

The Law of Privacy: Appraising the Practice of Professional Journalism in a Democratic 21st Century Nigeria

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Abstract

The issue of the invasion of privacy in the practice of professional journalism is not a strange phenomenon to those following happenings in Nigeria. Although there is a law guarding against such practice, it appears journalists derive great pleasure from reporting matters that relate to individuals' personal lives as long as such news is sensational. This paper attempts a synthesis of some of the principles that should inform the development and implementation of the right to individuals' privacy in a democratic state like Nigeria. Since a chapter of the country's constitution makes provision for guaranteed and protected rights to certain aspects of citizen's personal lives, homes, correspondences and several other situations, the paper argues that there is no better time to take the implementation and enforcement of such rights to the next level as now. The research relied on the analytical and critical methodology of study. It made several recommendations which includes the necessity for a re-appraisal of the current laws of Nigeria relating to citizen's right to privacy viz-a-vis the duty of journalists to publish and reconcile the gaps where any in the legal regime of protection of persons' privacy. Doing this, the paper concludes, will help significantly in upholding the dignity and integrity of human beings in Nigeria, thereby fostering the protection of fundamental human rights of citizens, and as well help in strengthening and deepening of our democratic values.

Keywords: Fundamental Right to Privacy, Constitutional Right to Publish, and Liabilities in Defamation

1. Introduction

One law that has received minimal attention in the order of things in Nigeria is the law of person's right to privacy. Fundamental rights like, right to life, right to personal liberty, right to fair hearing, right to freedom of expression and the press, right to freedom of movement, and right to peaceful assembly and association have all received copious attention by individuals, civil society groups and significantly, from the courts that often intervened through the adjudicatory processes where such guaranteed right have been violated. However, not so much attention has been given to the right to private and family life as enshrined in section 37 of the Nigerian Constitution. Perhaps it is instructive at this point to note that the Nigerian society at the point of drafting of its constitution had not developed sufficiently in respect of the values attached to the privacy of the individual and in fact to the citizen's family life. Indeed section 37 just made a cosmetic mention in as little as two lines whereas section 33 on right to life has 14 lines, section 34 on right to dignity of the human person has 30 lines and section 35 on right to personal liberty amazingly has 76 lines. It therefore leaves readers and observers little or no choice than to speculate as to whether the drafters of the Nigeria's 1999 constitution merely added section 37 as an afterthought. Yet there are many problems, social, economic, legal and political that the absence of respect by journalists and other persons that have violated the right to the private and family life of individuals have caused out of their zeal to either publish a story or fulfil their individual personal commitment in life to self, family or organization.

The essence of the law of privacy is to guarantee the right to privacy against all persons. The law in Nigeria has been constantly squeezed to near oblivion or irrelevance by those who should know and apply it better. Apart from the day to day individuals' constant infringement on the rights to privacy of those around them as witnessed among friends and family, journalists, law enforcement agents and other government functionaries constantly invade the privacy of the citizenry at will. A clear example is the invasion of the Akwa Ibom state government house in 2015 by men of the Directorate for Security Services (DSS) under the guise of looking for bombs. Again, during the build up to the 2015 general elections in Nigeria which ushered in the incumbent President, Mohammadu Buhari, the case was also reported of the invasion of his All Progressive Congress (APC) party secretariat by men of the State Security Service (SSS) where many computers and other electronic devices housing vital party information were carted away. The SSS was reported to have alleged that the secretariat was a ware house owned by a national leader of the APC, housing dangerous weapons.

Many other cases abound of individuals either being harassed in their homes or business premises, or

sometimes even beaten in the streets by law enforcement agencies without due warrants and brazen disregard for a core component of their fundamental human right, which is their right to privacy and the right to be assumed innocent of whatever crime that is being suspected until proven guilty.

Nigerian journalists many times also may not have helped matters. Gossip publications attract the highest patronage, even when most times the reading public knows clearly that a good number of such stories are highly exaggerated. If it has to do with marriage, family, sex, fashion, career, business or other aspect of an individual's private life, stories are published just to make sales without really paying attention to law of privacy.

The right to privacy is linked to the dignity and autonomy of human beings - values which are at the core of the protection of fundamental human rights. In this regard, section 34(1) of the 1999 constitution provides that every person is entitled to respect for the dignity of his person." It is not in doubt that privacy ranks very high in the indices of the respect for the dignity of an individual. More so, the inclusion of the right to private and family life in the Bill of Rights can be said to represent a conviction that this is a right worth protecting for all Nigerians.

