POSITIVE OBLIGATION TO PROTECT AFRICAN CHARTER'S ACCESS TO INFORMATION NORM VERSUS NATIONAL SECURITY RESTRICTIONS IN NIGERIAN LAW: STRIKING A BALANCE

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I. INTRODUCTION

The right of access to information is a fundamental right that merits recognition as a basic constitutional value in every democratic state. Constitutional protection of access to information has both juridical and social significance as vital pre-conditions for its enjoyment. First, constitutional provisions establish normative content, standards and scope of rights that other laws and official practices must comply with. Second, the formal character of a constitutional guarantee means that it can be directly enforced in court as a concrete protection without undue limitations to its enjoyment. Third, clear constitutional protection for the right including permissible restrictions thereto in terms of international instruments signals a progressive commitment to international law.

Many African states have either adopted constitutions or enacted laws giving effect to the right of access to information,[1] but some of these are inoperable, deficient or not fully compatible with African and international standards.[2] The African Charter on Human and Peoples' Rights 1981 (African Charter)[3] imposes a positive obligation on state parties to protect the right of access to information by

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1 South Africa: The Constitution of the Republic of South Africa No. 108 of 1996, s. 32 & Promotion of Access to Information Act (PAIA) No. 2 2002; Uganda: Constitution of Uganda 1995, Art. 41; Ghana: Constitution of Ghana 1992, Art. 21(f); Kenyan Constitution 2010, Art. 35; Constitution of Burkina Faso 1991, Art. 8.

2 M. L. Phooko, 'An Actionable Constitutional Right of ATI: The Case of Southern Africa', in F. Diallo and R. Calland (eds), *Access to Information in Africa: Law, Culture and Practice* (Brill, 2013), pp. 171–89.

3 OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (adopted 27 June 1981, entered into force 21 October 1986).

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adopting legislative and other measures to give effect to the right in domestic law.[4] Any restriction to the right by a state party, even on national security grounds, must be prescribed by law, serve a legitimate interest and be necessary in a democratic society.[5]

Nigeria has ratified and incorporated the African Charter into its domestic law[6] in terms of the Constitution of the Federal Republic of Nigeria 1999,[7] which is binding on all persons and authorities.[8] By virtue of the Constitution, Nigeria is a democratic state founded on the ideals of freedom, equality and justice.[9] The Constitution upholds the right of political participation and establishes the framework for a democratic government.[10] Section 39(1) of the 1999 Constitution guarantees 'freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference'. But scholars have argued that section 39(1) does not confer a right of access to information.[11] Undeniably, sections 39(3) and 45(1) of the Constitution qualify the right to information and validate laws that restrict access to state information to protect several interests as may be justifiable in a democratic society. Invariably, the state relies on sections 39(3) and 45(1) to affirm the constitutionality of statutes that excessively restrict access to information,[12] the Official Secrets Act 1962 (OSA 1962)[13] and the National Security Agencies Act 1986 (NSA Act 1986)[14] being the two most disturbing. Though Nigeria enacted a Freedom of Information Act 2011 (FOIA 2011),[15] both statutes confer broad powers on the executive branch to restrict access to state information pertaining to 'national security' without defining what 'national security' means. The NSA Act 1986 also voids the provisions of other laws that would have permitted access to public interest

4 O. Mba, 'Positive Obligations under the African Charter on Human and Peoples' Rights: The Duty of the Nigerian Government to Enact a Freedom of Information Act', 35 *Commonwealth Law Bulletin* (2009), p. 215.

5 *Constitutional Rights Project* v. *Nigeria* (2000) AHRLR 227 (ACHPR 1999), paras 42, 44; *Media Rights Agenda* v. *Nigeria* (2000) AHRLR 200 (ACHPR 1998); *International Pen (on behalf of Saro-Wiwa)* v. *Nigeria* (2000) AHRLR 212 (ACHPR 1998), paras 113, 116.

6 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria (LFN) 2004 (African Charter Act).

7 Constitution of the Federal Republic of Nigeria (Promulgation) Act 24 of 1999, Cap. C23 LFN 2004, s. 17 (hereinafter CFRN 1999, the 1999 Constitution or the Constitution).

8 *Ibid.*, s. 1(1)(3).

9 *Ibid.*, s. 14(1).

10 *Ibid.*, s. 14(2).

11 C. Darch and P. G. Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Chandos Publishing, 2010), p. 220; M. Adebayo and A. Akinyoade, 'Access to Information and Transparency: Opportunities and Challenges for Nigeria's FOI Act 2011', in F. Diallo and R. Calland (eds), *Access to Information in Africa: Law, Culture and Practice* (Brill, 2013), pp. 261, 265; A. Obe, 'The Challenging Case of Nigeria', in A. Florini (ed.), *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007), p. 163.

12 See Statistics Act, Cap. S10 LFN 2004; Criminal Code Act, Cap. 38 LFN 2004, s. 97 (1) and (2).

13 Cap. O3 LFN 2004.

14 NSA Act Cap. N7 LFN 2004.

15 FOIA 2011 LFN 2011.

information held under it.[16] Hence this article contends that the Nigerian State has not satisfactorily complied with its obligation under the African Charter to protect the right of access to information.

The introduction aside, the rest of the article is divided into four parts. Part II conceptualises the right of access to information and examines the scope of positive obligations of state parties to the African Charter to protect access to information including the nature of permissible national security restrictions thereto. Part III assesses Nigeria's constitutional framework on access to information. It finds its phrasing to be clumsy and non-compliant with the state's positive obligation in the Charter. Part IV subjects the NSA Act 1986 and the OSA 1962 to the three-part test of restrictions on the right of access to information, of which these laws fall short. Part V concludes that a clearly worded constitutional guarantee of the right to information and a rule-of-law-based definition of national security would lead to reasonably justifiable and balanced interplay between the right of access to information and national security in Nigerian law.

II. CONCEPTUALISING THE RIGHT OF ACCESS TO INFORMATION

In this part I argue that the right of access to information is a fundamental value that accentuates the public interest in a democratic society.

The right of access to information is fundamental to the smooth functioning of a democracy. First, access to information empowers citizens to participate in democracy. The political power ascribed to the people in a democracy – independent assessment of candidates in an election and ability to monitor officials – are attainable only to the extent that citizens possess full knowledge of the running of their government.[17] Moreover, democratic government exists to protect the public interest.[18] To engage meaningfully with one's representatives in public debate and set the agenda for governance in accordance with the public interest thus requires that citizens be entitled as of right to official information.[19] Second, democracy provides one of the philosophical foundations for human rights.[20] This has greater impact for the right of access to information because states' duties require them to establish processes that gather,

16 NSA Act, s. 7(2).

17 M. Bovens, 'Information Rights: Citizenship in the Information Society', 10 *Journal of Political Philosophy* (2002), pp. 317–41.

18 C. Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights', 13 *Human Rights Review* (2012), pp. 279–301.

19 M. D. Bunker, S. L. Splichal, B. F. Chamberlin and L. M. Perry, 'Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology', 20 *Florida State University Law Review* (1992), p. 543.

