African Journal on Privacy & Data Protection

To cite: O Babalola 'The constitutional origins of the right to privacy in Nigeria' (2025) 1 *African Journal on Privacy & Data Protection* 83-97

# The constitutional origins of the right to privacy in Nigeria

*Olumide Babalola**
PhD Researcher, University of Portsmouth, United Kingdom

**Abstract**

The right to privacy – a fundamental right and tortious claim – has its deep historical roots traceable to the academic advocacy of Warren and Brandeis in their 1890 article published in the Harvard Law Review. The article closely or remotely invokes the characteristic propensity for judicial activism by the American courts towards the enforcement of the right even though empirical evidence exists on the judicial recognition on privacy in the eighteenth century. In the Nigerian context, even though it is sparingly recorded that the evolution of privacy has been influenced by a myriad of factors, including minority agitation, colonial legacies, political machinations and contemporary legal developments, this article represents an academic ascertainment of the origins of privacy as a fundamental right in Nigeria by tracing its historical trajectory from precolonial constitutional conference proceedings. Combining a predominantly descriptive legal historical methodology with a touch of analytic review, the article emphasises some 'semantic' inconsistencies in the few existing academic accounts of the entry of privacy into the Nigerian pre-colonial and Independence Constitutions. By reviewing relevant case law on privacy and the authoritative constitutional documents, the article concludes that, contrary to the repeated

* PhD Researcher, University of Portsmouth, UK; Chair, Nigerian Bar Association's Data Protection Committee. olumide.babalola@port.ac.uk

academic statements fixing the entry of privacy to the Nigerian Independence Constitution, privacy in Nigeria has been constitutionally recognised as an appendage to the 1954 (Lyttleton) Constitution.

**Key words:** Constitution, privacy, Nigeria, origin, right

## 1 Introduction

Internationally, privacy,[1] unlike other fundamental rights, did not become a human right through national constitutions. Diggleman and others discovered that '[t]he right to privacy became an international human right before it was a nationally well-established fundamental right'.[2] In Nigeria, academic discourse around the concept of privacy and its variants, whether as a right or object of entitlement, continues to flow along the lines of socio-legal realities, but the historical context has been palpably ignored. The few Nigerian academic papers bearing historical accounts on the origin of privacy are all focused on its American trajectories, thereby completely blotting out the eventful moments ushering in the right in the pre- and post-colonial Nigerian constitutional documents.

Without attempting to rewrite history, this article identifies the scant but direct literature on the origins of the right to privacy in Nigeria. This is particularly done by sieving privacy out of the Bill of Rights – the subject matter of the historical literature. With a predominantly descriptive method, the article references earlier literature tracing the origins of privacy in Nigeria, illuminating the characters and events that influenced the inclusion of bills of rights in the pre-colonial and Independence Constitution and the source of such inspiration. On choice of methodology for historical legal research of this sort, Majeed notes that

> similarly, the fourth step of his methodology is concerned with addressing the hypothesis or research questions and putting forward the conclusions about them. All this requires certain tasks to be performed which include checking the historical facts, evaluation of the validity and reliability of collected data and analysis of the evidence collected from various sources.[3]

The last step of Majeed's methodology is about the report writing which involves description and interpretation of findings. From the minority agitations to the whimsical political shenanigans culminating in the constitutional frameworks on privacy, the article navigates through the labyrinth of history to unravel the entry of the right to privacy in Nigeria's constitutional arrangement.

1 The right to privacy is advisedly used interchangeably with 'privacy' in this article. The distinction between the two concepts has been likened to an analogy of the chicken and its egg. While the right to privacy is a legal entitlement, privacy is the object of that entitlement. See O Babalola *Privacy and data protection law in Nigeria* (2021) 9.

2 O Diggelmann & MN Cleis 'How the right to privacy became a human right' (2014) 14 *Human Rights Law Review* 441.

3 N Majeed, A Hilal & R Ilyas 'On historical and historical-legal research: Forms, challenges and methodologies' (2023) 5 *Pakistan Journal of Social Research* 528.

For clarity, the article is divided into six parts. The first part introduces the subject of discourse and the next part justifies the necessity, while the third part reproduces the definition of privacy as provided by Nigerian academics and jurists. The fourth part analyses the inconsistent historical accounts of the origin of the right to privacy in Nigeria, and the fifth part emphasises the oft-ignored nexus between privacy as known in Nigeria and the European Charter on Human Rights (European Charter). The last part concludes with a brief recap of the discourse.

