denied* where the public interest in disclosing the information outweighs whatever injury that disclosure would cause. (Emphasis supplied).

The section still leaves much the discretion to the authority concerned who might actually shift the duty to grant access to the courts. The appropriate language should have been, ‘shall be granted’. Again, section 11(1) the terms ‘defence and international affairs’ are nowhere defined in the Act. But the Attorney-General of the Federation (AGF) offer some guidance by listing 9 matters that may fall under the category.<sup>156</sup> Concerning ‘defence’, the AGF says:

It is important to understand that, this exemption is not for defense information but for information whose disclosure may harm the defence of the FRN. Therefore, information about weaponry, troop deployments, the state of alert of the Armed Forces, etc might be expected to be covered by the exemption.<sup>157</sup>

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<sup>154</sup>FOIA 2011, sections 11(2), 12(2), 15(1)(a), 19(2).

<sup>155</sup>Model Law on Access to Information for Africa, articles 38(a)(b) & 75(1) (2).

<sup>156</sup> FOIA Guidelines 2013, op cit note 153 at 26.

<sup>157</sup> FOIA Guidelines 2013 at 27 – 8.

It would make the law more certain and assist the relevant institutions in making reasonable decisions if these heads of exemptions are specifically identified and incorporated into the FOIA itself.

#### *4.2.5.7 Judicial review*

The principle of judicial review under the Act must involve a *de novo* appraisal of the merits of the application of a specific harm test by a public institution which refused an access request. A refusal to give access shall be by written notice specifying the grounds therefor, the section of the Act pursuant to which the request was refused, and informing the applicant of her right to judicial review.<sup>158</sup> Failure to give access within the statutory stipulated seven days turn-around time amounts to a ‘deemed refusal’.<sup>159</sup>

The Act does not explicitly provide for a right to internal review. The Attorney-General of the Federation has however issued a comprehensive 53-page analysis of the provisions of the Act including guidelines for internal review.<sup>160</sup> A party refused access to information has a right to challenge the decision to refuse access and have it reviewed by a competent court within 30 days of the refusal or such period as may be extended by the court.<sup>161</sup> The burden of proof that the public institution is authorised to deny access to the particular information sought lies with the public institution.<sup>162</sup>

#### *4.2.5.8 Monitoring and implementation challenges*

The FOIA suffers from many enforcement and effective oversight related problems. A clear-eyed view of history and current social and political realities in Nigeria does not paint a rosy picture of a fully-functional transparent governance. The Attorney-General of the Federation (AGF) is mandated to monitor and ensure compliance with the FOIA, and receive and publish annual reports on FOI requests received and responded which every public institutions must submit on or before

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<sup>158</sup>FOIA 2011, section 7(1).

<sup>159</sup>FOIA 2011, section 7(4).

<sup>160</sup> FOIA Guidelines op cit note 153 at 62.

<sup>161</sup> FOIA 2011, section 20. See further Suit No. ID/211/2009 *Incorporated Trustees of the Citizens Assistance Centre v Honourable S. Adeyemi Ikuforiji & Lagos State House of Assembly* (Unreported High Court, Lagos judgment of 14th March 2012).

<sup>162</sup> FOIA 2011, section 23.

every 1 February to the AGF's Office.<sup>163</sup> Between 2011 and 2016, there were 3 submissions of annual reports by public institutions to the AGF's Office for 2014, 2015 and 2016 respectively, each covering the preceding year.<sup>164</sup> But significant non-compliance by public institutions with their proactive disclosure obligations and reporting obligations persists.<sup>165</sup> Ironically, the National Assembly has never submitted an annual report to the AGF's Office.<sup>166</sup>

Again, an attitude of resistance to access requests 'grounded in the practice of institutionalized secrecy premised on the provisions of the Official Secrets Act' persists among public officials despite the enactment of a FOIA. This attitude also reveals a lack of knowledge by many public officials of the existence and/or workings of the Act.<sup>167</sup> Also, systematic information-keeping, electronic retrieval and online systems – the backbone of a functional access to information – are largely non-existent. According to surveys conducted in 2014 and 2015, where record-keeping systems are in place, they are grossly underutilised for disclosing information of real public interest.<sup>168</sup>

It is observed that the enforcement regime of the FOIA 2011 which makes the Courts the only enforcement institution and not say, an ombudsman, could discourage effective use of the law by ordinary citizens considering the time, energy and monetary costs of litigation. Also, the provisions of section 7, which provides that where a public institution denies a request for access it shall state in the refusal notice the names of persons responsible therefore may actually encourage mute refusals.

The coming into effect of the FOIA 2011 is an important milestone in bringing about open government in Nigeria, but it would have to be fine-tuned to dissuade deliberate attempts by the executive to withhold information. The law is not able to effectively counteract the unsatisfactory

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<sup>163</sup> FOIA, section 29 (1)(2) & (3).

<sup>164</sup> Right to Know (R2K), *Nigeria Nigeria's Freedom of Information Act (2011): Compliance Assessment Report 2016* available at [foi compliance assessment report 2016.pdf](#) (R2K 2016).

<sup>165</sup> Right to Know (R2K) *Nigeria Report on the Status of Public Institutions' Compliance with the Obligation to Proactively Disclose Information under Section 2(3) & (4) of the Freedom of Information (FOI) Act, 2011* (R2K 2015) available at [PDA report 28-09-15.pdf](#); R2K 2016 *ibid*, 7.

<sup>166</sup> (R2K) (2016) *Ibid*.

<sup>167</sup> (R2K) (2015) *op cit* note 165.

<sup>168</sup> (R2K) (2016) *op cit* note 164.

state of Nigerian law as regards the state's power to withhold undefined categories of 'national security' information. I engage more definitively with this observation next.

### 4.3 NATIONAL SECURITY EXEMPTIONS TO ACCESS TO INFORMATION IN NIGERIA

This part subjects the National Security Agencies Act 1986 and the Official Secrets Act 1962 to the three-part test of restrictions to the right of access to information in article 9 of the African Charter read into sections 39(3) and 45(1) of the Constitution. These laws fail the test. First, a restriction must be prescribed by a precise law that does not eviscerate the right. Second, it must serve a legitimate national security interest which incorporates public access to information as a bare minimum for a functioning democracy. Thirdly, it must have a proportionate and rational relation with, and be the least restrictive achieve its objective.

#### 4.3.1 Any 'law'

An essence of international law protection for the right of access to information that the right be broadly interpreted and restrictions thereto narrowly interpreted. Hence, any State authority or public institution that withholds public information must to sufficiently establish the legitimate grounds for such restriction.<sup>169</sup> Any 'law' refers to a law that is precise to enable individuals foresee any conduct that may be affected by it and adapt their conduct appropriately, and is accessible to everyone. The law in question must confer an unfettered discretion on the executing authority, but provide sufficient guidance to enable it ascertain the information access to which may be restricted. Both the Official Secrets Act and the National Security Agencies Act give the executive an unfettered classification discretion for national security reasons regardless of the public interest in access to state information.

The statutes neither precisely define 'national security' nor the procedure for classification, that is, who may classify, levels of classification and information subject to classification thus enabling the executive to withhold information to serve its interests. These statutes to the extent they are imprecise do not constitute 'law' according to section 39(3) of the 1999 Constitution.

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<sup>169</sup> Tshwane Principles, Principle 4.

#### 4.3.2 Legitimate purpose

The reasons for exemptions provided for in law must serve a legitimate public interest. Measures designed to protect national security ought to strengthen the interests of society vis-à-vis the basic rights and freedoms of the individual. As a matter of fact, access to information that may enable persons better understand or participate in government decision-making or which exposes abuse of authority or the existence of any threat to public safety ought not to be restricted. Unfortunately, the Official Secrets Act 1962 and the National Security Agencies Act 1986 permit the classification of information for the sake of vague interests of national security subject to the whims of the executive. Expressly specifying these requirements in law will attenuates any kind of arbitrariness and abuse in classifying information.

#### 4.3.3 Democratic society

The right of access to information as discussed in chapters 2 and 3 is the linchpin of a healthy democracy, a means of combating corruption and for protecting other rights. Considering its importance then, information may not be withheld except it is ‘necessary’ or justifiable in a ‘democratic society’, that is, in cases of substantial harm to national security, for instance. This means that a restriction must undergo a heavy scrutiny to ensure it is not excessive or disproportionate to the legitimate purpose it seeks to achieve. Hence, the disadvantages of limitation should be strictly proportionate to and absolutely necessary to achieve the desired benefit.<sup>170</sup> This is the purport of the harm and public interest tests in the FOIA 2011. Before withholding information, a responsible government official or public institution must ensure the non-disclosure protects the public interest thus effectively balancing the right of access against the general interest of the society or the State.

A restriction which stifles or destroys the essence of the right cannot be fitting to achieve its objective, especially where a lesser or least restrictive means exists to achieve the same outcome. For instance, the use of criminal sanctions of its own is not contrary to international law, but it must be unquestionably necessary to achieve its purpose. Though the 14 years’ imprisonment prescribed by the Official Secrets Act for unauthorised disclosure of official information is neither

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<sup>170</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 69.

a minimum nor mandatory sentence, it has a chilling effect on the right of access to information since public officers would never disclose official information without 'orders from above'. A healthy democracy requires that government is constrained from using its machinery to suppress information on official wrongdoings. The discretion thus given to judicial officers to award lower or higher sentences ought to be exercised judiciously and judicially.

#### 4.4 CONCLUSION

The interplay of access to information and national security in a democracy only permits the classification of official information which addresses legitimate concerns of national security, and is narrowly tailored towards such. Thus, any restriction on the right of access to information on grounds of national security must pass the strict tests of legality, legitimacy and necessity. This calls for the repeal or painstaking amendment of existing statutes, which authorise the classification and criminalisation of unauthorised disclosure of state information without damage to national security. To remove any doubt in effecting the right balance between access to information and national security which is currently in favour of the latter, the Official Secrets Act must be repealed and necessary constitutional safeguards incorporated into the National Securities Agencies Act.

There must be substantial decriminalisation of public interest disclosure of official information. Nigeria should also consider enacting a separate whistleblower protection statute to further strengthen the right of public access to State-held information. Government agencies need to adequately train their staff, develop and adequately fund modern, functional and efficient record-keeping infrastructure. Also, the degree of harm that attracts national security classification of information must be specified and not left to executive discretion. 'National security' must be sufficiently described and itemised to obviate its 'chilling' effect on the public interest in official information and promote a liberal and rational decision-making public officials concerning denial of access to information.

## CHAPTER FIVE: JUDICIAL CONTROL OF NATIONAL SECURITY LIMITATIONS ON ACCESS TO INFORMATION IN NIGERIA

### 5.1 INTRODUCTION

As paragraph 4.2.5.7 of chapter four shows, a refusal of request for information pursuant to the Freedom of Information Act 2011 (FOIA 2011) by a public institution on national security grounds is subject to judicial review.<sup>1</sup> The courts will order disclosure if the public institution had no authority to withhold the information.<sup>2</sup> Beyond that, Nigerian courts have constitutional authority to determine the validity of the exercise of power to withhold information under laws such as the Official Secrets and National Security Agencies Acts.<sup>3</sup> Under sections 39(3) and 45(1) of the Constitution, a law that permits the withholding must be reasonably justifiable in a democratic society<sup>4</sup> otherwise the withholding will be inconsistent with the Constitution and liable to be invalidated by the judiciary which is the arbiter of what is reasonably justifiable in a democratic society.<sup>4</sup> The issue to be addressed then is: by what standards of civil liberties should the courts adjudge the extent to which statutory grant of powers to the executive to classify information is within constitutional ambit?

Thus, together with the introduction, the chapter is in four parts. Part 2 engages with the nature, extent and scope of judicial power in the Nigerian Constitution. It then sets out the standards of reasonably justifiable restrictions on access to information in article 9 of the African Charter read into the Constitution. It finally argues that the Official Secrets Act 1962 and National Security Agencies Act 1986 must be struck down as unconstitutional for vagueness and conferring unfettered discretion to classify information. Part 3 reviews the interpretive jurisprudence in Nigeria, which it argues is defective for constitutional protection for the right of access to

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<sup>1</sup> FOIA 2011, section 20.

<sup>2</sup> FOIA 2011, section 25.

<sup>3</sup> The 1999 Constitution, sections 1(3), 4(2), 36(1), 39(3), 46, etc.

