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Privacy Protection and the Property in Personal Data: An Appraisal of Human Rights Intricacies

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Abstract

"Aware of it or not, we are all heirs to potent Enlightenment ideas in matters relating to control. If knowledge is good, and informed action is preferable to the alternative, why shouldn't we expect institutions of all kinds to maximize their grip on the lives of those they deal with? If government and private organisations are pursuing what are publicly recognised as legitimate ends, why shouldn't they do so as efficiently as possible?"[764]*The protection of an individual's privacy has formed part of the fundamental rights recognized internationally. However, the wave of digital age which brings along the influx of technology and exchange of information now constitute an essential part of our daily living as humans. Key pieces of information that are commonly stored by businesses, be that employee records, customer details, loyalty schemes, transactions, or data collection, now need to be protected. This is to prevent that information from being misused by third parties for fraud, such as phishing scams and identity theft. Also, personal data as an information are being obtained, processed, collate and stored by government agencies, business organizations, non-governmental organizations for their legitimately recognized transaction with the data subject, and the issue of control over this information being juxtaposed with the right of the individual who are the (data subject) over the information. This work appraises the protection of individual privacy and the scope of the rights an individual has over the personal data. Adopting the doctrinal method of research which involves gathering of information from materials useful to this work, it is discovered that the scope an individual's right over their personal is limited. It therefore recommends for improvement in our privacy laws and an expansion of rights over personal data to facilitate data subject's ownership of personal data which will afford full protection and control of personal data.*

Keywords: Privacy, Protection, Data, Personal Data, Right, Data Subject

1.0 Introduction

The right to privacy has existed in the early 16th century when Robert Beale, Clerk made an allusion in 1589 to the Privy Council, referencing the Magna Carta as a legal basis for the right to privacy.[765]

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[764] Richard Warner and Robert H. Sloan, *Self, Privacy, and Power: Is It All Over?* https://journals.tulane.edu/TIP/article/view/2637/2459 Accessed 20th August, 2023.

[765] Leonard W. Levy, *Origins of the Fourth Amendment* (1999)114 Political Science Quarterly 79.

It was further brought to limelight by Samuel Warren and Louis D. Brandeis in their article titled The Right to Privacy published in the Harvard Law Review in 1890. In the article, the two lawyers who later became judges advocated that "thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature. Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what judge Cooley calls the "right to be alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of privates and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops". For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits for private person; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. …no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested except the right to privacy, as a part of the more general right to the immunity of the person, -- the right to one's personality"[766].

The right to privacy has since then been recognised by international treaties like the Universal Declaration of Human Right (UDHR), [767] European Convention on Human Rights (ECHR), [768] International Convention on Civil and Political Rights (ICCPR),[769] etc. and several countries have adopted or domesticated it in their *grundnorm* for example is section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) 2023.[770]

The development of computer technology and the internet in the late 20th and early 21st centuries led to a greater need for data protection and privacy, as more and personal information became stored and shared digitally. [771] According to Professor Spiros Simitis who is regarded as the father/lead pioneer of data protection, "Databanks, like the collection initiated by the government of the German Federal State of Hesse in the middle of the 1960s, embodied the hopes evoked by 'cybernetic machines'. The data collections were to allow efficient long-term policies, such as in finance and social security, and also to secure better medical help, especially in emergencies. But

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[766] Samuel Warren & Louis D. Brandeis, *The Right to Privacy* (1890) 4(5) Harvard Law Review, 1. 9.
[767] *Article 12 of The Universal Declaration of Human Rights (UDHR) 1948.*
[768] *Article 8 of the European Convention on Human (ECHR) 1950.*
[769] Article 17 of the International Covenant on Civil and Political Rights 1966.
[770] The Privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.
[771] Identity Management Institute, *Evolution of Data Protection and Privacy* <https://identitymanagementinstitute.org/evolution-of-data-protection-and-privacy/?gclid=CjwKCAjw_aemBhBLEiwAT98FMmmHMe-7oohB3vx45tlnRHzIjTRyOTBC-AENQtzhNinPsDdi_HhXYhoCxcQQAvD_BwE> Accessed 20th August, 2023. [9]
Spiros Simitis, *Privacy – An Endless Debate?* (2010) 98 (6) California Law Review, 1989, 1995.