## 2 Rationale of this contribution

In my doctoral research, it became imperative to interrogate the cultural relativity of privacy (beliefs) in Nigeria and that led to a finding of the European influence on the inclusion of human rights in the Nigerian (pre-colonial) Constitution and Independence Constitution. The origin of fundamental rights (privacy inclusive) is palpably omitted from many existing academic contributions on human rights in Nigeria. As far back as 1965, Amachree observed this, and the situation has not changed. He notes:[4]

> The fundamental rights provisions in the Nigerian Constitution have, as is to be expected, afforded jurists an opportunity to produce learned legal articles and commentaries. The majority of the writers and commentators have, however, dealt more with the legal interpretation of the provisions than with the historical background.

Most Nigerian academics simplistically allude to international bills of rights as the 'source' of fundamental rights without more. Conversely, the few accounts of the origin of fundamental rights in Nigeria are at loggerheads. Hence, there is an imminent need for legal historical clarity in this regard. On the importance of legal history, Phillips argues that such a study establishes legal contingency, that is, law exists within human societies.[5] From a Nigerian perspective, this may help push the relatable narrative of cultural relativism with regard to privacy beliefs in Nigerian societies. From the foregoing, this article becomes essential for two reasons: first, to resolve the existing conflict with documentary evidence; and, second, it represents the first academic paper solely dedicated to the origin of privacy in Nigeria – the earlier ones are focused on fundamental rights as a bundle.[6]

4 GKJ Amachree, 'Fundamental rights in Nigeria' (1965) 11 *Howard Law Journal* 463.
5 J Phillips 'Why legal history matters' (2010) 41 *Victoria University of Wellington Law Review* 293.
6 These are considered later in the article.

## 3 Defining of privacy: The Nigerian way

Universally, privacy remains an elusive concept to define.[7] Regardless of the lack of consensus on its definition, many researchers have attempted to define or describe the concept from multicultural perspectives.[8] From a theoretical perspective, it is important to define the notion of privacy for many reasons. First, the definition gives clear insight into the core and essential functionality of the concept as distinguished from other related interests.[9] Then such offers an unmistakable foundation for the understanding and application of legal frameworks for redress, thereby eliminating a conflation of concepts. Defining the rigours of privacy also helps an appreciation of its cultural relativism, thereby giving effect to all the diverse interests protected by the notion. Despite the relatively low quantity of literature on the right to privacy in Nigeria, some authors and jurists have, at varying times, defined privacy from diverse perspectives. While resolving a dispute on bodily integrity, the Nigerian Supreme defined the concept as 'a right to protect one's thought, conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorised invasion'.[10] This definition is rather narrow as it omits elements of spatial privacy, information privacy, publication of private facts and publicity in a false light, and so forth. In another decision, the High Court of Lagos State defined privacy as 'the presumption that individuals should have an area of autonomous development, interaction and liberty a "private sphere" with or without interaction with others, free from arbitrary state intervention by other uninvited individuals'.[11] This definition also focuses on non-interference with seclusion – a passive aspect of privacy – in total disregard of the active version where an individual assumes control over and decides who has access to their privacy spheres.[12]

Nigerian academics have also attempted varying definitions of the notion of privacy. Nwauche believes that privacy is better described that defined and that the lack of a universally-acceptable definition does not detract from the dynamism and development of privacy. He restrictively describes it as the legal

7 A Alibeigi, AB Munir & nd MD Ershadul Karim 'Right to privacy, a complicated concept to review' (2019) *Library Philosophy and Practice* 2841.

8 For some definitions of privacy, see T Dixon 'Valuing privacy: An overview and introduction' (2001) 39 *Journal of Social Philosophy* 411; AD Moore 'Defining privacy' (2008) 39 *Journal of Social Philosophy* 411; EVD Haag 'On privacy' in JR Pennock & JW Chapman (eds) *Privacy* (1971) 56; R Gavison 'Privacy and the limits of law' (1980) 89 *Yale Law Journal* 423; A Westin 'Privacy and freedom' (1968) 25 *Washington and Lee Law Review* 166; C Fried 'Privacy' (1968) 77 *Yale Law Journal* 482; T Gerety 'Redefining privacy' (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* 281.

9 DK Mulligan, C Koopman & N Doty 'Privacy is an essentially contested concept: A multi-dimensional analytic for mapping privacy' (2016) 374 *Philosophical Transactions. Series A, 20160118*.

10 *Medical Dental Practitioners Disciplinary Tribunal v Dr John Okonkwo* (2001) 7 NWLR (Pt 711) 206.

11 Unreported Suit LD/14895MFHR/2023 between Olumide Babalola and Oyinlola Adebayo delivered by Hon Justice OA Oresanya (Mr) on 13 February 2024.