<sup>4</sup> *DPP v Obi* [1961] ALL NLR 186; *Nwankwo v The State* [1983] CRN.

information, and suggests a purposeful interpretation. Part 4 concludes that the judiciary must ensure that national security restrictions on access to information accord with human dignity, the rule of law and other democratic principles.<sup>5</sup>

## 5.2 SCOPE OF JUDICIAL POWER AND CONSTITUTIONAL LIMITS ON GOVERNMENT

This part argues that the Official Secrets and the National Security Agencies Acts are invalid based on their inconsistency with section 39 of the Constitution. It starts by examining the constitutional principles of the rule of law and separation of powers which underlie judicial power and its implications for Nigeria's democracy. It then sets out the implications of the constitutional limits on legislative and executive powers pertaining to reasonably justifiable restrictions on the right of access to information according to the Constitution. It ultimately finds that limitations on the right of access to information by the Official Secrets Act 1962 and National Security Agencies Act 1986 are contrary to constitutional standards of what is reasonably justifiable in a democratic society.

### 5.2.1 Constitutional supremacy, judicial power and underlying principles

The separation of legislative, executive and judicial powers as created, limited and exercisable in terms of a supreme Constitution such as Nigeria's has far-reaching consequence.<sup>6</sup> Public authorities must act within the confines of their authority, and are subject to judicial review pertaining to the legality or constitutionality of their actions.<sup>7</sup> The power to authoritatively and with finality determine the correct interpretation of the Constitution belongs to the judiciary.<sup>8</sup> Furthermore, the judiciary is empowered to remedy every infraction of human rights violation at

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<sup>5</sup> See *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) para 33.

<sup>6</sup> Seidman 'Constitutional Standards of Judicial Review of Administrative Actions in Nigeria' *Nigerian Law Journal* 323. For an extensive discussion, see Ben Nwabueze *Constitutional Democracy in Africa Vol 3* (2003) (Ben Nwabueze 3) chapters 11, 12 & 13.

<sup>7</sup> Akintunde Emiola *Remedies in Administrative Law* 2 ed (2011) 32 (Akintunde Emiola); Ben Nwabueze *Constitutional Democracy in Africa Vol 1* (2003) ch 12 (Ben Nwabueze 1); Ben Nwabueze *Judicialism in the Commonwealth* (1977) 109 – 110; Iluyomade & Eka *Constitutional and Administrative Law* (1992); *Liyange v R* [1967] 1 A C 259; *The Bribery Commissioner v Ranasinghe* [1965] AC 179 at 198, 200.

<sup>8</sup> Ben Nwabueze 1 *ibid*, ch 12.

the suit of an aggrieved person<sup>9</sup> or in a public interest litigation.<sup>10</sup> It is important to explain in some detail the underlying basis of these judicial powers.

The Constitution is the organic law or *grundnorm* of Nigeria: it binds all persons, authorities and institutions in Nigeria; and all laws and acts of government derive their validity from it.<sup>11</sup> Because the Constitution is supreme it declares any power, law, rule or enactment (including prior existing military decrees and colonial laws) inconsistent with it to be invalid.<sup>12</sup> Thus, section 1 of the Constitution stipulates:

- (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
- (2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
- (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

In *Tanko v State*,<sup>13</sup> the Supreme Court expatiated on the importance of constitutional supremacy when it said:

It cannot be denied that the Constitution (the *grundnorm*) of this country, indeed, the constitution of any country is supreme. It is by it (the Constitution) that the validity of any laws, rules, or enactment for the governance of any part of this country will always be tested. It follows therefore, that all powers; be they legislative, executive and judicial, must ultimately be traced or predicated on the Constitution for the determination of their validity. All these powers that I have mentioned must be exercised in conformity with Constitution and indeed, cannot be exercised inconsistently with any provisions of the Constitution where any of them is so exercised, it is invalid to the extent of such inconsistency.

Thus, the 1999 Constitution is founded on respect for the rule of law, justice and equality.<sup>14</sup> Within the Nigerian context then, the rule of law intertwines with and is subsumed under constitutional

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<sup>9</sup>*Archbishop Okogie v AG Lagos State* (1981) 1 NCLR 218 at 229; Susa, B A & Nwugo, F O P *Constitutional Litigation in Nigeria* (2013); Oyelowo Oyewo *Constitutional Law in Nigeria* (2012) (Oyelowo Oyewo); Ben Nwabueze 1 op cit note 7, chaps 12 & 14; Kehinde M. Mowoe *Constitutional Law in Nigeria* (2003) (K Mowoe).

<sup>10</sup> Order 1 Rule 1 Fundamental Rights (Enforcement Procedure) Rules 2009; Akintunde Emiola op cit note 7 at 414.

<sup>11</sup>The 1999 Constitution, section 1(1); B O Nwabueze *the Presidential Constitution of Nigeria* (1982) ch 1; *Tanko v State* [2009] 14 WRN 1; *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228 (SC).

<sup>12</sup> See also *Attorney-General of Abia State v Attorney-General of the Federation* (2002) 17 WRN 1; *Attorney-General of Lagos State v Attorney-General of the Federation* (2003) 12 NWLR (Pt. 833) 1.

<sup>13</sup> [2009] 14 WRN 1.

<sup>14</sup> The 1999 Constitution, section 17(1) & (2).

supremacy<sup>15</sup> and other provisions that limit government powers including the guarantee of individual rights, of which the judiciary is the sentinel.<sup>16</sup> Except as the Constitution itself expressly permits, all persons, State organs and authorities in Nigeria are subject to the rule of law under the Constitution.<sup>17</sup>

The rule of law is a dynamic concept. As a principle of government it connotes supremacy of the ordinary laws, fixed and clear in their effect; equality of rulers and the ruled before the law as applied by independent judges; and no unlimited discretion by government.<sup>18</sup> Universally, it is recognised as signifying the legal protection of fundamental rights.<sup>19</sup> The rule of law particularly ensures that: criminal laws are not vague or indefinite; primary and delegated legislations are subject to judicial supervision; and rights protected by the constitution are not encroached upon without due process which must not conflict with the constitution.<sup>20</sup>

Thus, an independent judiciary whose function is to uphold the rule of law, prevent government arbitrariness and pronounce on the legality of government actions is the most important offshoot of constitutional supremacy.<sup>21</sup> In the case of *Military Governor of Lagos State v Chief Odumegwu Ojukwu*,<sup>22</sup> the Nigerian Supreme Court held that the:

Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law... The rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive.

The rule of law also incorporates the notion of separation of powers to ensure there is no fusion of government powers or functions in any one authority to prevent tyranny.<sup>23</sup> Hence, separation of

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<sup>15</sup> The 1999 Constitution, section 1(3).

<sup>16</sup> Grove 'The Sentinels of Liberty? The Nigerian Judiciary and Fundamental Rights' *JAL* (1963) 52; Ben Nwabueze *Constitutional Democracy in Africa Vol 3* (2003) 33, 57 – 9.

<sup>17</sup> *Attorney General of Bendel State v Attorney General of the Federation & Ors* [1982] 3 NCLR 1; *Shugaba v Minister of Internal Affairs* [1981] 2 NCLR 459; *The Federal Minister of Internal Affairs & Ors v Shugaba* [1982] 3 NCLR 915; *Agbaje v Commissioner of Police* [1969] 1 NMLR 176; *Balewa v Doherty* [1961] 1 ANLR 604.

<sup>18</sup> Wade *Administrative Law* 4 ed (1977) 21; United Nations Security Council Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/61 (2004).

<sup>19</sup> Mary Ann Glendon 'the Rule of Law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights*; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, arts 21, 28, 29, and Preamble (3) (1948).

<sup>20</sup> K Mowoe op cit note 9 at 18 – 9; *Ariori v Elemo* (1983) 1 SCNLR 1.

<sup>21</sup> Wade *Administrative Law* 4 ed (1977) 21; *Marbury v Madison* 5 U.S. 137 (1803).

<sup>22</sup> (1986) ANLR 233 at 246, per Obaseki JSC.

<sup>23</sup> Ivor Jennings *the Law and the Constitution* (1963) 49.

powers, though not explicitly mentioned, is a fundamental principle of the Nigerian Constitution.<sup>24</sup> As to the rationale for making the principle part of the Constitution, Eso JSC said:<sup>25</sup>

I do not claim to know the reason for the adoption of the doctrine in the U.S. Constitution but it seems to me that in so far as our Constitution is concerned observance of the doctrine is meant to promote both efficiency and preclude exercise of arbitrary power. Actually, whether one both of these aims succeed depends on the three arms of government but more in my view of the judiciary bringing it home to all the functionaries concerned at every opportunity.

The three powers of State created by the Constitution are separate in terms of function and personnel though not absolutely. Part II of the 1999 Constitution sets out '[p]owers of the Federal Republic of Nigeria' (sections 4 – 12). Section 4(2) provides that:

The National Assembly 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.

However, section 4(8) ensures that the Legislature cannot limit the courts' power to do justice by subjecting the exercise of legislative powers to court jurisdiction. It provides:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Section 5(1) of the Constitution vests executive powers of the State in the President and provides:

Subject to the provisions of this Constitution, the executive powers of the Federation:

- (a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and
- (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

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<sup>24</sup> The 1999 Constitution, sections 14(2)(a)(c) & 221 – 229; *Paul Unongo v Aper Aku* (1983) 3 SCNLR 332 (*Aku*). See also Nigeria Constitution Drafting Committee *Report of the Constitution Drafting Committee containing the draft Constitution. Vol. 1* (1976) xxxxi; Abiola Ojo 'Separation of Powers in a Presidential Constitution' *Public Law Journal* (1981) 105.

<sup>25</sup>*Aku* *ibid* (the National Assembly cannot make laws to curtail judicial power inconsistently with the Constitution).

The above section is the heart of the rule of law because it indicates that the exercise of executive power must have a basis in an enabling legal provision in a statute or the Constitution otherwise it is invalid.<sup>26</sup> Section 6(1) invests judicial power in the courts established by the Constitution. It states:

The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation. The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

Furthermore, subsection (6)(a)(b) of s 6 provides that:

The judicial powers vested in accordance with the foregoing provisions of this section –

- (a) shall extend, notwithstanding anything to the contrary in this constitution, to *all inherent powers and sanctions of a court of law* (emphasis supplied);
- (b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the *civil rights and obligations* of that person (emphasis supplied).

By virtue of the foregoing provisions, the judicial power is unfettered to review legislative and executive acts except as otherwise expressly stated by the Constitution. For instance, section 6(6)(a) above establishes that the inherent powers of the courts cannot be taken away or abridged by legislation, ‘notwithstanding anything to the contrary in the Constitution’.<sup>27</sup> Similarly, section 4(8) ensures no law outside the Constitution can limit the Courts’ power to do justice and protect fundamental liberties.<sup>28</sup>

### 5.2.2 *Judicial protection of constitutional right of access to information*

Thus, buoyed by sections 1(3), 4(8), 6(6)(a) and other provisions of the Constitution set out above, the courts are well-fortified to enforce the right of access to information guarantee by section 39(1) of chapter IV of the Constitution. This is quite important in this study because the entrenchment of individual rights, including access to information, is a constitutional limitation on the exercise of State powers, which the courts have a duty to police.<sup>29</sup>

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<sup>26</sup>Ben Nwabueze I op cit note 7.

<sup>27</sup>*Adigun & Ors v AG Oyo State [No. 2]* (1987) 2 NWLR (Pt. 56) 197.

<sup>28</sup>Akintunde Emiola op cit note 7 at 46 – 7.

<sup>29</sup>Ben Nwabueze I op cit note 7 at ch 14.

As argued in paragraphs 3.2.3 – 3.2.4 and 4.2.3 of chapters three and four respectively, freedom of expression including access to information guaranteed in article 9 of the African Charter have been incorporated into section 39(1) of the Nigerian Constitution.<sup>30</sup> Where there is a threatened or actual infringement of this rights in relation to any person, the person may institute an action for redress pursuant to a special procedure in section 46 of the Constitution. Section 46 expressly empowers the High Courts to enforce constitutionally guaranteed rights and give effective remedies,<sup>31</sup> and provides:

- (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.
- (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter.

The above provision and others in the Constitution can be viewed as giving teeth to the right to access to information considering its importance in a democracy. Such other provisions include section 6(6)(b) on judicial power and Constitutional right to fair hearing in section 36. These two provisions are closely intertwined. Section 36(1) provides in part thus:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

Section 36(1) is also intertwined with section 272 (1) of the Constitution, which gives jurisdiction to the High Court of a State as follows:

Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to

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<sup>30</sup> Chapter 4 of this thesis.

