

THE NIGERIA DATA PROTECTION ACT, 2023 AND THE RIGHT TO PRIVACY: CONSTITUTIONAL IMPLICATIONS UNDER THE 1999 NIGERIAN CONSTITUTION (AS AMENDED).

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ABSTRACT

As digital data proliferates, the significance of robust data protection measures has become paramount in safeguarding individual privacy rights. This has birthed in Nigeria, the Nigerian Data Protection Act (NDPA) 2024. The Act seeks to establish a comprehensive framework for the protection of personal data, however, its alignment with constitutional provisions raises concerns and critical questions. This article examines the interplay between the Nigeria Data Protection Act (NDPA) 2024 and the constitutional right to privacy as enshrined in Section 37 of the 1999 Nigeria Constitution. It analyzes whether and the extent to which the Act enhances or undermines the right to privacy, focusing on its legal definitions, enforcement mechanisms, and potential gaps in protection. By evaluating the Act's compliance with constitutional standards and judicial interpretations of privacy rights in Nigeria, this article aims to elucidate the implications for citizens' rights in the digital age. Ultimately, this research contributes to the discourse on privacy and data protection in Nigeria, suggesting pathways for strengthening legal safeguards to ensure that privacy remains a fundamental right in the context of the rapid growth and advancement of technology.

Keywords: Data Protection, NDPA, Right to Privacy, Fundamental Right, Constitutional Law, Nigeria.

INTRODUCTION

In this era characterized by an upward trajectory in the use of digital technologies across several sectors of the economy, the importance of personal data has assumed a global relevance. This development, which has made personal data freely and easily available has also, unfortunately, resulted in the misuse of personal data by data controllers and/or processors.² In Nigeria therefore, the wake of the catholic use of technology and digitalization of the country's economy, is the regular abuse of the personal data. This has led to a greater need for data protection and privacy, as more personal information became stored and shared digitally.³

Data have become very crucial to human existence as a breach of same could affect the life of the individual concerned. A breach of data protection is therefore considered a breach of privacy. Privacy of citizens is a fundamental right protected by *Section 37* of the Nigerian Constitution. Although it is limited in its provision, it has been interpreted by judiciary authorities as encompassing the right to data protection by stating that the Nigeria Data Protection Regulation 2019 issued by the National Information Technology Development Agency is a legal instruments that protects or safeguards the right to "privacy of citizens" as it relates to the protection of their personal information or data.⁴

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² Sadiku I., Lawal K., & Victoria O., *Navigating the Enforcement Framework under the Data Protection Act 2023* <<https://lnkd.in/dvQc6sv6>> Accessed 25th September, 2024.

³ Identity Management Institute, *Evolution of Data Protection and Privacy* <https://identitymanagementinstitute.org/evolution-of-data-protection-and-privacy/?gclid=CjwKCAjw_aemBhBLEiwAT98FMmmHMe-7oohB3vx45tlnRHZlJTRyOTBC-AENQtzhNinPsDdi_HhXYhoCxcQQA_vD_BwE> Accessed 30th August, 2024.

⁴ Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC (2021) LPELR-55623(CA).

The National Assembly offered a legislative backing by enacting the Nigeria Data Protection Act, 2023 which exhaustively solely dealt with the protection of personal data in Nigeria. The act has among its objectives to “safeguard the fundamental rights and freedoms, and the interests of data subjects, as guaranteed under the constitution of the Federal Republic of Nigeria, 1999...”⁵

The NDPA in existence did not repeal the Nigerian Data Protection Regulations (NDPR), 2019 earlier issued by the National Information Technology Development Authority (NITDA) and other guidelines and framework also issued by NITDA, but rather, the NDPA extended a lifeline for the NDPA and other quasi-legislations issued by NITDA to operate side by side the NDPA although with an overriding application retained by NDPA.

DEFINITION OF TERMS

Right to Privacy

The right to privacy is the right to be free from public attention or the right not to have others intrude into one's private space uninvited or without one's approval. It means to be able to stay away or apart from others without observation or intrusion. It also includes the protection of personal information from others.⁶ The right has been regarded as an element of various legal traditions that intends to restrain governmental and private actions that threaten the privacy of individuals.

