Privacy and State Surveillance for Constitutional values: Antinomy or Compromise?[*]

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ABSTRACT

The right to privacy features in many international human rights' instruments [UDHR; ICCPR; UN Convention on Migrant Workers; UN Convention on the Protection of the Child]; regional human rights treaties [ECHR and IACHR]; and Constitutions of certain domestic jurisdictions, for example, Nigeria etc. Indeed, in its Resolution 68/167, the UN General Assembly recalled that international human rights law provides the universal framework against which any interference on individual private rights must be assessed.

That notwithstanding, the right to privacy is not amenable to a precise definition. Even then, it is not absolute. That is the basis of the conundrum in its expression and enforcement. In some jurisdictions, states have expanded their surveillance activities: activities which pose challenges to the right to privacy. For instance, Navi Pillay, former UN High Commissioner for Human Rights, in her 2014 Report, while conceding that intrusive surveillance could be permissible in certain instances, maintained that states have an obligation to show that the "interference is both necessary and proportionate to the specific risk being addressed."

However, this has not, always, been the case. In some jurisdictions, it has been shown that "intelligence services conducted arbitrary acts in a systematic and generalised manner in order to track and surveil

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journalists, members of the opposition, human rights defenders, Judges, and individuals who were considered government policy opponents."

In this presentation, we shall analyze international, regional and domestic human rights instruments apropos the right to privacy. In the process, we shall highlight the limitations which regional and domestic courts have endorsed if surveillance activities would not be arbitrary and illegal; that is, the safeguards under international human rights law that consider valid limits to the right to privacy. In all, it would be argued that the state's decision to conduct surveillance activities 'must be based on balancing the interference with the right to privacy with the legitimate public interests which the authorities aim to protect.' It would be demonstrated that the judiciary has, always, remained the best body to scrutinize surveillance applications and determine whether such a justification could be accepted.

INTRODUCTION

Notwithstanding its potency as the pivot on which other rights, such as the right to human dignity; freedom of speech; freedom of association revolve,[1] the right to privacy is not amenable to a precise definition. Indeed, privacy scholarship[2] is

[1] A learned writer, once, observed that "in one sense, all human rights are aspects of the right to privacy," F. Volio, "Legal Personality, Privacy and the Family," in Henkin (ed) *The International Bill of Rights,* (New York: Columbia University Press, 1981) cited in "Privacy and Human Rights: An International Survey of Privacy Laws and Practice," *Global Internet Liberty Campaign,* http://gilc.org/privacy/survey/intro.html, accessed on May 27, 2016, 5. In *NAACP* v *Alabama* 357 US 449, 462 (1958), the US Supreme Court identified a link between privacy, freedom of expression and freedom of association, see, Human Rights Watch, *With Liberty To Monitor All*, How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy, (Human Rights Watch/July 2014) 87. It has, however, been contended that privacy could be viewed as an integral part of the fundamental right to human dignity if the latter concept is broadly interpreted, see, J. Burchell, "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid," in Vol 13. 1, *Electronic Journal of Comparative Law,* (March 2009), 3, available online @ http://www.ejcl.org/131/art13`-2.pdf, last accessed on June 15, 2006

[2] A term we have borrowed from Derek E. Bambauer, "Privacy Versus Security," in *Journal of Criminal Law and Criminology,* Vol 103/Issue 3, 670. Although, the right to privacy traces its provenance to three main sources, namely, the common law (of tort or civil law delict); a Bill of Rights and

remarkable for the debates that characterise it: debates that have witnessed scholastic and judicial divergences.

The range and diversity of these debates are, actually, breath-taking. This is evident from their collation elsewhere in the Literature.[3] They range from the theoretical bases and contours of privacy rights; the relative merits of free expression rights versus privacy; the risks posed by de-identified data; the virtues of a 'right to be forgotten;' and the benefits of ad-supported media versus Internet users' interests in not being tracked online.[4]

These debates, notwithstanding, the predominant scholastic view, as has been insightfully pointed out, would appear to be that privacy is no longer a "binary division between data revealed and data concealed. It is about *competing claims to information*."[5] These competing claims strike at the root of the conundrum which this presentation is concerned with.

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legislation, J. Burchell, *ibid* [FN 1, supra), this presentation is, mostly, concerned with its pedestal in human rights law. Other fascinating accounts of the right to privacy under the common law and civil law could be found, respectively, in S. D. Warren and L. D. Brandeis, "The Right to Privacy," in *Harvard Law Review,* Vol. 4, No. 5 (Dec. 15, 1890) 193 -220 and J. Burchell, "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid," *op cit* [FN 1, supra]

[3] Derek E. Bambauer, *ibid.*

[4] Derek E. Bambauer, *ibid,* 672-673

[5] See, generally, Derek E. Bambauer, *loc cit;* italics supplied for emphasis

On his part, the individual anticipates that there should be a limit to which society could intrude into such aspects of his personal affairs[6] which have been typologized into information privacy; bodily privacy; privacy of communication and territorial communication. On their part, governments, whose obligations include the protection of national security,[7] and, accordingly, must respond to social disorder; rising crime rates[8] and most recently, to global threats,[9] assume their legitimacy to restrict certain rights if they must achieve those aims. This is the rationale for the contention in some schools of thought that a fundamental precept of democratic theory is securing and maintaining public consent for the activities of the state.[10]

While it cannot be gainsaid that intelligence has a vital role in safeguarding national security (and in some extreme case, the survival of the state),[11] it is, equally, true, as demonstrated elsewhere, that "if not subject to control and

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[6] S. Davies, *Big Brother: Britain's web of surveillance and the new technological order,* (Pan, London, 1996) 23, cited in "Privacy and Human Rights: An International Survey of Privacy Laws and Practice," *loc cit*

[7] *With Liberty to Monitor All:* How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy (Human Rights Watch/July 2014) 2

[8] Nick Taylor, "State Surveillance and the Right to Privacy," *Surveillance and Society* 1 (1): 66-85 available online at http://www.surveillance-and-society.org last accessed on May 27, 2016, 66

