PRIVACY IN CONTEXT: THE RIGHT TO PRIVACY, AND FREEDOM AND INDEPENDENCE OF THE MEDIA UNDER THE CONSTITUTION OF GHANA

DOMINIC N. DAGBANJA*

> [E]ven modern societies have differing concepts of privacy. For instance, while Germans demand closed office doors, fenced yards, separate rooms and strict person to person distancing, the Americans are content with open office doors, unfenced properties and informal rules of personal and social distance. The English on the other hand are accustomed to shared offices and bedrooms, and use 'reserve' rather than doors and walls to preserve their privacy. The French and the Arabs have been described as 'sensually involved' with individual members of their society in a manner which would be offensive to Germans, Englishmen and Americans. It has been suggested that because the Japanese and the Arabs enjoy crowding together they have no word for 'privacy' [. . .] but one cannot say that the concept of privacy does not exist [. . .] only that it is very different from the Western conception.[1]

I. INTRODUCTION

The preceding quotation demonstrates the extent to which privacy, a universal natural right, is culturally defined and shaped. While privacy is a natural right – and a cultural universal in the sense that it is recognised in all cultures – the scope and content of privacy is very much contextual since the particular desires

* BA, LLB (University of Ghana), BL (Ghana School of Law), LLM (University of the Pacific, USA), LLM (The George Washington University, USA), PhD Candidate (The University of Auckland, New Zealand); Lecturer in Law, Ghana Institute of Management and Public Administration, Accra, Ghana. Professor Francesca Bignami of The George Washington University Law School deserves my special thanks for her role in supervising this article. I am very much grateful to her for her willingness to work with me and for the very positive support she has given me in terms of shaping both the structure and content of this article. I am also very grateful to the anonymous reviewers for their comments and suggestions.

1 D. J. McQuoid-Mason, *The Law of Privacy in South Africa*, Juta (1978), pp. 1–2.

African Journal of International and Comparative Law 22.1 (2014): 40–62
Edinburgh University Press
DOI: 10.3366/ajicl.2014.0079

www.euppublishing.com/ajicl

and expressions of privacy are dictated by the culture in a given society. Put differently, the nature and significance, and therefore, the content and scope of privacy depend on the cultural context.[2]

Thus, this article ascertains the scope, nature and contours of the right to privacy in the Ghanaian context. The Constitution of the Republic of Ghana 1992 (hereafter the 'Constitution 1992') contains constitutional principles protecting the right to privacy. It equally does so in respect of the freedom and independence of the media. Therefore, this article discusses the nature and scope of the right to privacy in light of freedom and independence of the media in Ghana. Is the right to privacy as guaranteed by the Constitution 1992 affected by free speech and freedom of the media? In answering this question, the article discusses judicial decisions on the subject to ascertain how the judiciary has resolved conflicts between the right to privacy and free speech in the Ghanaian context. It examines the relevance and place of Ghanaian culture in the cases decided by the courts and whether the cases were decided in the right way. It answers the question: is Ghana taking the right direction on the privacy versus free speech issue?

The modern claim to privacy is said to be based on a notion of a boundary between the individual and other individuals, and between the individual and the State.[3] It rests on notions of a distinction between the public and the private, on the assumption of a civil society consisting of relatively autonomous individuals who need a modicum of privacy in order to be able to fulfil the various roles of the citizen in a liberal democratic state.[4] However, in every legal system, rights, including the right to privacy and free media, understandably are not absolute[5] and the nature of the guarantee and protection of rights is not the same either in all jurisdictions. Where one right begins, there another must or may end. This is necessary to ensure an even, balanced scale in the protection of the rights of all persons in a given society.

In this regard, how is freedom of the media reconciled with the right to privacy in Ghana? Free media is essential to the nature of a free state. A free media is

2 Justice Sowah in the Ghanaian case of *University of Cape Coast v Anthony* [1977] 2 GLR 21, at 42–3 underscoring the point that privacy manifests differently in different cultures. It is important to make an important distinction here. In submitting that the right to privacy is a 'natural right', this article seeks to argue that the 'root' to privacy lies in the very nature of human beings or even in animals as human beings or as animals. However, to the extent that there is no uniformity in the expression of the right to privacy, differences in the expression of privacy can only be explained in cultural terms. But the suggestion that privacy is something that is culturally expressed or even that it is culturally valued in all cultures, and therefore, a cultural universal, is not to, and does not, suggest that privacy is rooted in culture. At least in the opinion of this article, privacy is rooted in the very idea that human beings by their very nature as human beings have and need some sphere of space but how that sphere of space may be given recognition and protection will vary from society to society based on the ways of life of the society in question. For discussion on natural rights, see for example R. Cumberland, *A Treatise of the Laws of Nature*, gen. ed. K. Haakonssen, Liberty Fund (2005).

3 C. J. Bennet and C. D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective*, MIT Press (2004), p. 4.

4 *Ibid*.

5 N. K. Taylor, 'The Scope of Human Rights in Ghana', XIX *Review of Ghana Law* (1993–5): 84, at 88.

necessary for the effective dissemination of information for the consumption of the citizenry. A free flow of information is necessary, indeed it may be said, is a functional prerequisite for the existence and well-functioning of society. This is because open information allows individuals and citizens to make informed decisions and choices both about their private lives and on public issues. It also keeps individuals well informed of the economic and political processes. These are all necessary for the effective participation of citizens and all other persons so entitled to act in the governance process and thereby help in building a vibrant society. While a free media is essential to the nature of a free society, the right to publish or broadcast must be exercised within the limits imposed by law to protect individuals in some way. One way the exercise of freedom of the media is limited is when publication or broadcast of a matter will infringe upon the individual right to privacy. Just as freedom of the media is a limited right, so is the right to privacy. Thus society may permit, and indeed does permit, 'encroachments upon individual's desire to be left alone, or to be free from wholesome sights and sounds'.[6] In other words:

> The right to privacy cannot be absolute; it must yield on many occasions to other interests which society considers to be of greater importance. Indeed the pressure of those who wish to obtain the right of privacy is often met by other pressures from those who whilst not unsympathetic to certain kinds of privacy interests, are demanding greater rights to know, to publish, to discuss and to use private information.[7]

> The right to privacy is inherent in the right to liberty, but the life of the individual in all societies has to strike a balance between freedom and discipline. Insufficient freedom will subdue the spirit of enterprise and resolution on which so much of civilised progress depends, whereas unbridled freedom will clash inexorably with the way of life of others. It is inevitable therefore that there must be some measure of restraint on the activities of members of a community, and in order to control people in a modern and complex society information about them and their behaviour is indispensable. The concomitant price which the individual must pay can be measured in terms of loss of privacy.[8]

Therein lies the problem. Thus, apart from intrusions into a person's private life, a person's privacy may also be invaded by disclosures concerning the person's personal life, publicity misrepresenting the person or his or her life style, and authorised use of his or her image and likeness.[9] The solution then is to find a balance between conflicting interests or rights as between the rights to privacy and freedom of the media. And as the quotation at the beginning of this article shows,

6 G. Dworkin, 'Privacy and the Law', in J. B. Young (ed.), *Privacy*, John Wiley (1998), p. 115.
7 *Ibid*.
8 J. B. Young, 'Introduction: A Look at Privacy', in Young, *supra* note 6, p. 1.
9 McQuoid-Mason, *supra* note 1, p. 169.

privacy, and rights generally, although they may originate and apply beyond the confines of culture, are culturally shaped. Therefore, the contours and scope of privacy are culturally and as such contextually shaped. Thus, although privacy may be recognised in every culture and jurisdiction, the limits to the exercise of the right to privacy may depend on the social group or culture in which the right may be sought to be exercised. It follows that balancing the right to privacy with other rights or interests will vary from jurisdiction to jurisdiction. Therefore, the discussion in this article is to look at privacy in context: how the right to privacy and freedom of the media in Ghana are reconciled.

