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COMPARATIVE ANALYSIS OF THE RIGHT TO PRIVACY UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Introduction

The right to privacy is a fundamental human right that various international and regional human rights instruments have recognized.[1] The protection of the right to privacy under the African Charter on Human and Peoples' Rights (AFCHPR or Banjul Charter)[2] and the European Convention on Human Rights (ECHR or European Convention) is significant, mainly because they are adopted in different legal and cultural contexts. The African society is traditionally communal in nature. This is characterized by a close chain of kinship that transcends nuclear and extended families into the entire fabric of the community.[3] The individual exists not in isolation but as an integral part of the community, deriving his identity only in the community he lives in and through the community while sharing much of his life with the community. Within this traditional kinship setting, the meaning, application, and respect for privacy are fundamentally blurred but not extinguished.[4] Communal African values continue to greatly influence the stultification of the right to privacy in Africa. Critiques of the communal value system encourage Africans to commit seriously to the notion of individualism, which is the foundation of the Western legal guarantee of a right to privacy.[5] Article 29 of the UDHR, though seemingly rooted in Western notions of individualism, arguably offers a reconciliation in the debate between communalism and individualism. It states that each person has responsibilities towards the community, which are essential for the individual's development and the acknowledgment of rights and freedoms, including privacy rights. This emphasizes that the full realization of such rights within a community depends on individuals acknowledging their duties, thus fostering a social order that respects rights and freedoms.[6] Through this lens, the perceived divide between individualism and communalism is bridged, illustrating that a harmonious balance between

[1] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 12; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 8

[2] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[3] Abakare Chris and Okeke Vincent, 'Communalism in Contemporary African Society: A Phenomenological Study' (2018) 10 (2) Nnamdi Azikiwe Journal of Philosophy 67

[4] Ogbujah Columbus, 'African Cultural Values and Inter-communal Relations: The Case with Nigeria' (2014) 4 (24) Developing Country Studies 208

[5] Táíwò Olúfẹ́mi, 'Against African Communalism' (2016) 24 (1) Journal of French and Francophone Philosophy 1.

[6] UDHR 1948, Article 29

personal freedoms and communal responsibilities is not only possible but essential for the holistic recognition and exercise of human rights.[7]

Individualism asserts the place and authority of the individual instead of the community. Here, the individual enjoys his individuality as a distinct and unique person. This favours a commitment to privacy and individual self-determination.[8] Western individualism broadens the scope and application of the right to privacy, as opposed to African communalism, which identifies a person with his community and deemphasizes a claim to a distinct existence outside the community framework. Earlier writers observed that under African communalism, a claim to individualism was considered taboo, such that the community exercised extensive controlling rights over a person. The opposite was the case in Western civilization.[9]

African communalism as the ideal of social relations was incorporated into the AFCHPR as stated in the preamble to the Banjul Charter.[10] This is because, curiously, the Charter tiptoes around the issue of privacy, thereby leaving a long trail of legal controversies about whether a right to privacy exists therein. Legal opinion on the issue is sharply divided into two broad camps. The first insists that under the AFCHPR, there is no legal right to privacy. The argument is that the omission of an express statement of the right to privacy under the Charter is an express non-recognition of the right under the Charter.[11] The absence of the word "privacy" does, therefore, foreclose the logical inference of the right from the provisions of the Charter.[12]

The second camp insists that even though it is admitted that the Charter does not mention "privacy," the right to privacy exists under the Charter as a derivable right from other rights. There is also a further argument that article 60 of the AFCHPR empowers the African Human Rights Commission to "draw inspiration from international law on human and peoples' rights." Consequently, the article allows for the importation of the right to privacy from international human rights instruments such as the Universal Declaration of Human Rights into the Charter.

[7] Lohmann Georg, 'Individual Human Rights and Obligations Towards Communities' (2015) 8 (3) Fudan Journal of Humanities and Social Sciences 387
[8] Bisong Peter, 'Between Communalism and Individualism: Which Way Africa?' (2018) 2 (2) Rais Journal for Social Sciences 6
[9] Nwoko, Matthew, *The Rationality of Africa Socialism*. (Roma, University Press 1985) 86
[10] Kufuor, Kofi, *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan, 2010) 39
[11] Gutwirth Serge, *Privacy and the Information Age* (Rowman & Littlefield Publishers, Inc, 2002) 24
[12] Singh Avani and Power Michael, 'The Privacy Awakening: The Urgent Need to Harmonize the Right to Privacy in Africa' (2019) 3 African Human Rights Yearbook 202

The effect of article 60 is that the Charter is to be read with regard to international human rights law.[13]

The divergent positions expressed above obfuscate the existence and extent (if any) of the right to privacy under the AFCHPR. This unsettled legal position is unhealthy for the development of the right to privacy in Africa, especially for navigating the strongly rooted value of communalism. This is particularly so as more Africans continue to assert a right to individualism and self-determination as opposed to traditional values of communalism without clearly defined boundaries of privacy.[14]

Despite the unsettled position of the right to privacy, the right to privacy has often been used by African leaders to prevent public scrutiny. This results in a dilemmatic legal situation in the face of corruption and public accountability crisis by African public officials.[15] The right to privacy continues to be used to undermine financial transparency. Meanwhile, the rapid diffusion of technologies in the areas of communication has also continued to challenge the boundaries of the right to privacy, including data privacy.[16]

From the above, there is the legal problem of a clear definition of the legal nature, extent, and limits of the right to privacy in Africa. There is an even more serious legal problem with regard to public office holders in Africa as the African people continue to push to be entitled to information regarding their public office holders, which is necessary to fight corruption and enhance public accountability.[17] This problem encourages the use of privacy to stultify accountability in public affairs.

The objective of the research is to critically appraise and determine the existence, nature, and extent of the right to privacy under the AFCHPR in response to the identified legal problems of public accountability and freedom of expression. This is with the aim of contributing to the

[13] Yohannes Eneyew, 'Untrodden Paths towards the Right to Privacy in the Digital era under African Human Rights Law' (2022) 12 (1) International Data Privacy, Oxford University Press 16, 24
[14] Jumoh Mujib, 'The Place of Digital Surveillance under the African Charter on Human and Peoples' Rights and the African Human Rights System in the Era of Technology' (2023) 1 African Journal of Legal Issues in Technology and Innovation 113
[15] Fagbadebo Omololu, 'Corruption and the Challenge of Accountability in the Post-Colonial African States: A Discourse' (2019) 1 Journal of African Union Studies 9
[16] Collaboration on Internet ICT Policy for East and Southern Africa, 'Mapping and Analysis of Privacy Laws in Africa: Collaboration on Internet ICT Policy for East and Southern Africa' (CIPESA) 2021, 5
[17] African Charter, Article 9 (1)

discussion on the need to prevent the misuse of privacy rights from obstructing public accountability, which fosters corruption and limits the freedom of expression. The comparative assessment of the right to privacy under the AFCHPR and the ECHR is to provide insights from the ECHR's approach, which Africa may learn from.

The legal questions which this thesis will address are as follows:

1) To what extent does the AFCHPR recognize and guarantee the right to privacy?
2) Does the right to privacy under the AFCHPR protect African public office holders against financial and personal accountability to the people?
3) What are the legal challenges to the implementation of the right to privacy under the AFCHPR vis-à-vis the necessity of financial and personal accountability by African public office holders?
4) Can the right to privacy be used by public office holders to limit public accountability or the freedom of expression, including the right to information?
5) In what ways does the legal approach to the right to privacy under the AFCHPR compare with the approach under the ECHR?

The significance of addressing legal problems cannot be over-emphasized. As already pointed out, the unsettled position on the existence of the right contributes to the disregard as well as the abuse of the right to undermine accountability of the government. By critically examining the right, the research shall provide valuable resources that will be important for promoting and securing the right to privacy in Africa as well as protection against abuse of the right to freedom of expression. The comparative analysis with the ECHR will allow for the identification of weaknesses inherent in the AFCHPR's approach and the alternative approach under the ECHR, which Africa may consider adopting.

Furthermore, by narrowing down the analysis to the privacy of public office holders, this thesis introduces novelty in the discussion of the right to privacy in Africa as it focuses on the narrower issue of abuse of the right to privacy aimed at undermining financial and personal accountability in Africa, using Nigeria as a case study, a situation that promotes corruption in the continent.

Moreover, by critically appraising the right to privacy under the AFCHPR, including an analysis of the arguments for and against the existence of the right under the Banjul Charter, the research

will make a significant contribution to the long-drawn legal dispute. This contribution will strengthen respect for the right to privacy in Africa. The research will also be significant to the academic community by providing an additional literature base for future research into the right to privacy in Africa.

The research adopts a doctrinal and comparative methodology, leveraging primary sources such as the African Charter on Human and Peoples' Rights (AFCHPR), the European Convention on Human Rights (ECHR), International Covenant on Civil and Political Rights (ICCPR), and their judicial decisions, alongside secondary sources including soft law instruments, academic literature, and online materials including newspapers. To address recommendations for expansion, the methodology will explicitly analyze soft law instruments from both systems, employing textual analysis based on Article 31 of the Vienna Convention on the Law of Treaties to interpret the AFCHPR and ECHR provisions. This analysis will be enriched with judicial decisions to contextualize the provisions' practical applications. Secondary sources, including legal opinions and scholarly articles, will provide additional support and insight into the interpretations. The research will culminate in a detailed comparative analysis, highlighting the similarities and differences in the right to privacy's articulation and enforcement within both legal frameworks, thus offering a comprehensive understanding of its jurisprudential and normative dimensions in these different regional legal cultures. This methodological approach ensures a nuanced exploration of the right to privacy, incorporating the guiding principles and influences of soft law to deepen the comparative analysis.

The thesis uses Nigeria as a case study to analyze the right to privacy in Africa. The first reason is that Nigeria has domesticated the AFCHPR, which provides a context-specific example of its implementation.[18] Second, Nigeria has ratified the Protocol to the African Charter on Human and Peoples' Rights, which established the African Court on Human and Peoples' Rights. Third, Nigeria provides intriguing and contemporary examples of the use or attempt to use the right to privacy to undermine accountability by public officeholders.

Chapter One elaborates on the legal frameworks for protecting the right to privacy under the Banjul Charter and the European Convention.

[18] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983

Chapter two examines the right to privacy based on specific contexts, such as private and family life, home, communication, and correspondence, and the circumstances under which the right to privacy may be limited in both human rights instruments.

Chapter three addresses the strategies for implementing the right to privacy under the AFCHPR and the ECHR, beginning with the state obligation and the court systems established to protect the right to privacy.

CHAPTER 1. LEGAL FRAMEWORKS FOR THE PROTECTION OF THE RIGHT TO PRIVACY

The Organisation of African Unity (OAU) (now African Union) in Banjul adopted the African Charter on Human and Peoples' Rights in 1981. The Charter, however, came into force in 1986.[19] The AFCHPR is the primary legal codification and recognition of human rights at the African continental level. At the time of the Charter's adoption, Africa was notorious for human rights abuses, especially by military dictators who had usurped political powers in some African States.[20] This resulted in a battered human rights image for Africa that adversely affected the continent's international reputation. Examples included politically motivated detentions and harassment, clampdown on opposition and civil society groups, and the apartheid regime in South Africa that dehumanized black South Africans. The AFCHPR is, therefore, largely considered a political response to salvage the image of Africa in the context of human rights.[21] The AFCHPR deals with various aspects of human rights in the political, social, economic, and educational fields, among others. Under article 2 of the Charter, the rights contained therein are to be enjoyed by everyone without discrimination.[22]

The ECHR was adopted much earlier in 1950 by member states of the Council of Europe and has undergone some amendments.[23] The draft and adoption of the Convention were primarily influenced by the adoption of the Universal Declaration of Human Rights in 1948, which was an essential source of reference for the drafters of the European Convention. Therefore, it is not surprising that the Convention was largely fashioned around the civil and political rights in the UDHR. The preamble to the ECHR expresses consideration of the aim of the Council of Europe, which is to achieve unity among the members, and the acknowledgment that the protection of human rights is one of the methods through which the said unity can be pursued. The ECHR, in its preamble, notes further the importance of the democratic system of government and common

[19] OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[20] Mutua Makau, 'The African Human Rights System in a Comparative Perspective' (1993) 3 (5) Review of African Committee on Human and Peoples' Rights 7
[21] Mutua M. *op cit.*
[22] Magnarella Paul, 'Achieving Human Rights in Africa: The Challenge for the New Millennium' (2020) 4 (2) African Studies Quarterly 17
[23] Up to now, 16 protocols have been adopted by the ECHR

understanding at the European level in the enforcement of human rights.[24] This chapter provides a legal analysis of the right to privacy under both regional human rights instruments in a comparative context.