[9] *With Liberty To Monitor All*, *ibid*

[10] Marina Caparini, "Controlling and Overseeing Intelligence Service in Democratic States," 3

[11] Marina Caparini, *loc cit*

oversight, the intelligence sector's unique characteristics – expertise in surveillance, capacity to carry out covert operations, control of sensitive information, and functioning behind a veil of secrecy – may serve to undermine democratic governance and the fundamental rights and liberties of citizens."[12]

It is against this background that scholars have posed the question whether state security ought to be elevated to a Leviathan which should be beyond any constraints, that is, whether, in vouchsafing the security of the state, all other core values of democracy should remain tangential.[13]

This presentation hopes to demonstrate that human rights law, in general, and the right to privacy, in particular [which encompasses such other rights like freedom of expression; dignity[13a] etc], is the veritable avenue for nibbling away at the hydra-headed forms of covert surveillance by security operatives.[14] Put differently, it would be shown that international human rights, and constitutional, laws impose

[12] Marina Caparini, *loc cit*

[13] See, Hastedt, 1991a, p. 10, cited in Marina Caparini, *op cit,* 4

[13a] In *NAACP* v *Alabama* 357 US 449, 462 (1958), the US Supreme Court identified a link between privacy, freedom of expression and freedom of association; see, FN 1 (supra)

[14] Nick Taylor, "State Surveillance and the Right to Privacy," *op cit,* 67

limits on the state's authority to engage in activities like surveillance, which have the potential of undermining so many other rights, in general and, the right to privacy, in particular.[15]

METHODOLOGY OF PRESENTATION

For clarity of thought, this presentation is segmented into four main parts. **Part one** commences with a trip through the boulevard of the history of private life, in particular, and the right to privacy. It, then, descends into the arena of international human rights regimes.

It contextualises this normative discourse into the logical postulate that governments, whose obligations include the protection of national security, must, of necessity, respond to social disorder and rising crime rates, and as recent events and happenstances have shown, to global threats.

Part two turns to the critical juncture where the two normative firmaments of the private and the public spheres interface. While conceding that intelligence has a vital role in safeguarding national security (and in some extreme cases, the survival of the state), it maintains, and this is the heart of the

[15] *With Liberty To Monitor All, loc cit*

matter, that state surveillance activities must be anchored on a delicate balancing act[16] of the interference with the right to privacy with the legitimate public interests which the authorities aim to protect. That is, such interferences must be in furtherance of constitutional values.

To this end, it canvasses the view that an independent judiciary is the best body to scrutinize surveillance applications and determine whether such a justification could be accepted. It demonstrates that it is only in so doing would the apparent antinomies [in the curtailment of the right of privacy for the purpose of safeguarding national security] would yield a compromise, otherwise referred to as the "Theory of balance of interests." Put differently, that is the only sure way of exercising state surveillance without antagonising or undermining the right to privacy which is at the core of democratic governance and the enjoyment of such other rights

[16] As Professor explained the "theory of balance of interests represents a wholly pragmatic approach to the problem of First Amendment freedom, indeed, to the whole problem of constitutional interpretation. *It rests on the theory that it is the Court's function in the case before it when it finds public interests served by legislation on the one hand and First Amendment freedoms affected by it on the other, to balance the one against the other and to arrive at a judgment where the greater weight shall be placed. If on balance it appears that the public interest served by restrictive legislation is of such a character that it outweighs the abridgment of freedom, then the Court will find the legislation valid. In short, the balance-of-interests theory rests on the basis that constitutional freedoms are not absolute, not even those stated in the First Amendment, and that they may be abridged to some extent to serve appropriate and important interest.*
(cited in *Gonzales* v *COMELEC, G. R.* No L. 27833, April 18, 1969, 27 SCRA 835, 899, adopted by Bersamin J, in his Concurring and Dissenting Opinion in *Pollo* v *Chairperson Karina and Ors* G. R. No. 181881; Italics supplied for emphasis)

like the dignity of the human person; freedom of expression and other liberties of the citizens!

In **Part three**, our presentation deals with two sub-questions in the context of the antinomy between privacy and state surveillance. First, it explores the rationale for the evolution of the limitation provisions in human rights instruments. It, then, examines the safeguards which international human rights law considers as valid limits to privacy. In doing so, it inches across to regional human rights space for the relevant jurisprudence that has, insightfully, explored the ambit of their context and content.

As a corollary, **Part four** of this presentation charts a comparative perspective, broaching, in the process, the insightful developments in some jurisdictions if only to highlight the hiatuses in other disparate jurisdictions. In consequence, it points to the increasing constitutionalisation of the right to privacy in the context of the challenges of the digital age in some municipal jurisdictions.

In the **Final Part**, titled epimythium, we recount the allegorical tale of the blind men in the fictional country of Hindustani. Much like them, this presentation canvasses this author's understanding of the subject matter. In particular, it

draws attention to the compromise which international human rights law has, successfully, wrenched from the anti-thethical relationship between privacy and state surveillance!

We shall now commence with the first part of this presentation which explores the international human rights framework of the said right to privacy from which, according to an erudite writer,[17] all human rights evolved. Before then, however, a trip through the boulevard of the history of private life, in general, and the right to privacy, in particular, would not be out of place.

[17] F. Volio, seen FN 1 (supra)

PART ONE

THE RIGHT TO PRIVACY: INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A JURIDICAL PROLEGOMENON

Privacy, which was historically protected from the rather strict context of the right to solitude, has firm ancestral pedigree, dating back to the Biblical; Hebraic and ancient Sino - Greek civilisations.[18] Perhaps, nothing could better capture this pristine context than this picturesque portraiture that:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement[19]

Subsequent centuries witnessed the proliferation of an assortment of this right in disparate civilisations and climes, viz, England in 1361; Sweden in 1776; France in 1792 and 1858.[20] The US Constitution does not mention privacy by name. It was, therefore, not surprising, as a learned commentator has pointed out, that the courts did not consider privacy as a

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[18] R. Hixson, "Privacy in a Public Society: Human Rights in Conflict" 3 (1987), noted in J. Michael, *Privacy and Human Rights*, (Paris: UNESCO, 1994) 4 -5