<sup>31</sup> These range from a 'declaration of rights', 'mandamus', 'order of prohibition', 'order of certiorari', 'habeas corpus', 'injunction', 'compensation and award of damages' and 'apology'. See Oyelowo Oyewo op cit note 9 (2012) 134 – 5, 147 – 50. Section 236 of the Constitution of the Federal Republic of Nigeria 1979 (1979 Constitution) similar to s 272(2) was judicially interpreted as enabling the courts to provide such remedies in *Bronik Moors Ltd. v Wema Bank Ltd.* (1983) 6 SC 158 – 350; *Savannah Bank of Nig. Ltd. v Pan Atlantic* (1987) 1 NWLR (Pt. 9) 212; *Tukur v Govt. of Gongola State* (1989) 4 NWLR (Pt. 117) 517; *Military Government of Ondo State v Adewunmi* (1988) 3 NWLR (Pt. 82) 280; *A G Federation v Sode* (1990) 1 NWLR (Pt. 128) 500.

hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

A summary of sections 4(2)(8), 5(1), 6(1)(6)(a)(b), 36(1), 46(1) and 272(1) that the courts are empowered to inquire into the constitutionality of executive and legislative acts that infringe on the ‘civil rights and obligations’ of any person.<sup>32</sup> This power may be enforced through judicial determination of the substantive or procedural validity of legislations that provide for restrictions and the exercise of executive powers to implement such restrictions.<sup>33</sup> The relevant provisions at issue in this chapter being sections 39(3) and 45(1) of the Constitution, the analysis of these shall form the crux of next discussion.

### 5.2.3 Normative standards for permissible national security restrictions under sections 39(3) and 45(1)

In a competent action, the courts have a duty to declare any legislative and executive act that restricts fundamental rights inconsistently with constitutionally laid down conditions and standards such as found in sections 39(3) and 45(1) as unconstitutional and void.<sup>34</sup> But before analysing relevant standards there is need to consider some underlying principles.

The ability to make a declaration of invalidity flows from both the inherent and express powers of the courts, that is, by a combined reading of conferred on it by sections 1(3), 4(8), 6(1)(2)(6)(a)(b), 46, etc., of the Constitution.<sup>35</sup> Eso JSC reflected on the importance of inherent judicial power in section 4(8) of the 1979 Constitution from which section 4(8) of the 1999 Constitution evolved thus:

The powers conferred on the courts by section 4(8) are wider than the inherent powers to interpret the constitutional system such as ours. The express provision of the powers vested in the courts and the mandatory nature of it indicate to my mind an intention on the part of the framers of the

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<sup>32</sup> Akintunde Emiola op cit note 7. However, judicial opinions as to the meaning of the phrase ‘civil rights and obligations’ oscillate between rights guaranteed in chapter IV only, rights protected overall by the Constitution and any legal right whether protected by the Constitution or ordinary statutes. See *Senator Adesanya v The President* (1981) 2 NCLR 338; *Irene Thomas v Archbishop Olufoyo* (1986) 1 NWLR (Pt. 18) 669 (‘these are fundamental rights no more no less’, per Niki Tobi JSC).

<sup>33</sup> *Hon. Muyiwa Inakoju & Ors. v Hon, Abraham Adeleke & Ors.* (2007) 4 NWLR (Pt. 1025) 423 at 653, 661, 698; *AG Bendel State v AG Federation & Ors.* (1981) 10 SC 1; *Lakanmi v AG Western State & Ors.* (1970) NSCC 143.

<sup>34</sup> *Archbishop Okogie v AG Lagos State* (1981) 1 NCLR 218 at 229.

<sup>35</sup> *Oyelowo Oyewo* op cit note 9 at 145. *Adiukwu v Federal House of Representatives* (1982) 3 NCLR, 394 SC; *Attorney General Bendel State v Attorney General Federation* (1981) 10 SC 1, per Eso JSC at 178 – 9.

Constitution that the Courts should have this power to scrutinize the exercise of legislative power by the National Assembly. The inherent power is provided for in section 6(6)(a) and the *ultra vires* doctrine could be applied in respect of any law which violated section 4(2)(3) but yet, the Constitution stipulated section 4(8). It seems to be one of the many checks and balances contained in our Constitution. It is also unique among written Constitutions.<sup>36</sup>

Hence, an Act of the National Assembly (or a prior existing law having effect as if so made)<sup>37</sup> may be declared unconstitutional or *ultra vires*, if it deviates from substantive<sup>38</sup> or procedural<sup>39</sup> requirements for the valid exercise of legislative power.<sup>40</sup> This applies to former military Decrees modified to become existing laws on the coming into effect of the 1999 Constitution.<sup>41</sup> Similarly, Rules<sup>42</sup> made by the executive (or other non-primary law-making body) under authority derived from an enabling provision, be it the Constitution, Act of the National Assembly or Law of a State,<sup>43</sup> take effect as subordinate, subsidiary or delegated legislation.<sup>44</sup> For instance, ‘any system of security classification’ that may be devised by any branch of government under section 9 of the Official Secrets Act 1962 and cross-referenced in section 2(5) of the National Securities Agencies Act 1986 fall under this category. Thus, subordinate legislation in Nigeria may be rendered *ultra vires* procedurally or substantively and invalid if made contrary to prescribed procedure or substantive scope of powers delegated by its enabling provision.<sup>45</sup>

Now to the issue at hand. The pertinent question here is: what are the substantive or procedural requirements of section 39(3) of the Constitution the noncompliance with which renders the Official Secrets Act 1962 and the National Securities Agencies Act 1986 constitutionally inconsistent and liable to judicial invalidation? These provisions are respectively set out. Section 39(3) provides that:

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<sup>36</sup>See *Adigun v AG of Oyo State* (No. 2) (1987) 2 NWLR (PT. 56) 197.

<sup>37</sup> 1999 Constitution, section 315.

<sup>38</sup>*Fawehinmi v Babangida* (2003) 3 NWLR (Pt. 808) 604.

<sup>39</sup>*Attorney General Bendel State v Attorney General Federation* (1982) 3 NCLR 1 (SC) (the 1980 Appropriation Bill assented to by the President was held to be a nullity because it did not pass through the procedure enumerated for money bills in sections 54 and 55 of the 1979 Constitution).

<sup>40</sup>See the 1999 Constitution, section 4(2).

<sup>41</sup>*Attorney General Lagos State v Attorney General Federation* (2003) 12 NWLR (Pt. 833) 1 (SC); *Attorney General Federation v Attorney General Abia State* (2002) NWLR (pt. 808) 604 SC (SC).

<sup>42</sup> These take different forms in Nigeria including Regulation, Rules, Orders, Statutory Instruments, Directives, Circulars, Guidelines, bye-laws, etc., see Oyelowo Oyewo *Constitutional Law in Nigeria* (2012) 42 – 4.

<sup>43</sup> See Interpretation Act, section 18 Cap. 213 Laws of the Federation of Nigeria (LFN) 2004.

<sup>44</sup>*Barclays Bank of Nigeria Ltd. v Ashiru & Ors.* (1978) 6 – 7 SC 70.

<sup>45</sup>*Attorney-General v Sode* (1990) 3 SC (Pt. 1) 1 (SC); A W Bradley & K D Ewing *Constitutional and Administrative Law* 15 ed (2011) 661 – 3.

- (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.

Essentially, the judiciary is the final arbiter of what is ‘reasonably justifiable in a democratic society’ under sections 39(3) and 45(1).<sup>46</sup> Yet, judicial control does not connote judicial supremacy over other organs of government.<sup>47</sup> Hence, the courts must be guided by the constitutional standards of what is ‘reasonably justifiable’. As argued in paragraph 4.2.2 of thesis, to be reasonably justifiable, a restriction must be provided by law; serve a legitimate interest; and necessary and proportionate to the legitimate aim pursued. These standards are clearly specified under article 9 of the African Charter (as incorporated into Nigerian law).<sup>48</sup> To reiterate, a limiting law must:

- a. be of general application, precise without conferring unfettered discretion to effect restrictions upon persons entrusted with its execution;<sup>49</sup>
- b. the legitimate purpose served by the law should not override or undermine fundamental rights guaranteed by the constitution and international law.<sup>50</sup>
- c. A legitimate limitation must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never eviscerate the right itself;<sup>51</sup>

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<sup>46</sup>*DPP v Chike Obi* [1961] ALL NLR 186; *Arthur Nwankwo v The State* (1983) FRN 320.

<sup>47</sup>G A Arowolo and Anwo J O ‘Judicial Review of Legislation in Nigeria: A constitutional imperative’ (2015) 2 *Joseph Ayo Babalola University Law Journal* 42.

<sup>48</sup>African Charter (Ratification and Enforcement) Act Cap 09 LFN 2004, section 1.

<sup>49</sup>*Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 107; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 57 – 9; *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).

<sup>50</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 64; *Good v Republic of Botswana* (2010) AHRLR 43 (ACHPR 2010); *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003).

<sup>51</sup>*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 69; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) 105 para 43; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) paras 78 – 9; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 72.

- d. the limitation must be rationally connected and proportionate to its purpose;<sup>52</sup> and
- e. Be a least restrictive means to achieve its purpose.<sup>53</sup>

The next question to be answered then is whether the Official Secrets and National Security Agencies Acts satisfy these requirements.

#### 5.2.5 Unconstitutionality of Official Secrets and National Security Agencies Acts

The Official Secrets Act 1962 and National Security Agencies Act 1986 are an unconstitutional exercise of legislative power and invalid to the extent of their inconsistencies on the grounds of vagueness and excessiveness of restrictions imposed.

As noted in paragraph 5.2.4 above, section 39(3) of the Constitution embodies three conditions for validity of restrictions on access to information when it provides: ‘Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society ...’ namely, it must be prescribed by a precise law; serve a legitimate purpose and not disproportionate. First, the Official Secrets Act and National Security Agencies Act do not qualify as ‘law’ in terms of section 39(3) because they not provide a precise definition of ‘national security’ based on which they confer unfettered discretion on the executive to classify information. Under the Official Secrets Act, no one shall disclose or receive ‘classified matter’. This means ‘any information or thing which, under any system of security classification, from time to time, in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria’.<sup>54</sup> Similarly, the National Security Agencies Act protect indeterminate military and non-military ‘classified matters’<sup>55</sup> concerning national security vaguely defined in terms of the latter Act.

Second, the criminal sanctions imposed by these statutes are disproportionate to their national security purpose. For instance, it is still a crime potentially punishable with 14 years’ imprisonment under the Official Secrets Act to make public interest disclosure or receive information that does not harm national security, which reveals human rights violations, fraud or abuse of power. But

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<sup>52</sup>*Interights and others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), paras 64 – 75.

<sup>53</sup>Communications 279/03, 296/05: *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (‘the COHRE case’) para 214.

<sup>54</sup>Official Secrets Act 1962, section 9(1).

<sup>55</sup>NSA Act, sections 1(a)(b)(c), 2(1)(b)(c) & (3)(b).

both statutes prescribe no test of prejudice to national security that disclosure of ‘classified matters’ would engender. Therefore, these statutes create substantial excuses for the State to eviscerate the right of access to information, they are thus *ultra vires* the National Assembly, unconstitutional and ought to be judicially declared so.

The last issues to be dealt with in this chapter relates to the interpretive stance of Nigerian courts as to whether access to information is an actionable constitutional right and how have they engaged with national security restrictions thereto.

### 5.3 INTERPRETIVE JURISPRUDENCE ON CONSTITUTIONAL PROTECTION FOR ACCESS TO INFORMATION

This section argues that the interpretive approach in Nigerian jurisprudence to protect the constitutional right of individuals to obtain information held by the state is deficient and proposes a purposive alternative. An analysis of relevant jurisprudence reveal that the courts have not viewed access to state information as having a constitutional status, but more or less been beguiled by the imperative of national security. Before analysing the cases, it would be appropriate to set out the interpretive principles of the Nigerian Constitution as a foundation for the discussion that follows in paragraph 5.3.2 below.

#### 5.3.1 Models of interpretation of the Nigerian Constitution

It is important to state from the onset that the judiciary is keenly aware of its ultimate responsibility to declare and interpret provisions of the Constitution. Accordingly, the Nigerian Supreme Court, which also doubles as the Constitutional Court,<sup>56</sup> is careful to note that:

The 1999 Constitution of Nigeria is not an academic document, but a unique Constitution enacted for a peculiar socio-cultural setting and for finding solutions to constitutional problems for which only the provisions of the Constitution are designed, except in cases where similar provisions of other Constitutions may be of persuasion.<sup>57</sup>

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<sup>56</sup>Mohammed Lawal Uwais *the Evolution of Constitutionalism in Nigeria: The Role of the Supreme Court Under The 1979 And 1999 Constitutions* (2006) 19.

