DOI: https://doi.org/10.67203/abulj.2007.odru6g2a

# THE SCOPE OF THE RIGHT TO PRIVACY UNDER THE 1999 CONSTITUTION

By

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## INTRODUCTION

Chapter IV of the 1999 Constitution, which spanned from sections 33-46 provides for the fundamental rights. The fundamental rights in Nigeria were first recommended to be part of the body of our laws in the Minorities Commission Reports of 1957, thereafter demands for these rights were made in the constitutional conferences of 1957 and 1958, and Balewa Government agreed to incorporate them in the 1960 Independence Constitution under which Nigeria was granted independence[2]. Prior to independence the government incorporated some of these rights into statutes and legislation. These rights were subsequently repeated in successive Nigerian Constitutions with very little changes[3].

Generally the fundamental rights concept was derived from the idea that man is entitled to certain basic rights as human being for living a free and meaningful life. According to one theory by John Locke, the human rights man possessed in his natural condition and that when he enters a civil society, he contracted to give part of his power to the government or the state on condition that the state so constituted shall protect the natural rights of the individual. Whenever the state violates this trust, the people have the right to take back the power and vest it in another government.

Human rights in its earlier stage were regarded as the irreducible minimum, which an individual must have and the state cannot violate or encroach upon them with impunity. With the shift in emphasis from the concept of *laissez faire* to *welfarism,* the state assumes more responsibility in its desire to transform and improve the living condition of the society in all spheres of life i.e social, cultural, political, economic e.t.c. This situation resulted in a greater possibility of collision between the rights of the individual against the collective interest of the society.

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[2] See Chapter III Sections 17 – 31 1963 Constitution, Sections 30 –42 1979 Constitution, Sections 32 – 44 1989
Constitution, Sections 33 – 46 1999 Constitution

[3] See the 1963,1979,1989,1995 and 1999 Constitutions. See Generally Odumosu, Nigerian Constitution: History and Development (1963) A.U.P. pp 122-3

The United States Constitution first amendments introduce fundamental rights in absolute terms,[4] but the courts in the interest of the state or society read various limitations unto these rights. Subsequent constitutions of many nations ensure that the fundamental rights were not only provided for but equally recognized the various rights and interest of the society in a form of exceptions or limitations. Such limitations attempted to strike a balance between individual rights and state power.

Nigeria has immensely benefited from this experience because the fundamental rights provisions contained in Chapter IV are not in absolute terms but limited or restricted on various grounds that represents the interest of the society or the state. It is against this background this article examined the nature, scope and constitutional limitations of the right of privacy guaranteed under section 37 of the 1999 Constitution. In view of the dearth of materials under the Nigerian provisions heavy reliance was placed upon the United States Supreme Court cases in the determination of the content, nature and extent of the right.

## DEFINITION AND NATURE OF THE RIGHT TO PRIVACY

The right to private and family life otherwise referred to as the right to privacy under section 37[5] of the 1999 Constitution which states that, "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication is hereby guaranteed and protected." Of all the rights guaranteed by the 1999 Constitution, the right to privacy is perhaps the shortest in term wordings. This is not to suggest in anyway that it is the least important. The Constitution has not define the word "privacy" for us to ascertain what was being protected and the Courts in Nigeria had not been called upon to define or interpret the term. Oxford Advanced Learner's Dictionary defines privacy to mean, " the state of being alone and not watched or disturbed by other people" or "the state of being free from the attention of the public"[6]. This definition is sufficient for our purpose and the constitution by relating it to "homes, correspondence, telephones and telegraphic communications", we have a fairly good idea of what is being protected. The right of privacy, it is submitted, is available against both the individuals and the government or state. The question is whether the specified list mentioned in the section is exhaustive or exclusive and

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[4] See The First Ten Amendments to the United States Constitution

[5] ***The wordings of the section is a reproduction of section 34 of the 1979 Constitution***

[6] ***6th Edition pp 926***

anything outside it will not enjoy the constitutional protection. In view of the rapidly changing nature of the world of science and technology matters of similar nature must be construed to fall within the purview of the constitutional protection e.g fax, e-mail, Internet and other mode of electronic transmissions, receiving and storage etc.