1.1 Legal Nature of the Right to Privacy under the AFCHPR and the ECHR

A common understanding of the legal concept of right is that it is a bundle of entitlements that a person can enforce for his benefit.[25] Accordingly, the right to privacy expresses a person's legal entitlements to enjoy privacy. What is privacy in the legal context is, however, not free from controversy. That is, the legal dividing line between what is private and, on the contrary, what is public is not always as obvious as one may suppose. Privacy appears to be understood on a case-by-case basis, and the law only provides the guiding considerations, which may differ under different statutory frameworks.[26]

Hughes describes privacy as a bulwark against totalitarianism, noting that one of the core values of privacy is allowing individuals to maintain some distance from the state to allow democracy to thrive.[27] Lever argues that privacy is essential for democracy, framing it as a core necessity. She posits that individuals have the right to withhold certain truths about themselves if they choose, as a gesture of acknowledging their moral and political significance and to prevent being exploited as examples for the purposes of educating or amusing others.[28] Megwara attempts to provide a comprehensive expression of the right to privacy. He states: "The right to private life encompasses the right to live in isolation of others, the right to protect one's social, interpersonal relationships, the right of concealment of one's nudity, from public glare and the right of an individual over his own body." [29] Although applicable, the above fails to particularise the extent of the right in each of the perspectives mentioned. For instance, he does not state the extent to

[24] Mowbray Alastair, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edition, Oxford University Press 2012) 5
[25] Kamm Frances, 'Rights' in Coleman Jules. and Scott Shapiro. (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 476-513
[26] Solove Daniel, *Understanding Privacy* (Harvard University Press 2008) 21-36
[27] Hughes Kirsty, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in Roessler Beate and Mokrosinska Dorota, eds. *Social Dimensions of Privacy: Interdisciplinary Perspectives*. (Cambridge University Press 2015) 225, 228
[28] Lever Annabelle, 'Privacy, Democracy and Freedom of Expression' in Roessler Beate Mokrosinska and Dorota, eds. *Social Dimensions of Privacy: Interdisciplinary Perspectives*. (Cambridge University Press 2015) 163
[29] Megwara Lloyd, *The Law and Practice of Human Rights in Nigeria*)Olive Printing & Publishing House 2010) 202

which a person may live in isolation from others. He suggests wrongly that the right is without limit. The Nigerian Supreme Court provides a more practical statement of the right as follows: "The right to privacy implies a right to protect one's thought, and one's body from unauthorized invasion… The sum of the rights of privacy and freedom of thought, conscience, or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life unless a clear and compelling overriding state interest justified the contrary."[30]

The introduction by the Nigerian Supreme Court of such qualifications as "unauthorized invasion" and "compelling overriding state interest" introduces limitations to the right and, therefore, better states the legal understanding of the right. In any case, the right to privacy is best understood from the particular context of each enabling law that created the right. This way, privacy is not understood in a vacuum but with specific reference to the provision of the human rights law under which the right is claimed. Accordingly, in the legal analysis of the right, particular inferences will be drawn from the AFCHPR and the ECHR.

1.1.1 Privacy under the AFCHPR

It should be recalled that the AFCHPR does not contain any express statement of the right to privacy, and there are, therefore, two possible legal implications of the above. Firstly, there is no right to privacy under the AFCHPR, and secondly, the right can be derived from other rights provided in the Charter and other instruments in accordance with Article 60 of the Banjul Charter. These two possible outcomes will now be examined. The rules of interpretation that will be applied for this analysis are derived from article 31 of the Vienna Convention on the Law of Treaties 1969. The relevant rules are as follows:

a) The AFCHPR is to be interpreted in good faith following the literal meaning of the words used in the treaty.
b) The context of the usage of those words and the purpose and object of the Charter shall be considered, including the preamble to the Charter.
c) Other treaties between the State Parties to the AFCHPR shall be considered. In this regard, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, the African Charter on the Rights and Welfare of the Child

[30] *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2001) 10 WRN 1 SC, 41

1990, and the African Union Convention on Cybersecurity and Personal Data Protection shall be considered. These instruments were adopted under the context of the African Union and provide for the protection of the right to privacy in Africa.

d) Relevant international treaties, particularly the Universal Declaration of Human Rights 1948 and the ICCPR, shall also be considered. This choice is informed by the fact that the UDHR is the foremost human rights instrument establishing the right to privacy, and the ICCPR is the first international legally binding human rights instrument establishing the right to privacy.

It needs to be stated that the totality of the above rules is to be applied jointly such that none of the rules exclusively define the intentions of the State Parties to the AFCHPR. The literal rule of interpretation of the AFCHPR would suggest that there is no right to privacy under the Charter. This is because the rights, freedoms, and duties which the State Parties to the Charter undertake to recognize and abide by are those enshrined in the Charter.[31] It may, therefore, be argued that for any right such as privacy which is not expressly enshrined in the Charter, the Parties have no binding obligation to respect or even recognize. Makulilo supports this line of thought.[32] This argument is not entirely misplaced. After all, even at the most basic level, it may be reasonably contended that if the parties had intended to recognize a right to privacy, they would have so stated without leaving it open for debate. To lay further credence in support of this school of thought, the *travaux preparatoires* of the African Charter reveal that the right to privacy was contained under the first draft of the African Charter on Human and Peoples' Rights (Keba Mbaye Draft).[33] However, the right to privacy was omitted during the adoption of the Banjul Charter, and there is a lack of in-depth commentary on how and why each article of the Charter was drafted in a certain way and the reason for the omission.[34] Accordingly, the absence of an express statement of the right may be argued not to be a result of legislative oversight but deliberate non-recognition of the right. This may be expressed in the legal maxim '*expressio*

[31] AFCHPR 1981, article 1

[32] Makulilo Alex, 'The Long Arm of GDPR in Africa: Reflection on Data Privacy Law Reform and Practice in Mauritius' (2021) 25 The International Journal of Human Rights 117

[33] Art 24 of the The Keba Mbaye Draft on African Charter on Human and Peoples' Rights prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, CAB/LEG/67/1

[34] Murray Rachel, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, 2019); Plagis Misha and Riemer Lena 'From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7' (2020) 23(4) Journal of the History of International Law 556-589

unius est exclusio alterius', which is translated to mean that the express mention of one thing is the express exclusion of others that are not mentioned.

Despite the above strengths of the arguments against the existence of the right to privacy under the AFCHPR, it fails to take into account the other principles of interpretation of treaties, such as good faith. Good faith in the interpretation of the AFCHPR would require a liberal and objective approach that does not stultify the objectives of the Charter and does not undermine its contexts. Hence, the absence of an express statement of the right to privacy cannot lead to a hurried conclusion of the absence of the right *simpliciter*. The preamble to the AFCHPR provides statements about its objectives, purposes, and contexts. It becomes necessary to have regard to its preamble to better interpret the absence of an express provision on privacy.[35]

The preamble to the AFCHPR reaffirms the pledge of the State Parties to promote international cooperation based on the Charter of the United Nations and the Universal Declaration of Human Rights. The Parties also affirm that they will adhere to human rights principles adopted by the African Union, the Movement of Non-Aligned Countries, and the United Nations. This means that the Universal Declaration of Human Rights (UDHR) undoubtedly provides a context for understanding the AFCHPR. This is consistent with Article 31 of the Vienna Convention on the Law of Treaties, which requires consideration of relevant international instruments in the interpretation of treaties.

Beyond its preamble, the AFCHPR expressly mandates deriving inspiration from international law. It provides: "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members."[36] This is further strengthened by article 61 of the AFCHPR, which mandates considering international law in determining the principles of law that should guide the interpretation of the Charter.

[35] Kufuor K. (n 10) 39
[36] AFCHPR article 60

Based on the above, inspiration will now be drawn from the UDHR, ICCPR, and any other instruments adopted by member states of the African Union that seek to protect the right to privacy. The UDHR represents the common universal standard of human rights.[37] This makes it especially important in the interpretation of the AFCHPR. The preamble to the Declaration recognises the inherent dignity of every person as the foundation of justice, freedom and peace globally. That is, without the recognition and protection of human dignity, the world cannot lay any claim to freedom, justice, or peace. The dignity of the human person becomes the basis of all other human rights. It is, therefore, not surprising that the first substantive right under the UDHR is the freeborn status and equal dignity of all members of the human family.[38] The UDHR expressly states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[39] The ICCPR, in article 17, protects at least seven aspects of the right to privacy: private life, autonomy, identity, integrity, sexuality, intimacy, and communication.[40] The next question will be whether the AFCHPR protects against interference in the above areas to infer the right to privacy.

Article 5 of the African Charter protects the right to dignity of the human person. Okene et al. submit that the fundamental feature of dignity is the autonomy of the self and self-worth. [41] Dignity includes an entitlement to respect.[42] Respect for the dignity of a person necessarily includes respect for the privacy of the person.[43] Conversely, violation of the privacy of a person undermines the dignity of a person. Respect for the inherent worth of the human person, which dignity invokes, reasonably includes privacy.[44] The AFCHPR protects the inviolability of the human person, including the integrity of his person. No person is to be deprived of this right arbitrarily.[45] This thesis argues that personal integrity and the inviolability of the human is the

[37] UDHR 1948, General Assembly proclamation
[38] UDHR article 1
[39] UDHR article 12
[40] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Publisher, Kehl 1993) 385, 92
[41] Okene O. and Akani Nnamdi, 'Human Dignity and Human Rights: The Nigerian Question' (2019) 17 Maiduguri Law Journal 199
[42] Shultziner Doron, 'Human Dignity. Functions and Meanings' (2003) 3 Global Jurist Topics 1
[43] Floridi Luciano 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 (4) *Philosophy and Technology* 307, 309
[44] Sieghart Paul, *The International Law of Human Rights* (Clarendon Press 1983) 569
[45] AFCHPR, article 4

same as the right to privacy particularly in the context of personal autonomy or personal self-determination. Here, the body of a person is protected against violation as the integrity of his person is to be respected. In addition, the AFCHPR guarantees to every individual a right to the security of his person.[46] Since the person of an individual is secured, it precludes unauthorized access to an individual's person.[47] It is, therefore, submitted that protection of an individual's body from unauthorized access constitutes protection of the privacy of a person.

Another aspect of the right to privacy that is protected is the privacy of the family. Under this perspective, the AFCHPR states that the "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 morals."[48] Beyond the responsibility of the State Parties to recognise and implement the provisions of the Charter, individuals who enjoy their rights have a duty to respect the rights of others.[49] Clearly therefore, the AFCHPR protects the right to privacy despite the absence of the express use of the word privacy.

Another important and relevant context to the question of whether privacy exists under the AFCHPR is other treaties adopted by member states of the African Union. Article 66 of the Charter provides the power to make other supplementary or complementary treaties to the AFCHPR. In the exercise of that power, State parties to the AFCHPR have adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[50] Article 4 of the Maputo Protocol protects every woman's right to respect for the security and integrity of her person. Clearly, members of the AU appear to have a particular choice of words in terms of protecting privacy, such as bodily and personhood security and integrity.

The African Charter on the Rights and Welfare of the Child (ACRWC), which State Parties equally adopted to the AFCHPR, provides a more explicit statement of the right to privacy.[51]

[46] AFCHPR article 6
[47] Makulilo Alex, "A Person is a Person through Other Persons"—A Critical Analysis of Privacy and Culture in Africa (2016) 7 Beijing Law Review 192-204
[48] African Charter, Article 18 (1)
[49] African Charter, article 27(2)
[50] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003
[51] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)

Article 10 of the Charter provides that "No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks."[52] While this is more expressive of the right to privacy, it does not in any way undermine the same protection under other instruments. On the other hand, it shows clearly that the African Union is not opposed to the right to privacy. Moreover, the AFCHPR strongly recognizes the principle of equality, including equal protection by the law, and prohibits any form of discrimination.[53] It cannot, therefore, be argued that the right to privacy is recognized under the Maputo Protocol and the African Charter on the Rights and Welfare of the Child but not under the AFCHPR. This will result in a discriminatory stance wherein only men will be denied the right to privacy, an outcome that is clearly not intended by State Parties to the AFCHPR. Based on the above analysis, it is submitted that the Charter recognizes and protects the right to privacy.

Further, the 2019 African Declaration on Freedom of Expression and Access to Information (African Declaration), which is a non-binding instrument adopted by the African Commission, provides for the scope of legal protection for the right to privacy in the digital age. The African Declaration acts as an interpretative aid to the African Commission and guarantees the protection of personal information, anonymity, and confidentiality.[54]

The Malabo Convention, effective from June 9, 2023, post-Mauritania's ratification, aims to enhance cybersecurity and personal data protection across Africa. Its objectives include establishing comprehensive legal frameworks for cybersecurity and data protection, thereby safeguarding individuals' personal data and ensuring that the rights of local communities are protected. Central to the convention is its commitment to reinforcing the right to privacy through the promotion of secure digital environments and the regulation of personal data processing. This alignment underscores the convention's pivotal role in balancing technological advancement with

[52] ACRWC Article 10
[53] African Charter, articles 2 and 3
[54] African Commission *The Declaration on Freedom of Expression and Access to Information* 10 November 2019

privacy rights, serving as a cornerstone for privacy protection in the digital age in Africa.[55] The several laws which have been adopted within the African Union framework are a testament that the right to privacy is protected despite the fact that it is expressly not contained in the African Charter.

1.1.2 Privacy under the ECHR

The ECHR, just like the AFCHPR in its preamble, considers the Universal Declaration of Human Rights. The preamble further states that the aim of the ECHR is to give effect to the recognition and observance of the rights guaranteed under the UDHR. Thus, much effort is not needed to determine the relationship between the ECHR and the UDHR since the first gives effect to the latter in Europe. This way, the UDHR provides a clear context for the interpretation and application of the ECHR.[56]

Again, unlike the AFCHPR, where extensive analysis is needed to logically deduce a right to privacy, the ECHR provides an express recognition and protection of the right, making such analysis unnecessary. It states expressly that every person has a right to have his private life as well as his family life respected. Furthermore, a person is entitled to respect for the privacy of his home as well as his correspondence. This respect for privacy prohibits interference by a public authority with the enjoyment of the right. The only exception is that any interference must be backed by law and must be such that it is necessary to follow the standards of democratic societies, and the interference must be in the interests of national security, national economic well-being, public safety, crime prevention or prevention of disorder, to protect public health or public morals or to protect the rights of other members of the society.[57] While the statement of the right to privacy appears clear from the ECHR, practical application on a case-by-case basis does not enjoy equal clarity. It becomes necessary to examine each context of the application of the right as provided.

[55] African Union, *African Union Convention on Cyber Security and Personal Data Protection* (Malabo Convention), 27 June 2014
[56] ECHR, Preamble, § 1
[57] ECHR, article 8

CHAPTER 2. PRIVACY PROTECTIONS IN SPECIFIC CONTEXTS

The previous chapter discussed the legal nature of the right to privacy under the AFCHPR and the ECHR. This chapter builds on the previous to discuss the understanding and application of the right to privacy in specific legal contexts. This discussion became necessary because privacy does not exist in a vacuum as it is expressed in relationship to something, or it is understood in respect of a particular circumstance or from different perspectives. This is clear from both the AFCHPR and the ECHR, which refers, for instance, to the privacy of the person, family, home, and correspondence. Accordingly, this section provides a critical examination of the application of privacy in each context.