Holvast describes privacy as a right to be let alone and a right of each individual to determine under ordinary circumstances, what his or her thoughts, sentiments and emotions shall be when in communication with others.⁷ Babalola view privacy as a fundamental right protection afforded a natural person from undesired or unauthorized interference with his/her personal affairs or relationships by whatever means irrespective of the purpose.⁸

The Constitution of the Federal Republic of Nigeria⁹ makes provision for right to 'privacy of citizens' but does not define privacy. Whereas, privacy has been viewed as a 'chameleon-like' word used denotatively to designate a wide range of widely disparate interests-from confidentiality of personal information to reproductive autonomy and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.¹⁰ It will then be well seen that the constitution created a difficulty because a citizen is ordinarily a human being constituted of his body, his life, his person, thought, conscience, belief, decisions (including his plans and choices), desires, his health, his relationships, character, possessions, family, etc.¹¹

Data Protection

Data protection assures that data is not corrupted, is accessible for authorized purposes only, and is in compliance with applicable legal or regulatory requirements. Imperva defines it as the process of protecting sensitive information from damage, loss, or corruption.¹² It is any method of securing information, especially information stored on a computer, from being either physically lost or seen by an unauthorized person.¹³

⁶ Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC (2021) LPELR-55623(CA).

⁷ Jan Holvast, History of Privacy in Vashek Matyas, Simone Fisher-Hubner & Petr Svenda (eds) The Future of Identity in the Information Society, (2008) IFPA Advances in Information Communication Technology, 1.

⁸ Olumide Babalola, Privacy and Data Protection Law in Nigeria (Noeticum Repertum 2021) 17.

⁹ Sections.37 CFRN 1999 (as Amended) 2023.

¹⁰ Saed Alitajer & Ghazelah Molani Nejoui, Privacy at Home; Analysis of Behavioural Patterns in the Spatial Configuration of Traditional and Modern Houses in the City of Hamedan Based on the Notion of Space Syntax (2016) 5 Frontiers of Architectural Research 341-352.

¹¹ Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC (2021) LPELR-55623(CA).

¹² Imperva, *Data Protection* <<https://www.imperva.com/learn/data-security/data-protection/#:~:text=Data%20protection%20is%20the%20process,making%20data%20protection%20increasingly%20important.>>> Accessed 17th March, 2023.

¹³ Oyetola Muiyiwa Atoyebi, 'Data Protection in the Banking Sector: Challenges, Prospects and The Way Forward'. *Emerging Jurisprudence on Privacy and Data Protection in Nigeria* (UpThought Limited, 2023) 136.

Data protection is important in every industry. Many organizations and individuals are processing personal information about individual. We are all affected by data processing activities involving our personal information and it is in our best interests for such activities to be regulated.¹⁴

The terms data protection and data privacy are often used interchangeably, but there is an important difference between the two concepts. While data privacy defines who has access to personal information/data, data protection provides tools and policies to actually restrict access to the data.¹⁵ Thus, data protection entails the legal mechanism put in place to regulate the use of data or the compliance regulations that ensures that user's privacy and 'lawful' requests are carried out by data controllers, and data controllers are responsible to measures to protect personal/private user data.

Fundamental Right

Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution¹⁶ (especially in the Bill of Rights) or have been implied through interpretation of clauses, such as under Due Process. Fundamental rights as a matter of both fact and law are basic moral which guarantees that people in all countries and cultures have, simply for being human beings the rights are inalienable and of course not absolute.¹⁷ I beg to respectfully differ with the above definition as it seems to me to be referring to human right which is universal rather than fundamental human right which is relative.

According to Garner, B. A, fundamental right is a right derived from fundamental law, example the constitutional law. Falana F. in his book *Fundamental Right Enforcement in Nigeria* argues that fundamental rights are generally regarded as those aspects of human rights which have been recognized and entrenched in the Constitution of a country.¹⁸

