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THE RIGHT TO PRIVACY IN NIGERIA

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I. INTRODUCTION

This paper essays a synthesis of the principles that should inform the development of the right to privacy in Nigeria. 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." As the ensuing discussions show, this is one right which has not received much legal attention. At a superficial level, it may be tempting to conclude that Nigerians are not in need of privacy. This would not be correct because there are dicta showing at least, judicial concern for the privacy of peoples homes in the course of execution of anton piller orders. Moreover the inclusion of the right to private and family life in the Bill of Rights can be said to represent a conviction that this a right worth protecting for Nigerians. Furthermore 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) 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.

It may also be as a result of the fact the English common law even up till now- at least in a technical sense- does not have a comprehensive protection of privacy. Again whatever effect this may have had on the development of the common law tort of privacy, the fact that the 1979 Constitution introduced a right to privacy ought to have engineered the conceptual development of the right. Sadly this has not happened. Even though countries like South Africa maintain dual tracks of common law and constitutional protection of privacy, there seems no doubt, that in these such countries that the constitutional or statutory development of the right to privacy rode on the back of settled principles of the common law even if in addition it represents a source of tension given the supremacy of constitutional provisions.

In the next part of this paper I shall sketch the scope and basis of privacy protection and then discuss the existing legal protection of privacy in Nigeria in part three. In part four I review the possible protection of the right to privacy by the tort of breach of confidence and the tort of privacy and in part five I examine the constitutional protection of the right to privacy.

II. THE SCOPE AND BASIS OF PRIVACY PROTECTION

Privacy is a legal term that continues to generate considerable controversy. This may well be partly because it is a difficult concept to define. Even the 1999 Constitution does not define the term. 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.[1] Privacy has been defined as the right to be left alone.[2] Another definition is 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."[3] It is my belief that the lack of an acceptable definition is not fatal to the development of the law of privacy. What is critical is an understanding of the key issues in the concept of privacy.

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. 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.[4] 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, there are two possible philosophical basis for the protection of privacy. The first is the dignitary concept. This concept seeks to protect the personality of an individual because he is a human being. This is also the broader basis if human rights. Dignitary interests, on one hand recognise the individual 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 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 property can. The commercial interests underpinning the protection of privacy conceives 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.

The two interests are not mutually exclusive. In deed 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.

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1 See a number of definitions in R.Wacks (ed) *Privacy* (Aldershot 1993).

2 See Brandeis J in *Olmstead v United States* 277 US 438 478.

3 *Report of the Committee on Privacy and Related Matters* 1990 Cmnd. 1102, London: HMSO at 7.

4 " Privacy " 48 *California Law Review* 383, 389. This definition has been adopted by the *Restatement (Second) of Torts.* See also *Zacchini v Scipps-Howard Broadcasting Co* 433 US 562, 571-3.

III. THE CONTENT OF THE EXISTING PROTECTION OF PRIVACY IN NIGERIA

Is privacy important in Nigeria? The answer to the question is Yes. Because there are human beings in Nigeria. And there is a constitutional protection of this right.Yet as we noted above this is one right that has not received adequate protection or elaboration both in the definition, philosophical basis or the key issues in the concept of privacy. In deed what exists in case law is a concern that Anton Piller orders are an infringement of the right to privacy. Given the original jurisdiction of the Federal High Court over intellectual property cases[5] it is not surprising that in reviewing the execution of these *ex parte* orders[6] to enter defendants premises and collect evidence without notice, the court have expressed their concern that in the execution of the orders, the right to fair privacy should be respected. In *Sony Kahushiki Kaisha v Hahani & Co Ltd*[7] the Court in refusing the order wondered thus:

> " Can one say the use of a police to enforce an obligation is compatible with the defendant's fundamental rights when he had not had a hearing at all whether fair or unfair? It is common knowledge here in Nigeria that many business premises are also living accommodations, can intrusion on one's privacy without fair hearing be compatible with Section 34 of the 1979 Constitution"[8]

The nature of the Anton Piller order implicate the privacy of citizen's homes. The difficulty has been a conceptual one in the definition of this nature of privacy and it fundamental tenets. Of course we can surmise that all private homes cannot be searched by the State without the knowledge of the defendants. But this cannot be an absolute rule as the cases show. At present there is no indication of how this rule can apply in detail. For example, must the search be conducted after judicial sanction with an obligation to report the execution? It is true that Belgore J stated that in considering an Anton Piller order the court had to weigh the violation of fundamental rights against the financial loss the plaintiffs may sustain by following laid down procedures. Yet in this type of proceeding, the constitutional status of the fundamental human right will as a matter of principle trump- as it did in that case- the Anton Piller orders if there

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5 See section 251 of the 1999 Constitution

6 Anton Piller orders were formulated in the English case of *Anton Piller KG v Manufacturing Process Ltd* (1976) Ch 55. They were received and applied in Nigeria by the case of *Ferodo Bros v Unibros* (1980) FSR 489 and *Ferodo Bros v West Germany and Nigeria Trading Co Ltd* [1980] FHCLR 116. See also section 22 of the Copyright Act, Laws of the Federation of Nigeria 2004.

7 FHC/L/35/81.

8 See also *Rokana Industries v Maun* (1993) 243, 251 where the Court urged that in considering an Anton Piller the Courts must take due cognisance of all constitutional and statutory guarantee.

is no defined set of criteria for evaluating the claims of privacy and the search for evidence. A proper balance would be to seek to ensure that the order is executed in a manner that least invades the privacy of a person.

There are other statutory examples where the protection of privacy seems to be at the root of particular rules. For example section 164 of the Evidence Act protects the confidentiality of communication during marriage by providing that no husband or wife shall be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor shall he or she be permitted to disclose any such communication, unless the person who made it, or that person's representative consents, except in suits between married persons, or proceedings in which one married person is prosecuted for certain specified offenses.

The foregoing analysis indicates a weak protection of the right to privacy. So how should Nigeria proceed to a stronger regime? Should Nigeria seek to develop the civil protection of privacy or should it develop the constitutional right to privacy or should the two develop simultaneously. That is the focus of the next two sections. In the next section I consider the civil protection of the right to privacy by examining a number of factors that could assist in determining whether to use the tort of breach of confidence or the tort of privacy. In the section after that I look at the constitutional right to privacy.

IV. PROTECTING PRIVACY THROUGH THE TORT OF BREACH OF CONFIDENCE OR THE TORT OF PRIVACY

In this section I shall inquire as to the possible protection of privacy through the torts of breach of confidence and privacy. I shall consider a number of principles to determine whether the tort of breach of confidence adequately protects privacy or whether there is need for an overarching tort for privacy or for information privacy.