2.1 Private Life

The first context of the right to privacy, which will be examined, is the privacy of the person. In this regard, article 8 of the ECHR refers to private life, while in the previous chapter, it has been stated that the right to privacy may be read from article 4 of the AFCHPR, which refers to the inviolability of the person and article 5 of the AFCHPR which refers to respect of the dignity inherent in the human person. It is submitted that the inviolability and dignity of the person of an individual and private life enjoy similar application. The African Commission, in its general comment no. 3 on Article 4 of the Banjul Charter noted that the Banjul Charter envisages the employment of a broader interpretation of protection of life, which extends beyond survival to ensuring that an individual lives a dignifying life, including upholding the right to private life.[58] Article 4 creates three related and mutually re-enforcing rights: right to inviolability of every human, right to life and right to integrity of the person. These rights, although related, are different. Here, while deprivation of human life also amounts to a violation of a human being and the integrity of the person of a human being, there can be a violation of a human being and the integrity of a person without breaching the right to life.

The inviolability of human beings and the integrity of the person under article 4 of the AFCHPR protect against violation of personhood irrespective of whether the right to life is ultimately violated in the circumstance. That is, the inviolability of human beings and the integrity of the

[58] General Comment No. 3 On The African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples' Rights Held from 4 to 18 November 2015 In Banjul, The Gambia, paragraph 28

person of an individual is distinct from the right of the individual to life and secure to the person a respect for his personhood, and such respect it is submitted includes the privacy of his personhood. The Court in *Petrova v Latvia* held the body of a dead person to be private to the person. In this case, some vital organs of the deceased were harvested, and his mother brought an action for violation of his privacy. The Court found in favour of the claimant.[59] Personhood encourages the totality of the individual, including his body, sexual orientation, intimate relationship, worldview, and emotions, among others.[60] These, in other words, may be referred to as the private life or private spheres of a person's life, those aspects which are considered personal to an individual and for which he enjoys or should enjoy the right of self-determination.

It is important to state that the right to private life is distinct from the right to life, although general comment no. 3 on article 4 of the AFCHPR seems to lump both rights together. Under the ECHR on the other hand, article 2 protects the right to life while article 8(1) protects among others the right to private life. Nevertheless, the controversy over life and private life persists. Rogatz, for instance, argues that the decision of whether to die or be alive is the most private decision for any person to take, and such deprivation of an individual of such a right undermines the foundation of the right to private life. By this, he appears to subsume the right to life under the right to private life. [61]

Following Pretty v. UK, this thesis takes the view that this position cannot be sustained under any human rights law.[62] Human life is treated as a matter beyond the privacy rights of a person. The European Convention provides that "Everyone's right to life shall be protected by law."[63] That is, there is a legal obligation to protect life even against the individual who seeks to take his own life.[64] Article 1 of the Convention mandates the High Contracting Parties to secure the rights and freedom of everyone within their jurisdiction. Such an obligation, in certain circumstances, calls for positive action on the part of the Contracting Parties, in particular, an active measure to

[59] Application no. 4605/05 (ECHR 24 June 2014) § 89
[60] White, F. J. "Personhood: An essential characteristic of the human species." *The Linacre Quarterly* vol. 80 No. 1 (2013), axell74-97
[61] Rogatz Peter, 'Avoiding a Slippery Slope in PAD' (2014) 44 (4) Hastings Center Report, Accessible: http://dx.doi.org/10.1002/hast.319 (17.11. 2023).
[62] [62] *Pretty v. United Kingdom*, Application no. 2346/02, (ECHR 29 April 2002) § 39 (where the European Court of Human Rights held that the guarantee of a right to life under Article 2 of the Convention does not confer on the applicant the right to die)
[63] ECHR, Article 2 (1)
[64] Pretty v United Kingdom (*supra*)

save lives. This way, private life does not mean that human life is a private affair. It only connotes a right to enjoy life in private.[65]

The right to private life, which is stated in terms of the inviolability of human beings and integrity of the person under article 4 of the AFCHPR, and more expressly under article 8(1) of the ECHR, cannot be exhaustively defined because of the complexity of private life and its amenability to subjective contexts. Nevertheless, the right to private life includes a right to personal social space when one desires in the form of isolation from others or to associate with only those which the person desires, to prevent others from having access to the body of the person, and to enjoy some aspects of life such as intimacy in isolation from the public.[66] The privacy of the person also includes a right to exclude from public access information about a person that is of a personal nature.[67] The above are mere instances of private life; they are not exhaustive in themselves in terms of the circumstances covered by private life. Even the European Court on Human Rights has observed that matters covered by private life cannot be exhaustively listed but continue to evolve. Moreover, what one person considers an aspect of his private life may not be considered by another. Private life is, therefore, determined on a case-by-case basis, employing both objective and subjective criteria.[68]

In X v Iceland, the ECtHR stated that "For numerous Anglo-Saxon and French authors, the right to respect for "private life" is the right to privacy, the right to live as far as one wishes, protected from publicity… In the opinion of the commission, however, the right to respect for private life does not end there. It also comprises, to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality." [69] Similarly, the European Court of Human Rights, in the case of X and Y v. The Netherlands, held that the right to private life includes the physical and moral integrity of a person, the right to personal space, and the right to be free from attention which a person does not want.[70] The reference to "unwanted" attention has serious legal implications because, for individuals, it sets the parameters between private and public life. Yet,

[65] ECHR, Article 1
[66] Tiedemann Paul, 'The Human Right to Privacy' In Philosophical Foundation of Human Rights. Springer Textbooks in Law (2020). Springer, Cham. https://doi.org/10.1007/978-3-030-42262-2_11
[67] Solove Daniel, (n 26) 23
[68] *Peck v. United Kingdom* Application no. 44647/98 (ECHR 28 January 2003) § 57
[69] *X. v. Iceland* Application no. 6825/74 (ECHR 18 May 1976) § 87
[70] *X and Y v. The Netherlands* Application no. 8978/80 (ECHR 26 March 1985) § 22

the question of wanted or unwanted attention is not one that is determinable without controversies. For instance, in seeking political office, which necessarily comes with public attention and probing, it may be argued that a person has, by that, accepted a certain level of public attention.[71]

Another aspect of the right to privacy that the Court has acknowledged is the right to personality, personal development, fulfillment, and personal happiness.[72] The nudity of a person is also considered physical integrity, which is private to the person. For instance, the European Court of Human Rights in *Konovalova v Russia* held that the privacy of a patient was violated when medical students were invited to observe the medical procedure performed on the patient as part of the learning process. The Court held that access to her medical record and body by the students without her consent breached her right to private life.[73]

The right to private life with regard to public office holders who are public individuals by their office poses peculiar problems of application. While public office holders are entitled to private life, members of the public may claim a right to information regarding them. This is because the private life of public office holders may have a direct impact on public performance, policy decision-making, and, by extension, impact on members of the public. In addition, such information may be relevant for informed public decisions, especially during elections. As Thompson rightly pointed out, public officials should not expect to enjoy the same protection as ordinary citizens do because public officials must be held accountable in a democracy.[74] Balancing the right of public office holders to privacy against the justified interests of the public in their private affairs is, therefore, challenging.[75]

The right to privacy has often been employed by Nigerian public officers to protect access to personal information. In November 2009, the then-Nigerian President, Umaru Musa Yar'Adua, was flown out of the country for speculated health challenges. It was speculated that he was already suffering from kidney failure even before his election, a fact that was kept a secret. The president was hospitalized for over five months without Nigerians having the right of access to

[71] *Von Hannover v Germany (no. 2)* [GC] Application nos. 40660/08 and 60641/08 (ECHR 7 February 2012) §120
[72] *Briggeman and Scheuten v. Germany* Application no. 6959/75 (ECHR 12 July 1977)
[73] *Konovalova v. Russia* Application no. 37873/04 (ECHR 9 October 2014) § 49
[74] Thompson Dennis, *Political Ethics and Public Office* (Harvard University Press, 1987) 129
[75] Devine John William. 'The Political Privacy Dilemma: Private Lives and Public Office' (2023) Journal *of Applied Philosophy* 2

his medical condition and without transmission of power to the vice president, a situation that created a constitutional and governance crisis. At some point, it was rumoured that the president was in coma and later that he had died. While all these controversies lingered, his handlers continued to insist that he was entitled to a right to private life.[76] On the whole, Mbah notes that "The long absence of President Yar'Adua created an executive vacuum that made some of the members of the executive council of the federation support the transfer of executive powers to the Vice President, Goodluck Jonathan. The division and absurdity of executive power vacuum led to political crisis and instability in the Federal Executive."[77]

A presidential cabal quickly emerged as people close to the president issued presidential orders in proxy on his behalf. In the circumstances, it became difficult to determine the person who was actually presiding over national affairs. While some believed that the wife of the president was the *de facto* President, others felt that political gladiators close to the president, like the Attorney General of the Federal, were in charge. In any case, the name of a president believed to be in a coma was used to govern and control the government.[78] The above represent some of the challenges that the application of the right to private life to public office holders may have on national stability. The relationship between the privacy of the president and national security was, however, interpreted from two perspectives. The first perspective argued that citizens were entitled to information regarding the health of their president. The second perspective invoked national security to argue that the president's health status or other personal information was a matter of national security that could not be disclosed to the public. Even the country and hospital where the president was receiving treatment were kept a secret. It was also argued that as a matter of national security and privacy, the president could rule from anywhere in the world and that disclosing his location would undermine national security.[79]

Although section 144(1) of the Constitution of the Federal Republic of Nigeria 1999 empowered the Federal Executive Council to remove the president from office by declaring that he is permanently incapacitated to discharge the functions of his office as a result of health challenges,

[76] Mbah Peter 'The President Can Rule from Anywhere: The Politics of President Yar'adua's Health and Executive Instability in Nigeria' (2017) 2 (2) Social Scientia Journal of the Social Sciences and Humanities 42
[77] Mbah Peter *op. cit.* 46
[78] Scott Baldauf 'Is Nigerian President Yar'Adua dead? His Absence may Spark Political Crisis' *The Christian Science Monitor* (Johannesburg 11 January 2010)
[79] Akintola O. Power Game. Sunday Sun, 09.05.2010, p. 57

this provision could not be activated. This was because while section 144 required a two-thirds majority vote of members of the Federal Executive Council, the majority of the members were loyal to the president, who was their benefactor and appointor.[80] It was, therefore, a political impossibility to expect that ministers appointed by the president would reach a resolution that the president has become permanently incapacitated. It was more politically convenient for members of the Federal Executive Council to hold on to the president's right to private life even against the public that elected him president. The right to privacy was, therefore, effectively employed to foster executive instability. This was exacerbated by the fact that the Nigerian Constitution did not contemplate such a situation. There was therefore a constitutional stalemate because the president who was sick insisted on his right to privacy.[81]

Ndoma-Egba, who was a member of the Senate at the time, lamenting the helplessness of the Senate, stated, "We have no role to play in this matter constitutionally; we must wait for the executive to act before we respond. We cannot impose a role on ourselves just because Nigerians are agitating. We cannot afford to be unconstitutional. I don't know when it became an offence to be ill. Invoking section 143 of the Nigerian Constitution means you are criminalizing ill-health."[82] However, the situation quickly degenerated into a national crisis that sparked a wave of protests and demonstrations across the country. Nigerians insisted that they had a right to know the president's health status or that the president should resign or be impeached.[83] Fearing that the situation would occasion a national breakdown of law and order and increasing international pressure, the Nigerian Senate had to come up with a purported "doctrine of necessity" under which they declared the vice president as acting president.[84] Furthermore, the National Assembly amended section 145 of the Constitution to provide that where the president is out of the country for up to 21 days, the National Assembly shall, by a simple majority vote, mandate the vice president to function as an acting president until the president writes to the National Assembly that he is available to discharge the functions of his office.

[80] Atedo Peterside, 'How to resolve the Political Impasse' *ANAP Foundation* (Abuja, 12 January 2010)
[81] Okoye Festus, Constitutional and Succession Issues in Presidential Indisposition. The Nation, 13.12.2009, 46
[82] Iwuchukwu Francis, Ndoma-Egba in Defence of Yar'Adua. Daily Independent, 22.01.2010, 35
[83] Ihekwaba Nzeribe 'Aso Rock: After 40 Days and 40 Nights' (*Modern Ghana*, 11 January 2010) <http://www.cyberschuulnews.com/missing-president1.htm>accessed 10 November 2023
[84] Mbah Peter (n 76) 50

Beyond the governance crises surrounding the president's secret medical crisis, it may be said that if Nigerians had been privy to his medical record before his presidential election, the voting pattern may have been significantly affected. Curiously, president Yar'Adua had served as governor of Katsina State from 1999 to 2007. During the period, he was absent on several occasions on medical ground. During the presidential elections also, he had to be flown by air ambulance out of the country for urgent medical attention. While these raised concerns about his health status, they were largely speculations as his true health condition was not accessible to the public, citing the right to privacy.[85] Yet, undue allegiance to the right to privacy of public officers seems to undermine public political stability, transparency, and accountability. Accordingly, it has been argued that in the African democratic context, privacy should not be used to justify secrecy regarding otherwise relevant information about public office holders.[86]

This thesis submits that the AFCHPR does not sufficiently address the legal problem of the right of public office holders to private life by balancing it against public information regarding public office holders. This legal inadequacy enabled Nigeria's constitutional crisis in the secret management of the health crisis of then president Yar'Adua. The most directly relevant right in the African Charter to which the right to privacy can be read into is article 4 which provides that human beings are inviolable and that human beings are entitled to the respect for his life and integrity of his person. The implication is that as long as you are a human being, you are entitled to enjoy the rights without any qualification, which takes into consideration the peculiar status of public office holders. This is further strengthened by article 3 of the AFCHPR which guarantees a right to equality before the law and equal protection under the law. That is, in the enjoyment of private life, both public office holders and private citizens are entitled to be equally protected. However, Thompson has argued that public office holders should not expect to enjoy the same protection as ordinary citizens do because they must be held accountable in a democratic society and this thesis agrees with his reasoning even though the context of his book was based on the American public life.[87]

[85] Omotola Shola, 'Cabalised Regime: Neopatrimonialism, President Yar'adua's Health Crisis and Nigeria's Democracy' (2011) 6 (2) CEU Political Science Journal 222
[86] Ibeanu Okechukwu and Mbah Peter, 'The African Union and Democracy in Africa: Preliminary Observations' (2014) 2 (2) Social Science Research 30
[87] Thompson Dennis (n 74) 134

Similarly, the right to private life under article 8(1) of the ECHR inures to "everyone". It is submitted that everyone means nothing less and nothing more than everyone. Effectively, public office holders are equally entitled to enjoy private life. Besides, article 14 of the ECHR provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or another opinion, national or social origin, association with a national minority, property, birth or other status." While it is true that Article 14 does not allow for discrimination, the ECtHR has clarified that public figures are to be held to higher standards of scrutiny with respect to their right to privacy, especially in balancing the same with freedom of expression, including access to information.[88]

Under the AFCHPR, the legal statement of the right to private life is grossly inadequate. A set of criteria setting forth the conditions under which the right to privacy of public office holders may be limited in a democratic society may be expedient to make public office holders accountable to the people. The case of President Yar'Adua is a good pointer as to how otherwise private medical conditions and information of the president can impact national stability and governance. It is also not clear how it may be expected that informed political decisions, especially during elections, can be made by the public without access to some personal information about public office seekers, such as academic, educational, and police records. The above information, although private, is a matter of reasonably justified public interest.