20 M. Nowak, *Introduction to the International Human Rights Regime Rights* (Martinus Nijhoff, 2003), p. 46; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly Resolution 53/144 of 9 December 1998, available at https://www.ohchr.org/en/professionalinterest/pages/rightandresponsibility.aspx (accessed 23 July 2018) (the Declaration on Human Rights Defenders).

utilise and keep public interest data. Enforceable access to government-held data can enhance the citizens' ability to demand the protection of socio-economic rights.[21] Third, public accountability will suffer if the press, civil society and watchdog organisations that play constitutional roles in enforcing government accountability are denied the legal teeth that access to information gives. This is because the right of access to information imposes a duty on the state to make information held by public institutions and private bodies performing public functions available to the people.[22]

A. Positive Obligations and African Standards on Right of Access to Information

The concept of positive obligation emanates from Article 1 of the Charter which provides thus:

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

The foregoing article establishes the fundamental human rights obligations that the Charter's state parties owe the persons under their jurisdiction. According to the African Commission on Human and Peoples' Rights,[23] all rights generate at least four levels of duties in terms of Article 1.[24] These are 'the duty to respect, protect, promote, and fulfil these rights' which 'entail a combination of negative and positive duties'.[25] The duty to respect entails that states should not interfere with the enjoyment of rights.[26] The duty to protect requires states to take appropriate measures such as legislation, provision of effective remedies and other positive steps to prevent interference with the enjoyment of rights.[27] The duty to promote means that states should actually facilitate the enjoyment of rights by

21 S. Jagwanth, 'The Right to Information as a Leverage Right', in R. Calland and A. Tilley (eds), *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (ODAC, 2002), p. 3.

22 A. Roberts, 'Structural Pluralism and the Right to Information', 51 *University of Toronto Law Journal* (2001), pp. 243–71.

23 *Social and Economic Rights Action Centre and Another* v. *Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*). Based on Art. 1, the Commission continues to maintain in a plethora of communications that state-parties have a general obligation of inherent negative undertakings of non-interference that intertwine with positive obligations. *Association of Victims of Post Electoral Violence and Another* v. *Cameroon* (2009) AHRLR 47 (ACHPR 2009), paras 122–30; *Commission Nationale des Droits de l'Homme et des Libertés* v. *Chad* (2000) AHRLR 66 (ACHPR 1995), para. 22; *Interights, Institute for Human Rights and Development in Africa and Association Mauritanienne des Droits de l'Homme* v. *Mauritania* AHRLR (2004) 87; Communication No. 288/04 *Gabriel Shumba* v. *Zimbabwe* (decided 2 May 2012) para. 136, available at http://caselaw.ihrda.org/doc/288.04/view/en/ (accessed 17 October 2016).

24 *SERAC*, *ibid*., at paras 44–7.

25 *Ibid*., at para. 44.

26 *Ibid*., at para. 45.

27 *Ibid*., at paras 46, 57.

promoting tolerance, raising awareness and even building infrastructures.[28] The obligation to fulfil implies an expectation from states to take concrete or positive steps to actualise rights through the direct provision of basic needs and social services.[29] These are legally binding obligation on state-parties to the Charter similar to those emanating from comparative international treaties.[30]

Based on the concept of positive obligations and rights interrelatedness in the African Charter, in addition to the theory of implied rights, the Commission has shown that the right of access to information is a fundamental right.[31] The Commission conceived the right as instrumental to human rights protection[32] and as a component of the broader right to freedom of expression enshrined in international human rights instruments including Article 9 of the African Charter. Article 9 provides:

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

Article 9(1) protects freedom of expression and access to information which are indispensable to a democracy and the protection of other rights. Article 9(2) admits of states' jurisdiction to regulate access to information and freedom of expression 'within the law'. Starting with *SERAC*,[33] the Commission began to adopt a broad interpretive approach to the Charter. The Commission held that Articles 16 and 24 are closely related and both 'recognise the importance of a clean and safe environment' for human habitation, health and development.[34] The Commission found Nigeria to be in violation of its positive obligations in terms of both articles. It said:

> Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed

28 *Ibid*., at para. 46.

29 *Ibid*., at para. 47; *Sudan Human Rights Organisation and Another* v. *Sudan* (2009) AHRLR 153 (ACHPR 2009) (the COHRE case), paras 191, 248.

30 Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 7.

31 M. Ssenyonjo, 'Economic, Social and Cultural Rights in the African Charter', in M. Ssenyonjo (ed.), *The African Human Rights System* (Martinus Nijhoff, 2012), chapter 3.

32 See *SERAC*, *supra*, note 23, at paras 59–6.

33 *Ibid*.

34 *Ibid*., at para. 51. Similarly, Art. 16 of the African Charter reads: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.' Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

> to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[35]

It is explicit from the final recommendations in *SERAC* that the Commission recognised access to public interest information as a mechanism for realising the rights to an environment conducive to development, property, health, and family life rather than as a stand-alone right.

The Commission later adopted a Declaration of Principles on Freedom of Expression in Africa (DoP)[36] fashioned by its Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur).[37] The DoP elaborates on the meaning and scope of access to information and embodies the Commission's jurisprudence on the justifications and conditions for the limitation of rights guaranteed by Article 9.[38] The Declaration reasserts a key principle of access to information as a human entitlement capable of both vertical and horizontal enforcement in that:

> everyone has the right to access information held by public bodies [and] everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.[39]

Principle I(1) of the DoP states:

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

Principle IV(1) acknowledges that public bodies hold information as custodians of the public good to which everyone has a right of access 'subject only to clearly defined rules established by law'. Principle IV(2) affirms the positive obligation of states to guarantee the 'right [of access] to information by law in accordance with the … [Declaration's] principles'. This principle provides grounds for a public

35 *SERAC*, *supra*, note 23, at para. 53.

36 African Commission on Human and Peoples' Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (adopted at 32nd Ordinary Session, held 17–23 October 2002 in Banjul, The Gambia), available at http://www.achpr.org/sessions/32nd/resolutions/62/ (accessed 5 October 2016).

37 Established to monitor state parties' compliance with access to information principles. See African Commission on Human and Peoples' Rights, Resolution ACHPR/Res.122 (XXXXII) 07: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa (adopted at 42nd Ordinary Session, held 15–28 November 2007 in Brazzaville, Republic of Congo).

38 African Commission on Human and Peoples' Rights, Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, 'Viewed in 25 Years of the Commission' (presented by Adv. Pansy Tlakula at 52nd Ordinary Session, held 9–22 October 2012 in Yamoussoukro, Côte d'Ivoire, available at http://www.achpr.org/files/sessions/52nd/inter-act-reps/183/activity_report_sp_freedom_expression_eng.pdf (accessed 7 October 2016.

39 DoP, Principle IV(2).

interest test of any state law that exempts information from disclosure to protect states' interests.

Furthermore, to promote openness and do away with an entrenched culture of secrecy associated with the protection of state security in Africa, the DoP articulates the positive obligation of state parties to amend their secrecy laws 'as necessary to comply with freedom of information principles'.[40]

B. National Security Restrictions on Access to Information in the African Charter

The duty placed upon states to protect national security, including military defence and national intelligence which sometimes require secrecy for their effectiveness,[41] often conflicts with and is used as an excuse to restrict access to government information. National security covers:

> measures to prevent or respond to serious threats to the country as a whole, whether from an external source, such as military threat, or an internal source, such as incitement to violent overthrow of the government.[42]

The foregoing excludes 'restrictions in the sole interest of a government, regime or power group' and limitations set only to avoid riots or other troubles that do not threaten the life of a whole nation.[43] But obstinate secrecy often demanded by those responsible for national security provides a safe haven for official corruption, human rights violations and abuse of power. National security is thus best protected under conditions of effective individual rights' protection, judicial oversight and accountability of government security agencies.

Consequently, the African Commission has devised a national security benchmark of permissible restrictions to the right of access to information through its Model Law on Access to Information for Africa, officially launched during its 53rd Ordinary Session held 9 to 23 April 2013 in Banjul, The Gambia.[44]

40 *Ibid*. See also *International Pen (on behalf of Saro-Wiwa)* v. *Nigeria*, *supra*, note 5, at para. 118 (pronouncing that Nigeria has an obligation to annul the Nigerian State Security (Detention of Persons) Decree of 1984 and State Security (Detention of Persons) (Amendment) Decree No. 14 of 1994 Decree which violated Art. 6 of the ACHPR).