Invasion of privacy must be understood as an unjustifiable exploitation of one's personality or intrusion into one's personal activity, actionable under the law of torts and sometimes under constitutional law. While this discussion is anchored from the constitutional law perspective it is necessary to mention, in passing, that the four types of invasion of privacy in the law of torts are:

(1) An appropriation, for ones benefit, of another's name or likeness
(2) An offensive, intentional interference with a person's seclusion or private affairs
(3) The public disclosure, of an objectionable nature, of private information about another, and
(4) The use of publicity to place another in a false light in the public eye

Under the United States Constitution the 4th Amendment was, defined by the Courts and constitutional law writers, as the right to privacy .The United States Constitution [7] provides that,

> *"The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."*

It is respectfully submitted that the right to privacy simply means "the right to be left alone". The right to be left alone certainly implies freedom from governmental intrusion into ones private life. The fact that a person is alone when exercising this right suggests that a constitutional government in a democracy has no valid interest to protect from such intrusion into such person's private moments.

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[7] ***Fourth Amendment to the United States Constitution***

The question is: to what degree is our concept of limited government means that government may use its police power to interfere with individual rights? Is it only when human behavior has a spill over effects on other citizens? If privacy is a personal right, which one must generally concede it is, privacy then establishes a barrier against intrusion from outside or by outsiders[8]. Our volition determines what we will do in the realm of protected behavior. Given the right to privacy as a personal right, is it constitutional for the government to punish "crimes without victims"? Behavior which because of a certain notion of morality that the state is enforcing are called "crimes" but which in objective terms would seem not to be because the individual freely consented e.g prostitution, homosexuality, drug addiction etc[9]

The punishing of "private morality" contradicts the view of J.S. Mill[10] that, "The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.."

Section 37 of the Nigerian Constitution is an improvement on the United States provisions in so far as it used the words "...correspondence, telephone and the telegraphic communication....". In United States the Courts interpreted the words "papers and effects " to cover all means and methods that man preserved his knowledge or information about his affairs which he prefers to keep out of sight or knowledge of other persons.[11] Therefore, the provision was held to be applicable not only to searches of a dwelling, but also places of business,[12] a garage[13] or a vehicle[14].

By progressive interpretation the new methods of correspondence, communications, recording of information and materials such as telephones, telegraph, wireless and other electronic devices were brought within the

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[8] STANLEY V GEORGIA 393 US 557, 89 SCt (1969)
[9] PEOPLE V ONOFORE 415 2nd (1978)
[10] ON LIBERTY, in ESSAYS ON POLITICS AND SOCIETY, ed .J.M.Robson, (Toronto:T.U.P,1977)pp213-310
[11] GOULED V UNITED STATES 290 US 41 (1933)
[12] TAYLOR V UNITED STATES 286 US 1 (1932)
[13] CAROLL V UNITED STATES 267 US 132 (1925)
[14] SILVERMAN V UNITED STATES 305 US 505 (1961) cf NARDONE V UNITED STATES 302 US (1937), BENANTI V UNITED STATES 355 V 96 (1957)

scope of the right to privacy. The Courts in the United States have generally held that evidence obtained by means of unauthorized use of eavesdropping using these electronic devices is an invasion of the right to privacy. The simple reason being that such action amount to an unauthorized penetration of a citizen's premises.

## SCOPE OF THE RIGHT OF PRIVACY

The right to privacy is a very important freedom in the sense that it protects the invasion of the privacy of the individual and upholds the sanctity of family life. The basic restriction or limitation of the right to personal liberty under Section 37 of the 1999 Constitution is found under section 45 (1) which provides that:

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

The key phrase in determining the exact scope of this limitation is to be ascertained by reference to the determination of the meaning of "reasonably justifiable in a democratic society." This phrase conferred a wide discretion on both the legislature and the Courts to determine the meaning and scope of the term in exercising their constitutional responsibility. While the legislature makes law, within what they regard or consider as the meaning of the term, the courts becomes the final arbiter as to what the term really means and will in theory strike down any legislation that transgress the constitutional limitations. The scope of legislative discretion is more limited then that of the Courts. It is submitted that whether or not a law is reasonably justifiable in a democratic society can only, in the final analysis, be determine by the Court taking into consideration the higher political, social, economic and moral values of the society.

