The Media and Statutory Right of Privacy in Nigeria

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Abstract
The issue of right of privacy has generated a lot of problem not only in Nigeria, but also across the world. This article is focused on the development of privacy law and instances of invasion of privacy by the media. In addition, the article discusses the merits of a statutory civil right of privacy and instances of valid intrusion by the media and the available defences. Finally, the writer canvasses for the introduction of a statutory civil right of privacy into the Nigerian legal system.

Introduction

The call for a statutory civil right of privacy into the Nigerian legal system is not without opposition. However, to the supporters of the new law on privacy, privacy is worth fighting for as a result of the damage and embarrassment which an uncontrolled right of intrusion into the privacy of individuals have caused them.

On the other hand, those who oppose the introduction of a new statutory civil right of privacy in Nigeria are of the view that, an additional law to the several restrictive laws on freedom of expression and of the press as provided for in the Nigerian constitution and codes, would further strengthen the inhibitions already put in place. They argue that there are adequate legal frame works, such as the tort of trespass, to person[1], trespass to goods[2], tort of defamation[3], malicious falsehood[4], tort of harassment[5], breach of confidence[6], professional codes[7], communication laws[8], the copyright law[9] and a host of other laws which an aggrieved person could resort to for remedies. To them, the time is not yet ripe for such law even though they admit that it is necessary as obtainable in other jurisdiction like the United States of America.

The Role of the Media under the Nigerian Constitution

The Nigerian Constitution provides for the obligation of the mass media. It provides that,

> The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives in this chapter and uphold the responsibility and accountability of the Government to the people.[10]

The Constitution also provides that,

> Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impact ideas and information without interference.[11]

It is the duty of the media as agent to the public to collect information and tell the public of it (Tom, 2009:59-60). It is the duty of the media to expose wrong doings. If the media

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is restrained as a result of fear of court action, unfairness would go unremedied and misdeeds in the corridor of powers in companies or in government departments would never be known.

However, in playing this role, the media should ensure that it does not infringe on the rights of others by way of invasion of their privacy all in the name of freedom of expression and of the press.

According to the British Law Lords,

> Free' in itself is vague and indeterminate. It must take its colour from the context. Compare for instance its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech. It means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law.[12]

In a statement credited to the Duke of Wellington under the heading Publish and be Damned he was quoted as having said that,

> The Media is free to publish and be damned, so long as damnation comes after, and not before the words get out. Journalists cannot claim to be above the law, but what they can claim in every country that takes free speech seriously, is a right to publish first, and take the risk of conviction after-ward. (Robertson and Nicol, 1992:19).

The above statement is also in line with Blackstone's idea of what freedom of the press is. According to him,

> The liberty of the press is indeed essential to the nature of a free society, but this consists in laying no previous restraints on publications and not in freedom from censorship for criminal matter when published. Every free man 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, he must take the consequences of his own temerity." (Blackstone's, 1765:151 – 152).

The main issue which this article seeks to resolve is where the balance should tilt to: Is it to the side of those who support the new law or those who oppose it?

In resolving this issue, the writer shall canvass for the introduction of a new statutory civil right of privacy into the Nigerian Legal System bearing in mind three considerations:

1. That citizen's privacy should be protected, particularly in matters that are private and of no value to the public.
2. That in the exercise of right of privacy, the interest of others and the security of the state should be taken into consideration
3. That where it becomes necessary to invade the privacy of individuals, such invasion should be done with some decency with special regard to information that are personal to the aggrieved which are not of value to the public. (Carey, 1996:64 – 65).

The Concept of Human Rights

The right of privacy is a specie of human right. Human rights are defined by the (Oxford, :608) as;

> "Rights which it is generally thought that every living person should have, e.g. the right to freedom, justice, etc." Human rights are derived from natural right and are inalienable. No one or even the government can take it since it was not given by the government.

Human rights as a concept embraces several other rights that are not contained in the definition above but which are necessary for a meaningful and purposeful existence of man. Such rights to mention a few include, right to privacy, right to freedom of expression and of the press. Because of the importance of these rights, democratic governments all over the world have carefully designed policies and enacted specific laws to enable citizens take advantage of these rights. However, these rights have not been easy to claim, assert or enforced by the citizens due to inadequacies of these laws and policies.