12 SS Al-Fedaghi 'The right to be let alone and private information' in C Chen and others (eds) *Enterprise information systems VII* (2006) 117.

right that allows an individual to lead their desired life devoid of interference,[13] but expansively considers other issues surrounding the notion. In a simplistic manner, Olomojobi addresses the notion of privacy in the realm of information or human activities intended to be restricted or excluded from others' knowledge,[14] but elucidates further that the right protects and individual's affairs from the prying eyes of the public.[15]

Privacy has also been described or defined as the right or condition of being protected from unjustifiable, undesired or unauthorised observation, intrusion, or interference into an individual's personal affairs. This right effectively ensures that individuals have considerable reasonable control over their personal choices, information, decisions and spaces, ensuring that they can choose what personal information to divulge, with whom, and under what circumstances.

In their technology-focused paper, Abdulrauf and Daibu conceptualise privacy in the context of spatial protection of an individual's home, physical space and property. According to the authors, privacy predominantly concerns the protection of individuals from intrusion into their private or family life.[16] By their attempt, the learned authors conclude that, with the ubiquity of technology, the contemporary definition of privacy ought to accommodate all the peculiar concerns of the phenomenon. After a disclaimer against proposing an all-encompassing definition, Babalola defines privacy as 'a fundamental right protection afforded a natural person from undesired or unauthorised interference with his/her personal affairs or relationships by whatever means irrespective of the purpose',[17] while Salau defines the concept in terms of a passive right which entitles an individual within any given society to reasonable expect that his personal affairs are protected from 'patronising, paternalistic or meddlesome influences by others'.[18] Regardless of the attempts by Nigerian academics, a universally-acceptable definition still eludes the concept of privacy. However, understanding the notion from a cultural relativism perspective holds the potential for peculiar development of the concept in Nigeria.

13 ES Nwauche 'The right to privacy in Nigeria' (2007) 1 *CALS Review of Nigerian Law and Practice* 63.
14 Y Olomojobi 'Right to privacy in Nigeria' in O Babalola & K Okwujiako (eds) *Emerging jurisprudence on privacy and data protection in Nigeria* (2023) 3.
15 As above.
16 LA Abdulrauf & AA Daibu 'New technologies and the right to privacy in Nigeria: Evaluating the tension between traditional and modern conceptions' (2016) 7 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 113.
17 Babalola (n 1) 17.
18 AO Salau 'Cybersecurity, state surveillance and the right to online privacy in Nigeria: A call for synergy of law and policy' (2024) 1 *African Journal on Privacy and Data Protection* 152-175.

## 4 Conflicting accounts of the origin of privacy in Nigeria

It cannot be overemphasised that the literature on the right to privacy in Nigeria remains scanty despite a remarkable increase in recent times.[19] Seven years after Salau's[20] and Odusote's[21] observations on privacy as the most under-researched fundamental right by Nigerian academics, not much has changed, as evidenced by the existing literature on the subject. For example, Nwabueze – fondly remembered as the father of constitutional law in Nigeria – clearly accounts for 1958 as the entry of fundamental rights into our constitution thus: 'On the recommendation of the Minorities Commission in 1958, a guarantee of fundamental right was incorporated into the Constitution in that year and was retained in both 1960 and 1963 Constitutions. The guaranteed rights were ... private and family life.'[22]

Remarkably, Mowoe's[23] and Hon's[24] expositions on the right to privacy are quite extensive but, unfortunately, omit an account of the origins of the right in Nigeria. Both learned authors discuss privacy only from section 37 of the 1999 Constitution without any historical flavour. Oluyede,[25] Oyewo,[26] Susu[27] and Malemi[28] completely avoid a historical account of how fundamental rights were introduced into the Nigerian Constitution – an academic omission with a long history of 'culprits' as noted by Amachree thus: 'The fundamental rights provisions in the Nigerian Constitution have, as is to be expected, afforded jurists an opportunity to produce learned legal articles and commentaries.' The majority of the writers and commentators have, however, dealt more with the legal interpretation of the provisions than with the historical background. One writer, in an otherwise very informative article, had no more to say on the history of the provisions than that recounting how the Willink Commission recommended the inclusion of fundamental rights as a panacea to pacifying the minorities' fears during the pre-independence agitations.[29] Other writers

19 Early in 2024 I compiled a bibliography of academic articles on the right to privacy and data protection listing a total of 126 articles. See O Babalola 'Data protection and the right to privacy in Nigeria: A bibliography', https://papers.ssrn.com/abstract=4625918 (accessed 2 June 2024).

20 AO Salau 'Data protection in an emerging digital economy: The case of Nigerian Communications Commission: Regulation without predictability' (2016) Broadening the Horizons of Information Law and Ethics: A Time for Inclusion 1.