<sup>57</sup>According to Bello JSC in *Senator Abraham Adesanya v The President of the Federal Republic of Nigeria & Anor.* (1981) 5 S.C. 112 at 149.

The court has further said that the function of the Nigerian Constitution,

...is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions...therefore, more technical rules of interpretation of statutes are to some extent inadmissible...to defeat the principles of government enshrined in the Constitution.<sup>58</sup>

Most importantly, the Supreme Court has held itself duty bound to safeguard fundamental rights in the country

‘...having regard to the nascence of our Constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily have to be placed, as a result of this background on the courts...’<sup>59</sup>

The Supreme Court has often reiterated interpretive principles for the Constitution. These principles are not explicitly stated in the Constitution, but have evolved through judicial decision-making. The foremost principle of interpretation of the Nigerian Constitution is one of ‘liberalism’ as enunciated in the immortal words of Udo Udoma JSC who said:

‘My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism ... I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.’<sup>60</sup>

This approach has been subscribed to by later jurists. For example, Obaseki JSC in *Garba & Ors v University of Maiduguri*<sup>61</sup> said:

The provisions of the constitution are to be given liberal construction so as to best carry out the instruction of the founding fathers...This court will not give to any of the provision of the constitution a construction which will defeat its obvious intention.<sup>62</sup>

In construing doctrines such as *locus standi* which limits access to the courts, the position of the Supreme Court is that, as far as constitutional matters are concerned, is that:

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<sup>58</sup>*Nafiu Rabi v The State* (1980) 8-11 SC 130 – 235 at 148 – 149, per Sir Udo Udoma, JSC; *Minister of Internal Affairs & 3 Others v Shugaba Abdulrahman Darman* [1982] 3 NCLR 915 at 929, per Uche Omo, JSC.

<sup>59</sup>*Ariori & Ors. v Elemo & Ors.* (1983) 1 SC 13 at 66.

<sup>60</sup> As per Udo Udoma, JSC in *Nafiu Rabi v The State* (1980) 8 – 11 SC 130 – 235 at 149.

<sup>61</sup>*Garba & Ors v University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550 at 583.

<sup>62</sup> A liberal approach was adopted by Karibi-Whyte and Kayode Eso, JJSC, in *Gani Fawehinmi v Akilu & Anor* (1987) 4 NWLR (Part 67) 797 (where the Supreme Court developed and introduced the concept of brotherhood to soften the rules of locus standi to enable the Appellant, a lawyer, whose friend and client was killed by a parcel bomb allegedly delivered to his residence on the orders of the Respondent, carry out a private criminal prosecution of the Respondent). See also Obaseki JSC in *Abraham Adesanya v The President of Federal Republic of Nigeria* (1981) 5 SC 112 at 176

It has to be accepted that our Constitution has undisguisedly put the judiciary in a “pre-eminent” position, a position unknown to any other constitution ... where the judiciary has to see to the correct exercise of the legislative powers by the National Assembly (section 4(8)). There is no doubt ... the court has to interpret the constitutional provisions broadly...<sup>63</sup>

Again, Nigerian judges often assert that the courts’ primary concern is to give effect to the original meaning of the Constitution by ascertaining such from ‘the spirit of the constitution’ or the intention of its drafters through resort to the words used. Hence, the courts cannot through their interpretation amend the Constitution or change the words used; they lack power to import into the meaning of a word, clause or section of the Constitution or statute what it does not say.<sup>64</sup> Where the provisions are clear and unambiguous, the courts must give effect to their plain meaning unless it would be absurd to do so, having regard to the nature and circumstance of the case.<sup>65</sup> Other binding principles which must be borne in mind by judges in interpreting the Constitution enunciated by Obaseki JSC are as follows:<sup>66</sup>

1. Effect must be given to every word.
2. A construction nullifying a specific clause will not be given to the constitution unless absolutely required by the context.
3. A constitutional power cannot be used way of condition to attain unconstitutional result.
4. The language of the Constitution where clear and unambiguous must be given its plain evident meaning.
5. The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be severed from the rest of the Constitution.
6. While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.
7. A constitutional provision should not be construed so as to defeat its evident purpose.
8. Under a constitution conferring specific powers, a particular power must be granted or it cannot be exercised.
9. Delegation by the National Assembly of its essential legislative function is precluded by the Constitution (section 58(4) and section 4(1)).
10. ....
11. The principles upon which the constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.
12. Words of the Constitution are therefore not to be read with stultifying narrowness.

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<sup>63</sup>*Attorney General-Bendel State v Attorney-General Federation & 22 Ors.* (1981) 10 Sc 190 – 192, per Eso JSC (SC).

<sup>64</sup>*Nafiu Rabiu v The State* (1980) 8 – 11 SC 130 – 235; *Peoples Democratic Party and Anor. v Independent National Electoral Commission and Ors.* (2001) 1 FWLR 27 - 35. *Nasiru Bello & Ors. V A. G. Oyo State* (1986) 5 NWLR (Pt. 45) 828.

<sup>65</sup>*Awolowo v Shagari* (1979) 6-9 SC 51; *Alamiyeseigha v FRN* (2006) 16 NWLR pt 1004 1; *Rabiu v State* (1980) 8 – 11 SC 130; *A-G Bendel State v A-G Federation* (1981) 10 SC 1; *Owena v NSE Ltd* (1997) 8 NWLR (Part 515).

<sup>66</sup>See Obaseki, JSC in *Attorney General Bendel State v Attorney General Federation & 22 Ors* (1981) 10 SC 1 – 330 at 132 – 4.

Ideally, the judicial attitude towards a liberal construction of the Constitution should ensure the realisation of principles of democracy<sup>67</sup> and constitutional objectives of freedom, equality and justice<sup>68</sup> or such values encompassed in chapter IV of the Constitution (fundamental rights). This entails expanding the boundaries of individual liberties except for limitations acceptable in a democratic society that values human dignity.<sup>69</sup>

### 5.3.2 The courts' approach to constitutional protection for access to information

The approach of Nigerian courts in adjudicating claims for Constitutional right of access to information may be categorised into two: pre and post FOIA 2011 eras. The emerging issue, post-2011, is whether the FOIA 2011 gives effective protection to the right to receive information in s 39 of the Constitution in which case the Act is binding on the whole Federation or whether it relates only to the National Legislative power on public records and documents, in which case its operation would not bind the 36 states of the Federation. Hence the determination of the issue pertaining to the constitutional protection for the right of access to information is, most times, usually glossed over.

#### 5.3.2.1 Pre-2011 Access to information cases

Due to a number of reasons, including the promulgation of Decrees with ouster clauses and the use of state prosecutorial powers to harass citizens, most actions and prosecutions during this period did not undergo full-blown trial. Hence, the courts could not effectively pronounce on the constitutional protection for the right of access to information.

For instance, in *Dr. Olu Onagoruwa v Major-General Ibrahim Babangida (President of the Federal Republic of Nigeria) & Another*,<sup>70</sup> the Applicant, a Lawyer, instituted the action on 15 April 1987 against the Government to seek the following reliefs:

1. A Declaration that the proscription of Newswatch Magazine by the Newswatch (Proscription and Prohibition from Circulation) Decree No. 6 of 1987 by the 1<sup>st</sup> Defendant violates the

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<sup>67</sup>1999 Constitution, section 14(1).

<sup>68</sup> 1999 Constitution, section 17(1).

<sup>69</sup> 1999 Constitution, sections 17(b), 21(a) and chapter IV (fundamental rights) which protect human dignity and Suit No. CA/L/255/92, *Olisa Agbakoba v The Director, SSS & Another*, Richard Akinola (ed) *Cases and Materials on Human Rights in Nigeria* Civil Liberties Organisation: Lagos (1994) 81 – 113 at 93.

<sup>70</sup> (Suit No. LD/658/87, Ruling of Lagos High Court delivered 18 May 1987), reported in Richard Akinola (ed) *Cases and Materials on Human Rights in Nigeria* Civil Liberties Organisation: Lagos (1994) 32 (*Onagoruwa v Babangida*).

Constitutional Right of the Plaintiff to be informed by receiving information (without interference) of the responsibility and accountability of the Government of Nigeria (Federal and States) to the people of Nigeria.

2. A Declaration that the said Decree is a usurpation by the 1<sup>st</sup> Defendant of the judicial powers of the Federation vested in the courts by section 6 of the 1979 Constitution and consequently the said Decree is unconstitutional.

The Plaintiff also filed an interlocutory application seeking ‘[a]n Order suspending the operation of the Newswatch Magazine (Proscription and Prohibition from Circulation) Decree No. 6 of 1987 pending the final determination of this suit’ and invoked section 36(1) of the 1979 Constitution which was *impari materia* with section 39(1) of the 1999 Constitution. The Attorney-General of the Federation, on behalf of the Defendants, opposed the application claiming that the Plaintiff lacked *locus standi* to institute the action since his case was not founded on ‘the right to information generally’, but on accountability of the government, a non-justiciable ‘right’ under the Constitution.<sup>71</sup> It is noteworthy that *Newswatch Magazine* was proscribed for allegedly publishing classified information contrary to the provisions of the Official Secrets Act 1962, which as Plaintiff’s Counsel contended, was a legislative judgement.<sup>72</sup>

However, the matter was struck out because the Constitution (Suspension and Modification),<sup>73</sup> and the Federal Military Government (Supremacy and Enforcement of Powers) Decree,<sup>74</sup> had ousted the court’s jurisdiction to determine the competence of the Military to make any law. The Decrees combined the executive, and the legislative powers in the Military Government, and also barred the courts from inquiring into any question pertaining to the breach of any fundamental rights under a Decree. The court held that by being superimposed on the Constitution the Decrees had displaced the latter as the *grundnorm* of Nigerian law. The court discountenanced the Plaintiff’s Counsel’s argument that the court was still entitled to determine whether Decree No. 6 was a valid exercise of power under Decrees Nos 1 and 13. It held that since the Decrees superseded fundamental rights the validity of Decree No. 6 could not be challenged in court. Hence, instead of construing the ouster clause narrowly so as to save its

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<sup>71</sup> *Onagoruwa v Babangida* *ibid*, 34.

<sup>72</sup> *Ibid*, 36.

<sup>73</sup> No. 1 of 1984.

<sup>74</sup> No. 13 of 1984.

inherent power to determine whether Decree No. 6 was an invalid exercise of legislative power under Decree No. 13, it did so narrowly.<sup>75</sup>

Another relevant case involved the Incorporated Trustees of Media Rights Agenda (MRA) and Mr. Edetaen Ojo, MRA's Executive Director, as Applicants, against the Code of Conduct Bureau (CCB) and the Attorney-General of Nigeria, as Respondents (the MRA case).<sup>76</sup> By an Originating Summons filed at the Federal High Court, Lagos in August 1999, the Applicants sought the court's order to compel the Respondents to release to it copies of the declaration of assets of 40 public officers including former President Olusegun Obasanjo. One of the four questions submitted for determination was:

whether the true interpretation and effect of Section 3[c] of Part 1 of the Third Schedule to the Constitution is that every Nigerian has an uninhibited right of access to assets declarations made by public officers, which can only be circumscribed if the National Assembly imposes lawful conditions for that purpose; and if the answer to this question is also yes, whether the Bureau's refusal to give MRA access to the assets declarations made by the affected public officers is not unconstitutional.

The CCB is an anti-corruption mechanism established under section 153(1)(a) of the Constitution to receive, verify and keep asset declarations to be made on oath by public officers. Section 3(c) of Part I of the Third Schedule provides that the CCB shall have power to:

retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe.