The intrusion of privacy takes a number of different ways and forms. These include: intrusion into one's home life; intrusion into one's business; intrusion from unwanted and unsolicited publicity from biased and sensation-seeking newspaper reporting, hounding by press photographers, over-zealous exposure journalism; intrusion from the use of technical surveillance devices; intrusion by the disclosure or use of private information; and, inter alia, intrusion through the misuse of computers.[10] While intrusion of privacy can result from any of these forms of intrusion, as indicated above, the focus of this article is on the right to privacy and the media in Ghana generally.

II. THE SCOPE OF THE RIGHT TO PRIVACY IN GHANA

A. The meaning and nature of the right to privacy

Human rights may broadly be categorised into the public domain and the private domain.[11] With these categorisations, the human rights concept has been projected on the public sphere.[12] The effect of this projection is to map out areas of public life where the government has the right to control and regulate the life and affairs of the citizenry.[13] In contrast to this are the areas of personal choice or action and interpersonal relations and relationships where the government or anyone or group including the media for that matter, should not or would not be able to control and regulate people's affairs inevitably. This is the private sphere.[14] This classification into private and public spheres is significant because, with regard to the private sphere, a further conceptual dichotomy exists in identifying areas of human activities in the said private sphere where government control or regulation is traditionally conceded,[15] and where media interference will be frowned upon. This right to privacy includes, for example, the right to choose with whom to speak or associate, the right to choose with whom to have commercial or economic dealings, and the right to choose with whom to have intimate relations including sexual relationship.[16] Within these two categories and with the

10 Young, *supra* note 8, pp. 2–3.
11 Taylor, *supra* note 5, at 84.
12 *Ibid*.
13 *Ibid*.
14 *Ibid*., at 87.
15 *Ibid*.
16 *Ibid*.

influence of colonialism, human rights operation in Ghana have been identified at five conceptual levels in ascending order of operation: (1) the customary family unit; (2) particular customary communities; (3) municipal statute law; (4) the constitution; and (5) the international level.[17]

Privacy cannot be defined easily and because of this, it is difficult to map out areas of life where media interference should be restricted. There are many variant definitions.[18] The concern of this article is to briefly look at the roots to the rights to privacy. That will give a better conception of the nature of privacy and what it is. Such an approach will provide the basis for this article to make a case as to areas of life in which media freedom should be permitted and areas where media interference should not be permitted as a matter of law.

The right to privacy, in the opinion of this article, is inherent in us as human beings; it emanates from our very human nature and our desire by this very human nature to see and to conceive of ourselves as unique, whole, independent, free and apart from others. As unique and independent human beings, we have the capacity to think and we would want our uniqueness and our ability to take control of our lives and affairs, and the sanctity of our lives as unique human beings to be respected. This underlies the notion of the right to privacy. It simply means that our nature as human beings and our well-being and happiness as such, in some respects, would be better promoted if we are left alone; if our spheres of life, if matters, affairs, issues, facts and information which intimately concern us as unique individual human beings, are respected and left intact as we would want them to be. In other words, because we are unique, independent and apart from others, we would want matters that intimately concern us that we do not want others to have anything to do with to be accorded the needed distance. It is in this way that the right to privacy is conceived as a natural right; it inheres in us as human beings, it is a 'birthright' by the very fact that we are born human. While privacy is a natural right, however, the nature of the expression of the right to privacy and, therefore, its scope, are culturally shaped and influenced. The problem arises as to the extent to which we may assert our desire to be left alone since we live in a human society with others. In other words, our 'desires, projects, and commitments are not the end of the matter, since we live among other people who have their own desires, projects, and commitments'.[19] The nature of the conflict becomes more problematic when it becomes necessary to reconcile our desire to protect our privacy and the need for free dissemination of information in a democratic society that may affect such desire to privacy.

There are a number of other respectable authorities that hold the view that the right to privacy emanates from our nature as human beings and is not necessarily a positive right conferred on us by law. Indeed, positive law may

17 *Ibid*., at 84.

18 See J. Michael, *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology*, Dartmouth/UNESCO Publishing (1994), pp. 13–14 defining privacy.

19 R. G. Frey, 'Privacy, Control, and Talk of Rights', in E. Frankel Paul, F. D. Miller, Jr. and J. Paul (eds), *The Right to Privacy*, Cambridge University Press (2000), pp. 45–67.

only be said to recognise the right to privacy and seeks to protect it and not to 'give' it to us. Approaching the issue in a similar tone, Professor R. G. Frey has observed that 'Negative rights, rights of noninterference, are natural rights.'[20] What Professor Frey means by this is that the rights of noninterference are not contingent upon specific social structures and political institutions but rather serve as checks upon the kinds of structures and institutions that can justifiably exist. Rights of noninterference, in his view, are not conventional and social in character, that is, they are not conferred upon individuals by government or society. Finally, Professor Frey submits that if rights of noninterference are not given by the State, they cannot be taken by the State or by any other grouping of individuals.[21] Proceeding from what he describes as liberal and classical liberal pictures, Professor Frey writes:

> In the liberal picture, each individual is viewed as having a certain private realm or sphere of noninterference that is protected by a rather strong concatenation of rights that trump, among other things, considerations of the general welfare and the deep intrusion into one's life of other people's projects and concerns. These rights are required [. . .] because they are what ensure that we cannot only choose a conception but also live out that conception, free from the interference of others who do not share and are hostile to it or to the way that we conduct our lives in pursuit of it [. . .] For to have a conception of the good life but to be unable to live it out, because one lacks the theoretical wherewithal to resist claims of interference in one's activities, is in effect not to be permitted to adopt a conception of the good life to ourselves at all. The choice of how we are to live our lives and the activities that we engage in to fulfill that choice are an integral part of our individuality, which individual rights protect and preserve.
>
> Matters are very similar in the classical liberal picture. Once again, we are held to have a certain sphere of noninterference that is protected by a rather strong concatenation of rights that resist considerations of the general welfare. These negative rights resist the encroachment of others in our lives, as we seek to live out our different conceptions of the good that we choose for ourselves. Such interference, whether by the state or others, cannot be justified by the collective good.
>
> In this classical liberal picture, it is autonomy around which the picture explicitly revolves, and this value is held to be very sensitive to coercive intrusions by others.[22]

20 *Ibid*., p. 53.
21 *Ibid*.
22 *Ibid*., pp. 54–5.