Aside the issue of sensational reporting, many a time professional journalists in Nigeria and Africa as a whole are faced with real dilemmas in reporting true stories either in order not to be seen as invading anyone's privacy or breaching any ethical code. Sometimes it is government that constitutes a clog in the wheel of information dissemination. As was the case back in South Africa in year 2000, regarding Parks Mankahlana's death where according to Carolyn Dempster of the BBC, South Africa's foremost Aids awareness lobby groups, the 'Treatment Action Campaign' called on the government to "tell the truth" about Mankahlana's death, and to publicly acknowledge that a number of senior government officials are also living with HIV and AIDS. The Press had a hard time covering and reporting the whole story. The Center for Journalism Ethics, School of Journalism and Mass Communication, University of Wisconsin-Madison corroborates this position stating that South African journalists face a seemingly insurmountable task reporting HIV and AIDS because it has become a complex and politicized pandemic. Close to it was the drama that surrounded the sickness and death of late President Musa Yar'adua in Nigeria. The question then begs for answer, does reporting the cause of sickness or death violates a man's privacy? Should reportage of AIDS or other terminal diseases be treated differently when public officials are involved? Should public officials be accorded fewer privacy protections because of their jobs? Or why do officials and some journalists try to avoid or cover the truth?

2. Conceptual Clarifications

The concepts for immediate clarifications include the following: fundamental right to privacy, constitutional right to publish, and liabilities in defamation, and they will be analysed serially hereafter.

Fundamental Right to Privacy

The concept of privacy is not new both to the Nigerian media landscape and the society generally. Among the torts guiding the practice of professional journalistic endeavours in the country, the law of privacy is central. This is because, though working for the interests of the general society, journalists must not be seen to take the fundamental rights of individuals who they claim to be serving for granted. And because journalists themselves are human beings who are parts of the larger society which they serve, their activities must be carried out in a way as to show regard for societal values and not to ridicule them. A watchdog is not supposed to attack or bite those over whom it is watching. The duty to publish for the consumption of the public is not in isolation, it is accompanied by a corresponding responsibility on the part of the publishers in the observance of specific laws, including the constitution which guarantees the rights of the individuals to privacy. Therefore, journalists are to protect the interests of every individual in the society while seeking the good of the entire generality of this same society (Nwauche 2007, Mowoe 2008).

As a legal term, privacy continues to generate considerable controversy among professionals and legal commentators. This in part is because privacy is a difficult concept to define. Even the 1999 Constitution of Nigeria does not define the term. Nwauche (2007) suggests that it may be one of those concepts that are better described than defined. Be that as it may, there have been credible definitions that attempt to give an insight into the concept. Ogunjimi and Adam (2015), defines privacy as "the right of a person to be alone and free of unwarranted publicity". Privacy has also been viewed 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." Tejuoso, Lanre-Iyanda and Togunwa (2011), observed that the principle of the law of privacy implies that individuals should be allowed to live their lives without interference from the mass media. Privacy seeks to emphasize the right of any person to live his/her life away from the public. It is that right which a person has to be left alone, or to uphold certain personal things in secrecy without interference whether due or undue. Since section 37 of the 1999 Constitution of the Federal Republic of Nigeria provides that "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected," the issue may no longer be whether privacy has a proper definition or not. Rather, what is critical becomes how to understand the key issues in the concept of privacy, so that the development and

full implementation of the law of privacy will be guaranteed across boards.

An idea of the key issues in the right to privacy can be found in the classification of the jurist Prosser of the four torts which had then emerged from the American protection of privacy as corroborated by Nwauche (2007). These four torts are:

- (i) publicity which places plaintiff in a false light;
- (ii) appropriation of the plaintiffs name or likeness;
- (iii) intrusion upon plaintiff's seclusion or solitude and
- (iv) public disclosure of private facts about the plaintiff.

Even though these torts have found different manifestations in different countries, they remain the signposts for the protection of the right to privacy. Be that as it may, Nwauche (2007) went further to suggest that there are two possible philosophical bases for the protection of privacy. The first is the dignitary concept. This concept, he explained, seeks to protect the personality of an individual because he is a human being. This is also the broader basis of human rights. Dignitary interests, on one hand recognise the individual's autonomy of person and the need to respect that autonomy flowing from the dignity of a person. Conceived in this way an individual is allowed to lead his life without interference. Dignitary interests can also be related to the self-worth of a person. In this way the law could seek to protect an individual's subjective feelings. Personality rights like privacy are based on dignitary interests and are linked to sentimental loss. What is protected is the embarrassment anguish and the distress of the person. In this regard, the right to privacy is not a proprietary interest and does not survive the person, nor can it be licensed the manner in which other forms of proprietary interests can. The second, which is the commercial interests according to Nwauche (2007), underpins the protection of privacy conceived of the commercial value of a person's image and identity and the efforts to enhance this value. Accordingly, it is regarded as a property which can be licensed and can survive the death of the person. That is to say, that situation where a suit is pending in court against the tortfeasor, even though the plaintiff dies, the estate of the deceased plaintiff is able to pursue and sustain the action in court until the judgement.