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<sup>75</sup> During military rule in Nigeria, the military reversed the *grundnorm* of Nigeria from the Constitution to military Decrees, most of which ousted the courts' jurisdiction to adjudicate fundamental rights cases. Most times, the judiciary felt bound to accept the fait accompli foisted upon it by declining jurisdiction in fundamental right cases, see: *Major-General Zamani Lekwot v Judicial Tribunal on Communal Disturbances in Kaduna State* [1993] 2 NWLR (Pt. 276) 410; *N K Adamolekun v University of Ibadan* (1968) NMLR 253; *Military Government of Ondo State & Anor. v Victor Adegoke Adewunmi* [1983] 3 NWLR (Pt. 82) 280, 306 – 7, per Karibi-Whyte JSC. However, in some moments of activism, the Supreme Court laid down a principle of narrow construction of ouster clauses to the effect that such clauses took effect only when there had been strict compliance with provisions of a Decree. Hence was entitled first to assume jurisdiction to determine whether it had jurisdiction, see: *Saidu Garba v Federal Civil Service Commission & Another* [1988] 1 NWLR (Pt. 71) 449. In Suit No. M/102/93, *The Registered Trustees of the Constitutional Rights (CRP) v The President of the Federal Republic of Nigeria & 2 Others*, Reported in Richard Akinnola (ed) *Cases and Materials on Human Rights in Nigeria* (1994) 218 – 249 and Suit No. M/462/93, *Richard Akinnola v General Ibrahim Babangida & 3 Ors.* Ibid, Richard Akinnola (ed) 250 – 268. In both cases, objection to the jurisdiction of in the court similar to the one made in *Onagoruwa* were made, but the courts in these cases held that the African Charter saved their jurisdiction to determine the legality of ouster clauses in military Decrees which were thus narrowly construed.

<sup>76</sup>(The case is unreported, but its facts were culled from MRA's website), see 'Press Release (May 2, 2001) Court Dismisses MRA's Suit Over Public Officers Assets Declarations' available at [http://www.mediaryightsagenda.org/pressrel/pr\\_20010502.htm](http://www.mediaryightsagenda.org/pressrel/pr_20010502.htm), accessed 17 December 2016.

Hence, the real issue was whether in the absence of a law passed by the National Assembly prescribing such terms of access, any person is entitled to any right of access to asset declarations. The Respondents raised a preliminary objection to MRA's action, arguing that it lacked *locus standi* to institute the action and the court lacked jurisdiction to entertain the matter since the National Assembly was yet to pass legislation prescribing terms of access to asset declarations. The court held that the Constitution gives a right to inspect declarations, which is inchoate until the National Assembly passes an Act prescribing the terms and conditions for access, and struck out the action.

It is noteworthy that the pre-2011 cases discussed were struck out without full trial, hence no principles were developed. But the MRA case could have been alternatively predicated on a positive State obligation under article 9 of the African Charter read into section 39(1) of the Constitution to guarantee access to information as argued in Chapter 4 of the thesis. Then, the Applicant could have argued that the State's failure to pass a law providing terms of access to asset declarations was in violation of section 39(1).

#### 5.3.2.2 *Post-2011 Access to information cases*

The post-2011 cases largely portray a lack of awareness among judges and lawyers alike of the human right or constitutional dimensions of the right of access to information. Indeed, judges and lawyers adopt opposing views: some argue the FOIA applies to both the Federal Government and the 36 States of Nigeria<sup>77</sup> while some say it applies only to the former.<sup>78</sup>

Those in the latter group advance two main reasons for their viewpoint. First, that 'information', the subject matter of the FOIA, is neither in the Exclusive or Concurrent Legislative Lists of the Constitution, hence the FOIA must be 'domesticated' before it can apply in the States.<sup>79</sup> Second, that the FOIA corresponds to the concurrent legislative power invested in both the National

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<sup>77</sup> Media Rights Agenda 'Judge Rules that FOI Act is of General Application to all tiers of Government, their Officials, Agencies and Institutions', posted December 18 2013 available at <http://mediarightsagenda.net/web/judge-rules-that-foi-act-is-of-general-application-to-all-tiers-of-government-their-officials-agencies-and-institutions/>, accessed 20 December 2016.

<sup>78</sup> See [freedominfo.org](http://www.freedominfo.org) 'Application of Nigerian FOI Law to States Contested' posted on February 14 2014, available at <http://www.freedominfo.org/2014/02/application-nigerian-foi-law-states-contested/>, accessed 20 December 2016.

<sup>79</sup> *Ibid.*

Assembly and States to protect ‘public archives and records’ under paragraphs 4 and 5 of the Concurrent Legislative List of the Constitution.<sup>80</sup> Thus, the question whether the FOIA gives legislative effect to Nigeria’s positive obligation under article 9 of the African Charter or constitutional right of access to information has been glossed over except in one case. In Unreported Suit No. M/332/12, *Yomi Ogunlola & 1 Or v Speaker, Oyo State House of Assembly & 3 Ors*,<sup>81</sup> the questions for determination were:

- (1) Whether any Act of the National Assembly, made in furtherance of its powers under section 4(2) and 4(4) (b) of the 1999 Constitution (as amended) to make laws for the peace, order and good government of the Federation or any part thereof requires States’ domestication to be applicable in the respective states of the Federation?
- (2) Whether the Freedom of Information (FOI) Act, 2011, intended to ease access *inter alia* to public records and Information should be construed restrictively as applicable only to Federal Government institutions?
- (3) Whether in constructing Section 2(1) of the Freedom of Information Act, 2011 the 3<sup>rd</sup> Respondent is right to hold that the Freedom of Information Act 2011 is inapplicable to Oyo State same not having been domesticated.

The Plaintiff’s Counsel’s arguments turned on whether the FOIA 2011 was a competent exercise of power by the National Assembly pursuant to section 4(2) of the Constitution to give legislative effect to the right to receive information guaranteed in section 39 of the Constitution. The Defendants argued that ‘information’ is not included in the Exclusive Legislative List in Part 1 of the Second Schedule to the Constitution within the exclusive legislative competence of the National Assembly. It also contended that the FOIA’s objective ‘to make public records and information more freely available’<sup>82</sup> is cognisable under powers shared by the National

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<sup>80</sup>Paragraph 4 reads: ‘The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation’ while paragraph 5 reads: A House of Assembly may, subject to paragraph 4 hereof, make laws for that State or any part thereof with respect to archives and public records of the Government of the State’. There are two broad legislative powers exercisable under the Nigerian model of federalism. These are Exclusive Legislative List (ELL) in Part I of the Second Schedule to the Constitution consisting of 68 items, and the Concurrent Legislative List (CLL) in Part II of the Second Schedule to the Constitution consisting of 30 items. The Supreme Court has held that the National Assembly (NASS) has power to the exclusion of a State House of Assembly to legislate on any matter listed in the ELL. Furthermore, the NASS shares competence with a State House of Assembly to legislate on any issue on the CLL. But by virtue of the doctrine of ‘covering the field’ while applies in Nigeria, where an Act of the National Assembly ‘covers the field’ or the total extent of powers exercisable by it under the Second Schedule on any item on the CLL, then a House of Assembly is barred from passing any law again on that subject. See *AG Abia State & Ors v AG Federation & Ors*.

<sup>81</sup> See ‘Judge Rules that FOI Act is of General Application to all tiers of Government, their Officials, Agencies and Institutions’, available at <http://mediarightsagenda.net/web/judge-rules-that-foi-act-is-of-general-application-to-all-tiers-of-government-their-officials-agencies-and-institutions/>, (of High Court, Ibadan delivered 31st Day of October, 2013) accessed 17 December 2016.

<sup>82</sup> FOIA 2011, the explanatory memorandum.

Assembly with the States under paragraphs 4 and 5 respectively of the Concurrent Legislative List to legislate on archives and public records.<sup>83</sup> Hence, the Defendants contended that since States of the Federation could also legislate on public records and information the FOIA only binds the Federal Government and not the States. Considering the complexity of these arguments it is important to replicate relevant provisions that had to be interpreted, especially section 4 subsections (2), (3), (4), (5), (6) and (7) of the Constitution, which provide:

- (2) The National Assembly 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.
- (3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.
- (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say—
  - (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
  - (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
- (5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency be void.
- (6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.
- (7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say—
  - (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
  - (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

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<sup>83</sup>Paragraph 4 reads: ‘The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation’ while paragraph 5 reads: A House of Assembly may, subject to paragraph 4 hereof, make laws for that State or any part thereof with respect to archives and public records of the Government of the State’. There are two broad legislative powers exercisable under the Nigerian model of federalism. These are Exclusive Legislative List (ELL) in Part I of the Second Schedule to the Constitution consisting of 68 items, and the Concurrent Legislative List (CLL) in Part II of the Second Schedule to the Constitution consisting of 30 items. The Supreme Court has held that the National Assembly (NASS) has power to the exclusion of a State House of Assembly to legislate on any matter listed in the ELL. Furthermore, the NASS shares competence with a State House of Assembly to legislate on any issue on the CLL. But by virtue of the doctrine of ‘covering the field’ while applies in Nigeria, where an Act of the National Assembly ‘covers the field’ or the total extent of powers exercisable by it under the Second Schedule on any item on the CLL, then a House of Assembly is barred from passing any law again on that subject.

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

Akinteye J gave several reasons and applied the rule of liberal construction of the Constitution in his judgment to uphold the enactment of the Act. His Lordship held that since the Act was enacted to give access to ‘information’ held by ‘public institutions’ defined as legislative, executive and judicial bodies,<sup>84</sup> then it was clear the Act was enacted to bring into effect the fundamental ‘right to receive information without interference’ in section 39(1) of the Constitution. According to His Lordship, notwithstanding that ‘information’ is neither on the Exclusive nor Concurrent Legislative List, by a liberal construction of the Constitution, the FOIA gives effect to state policy to eradicate corruption by making information held by institutions more readily available. Furthermore, that this was pursuant to powers of the National Assembly under section 4(2) of the 1999 Constitution to ‘make laws for the peace, order and good government of the federation or any part thereof’.<sup>85</sup> Furthermore, the judge held that the National Assembly is competent to make laws applicable throughout the Federation for the peace, order, and good government of Nigeria to correct a malaise (such as corruption) plaguing the country without infringing on the States’ legislative autonomy.

However, in a judgement of a Federal High Court, delivered a year after Akinteye J’s decision, Abang J held that the FOIA 2011 was binding only on federal government and its agencies and not on the 36 states of the federation.<sup>86</sup> That was in an action by Legal Defence and Assistance Project Limited (LEDAP Ltd) against the Attorney-General of Lagos State and the Finance Commissioners of Lagos, Imo, Rivers, Abia, Akwa Ibom and Delta States. LEDAP Ltd had instituted the action against the Defendant states for declining its request for information pursuant to s 2 of the FOIA for the amount raised and received by these states from the Nigerian Capital Market. The Respondents had refused the request on the basis that the FOIA was meant to protect public records belonging to the federal government and not of the states hence it was not binding

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<sup>84</sup> See FOIA 2011, sections 2(7) & 31.

<sup>85</sup> For similar unconfirmed judgments, See Sahara Reporters ‘A Letter To The Auditor General of Lagos: FOI Request For Audited Accounts Of Local Governments In Lagos State’ posted online 7 June 2014, available at <http://saharareporters.com/press-release/letter-auditor-general-lagos-foi-request-audited-accounts-local-governments-lagos-state>, accessed 20 December 2016.

<sup>86</sup> Daily Post Online of 1 November 2014 ‘Court rules FoI Act as not binding on States’, available at <http://dailypost.ng/2014/11/01/court-rules-foi-act-binding-states/>, accessed 18 December 2016.

on them. The states also claimed that the power to make laws on public records is concurrently shared by the National Assembly and the States' House of Assembly. However, the court's reasoning for upholding the states' argument was that the Act was neither a residual law, nor was it passed based on the Concurrent list of the 1999 Constitution.<sup>87</sup>

According to a *Daily Independent* editorial the ruling 'raises fundamental issues that can only be resolved by further judicial interpretation'.<sup>88</sup> Dele Adesina, a former Secretary General of the Nigerian Bar Association (NBA), was quoted as saying,

The Federal Government, I believe, has legislative powers to legislate on any matter in the exclusive legislative list and even the concurrent list, and information generally is on the concurrent list. I hope this judgment will be tested at the appellate court.<sup>89</sup>

So from all indications, there is unnecessary confusion among lawyers, judges and government as to the nature of access to information as a fundamental right. For instance, Akinteye J's judgment is problematic: though correct, it was not based on a justiciable public right of access to information that emanate from section 39(1), but on government's duty to eradicate corruption. Similarly, the Abang J judgment was focused on the legislative validity of the FOIA 2011, not the right nature of access to information. More confusing is that, apart from Ekiti, Lagos and Delta states that have enacted local versions of the FOIA, some State Governors have announced plans to 'domesticate' the FOIA 2011.<sup>90</sup> The question of whether there is a public right of access to government information under section 39 of the Constitution remains yet unanswered by any court in Nigeria. Thus, the judiciary can, pending a constitutional amendment, put to rest the confusion as to the Constitutional status of access to information, by a purposeful interpretation of section 39(1) of the Constitution as the anchor for the FOIA.