B. The constitution and privacy in Ghana

The Constitution 1992 guarantees the right to privacy in Ghana and subjects that right to the need to protect the rights of others in society and to other larger societal interests including the need for a free media for effective dissemination of information in a free and democratic society. This may broadly be said as defining the contours of the right to privacy in Ghana. Thus, as far as the scope of the right to privacy in Ghana is concerned, the Constitution 1992 provides that:

> No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.[23]

This is the only direct provision on the rights to privacy in Ghana under the Constitution 1992 but no definition of privacy is provided for therein. What is broadly clear from article 18 of the Constitution 1992 is that the right to privacy in Ghana is very broad and includes privacy in relation to one's 'home', 'property' and 'correspondence' or 'communication'. Interference with the right to privacy in Ghana in accordance with this constitutional provision is permitted (1) as may be provided by law; (2) as may be necessary in a free and democratic society; and (3) where such interference is for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

The use of the word 'interference', meaning 'meddling', 'intrusion', 'prying', 'nosiness', 'obstruction' or 'hindrance', in the Constitution 1992 is of particular significance to note. What the Constitution 1992 seeks to prohibit in relation to the right to privacy is 'interference', which has the various enumerated connotations.

23 Constitution 1992, article 18(1)&(2). As far back as 1970 before the current Constitution of Ghana 1992 came into force, some judges were calling for the need for recognition and protection of the right to privacy in Ghana. Other judges were more hesitant and called for the need for studies that would allow for the development of principles on the right to privacy that would be in consonance with the Ghanaian culture and ways of life. A case in point is *University of Cape Coast v Anthony*, *supra* note 2. The photograph of the plaintiff, a married woman, was taken at a function of a benevolent society at the request of the society by arrangement with *The Catholic Standard*, a religious newspaper and with the consent of the plaintiff. The photograph was published in the newspaper. Subsequently, the University of Cape Coast published copies of the plaintiff's photograph in the form of postcards. The postcards were then exhibited and sold at their bookshop. The plaintiff alleged that she had been libelled by the publication of the postcards and sued for damages. No case of invasion of privacy was pleaded but on appeal the plaintiff sought to make a claim to invasion of her privacy. It was held, allowing the appeal that the publication of a person's photograph even for sale without his consent was not libel per se and was not libellous in the circumstances of this case. On the right to privacy, it was held, *obiter*, that the court was precluded by a long line of respectable authorities from granting any relief to the plaintiff for the alleged invasion of her privacy. The court noted that plaintiff gave her full blessing for the picture to be published in a newspaper with worldwide circulation; the defendant did not extract her picture from her private family album. Therefore, she could not make a claim to invasion of her right to privacy.

This kind of approach is consistent with the definition of the right to privacy as 'the right to be alone'.[24]

The use of the phrase 'as may be necessary *in a free and democratic society*' is also significant to note. The phrase, if properly interpreted, implies that Ghana is a free and democratic society. It also equally implies that there are other free and democratic societies apart from Ghana. What this in effect means is that interference with the right to privacy is 'necessary' not only as may be judged in the Ghanaian context, but also as may be judged in the context of any other free and democratic society. The phrase suggests, impliedly, that there are certain values enshrined in free and democratic societies and that those values are necessary in defining the scope of the rights to privacy in Ghana. Impliedly, all of these mean that it will be difficult for a plaintiff in Ghana to make a claim to privacy merely on Ghanaian cultural values and norms alone.

A contrary argument to the foregoing is that not all values in other free and democratic societies may be cherished in Ghana. Thus interference with the right to privacy in one free and democratic society may not be necessary in Ghana. And to that extent not all forms of interference with the right to privacy that may be necessary in other free and democratic societies on the bases of the values in those societies may be necessary to justify interference with the right to privacy in Ghana. So that in the end, whether what is necessary for or justifies interference with the right to privacy in other societies is applicable in Ghana will depend on the circumstances of each case. This article subscribes to the latter interpretation.

The reasoning of this article is that given the group-focused rather than individual-focused nature of Ghanaian society, it is not likely that what will justify interference with the right to privacy in individual-oriented societies will in all cases apply to the Ghanaian context. Indeed, it is likely that in Ghana complaints about interference with the rights to privacy would have more to do with government and media interference than interference from fellow private citizens in their individual or group character. This is because Ghanaians live in groups: families, clans and lineages and in other social groups and aggregates. The conception of the right to privacy in Ghana would therefore be different from that in individually focused societies. Therefore, the invasion of the right to privacy within the family context is more likely to be tolerated than when the right is invaded through other means such as the media. Indeed, one author has acknowledged even in the case of the United States that 'in cases where individuals trespass or eavesdrop merely for their own titillation, it becomes very difficult to assert any public interest in their conduct. The matter becomes much more vexed when the acquired information is then published to the world at large.'[25]

In broad terms, then, the Constitution 1992 protects the privacy of 'home', 'property', 'correspondence' or 'communication'. Literally, these are the spheres

24 S. D. Warren and L. D. Brandeis, 'The Right to Privacy', 4(5) *Harvard Law Review* (1890–1): 193.

25 R. A. Epstein, 'Deconstructing Privacy: And Putting it Back Again', in Paul, Miller and Paul, *supra* note 19, p. 15.

or zones, or contexts within which the right to privacy may be asserted or claimed in Ghana. In other words, a claim to privacy must be situated within any of these contexts. If this is the case, this may limit the scope of the right to privacy. In substance, the content of the right to privacy of home, property, correspondence or communication, as it is, will depend on the circumstances of each case.

There are other substantive rights under the Constitution 1992 which if respected and upheld will promote the substantive right to privacy in Ghana. These include the right to: freedom of speech and expression, freedom of thought, conscience and belief, information, freedom of movement,[26] personal liberty[27] and respect for human dignity.[28]

III. FREEDOM AND INDEPENDENCE OF THE MEDIA IN GHANA

A. The functions of the media and their implications for the right to privacy

The functions of the media have already been alluded to in the introduction. This part seeks to restate the functions of the media and how they relate to privacy generally, not just within the Ghanaian context. The media plays a number of functions that are essential to the operation of a liberal democratic society. First, the media serves as a 'watchdog'. This is accomplished through investigative activity by the press or broadcasting. Investigative journalism is undertaken on behalf of the public and is an essential component in the performance of the watchdog function of the press.[29] In this regard, press initiative can be instrumental in bringing abuses to light or gaining redress against public authorities or private firms or individuals.[30] However, investigative journalism also involves the invasion of privacy since its aim is to disclose matters that people would otherwise not want others to know.[31] Investigative journalism may also interfere with, and damage, the working of institutions subject to investigations.[32] Complex organisations are said to require areas of privacy and discretion, and the effect of unskilful journalistic reporting can be to disrupt relationships between persons and groups within organisations, to weaken public confidence and harm individual reputations.[33] It may also subvert the aims of organisations where some secrecy is essential, as in planning, or investment, or security matters.[34]

