

THE LAW OF PRIVACY IN KENYA : A CASUS OMISSUS?

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LAWS.

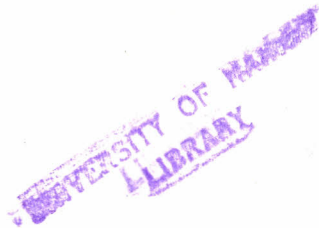
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II

DEDICATION:

This dissertation is specially dedicated to Murithi Wa Mugo Muturi for sheltering and feeding me when I was fleeing away from my adversaries. He knows what I mean.

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ABBREVIATIONS:

1. A.C. Appeal cases
2. B&C Barnwell and Creswell's Reports (1811-1830)
3. COX COX's Criminal cases (1843-1940)
4. K.B King's Bench
5. K.L.R Kenya Law Reports
6. Q.B.D Queen's Bench Division
7. St. Tr. State Trials (1163-1820)

STATUTUTES

1. Constitution
2. Income Tax ActChapter 470
3. Kenya Posts and Telecommunication Chapter 411
Corporation Act.....
4. Preservation of Public Security ActChapter 37
5. Police ActChapter 84
6. Kenya Medical Practitioners andChapter 253
Dentists Act
7. Prevention of Corruption ActChapter 65

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CHAPTER ONE:

1.1 THE CONCEPT OF PRIVACY

Privacy is indeed, a nebulous and a rather under-developed field of litigation in many legal systems, even in the very established ones such as of the United States and Britain. This state of affairs has had it's sinister ramifications and fall-outs, one of them being lack of a solid and popular definition of personal privacy. This is not baffling considering the rawness and unfamiliarity of the subjects. The courts have not been very usefull in this direction, most of the judges preferring to sidestep the matter than confront it squarely. Luckily, to define what privacy is and its place and extent in the legal field. Yet, despite an immense body of literature on the subject, privacy still remains a conceptual chimera. Hopefully, the issue is being approached with increased avidity as the modern lifestyle hinged upon technology exposes new areas of the invasion of privacy that are even more deleterious than those previously known.

A deep understanding of what privacy constitutes must start from a generally accepted and clear-cut definition of that term. Attempts to define "privacy" have been beset by multifarious bottlenecks. For instance, cultural disparities may lead to different perspectives of what privacy is. This is clearly illustrated by the observation that in most primitive societies, privacy of the person, the family and property is almost non-existent. Writing on the Tlingit Indians of North America, Livingston Jones says:

"Privacy is hardly known among them. It cannot be maintained very well under their system of living, with families bunched together The Tlingit's bump of curiosity is well developed and

anything out of the ordinary, as an accident, a birth, a death or a quarrel, never fails to draw a crowd..... They walk in and out of another's homes without knocking on the door. A woman may be in the very act of changing her garments when Mr. Quakish steps in unannounced to visit her husband. This does not embarrass her in the least. She proceeds as if no one had called".¹

In the modern culture, there is a predilection towards seclusion and privacy. The intensity and complexity of modern life, attendant upon advancing civilization, have rendered necessary some retreat from the world. There is an increasing abhorrence of any social intrusion without private consent. The horizons of the problem of invasion of privacy have been stretched quite extensively in modern life due to the present technology advancement which has led to the emergence of refined and powerful means of surveillance such as electric devices. Therefore, diverse social, political and economic background will invariably end up with reducing or extending the scope of privacy thereby making a conceptual gamut on the matter hard to come by. Furthermore, sceptical perspectives on privacy as a right have also contributed to the fluidity of this field of law. Nevertheless, and notwithstanding these and other variables to which the meaning and scope of "privacy" have been subject, it is ideally requisite to develop a working definition of privacy.

Several definitions have been articulated in an attempt to explain what privacy is. Many as they are, they all indicate that the rights to privacy essentially deals with the "right to be left alone".² But there seems to be no consensus among legal commentators as to the quality of privacy as a "right". Some feel that the offence of invasion of

confidence, copyright, and defamation, Warren and Brandeis argued with a sweeping rhetoric often misleading, that these cases were merely instances and applications of a "general right to privacy". The common law, they claimed, protects an individual whose privacy is assailed by the likes of uninvited pressman, albeit under different names and forms. However, their arguments were rejected and accordingly overruled. But that legal tussle served to enlighten the courts on the importance of spiritual and intellectual needs of men as evident in the protection of privacy. Therefore, it was not incidental when New York included on its statute book an Act rendering those guilty of privacy invasion in the form of use of another's name or picture for commercial purpose without his consent liable to criminal and civil action.⁶ Two years later, in 1905, the supreme court of Georgia recognized, at last, the right to privacy. Finally, the Warren and Brandeis thesis had triumphed. Since 1905 the vicissitudes of the mammoth body of literature.

Today the right to privacy is recognized by the overwhelming majority of American courts following numerous legislations. The decisions of the court on the matter have been fully analysed by Dean Prosser under four different headings which are adopted here for the sake of convenience.⁷

- a) Firstly, the tort covers cases in which there has been an intrusion upon the plaintiff's seclusion or solitude or into his private affairs. This head of liability has obvious affinities with the present law governing trespass to the person or property or nuisance or the intentional infliction of emotional distress. The common law gives an adequate remedy in these cases which is often supported by the award of exemplary or vindictive damages. But the common law gives no remedy to one who complains

privacy is primarily one against good taste and no more. Sarmond classifies the offence of invasion of privacy as a "doubtfull tort"³ and this clearly shows the position of the right to privacy in most legal systems. However, recent developments have taken place despite the unwillingness displayed by courts to create a new head of liability. However, the task of defining privacy at the conceptual level still remains a most absorbing and uphill one. Nevertheless, the absence of an absolutist conception of privacy has not hampered an appreciation of the human and personal value of privacy and its importance in modern life especially. With the modern life becoming more hectic and complex, it is difficult not to realize the importance of privacy. Modern inventions and practices have subjected individuals to mental pain and distress which could be regarded as being far greater than could be inflicted by more bodily injury.

The historical origin of the debate about the right to privacy may be traced to the essay "The Right to Privacy" which was co-written by Lois Brandeis and Samuel Warren.⁴ It appeared in the Harvard Law Review in 1890 and has been referred to as perhaps the most influential legal article ever written.⁵ This is because of the outstanding influence it exerted upon American law at that time and it enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence. What led to the writing of the article was the case in which Samuel Warren had sued the Boston's "Yellow Press" for covering and disclosing the details of a wedding celebration in which the plaintiff's daughter was being married off. The "Yellow Press" which had not been invited not only regaled its readen with details of the celebration but also disclosed the guest-list. Naturally that irked Samuel Warren as the wedding celebration had been intended to be a quiet affair.

Drawing upon English cases of, in particular, property, breach of

that his neighbours have spied from their windows into his premises. Nor does there seem to be any remedy for the interception of telephone or other conversations. Especially with the upsurge of electronic surveillance, there is clearly a need for some development of the law safeguarded properly in this age of the tape-recorder, the candid camera, radar or laser beams and long-range and infra-red photography. Indeed, such countries as United States, Canada and Britain have taken the hint and are enacting appropriate legislations.

- b) Secondly, there are cases in which complaint is made about the public disclosure of embarrassing private facts about the plaintiff. For example, one may say of another that he does pay his debts. Though the law of defamation could be applied, the defence of justification could be successfully pleaded. In any event, the material so published must be objectionable to a reasonable man of normal sensibilities. In such a case, the victim may be left devoid of a legal remedy.
- c) Thirdly, there are cases relating to defendants who place the plaintiff in a false light in the public eye by publishing untrue statements about him. Sometimes, a remedy under the law of defamation may apply.
- d) Finally, there are cases in which the defendant has acted for his own purpose, mostly commercial. All these torts show the importance of privacy.

Apart from the influence of the Warren and Brandeis decisions on the right of privacy, Article 12 of the Universal Declaration of Human Rights was

also responsible for enhanced thematic concern in this area. That document was formally endorsed on 10th of December, 1948, and its introduction led to creation of some new rights as well as further entrenchment of those traditionally recognized. Such a line of action was agitated by the second world war conflagration. Article 12 reads as follows:-

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

For the purposes of this paper, it is vital to note the second part of the Article. It impliedly appeals to various legal systems to create that right to privacy if it is absent. Since adequate protection of the individual against intrusions into his privacy can only be supplied by the law, it necessarily follows that such law guaranteeing privacy should be created. However, this Article remains a recommendation until when acted upon ^{by} a state.