Government, as a result of its inability to give protection to these rights have decided to categories these rights such that certain rights are now classified as fundamental rights and specific laws are enacted to give effect to them. According to (Davies and Holdcroft, 1991: 150),

> Certain rights are now classified as fundamental and acknowledged those duties and goals which are necessary to secure the rights in question for individuals.

In the words of (Odge, 1986:87),

> It follows that while all rights enjoyed and asserted by human persons may be described generally as human rights, not all human rights can be termed fundamental under our classification unless they are entrenched in the constitution.

One of the major and fundamental right which this work seeks to discuss is the right to privacy.

The Right of Privacy

Privacy – Definition

(Black's, 1990:1357) defines Privacy as;

> Privacy, right of. The right to be left alone: the right of a person to be free from unwarranted interference by the public in matters which the public is not necessarily concerned. The term right of privacy is generic term encompassing various rights recognized to be inherent in concept of ordered liberty and such right prevents government interference in intimate personal relationship or activities, freedom of individuals to make fundamental choices involving himself, his family and his relationship with others... The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses.

Development of Privacy Law

The history of development of right of privacy has been attributed to two American lawyers, Samuel D. Warren and Louis Brandies through an article published in 1890 by them titled "The Right to Privacy." Around this time, there was no evidence that the Common Law made provision for the right of privacy. (Nelson, and Teeter, 1980:182).

However, Professor Don, R Pember in his study titled "Privacy and the Press", stated that as far back as 1881, that was nine years before Warren and Brandies published their article on the Right to Privacy, the Supreme Court of Michigan USA had made some pronouncement which established that one is entitled to be let alone. In *Demay V. Roberts*[13], a woman sued a doctor's assistant who had been present when the woman gave birth to a baby. The Supreme Court of Michigan held that;

> the woman could collect damages from the doctor. The Court declared that; "the moment of a child's birth was sacred and that the mother's privacy had been invaded.

Several countries all over the world have now enacted statutes on privacy[14]. However, Nigeria is yet to have a specific statute on privacy.

Privacy is not only a problem concerning citizens and the State, but it is also a serious media problem in that in jurisdictions where there are statutory provisions, a misstep by newspapers, magazines, radio and television stations have resulted in many privacy cases. Surprisingly, the writer is only aware of a case of invasion of privacy which did not involve the Nigerian media[15].

Constitutional and Statutory Provisions on Right of Privacy

From all records, the right of privacy seems to have been recognized in America before any other country. Although the original Constitution of the United States of America did not expressly provide for right of privacy, what could be likened to the right of privacy in this constitution could be found in one of the first eight amendments and the fourteenth amendments which guaranteed the citizen's right against unreasonable search and seizure. In Boyd v. US[16], the court stated that;

> the fourth and fifth amendments were protections against all governmental invasion of the sanctity of a man's home and the privacies of life.

In addition to the provisions in the American Constitution on right to privacy which came by way of amendment, the United States of America rank highest in the World in terms of specific enactments on right of privacy by both the United States Government[17] and the component states[18].

The Universal Declaration of Human Rights Of 1948

The United Nations formally proclaimed, the Universal Declaration of Human Rights which included the right to privacy. This proclamation came several years after the right of privacy was recognized by the American constitution and pronouncements by American courts.

Article 12 of the Universal Declaration of Human Right provides as follows;

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, no attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference of attack.

African Charter on Human and Peoples' Right

The African Charter on Human and Peoples' Right was formally adopted in 1984 by the Assembly of African Heads of State. All member states of the Organization of African Unity (O.A.U.) now African Union, (A.U.) including Nigeria, as a founding member, are expected to adopt the provisions of the Charter.

The Charter provides for such rights as; right to respect for life and the integrity of his person, respect of the dignity of human being, fair hearing, free association, education, freedom to receive information, right to express and disseminate his opinions within the law etc. Unfortunately, the Charter either as a deliberate intention or omission did not provide for right of privacy. This is a serious omission which should be addressed as soon as possible.