Second, the media, and in particular the press, also establishes and maintains 'a sphere of the public'.[35] A society without a free press is said not to contain 'open space' between state or collective control and surveillance and private

26 Constitution 1992, article 21(1).
27 *Ibid*., article 14.
28 *Ibid*., article 15.
29 D. McQuail, 'The Mass Media and Privacy', in Young, *supra* note 6, p. 179.
30 *Ibid*., p. 180.
31 *Ibid*.
32 *Ibid*.
33 *Ibid*.
34 *Ibid*.
35 *Ibid*., p. 181.

personal affairs.[36] In this regard, the media 'are allotted a function in the theory of democratic society which requires them to respond to the needs of the ordinary members of society and keep a watchful eye on institutional threats to the autonomy of the public'.[37] The media does this by gathering and distributing information which is relevant to the processes of public control and accountability of the economy and through the provision of platforms for alternative versions of what should or could be done, among others.[38] The fulfilment of some of these functions may infringe or interfere with the rights of people and organisations. And therein lies the root of the problem of privacy and the media.

The central problem on the issue of privacy and the media then appears to be obvious. On the one hand, it involves the intrusion into, or invasion of, the private life or personal life or affairs of the individual. This intrusion may either be reflected in the methods used by the reporters in obtaining information or it may be a matter of the consequence of publicity, which can cause distress and embarrassment.[39] On the other hand, the problem of the issue of privacy and the media 'is the need to balance individual rights to privacy against the public interest in having information which may unavoidably reflect adversely on individuals or expose otherwise personal matters'.[40] Thus the scale of the problem lies in the general public acceptance of the importance of privacy[41] and the widespread feeling of a threat to privacy from the media. In particular, it is significant to note the paradox that complaints about the effects of publicity only produce more publicity.[42] Similarly, grievances expressed about the methods of obtaining information are likely to exacerbate the distress caused by the initial act.[43] The main focus of this article is the dimensions of the problem between privacy and the media in Ghana and how the issues raised above are addressed in Ghana. Such a discussion is important in outlining the scope of privacy rights and freedom of the media in themselves as rights and how the ensuing conflict in itself is resolved in Ghana.

B. Freedom and independence of the media and its limits in Ghana

In response to the above and other concerns, as far as the functions of the media and the implication of these on the right to privacy and other matters, there is need for some regulation of the operation of the media in Ghana so as to ensure some balance in the protection of both rights. And for this purpose, the Constitution 1992 devotes a whole chapter to 'Freedom and Independence of the Media', much

36 *Ibid*.
37 *Ibid*.
38 *Ibid*.
39 *Ibid*., p. 177.
40 *Ibid.*
41 *Ibid*.
42 *Ibid*.
43 *Ibid*., p. 178.

as it devotes a whole chapter to the protection of human rights including the right to privacy.

First, what the Constitution 1992 does is to guarantee freedom and independence of the media and to prohibit censorship in Ghana.[44] To ensure the realisation of these objectives, impediments to the establishment of private press or media and laws requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information are prohibited.[45] Editors and publishers of newspapers and other institutions of the mass media are free from control or interference by government and they are not to be penalised or harassed for their editorial opinions and views, or the content of their publications.[46] The Constitution 1992 also assures all agencies of the mass media, at all times, the freedom to uphold the principles, provisions and objectives as contained in the Constitution 1992 and the duty to uphold the responsibility and accountability of the government to the people of Ghana.[47]

Second, in recognition of the need to protect other interests in society, what the Constitution 1992 also does is to place some limitation on rights and freedoms as guaranteed to the media. Thus freedom and independence of the media as guaranteed 'are subject to laws that are reasonably required[48] in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons'.[49] Further and more precisely, media rights and freedoms as guaranteed and protected 'shall not be taken to limit the enjoyment of any of the fundamental human rights and freedoms

44 Constitution 1992, article 162(1)(2). See also article 21(1) providing for 'freedom of speech and expression, which shall include freedom of the press and other media'.

45 *Ibid*., article 162(3).

46 *Ibid*., article 162(4). In *Republic v Tommy Thompson Books Ltd (No. 1)* [1997–98] 1 GLR 611, Justice Acquah, later Chief Justice of Ghana, held that article 162(4) did not exempt editors and publishers from both civil and criminal proceedings at the courts in respect of the contents of their publications. Accordingly the words 'control', 'interference', 'penalized' and 'harassed' as used in article 162(4) of the Constitution 1992 were all referable to the government and not the courts.

47 *Ibid*., article 162(5).

48 In interpreting the phrase 'reasonably required' or reasonably necessary in the public interest, security and so on, Justice Acquah wrote:

> This really implies that for any law to qualify as being reasonably necessary or required, the objective of that law must be of such sufficient importance as to override a constitutionally protected right or freedom. In other words, the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial. After this, it must further be shown that the law itself is a fairly proper means of achieving this important objective. This will involve an examination of the provisions of the law to determine, inter alia, whether the provisions infringe any fundamental principle of law like natural justice, and whether they unduly impair the constitutional right. The nature of the examination in this second stage will depend on the nature of the law and the issues at stake.

Supra note 46, at 629.

49 Constitution 1992, article 164.

[including the right to privacy] guaranteed under [...] th[e] Constitution'.[50] In short, freedom and independence of the media are not absolute in Ghana.

IV. ENFORCEMENT OF THE RIGHT TO PRIVACY IN GHANA

A. The constitution, common law and remedies for breach of the right to privacy in Ghana

The Constitution 1992 not only deals with the substantive right to privacy, it also in broad terms indicates the nature of remedies that may be granted for breach of privacy rights and other human rights provisions. The enforcement of fundamental human rights, including the right to privacy, is within the jurisdiction of the High Court.[51] In exercising its jurisdiction, the High Court has the power to give directions or orders or writs including writs or orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition and *quo warranto*, whichever is appropriate, for the purposes of enforcing or securing fundamental human rights and freedoms.[52] There is a right of appeal from the decision of the High Court to the Court of Appeal with a further right of appeal to the Supreme Court in respect of privacy and other human rights disputes.[53]

The Constitution 1992 specifies the laws of Ghana to include the 'common law'.[54] The common law of Ghana comprises 'the rules of law *generally known as the common law*, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature'.[55] The 'rules generally known as the common law' are basically the judge-made law of the English legal system.[56] Ghana was colony of Britain, so British decisions on issues unaffected by Ghanaian statutes or case law may be cited as persuasive authority. Therefore, the scope of the remedy for breach of the right to privacy in Ghana includes both those remedies as specifically decided under the common law of England and those remedies specifically decided by the superior courts of Ghana. Generally, the remedies for breach or threatened breach of the right to privacy include damages and injunctions.[57] It follows that damages or injunction may be secured for breach or threatened breach of the right to privacy in Ghana and damages may be assessed by following common law principles as the Constitution 1992 does not address this matter. The conclusion to draw is that the existence of the constitutional regime for the protection of the right to privacy