41 For example, the names of secret intelligence sources, diplomatic exchanges, secret military technologies and secret intelligence methods – all of which are secret and whose efficacy would be undermined by public disclosure.

42 E. Evatt 'The International Covenant on Civil and Political Rights', in S. Coliver, P. Hoffman, J. Fitzpatrick et al. (eds), *Secrecy and Liberty: Freedom of Expression, Access to Information and National Security* (Martinus Nijhoff, 1999), p. 84; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 29, UN Doc. E/CN.4/ 1985/4, Annex, para. 30 (1985).

43 A. Kiss, 'Commentary by the Rapporteur on the Limitation Provisions', 7 *Human Rights Quarterly* (1985), pp. 15, 21.

44 African Commission on Human and Peoples' Rights, Resolution 167: Resolution on Securing the Effective Realization of Access to Information in Africa (adopted at Ordinary Session, held 10–24 November 2010 in Banjul, The Gambia), available at http://www.achpr.org/sessions/48th/resolutions/167/ (accessed 5 October 2018).

The roots of the Model Law lie specifically in states' positive obligations in Articles 1 and 9 of the African Charter, and aims essentially to guide states to adopt legislative measures and amend existing secrecy laws to give concrete effect to access to information principles. Articles 25 and 26 of the Model Law ensure that exemptions of classified information from disclosure is subject to a 'public interest override' and not on mere characterisation. Furthermore, Article 30 thereof provides that only information the disclosure of which would cause *substantial prejudice* to the 'security or defence' of the state *may be* exempt from disclosure (emphasis supplied). Article 30(2) specifies seven sub-categories of such information. These include war strategy, military and defence intelligence methods to suppress subversive activities, capabilities of military and weapons systems excluding nuclear weaponry, and counter-subversion intelligence. Hence, the Commission continues to call upon states to 'expedite the process of enactment of Access to Information Laws, in accordance with regional and international standards on access to information as embodied in the Model Law on Access to Information for Africa'.[45]

The Commission has admirably rebuffed the exercise of unfettered discretion or attempts by states to override their Article 1 obligations through reliance on Article 9(2). The Commission's jurisprudence demonstrates that the right of access to information may only be restricted on grounds of national security if clearly provided for by law, the restriction serves a legitimate interest and it is necessary in a democratic society. These are the core tests of legality, legitimacy and necessity that are clearly demonstrated in Communications from a number of states including Nigeria, South Africa, Sudan, Mauritania, Zambia, Zimbabwe, Botswana, Rwanda and The Gambia.

Concerning legality of restrictions, the Commission, in *Media Rights Agenda* v. *Nigeria*,[46] applied the standard already set in *Civil Liberties Organisation (in respect of Bar Association)* v. *Nigeria*[47] to Article 9(2). It pronounced thus:

> Competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.[48]

The Commission holds the view that the Charter does not displace national constitutions and laws, but that they must conform to international laws and

45 See, for instance, 39th Activity Report of the African Commission on Human and Peoples' Rights (adopted at 57th Ordinary Session, held 4–18 November 2015 in Banjul, The Gambia, para. 57(iii), available at http://www.achpr.org/files/activity-reports/39/actrep39_2015_eng.pdf (accessed 18 September 2018).

46 *Supra*, note 5.

47 (2000) AHRLR 188 (ACHPR 1995) para. 15.

48 *Media Rights Agenda* v. *Nigeria*, *supra*, note 5, at para. 64.

standards by which a state party is bound.[49] As pertaining to legitimacy, the Commission continues to reiterate thus:

> The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.[50]

In *Good* v. *Republic of Botswana*,[51] an Australian national was expelled from Botswana pursuant to a Presidential Order under Botswana's Immigration Act, section 36(2) of which precluded judicial review. Botswana's highest court agreed that this was necessary to protect national security. The Commission, relying on its earlier jurisprudence,[52] held that the President's action violated the Applicant's right to information under Article 9(1), which in turn negated other rights such as access to justice (Article 7), the obligation to respect, protect and fulfil Charter provisions (Article 1) and so on.[53] The requirement of necessity embodies and is the culmination of the three-part test of reasonableness of rights' restrictions.[54] Given the importance of the right at hand in a democracy, the Commission's standard of necessity is that the reasons for possible limitations must be based on legitimate public interests and the effect of the limitation must be strictly proportionate to its object.[55]

Similarly, the burgeoning African Court on Human and Peoples' Rights' (African Court)[56] jurisprudence on Article 9 including permissible restrictions thereto mirror those found in African and international human rights law and

49 *Amnesty International* v. *Zambia* (2000) AHRLR 325 (ACHPR 1999) para. 50; *Prince* v. *South Africa* (2004) AHRLR 105 (ACHPR 2004) para. 44; *Good* v. *Republic of Botswana* (2010) AHRLR 43 (ACHPR 2010) para. 204.

50 *Prince* v. *South Africa*, *ibid*., at para. 43; *Interights* v. *Mauritania* (2004) AHRLR 87 (ACHPR 2004) paras 78–9; *Legal Resources Foundation* v. *Zambia* (2001) AHRLR 84 (ACHPR 2001) para. 72.

51 *Good* v. *Republic of Botswana*, *supra*, note 49.

52 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe* v. *Zimbabwe* (2009) AHRLR 235 (ACHPR 2009); *Rencontre Africaine pour la Défense des Droits de l'Homme* v. *Zambia* (2000) AHRLR 321 (ACHPR 1996); *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); *Organisation Mondiale Contre la Torture* v. *Rwanda* (2000) AHRLR 282 (ACHPR 1996); *Jawara* v. *The Gambia* (2000) AHRLR 107 (ACHPR 2000) para. 46.

53 *Good* v. *Republic of Botswana*, *supra*, note 49, at paras 160–242; Application No. 013/2011: *The Beneficiaries of the Late Norbert Zongo et al.* v. *Burkina Faso* (judgment delivered 28 March 2014) paras 183, 199.

54 The three-part test and limitation analysis were extensively articulated in the following: *Law Office of Ghazi Suleiman* v. *Sudan (II)* (2003) AHRLR 144 (ACHPR 2003) paras 46–6; Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) paras 33–6; P. De Vos, 'Freedom of Religion v drug Traffic Control: The Rastafarian, the Law, Society and the Right to Smoke the Holy Weed', 5 *Law Democracy and Development* (2001): 84, 88–91, 94–6.

55 *Law Office of Ghazi Suleiman* v. *Sudan (I)* (2003) AHRLR 134 (ACHPR 2003); *Constitutional Rights Project* v. *Nigeria*, *supra*, note 5, at para. 54.

56 Established by Art. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ('the Protocol' or 'the

jurisprudence.[57] In *Tanganyika Law Society, Legal and Human Rights Centre & Rev C. Mtikila* v. *Tanzania* (*Mtikila*),[58] the African Court held that proportionality requires that a fair balance be struck in national law between national security interest and the protection of individual rights.[59]

III. NIGERIA'S CONSTITUTIONAL FRAMEWORK ON THE RIGHT OF ACCESS TO INFORMATION

This part examines Nigeria's constitutional framework on access to information against the background of the culture of secrecy that has shaped Nigeria's access to information experience to date. It argues that the Constitution, when read together with Article 9 of the African Charter and purposively interpreted, confers a meaningful guarantee of access to information.