In the United Kingdom, there was no law on privacy until 1998 when the United Kingdom ratified the European Convention on Human Rights which took effect in the United Kingdom in 2000. But before then, there had been several calls for the introduction of a statutory tort of privacy in the United Kingdom. As a result of these calls, several committees and commissions were set up by the United Kingdom government. One of such committee was Calcutt's Committee and its report stated as follows:

> We are satisfied that the absence of sufficient protection for the individual against intrusion by the press satisfied the criterion of pressing social needs. This need is especially pressing in the case of individual's who are vulnerable to exploitation because, for example, of age, immaturity infirmity, grief or the need to undergo medical treatment. (Crone, 1995:213).

The Committee did not recommend the introduction of a statute on privacy, but rather recommended the establishment of the Press Complaints Commission which came into effect on 1, January 1991.

The Committee further recommended that if the self regulatory scheme by the media failed, parliament should consider the introduction of new laws of criminal trespass. The new laws were intended to (out- law) what the Committee saw as abuses in the way stories are sometimes gathered.

In 1993, the Lord Chancellor's Department published a paper called "Infringement of Privacy" which proposed the introduction of legislation to create a civil right to privacy. At this stage it was clear that the United Kingdom was ready to have a specific law on privacy and this was through a positive step by ratifying the European Convention on Human Rights in 1998 which took effect in the United Kingdom in 2000. (Robertson, and Nicol, 1992:210).

The European Convention on Human Rights and Fundamental Freedom provides as follows:

> Everyone has the right to respect for his private and family Life, his homes and correspondence.[19]

The Convention goes further to state that;

> 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 interest of national security, territorial integrity or public safety, or the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[20]

Constitutional and Statutory Provisions on Right of Privacy in Nigeria
All the constitutions of Nigeria from 1960 to 1963, to 1979 and then to 1999 have similar provisions on right of privacy of citizens. The 1999 Constitution provides as follows:

> The Privacy of every citizens," their homes, correspondence, telephone conversion and telegraphic communication is hereby guaranteed and protected[21].

However, one draw-back in this constitutional provision on the right of privacy is the inability of any aggrieved citizen to sue on it. This is because, the right of privacy as contained in the constitution is neither a tort nor a crime as such right is not re-enforced by the provisions of any penal code.

Invasion of Individual's Privacy by the Media in Nigeria
The extent, to which the media have gone in the invasion of individual's privacy, is unimaginable. The following is a publication in one of Nigerian's Newspapers[22] under the Heading "30 CARELESS DRESSERS IN NIGERIA." A seasoned politician and former Federal Minister of Labour under the General Abacha Regime was presented as follows.

> He … (name not used) has failed to come tops with his dress sense. Even during his daughter's wedding recently, the embroidery on his agbada must have been done by a tailor who probably slept all through his apprenticeship. It was wacky. His safari suits are also from another planet, tactlessly knocked together by his tailor, they have never sat well on him.

Surely, the person referred to here was a Federal Minister, a public figure. Although his name was not mentioned but by innuendo he could be identified. The newspaper reported accurately his style of dressing as it pleased him. As a public officer, he was not in fact given a dress code neither was he nude, or un-tardily dressed. The newspaper equally did not say that his dresses were unusually kept. There was therefore nothing wrong in his dressing habit which should be of interest to the public. Yet, the former minister may not have been able to claim any damages if he had brought any action against the newspaper under the tort of defamation. But, he would have succeeded under the law of privacy as his mode of dressing is his personal and private affairs. In addition, he is entitled to have his peace.

There was also a publication in the same newspaper which pointed to a well known retired Army General. The General, a director with a Limited Liability company was linked with a multi-million naira loan scandal**.** The publication goes thus,

> A staggering 1.4 million naira loan granted one of the companies (name of General withheld) and a trusted friend of President Olusegun Obasanjo …is now a source of legal tussle in the Federal High Court.

Here again, the loan was not granted to the General but to the company in which the General is a director. The company has its distinct legal personality different from that of the directors. Courts in Nigeria have made several pronouncements on this[23]. However, if there was any tussle in the Federal High Court, it did not involve the General as a person. There was no reason therefore for the newspaper to intrude into the quiet and peaceful life of the General all in an attempt to boost its circulation figures and increase its economic gains.