50 *Ibid*., article 165.
51 *Ibid*., article 33(1).
52 *Ibid*., article 33(2).
53 *Ibid*., article 33(3).
54 *Ibid*., article 11(1)(e).
55 *Ibid*., article 11(2) (emphasis added).
56 G. L. Williams, *Learning the Law*, Stevens (1982), p. 25.
57 Relevant English case law includes *Wainwright v Home Office (Respondents)* [2003] UKHL 53; [2003] 3 WLR 1137; *His Royal Highness the Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 11 (Ch); *Douglas v Hello! Ltd* [2005] EWCA Civ 595; *Kaye v Robertson* [1991] FSR 62; *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB); *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

in Ghana does not preclude the development or application of the rules of law generally known as the common law regime in Ghana. Indeed, the Constitution 1992 provides that the rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms it specifically recognises or establishes (including the right to privacy) do not exclude other rights or remedies it has not specifically stated but which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.[58] The common law regime for privacy protection thus provides advantages which the Constitution 1992 does not offer by providing for both the substantive right and the remedies for breach. The common law regime, therefore, complements the constitutional protection of privacy in Ghana.

B. The right to privacy, the media and the courts in Ghana

1. An encapsulation of the principles governing the protection of rights in Ghana

A careful reading and analysis of the cases that follow show that the judiciary in Ghana is up to protect both the rights to privacy and free media as guaranteed under the Constitution 1992. The constitutional structure in Ghana guarantees rights that are not absolute by balancing rights against each other or one another or limiting them as may be required by law. Thus the right to privacy has been guaranteed subject to other rights as protected under the Constitution 1992 and subject to other broader societal interests and concerns.[59] Equally, the constitutional structure guarantees freedom and independence of media in Ghana subject to the need to protect fundamental human rights and other laws. The constitutional structure, therefore, is explicit as to when rights may be fully exercised and enjoyed and as to when the exercise and enjoyment of rights as guaranteed may be restricted. The judicial approach as reflected in the cases below seeks to give effect to this very structure in the constitutional jurisprudence of Ghana. The courts are generally of the opinion that rights in Ghana are not absolute and the exercise and enjoyment of rights may be limited as is consistent with law and as is necessary for the protection of the rights of others in a free society with divergent rights and interests. The approach, therefore, is to balance rights against each other so as to protect each right as guaranteed and as appropriate in each context.

2. Judicial interpretation of the right to privacy and freedom and independence of the media in Ghana

The case law also demonstrates that the courts in Ghana recognise that they operate within a cultural setting that is unique and the courts are therefore conscious of and sensitive to the need for them to interpret the law and fashion a body of judicial jurisprudence that is consistent with the context of Ghanaian

58 Constitution 1992, article 33(5).
59 *Ibid*., article 18.

society and culture. In this connection, the courts have called for the need to recognise and apply Ghanaian customary principles in the interpretation and protection of the rights to privacy and free media and other rights generally. In this regard, a better approach to the rights to privacy and the media in Ghana could not have been advocated.

A case in point where the issue of the right to privacy as against freedom and independence of the media came for consideration is the Supreme Court case of *Republic v Tommy Thompson Books Ltd (No. 1)*.[60] The accused persons in this case made a publication in the *Free Press*, which alleged that Mrs Nana Konadu Agyeman Rawlings, the then first lady of Ghana, had smuggled gold to Europe during some trips. The publication further alleged that she was also involved in cocaine deals. The First Lady contended that the publication was false and malignant and calculated to ridicule her in the eyes of the public.

The accused persons were arraigned before the Circuit Court on a charge of criminal libel contrary to section 112 of the Criminal Offences Act 1960 (Act 29). The accused persons then raised a preliminary objection to the jurisdiction of the trial court on the grounds that sections 112 and 117(1)(h) of the Criminal Offences Act were inconsistent with and in contravention of the letter and spirit of the Constitution 1992, particularly articles 162(1)&(4) and 164 which guarantee freedom and independence of the media. The trial court, therefore, stayed proceedings and referred the issue to the Supreme Court for determination. At the hearing, the accused contended that the law of criminal libel under sections 112 and 117(1)(h) of the Criminal Offences Act constituted an unreasonable limitation on the freedom and independence of the media under article 162(1) of the Constitution 1992 and were not reasonably required within the meaning of article 164 of the Constitution 1992. They argued that the effect of section 112 of Act 29 was to penalise the mass media in direct contravention of article 162(4) of the Constitution 1992. The issue was whether these Criminal Offences Act provisions were inconsistent with articles 162(1)&(4) and 164 of the Constitution 1992 guaranteeing freedom and independence of the media.

In a unanimous decision, the Supreme Court held that the provisions were not inconsistent with or in contravention of the spirit and letter of the Constitution 1992. The Law Lords stated that although the offence of criminal libel as created under the Criminal Offences Act constituted a restriction on the freedom and independence of the media as guaranteed under the Constitution 1992, article 164 of the Constitution 1992 subjects the freedom and independence of the media to laws that were reasonably required for the purposes of protecting the reputations, rights and freedoms of other persons. The law of criminal libel, in the opinion of the Supreme Court, did not infringe any known legal principle and was intended to deal with those who unlawfully published intentionally defamatory matter concerning other persons with intent to defame them. The Court reasoned that the Criminal Offences Act provisions in question were meant to prevent interference with and invasion of the victims' constitutionally guaranteed right to privacy.

60 *Supra* note 46.

In the view of the Court, since it was clear that the relevant provisions in the Criminal Offences Act were intended to ensure that press freedom did not degenerate into a regime of tyranny of the press, and since the objective of the provisions was to protect the reputation of others from malicious and unfounded publications, it was a reasonably necessary limitation on the freedom and independence of the media.

The right to one's privacy, according to the Supreme Court, is a fundamental human right guaranteed under article 18(2) of the Constitution 1992, under article 8(1) of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms and article 12 of the Universal Declaration of Human Rights. Therefore, according to the Court, section 117(1)(h) of the Criminal Offences Act, which required the need to establish public benefit in addition to the truth of the matter published, was aimed at giving meaning to the protection of the individual's right to privacy. It was to ensure that, in the dissemination of information about persons, the media in addition to taking care to verify its facts also took care to avoid intentional defamation of persons purely for the purpose of causing wanton mischief. On the right to privacy Justice Acquah was of the opinion that:

> [T]he Constitution, 1992 guarantees each individual the right to the privacy of his property, correspondence and communications, and no one, including a journalist, has a right to violate this privacy except as authorised by law or as it becomes necessary in the interest of the public [...] It is interesting to observe that the protection of one's privacy was in the Constitutions, 1969 and 1979 confined to searches of one's person; property or premises [...] The Constitution, 1992 goes further than the previous Constitutions and protects against 'interference' with one's privacy – a word covering not only searches but any form of intrusion into one's personal life [...] [T]he recent injunction by an English court to protect Princess Diana from press harassment is a solid example of the benefit of such a right.
>
> The Constitution, 1992 does not entitle anyone to unlawfully publish, either negligently or intentionally, a defamatory matter about any individual.[61]

