SHOULD WE FORGET THE RIGHT TO BE FORGOTTEN?

*Understanding the **"Right to be forgotten"** and its applicability under Nigerian law.*

It is a known fact that while human beings possess the ability to forgive and forget over time, the internet has an almost infinite ability to recollect and remember. This "remembrance" could be by way of online videos, photographs, documents, audio messages and recordings that may have curated a near permanent record of our personal lives[1]. As a result of the increased use of digital processes by both individuals and corporates vis-a-vis the pervasive nature of the internet, the right of Data Subjects[2] (whose information are being processed) to have their personal data[3] forgotten or erased by Data Controllers[4] and Administrators[5] ("*right to be forgotten*") have become an increasingly pertinent issue across the globe. Between July 2019 to December 2019, Google received over 925,944 content removal requests from Governments and courts in 19 countries[6]. This statistic clearly evidences the rate at which Data Subjects are willing to exercise their '*right to be forgotten*'. Nigeria is not left out as it issued the Nigeria Data Protection Regulation 2019 ("**NDPR**") thereby providing a legal basis for Data Subjects to approach the courts to enforce the "*right to be forgotten*".

Bearing in mind that one of the core purposes of legislations is to establish certain rights or balance competing interests, some controversies have been sparked on the propriety or otherwise of the "*right to be forgotten*" in protection of the privacy of Data Subjects; and its impact on access to

[1] https://computer.howstuffworks.com/how-can-google-forget-you

[2] means any person, who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

[3] "Personal Data" means any information relating to an identified or identifiable natural person ('Data Subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; It can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information, and other unique identifier such as but not limited to MAC address, IP address, IMEI number, IMSI number, SIM and others.

[4] means a person who either alone, jointly with other persons or in common with other persons or a statutory body determines the purposes for and the manner in which Personal Data is processed or is to be processed.

[5] Means a person or organization that processes data.

[6] https://www.statista.com/statistics/268257/goverment-requests-for-content-removal-from-google/

information of internet users (particularly where such information is lawfully published and is neither false nor libelous).

For instance, can the Nigerian who first contracted the novel coronavirus ask that all information relating to him on the internet, with respect to coronavirus, be forgotten and totally erased in the near future? If such information is deleted, what becomes of the relevance of such information particularly for research, developmental planning or such other legitimates uses now or by the next generation? Put differently, there have been discussions as to whether a Data Subject can legally obliterate his past records and completely live "a new life" online if s/he so wishes. Questions have arisen as to whether internet users (Data Subjects) could invoke a wish that certain past information should not be known to other internet users when it is considered that such information might be prejudicial and should be consigned to oblivion, even though the information in question has been lawfully published by third parties.

This article attempts an exposé on the right to be forgotten, its historical background, scope, practicability, limitations and applicability under Nigerian law in comparison with other jurisdictions while proffering recommendations for the Nigerian courts where this right will be determined.

CONCEPTION OF THE RIGHT TO BE FORGOTTEN

Simply put, the right to be forgotten is the right of a Data Subject to have his/her personal data erased by a Data Controller or Data processor following a past action or event. In other words, it is the right to have information (particularly negative and outdated ones) about a person be removed from internet searches or directories under certain circumstances.[7] This right is brought to fore by the decision of the European Union Court of Justice (the "**EUCJ**") in the case of **Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González** (2014)[8] that was later codified in the European Union General Data Protection Regulation ("**GDPR**")[9]. This landmark decision creates precedent for search engines to be compelled by courts to erase personal data further to a request by a Data Subject in certain circumstances. In this case, a Spanish citizen, Mr. Mario Gonzalez filed a claim before the Spanish Authority for Personal Data Protection ("**SPDP**") against two national newspapers, as well as Google Spain and Google Inc ("**Google**"). The applicant complained that any internet user, who typed his name in the Google search engine, would receive, as a result, two publications by some Spanish newspaper regarding a confiscation order for his house relating to an attachment proceeding for the recovery of his social security debts. He contended that the newspaper and Google erased his name from the publications and that his personal data be erased for results produced from Google searches. He argued that the attachment and confiscation had been long resolved and reference to it was totally irrelevant.