Though the above-quoted Article guarantees the right to respect for private life, the text itself provides little or no material at all to assist in determining the scope of the right. Even the preparatory documents give little assistance in interpreting that right. Consequently, the issue has been left to legal and judicial commentators. In the recent years various human rights writers and judicial notables, a considerable number of legal societies and several supranational, organizations have made important studies on the subject, all of them arriving at the conclusion that the individual has a right to the protection of his privacy. Some feel that, in fact, the right to be left alone is the fount show "such respect for this privacy that they refrain from analysing what it consists of",⁸ as Badinter aptly remarks.

A cursory glance at such works on the subject shows that the term "privacy" covers a very broad area of the law, the borders of which can hardly be described. Besides, most authors agree that it is difficult, if not impossible, to give a general definition of "respect for private life" which would be suitable for legal use. It should not be surprising, therefore, that due to the extent to which the concept of privacy has been abused, some commentators have gone as far as feel that "the currency of privacy has been so devalued that it no longer warrants if it ever did serious consideration as a legal term of art".⁹ There is good cause to worry about this problem of lack of a definition of privacy. Such a definition should be capable of being confined to certain legal interpretation. This is very necessary because no legislation can be created on a subject that is ill-defined otherwise it would not only create confusion to the courts but also the administrators of that same law, consequently, more harm than good would be done. Therefore, however it is appropriate to point out and fill the lacunae in our law, it is submitted that it would even be more urgent and requisite to identify the subject-matter with certainty.

Common law jusists were certainly the first to attempt to describe this concept. This has led to a large corpus of definition of privacy, all seeming revolving around such words as seclusion, intrusion, and interference. According to Mr. Justice Cooley, the right to respect for private life is "the right to be left alone".¹⁰ This definition deserves appreciation at least for categorically emphasizing the need for individuals to be left alone in their pursuit of a happy life. This accurately describes the essence of freedom of liberty which is so often curtailed by public bodies and individuals alike with or without justification. For centuries man has pitted himself against the encroachment of the state upon his freedom of action and thought. Individual persons are also a danger to the privacy of the individual.

In essence, the amount of privacy a citizen enjoys may be used as a gauge of freedom and liberty in that particular community. This is why privacy depends upon the scope and function of individual freedom in society. The question of whether or not a man's home is his castle will be answered by determining the extent to which individuals and public agencies have left him alone. It is arguable that this could include an unauthorized viewing by a member of the public.

The American courts have defined privacy as "the right to live one's life in seclusion without being subjected to unwarranted and undesired ^{publicity} ["] The scope of such a definition is rather limited as it does not deal with those instances where no disclosure is made to the public although it is arguable that this could include an unauthorized viewing by a member of the public. For instance, mere peeping seems not to be included under that definition. In cases where snooping is accompanied by disclosure, the course of action is easy to discern. In the case of *Commonwealth v. Lovett*, in which a man had watched a married woman through the window of her house and then circulated discreditable tales about her, a Pennsylvania judge commented:-

" I consider this as a serious kind of offence. Every man's house is his castle, where no man has a right to intrude for any purpose whatever. No man has a right to pry into your secrecy in your own house. There are very few families where even the truth would not be very unpleasant to be told all over the country..... It is important to all persons that our families should be sacred from the intrusion of every person". ¹²

Though disclosure of facts gathered by snooping is glaringly detestable and the courts have recognised this, the same does not appear to be the case where only mere snooping is involved. Winfield's definition

of violation of privacy seems to offer more guidance, "the unauthorized interference with another's seclusion of himself, his family or his property from the public".¹³ Unfortunately, this definition could very likely include only mere snooping.

But more impressive is the French legal theory which is not only more particular about what privacy is but also gives some insight into the possible scope of such a right. According to Martin, one of the commentators, private life is "a person's family and personal life he lives at home with the door shut." This is further complemented and amplified by Nerson, another French legal publicist, who speaks of the "right to privacy" as:-

"... a private preserve which enables an individual to make the essence of his personality inaccessible to the public without his consent. In this way a person can enjoy peace and remain alone with himself. He is entitled to the right to a kind of central redoubt where he can escape the grip of others and as "The Imitation of Christ" puts it, attend to himself".¹⁴

This view is quite compatible with what privacy is all about, the individual's right to exclude others from those aspects of living which are primarily and intimately his, the right to respect for the private nature of his person and its integrity, which is the right to be left in peace. The notion of being left in peace is indeed of immense significance in assessing the concept of privacy as it has been held as the mark of individual freedom. In the case of public utilities commission .V. Pollak,¹⁵ in his dissenting opinion, justice Douglas pointed out that "the right to be left alone is indeed the beginning of all freedom". This statement has much validity especially in the present day when citizen's lives have come under much monitoring by the governmental agencies.

The undoubted difficulties involved in defining the individual's private life have led some writers to do so by reference to its converse, namely, public life. An Individual's private life is thus everything that is not his public life. Bodinter observes that:-

"At first sight this would appear to be merely shifting the problem with nothing gained.... But apart from the fact that the limits of public life, which is more restricted, appear easier to determine, this negative definition has the advantage of concentrating attention on the primacy of private life as something closed to indisrect intrusion and the common lot of man, whereas the rest, that is to say public, is open to the curiosity of all and constitutes the exception".¹⁶

But such a suggestion does not make the concept clearer. It merely defers the problem because practically it is difficult to trace and draw a frontier between what belongs to the public life and what is in the realm of private life. One must still start by knowing with certainty what is private to an individual's life. This standard must not be so subjective as to be incapable of legal evaluation. Therefore, the appropriate standard cannot be the reticence which a person shows with regard to his private life alone. However, the reserve that one shows to that intimate sphere of his activity does mark the distinction between and contrasts the individual and the person. Nevertheless, the boundary between what is private and what is public would still remain elusive due to the multiplicity of subjective views. Fortunately, the muddle created thereby on the subject is easily away at an encouraging pace especially with the pioneer guidance provided by various American legal publicists and court decisions.

While illustrating the importance of informational privacy, Jerome J. Hanus, an American legal writer, writes in his article entitled "Informational Privacy" that:-

"An arrest record precludes government employment although charges have been dropped; an applicant for a mortgage is inesplicably refused; a teacher's caustic comment follows a pupil into adult life. Such incidents illustrate an individuals loss of control over information about himself maintained in records. Whether one views this loss with alarm or considers it merely as an inevitable irritant of modern life depends upon the degree to which one values the underlying right of privacy".

The aspect of control seems to have been very central to Jerome's understanding of privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how and what information about them is communicated to others".¹⁷

Jerome's definition ^{is} more broad and articulate, compared to the others. Firstly, it portrays the right of privacy as a right by bestowing upon an individual legitimate power (inherent in the "claim") to determine what information about him may be consumed by the public. The offence of privacy invasion therefore ceases to be merely an offence against good taste. Secondly, the definition allows for the inclusion of other "persons" who may benefit from the right to privacy. As to whether juridical persons may enjoy such a right and have duties under the same is a much disputed question. But this problem arises if the claim to privacy is given a very categorical and parochial construction. If juridical persons are entitled to a name, or to be protected from unwarranted interference, the begging question then is why they should not be accorded enjoyment of the right to privacy. It has also been doubted whether the right to respect for the home is traditionally viewed as the house occupied by an individual, current judicial practice and legal theory tends to give it a wider meaning. The term 'home' is applied to any building, whatever its purpose, together with its curtilage, whether built on or not, access, to which is restricted to the persons having the right to exclusive occupation and to persons whom they have authorized to enter or establish themselves there. Thus the building in which a trading company has its registered office, its management and its offices is considered its home. In Belgium, for example, a search of such premises must be authorized by a warrant issued by a examining judge. Similarly, it seems juridical persons may rely on the right for the respect of their

correspondence. Protection of trademarks and business confidences indicates a demand for privacy.

