THE WHITE COLLAR

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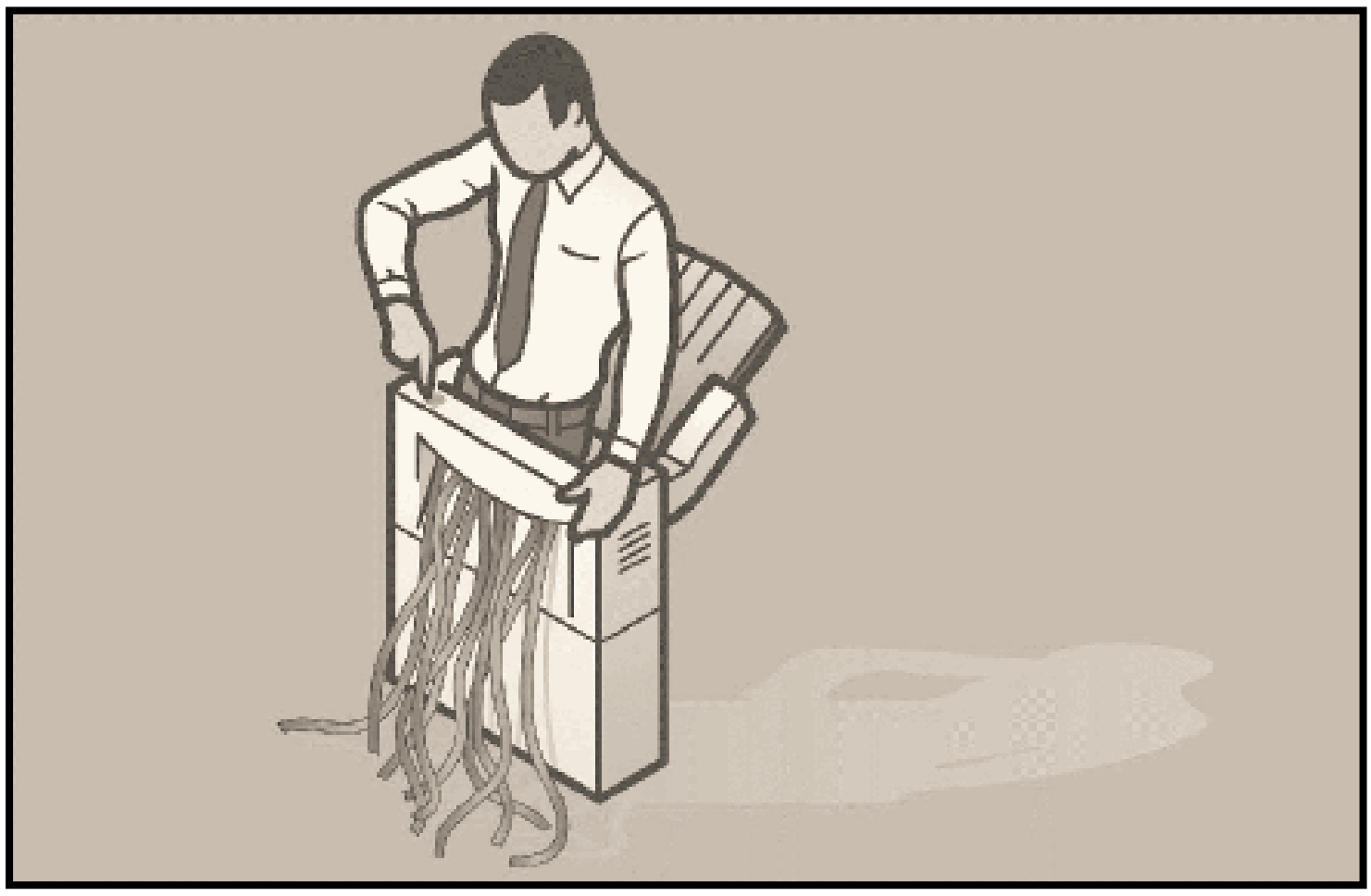
"You Have a Right to be… Forgotten?"



As a young child, Kunle now married with children of his own, was sexually abused. The scandal of his abuse was exacerbated because it captured the hearts of Nigerians when it was first reported as the "Zobo-Baby Case" in the early 80s broadcast on NTA news. Almost two decades later, while at the Eko University and as part of a Psychotherapy experiment an audio recording of his private discussions about the 'Zobo-Baby Case' with his supervisor a licensed clinical Psychologist was stolen and put online in a rogue university blog- Eko's Finest Gist. Kunle left the country and started a new life for himself in Canada where he changed his name so that he would not be linked with the Eko's Finest Gist blog. He married, had children and got a job. He never discussed the Zobo-Baby Case with his wife or anyone ever again, until his employer, while researching Kunle's University qualifications from Eko University discovered a link on Facebook naming Kunle as the Zobo-Baby. Now here is the question that follows this emotive and provocative issue- Does Kunle have the right to compel independent third party websites like Facebook, simply reporting true and factual occurrences, to take down the information about his connection to the Zobo-Baby Case? In short does he have the right to be forgotten?

We do not have a problem with forgetting in Nigeria. As any skilled public figure knows, any scandal in Nigeria can be short-lived, all you have to do is survive the initial uproar of its revelation and make it to 90 days out of prison from the date of the scandal and your chances of escaping it keep increasing exponentially the farther in time you get. And yet, as fascinating as the "90 day-Rule" in Nigeria is, that is not the topic of our discourse today, although it does form the basis of another fascinating idea.