The question may even be asked whether people living at public expense, such as public houses and public cars maintained by the public, should enjoy the same level of right to private life as private citizens. Several decisions of the European Court of Human Rights, such as Axel Springer AG V. Germany, outlined the relevant criteria for balancing the right to privacy against the freedom of expression, including the right to information to include contribution to a debate of general interest, how well known is the person concerned and what is the subject of the report, prior conduct of the person concerned, method of obtaining information and its veracity, content form and consequences of publication and the severity of sanctions imposed.[89] The criteria are to be applied to the case to determine whether there is a violation, and it is inconsequential

[88] *Von Hannover v Germany (no. 2)* [GC] (supra)
[89] Application no. 39954/08 (ECHR 7 February 2012) § 89-95

whether the case is brought under Article 8 or Article 10 of the ECHR, which deals with the right to freedom of expression including right to b to information.[90]

Therefore, unlike the situation under the AFCHPR, the ECHR provides a set of criteria under which a balancing exercise may be undertaken in order to determine whether there has been a violation of the right to privacy of public office holders. This way, a person cannot hold public office while claiming unwanted attention over private information that is of public interest by virtue of his office.[91]

2.2 Right to Privacy of Family Life

The right to family is a universally recognised and protected right.[92] This is because the family is a crucial institution for the sustainability of the human race. The African communal ideology is strongly rooted in the family system, which provides the social framework for procreation, socialisation, and economic sustenance. Thus, the family is considered the most basic social institution in the African setting.[93] In Africa, family is rather extensive and covers people who are related by blood, adoption, marriage up to the extended family level. As long as there is blood relationship between persons no matter the length of the blood chain, they are considered as family. Life in Africa starts with the family. The family acts as the first institution of social welfare for the individual member as well as the first institution of government and social control. Even the notion of collectivism, to which Africa lays claim as opposed to Western individualism, begins at the family level.[94] Hence, article 18(1) of the Charter refers to the family as the "natural unit and basis of society." This signifies the importance that Africa attaches to family and family life.

Marriage plays a vital role in the constitution of the African family system. First, it creates a nuclear family. Second, it extends the extended family network through the admission of new in-law relationships that further bind both families and their respective extended families. Thus, marriage in Africa is treated not as an individual affair but as a family and, in some

[90] Axel Springer AG V. Germany (supra) § 87
[91] Mark Tunick, *Balancing Privacy And Free Speech: Unwanted Attention In The Age Of Social Media* (New York, Routledge 2015) 10
[92] UDHR *ibid.* Article 16
[93] Nmom Ogudia *Interpreting Social Problems and Public Issues in Nigeria* (Pearl Publishers 2003) 17
[94] Mafumbate Racheal 'The Undiluted African Community: Values, The Family, Orphanage and Wellness in Traditional Africa' (2019) 9(8) Information and Knowledge Management 7

circumstances, a community affair because of the new family bond it creates beyond the married couple.[95] Marriage in Africa is therefore viewed not as a private contract but as a communal ceremony involving elaborate rituals, rites, and celebrations. In some places, on the conclusion of the rites and payment of the dowry, it is the community that hands over the wife to the husband and this explains the extent of community interest in the marriage. Moreover, marriage is often arranged by the family and not by the couple. This way, Izzi defines African marriage as 'an arrangement which enables persons to live together and cooperate with one another in an orderly social life.'[96]

The above analysis of family and marriage is important for a better understanding of the right to private family life in Africa even as affecting public office holders. This is because, in much of Africa, the idea of a family extends beyond its conjugal members to include extended relations in a lineage. A lineage, or extended family, is a far larger web of relationships in which all members have a common ancestor, either male or female. One's relationship with members of one's extended family may be as important as, and in some cases, more important than, one's relationship with one's spouses and children.[97] The African family system not only enables one to grow up, socialize, and find his/her own identity but also reflects the structure and culture as well as values, expectations, and rules of the larger society. Thus, family lays a bridge for the child to be a part of the society and life. It is primarily the family that ensures that the individual is content with life, fulfills his/her duties, and comports with societal norms. The experiences and models that the family sets for the child play an important role in developing positive social behaviours and values.[98] Another important function which the family plays in the African society is economic sustainability for the individual members. The family is an epitome of the larger society and the foundation of the society including security.[99]

The AFCHPR and the ECHR differ considerably in the treatment of families as falling within the realms of privacy. While the former does not treat family life as private, the latter considers

[95] Nmom Ogudia, *Man's Basic Institutions and Social Environment* (Pearl Publishers, 2002) 17
[96] Izzi Mabel, 'The Injustice of Customary Law Marriages in Nigeria: Emerging Issues' (2019) 5 Ife Juris Review 86
[97] Jean-Phillipe Platteau. 'Traditional Systems of Social Security and Hunger Insurance' in Ahmad E. et al. (eds), *Social Security in Developing Countries* (Clarendon Press 1991) 112 -170
[98] Günindi, Yunus, Tezel Şahin, and Demircioğlu, Haktan, 'Functions of the Family: Family Structure and Place of Residence' (2012) 4 (1) Energy Education Science and Technology Part B: Social and Educational Studies, 549
[99] Nmom, Ogudia 'Nigerian Family Values Amidst Security Challenges' (2013) 4 (4) Journal of Economics and Sustainable Development, 183

family life as part of private life. Nevertheless, both human rights instruments recognise and protect the right to family. Article 18 of the AFCHPR provides as follows:

"1) The 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.

2) The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.

3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."

Fundamentally, what the AFCHPR guarantees is a double fold binding duty on State Parties to protect the family and to assist the family. Protection of the family will involve the creation of necessary social, economic and cultural conditions for the family system to flourish and to prohibit or address factors which threaten the sustainability of the family. Assistance, on the other hand, employs State intervention in areas of legislative, economic, or social fields so as to strengthen the family system.[100] While the above does not clearly provide a right to privacy of family life, it is submitted that protection and assistance of the family reasonably mandates the provision of necessary privacy conditions for the family to flourish. For instance, intimacy between married couples within the family system will require privacy. The privacy of the family can, therefore, be deduced from the duties of protecting and assisting the family.

Moreover, in giving effect to the said duty, some State parties to AFCHPR have provided a national legislative guarantee of the right to private family life. For instance, section 37 of the Constitution of the Federal Republic of Nigeria provides that "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."[101] Furthermore, the duty of State Parties to protect the family arises

[100] AFCHPR, Article 18
[101] Constitution of the Federal Republic of Nigeria 1999 (as amended)

because of the role which the family plays as the custodian of the moral consciousness and values of the traditional African society. Such values ordinarily include respect for the privacy of persons as a family, particularly for the purpose of sexual intimacy. The African moral and value system, which justifies the protection of the family, provides further justification for the right to private family life, even though not supported by the AFCHPR.

Unlike the African Charter, the European Convention takes a more deliberate approach to family life as falling within the spheres of the privacy of a person. The European Convention provides for the protection of the right to family distinctively from the right to privacy of family life, thus leaving no controversy as to what is intended. The ECHR guarantees a right to marry and to found a family but leaves the substantive and procedural aspects to member States including issues as marriageable age and same sex marriage.[102] This is similar to what is obtainable under the AFCHPR, where Article 18 is silent on marriageable age and same-sex marriage. What is important to this thesis, however, is the unequivocal right to marriage upon attainment of marriageable age and satisfaction of other conditions which may be imposed by national law. This is so because to enjoy the right to private family life, there has to be the existence of a de facto family.[103]

Once a person establishes a family, article 8(1) of the European Convention clothes him with the right to have the privacy of his family protected, whereas article 12 of the ECHR suggests a co-joined right "to marry and to found a family," marriage is not the only way of establishing a family even though like in the African value system, marriage is a crucial institution for the creation of family system. Yet, the existence of a "family" relationship with another person or persons is clearly a condition to the enjoyment of private family life because an individual cannot constitute a family.[104]

By implication, the right to private family life under the ECHR is not exclusive to persons within a traditional marriage relationship and their children but extends to other forms of relationships

[102] ECHR Article 12

[103] Under the ECHR, what constitutes a family largely depends on the existence in practice on close personal ties, such as living together, having children, or being legally married irrespective of the sexual inclination of the parties See Paradiso and Campanelli v. Italy (GC) Application no. 25358/12 (ECHR 24 January 2017) and Oliari and others v. Italy Applications nos. 18766/11 and 36030/11 (ECHR 21 July 2015)

[104] Van Dijk, Pieter, Godefridus JH Hoof, and Godefridus JH Van Hoof. *Theory and practice of the European Convention on Human Rights* (5th edition, Antwerpen: Intersentia, 2018) 504-508

that provide a "family" bond among the persons living together as a family regardless of marital or blood relationship between them.[105] The attitude of the ECtHR would suggest that family exists where there is a close interpersonal relationship between or among persons as to give rise to them considering themselves as a family without undue insistence of blood or marriage connections. The Court from the above more or less focuses on the actual relationship between the persons as not the basis of that relationship. After all, people may be related by blood yet not live together or share any family bond.[106]

Under article 8(1) of the ECHR, the presence of family life for the purpose of privacy is a question of fact that revolves around the actual family relationship between the persons concerned. By implication, the existence of a family is foundational to a claim to the right to privacy of family life. This is because unlike the right to privacy of the person which is personal to the individual, privacy of family life is enjoyed within the circumference of the family.[107] Where no such relationship exists, a person is nonetheless entitled to the right to private life but not private family life since there is no family upon which the right is based. The right to privacy of family life, therefore, exists as protection for family, not for individual private life.[108] This is similar under the AFCHPR because under the African legal system, marriage, which is usually between husband and wife or wives, depending on whether it is Civil marriage or marriage under Customary law, is the basis of a family unit.[109] Also, article 18(1) obligates the State to protect the physical and moral health of the family; it implies that a family must exist for the said duty to attach.

In any case, the approach which the ECtHR adopts in the interpretation of the right to private family life is commendable for obvious reasons. The Court focuses on the practical and functional aspects of human relationships rather than the traditional definition of family in terms of blood, marriage, or adoption. This way, people who are so related either by blood, marriage, or adoption may not be considered as a family for the purpose of privacy of family if there is no

[105] Van Der Heijden V. The Netherlands (GC) Application no. 42857/05 (ECHR 3 April 2012)
[106] Blake Nicholas and Husain Raza, *Immigration, Asylum and Human Rights* (Oxford University Press 2003) 165
[107] Van Dijk Peter et al (n. 104) 508
[108] Fomina Yu, 'Protection of the Right to Respect for Private and Family Life in European Court of Human Rights' (2016) 19 (3) European Research Studies Journal 97-110
[109] Odimegwu Clifford, 'Family Laws and Policies in Sub-Saharan Africa' In Odimegwu, Clifford. (ed) *Family Demography and Post-2015 Development Agenda in Africa*. (Springer, Cham2020) 384 https://doi.org/10.1007/978-3-030-14887-4_17

family relationship between them.[110] Here, family is treated not as a legal or social construction but as a function of actual and existing relationships between people. This avoids a definition of family in the abstract without regard for the actual circumstances of each case. Moreover, it protects persons who share actual family ties and yet have no blood, marital, or adoptive connection. The ECtHR has, therefore, treated family as a living construct rather than a term to be defined in a vacuum. This ignores traditional conceptualisation of family which does not take into consideration the actual relationship existing between persons as seen in the African legal system.

However, this approach has been criticised by the conservationist who argues that disregard for traditional basis of family being marriage, blood or adoption undermines the family system.[111] It has also been argued that such a liberal interpretation of family may create an immigration crisis in Europe by considering illegal immigrants as family to citizens because of the personal relationship between them. Besides, it is further contended that the Court has not sufficiently defined actual family relationship existing between persons and therefore the judicial approach may be a recipe for more legal controversies.[112] This thesis concedes that while traditional notions of family based on blood, marriage, or adoption are a more defined baseline, the concept of actual family relationships does not enjoy equal legal clarity.

Again, when the family is understood in terms of actual interpersonal relationships, it will become even more amenable to abuse by public office holders. This is because the right to private family life will then be extended to cover the relationship between public office holders and their close associates, thus making public scrutiny even more challenging. In the case of Africa, considering the recurring incidence of abuse of official privileges by family members of public office holders, the limitation of persons who may claim entitlement to private family relations become important. While public office holders cannot be denied their right to family life, their family members are often maintained at public expense, and the private interaction within the family equally has impacts on public affairs.