A. The Civil Service Colonial Culture of Official Secrecy

Nigeria's legal history offers a case study of countries where an inherited colonial culture of secrecy has bolstered an ambivalence in constitutional provisions on access to information.[60] From 1861 to 1960, the British colonised the peoples of the territories that became Nigeria.[61] To protect their commercial, security and other interests, the colonists imported the British administrative system into Nigeria[62] together with a complete package of the British tradition of civil service secrecy.[63] Of course, the colonial power neither recognised the duty to make official information widely available nor the right of colonised peoples to such.[64] At independence, the tradition of official decision-making based on secrecy was not dismantled: the succeeding parliamentary government perfected the inherited

Court's Protocol') (adopted by the OAU in Ouagadougou, Burkina Faso on 9 June 1998 and came into force 25 January 2004).

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

58 Application Nos. 009/2011 and 011/2011. Reported in C. Heyns and M. Killander, *Compendium of Key Human Rights Documents of the African Union* (PULP, 2013).

59 *Ibid*., at para. 107. See, further, Application No. 004/2013 *Lohé Issa Konaté* v. *The Republic of Burkina Faso*, pertaining to Art. 8 of the Constitution of Burkina Faso 1991 which guarantees freedom of expression and the right to information. The African Court held that imprisonment and fines were a disproportionate interference with Konate's freedom of expression rights contrary to the state's Charter obligation in Art. 9.

60 See Obe, 'The Challenging case of Nigeria', *supra*, note 11, at pp. 147–8.

61 N. Uko *Romancing the Gun: The Press as Promoter of Military Rule* (Africa World Press, 2004).

62 A. O. Obilade *The Nigerian Legal System* (Sweet & Maxwell, 1979).

63 See Franks Report, Report of the Committee under the Chairmanship of Lord Franks on Section 2 of the Official Secrets Act 1911 (HMSO, 1972), Cmnd 5104, Vol. 1, para. 50; Obe, 'The Challenging Case of Nigeria', *supra*, note 11, at p. 148.

64 S. Oguche, 'Freedom of Information and National Security in Nigeria: Practices of the United Kingdom', in E. Azinge and F. Waziri (eds), *Freedom of Information Law and Regulation in Nigeria* (NIALS, 2013), pp. 92–3.

culture of secrecy.[65] Successive military juntas who hijacked power between 1966 and 1999 never pretended to be accountable.[66] The publication of unpublished government records or information considered embarrassing to government was heavily restricted.[67] This tradition of secrecy persists in Nigeria to today despite the establishment of a democratic government since 29 May 1999. Lamenting the difficulty of making government accountable, Ayo Obe comments:

> It is these habits of secrecy that have held sway rather than constitutional provisions and international and regional agreements, by which Nigeria purported to guarantee freedom of information and which it took no concrete steps to actualize.[68]

There is therefore a need to examine the extent to which Nigeria's constitutional and statutory provisions protect the right of access to information.

B. The Phraseology of Section 39 of the 1999 Constitution on Access to Information

Section 39 of the 1999 Constitution guarantees freedom of expression including other rights essential to a healthy democracy; it provides:

> (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
> (2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:
> Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever.
> (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –
>
> (a) for the purpose of preventing the disclosure. of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

65 Obe, 'The Challenging Case of Nigeria', *supra*, note 11.
66 T. Momoh, *Nigerian Media Laws* (Efua Media Associates, 2002).
67 *Ibid*.
68 Obe, 'The Challenging Case of Nigeria', *supra*, note 11, p. at 165.

> (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

Section 39 is the underlying basis for an open and accountable government.[69] It guarantees individual liberty of democratic choices which underpins other fundamental freedoms;[70] the liberty to receive and impart knowledge through any medium;[71] and the public's right to be informed about matters of public interest. Hence journalists cannot be forced to disclose confidential information.[72]

Pertaining to the contention that section 39(1) is too 'weak' to confer the right of access to information,[73] a plausible interpretation of the provisions is that it encompasses or implies the right. This assertion is supportable on several grounds. First, because the word 'including' in the section means 'part of' or 'not limited to'[74] it can support an expansive meaning of the generic concept of 'freedom'. Secondly, the Constitution is a living document which must be interpreted broadly to fulfil its original intent.[75] Hence the word 'including' must by implication encompass the right to acquire official information to perform the roles that democracy assigns to citizens.

Again, scholars have argued that section 39 does not guarantee the right of access to information due to the clumsy and restrictive wording of sections 39(3) and 45(1) of the 1999 Constitution.[76] This is a substantial argument which requires further clarification of the scope of the two sections implicated.

1. The Qualification of Access to Information in Sections 39(3) and 45(1)

Section 39(3) internally qualifies section 39(1)(2) while section 45(1) is the omnibus limitation clause. Both sections 39(3) and 45(1) qualify the right to information, but their clumsy – and restrictive – wording, appear to strengthen the

69 B. O. Nwabueze, *The Presidential Constitution of Nigeria* (Fourth Dimension, 1982), p. 457; O. Oyewo, *Constitutional Law in Nigeria* (Kluwer Law International, 2012), p. 129.

70 *Adewole* v. *Jakande* [1981] 1 NCLR 262 (HC).

71 *Adewole* v. *Jakande*, *ibid.*; *Okogie* v. *The Attorney-General of Lagos State* [1981] 2 NCLR 337 (CA). The outcome was based on the Constitution of the Federal Republic of Nigeria 1979, s. 36(1)(2) (the 1979 Constitution), which is *impari materia* with s. 39(1)(2) of the 1999 Constitution.

72 *Tony Momoh* v. *Senate of the National Assembly* [1981] 1 NCLR 105 (HC). The Lagos High Court reached a similar conclusion in *Olusola Oyegbemi* v. *AG of the Federation* [1982] 3 NCLR 895.

73 Darch and Underwood, *supra*, note 11.

74 B. A. Garner (ed.), *Black's Law Dictionary* (Thomson Reuters, 2014).

75 *Adewole* v. *Jakande*, *supra*, note 70; *Nofiu Rabiu* v. *The State* (1980) 1 SC.

76 Obe, 'The Challenging Case of Nigeria', *supra*, note 11, at p. 143.

case that section 39(1) does not guarantee the right of access to information. Section 45(1) provides:

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

Sections 39(3) and 45(1) seem to exempt all laws that permit the non-disclosure of any information received in confidence from the operation of section 39(1). In reality, both sections only exempt confidential information relating to defence, public safety and public order as may be provided by a law which is reasonably justifiable in a democracy. Thus the express intent of these provisions is that no law, proposed measure or government action may infringe on the right of access to information (implied in section 39(1)) unless it passes the test of necessity. This is so because section 39(3) does not clearly specify the test which a limiting law or measure must pass to be 'reasonably justifiable in a democratic society'.[77] Again, the wide scope of permissible limitations in sections 39(3) and 45(1) covers the interests of defence, confidentiality and public order, which motivates the adoption of laws that impose criminal penalties for unauthorised disclosure of official information. Concerning the clumsiness of section 45(1), Nwabueze argues:

> First, the wording of the qualification seems to shift emphasis from liberty to the authority of the legislature to interfere with them, from protection of liberty to qualification on it. It fails to emphasis as clearly as would be desired that liberty is the rule and governmental interference the exception. It seems to place on the individual the onus of showing that the interfering law is not reasonably justifiable in the specified public interests rather than on the state to show that it is. In short, it fails to strike the balance in favour of liberty, which … is 'the true mark of a free society'.[78]

The author also observes rightly thus:

> [T]he provisions fail to specify in explicit terms the kind of relations that must exist between an interfering law and the prescribed public

77 This has been a recurring problem with Nigerian Constitutions since independence. See Nigeria Constitution (Order-in-Council) 1960, s. 4; the Constitution of the Federal Republic of Nigeria 1963, s. 23(4)(a)(b); Constitution of the Federal Republic of Nigeria 1979, s. 36(3); the Constitution of the Federal Republic of Nigeria 1989, s. 39(3) and the Constitution of the Federal Republic of Nigeria 1999, ss. 39(3) and 45(1).