while the databanks were at first generally accepted, doubts gradually arose, beginning in 1968, with regard to the processing of personal data. The involvement of nearly all Hesse citizens, the storage of especially sensitive data, as those concerning health or income, and the databank's capacity to exploit information for different purposes triggered demands that the government investigate the risks of a permanent surveillance of citizens. Consequently, on October 10, 1970, the Hessian Parliament adopted the world's first Data Protection Act after a short but intensive debate."[9]

With the advent of new technologies, the dynamic and continuous evolution of data protection and the need to protect one's privacy becoming of ever greater importance, the call for legislations giving the data subject ownership of their personal information and by extension granting the right over the personal information on the individual owner became inevitable. Nigeria which is the focal point of this research, in its trend of Data Protection development has now enacted the Nigeria Data Protection Act, 2023 which operates (although with an overriding status) alongside the Nigeria Data Protection Regulation 2019 and its Implementation Framework, 2020 to stipulate the rights exercisable over personal data. The extent of ownership of the rights to be bequeathed on the data subject and whether the right to data protection is incorporated into the right to privacy already widely recognized as a fundamental right becomes an issue for discuss.

1.1 **Definition of terms**

1.1.1 **Privacy**

The term Privacy has been viewed in different ways by different people as such not having as precise or generally acceptable definition. However, we will access some of the definitions offered by authors for an understanding of the term. Privacy has been defined as the right to be let alone, or freedom from interference or intrusion.[772] It is a reasonable expectation that personal information disclosed in a private place will not be disclosed to third parties when doing so would embarrass a person of ordinary sensitivities.[773] According to Professor Weston, privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communication to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.[774] Gerety sees privacy as a nominative concept of autonomy or control of the intimacies of personal identity. The autonomy, identity and intimacy are all necessary and together normally sufficient for the proper invocation of the concept of privacy.[775] In all, we can understand that privacy is the

[772] IAPP, *What does Privacy Mean?* < https://iapp.org/about/what-is-privacy/#> Accessed 14th August, 2023.
[773] Old Research Report, *Prison Labor; Confidentiality of Information* <https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1455.htm> Accessed 15th August, 2023.
[774] A.F. Westin, *Privacy and Freedom* (The Bodley Head, 1969) 7.
[775] Tom Gerety, *Redefining Privacy.* Harv CRCLL (1977) 2 Rev. 233 at 236.

state of an individual's freedom to live a life known to only self and any other person he/she wants to know.

1.1.2 **Data**

Data can be broadly defined as any information that has been reduced to characters, words, numbers, images, sounds or videos. According to the Law Insider, data means all results, technical information and materials developed and/or obtained in the performance of the services hereunder, including but not limited to all reports, survey and evaluation tools, survey and evaluations, plans, charts, recordings (video and/or sound), pictures, curricula, electronically prepared presentations, public awareness or prevention campaign materials, drawings, analyses, graphic representations, computer programs and printouts, notes and memoranda, and documents, whether finished or unfinished, which results from or are prepared in connection with the services performed hereunder.[776] The United Kingdom (UK) Court of Appeal in the case *Michael John Durant v Financial Services Authority*[777] held that

> "Data is information which;
>
> (a) Is being processed by means of equipment operating automatically in response to instructions given for that purpose.
>
> (b) Is recorded with the intention that it should be processed by means of such equipment,
>
> (c) Is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filling system, ..."

