

# ONLINE PRIVACY RIGHTS: A MYTH OR REALITY?

## INTRODUCTION

The concept of privacy is a complex one which, like most concepts, has no universally accepted definition. The most frequently quoted definition<sup>1</sup> of privacy was the one offered by the American Jurist, Louis Brandeis which describes the right to privacy as “the right to be left alone”<sup>2</sup>. It is a concept that is recognized and afforded adequate protection under most nation’s constitution<sup>3</sup> and even extended to international conventions and instruments.<sup>4</sup>

Despite the diversified views on privacy, it is generally conceptualized as encompassing these 7 (Seven)<sup>5</sup> concepts namely:

- (a) The privacy of the person
- (b) Privacy of behavior and action
- (c) Privacy of communication
- (d) Privacy of data and image
- (e) Privacy of thought and feeling
- (f) Privacy of location and space and
- (g) Privacy of association (including group privacy).<sup>6</sup>

Privacy generally relates to giving individuals exclusive control over their data by affording them the liberty to determine how their data is being used, by whom and why. It has to do with the ability of data subjects to exercise control over the use of their personal data as well as decide who can have access to such data. The right to privacy in its traditional context is a fundamental right that is guaranteed and protected under Section 37 of the Nigerian Constitution and has been upheld by the courts in plethora of cases.<sup>7</sup>

## 1.0 ONLINE PRIVACY

The advent of the internet and the general advancement in technology have brought about a paradigm shift in the traditional concept of privacy as to extend to the privacy of individuals to the online sphere. Also referred to as digital privacy or internet privacy, online privacy basically involves the right to, or the mandate of personal privacy, concerning



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the storing, repurposing, provision to third parties and displaying of information pertaining to a person via the internet.<sup>8</sup> It connotes the right of internet users to exclude others from unauthorized use or access to their data online. Prior to the advent of the internet, the traditional rights to privacy were sufficient and sustainable to cater for the privacy needs of persons. However, the advent of the internet has necessitated a need to develop new sets of privacy laws to meet up with evolving societal trends and cater for emerging situations. This is what birthed the various data privacy and protection legislations to fill the vacuum in areas where existing legislation leaves varying degrees of lacuna with respect to privacy rights.

In this time and age, the use of the internet and cyberspace is widespread; there is therefore the need to strike a balance between the inherent benefit of internet usage and curtailing the intrusion of technology into our private life. The universal nature of the internet provides a platform for other people to side step the barriers of distance and physical restrictions irrespective of physical distance from the data subject. It has also nursed substantial intrusion into the otherwise sacred and private spheres of personal space with the easy pass offered by the internet gateways. This necessitates the call for comprehensive laws to govern electronic transactions, interactions and relationships.

## 2.0 IS IT A MYTH OR REALITY?

Nowadays, internet users contend with the harsh reality of not knowing who actually control their personal information, or the use to which such information are being put. This is not unconnected to the

rights which some persons have to access certain privileged information either by virtue of being tech savvy or by virtue of the position they occupy within the cyberspace ecosystem. Also, big tech companies often engage in data mining, search engine optimization, online marketing etc, leveraging on the internet and processing the personal data of data subjects to market their products. Not only that, cookies on websites often retain a user's browser history thereby churning out adverts that tent to tilt towards the users browsing habit. A cursory look at these often provoke the conclusion that privacy in the tech space does not exist in the real world. Hacking, mining, unauthorized disclosure of personal information, use of electronic mail<sup>9</sup>, surveillance of communications, etc constitute some of the greatest areas of privacy rights invasion within the tech space. We should then ask the very pertinent question: Is online privacy a myth or reality? In other words, does the concept of online privacy actually exist in reality or is it just a myth?

A careful examination of the concept of online privacy would validate the growing suspicion that it is altogether a myth. This is because going by the workings of the internet, one would realize that a good majority of almost every personal information which data subjects put online are actually not private.<sup>10</sup> The internet itself is a backdoor for privacy invasion; it therefore leaves one to wonder why we clamor for digital privacy rights in an obviously public world. According to a scholar:

***“the internet as the amalgam of everything that online activity represents has opened up new vistas for the breach or violation of the right of privacy.”<sup>12</sup>***

Online privacy rights as guaranteed under the law

reeks of so many exceptions such as is manifest in the sphere of crime, criminal investigation/prosecution, public interest, contract, health, etc. A close look at the EU's GDPR and even the Nigeria Data Protection Regulation (NDPR) would reveal that these rights only exist to the extent that other considerable factors are put in place. For instance, public interest,<sup>13</sup> contract,<sup>14</sup> etc are instances where data could be processed without consent under the NDPR. This implies that even in the face of these rights, the protected information is susceptible to divulgence where for instance, there is commission of crime or where public interest demands that they be divulged. Thus, the rising vulnerability of the data subjects in spite of rising online privacy awareness is essentially attributable to a combination of legal exceptions like necessity and criminal prosecution needs as well as the exponential growth in cyber-crime sophistication. Thus, while online privacy rights actually exist on the surface, data subjects have to do more on their part to actually safeguard their respective privacy rights.