[19] *Human Rights and the Right to Privacy*, 5-6

[20] J. Michael, *loc cit* cited in *Human Rights and the Right to Privacy*, *ibid,* 20

right[20a] until the eve of the twentieth century. Indeed, the proximate impulsion to the recognition of this right in that jurisdiction was the enchanting article by Samuel Warren and Louis Brandeis.[21] Subsequently, in a prediction akin to the prophecies of Nostradamus, Brandeis's dissenting opinion in the US Supreme Court,[22] foresaw the impact of state surveillance on the right to privacy when:

> Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions[23]

[20a] In *Roberson* v *Rochester Folding Box Co,* the first Higher American case to consider the right to privacy, Parker, CJ of the New York Court of Appeal, observed that:

> ... Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890,

Cited in V. K. Vora, "Fight between Right to Privacy and Right to Know: Who should win?" available online at http;//www. file://K:/Fight between Right to Privacy and the Right to Know.htm, accessed on June 3, 2016.

[21] S. D. Warren and L. D. Brandeis, "The Right to Privacy," in *Harvard Law Review,* Vol. 4, No. 5 (Dec. 15, 1890) 193 -220. Although not mentioned in the Constitution, its roots have been traced to the Fourth Amendment's ban on "unreasonable searches and seizures," see, *Human Rights Watch, With Liberty to Monitor All*, p. 77.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and furthermore provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," U. S. Const. Amend. IV, cited in E. Berman, "Quasi-Constitutional Protections and Government Surveillance," in 2016 *B. Y. U. L. Rev.* 1.

[22] *Olmstead* v *United States* 277 US 438 (1928)

[23] Noted in Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' A/HRC/23/40, page 5, fn 2l

The modern construct of the right to privacy, which seeks to delimit the extent of society's intrusion into a person's affairs[24] is, as already indicated above, not amenable to a precise definition. Indeed, not only has its satisfactory definition proved elusive,[25] its juridical pedestal or status is yet to gain unanimity.

While some scholars consider it as a right, others view it as a presumption. For the former, it as the: "right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."[26] For the latter, it is "the presumption that individuals should have area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals."[27] It is in this sense, then, that Professor Ruth Gavison's constitutive Trinitarian elements of privacy have to be

[24] S. Davies, Big Brother, cited in J. Michael, *Privacy and Human Rights*, 4 [FN 12, supra]

[25] Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd, 1102, London: HMSO, page 7, cited in J. Michael, [FN 18, supra] 5

[26] Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, 1990, Cmnd, 1102, London: HMSO, page 7, cited in J. Michael, *loc cit*

[27] Lord Lester and D. Pannick (eds), *Human Rights Law and Practice* (London: Butterworth, 2004) para. 4. 82.

pitch-forked. These elements, in her view, are "secrecy, anonymity and integrity."[28]

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

At its nascence,[29] the international human rights framework on the right to privacy was bedevilled by two paradoxes. In the first place, although article 12 of the Universal Declaration of Human Rights [**UDHR**];[30] article 17 of the International Covenant on Civil and Political Rights

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[28] R. Gavison, "Privacy and the Limits of Law," [1980] *Yale L. J.* 421, 428

[29] we, entirely, endorse the contention that, though the concept of human rights evolved at a time before the "accelerated dynamics of digitisation," their value to protect every individual remains the same, B. Wagner *et al,* "Surveillance and Censorship: The Impact of technologies on human rights," Directorate-Generale for External Policies, Policy Department," page 7

[30] According to article 12 of the **UDHR** "No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks."

It is thus evident that, in its pristine phraseology, this article protected the individual from "arbitrary interference with his privacy, family, home or correspondence." However, the evolution of technologies has impelled a broad interpretation of 'privacy of correspondence' to embrace different forms of digital communications, as do 'any media' in the context of freedom of expression," B. Wagner *et al op cit* 13

Article 19 of the **UDHR** which provides for "the right to freedom of opinion and expression," is said to be composed of two complimentary freedoms: "to hold opinions without interference" and "to seek, receive and impart information and ideas through any media and regardless of frontiers," B. Wagner *et al loc cit*.

Instructively, General Comment 34 of the UN Human Rights Committee on the Right to Freedom of Expression and Opinion, updated in 2011, has even extended "the freedom of expression" to include "electronic and internet-based modes of expression,", see B. Wagner *et al*, *ibid* 15. This, probably, explains why the two articles [12 and 19] are said to have impacted on the regime of ICT, B. Wagner, *loc cit*

[**ICCPR**];[31] article 16 of the Convention on the Right of the Child [**CRC**], and so on, recognised the obligation to protect privacy as a human right, they were destitute of the explicit articulation of the content of this right.[32]

Above all, since it [the right to privacy] was hedged around with limitations,[33] its interpretation triggered off a binary tension as regards two constitutive firmaments, namely, the exact delimitation of the private sphere and the configuration of the contours of the public interest.[34]

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[31] Although the 1988 General Comment 16 on the right to privacy, as recognised in article 17, ICCPR, mentions "computers, data banks and other devices," it does not mention the internet or even digital communications at all, B. Wagner *et al loc cit.* Article 17 of the ICCPR does not contain a limitation clause.

[32] A/RRC/23/40, citing *UNESCO Global Survey on Internet Privacy*, 51

[33] As opposed to article 17 above, article 19 (3) of the ICCPR provides for restrictions on the freedom of expression and information to protect the rights of others, A/HRC/23/40, 8. As Wagner *et al* have pointed out "article 19 of the **ICCPR** introduces the tension between freedom of expression and national security which is still very much present in debates about human rights in the digital sphere and is a constantly recurring theme in the current political narrative," B. Wagner *et al op cit* 13. Nonetheless, in its General Comment No. 34 (2011), on the right to freedom of expression, the Human Rights Committee canvassed the view that article 17 of the **ICCPR** should also be interpreted as containing elements of a permissible limitation test. Indeed, as indicated elsewhere, the Special Rapporteur's position was that the same permissible limitations that govern the right to freedom of movement [CCPR General Comment No 34, A/HRC/23/40, page 8, fn 15], should apply to the right to privacy.