Thirdly, Jerome's definition is apt in that it shows the individual the character of privacy. It does this by elevating the rights of the individual in his quest for privacy against those of the other members of society. It is the individual who has the final say as to what information about him is to be discussed, when and how.

A close examination at the sample definition given in the foregoing about what privacy is shows that a common definition has not been arrived at yet. Yet the long search for a definition of 'privacy' has produced a continuing debate that is often sterile and, ultimately, futile for at least three main reasons. First, the premises upon which the the proposed definitions are based are materially different. Thus, for example, those who assume privacy to be a "right" have not really joined issue with those who conceive it to be a state, condition, or area of life. While the former are asserting a normative statement about the desirability of whatever it is that the particular writer regards as privacy, the latter are merely proffering a descriptive statement about privacy.

Secondly, the arguments as to the desirability of privacy frequently proved from different standpoints. Some see privacy as an end in itself, while others regard it as instrumental in the securing of other desirable social ends such as creativity, love of "emotional release"¹⁸. Thirdly, the definitions usually beg more questions than they are designed to answer. For example, Jerome defines privacy in terms of "control" over who has information about or access to the individual.¹⁹ But in order to evaluate such definitions one needs to know, for instance, what purpose, if any, is served by the exercise

of this control. Normally, the answers point to arguments in favour of the individual's right or claim to or interest in limiting the exposure to which he is subject, or the circulation of facts about him. These arguments for a specific exercise of choice, not for mere control. Nevertheless, all hope is not lost as all the legal commentaries on this subject seem to share the view that privacy revolves around the "right to be left alone". This view is the one to be hereafter relied on as the meaning of the right to privacy. Even in its brevity it does tell us what privacy is as well as signify its importance.

Although different individuals may occupy various places on the spectrum of concern for privacy, it is a vital pre-requisite for enjoying privacy that any individual retains the choice to be private in the first place. Such individual privacy may be seen in solitude, small-group intimately, anonymity and reserve.²⁰ This should be a matter of personal taste. hence. openness in society should be subject to this qualifications unless if it can be reasonably justified. Such a line of action would be congruous the undisputed notion that human rights have the individual as their centre of focus. Of course one cannot afford to ignore those numerous instances when an individual's personalized claim of privacy conflicts with the needs of the society. Apart from that some private acts may also have adverse results on the individuals themselves on one hand as well as the society on the other. For instance, a person's claim for privacy has to survive a clash of interest in achieving a balance with other essential values. this is especially the case at the social level where a search for solitude can easily lead to overwhelming isolation and eventually psychological dilapidation. Yet, even such a state of affairs may not necessary form an excuse or justification for intruding into and encraching an individual's desire for privacy

unless it affects his individual and social responsibilities.

The above-discussed view is clearly envisaged by the words of Clinton Rossiter while summing up the importance of privacy for political liberty:-

"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society.... It seeks to erect an unreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgements entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts".²¹

Despite the fluiding of the definition of the right to privacy, one fact remains clear, that privacy is a concept that is gradually taking its place in law as well as political philosophy. This may be seen in the recent development of the concept in most of the Western European legal systems particularly in America and Britain. Just like the familiar concepts, such as justice, equality, freedom and fair-play, have extensively influenced the minds of many persons as well as affected public policies, privacy seems destined to do the same. At the moment it remains quite opaque and offers a genuine opportunity for endless commentary. A cursory glance at the relevant traits of the modern society especially its information-mania, which is unprecedented in magnitude, exposes the singular danger that the right to privacy is now facing. This calls for a keen study attended with special care in order to know how best to protect that valuable social and civil asset while at the same time dealing with the many and

yawning legal loopholes in that sphere of the law.

It is not difficult to note that the more quite problems of privacy violations are a product of the extraordinary development of Science and technology in the recent years. Like janus, science and technology have two faces and have brought to man prosperity as well as oppression. During the pre-technology era, privacy violation was greatly hampered by limited capability of the eye and ear of man. With the scientific explosion of the present-day, almost any form of privacy invasion can be conducted with a wider scope. Apart from that, new areas of privacy concern have emerged, for instance, computerized data-banks and polygraphing. As science changes, as quickly as its doing today, so do privacy circumstances also vary. Therefore, if any definition and understanding of the concept of privacy are to be adopted, they must allow for such variables. It is submitted that "the right to be left alone" meaning is quite adaptable. The adaptability of the meaning of the concept is crucial as the following illustration shows.

Spying (in the literary sense of watching), though in itself an ancient offence, can nowadays be performed with far greater effect by utilising modern devices; the hidden camera for the visual image the hidden microphone for the spoken word, the use of laser rays, infra-red photography and so on. Today, a spy does not have to trespass his victim's premises since he can do it even while some miles away. Moreover, while it is bad enough that the recording of sounds or images in a manner which constitutes a violation of privacy has become much easier and more frequent in the recent years, it is even worse that the important use of the information thus obtained has also become tremendously facilitated. This state of affairs indicates that surveillance by public authorities as well as by individuals has increased. Therefore, the individual needs to be protected against those two forces.

1.2: RIGHT TO PRIVACY : A RIGHT?

Privacy had its legal and political genesis in 1890 when Samuel, D. Warren and Louis D. Branders, elucidating upon judge Thomas Cooley's "Treatise on the law of Torts"¹² urged recognition of a right to privacy in the law of torts defined as the right to be left alone. Their understanding of the right was quite straightforward. People engaged in activities of non-public import should be left alone by the press and the government as well as the uninvited individual. The common law, they argued, had developed from the protection of the physical person and corporeal property to the protection of the individual's thoughts, emotions and sensations. More important than their policy recommendation, however, was the rationale they gave for recognizing such a right. While their argument rested on concern for human dignity on one hand, they also realized that new technological inventions and business methods which were very likely to find their way into the hands of unscrupulous men, could pose a threat to personal freedom on the other hand.

As the last century drew to an end it was relatively simple to evaluate the legal position of a man whose privacy had been invaded - the doors of the courthouse were closed to him. Viewed historically, this is not surprising. For centuries the common law's primary concern in the personal injury field had been the maintenance of an often uneasy and fragile public peace. The courts focussed their attention on redressing those wrongs that were likely to lead to violence, such as injury to the person and interference with property rights. Apart from unconsciously yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel, until recently judges have been somewhat obsessed with the fear that

offering protection for intangible personal interest would open the floodgates of litigations and deluge the courts with ill-conceived lawsuits brought by people who were overly sensitive, vindictive, or litigious paranoids. The mental distress that resulted from a loss of privacy no doubt seemed too ephemeral and shapeless an injury to warrant the attention of the law.

It may be said quite correctly that at the time there was no pressing need for the courts to protect privacy. This is because it was quite limited in scope by the available technical means. After all, the common law offered remedies for the offences that usually went along with privacy invasion, such as trespass to property during snooping. Indeed such a form of privacy invasion like spying was inhibited adversely by the natural limitation of the human eye, ear, voice and memory. And in the relatively closed society in which everyone knew everyone else, the danger that inaccurate information would be accepted as true was mitigated by the fact that people were apt to have first-hand knowledge or at least their opinion - of the individual or event being gossiped about. There was also the threat of extralegal sanctions, such as social or commercial ostracism, that would discourage the tale-teller and prevent privacy invasion from becoming too serious.

There seems to be a very distinct relationship between a people's level of civilization and demand for privacy. As individuals advance, especially ideologically and materially, they tend to become possessed of individualistic tendencies that are evidence of demand for privacy.

Our Kenya society is on the path of modern development. the more modernized one is, the more his demand for privacy seems to be escalating. The rural folk appear to be still living in an atmosphere of closeness. The need for privacy is not yet noticeably developed probably due to "ignorance" as well as the desire for mutual co-existence that militates

against high demands for privacy. But as people's lifestyles become individualistic and materialistic, there is good reason to believe that privacy will attain a new tone of sensitivity. After all, the generalty of the Kenyan society has not become used to litigation as yet. Some inter-personal frictions are either ignores or solved outside the court.