21 A Odusote 'Data misuse, data theft and data protection in Nigeria: A call for a more robust and more effective legislation' (2021) 12 *Beijing Law Review* 1284.its influence on global systems and economies, and the harm that may arise from its abuse. This makes data protection laws important to protect the privacy data subjects all over the world, which is a fundamental human right under article 12 of the Universal Declaration of Human Rights (UDHR, 1948

22 B Nwabueze *A constitutional history of Nigeria* (1982) 116.

23 KM Mowoe *Constitutional law in Nigeria* (2008) 405.

24 ST Hon *ST Hon's constitutional and migration law in Nigeria* (2016) 535.

25 P Oluyede *Constitutional law in Nigeria* (1992) 23.

26 O Oyewo *Constitutional law in Nigeria* (2020).

27 B Susu *Constitutional litigation in Nigeria* (1999).

28 E Malemi *The Nigerian constitutional law* (2012).

29 L Izuagie 'The Willink Minority Commission and minority rights in Nigeria' (2015) 5 *Ekpoma Journal of Theatre and Media Arts* 206.

have tended to explain the background by very brief references to minority fears without giving any details as to what those fears were.[30] Happily, Amachree seems to have academically plugged the historical gap by emphatically fixing the entry of fundamental rights into Nigerian law through the 1960 Constitution:[31]

> At the Constitutional Conference held in London in May and June 1957, it was agreed that provisions should be made in the Independence Constitution for fundamental rights ... These clauses were to be submitted to the governments of the different regions of Nigeria and were to be considered at the resumed Conference held in London in September and October of 1958 ... The Commission divided the fundamental rights into five groups which they recommended should be included in the Constitution. These were ... (5) private and family life ... These recommendations are based on articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the European Convention on Human Rights and on article 9(2) of the Malaya Constitution which deals with freedom of movement, and article 13(1) and (2) of the Pakistan Constitution from which the provisions pertaining to religious education were obtained. The recommendations were adopted and incorporated in the (1960) Constitution as chapter III.

This academic account was later judicially confirmed in Darman's case[32] where Karibi-Whyte[33] notes thus:[34]

> Before examining the arguments before the court, particularly concerning the jurisdiction of the court, it is relevant in this judgment to explain even if superficially the origin and nature and constitutional status of the action now known as fundamental right ...The earliest attempt to incorporate fundamental rights in the Constitution was at the 1957 Constitutional Conference, when the Action Group ... requested the addition of a set of fundamental rights in the Constitution ... It however went on to recommend the entrenchment in the Constitution of fundamental rights as a safeguard for minorities, as a check against the abuse of majority power. Its detailed proposals followed closely the terms of the European Convention on Human Rights, adopted by the United Kingdom parliament barely eight years previously. These proposals were substantially approved by the Constitutional Conference of 1958.

Although in the appendix to Amachree's paper, reference is made to pre-1960 court cases litigated on fundamental rights, the account in the body of the paper somewhat gives a confusing narrative that fundamental mental rights originated from the 1960 Independence Constitution. This could have swayed the Court of Appeal's emphatic statement that 'the earliest attempt' to incorporate fundamental rights into a constitution was in 1957.[35]

30 Amachree (n 4) 528.
31 As above.
32 *Federal Minister of Internal Affairs v Shugaba Abdulrahman Darman* (1982) 2 NCLR 915.
33 Justice of the Court of Appeal (as he then was).
34 As above.
35 As above.

In Parkinson's account, a suggestion for the inclusion of fundamental rights in the Constitution was rejected during the constitutional conference in 1953. By his graphic narration:[36]

> When Awolowo raised the issue of fundamental rights at the conference in 1953, the Secretary of State for the Colonies ridiculed a bill of rights out of serious consideration by saying that the Nigerians could put 'God is Love' into their constitution if they so wished, but not while he was chairing the conference. This stance reflected the orthodox Colonial Office position on bills of rights in colonial constitutions, namely that such instruments are of little value and were unknown in British colonial constitutions. The resulting Lyttleton Constitution, named after Oliver Lyttleton, the Secretary of State for the Colonies, came into operation in September 1954.

For unknown reasons, Parkinson's account, however, omits to acknowledge the provisions of fundamental rights in the schedule to the 1954 Lyttleton Constitution with his statement that

> [t]he foreshadowed next constitutional conference was set to commence on May 23, 1957 ... The question of a bill of rights was again raised at the conference ... Since the 1953 Constitutional Conference, the Colonial Office had reviewed its policy on colonial bills of rights and, in a fundamental policy shift, changed its position from total opposition to a bill of rights in any colonial constitution to limited support for a bill of rights for Nigeria's independence constitution.[37]

On the same wavelength, Ediagbonya also traces the entry of fundamental rights to the Independence Constitution thus:[38]

> On the controversial issue of the fears of the minority groups in the country based on the recommendation of the Minority Commission that no state should be created instead fundamental human rights should be entrenched in the constitution. The conference agreed that a number of rights and freedom like the right to life, the right to religion, the freedom of peaceful assembly, movement, speech, association etc should be entrenched in the constitution of the Federal Republic of Nigeria. So the conference accepted the inclusion of a long list of fundamental human rights in the constitution to protect Nigerian citizen (majority and minority alike) against arbitrary abuse of power by government (Report by the Resumed Nigeria Constitutional Conference (1958).