It is therefore safe to say that fundamental rights are human rights enshrined in fundamental laws because of their importance to the populace who are and constitute the sovereign. Nimpair JCA held in the case of *Billie v Multi-Links Telecom Ltd*¹⁹ that “the nature of fundamental right is one that stands far above ordinary rights derived from legislations. It is the basic and primary condition of a civilized society which the Nigeria Constitution recognizes and protects”. In Nigeria the *Constitution of the Federal Republic of Nigeria 1999* (as Amended 2023) is the *Grundnorm*, (i.e. the fundamental law). Chapter IV²⁰ of the said constitution provides for the fundamental right entitled to persons within its jurisdiction, making it enforceable in the Nigerian Courts of law unlike the fundamental objectives and directive principles of state policy contained in Chapter II²¹ of the CFRN 1999 (as Amended) 2023 which guilds governance, the governed and is merely persuasive in court but not enforceable. Fundamental rights are therefore given a special place and treatment in any civilized society.²²

The Nigeria Court of Appeal in the case of *Eyop Industries Ltd v Ekong*²³ held thus;

"A fundamental right is any of the rights provided for in Chapter IV of the Constitution, and it includes any rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act."

¹⁴ *Ibid.*

¹⁵ Cloudian, *Data Protection and Privacy: How to Protect User Data* <<https://cloudian.com/guides/data-protection/data-protection-and-privacy-7-ways-to-protect-user-data/>> Accessed 14 April, 2023.

¹⁶ Contained in *Chapter IV of the CFRN 1999 (as Amended) 2023 in Nigeria*.

¹⁷ *Ransome-Kuti v Attorney General of the Federation* (1985) 2 NWLR (Pt. 6) 211 at 23.

¹⁸ Beijing Law Review Vol.10 NO.1 March, 2019 *Enforcement of Fundamental Rights in Nigeria and the Unsolved Issue of Poverty Among the Citizens: An Appraisal* <<https://www.scirp.org/journal/paperinformation.aspx?paperid=89952#return1>> Accessed on the 23rd of March, 2023.

¹⁹ (2017) LPELR-41862 (CA).

²⁰ Sections 33 to 46 of the CFRN 1999 (as Amended) 2023.

²¹ Sections 13 to 24 of the CFRN 1999 (as Amended) 2023.

²² *Billie v Multi-Links Telecom Ltd* (2017) LPELR-41862 (CA).

²³ (2021) LPELR-55387 (CA).

In a strict sense, a simple juxtaposition of the terms Rights, Human Right and Fundamental Human Right or Fundamental Right is that while Rights may include the permissions and entitlements to do things which other persons, or which governments or authorities, cannot infringe upon and which can be enjoined by both humans and other animals, Human Rights are restricted to rights entitled and enjoined by only humans/individuals although some of which are enforceable and some of which are not; and Fundamental Rights specifically deals with those human rights which are enshrined in the fundamental law and are therefore enforceable in the courts of law.

The above notwithstanding, the three concepts have been used interchangeably (Rights has being used to mean Human Rights and vice versa and Human Right used to mean Fundamental Human Rights and vice versa). Fundamental rights in Nigeria are basically guided by the *CFRN 1999 (as Amended) 2023, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, and the *Fundamental Right (Enforcement Procedure) Rules, 2009*.

RIGHT TO DATA PROTECTION AS A FUNDAMENTAL RIGHT UNDER THE 1999 CONSTITUTION OF NIGERIAN AND THE NDPA, 2024.

Privacy and Protection of Personal Data Not Provided Under Section 37 of the CFRN, 1999

The terms data protection and data privacy are often used interchangeably, but there is an important difference between the two concepts. While data privacy defines who has access to personal data, data protection provides tools and policies to actually restrict access to the data. Is the protection of data and its privacy a fundamental right encapsulated under the Nigeria Constitution?

In an attempt to answer this question, a look at *Section 37* of Constitution is apt. *Section 37* of the Constitution provides thus;

“The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”

It is clear that from the above reproduced *Section* there is no reference made to the privacy or protection of personal data. Personal data is any information relating to an individual, who can be identified or is identifiable, directly or indirectly, by reference to an identifier. That is to say, any information about a person whose identity is either manifestly clear or can be established from additional information.²⁴ Personal data covers information pertaining to the private life of a person, which also includes professional activities, as well as information about his or her public life.²⁵ According to the Nigeria Data Protection Act, 2023 (herein after referred to as the Act/NDPA), identifiers include a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, psychological, cultural, social, or economic identity of that individual.²⁶ Again, none of these identifiers are manifestly listed to be protected by the provision of *Section 37* of the Constitution.