Observations from the foregoing show that the two interests are not mutually exclusive. Indeed many jurisdictions protect the two and one may lead to the other. A protection of privacy based on dignitary interests can lead to the enhancement of commercial interests. If the protection of privacy can lead to a grant of an injunction preventing third parties from dealing with manifestations of privacy, it means that appropriate incentives monetary or otherwise can be used to obtain permission to deal in the manifestations of privacy such as images and other associational facts.

Of interest to this research is an appraisal of the issue whether or not the Nigerian legal system is paying lip service or mere hortatory to the right to privacy. A question can be asked; is privacy important in Nigeria? The answer to this question will be in the affirmative because there are human beings that require protection of their privacy in Nigeria. Besides, there is a constitutional protection of this right under section 37 of the self-same constitution. Yet as noted above, this is one right that has not received adequate protection or elaboration either in the definition, philosophical basis, application, enforcement or even in the key issues in the concept of privacy. Many a time, perhaps as a result of pressure to deliver, journalists over step their limit especially when the feeling that certain events or issues should be reported for public interest. However, the distinction between human interest and human curiosity must not be taken for granted. If such events or issues concerns the private lives of individuals, then their consent must be sought before it is reported.

Constitutional Right to Publish

The concept of the constitutional right to publish arises out of a duty of publishers to inform the public. Most media houses are engaged in the business of sourcing for information for publication for the consumption of the public. The right of freedom of expression and the press is guaranteed by section 39 of the Nigerian constitution which specifically provides in section 39(1-2) as follows:

every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference...every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.

The right to freedom of expression is one of those rights seen as very essential and fundamental to the development of a civilised society. It is the foundation for the enforcement of other rights, encroachment of which is made known by expression. A major determinant of a nation's respect for the rights of its people is the extent to which they can express themselves. Also, there is the presupposition that such speech is directed towards other people and not to oneself, which will be against the order of nature. Most significantly, speech which is the basis of expression is one of the most basic nature of man which helps to determine his natural development and potential (Mowoe, 2008).

Nwabueze (2004) strongly corroborates the natural right of man to speak or express himself in the following words: "so long as he lives he cannot be prevented from speaking if he wants to do so. You can punish

him for what he says, but that is after he has said it. Gaggling apart, it is physically impossible to prevent a living person from speaking what he pleases. His audience may be restricted by government regulation banning assemblages of persons in public places, but he remains free to speak his mind privately if he has the courage to damn the consequences.

As can be seen from the above, the right or freedom of expression is not a right created by the state, rather the state guarantees the existence and enjoyment of this right which is innate to the very nature of humanity. In fact at birth, where a baby does not express himself by crying, the parents, the midwives and doctors will all be worried, because the right or freedom of expression is a major determinant of the wellbeing of a human being. Significantly, one of the strongest arguments in support of the freedom of speech principle is the benefit of an open discussion to the discovery of truth. According to Justice Wendell Holmes in *Abrams vs the United States* (1919), “the best test of truth is the power of the thought to get itself accepted in the competition of market.” This position is corroborated by J. S. Mills (1951) who instructively posits that:

...but the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose it; what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

In summary, the right or freedom of expression is so fundamental that it cannot, and ought not to be taken away from man, as such an attempt reduces the very nature of man. The government only acknowledges its existence and seeks to guarantee its enjoyment through the constitution and other municipal and international laws.

It is in pursuance to the realization of freedom of expression and the importance of the right attached to it especially in relation to the press that the Nigeria Constitution (1999) states that ‘the press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the government to the people.’ The Nigerian press while upholding the right to publish, as exemplified in the establishment of various media houses both government and privately owned across the country, cannot be said to have lived up to expectation in terms of fairness, equal unbiased coverage and accessibility, and neither does the press hold the government accountable to the people. The government does whatever it deems fit at any time and the press looks the other way. Many individuals whose rights had been violated were denied access to the press, thereby denying them their constitutional right to publish and be heard.

Liabilities in Defamation

The most important approach to this part of the work is to undertake a cursory explanation of the concept of defamation with particular emphasis on libel. Thereafter, this portion of the work will identify the link of publishing to the responsibility of publishing to avoid the violation of the right of privacy of individuals with particular attention to specific liability in libel.

Defamation is an act committed through words spoken or written, which generate adverse, derogatory or unpleasant feeling against a person, such that injury is done to his reputation. The law that seeks to protect the reputation of every individual and provides redress for injury done to his or her reputation is the Law of Defamation (Onabanjo, 2002). Yakubu (1999) citing the decision of the court of appeal where defamatory statement was defined as that which is published about a person, which is calculated to lower him in the estimation of right thinking people or cause him to be shunned or avoided, such that he is exposed to hatred, contempt or ridicule, which may be injurious to him in his office, profession, calling, trade or business.