[34] Although beyond the scope of this presentation, we note that certain standards, based on the developing norms of international law, have been evolved to address these tensions, namely, the tension between the private sphere [access to information] and the public sphere [the protection of national security] as regards the proper scope of some of the rights the ICCPR protects. They include the Johannesburg Principles; the 2013 Tshwane Principles, see, generally, *With Liberty to Monitor All,* 82 – 86.

Happily, the want of the articulation of the content of the right [to privacy] has not hampered the creative attempts to address, not only its status in this digital age, but also the pro-active efforts to widen its breadth[35] and, above all, to map a nexus between it and such other kindred freedoms like the freedom of expression; freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.[36]

In this connection, attention may be drawn to the view of the United Nations Human Rights Council that there is a "strong and well-recognized connection between privacy and freedom of expression in that inadequate protections for the former can seriously undermine the latter."[37] Above all, just as the right to privacy and freedom of expression are inter-connected, on the one hand; freedom of expression is, inextricably, twined to the freedom of association as much as the rights to information and the freedom of expression are central to the sustenance of group and civil society advocacy

[35] As shown above, article 12 of the **UDHR, i**n its pristine phraseology, protected the individual from "arbitrary interference with his privacy, family, home or correspondence." However, the evolution of technologies has impelled a broad interpretation of 'privacy of correspondence' to embrace different forms of digital communications, as do 'any media' in the context of freedom of expression," B. Wagner *et al op cit* 13

[36] Human Rights Watch, *With Liberty To Monitor All, op cit,* 77 FN 416, citing "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," Frank La Rue, A/HRC/23/40, April 17, 2013.

[37] Human Rights Watch, *With Liberty To Monitor All, loc cit*

and all other associated rights in a democratic society, on the other hand.[38]

In effect, the breadth and concern of the right to privacy are, truly, far-reaching. This result eventuated from the hermeneutical attempts by the organs responsible for the interpretation of the **ICCPR.** Thus, it has been established that individuals have the right to obtain information held by the government if such information affects their private lives. As such, the government's storage of that information, therefore, interferes with their rights to privacy and family life. Furthermore, governments may not restrict a person from receiving information that others wish or may be willing to impart.[39]

Against this background, it is little wonder, then, that article 19 of the **ICCPR** has been accorded an expansive scope as establishing a "right to access to information held by public bodies:" a right which enjoins State parties to, proactively, "put in the public domain Government information of public interest.

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[38] Human Rights Watch, *With Liberty To Monitor All, loc cit,* citing UN Human Rights Committee, General Committee, General Comment 34, Article 19: Freedoms of opinion and expression, U. N. Doc. CCPR/C/GC/34 (2011), para. 4

[39] *Leander* v *Sweden,* No 10/1985/96/144, February 1985, para*s 48 and 74;* Gaskin *v United Kingdom,* No 2/1988/146/200, June 1989, para. 49; *Guerra and Ors* v *Italy,* No 116/1996/735/932, February 1998, paras. 53 and 60; *Guerra and Ors* v *Italy,* No 116/1996/735/932, February 1998, paras 53 and 60, all cited in *Human Rights Watch*, *With Liberty to Monitor All, op cit* 80, FN 433.

The resultant obligation is that State parties should make every effort to ensure easy, prompt, effective and practical access to such information."[40]

The rationale for this position is that the right to official information is crucial to ensure democratic control of public entities and to promote accountability within the government.[41] The corollaries to the promotion of accountability in government include the media's right to receive information; to comment on public issues without censorship or restraint and to inform public opinion and the corresponding right of the public to receive media output.[42]

The reasoning of the Inter-American Court of Human Rights offers the philosophical rationale for the cogency of the conflation of these rights, on the one hand, and the linkage between them and democratic governance, on the other hand. In the view of the court, the effective citizen participation and democratic control, as well as a true debate in a democratic

[40] UN Human Rights Committee, General Committee, General Comment 34, Article 19: Freedoms of opinion and expression, U. N. Doc. CCPR/C/GC/34 (2011), para. 4, noted in *Human Rights Watch*, *With Liberty To Monitor All, op cit* 80, FN 431 and 432

[41] T. Mendel, "Freedom of information; An Internationally-protected Human Right," *Comparative Media Law,* January –June 2003, 13 -19, cited in *Human Rights Watch, With Liberty to Monitor All*, 81

[42] UN Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, U. N. Doc. CCPR/C/GC/34 (2011), para. 13, noted in Human Rights Watch, With Liberty to Monitor All, 81

society, cannot be based on incomplete information. Listen to this:

> ...freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable in the formation of public opinion. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well-informed is not a society that is truly free.[43]

The above illustrations instantiate the right to privacy as the pivot on which the other kindred rights revolve. Interestingly, pursuant to its up-beat conflation of article 17 on the right to privacy; article 19 on freedom of expression; article 22 on the freedom of association with article 26 of the **ICCPR** on equal protection before the law for everyone, regardless of status, both the Human Right Committee[44] and the Office of the High Commissioner on Human Rights[45] have endorsed its extraterritorial application.

The implication of this approach is that a state's exercise of the right of the extraterritorial interception of electronic communication of persons outside its territory carries with it a

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[43] Cited in *Human Rights Watch, With Liberty to Monitor All*, 81

[44] HRC, "Concluding observations on the Fourth Periodic Report of the United States of America," CCPR/C/USA/CO/4, April 23, 2014, http://www.refworld.org/docid/537aafcd4.html, cited in *Human Rights Watch, With Liberty to Monitor All*, page 79, FN 427

[45] see, ibid fn 428 citing UN Human Rights Council, "The Right to Privacy in the digital age: Report of the Office of the UN High Commissioner for Human Rights," A/HRC/27/37, June 30, 2014

corresponding duty to respect privacy, freedom of expression, and other associated rights.[46] It is immaterial whether they are aliens or citizens for these Trinitarian rights of expression, association and privacy do not brook any discrimination between them.[47]

OTHER UNITED NATIONS STANDARDS

True indeed, digital technologies have provoked a host of challenges to the promotion and protection of human rights, in general and the right to freedom of opinion and expression, in particular: digital challenges which have been captured in two Reports that enrich the understanding of how the internet affects human rights.[48]

Instructively, the Resolution of the General Assembly on the right to privacy in the digital age achieved two feats in this regard.