78 Ben Nwabueze *Constitutional Democracy in Africa*, *Vol. 1* (Spectrum Books, 2003), p. 389.

> interests to make interfering law reasonably justifiable in a democratic society in those interests.[79]

The statement above posits the existence of a proximate relation, which must also be rational not arbitrary, between any law that limits section 39(1) and any of the enumerated interests in sections 39(3) and 45(1).[80]

Regrettably, within official circles, section 39(3) is invariably misconstrued as a blank cheque to determine what the public must know, to keep official information secret and punish its unauthorised disclosure as a crime against public order or national security.[81] But this is highly disturbing considering the fact that 'national security' has no precise meaning in Nigerian law, thus making the executive the sole judge of what national security entails.[82] The article engages more with this matter later on. Suffice it to say that because of the inelegant and restrictive formulation of sections 39(3) and 45(1) highlighted above, the African Charter provides a way forward.

C. Justiciability of Positive Obligations under the Nigerian Constitution

Nigeria has signed, ratified and domesticated the African Charter.[83] The African Charter Act[84] incorporates the African Charter into Nigerian domestic law pursuant to section 12 of the Constitution, which provides as follows:

> (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

By its coming to effect the African Charter Act makes the African Charter together with the interpretations of its provisions by authoritative bodies become applicable in Nigeria. Section 1 of the Act states:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

79 *Ibid*., at pp. 392–3.
80 *Ibid*., at p. 393.
81 T. Momoh *Democracy Watch: A Monitor's Diary Volume 2* (Pumak Nigeria Ltd, 2003), p. 14.
82 *Ching Yao & 4 Ors* v. *Chief of Staff Gani Fawehinmi Nigerian Law of Habeas Corpus* (Nigerian Law Publications, 1986), pp. 437–48.
83 African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act, Act 2 of 1983 (now Cap. A9 LFN 2004) (African Charter Act).
84 *Ibid*.

The African Commission has established that states have an obligation to protect access to information which underpins the protection of human rights.[85] Hence the right of access to information which fulfils the enjoyment of freedom of expression in Article 9 of the African Charter comes in handy to augment section 39 of the 1999 Constitution. Again, state parties to the Charter are expected to repeal secrecy laws or adopt new laws or otherwise bring existing laws in compliance with access to information principles. The African Commission's limitation jurisprudence on access to information (three-part test of reasonableness) discussed under heading III.B above can be cited as legal authority in Nigerian courts.

The Nigerian Supreme Court has confirmed the direct enforceability of the Charter in Nigerian courts like other domestic statutes, including its primacy over inconsistent laws, except the 1999 Constitution.[86] According to the court, it is presumed the legislature does not intend to breach an international obligation.[87] In *Abacha* v. *Fawehinmi*,[88] the Court held thus:

> Where, however, [a] treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (ie domestic) law by … Cap [9] … it becomes binding and our Courts must give effect to it like all other laws falling within the judicial power of the Courts. By Cap [9] the African Charter is now part of the laws of Nigeria and like all other laws the Courts must uphold it. The Charter gives to citizens of member states of the [African Union] rights and obligations, which rights and obligations are to be enforced by our Courts, if they are to have any meaning … the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in … Chapter IV of the 1979 and 1999 Constitutions … But that is not to say that the Charter is superior to the Constitution … Nor can its international flavour prevent the National Assembly … removing it from our body of municipal laws by simply repealing Cap [9].[89]

In reality, while it subsists, 'the government of Nigeria cannot enact a domestic law inconsistent with the Charter'.[90] Notwithstanding the technically lower status of the Charter, sections 39(3) and 45(1) of the Constitution do not trump Article 9 of the African Charter. Both the African Charter and these sections can coexist since the Charter complements these sections by expanding protection

85 See *SERAC*, *supra*, note 23.
86 *Abacha* v. *Fawehinmi* (2001) AHRLR 172 (NgSC 2000).
87 *Ibid*.
88 *Ibid*., at para. 15.
89 *Ibid*., at paras 14–15.
90 *Ibid*., at para. 23; *Civil Liberties Organisation* v. *Nigeria*, *supra*, note 47, at para. 12 (the African Commission said: 'If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice … ').

for the right of access to information and does not limit the right in contravention of these sections. Moreover, the Charter is, in practice, being enforced contemporaneously with the Nigerian bill of rights pursuant to relevant procedural rules.[91] African Charter principles on the right of access to information thus effectively became part of Nigerian domestic law since the African Charter Act came into effect in 1983. Thus the Nigerian state must amend secrecy laws, adopt legislation and take other measures according to its positive obligation under Articles 1 and 9 of the Charter to protect the right of access to information.[92] Complementary Charter interpretations by the African Commission and the African Court on Human and Peoples' Rights must also be used as standards against which to test whether restrictions to access to information are reasonably justifiable under sections 39(3) and 45(1) of the Constitution. This matter is the focus of discussions below.

D. Executive Secrecy and National Security in Nigerian Law

The repeal of a few military laws on return to democratic rule on 29 May 1999[93] and the enactment of some sectoral transparency laws thereafter suggest a desire to break with the authoritarian past.[94] However, the main colonial and military secrecy laws were left intact. Government secrecy is effected in two broad ways: first, through the operation of the common law and statutes that permit the withholding of official information on grounds of 'state matters', confidentiality, national security and so on, whether classified or not;[95] and secondly, through the criminalisation of unauthorised disclosure of such information.[96] However, the OSA 1962 and the NSA Act 1986 are the most severe of such laws.

1. The OSA 1962

Apparently enacted for securing 'public safety',[97] a term not defined by it, the OSA 1962 severely hinders transparent and accountable governance guaranteed by section 39(1) of the Constitution, Article 9 of the African Charter and the FOIA 2011.

The OSA 1962 is one of two main laws that protect the country against espionage through unauthorised disclosure of official information in Nigeria.

91 *Abacha* v. *Fawehinmi* (2001) AHRLR 172 (NgSC 2000); *Ogugu* v. *The State* (1994) 9 NWLR (Part 366) 1; A Sanni, 'Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The Need for Far-reaching Reform', 2 *African Human Rights Law Journal* (2001), pp. 511–31.

92 *Law Office of Ghazi Suleiman* v. *Sudan (I)*, *supra*, note 55; DoP, Principle IV.

93 Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 1999.

94 See Public Procurement Act 14 2007, Nigeria Extractive Industries Transparency (NEITI) Act 2007.

95 See OSA 1962 (as amended), ss. 1, 2, 9; NSA Act 1986, Evidence Act 2011, Statistics Act 9 of 2007, and so on.

96 See OSA 1962 (as amended), s. 1(1)(2)(3); Criminal Code Act, ss. 96–7; Statistics Act 9 of 2007, s. 28.

97 See the OSA 1962, long title.

According to Elias, the statute was enacted 'to prevent espionage and the communication or transmission of information vital to the security of the state from falling into the hands of an enemy'.[98] Dare Babarinsa corroborates Elias; he says the OSA was directed against acts of spying for a foreign power, but in his opinion, not against the press.[99] But the key to understanding the Act is the British Official Secrets Act 1911–39, which it repealed and re-enacted in a modified form,[100] considering the paucity of prosecutions under it. The British Official Secrets Act 1911–39 created offences against espionage and unauthorised leakage of official information.[101] According to Thomas:

> Espionage concerns spies and others who intend to help an enemy and deliberately harm the security of the nation … Rather the Official Secrets Acts are invoked in cases of espionage. Espionage relates to another distinct but overlapping problem: that of the unauthorized leakage of official information. Harm may befall the country from information getting into the wrong hands, whether by espionage or leakage. A crucial distinction between the two is that damage to the state is *intentional* in the case of espionage, whereas leaks may involve persons having no such purpose.[102]

The OSA 1962 consists of ten sections. Section 1 creates offences analogous to the unauthorised disclosure of official information prejudicial to national security described in the above quote. It provides as follows:

> (1) Subject to subsection (3) of this section, a person who –
>
> (a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or
> (b) obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, reproduce or retain, as the case may be, is guilty of an offence.
>
> (2) A public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control is guilty of an offence.