There was yet another publication about a former presiding officer of the National Assembly which goes thus;

> "The Dibia of careless dresser, the Head of this Assembly ...(name withheld) has the ill luck of being a fashion bomb. The word no description was perhaps invented because of him. Embarrassingly colourless, before be became the Head of the House of Assembly) and even now, he will be lost in the V. I. P. section of the Eagles Square (Abuja) in a handful crowd. His mien and carriage belong to Ochanja market (a local market) in Onitsha (Anambra State)."

Like the case of 30 Careless Dressers in Nigeria cited earlier, the dressing manner of the person referred to here has not portrayed him as a careless dresser. The mere combinations of colours do not make one careless dresser because the beauty of combination of colours belong to the person putting on the coloured dresses.

The publications about the personalities referred to, without their name being mentioned may be true or false. Where it is false, the concerned persons have right in law to probably sue for defamation. (Yakubu, 1999:56-57). But where it is true, a defamatory suit may not likely be successful as the defendant could easily rely on the defenses of truth, newsworthiness or public interest. The case may be compounded where the name of the plaintiff was not mentioned.

The above trauma is what the individual is experiencing in the hands of journalists who often will rely on the defense of the freedom of expression and of the press to intrude into individual's privacy.

The questions then are; which are the instances of invasion of individual's privacy? What are the elements to substantiate invasion of privacy? What protection is available in law, to an individual particularly in Nigeria, whose privacy has been invaded by the press? And what are the defenses that the alleged media could raise in a case of invasion of privacy? The issue raised above are addressed below.

Instances of Invasion of Privacy

The following are instances of invasion of privacy by the media.

- (a) Entering private property without the consent of the lawful occupant with intent to obtain personal information or detect crime.
- (b) Use of bugging and listening devices through placement of surveillance equipments on private property without the consent of the lawful occupant.
- (c) Taking photographs or recording the voice of an individual who is on private property without his consent.
- (d) False publication about the aggrieved person which touches on his privacy.
- (e) False caption of the aggrieved which portray him in bad light.
- (f) Obtaining information from those in distress like the sick, the informed person, the under aged without their consent.
- (g) Fictionalisation of the aggrieved person

The invasion of privacy by the media has gone beyond the scope of interference by the media with peoples private matters that are not of importance to the public. It now has some extension to activities relating to marriage, procreation, contraception, family relationship, child bearing and education. In *Boyd V. US*[24] the court stated that;

> The fourth and fifth amendments were protections against all governmental invasion of the sanctity of a man's home and the privacies of life.

Similarly, the court in *NAACP V. Alabama*[25] stated that;

> It would not allow the police to search the sacred precincts of marital bedrooms for tale signs of use of contraceptives.

The Court went further to state that;

> The idea is repulsive to the notions of privacy surrounding the marriage relationship.

Invasion by the Media for Purpose of Detecting Crime and use of Bugging and Listening Devices

In Dieteman V Time Incorp[26], reporters from life Magazine with the Los Angeles, California District Attorney and the State Board of Health embarked on a mission to entrap a medical quack. A reporter and a photographer went to the house of the suspected medical quack with a woman who pretended to be sick. The medical quack while examining the so called patient was being recorded by a transmitter in the so called patient's purse and the transmitter was relaying the conversion between the medical quack and the supposed patient to a receiver/tape recorder in an auto parked nearby. The auto contained some eavesdroppers, a life reporter, and a representative of District Attorney's office and an investigator from California State Department of Public Health**.** Despite the fact that the medical quack was tried and convicted, he sued for damages for invasion of his privacy and won.

In the defense of the life Magazine, their counsel argued that; concealed electronic instruments were indispensable tools of investigative reporting. But the court disagreed and held that;

> Investigative reporting is an ancient art, its successful practice long antecedes the invention of miniature cameras and electronic devices. The first amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The first amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

The lesson to be learnt from the decision in this case is that, while a reporter may rely on the defense of detecting a crime to invade another person's privacy, he may still be liable for intruding into such persons privacy. In this instance, the plaintiff, a plumber turned a quack doctor was eventually convicted as a result of overwhelming evidence secretly recorded in his private residence by reporters using listening devices concealed in them. The convict nevertheless succeeded in his action for invasion of his privacy.