Kodilinye and Aluko (1982) attempted a beautiful simplification of the concept of defamation when they summarised the requirements for defamation as follows: A statement which

1. Lowers a person in the estimation of right thinking members of the public
2. Exposes him to hatred ridicule or contempt
3. Makes others shun or avoid him
4. Discredits him in his office, trade or profession
5. Injures his financial credit.

For the purpose of this work, it is instructive at this point to undertake a distinction in the two branches of defamation which are libel and slander. Libel is about any defamatory statement which in written form, while slander is a defamatory statement that is oral. It is the opinion of this work that sign language is covered under the scope of slander. In this case, libel applies to written publications like newspapers, journals, text books, letters and other such materials, while slander covers broadcast by television, radio, skype, YouTube and other such media platforms. An individual or publisher can be held liable for publication whether in written or oral form of any defamatory statement as explained above. Journalists are therefore under a serious responsibility

while exercising their rights of freedom of the press since such freedom attracts serious liabilities when abused. As noted in the words of the eminent English jurist Blackstone (1723-1780); “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Everyman has an undoubted right to lay what sentiments he pleases before the public, to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, must face the consequences of his temerity.

3. Theoretical Foundation

A combination of theories drawn from those of mass communication, law and ethics are fundamental to the background framework that attempt to analyse and aid the understanding of the major concerns central to this study. Such ethical theories as absolutist, relativist, deontological, legalistic, antinomian and situational as posited by Merrill (1974), tend to explain and proffer reasons why human beings take whatever moral decisions they arrive at in actions relating to their relationships with those around them. Law and ethics both in theory and practice play a fundamental role in the practice of mass communication because whatever is published or broadcast at any time by media practitioners is driven by one legal and ethical ideology or the other. Either the journalist does so because of his bond to his social responsibility to the society or some law of the land that demands or calls his ethical beliefs to question. A journalist of the deontological school of thought for instance will consider duty as paramount, while that of a teleological leaning would place the end result over anything else. To him, the Machiavellian approach of ‘the end justifies the means’ holds sway, which could account for why the Indian reporters earlier cited went that far.

Conversely, mass communication theories, apart from helping to improve our understanding of the process of mass communication, puts one in a better position to predict and control the outcomes derived from mass communication processes. Severin and Tankard (2001), explained that these theories among other things explain the uses to which people put mass communication, how people learn from the mass media and the role of the mass media in shaping people’s values and views. Each or a combination of the normative, social-scientific, working and common sense theories at one time or the other form background tones upon which media practitioners base their actions and judgements.

The theoretical orientation of this paper is therefore anchored on the authoritarian and social responsibility media theories as well as deontological and teleological legal and ethical theories. Authoritarian and social responsibility theories are subsets of normative theories of the media which seek to locate media structure and performance within the milieu in which it operates. The basic assumption of the normative theory according to Siebert, Peterson and Schramm (1956), quoted in Anaeto, Onabajo and Osifeso (2008) is that “the press always takes its form and coloration from the social, legal and political structure within which it operates”. Anaeto et al (2008) further asserted that these theories help to explain the ways in which societal communication principles/common-sense rules impinge on mass media structure, conventions and performances, as well as highlight the implications of non-convergence between societal communication principles and mass communication principles. These theories are relevant to this study because of the role they play in helping media practitioners, legal practitioners and publicists, and researchers to understand the relationship between media and society. It is expected that the right application of media, legal and ethical theories bring out the best from practitioners as well as enable researchers give the right interpretations to given phenomena, draw relevant conclusions, and proffer suggestions that move the society in which they operate forward.

4. The Quest for Professionalism

The practice of journalism in Nigeria as a country has come a long way. From the days of *Iwe Irohin* established by Reverend Henry Townsend with its maiden issue hitting the streets of Abeokuta on December 3, 1859 and *African Pilot* established by Dr Nnamdi Azikwe in 1937 to other stages of the evolutionary phases just before the emergence of the *Daily Times Nigeria*, the need for professional journalistic endeavours has remained a vital stage which the media in the country has aimed to attain. Galadima and Enighe (2000) wrote that before this time, there were no training institutions to help inculcate modern media techniques and skills to practicing journalists. Most of those who worked as journalists learnt on the trade and as a result lacked some of the requisite reportorial skills needed to carry out their functions effectively. Coupled with this is the fact that most media establishments in the country were owned or controlled by government, politicians or business men who were either after self-affirmation, the spread of their political ideologies through popular propaganda or to maximize profit. These factors made it difficult for media practitioners to carry out their functions professionally. As Fab-Ukozor (2013) noted, the legal and ethical obligation of meeting public’s interest and to still maximize profit in order to sustain the viability of the industry remained a great challenge that confronted media practitioners then. To this end, deliberate deception and sometimes over sensationalization of issues was the order of the day. This was a common practice that lasted up to the period of the first and second republics, during which period most journalists joined forces with politicians to either maintain the status quo or create confusion

in the system.