Given Nigeria's English colonial legal heritage, I shall dig deep into English common law because there is little Nigerian jurisprudence on the protection of privacy by the afore-mentioned torts. In an environment where it cannot be said with any certainty that English common law is regarded as binding by Nigerian courts or is of persuasive authority given the manner in which Nigerian courts weave seamlessly in and out of English law, it is plausible to argue that the present English law on the subject could be regarded as binding by Nigerian courts. In a technical sense however the Nigerian Legal system since 1963 when it declined the jurisdiction of the Privy Council coupled with the successive written constitutions wherein the Supreme Court of Nigeria is the highest court is a complete system and all references to English law can only be regarded as of a strong persuasive effect. There are many reasons why this should be so with respect to the development of a common law protection of a right to privacy in Nigeria. First, While English law could be of strong persuasive effect, our analysis will show that it is far from clear whether the tort of breach of confidence will continue to protect privacy or whether in accordance with the

Human Rights Act 1998 a tort of privacy will assume centre stage. Secondly the undeveloped nature of privacy protection in Nigeria may be a blessing in disguise as it could enable the synthesis of the content of the protection by reaching out to other legal traditions and legal systems in order to ensure that privacy receives adequate protection. Accordingly in this section while I primarily analyse English tort of breach of confidence in its protection of privacy. I also shall draw inspiration from other jurisdictions.

IV. I The Tort of Breach of Confidence and its Protection of the Right to Privacy

As I noted earlier, the tort of breach of confidence is used in England in protecting privacy. It is important to note that what breach of confidence protects is only information privacy. In *Wainwright v Home Office*[9], it was stated that there is no overarching cause of action for privacy in England. In *Campbell v MGN Ltd*[10] the House of Lords noted that various aspects of privacy protection were fast developing especially with the enactment of the Human Rights Act 1998[11] and that the "...courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence."[12] In *Campbell*, the protection offered to privacy by article 8 and freedom of expression by article 10[13] of the European Convention were made part of the requirements of the tort of breach of confidence. It is for this reason that we now turn to a consideration of the requirements for the tort of breach of confidence. These requirements were set out in *Coco v AN Clark (Engineers) Ltd*[14]

9 [2003] 3 WLR 1137. Hereafter *Wainwright*.

10 [2004]UKHL 22. Hereafter *Campbell*.

11 The 1988 Human Rights Act incorporated the European Convention on Human Rights into English Law. Article 8 of the Convention provides that 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.

12 Per Lord Nicholls [para. 13]

13 Article 10 of the European Convention provides that

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

14 [1969] RPC 41, 47.

" (1) the information must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be an unauthorised use or disclosure of that information to the detriment of the party communicating it."

What follows hereunder is a detailed consideration of some of the issues that arise from these requirements.

IV.I(a) *Information that is Offensive, Reasonable Expectation of Privacy or Personal Control over Information*

To determine information that has the necessary quality of confidence about is to ascertain the type of information that will be protected by the tort of breach of confidence. In this regard, will gossip, trivial matters or mere tittle-tattle be protected? Will information already known to the public lose the quality of confidence? Is prior consent a disqualifying factor? Is the form of the information for example photographs as distinguished from printed word of any effect? Is the test however better determined by reference to the phrase 'private life' a phrase that occurs in both article 8 of the European Convention on Human Rights and section 37 of the Nigerian Constitution? Accordingly if the courts were to determine what information would fall under the rubric of 'private life', would the fact that the information is personal play a role? Would the *determination* of the plaintiff to *keep and/or control* the personal information be decisive, turning on the actions of the plaintiff in furtherance of his autonomy?

One of the features of the addition of the rights to privacy and freedom of expression to the elements of the tort of breach of confidence can be found in the change in the underlying test for information that qualifies. The traditional requirement of qualifying information was determined by the test laid down in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[15] and applied by the Court of Appeal in *Campbell v MGN*[16] that the information that would be protected is such that its disclosure ' would be highly offensive to a reasonable person of ordinary sensibilities.'[17]In *Lenah*, the respondents sought to restrain the broadcasting of of a film about its operations at a bush tail possum factory essentially because of the slaughtering methods which wer through the stunning and killing of possums. In defining what facts can be regarded as private and what is public, Glesson CJ said:

" There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is neccesarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private

15 (2001) 185 ALR 1. Hereafter *Lenah*.

16 [2003] QB 633, 660 CA

17 The trial judge in *Campbell* applied the *Lenah* test.

property, it has such a measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person applying contemporary standards of morals and behavior, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."[18]

It is possible to discern two tests from this formulation. The first test is one of a reasonable expectation of privacy in which the information is obviously private. The other test is the 'highly offensive to a reasonable person'. In *Campbell* the majority of the House of Lords endorsed the 'reasonable expectation' test discernible in *Lenah*.[19] While Lord Nicholls adopted the 'reasonable expectation of privacy' test, [20] Lord Hope adopted the distinction in *Lenah* where the information is obviously private and where there is doubt. According to him ' The test which Glesson CJ has identified is useful in cases where there is room for doubt, ...the test is not needed where the information can be identified as private."[21] Continuing, Lord Hope said that: 'Where the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it will be highly offensive for it to be published.'[22] Baroness Hale on the other hand believes that " An objective reasonable expectation test is much simpler than the test sometimes quoted from the judgment of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats (Pty) Ltd...*'[23] Her Lordship further remarked on the *Lenah* test:

' It is apparent that the Chief Justice did not intend those last words to be the only test, particularly in respect of information which is obviously private, including information about health, personal relationships or finance. It is also apparent that he was referring to the sensibilities of a reasonable person placed in the situation of of the subject of the disclosure rather than the recipient.'[24]

The *Lenah* test has come under severe criticism. It was contended by Lord Nicholls in *Campbell* that the test imported a stricter test of private information and was more appropriate in proportionality issues.[25] Another criticism is that the test in no way reflected the values of article 8 of the European Convention as it did not define 'private life'. [26]The import of this is further considered below.

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18 [Para 41].
19 See also *A v B Plc* [2003] 195, 206.
20 Note 11 , [para 22]
21 [Para 94]
22 [Para 96].
23 [Para 135].
24 [Para 136]
25 [Para 22].
26 See Gavin Phillipson 'Transforming breach of confidence? Towards a common law right of

We shall now consider the facts of *Campbell* and how the House of Lords applied the reasonable expectation of privacy test to it. Naomi Campbell who is a celebrated fashion model sued the Mirror Newspaper for a story it carried: 'I am a drug addict'. This article was supported on one side by a picture of Miss Campbell as a glamorous model and on the other side by a slightly indistinct picture of a smiling relaxed Miss Campbell dressed in a baseball cap and jeans over the caption 'Therapy: Naomi outside meeting'. The article disclosed that she was attending a meeting of Narcotics Anonymous in order to beat her addiction to drinks and drugs. The story continued inside, with a longer article spread across two pages with a headline "Naomi's trying to beat the demons that have been haunting her'. In the middle of the double spread were other pictures of Miss Campbell the dominant one showing her in the street on the doorstep of a building as the central figure in a small group. It is acknowledged that the central tone of the articles were sympathetic and supportive. On the day the articles appeared, Miss Campbell commenced proceedings against MGN Ltd publishers of the 'Mirror' Newspapers. The response of the newspapers were to publish further articles highly critical of Miss Campbell. Miss Campbell claimed damages for breach of confidence and compensation under the Data Protection Act. Morland J[27] upheld the claim and made a modest award to her plus damages for aggravated damages. The newspaper appealed and the Court of Appeal allowed the appeal and discharged the order.[28] Miss Campbell then brought an appeal before the Lords. The House of Lords allowed the appeal by a majority of three to two. It was comon ground that a catergorisation of the information published by the newspaper can be made into five groups: (i) the fact of Miss Campbell's addiction; (ii) the fact she was receiving treatment; (ii) the fact she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment and (v) visual portrayal of her leaving a specific meeting with other addicts.[29]
Lord Nicholls in refusing the appeal stated that it was agreed that protection for category (1) &(2) would not be available because Miss Campbell in talking to the press previously had stated that unlike many fashion models she did not take drugs. Accordingly her lies precluded her from any protection because ' by repeatedly making these assertions in pubic Miss Campbell could no longer have a reasonable expectation that this aspect of her life would be private...where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press would normally be entitled to put the records straight'.[30] For categories 3-5, his Lordship applying the reasonable expectation of privacy test felt that since Miss Campbell had put her addiction and treatment in the public domain, she could not reasonable expect information on her attendance to retain its private character. He regarded the information on