Photographing without Consent

There may be other instances in which the reporter could be held liable for intruding into another's privacy (Pember, 2004:240). They are when the photograph of a person or his home-building is taken and published without that persons consent[27]. It could also be by reporting correct stories about a sick person on admission without his "full consent"[28] even when such story is not defamatory. Full consent as it is used here means that the patient must be conscious of what he is saying at the time of the interview.

Publication of Private Matters

"Public interest", is a common defense to all defamatory suits. The defense is also available to any journalist facing a suit for invasion of privacy. It is possible for a reporter to escape liability for any defamatory statement by relying on truth as a defense. Here, the reporter would succeed where he reported his story accurately. But then, truth is not a defence to any action for invasion of privacy. Whether there is truth in the story or whether the story was accurately reported is one thing. It is yet another where the news relates to private matter. The law on privacy distinguishes between private matters and public matters. Private matters include such matters which should be of relevance to the plaintiff alone. They include also publication of matters violating the ordinary decencies. It is not in all cases that the affairs relating to a public officer will be regarded to be of interest to the public. A man may well be a public officer, but a particular matter may be relevant to him alone and not the public. Similarly a matter concerning a private person may fall within the ambit of matters that are of interest to the public. Each case will be considered on its merit.

For instance, the impotency of a man who is performing his duties effectively as a private or public official should not be a news item, particularly, where the impotency was not caused by him. Of what interest is his impotency to the public? An overzealous reporter or newspaper that publishes such news is surely inviting a privacy suit. The story is based on the truth and was factually reported but such an official is entitled to his private life and peace. It also serves no decent purpose to the public to publish such matter or any matter relating to under aged children who were sexually assaulted. The misfortune of such children should not be public news. Of course, the name of the offenders could be publicized. The purpose of punishment sometimes is to use the victim as a deterrent to others. Such offenders when known are subjected to isolation by members of the public.

A private matter relating to a public officer may well turn out to be of interest to the public (Pember, 2004:266). Once a man takes up a public office, his private life and public life are merged. The public will want to know what is happening to the man in his two capacities because sometime, his private affairs may influence his efficiency in his official capacity. Similarly, his private affairs, such as his standard of morality, may have a negative influence on the public. A journalist can publish such matters and rely on the defense of public interest.

One known case of a private matter, turned public matter was the case of Oliver Sipple (Nelson, and Teeter, 1980:200). Oliver Sipple was an ex-marine who saved President Gerald Ford's life in 1975 by deflecting the aim of a would-be assassin, Sarah Jane Moore. A newspaper, the Los Angeles Time while praising him for his bravery wrote that the San Francisco's Gay Community was proud of Sipple's action and that it might dispel stereotypes about homosexuals. Sipple brought an action against the newspaper for invasion of his privacy on the ground that his sexual preference had nothing to do with the saving of the President. The Los Angeles Times countered that Sipple, as a person thrust into the "vortex" of publicity of worldwide importance had become a newsworthy figure and that many aspects of his life became matters of legitimate public interest. It went further to state that individuals who become public persons give up part of their right of privacy. The court while dismissing Sipple's suit said that Sipple was involved in an event of international importance and that his privacy is of public interest.

The writer is of the view that Sipple's sexual preference should not have in any way been a subject matter in a life saving event. The reporter should therefore be aware of the danger inherent in a privacy suit as it is often said that with the law of privacy, truth can hurt". Although in this instant case, Sipple did not win the suit, but there are too many cases where such facts led to the award of damages against the journalist, and newspaper.