Because of these background factors and more, the problem of lack of credibility which characterised media practice in Nigeria from that period has continued to bedevil the system till now. This is so, even after the establishment of media training schools like the Nigeria Institute of Journalism (NIJ), which started as the Times Training School in the 1970s and the emergence of mass communication departments in many tertiary institutions in the country. The new approaches introduced by these training facilities are supposed to help in accentuating the need to strike a balance between the fulfilment of social responsibility obligations, compliance to legal regulations/ethical norms and profit maximization among media owners and practitioners.

However, this has not been the case. Instances where journalists trade conscience for cheap gain still hold sway. Despite the introduction of a code of conduct by the Nigeria Press Organisation (NPO) and the establishment of the Nigeria Press Council by the government through the Nigeria Media Council Decree of 1988, some journalists sometimes carry out their functions in a manner that tend to suggest that they do not want to be guided by proper professional and ethical conduct. Quoting Galadima and Enighe (2000), Fab-Ukozor (2013) noted that "...the present Nigeria Press Council (NPC) is made irrelevant by the journalists themselves." Government on its part sometimes contribute to the malady by insisting that things be done wrongly just because it favours them. As a result of the authoritarian manifestations inherited from the dark era of military junta, they wield their muscles on any journalist who would not comply. This has made professional journalism that is guided by sound legal, ethical and moral values to constantly elude Nigeria. For instance, several journalists have refused to be guided by their legal and ethical duties, to acknowledge and refrain from invasion of the citizens' right to their privacy or succumbing to pressures induced through brown envelopes (gratifications handed out to induce the tone or slant of their story) in the course of their duties.

Right to Privacy and the Law

Among many other legal, ethical and moral values embedded in professional journalism practice is respect to the right of privacy of an individual (Dorothy, 1979). At its core, this right seeks to ensure that individuals are allowed to enjoy secrecy to a certain degree. That is to say, that whatever an individual makes public should be seen as public, and whatever s/he regards as secret must as well be regarded as such by the public. The right to privacy seeks to protect the individual. According Cooley (1879), privacy is "the right to be left alone". Gavison (1980) asserted that privacy is "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." It also entails the right of an individual to have physical, psychological and emotional space for herself or himself in the society within the ambience of the law. However, since the media is the watchdog of the society, its role is to ensure disclosure to the public, information it deem newsworthy and/or important for the public's good about individuals, corporate bodies and government.

According to Juriscope (2004), the rationale for having the right to privacy is that an individual must be protected in respect of his purely private affairs; otherwise it may not be possible for the individual to develop his being to the best possible extent. It is to be noted that the right to privacy may be curbed by a law, which is reasonably justifiable in the interest of defence, public safety, public order, public morality or public health or for protecting the right and freedom of other persons. In other words, the state may pass a law for the above purposes and thus curb the right to privacy. But such a law has to be reasonably justifiable.

As noted earlier, there is no one definition to privacy, and this is not peculiar to Nigeria alone. From Europe to America, the deliberation on what really constitutes privacy and its violation has been a controversy. Be that as it may, we talk about the right to privacy in Nigeria because it is guaranteed in the constitution. Meaning that individuals or institutions who feel a breach to their right of privacy can seek redress in court. Privacy suits occur when an individual feels that he has been wrongly portrayed in the media, especially in a way that causes him emotional distress, humiliation, shame, suffering or anguish. The individual may be a public figure or he may be a private person who has generated public interest through his actions or his involvement in a tragedy or any other event or incident that is of human interest. (Nwauche, 2007; Kodilinye and Aluko, 2002; Mowoe, 2008; Gavison, 1980).

The law of privacy is a 19th century American development. Before 1890, no American court had recognised a right of privacy. In 1890, an article entitled "The Right of Privacy" by Samuel D. Warren and Louis Brandeis was published in the Harvard Law Review (Dorothy, 1979). Although there was little evidence to support their assertion, the two lawyers claimed inspiration for the article from gossip in the press about the social affairs of the wealthy Warren family. Warren and Brandeis (1890) argued that the growing excesses of the press required the courts to consider granting private individuals protection against the hounding media. In essence, "The Right to Privacy" attempted to establish a common law right of privacy using property rights, defamation, and breach of confidence as its basis. The authors argued that property owners should be allowed to apply the same right of protection of their houses and lands from trespass to the protection of their private lives" (Creech, 2003). However, the law of privacy is only limited to individuals. Corporate bodies or companies

cannot sue for invasion of privacy based on the assumptions that such corporate entities have impersonal entities without personal sensitivities that can be wounded.