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privacy under the Human Rights Act" 66 *MLR* 726, 734. Hereafter *Phillipson.*

27 [2002] EWHC 499 (QB).

28 [2002] ECWA Civ 1373 633 (QB).

29 [Para 23].

30 [Para 24}.

attendance as merely of an 'unremarkable and consequential nature.'[31]
Lord Hope, Baroness Hale and Lord Carswell who upheld the appeal, applied the reasonable expectation of privacy test as seen above but disagreed with Lord Nicholls in its outcome. Their Lordships believed that the disclosure of the details of the treatment was not private as it could not have been reasonably expected by Miss Campbell because the nature of the treatment at Narcotics Anonymous had privacy at its heart. Disclosure of the meetings was a breach of confidence and robbed the treatment of anonymity which was essential if the therapy was to continue. The Law Lords equated details of treatment by Narcotics Anonymous as equal to details of treatment of a clinical nature,[32] which they regarded without doubt a private matter.[33] Furthermore in determining the disclosures a person of ordinary sensibilities would regard as offensive according to the *Lenah* test, Lord Hope was careful to point out that in the circumstances of *Campbell* the relevant person is ' ...a reasonable person in need of that treatment.'[34] and not as the Court of Appeal in that case, noted a reasonable person of ordinary sensibilities.
The fact that the same test of reasonable expectation of privacy has led to two different outcomes illustrates the difficulty if not the futility of such a test. Perhaps it is vague as it does not yield to easy determination. In any case the fact that Lord Hope has further narrowed the test to the person against whom the disclosure is made seems to rob the test as to its objectivity. It seems now highly subjective. If the reasonable man is in the person of the circumstances of the plaintiff, then it is difficult to find the objectivity. The direction seems now to point to the individual. When this direction is read alongside Lord Hoffman's view as to the new direction consequent on the Human Rights Act, it may be plausible that in the very near future an entirely different basis for the tort of breach of confidence may well be found. In our opinion, that new basis lies in the control over personal information which should define what is private information of not. A good example of where this fact lies at the centre of privacy protection is South Africa. Neethling et al[35] define privacy in South Africa as a condition in which "An individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy."
The use of a person's control over his or personal information as a determining criteria is attractive because it is a clearer test as is evident if it is applied to other circumstances that present a problem in determining if information concerning

31 [Para 26].

32 See for example, Lord Hope [Para 95].

33 See *Lenah*, note 15.

34 [Para 98].

35 See J. Neethling, J.M Potgeiter P.J Visser Neethling's *Law of Personality* (Butterworths Durban 1996) 36. This definition was adopted by Harms JA in *National Media Limited ao v Jooste* 1996 (3) SA 262 (A) 271.

them is private or public. A good example is when an activity occurs in public. The fact that an activity occurs in public may rob the information of the confidentiality to qualify it as private information. English case law indicates that the fact that some limited number of persons were acquainted with the information does not rob the information of its confidentiality[36] turning the answer to a matter of degree. It is true that in *Campbell* for example, the fact that a limited number of persons knew of the attendance of Miss Campbell at the Narcotics Anonymous was not a factor that featured in the determination of the confidentiality of the information. However if control of personal information was a criteria, the relevant question would have been whether Miss Campbell sought to ensure that the details of her attendance at the Narcotics Anonymous meetings were personal. The inquiry would not be be one of a degree which is inherently arbitrary.[37]

In regarding questions 1 and 2 in *Campbell* as not being private information, the Lords were careful to state that prior declarations made by Miss Campbell about her drug status entitled the press to put the records straight. Like Miss Campbell many public figures seek publicity in a variety of ways. The question is whether such public figures waive their rights to any information about them being private. This waiver could be general or specific. In *Woodward v Hutchings*[38] Bridge L.J said:

> “those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.”[39]

In this regard, the person courting publicity loses all privacy and all relevant information lie in the public domain. *Woodward* seems to support this position.

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36 See the cases of *A.G v Guardian Newspapers Ltd (No.2)* [1990] AC 109, 260; *B V H Bauer Publishing Ltd* [2002] EMLR 8 [Para 6]; *Mills v Mills* [2001] EMLR 41 (hereafter *Mills*)[Para 25]: 'The fact that the information is known to a limited number of members of the public does not of itself prevent it having and retaining the character of confidentiality, or even that it had previously been widely available. Compare *Theakston v MGN* [2002] EMLR 22 (hereafter *Theakston*) where the court doubted whether information relating to encounters with prostitutes in a brothel could still be private since the prostitutes and other clients of the brothel were aware of the information.; In *Peck v UK* [2003] ECHR 44 the European Court of Human Rights held that a footage of the applicant caught on Council CCTV and rebroadcast to the public breached the applicants right of privacy even though the UK Government argued that the information was already in the public domain.

37 Commenting on dicta of the trial judge in *Douglas v Hello* [2003] EWHC 786 (Ch), *Phillipson*, note 26, p. 738 said: 'Rather than simply counting heads and deciding at some inevitably arbitrary point that attendance of 100 guests at an occasion does not destroy its confidentiality but that 1000 does, the judge asks whether, regardless of numbers, there is a sense in which the subjects of the occasion sought to exert control and thus choice over who could observe the occasion. If there is , as with the Douglas wedding, the the occasion may be termed confidential; if, however, the subject allow indiscriminate observation of the occasion, it may not.'

38 [1977] WLR 760. Hereafter *Woodward*.

39 At p. 765. See also *Lennon v News Group Newspapers* [1978] FSR 573.

Another possibility is that the loss of privacy is confined to the broad area in which publicity is sought. Yet another scenario is one where publicity is confined strictly to the issues for which publicity is sought. In some ways, this distinction is more real than imagined. In *Campbell* the minority opinions dwelt on the fact that since Miss Campbell's drug status was declared by her, the details of her treatment constituted what could no longer be private. To them it was too much to distinguish between the fact of the drug addiction and its treatment. Such is the dilemma in this area. However it can be stated that the majority in *Campbell* have approved the view that only the issues called in question by the party seeking publicity are relevant and the press rebuttal of the issue were cognisable under the public interest defence.[40] This is commendable and illustrates the fact of control over personal information. In this way every allegation of courting publicity must be scrutinsed on its merits to determine whether the applicant had courted publicity that robs subsequent information of its privacy.