However, the Court of law in interpreting the privacy of citizen being protected by *Section 37* of the Constitution stated that “the meaning of privacy of citizen is not directly obvious on its face. It is obviously very wide as it does not define the specific aspects of the privacy of citizens it protects...”²⁷ A citizen is ordinarily a human being his body, his life, his person, thought, conscience, belief, decisions (including his plans and choices), desires, his health, his relationships, character, possessions, family etc.²⁸ Data is personal if the identification of a person is possible based on the

²⁴ European Union Agency for Fundamental Rights, *Handbook on European Data Protection Law* (Imprimerie Centrale in Luxembourg, 2018) [2018 edn] 83.

²⁵ *Ibid*, 86.

²⁶ *Section 65 of the NDPA, 2023*.

²⁷ *Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC (2021) LPELR-55623(CA)*

²⁸ *Bi-Courtney Aviation Services Ltd v Kelani (2021) LPELR-56365(CA)*.

available data, meaning that, if a person can be detected, directly or indirectly, by reference to an identifier, then those identifiers are personal data. It is also the case if the assignment to one or more characteristics that are the expression of a physical, physiological, psychological, genetic, economic, cultural or social identity is possible etc.²⁹ The question then is, 'does personal data constitute parts of a human being?' Do the identifiers as listed by the NDPA and the NDPR qualify as essential features of a human being which are inseparable from him?

Notwithstanding the absence of a comprehensive legislation/law on data protection at the material time, the court in *Incorporated Trustees of Digital Rights Lawyers Initiative (supra)* held that

“it is pertinent for me to state that the CFRN, 1999 makes provisions in Chapter IV guaranteeing the various fundamental rights of the citizens... the nature and scope of those rights and even their limitations, are in most instances furthered by other statutes, regulations or other legal instruments. It is in this instance that the NDPR, 2019 must be construed as providing one of such legal instruments that protects or safeguards the right to "privacy of citizens" as it relates to the protection of their personal information or data, which the trial Court had rightly adjudged”.

The other rights protected by *Chapter IV* of the Constitution are clearly definable and determinable as to their nature and scope but for right to privacy of citizen therefore, the court went on to hold

“that the meaning and scope of "privacy of citizens" as guaranteed by the Section has not received clear definition/interpretation in the Constitution. The trial Court had, in my view, rightly held above, that the right to "privacy of citizens" as guaranteed under the Section 37 includes the right to protection of personal information and personal data... this was in a way also acknowledged by the trial Court when it held that right to privacy guaranteed in Section 37 of CFRN, extends to anything that is private and personal, including personal communication and personal data.”³⁰

When the constitution of Nigeria was made, technology and issues of data has not yet arrived and could not have been contemplated by the draftsmen of the Nigerian Constitution. Therefore, the above decision of the court to me, is based on the principle that requires the constitution to be interpreted with the aim of advancing the rights and freedoms contained in the constitution. To this extent, it is settled law that the personal information falls within what constitutes a 'citizen' and the protection of personal information and personal data is the protection of privacy of citizens.

Upon the enactment of a comprehensive legislation/law on data protection by the Nigeria National Assembly, it is thought that the issues surrounding the place of data protection under the fundamental rights would have been sorted by the Act³¹. The NDPA provides that the objective(s) of the Act are to;

- (a) Safeguard the fundamental rights and freedoms, and the interest of data subjects, as guaranteed under the constitution of the Federal Republic of Nigeria, 1999....³²

The above cited *Section* of the NDPA purports to incorporated data protections as a fundamental right by appearing to expand the fundamental rights and freedoms as provided under the constitution. The intendment of this Act is to further protect the fundamental right to privacy of a data subject, and can be seen in words of the Act thus;

- 3. (1) “This Act shall not apply to the processing of personal data carried out by one or more persons solely for personal or household purposes:
Provided that such processing for personal or household purposes does not constitute a violation of fundamental right to privacy of a data subject.”³³

²⁹ Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR) A Practical Guide* (Springer International Publishing 2017) 11.