Therefore, data which is now considered to be the 'oil' of the digital era[778] are individual units of information, which may be measured; collected and reported; stored and analyzed. In computing, data is information that has been translated into a form that is efficient for movement or processing.[779]

1.1.3 **Personal Data**

Personal data according the Nigerian Data Protection Act[18] and the General Data Protection Regulation[780] which has very similar provision, means any information relating to an individual,

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[776] Law Insider, *Data Definition*<https://www.lawinsider.com/dictionary/data#:~:text=Data%20means%20recorded%20information%2C%20regardless,or%20pricing%2C%20or%20management%20information.>Accessed 25 June, 2023.

[777] (2003) EWCA Civ 1746, para 33.

[778] Uche Val Obi, *Data Privacy and Data Protection Law in Nigeria* <https://www.mondaq.com/nigeria/privacyprotection/1183140/data-privacy-and-data-protection-law-in-nigeria> Accessed 18th August, 2023.

[779] Jack Vaughan, *'Guide to telling stories with Data: How to share analytics insights'* (Techtarget, July 2019) <https://searchdatamanagement.techtarget.com/definition/data> Accessed 25th March 2023 [18] *Ss. 65 of the NDPA, 2023.*

[780] *Article 4 (1) of the GDPR, 2016.*

who can be identified or is identifiable, directly or indirectly, by reference to an identifier such as 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.

It must therefore be understood that personal data includes information relating to natural persons who can be identified or who are identifiable, directly from the information in question; or who can be indirectly identified from that information in combination with other information.[781] It include special categories of personal data (for example health data) or criminal conviction and offences data which are considered to be more sensitive and may be only process in more limited circumstance. Although pseudonymization helps to reduce privacy risk by making it more difficult to identify a data subject, the principles of data protection will apply to pseudonymized data as same is still personal data exception for when such data has been anonymized. Although the concept of anonymization is not provided for neither under the NDPR or the NDPA but the GDPR makes is an adequate way to secure data. Also, information about individuals acting as sole traders, employees, partners and company directors where they are individually identifiable and the information relates to them as an individual, may constitute personal data.[782]

However, it becomes unclear for the Nigeria data protection laws if an information about a deceased person and companies/artificial persons will constitute personal data. This is due to the fact that the definition of personal data by the substantive legislation on data protection in Nigeria was not prudent (with respect to the draftsmen), and do not specify in its definition of personal data[783] whether the individual is a natural person or both. Although the NDPR, which operates alongside the NDPA makes it clear that the individual must be a natural person.

1.1.4 **Data Subject**

Data subject was succinctly defined by the NDPA as an individual to whom personal data relates.[784] This definition has however been criticized for being awkwardly simplistic and potentially elusive. This definition according to Babalola [785] evinces two problems in waiting. "First, the word 'individual' is capable of diverse meanings to suit different narratives depending on who the 'interpreter' is. The Compact Oxford English Dictionary of Current English defines

[781] Information Commissioner's Office, *Guild to the General Data Protection Regulation* <https://ico.org.uk/media/for-organisations/guide-to-data-protection/guide-to-the-general-data-protectionregulation-gdpr-1-1.pdf> Accessed 17th August, 2023.
[782] *Ibid.*
[783] *S. 65 of the Nigerian Data Protection Act, 2023.*
[784] *Ss. 65 of the NDPA, 2023.*
[785] Olumida Babalola, *Transitioning form NDPR to NDPA: Some Good, Bad and Ugly Provisions of the Newly Enacted Nigeria Data Protection Act 2023* <https://dnllegalandstyle.com/2023/transitioning-from-ndpr-to-ndpa-somegood-bad-and-ugly-provisions-of-the-newly-enacted-nigeria-data-protection-act-2023/> Accessed 17th August, 2023.