The key opening words of the section " Nothing in sections 37,38, 39, 40, and 41... shall invalidate any law....." clearly established the limited scope of all the rights mentioned in those sections. Literary construed these rights cannot not be used or employed as a bulwark to destroy or invalidate any law which is *reasonably justifiable in a democratic society*[15]. Therefore the

[15] ***Emphasis supplied***

constitution impliedly raises a rebuttable presumption of the validity of the legislation subject to the discharge of the onus by anyone challenging its constitutionality as not being reasonably justifiable.

This limitation or restriction applies not only to the right of privacy but also the freedom of thought, conscience and religion, freedom of expression, freedom of Assembly and Association and freedom from discrimination. The phrase "reasonably justifiable in a democratic society" came up for determination before the Supreme Court of Nigeria in the case of ***DIRECTOR OF PUBLIC PROSECUTION V DR CHIKE OBI*** [16] Where Brett F.J. quoted with approval the decision of the Supreme Court of India[17] that,

> *"In evaluating such elusive factors and forming their own conception of what is reasonable in all circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment can only be dictated by their sense of responsibility and self restrain and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions, considered them to be reasonable".*

While it is necessary to restrict the right of an individual in society's interest, it is equally imperative to ensure that individual rights are secured against the oppression of the majority if they are to have any meaning. In the words of Karibe-Whyte JCA (as he then was) in the case of *SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS* that[18],

> *"It is of undoubted relevance to bear in mind that the provisions of the fundamental rights was designed to protect the individual against coercion and oppressive*

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[16] ***(1961)1 ALL NLR 188***
[17] ***STATE OF MADRAS V ROW (1952) SCR 587***
[18] ***(1982) 3 NCLR 905 at 976***

*exercise of governmental powers or authority and abuse of the majority powers.."*

It is quite clear from the above that the court had completely left it for the legislature to determine *what is reasonably justifiable in a democratic society*. This decision of the court appear to have shifted the balance of power to the legislature and almost amounted to judicial abdication of its power of judicial review of legislative action which the constitution cumulatively vested in the courts.[19] It is submitted that the attitude of the courts in interpreting the scope of the power of the legislature to impose lawful restrictions and limitations on the rights could in fact determine the difference between democracy and dictatorship.

The main issue for determination in ***CHIKE OBI'S*** case was whether section 51 of the Criminal Code which provides for the offence and punishment of sedition contradicts or violates the freedom of expression guaranteed under section 25 of the 1963 Constitution ( similar to section 39 of the 1999 Constitution).

Unsworth F.J.(as he then was) by way of *obiter* observed that,

*" The law relating to sedition in a democratic society is designed to secure the safety of the state and public order, and I do not think that the law in Nigeria in so far as it relates to the matters under consideration in this reference goes further then is reasonably justifiable for this purpose..."*

The Supreme Court of Nigeria held section 51 of the Criminal Code as constitutional and reasonably justifiable for good governance thereby rejecting the appellant contention that the violates the freedom of expression guaranteed by the constitution.

The Court did not define the expression *reasonably justifiable* possibly because of the difficulty involved. The problem with the term is that it is coated in subjective term making it virtually impossible to reduce it to an objective analysis or standard. The Courts must recognize, which indeed they did, that a wide discretion was conferred by the constitution on the legislature in such determination. It is for this reason the courts respect legislative determination on this issue. In other words the court is always

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[19] ***See sections 1(1)(3),4(8),6(6),36(1),46(1)(2) of the 1999 Constitution***

reluctant to temper with the decision of the legislature as to what is reasonably justifiable in a democratic society. Generally the courts consider it more appropriate to apply the term on a case-to-case basis thereby dispensing with the necessity of setting a generalized or objective standard for application in all circumstances.[20]

In the case of ***QUEEN V AMALGAMATED PRESS OF NIGERIA LTD***[21] the court maintained that ,

> *" it is right that the Courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own view as to what the law ought to be"*

While it is necessary to restrict the right of the individual in society's interest, it is equally imperative to ensure that individual rights are secured against the majority if they are to have any meaning. Per Karibe-Whyte JCA ( as he then was) insisted that,

> *"It is of undoubted relevance to bear in mind that the provisions of fundamental rights was designed to protect the individual against coercion and oppressive exercise of governmental authority and abuse of majority powers...."*[22]

In is submitted that the attitude of the courts in interpreting the scope of the power to impose lawful restrictions by the legislature could in the long run determine the difference between democracy and dictatorship. There are various legislations which in different ways restricts the operational efficacy of the right to privacy and it is intended to consider a few of them.

