THE RIGHT TO BE FORGOTTEN: PROSPECTS AND CHALLENGES IN THE DIGITAL AGE

INTRODUCTION

The internet era has given an increasing opportunity for individual data to be shared and received on a large scale, as anytime we utilize a digital device or use the internet, we leave traces of ourselves behind, which can be used to track or judge our history, habits and tendencies. Unlike humans who are possessed of the ability to forgive and forget over time, the internet in its own case has an interminable ability to remember and recollect data, through the use of search engines such as google, Bing, Firefox, safari, etc.

In an age where data collection and processing record a remarkable increase daily, there have been concerns as to how much information should be left online for the public to see. Thus, while data subjects have a right to be forgotten (i.e., the right to request deletion or further processing of their data), this right appears to overlap with the right of the public to access information especially those in the public domain or on search engines.

It is against this background that this piece aims at examining the right to be forgotten, its prospects and challenges in the digital age as well as the possibility of striking a balance between exercising this right and not infringing the right of the public to access information.

1.0 WHAT IS THE RIGHT TO BE FORGOTTEN?

The right to be forgotten also termed ***"the right to deletion", "right to erasure" or "right to de referencing"*** entails the right of data subjects to request a data controller to delete and stop further processing of personal data pertaining to them. This right is one of the most popular data privacy and protection rights which is safeguarded in most nation's data privacy legislations (the NDPR and GDPR inclusive) [i]. This means that a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for

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which they are collected or otherwise processed.

The concept of the right to be forgotten is based on the notion that individuals should be have the ability to have untruthful, outdated, out-of- context data, and other forms of damaging information about them being erased, such that third persons can no longer trace, access or view them.

The right to be forgotten gained prominence in the famous case of [ii]. In that case, Mr Costeja Gonzalez, a Spanish national resident in Spain, filed a complaint before the European court of justice (the CJEU) against two national dailies, Google Spain and Google Inc. He complained that upon entering his name into the search engine of the Google group, the information that came up was that of a recovery of social security debts through the means of real-estate auction that was associated with his name. He contended that the attachment proceedings for the recovery had been fully recovered for a number of years and that references to this information are irrelevant now. Therefore, he demanded that the offensive online information should be erased as it was inaccurate. When delivering the judgment for this case, the CJEU considered the privacy rights of the complainant side by side with Google's economic interest and held that the latter outweighs the former.

The court stated that the process was ubiquitous as it was not only accessed by google Spain, but everyone working with the parent body Google Inc which is the data processor. Subsequently, the court made its ruling in favour of Mr. Gonzalez and held that the attachment proceedings be deleted. This decision has since emerged as the locus classicus and reference authority on the right to be forgotten.

However, in the subsequent case of ***Google Inc. v. Commission Nationale de l'informatique et des Libertés (CNIL)*** [iii] , the court introduced a territorial limitation to the enforceability of the right to be forgotten. Although the court upheld the right to be forgotten in the said case, it held that its application is only limited to the EU member states and should not be construed to apply globally. The import of the decision is that while the right to be forgotten applies and can be enforced within the EU, its application is not extraterritorial and does not transcend beyond EU member states.

From both cases cited above, it would appear that the right to be forgotten is not absolute and is granted only when one's personal data protection rights outweigh the public's interest in continued access to the information.

A major flaw in the CNIL decision lies in the fact that the level of protection afforded data subjects in the EU is not absolute. This creates certain vulnerability issues as it does not address the likelihood of a data subject to bypass the seeming territorial limitation by leveraging the VPN to access these protected data.

However, a data controller may lawfully retain personal data longer than usual where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of its official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.

2.0 APPLICATION OF THE RIGHT TO BE FORGOTTEN IN NIGERIA

The Nigerian Data Protection Regulation (NDPR) is the most comprehensive law regulating the processing of personal data in Nigeria. The NDPR was introduced in 2019 with the intention of covering all transactions intended for processing of personal data in respect to the natural persons within Nigeria. The regulation applies to every person or organization that collects, uses, stores and processes personal data. one of the highlights of the regulation is the recognition of the rights of data subjects including the right to be forgotten.

