Navigating the Digital Divide: Balancing the Right to Be Forgotten and Freedom of the Media in Kenya.

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By David Mshindi Maina
145031

Prepared under the supervision of
Eva Nyambura Maina

February 2025

Word Count 10,701

DECLARATION

I, MAINA DAVID MSHINDI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....  .....

Date: .....5th February 2025.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....  .....

Eva Naymbura Maina

Date: ...5th February 2024.....

ACKNOWLEDGEMENTS

I thank my supervisor for the much needed advice and guidance all through undertaking this research project. I also thank my parents and the rest of my family for offering me much required support not only through my final year dissertation, but also throughout my journey in University. Special thanks is owed to my twin brother, who I shared this journey with. I thank him for his companionship and brotherhood which proved to be invaluable.

LIST OF CASES

1. *Google Spain v Mario Costeja Gonzalez and AEPD* (2014), Court of Justice of the European Union
2. *Campbell v Mirror Group Newspapers Ltd* (2004), The United Kingdom House of Lords

LIST OF LEGAL INSTRUMENTS

1. Constitution of Kenya , (2010)
2. General Data Protection Regulation of 2018 (European Union)
3. The Data Protection Act No. 24 of 2019
4. The Media Act No. 3 of 2007
5. The Access To Information Act No. 31 of 2016

LIST OF ABBREVIATIONS

AEPD	Agencia Española de Protección de Datos
EU	European Union
GDPR	General Data Protection Regulation
ODPC	Office of the Data Protection Commissioner

ABSTRACT

“This research explores the relationship between the right to be forgotten and media freedoms in the Kenyan context, aiming to clarify ambiguities surrounding the interpretation of "irrelevant" and "excessive" information and develop a practical framework to reconcile these competing interests. The study evaluates the legal, institutional, and ethical dimensions influencing the right to be forgotten and media practices, offering actionable recommendations for their harmonization. The project examines Kenya's constitutional provisions on privacy and media freedom, the Data Protection Act (2019), and subsidiary regulations, alongside comparative insights from global and regional frameworks like the GDPR. It includes a review of ethical theories and case law to contextualize the right to be forgotten in Kenya's legal and social landscape.

Employing a doctrinal research methodology, the study utilizes primary sources such as statutes, judicial decisions, and secondary sources like peer-reviewed journals and expert analyses. Ethical frameworks, including Bentham's Utilitarianism and Kantian Ethics, are applied to assess the implications of privacy violations and media responsibilities. The study finds that this right suffers from limited definitions and unclear applications, particularly concerning "irrelevant" and "excessive" information. The current legal framework inadequately addresses the intersection of public interest and individual privacy, especially for public figures. Key recommendations include adopting the Three Principle Filtering Test to evaluate erasure requests, balancing public access to information with privacy rights, and refining statutory language to guide both media practitioners and legal adjudicators

.

CHAPTER ONE: INTRODUCTION

1.1 Background.

The phrase, "The internet never forgets" is now common parlance in the digital age. This is often a terrifying prospect to imagine, that there is a near immutable record of everything that has ever happened to anyone who ever lived, including personal information that they would much rather keep private. The right to be forgotten says that this should not be the case. It is defined to be the legal right of a person to ask data processors to erase their personal data.[1] This includes news articles that mention the individual in an adverse light such as articles mentioning them as the subject of legal proceedings such as bankruptcy.

This right was first discussed in the Costeja case at the Court of Justice of the European Union[2]. In the Costeja case, a Spanish Newspaper outlet published news regarding the forced sale of some properties in fulfilment of some debts, one of which belonged to Mario Costeja Gonzalez. A web version of the same was made available. Whenever Gonzalez input his name in the Google search engine, the article would come up. He contacted the newspaper to complain and ask that the data concerning him be removed. He argued that such information was no longer relevant because the sale had been concluded. The court in its determination found that people whose personal data is publicly available through internet searches may "request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results" as their rights to privacy and protection of personal data override "not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name." [3] This right was further codified into law in the General Data Protection Regulation (GDPR). [4]

In Kenya, this right is tied to the right to privacy.[5] The Constitution also provides for the freedom of expression, which includes the freedom to access, share and express information or ideas.[6]

---

[1] <https://gdpr.eu/right-to-be-forgotten/?cn-reloaded=1> on 1 March 2024.
[2] *Google Spain v Mario Costeja Gonzalez and AEPD* (2014), Court of Justice of the European Union.
[3] *Google Spain v Mario Costeja Gonzalez and AEPD* (2014), Court of Justice of the European Union. (para 81)
[4] Article 17, *General Data Protection Regulation*, (2018).
[5] Article 31(c), *Constitution of Kenya*. (2010).
[6] Article 33(1), *Constitution of Kenya*. (2010).