In the western world, by the close of the 19th century the scenario fundamentally altered due to the quick and momentour growth in commerce and industry. many towns emerged. Print, telegraphic and photographic technology were emerging and were becoming extensively fashionable and available. Literacy was on the increase and newspapers and recor-keeping were becoming common. This materialistic and intellectual life invariably gave birth to information mania and individualism. As larger amounts of information began to be gathered and circulated to wider audiences, the chances that those receiving it would have direct knowledge about the subject or be able to test truth of what they heard or read decreased, while the likelihood that the printed or spoken word would be accepted as the truth increased. It is at this time that the law inevitably began to consider the need for recognizing a right to report to the courts to protect individual privacy. This the law did by creating the offences of defamation especially but which does not cater for the privacy invasion involved in some instances. It is because of such lacanal that Warren and Brandeis argued for the creation and recognition of a tort or civil action that would adequately remedy such invasion of individual privacy. Specially, they attacked the press for its rapacity for news; "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery"²³ Such a right was to be founded on the claimant's inviolate personality.

As noted above, the development of the right to privacy was also substantially suppressed by the conservatism of the courts. The ruling in the case of Roberson V. Rochester Folding Box Company shows that. The plaintiff's picture had, without her consent, been used by the defendant company for adorning ^{advertisements}, parker C.J, speaking for the majority, was unable to find a precedent for the existence of such a right, said he, it had "not as yet an abiding place in our jurisprudence, and..... cannot now be incorporated without doing violence to settled principles of law....." ²⁴

However, in 1905, the supreme court of Georgia became the first court to recognise expressly the right to privacy in the case of pavesich .V. New England life Insurance Co. ²⁵ The plaintiff was allowed recovery after the Insurance company had used his name and picture together with a testimonial falsely attributed to him which proclaimed the wisdom of insuring with the defendant.

Under pavesich's photograph appeared the testimonial that in his "healthy and productive period of life" he had bought insurance from the company and was reaping the benefits of that wise decision. The caption beneath the "sickly looking" counterpart whined that he had failed to pursue this favourable course and had come to regret it. The plaintiff had apparently never connected to the use of his name and picture in that manner; indeed, he had never purchased a policy from the company and had not made the statement attributed to him. The Georgia court held that the right to privacy did exist and concluded that the victim of such an intrusion would recover damages for the injury. It was a good judgement as it appreciated that the plaintiff had actually sustained an injury of a manner that the traditional law of trespass could not redress effectively. By so doing, the court brushed off the stringent conservative instincts of the courts as evident in the spirit of the common-law precedents.

In the years that followed, the Roberson and Pavesich cases provided the pattern though it was only restricted to protection of the individual's privacy against commercial exploitation. But other courts ventured beyond the Pavesich decision while others have been restrained by conservatism and sense of uncertainty as to the extent to which individuals' privacy could or should be protected. Fortunately, legislation in some jurisdictions has recognized and standardized the right to privacy so that currently there are more or less clear boundaries within which the courts can operate. In America, federal statutes have played a crucial role of considering the right to privacy. Such statutes are the Crime Control Act, 1973, Fair Credit Reporting Act 1970, Family Educational Rights and the Privacy Act of 1974. Other provisions of the law have also been accorded a liberal interpretation so as to ensure protection of privacy, for instance, the law relating to entry, seizure and arrest, and trespass.

The Kenyan legal system has certainly not gone that far. In fact, it has barely made any tangible steps towards creating a tort of that nature. Apparently, section 70 (c) and 76(1) of the constitution can be said to contain the intention to protect privacy. They deal with protection for the privacy of one's home and other property and from deprivation of property without compensation, and protection against arbitrary and unreasonable entry and search of one's person or his property of premises without his consent respectively. Unfortunately, the courts have obscured the issue of privacy in their own vocabulary as well as shown unwillingness to use the term. By so doing, the issues are obscured and, in consequence, diminish the force of the argument against, for instance, excessive police power of search. Indeed, the scope of these provisions of our constitution have been directly qualified by supplementary legislations such as the Police Act and Preservation of Public Security Act. Therefore, a general right to privacy seems non-existent. One wonders about the cause of this legal lacuna.

Probably it's the level of our development especially in the area of technology and material civilization . It could even be a reflection of the operative moral norms as argued above. However, although the traditional African societies never stressed so much on privacy as a norm, there is evidence of its importance. For instance, some proverbs do teach the wisdom of not interfering with other people's private matters, home and family. that shows the desire to be left alone and for persons to mind their own business, which is what right to privacy deals with.

Finally, it is significant to note that privacy seems to be an issue in other common-law actions. the law of trespass to property and person may be viewed as containing some protection of the individuals privacy. Indeed, it is a solid principle of common-law that a man's home is his castle. This serves to keep intruders out of a person's premises and this is aimed at ensuring that one enjoys peace and tranquility while he is at his home. the home is a cherished place where one can retreat into from the hassles of the life outside. The intention to allow individuals enjoy their own peace is further buttressed by the view of John Stuart Mill that "over himself, over his own body and mind, the individual is sovereign"²⁶. Similarly, the law relating to defamation seems to have an element of privacy as its purpose. But such propositions are denied substance by a critical analysis of those actions and their limitations.

For instance, an action for defamation does not deal with right to privacy as such. When private facts about an individual are gratuitously published the truth or falsity of those facts ought to be irrelevant in deciding on the wrongfulness of the defendant's conduct. Should they be untrue and affect his reputation the plaintiff may have a cause of action for defamation. But, of course, in general, if the facts disclosed are true he will, in most common-law jurisdictions,

be met with the defence of justification, whatever the effect upon his reputation. In the American law an action for invasion of privacy may then be brought provided that the ingredients of the tort are satisfied. According to Prosser (supra), there must be publicity, the facts disclosed must be private facts, and they must be offensive to a reasonable man. In such cases it is often said that it is the plaintiff's reputation which is the principal interest protected. This seems wrong for two reasons. First, the gravamen of the plaintiff's complaint is the publicity given to his private life; he seeks not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all. Secondly, the plaintiff ought not to be barred from recovery when the disclosure does not affect the esteem in which he is held or even enhances it. However, it is submitted that an overlap between the two forms of action is inevitable at times especially when dealing with one of the privacy torts the activity which consists in publicity that places the plaintiff in a false light in the public eye. But, as in every action, it is significant to know what the law is seeking to protect. Some provisions may be couched in the language of privacy, such as the claim for legal professional privilege whose rationale, in any event, is to facilitate the obtaining and preparation of evidence by a party to an action in support of his case and any protections given to the client's privacy is basically fortuitous.

After this brief survey of the historical development of the concept of privacy and the right thereof, it is appropriate to study the intrinsic aspects of privacy and its qualifications as a right as well as its practicality as a legal norm. Such a description should be welcome since people at times tend to make linguistic and conceptual mistakes to speak of some phenomena as rights.

My view in this regard is that respects for private life should in the

first place, be analysed according to the meaning and scope which the authors of the universal declaration of human rights intended to give to this concept. Such a study is not merely an academic venture aimed at encouraging the progress of legal science in a specific field. It also has a profound import from the point of view of social ethics and the extent to which it will be cherished and upheld. This will ensure that arbitrary qualifications are not made on the right especially by the signatory states.

Right to privacy in this case is being used in its special 'manifesto' sense. Our human nature is the natural seed from which such a right sprouts and grows. That is why, although the notion of privacy is clearly relative, depending as it does both on current manners and customs and the individual's circumstances, it seems that there is nevertheless an area of private life entitled to special protection, which comprises essentially, in an unusual conjunction, the interests of the other members of the family, a person's own likeness, the privacy of his family life and love life. That is why rights to freedom are traditionally said to arise from our concern for the respect of a person's autonomy (and hence may be referred to as autonomy rights). Some of these rights are possessed by us solely by virtue of being human beings. They address themselves to that humanity in us. Those should be distinguished from social-contract rights which accrue to us because of our being members of particular society at a particular time. Unless that capacity of membership in a society is established one may be unable to enjoy them, let alone enforce them. They are defined as the rights which we, as members of the society can justly claim, the rights that a just society given its concrete conditions of production and so on, deems us to have. Many of our civil liberties must be constructed as social-contract rights such as the right to vote.