False Captions which Invade Privacy

Most often, newspapers publish photographs which reflect the true state of affairs or things but under a wrong caption. Such captions give misleading impression of a person's character. In *Complete Communication Ltd. v. Bianca Onoh,*[29] the plaintiff consented to her photograph being taken. The photograph taken reflected her true nature but was put under a caption titled; "Bianca Onoh's Revealing Photos" The paper went further to state that, the plaintiff was "semi-nude"…and … felt that the plaintiff is something else. *"I think something just went into her head" the paper further reported."*

The plaintiff succeeded in her action for defamation even though the newspaper put up a defense of consent. The failure of this defense was as a result of the caption which stated that the plaintiff was semi-nude. According to the court, it is only an insane person that will be semi-nude in the public. Had the newspaper published the photograph which was taken with the plaintiff's consent without this caption, the plaintiff may not have succeeded in her action. Since the outcome of suit can never be predicted, the newspaper may well have put up the defense of public interest as the plaintiff was once a Miss Nigeria and Miss Inter Continental, for the year 1989. However, if the plaintiff's consent was not sought and the article was not wrongly captioned, she will not succeed in any defamation suit, but may succeed for breach of her privacy.

Careless use of pictures poses great dangers of lawsuits for the mass media. Pictures which convey or portray a misleading impression of a person's character are very dangerous. Sometime, the publication complained of may be an unintentional defamation with regard to the plaintiff. It then depends on whether the plaintiff would want to bring his action under the tort of defamation or the law of privacy. It will sometime depend on the circumstances surrounding each case.

The media should adopt plain language in their presentation whether the picture is taken in public or in private place or whether the picture was taken with the aggrieved person's consent if the picture will portray such aggrieved person in bad light. However, where the photographer received permission express or otherwise, any privacy suit against such newspaper may fail. This however, again depends on the caption of the article.

The danger inherent in wrong caption which portrays the plaintiff in bad light and lead to invasion of his privacy was highlighted in a case involving Mr. and Mrs. Gill**.** Mr. and Mrs. Gill had voluntarily posed for a photograph which was taken by two photo-journalists for two different newspapers**.** Mr. Gill was putting his arm around his wife when the picture was taken. Mr. Gill brought two suits against the two newspapers under invasion of his privacy. In one of the suits, *Gill v. Hearst Pub. Co.*[30], the newspaper published Mr. and Mrs. Gill's under the heading "And so the World Goes Around" In an action for invasion of privacy, the court held that;

> the plaintiff cannot claim any damages since they took the photograph voluntarily and there was nothing uncomplimentary about the photograph itself and the caption.

However, in *Gill v. Curtis Publishing Co.*[31] the defendant published the same picture to illustrate an article titled "Love" Underneath the plaintiffs picture was the caption. "Publicized as Glamorous, desirable, Love at first sight" is a bad trick". The story went on to term such love "100% sex attraction" and the wrong kind. The Newspaper was held liable as the court held that the article implied that this husband and wife were "persons" whose only interest in each other is sex, a characterization that may be said to impinge seriously upon their sensibilities.

Defences to the Tort of Privacy

Privacy is a new area of law which is a danger to the media. Where a suit is brought under the tort of defamation, the defendant could raise a defence, such as truth. (Yakubu 1999:57 – 66). But with the law of privacy, such defence is not available.

The threat to freedom of the press, interest of the public and the security of the state by the law of privacy has led to the formulation of certain defenses. The formulation of such defenses became imperative as the law of privacy has created grave risk of serious impairment on the press quest for news. For the press to be able to escape privacy suit, it must verify its news with certainty. Such verification is expensive, time wasting and discourages investigative journalism. Such verification will scare away the press from their constitutional duties of informing the public.

Again, to restrain the press from visiting certain places or seeking the consent of those to be interviewed at all times is another restraint on the path of the press to source for news as certain individuals may not voluntarily give such consent.

The use of modern electronic devices to record news should not be discouraged where the news so recorded is in public interest regardless of whether the news was got with the plaintiff's consent or not. Again, where the media invade the privacy of citizen and discover a crime, the interest of the public should outweigh that of the individual.

The defenses (Crone, 1995:213) presently available to a defendant in a privacy suit could be broadly classified into three, namely.

(1) Defense under the Constitution.
(2) Public Interest / Newsworthiness.
(3) Consent.