³⁰ *Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC. Ibid.*

³¹ *Nigeria Data Protection Act, 2023.*

³² *Section 1 (a) of the Nigeria Data Protection Act, 2023.*

³³ *Section 3 (1) of the Nigeria Data Protection Act, 2023.*

Having in mind the intendment of the said *Section* which is to safeguard the right to privacy of citizens, it is right to say that *Section* 1(a) of the NDPA is manifestly clouded with lacks precision and too open ended. There are about 11 (eleven) fundamental rights and freedoms provided under Chapter 4 of the Constitution which are distinct in themselves and not interrelated. To therefore state that the Act seeks to safeguard all of the fundamental right will be absurd in interpretation and/or application.

Right to Privacy Limited to Nigerian Citizens

Again, the personal data which the Act protects must be that of a data subject and in defining whom a data subject is, the Act states that a data subject means an individual to whom personal data relates;³⁴ Then it further states that “personal data means any information relating to an individual, who can be identified or is identifiable, directly or indirectly...”.³⁵ Therefore, in its application, the Act protects personal data of an individuals.

According to the Black's Law Dictionary, an individual relates to a single person or thing, as opposed to a group.³⁶ For lack of specificity, a person could either be natural or artificial. A natural person is a human being who may be a citizen or non-citizen of a country while artificial person otherwise known as legal person is “...any subject matter other than a human being to which the law attributes personality...”³⁷ this can include companies, trade unions, friendly societies etc. Thus, it will not be incorrect to argue that the Act applies to protect the personal data of citizens, non-citizens, natural persons and also artificial persons.

Meanwhile, *Section* 37 of the Constitution makes it clear that only citizens of Nigeria can enjoy the right to privacy. A citizen here can only be a human being who satisfies the requirement as stipulated in *Sections* 25, 26, 27 and 28 of the Constitution. That means that, going by the clear provision of the Constitution, a non-citizen of Nigeria and a legal person cannot enjoy the right to privacy and if the Act was made to safeguard the fundamental right to privacy provided for by *Section* 37 of the Constitution, then there are direct contradictions on its application which will need to be reviewed.

Constitutional Basis for the Establishment of Data Protection Act, 2023

Also, the legality of the NDPA has can be questioned and the constitutionality of a federal law regulating data protection becomes a critical legal issue which requires consideration. On the powers of the National Assembly, the constitution provides thus;

“The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 or the Second Schedule to this Constitution.”³⁸

The powers bestowed on the National Assembly over matters in the exclusive list is to the express exclusion of the House of Assembly of States.³⁹ Also, additional powers given to the National Assembly to also make laws with respect to matters in the Concurrent Legislative List and any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.⁴⁰

³⁴Section 65 of the Nigeria Data Protection Act, 2023.

³⁵Ibid.

³⁶Bryan A. Garner, Black's Law Dictionary (9th edn, 2009) West Publication Co. United States of America, 843.

³⁷Nigerian Nurses Association & Anor v A.G. Federation & Ors (1981) LPELR-2027 (SC).

³⁸Section 4 (2) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) 2023.

³⁹See Section 4 (3) of the CFRN 1999 (as Amended) 2023.

⁴⁰See Section 4 (4) (a) & (b) of the CFRN 1999 (as Amended) 2023.

The Houses of Assembly of States on the other hand is saddled with the power to make laws for the peace and order and good government of the state with respect to the following;

- (a) Any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.
- (b) Any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto”
- © Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution⁴¹

From the above, it is clear that the National Assembly has exclusive power over matters in the Exclusive Legislative List (ELL) and matters incidental thereto, the National Assembly and Houses of Assembly of States has equal powers to make laws on matter on the Concurrent Legislative List (CLL) and matters incidental thereto and the Houses of Assembly has exclusive power to makes laws over matters not contained in both the ELL and the CLL which could be classified as the Residual matters and other matters incidental thereto.

Apparently, the issue of data protection is not contained either on the ELL nor the CLL, therefore it can be safely said that data protections falls with the class of residual matters which the Houses of Assembly of the States by virtue of *Section 4 (7) (a)* of the Constitution has exclusive power to make laws on. In this sense, when the legality of the NDPA is called into question, it will amount to a law made ultra vires and stands to be null and void.