John Locke and other classical liberals were the first to express the existence and sanctity of natural rights of human beings, that is, rights we have without being in any special circumstances. Though they spoke of natural law and natural rights, its clear that insofar as they worked with the concert of rights, they conceived them as permissions to act in certain ways and correlative obligations of others not to interfere. The underlying ideas were that persons ought to be free to order their actions and dispose of their possessions and persons as they see fit, and that all men may be restrained from invading one another's rights. It is submitted that , that is what makes the difference between a "right" on one hand and "moral norm", "condition", "state" or "area of life" on the other. Looking at the gravity of the individual need for privacy, it seems that the concept of privacy belongs and fits comfortably in the former category. to put it in the latter category would be tantamount to attempting to resist our true nature.

According to Joel Feinberg, a right revolves around a claim.

He says:-

"To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. to have a claim in turn, is to have to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming".²⁷

The lesson one draws from this statement is that a right affords the individual grounds for coercion; one can legitimately force someone not to violate or cease from violating another person's rights. The concept of privacy must be seen in this context and be rigorously screened against that background before one can confidently talk of a "right to privacy".

There is the danger of the concept been seen as an "ought" situation. "Ought" situation are only born of moral sensitivities and do not afford grounds for coercion. But looking at the concept of privacy in its entirety it does qualify as a right that accrues to the individual by virtue of his humanity.

There seems to exist certain fundamental ties between rights and the notions of human worth and human dignity. Such connexions do provide us with further determinative theoretical or systematic reasons for recognising such a right as right to privacy. This is going to provide a solid test of the right to privacy. This is because the ultimate goal of all legal rules is to promote the welfare of man who is subject to any law. One way of promoting the welfare of the individual is to recognise and provide for his dignity and worth as a human being. Bad law runs counter to these principles. If there is absence of provisions aimed at protecting those principles, then there is lacuna. Feinberg notes some of the above-mentioned connexions in the following manner:-

"They (rights) are especially sturdy objects to "stand upon", a most useful sort of moral furniture.... This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men", to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be duly but properly proud, to have that minimal self-respect that is necessary to be worthy of love and esteem of others. Indeed, respect for persons may simply be respect for their rights, so there cannot be the one without the other, and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then or to

think of him as possessed of human dignity, simply is to think of him as a potential maker of claims".²⁸

These words of Feinberg are almost perfect. They are powerfully illustrative and descriptive. Human worth is the intrinsic value we attribute to human beings regardless of their merit. It is perhaps our most basic moral principle. If the need and value of privacy is worthy of doubt that, in fact the right to privacy is illuminated with this notion of human worth, it leaves no shadow of doubt that, in fact, the right to privacy is worthy of philisophic acclamation and appreciation. Privacy violation can have several negative effects. The victim, inter alia, feels bad and ashamed for having been "discovered". This could eventually lead to psychological distress. Apart from that, the very act of prying into other people's affairs and seclusion is offensive to moral propriety. These are some of the salient aspects of privacy which really justify its worth as a right. If the concepts of equality and liberty, for instance, are highly respected, there seems to be little justification for having scruples about the right to privacy. But whether or not it is to be considered as fundamental is quite another question. But one is inclined to consider it as a fundamental right especially in this era of information explosion and thirst.

Merely conceptualization of the right to privacy ^{is ineffectual} if it is not accompanied by recognition by the law. This could be through legislation which is the most effective mode of recognition for, normally, it is not for the courts to make new law. But existence of precedents or custom may also suffice. Quite perceptible is the fact that our laws offer a very limited scope of privacy (supra). there is no particular case law insofar as the right to privacy is concerned. Such a state of affairs is almost dangerous especially when directed at

some of the realities around us, for example, the often but covert inhuman treatment of political undesirables. Subject to statutory and reasonable qualifications, can such a person plead violation of right to privacy on the bans of our constitution or any other law? such an argument would seem far-fetched.

In the case of Kenneth Matiba .V. Attorney-General, Justice Bosire said:-

"An argument founded on what is claimed to be the spirit of the constitution is always attractive for it has a power appeal to sentiment and emotion; but a court of law has to gather the spirit of the constitution from the language of the constitution. What one may believe or think to be the spirit of the constitution cannot prevail if the language of the constitution does not support that view".²⁹

The same view had been made by Das. J. in a previous case of Keshava Menon.V. state of Bombay. The essence of that reasoning is that mere argumentation, however persuasive, will be considered an opinion if the intention of the law-giver does not seem to make a particular provision. The court of appeal went on to say:-

"... an applicant must allege in his application a violation of any of the provision of sections 70-83, (inclusive) before the court can have jurisdiction to entertain his complaint. That is what section 84 says. That, in our view, is what the legislature intended. We cannot but give effect to the words of the enactment".³⁰

That clearly illustrates the precarious position of the right to privacy in the Kenya legal system. Our law is manifestly inadequate to protect the individual against various attacks made, often

in the name of progress, order of liberty, upon his personality. It seems that only legal intervention can remedy that state of affairs. though the law provides certain protection against physical intrusion (in particular by the tort of trespass and nuisance) the safeguards against surveillance and telephone tapping are clearly inadequate. In Britain, for instance, the situation is comparatively different. The English have always been known to value the right to be left alone not only by public authorities but also by uninvited fellow individuals. It is a civil right that has flourished, not because it is enshrined in constitutional law but because the English society has an ingrained respect for privacy that even the authorities traditionally have shown little indication to threaten it. The maxim "A man's house is his castle" is a case in point notwithstanding its ancient origins. In addition, several legislations have emerged in response to the more modern types of privacy invasion.

In conclusion, however, it must be admitted that if any tangible progress is to be made in this field of the law, the law must eschew the ambiguity, the abstractions and the poverty of "privacy". For example, the limits of "personal information" must be clearly defined. Those facts, communications or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or confidential and therefore to want to without or at least to restrict their circulation, must be analysed objectively. This is necessary because the flexibility given to the language of privacy has been responsible to a large extent for its uncertainty. "Privacy" has therefore grown into a large and unwieldy concept. Its inclusion also in numerous issues, such as defamation, property

and secrecy, has resulted in the dilution of privacy itself, thereby diminishing the prospect of the own protection as well as the protection of related interests. Unless the language of privacy is concretized, the conceptual anarchy that now prevails around the notion will continue to be an insurmountable stumbling-block. The core of the issue must be located. In fact, the aura of mystery that previously surrounded the concept has replaced by confusion. General theory must give way to specific areas of thematic concern.

FOOTNOTES:

1. Livingstone F. Jones, A study of the Tlingits of Alaska,
(New York, 1914) page 58.
2. Barry Cox, Civil liberties in Britain, (1958) Chapter 8
3. Salmond on the law of Torst, 15th Edition (1961) page 20
4. (1890) 4 Harvard Law Review, page 193
5. Richard Wacks, The protection of privacy, (1980) page 1
6. N.Y. Seccional Laws (1903) chapter 132
7. A.H. Robertson, privacy and Humna Rights (1970) page 32
8. Ibud, page 27 parag. 2
9. Raymond Wacks (supra) page 10
10. Cooley, Torts 2nd Edition (1888) page 29
11. A.H. Robertson (supra) page 27 parag. 3
12. 4 clark 5 (1831)
13. Winfiled and Jalowicz on Tort, 12th Edition page 566
14. A.H. Robertson (supra) page 28, parag.2
15. 343 U.S 451 (1952)
16. Badinter, J.C.P (1968) No. 2136 parag.12
17. Stephen L. Wasby, civil liberties: Policy and policy-making
(1977) chap. 12
18. Alan F. Westin. privacy and Freedom (1979) pages 33-34
19. Ibid
20. Ibid pages 31-32
21. Clinton Rossiter, the pattern of liberty pp 15-17.
22. Kalven, privacy in Tort law -"were Warren and Brandeis wrong?".
31 law and contemporary problems (1966)
23. 4 Harvard law Review (1890), Warren and Brandeis, "The Right to
privacy".
24. 171 N.Y (1902) p. 538
25. 122 GG)1905) p. 190
26. On liberty (1859)

27. Joel Feinberg, The Nature and value of Rights: Journal of
value inquiry 4 No. 4 winter 1970
28. Ibid
29. Misc. Application No. 666 of 1990, Before justice B.E.O Bosire and
J.A. Mango
30. S.G.R. 228. The words of Das, I were also adopted in:
 - a) R.V. Lel Mann (1969) E.A. p. 357
 - b) Anaita Karimi Njeru .V. R (No.1) (1977) KLR p 154

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SOME ASPECTS OF INVASION OF PRIVACY

This chapter deals with some particular instances of invasion of privacy. These are mainly illustrative and will constitute only a tiny part of the subject. Obviously, an attempt to encompass the entire cross-section of the issues coming under the umbrella of the topic of privacy would be too ambitious a project.