98 T. O. Elias (ed.), *Nigerian Press Law* (University of Lagos & Evans Brothers (1969), p. 40.

99 *Newswatch Magazine*, 14 September 1987, p. 20, referred to by I. B. Oloyede, *Freedom of Expression and National Security in Nigeria: An Appraisal of State Security (Detention of Persons) Decree (Decree No. 2) 1984* (Lambert Academic Publishing, 2012), p. 36.

100 A. Aguda *Criminal Law and Procedure in Southern Nigeria* (Sweet & Maxwell, 1982); S. Oguche, 'Freedom of Information and National Security in Nigeria', *supra*, note 64.

101 See for an analysis of these statutes R. M. Thomas, *Espionage and Secrecy: The Official Secrets Acts 1911–1989 of the United Kingdom* (Routledge, 1991), pp. 2–3.

102 *Ibid*.

The only apparent defence for section 1 offences is provided for in subsection (3), which provides that:

> (3) In proceedings for an offence under subsection (1) of this section relating to any classified matter, it shall be a defence to prove that –
>
> (a) when the accused transmitted, obtained, reproduced or retained the matter, as the case may be, he did not know and could not reasonably have been expected to believe that it was classified matter; and
> (b) when he knew or could reasonably have been expected to believe that the matter was classified matter, he forthwith placed his knowledge of the case at the disposal of the Nigerian Police Force.

It does not matter whether the classified matter was in the public domain through other means before a third party innocently receives or it reveals official wrongdoing or abuse of office. For as long as it is not delivered to the police, it is a crime to retain it. Section 1 applies to individuals, the press and both serving and retired public officers according to the definition of that term in the section 9. The test of section 1 offences is the term 'classified matter', which is vaguely defined in section 9(1) to mean:

> [A]ny information or thing which, under any system of security classification, from time to time, in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria.

The 'definition' is 'a moving target', but actually is a recipe for blanket secrecy considering the wide discretionary powers it gives to government. Hence government has cashed in on the provision to suppress public access to virtually every piece of information in its possession. Public officers often prefer to err on the side of caution because they cannot give out any official information without receiving 'orders from above'. The chilling effect of the provision is such that some classified files contain old newspapers cuttings and that the number of cups of tea drunk in a government office cannot be revealed without permission! But this is unfortunate because the acts or omissions which constitute the *actus reus* in section 1 such as to 'transmit', 'reproduce', 'retain' and so on must have been done with the *mens rea* or intent 'prejudicial to the security of Nigeria'.[103] Yet the phrase is nowhere defined in the Act, but is the commonest ground for refusal to disclose or penalise disclosure of information. Again, 'prejudicial to the security of Nigeria' is often conflated with 'public safety' or 'public order' within Nigerian official circles. At worst, it is a euphemism for 'security risk', which means whatever the government construes it to mean. However, to be

103 A. Mathews, *The Darker Reaches of Government* (Juta, 1978), pp. 103–4.

prejudicial, a disclosure of information must be shown to create a demonstrable and substantial risk, not merely because it is related to national security. Section 2 bars physical public access to and information relating to a 'protected place' like section 1 of the British Official Secrets Act 1911 except that the words 'calculated to be or might be or is intended to be directly or indirectly useful to the enemy' occurring in the latter Act is omitted in the Nigerian version.[104] It is a crime under section 2: to enter or be in the vicinity of; make a record of anything in; interfere with or obstruct anyone guarding; or obtain a sketch, photograph or model, of a 'protected place' for 'any purpose prejudicial to the security of Nigeria'.[105] The section protects information about military installations and defence hardware and software which might be useful to the enemy if published, but there is no requirement that it be classified. Subsection (2) creates a reverse onus on an accused to prove her innocence or that her presence in a protected place was not for 'a purpose prejudicial to the security of Nigeria'. A similar provision in the British Official Secrets Act 1939 was construed to mean that a public interest motive or actual effect of the action was irrelevant so long as the action is capable of harming the security of the state.[106] However, the reverse onus would be unconstitutional under section 35 of the Constitution because it places the onus of proving the commission of an offence beyond reasonable doubt on the prosecution. Section 3 permits the President to make an order during an emergency declared under section 305 of the Constitution that no one shall without the President's written permission make a sketch or record of any thing designed for defence purposes without his permission.[107]

Sections 4, 5, 6, 7 and 8 enact provisions to enforce the Act. Some of these provisions have the potential to violate personal communications. For instance, under section 4, the responsible minister may make regulations to require postal,

104 Defined by s. 9(1) of the OSA 1962 to mean:

> (a) any naval, military or air force establishment in Nigeria, any other place in Nigeria used for or in connection with the production, storage or testing, by or on behalf of the government, of equipment designed or adapted for use for defence purposes, and any other building, structure or work in Nigeria used by the government for defence purposes; and
> (b) any area in Nigeria or elsewhere for the time being designated by an order made by the Minister as being an area from which the public should be excluded in the interests of the security of Nigeria, and includes a part of a protected place within the meaning of paragraph (a) or (b) of this definition.

105 Based on s. 1 of the British Official Secrets Act 1939 similar to s. 2 of the 1962 Act, but with the addition of 'directly or indirectly useful to the enemy', the English case of *Chandler* v. *Crane* [1962] 3 All ER 142 (HL) held that 'any purpose prejudicial to the security of the State' encompasses sabotage, but with intent to aid the enemy. Because the 1962 Act is not so qualified it will cover any prejudicial disclosure. But the test is subjective not objective.

106 See *Chandler* v. *DPP* [1964] AC 763 in which some anti-nuclear protesters had entered a British RAF airfield to immobilise an aircraft not for espionage, but to draw attention to the dangers of stockpiling nuclear weapons. The effect of the decision has since been modified. See Thomas, *Espionage and Secrecy*, *supra*, note 101, at pp. 52–3.