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[46] *ibid* FN 429. For a scintillating exegesis on, and an unanswerable rebuttal of, the doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism, see, M. Scheinin and M. Vermeulen, "Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that seek to Deny or Reduce the Applicability of Human Rights in the fight against Terrorism," in *Denial of Extra-territorial Effect of Human Rights (Treaties),* available online @http://projects.essex.ac.uk/ehrr/V8NI/Scheinin_Vermeulen.pdf, accessed on June 16, 2016

[47] *ibid* FN 425

[48] See, Frank La Rue, former U. N. Special Rapporteur for Freedom of Expression's 2011 *Report* to the General Assembly on the Right to freedom of opinion and expression exercised through the Internet; Frank La Rue, 2013 *Report to the Human Rights Council in the implications State's surveillance of communications on the exercise of the human rights to privacy and the freedom of opinion and expression*, http://ap.ohchr.org/documents/dpage e.aspx?si=A/66/290 and http://ap.ohchr.org/documents/dpage e.aspx?si=A/HRC/23/40, cited in B. Wagner et al, page 14, fn 9.

In the first place, it called on states to protect the right to privacy in the context of digital communication and to put an end to violations of that right. It, also, enjoined them to "review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection."[49]

What is more, the significance of the former UN High Commissioner for Human Rights, Navi Pillay's intervention cannot but understated. Her report,[50] while acknowledging that intrusive surveillance might be allowed, stated that it is the responsibility of governments to demonstrate that "interference is both necessary and proportionate to the specific risk being addressed:"[51] twin concepts around which international principles on the application of human rights law to communication surveillance have been developed.[51a]

Pillay, in obvious acknowledgement of the impossibility of mass or "bulk"[52] surveillance programmes attaining this threshold, contended that such bulk surveillance "may be deemed to be

[49] A/RES/68/167, cited in B. Wagner et al, page 14

[50] 2014 Report on the right to privacy in the digital age

[51] cited in B. Wagner *et al, op cit* 14

[51a] See, *Necessary and Proportionate*: International Principles on the Application of Human Rights Law to Communications Surveillance, Electronic Frontier Foundation eff.org

[52] cited in B. Wagner *et al* , *loc cit*

arbitrary, even if they a legitimate aim and have been adopted on the basis of an accessible legal regime."[53]

The Third Committee of the UN General Assembly leveraged on her report by revising the Resolution on the right to privacy in the digital age in November, 2014 to include a call for all States to:

> ...establish or maintain existing independent, effective, adequately resourced and impartial judicial, administrative and/or parliamentary domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data, [as well as] to provide individuals whose right to privacy has been violated by unlawful or arbitrary surveillance with access to an effective remedy, consistent with international human rights obligations.[54]

PART TWO

THE INTERFACE BETWEEN THE PRIVATE AND PUBLIC SPHERES

As indicated earlier, since it [the right to privacy] was hedged around with limitations, its interpretation triggered off a binary tension as regards two constitutive firmaments, namely, the exact delimitation of the private sphere and the configuration of the contours of the public interest.

[53] cited in B. Wagner *et al, op cit* 15.

[54] Cited in B, Wager *et al loc cit*

On the one hand, the expression "private sphere" has been characterised as a metaphor which illustrates the fact that the individual is exempt from "State intervention or arbitrary social interferences" because such "protection is deemed necessary to allow full personal, individual and cultural growth."[55] However, from their very nature, certain categories of rights are not absolute but, rather relative normative prescriptions. As such, they must be subordinated to such goals like national security, public morality etc which are, constitutionally, consecrated.

In this sense, therefore, there is considerable force in the contention that the absence of such essential relativism may, indeed, negate and undermine the social and institutional life of the society.[56] The right to privacy belongs to this category. We had, already, noted that the specific content of this right was not fully developed by international human rights protection mechanisms at the time of its inclusion in the UDHR; ICCPR etc. However, in its analysis of article 17 of the **ICCPR**, the Human Rights Committee affirmed that the article aims to protect individuals from any unlawful and arbitrary interference

[55] J. C. Rivera and K. Rodriguez, "State Communications Surveillance and the Protection of Fundamental Rights in Colombia," *Comision Colombiana de Juristas,* December 2015, 11.

[56] J. C. Rivera and K. Rodriguez, *ibid* 12, FN 38

with their privacy, family, home, or correspondence, and national legal frameworks must provide for the protection of this right.[57]

For the effectuation of this aim, it has been suggested that there should be a prohibition of "surveillance, whether electronic or otherwise, interceptions of telephone, telegraphic and other forms of communication, wire-tapping[58] and recording of conversations."[59] This is the background to the General Comment that "the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law."[60]

This is the critical juncture where the two normative firmaments of the private and the public spheres interface. As it is well-known, governments, whose obligations include the protection of national security, must, of necessity, respond to social disorder and rising crime rates, and as recent events and

[57] Frank La Rue, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," A/HRC/23/40

[58] which Justice Brandeis referred to as a "subtler and more far-reaching means of invading privacy" in *Olmstead* v *United States,* 277 U. S. 438 (1928) (dissenting opinion)

[59] Centre for Civil and Political Rights (CCPR) General Comment No 16, page 8, cited in Frank La Rue, "Report of the Special Rapporteur..., A/HRC/23/40].

[60] Centre for Civil and Political Rights (CCPR) General Comment No 16, page 10, cited in Frank La Rue, "Report of the Special Rapporteur..., A/HRC/23/40], page 7

happenstances have shown,[61] to global threats. This is part of the rationale for the intelligence sector as a special area of state activity: a sector whose vital role in vouchsafing national security cannot be gainsaid.