Though doctrines of privacy have been so fluid that a certain judge was prompted to compare them to a "haystack in a hurricane" in the case of ETTORE V. PHILCO TELEVISION BROADCASTING CORPORATION¹, some structure has been provided by an eminent legal scholar known as Dean William Prosser. After canvassing the relevant cases, he subdivided them into four categories on the basis of whether they involve: appropriation of another's name or likeness for personal advantage; intrusion upon a person's seclusion or solitude, or into his private affairs; public disclosure of embarrassing facts about someone; or, publicity that places a person in a false light in the public eye². This arrangement has been questioned by several legal scholars, especially its value and validity. Some have criticized it as being rigid and unreflective of the development of the institution of privacy. But it seems that the courts (especially American courts) have tended to accept prosser's approach as a practical sketch of the law of privacy's present contours³. However, what is essential is the law's protection of the individual's interest in privacy as a projection of his human dignity.

It is necessary to make one general observation before proceeding to examine some aspects of invasion of privacy in Kenya and in other societies as well. It is a fact that

development of law is usually a response to socio-economic and political conditions in a given society. That being the case, it should not be surprising to discover that, for instance, dissemination of computer data is not yet a sensitive problem in Kenya. This may be viewed vis-a-vis the situation in the developed countries where computer technology is very extensively used. Kenya is yet to reach that stage of technological development. The same case applies to the form of invasion of privacy dealing with appropriation of the plaintiff's name or likeness for the defendant's advantage. Such situations are products of break-neck commercial competitiveness. In Kenya conditions have not got to that stage yet. For such reasons, some aspects of violation of privacy are going to be left out of this paper due to their lack of relevance.

Some forms of interference with privacy have existed for centuries such as spying and prying, or attacks on a person's honour and reputation. Others are new, or more effectively practised on account of modern techniques brought about by advance in technology. For example, prying has become quite revolutionized. Another problem that is reasonably associated with modern technology is the improper use of information collected and its dissemination. With today's immense circulation of popular press and other materials, it means that a vast audience can be reached. This contrasts with the past when the modes of communication were less developed. At the present-day, more harm is likely to be inflicted since transmission of information is much quicker and covers a larger audience.

Following is a discussion of selected forms of interference with privacy. As much as possible an attempt is made to examine the Kenyan law and practice but while at the same time referring to the general principles.

2:1 SNOOPING

This covers both spying and prying. It involves watching and listening that is not permitted by the injured party. It is best understood in the context of the "siege of the Englishman's castle" that usually takes many forms. For instance, eavesdropping is a form of snooping.

An element of privacy that seems universal is a tendency of individuals to keep a watch on the activities of others. The society also does engage in some kind of surveillance in order to guard against anti-social conduct. At the individual level, the tendency is born of a sense of curiosity that lies in each individual from the time that as a child he seeks to explore his environment to his later conduct as an adult in wanting to know more than he learns casually about what is happening to others. The amount of curiosity may differ from one individual and society to another.

Curiosity has its role to play in the development of individuals and societies alike. In the society it helps to provide vicarious experience, to circulate information, and to promote group and community norms. Therefore, curiosity operates as part of family, neighbourhood, and organizational life: in the form of gossip, it expresses the desire of persons in any social unit to keep abreast with news and be privy to the secret aspects of behaviour. The basic stock-in-trade of the press is to satisfy curiosity through radio, newspapers and other literary materials. In the same vein, the press often stimulates public curiosity to maximum levels by reportorial techniques that override the privacy claims especially of public figures and anyone touched by a public event. All these situations indicate that snooping is quite normal but while conducted in a certain manner. As one commentator has put it:

"There is a hermit spirit in each of us, but there is also a snooper, a census-taker, a gossip-monger and a brother's keeper"⁴.

This seems to be the reason why people tend to pry and eavesdrop around. Viewed this way, snooping may be regarded as a mere irritant, being a phenomenon that we have to live with as it seems to be a part of our human nature. "Show me a man who does not eavesdrop and I will show you a man with serious hearing problems"⁵, one writer has noted. But that is not the kind of snooping intended to be dealt with in this case. It is the form of snooping that is planned and aimed at achieving a certain goal, often prejudicial to the victim.

Individuals may react differently to an instance of snooping. The less sensitive ones may not mind very much, but the fact remains that every individual has the desire to be free from the greedy eyes and ears of other people. This will be quite evident especially where the atmosphere is rather intimate and confidential. Typical of the offensive prying that constitutes intrusion is an early case in which a woman successfully sued her doctor for bringing a young man who was not a physician into her room while one was giving birth. That was in the case of DE MAY .V. ROBERTS⁶. Such an incident may deprive the victim of that inner sense of being known to himself or herself, a feeling that could lead to psychological suffering. The feeling that one is being watched or listened to could also reduce one's enjoyment of freedom.

Technological advancement has quite compounded the problem of snooping through the introduction of more efficient electronic surveillance devices. The competence of today's watching and listening equipment makes it possible for a "peeping Tom" to conduct his snooping with great ease and

efficiency. Private conversations conducted in the ostensible seclusion of the home may be recorded with ease and impunity by powerful transmitters no bigger than a match-head or by radar or laser beams which interpret vibrations on window-pane by someone who may be up to two miles from the source. Long-range and infra-red photography abolish the cameraman's need of propinquity and light⁷.

Hitherto, the snooper had necessarily to infringe the territorial limits of his victim. This could then lead to an action for trespass, an arrangement that tended to relegate the invasion of privacy into the background. But electronic technology has rendered such traditional protection - physical and legal - unnecessary since one does not have to trespass the land of the victim in order to snoop. This state of affairs poses a challenge to the legal principles that deny the victim relief without trespass. The question that emerges is then whether or not the victim has suffered a wrong worthy of legal redress.

The common-law action of trespass which could be resorted to in the absence of a general tort of violation of privacy is subject to some limitations. An action of trespass is applicable only when there has been entry upon the plaintiff's land. Entry need not occur when modern electronic surveillance devices are used. Moreover, the action will not avail a guest in a house or hotel for he has no interest in the land. But should physical entry take place without authority, or by the impersonation of an official, or should lawful entry be abused, "or should lawful entry be abused, a trespass may be committed. It was so decided in the case of ..."
SHEEN .V.CLEGG⁸ in which damages were awarded after the defendant had secretly installed a microphone above the plaintiff's marital bed.

But considering the engulfing embarrassment and shame such a victim experiences, it would be practical to consider a tort of violation of privacy.

An alternative action would be that of nuisance. Unfortunately, it suffers from similar disabilities. Usually, snooping, by whatever means is conducted secretly and without the victim's awareness. Nuisance has been widely defined to include "interference with one's enjoyment, one's quiet, one's personal freedom, anything that decomposes or injurious affects the senses or the nerves". This definition was laid down in the case of ST. HELENS SMELTING CO. V TIPPING⁹. Firstly, for the action of nuisance to be sustained, the victim must have been aware of the circumstance causing nuisance. This may not apply in the case of electronic surveillance. Secondly, it will be of no use to a plaintiff who does not have interest in the land. Thirdly, a landowner or user cannot be prevented from opening windows that overlook the plaintiff's premises since the privacy of a man's landed property must give way to the building activities of his neighbours. This is especially the case in densely populated areas, a view that is supportable on both legal and equitable grounds. In conclusion, common-law actions are deficient in so far as protection of privacy is concerned. Neither trespass nor nuisance avails someone who is not in the occupation of the premises affected. Apart from that, neither tort is apt to deal with modern means of electronic and optical surveillance which do not require physical proximity. There is no trespass when watching or listening is conducted outside the compound of the victim. On the other hand, it is difficult to stretch the law of nuisance to cover an interference of which occupier was wholly unaware at the time.