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<sup>87</sup>Ibid. but see the judgements of ... to the contrary. See 'Application of Nigerian FOI Law to States Contested'

<sup>88</sup>*Daily Independent* Online 'Nigeria: The Lagos Federal High Court Ruling On FOI Act' 10 November 2014, available at <http://allafrica.com/stories/201411102501.html>, accessed 18 December 2016.

<sup>89</sup> Freedominfo.org 'Nigerian Judge Says FOI Law Not Applicable to States' of 12 November 2014, available at <http://www.freedominfo.org/2014/11/nigerian-judge-says-foi-law-applicable-states/>, accessed 18 December 2016.

<sup>90</sup> Freedominfo.org 'Nigerian State to Adopt FOI Act, New Governor Says' of 1 October 2015, available at <http://www.freedominfo.org/2015/10/nigerian-state-to-adopt-foi-act-new-governor-says/>, accessed 18 December 2016.

### 5.3.2.3 *The need for a purposeful interpretation of section 39(1) of the Constitution*

In this part, I argue that a purposeful interpretation of section 39(1) to encompass the right of access to information will serve to give effect to the purposes of the provision for enabling meaningful citizen participation in policy making, altering power relations between the state and citizens in favour of citizens, corruption eradication, protecting other democratic rights, etc.<sup>91</sup>

The Supreme Court has affirmed that in adjudicating claims to fundamental rights guaranteed in the Constitution the provisions should be purposively and liberally interpreted because

... mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the question is whether the Constitution has used an expression in the wider or in the narrower sense ...this court should ... in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution.<sup>92</sup>

Thus, the court, in *Director, SSS v Olisa Agbakoba*,<sup>93</sup> interpreted the fundamental right to freedom of movement,<sup>94</sup> particularly of entry to or exit from Nigeria, as encompassing a right of every Nigerian to hold an international passport. The Court said:

It is not conceivable that a right can be given without the facility of actualizing it. As rightly held by the court below, the Constitution cannot condescend to details in its description of the fundamental rights and freedoms it guaranteed. The Constitution of the Federal Republic of Nigeria is a written organic instrument. It is a mechanism under which our laws are made and not a mere Act of Parliament or a Decree which declares what the law is to be. It has been an accepted canon in interpretation of documents to interpolate into the text such provision, though not expressed, as essential to prevent the defeat of their purpose and this applies with special force to the interpretation of Constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen circumstances, are cast in general language which are not constantly amended.<sup>95</sup>

Thus the Supreme Court agreed with the purposive reading of 'passport' into section 38(1) of the 1979 Constitution by the Court of Appeal in finding that the seizure of the Respondent's passport violated the right. The Supreme Court stated:

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<sup>91</sup>See generally chapter 2 of thesis.

<sup>92</sup>See *Nafiu Rabiu v. The State* (1980) 8 – 11 SC 130 – 235 at 148 per Sir Udo Udoma, JSC.

<sup>93</sup>*Ibid.*

<sup>94</sup>The Constitution of the Federal Republic of Nigeria 1979, section 38(1).

<sup>95</sup> See also *Attorney-General of Bendel State v Attorney-General of the Federation & 22 Ors* (1982) 3 NCLR 1; (1981) 10 SC 1 and *Abdul karim v Incar (Nig.) Ltd* (1992) 7 NWLR (Pt. 251) 1.

The Constitution is an organic document which must be treated as speaking from time to time. It can therefore only describe the fundamental rights and freedoms it guarantees in broad terms. It is for the courts to fill the fundamental rights provisions with content such as would fulfill their purpose and infuse them with life. A narrow and literal construction of the human rights provisions in our Constitution can only make the Constitution arid in the sphere of human rights. Such approach will retard the realisation, enjoyment and protection of these rights and freedoms and is unacceptable.<sup>96</sup>

Section 39(1) of the Constitution could benefit from such a liberal and purposive interpretation demonstrated above as embracing protection for the right of access to information as the oxygen of democracy. This will ensure greater protection for the right and obviate needless contradictions as to the Constitutional basis of the FOIA 2011.

#### 5.4 CONCLUSION

This chapter has analysed the power of the courts to uphold constitutional protection for the right of access to information and provide effective remedies for violations of the right occasioned by laws such as the Official Secrets Act and the National Security Agencies Act which are not reasonably justifiable in a democratic society. It was contended that these laws are an affront to human rights norm of access to information protected by article 9 of the African Charter read into section 39(1) of the Constitution since they drain the latter of effect by granting unfettered discretion to the Government to withhold and criminalise disclosure of public interest information. Judicial declaration of invalidity of these offending laws is thus the first step in expanding protection for access to information.

Judicial interpretation and recognition of the right as part of section 39 of the Constitution is similarly crucial for actual enjoyment of the right by Nigerians considering its importance to the health of a democracy, as a tool for combating corruption and a right for leveraging the ability of citizens to secure socioeconomic rights. There is therefore need for the judiciary to anchor the FOIA 2011 on section 39(1) through a purposive interpretation of the latter as against the jaundiced interpretations that now abound.

Nonetheless, there is need for a holistic re-phrasing of section 39 of the Constitution to bring out the salience of the right of access to information and create a new balance in its favour as against the existing one that favours government security and other concerns.

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<sup>96</sup>*Director of SSS v. Olisa Abgakoba* (1999) 3 NWLR (Pt.595) 340, concurring judgment of Onu JSC

## CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

### 6.1 INTRODUCTION

The right of access to information and national security are thought to be intractably at loggerheads hence United Nations bodies, international and national law experts, other scholars and specialized NGOs have proposed differing balancing formulas to contain the conflict at international, regional and country-specific levels.

But this research: ‘The right of access to information and its limitation by national security in Nigeria: mutually inclusive or exclusive?’ is unique in several respects. First, in the use of democratic theory, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights to conceptualise and analyse the extent to which section 39 of the Constitution of the Federal Republic of Nigeria, 1999<sup>1</sup> protects the right of access to information. Second, neither the Official Secrets Act 1962 nor the National Security Agencies Act 1986, two major laws that impose severe limitations on access to state-held information in Nigeria or measures taken under them, have ever been subjected to such constitutional scrutiny such as this thesis engaged with. Third, it is a major work to conceptually resolve the lingering problems regarding constitutionality of ‘national security’ impositions in Nigeria’s post-military era. Thus, as stated in chapter one, this thesis aims to propose principles, norms and standards that will allow courts to strike the balance in the conflict between national security needs and the right of access to information.

The thesis, based on the need to re-phrase section 39 of the 1999 Constitution, the *grundnorm* of Nigerian law to strengthen protection for the right of access to information and thus strike an appropriate balance between the right and national security in Nigerian law as against what currently exists. This is essential otherwise the State will be able to limit the right inconsistently with the Constitution in the pretext of protecting national security as currently applies under the

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<sup>1</sup> The 1999 Constitution.

Official Secrets Act 1962 and the National Securities Agencies Act 1986. These statutes are vaguely worded and confer broad powers on government agencies to classify information on the basis of 'national security' though the parameters for such classifications are unspecified in Nigerian law.

Thus apart from part 1, the introduction, the rest of this chapter is in four parts. Part 2 sets out the summary and analyses of the research findings. Part 3 makes recommendations towards legal reforms, while part 4 deals concludes on the need for further research.

## 6.2 SUMMARY AND ANALYSES OF RESEARCH FINDINGS

### 6.2.1 The right of access to information in the 1999 Constitution?

Findings made in chapters two and four refute arguments of scholars that section 39(1) of the 1999 Constitution is too restrictive to protect the right of access to information. First, it will be recalled that the finding that access to information is the bedrock and irreducible minimum of a functioning democracy was made in chapter two. The Nigerian State is founded on the principles of democracy. Thus in theory, section 39 encompasses the right of access to information. Second, a reading in of article 9 of the domesticated African Charter, which guarantees the right of access to information, into section 39(1) of the Constitution is in fulfilment of Nigeria's positive obligation to protect the right. Third, a liberal judicial construction of section 39(1) especially the word 'including' brings the latter provisions up to the standard required to give effect to the foundational access to information requirement of the Constitution as a living instrument for past and future generations.

### 6.2.2 Extent of permissible national security limitations on constitutional right of access information

The requirement of sections 39(3) and 45(1) of the Constitution is that to be valid, any law which imposes restrictions on the right to information in the interest of defence must be 'reasonably justifiable in a democratic society'. But the Constitution gives no guidance to assist the courts in determining the essence of this requirement. Also, what 'national security' means is nowhere defined in Nigerian law.

But findings in chapters two and three show that ‘national security’ encompasses not only defence against external aggression and internal insurrection, but also individual security, good government and the rule of law in a democracy. It must be narrowly construed as:

measures to prevent or respond to serious threats to the country as a whole, whether from an external source, such as military threat, or an internal source, such as incitement to violent overthrow of the government<sup>2</sup>

The foregoing excludes information the disclosure of which does not harm national security namely: information relating to scientific processes; human rights violations, official wrongdoings; regime protection; limitations set to avoid riots or other troubles that do not threaten the life of a whole nation;<sup>3</sup> ordinary crime detection; public order; public safety, and the like.

In its military aspects, ‘national security’ restrictions may only be imposed on access to information that directly has a bearing on national security such as:

- (a) disclosure of secrets which pose serious political or military threats to critical national infrastructure;
- (b) disclosure of defence and intelligence sources and methods used generally and for counter-subversion intelligence;
- (c) capabilities of military and weapons systems;
- (d) Design of defence weapons and military establishments;
- (e) Protection of physical integrity of citizens from external threats such as invasion, terrorism, and bio-security risks to human health
- (f) war and military strategy; and
- (g) Defence related military signals.

Again, as found in chapters two and three, the requirement that restrictions on access to information be reasonably justifiable in a democratic society imports a notion of necessity, including a two-stage analysis of acceptability of restrictions, into the Constitution. A restriction

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<sup>2</sup> Elizabeth Evatt ‘The International Covenant on Civil and Political Rights’ in Sandra Coliver (ed.) *Secrecy and Liberty* in Coliver, S (ed.) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 84; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 29, U. N. Doc. E/CN.4/ 1985/ 4, Annex, para 30 (1985).

<sup>3</sup> Alexandre Kiss ‘Commentary by the Rapporteur on the Limitation Provisions’ (1985) 7 *Hum. Rts. Q.* 15 at 21.

must therefore be clearly outlined in an accessible law that is shorn of unfettered discretion in its application, and be proportionate and necessary to protect legitimate national security interests.<sup>4</sup>

### 6.2.3 Democratic rationale vis-à-vis international legal standards for access to information and national security including constitutional application thereof in Nigerian law

Findings in chapters two and three explicate the fundamental importance of access to information to the health of a democracy and the binding nature of obligations on State-parties to give effect to the right of access to information guaranteed by the International Covenant on Civil and Political Rights (ICCPR) 1966 and the African Charter on Human and Peoples' Rights (ACHPR) 1981. Nigeria as a democracy has only ratified the ICCPR, but has domesticated the ACHPR in terms of section 12 of the Constitution. The effect is to further enrich and not detract from freedom to receive and impart information in section 39 of the Constitution.

### 6.2.4 Nigerian jurisprudential models on constitutional right of access to information

Among the findings in chapter three is that the African Commission uses a purposive and broad interpretive approach in determining allegations of rights violations in order to give effect to otherwise vague and narrow provisions of the African Charter.<sup>5</sup> But the finding in chapter five point out that Nigerian Courts are yet to imbibe a purposive interpretation to give to the right of access to information in section 39 of the Constitution save in one cited case.<sup>6</sup>

Though the Nigerian Supreme Court recommended a liberal approach to interpreting rights in the Constitution, many conflicting High Court judgments have interpreted the Freedom of Information Act 2011 narrowly as intended to ease access to public records and Information only. But considering that the right of access to information only gained statutory recognition in Nigeria in 2011, it is expected that opportunities will soon arise at the Court of Appeal or Supreme Court to determine the scope of constitutional protection for the right.

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<sup>4</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, op cit, para 40.

<sup>5</sup> See Olufemi Amao 'Civil and Political Rights in the African Charter' in Manisuli Ssenyonjo (ed) ch 2.

<sup>6</sup> Unreported Suit No. M/332/12, *Yomi Ogunlola & 1 Or v Speaker, Oyo State House of Assembly & 3 Ors.* (High Court of Oyo State Judgment of 31 October 2013).