Aspects of the Law of Privacy

Invasion of privacy is a multifaceted tort that is designed to redress a variety of grievances. These, according to Nwauche (2007) include the commercial exploitation of an individual's name or likeness, the intrusion on what might be called our private domains, the revelation of intimate information about someone, and the libel-like publication of embarrassing false information about a person. These four aspects of the law of privacy are summarily discussed as; appropriation, intrusion, publication of private (embarrassing) information about individuals, and false light below.

a. Appropriation

When a person's name, picture, photograph or likeness is used for commercial gain without permission, it is called appropriation. Illegal appropriation occurs when consent is not obtained before using someone's name, picture, or likeness to advertise a product, to accompany an article sold, or to add "luster" to a company name. Courts have held, however, that the incidental use of a person's name or picture in a book, film, magazine, or other medium is not an invasion of privacy. If a name or likeness is not published for commercial gain, it cannot be appropriation (Creech, 2003; Pember, 2003/04).

It should be noted, however, that stage names, pen names, pseudonyms and so forth function as real names in the eyes of the law. If the name of Nigerian comedy star 'Basket Mouth' is used in an advertisement without his permission, the suit cannot be defended on the basis that because Basket Mouth's real name is Bright Okpocha, his "name" was not appropriated illegally. Only the names of people are protected under appropriation. The names of businesses, corporations, schools and other "things" are not protected under the law. However, the unauthorised usage of a trade name like Babcock University or Coca-cola can create other serious legal problems. As Pember (2003/04) noted, a photograph, a painting, a sketch or anything that suggest to readers and viewers that the plaintiff is pictured, is a likeness. He went further to refer to federal courts in New York state rule that a sketch of a black man sitting in the corner of a boxing ring was, for purposes of an invasion-of-privacy suit, the "likeness" of former and late heavyweight champion Muhammad Ali. The boxer looked a little like Ali, and the sketch was accompanied by a verse that referred to the boxer as "the Greatest". Again citing *Negri v. Scering*, Creech (2003) noted the Supreme Court of New York's rule that "if a picture is a clear and identifiable likeness of a living person, he or she is entitled to recover damages suffered by reason of such use". Pember (2003/04) went further to outline examples of actions that can be regarded under appropriation as commercial use. They are:

1. Use of a person's name or photograph in an advertisement on television, on radio, in newspapers, in magazines, on posters, on billboards and so forth.
2. Display of a person's photograph in the window of photographer's shop to show potential customers the quality of work done by the studio.
3. A testimonial falsely suggesting that an individual eats the cereal or drives the automobile in question.
4. Use of an individual's name or likeness in a banner ad or some other commercial message on a web site.
5. The use of someone's likeness or identity in a commercial entertainment vehicle like a feature film, a television situation comedy or a novel.

The appropriation tort encompasses two legal causes of action. One is the right to privacy, and the other is the right of publicity. The difference between the two is small but important. The right to privacy protects an individual from the embarrassment and humiliation that can accrue when a name or picture is used without consent for advertising or trade purposes. The right to publicity on the other hand, protects individuals from the exploitation of their names or likeness for commercial purposes. In other words, someone is making money by using another individual's name and photo. The right to privacy protects a personal right; the right to be free from such humiliation or embarrassment. The right to publicity protects a proprietary right; the economic value in a name or likeness. While ordinary citizens can claim right to privacy, the famous can claim right to publicity. It is also important to note that the right to privacy dies with the death of an individual, but the right to publicity may live on. Only the living can claim that their right to privacy has been intruded upon. But if a famous person were to have heirs, the principle of descendibility will apply. That is, permission must be sought or payment for licensing must be made before the use of a name, picture or image of a late but famous person for commercial purposes. If this is not done, the heirs to the estate of the late public figures can sue.

b. Intrusion

Intrusion occurs when there is an encroachment, invasion, or trespass by an individual on the solitude, seclusion or personal affairs of another. Intrusion can either be physically or with the use of technological equipment or gadgets. "Examples of intrusion consist of unreasonable searches; eavesdropping on conversations; surveillance by cameras, telescopes, or other devices; telephone harassment; peering into windows; and wiretapping. To be considered intrusion, the act clearly must encompass prying into matters that are of no public concern, and such prying must be judged offensive by a reasonable person" (Creech, 2003; Nwauche, 2007).

Intrusion somehow is a bit different from the other three privacy tort categories in the sense that while intrusion involves the collection of data about someone; the other three involves the publication of information about an individual. In an intrusion case, such as the occurrence in India earlier cited, if the information has been gathered illegally, an intrusion has taken place. It does not really matter what the defendant does or did not do with the data. The legal wrong takes place when the material is gathered. Under appropriation, publication of private facts, and false light privacy, it is the publication of the data that creates the legal wrong. How the information has been gathered is generally immaterial to those causes of action (Pember 2003/04). An important concept worthy of note regarding the tort of intrusion is the phrase “reasonable expectation of privacy” (Nwauche, 2007). If an act of intrusion occurs when the plaintiff is deemed to expect that he has a reasonable expectation of privacy, then, an intrusion can be deemed to have occurred. However, if a person is in a public place or in a situation where the court does not regard him as having any reasonable expectation of privacy then, information gathered in those situations will be deemed legal and no intrusion would have occurred. For example if a man decides to abandon his bedroom to kiss or caress his wife in the market or another decides to bath naked openly by the riverside at noon, such people have absolutely abandoned their right of claim to privacy and therefore cannot complain of intrusion. In this light, intrusion can only sustained within the framework of reasonable expectation of privacy and no more.