107 S. Coliver, 'Commentary on Johannesburg Principles', in S. Coliver, P. Hoffman, J. Fitzpatrick et al., *Secrecy and Liberty: Freedom of Expression, Access to Information and National Security* (Martinus Nijhoff, 1999).

telephone and telegraph companies to furnish the government with information and records of their operations.[108] Section 5 permits the concerned minister to authorise a superior police officer (SPO) to issue a warrant, or where impracticable the SPO may issue a warrant, to enable the police to obtain evidence from anyone or premises as to a suspected commission of an offence under sections 1–3 of the Act. The security services and police usually have this provision in mind whenever they attempt to force journalists to reveal the source of confidential information.[109]

Section 6 permits an SPO, upon suspicion of the commission of any offence in sections 1–3, to issue a warrant to a junior officer to enter, search and remove any suspected incriminating evidence from any premises and use reasonable force to execute the warrant. Sections 5 and 6 go against the normal safeguards for obtaining search warrants which is by a statement on oath laid before a judicial officer.[110]

Section 7(1)(a) provides for prison sentences. Upon conviction on indictment for any offence in sections 1–3 a person is liable to 14 years' imprisonment, but on conviction after summary trial to two years' imprisonment or ₦200 fine (US$0.54) ($1 equals ₦370) or to both fine and imprisonment.[111] A summary conviction for a section 5 offence attracts three months' imprisonment or ₦100 fine (US$0.27) or both fine and imprisonment.[112] Also, a person who attempts to commit; aids, abets, counsels, procures, incites; being accessory before or after the fact, conceals or procures the commission of an offence punishable under the Act also commits a crime punishable as the main offence.[113] To attenuate the harshness of the law, prosecution for an offence under the Act cannot be initiated without the consent of the Attorney-General (AG) or authority of the Director of Public Prosecutions (DPP) of the Federation or a state.[114] The AG is the chief law officer of the state[115] and is constitutionally entitled to initiate, continue or discontinue a criminal prosecution independently of external opinions except by public policy and the public interest.[116] Thus the AG should decline consent where the information disclosed simply embarrassed the government or where available evidence does not establish a prima facie case or where lesser punishment or alternative charges to that provided under the Act exist in another

108 Related provision on control of communications can be found in the Prevention of Terrorism Act 2011 (as amended) and the National Communications Commission SIM Card Registration Policy 2010.

109 See the prosecutions of Dele Giwa and Jerry Needam analysed under heading III.D.1 above.

110 F. Nwadialo, *The Criminal Procedure of the Southern States of Nigeria* (Ethiope Publishing, 1976), p. 49.

111 OSA 1962, s. 7(1)(b).

112 OSA 1962, s. 7(2).

113 OSA 1962, s. 8(1)(a)(b)(c)(d). Section 8(2) extends the Act's coverage to offences committed outside Nigeria while s. 8(3) preserves the power of police officers to arrest without warrant anyone who they reasonably suspect to have committed an offence.

114 OSA 1962, s. 7(3).

115 The 1999 Constitution, s. 150(1).

116 The Constitution, s. 174(1)(a)(b)(c) and the Administration of Criminal Justice Act 2015, ss. 104, 106, 107.

law.[117] But in Nigeria, the exercise of the AG's power is not subject to any legal controls but to her conscience and regard for the public interest only.[118] A few hurried prosecutions illustrate how the power has been exercised.

For instance, the Nigerian Military Government by Decree proscribed the *Newswatch* magazine for six months in April 1987. The magazine had published an unpublished report of the 'Political Bureau' set up to design a political future for Nigeria.[119] The government claimed the report was a 'classified and confidential matter' hence it decided to 'take appropriate measure to prevent further disclosure of classified and confidential matter in the interest of public safety and public order.

In October 1982, the *Sunday Concord* serialised a yet to be released report of a government panel set up to investigate a fire accident in Lagos. The government claimed the document was classified and the Attorney-General of the Federation initiated a three-count charge against Mr Dele Giwa and Concord Press of Nigeria Limited. The charge read in part thus:[120]

> That you Dele Giwa . . . did reproduce a classified matter, to wit – draft of the Federal Government Views On the Report of the Republic Building Fire Incident Tribunal of Inquiry – on the Sunday Concord Newspaper Volume 3 No. 86 of 24 October, 1982, which matters you are not authorised on behalf of the government to reproduce and thereby committed an offence contrary to Section 1(1)(b) and punishable under Section 7(1)(a) of the Official Secrets Act 1962 (No. 29 of 1962 Laws of the Federation), as amended by the Criminal Procedure (Amendment) Act 1966 (No. 12 of 1966 Laws of the Federation).[121]

The DPP subsequently entered a *nolle prosequi* to discontinue the prosecution.[122] But Dele Giwa was again arrested on 2 February 1983 for allegedly flouting the OSA 1962 and charged before Fred Anyaegbunam J of the Federal High Court, Lagos. This time, it was for reproducing two classified pieces of correspondences in the *Sunday Concord* newspaper of 30 January 1983. One of the letters was a copy of a letter dated 14 December 1982 written by the Attorney-General Chief Akinjide to Mr Adewusi, the Inspector-General of Police. The government later withdrew the charges thus denying the courts an opportunity to pronounce on the scope of 'prejudicial to the security of Nigeria' and the constitutionality of security classifications.

On 2 November 1999, Mr Jerry Needam, the acting editor of the *Ogoni Star*, was arraigned in court by the police for 'being in unlawful possession of

117 See Thomas, *Espionage and Secrecy*, *supra*, note 101, at p. 115.

118 *The State* v. *Ilori* (1982) SC 1 (SC).

119 The Newswatch (Proscription and Prohibition from Circulation) Decree 6 of 1987.

120 Charge No. FHC/L/390c/82 (Federal High Court, Lagos).

121 *National Mirror*, 'How Dele Giwa Was Charged with Official Secrets Act', available at http://nationalmirroronline.net/new/how-dele-giwa-was-charged-with-official-secrets-act/ (accessed 29 October 2016).

122 *Ibid*.

a classified document', 'an offence punishable under Section 7(1) of the Official Secrets Act Cap. 335 Law of the Federation 1990'.[123] The publication was a police operational order containing detailed plans of an impending clampdown on Ijaw ethnic militants in the Niger Delta.[124] The prosecution was subsequently abandoned. Thus the foundation for official secrecy laid during colonial times was vigorously pursued by the military. The next law analysed below bears out this assertion.

2. The NSA Act 1986

The NSA Act 1986 established three national security agencies – namely the Defence Intelligence Agency (DIA), the National Intelligence Agency (NIA) and the State Security Service (SSS) – and assigned functions to them 'for the effective conduct of national security'.[125] Beyond this, 'national security' has no specific description under the Act. Promulgated and made unalterable except by a cumbersome constitutional procedure[126] by a military body that combined both executive and legislative powers,[127] the objective of the Act is the establishment of specialised agencies to protect 'national security'. But its real effect has been to render all information held by National Security Agencies as state secret irrespective of content or effect on national security.

The DIA is responsible for the prevention and detection of military crimes against Nigeria, the protection and preservation of all military classified matters pertaining to Nigeria's security and defence intelligence of a military nature.[128] The NIA is responsible for national intelligence relating to Nigeria's external security.[129] The SSS is responsible for the detection of crimes that affect Nigeria's internal security.[130] It is also responsible for the protection and preservation of all non-military classified matters affecting Nigeria's internal security.[131]

What is or how to classify information is not provided for, but the Act relies on the vague description of 'classified matter' provided by section 9(1) of the OSA 1962.[132] Thus it clothes the National Securities Agencies with absolute discretion to ascribe meanings to 'national security'. The Act trumps access to information under the FOIA 2011 and Evidence Act 2011 because it specifically voids other provisions inconsistent with it.[133]

123 *Media Right Monitor*, 'One Year of the Nigerian Media under Obasanjo: An Orphan Left to Fate', available at http://mediarightsagenda.org/mrm/june00/oneyear.htm (accessed 29 October 2016).
124 L. N. Malu, *Media Law and Policy in Nigeria* (Malthouse Press, 2016), p. 160.
125 NSA Act 1986, s. 1(1)(a)(b)(c).
126 The 1999 Constitution, s. 315(5).
127 The Armed Forces Ruling Council (AFRC), a body under the unilateral will of the military Head of State.
128 NSA Act 1986, s. 2(1)(a)(b)(c).
129 NSA Act 1986, s. 2(2)(a)(b).
130 NSA Act 1986, s. 2(3)(a).
131 NSA Act 1986, s. 2(3)(b).
132 NSA Act 1986, s. 2(5).
133 NSA Act 1986, s. 7(2).