**Restrictions of some Legislation on the Right of Privacy**

Since the Constitution guaranteed the right to privacy, how does one view the effects of some legislation, which literally authorized the invasion of this privacy? For instance the law that provides for arrest, search and seizures. In almost all jurisdictions law enforcement agents were conferred

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[20] ***WILLIAMS V MAJEKODUNMI No.2 (1962) 1 ALLNLR 328,***
[21] ***(1961) ANLR 199***
[22] ***SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS (1983) 3 NCLR 905 at 976***

with the power of arrest[23], searches of body of persons[24] or premises[25], seizure of potential evidence[26] e.t.c. However because the power of arrest has the tendency of violating this constitutional guarantee, it must be exercised within certain confinement or restrictions.

The question of whether or not the power of arrest has violated section 37 has never been raised before any Nigerian Courts. Similar question were considered several times by the United States Supreme Court. The Court once held that the right of privacy was violated where there was a physical invasion of the constitutionally protected area and when there is actual seizure of physical object[27]

In the United States the Courts always insist that arrest can only be effected upon a warrant which can only be issued where "a probable cause" is shown. A probable cause exists when the officer has a personal knowledge or trustworthy information that offence has been committed.[28] Recognizing the restriction placed on the power of arrest the Court further emphasized that it is not always necessary that there should a warrant of arrest [29]. In exceptional circumstances when the offence is committed in the presence of an officer or where the officer apprehends the offender who may likely escape, an arrest without warrant could be executed.

For a probable cause to be shown the information must be trustworthy, mere hunch or hearsay information about the commission of the offence is not enough[30]. The officer must have such information or knowledge, which a reasonable prudent man would consider as justifiable for making the arrest of a particular person. The two most important exceptions to the rights of

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[23] ***See section 61 Criminal Procedure Code***
[24] ***See section 44 & 81 Criminal Procedure Code***
[25] ***See section 34 Criminal Procedure Code***
[26] See section 44 (2) Criminal Procedure Code
[27] CHAPMAN V UNITED STATES 365 US 610 (1961) OMSTEAD V UNITED STATES 277 US 438(1928)
Ex Parte JACKSON, 96 US 727 (1877) GRISWORLD V CONNECTICUT,382 US 479 SCt (1978)
[28] See DRAPER V UNITED STATES 358 US 307 (1959)
[29] UNITED STATES V WATSON,425 US 411, 965 SCt 820 (1976) cf Sections 27,28,29,30,31,33 and 61,
Criminal Procedure Code
[30] See CHAPMAN ( Supra)

privacy under most modern constitutions are the power of searches and seizures exercise by the state in almost all jurisdictions.

**Searches of premises and seizures of objects or potential evidence**

One of the primary functions of the executive arm of government is maintenance of law and order in the society. A significant proportion of the powers exercised by the executive came by way of legislation. Since the executive arm controlled the state's coersive machinery, the issues to be determine is how to maintain a balance between the right of privacy and the duty of maintaining law and order. One of the important powers exercise by the law enforcement agencies are power of search of premises and seizure of potential evidence. It is for this reason that the law imposed certain safeguards as a check in the exercise of the power. For instance, the issuance of warrant by a judicial officer before searches were conducted.

A judicial officer may order searches of a person, house, papers, goods and effects upon a warrant issued under his hand. Search warrant can only be issued when the law enforcement officer on an Oath or Affirmation satisfies himself that there is a probable cause. In other words reasonable belief of information about the commission of the offence that the search required is necessary. The interposition of the judicial officer in the process is considered as a sufficient safeguard as to the existence of a probable cause, so that the law enforcement officers, in their zeal and enthusiasm, do not regard everything as probable cause.