The foregoing accounts, including those of Proehl[39] and Seng,[40] all point to the conclusion that privacy surfaced for the first time in the 1960 Independence Constitution, but such a conclusion is not failproof when other academic or judicial accounts are considered. For example, Gledhill declares that 'fundamental human rights have now been written into the Nigerian Constitution, and the first

36 C Parkinson *Bills of rights and decolonisation: The emergence of domestic human rights instruments in Britain's overseas territories* (2008) 539.
37 As above.
38 M Ediagbonya 'Nigeria constitutional development in historical perspective, 1914-1960' (2020) 4 *American Journal of Humanities and Social Sciences Research* 242-248.
39 PO Proehl *Fundamental rights under the Nigerian Constitution, 1960-1965* (1970) 1.
40 MP Seng 'Democracy in Nigeria' (1985) 9 *National Black Law Journal* 113.

two decisions involving fundamental rights in Nigeria, both from the Northern Region High Court, have recently come to hand'.[41] In the article published by the School of Oriental and African Studies in the summer of 1960, the author reviews two decisions[42] filed for the enforcement of the right to privacy (among other fundamental rights) in 1959 before the Independence Constitution. The cases were litigated pursuant to the fundamental rights contained in the schedules to the Nigeria (Constitution) Order in Council 1954, thereby showing a conflict in the academic reports that fundamental rights originated from the 1960 Independence Constitution.

In what turns out to be a legal historical ice breaker, Vasak copiously reports:[43]

> Presided over by Sir Henry Willink, the Minorities Commission submitted its report in July 1958. It pronounced against the creation of new regions and proposed, as one means of allaying the fears of the minorities, the inclusion in the Nigerian Constitution of provisions guaranteeing certain fundamental rights. In the view of the Commission: 'Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed ... We have therefore considered what provisions might suitably be inserted in the Constitution and have given particular attention to the Convention on Human Rights to which, we understand, Her Majesty's Government has adhered on behalf of the Nigerian Government.' On the basis of the proposals of the Minorities Commission the Colonial Secretary of the United Kingdom prepared a draft text, which was presented to the Constitutional Conference of September and October 1958 in London. This Conference prepared a text and recommended its inclusion in what was to be the Independence Constitution. However, at the request of the Nigerian political leaders, the Chapter relating to human rights was promulgated even before independence on October 24, 1959, that is to say, before the federal elections which took place on December 18, 1959. For the Nigerian leaders, indeed, it was during the electoral period that respect for human rights became absolutely essential ...These provisions were published as the Sixth Schedule to the Constitutional Order of 1954. In the Constitution of independent Nigeria, which came into force on October 1, 1960, the provisions of the Sixth Schedule were repeated with a few minor amendments as Chapter III (Fundamental Rights) of the Second Part of the Constitution of the Federation of Nigeria.

This comprehensive account remarkably closes the gap identified in other accounts, especially on the reconciliation between the provision of privacy (bills of rights) in the 1954 Constitution and the regurgitated statements that fundamental rights originated from the 1960 Constitution. It is more plausible,

41 A Gledhill 'Fundamental rights in Northern Nigeria' (1960) 4 *Journal of African Law* 115.
42 Unreported Suit K/M26/1959) between Dahiru Cheranci and Alkali Cheranci; unreported Suit Z/22/1959 between J Olawoyin and Attorney General, Northern Region. This case is analysed later in this article. See also DL Grove 'The "sentinels" of liberty? The Nigerian judiciary and fundamental rights' (1963) 7 *Journal of African Law* 152.
43 K Vasak 'The European Convention of Human Rights beyond the frontiers of Europe' (1963) 12 *International and Comparative Law Quarterly* 1206.

from a historical perspective, to understand that, even though agitations for the inclusion of fundamental rights were directed towards the Independence Constitution of 1960, the politicians succeeded in making fundamental rights an appendage to the existing 1954 Constitution at the tail end of 1959. Hence, to clear the air, irrespective of the motive or narrative, fundamental rights are clearly provided under the schedule to the 1954 (Lyttleton) Constitution and the Nigerian Supreme Court has repeatedly held that schedules to an Act/ Statute are part of the legislation,[44] hence a categorical statement or suggestion that the fundamental rights surfaced for the first time in Nigeria in the 1960 Independence Constitution is misleading.