Paradoxically, it is in the exercise of this mandate [vouchsafing national security], that is, the well-being or general welfare of the society, that the antinomies between the public and private spheres become imminent. It cannot be otherwise because that mandate is executed in the milieu of its unique characteristics which have been described as:[62] expertise in surveillance; capacity to carry out covert operations; control of sensitive information and functioning behind a veil of secrecy.

Of these categories, expertise in surveillance would appear to impact more on the private sphere. As a perceptive rapporteur[63] has shown, modalities of surveillance of communications could be subsumed into three broad categories, namely, communications surveillance;[63a]

[61] Chima C. Nweze, "Re-Mapping the Contours: Interrogating the Ontology of International Law in a Rapidly-Changing World," available online @ http://www.digitalcommons.ggu,edu, last accessed on June 14, 2016.

[62] M. Caparini, "Controlling and Overseeing Intelligence Services in Democratic States," 3].

[63] Frank La Rue, "Report of the Special Rapporteur..., A/HRC/23/40], page 3

[63a] which refers to the monitoring, interception, collection, preservation and retention of information that has been communicated, relayed or generated over communications networks

communications data[63b] and Internet filtering.[64] Against the above background, a compromise, therefore, becomes inevitable. It is in this connection that we, entirely, endorse the contention that the above characteristics of the intelligence sector "may serve to undermine democratic governance and the fundamental rights and liberties of citizens."[65] This, then, explains the cogency for the qualifications to the right to privacy, on the one hand; and the imperatives of oversight on state surveillance activities, on the other hand.

In this regard, Professor Marini's question would always be relevant, that is, whether "intrusive measures such as searches and surveillance of persons or premises, wiretaps, orders to obtain confidential records, and spying on political or religious

[63b] an expression employed to describe information about an individual's communications (e-mails, phone calls and text messages sent and received, social networking messages and posts}; identity; network accounts; addresses; websites visited; books and other materials read, watched or listened to; searches conducted; resources used; interactions (origins and destinations of communications, people interacted with, friends, family, acquaintances), and times and locations of an individual, including proximity to others};

[64] a neologism which describes the automated or manual monitoring of Internet content (including websites, blogs and online media sources, as well as e-mail) to restrict or suppress particular text, images, websites, networks, protocols, services or activities.

A typical example cited here is a 2012 Brazilian Law on money laundering which gives police the power to access registration information from Internet and communication providers without a court order, Brazilian Federal Law 12683/2012; article 17- B, available online at http://www.planalto,gov.br/ccivil_03/Ato2011-2014/2012/Lei/L12683.htm. cited in Frank La Rue, "Report of the Special Rapporteur..., A/HRC/23/40], page 16

[65] Marina Caparini, *op cit*, page 3

activity should be subject to limits."[66] Only the courts are equipped for the determination of such questions.

PART THREE

ANTINOMY BETWEEN PRIVACY AND STATE SURVEILLANCE: COMPROMISE FOR VOUCHSAFING CONSTITUTIONAL VALUES

(A) EVOLUTION OF LIMITATION PROVISIONS

Prior to the evolution of the contemporary challenges which the right to privacy is confronted with in this digital age, International human rights law had anticipated the imperative of balancing the said right with the need for safeguarding national security; public morality; public health etc. Thus, the law imposed limits on the state's authority to engage in certain activities.

These activities were such that had the potential of undermining the right to privacy: a right which is at the core of democratic governance.[67] However, as a corollary, the law

[66] Marina Caparini, *op cit*, page 15

[67] Perhaps, this idea could not have been better put than in the apt language of Professor Emerson that:

> The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. *This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government, safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector* protection, in other words, *of the dignity and integrity of the individual has become increasingly important as*

recognised the need for governments, whose obligations include the protection of national security, public morality, public health, to respond to social disorder and rising crime rates, and as recent events and happenstances have shown, to global threats.

The resultant effect was a requirement anchored on a delicate balancing act[68] of the interference with the right to privacy with the legitimate public interests which the authorities aim to protect. That, unarguably, would appear to be the proximate impulsion to the limitation provisions in the international Bill of Rights.

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modern society has developed. All the forces of a technological age industrialization, urbanization, and organization operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.

Cited with approval in the Philippine case of *Morfe* v *Mutuc* G. R. No L-20387, 22 SCR A 424, Jan 31, 1968 noted by Bersamin J (supra) 9

[68] As Professor Kauper explained, with regard to American Constitutional jurisprudence, the "theory of balance of interests represents a wholly pragmatic approach to the problem of First Amendment freedom, indeed, to the whole problem of constitutional interpretation. *It rests on the theory that it is the Court's function in the case before it when it finds public interests served by legislation on the one hand and First Amendment freedoms affected by it on the other, to balance the one against the other and to arrive at a judgment where the greater weight shall be placed. If on balance it appears that the public interest served by restrictive legislation is of such a character that it outweighs the abridgment of freedom, then the Court will find the legislation valid. In short, the balance-of-interests theory rests on the basis that constitutional freedoms are not absolute, not even those stated in the First Amendment, and that they may be abridged to some extent to serve appropriate and important interest.*

(cited in *Gonzales* v *COMELEC, G. R.* No L. 27833, April 18, 1969, 27 SCRA 835, 899, adopted by Bersamin J, in his Concurring and Dissenting Opinion in *Pollo* v *Chairperson Karina and Ors* G. R. No. 181881; Italics supplied for emphasis)

(B) Safeguards of International human rights law: valid limits to the right to privacy

In the introductory part of this presentation, we noted that despite the engaging debates in privacy scholarship, the predominant scholastic view would appear to be that privacy is no longer a "binary division between data revealed and data concealed. It is about *competing claims to information."*[69] These competing claims come to this. The individual, as shown above, lays claim to his bodily privacy, privacy of communication and territorial communication etc.

The State, on its part, makes corresponding claims to an entitlement to intrude into these genres of privacy for the common good of the protection of national security, public health; public morality; responses to social disorder, rising crime rates and global threats posed by non-state actors.

It is, therefore, in an attempt to navigate out of this conundrum that international human rights, and constitutional, laws have evolved safeguards which, as it were, operate as limits on the state's authority to engage in activities like surveillance, which have the potential of undermining so many other rights, in general and, the right to privacy, in particular.