The SPDP dismissed the claim regarding the Newspaper but approved it regarding Google. The SPDP on the one hand, held that the newspaper was not obliged to repeal the publications, since they were lawfully published on the date on which they were issued. On the other hand, it held that search engines (Google) are personal data processors and were mandated to erase the personal data further to the request by Mr Gonzalez. Dissatisfied, Google appealed the decision before the EUCJ. Google requested that the EUCJ should determine it's liability as a Data Processor and assess whether a Data Subject has the right to request that Google

[7] https://en.wikipedia.org/wiki/Right_to_be_forgotten
[8] http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en
[9] Article 17 of the GDPR 2018. By the analogous provision of the GDPR, Data Controllers are obligated to remove or delist Data Subjects' personal data upon requests where same is no longer needed for the original purpose for which it was processed.

erases his personal data i.e. *the right to have his personal data forgotten.*

In delivering its ruling, the EUCJ found that Google is indeed a processor of personal data[10]. Also, the court took into consideration the privacy rights of Mr Gonzalez and found it weightier than the economic interest of Google. The EUCJ found that even though search engines have the right to process Personal Data, this right is limited especially when it is in contention with the right to privacy, which goes to the heart of the rights of Data Subjects. The EUCJ underlined that the economic interests of the search engine (Google) are not enough to override the right to privacy and further stated that the right to privacy prevails over the right of the public to gain access to the Personal Data of a Data Subject. On the basis of the aforementioned reasoning, the court ruled in favour of Mr Gonzalez and held that the information relating to the attachment proceedings relating to him be deleted given that the information was outdated, and Google had the obligation to erase them. This locus classicus decision established the *right to be forgotten.*

LEGAL FRAMEWORK IN NIGERIA

In Nigeria, the principal legislation on data privacy is the NDPR issued by the National Information Technology Development Agency (**"NITDA"**) in January 2019. This right has only been recently incorporated into the Nigerian legal jurisprudence and is akin to the GDPR. By the provisions of the NDPR, one could argue that Data Subjects could rightfully seek erasure of their data from data processors. The bigger question is, to what extent can a Data Subject pursue his/her "right to be forgotten" or the court enforces such right in Nigeria? Whilst as at the time of writing, there have been no judicial authorities or decided cases on this subject in Nigeria, there are a couple of pending cases on this subject before the Nigerian courts which when decided may provide more clarity on the application of the right of data subjects to demand erasure of their data in accordance with the NDPR provisions, which provides for the deletion of Personal Data of a Data Subject under certain circumstances.

The circumstances are as follows:

1. where the Personal Data is no longer necessary in relation to the purposes for which they were collected or processed. Hence for example, where information was collected as a result of membership of an association and the Data Subject later leaves that association, the ex-member could request that certain data relating to his membership be expunged;
2. where the Data Subject withdraws consent on which the processing is based. For instance, most websites make use of cookies where Data Subjects can opt out by unticking the consent box and could indicate where consent is no longer granted;
3. where the Data Subject objects to the processing and there are no overriding legitimate grounds for processing;
4. where the Personal Data has been unlawfully processed; and
5. where the personal data must be erased for compliance with a legal obligation in Nigeria.

ISSUES AND CONSIDERATIONS

As indicated in the opening paragraphs of this article, Data Subjects are consistently requesting that certain information concerning them be erased by data processors including search engines. In considering the right to erasure, several practical issues are brought to bear and have been widely debated. While the position of Nigerian law on the subject is still very much

[10] The reasoning of the court is that Google collects such data which it subsequently retrieves, records and organizes within the framework of its indexing programmes. Such data is further made available to users in the form of search results and this for all intents and purposes amounts to "data processing".

in its infancy, it would be interesting to see the judicial attitude of the courts in the determination of this right. In the following paragraphs, we will discuss some pertinent issues/arguments and proffer takeaways for the Nigerian courts.