Justice Acquah in this case also examined the precise boundary between one's private and public life. According to him, it is in ascertaining this boundary, which ought to be ascertained having regard to the constitutional protection of one's privacy, that most journalists may genuinely be caught by the law. In his view, there are three indispensable pillars of a viable democracy: freedom of thought and expression including press freedom; the rule of law and an independent judiciary; and fair and free elections. Thus every effort must be made 'to keep the press free and independent within reasonable limits, which balance societal interests with that of the individual'.[62] On the issue of privacy and public life, Justice Acquah

61 *Ibid*., at 632–3.
62 *Ibid*., at 634.

noted that in a free democratic society such as Ghana, those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism, accordance to Justice Acquah, would amount to political censorship of the most objectionable kind.[63] Nevertheless, since:

> [S]ome publications in some newspapers go beyond genuine criticism to a deliberate and orchestrated design to scandalise, ridicule and malign innocent citizens [...] [s]uch a situation obviously provides a strong case for the maintenance of appropriate penal laws to deal with such irresponsible and venal journalism.[64]

Justice Sophia Akuffo, who was also on the bench in the case, observed that like other forms of liberty, unrestricted freedom of expression will lead to infringement of the rights of others and, therefore, restraints on the liberty of utterance are necessary and inevitable.[65] The effect of article 164 of the Constitution 1992, according to Justice Akuffo, is to place a limit on the constitutional rights and freedoms of the media and this limit patently permits laws reasonably required for the protection of the reputations of other persons. In her opinion, the 'need to afford such protection is premised on the proposition that a person is entitled to his good name and such name ought not be interfered with or tarnished gratuitously and on an irresponsible whim'.[66] The constitutional guarantee of a free and independent media, according to Justice Akuffo, is not intended as an end in itself, created just for its own sake. The only end envisaged by the Constitution 1992, she noted, is the creation and promotion of a democratic society and the freedom and independence of the media is one of the tools with which the Constitution 1992 seeks to achieve this end.

Republic v Tommy Thompson Books Ltd (No. 1) is thus an exhaustive and interesting case on the right to privacy, protection of reputation and media freedom in Ghana. What is not clear from the case is whether it was one protecting the right to privacy and reputation or even it was a case for defamation. This is because the decision does make references to these concepts as if they meant the same thing. Perhaps such a blend of privacy, reputation and defamation as against freedom of the media suggests that the demarcation line among these rights or concepts, if any, is blurred at least in the Ghanaian context. The case does provide an interesting discussion of the significance and nature of the rights to privacy and the limitations on the right to privacy and the media in Ghana.

Another important case involving freedom of the press and human rights generally is *Republic v Tommy Thompson Books Ltd*.[67] Two publishers, the managing director and the editor of the *Free Press* newspaper, and the editor-in-chief of the *Ghanaian Chronicle* newspaper caused certain publications which

63 *Ibid*., at 635.
64 *Ibid*.
65 *Ibid*., at 639.
66 *Ibid*., at 640.
67 *Republic v Tommy Thompson Books Ltd* [1997–98] 1 GLR 515.

suggested that the government of Ghana was involved in drug trafficking. The *Free Press* asserted that the government then was the most disgraceful and disgraced in the history of Ghana, being made up of drug barons. The four accused persons were arraigned before the Circuit Court, charged for communicating false reports likely to injure the reputation of the government contrary to section 185 of the Criminal Offences Act 1960 (Act 29). Section 185 of the Criminal Offences Act provides in part that whoever communicates to any other person any false statement or report which was likely to injure the credit or reputation of Ghana or the government and which he knew or has reason to believe is false, is guilty of a second degree felony.

At the trial, counsel for the accused raised an objection to the jurisdiction of the trial Circuit Court on the ground that section 185 of Criminal Offences Act was inconsistent with and in contravention of the letter and spirit of the Constitution 1992, particularly articles 21(1)(a) and 162(1)&(2). Consequently, the trial Circuit Court referred the issue of the constitutionality of section 185 of the Criminal Offences Act to the Supreme Court under article 130(2) of the Constitution 1992. Articles 162(1)&(2) of the Constitution 1992 guarantee freedom and independence of the media and prohibit censorship in Ghana except as provided by law, which law must be consistent with the Constitution 1992. Article 21(1) provides that all persons have the right to freedom of speech and expression, which includes freedom of the press and other media. The issue was whether section 185 of the Criminal Offences Act was inconsistent with or in contravention of the letter and spirit of the Constitution 1992.

The Supreme Court held that although articles 21(1)(a) and 162(1)&(2) of the Constitution 1992 conferred on every citizen and the media of Ghana the right of freedom of speech and expression, and the right to publish, respectively, those rights were subject to laws as were reasonably required in the interest of national security, public order and public morality in accordance with article 164 of the Constitution 1992. The Supreme Court reasoned that although section 185 of the Criminal Offences Act imposed a restriction on the rights conferred on an individual and the media in his enjoyment of freedom of speech and expression and to publish, since section 185 sought to punish the making or publishing of false statements which were likely to injure the credit or reputation of Ghana or the government of Ghana, section 185 fell within each of the permissible restrictions under article 164 of the Constitution 1992. The Court further reasoned that making or publishing such statements or reports would be against the public interest.[68]

The judgment of Justice Kpegah is of particular interest in this regard in the sense that, first, his analysis extends the discussion to what may be described as balancing individual rights against the 'collective', 'group' or 'societal' rights. Second, the judgment of Justice Kpegah calls for the need to take into cognisance the dual nature of the Ghana legal system in deciding upon rights in particular and in adjudicating cases generally. Third, his analysis calls for the need for cultural

68 Constitution 1992, article 295 defines 'public interest' as including 'any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana'.

sensitivity in the interpretation and application of the laws of Ghana. His call for the need to balance individual rights as against societal rights shows a certain measure of the consciousness of the judiciary in Ghana of the very cultural setting in which cases in Ghana are adjudicated and decided upon. A further implication of his analysis is that individual rights in Ghana may be abridged when the needs of the larger society are to prevail given the circumstances of each case. In his judgment, Justice Kpegah called for the need to 'balance' individual rights against societal rights. In the opinion of Justice Kpegah:

> There is the need for a meeting point between individual and societal rights for harmony. For while an unbridled insistence on, and enforcement of personal rights have the grave potential of leading to anarchy, so also has a similar insistence and enforcement of societal rights the potential of undermining the democratic values of a society.[69]