## 5 Source(s) of the right to privacy and the European Charter influence

The Nigerian literature is replete with academic narrations on the sources of the Nigerian law or legal system. Like many other academic commentators on the issue, Park,[45] Obilade,[46] Alkali,[47] Gwangndi,[48] Nwalimu[49]and Alabi[50] all identify received English law, common law, customary law and case law as the major sources of Nigerian law. However, a distinct narration on the 'source' of privacy is missing from the existing literature as it is usually taken for granted that the common international instruments are the sources of Nigeria's bills of rights. For example, the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR) have enjoyed a large chunk of academic attention in most of the discourse on the sources of fundamental rights in Nigeria.[51]

44 *Dr Olusola Saraki v Federal Republic of Nigeria* (2016) LPELR – 40013(SC); *NNPC v Famfa Oil Ltd* (2012) 17 NWLR (Pt 1328) 148.

45 AEW Park *The sources of Nigerian law* (1963).

46 AO Obilade *The Nigerian legal system* (1979).

47 AU Akali and others 'Nature and sources of Nigerian legal system: An exorcism of a wrong notion' (2014) 5 *International Journal of Business, Economics and Law* 1.

48 MI Gwangndi 'The socio-legal context of the Nigerian legal system and the Shariah controversy: An analysis of its impact on some aspects of Nigerian women's rights' (2016) 45 *Journal of Law, Policy and Globalisation* 1.

49 C Nwalimu *Nigerian legal system* (2008).

50 LA Ayinla 'Jurisprudential perspectives on the fountain of Nigeria legal system' (2020) 13 *Agora International Journal of Juridical Sciences* 15-24.

51 See EA Odike & A Akujobi 'Enforcement of fundamental rights in national constitutions: Resolving the conflict of jurisdiction between the Federal High Court and State High Court in Nigeria' (2018) 9 *Beijing Law Review* 53; NO Anyadike, ST Nwachukwu & JO Wogu 'Human rights in Nigeria and the implications of human rights education for resource collection by libraries' (2021) *Library Philosophy and Practice* 5391; AS Fadlalla 'Fundamental rights and the Nigerian draft constitution' (1977) 10 *Verfassung in Recht und Übersee* 543; E Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution : A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 548; H Hannum 'The status of the Universal Declaration of Human Rights in national and international Law' (2014) 25 *Georgia Journal of International and Comparative Law* 287.

Surprisingly, within and outside the Nigerian classrooms, the direct and exclusive inspiration of the contents and wording of fundamental rights in the Nigerian Constitution has not been befittingly discoursed.

Commenting on the 'content' of (fundamental) rights in the context of the constitutional provision as contained in the Independence Constitution, Nwabueze overlooked the documents that provided a precedent for the draftsmen but deflected to the relic of colonialism thus:[52]

> But the content of a constitutional guarantee of rights depends not only upon the range of rights guaranteed but also upon the scope and sweep of the qualifications made to them ... In spite of these deficiencies of the guarantee, its incorporation in the Nigerian Constitution was a major development in the country's constitutional history. Of Britain's legacies to the country, perhaps the most valuable is the libertarian tradition of the common law and its system of justice. Resting upon a *laissez-faire* conception of society, the common law has a zealous concern for private rights, not only civil and political liberty but individual freedom of action generally. It is the tradition of British justice, said Lord Atkin, that judges should not shrink from upholding the lawful rights of the individual in the face of the executive.

Nwabueze's fixation on the common law as reproduced above is flawed for two reasons. Neither the common law nor the British legal system played any role in shaping the contents or wording of Nigeria's Bill of Rights. Second, the United Kingdom had no relatable or influential fundamental rights framework that could offer some form of precedent to Nigeria at all material times since the 1689 English bills of rights predominantly guarantee basic civil rights and royal succession – a non-binding[53] and insignificant document to the guarantee of fundamental rights.[54] In this same respect, it also is worthy of note that, at Nigeria's independence, Britain neither had fundamental rights written in its Constitution nor a statute dedicated to fundamental rights – the extant Human Rights Act was passed in 1998.[55]

In an unprecedented manner, Amachree – the only Nigerian to have done so at the time – traces the transplantation of the right to privacy into the Nigerian Constitution from the European Convention on Human Rights (European Convention) thus:[56]

> At the Constitutional Conference held in London in May and June 1957, it was agreed that provisions should be made in the Independence Constitution for fundamental rights ...The wishes of the Conference were duly carried out ... It is felt in spite of the wide terms of reference of the Com- mission that they

52 Nwabueze (n 9) 118.
53 A Lester 'Fundamental rights in the United Kingdom: The law and the British Constitution' (1976) 125 *University of Pennsylvania Law Review* 337.
54 P Murrell 'Design and evolution in institutional development: The insignificance of the English Bill of Rights' (2017) 45 *Journal of Comparative Economics* 36.
55 R Costigan & PA Thomas 'The Human Rights Act: A view from below' (2005) 32 *Journal of Law and Society* 51.
56 Amachree (n 4) 528.