Another form of action - for breach of confidence - seems

to be equally handicapped. This form of action applies only where there is a pre-existing confidential relationship and where there is disclosure or use of confidential information. It seems to be common in business relationships as well as in correspondence matters. However, the notion of confidentiality does not arise in cases of surreptitious watching or listening. Therefore in the absence of a separate and distinct legal redress, or extension of the purview of some legal remedies to accomodate the wrong of violation of individual privacy, the problem of snooping is likely to remain a thorn in the flesh. There is need for more protection than the law now gives.

The American legal system has responded by passing several Acts, inter alia, the privacy Act of 1974 which has clarified the law of privacy to a large extent¹⁰. But this has not completely cleared the confusion surrounding the law of privacy. Many issues about it are still contentious. For example, a question that frequently arises in relation to the problem of snooping is whether an individual has a "right to the spoken word". This may depend on the degree to which the contents of the spoken word are public or private. This is why the public comments of a public personage do not enjoy much confidentiality and a voluntary waiver is usually presumed. Consequently, a public figure does not enjoy so extensive an area of privacy as do the other individuals. But a public figure has, too, a right to respect for his private life but to a limited extent. On the whole it appears that if the words uttered are private and no consent has been given for this disclosure, one may be deemed to have a right in them at least at the conceptual level.

Philosophically one may be viewed as the owner of his body.

In the same manner he could be considered as the owner of the products of the physical functioning of his body. Spoken words are crucial as they reflect one's fears, emotions, hopes, rationalizations and perceptions of himself and his environment. In that case spoken words may be seen as ^{constituting} a personality right. Probably this is why, for example, the Norwegian Criminal Penal Code provides that it is an offence to eavesdrop on conversations by means of a secret listening device, or, even to put recording apparatus or any other technical device in a place to which a person has obtained access surreptitiously or by fraudulent means¹¹. Though the theory of information property has been constantly attacked, it is essential to note the words of Professor Edward Shills:

"The social space" around an individual, the recollection of his past, his conversation, his body and its image, all belong to him. He possesses them and is entitled to possess them by virtue of the charisma which is inherent in his existence (Sic) as an individual soul - as we say nowadays, in his individuality - and which is inherent in his membership in the civil community"¹².

This property theory is supported by the fact that personal data are treated as commodities especially in the law of search and seizure. But the basic objection to the theory is that real and personal property concepts are irrelevant to the personal values that a recognition of the right of privacy aims at preserving. The objective of protecting individual privacy is to safeguard emotional and psychological tranquility by remedying an injurious dissemination of personal information. It is difficult to envisage a legal right to information on the same parallel as to land. In the same way, what property right could be there in relation to solitude? Therefore, it is rather difficult to regard personal information as intangible property.

As already noted, it is not only the individual who is involved in snooping. In fact, at the present-day snooping is becoming the domain for public authorities. Surveillance is a means of social control. Individual performance of various legal obligations is constantly being watched, especially one's conduct of his political life. Intrinsicly, this is not offensive, after all, parents watch their children, supervisors watch employees, policemen monitor the streets and other public places, but restraint must be observed by the state machinery especially least the personal freedom of the citizen becomes encroached. This will be dealt with in a later section.

In Kenya, the problem of snooping is not serious. It seems that people do still respect one another's integrity especially in regard to his home. If there is snooping, it is quite harmless and ordinary and not of the type suggested by the word 'surveillance'. Surveillance by public authorities is also limited and used mainly for the detection of crime without necessarily eroding the freedom of individuals. But as the Kenyan society becomes more sophisticated, the problem of snooping may be felt. For instance, the technological progress may bring with it use of electronic surveillance devices and other listening and recording systems. This is a likely consequence of economic growth and change of social attitudes.

It is arguable that some of our demands for privacy are as a result of social attitudes that may not yield positively to rigorous rationalization. For instance, disclosure of intimate facts and behaviour is viewed with awe. Most of us would be extremely pained were we to learn that such information had become known to persons other than those to

whom we chose to disclose them. The agony may come about in several ways. If I do something private with somebody (or even alone) and I believe that we are doing it in private, I may very well be hurt if I learn later that we were being observed but did not know it. That will cause me distress because of two reasons: my expectations were incorrect, and because I do not like the idea that I was being spied on. People have a right to have the world be what it appears to be precisely in those areas in which they regard privacy as essential to the diminution of their own vulnerability. What is more, the sense of being watched or listened to tampers with the spontaneity of some acts.

However, it may be agreed that privacy is important in several ways. The fundamental point is that intrusion into one's privacy with the concomitant disclosure of one's thoughts and "small world" by itself diminishes the concept of individual personhood. One ceases to have a complete sense of being himself as a distinct person. A fundamental part of what it is to be an individual is to be an entity that is capable of being exclusively aware of its own thoughts and feelings. At the political level, one may rely on the conceptual ramifications of this premise to appraise the scope and function of individual freedom in society. It is not uncommon to find people with different political thoughts other than those shared by the government being monitored. At times this involves snooping. Of course this is conducted in every state, the only difference being only the extent and the means.

2.2 INTERCEPTION OF TELEPHONE-CALLS AND CORRESPONDENCE

This form of invasion of individual privacy may be viewed as a form of snooping to the extent that it involves the inquisitiveness of the eye and the ear. However, it is less direct and may also go undetected by the victims.

In his essay on "some threats of Technology to Privacy", Professor R. V. Jones lists and discusses several methods infringing privacy through use of technology. One of his discussions is on telephone-tapping¹³. The mechanical aspects of telephone-tapping are not going to form a part of this discourse. However, it should be noted that this telephone-tapping is done by private individuals as well as public authorities. The latter case is quite common during police operations. Some reasons prompt persons and public authorities to carry out such practices. At times it is done by private individuals out of sheer curiosity. Others do it so that they may use the information they intercept against their enemies. Yet some other people do it so as to discover information vital to their undertakings, social, political or even economic. On the other hand, public authorities particularly the security agencies intercept telephone-calls and correspondences as a means of combating crime. In that way, social control is effected. This pervades the entire spectrum of social, economic and political activities. The most controversial use of interception of telephone-calls and correspondence is detection of crime by the security agencies. This has always been challenged in several courts. This is because such interception is viewed with dismay and is considered by many as being unwarrantable. It is distasteful to the tenets of civilization. Though it is at times necessary, this is not always the case. It may be abused. Generally it is inevitable that in any society there must be a degree of control. This control depends in the first place on information regarding the past, present, and predicted behaviour of the system. The state is thus naturally interested in obtaining this information even at the risk of interfering with individual privacy. This happens because of the recognised need of states to protect themselves against espionage and

subversion, and generally to suppress crime for the sake of societal organization. The state therefore engages in surveillance of its own nationals, and indeed any other organisation seeking information about its rivals.

Interception of telephone-call and correspondence is a frequent mode of surveillance. The ethics or the desirable limits of state control will be discussed in a later section.

Referring to search of premises, Judge Thomas Cooley voiced the sentiment that:

"It is sometimes better that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons"¹⁴.

With the same vigour he could have proceeded to condemn interception of telephone-calls and correspondence as a mode of gathering information against suspects. The very nature of telephone-calls and letters constitutes privacy and the desire to communicate to a certain party. Any interference of such communication should therefore be viewed through critical eyes.

The relevant statute in regard to interference with telephone-calls and letters is the Kenya Posts and Telecommunications Act¹⁵. Postal material is also protected by the Penal Code. This shows that the law does offer some protection against this form of invasion of privacy. Section 61 of the KPTCA provides that:

Subject to this Act, no employee of the corporation nor any person in the employment of the holder of a public telephone licence shall -

- a) Intercept any communication between other persons over telephone services save in so far as such interception is necessary for

- the proper working of those services; or
- b) Disclose any such communication or any information in relation thereto of which he is aware save in accordance with the order of any court.

This section is important at least in one respect: it underscores the secrecy of telephone communications. But this Act is inadequate to the extent that it only covers interception by the employees of the Kenya Posts and Telecommunications Corporation and agents of holders of public telephone licences. It does not extend to the ordinary telephone users. This is a serious limitation.