Right to be forgotten versus the right of the public to access information

Although some groups have hailed the *Gonzalez decision* as a privacy victory round the world, some other groups (particularly, Free Speech Organisations and Non-Governmental Institutions) have consistently raised a concern that the right to be forgotten online is in danger of being transformed into a tool of censorship. Many quarters have equally argued that granting Data Subjects the right to request removal of certain content from internet domains will enable totalitarian governments exert control over the press regarding publicly available information. It is expected that Nigerian courts would consider the peculiarity of our jurisdiction. In a country where, despite the existence of the Freedom of Information Act[11], obtaining information from certain individuals and entities, especially politically exposed persons and public servants, has remained a continuous challenge. Interested individuals and organisations such as SERAP[12] continue to approach the court to compel the release of certain information not available in public domain. Exercise of right to be forgotten can be abused by certain Data Subjects to undermine the gains of the Freedom of Information Act (especially where such information procured under the Act was made available on search engines like Google, Bing, Yandex, Ask.com, Duckduckgo.com etc). This would potentially hide away facts which would have otherwise been available to the public in taking certain decisions including political, economic, developmental decisions.

Another key concern is the quality, accuracy and completeness of digital content available on the internet as exercise of right to be forgotten could make it difficult, if not impossible to find or retrieve relevant articles associated with a person. For internet users, the reality of the situation is that although the underlying articles related to a Data Subject might still be online, the public's ability to find or access the information through an online search is denied thereby implicitly eroding trust in the reliability of search engines. Amongst other things, the right to be forgotten, if exercised and granted arbitrarily, might impede and threaten access to publicly available information.

In line with the above, it is worthy to state that the EUCJ posited that such right is not absolute. In 2019, the EUCJ held in the case of **Google v CNIL**[13] that the protection of personal data is not an absolute right but must be considered in relation to the functioning of the society alongside other fundamental rights. Nigerian courts are encouraged to bear the potential conflict in mind and the relevant considerations whilst weighing these rights against each other on a case by case basis.

Constitutional right over a Subsidiary right

It can be argued that the Constitution of the Federal Republic of Nigeria 1999 (as amended) ("**CFRN**") guarantees the freedom of expression and entitlement to information without interference. Flowing from this guarantee, barring certain limited circumstances, citizens can operate any medium for the dissemination of information, ideas and opinions. The CFRN

[11] The Freedom of Information Act 2011 provides public access to information held by public authorities. By virtue of the Act, every person now has a legal right of access to information, records and documents held by government bodies and private bodies carrying out public functions

[12] The Socio-Economic Rights and Accountability Project is a non-governmental, non profit organization established in 2004 to promote transparency and respect for socio-economic rights.

[13] http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=FF2068A68B302A60C12B4191B752D64D?docid=218105&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=1704403

being the grundnorm, is superior to the NDPR, thereby conferring supremacy over and above the right to be forgotten where the respective rights conferred by both statutes are in conflict. On the other hand, some groups hold the view that the right to erasure of personal data, is envisaged under the CFRN and enjoy same status. The CFRN provides for protection of the "*privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications".* The CFRN does not however provide much clarity as to what constitutes the "*privacy of citizens*".

Sequel to a close consideration of the above, it is safe to posit that the *right to be forgotten* is largely predicated on the provisions of the NDPR in relation to Data Subjects[14] as mentioned in previous paragraphs. Thus, the right to the erasure of personal data, not being one of the rights cognizable under the Constitution[15] brings to fore a clash between a constitutional/principal right and a right made pursuant to a subsidiary legislation. The NDPR is a subsidiary legislation issued pursuant to NITDA Act. Therefore, it can be argued that such legislation should neither in law nor in fact be able to confer rights of the same magnitude or latitude like a principal legislation such as the CFRN. This reasoning implies that constitutional rights should therefore be prioritised. It then becomes pertinent to determine the extent to which the exercise of right to be forgotten on the internet (a subsidiary right) will constitute a direct interference and supersede the right of freedom of expression and access to public information (a constitutional right) in Nigeria. Regardless of this argument, this is an issue that Data Subjects should be willing to test in courts.