### 6.2.5 Effective balancing of public interest considerations underlie national security and the right of access to government held information in a democratic society

Findings made in chapters two, three, four and five reveal that the protection of national security is a legitimate concern of every democratic State without which there cannot be full exercise of human rights subject to necessary secrecy in limited circumstances. Consequently, the exercise of the right of access to information requires that the public be well-informed about the State's activities, but not absolutely to override national security concerns. It is thus noteworthy that '[a] democracy works best when the people have all the information that the security of the nation permits' except where secrecy is absolutely necessary in the public interest.<sup>7</sup>

Striking the right balance in the tension between access to information and national security is therefore imperative. To recall similar findings made both in chapters two and three; to be acceptable, a national security restriction must fulfil a three-part test of justification. It must be specified by a clear and accessible law, serve a legitimate interest and be proportionate and bear a rational relationship to its objective, other relevant facts having been taken into consideration. This presupposes a clear definition of 'national security' and clear standards or procedures for classifying or otherwise withholding information on security grounds. Then, the courts or other independent oversight bodies, having taken necessary protective measures, must be able to inspect officially exempt information including classified documents to enable them discharge the responsibilities to protect the exercise of the right of access to information.

## 6.3 RECOMMENDATIONS

It is noteworthy that the above findings were made through theoretical and analytical synthesis of primary sources of law including the Nigerian Constitution, legislations, case-law, and international human rights treaties ratified by Nigeria especially the ICCPR and the African Charter.

Copious use of Secondary sources including opinions of international human rights bodies, views of textbook writers, and international soft law also formed part of the analysis. Such analysis is expected from a human rights focused judiciary, but effective guarantee of access to information

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<sup>7</sup> President Lyndon B Johnson, statement made at the signing of the Freedom of Information Act 1966 into law.

must proceed on the basis of clearly-drafted provisions of the law. There is therefore need for some fundamental institutional and legal reforms in order to fill the lacuna in the current Nigerian law.

### 6.3.1 Institutional reforms

#### *6.3.1.1 Strengthening of institutional oversight of national security agencies*

The reign of operational control, finances, appointments and administration of the national security agencies are solely in the hands of the President through the National Security Adviser. Pending a holistic amendment of the National Security Agencies Act 1986, there is need for the relevant committees of the National Assembly to carry out more stringent oversight of the activities of the intelligence agencies. An amended National Security Agencies Act must include specific provisions to enhance Parliamentary oversight of the national security agencies as part of government commitment to openness.

### 6.3.2 Amendments to the Constitution

#### *6.3.2.1 Status and effects of the African Charter on Nigerian Domestic Law*

The legal incongruities occasioned by the ‘dualist’ position of Nigeria concerning treaties ratified by Nigeria has drawbacks on the enforcement of access to information guaranteed under article 9 in Nigerian domestic law. Section 12 of the Constitution provides that:

- (1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

The argument by some States in Nigeria, highlighted in chapter five, to the effect that the FOIA 2011 is not legally binding on them except by way of ‘domestication’ is an ingenious reference to section 12(3) above.<sup>8</sup> Indeed, the FOIA 2011 was not passed by the National Assembly in conjunction with the House of Assembly of the States. Assuming but not conceding that this argument holds water, since it has been argued that the courts may add flesh to fundamental

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<sup>8</sup>See paragraph 5.3.2.2.

rights, it would accord with common sense to avoid this cumbersome legislative process in the long term. Section 12(3) should therefore be amended to read:

A bill passed into law as an Act of the National Assembly passed pursuant to subsection (2) of this section and assented to by the President shall have full effect pertaining to matters subject to the jurisdiction of the National Assembly and may be ratified by any State House of Assembly in the Federation to which it shall then become applicable.

The suggested amendment is to ensure the FOIA would at least, in terms of this midway approach, continue to serve as a means of demanding accountability from the States concerning federal allocation of funds received by them under the Constitution.

#### *6.3.2.2 Correcting the phraseology of sections 39(3) and 45(1) of the Constitution*

Again, to recall, the thesis argument in chapter four, section 39's guarantees of 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference' is not very explicit on the right of access to information from. But that a creative interpretation would elicit the right from the provision. The phrasing of section 39(3), it was argued, is too restrictive and awkward. It will be recalled also that the qualifications to access to information by section 39(3) read: 'Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society ...' while that of section 45(1) read: 'Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society ...'. Among writers who noted this clumsiness was Ben Nwabueze who remarked:

had the wording of the qualification read instead, "any law derogating from or interfering with a guaranteed right shall be invalid unless it is reasonably justifiable" etc, the onus of proving the reasonable justifiability of the law would have been cast unequivocally upon the authorities, and the guaranteed right would have been enhanced in value.<sup>9</sup>

It is thus imperative to redraft these two provisions to explicitly state the conditions in terms of which restrictions will be necessary or reasonably justifiable. Section 39(3) should be entirely deleted from the body of section 39. Subject to whatever future inclusions that may be made to further strengthen freedom of expression, section 39(1) should be amended to read:

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<sup>9</sup> Ben Nwabueze *Constitutional Democracy in Africa Vol 1* (2003) 389.

Every person shall be entitled to hold opinions, and to freedom of expression, including freedom to seek, receive and impart ideas and information without interference.

Also, a new provision should be inserted after section 39 to wit:

1. Everyone has the right of access to information held by public bodies.
2. Everyone has the right of access to information held by private bodies which is necessary for the exercise or protection of any right.

There are findings in chapter three pertaining to the African Commission's analyses of criteria for reasonableness of restrictions on the right of access to information.<sup>10</sup> Thus, section 45(1) should incorporate the criteria and retained as the only limitation clause in the bill of rights in the Constitution while section 39(3) should be deleted. Section 45 should then be amended to read:

45. (1) Nothing shall limit the rights in sections 37, 38, 39, 39A, 40 and 41 of this Constitution
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- (a) in the interest of national security, public safety, public order, public morality or public health; or
  - (b) for the purpose of protecting the rights and freedom of other persons:

Except as reasonably justifiable in a democratic society and to the extent the limitation is:

- (i) provided by a precise law of general application;
  - (ii) serves a legitimate public purpose; and
  - (iii) necessary and proportionate to its purpose.
- (c) for the purpose of subsection (b), all organs of government, authorities and persons exercising legislative, executive or judicial powers must take account of all relevant factors, including:
- (i) the nature of the right or freedom concerned;
  - (ii) the purpose of the limitation;
  - (iii) the nature and extent of the limitation;
  - (iv) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions than necessary to achieve its purpose; and whether there are any least restrictive means to achieve the purpose of the limitation.

(2) In determining limitations that are reasonably justifiable the courts shall have recourse to the principles of democracy, such as transparency, accountability, justice, human dignity, equality and freedom.

Section 315(5)(c) of the Constitution should be deleted or amended to read:

National security means:

- (a) Protection of national and critical infrastructure against military threats;

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<sup>10</sup>Paragraph 3.3.2.3 of the thesis.

- (b) Military defence, national intelligence and counter-subversion intelligence;
- (c) Protection of military capabilities and weapons systems;
- (d) Protection of defence weapons design and military establishments;
- (e) Protection of physical integrity of citizens from external threats such as invasion, terrorism, and bio-security risks to human health; and
- (f) Protection of democracy, good governance, civil liberties and the rule of law.

### 6.3.3 Strengthening existing legal framework on access to information

The unconstitutionality of the Official Secrets Act 1962 and the National Security Agencies Act 1986 has already been noted.<sup>11</sup> The latter Act must be consigned to the dustbin of history. Provisions in other laws such as the Criminal Code Act and Statistics Act that have secrecy provisions must be streamlined with a new National Security and Intelligence Agencies Act to be enacted according to ‘good democratic practices’ to protect information directly relevant to national security. The law should provide for the rules of information classification; the authorities that may classify, the categories of information subject to classification and the rules of declassification. There is also need to further strengthen the existing legal framework on access to information in Nigeria by way of promoting and educating the public as to their legal rights under the African Charter and the FOIA 2011.

The above suggested constitutional amendments and legal reforms will, if effectively carried out, truly make the right of access to information and national security mutually inclusive instead of being mutually exclusive as is currently the case.

### 6.3.3 Limitations of the Study and need for further research

There has been no judicial or rigorous academic analysis of the reasonable justifiability of of restrictions to access to official information in the interest of Nigeria’s national security. Although the main laws – the Official Secrets Act and the National Securities Agencies Act – which permit information classification have been dealt with in this thesis, some lesser bastions of information restrictions still exist. For instance, the executive could still restrict access to ‘privileged information’ under the Evidence Act. There is thus need for further research into information classification processes. Moreover, confidential and secret records kept in public archives remain

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<sup>11</sup>Paragraph 5.2.5.

secret under the National Archives Act,<sup>12</sup> but access to such may be achieved in the long term with more openness and compliance with the FOIA 2011 by government agencies. Also, the research was conducted with a positivist approach. There are other methodological perspectives which could further enrich the work.

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<sup>12</sup> National Archives Act No. 30 1992, s 12(2). See also Toyin Falola & Saheed Aderinto *Nigeria, Nationalism, and Writing History* (2010) 35.

Supplement to Official Gazette Extraordinary No. 38, Vol. 73, 5th August, 1986  
—Part A

**NATIONAL SECURITY AGENCIES DECREE 1986**



**Decree No. 19**

[5th June 1986]

THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows :—

1. There shall, for the effective conduct of national security, be established the following National Security Agencies, that is to say—

- (a) the Defence Intelligence Agency ;
- (b) the National Intelligence Agency ; and
- (c) the State Security Service.

2.—(1) The Defence Intelligence Agency shall be charged with responsibility for—

- (a) the prevention and detection of crime of a military nature against the security of Nigeria ;
- (b) the protection and preservation of all military classified matters concerning the security of Nigeria both within and outside Nigeria ;
- (c) such other responsibilities affecting defence intelligence of a military nature, both within and outside Nigeria, as the President, Commander-in-Chief of the Armed Forces or the Chairman, Joint Chiefs of Staff, as the case may be, may deem necessary.

(2) The National Intelligence Agency shall be charged with responsibility for—

- (a) the general maintenance of the security of Nigeria outside Nigeria concerning matters that are not related to military issues ; and
- (b) such other responsibilities affecting national intelligence outside Nigeria as the National Defence and Security Council or the President, Commander-in-Chief of the Armed Forces, as the case may be, may deem necessary.

(3) The State Security Service shall be charged with responsibility for—

- (a) the prevention and detection within Nigeria of any crime against the internal security of Nigeria ;
- (b) the protection and preservation of all non-military classified matters concerning the internal security of Nigeria ; and

Commence-  
ment.

Establish-  
ment of  
National  
Security  
Agencies.

General  
duties of  
the  
National  
Security  
Agencies.

(c) such other responsibilities affecting internal security within Nigeria as the Armed Forces Ruling Council or the President, Commander-in-Chief of the Armed Forces, as the case may be, may deem necessary.

(4) The foregoing provisions of this section shall have effect notwithstanding the provisions of any other law to the contrary, or any matter therein mentioned.

1962 No. 29.

(5) In this section, "classified matter" has the same meaning assigned thereto in section 9 of the Official Secrets Act 1962.

Principal officers of the agencies.

3.—(1) There shall be appointed for each of the agencies a principal officer who shall be known by such designation as the President, Commander-in-Chief of the Armed Forces, may determine.

(2) The principal officers of the agencies shall, in the discharge of their functions under this Decree—

(a) in the case of the State Security Service, and the National Intelligence Agency, be responsible directly to the President, Commander-in-Chief of the Armed Forces ; and

(b) in the case of the Defence Intelligence Agency, be directly responsible to the Chairman, Joint Chiefs of Staff.

Co-ordinator on National Security.

4.—(1) For the purpose of co-ordinating the intelligence activities of the National Security Agencies set up under section 1 of this Decree, there shall be appointed by the President, Commander-in-Chief of the Armed Forces, a Co-ordinator on National Security.

(2) The Co-ordinator on National Security shall be a Principal Staff Officer in the office of the President, Commander-in-Chief of the Armed Forces.

(3) The Co-ordinator on National Security shall be charged with the duty of—

(a) advising the President, Commander-in-Chief of the Armed Forces on matters concerning the intelligence activities of the agencies ;

(b) making recommendations in relation to the activities of the agencies to the President, Commander-in-Chief of the Armed Forces as contingencies may warrant ;

(c) correlating and evaluating intelligence reports relating to the national security and providing the appropriate dissemination of such intelligence within Government using existing facilities as the President, Commander-in-Chief of the Armed Forces may direct ;

(d) determining the number and level of staff to be employed by each Agency established pursuant to section 1 of this Decree and organising the transfer and posting of staff especially the transfer and posting of existing staff of the Nigerian Security Organisation established pursuant to the Nigerian Security Organisation Act 1976 repealed by section 7 (1) of this Decree.