In his view, the type of speech that can be described as intrinsically evil and injurious to the rights of others and the interests of society as a whole should be prohibited. This category of interests should be the legitimate concern of, and be asserted by, a government in any democratic society. The main justification for the 'balancing concept' according to Justice Kpegah 'is that it is not intended to directly control free speech, but rather to protect from evil and injurious consequences those interests which are lawfully within the sphere of governmental concern in any democratic society'.[70] In particular Justice Kpegah saw the need for balancing rights in view of the fact that the 'Constitution, 1992 [. . .] imposes on the courts the duty to "balance" individual rights and the freedom of the press against the legitimate interests of society; that is, interests which should be the concern of a government in a free society'.[71] Thus in his judgment, free speech and freedom of the press are not absolute in Ghana. Since the Constitution 1992 'itself imposes certain limitations, in broad terms, on those rights, the only sensible thing the courts can, and must, do in such disputes is to "balance" the rights against laws which, in the words of the Constitution 1992, are "reasonably required" to protect the rights of others and societal needs'.[72]

Justice Kpegah also rooted his judgment and legal analysis in the unique structure of the legal system of Ghana, which is a dual one consisting of the statute laws and common law, on the one hand, and customary law, on the other.[73] Customary law consists of the indigenous traditions, practices and laws of the various ethnic groups in Ghana.[74] In the view of Justice Kpegah, customary laws

69 *Supra* note 46, at 558–9.
70 *Ibid*., at 559–60.
71 *Ibid*., at 560.
72 *Ibid*., at 561.
73 Constitution 1992, article 11.
74 See J. A. Davies and D. N. Dagbanja, 'The Role and Future of Customary Tort Law in Ghana: A Cross-cultural Perspective', 26 *Arizona Journal of International and Comparative Law* (2009): 303.

and traditions ought to be taken into account in fashioning the jurisprudence of Ghana. In his opinion, the framers of the Constitution 1992, in providing for customary law as part of the laws of Ghana, have given Ghanaians a unique opportunity to fashion Ghanaian jurisprudence which will serve the peculiar needs and aspirations of Ghanaians. In the context of the protection of Ghanaian society, Justice Kpegah stated that a law which is enacted primarily to protect the integrity and reputation of Ghana,[75] and therefore the integrity, reputation and right to privacy of Ghanaians, is consistent with the Ghanaian culture and value system. The learned judge stated:

> Our culture and custom abhor insulting the occupant of a stool (that is a chief); and such a conduct is taken to be disrespect for the stool itself, *ipso facto*, the State. This is reflected in the [...] saying [...] 'no one uses his left finger to point to his hometown.' It is a saying which is known to every tribe in Ghana and demonstrates the cultural value of the people and the esteem in which they hold the State and its authority, and those who personify it. Therefore, a law enacted to protect the reputation and integrity of the modern state of Ghana cannot be against our values as a people and therefore [cannot be] against the spirit of our Constitution, 1992.[76]

Thus Justice Kpegah is advocating for judicial recognition and application of customary laws and traditions in Ghana in adjudicating upon rights, including the right to privacy.[77] The position of Justice Kpegah that the protection of the

75 Justice Amuah similarly reasoned that it would not be in the interest of the people of Ghana as a whole to allow the state of affairs where people can make or publish serious false statements or reports about the country or the government, statements which the maker knows or has reason to believe are false. In his view, such a practice would bring about confusion and thus endanger the young democracy in Ghana and would serve as a recipe for social anarchy; *Republic v Tommy Thompson Books Ltd*, supra note 67, at 585.

76 *Ibid*., at 570.

77 Constitution 1992, article 39(1) requires the State 'to encourage the integration of appropriate customary values into the fabric of national life'. Article 39(2) equally provides that 'The State shall ensure that appropriate customary and cultural values are adopted and developed as an integral part of the growing needs of the society as a whole.' Further, article 11 provides for customary law as part of the laws of Ghana. In addition, article 34(1) enjoins every citizen and institution, including the judiciary, to be guided by the Directive Principles of State Policy in the interpretation and application of the Constitution and laws of Ghana. In interpreting these stipulations as a whole, Justice Kpegah said in *Republic v Tommy Thompson Books Ltd*, *supra* note 67, at 562:

> The cumulative effect of these provisions and others I have already referred to, in respect of the customs, traditions and values of our people, in my humble opinion, is that the framers of the Constitution 1992 have given us a unique opportunity to fashion our own jurisprudence which will serve our peculiar needs and aspirations as Ghanaians. We shall be doing a lot of disservice to our people if in developing our jurisprudence which should underpin the administration of justice in our country, we tend to ignore or relegate to the background our customs, traditions and values but rather opt for a slavish adherence to the unexamined jurisprudence and concepts from other countries.

On this basis, Justice Kpegah noted as he did in *Republic v Independent Media Corporation of Ghana* [1996–97] SCGLR 258, at 269 that Ghanaian judges must remember that legal system

integrity and reputation of the State and the people who represent the State and their right to privacy is in consonance with the Ghanaian culture and value system. The suggestion that Ghanaian customary traditions and values should be taken into consideration in the interpretation and application of the law, had been made in an earlier case. In *University of Cape Coast v Anthony*,[78] Justice Sowah in his *obiter* opinion noted that Ghanaians' 'innate ideas of ordinary common decency' and 'social mores' impel a recognition and protection of the right to privacy.[79] In other words, privacy in Ghana is not just a natural right which is given legal protection; it is also culturally valued, and as such in the context of the Ghanaian legal system should be protected under customary law as much as it should be protected under statute law. This approach is consistent with the Constitution 1992, which in relation to privacy does nothing more than *protect*[80] against interference with privacy.

The fact that the Constitution 1992 seeks to *protect* the right to privacy is an implicit acknowledgement that the right to privacy is not conferred on individuals by positive law as such. Positive law in the form of a constitution only recognises that the right exists and then seeks to protect it. This in turn supports the assertion of this article that the right to privacy is natural and differently expressed within the cultural context. In the Ghanaian context, an analysis of the preceding cases and the Constitution 1992 suggests that the right to privacy is not just a natural right; it is something that is culturally valued in Ghana, and for this reason the Ghanaian 'social mores' and 'innate ideas of ordinary common sense' require that protection be accorded to this right.

Justice Kpegah in his judgment also observed that the Constitution 1992 'is drafted in such a way that it does not exalt or elevate individual liberty above legitimate concerns of the society which may be peculiar to [Ghanaians]'.[81] In a dissenting opinion, however, Justice Wiredu held that section 185 of the Criminal Offences Act in its form without a second look by an appropriate authority

---

of Ghana is a dual one and that Ghanaian customary laws and traditions need to be to take into account in fashioning a jurisprudence of Ghana. In other words, Ghanaian judges 'have to endeavour to develop our own [Ghana's] jurisprudence, not neglecting our cultural values as a people'. *Republic v Tommy Thompson Ltd*, supra note 67, at 562.

78 *Supra* note 2, at 36–7.