Balancing the right to be forgotten and public interest

The EUCJ in the *Gonzalez decision* proposed striking a balance between the legitimate interest of internet users[16] interested in having access to information and the Data Subject's rights as the criterion for evaluating delisting requests. Regardless of the decision in favour of the Data Subject in the case, the EUCJ equally stated that where the Data Subject's Personal Data relates to the role they played in public life, the scale tilts towards the right of the general public[17] to access information regarding that public role.

This has been tested in the United Kingdom (UK) where a UK High Court considered the Gonzalez's Case in **NT1 and NT2 v. Google[18]**. In that case, a businessman (the claimant) who was convicted for criminal conspiracy connected with his business sought the removal of news content relating to his past conviction on the ground that, after the conviction was spent, the news content was no longer necessary. After reviewing the Gonzalez's Case, the UK High Court declined to make a delisting order, holding rather that the information has been legitimately available for many years. The court opined that the information continued to be relevant to the assessment of the claimant by members of the public, even after he served his conviction term, by reason of his business activities. The court was of the view that the information has continued relevance in view of the claimant' continued role in business. This decision seems to suggest that, regarding public figures or certain "important" individuals/corporates, the court may likely refuse to uphold their right to be forgotten. In view of this decision the Nigerian courts will be invited on a continuous basis to weigh the need of the public to be aware of past information

[14] Regulations 3.1 (7)(h) and 3.1 (9) of the NDPR
[15] Nigerian courts have held that of the fundamental rights must be cognizable and justiciable under the Constitution. See Tukur v. Government Taraba State [1997] 6 NWLR (Pt. 510) 549
[16] This could be categorized as a legitimate ground for the processing under Paragraph 3(9)(c) of the NDPR.
[17] The phrase, public interest means, the general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. See Black's Law Dictionary (9th Ed)
[18] (2018) EWHC 799

detrimental to its interest against privacy right of Data Subjects.

Another scenario where the public interest could be considered utmost is where the information sought to be delisted relates to criminal records. Would such information not prove helpful to the public to avoid unscrupulous dealings? It is trite that information relating to crime and punishment through the judicial system is not private in nature. The CFRN provides that whenever any person is charged with a criminal offence, such person shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal. Records of such trials are available to the public and can be made available on the website of the courts and/or law reporting companies and by implication, search engines like Google Bing, Yandex, Ask.com, Duckduckgo.com etc. Where the right to be forgotten is exercised in relation to criminal matters, then the spirit behind the publicity of such trials might become circumvented.

Bringing it home, we will consider one of the cases currently pending before the High Court of Lagos State ("**HCLS**") against a leading search engine (for reference purposes the search engine will be referred to as "**X.com**"). Sometime in 2018, the Punch Newspapers published on its online medium (the "Publication"), the news of the arrest of the Applicant by the police in connection with allegations that the Applicant serially abused her maid by torturing, depriving her of food and locking her up in the toilet. The Applicant was later charged before a Magistrates' Court in Lagos State for offences arising from the allegations. However, in March 2019, the Court struck out the charges for want of diligent prosecution. Subsequently, the Applicant, contacted X.com regarding the Publication and requested X.com to erase the Applicant's personal data, which, according to the Applicant, was stored on its search engine. Responding, X.com declined the Applicants request to erase her data based on the ground that **the information was still *relevant for purposes of data processing in the interest of the public.*** Dissatisfied, the Applicant brought the pending suit before the HCLS, seeking to enforce against X.com, her fundamental right to family and private life under the CFRN and her *right to be forgotten* under the NDPR. In this instance, the court has been called upon to evaluate the basis upon which the Applicant is seeking to exercise her *right to be forgotten.*