Another vital concept related to intrusion is disclosure. As noted by Nwauche (2007), a defendant could be charged with intrusion or disclosure or both. In some instances the mere fact that people are acquainted with information is as important as the fact that the information is made known to others. In this regard, the information gathered by a peeping tom is often as distressing as when the peeping tom tells of his findings (Nwauche, 2007). Meaning that disclosure could be placed on the same footing as intrusion or an individual could be charged with both. Nwauche (2007) further stated that invasion of a home without permission, secretly watching a person in private quarters, eavesdropping, reading private documents, watching a person bath, taking unauthorized blood tests, and improperly interrogating a detainee are treated as intrusion irrespective of whatever led to such action, whoever is involved or whatever use the information thereby gathered is subjected to.

c. Publication of Private (embarrassing) Information about Individuals

The third privacy tort is the publication by the media of private, truthful, non-defamatory but embarrassing information about an individual. Creech (2003) writes that Sometimes an invasion of privacy case can be brought against the media for the publication of truthful, non-defamatory facts that are embarrassing to an identified individual. Generally these facts must be communicated to a widespread public, be private in nature (rather than newsworthy), and be highly offensive and objectionable to a reasonable person. The plaintiff in a private facts case carries the burden of proving each element. Failure to convince the court of any one of these three parts of the law means the lawsuit is doomed (Nwauche, 2007; Pember 2003/04).

c. i. Publicity

For a private fact case to be established, it is essential that the plaintiff shows that the ‘private’ information was communicated to a large number of people. When a story is published in the media, it is taken for granted that it has already been publicized and that a large group of people are now aware of the information.

c. ii. Private facts

A plaintiff in a private fact case will also have the burden of establishing that the information published about him are indeed private and they were not known to the public prior to that time. If a large segment of the public is already aware of supposedly intimate or personal information, it is not private (Pember 2003/04). Documents and files and indeed all pieces of information that are considered to form part of public record, like court files, health records, police files and others can be published by the media without fear of liability. So should the names of rape victims or those of individuals who are sexually assaulted be published? There is a lot of contention on this. But the media should be guided more by ethics than by legislation on such issues.

c. iii. Highly offensive legitimate public concern

After establishing that private facts about an individual have been publicised and to a large segment of the community, the plaintiff must also establish that the publication of the material is offensive to a reasonable person. It is the responsibility of the court, or better put, it is a court question to determine whether a material is offensive to a reasonable person or not.

d. False light

The false-light tort involves the publication of false information that is highly offensive to an ordinary person. False-light invasions of privacy are similar to libel, but the important distinction is that the false light is non-defamatory. Libel actions are instituted to protect persons’ reputations, that is, the way they are viewed by right thinking members of the society. False-light privacy actions stem from a person’s right to be left alone and is based on the way people view themselves. Emotional distress is often the basis for false-light privacy suits. According to Creech (2003), false-light invasions of privacy actually may embellish one’s reputation unlike libel.

Citing the case of *Messner v. Warren*, he noted that when an unauthorised biography of famous baseball pitcher Warren Spahn portrayed him as a war hero, Spahn was able to bring a successful suit in *Messner Inc. v. Warren E. Spahn*. Even though the material was flattering, the “gross misstatement of fact” portrayed the former pitcher in a false-light, thereby causing him emotional distress. False-light claims often result from dramatisations and fictional accounts of real-life incidents. Pember (2003/04) and Creech (2003) delineate three important elements in the false-light tort: The material is substantially false; the false statement or material is offensive to a reasonable person; the defendant who published the false material was at fault. Unless all these are proven beyond reasonable doubt, the case is likely to be thrown out.

5. Defense against Invasion of Privacy

The basic defenses against invasion of privacy suits are consent, newsworthiness, legitimate public interest and the use of public record. Once it has been established that an individual had given consent for an interview or the use of his name or picture, he can no longer sue for invasion of privacy. Consent can be clearly stated (by word of mouth or the signing of a document) or it can be implied. It is however worthy of note that consent does not always work as defense even if it was given by the plaintiff. Pember (2003/04) states three clear instances:

- i. Consent given today may not be valid in the distant future, especially if it is gratuitous oral consent.
- ii. Some persons cannot give consent. For example under age, psychologically deranged or drunken persons.
- iii. Consent to use the photograph of a person in an advertisement or on a poster cannot be used as defense if the photograph is materially altered or changed.