(e) doing such other things in connection with the foregoing provisions of this section as the President, Commander-in-Chief of the Armed Forces may, from time to time, determine.

5.—(1) There shall, in the interest of national security be established two advisory councils, that is to say—

- (a) the National Defence and Security Council ; and
- (b) the National Defence Council.

Establishment of advisory councils.

(2) The National Defence and Security Council shall be charged with responsibility for matters relating—

- (a) to public security ; and
- (b) generally to the structure, staff and other matters concerning the agencies set up under this Decree.

(3) The National Defence Council shall advise the President, Commander-in-Chief of the Armed Forces on all matters concerning the defence of the sovereignty and territorial integrity of Nigeria.

6.—(1) The President, Commander-in-Chief of the Armed Forces may by an instrument under his hand make provisions with respect to the following matters, that is to say—

Instruments relating to the advisory councils, the structure, etc. of the agencies.

(a) the composition, membership and appointment to the advisory councils established by section 5 (1) of this Decree ;

(b) the structure of each of the agencies set up under this Decree (including the designation and the appointment of the principal officers of the agency concerned) and the manner in which each agency is to be administered ;

(c) the manner in which the powers of each agency is to be exercised and the conferment on specified officers of the agencies of the powers of a superior police officer ; and

(d) such other matters concerning or incidental to any of the matters mentioned in this Decree as the President, Commander-in-Chief of the Armed Forces may deem fit.

(2) An instrument made under subsection (1) of this section shall, notwithstanding anything to the contrary in any law, have the like effect as a Decree and shall not be published in the *Gazette*.

7.—(1) The following enactments, that is to say—

Repeal.

(a) paragraph (c) of subsection (5) of section 274 of the Constitution of the Federal Republic of Nigeria 1979 ;

(b) the Nigerian Security Organisation Act 1976 ; and

1976 No. 16.

(c) the Nigerian Security Organisation (Amendment) Act 1977, are hereby repealed.

1977 No. 27.

(2) The provisions of paragraphs 9 and 10 in Part E of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1979, as substituted by the Constitution (Suspension and Modification) Decree 1984 (relating to the National Defence and Security Council) are hereby consequentially revoked.

1984 No. 1.

(3) If any other law including the Constitution of the Federal Republic Nigeria 1979, as amended, is inconsistent with the provisions of this Decree, the provisions of this Decree shall prevail, and that other law shall, to the extent of the inconsistency, be void.

APPENDIX 1: NATIONAL SECURITY AGENCIES DECREE NO. 19, 1986

A 114

1986 No. 19

National Security Agencies

Citation and commencement.

8. This Decree may be cited as the National Security Agencies Decree 1986 and shall be deemed to have come into force on 5th June 1986.

MADE at Lagos this 28th day of July 1986.

MAJOR-GENERAL I. B. BABANGIDA,  
President, Commander-in-Chief  
of the Armed Forces,  
Federal Republic of Nigeria

EXPLANATORY NOTE

(This note does not form part of the above Decree but is intended to explain its purpose)

The Decree disbands the former Nigerian Security Organisation and in its place creates three separate agencies and charges each with the conduct of the relevant aspect of national security. It also creates the National Defence and Security Council and the National Defence Council, also charged with other aspects of the national security.

## OFFICIAL SECRETS ACT, 1962



### ARRANGEMENT OF SECTIONS

*Section*

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Protection of official information, etc.</li> <li>2. Protection of defence establishments, etc.</li> <li>3. Restrictions on photography, etc. during periods of emergency.</li> <li>4. Control of mail forwarding agencies, etc.</li> </ol> | <ol style="list-style-type: none"> <li>5. Power to require information as to offences under this Act.</li> <li>6. Search warrants.</li> <li>7. Penalties, and legal proceedings</li> <li>8. Supplementary provisions as to offences.</li> <li>9. Interpretation, etc.</li> <li>10. Short title, extent and repeal.</li> </ol> |
|---|---|

### 1962, No. 29

AN ACT TO MAKE FURTHER PROVISION FOR SECURING PUBLIC SAFETY ; AND FOR PURPOSES CONNECTED THEREWITH.

[13th September, 1962]

Commence-  
ment.

BE IT ENACTED by the Legislature of the Federation in this present Parliament assembled and by the authority of the same as follows :—

Protection  
of official  
information,  
etc.

1.—(1) Subject to subsection (3) of this section, a person who—

(a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it ; or

(b) obtains, reproduces or retains any classified matter which he is not authorised on behalf of the government to obtain, reproduce or retain, as the case may be,

shall be guilty of an offence.

(2) A public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control shall be guilty of an offence.

(3) In proceedings for an offence under subsection (1) of this section relating to any classified matter, it shall be a defence to prove that—

(a) when the accused transmitted, obtained, reproduced or retained the matter, as the case may be, he did not know and could not reasonably have been expected to believe that it was classified matter ; and

(b) when he knew or could reasonably have been expected to believe that the matter was classified matter, he forthwith placed his knowledge of the case at the disposal of the Nigeria Police Force.

Protection of defence establishments, etc.

2.—(1) A person who, for any purpose prejudicial to the security of Nigeria,—

(a) enters or is in the vicinity of or inspects a protected place; or

(b) photographs, sketches or in any other manner whatsoever makes a record of the description of, or of anything situated in, a protected place; or

(c) obstructs, misleads or otherwise interferes with a person engaged in guarding a protected place; or

(d) obtains, reproduces or retains any photograph, sketch, plan, model or document relating to, or to anything situated in, a protected place,

shall be guilty of an offence.

(2) A person charged with an offence under the foregoing subsection shall, unless the contrary is proved, be deemed to have acted for a purpose prejudicial to the security of Nigeria if from his character or general conduct and from all the circumstances of the case it appears that he acted for such a purpose; but nothing in this subsection shall be construed as precluding the giving in evidence of matters tending to show that the accused acted for such a purpose.

Restrictions on photography, etc. during periods of emergency.

3.—(1) The Minister may, during any period of emergency within the meaning of section sixty-five of the Constitution of the Federation, by order provide that during the continuance of that period no person shall, without permission in writing given by the Minister, photograph, sketch, or in any other manner whatsoever make a record of the description of, such things designed or adapted for use for defence purposes as may be specified by the order.

(2) A person who contravenes the provisions of an order under this section shall be guilty of an offence.

Control of mail forwarding agencies, etc.

4.—(1) The Minister may make regulations—

(a) for controlling the manner in which any person conducts any organisation for receiving letters, telegrams, packages or other matter for delivery or forwarding to any other person; and

(b) without prejudice to the generality of the foregoing paragraph, providing for the furnishing of information and the keeping of records by persons having or ceasing to have the conduct of such an organisation.

(2) Regulations under this section may contain such incidental and supplementary provisions as the Minister considers expedient for the purposes of the regulations, including in particular provisions imposing penalties (not exceeding imprisonment for a term of three months or a fine of fifty pounds or both) for any failure to comply with the regulations; and the regulations may make different provision for different circumstances.

(3) Regulations under this section shall not come into force until they are approved by resolution of each House of Parliament.

Power to require information as to offences under this Act.

5.—(1) Where an officer of the Nigeria Police Force not below the rank of assistant commissioner suspects that an offence under section one, two or three of this Act has been committed and that a particular person is likely to be able to furnish information with respect to the suspected offence, he may, after obtaining the consent in writing of the Minister

for the issue of a warrant under this subsection in respect of that person, issue a warrant to any superior police officer of that force authorising him—

(a) to require that person to furnish to the superior officer all information in that person's possession relating to the suspected offence ; and

(b) in any case where it appears necessary to the superior officer so to do, to afford that person adequate facilities for attending at a time and place specified by the officer and to require that person so to attend for the purpose of furnishing the information aforesaid.

(2) Where it appears to an officer proposing to issue a warrant under the foregoing subsection that the delay likely to be involved in obtaining the consent mentioned in that subsection would seriously prejudice the security of Nigeria, he may issue the warrant without obtaining that consent but shall on so doing forthwith report his action to the Minister.

(3) If any person—

(a) fails to comply with a requisition under subsection (1) of this section ; or

(b) in pursuance of such a requisition furnishes any information which he believes to be, or recklessly furnishes any information which is, false in a material particular,

he shall be guilty of an offence.

6.—(1) Where an officer of the Nigeria Police Force not below the rank of assistant commissioner has reasonable cause to believe that an offence under section one, two or three of this Act has been committed and that matter relating to the offence is likely to be found on particular premises, he may issue a warrant to any superior police officer of that force authorising him, and such other police officers as may accompany him, to enter and search those premises and to seize and remove any matter found on the premises which the superior police officer considers is evidence of an offence under any of those sections.

(2) A police officer may use such force as may be reasonably necessary for the purpose of executing a warrant issued under this section.

7.—(1) A person who commits an offence under section one, two or three of this Act shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding fourteen years ;

(b) on summary conviction, to imprisonment for a term not exceeding two years or a fine of an amount not exceeding one hundred pounds or both.

(2) A person who commits an offence under section five of this Act shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine of an amount not exceeding fifty pounds or both.

(3) No proceedings in respect of an offence under section one, two or three of this Act shall be begun except with the consent of the Attorney-General of the Federation or a Region or by or on the instructions or authority of the Director of Public Prosecutions of the Federation or a Region ; and the instrument by which permission is signified for the beginning of any such proceedings shall state whether the proceedings shall be summary or on indictment.

Search  
warrants.

Penalties,  
and legal  
proceedings.

(4) Nothing in the last foregoing subsection shall be construed as preventing the detention of any person with a view to the taking of proceedings against him.

Supplemen-  
tary  
provisions  
as to  
offences.

8.—(1) Without prejudice to any other provisions relating to the matters mentioned in the following paragraphs or cognate matters, a person who—

(a) attempts to commit an offence under this Act or regulations made thereunder ; or

(b) aids, abets, counsels, incites, procures or commands the commission of such an offence ; or

(c) becomes an accessory before or after the fact to such an offence ; or

(d) conceals or procures the concealment of such an offence which he knows has been committed,

shall be liable to be proceeded against and punished as a principal offender ; and references in this Act to such an offence, or to an offence under any provision of this Act, shall include references to an offence in pursuance of this subsection.

(2) Where it is alleged that an offence under this Act or regulations made thereunder has been committed outside Nigeria by a citizen of Nigeria, proceedings in respect of the offence may be brought in any court in Nigeria which would have had jurisdiction in the matter if the offence had been committed in the part of Nigeria for which the court acts.

(3) Without prejudice to any other power of arrest, a police officer may arrest without warrant any person whom he finds committing an offence under section one, two or three of this Act, or whom he reasonably suspects of having committed such an offence.

Interpreta-  
tion, etc.

9.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say—

“classified matter” means any information or thing which, under any system of security classification from time to time in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria ;

“the government” means the government of the Federation ;

“the Minister” means the Minister of the government responsible for security and public safety ;

“protected place” means—

(a) any naval, military or air-force establishment in Nigeria, any other place in Nigeria used for or in connection with the production, storage or testing, by or on behalf of the government, of equipment designed or adapted for use for defence purposes, and any other building, structure or work in Nigeria used by the government for defence purposes ; and

(b) any area in Nigeria or elsewhere for the time being designated by an order made by the Minister as being an area from which the public should be excluded in the interests of the security of Nigeria, and includes a part of a protected place within the meaning of paragraph (a) or (b) of this definition ;

“public officer” means a person who exercises or formerly exercised, for the purposes of the government, the functions of any office or employment under the Crown.

(2) For the purposes of this Act, classified matter remains classified matter notwithstanding that it is properly transmitted to, or obtained from, or otherwise dealt with by, a person acting on behalf of the government of a Region.

10.—(1) This Act may be cited as the Official Secrets Act, 1962.

(2) This Act shall apply throughout the Federation, and shall apply to citizens of Nigeria elsewhere than in the Federation.

(3) The Official Secrets Act is hereby repealed, so however that section five of the Official Secrets Act, 1920 (which provides for the control of mail forwarding agencies) shall not cease to have effect in its application to Nigeria until the first regulations made in pursuance of section four of this Act come into force.

Short title,  
extent and  
repeal.

Cap. 144.

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