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[110] Van Der Heijden V. The Netherlands (GC) (*supra)*

[111] Steiner Henry, Alston Philip and Ryan Goodman, *International Human Rights in Context* (revised edition Oxford University Press 2008) 403

[112] Linda Hart, 'Anthropology of Kinship meets Human Rights Rationality: Limits of Marriage and Family Life in the European Court of Human Rights' (2018) 20 (5) European Societies 821; Thym Daniel, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?' (2008) 57 (5) International and Comparative Law Quarterly, 87

In Nigeria, for instance, during the medical travails of the then-president Yar'Adua, his wife was believed to be the de facto president superintending the affairs of government.[113] During the presidency of Mohammadu Buhari, one of his daughters even used the presidential jet for a private photo-shooting session in Kano State.[114] In addition, family members of public office holders are often used for the embezzlement of public funds. Close and trusted family members are often indirectly co-opted into government to siphon public resources with impunity.[115] Furthermore, the political practice in Nigeria has evolved into the institutionalisation of the Office of the First Lady at the national level which is the exclusive preserve of the wife of the president, and Office of the First Lady at the State level which is reserved for the wife of the governor with substantial budgetary allocations. What this means is that private family is effectively extended to governmental power structure such that government becomes run as a family affair, and this is true not only for Nigeria but also for most African countries.[116]. In such circumstances, the treatment of the family as a private affair entitled to maximum level of privacy enjoyed by other citizens cannot be justified. Hence, the provision of laid down criteria aimed at balancing the right to privacy of public office holder against the right to freedom of expression, including the right of information is commendable; however, it is essential to state that the right of family members of public office holders are not subject to the stated criteria and so care must be taken not to violate the right to privacy of family members of public office holders.

2.3 Privacy of Home and Correspondence

Beyond private and family life, the right to privacy also protects the privacy of home and correspondence. Home is a dwelling place where a person lives either alone or with his family.[117] Correspondence in ordinary usage is a written communication between a person and another.[118]

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[113] Mbah Peter *ibid* 52

[114] Adebulu Taiwo, 'It's Abuse of Power' — Outrage over Buhari's Daughter Flying Presidential Jet to Private Event' *The Cable* (Nigeria, 11 January 2020) https://www.thecable.ng/how-nigerians-reacted-to-buharis-daughter-flying-presidential-jet-to-private-event (24/02/2024)

[115] Duri Jorum, 'Sub-Saharan Africa: Overview of Corruption and Anti-corruption' (Bergen: U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute (U4 Helpdesk Answer 2020:5)' 2020) 10

[116] Van Wyk Jo-Ansie and Nyere Chidochashe, 'The Roles, Powers and Influence of Africa's First Ladies' *Independent Online* (21 May 2019) https://www.iol.co.za/news/the-roles-powers-and-influence-of-africas-first-ladies-23662503 (25/02/2024)

[117] Garner Bryan, Black's Law Dictionary (9th edition, Thompson Reuters 2009) 801

[118] Garner B., *op cit.* p. 396

The first part of this paragraph will focus on privacy of homes while the second will focus on privacy of correspondence.

The right to privacy of the home lies in the consideration that the home of a person is his safe haven, a personal space for the enjoyment of private life or family life, a place of solitude. Moreover, the home of a person is considered to hold his most private correspondence and data. The home of a person is, therefore, his private space deserving of protection from interference. The point remains that private and family life reasonably requires a private space for their expression and enjoyment. Both cannot, therefore, be adequately protected without the privacy of the home, which provides the physical space for their expression.[119]

What the right to privacy of the home achieves is to treat the home as sacred and personal to a person and thereby prohibit unwanted or unauthorised or trespass into the home.[120] This right is also derived from the right to inherent dignity of the person. Here, the privacy of the home protects a person from unwanted public exposure or access, which may lower his estimation or reputation in the society. The maintenance of human dignity must justifiably involve specific aspects of human dwelling which is person to the person. It is equally essential for the protection of such human values as suitable to solitude, alone time and personal space without intrusion.[121]

The right to privacy in the home was conceived to protect against interference by the State, such as searching the home, seizures of property at the home, and unwanted or vexatious visitations. ECtHR case law has significantly extended the right to privacy in the home. [122] Perhaps the ECtHR rightly views the home as an escape from the pressure of public places such as the office or marketplace.

Equally important is the fact that the home is the place where private life is most expressed including for instance nudity. Thus, in the case where the applicant's nudity in her home was filmed without her knowledge or consent, the Court held same to amount to a breach of the

[119] Diggelmann Oliver and Cleis Maria, 'How the Right to Privacy Became a Human Right' (2014) *Human Rights Law Review* 441
[120] Whitman James, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 (6) The Yale Law Journal 1151
[121] Floridi Luciano, *ibid* 307
[122] *Moreno Gómez v. Spain* Application no. 4143/02 (ECHR 16 November 2005) § 62-63

privacy of her home.[123] This development supports the view that interference with the home, which privacy protects, is not only physical but extends to other aspects, such as taking a picture of a person in his home without consent.[124]

The AFCHPR and the ECHR do not treat the privacy of the home of private citizens differently from the home of public office holders. The position is the same even where the said home is the official residence of the public office holder financed and maintained with public resources. While more liberal access policies may be adopted, the home nonetheless enjoys the right to privacy. Thus, a distinction must be made between the office and the home such that the occupation of public office does not undermine the right to enjoy private and family life in the home. This aspect of privacy does not seem to pose any controversy because there is hardly a documented case of public interest or claim of right of access to the home of a public office holder.

According to Post, the right to privacy of correspondence lies in the maintenance of the dignity and reputation of the person. This is because exposure of private communication will risk a person being misjudged outside the context of such communication. It will risk the exposure of his thoughts, feelings, and fears, which are intended to be a private affair between him and the recipient of the communication. It will risk exposure of financial or otherwise private information, which may expose a person to security risks. It becomes important that private communications be protected against public interference. This is also consistent with the right to freedom of expression, wherein a person is entitled to decide whether expressions should be public or private. [125]

Whereas the particular word used by article 8 of the Convention is "correspondence", the ECtHR has adopted a liberal interpretation of what correspondence covers. This is because the Court has always insisted that the provisions of the Convention must be "interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory."[126] This way, words used in the ECHR are not given narrow literal interpretation that is static. The ECtHR takes the position that "the Convention is a living instrument which must be interpreted in the

[123] *Söderman v. Sweden* Application no. 5786/08 (ECHR 12 November 2013) § 117
[124] *Eremia v. the Republic of Moldova* Application no.3564/11 (ECHR 28 August 2013)
[125] Post Robert 'Three Concepts of Privacy' (2001) 89 The Georgetown Law Journal 2087
[126] *Christine Goodwin v. United Kingdom* Application no. 74/02 (ECHR 11 July 2002)

light of present-day conditions." It takes "a pragmatic, common-sense approach rather than a formalistic or purely legal one."[127]

The point remains that the word "correspondence" which is used in the ECHR in 1950 will lose its relevance if it is interpreted literally. This is because, at the time, other modern means of communication, such as internet-based emails and telephone networks, had not been invented and diffused. Consequently, a living interpretation of "correspondence" will require an extension to cover modern means of correspondence, or else the purpose of the protection will be defeated. Accordingly, for the purpose of privacy of correspondence under article 8 of the ECHR, the ECtHR has held that telephone conversation qualified as correspondence even though it is not mentioned in article 8 of the Convention. It nonetheless fell within the purview of private life.[128]

This liberal and pragmatic interpretation avoids a need for amendment of the ECHR along with changing technological innovations while allowing the Court to focus on what was intended by each protection rather than the particular words used. Consequently, if the intention was to make "correspondence" a matter of the private right of a person, it would not matter what form that correspondence took, whether it was a letter as in 1950, telegram, or electronic mail. The subject matter of the provision is private communication between persons and not the form that the communication took. This thesis finds this approach adopted by the Court as most commendable and consistent with the principles of interpretation of treaties under article 31 of the Vienna Convention on the Law of Treaties which requires consideration of the objectives and contexts of each provision. Thus, the concept of correspondence will cover private emails, private radio broadcasting, social media private messaging, and chats, among others.[129] The private nature of the correspondence is deduced from the intention of the communicating parties and not the channel of the communication. Thus, a private email sent to a person will fall within the radius of correspondence protected under article 8 of the Convention.[130]

Comparatively, article 9(1) of the AFCHPR guarantees to every person the right to receive information. This thesis takes the considered view that receipt of information is essentially the same as correspondence in the context of article 8 of the ECHR. However, article 9(1) of the

[127] *Matthews v. United Kingdom* 24833/94 (ECHR 18 February 1999)
[128] *Klass v. Germany* Application no. 5029/71 (11 July 1971) §28
[129] *Copland v. United Kingdom* Application no. 62617/00 (3 April 2007)§ 41
[130] *Taylor-Sabori v. The United Kingdom* Application no. 47114/99 (29 May 2001) § 691

AFCHPR does not provide any privacy context to the enjoyment of the right to receive information. That is, it does not say whether a right of privacy inures in the receipt of information between or among persons.

Just like the context of privacy of the home where the home is distinct from the office, a distinction must be drawn between official correspondence and private correspondence. This way, even for public office holders, private correspondence will be covered by the right to privacy. The point has to be made that the basis of the right to privacy is a reasonable expectation of privacy. That is, where in the circumstance a person reasonably expects the enjoyment of privacy, the right attaches to the person. This test was applied by the ECtHR in the case of *Halford v United Kingdom*, where the applicant, a police assistant chief constable, challenged the interception of calls she made from her office using an official telephone line. The Court held that the interception of the applicant's calls at the office constituted a violation of her right to privacy under article 8 as she had no prior knowledge of the interception.[131]

The case of *Peck v. United Kingdom* reflects the flexibility of the reasonable expectation test, which may be a reasonable expectation of complete privacy or a reasonable expectation of partial privacy. In the said case, the applicant attempted to commit suicide on a public road, but unknown to him, the entire incident was recorded by closed-circuit television. This allowed for a prompt police response that prevented the Applicant from completing the suicide attempt. The police gave a public briefing on how its CCTV security system assisted in saving the life of the Applicant and released some clips of the video footage, which showed the Applicant holding a knife to kill himself. The footage quickly appeared in newspaper headlines and on BBC TV shows, among other publications, where the Applicant was recognized by family, friends, and associates. [132]

The State argued that the incident did not fail within the private life of the Applicant haven been done on a public road. The Applicant had no justified expectation that the attempted suicide would be private. Thus, the State merely further distributed to the public an act that was already public and, therefore, cannot be said to have breached the Applicant's right to privacy. The Court, however, held that the publication breached the Applicant's right to privacy. This was

[131] *Halford v. United Kingdom* Application no. 20605/92 (ECHR 25 June 1997) § 1004
[132] *Peck v. United Kingdom* Application no. 44647/98 (ECHR 28 April 2003) §123

because even though the action was done in public, he nonetheless had reasonable expectation of partial privacy that at the very least, the action would not be exposed to the degree and with the details captured in the distributed video coverage. The Court considered that "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation . . . and to a degree surpassing that which the applicant could possibly have foreseen when he walked in [the city on the date in question]."[133]

Applying the above test, the question arises whether public office holders are entitled to a reasonable expectation of privacy in the context examined. One way to look at the issue is that the holding of public office is distinct from the private life of the person just as official duties are distinct from private engagements. In the line of duties, certain level of privacy may not be reasonably expected, yet, off the line of duty, a public office holder would be entitled to reasonable expectation of the privacy of his life, family, home, and correspondence. As long as a clear distinction is drawn between public affairs and private business, reasonable expectation of privacy will be met.[134] Thus, without statutory clarity, it will be difficult to create distinct privacy rules for public officers, no matter how desirable it may be.

2.4 Limitation of the Right to Privacy

The previous section examined the application of the right to privacy in the contexts of the person, the family, home, and correspondence. However, the legal nature and contextual application of the right to privacy cannot be reasonably concluded without an examination of the derogations/limitations of the right which are inherent parts of the nature and application of the right. It is for this reason that the section sets out to examine the limitation of the right to privacy in the respective contexts. While the ECHR provides for derogation of the rights contained therein in a single article,[135] The AFCHPR does not. This is not conclusive of the absence of limitation of the right to privacy under the AFCHPR.

[133] Peck v United Kingdom *supra*.
[134] Gomez-Arostegui Tomas, 'Defining Private Life under the European Convention on Human Rights by Referring to Reasonable Expectations' (2005) 35 (2) California Western International Law Journal 13
[135] ECHR Article 15

2.4.1 Limitation of the Right to Privacy under the AFCHPR

As already argued, article 4 of the AFCHPR protects privacy of the person under the inviolability of human beings and the integrity of the person of every human. However, the right is not absolute as the said article 4 prohibits arbitrary deprivation of the right. By legal implication, limitation is allowed on the condition that it is not arbitrary. Article 9 of the Charter, which relates to correspondence, contains a proviso that the right must be exercised within the law. This means that national law can justifiably limit the right to information/correspondence. Article 18 of the AFCHPR, which protects privacy in the context of the family, does not, however, contain any limitation. For this reason, this section shall focus on the limitation under article 4, which is to the effect that the limitation should not be arbitrary.

However, the AFCHPR fails to define arbitrariness or the factors for its determination. Recourse will, therefore, be had to the UDHR, ICCPR, and national laws of State parties, which provide practical contexts for the understanding of the rights provided in the Charter. This recourse is justified by article 60 of the AFCHPR, which allows inspiration to be drawn from international human rights instruments adopted by the UN, including the UDHR and the domestic laws of African States. Moreover, the preamble to the AFCHPR affirms adherence to human rights principles adopted by the UN.

The UDHR suffers the same deficiency as the AFCHPR. It merely provides in article 12 that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation" but also fails to define arbitrariness. Article 17 of the ICCPR has a similar provision to the UDHR and suffers a similar fate to the UDHR with reference to the lack of definition of arbitrariness. Recourse will then be had to the Nigerian national legal framework as providing specific case study in the analysis of arbitrariness. This recourse to national law is enabled by article 1 of the AFCHPR which imposes a duty on Member States of the African Union (which includes Nigeria) to adopt legislative and other measures to give effect to the rights contained in the AFCHPR. Since national law gives effect to the rights contained in the AFCHPR, national law becomes essential for interpreting the rights contained in the AFCHPR on a country-by-country basis.