> may have been averse to the inclusion of any fundamental rights in the Nigerian Constitution ... However, as it was part of their duty to propose means of allaying the fears of minorities and to make recommendations as to the safeguards to be included in the Constitution, the Commission accepted the proposal by the church groups. The Commission divided the fundamental rights into five groups which they recommended should be included in the Constitution. These were ... private and family life ... These recommendations are based on articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the European Convention on Human Rights ... The recommendations were adopted and incorporated in the Constitution as Chapter III.

The foregoing narration shows in clear terms that the privacy under the Nigerian Constitution was fashioned after its European counterpart from where inspiration was drawn.

In a more graphic relation of the verbatim transplantation of the European Convention as Nigeria's bills of rights, Vasak recounts thus: 'The Nigerian Constitution guarantees the following rights, whose definitions for the most part have been taken almost word for word from the European Convention ... right to respect for private and family life, home and correspondence (article 22; cf article 8 of the Convention.'[57] Confirming the European Convention as the identical source of the right to privacy in Nigeria, Parkinson narrates:[58]

> The methodology of the Nigeria Working Group was to cut and paste a bill of rights from various sources. Eastwood later described the approach of the Nigeria Working Group to preparing the draft bill of rights in a minute: 'We have taken the European Convention (to which Nigeria adheres) as a model ... As the European Convention on Human Rights was the most comprehensive bill of rights then drafted with the input of British lawyers, it necessarily formed the backbone of the list, being used in fourteen of the eighteen sections.

In De Smith's intervention, rather than credit the constitutional debut of privacy to minority groups, he ascribes it to political whims and strategy thus:[59]

> The full story of the Nigerian constitutional conferences preceding independence has yet to be written, but it is believed that the origins of the decision to incorporate fundamental rights in the Constitution are directly traceable to local politics ... At the 1957 Constitutional Conference the Government of the Western Region sponsored two proposals that would have tended to weaken the position of the NPC: the creation of a small number of new States (which would diminish the size of the Northern Region) the adoption of a set of fundamental rights (which might affect the policies pursued by the N.P.C. and make it easier for its opponents to organise freely in the North) ... The Minorities Commission came to the conclusion that the case for new States had not been made out. It discovered little enthusiasm in Nigeria for the entrenchment of fundamental rights as a guard for minorities; nevertheless, it recommended that the written into the Constitution together with

57 Vasak (n 29) 1217.
58 Parkinson (n 22) 554.
59 SA de Smith 'Fundamental rights in the new Commonwealth – II' (1961) 10 *International and Comparative Law Quarterly* 215.

> other checks ag the abuse of power. Its detailed proposals closely followed terms of the European Convention on Human Rights (the Convention for the Protection of Human Rights and Fundamental and Freedoms, 1950) … These recommendations were substantially approved at the Constitutional Conference held in 1959.

According to Proehl,

> the 1960 Bill of Rights of the Nigerian Constitution came about because the Minorities Commission Report of 1958 had recommended that the fears of minorities, into which the Commission had inquired, would be allayed by express constitutional guarantees of rights. These were to follow the European Convention for the Protection of Human Rights and Fundamental Freedoms. The convention had already been adhered to by the British Government on behalf of Nigeria, but to have the force of law in Nigeria, it had first to become part of Nigerian municipal law. This is well known, but it is worth noting that the traditional British reserve against the inclusion of ex-press fundamental rights in the constitutions of its colonial or former colonial territories was now laid aside in favour of such incorporation, but not without misgivings.[60]

Narrating from a colonial heritage perspective, Seng accounts:[61]

> One of the final acts of the colonial government prior to independence was to bequeath to Nigeria a Bill of Rights. The Bill of Rights was recommended by the Minorities Commission appointed in 1957 to study the problems of minority tribes in the three regions. Rather than recommending the creation of new states … the commission suggested the inclusion of a bill of rights into the constitution. The Bill of Rights did not solve the problems of the minority tribes, but it has formed the model for the protection of individual rights in all subsequent constitutions. The Bill of Rights was patterned after the European Convention on Human Rights … It also had provisions guaranteeing … the rights of privacy and family life.