The World Wide Web of Information

Our Constitution holds sacred certain inalienable rights for every Nigerian- rich, poor, obscure, influential we all have certain rights that are protected by the Constitution. The question of enforcement however is another matter, but nonetheless, these rights exist. The internet is perhaps the greatest repository of knowledge and information ever created by mankind. Put in perspective the great library of Alexandria- a grand library of the ancient world, containing between 400, 000 to 700, 000 scrolls of papyrus recording the genius of the greatest thinkers and philosophers of that time, and the irretrievable loss it has come to represent being razed eventually by fires that destroyed it, is only a fraction of the repository that the internet represents.

While the great library of Alexandria may have attempted to collect a copy of every book ever written, the Internet can be likened to every copy of every book on every person in the world because it represents immediate worldwide access to information held by any system or person. If there is a chance that someone has thought of the information, recorded it or is willing to share it, the internet possibly has it. The idea is astounding. There is so much information available to users that it beggars belief, but it also begs an interesting question- "How do you take something out of the internet?"

The Right to be Forgotten

This is not simply a question of "taking something down" from Facebook or "deleting posts online", I mean how does anyone remove any personal information from the internet entirely so that no record of it exists? Is that even possible? Traditionally the question of whether it is possible or not was never reached because it would be preceded by whether the relevant information is true or not and a defence of justification- i.e. the information is true and therefore publishable, especially where the duty of the Press and freedom to report on matters within the public domain are concerned.

That was until the European Court of Justice (ECJ), the court of final recourse for matters that have reached the apex courts in European Union member states, declared that as far as it is possible- a person has the right to be forgotten by requiring internet search engines- the worldwide conglomerate companies that have revolutionised the storage and access of vast amounts of data that is the internet- like Google, to remove information about a person that is inadequate, irrelevant or no longer relevant in relation to its purpose, when the person to which such information refers to requests that the information be removed from the internet.

The Costeja Case

In March 2010 Costeja Gonzales a Spanish national brought a complaint against Spanish Newspaper La Vanguardia, Google Spain and Google Inc. at the Spanish Data Protection Agency- Agencia Espanola de Proteccion de Datos (SDPA). Gonzales wanted to compel La Vanguardia to remove or change the record of garnishment proceedings he was involved with in 1998 so that it no longer came up when searching the internet search engine Google. He wanted Google Inc. or its Spanish subsidiary Google Spain to delete or conceal the information. The basis for Gonzales' demand was that the proceedings had been settled for some years and its report online was therefore no longer relevant and ought to be removed. The SDPA dismissed the complaint against La Vanguardia protecting its status as a newspaper in the publication of a justified matter in accordance with a directive of the Government. However it upheld the complaint against Google, finding that the company is subject to data protection laws and was obliged to take steps to protect personal data that may include removing such records of a matter from its search engine.

Google appealed to the nation's High Court which referred the question- on the basis that it affected EU Directive on the Protection of Personal Data- to the European Court of Justice of the EU. The European Court of Justice found that Google is a "controller" of information by virtue of its operation as content provider of content included on the internet by third parties, and therefore subject to EU Directives on the protection of personal data and may at times be obligated to remove personal data published on third party websites. However the right of a data subject to require a controller such as Google to remove their data is to be balanced against the public's right to have access to that data.

A Nigerian Perspective

The Right to be forgotten is therefore clearly protected under European jurisprudence, and Kunle our poor protagonist would be secure in that realisation. However that position as attractive as it is, is not tested in our jurisdiction. It also brings us to the classic jurisprudential contention between the Right to Privacy and the Freedom of the Press. The Constitution of the Federal Republic of Nigeria 1999 in section 37 guarantees the Right to Private and Family Life when it says:

"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected"

In similar manner section 39 subsumes the Right to Freedom of Expression and the Press stipulating in subsection (2) specifically that:

"Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions…"

after which it goes on to stipulate legitimate conditions upon which this right may be restricted or limited within the context of our democratic Presidential system of government.

A Man's Home his Castle v. The Liberty of the Press

Historically these two separate but indispensable rights form part of the essential tenets of the protection and checks of a democratic system of government. Neither is an absolute right to be enjoyed at the expense of all others and in fact except for the inviolate right to call on God in times of disaster, we Nigerians have very few rights that are absolute. The question of balancing the subtle and vital interests of the privacy of a person and the freedom of the press has been the subject of great oratory like Mr. John Milton's oratory to Parliament –Areopagitica- 'For the Liberty of Unlicenc'd Printing' in England or Cicero's ancient question "quid enim sanctius, quid omni religione munitius, quam domus unusquisque civium?" –What more sacred, what more strongly guarded by every holy feeling, than a man's own home? – and ultimately that balance goes on in perpetuity for the benefit of society and not in spite of it.

In a Land Where no Right is Absolute the Beggar is King

As a nation the rights to the sanctity of the home, the rights to dignity and protection against inhumane treatment, the right of free thought and conscience and others- are all provided for amply in our Constitution, however few have the ability to enforce them and even fewer have the forbearance to do so without payback and reprisal that makes a situation worse than simply being wronged and moving on. It therefore makes most of us beggars for the protections that we are entitled to. Still, those who can, have recourse to the Courts who are the arbiters and referees for the competing interests between the Right of Privacy and the Freedom of the Press. The rest of us will have to content ourselves with believing that we have a Right to forget everything else that happens to us.