Newsworthiness is another strong defense in an invasion of privacy suit. If a story or event is newsworthy, the argument is likely to supersede that of embarrassing facts cases of invasion of privacy. Public interest can also be a defense against a privacy suit, likewise the use of public record. Information already in the public domain or in public records can be published by the media. When newsworthy private facts are part of the public record, suit cannot be sustained (Creech 2003).

6. Freedom and Responsibility, Accuracy and Fairness

Political and social changes all over the world have in the last few decades in a sense resulted in a bit more freedom for journalists and their media organisations. For those who seek to replace dictatorship with democracy, this newfound freedom has been a welcome change. In 2014 in Nigeria, the Freedom of Information Act (FIA) was signed into law by the then President Goodluck Jonathan. Although its implementation is more in principle than in practice yet, many believe that signing the bill into law is a huge step in the right direction which likely portends positive signs of good things to come. However, the reality of new responsibilities attached to this freedom somehow tempers the euphoria in the air. Social responsibility theory, a key theory in mass communication that emphasizes the responsibility and duties owed the society by practicing journalists tend to leave a huge moral burden on their shoulders. Many a time, most journalists carry out their functions as if to say that their professional duties and obligations are not entirely clear to them. This invariably means that media owners and professional associations must make vigorous attempts to ensure that legal regulations and professional ethics are drummed into the ears of practicing journalists as they go about their duties. Among the major legal and ethical issues in the balance between freedom and responsibility are right to privacy as has been extensively discussed, limits to sensationalism and objectivity of the journalist. These key issues should be debated every day in newsrooms across the country as it is around the world, and the challenges they present be analyzed so that what is at stake and ways that the media can act responsibly can be brought to the fore.

Closely related to freedom and responsibility are accuracy and fairness. According to the International Centre for Journalism (ICFJ Manual, 2009), “the first duty of every journalist is to seek truth and report it completely and fairly. This is a rigorous journalistic standard: the journalist must decide honestly and ethically whether the facts he or she has gathered amount to a fair and accurate picture of reality or, to the contrary, will mislead, distort and perhaps unfairly malign those about whom he or she reports”. These are sometimes the toughest judgments journalists must make. In Nigeria, the journalist might largely caught in a web he voluntarily walked into when he takes the job as so many media outlets with the widest circulation of publications are either government owned or floated and run by top politicians or individuals who hob nob with government. It becomes a daunting task to seek truth and report it completely and fairly. Unstated ethical considerations for the boss, owner holds sway. Those who chose the path of professionalism to report fairly have either been punished or compelled to walk the honor by quitting. The values of accuracy and fairness define the precise intersection where journalistic legal and ethical responsibilities meet the professional standards that guide a reporter’s day-to-day work. The range of issues as noted by the ICFJ manual includes judging the reliability of sources, confirming facts, use of deceptive methods, and decisions on deadline. These issues and more, constitute matters for another study, however, how practicing journalists handle them largely determines the kind of results they

are likely to come out with in the long run.

7. Conclusion

The right to privacy seeks to protect the individual. Nigeria as a country is believed, wants to protect this right for her citizens, this accounts for why the nation's constitution makes provision for the protection of this right even though its wordings appear scanty and not so comprehensive compared to other rights under the same constitution. Since the right to privacy forms a part of the fundamental human right as sought to be guarded by democracies all over the world, the time has come to unequivocally state that, right to privacy is not only in shambles in Nigeria, but it is time also for the government to rise to the challenge of ensuring the protection of this right for her citizens already guaranteed by the *grund norm*. Media practitioners must ensure that in the discharge of their duties of informing the public and acting as watchdogs, they do not intrude into the lives of the citizens. This could be done by imbuing highly professional, legal, ethical and moral values in the daily discharge of their duties. They must be socially responsible and fair in the discharge of duty.

Citizens need to rise beyond being spoon fed, must know their rights and how to seek redress when these rights are infringed upon. This is vital and can only be if education makes impact, as Nigerian do not just need to go school but must be educated in the real sense of the word – know the constitution and their rights and not be told.

Journalists on their part must know where to start and stop. Money or quest for wealth is not what defines life, some of the most successful journalists in the developed countries of the west are not necessarily rich. Even if they are, they may not necessarily have had wealth through illegal or unethical means. Conscience and forthrightness to duty as the needle is to the pole must be every journalist's credo.

The judicial system in the country must be strengthened. Institutional re-enforcements of the channels of law enforcement of the rights and duties flowing from the constitution and other laws should be improved. In Nigeria, individuals whose rights are sometimes breached do not go to court due to lack of confidence in the country's judicial system. Taking the rights of citizens seriously is one way of proving to the international community that Nigeria truly desires that the tenets of democratic values be preserved in the country's system of governance.

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