the term 'individual' to include a person and an entity while the Supreme Court in *Alhaji Aliyu Ibrahim v Judicial Service Committee*[786] defined 'individual' to include artificial persons i.e. companies. Hence, the term 'individual' in the section can be interpreted to mean the protection of companies too therefore, they can also sue for data breaches under Nigerian law. Without arguing the benefits or drawbacks of such a possibility, this definition of data subject ought to be clear to avoid such conjecture. Secondly, the drafters missed a golden opportunity to define 'data subject' by clarifying whether deceased individuals are also protected under our data protection legal regime. Bearing in mind the decision of the Court of Appeal in *C.C.B. v Nwankwo*[787] where the court glossed over the issue of whether the privacy right of a dead man can be protected, this Act would have legislatively laid the matter to rest."[788]

The NDPR did not do any better when it defined data subject as "any person, who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity". However, a combined reading of Article 1.2 (b)[789] which provides that "this Regulation applies to natural persons residing in Nigeria or residing outside Nigeria who are citizens of Nigeria" and Article 1.3 (xiv)[790] of the NDPR already stated above, it would be understood that natural persons are the only beneficiaries of data protection rules and therefore protected by the Nigerian Data Protection Regulation,[791] although nothing was also said about dead person in the regulation. The GDPR[792] was able to avoid this confusion in its definition by clearly stating a data subject to be an identified or identifiable natural person.

1.1.5 **Property**

The term property is an object of legal rights, which embraces possessions or wealth collectively, frequently with strong connotations of individual ownership.[793] According to Oxford Language, property is a thing or things belonging to someone; the right to the possession, use or disposal of something; ownership.[794] For Steven, property as a legal regime incorporates three elements;

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[786] (1998) 14 NWLR (Pt. 584) 1.

[787] (2018) LPELR–44762(CA).

[788] Olumida Babalola, *Transitioning form NDPR to NDPA: Some Good, Bad and Ugly Provisions of the Newly Enacted Nigeria Data Protection Act 2023, (2023) Ibid*.

[789] Article 1.2 (b) of the NDPR, 2019.

[790] Article 1.3 (xiv) of the NDPR, 2019.

[791] Emmanuel T. Okpara, *Individuals Rights To Data Protection In Nigeria*, (2020) <http://www.barristerNG.com/individuals-rights-to-data-protection-in-nigeria-by-emmanuel-t-okpara-esq/.> Accessed 19th August, 2023.

[792] Article 4.1 of the GDPR [2016] OJ L 119/1.

[793] Britannica, *Property* <https://www.britannica.com/money/topic/property-legal-concept> Accessed 16th August, 2023.

[794] Oxford Language Dictionary, *Property* <https://www.google.com/search?q=meaning+of+property & zoq=meaning+of+property&aqs=chrome..69i57j0i512l9.8927j1j7&sourceid=chrome&ie=UTF-8> Accessed 17th August, 2023.

Firstly, property grants a bundle of rights, including rights to exclude, use, transfer, and destroy. Secondly, those rights are good against the world (in rem), rather than limited to specific counterparties (in personam) and thirdly, that regime must limit property owners' ability to alienate property rights.[795] When one has property rights over a thing/resource, he is said to have the exclusive authority to determine how the thing/resource is used. If a property is a thing belonging to someone or one can have legal title/rights over then, in this discuss the tangibility or otherwise of data which makes it capable of being owned by a person is the concern.

1.2 What is Privacy Protection

With the world shrinking to a global village and the complexity of life, it seems that the individual is perpetually connected to world.[796] It is therefore against this backdrop, that the state of an individual's freedom to live a life known to only self and any other person he/she wants to know is of high essence. The reasonable expectation that personal information disclosed in a private place will not be disclosed to third parties when doing so would embarrass a person of ordinary sensitivities birthed the protection of privacy.

The legislative instruments which have birthed the right to privacy were put in place for the protection of privacy. Internationally, the Universal Declaration of Human Right (UDHR) provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[797] Similarly provision of was also made in the International Covenant on Civil and Political Rights[798] without limitations.