[69] See, footnote 5 (supra)

These safeguards are, therefore, considered valid limits to the right to privacy.

Out of the usual five categories of limitations, namely, limitations for the protection of public order; public health or morals, or the rights and freedoms of others and national security,[70] the latter, that is, the limitation which is permissible for the protection national security constitutes the greatest challenge to the right to privacy of the citizens. The explanation is simple. Surveillance activities are, almost always, undertaken under its amorphous guise.

A curious irony is noticeable in the limitation provisions of the **ICCPR.** Thus, while article 19 (3), ICCPR on the freedom of opinion and expression, outlines the parameters for permissible limitations; article 12 (3) stipulates the permissible limitations on the right to liberty of movement and freedom to choose residence; article 18 (3) brooks limitations on the right to freedom of thought, conscience and religion; article 21 endorses limitations on the right of peaceable assembly and article 22 (2) approves of limitations on the right to freedom of association.

[70] See, for example, article 12 of the **ICCPR; article 19 (3) of the ICCPR**

On the contrary, article 17 ICCPR, on the right to privacy, has no limitation provision. However, there is scholastic[71] and juridical[72] unanimity on the legitimacy of subjecting the right to privacy in article 17 to the same parameters of permissible limitations above. These parameters, expressively, contained in the General Comments of the Human Rights Committee[73] are, among others:

(a) Any restrictions must be provided by the law;

(b) Restrictions must be necessary in a democratic society;

(c) Any discretion exercised when implementing the restrictions must not be unfettered;

(d) For the restrictions to be permissible, it is not enough that it serves one of the enumerated legitimate aims. It should be necessary for reaching the legitimate aim;

(e) Restrictive measures must conform to the principle of proportionality, they must be

[71] M. Nowark, 82; see, *With Liberty,* [FN 43, supra]

[72] UN Human Rights Council fn 436 page 82 With Liberty to Monitor; Frank La Rue, Report of the Special Rapporteur A/HRC/23/40 Page 8

[73] Cited in Frank La Rue, *op cit* 8

> appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which might achieve the desired result, and they must be proportionate to the interests to be protected.

The practical implication is that, though permissible, these limitations, in the apt phraseology of a distinguished commentator, "must be strictly cabined."[74] Hence, although the right to freedom of expression in article 19 of the **ICCPR** is subject to limitations, such limitations that could, legitimately, hamper its enjoyment, must be defined by law and must be necessary for the protection of a state interest which is stipulated in such a law.

Such limitations, according to the UN Human Rights Committee, must scrupulously be in tandem with the purposes set out in the said article 19. Additionally, "they must conform to the strict tests of necessity and proportionality....Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[75]

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[74] *With Liberty To Monitor All, op cit* 82

[75] UN Human Rights Committee, General Comment 34, Article 19; Freedoms of opinion and expression, U. N. Doc. CCPR/C/GC/34 (2011), para 22, cited in *With Liberty to Monitor All*, *loc cit,* fn 438

As shown above, scholars and jurists are unanimous that, though not expressly provided for, article 17 of the ICCPR on the right to privacy are as much subject to the above limitations as they are insulated from restrictions that are outside the prism of the permissible bounds. Hence, to qualify as an interference with the right to privacy which is neither arbitrary nor illegal, such intrusion must scale the tripartite huddles which govern the kindred rights, namely, it must be: embodied in a law; consistent with the provisions, purposes and aims of the Covenant and reasonable in the light of the circumstances of each particular case.[76]

This hermeneutic enterprise has enriched not only international human rights, but also, regional human rights, jurisprudence. Such is the status which the right to privacy enjoys now that, it not only guarantees the sacrosanctity of communications, it actually vouchsafes to the citizen a private life which is free from intrusion. It is in this context that the view has been canvassed "surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of

[76] Human Rights Committee, General Comment No 16, Article 17 – The Right to Privacy, paragraph 4, noted in J . C. Rivera and K. Rodriguez, "State Communications Surveillance ..." *op cit* [fn] page 10

communication, wire-tapping, and recording of conversions should be prohibited."[77]

Like international human rights law, regional human rights law accords this status to the right to privacy. For example, the European Court of Human Rights does not brook any surveillance legislation couched in such imprecise phraseology that its determinacy becomes problematic. It has, accordingly, taken the view that surveillance measures must be based on a particular and precise law, mainly due to the implicit risk of abuse any surveillance system poses and to technological advances that facilitate their operations.[78]

Like Regional human rights courts, municipal courts have been on the vanguard for the ascertainment of the propriety of surveillance activities. In this process, which has been aptly described as "judicial oversight,"[79] courts embark on the determination of the question whether surveillance activities have been undertaken in a lawful manner.[80] It is this process

[77] Human Rights Committee, General Comment, ibid [fn 76, supra]; indeed, in *Berger* v *New York* 388 U. S. 41, 44 (1967), the US Supreme Court struck down New York State's wiretapping law, holding that it was insufficiently protective of the Fourth Amendment. In addition, the court "laid out guidelines for the Congress and State legislatures to follow in enacting wiretapping and electronic eavesdropping statutes which would meet constitutional requirements, see, S. REP. No. 90 -1097, at 68 (1968) noted in E. Berman, "Quasi-Constitutional Protections and Government Surveillance," 2016 *B. Y. U. L. Rev.* 14, FN 64

[78] *Uzun* v *Germany*, Case No [fn 31 J. C. Rivera and K. Rodriguez op cit

[79] See, M. Caparini, *op cit* 9

[80] M. Caparini, *loc cit*

that has prompted the courts' valiant jurisprudence: jurisprudence that has woven a bulwark against the intrusion of the private sphere by state surveillance activities.