Despite the existing academic accounts of the European Convention's influence on the contents and wording of the constitutional right to privacy in Nigeria, contemporary writings conspicuously omit this very important historical connection. Surprisingly, with the exception of Babalola[62] who made slight allusion to the Convention's influence on the inclusion of 'private and family life' in the wording of the provision, earlier writers such as Nwauche,[63] Olomojobi,[64] Abdulrauf[65] and Adekunle,[66] who have all written relatively comprehensive pieces on the concept of privacy, inexplicably avoid this historical root.

60 Proehl (n 37) 1.
61 Seng (n 38) 113.
62 Here I simply note that '[t]he phrase "private and family life" was likely copied from article 8 of the European Convention on Human Rights which was adopted in 1948 – twelve years before Nigeria's Independence Constitution was drafted in 1960'. In a related context, I continue on page 109 that '[m]ost of the definitions adopted in the NDPA are verbatim (or with slight modifications) reproductions of the definitions in the GDPR thereby giving further credence to the submission that European law in part of the source of data protection in Nigeria'. See Babalola (n 1) 38 & 109.
63 Nwauche (n 13) 63.
64 Olomojobi (n 14) 3.
65 Abdulrauf & Daibu (n 16) 113.
66 A Adekunle & I Okukpon 'The right to privacy and law enforcement: Lessons for the Nigerian judiciary' (2017) 7 *International Data Privacy Law* 202.

Identifying the European link to Nigerian privacy is essential for many reasons. Since there exists a clear distinction between the European and American approaches to privacy, it is imperative for Nigeria to know what pattern to follow or draw lessons from together with the justification of such choice. For context, in Europe, privacy is rights-based;[67] hence, the clear guarantees in the international treaties and national constitutions, but in the US, privacy is an expectation-based concept developed as a tort. This potential conflation of approaches appears in some Nigerian literature without necessary clarification of the divergent jurisdictional preferences and what it portends for Nigeria. Nwauche, the foremost author on the subject, notes:[68]

> An idea of the key issues in the right to privacy can be found in the classification of the jurist Prosser of the four torts which had then emerged from the American protection of privacy. These four torts are: (i) publicity which places plaintiff in a false light; (ii) appropriation of the plaintiff's name or likeness; (iii) intrusion upon plaintiff's seclusion or solitude; and (iv) public disclosure of private facts about the plaintiff. Even though these torts have found different manifestations in different countries, they remain the signposts for the protection of the right to privacy.

Surprisingly, despite identifying the right-based provision of privacy under the Nigerian Constitution, Nwauche does not acknowledge the converse provision of privacy as a tort under another existing Nigerian legislation, and this omission is repeated by Abdulrauf and Daibu when they argue that '[u]nlike the common law of England, the common law applicable in Nigeria does not recognize an independent tort of privacy. What is applicable in Nigeria is an equitable action of breach of confidence.'[69] While the statement is not wrong, the authors, however, missed an opportunity to analyse the multi-jurisdictional approach (that is, rights-based and civil wrong) Nigeria has taken to privacy as evidenced by the provision of Law Reform (Torts) Law thus:[70]

> (1) Anyone who intentionally intrudes, physically or otherwise, on the solitude or seclusion of another or private affairs or concerns, is liable for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.
> (2) Anyone who uses the name or likeness of another in a manner and to an extent which suggests to a reasonable person an intention to appropriate the name and likeness of another or that is associated with another is liable to damages.
> (3) Anyone who publicizes a matter concerning the private life of another is liable for invasion of privacy.

Even though no reported cases exist where the provision has been interpreted or enforced, it remains part of Nigeria's *corpus juris* and confirms the multi-jurisdictional approach to privacy that robs Nigeria of a clearly-identifiable methodology, the theoretical development of the right to privacy.

67 D Buresh 'A comparison between the European and the American approaches to privacy' (2021) 6 *Indonesian Journal of International Law* 253.
68 Nwauche (n 13) 63.
69 Abdulrauf & Daibu (n 16) 113.
70 Sec 29 Law Reform (Torts) Law Ch L82, Laws of Lagos State 2015.

## 6 Conclusion

In this article I have analysed the necessity of identifying the origins and sources of the right to privacy in Nigeria, especially to avoid unnecessary conflation that comes with mixed approaches, which may hamper both academic and practical appreciation of the interests protected by the right-based approach as opposed to the expectation-based approach. The article has also traced the origins to the constitutional conferences of the late 1950s and the eventual affixing of the Bill of Rights to the 1954 Constitution as a political tool in anticipation of the general elections of 1959. The article emphasises the role played by the European Charter and its transplantation as the Nigerian Bills of Rights by concluding that, from a privacy perspective, European law represents a persuasive precedent for Nigeria.