The African Charter on Human and People's Right Human which represents African nations' embrace of human rights unfortunately, makes not provision for the right to privacy. However, the African Charter on the Rights and Welfare of the Child, 1990 provides that "No child shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks."[799]

Interestingly, in the Nigerian constitution[800] the right to privacy is entrenched in Chapter 4, which houses fundamental rights which has been defined by the Supreme Court as rights which stand above the ordinary laws of the land which are in fact antecedent to the political society itself and

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[795] Steven H. Hazel, *Personal Data as Property* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669268> Accessed 12th August, 2023.
[796] Yinka Olomojobi, *Right to Privacy in Nigeria* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062603> Accessed 17th August, 2023.
[797] *Article 12 of the UDHR, 1948.*
[798] *Article 17 of the ICCR, 1966.*
[799] *Article 10 of the African Charter on the Rights and Welfare of the Child, 1990.*
[800] Constitution of the Federal Republic of Nigeria, (CFRN) 1999 (As Amended) C. 23 Laws of the Federation, 2004.

it is primary condition to civilized existence.[801] The constitution provides that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected"[802]. It is important to note that, although the marginal note of said section 37 stipulates 'right to private and family life' which is broader and more comprehensive than the 'right to privacy', it has been criticized for not providing for the former which includes the right to establish and develop relationships. Unlike Article 8[803] of the European Convention on Human Right which expressly provides for the "rights to respect for private and family life" in the text of the body of the treaty, the provision of section 37 of the CFRN 1999 does not guarantee right to private and family life, it merely confines the phrase to the table of contents and marginal note.[804] Meanwhile, it is settled law that marginal notes or explanatory notes ought to be ignored as they only offer explanation to statues and nothing more.[805]

Under section 37, the rights protected include;

(a) Privacy of the citizens

(b) Privacy of homes

(c) Privacy of correspondences

(d) Privacy of telephone conversation and, (e) Privacy of telegraph communication.

While it is clear that the right as provided by section 37 is limited only to citizens, it is pertinent to note that no explicit reference was made regarding privacy of data. However, the Court of Appeal in the case of *Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC*[806], it was restated that "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."

In Nigeria, the Nigeria Data Protection Act (NDPA) 2023 has been signed into law representing the comprehensive legislation on Data Protection in the country. Of key interest is that it makes as its number 1 objective "to safeguard the fundamental rights and freedoms, and the interests of data

[801] Oliver Diggelman and Maria Nicole Cleis, *How the Right to Privacy Became a Human Right* (2014) 14 Human Rights Law Review, 449.
[802] *Section 37 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended) 2023.*
[803] Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[804] Olumida Babalola, *Privacy and Data Protection Law in Nigeria* (Noetico Repertum Inc. 2021) 5, 58.
[805] *Uwaifo v Attorney General of Bendel State (1987) 7 SC 124. See also Akintokun v LDPC (2014) LPECR-22941(SC).*
[806] (2021) LPELP-55623(CA).

subjects, as guaranteed under the constitution of the Federal Republic of Nigeria, 1999;"[807] This which I suppose is intended to incorporate data protection under the fundamental right of privacy unfortunately creates issue; one would ordinarily wonder which of the fundamental rights and freedoms the Act sort to safeguard as the couching of said objective is without precision.

Another issue of whether the rights provided in the Act is enjoyable by every person within its scope or it is limited to the citizens of Nigeria as provided for under section 37 of the CFRN, as Amended, 2023. It appears clearly as earlier pointed out in this research that the definition of 'data subject' to whom the Act applies to is quite wide and overreaching the provision of the constitution.[47] Another pertinent question is that, the NDPA, 2023 indeed is a comprehensive law which regulates data protection in Nigeria. However, can the NDPA, 2023 amend section 37 of the CFRN, as Amended, 2023 which makes no provision for right to private and family life, to incorporate data protection as a fundamental right under chapter 4 of the CFRN, as Amended, 2023 without a proper alteration of the relevant section of the Constitution to incorporate the said right?