Also, the plethora of terms of use, privacy policies and notices offer ambivalent rights to data controllers/administrators to use data as well as provide some form of indemnity against liabilities for unauthorized divulgence to third parties. Where a data subject elects not to accept these privacy policies and terms of use, it often means that such data subject would be denied the desired access to these services.

Traditionally, online privacy rights are guaranteed and protected under Section 37 of the 1999 constitution, Regulation 3.1 of the NDPR among other applicable laws as supplemented by judicial decisions of Nigerian courts. By this stretch, online privacy rights are protected under the Nigerian domestic

laws as well as under the common law. However, government control, crime and sometimes, contract play a big role in decimating and eroding the individual bragging rights of the data subjects over the privacy of their persons online. It is therefore safe to conclude that online privacy rights do not exist in isolation but within an interlace of other rights, duties and obligations.

### 3.0 ENFORCEMENT OF ONLINE PRIVACY RIGHTS

Efforts have been made by the laws to safeguard the online privacy rights of data subjects even prior to the intrusion by technology into private lives. Section 37 of the Constitution protects the privacy of citizens, their homes, correspondences, telephone conversations and telegraphic communications. This constitutional provision is reinforced through a long list of judicial decisions as exemplified in the case of *Nwali v. EBSIEC & Ors*,<sup>15</sup> where the court held that:

***“S. 37 of the 1999 Constitution states that “the privacy of citizens, their homes, correspondence, conversations and telegraphic communication is guaranteed and protected”. It is clear from the text of the provision that it specifically mentioned the types of privacy that it protects. Five of them are listed therein as follows- 1. The privacy of citizens 2. The privacy of their homes 3. The privacy of their correspondence 4. The privacy of their telephone conversations 5. The privacy of their telegraphic communication.***

The above aligns with the pronouncement of the courts in the following cases where the right to privacy has been equally identified and enforced: *Nwali v. EBSIEC & Ors*,<sup>16</sup> *Ezeadukwa v. Maduka & Anor*,<sup>17</sup> *M.D.P.D.T v. Okonkwo*,<sup>18</sup> *Ojoma v. State*,<sup>19</sup> and *Ibrahim v. Nigeria Army*.<sup>20</sup> This long line of judicial decisions has situated the discourse on privacy in clear space of white and black, admitting of no grey area. Nevertheless, the advancement in technology has birthed a new vista in the dimension, form and scope of possible intrusion into the privacy of citizens, with the ever-expanding online channels and social media platforms. Although, it would appear that the traditional privacy rights as enshrined in S.37 is inadequate as the draftsmen of the Constitution never anticipated online privacy breaches as we have today, the court has held that the provision of S.37 could still be invoked to cater for any form of privacy breach (online privacy inclusive) due to its generic nature thus:

***“It is glaring that the phrase “Privacy of Citizens” is general and is not limited to any aspect of the person or life of a citizen. It is not expressly defined by the Constitution and there is nothing in the Constitution or any other statute from which it’s exact meaning or scope can be gleaned.”***<sup>21</sup>

Therefore, the courts have extended the enforcement of privacy rights to cases where a citizen’s use of his telephone line was hampered by unsolicited messages arising from unreasonable disclosure of his information to third parties. This was the situation in the case of *Emerging Markets Telecommunication Services Ltd v. Eneye*,<sup>22</sup> where the court held thus:

***“It is my view that by giving those un-***

***known persons and organizations access to the respondent’s Etisalat GSM phone number to send unsolicited text messages into it, amount to violation of the respondent’s right to privacy guaranteed by Section 37 of the Constitution, which includes the right to the privacy of a personal’s telephone line”.***

A similar position has been upheld by the courts in the following case s: *Barr. Ezugwu Emmanuel Anene v. Airtel Nigeria Ltd*,<sup>23</sup> and *Godfrey Nya Eneye v MTN Nigeria Communication Ltd*.<sup>24</sup> Flowing from the above, it is glaring that the law and the courts have created a means of safeguarding privacy rights regardless of form, whether online or physical even prior to the intrusion of privacy rights via the internet.

However, despite the giant strides and effective impact of the above judicial decision, it is doubtful whether they would be sufficient to catch up with the fast-paced surge in online activities. therefore, necessitating the need for laws to cater for this anomaly. While it is borderline impossible to provide a one size fits all codification of all laws to address the diverse dimensions of privacy rights, creative adaptations of the constitution and legislations like the NITDA’s NDPR would go a long way to provide the much-needed relief to aggrieved data subjects. Also, the tort of negligence offers another layer of reliefs for data subjects where negligence can be established.

The law has made giant strides in expanding the field for the enforcement of privacy rights (online privacy right inclusive) and persons whose online privacy rights are breached now have plethora of avenues under the law within which to seek redress.