Defences under the Nigeria Constitution

The Constitution of Nigeria provides for citizens right to privacy. The Constitution[32] provides as follows:

> The privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communications is hereby guaranteed and protected.

However, the same Constitution[33] provide for instances under which such rights could be restricted or even taken away by the State. The Constitution empowers the National Assembly and the President to derogate from such rights as contained in Sections 37, 38, 39, 40 and 41 of the Constitution in the;

(a) interest of defense, public safety, public order, public morality or public health or
(b) for the purpose of protecting the rights and freedom of other persons

Public Interest and Newsworthiness

The instances listed in Section 45 of the Constitution which raise good defenses to the invasion of privacy are easily available to the state than the media. The individual or the media could rely on it where the individual or the press is working in concert with the government.

However, the defense of public interest/newsworthiness is available to an individual or newspaper facing a privacy suit. Sometimes, private persons are caught in the news. When the event involving such private person is news, the court is likely to recognize public interest and subdue the right of the private individual to that of the public**.** The courts have developed what it called an unwilling actor (Nelson, and Teeter, 1982:233) in

a news event. Here, one may become an actor in an occurrence of public or general interest. Where for instance, a good citizen is photographed in his attempt to quell a public disturbance of a criminal nature and such a photograph is published showing him in the midst of the real actors, the public is likely to conclude that the good citizen was one of the criminals. In such instance, the good citizen/peace maker is said to be an involuntary public figure. Any media facing a suit of privacy in this instance should be able to raise the defense of public interest.

The defense of public interest and newsworthiness will avail the media where the publication relates to corruption, fraud, crime, education, sports and morality in the society.

Defence of Consent

Another defense is that of consent (Tom, 2009:121). Where a person has consented to his privacy being invaded, he should not be allowed to sue for the invasion. The right of privacy ceases upon the publication of facts" by the individual with his consent.

In *Metzger V Dell Pub. Co*[34] a young man consented to have his picture taken in the doorway of a shop. But the young boy was surprised when his photograph was published under a caption "Gang Boy". The Supreme Court of New York allowed the young man to recover damages, holding that consent to one thing is not consent to another.

For consent to be good defense, the words, and story published must be true words. Where the story is false or where the photograph is used for a purpose not intended by the person who consented, the defense of consent will fail.

Conclusion

It is clear from the discussion so far that the general constitutional provision on privacy is grossly inadequate. The necessity to prove the elements of defamation, trespass to land, etc are pretty difficult even where it is glaring that the aggrieved person's privacy had been invaded and his reputation damaged. Perhaps this is why it has been so easy for the media, to invade the privacy of others with impunity.

In addition to this inadequacies is the fact that infringement of privacy is unknown under any tort head and neither is it a crime. Nigeria should therefore emulate the American position where there is in place a statutory provision on right to privacy.

The argument that the introduction of a statutory tort of privacy will be an additional inhibition to several restrictive laws is not tenable. This is because with such torts as defamation, false imprisonment trespass to land, citizens are still able to exercise their rights except in instances where they have breached the law.

Whoever feels aggrieved, whether it is the complainant, the intruder or government, there is in place a court of law that is expected to protect the interest of all.

To be able to take the benefit of the proposed tort of privacy, Nigerian courts should not allow technicalities to defeat the course of justice. In *Falobi v. Falobi*[35], the court stated that,

> technicalities should not be allowed to frustrate a claim so long as it could be established that a right belongs to a particular claimant.

Again with respect to ambiguity and technicalities, Nigeria could adopt the English court's decision in Lant's[36] case which was based on the European Convention on Human Rights. The court stated that,

> the provisions on human rights should be interpreted where there is ambiguity in favour of the individual.

The court further went to states that;

> It may of course happen under our law that the basic rights to justice undeferred and to respect for family and private life have to yield to the express requirements of a statute. But in my judgment, it is the duty of the courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers, those rights. Problems of ambiguity or omission, if they arise under the language of an Act, should be resolved so as to give effect to, or at the very least, so as not to derogate from the rights recognised by Magna Carta and the European Convention.

The right of privacy is a fundamental right and as such any individual should be able to sue on it where there is a breach.

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