The NDPA, 2023 by its provisions, seeks to regulate procession of personal data and making the right to data protection a fundamental right under the right to privacy. It also provides for punishment for offenders and remedies for victims of any breach of personal data. Thereby creating the window for both criminal sanctions and civil liability of any such breach of personal data. When a data subjects rights to data protection has been breach and aside the offender facing criminal charge, [808] the victim may file civil suit against the offender seeking for damages/compensation.[809]

Before the coming into force of the Nigerian Data Protection Act, 2023, the National Information Technology Development Agency issued a regulation in 2019 known as Nigerian Data Protection Regulation (NDPA), 2019 for the regulation of the processing of personal information. In 2020 Implementation Framework, was also issued to aid the enforcement of the regulation. Interestingly the regulation of 2019 and its implementation framework is preserved by NDPA, 2023[810] making them applicable alongside the Act itself although with the Act having a superior status. This will help fill in the loopholes in the act and reference could be made to the NDPR, 2019 and/or its Implementation Framework when there are ambiguities in the Act.

1.3 **Property in Personal Data**

If sexual behavior, pictures, feelings, attitudes, addresses, financial status and other personal data can be sold on the market, we may end up understanding data protection not as a matter of human

[807] *Ss. 1 (a) of the Nigeria Data Protection Act, (NDPA) 2023.*
[47] *Ss. 37 of the CFRN, as Amended, 2023.*
[808] *See Ss. 46 of the NDPR, 2023.*
[809] *See Ss. 51 of the NDPA, 2023.*
[810] *See Sc. 64 (f) of the NDPA, 2023.*

rights but as a form of property rights.[811] Personal data may become viewed as a commodity and a property rights system concerning personal data where license agreements about the use of personal data and the control of the use by digital rights management systems could come into existence, thus setting aside the existing distinction between personal rights and proprietary rights.[812] Introduction of property rights in personal data has been advocated from several perspectives: arguably it would help individuals reclaim lost control over their personal data, or acknowledge an inherent connection between an individual and data pertaining to him. Other commentators see benefits of propertization in a rhetorical value of property talks. Some believe that only propertization is able to overcome inherent limitations of the legal and political system. The most discussed approaches to information privacy as property have been taken from the perspective of economic analysis of law.[813]

In theory, property rights emerge when the gains from propertization outweigh the costs of securing those rights. This formula, originally identified by Harold Demsetz, explains the development of property rights in land, intellectual property, and many other assets.[814] The U.S.

Supreme Court in the case of In [815]*Riley v. California*[55] has recognized that the enormous amount of personal data distinguishes it from other assets. The Court emphasized that "the current top-selling smart phone . . . [can hold] millions of pages of text, thousands of pictures, or hundreds of videos." No other asset—whether land, real property, or even intellectual property—is collected in the same quantity as personal information, little wonder data is seen as the new oil.

The shortcomings and the complications not addressed by the current legal system has encouraged the crusade for propertization of data protection. The current data protection laws do not seem to adequately grasp the new structure of relationships within data flow (particularly in the lack of transparency and accountability in the modern data flow) and therefore, are not able to control modern processing of personal data. There is lack of certainty regarding a specific actor that has to be accountable for a data protection violation. Indeed, in the information chains every actor may be considered as a controller since every actor determines their own purposes and means of personal data processing.[816] A clear example would be the system of sharing of medical files between general practitioners, medical specialists, and hospitals. They all have their own specific

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[811] James B Rule and Graham Greenleaf, Global Privacy Protection (Edward Elgar Publishing Limited, 2008) p. 97.
[812] *Ibid.*
[813] Nadezda Purtova, *Property in Personal Data: a European Perspective on the Instrumentalist Theory of Propertisation* <https://core.ac.uk/download/pdf/45678038.pdf> Accessed 14th August, 2023.
[814] Steven H. Hazel, *Personal Data as Property* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669268> Accessed 12th August, 2023.
[815] *U.S. 373 (2014).*
[816] Serge Gutwirth, Yves Poullet, Paul De Hert, Ronald Leenes, Computers, Privacy and Data Protection: An Element of Chioce (Springer Dordrecht Heidelberg London New York 2011), 48.