There are other practical limitations. Firstly, detection of interception of a telephone may be very difficult to detect. This problem makes sections 61 and 65 of the KPTCA less helpful. The person doing the tapping may be several miles away. Apart from that, there is hardly ever, anything to indicate that tapping is going on. Secondly, one wonders whether mere tapping or overhearing of a conversation on a crossed line would inflict any damage on the victim. After all, he is totally unaware of the tapping and the information gathered may never be disclosed to the public. This limitation particularly does question the validity of measures to protect telephonic privacy. A recourse to the constitution would be futile since the pertinent provision - section 70 (c) - is limited only to the privacy of the home and other property and protection against deprivation of property without compensation. The purview of this constitutional provision is too narrow to contain the right to telephonic privacy. A last ditch attempt to invoke such a provision as a right to security would also be in vain since it is doubtful

whether it protects psychological security that telephonic privacy is mainly all about. However, the KPTCA does provide psychological solace and something more to those apprehensive about possible tapping of their telephones. The putative secrecy of such conversations is out totally unprotected after all. But the principal offender in this area is the state. This is the case notwithstanding that the impunity with which the state intercepts telephones is incompatible with the obscurity of its powers to do such things.

Interception of telephones by the police is bound to raise questions of policy and law. This also includes other security agencies. Though section 14 of the Police Act¹⁶ charges the Police Force with the duty of preventing and detecting crime and the enforcement of the law generally, it is highly doubtful whether the means of achieving that end are inexhaustible. That would have the adverse effect of creating uncertainty in the law. But it is agreed in principle that the police ought to use reasonable ways of detecting crime otherwise they will become meta-legal and illegal. Despite the illegality involved, the security agencies have always used some forms of surveillance in the detection of crime and criminals. This has continued to be the trend, at times encouraged by courts through admission of illegally-obtained evidence. The outer society, on its part, has constantly viewed police activities with an air of nonchalance. Some people consider it as a lesser evil.

Telephone tapping is crucial form of surveillance today. This is especially because of the fact that nowadays many activities, even criminal ones rely on face to face communication offered by telephones and other forms of electronic

communication. Criminal activities have also become technologicalized. Counter-measures must therefore necessarily be modelled along the same patterns. That is only reasonable, otherwise the society might be unable to enforce its norms, a situation that could lead to its demise. This means that in an era of fast communication, mobility of persons, and co-ordination of conspiracies means of societal protection must keep pace with the technology of crime. Yet such measures should not out-balance the needs of freedom and liberty of individuals who are the targeted beneficiaries of those measures.

In some jurisdictions it is accepted that the police may be authorised to intercept communications in order to detect serious crime or in the interests of national security¹⁷. In England, for instance, the warrant authorising such action must be issued by the secretary of state and signed by him personally. In criminal matters three conditions must be fulfilled before a warrant is issued;

- a) There must be a really serious crime;
- b) Normal methods of investigation must have been tried and have failed or must in the nature of things offer little chance of success if applied; and,
- c) There must be good reason to believe that interception will lead to a conviction.

These conditions are aimed at protecting individuals against interference of their seclusion by the police. And the standard is very high indeed. Some persons may probably feel that this could hamper the operations of the police. But this could be avoided by making the warrant-issuing process a bit faster while still preserving its objectives.

The Kenyan situation seems rather vague. This is mainly because of lack of texts and reported materials on the subject. It may not be a wild exercise of imagination if one assumes that the Kenyan security authorities do utilize such methods of crime detection. The spirit of the preservation of public security Act¹⁸ seems to be that the security forces may use very stringent means to suppress crimes and other activities aimed at destabilising the country. The governing principle appears to be the maxim that 'the security of the state is the supreme law'. Of course public safety and national security matters are very weighty but that does not license unnecessary and undemocratic practices. Such a justification would not obviate the need for proper controls over a practice that involves an intrusion into private lives of individuals. It is the idea of control that distinguishes democratic governments and police states. In the absence of overwhelming evidence of the need, and the probable efficacy of the crime-combating measures in question, telephone-tapping and opening of correspondence should be prohibited, this is not because one wishes to hamper law enforcement but due to the fact that there are values to be placed above efficient police work. In the case of MALONE .V. COMMISSIONER OF POLICE THE METROPOLIS¹⁹, Sir Robert Megarney V.C expressed the view that:

"However much the protection of the public against crime demands that in proper cases the police should have the assistance of telephone-tapping, I would have thought that in any civilized system of law the claims of liberty and justice require that telephone users should have effective and independent safeguards against possible abuses".

This judgment should be highlighted for putting the interests of the citizen at one end of the scale and those of

the state on the other. Those of the individual are upheld in this case for the purpose of extolling the democratic principles of liberty and justice. The right to privacy is indeed a reflection of such democratic ideals.

In the Malone case, the accused learned that his telephone had been tapped severally. This was revealed at the trial in which the accused was charged with the offence of handling stolen property. The prosecution admitted having tapped the accused's telephone in order to discover his criminal activities. This case raises a practical problem about police operations for law should not be used to defeat its own end maintenance of law and order. Though it is admitted that the police should be invested with reasonable powers to detect and bring offenders to trial, there still remains the problem of defining with certainty the extent of police powers in this regard. Should the police powers supercede principles of liberty and justice? For instance, when the police indulge in telephone-tapping, the privacy of those suspected of a crime gets violated, although it is arguable that criminal activity entails forfeiture of such rights and privileges. Such a measure is not justifiable since it sacrifices the rights of the innocent as well and inculcates fear on people. It is only where a situation extremely justifies that the state should take measures likely to punish the innocent. Apart from that persons have a right to live free of fear. Another danger of allowing interception of telephones by the police is that of slipping into loose and disjointed talk about 'war against crime' and the 'security of the state' which infuse the psychology and morals of such exercise into the administration of justice. Where does the 'war against crime' begin and end? Such talk is not conducive to a smooth application of democratic principles.

The Malone case provides a guiding-light on how to credit police activity in the detection of crime. However, it fails to consider some of those instances when telephone-tapping may in fact be a very suitable method of arresting criminality. As already noted, crime has also positively responded to technology. Some of today's illegal practices and business deals are transacted through the phone. Supposing the police yet involved in telephone-tapping in order to discover a drug-trafficking racket, what democratic principles have been sacrificed? Even if some rights of the arrested personas are violated, this would be in the public interest. In fact, the battle of today against dangerous drugs can only be won if all means of communication of the dealers and the users are monitored. Telephone-tapping is one form of surveillance. But even in such cases, abuse should be avoided as much as possible and this calls for discipline and responsibility on the part of the security forces.

The other areas of concern is interception of correspondence. This form of unauthorized interception involves a kind of surveillance over communication of a permanent matter than ephemeral nature. It is for this reason that postal matter is also protected by the law of property or theft. If a mail is stolen the penal code provisions may be invoked. Section 277 of the penal code makes stealing of letters and related postal matters an offence. Other personal documents such as wills and title-deeds are similarly protected by the penal code. Alternatively, one may sue for conversion in case the postal matter been appropriated. The law of trespass may also apply. Probably it is this tangible nature of letters that is responsible for its finer protection compared to telephone conversations.

It is quite apparent that the thing sought to be protected in letter and similar documents is the 'tangible property' in them and not the contents or the subject-matter of writing. This is because it cannot be reasonably argued that the contents in a letter are more confidential than a telephone conversation. After all, the guiding principle should be that when one chooses to write to or ring a particular party, there is the expectation that such communication should only get to the intended party except where consent is granted. The notion of confidentiality revolves around the control of the information. This is why the case of ENTICK .V. CARRINGTON²⁰. Should be seen as improper since it completely ignored the secrecy of private communications contained in letters and similar documents. In that case it was held that if in the course of reading its contents the trespass to goods. Lord Camden C. J emphasized the aspect of physical touching, holding that "the eye cannot by the Law of England be guilty of a trespass". In itself, the statement is correct but it ignores the vital aspect of privacy which makes a letter what it is. A 'letter' is defined in the Encyclopaedia Britannica²¹ as a "written message intended for the perusal only of the person or organization to whom it is addressed". It further says that letters are often considered to be a variety of biographical literature since they express the personality of the writer.

The objection to the unpermitted perusal of private correspondence stems from not the permanent or temporal loss of the property in the pages, but from the derive by the author or the recipient or both that the knowledge of the contents be confined to the intended parties. Sections 27, 30, 31, 44, 53 and 72 of the Kenya Posts and Telecommunications Act