Two justifications are given for this discourse. The first is that Nigeria is a State Party to the AFCHPR and has, in fact, domesticated the Charter. Consequently, the Charter has the force of national law in Nigeria. This was confirmed by the Court in the case of Peter Nemi v AG of Lagos State & Ano, where the Court stated that "it is not enough that we (Nigeria) have ratified the African Charter; we must move with the rest of the human race in the implementation of those rights.[136] While the Executive may take steps to examine or set in motion ways of improving human rights situations, the Judiciary should actively show its impetuous readiness to complement or indeed surpass the efforts of the Executive by an inspiring judicial approach to, or definition and recognition of, circumstances of human rights where appropriate and feasible." Again, Nigeria forms the specific country case study for the analysis in this thesis.

Section 45(1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) provides the grounds for limitation of some rights, including the right to privacy. It provides that nothing in the protected right to privacy "shall invalidate any law that is reasonably justifiable in a democratic society-

a) in the interest of defence, public safety, public order, public morality, or public health; or

b) for the purpose of protecting the rights and freedom of other persons."

The first point to note from section 45(1) of the CFRN above is that only a law can limit the enjoyment of the right to privacy. Put differently, the limitation of the right to privacy must be in accordance with the law. The constitutional insistence that such limitation must be statutory represents the fundamentality that the CFRN 1999 attaches to fundamental rights. Hence, the rights cannot be limited by the whims or caprices of any person or authority. This addresses possible arbitrary limitation of the protected rights.[137] The first point in the understanding of arbitrariness in the limitation of the right to privacy under article 4 of the AFCHPR would therefore be that the limitation was not permitted by law. Once there is no law in force that permits limitation of the right to privacy, any interference with the right will be arbitrary.

[136] (1996) 6 NWLR 42, 58
[137] Rusi Nadia and Shqarri Fjorda, 'Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat during the COVID-19 Crisis' (2020) 9 (5) Academic Journal of Interdisciplinary Studies 166

This thesis takes the further view that statutory requirement of the limitation of the rights provides clarity as to extent of the limitation and allows for easy juxtaposition of the limitation against the right as protected in the constitution. This is because where such limitation is inconsistent with constitutional standards, it will be void to the extent of the inconsistency.[138] Moreover, legislative lawmaking follows a detailed process that allows for extensive consultations and inputs. This way, it may be assumed that all interests are adequately represented when passing the limitation of the right into law. Without such an exhaustive legislative process, a limitation of the right to privacy will be arbitrary.

The second point is that such a law that seeks to limit the right to privacy must be justified reasonably in a democratic society. The fact remains that democratic standards of freedom are more liberal than standards under military or dictatorial governments. Nigeria having committed to the principles of democracy under section 14(1) of its Constitution; any limit of individual or group rights must be guarded against the standards of democratic societies. Even then, the limitation must be such that it can be justified by reason regarding what is obtained in democratic societies. In determining reasonable justification, the CFRN 1999 provides further particular yardsticks, which are defence, public safety, public order, public morality, or public health or for the purpose of protecting the rights and freedom of other persons.

For instance, in Faith *Okafor v Lagos State*, the Court held that restriction of movement for monthly environmental sanitation was a breach of the right of freedom of movement. This was because the Court found that the restriction was not reasonably justified in a democratic society.[139] After all, environmental sanitation can be conducted without restrictions on movement. This thesis submits that reasonable justification requires a compelling reason for which the limitation becomes the most logical course of action. Thus, where there are other reasonable alternatives that will achieve the same result, the limitation of a fundamental right will not be justified.

The requirement that the law limiting the protected rights must be reasonably justifiable in a democratic society points to the quality of the law. Notwithstanding the lack of uniformity in the characters of democracy in different countries, certain principles are central in genuine

[138] CFRN 1999, section 1
[139] (2016) LPELR-41066 (CA)

democracies. They include majority rule, respect for minority rights, due process, and rule of law. That the law must be justifiable in a democratic society implies that the laws are not arbitrary or dictatorial.

The determination of whether a particular law is justifiable in a democratic society is a question of fact, solely reserved for the Court to determine. Thus, in *Chike Obi v Director of Public Prosecutions,* the Federal Supreme Court held that its role was not merely to rubber-stamp the acts of the Legislature and the Executive; that the court must be the arbiter of whether or not any particular law is reasonably justifiable.[140] Also, in *Olawonyin v Attorney General of Northern Nigeria*, the Court held that a restriction upon a fundamental human right, before it may be considered justifiable, must be necessary in the interest of public morality and not be excessive or out of proportion to the object which it is sought to achieve.[141]

Public defence is often viewed as a generally accepted justification in democratic societies. Thus, in *Dokubo-Asari v FRN*, the Supreme Court of Nigeria held that "where national security is threatened, or there is the real likelihood of it being threatened, human rights or the individual rights of those responsible take second place, human rights or individual rights must be suspended until the national security can be protected or well taken care of.[142] This is not new. Nigeria's corporate existence as a united, harmonious, indivisible, and indissoluble sovereign nation is undoubtedly more significant than any citizen's liberty or right.[143]

2.4.2 Limitation of the Right to Privacy under the ECHR

The ECHR provides more clarity on the limitation of the right to privacy in comparison with the AFCHPR. While article 8(1) defined the nature and scope of the right, article 8(2) prohibits interference with the right and provides circumstances that would justify interference. It states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder

[140] [1961] All NLR 186.
[141] (1961) 1 All NLR 182.
[142] (2006) 11 NWLR (Pt. 991) 324
[143] Dokubo Asari v. FRN *Ibid*

or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[144]

This notwithstanding, it is important to provide a specific context analysis under the ECHR to provide more clarity on the scope and limits of the limitations allowed. Under both human rights laws, the right to privacy may be limited. Again, both human rights laws require that the limitation must be "necessary in a democratic society." This is interpreted as relating to the overwhelming necessity of the limitation to serve defined public interest or need. The burden is on the State to provide the justification, not on the applicant to show that there is no justification for the limitation.[145]

Article 8(2) serves two related purposes: it ensures that the right to privacy is not used to undermine public interests or the rights of others; it ensures that the State does not hide under this excuse to interfere with the right arbitrarily. The article, therefore, tries to create a functional balance between individual right to privacy and the overriding and justified interests of the State. In effect, the article checkmates individual enjoyment of the right to privacy on the one hand to prevent abuse and, on the other hand, checkmates the State from wrongful interference with the right.[146]

Generally, the ECHR adopts a three-stage approach to determining whether the right to privacy under article 8 has been violated. The first step is to determine whether the cause of action is one that is covered under the right to privacy. That is, whether the grievance relates to private life, private family life, privacy of home or the confidentiality of private correspondence. Where the grievance cannot be accommodated under any of the specific contexts of privacy, there will be no need to proceed to the next stage of the analysis. Where, however, it is a case covered by article 8 of the ECHR, the Court proceeds further into the second stage.

The second phase is the determination of whether a public authority has interfered with the right to privacy either directly or through failure to take reasonable steps to prevent interference with the right. It should be noted that action for breach of the right to privacy under the ECHR can

[144] ECHR Article 8
[145] Evans Malcolm, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 319
[146] Pevtsova, I. E. 'Family Life Protection by European Court of Human Rights' Yuridichesky Mirror Vol. 8 (2014), 48-52

only be maintained against a State. The Convention does not cover interference in the enjoyment of privacy by individuals, only against the authorities or agents of the State. Another way to express the application is that the duties in the ECHR are binding on the State and not private individuals. This is deduced from the opening clause in article 8(2) of the ECHR, which states that "There shall be no interference by a public authority with the exercise of this right."

What this means is that the violation of rights under the ECHR cannot be maintained against another individual. That is, the ECHR does not impose binding duties on private individuals, which can be enforced against the individual. It only cloths individuals with rights and imposes the duties for respecting and protecting the rights on the States. This way, the duty to protect individuals against violation of their rights by other individuals is still imposed on the State. This approach seems to have been informed by the need to compel states to take appropriate legislative, executive, and judicial measures to protect their rights and to prevent them from escaping liability on the grounds that the violation was done by private individuals.[147]

The AFCHPR, however, takes a different approach which imposes duties both on the State and private individuals. Article 27 of the Charter imposes duties on every person towards the family, the State and towards the international community. Notably, the individual has the duty to ensure that in enjoying his protected rights, he respects the rights of other persons, collective morality, collective security, and the common interests of the State. Consequently, an individual can be held liable for violation of rights protected under the AFCHPR. This is distinct from the ECHR, where the State is the only person responsible for the breach and the only proper party against whom a breach may be maintained.

Nevertheless, consistent with its rules of interpreting the ECHR in the context of practical realities, it has held that interference by public authority can be direct or indirect through failure to take reasonable legislative or other means to prevent interference in the enjoyment of the right by private individuals. The ECHR here explained that "Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective

[147] Harris David. et al. *Law of the European Convention on Human Rights* (Oxford University Press 2018) 23

respect for private and family life."[148] This interpretation creates a horizontal effect using the State to prevent private interference. That is, even if the interference was not by State authority if it could have been prevented by the State authority taking appropriate measures, the State authority would still be liable for the interference. This imposes a dual duty on the State not to interfere with the enjoyment of the right to privacy and to adopt reasonable measures to prevent private individuals from interfering with the right also.[149]

If the Court finds that the State breached its negative obligation not to interfere in the right to privacy or its positive obligation to prevent interference by private actors, the Court proceeds to the third stage. The third stage involves an even more complex analysis of determining whether the interference, direct or indirect, was justified. This stage involves the following sub-analysis:

a) Whether the interference was consistent with the law of the State. This analysis is derived from the requirement that only a law can authorize interference with the right. Thus, the Court must appraise the existence of any law that authorizes the interference and proceed to determine whether, in the particular circumstances, the interference by the State authority was in strict compliance with that law.
b) Whether the law which authorised the interference with the right to privacy is directed towards the achievement of the State interests stated in article 8(2) of the ECHR. These interests are public safety, national security, the economic well-being of the State, protection of the morals and health of the State, prevention of public disorder, and the protection of the rights of other persons in the State. If the law does not serve any of the above interests, the Court will proceed to hold the State liable. However, where the law was enacted to protect any of this legitimate interest of the State, the Court will proceed to a further analysis.
c) Whether the interference which is permitted by that law is necessary in a democratic society to secure the legitimate interests which the law sets to achieve. This reflects the relationship between the interference and its purpose. It evaluates whether the interference is justified or overreaching, considering the objectives that it pursues. Here, the State enjoys a certain level of discretion in deciding the measures to protect its

[148] *X. and Y. v. Netherlands*, (supra) §23
[149] *V. G. T. v. Switzerland* Application no. 24699/94 (ECHR 28 September 2001)

> legislative interests, and the Court is under obligation to respect same. It is where the interference is manifestly unreasonable or unnecessary regards being had to its objectives that the Court will intervene.[150]

It should be noted that not all cases of violation of the right to privacy can be sustained under the ECHR. The ECtHR has adopted an Admissibility Criteria 2021, which provides the criteria for the court's admission of cases. Under item 320 of the Admissibility Criteria of the ECHR 2021, before the Court admits a case, the Applicant must show that as a result of the alleged violation, he had suffered a 'significant disadvantage' to merit consideration by the Court. This avoids the admission of frivolous claims which would otherwise overburden the Court. Moreover, being a regional Court, it serves its best interest and prestige to attain only cases involving significant disadvantage to the Applicant.[151]

The requirement of significant disadvantage requires that even if the allegation of violation of the right can be proved in law, it must meet a minimum degree of seriousness or severity to merit consideration by an international Court. The European Court of Human Rights (ECtHR) does not consider cases where the alleged violations of rights outlined in the European Convention on Human Rights (ECHR) are deemed minor or merely technical, as exemplified in the case of Shefer v. Russia.[152] The assessment of this minimum level is relative and depends on all the circumstances of the case. The severity of a violation is assessed by taking into account both the applicant's subjective perception and what is objectively at stake in a particular case.[153]

However, the applicant's subjective perception cannot alone suffice to conclude that he or she suffered a significant disadvantage. The subjective perception must be justified on objective grounds. A violation of the right to family life may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest. What this means is that considerable disadvantage is not calculated based exclusively on pecuniary considerations. In Giuran v Romania, the Court found that the applicant had suffered a significant disadvantage because the proceedings concerned a question of principle for him, namely his right to respect for his possessions and for his home. This was despite the fact that the domestic proceedings

[150] *Marckx v. Belgium* Application no. 6833/74 (ECHR 13 June 1979) §29
[151] ECHR Article 35
[152] Application no. 45175/04 (ECHR 13 March 2012) § 19
[153] *Korolev v Russia* Application no. 25551/05 (ECHR 1 July 2010) § A

which were the subject of the complaint were aimed at the recovery of stolen goods worth 'merely' 350 euros from the applicant's own apartment.[154]

Moreover, in evaluating the subjective significance of the issue for the applicant, the Court can take into account the applicant's conduct, for example, in being inactive in court proceedings during a specific period, which demonstrated that in this case, the proceedings could not have been significant to her.[155] In *Giusti v. Italy*, the Court introduced certain new elements to take into account when determining the minimum threshold of seriousness to justify examination by an international court, namely the nature of the right allegedly violated, the seriousness of the claimed violation, and/or the potential consequences of the violation on the personal situation of the applicant. In evaluating these consequences, the Court will examine what is at stake or the outcome of the national proceedings.[156]

[154] *Giuran v Romania* Application no. 24360/04 (ECHR 21 June 2011)
[155] Shefer v Russia (*supra)*
[156] *Giusti v. Italy* Application no. 105/2014 (ECHR 18 October 2016)

CHAPTER 3. STRATEGIES FOR THE IMPLEMENTATION OF THE RIGHT TO PRIVACY UNDER THE BANJUL CHARTER AND THE EUROPEAN CONVENTION

The previous chapters have discussed the legal nature of the right to privacy under the AFCHPR and the ECHR, with specific context examples supported by judicial decisions. This chapter proceeds on the previous analysis to examine the different legal strategies or mechanisms that exist under the AFCHPR and the ECHR to ensure that political office holders do not utilize the right to privacy to avoid being held accountable. Implementation strategies are important for effectuating the right to privacy under the AFCHPR and the ECHR and, therefore, form an important part of any international human rights instruments. Moreover, enforceability distinguishes a legal right from a mere privilege. This necessitated a review of the implementation strategies for the right to privacy under the AFCHPR and the ECHR.