The procedure requires an officer to fill out an application form, which particularly described what the authorities expect to find and where they expect to find it. Not only must the affidavits deal with specifics, but also it must set them out to the extent that a neutral or detached Magistrate can independently determine if such information demonstrates "probable cause "to justify the issuing of the warrant. The affidavit must set out sufficient facts to enable the judge to reach his independent conclusion that probable cause exist.[31]

The United States Supreme Court once held that when a valid arrest is made the officer making the arrest could search anything that is in plain sight within the immediate area of arrest[32]. For instance if a man is arrested in a room, the officer making the arrest can search anything that is in plain sight

[31] COOLIDGE V NEW HAMPSHIRE (1971) 403 US 443
[32] MARRON V UNITED STATES 275 US 192 (1927)

within the immediate area of arrest[33] This however doesn't give him the justification to search other rooms or places in the house. The limited search without warrant is justified on the ground that the suspect, at the place where he is found, is likely to have materials evidence in connection with the crime under investigation.

This principle has received judicial recognition by the United States Supreme Court in the case of ***AGNELLO V UNITED STATES***[34] where the Court asserted that, "...The right to search without warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted...."

In both the United States and Nigeria when for arrest or search an officer has to enter a house he is required by law to identify himself[35] and it is only then he can enter the place unless a "forced entry" becomes necessary in "hot pursuit"[36]. The issue of "hot pursuit" in the United States is governed by the " principle of test of immediacy ".[37] The arrest, searches and seizures of automobile with their occupants present a difficult problem. When a car is stop for the arrest and seizure of the persons and goods in the car there will be no time to obtain a warrant. In such cases where the officer reasonably suspects any occupant of the car with the commission of a crime or that the car carries contraband or has evidence material in a criminal case he can stop the car and search both the occupants and the car.[38] Warrant is not insisted for such an arrest and seizures.

The stopping of the car violates the right to personal liberty, right to property, right to freedom of movement and right to privacy. The moment the car was stopped then it amount to an arrest, because this arrest is not in

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[33] UNITED STATES V ROBINOWITZ, 339 US 59 (1950)

[34] 269 US 20 (1925) at pp30

[35] See section 26 Criminal Procedure Code

[36] In the former Northern Nigeria under section 78 of C.P.C the search must be conducted in the presence of two Witnesses who are respectable inhabitants of the locality and are in no way either connected with the Investigation or the police and the inventory of the items or goods seized must be made.

[37] See WARDEN V HYDEN (1967) 387 US 294, UNITED STATES V SANTANA 427 US 38 (1976)

[38] See CARROLL V UNITED STATES (Supra)

the conventional sense but is nevertheless an arrest. The arrest takes place when an officer accosts a person or his movements are subjected to the permission of the officer. From the moment the car was stopped there was an arrest.

The search without warrant that is permissible in this case is restricted to what the officer can see openly in the car but it does not extend to a thorough search of the car. Although as to this the Courts had taken different views at different times.

The rule of requiring probable cause for search and seizure is further relaxed in the case of borders and air travel passengers[39]. In the case of passengers and goods crossing borders, the right of privacy was held not applicable for the simple reason that general search and detention of persons crossing the border was necessary in order to verify the citizenship of that person, legality of their travel and to prevent transportation of goods in an illegal manner[40]. However later the general patrolling and stopping of each and every vehicle within the border zone was held unconstitutional unless there was reasonable suspicion that they were carrying goods or passengers illegally.

The question of searching of air passengers has not reached the Courts but the lower courts have held as constitutional the general searches of passengers and goods. Because of the danger of greater magnitude in the safety of aircrafts and passengers it is impossible either to take a risk or take such safety for granted. Hence irrespective of whether a person is suspected or not the general search of each and every passenger and their goods could easily be justified.