Is it plausible to assert that some types of information may receive better protection than others? For example will photographs be regarded as expressing more information than ordinary text? Furthermore does it matter if the photograph is taken in a public place with the applicant who is a public figure it. The concurrence of opinion in *Campbell* is that there is no infringement in the mere taking of taking of photographs, even if covertly including that of public figures and celebrities. In addition public figures such as Miss Campbell lose any capacity to complain about photographs taken in public. It is a feature of modern living.[41] There was unanimity on the fact that it was the publication of the photograph that was actionable. Lord Hoffman held that it must be a widespread publication which reveals the person to be in a situation of humiliation or severe embarrassment. Citing *Hellewell v Chief Constable Derbyshire*, [42] he also held that the widespread publication of a photograph taken by intrusion into a private place may in itself be such an infringement even if there is nothing embarrassing about the picture. Intrusion here obviously means without consent. Reading the two statements together it may be said that the public nature of the environment destroys any privacy that may be claimed until the issue of embarrassment or humiliation occurs. So long as there is none of this, photographs taken in public places cannot constitute confidential information and everybody loses any sense of privacy in the public. Lord Hope agrees that the publication must be offensive.[43] In determining this state, he seemed to imply that the *manner* in which the picture was taken is important. It must not be surreptitious. In addition the pictures must not be deliberate and the applicant must not be its

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40 See *Mills*, note 36, [para 34].

41 See Gleeson J in *Lenah* para 41: ' Part of the price we pay for living in an organsied society is that we are exposed to observation in a variety of ways by other people'. See also *Hosking v Runting* [2003] 3 NZLR 385, 415. Hereafter *Hosking*.

42 [1985] 1 WLR 804, 807.

43 He approved the views of Gault and Blanchard JJ of the Court of Appeal in *Hosking,* note 41 [para 165].

main focus. If they ' were taken deliberately, in secret and with a view to publication.'[44] with a text, then the information contained therein remains private. Part of the deliberate intent constituted the fact that a zoom lens was focused on the doorway and the faces of other persons were distorted to hide their identity. For Baroness Hale, the fact that the photograph accompanied the text was decisive as it contributed to the distress Miss Campbell felt and potentially could affect her treatment as she could keep away. In sum therefore it can be said that the nature of the information contained in the photograph is decisive in determining whether a picture in a public place is private information or not. It is somewhat surprising that a distinction is made by Lord Hoffman of pictures taken in private places. This fact illustrates the personal control over the information obtained. To deny pictures taken in public of this control is to deny the autonomy of individuals that may be at the heart of privacy protection. Having said that I do not lose sight of the immense public interest defence discussed below that may characterise any publication of pictures of public figures taken in public places.

IV.I(b) *Obligation of Confidence*

As noted above one of the key requirements of the tort of breach of confidence is the requirement that the information must have been disclosed in circumstances that import an obligation of confidentiality. It is the breach of this confidence by publication to others that courts of equity sought to prevent based on its being unconscionable.[45] This meant that some relationship must exist between the parties, a good example being when there is an express agreement of confidentiality or that imposed by the law as for example in the instances of fiduciary relationships.[46] The law has gone further to infer an obligation of confidentiality even when the parties do not know each other if by conduct there is notice that some confidentiality exists. Examples in this regard include preventing the use of a photograph taken clandestinely on a film set; [47] information obtained by wire tap[48] and use of a photograph of an album cover design taken clandestinely on the set.[49] In this category would fall *Douglas* where elaborate security arrangements were made to keep uninvited persons out of the wedding ceremony.

English courts seem to have gone outside this group to impose obligations of confidentiality when no relationship exists between the parties and there are no conditions in which an obligation of confidentiality may be inferred. This may be described as a constructive obligation of confidentiality. Three cases illustrate

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44 Para 123.

45 See *Stephens v Avery* [1988] Ch 449.

46 See for example *W v Edgell* [1990] Ch 59; *Attorney General v Guardian Newspapers* [1987]1 WLR 1248; *Duke of Argyll v Duchess v Argyll* [1967] 1 Ch 302

47 See for example *Shelley Films v Rex Features Limited* [1994] EMLR 134;

48 See *Francome v Mirror Group of Newspapers* [1984] 1 WLR 892.

49 See *Creation Records Ltd v News Groups Newspapers Ltd* [1997]EMLR 444.

this point. The first is *Venables v News Group of Newspapers*[50] the court granted an injunction against the world forbidding any media outlet disclosing the names of two juvenile killers. Phillipson concludes correctly that what gave rise to the obligation here is the nature of the information itself.[51] In this case it was the fact that the information was likely to lead to an intrusion into private life including breach of the juveniles right to life. The circumstances in which the information was obtained did not play any role. It was the nature of the information that was critical in the sense that its potential effect was evident. In *A v B Plc* the English Court of Appeal stated as follows:

" The need for the existence of a confidential relationship should not give rise to problems as to the law... A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.[52]

In *Campbell*, this constructive obligation of confidentiality was imposed on the photographs taken of Miss Campbell leaving the Narcotics Anonymous meeting. It is clear that even without any discussion, the Lords imposed an obligation of confidentiality on the photographer based on the *nature* of photographs that were taken even if they differed in their interpretation of what this meant. The fact is that it was assumed and that is important. The traditional definition of breach of confidence relied on a relationship. The law inferred it in addition to recognising it when it is express. If it can be constructed even when no sort of relationship exists between the parties, then a key part of the traditional requirements of the tort of breach of confidence is done away with. The result could mean two things. One is that the tort has expanded into a newer variety with privacy as a value in a wider sense as Lord Nicholls [53] and Lord Hoffman[54] recognise or as Phillipson concludes, it has transformed into a tort of privacy. Attractive as transformation is *Campbell* did not go that far. It was only Lord Hoffman of the two judges in the minority that seemed to point to the substance of transformation as the way for the future even though he shied away from pronouncing it preferring to frame the implications that the developments brought by the Human Rights Acts would bring: 'They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication is justified. '[55] What is important however in what rightly can considered as obiter is the graphic manner in which he describes the new tort of breach of confidence. In many ways he was describing the tort of privacy:

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50 [2001] 1 All ER 908.

51 Note 26, p. 745.

52 Note 19, 551.

53 [Para 18}

54 Para 51.

55 Para 52.

> " What human rights law has done is to identify private information as something worth protecting as an aspect of autonomy and dignity...As Sedley LJ observed in a perceptive passage in *Douglas v Hello! Ltd* [2001] QB 967, 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity- the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."[56]

No matter how laudable Lord Hoffman's opinion is, the fact is that the majority of the House of Lords prefer the reasonable expectation of privacy test.[57]

IV.I(c) *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. It is therefore important that intrusion is protected on the same footing as disclosure. One of the fundamental obstacles in transforming a tort of breach of confidence into a privacy tort is to expressly recognise intrusion. Thus even if Lord Hoffmann in *Campbell* all but in name had recognised the foundations of the tort of privacy, it is clear from his analysis that new breach of confidence was still deficient in this regard as it does not regard intrusion as actionable. This is not surprising as there is case law in this respect. In *Wainwright* a mother and son who went to see a relative in prison were strip searched. The House of Lords held that there was no breach of privacy. The crucial point seems to be that there was no publication of the facts gathered by the search. The search itself acquainted the prison authorities with information. It was an intrusion into their privacy which was not yet actionable. And it still is not. Speaking about the scope of the tort of breach of confidence, Baroness Hale in *Campbell* states that: ' Clearly outside its scope is the sort of intrusion into what is private which took place in Wainwright.'[58] The fact however remains that dicta in *Campbell*[59] about other forms on privacy may well mean that the matter is still open.