3.1 State Obligations

The imposition of binding obligations on the State is the primary legal strategy adopted under both the AFCHPR and the ECHR for the protection of the right to privacy. This is a justified starting point because the State, as a corporate political institution, controls the organized governmental force. The State comprises the entirety of the group of people that occupy a defined geo-political territory, having a sovereign governmental authority that coordinates its affairs.[157] While in constitutional democracies, sovereignty is theorized to inhere in the people, same is exercised by the government on behalf of the people.[158] Therefore, the power exercised by the state is donated by the people in the form of a social contract. State obligations for the protection of the right to privacy become, in reality, the obligation of the government of the State. This is because government is the institutional arrangement through which the powers of the State are exercised.[159]

Both the AFCHPR and the ECHR confer on the government, wielding the power of the people, the primary responsibility for the protection of all the rights contained in the respective

[157] Mahajan Vidya, *Political Theory* (4th edition S. Chand and Company Limited 2013) 132-136
[158] Ogundiya Ilufoye, 'Democracy and Good Governance: Nigeria's Dilemma' (2010) 4 (6) African Journal of Political Science and International Relations 201
[159] Fasenfest David, 'Government, Governing, and Governance' (2016) 36 (6) Critical Sociology 771-774

instruments, including the right to privacy, although specific implementation strategies differ in some respects.

Article 1 of the AFCHPR contains an undertaking by the members of the African Union, being State Parties to the AFCHPR, to "recognize the rights, duties, and freedoms enshrined" and, in this regard, to adopt both legislative and other necessary measures to give effect to the right. By implication, other measures provided in the Charter for the enforcement of the rights are complementary because the primary burden rests on States to adopt legislative measures and institutional arrangements to realise the right. This will include the constitutionalisation of the rights and or the enactment of the rights contained therein into domestic law. Different African countries have different legal regimes for the enforcement of the rights in the AFCHPR. For instance, under section 12 of the Constitution of the Federal Republic of Nigeria 1999, a treaty (such as the AFCHPR) to which Nigeria is a party and has assented does not acquire any force of law unless and only unless passed as a national law by the National Assembly. On the other hand, section 39 of the Constitution of the Republic of South Africa 1996 mandates a Court or Tribunal to consider international law in the interpretation of the rights contained in the said Constitution. This allows international law, including the AFCHPR, to be incorporated into the South African Bill of Rights, thus making national legislative measures unnecessary.

Yet, the legislative measures are just one of the strategies that States are mandated to adopt. The other measures are not mentioned in article 1 of the AFCHPR clearly to allow for subjectivity due to national circumstances. By legal implication, the adoption of legislative measures does not absolve the State of further liability for the enforcement of the rights. The legislative measure is just the first step; the state must adopt other complementary measures that are consistent with its national circumstance so as to give effect to the right.[160] For instance, in furtherance of the obligation of adopting other measures, Nigeria established the national human rights commission (NHRC) as an administrative body to facilitate the observance of human rights.[161]

The NHRC was established by the National Human Rights Commission Act, 1995, as amended by the NHRC Act, 2010 in line with Resolution 48/134 of the 1992 United Nations Assembly, which enjoined all member states to establish independent national institutions for the

[160] AFCHPR Article 1
[161] National Human Rights Commission Act, 1995, Article 5

promotion, protection and enforcement of human rights. The commission serves as an administrative mechanism which safeguards the human rights of the Nigerian population. It is an establishment geared towards the creation of an environment for human rights. It also provides avenues for enlightenment, research, and dialogue in order to create awareness of human rights issues.[162] The Commission has a Governing Council which consists of 16 members made up of a chairman who shall be a retired Justice of the Supreme Court of Nigeria or the Court of Appeal or a retired Judge of the High Court of a State and an Executive Secretary. The members of the Council are appointed by the President on the recommendation of the Attorney–General of the Federation.[163]

The functions of the Commission include to

a) deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the African Charter, the United Nations Charter, the Universal Declaration on Human Rights, and other international treaties on human rights to which Nigeria is a signatory.

b) monitor and investigate all alleged cases of human rights violations in Nigeria.

c) assist victims of human rights violations and seek appropriate redress and remedies on their behalf; and

d) organise local and international seminars, workshops, and conferences on human rights issues for public enlightenment.[164]

Nnamani submits that "the Commission as the highest National Institution dealing with human rights has presented a common front on human rights and put in place adequate mechanisms for the effective promotion and protection of human rights in Nigeria." He further stated that "through a consultative and collaborative process the commission has developed a National Action Plan for the promotion and protection of human rights in Nigeria. The National Action Plan includes an effective complaint mechanism, regular hosting of enlightenment seminars,

[162] Amalu Nneka and Moyosore Adetu 'The Role of the National Human Rights Commission (NHRC) in Post Conflict Situations in Nigeria' (2019) 8 (1) International Journal of Arts and Humanities 132, 134
[163] National Human Rights Commission Act 1995, section 2-3
[164] National Human Rights Commission Act, Section 5

workshops, rallies, and continuous reengineering of its strategies. It is expected to be a benchmark on which Nigeria's human rights records can be judged.[165] The domestic Court system is another vital forum for the enforcement of the rights contained in the AFCHPR. Order 2(1) of the Fundamental Rights (Enforcement Procedure) Rules 2009 empowers a person who alleges that his rights under the AFCHPR have been violated to apply to a High Court for address.

The ECHR adopts a similar approach of imposition of obligations on the State for the realisation of the rights provided in the Convention. Article 1 of the ECHR contains a similar provision with article 1 of the AFCHPR. Article 1 of the ECHR provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[166] From the above, the ECHR leaves no doubt that the fundamental obligation to secure the enjoyment of the rights provided in the Convention rests on the State and no other institution. It is for this reason that any violation of the right to privacy may be attributable to the State rather than private individuals. This is because the obligation of securing the rights is on the State.

The AFCHPR offers the adoption of legislative and other measures as a guide that States may follow to secure the enjoyment of the rights. In both instances, it is submitted that states enjoy equal flexibility in how best to effectuate their rights. This is known as the margin of appreciation under the ECHR. What counts is that primarily, the obligation is on the State, and each State has the liberty to decide how best to carry out that obligation. The AFCHPR in article 65, however, mandates State Parties to submit to the General Assembly every two years a report of the particular legislative and other measures that they have taken to give effect to the rights contained in the Charter.[167] This reporting mechanism brings political and reputational pressure to bear on States to compel them to uphold their responsibilities under the Charter.

The ECHR does not have similar reporting requirements with the AFCHPR. The reason is clear because the ECHR in Article 1 imposes a direct and positive obligation on State parties to "secure" to every person within their jurisdiction the enjoyment of the rights contained therein.

[165] Nnamani Ogbu. 'Institutional Mechanisms for Human Rights Protection in Nigeria: An appraisal' (2011) 2 (8) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 128.
[166] ECHR Article 1
[167] AFCHPR Article 65

Hence, it becomes reasonably unnecessary for reporting to be adopted. Article 1 of the AFCHPR, on the other hand, is rather evasive in defining the obligation of State parties. It only requires State parties to "recognise" the rights and then to adopt means to effectuate the rights. Recognition of the rights under the AFCHPR is a rather evasive approach when compared with securing the rights under the ECHR. Hence, the AFCHPR includes a reporting system to pressure State parties into recognition of the rights and the adoption of means to implement the rights. However, there is the enquiry procedure under the ECHR, which is when the Secretary General of the Council of Europe is empowered to request a High Contracting party to provide an explanation of the way their national law ensures implementation of the provisions of the ECHR.[168] Even though it has been rarely utilized, the enquiry procedure under Article 52 of the ECHR was recently invoked by the Secretary General of the Council of Europe in 2022 concerning the failure of Poland to implement key ECtHR judgments regarding the right to fair hearing.[169]

3.2 Establishment of Regional Courts

The establishment of regional courts under the AFCHPR and ECHR or quasi-judicial body such as the African Commission under the AFCHPR is a consequence of the realist school theorisation of law which holds practical realities.[170] This arises from the different interpretations which are capable of being given to any legal provision and thus creating uncertainty.[171] This way, judicial interpretation becomes important for properly defining and applying the law to real-life situations. Here, judicial decisions become the most authoritative law on the meaning and legal implications of the law.[172]

From the above, the necessity for a judicial or at least administrative framework, such as the African Commission, for the realization of the rights contained both in the AFCHPR and the ECHR cannot be overemphasized. The judiciary designs and applies the protected rights in a manner that is consistent with changing realities and thereby provides an inherent system of

[168] ECHR Article 52
[169] Antoine Buyse, 'Secretary General's Article 52 ECHR Report on Poland' (2022) ECHR Blog, https://www.echrblog.com/2022/11/secretary-generals-article-52-echr.html (25/04/2024)
[170] Green Michael, 'Legal Realism as a Theory of Law' (2005) 46 (2) William & Mary Law Review 1917
[171] Denning Alfred, *The Discipline of Law* (Butterworths 1979) 9
[172] Chinwo Chukwuma, *Principles and Practice of Constitutional Law in Nigeria* (2nd edition, Princeton and Associates Publishing Co. Ltd. 2020) 68

growth for the protected rights. Moreover, judicial interpretation and application of the rights provide authoritative clarity for future reference and further provide an unbiased forum where claims regarding infringements of the rights may be addressed. The judiciary is, therefore, a crucial institution and strategy in the implementation of protected rights, including the right to privacy.[173] The adoption of this strategy by both the AFCHPR and the ECHR is, therefore, consistent with modern approaches to the protection of human rights.

3.2.1 African Commission on Human and Peoples' Rights

The African Commission on Human Rights (hereafter called the African Commission) was established under the AFCHPR with the mandate of promotion and protection of the human rights enshrined in the African Charter.[174] The Commission is made up of eleven members elected from member states of the African Union. They must be persons of the highest reputation and mainly known for their integrity, high moral standing, competence, and impartiality. Experience in the field of law is also a consideration.[175] These qualifications are necessary to secure the independence and impartiality of the Commission in the discharge of its mandates. Additionally, article 33 of the AFCHPR provides that the election of the members of the Commission shall be by secret ballot by the Assembly of Heads of States of the African Union.

The specific mandates of the Commission are provided in article 35 of the Charter. They include the following:

a) Promotion of human rights at the African continental level. This promotion involves several implementation strategies such as documentation, seminars, conferences, research, dissemination of information, and capacity building. The Commission also cooperates with relevant international bodies and governments to further the promotion of human rights in Africa.
b) The Commission has the further duty to ensure that rights protected in the Charter are observed by State Parties in accordance with the provisions of the Charter.

[173] Ferreira Vivian and Langenegger Natalia, 'Rights, Democracy and Development: The Judicial System's Role in Developing Countries' (2018) 3 (3-4) Panorama of Brazilian Law 394, 404
[174] AFCHPR Article 30
[175] AFCHPR Article 31

c) The Commission also acts as the interpretative body for the interpretation and application of the Charter in specific national circumstances. This power of interpretation is exercised at the request of a State Party, an institution under the AU or at the request of an African organisation that is recognised by the AU.
d) The Assembly of Heads of State and Government of the AU may also assign other responsibilities to the Commission.

Under article 50 of the AFCHPR, the power of the Commission to deal with matters only arises where all national remedies have been exhausted unless the African Commission considers that the procedure for activating national remedies will be prolonged unduly.

The African Commission is a very important strategy for the implementation of the right to privacy. However, its structure and powers as constituted by the AFCHPR make the Commission fundamentally ineffective. Under article 45 of the AFCHPR, only State Parties, organisations of the AU or organisations recognised by the AU can activate the interpretative jurisdiction of the African Commission.[176] Yet, privacy is a personal right and hardly an organisational right. Individual victims of violations of the right to privacy, therefore, have no avenue to seek remedy with the Commission. According to Umozurike, the reason for not including individual applications is that the African Commission is designed to entertain complaints that are 'serious and massive,' and so a single breach is not enough.[177]

This is not entirely factual as article 55 of the AFCHPR mandates the secretary of the Commission to make a list of all communications which are not from State parties. However, a simple majority vote of the commission is required before any communication that is not from a state party can be considered. In any case, under article 56(5) of the AFCHPR, local remedies must be exhausted before such a communication can be brought. What this means is that the Commission is not ordinarily obligated to consider any communication that is not from a state party. This limits the right of access by individuals.

Another structural deficiency is that under article 52 of the AFCHPR, the Commission can only report to the AU Assembly. It does not have the inherent powers of a Court to make declarations

[176] AFCHPR Article 43
[177] Umozurike Orji, 'The African Commission on Human and Peoples 'Rights: An Introduction' (1991) *Review of the African Commission on Human and Peoples' Rights,* 11

or injunctive reliefs. It can only make recommendations that the AU Assembly is not under a binding obligation to implement. Even in cases of massive or serious violations of human rights under article 58 of the ACHPR, the Commission can only "draw the attention of the Assembly of Heads of State and Government to these special cases." The Heads of State and Government reserve the unfettered discretion to request the Commission to undertake a study of the cases and to make a report. In all, the Commission issues recommendations and not binding decisions. This weak approach does not secure an effective remedy against violation of the rights protected under the AFCHPR.[178]

3.2.2 African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established to complement the protective mandate of the African Commission on Human and Peoples' Rights.[179] The jurisdiction of the Court is stated in article 3 of the Protocol establishing the African Court as covering the interpretation and application of the Charter, the Protocol establishing the African Court and any other human rights instrument ratified by states.[180] The right of access to the Court is available to the African Commission, State Parties to the Charter, African Intergovernmental organizations, non-governmental organizations, and individuals.[181] However, in the case of NGOs, they have to have an observer status at the Commission. Individuals and NGOs will only have the *locus standi* to institute an action before the court if their states have filed a declaration accepting the jurisdiction of the court.[182] The court also has the power to issue advisory opinions.[183] Further, only 34 states have ratified the Protocol establishing the court.