79 *Ibid*., wherein Justice Sowah noted:

> In my opinion, *our own innate ideas of ordinary common decency impels such recognition* [of the right to privacy]. Suppose a family met behind closed doors to consider the claims to successions of two rival candidates A. and B. to a wealthy man. Such a meeting requires a high degree of confidentiality and suppose C. a nosy stranger eavesdropped on the deliberations of the meeting and heard D. the head of the family speak in disparaging terms about A. whom he disrecommended. If C. then publishes this to A., our law would be wholly deficient if the family could have no legal remedy against the inquisitive C. Or suppose that for purely prurient reasons A. peeps into the washroom where B., a modest lady was having a bath and communicates the result of his prying to C. Common decency and *our social mores* would compel our courts of justice to visit A. with some legal sanction for his obvious *invasion of B's privacy.* (Emphasis added)

80 Constitution 1992, article 18.

81 *Republic v Tommy Thompson Books Ltd*, supra note 67, at 574.

would be very dangerous in a multi-party democracy in the hands of a tyrannical government which would be likely to use it to suppress freedom of speech and expression and stifle criticism. In the opinion of Justice Wiredu, the language in section 185 of the Criminal Offences Act was ambiguous and sweeping, and it admitted that even private communications among relations could constitute a crime even if they occurred between spouses. Such wide and sweeping language, according to Justice Wiredu, ought not to be constitutionally sanctioned under the Constitution 1992.

The preceding analysis demonstrates the group-focused aspect of the right to privacy in Ghana. This is not surprising given the cultural and socio-linguistic nature of Ghanaian society. People in Ghana live in descent groups: the family, the clan, lineage and so on. Thus the constitutional and judicial approaches to the protection of collective or group rights or the rights of society are consistent with the social structure of Ghana. This approach is most unlikely to receive greater attention in most parts of the Western world than it does in Ghana. The judicial approach thus demonstrates that there are two levels of privacy in Ghana: the individual level and the group, collective or societal level. The societal level is identical with the general public interest and the values reflected in a democratic society. The analysis also shows that the courts in Ghana are very sensitive to both the right to privacy and freedom of the media. To this extent, the courts, given the constitutional structure, are prepared to balance privacy as against media rights. Media rights will prevail over privacy when publication or broadcast is required by law or when such broadcast or publication is necessary for some other larger societal interest, the public interest. Absent these, the right to privacy prevails.

In every human society, both the right to privacy and free speech are cherished and protected. These rights are necessary for both the individual and societal interests. And since rights are not absolute, the best approach to the issue of privacy versus free speech is to balance these rights against each other when a conflict ensues.

The Constitution 1992 strikes a balance in its guarantee or protection of these rights, and human rights generally. The judges in Ghana are living up to their duty to construe the law consistent with the purpose of the law by seeking to balance these rights to protect each depending in the circumstances of each case. Therefore, it may be asserted that the approach to the issue of privacy as against free media in Ghana is in the right direction. This approach is not out of the cultural context of Ghana and it is not completely different from the practice in Europe and the Western world.

From the decided cases, it can also be said that privacy in Ghana and media freedom are both strongly and seriously protected. Even then, it may be said that the exception to when the right to privacy may not be protected is very tight so that unless a matter concerns the public interest or unless the law provides otherwise, the media may not publish or broadcast anything about the privacy of the individual. Even though Western and European societies tend to be more individually centred than is the case in Ghana, it does not appear that individuals in these societies enjoy as much protection of their privacy as do their counterparts

in Ghana. Part of it is cultural: Ghanaian society appears much more secretive than Western societies.

It remains uncertain from these decided cases, however, the extent to which they are consistent with the indigenous Ghanaian conception of the right to privacy. What will a typical rural community perceive the right to privacy to be? This is not clear from the cases. This remains a question that can be answered from empirical inquiry which is beyond the scope of this article. It is for this reason that the call by Justice Kpegah for recognition to be given to customary law and practice in fashioning Ghanaian jurisprudence is worthy of commendation. Fashioning such jurisprudence requires the collaboration and involvement of all sectors of Ghanaian society including the law makers, members of the legal profession, ordinary citizens, academia and the judiciary.

V. CONCLUSION

This article examines the scope of the right to privacy under the Constitution 1992 in relation to free media: the limits to the right to privacy and the media; how conflict between the right to privacy and the freedom and independence of the media is resolved in Ghana; and the role of the courts in the protection of the right to privacy in Ghana.

The article argues that the right to privacy is inherent in us as human beings; it emanates from our very human nature and our desire by this very human nature to see and to conceive of ourselves as unique, whole, independent, free and apart from others. In other words, because each individual human being is unique, independent and apart from others, they would want matters, issues, facts or information that intimately concern them that they do not want others to have anything to do with to be accorded the needed distance and space. It is in this sense that the article sees the right to privacy as a universal natural right the scope and content of which are only culturally defined.

In respect of the constitutional right to privacy in Ghana, what is clear from article 18 of the Constitution 1992 is that the right to privacy in Ghana is very broad and includes privacy in relation to one's home, property and correspondence or communication. Interference with the right to privacy in Ghana in accordance with this constitutional provision is permitted (1) as may be provided by law; (2), as may be necessary in a free and democratic society; and (3) where such interference is for public safety or for the protection of the freedoms of others. Since the Constitution 1992 protects privacy of 'home', 'property' and 'correspondence' or 'communication', it goes without saying that these are the spheres or zones, or contexts within which a right to privacy be may be asserted or claimed in Ghana. In other words, a claim to privacy must be situated within any of these contexts. This, it is argued, limits the scope of the rights to privacy in Ghana since individuals may not be able to claim a right to privacy outside these contexts.

Further, the article argues that since the Constitution 1992 limits the exercise of the right to privacy to, among others, cases where it may be necessary 'in a free

and democratic society', interference with the right to privacy in Ghana may be said to be 'necessary' not only as may be judged in the Ghanaian context, but also as may be judged in the context of any other free and democratic society. However, since not all values in other free and democratic societies may be cherished in Ghana, interference with the right to privacy in other free and democratic societies based on the values of those societies may not be necessary in Ghana.

As far as privacy and the media in Ghana are concerned, the courts in Ghana are up to play their judicial role in interpreting and giving effect to the respective rights as provided for in the Constitution 1992. The courts in Ghana recognise and admit the important role of the media in a free democratic society such as Ghana. The courts in Ghana equally recognise the importance of and the need to protect the right to privacy. The conclusion to be drawn from the cases analysed is that the courts are more inclined to balance the right to privacy against societal interests. This is not surprising given the constitutional jurisprudence and social structure of Ghana in which both rights are not absolute.

Therefore, it can be said that there is a vibrant system of law and body of judicial decisions on the right to privacy, human rights generally and media rights in Ghana. What remains to be done is a study of the nature and scope of the rights to privacy in Ghana empirically. Given the group, collective and corporate nature of the social and descent groups in Ghana, the typical and indigenous conception of the right to privacy no doubt will be different from the Western or European conception of the right to privacy. Most people in Ghana who will go to court claiming invasion of the right to privacy are more likely to be people with 'sophisticated' lives who have received a Western type of education. The views of such persons, including some of the judges who sit to decide those cases, may not reflect the ordinary Ghanaian conception of the right to privacy. Ghana's legal system is dual in nature and customary law, which is part of it, may be better placed to deal with the indigenous conception of the right to privacy. Even then, it would be useful to conduct a study on the right to privacy in Ghana consistent with the cultural context of Ghana.