However, it is important to point out that the Constitution makes provision for the right to privacy of citizens which has be severally argued to encompass the right to data protection. Also, in item 28 of the ELL⁴² provision is made giving power to National Assembly to make laws on Fingerprints, identification and criminal records. These three things mentioned in item 28 of the ELL are examples of personal data and such information falls within the categories of things which can identify or is capable of identifying a data subject. Therefore, it will not be completely out of place and could actually be one of the basis for the National Assemble to make laws on data protection (as a matter incidental or supplementary to item 28 ELL and *Section 37* of the Constitution) pursuant to *Section 4 (4) (b)*, Item 28 of the second schedule, part 1 and *Section 37* of the Constitution.

Another pertinent question begging for answers is that; indeed, the NDPA is a comprehensive law which regulates data protection in Nigeria. However, since data protection is very novel and could not have been contemplated as at the time the constitution was made embodying the fundamental rights and there is no express mention of the term 'data protection' in the Constitution, and going by the legal maxim that says *expression unius est exclusion alterius* (meaning, the expression of one thing is the exclusion of the other) can the NDPA be said to amend/alter *Section 37* (and by extension the Constitution) to incorporate the data protection under fundamental right of Chapter 4 of the Constitution without a proper alteration as required by the Constitution?⁴³

The place of data protection under the fundament rights in Nigeria is still an occurring development. This is due to the fact that so many unsettled questions and data protection being a novel area of law in Nigeria have seen very few judicial inks on few issues. Notwithstanding the situation, the highest court decision on data protection in Nigeria is the Court of Appeal of *Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC*⁴⁴ wherein the court held that “...the right to "privacy of

⁴¹Section 4 (7) (a) & (b) of the CFRN 1999 (as Amended) 2023.

⁴²Second Schedule (Part 1) Item 28 of the CFRN 1999 (as Amended) 2023.

⁴³See Section 9 of the CFRN 1999 (as Amended) 2023.

⁴⁴(2021) LPELP-55623(CA).

citizens" as guaranteed under the *Section* includes the right to protection of personal information and personal data...this was in a way also acknowledged by the trial Court when it held that right to privacy guaranteed in *Section 37* of CFRN, extends to anything that is private and personal, including personal communication and personal data". Till the time of this research, that is the law and the right to data protection enjoys enforcement under the Fundamental Right Enforcement Procedure Rules, 2009 (FREPR) aside other means of enforcement.

The issue of data protection has received minimal attention within the African human rights system. No elaboration by the African Commission or the African Court on protection of personal information from a rights perspective. Usage of protection of personal information is strategic as what is already recognized development of legal frameworks has occurred at sub-regional level and most recently continental level.

Unfortunately, the African Charter on Human and Peoples' Right (1981) which was ratified, made a Nigeria law and enforceable under Chapter IV of the Nigeria Constitution has not provision for right to privacy and protection of personal information.

The Declaration of Principles on Freedom of Expression in Africa (2002) Supplements freedom of expression (article 9) only contains a right to access, update and to correct personal information.

The only tangible effort made by Africa as a continent on protection on personal information/data is the African Union Convention on Cyber Security and Personal Data Protection (also known as Malabo Convention) which was adopted on 27 June, 2014. Following Mauritania's ratification on May 9, 2023, the Convention entered into force officially thirty days after the date of receipt by the Chairperson of the Commission of the African Union of the fifteenth instrument of ratification as provided under article 36.⁴⁵ A country or a territory that has ratified the Malabo Convention is deemed to have adequate safeguards for the purposes of cross-border data transfers.⁴⁶ But Nigeria is not yet a signatory to the convention although, Nigeria has its comprehensive data protection law.

It is therefore encouraging to see that after long policy delays in many parts of the African continent, there has been a steady rise in the number of African data protection laws.⁴⁷ As of January 2024, 36 (thirty six) out of 55 (fifty five) African countries now have a data protection law and 3 countries have a draft law under consideration, leaving 16 countries that are yet to show progress in enacting data protection legislations.⁴⁸

Conclusion

Conclusively, the recognition of data protection and privacy as fundamental rights signifies a critical step towards ensuring the preservation of individual's autonomy and dignity in the digital age. The acknowledgment of these rights within the legal framework underscores the nation's commitment to upholding individual's privacy rights amid the rapid proliferation of digital technologies and data-driven systems. The issuance and enactment of laws such as the Nigeria Data Protection Regulation, (NDPR) 2019 and the Nigeria's Data Protection Act, (NDPA) 2023, reflects Nigeria's efforts to align with global best practices and establish a robust legal foundation for data protection and privacy rights. These legislative measures serve as a testament to Nigeria's dedication to safeguarding personal data and ensuring responsible data handling practices by entities handling such personal information.