The free disclosure of official information suffered severe restrictions under the military's hypersensitive invocations of national security.[134] 'National security' is invariably invoked to censor, intimidate and punish the press, especially for disclosing information considered embarrassing to the government.[135] Under the Act, the activities, budget and appointments to the national security agencies are state secrets not subject to democratic oversight.[136]

The accountability of the national security agencies cannot be gainsaid considering their mode of operation and vast powers invested in them to ensure public safety and national security. Subjecting the exercise of these powers to scrutiny will help curb potential abuses of civil liberties. Indeed, the Act was promulgated during the Cold War era when national security involved use of state surveillance by dictators to suppress political opponents.[137] But 'national security' has since evolved a more human-centred approach incorporating good governance, democratisation, respect for human rights and the rule of law.[138]

Indeed, during the Cold War and almost two decades thereafter, Nigeria was under military rule during which the press continuously advocated for the citizens' right to be informed and for the government, including national security agencies, to be accountable to the people.[139] But despite Nigeria's return to democracy in 1999 and the passing of a FOIA 2011 by the National Assembly the colonial-style secrecy statutes were left intact.[140] Hence the need to subject these statutes to the test of constitutionality.

IV. CONSTITUTIONALITY OF NATIONAL SECURITY EXEMPTIONS TO ACCESS TO INFORMATION IN NIGERIA: STANDARDS OF REASONABILITY

This part subjects the National Security Agencies Act 1986 and the Official Secrets Act 1962 to the three-part test of restrictions to the right of access to information in Article 9 of the African Charter as read into sections 39(3) and 45(1) of the Constitution.

Access to information may be subjected to restrictions in the interest of national security in appropriate circumstances. Such national security restriction must be found in a rule of law which gives clear notice of restrictions within its scope.[141] The law must not confer unfettered discretion to effect restrictions upon persons

134 O. G. Araka 'Freedom of Information and National Security', in Azinge and Waziri (eds), *supra*, note 64, at pp. 135–8.

135 Oloyede, *supra*, note 99.

136 NSA Act 1986, s. 3.

137 A. Roberts, *Blacked Out*: *Government Secrecy in the Information Age* (Cambridge University Press, 2006).

138 N. Mlambo (ed.), *Violent Conflicts, Fragile Peace: Perspectives on Africa's Security Problems* (Adonis & Abbey, 2008).

139 Obe, 'The Challenging Case of Nigeria', *supra*, note 11.

140 T. O. Ocheja 'Freedom of Information Versus the Issue of Official Secret', in Azinge and Waziri (eds), *supra*, note 64, at p. 165.

141 *Malawi African Association* v. *Mauritania* (2000) AHRLR 149 (ACHPR 2000) para. 107 (deciding that a vague law which created a national security offence of belonging to a secret association without specifying the ingredients of the offence failed the test of legality).

entrusted with its execution and should be easily accessible to persons likely to come within its purview to enable them adjust their conduct accordingly.[142] To meet the tests of predictability and accessibility, a limiting law must therefore be of general application.[143] Furthermore, the restriction must be legitimate and necessary.

A. Any 'Law'

The relevant limitation provision states that 'Nothing … shall invalidate any law that is reasonably justifiable in a democratic society …'[144] Any 'law' refers to a law which is accessible and precise enough to enable everyone to foresee whatever conduct may be affected by it and adapt their conduct appropriately. The law in question must not confer an unfettered discretion on the executing authority, but provide sufficient guidance to enable it ascertain the information to which access may be restricted. Both the OSA 1962 and the NSA Act 1986 give the executive an unfettered classification discretion for national security reasons regardless of the imperative of access to state information of public interest. The statutes neither precisely define 'national security' nor the procedure for classification, that is who may classify, levels of classification and information subject to classification thus enabling the executive to withhold information to protect its self-interests. These statutes to the extent they are imprecise do not constitute 'law' according to section 39(3) of the 1999 Constitution.

B. Legitimate Purpose

Besides being prescribed by law, the exempted information must serve a legitimate public interest such as national security. Moreover, measures designed to protect national security ought to strengthen the interests of society vis-à-vis the basic rights and freedoms of the individual. As a matter of fact, access to information that may enable persons better understand or participate in government decision-making or which exposes abuse of authority or the existence of any threat to public safety ought not be restricted. Unfortunately, the OSA 1962 and the NSA Act 1986 permit the classification of information for the sake of vague interests of national security subject to the whims of the executive. Expressly specifying these requirements in law will attenuate any kind of arbitrariness and abuse in classifying information.

142 *Media Rights Agenda* v. *Nigeria*, *supra*, note 5, at paras 57–9; *Constitutional Rights Project and Another* v. *Nigeria*, *supra*, note 5 (absolute discretion of the executive to determine the interest of state security was held not to be 'within the law'); Human Rights Committee, General Comment No. 34 Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) paras 24–9.

143 *Constitutional Rights Project* v. *Nigeria*, *supra*, note 5, at para. 44 (*ad hominem*/retroactive Decrees cannot be 'within the law'); *Scanlen and Holderness* v. *Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para. 117 (stating that provisions of the Zimbabwean Access to Information and Protection of Privacy Act are *ad hominem*).

144 See discussion under heading III.B.1 above.

C. Democratic Society

As argued in this article, the right of access to information is the linchpin of a healthy democracy, a means of combating corruption and for protecting other rights. Considering its importance, then, information may not be withheld except when it is 'necessary' or justifiable in a 'democratic society', that is there is substantial harm to national security, for instance. This means that a restriction must undergo a heavy scrutiny to ensure it is not excessive or disproportionate to the legitimate purpose it seeks to achieve. Hence the disadvantages of limitation should be strictly proportionate and absolutely necessary to achieve the desired benefit. This is the purport of the harm and public interest tests in the FOIA 2011. Before withholding information, a responsible government official or public institution must ensure the non-disclosure protects the public interest thus effectively balancing the right of access against the general interest of the society or state. A restriction which stifles or destroys the essence of the right cannot be fitting to achieve its objective, especially where a lesser or least restrictive means exists to achieve the same outcome. For instance, the use of criminal sanctions of its own is not contrary to international law, but it must be unquestionably necessary to achieve its purpose. Therefore a term of 14 years' imprisonment prescribed by the OSA 1962 for unauthorised disclosure of innocuous official information is excessive. Consequently, in practice, public officers would normally prefer to err on the side of non-disclosure rather than give access.

V. CONCLUSION

It is trite to say that '[a] democracy works best when the people have all the information that the security of the nation permits' except where secrecy is absolutely necessary in the public interest.[145] Thus any restriction on the right of access to information on the grounds of national security must pass the strict tests of legality, legitimacy and necessity. Again, the interplay of access to information and national security in a democracy only permits the classification of official information which addresses legitimate concerns of national security and is narrowly tailored towards such. This calls for the repeal or painstaking amendment of existing statutes which authorise the classification and criminalisation of unauthorised disclosure of state information without damage to national security. To remove any doubt in effecting the right-based balance between access to information and national security which is currently in favour of the latter, the OSA 1962 must be repealed and necessary constitutional safeguards incorporated into the NSA Act 1986.

In addition, there must be substantial decriminalisation of public interest disclosure of official information. Nigeria should also consider enacting a separate whistleblower protection statute to further strengthen the right of public access

145 President Lyndon B. Johnson's statement at the signing of the Freedom of Information Act 1966 into law.

to state-held information. Government agencies need to adequately train their staff and develop and adequately fund a modern, functional and efficient record-keeping infrastructure. Also, the degree of harm that attracts national security classification of information must be specified and not left to executive discretion. 'National security' must be sufficiently described and itemised to obviate its 'chilling' effect on the public interest in official information. This should promote a liberal and rational decision-making by public officials concerning the denial of access to information.