The question of control over personal information brings to the fore a distinction between intrusion and disclosure of information. As we will see later, breach of

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56 Paras 50-51. Sedley LJ in Douglas v Hello! Ltd

57 This is also the test adopted by the New Zealand High Court in *Hosking,* note 41.

58 [Para 134]

59 Lord Nicholls at para 15 said: " An individual's privacy can be invaded in ways not involving the publication of information. Strip searches are are an example. The extent to which the common law as developed thus far in this country protects other forms of invasions of privacy is not a matter in the present case."

confidentiality thrives on disclosure. How else can the confidence be breached if a third party does not know of the information. On the other hand informational privacy depends on individual autonomy and in addition to disclosure must deal with intrusion which is contact with information. Sedley J in *Douglas and Zeta Jones v Hello!*[60] said:

> "What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

One possible consequence of a finding of a constructive obligation of confidentiality especially evident in *Venables* is the fact that the nature of information may be salient in determining breach of confidence.
Another consequence of a recognition of intrusion can be seen in the manner in which South African courts deal with the question of information gathered in a public place, even if a public figure is concerned. In South Africa privacy is a personality right protected by the law of delict (tort).[61] As noted above, privacy is defined by Neethling *et al* as

> "An individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy."62

Privacy is concerned with personal information of an individual in a state of total or limited exclusion to other members of the society. The determination of what is private is at the instance of the individual. It is at his discretion to determine facts are private and otherwise. Accordingly there must be a conscious desire to keep the facts private. Thus privacy is concerned with intrusion and disclosure. This is a protection much wider than that offered by the tort of breach of confidence, which as we have seen only protects disclosure. Since the basis of the protection of privacy in countries like South Africa is entirely based on dignitary interests it is the inherent dignity of an individual that is at stake. That dignity is affronted in the same degree and manner when people come into contact with information about another person as when they disclose that information. In South Africa examples of intrusion that have been found actionable include the

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60 [2001]QB 967, 1011 [para 126]. Hereafter *Douglas.*

61 Privacy is also protected as a constitutional right. Section 14 of the South African Constitution provides that "Everyone has the right to privacy which includes the right not to have (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (c) the privacy of their communication infringed. We shall return to this point in the next section.

62 See note 35.

following: invasion of a home without permission;[63] secretly watching a person in private quarters;[64] eavesdropping;[65] reading private documents;[66] watching a person bath;[67] taking unauthorised blood tests[68] and improperly interrogating a detainee.[69] Accordingly *Wainwright* would have been actionable if it were decided in South Africa.

In ending this section, it may be important to draw attention to the fact that in addition to recognising intrusion as an integral part of privacy, *there is need to device a means to deal with the nature of information obtained by acquaintance that will be actionable*. In other words, an appropriate question can be framed thus: is it every information that will be actionable?. Will trivial matters, tittle tattle, gossip etc suffice. One possibility is to turn to an objective standard that assess whether the information gathered accords with the values of a society. The analysis would proceed thus. The first line of inquiry is to determine whether the facts were obtained contrary to the determination of the individual and then proceed to determine whether the values of society regard those facts as being in the public domain. If they are regarded as being in the public domain, the action will not succeed. The advantage of this position stems from the fact that it ensures that people of extra ordinary sensibilities are not the yard stick for protection. I acknowledge the difficulty of discerning what society considers as normal and it certainly will vary from society to society. What may be approved by a Nigerian society must be unique to it. It is submitted a beginning point could be the provisions of the Bill of Rights contained in the 1999 Constitution. In addition, trivial matters may not be recognised as consisting private information.

It may well be that it is the fear of the scope that intrusion will add to the tort of breach of confidence that continues to remain a conceptual block to the transformation of the tort of breach of confidence into a privacy tort. What may be necessary nay be to evolve a test by which not all facts obtained by intrusion are private.

IV. I(d) *Can the Tort of Breach of Confidence Protect the Right of a Famous and Public Figure to Profit from Confidential Information*

Directly flowing from the notion of personal determination of the facts that can remain private or otherwise is the capacity to make money from such an activity. It does seem a matter of course for this to happen. The critical point is when this involves celebrities who decide to make money from the information which

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63 See *S v I* 1976 (1) SA 781 (RAD).

64 See *R v Holliday* 1927 CPD; *R v R* 1954 (2) SA 134.

65 See *Financial Mail Pty Ltd v Sage Holdings (Pty) Ltd* 1993 (2) SA 451 (A).

66 *Reid-Daly v Hickman* 1981 (2) SA 315.

67 *R v Schoonberg* 1926 OPD 247.

68 *C v Minister of Correctional Services* 1996 (4) SA 292 (T)

69 *Gosschalk v Rossouw* 1966 (2) SA 476 (C).

because of their status would be considered valuable. A further controversial issue is whether this information becomes property which can be assigned, bequeathed and outlive the famous person. These questions were considered inn *Douglas and Others v Hello& Others Ltd*[70] The trial judge in that case held that the law of confidence protects those whose private life is a valuable commodity and who seek to manage publicity about it. What the law does is to 'treat information about a celebrity's life as a trade secret and grants an injunction against publication of such information, or damages in respect of it, not because of the distress which the invasion of privacy causes but because of the commercial damage caused by infringing the celebrity's monopoly right to make such information public.'[71]
The Court of Appeal considered whether the law of confidence protects the Douglases' commercial interest in information about their wedding. After acknowledging that there was: '... no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret,'[72] The court conceptualised what it rightly considered to be a new ground thus: ' The question raised by this appeal is the extent to which similar protection will be afforded to other types of valuable information which is acquired, not by breach of a confidential relationship, but by some form of unauthorised intrusion into a situation of privacy.'[73]

The Court concluded that:

" Where an individual ('the owner') has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner.[74]

With respect to the question as to whether this information amounts to intellectual property, the Court of Appeal answered in the negative: " We have concluded that confidential or private information, which is capable of commercial exploitation but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred".[75]
The reason is that in this case what the Douglasses granted to OK! Was no more than an exclusive licence. The court arrived at this position after analysing the contract. This may seem to imply that the decision that the information may

70 [2005] ECWA Civ 595. (CA). Hereafter Douglas IV.
71 Para 112
72 Para 113.
73 Para 114.
74 Para 118
75 Para 119

constitute property lies in the intention of the parties. Meaning that in appropriate circumstances property could be created. This interpretation is definitely at odds with the categorical statement of the Court that information protected by the tort of breach of confidence can not amount to property. The court was at pains to point out what it was faced with determining was equivalent of the tort of publicity in German Law and the image right found in article 9 of the French Code Civil. It is also found in the Untied States.