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[178] Uwazuruike Alllwell, 'A Proposal for the Effective Implementation of the Protective Mandate of the African Commission on Human and Peoples' Rights' (2018) 11 (2-3) African Journal of Legal Studies 178-200

[179] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, Article 2

[180] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, Article 3

[181] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, Article 3(1)

[182] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, Article 34(6); Only 12 states out of the 55 African states have filed a declaration, and 4 out of the 12 states have withdrawn their declaration, leaving only 8 states, Burkina Faso, Malawi, Mali, Ghana, Tunisia, Gambia, Niger and Guinea Bissau. (African Court on Human and Peoples' Rights, https://www.african-court.org/wpafc, accessed 21/01/2024)

[183] *Ibid,* Article 4

Since the establishment of the Court in 1998 and its entry into force in 2004, the Court has entertained 363 cases in total.[184] The small number of cases is as a result of the fact that most states are yet to make a declaration accepting the jurisdiction of the court to receive cases under Article 5(3). Even though these institutions are in place, the lack of willpower by states to accept the jurisdiction of the court acts as a bar to prevent their citizens from utilizing these avenues in the enforcement of their human rights.

In 2008, the African Union, due to the proliferation of institutions and the paucity of funds, decided to merge the African Court on Human and Peoples' Rights and the African Court of Justice.[185] The Court is divided into three sections: the general affairs section, the human and peoples' rights section, and the international criminal law section.[186] The General Affairs Section has been structured to hear all cases submitted under Article 28 of the Statute,[187] except those 'assigned to the Human and Peoples' Rights Section and the International Criminal Law Section as specified in Article 17.[188]

The second section – that is, the Human and Peoples' Rights Section – 'shall be competent to hear all cases relating to human and peoples' rights.'[189] Those cases are described very broadly in Article 28 as relating to 'the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights, ratified by the States Parties concerned.'[190] The Human and Peoples' Rights Section will have three judges.[191] The third section is the International Criminal Law Section. It is described as being 'competent to hear all cases relating to the crimes specified in this

[184] 313 of the cases were initiated by individuals, 21 by NGOs and 3 by the African Commission on Human and Peoples' Rights. African Court of Human and Peoples' Rights online Database https://www.african-court.org/wpafc/online-database/ (28/02.2024)
[185] African Union Protocol on the Statute of the African Court of Justice and Human Rights adopted 1 July 2008 in Sharman el-Sheikh, Egypt
[186] *Ibid.,* Article 16 (1)
[187] The Court's jurisdiction may be invoked in cases related to Constitutive Act interpretation, Union Treaties, Human rights instruments, International law, Regulations or directives of the Union's organs, Agreements concluded by State Parties conferring jurisdiction on the court, Breach of obligations and nature/extent reparation.
[188] African Union Protocol on the Statute of the African Court of Justice and Human Rights adopted 1 July 2008, Article 17 (1)
[189] *Ibid.,* Article 17 (2)
[190] *Ibid.* Article 28
[191] *Ibid.* Article 21

Statute.'[192] The proposed new International Criminal Law Section will have personal jurisdiction over natural and quite significantly legal persons in respect of the following crimes: (1) Genocide, (2) Crimes Against Humanity, (3) War Crimes, (4) The Crime of Unconstitutional Change of Government, (5) Piracy, (6) Terrorism, (7) Mercenarism, (8) Corruption, (9) Money Laundering, (10) Trafficking in Persons, (11) Trafficking in Drugs, (12) Trafficking in Hazardous Wastes, (13) Illicit Exploitation of Natural Resources and (14) the Crime of Aggression.[193] Article 28 (N) of the Protocol defines basic modes of responsibility to include inciting, instigating, organizing, directing, facilitating, financing, counselling or participating as a principal, co-principal, agent or accomplice in any of the offences stipulated above.[194]

It was designed to exercise the jurisdiction to examine all cases and disputes of a legal nature, with the exception of those involving the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned, or those relating to international criminal law.[195]

3.2.3 European Court of Human Rights

The European Court of Human Rights (ECtHR) was established in 1959 by the European Convention on Human Rights. The ECtHR is an independent judicial body for the Council of Europe, responsible for the interpretation and application of the provisions of the Convention and the Protocols thereto. The Court functions on a permanent basis.[196] The Court consists of a number of judges equal to that of the High Contracting Parties.[197] The criteria for election of persons to the Court include the following:

i. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

[192] *Ibid.*Article 17
[193] *Ibid.*Article 28A
[194] *Ibid.*Article 16(2) and 10(3)-(5)
[195] Du Plessis Max, 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) 235 Institute for Security Studies (ISS), 5
[196] ECHR Article 19
[197] ECHR Article 20

ii. Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly.

iii. The judges shall sit on the Court in their individual capacity.

iv. During their term of office, the judges shall not engage in any activity which is incompatible with their independence, impartiality, or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.[198]

To protect the independence of the Judges, article 23 of the Convention guarantees a term of nine years for the Judges. In addition, no judge may be dismissed from office unless the other judges decide by a majority of two-thirds that the judge has ceased to fulfill the required conditions.

Furthermore, the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. However, such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. In addition, decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.[199]

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.[200] The Court examines the case together with the representatives of the parties and, if need be, undertakes an investigation for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.[201]

[198] ECHR Article 21
[199] ECHR Article 47
[200] ECHR Article 34
[201] ECHR Article 38

The Strasbourg court performs two main functions. The first function is that of supervising the compliance by the States with their obligations under the Convention in concrete cases and of offering individual redress if need be.[202] It is generally accepted that these tasks form the cornerstone of the Convention system.[203] The ECtHR employs evolutive interpretation, which is a reflection of its core belief that the Convention is a living instrument which must be interpreted in the context of present-day conditions.[204] The second primary function of the Court is of a more constitutional nature, namely to clarify the minimum level of protection of fundamental rights that should be guaranteed in all Convention States.[205] The Convention, in its preamble, pronounces a resolution to take steps to secure collective enforcement of certain rights.

The ECtHR has continued to not only set the standard of protection for contracting parties but also ensure that the right to privacy is safeguarded. The Strasbourg court, in the case of Wolfgang Schüssel v. Austria, held that the application was inadmissible (manifestly ill-founded). It found that the Austrian Supreme Court had correctly weighed the general interest in an open political debate as protected by Article 10 (freedom of expression) of the Convention against the applicant's interest in protection against the publication of his picture. The case was in relation to the Austrian Prime Minister who had complained about his picture, which was partly covered in half by the face of a right-winged politician, with the inscription 'The social security slashers and the education snatchers share a common face.'[206]

It can be seen that with reference to political officers, the court is constantly trying to balance the right to freedom of expression and the right to privacy. In another case, Von Hannover v Germany (no. 2), the court held that the European Court of Human Rights found no breach of Article 8 (right to privacy) of the Convention, highlighting that German courts had judiciously weighed the publishing companies' freedom of expression against the applicants' privacy rights. This assessment focused on whether the published photos, within the context of related articles, contributed to public debate and considered how the photos were obtained. Notably, the Federal

[202] ECHR Article 19
[203] Report of the Committee of Minister's Steering Committee for Human Rights (CDDH) on Measures Requiring Amendment of the European Convention on Human Rights (Strasbourg, February 2012, CDDH (2012) R74 Addendum I)
[204] *Loizidou v Turkey* Application No 15318/89, Preliminary Objections (ECHR 23 March 1995), § 71
[205] Gerards Janneke, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 10
[206] Application no. 42409/98 (Third Section) (ECHR 21 February 2002)

Court of Justice adapted its methods after the European Court's 2004 von Hannover ruling. Furthermore, the Federal Constitutional Court endorsed this new approach and meticulously reviewed the European Court's jurisprudence following complaints about the Federal Court of Justice's adherence to the Convention and ECtHR decisions. Given the discretion allowed to national courts in balancing competing interests, the European Court deemed that the national courts had met their obligations under Article 8 in this case.[207] A brief fact of the case is that the applicants, Princess Caroline Von Hannover and her husband, Prince Ernst Von Hannover, have approached the German Court in separate suits to prevent the publication of a second set of photos of their private vacation, restraining the German magazine publication of their photos. In one of its rulings, the German Federal Court found that the reigning king's poor health was a subject of general interest and that the press had been entitled to report on how the children reconciled their obligation of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. Being dissatisfied with the ruling of the German Federal court, the applicant instituted a proceeding before the Strasbourg court, which gave rise to the decision above.

The court's decisions in the two cases above and other cases analyzed earlier, including *Axel Springer AG V. Germany*, clearly show that the rights of public figures and public officers are viewed differently and often balanced against the right to freedom of expression.

[207] Von Hannover v Germany (no. 2) (*supra)*

CONCLUSION

The right to privacy, to a large extent, enjoys universal recognition. However, the legal nature and extent of the right have remained a matter of controversy. Differently, cultural and political contexts produce a relatively different understanding of the right. The aim of this thesis was to compare the right to privacy under the African Charter on Human and Peoples' Rights 1981 and the European Charter on Human Rights 1950 in relation to public office holders. Both regions were chosen among others for their significantly different socio-cultural background. For instance, while Africa leans heavily towards collectivism, Europe is more favourably disposed to individualism, even though the systems are not totally different, as has been argued by many scholars. Both systems, therefore, offered a dynamic basis for comparison. The above notwithstanding, the right to privacy has often been used by African leaders to prevent public scrutiny, particularly of their wealth. This results in a dilemmatic legal situation in the face of corruption and public accountability crisis by African political leaders.

The identified legal problem was the lack of clear definition of the legal nature, extent and limits of the right to privacy in Africa.

The AFCHPR fails to provide any express provision for the right to privacy. This results in a controversy as to whether there is such a right under the Charter. However, a purposeful interpretation of the AFCHPR in line with article 31 of the Vienna Convention on the Law of Treaties, and subsequent legislations and practices of the African Union, will involve taking the contexts of the Charter into consideration. In this regard, the preamble, international law, and other instruments adopted by the State Parties to the Charter provide a beneficial guide. This approach to interpretation reveals that the right to privacy is deducible under article 4 of the Charter, which provides for personal integrity; article 5, which provides for the respect for the dignity of the human person; article 20, which provides for family; and article 60, which allows inspiration to be drawn from the international human rights instruments. This is because article 12 of the UDHR and article 17 of the ICCPR recognises the right to privacy.

The ECHR, on the other hand, provides an express statement of the right to privacy. This covers the privacy of the person, the privacy of the home, the privacy of the family, and privacy of correspondence. The ECtHR has also adopted the evolutive interpretation of article 8 of the

ECHR to bring it to speed with current realities. The specific contexts of the right are distinct and broad. The privacy of the person relates to the entirety of his person, including his body, thoughts, emotions, persons, and right of personal self-determination. The privacy of the home, on the other hand, covers the integrity of his physical dwelling or living house. This protects against unwanted searches, seizures, and entry. It guarantees him a private physical space for the enjoyment of his private and family life. Privacy of his family, on the other hand, extends to close interpersonal relationships that are functional family connections. Relatedly, the privacy of correspondence covers all personal communications regardless of their mode of transmission.

Nevertheless, the right to privacy is not absolute. The State reserves the right to derogate from the right in appropriate circumstances. Conditions are, however, put in place to protect against arbitrary limitations. The first is that every such limitation must be permitted by law. Second, the law must be reasonably justified in a democratic society to serve specific public interests such as defence, public health, public safety, national security, and the protection of the rights of others. This creates a fair balance between the right to privacy and the legitimate interest of the State. It is necessary also to strike a balance between the right to privacy and freedom of expression, particularly the right to information, in a democratic society. This right to information empowers people to make informed choices and decisions about public officers, especially political office holders.

Different strategies are employed by both the AFCHPR and the ECHR to ensure the implementation of the right to privacy. Under the AFCHPR, there is a binding obligation on State Parties to recognise the right and to adopt statutory and other interventionist measures to give effect to the right. In addition, the African Commission on Human and Peoples' Rights was created, and subsequently, the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights were established. Under the ECHR, Article 1 enjoins High Contracting parties to ensure that everyone within their jurisdiction enjoins the rights and freedoms contained in the Convention. It further creates the ECtHR under Article 19 and the enquiry procedure under Article 52 of the Convention.

The legal recognition of the right to privacy under the AFCHPR and the ECHR is not devoid of implementation challenges. Under the AFCHPR, for instance, the absence of a clear and express statement of the right creates ambiguities, which is the basis of the arguments over the existence

of the right in the first place under the Charter. Institutional frameworks for the implementation of the right are also grossly weak. The state's obligation to recognise and implement the right is not backed by any effective mechanism to ensure compliance. Furthermore, both the Commission and the African Court, as well as the yet-to-be-enforced African Court of Justice and Human Rights, are not open to private individuals who are the primary victims of rights violations except in limited cases. In addition, the value of communalism, which is the foundation of traditional African society, undermines the assertion of the right to privacy. The realisation of the right under the ECHR also faces some challenges. Overall, both under the AFCHPR and the ECHR, there is a need for efforts to strengthen the right while providing for clear limitations on the right to privacy of public office holders to forestall them from utilizing the rights to privacy to evade accountability from members of the society.

Future research into the right to privacy under the AFCHPR should focus on the development of effective institutional arrangements for the protection of the right taking into consideration the peculiarity of the African context. This is because inspiration from the UDHR and ICCPR even though justified may not meet the needs of the African society.

With regard to the ECHR, future research should focus on finding a satisfactory balance between national security and security rights. In addition, there is a need to investigate how to effectively address the problem of privacy breaches in the face of rising technology, which threatens to erode privacy completely. Research should focus on the development of an organic legal framework capable of responding to the dynamism of technological advancements in Europe.

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