Electronic surveillance such as telephone tapping, bugging, eavesdropping and other modes of electronic surveillance have been largely used to violate the privacy of the individual, their house. The Courts in the United States have taken the view that when telephone is tapped or telephone conversation is recorded by planting or concealing or listening devices in public telephone booth or by dropping electronic instruments in the houses

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[39] AMEIDA-SANCHEZ V UNITED STATES 423US 266 (1973), UNITED STATES V BRIGNONI PONCE, 422 US 873 (1975)

[40] AKANSAS V SANDERS, 442 US 891, 99 SCt 2586 (1979), UNITED STATES V ORTIZ 422 US 891 95 SCt 2585 (1975, UNITED STATES V MATINEZ-FUERTE, 428 US 543, 96 SCt 3074 (1976)

of person or watching the movement of person from a distance as not unconstitutional on the ground that the words seized by this process are not a physical object and hence under the two test mentioned earlier it cannot be said that the privacy is violated.
The Supreme Court abandoned the physical invasion text by observing that the right of privacy is of the person and not of the place. What a man decides to keep as private even in the public place the right of privacy is available to him. He will not have the right to privacy when he exposes to public knowledge things that are in his private place.

While enlarging the right to privacy against practices of wiretapping, telephone bugging, eavesdropping and other electronic devices, the Supreme Court laid down certain guidelines for making constitutional the violation of the right of privacy by these methods. The Court held that, by these methods, the privacy violation might be constitutional if it is done:

1. Under judicial authorization and after thorough investigation.
2. It is restricted only to the law enforcement. Even the need of state security within the country relating to foreign affairs has been brought under these guidelines. Therefore the state should not on the ground of state security and defence or without authority violate the right of privacy.
3. The judicial authorization can only be given where the law enforcement agents show the probable cause.

The position in Nigeria could be found under the *WIRELESS TELEGRAPHY ACT 1961 No. 31* which *inter alia* provides that,

> *"Telephone tapping could be undertaken by the appropriate executive agency to detect crime being planned by the use of that instrument."*

*This provision is however subject to certain procedural in-built safeguards like the interposition of a judicial officer before such authorization or approval is granted. The right of privacy is of the person and not the place. What a man decides to keep as private even in public place, the right of privacy is available to him. He will*

*not have the right of privacy when he exposes to public gaze or knowledge of things that are in his private place.*[41]

***Illegally Obtained Evidence***

The admissibility or otherwise of evidence obtained through the violation of the right to privacy by the use of these electronic instruments is a little confusing in Nigeria. Generally at common law seizure of evidence by illegal means was not viewed as affecting the quality of evidence materials obtained. This is a dangerous proposition because the United States Supreme Court consistently maintained that, such material or information should not be admissible in evidence. The reasoning of the court being that unless they are made inadmissible they will significantly undermine the right to privacy and the authorities may disregard the right and violate it with impunity. The right is only meaningful and of substance when such materials are excluded from admissible evidence[42]

This exclusionary rule developed by the U.S. Supreme Court has been criticized on the ground that it has totally neglected the interest of public justice. It was argued that mere technical violation by the police officer or negligence or corrupt practices on his part will result in the escape of the offender from public justice. This rule will enable the whole prosecution case to fall to the ground.

Although an attempt was made by the U.S Supreme Court to overrule this principle it failed because there was no suitable alternative that could adequately protect the right to privacy as well as to satisfy public justice. It is submitted that the wording of the section invites actually the court to strike a balance between the principal competing values of the criminal justice process. On the other hand the need to have a thorough and efficient law enforcement which affords all of us safety and the future need each of

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[41] The Supreme Court in this case EISENSTADT V BAIRD, 405 US 438, 92 Sct 1029 carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of public arena. There is a distinction between public and private morality and private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. cf STATE V SAUNDERS 75 N.J. 200, 218 - 220 .

[42] This is what is referred to as the "doctrine of fruit of the poisonous tree" established in the case of SILVERHORNE LUMBER Co. V U.S., 251 US 385 40 Sct 182 (1920) The doctrine also came to be applied to evidence gained as a result of leads produced by coerced confession.

us has in wanting to be assured that individual rights will be respected when we are suspected or accused of committing a crime.