IV. I(e) *The Tort of Breach of Confidence and the Balancing of the Right to Privacy and the Right to Freedom of Expression*

We saw earlier that the new tort of breach of confidence especially as it is under girded by publication implicates the right to privacy which it protects and the freedom of expression which more often than not is called in as a justification especially in the cases involving the media. It must be understood that the unique English approach in this area stems from its obligations to give effect to European Convention rights. It is arguable that for such a tort that is inchoate in Nigeria, which has a written Constitution, there is not much utility in considering the process of balancing the right to privacy and the freedom of expression. Will a tort be complete unless such balancing takes place. It may well be since for example there are defences to a finding of breach of privacy which as we shall see later include public interest which may well contemplate the freedom of expression which the press must have if they are to become a watch dog. I submit that nothing stops proceedings about the tort of breach of confidence or privacy being required to consider a defence of freedom of expression. It may be instructive to examine how English and other courts have proceeded in the process of balancing. In *In re S (A Child)*[76] Lord Steyn said that four principles emerged from the opinions in *Campbell* arising out of the interplay between articles 8 and 10:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

A more detailed examination of these factors is called for to deepen the understanding of what is an obviously a difficult exercise. The first factor is axiomatic. It is one of the hallowed foundations of human rights jurisprudence that no right is inherently superior to the other. What is involved in the second factor is an examination of the nature of the particular right must be characterised. With respect to freedom of expression, a difference is identified between political speech at the top of the hierarchy of information, followed by intellectual and educational speech, and then by artistic speech and the last

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76 [2004] UKHL 47; [2005] 1 AC 593 [Para 17].

would be commercial speech.[77] The more important the expression determines the weight to be given to its protection. With respect to the right to privacy, it is also acknowledged that there are different types of privacy and that the key question is the potential of the disclosure of the information to cause harm. For example Lord Hope in *Campbell* was moved by the fact that the disclosure of Miss Campbell's details of treatment since it related to her health had the potential of causing her harm and therefore a good deal of weight was to be given to this factor. The third point relate to the justifications for interference. In *Campbell* the newspaper claimed that the photographs for example was to give credibility to its story and the fact that it retained a margin of appreciation as to how to tell the story. Lord Hoffman believed that it was necessary to allow the press in furtherance with its freedom of expression to determine how to tell its story which justified the use of the photograph.[78] Lord Hope and Baroness Hale on the other hand considered that looking at the text alone, the balance between the two comparative rights were even and that it was the photograph that titled the balance to the protection of privacy.[79] In his opinion the photographs were not necessary to tell the story. The fourth factor can be likened to a sum of all the three previous factors and is specific to the circumstances of the case. *In Re S*[80] (a child) is an example of a combination of these factors in a proportionate manner. This case involved an application by a child whose mother was standing trial for the murder of his brother that the identity of the mother and brother should not be disclosed because it would infringe his right to private life. Arrayed against this claim was the freedom of expression which allowed the press to report fully on criminal trials and the utility this has in strengthening the confidence of the public in the administration of justice. In assessing the relative weight to be given to the claim, Lord Steyn who delivered the unanimous opinion that dismissed the appeal against a majority judgment of Court of Appeal affirming a trial court's decision to remove an earlier order prohibiting the identification of the child, noted that the child was not directly involved in the trial and that being affected indirectly because he was not an accused person, his interest did not outweigh the freedom of the press to report proceedings in a criminal trial. Assessing the utility of factors in the balancing of the two rights, it is important to heed Lord Carswell's caution in *Campbell* that: '... weighing and balancing these factors is a process which may well lead different people to different conclusions...'[81]

It is instructive to note that Nigeria also protects privacy as human right and that questions of balancing of rights seem more appropriate in the next section. In that section we shall examine how Nigeria's constitutional jurisprudence

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77 This classification is the one made by Baroness Hale, [Para 148]. Lord Hope adopted the classification of Clayton and Tomilson, *The Law of Human Rights* (2000), para 15.162: political expression, artistic expression and commercial expression, in that oder of importance.

78 [Para 77]

79 Lord Hope [Paras 121-122]; Baroness Hale [paras 155-156].

80 [2004] *UKHL* 47.

81 Para 168.

balances rights and also draw inspiration from the principles of constitutional protection of privacy in South Africa especially in the manner in which it balances the right to privacy with other rights.

IV. I(f) *Defences and Remedies*

Public Interest: This is one of the principal defences to an action for breach of privacy. What constitutes public interest in Nigeria would include issues concerning the government of the day[82] as well as its leaders and politicians of all levels.[83] To some extent the limitations contained in section 45(1) of the 1999 Constitution that is " defence, public safety, public order, public morality or public health' seem to qualify as public interest. With respect to public morality, Nigerian courts[84] believe that Nigerian courts have a duty to inform the general public of the level of public morals in our society especially public morals relating to such matters as sex, property, buisness, probity, fraud indolence or devotion to duty.
Other defences: This would include consent, necessity, fair comment,[85] absolute and qualified privilege.

IV. II Whither the Tort of Privacy in Nigeria

I am of the firm opinion that a comprehensive protection of information privacy can be achieved through a tort of privacy that protects against intrusion well as disclosure as discussed above. In this way the dignity of the individual will be well protected. A tort of privacy is important as it assists the development of a constitutional right to privacy which we shall now turn to discuss.

V. THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO PRIVACY

In this section we shall consider the constitutional protection of privacy. We noted above that section 37 of the 1999 Constitution protects the right to privacy thus: " The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected." It is however important to point out that the constitutional scheme for rights protection assumes a two pronged inquiry in the consideration of an alleged infringement of rights. The first line of inquiry is to determine whether a

82 See *Adikwu v National Assembly* (1982) 3 NCLR 394. See also *Nigerian Textile Mills v Punch* Unreported suit No ID/768/84 of 13th June 1986. (The press has a social obligation and duty to write on public issues that would affect the economy of the country).

83 See *Tarka v Sketch* (1978) CCHCJ 263 (The issue of corruption by a public officer is a matter of public concern).

84 See for example *Sobayo v Daily Times* (1977) 4 OYSHC (Pt.1) p. 19.

85 See *Tarka v Sketch*, note 83.

particular right has been infringed. The second line of inquiry is to thereafter undertake a limitation analysis in the context of section 45 of the 1999 Constitution, as to whether there is justification of the alleged infringement. This manner of inquiry assumes the social dimension of rights and that rights are not absolute.