This trend is noticeable in the jurisprudence of the European Court of Human Rights [ECHR];[81] the Court of Justice of the European Union [CJEU];[82] the Inter American Court of Human Rights [IACHA][83] and such municipal jurisdictions like Nigeria.[84]

From a conspectus of these juridical interventions, certain categories of surveillance activities have been, judicially, outlawed. The list is very long. However, spatial constraints would not permit their exhaustive consideration. In consequence, only a handful will be cited here. They include: surveillance activities that intrude into the communications

[81] For the luxuriant body of jurisprudence from this court, see, U. Kilkelly, *The Right to Respect for Private and Family Life*: A guide to the Implementation of Article 8 of the European Convention on Human Rights (Strasbourg: Directorate General of Human Rights Council of Europe, 2001) *passim;* I. Roagna, *Protecting the Right to Respect for Private and Family life under the European Convention on Human Rights* (Strasbourg: Directorate General of Human Rights Council of Europe, 2012) *passim; European Court of Human Rights,* National Security and European Case Law, available at http//www.echr.coe.int last accessed on July 11, 2016.

[82] J. Kokott and C. Sobotta, "The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR," *International Data Privacy Law,* 2013, Vol. 3, No 4, 222 -228

[83] B. Wagner *et al,* "Surveillance and Censorship: The Impact of Technologies on Human Rights," *passim*. The African Charter of Human and People's Rights has no provision on the right to privacy. This is not surprising having regard to the fact that its emphasis is on "collectivity rather than individual privacy," see, J. Burchell, *op cit,* [FN 1, supra) 2

[84] See, for example, O. Ojo, "An Xray of Nigeria's Cybercrimes Act, 2015 vis-a-vis the Right to Privacy," available online at http://works.bepress.com/oluwaseun.ojo/8/ accessed on July 11, 2015; K. M. Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd, 2008) 405 *et seq*

between an accused person and his defence counsel;[85] exposure of the identity of a donor of a large amount of money to a very worthy cause, because such an anonymous donor "has his reasons for wishing to remain anonymous;[86] and the protection of telephone conversation etc.[87]

In the view of the Inter-American Court on Human Rights, the latter [the protection of telephone conversation] includes:

> ...both the technical operations designed to record this content by taping it and listening to it, and any other elements of the communication process; for example, the destination or origin of the calls, the identity of the speakers, the frequency, time and duration of the calls, and other aspects that can be verified without the need to record the content of the call by recording the conversation.[88]

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[85] *Caldwell v US,* 205 F.2d 879, 881 (DC Cir. 1953), however, this is subject to certain limitations, see *Weatherfold* v *Bursey,* 429 US 545, 561 (1976)

[86] *AG* v *Observer Ltd* [1990] AC 109; exposure of an internet user's personal details, by automated means, to a newspaper that is not part of the organisation providing the internet search system or mechanism, *Google Spain* v *AEDPDD* [Decision of the European Court of Human Rights of 13/5/2014; publication in a book form of a person's HIV status, even if pseudonyms instead of the victim's real names are used, *NM* v *Smith* [2007] (5) SA 250 (CC), see, generally, S. T. Hon, *S. T. Hon's Constitutional and Migration Law in Nigeria* (Port Harcourt: Pearl Publishers International Ltd, 2016) 535 *et seq*

[87] *Escher et al* v *Brazil* (Interpretation of the judgement on Preliminary Objections, Merits, Reparations, and Costs; Inter-American Court of Human Rights, sentence on July 6, 2008; Series C No 200, paragraph 114), cited in J. C. Rivera and K. Rodriguez, *op cit* 10.

[88] *Escher et al* v *Brazil* (supra, FN 87)

PART FOUR

A GLIMPSE INTO COMPARATIVE JURISPRUDENCE

In a presentation of this nature, involving a concourse of participants from disparate juridical backgrounds, it would only be fair to broach, no matter how cursorily, the developments in some jurisdictions if only to highlight the hiatuses in other jurisdictions. This part, therefore, merely points to the increasing constitutionalisation of the right to privacy in the context of the challenges of the digital age in some municipal jurisdictions. We identified, at least, five main trends.

They are: States whose Constitutions do not, expressly, mention the said right to privacy [USA; UK; Malaysia; the Kingdom of Norway; Republic of Singapore; United Kingdom] and States whose Constitutions contain explicit right to privacy [Kingdom of Netherlands; Republic of Lithuania; Republic of the Philippines; Republic of Poland; Republic of Portugal; the Russian Federation; Slovak Republic; Republic of Slovenia; Republic of South Africa; Kingdom of Spain; Kingdom of Sweden; Republic of China; Republic of Turkey; Federal Republic of Nigeria etc].

The others are States whose Constitutions, although not expressly mentioning the right to privacy, guarantee an

aggregate of rights apropos privacy provisions [Republic of Latvia; Grand Duchy of Luxembourg; United Mexican States; New Zealand] and States [whose Constitutions prohibit surveillance activities which 'snoop into the contents of the communication materials between and among persons,' for example, section 37 of the 1998 Constitution of Thailand].

The last categories of States are those whose sub-constitutional norms deal with electronic surveillance [Republic of Singapore] and data protection [Slovakia; Slovenia; Spain; Sweden and Switzerland.[89]

EPIMYTHIUM

In the **Final Part**, titled epimythium, we recount the allegorical tale of the blind men in the fictional country of Hindustani. These six blind men set out to "see" an elephant. Upon encountering this mammoth creature, each announced the result of his encounter. To the man who touched the long tale, the animal was like a rope. The verdicts, which the others rendered, depended on the part of the animal they encountered.

[89] Privacy and Human Rights available online @ http://www.gilc.org/privacy/survey/surveylz.htm last accessed on July 12, 2016.

Much like these men of Hindustani, we have, merely, presented our own perspective of this vast and fascinating subject. Expectedly, other discussants and participants would present their own viewpoints on the subject. In so doing, its breadth and concerns would be further enriched.

In sum, the main plank of this presentation is that the law recognises the need for governments, whose obligations include the protection of national security, public morality, public health, to respond to social disorder and rising crime rates, and as recent events and happenstances have shown, to global threats.

However, we have canvassed the view that the exercise of this obligation must be anchored on a delicate balancing act of the interference with the right to privacy with the legitimate public interests which the authorities aim to protect: the very proximate impulsion to the limitation provisions in the international Bill of Rights. That is the compromise which international human rights law has, successfully, wrenched from this anti-thethical relationship between privacy and state surveillance!