interest in the data of a patient. The same may be said about the actors in data clouds.[817] The reality of business models is such that the providers of the on-line services may act not only as processors, but also process personal data for purposes and in ways they need.[58] For instance, situations where a social media user grows his or her friendship list/follower and afterwards sell off the account to another person would be in line with Rebeca Wong's argument that on social networking sites such as Twitter and Facebook individual users who post information of their friends should be regarded as controllers just like Facebook itself.[818][819] Also in the case of *US v Miller* [60] the Supreme Court ruled that 'checks are not confidential communications but negotiable instruments to be used in commercial transactions' and that the individual has no property interest or Fourth Amendment expectation of privacy in those records. As a result of this decision and with background and recommendations from the Privacy Protection Study Commission (PPSC) report, Congress passed the Right to Financial Privacy Act in 1978.

The concentration of a tradable commodity foreclosing competition under the shield of data protection is, what in the end may be the real intersection for both competition law and data protection. Data protection, if applied separately, may be used in the same fashion as a proprietary right such as intellectual property with the undesirable result of favouring the concentration of economic power regardless of abuses.[820] Although some scholars like Nadezda has said that the instrumentalist theory of Lessig does not fit into the European legal context because the scope of rights in personal data it advocates for is not what is meant by property in Europe.[821] While Steven, in answering with the Demsetz's formula says that the time has come to grant property rights in personal data.[822] He further states that the status quo is plagued by prohibitively high information costs and inadequate enforcement and propertization will mitigate those challenges. Propertization will also help to determine if information pertaining to or affecting a dead person will constitute personal data.

Development of the legal institution of property is a good example of pragmatism in law: while philosophers of law are occupied with normative justifications of existence of property, the actual property rights address certain practical dynamic needs that emerged in a given society. Given that many companies have built robust business models around data processing, and such processing often involves personal data. Certain companies may believe that specific rules related to personal

[817] *Ibid.*
[58] *Ibid.*
[818] Rebecca Wong, *Social Networking: Anybody Is a Data Controller?*, Social Science Research Network (2008).
[819] *U.S. 435 (1976).*
[820] Federico Ferretti, *EU Competition Law, The Consumer Interest and Data Protection; The Exchange of Consumer Information in the Retail Financial Sector* (Brunel University London, Uxbridge Middlesex, UK 2014) 117.
[821] Nadezda Purtova, *Property in Personal Data: a European Perspective on the Instrumentalist Theory of Propertisation, Ibid.*
[822] Steven H. Hazel, *Personal Data as Property. Ibid, 75.*

data protection may, in practice, result in overly burdensome obligations that could affect their economic interests. Thus, a question arises as to whether the economic interests of controllers and processors, or of the general public, could justify limiting the right to data protection. [823] By propertization of personal data, bundle of rights, including rights to exclude, use transfer, and destroy will be granted;[824] those rights are good against the world (*in rem*), rather than limited to specific counterparties (*in personam*)[825] and also the property owners' ability to alienate property rights will be limited[826].

Accessing the impact of the NDPA in the propertization of personal data, Section 65 which defines data subject and personal data determines the scope of the property rights in personal data in line with the *numerus clausus* principle which requires that "property interest must conform to a finite list of recognized forms"[827], although the Act did not create room for confusion as to whether noncitizens of Nigeria, artificial persons, or dead person can still be captured under this scope. Also, section 26 and 35 of the NDPA demands that a data controller must be able to demonstrate that the data subject has consented to processing of his or her personal data. By this, the NDPA provides one way for data subjects to show title to their data and another way for prospective purchasers to verify ownership of personal data. As rightly posited by an observer, knowledge about title to property rights is crucial to enjoying their value.[828] Finally, by virtue of sections 41, 42 and 43 of the NDPA which restrict cross border transfer of personal data, this is in line with the necessity to limit uses of neighbouring property in order to protect property rights.[829] However, there is no where in its provision it entitles the data subject the right to determine whether or not the said personal data may be transmitted from one controller to another.