⁴⁵ Yohannes Eneyew Ayalew, *The African Union's Malabo Convention On Cyber Security and Personal Data Protection Enters Into Force Nearly After A Decade. What Does It Mean For Data Privacy In Africa Or Beyond?* <<https://www.ejiltalk.org/the-african-unions-malabo-convention-on-cyber-security-and-personal-data-protection-enters-into-force-nearly-after-a-decade-what-does-it-mean-for-data-privacy-in-africa-or-beyond/>> Accessed August, 2023.

⁴⁶ Mondaq, *Data Privacy Comparative Guide* < <https://www.mondaq.com/privacy/1190020/data-privacy-comparative-guide>> Accessed February, 2024.

⁴⁷ Data Protection Africa, *Mapping The Progress (and delays) for data protection in Africa* <<https://dataprotection.africa/data-protection-in-africa-progress/>> Accessed February, 2024.

⁴⁸ *Ibid.*

However, challenges persist in effectively implementing and enforcing these rights. Issues such as awareness gaps among the populace, inadequate enforcement mechanisms, and the ever-evolving nature of technology pose continuous challenges in maintaining the relevance and efficacy of data protection laws. To fortify data protection and privacy rights in Nigeria, concerted efforts are essential. These efforts encompass a multifaceted approach involving continuous legislative enhancements, capacity-building initiatives, public awareness campaigns, and collaborations among regulatory bodies, businesses, civil society, and citizens.

The effective realization of data protection and privacy as fundamental rights in Nigeria necessitates a proactive and adaptive approach. Continuous amendments and advancements in legal frameworks, combined with comprehensive education, robust enforcement mechanisms, are crucial to ensure the enduring protection of citizen's privacy rights amidst the evolving technological landscape.

Recommendation

In view of the discourse regarding the Privacy and Data Protection in Nigeria and to strengthen data protection and privacy as fundamental rights in Nigeria, I make the following recommendations:

Legislation and Regulation; There is need for continuous review and updating of existing data protection laws to align with global standards and encompass evolving technological advancements and strengthen enforcement mechanisms to ensure compliance. Some of the legislation review include;

The same *Section 37* of the Nigeria Constitution should be altered and the issues of data protection clearly embedded in the said *Section*, to avoid giving room for contradictory judicial interpretations whether right to data protection can be held by the court to be a fundamental right.⁴⁹

Section 37 applies to only natural persons who are Nigerians, which the NDPA applies to both nature and artificial persons and even persons who are not Nigerians, this should be reconciled.

Section 1 (a) of the NDPA should also be amended because the objective of NDPA should be to safeguard the fundamental rights and freedoms of data subjection as guaranteed under *Section 37* of the Constitution and not all fundament rights and freedoms under the Constitution.

States should make haste and enact/domesticate data protection laws to sort out the issue of the validity of the NDPA being enacted by the National Assembly instead of State Houses of Assembly and being of general application since data protection appears to be a matter which falls within residual matters in the Constitution.

Section 54 of the NDPA should be reviewed, such that the limitation clause does not affect a data subject's right to seek redress under fundamental right which is without limitation in Nigeria.

The NDPA should be amended to address the issues of the definition of data subject, to reconcile it with the constitution and specifying whether a deceased person's personal data can be protected.⁵⁰

Public Awareness and Education: There should be a massive awareness campaigns to educate citizens, organizations and government bodies about their rights and responsibilities regarding data protection to promote a culture of privacy and data security in handling personal information. Also a frequent symposium for judicial officers to equip them with the necessary knowledge of privacy and data protection in making judicial laws. This will help go a long way in the enforcement of the Nigeria Data Protection Act, 2023 and the development of the laws on data protection and privacy.

⁴⁹ Okpara Emmanuel & Uzodinma Emmanuel, *Privacy Protection and the Property in Personal Data: An Appraisal of Human Right Intricacies*. Nnamdi Azikiwe University, Akwa Journal of Commercial and Property Law (Vol 10(2), Oct, 2023). 213.

⁵⁰ *Ibid*.