Given the facts of this case, it is the writer's view that X.com could assert that, as evinced by the NDPR, the information/personal data sought to be deleted is still relevant and there exist overriding legitimate grounds to continue to allow the data remain in its present form. Going by the rationale behind the refusal of the Applicant's request, premised on the continued relevance of the data to public interest, it is safe to say that any piece of data which bears or touches on public interest, could be categorised as an overriding legitimate ground or purpose. Although what amounts to "overriding legitimate grounds" is not provided in the NDPR, and there are no judicial decisions in this regard, it is very likely that the court will find that the public interest argument put forward by X.com substantially aligns with the requirement for overriding legitimate grounds provided under the NDPR, as a basis for declining such a request. The writer takes this view because the allegations raised against the Applicant in the publication, that is the torture, battering, starving and false imprisonment of a maid under the Applicant's care, bear on public morality[19]. This is because such behaviours, which have now also been criminalized as offences by the state[20] in the form of offences, fall short of the expectations, sensibilities, and ethical moral standards which the society will enforce. The Applicant's behaviour being

[19] In **Ojukwu v Agupusi & Anor, the term, public morality was described as** one that "…involves the value judgment of the Judge/Court which should be objectively related to contemporary mores, aspirations, expectations and sensitivities of the people of this country and the consensus opinion of civilized international community which we share."

[20] See section 10 of the Child Rights Law of Lagos State 2007

such that the society frowns at and which Nigeria[21] has indeed, criminalised, thus resulting in the arrest, investigation, and arraignment of the Applicant for criminal prosecution, is a matter of public interest that transcends the bounds of the private and family life of the Applicant. Regardless of the reasoning above, it will be interesting to see the attitude of the courts in determining the right to be forgotten in the light of sensitive matters that border on public morality and the general interest of the public.

How forgotten is the information deleted under the exercise of right to be forgotten?

The Supreme Court of Canada has stated that the "The internet has no borders and its natural habitat is global" [22]. The cross-border nature of the internet makes the implementation of the right to be forgotten counterintuitive. In the Google v CNIL case, the EUCJ held that search engines are not obliged under European law to apply the right globally across jurisdictions. The implication of this decision is that whilst the GDPR allows for European Union residents to be forgotten online, the right is only enjoyed within the European Union. Going by the international law doctrine of sovereignty, which posits that a country possesses full control over its jurisdictional affairs without interference, Nigerian courts might be willing to lean towards the direction of this decision. The decision of the EUCJ in this case is particularly interesting because it presents certain limitations. For example, where information is redacted from Google Spain, same information can be viewed in other Google search engines around the world e.g. Google Russia. Also, such information purported to be deleted by Google, remains available on other search engines including *Bing, Yandex, Ask.com, Duckduckgo.com, Startpage* etc. These are some of the unavoidable implications to the territorial and technological limitation of this right, thereby making the right seem unattainable.

CONCLUSION

While the right to be forgotten champions the law of privacy, this development presents several considerations to be factored in by the Nigerian Courts in making a decision. Though currently untested in Nigeria, what is certain is that the ability for Nigerian Data Subjects to request for certain personal information to be taken off the cyberspace is feasible. It should however be re-emphasized that this right is not absolute and is limited by certain circumstances as discussed in this article.

The Nigerian courts will from time to time be called upon to carry out a balancing act of whether the general public or commercial interest (of the search engines) is weightier than a Data Subject's right to have his/her personal information expunged. Ahead of this, the courts would first need to make deliberate efforts to undergo trainings to better appreciate the principles under the NDPR vis a vis digital realities, so as to give practical judgements that would serve as precedents and be enforceable in the light of the current digital environment.

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[21] The Nigerian Supreme Court, confirmed in the case of ***Chief Fawehinmi v Akilu*** that behaviour or matters bordering on protection against crimes are of public interest and therefore, the responsibility of every member of the society.

[22] Google Inc. v. Equustek Solutions Inc.https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do