The conversations around 'propertization' of personal data will continue to pose questions on the necessity (or otherwise) of extending coverage of data protection laws to such data for as long as they remain relevant to data controllers.

1.4 Conclusion

The protection of privacy is a legal mechanism put in place to facilitate the liberty of an individual to live a personal life void of interference from another person except as authorized. This right

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[823] European Union Agency for Fundamental Rights, *Handbook on European Data Protection Law (2018 Edn)* 78.

[824] Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 790 (2001) 22, at 730–39.

[825] Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1835 (2011) 15, at 2058.

[826] Steven H. Hazel, *Personal Data as Property* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669268> Accessed 12th August, 2023.

[827] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization and the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 9 (2000).

[828] Abraham Bell & Gideon Parchomovsky, *Property and Information*, (2016) 116 COLUM. L. REV. 237, 241.

[829] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (explaining that limitations imposed by zoning have benefits for the property rights of residential owners).

otherwise known as right to be let alone constitutionally limits the powers of the state, government agencies and the individual. The right to data protection ordinarily should be incorporated as part of the right to privacy because personal data which is sort to be protected are parts and parcel of the an individual and with the wave of technological takeover which has necessitated people living their daily life around technology, the urgency to protect data subject cannot be overemphasized.

Also, the ideal of propertization of personal data must be encouraged. This is because of the fact that having acknowledged personal data as parts and parcel of an individual, otherwise called, a 'data subject', ascribing full control/ownership of such part of him/herself will not be out of place. Also going by the fact that personal data is now being commercialized and persons are making fortunes out of it, it will be unfair to deny the data subject a bit of the fortune made from commercializing part of him/herself. Propertization of personal data might not be perfect to resolve issues around protecting personal data, but it would mitigate each of the market failures that plague personal data markets and will also help in the control of the use of data and ensure accountability and responsibility of all that processes such personal data. The new Nigeria Data Protection Act 2023 is clearly a good walk toward protecting the data subject and contains the closest good job at securing property rights in personal data, although the room for improvement is always there and most importantly, enforcement/implementation of the Act must be taken seriously. As Edward Snowden would say, "Data isn't harmless, data isn't abstract when it's about people. Almost all the data being collected today is about people. It is not data that is being exploited, it's people that are being exploited. It's not data in networks that is being influenced or manipulated, it is you being manipulated." [830] I dare say let us take control.

Recommendations

In view of the issues of protection of privacy and the propertization of personal data, I make the following recommendations:

1. As in the Article 8 of the European Convention on Human Right Section 37 of the Nigeria Constitution should be amended to incorporate the right to private and family life which is only seen in the marginal note of section 37 and not the in the body section to maintain international standard.
2. 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 road for contradictory interpretations whether right to data protection can be addressed by the court as a fundamental right.
3. The independence Nigeria Data Protection Commission which has be made imaginary by section 23(1) and section 60 notwithstanding the provision section 7 of the NDPA which

[830] Yahoo!finance News <https://uk.finance.yahoo.com/news/edward-snowden-web-summit-data-protection201301784.html> Accessed 26th August, 2023.

guaranteed the commission's independence must be review. The commission need to be practically independent to be able to do its functions in the protection of personal data.

4. The NDPA should be amended to address the issues of the definition data subject, to reconcile it with the constitution and specifying whether a deceased persons personal data can be protected.
5. A new institutional arrangement should be put in place to define and specify the way be which economic units relating to personal data can co-operate and compete. A purchasers of personal data must be able to tell which bundles of rights belongs to which owners.
6. No provision was made as to preventing the publicizing of data ownership information in the event that 'third-party' (which is not envisaged in the Act) needs to identify who owns a particular piece of personal data and this should be considered.