## CONCLUSION

Online privacy rights actually exist even though it appears elusive to desiring data subjects, except a few who may be willing to go extra mile to enforce them. Nevertheless, the law protects these rights and leaves an avenue for aggrieved data subjects to seek redress where these rights are breached. It is therefore imperative for interested data processors and aggrieved data subjects to understand that online privacy rights do not exist in isolation and a successful enforcement or defence of same must be pursued within a complicated interlace of competing and sometimes conflicting interests and rights.

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### REFERENCE:

<sup>1</sup> It means different things to different people and has resulted in the diversities in the meaning attached to it worldwide. In the words of Serge Gutwirth "The notion of privacy remains out of the grasp of every academic chasing it. Even when it is cornered by such additional modifiers as 'our privacy', it still finds a way to remain elusive". Colin Bennett also noted that "Attempts to define the concept of privacy have generally not met with any success". Also Debbie Kaspar has noted that "Scholars have a famously difficult time pinning down the meaning of such a widely loose term [and].... Most introduce their work by citing this difficulty". In addition, legal scholars James Whitman and Daniel Solove have described privacy as an unusually slippery concept and concept in disarray.

<sup>2</sup> See the case of *Olmstead v. United States* 277 U.S 438, 478 (1928) where the learned jurist posits thus: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. ... They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. ... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men. Thus, the pervading influence of technology is felt in every sphere of human living and the ability of some to use it more than others has enabled some to access the private lives of others without the permission of the victim.

<sup>3</sup> See for instance Section 37 of the 1999 Constitution of the Federal Republic of Nigeria (as amended); Section 14 of the Constitution of South Africa, 1996; Section 31 of the Constitution of Kenya, 2010; Section 35 of the Constitution of Thailand, 2007; Article 16-18 of the Constitution of Republic of Korea; Article 15 of the Constitution of Italy; Article 13 of the Constitution of Switzerland, etc

<sup>4</sup> See for instance Article 12 of the Universal Declaration on Human and Peoples Right, 1948.

<sup>5</sup> See Michael Friedewald, Rachel L. Finn and David Wright "Seven Types of Privacy" (European Data Protection: Coming of Age) DOI:10.1007/978-94-, 2013

<sup>6</sup> These approach to categorize privacy was an improvement on Roger Clark's 1997 categorization of privacy into: privacy of the person, privacy of personal data, privacy of personal behavior and privacy of personal communication which these scholars expressed as inadequate to capture the range of potential privacy issues in light of recent technological developments.

<sup>7</sup> See *Medical and Dental Practitioners Disciplinary Committee v. Okonkwo* (2000) 19 WRN 1; *Esabunor v. Faweya* 92019 LPELR-46961 (SC); *MTN Nigeria Communications Ltd v Barr Godfrey Nya Eneye Court of Appeal, Abuja Judicial Division, Appeal No: CA/A/689/2013 – Judgment delivered on 12 May 2017, P.1-58; Barr Ezugwu Emmanuel Anene v Airtel Nigeria Ltd Suit No: FCT/HC/CV/545/2015 (Unreported), etc.*

<sup>8</sup> Swaleh A. Ahmed "Online Privacy: Myth or Reality?" <https://www.slideshare.net/samaki84/online-privacy-myth-or-reality> (accessed on July 23, 2021).

<sup>9</sup> The general belief is that information sent via email is secure. This is unfortunately wrong as such information could be intercepted by third parties before getting to its recipient.

<sup>10</sup> This is regardless of the fact that these tech companies by their privacy notices promise not to commit such acts of intrusion of privacy. For instance, in 2013, two users sued Facebook for data mining private messages. In addition, a similar lawsuit has been instituted against Google for violating user privacy by scanning the contents of Gmail messages

<sup>11</sup> According to a writer "the internet as the amalgam of everything that online activity represents has opened up new vistas for the breach or violation of the right of privacy".

<sup>12</sup> B.O Jemilohun "Privacy Rights In a Public World: The Challenges of a Digital Age" (2010) 3 UNADLJ 239

<sup>13</sup> Regulation 2.2 (e) of the NDPR

<sup>14</sup> Regulation 2.2 (b) of the NDPR

<sup>15</sup> (2014) LPELR-23682 (CA)

<sup>16</sup> (2014) LPELR-23682(CA)

<sup>17</sup> (1997) LPELR-8062(CA)

<sup>18</sup> (2001) LPELR-1856(SC)

<sup>19</sup> (2014) LPELR-22942(CA)

<sup>20</sup> (2015) LPELR-24596(CA)

<sup>21</sup> See the case of *Nwali v. EBSIEC & Ors* (Supra)

<sup>22</sup> (2018) LPELR-46193(CA)

<sup>23</sup> Suit No: FCT/HC/CV/545/2015 (Unreported)

<sup>24</sup> Appeal No: CA/A/689/2013 (Unreported)