V.I- Elements of the Constitutional Right to Privacy

As we saw earlier the Constitution does not define what the term privacy means. A textual consideration of section 37 can yield a number of interpretations. On one level it could be argued that there is a general and specific right to privacy in the section. Accordingly the use of the word 'the privacy of citizens' constitutes the general right in this section. Thus the use of the words ' ..their homes, correspondence, telephone conversations and telegraphic communications...' are the specific enumeration of the aforesaid general right. Even if this interpretation is correct it in no way answers a deeper and perhaps more fundamental question as to what is meant by a citizen's privacy. The answer to this question can in addition be found by staring from the premise of our consideration in the previous section of the protection of privacy through either the tort of breach of confidence and the tort of privacy. In either case, the key point is that what the two torts protect is information. Informational privacy as a defining feature would then contextualise homes correspondence telephone conversations and telegraphic communications. On the other hand the nature of interests that these specific words connote is predominantly that of information. Even though 'homes' could be ambiguous, 'correspondence, telephone conversations and telegraphic communications' clearly refer to information. In sum therefore a good starting point would be that privacy relates to information about a citizen. Since no reference is made to the manner in which the information is obtained, the Constitution concentrates on the information and therefore the acquaintance and public disclosure of the information is actionable. Accordingly it makes no difference that a person only listened to a telephone conversation and did not publicise it to the public.

The use of the word '*home*' in section 37 could be interpreted to mean that the privacy that is contemplated is well beyond information. It is possible that it is privacy that deals with an individual's autonomy that is also protected. Thus while information about a person's home will certainly qualify, the word home could also refer to a condition where an individual is not harrassed, and the manner in which he lives in his *home* is not interfered with. Under this rubric would fall his personal life, his sexual life and other aspects of his family life. A sense that this could be plausible is found in the belief that *ex parte* orders such as anton piller orders breach the right to privacy. It is true that infringement could hinge on the object of the search which is the evidence contained in the premise. It seems more valid that infringement here is contemplated with respect to the disturbance, harassment and interference with the manner in which the individual lives in his home. In this case privacy clearly equates with being left

alone.

In some jurisdiction, these autonomy based privacy protection has found considerable judicial endorsement. A good example is South Africa. Pursuant to section 14 of the South African Constitution, the South African Constitutional Court in some instances sought to protect the ability of South Africans to make decisions about their family home and sexual life. These decisions include the practice of sodomy[86] and the possession of pornography.[87] In *Pretorius v Minister of Correctional Services*[88] a prisoner was successful in his claim that he should not be disturbed by radio broadcasts which he does not like. In a deeply religious country such as Nigeria such an interpretation of the reach of privacy is bound to invite significant controversy. Some of the manifestations of an autonomy driven privacy protection has religious and criminal connotations. Many of the acts which can be validated with this approach constitute either religious affronts or crimes. Examples are the acts of sodomy which is a criminal offence[89] under the Criminal Code and the Sharia Penal Code.[90] There is even now a Bill before the National Assembly to criminalise same sex marriages.[91] Our understanding of this type of privacy would pit the constitutional protection against these municipal laws. Except these laws are justified by section 45- an analysis of which is conducted hereafter- these laws breach the provisions of section 37.

Does the right to privacy contemplate what has been termed the right to publicity in the United States? In this regard, well known persons are protected by the conferment of a property like right to enable them prevent unauthorised use of their name, likeness and/or picture.[92] As argued above, there is no basis for such protection in Nigeria. For a country battling with the basic protection of privacy, it certainly will be too much to recognise this right.

The second inquiry of the analysis of the constitutional protection of the right to privacy is a consideration whether the alleged act can be justified in terms of section 45(1) of the 1999 Constitution which provides that " nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public

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86 See *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (CC).

87 *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC).

88 2004 (2) SA 658 (T).

89 See s. 214 of the Criminal Code.

90 See for example Chapter III "Hudud and Hudud related offences", Part III "Sodomy (Liwat)", Section 128-129 of the Kano State Shari'a Penal Code Law 2000.

91 The full title of the Bill is : A BILL FOR AN ACT TO MAKE PROVISIONS FOR THE PROHIBITION OF SEXUAL RELATIONSHIP BETWEEN PERSONS OF THE SAME SEX, CELEBRATION OF MARRIAGE BY THEM AND FOR OTHER MATTERS CONNECTED THEREWITH.

92 See N. Dimgba " The right to privacy and the Intrusion of the Press in Nigeria" Vol. 4 *Modern Practice Journal of Finance and Investment Law* 177 (2000). Dimgba adopts the classification that is clearly the American understanding of the right to privacy.

safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons."

There are two grounds of justification embedded in this section. The first ground contemplates a series laws of public acts of varying degrees of emphasis and elaboration. One critical point seems to be that there must be a legislation[93] in place. For example in *Osawe v Registrar of Trade Unions*[94], the Supreme Court decided that the right to freedom of association is made subject to its being in consonance with any law that is reasonably justifiable in a democratic society and the then Trade Union Act, as amended[95] is a law reasonably justifiable in an democratic society. As we noted above, some of the religious based crimes which are apparently in conflict with the right to privacy may find justification under this heading. A fitting basis of justification would be public morality. It is also possible to categorise the first grounds of justification as ably represented by the phrase' public interest'. This is a phrase which we saw earlier constitutes a defence of the tort of breach of confidence and/or privacy. And as we shall see later also to the constitutional right to privacy.

The second ground of justification relates to laws for the purpose of protecting the rights and freedoms of other persons. If as we noted above, a legislation is necessary to activate the operation of section 45(1), this would be most unfortunate. It would mean for example that unless a law could be said to express a fundamental human right, there would be no justification inquiry. In this regard, rights that clash with each other can not be evaluated. In this regard other fundamental human rights contained in the 1999 Constitution are contemplated. If this second category was not included it would have been the most natural example. It is axiomatic that rights conflict and all human rights system contemplate some measure of balancing. Freedom of expression and the press is at once the most obvious example of a right that would conflict, especially with informational privacy. Section 39(1) & (2) of the 1999 Constitution provides that "(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. (2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions..."

There is however no instance of a conflict between two human rights such as the right to privacy and the freedom of the press. It is submitted that section 45(1) of the Constitution contemplates such a clash and that it is not necessary that a legislation exists before this can occur. So 'law' in section 45(1) would include right: the right to freedom of expression and the freedom of the press exists so that the press can engage in their buisness. Even at that it is doubtful whether

93 See for example section 14 of the EFCC Act 2004; and section 10 of the money Laundering Prohibition Act 2004 which require financial institutions to report certain transactions to regulatory agencies.

94 (1985) 1 NWLR 755.

95 The said Act conferred a discretionary power on the Registrar of Trade Unions in the approval of trade unions.

Nigerian human jurisprudence admits of such an evaluation. Even though there is scant jurisprudence of the manner of evaluating two fundamental rights n Nigeria, a few general principles can be advanced. The first point is that all rights are equal and none inherently superior to the other. Secondly a number of factors can be used a basis of balancing the rights. These factors found in section 36(1) of the South African Constitution is a good starting point: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d)the relation between the limitation and its purpose; and (e) the less restrictive means to achieve the purpose. There is no doubt that other factors peculiar to the Nigerian environment can be discerned. One critical factor can be said to be that with respect to information privacy, the Nigerian press has for long operated in an environment where privacy plays little part. I refer in some detail, the views of leading society columnist in Nigeria and his belief that all the press has to bother about is the law of libel:

" ...gossip can be crippling, even killing, but the strange thing is that professionally, gossip is legitimate. All that is required of a gossip journalist is to apply the anti-libel rules like is it true, fair comment and without malice, et cetera?...when you- a man or woman-exercises freedom to sleep around with multiple sex partners, you must realise that such freedom is limited by the freedom of others who have an opinion or even feel irritated by your style. And they are also free to talk about you and your dastardly sexual irresponsibility in beer parlours, salons, supermarkets as well as cyber cafes, aren't they?So why shouldn't some one publish the same thing in a newspaper or magazine. Look at it this way Even the law is on the side of the scandalous and the fraudulent. By that I mean, every journalist- including gossip merchants- now know that truth aloe is no defence when an aggrieved party takes your 'teeny-weeny' gossip to court as libel. Unless you prove fair comment and jettison alleged malice, you are done for."[96]

A number of startling conclusions can be drawn from this contribution. Firstly Nigerian journalists have no regard for the right to privacy and are only concerned about libel. Thus once libel rules are complied with, nobody should bother with privacy. Perhaps it is because the two concepts are confused.[97] Even if they were to be so bothered, sexual stories of all kinds and of all persons qualify as public interest and protected by the freedom of expression. In this regard, no distinction seems to be made between public figures and others. The important criteria seems to be the salaciousness of the story. Yet another supportive view point is that public figures should by implication lose all privacy. According to Dimgba: " by being public figures such citizen's have freely waived their right to privacy by necessary implication."[98] Dimgba agrees that this argument has not been tested by the courts but goes ahead to make a distinction between politicians who seek public office and persons who become public

96 " Should scandals be secret?" Sunday *This Day*, March 26 2006, p. 84

97This view point seems to find support amongst Nigerian academic commentators. According to Dimgba, note 91, 188 :" ...there has been a tendency to confuse the legal concept of privacy with the law of defamation."

98 Dimgba, ibid, p. 187.

figures by reason of birth or fortune.[99] This is a distinction that seems more imagined than real. Be that as it may in the context of our arguments, the Nigerian press would argue that reporting on public figures is in consonance with their freedom of expression and the press. These two viewpoints exhibit the lack of a clear fundamental principle for the protection of the right to privacy in Nigeria and the basis of the public interest that can find justification in section 45. It would be sensible to regard what constitutes 'public interest' under the law of defamation as qualifying here. A robust defence of 'public interest' will ensure that the press is able to continue its role as the watchdog of society.

V.II - Horizontal Application of Human Rights

One of the apparent major obstacles to the enforcement of the rights to privacy, is the strong conviction that human rights cannot be enforced by individuals against other individuals in Nigeria. In other words it may be thought Nigerian human rights jurisprudence only contemplates vertical application of human rights and not its horizontal application. Even though there is case law for[100] and against[101] horizontal application, the preponderance of judicial and academic opinion is that human rights can be enforced by individuals against other individuals. It is important to discuss this point because it may have been one of the real reasons why the right to privacy has not been very well utilised and developed in Nigeria. The truth is that there are many cases where it is assumed that there is horizontal application such that we can safely say that in Nigeria the question of horizontal application is settled.[102] Indeed privacy is one of those rights where horizontal application is self evident. While there is no doubt that there are many instances where the State may be involved in breach of privacy, yet the fact remains that in many cases of informational privacy breach, individuals and corporates entities like the media are involved. To deny individuals the right to proceed against other individuals is to do them a lot of disservice.

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99 Ibid.

100 See the cases of *Onwo v Oko* (1996) 6 NWLR (Pt. 456) 584: "...It seems clear to me that in the absence of a clear positive prohibition which prohibits an individual to assert a violation or invasion of his fundamental rights against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the State for a similar infraction. per Achike JCA p. 603. See also *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt 200) 708; *Okoi v Inah* 1998(1) FHCLR 677.

101 *Aderinto v Omojola* 1998(1) FHCLR 101; *Ale v Obasanjo* (1996) 6 NWLR (Pt. 459) 384.

102 See for example the cases of *Anigboro v Sea Trucks Ltd* (1995) 6 NWLR (Pt. 399) 35 (Freedom of Association) ; *Aniekwe v Okereke* (1996) 6 NWLR (Pt. 452) 61; *Agbai v Okagbue* (1991) 7 NWLR (Pt. 204) 391(Right to Property) ; and *Salubi v Nwariaku* (1997) 5 NWLR (Pt. 505) 442 (Freedom from Discrimination).

V.III- Enforcement Procedure and Remedies

Enforcement Procedure:To protect the constitutional right to privacy an aggrieved person can proceed under the Fundamental Rights (Enforcement) Procedure Rules made pursuant to section 46 of the 1999 Constitution. The said section provides that any person who alleges that any of the fundamental human rights has been is being or likely to be contravened in any state may apply to the High Court in that state for redress. Because of the relatively easier means of enforcement instituted by the enforcement procedure rules, this remains one of the attractive points of the constitutional right to privacy. Sadly as we noted above there is no evidence to suggest that this has been recognised by Nigerians.

Remedies:

Damages: The combined cases of *Shugaba v Minister of Internal Affairs*; [103] *Ajayi v AG Federation*[104] and *Abiola v Abacha*[105] clearly establish that damages can be awarded for breach of fundamental human rights. In *Obisi v Nigerian Navy*[106] the Federal High Court adopted the views of Odunowo J in *Ajayi v AG Federation*[107] that in fixing the amount of damages for infringement of fundamental human rights, the following factors must be taken into consideration: (a) the frequency of the type of violation in recent time; the continually depreciating value of the naira; (c) the motivation for the violation; (d) the status of the applicant; (d) the undeserved embarrassment meted out to the applicant, including pecuniary losses, and (f) the conduct of the parties generally particularly that of the respondent.

Injunction: This remedy would be appropriate in many respects especially in cases where there is an intended public dissemination of personal information and also in cases of intrusion.

Apology: This remedy is very much used in the tort of defamation.[108] And there is no reason why in principle it should not be used in privacy cases. The remedy of apology seems quite appropriate for privacy cases where the embarrassment anguish and distress can be assuaged by a genuine apology. This is what Mokgoro J of the South African Constitutional Court in *Dikoko v Mokhtatla*[109] had to say of the remedy of apology in the South African law of defamation:

" In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu or botho* an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for

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103 (1998) I HRLRA 373

104 (1982) NCLR 915.

105 (1998) 1 HRLRA 447.

106 1999(1) FHCLR 609. See also *Inyang v Eduok* 1999(2) FHCLR 6.

107 Note 104.

108 See *Edukugbo v Sunday Times* (1958) WRNLR 215.

109 Case CCT 62/05 delivered on 3 August 2006.

defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant."[110]

VI. CONCLUDING REMARKS

It is my conviction that Nigerians want to protect their privacy. And that the deplorable state of our law in this regard can be remedied. Given our legal environment, there is no doubt that a consideration of such a case by our appellate courts will go a long way in this regard. A lot needs to be done in the development of this area of the law. I advocate a dual development of the protection of privacy. It is of course likely that the constitutional protection will in time become the preferred means of protection. The procedural route of protection is not as important as an effective protection of privacy in Nigeria. There is no doubt that a protection of privacy will affect the operations of at least Nigeria's soft sell magazines and newspapers. But they will survive. Even with our libel laws they did not disappear.

110 . [Para 68]