The right of data subjects to be forgotten is recognized, guaranteed and protected by virtue of the provisions of ***Regulation 3.1 (9) of the NDPR*** thus:

"The Data Subject shall have the right to request ***the Controller to delete Personal Data without delay, and the Controller shall delete Personal Data where one of the following grounds applies:***

(a) the Personal Data are no longer necessary in relation to the purposes for which they were collected or processed;

(b) the Data Subject withdraws consent on which the processing is based;

(c) the Data Subject objects to the processing and there are no overriding legitimate grounds for the processing;

(d) the Personal Data have been unlawfully processed; and
(e) the Personal Data must be erased for compliance with a legal obligation in Nigeria.

The NDPR enables a data subject to be able to request for the erasure of their personal data. However, there was no judicial authority on the right to be forgotten until January 2020, when the first and only Nigerian case on the subject matter was instituted in court in the case of ***Mr. Hillary Ogom Nwadei v. Google & Anor*** [iv] ***which judgment was delivered in October 2021.***

In that case, the claimant, a cleric who was convicted and imprisoned in the United Kingdom in 2015 for sexual offences, sued Google in Nigeria, seeking orders from the court to compel Google to erase or delete from its digital platforms, including the Google Search Engine, all information regarding his conviction and imprisonment in the UK. The defence argued that it neither published nor aided the publication of the info rmation complained of and cannot delete information published by independent internet users on third party websites. The defendant further contended that information relating to the claimant's conviction and imprisonment in the UK constitute pubic record accessible to the general public. The court however, dismissed all the claimant's claim on technical grounds and declined the orders restricting further access to the information through the Google Search engine.

The claimant claimed that the continued circulation of, or access to, the information on the internet through Google infringed upon his rights to privacy, freedom of association and dignity of his human person. He further asserted that he had been stigmatised and hindered from securing a job as a result of the continued access to the information on the Google website. The Court dismissed the claimant's request for the enforcement of his right to erasure of personal data and refused to make any orders directing Google or any other person or blogger to remove news content relating to his conviction and imprisonment by the UK court. The HC also declined the claimant's invitation to make orders restricting further access to the information through the Google Search Engine.

It is imperative to state that the said judgment did not truly reflect the right to be forgotten as same was not pursued in the light of the NDPR. Also, nowhere in the judgment was the NDPR referenced. Although the case was dismissed on technical grounds owing to the shabby manner in which the Claimant presented its case and prayers before the court, the consolation lies in the fact that a foundation has been laid for the right to be forgotten in Nigeria upon which subsequent cases could ride upon. It is hoped that a proper case on the right to be forgotten, pursued in light of the NDPR would be commenced in the nearest future to give a definite stance on the position of the courts on the subject matter in Nigeria especially as it relates to the enforcement of this right against financial institutions which enforcement could affect the investigation of crime by relevant agencies where the right has been upheld.[4]

CONCLUSION

The right to be forgotten is still at infancy stage in Nigeria due to the dearth of case laws on the subject matter. Nevertheless, it is our view that more cases bordering on this right needs to be tested before the courts in order to validate its enforcement in the country.

REFERENCE:

[i] SEE GENERALLY ARTICLE 17 AND REGULATION 3.1 (9) OF THE GDPR AND NDPR RESPECTIVELY.

[ii1] COURT OF JUSTICE, JUDGMENT OF 13 MAY 2014, CASE C-131/12, GOOGLE SPAIN AND GOOGLE.

[iii] COURT OF JUSTICE, JUDGMENT OF 24 SEPTEMBER 2019, CASE C-507/17, GOOGLE INC. V. COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (CNIL).

[iv] IKD/319/GCM/2019.

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