Friction results because frequently used methods, which the police found most efficient or convenient, are of a kind, which transgress standards, predicated on respect for the worth of the individual liberty. It is submitted that the Scottish Courts approach offers a viable alternative in the search for a balancing scale and the protection of each of the competing interest. In the case of *LAWRIE V MULR SCOTS* Lord Cooper observed that,

> *"It seem to me that the law must strive to reconcile the two highly important interests which are liable to come into conflict: (a) the interest of the citizens to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) that the interest of the state to secure the evidence bearing upon the commission of the crime and necessary to enable justice to be done shall not be withheld from the courts of law on any formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily the protection for the innocent citizens against unwarranted, wrongful and perhaps high handed interference; and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizens against the efforts of the public to vindicate the law... the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizens to vanish, and offering a positive inducement for the authorities to proceed by irregular needs."*[43]

One of the most difficult issue is in the area of electronic surveillance which is the determination of the extent to which the interpretation of the 4th amendment compels the judiciary to oversee surveillance in matters relating to national security. This suggests a potential clash between the courts intent on stringently enforcing the constitutional guarantee of judicial

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[43] As quoted by Shani; B.M(1981). Some Aspects of Criminal Procedure in the Northern States p.46-7

supervision and the constitutional commitment of protecting the national security by the executive.

In response to this highly sensitive and technical problem the United States Congress in 1978 responding to the perceived abuse of government wiretapping and eavesdropping in the name of national security enacted *"Foreign Intelligence Surveillance Law"*.

The law *inter alia* provides that,

> *"No bugging or wiretapping without prior judicial approval was to be initiated by federal intelligence or law enforcement agents against an American citizen, a lawfully resident alien or any of various incorporated or incorporated domestic organizations, the law requires agents seeking for a warrant for any electronic surveillance of the above parties to first produce evidence of criminal activity. The laws imposed stiff penalties for violations and provided stiff penalties for violations and provided for recovery of compensatory and punitive damages and legal and investigative fees by an aggrieved party..."*

In the case of *UNITED STATES V UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF MICHIGAN,*[44] the question for determination by the court was the power of the President, acting through the Attorney General to authorize electronic surveillance in internal security matters without prior judicial approval. The United States Supreme Court held that the interposition of judicial approval was meant to safeguard the rights of the citizens against possible abuse. Therefore any such authorization was unconstitutional, null and void.

In conclusion it is submitted that illegally collected evidence may be admitted in evidence against the person whose privacy under section 41 could be larger and more exclusive then the one upheld in the U.S. This is because the restrictions can be imposed "*in the interest of* "which expression gives the state the privilege to impose the restriction which are far more remotely connected to any of the matters mentioned there. The

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[44] 407 US 297 SCt 2125 (1972).

state may not be required to justify the restriction with reference to the immediate need of protecting any of those matters.

Under the Nigerian Constitution the idea of limited search should be adopted because allowing any time lapse may lead to the willful destruction of material evidence either by the accused or his accomplice. However the wide latitude of the United States Supreme Court need to be trimmed down or restricted in order to maintain a balance between the individual right and societal right. The United States Supreme Court proposition is, to say the least, very unsatisfactory because the basic idea behind the fundamental rights in constitutions is to safeguard the freedom of the individual against possible legislative and executive abuses. The least the court could do was to determine whether a particular legislation is consistent with these basic principles of democratic ideals.

Similarly under the Nigerian Constitution the opening phrase "Nothing in section 38,39,40, and 41 shall invalidated any law...." reduces to a large extent the efficacy of the right. The effect of this section is to raise a rebuttable presumption as to the validity of any legislative enactment curtailing this freedom. The burden of proving that such a law *is not reasonably justifiable in a democratic society* lies squarely on the Petitioner. This is no doubt a heavy burden, which is generally difficult to prove especially against the background of the Court's attitude of regarding such issue as a *political question.* Section 45 greatly undermined the right to privacy in the sense that there is no any safeguard against the legislative powers and that the constitution proceeded on the assumption of the validity of the law providing for the exception instead of affirming the right in positive form before laying the standard of the exceptions.

## CONCLUSION

From the above discussion it is clear that there is an overriding provision of section 45 of the 1999 constitution which in material facts reduces to a considerable extent the efficacy of those rights to which the general exception applies including the right to privacy. Essentially in the present day modern states, most legislation on security matters originates from the executive arm of government and in our not so fully developed democracy the general trend is that the executive control the legislature and could therefore have any form of legislation passed. Against this background the courts remained as the only avenue constitutionally available to reduce or at least control this enormous powers enjoyed by the state. The court must rise

to this challenge in order not only protect the individual rights against the awesome power of the state exercised by the executive but establish an enduring legacy on the bedrock of fundamental rights guaranteed by the constitution.