The Constitution also provides limits to the freedom of expression, excluding propaganda for war, incitement to violence, hate speech, or the advocacy of hatred that promotes ethnic incitement, vilification of others, incitement to harm, or discrimination based on any specified grounds[7] The freedom of expression also requires all those who exercise it to respect the rights and reputation of others.[8] The Constitution also stipulates that freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).[9]

The Data Protection Act does provide for this right. It provides that data subjects have the right to request a data processor to erase personal data that the data controller is no longer authorised to store, irrelevant, excessive or obtained in an unlawful manner .[10] The current position of the right in Kenya is that it is limited in its scope. It does not clearly delineate what information qualifies as "irrelevant or excessive". The right does not also clearly define under which circumstances can this right be denied, as seen in the GDPR. One of the grounds of limitation under the GDPR is if the information is necessary to form an archive pursuant to the public interest.[11]

From the above description of the right as it exists in the Kenyan judicial system, there arises an apparent contradiction. How are media houses and journalists expected to carry out their responsibility of keeping society informed if their works can be erased in the name of protecting the privacy rights of others? The press plays a critical role in maintaining open and democratic societies because they provide information to the society that is in their interest. The press also plays a role of keeping a record of everything important that happens in society. Therefore, to erase these records would be tantamount to introducing gaps in the collective memory of society. The press in Kenya is legally obligated to keep the public informed on matters of importance to them in a fair, accurate, and unbiased way. It must clearly separate opinions from facts while avoiding offensive coverage of sensitive matters such as violence and nudity and operate with freedom and independence.[12]

---

[7] Article 33(2), *Constitution of Kenya*. (2010).
[8] Article 33(3), *Constitution of Kenya*. (2010).
[9] Article 34(1), *Constitution of Kenya*. (2010).
[10] Section 40(b), *Data Protection Act*, (2019).
[11] Article 17(3)(d*), General Data Protection Regulation*, (2018).
[12] Section 35(1), *Media Act*, (2007)

This paper aims to find a way to reconcile these two competing interests. Most people would agree that people have the capacity to change and grow and some information therefore grows stale, irrelevant and downright excessive and that such information should not become a hamper to whatever future someone may have. Most people would agree that some information should not be erased and that society has an interest in that information. The point of disagreement usually comes in how people categorise the various kinds of information following the dichotomy described. People have differing opinions on what information falls under information in the public interest and information that is irrelevant and excessive. This research paper aims to propose a framework in the Kenyan legal context for determining how information in online press reports should be categorised and hence which online press reports should be "forgotten" and which information should not.

This area of study is worth researching because of the increasing reliance of the general population on online news sources. Therefore, granting this right must be a highly selective process to ensure media and journalistic freedoms are upheld. This is because individuals might take advantage of the right to bury bad press, and such information may be in the public interest such as media reports surrounding a corruption scandal in government or media reports surrounding a convicted murderer. On the other hand, some press stories might be outdated and fall under the category of "irrelevant" information while others are very intrusive on the privacy of a person to the extent that they might be considered "excessive".

1.2 Problem Statement

The problem that this research paper aims to tackle is the lack of a clear framework for determining which information qualifies as irrelevant, excessive information and consequently a lack of a clear definition of what kinds of media reports fall under this category and justify the right being applied.

1.3 Research Objectives

1. Provide a detailed account of the legal and institutional framework surrounding the right to be forgotten

2. Propose a meaning of irrelevant and excessive information.
3. Determine what media reports fall in the public interest and propose a framework for evaluating what kinds of media reports should be erased and which ones should not.

1.4 Research Questions

1. What is the legal and institutional framework surrounding the right to be forgotten?
2. What is the meaning of irrelevant and excessive information?
3. What is the meaning of the public interest with regard to information reported by the media and what framework can be used for evaluating what media reports should be erased and which ones should not?

1.5 Justification of the Study

This study is needed because it will provide insights on how to balance between the right to be forgotten and the freedom of expression of the media. The findings of this study will then lead to a clear definition of what information contained in online press reports can be qualified as "irrelevant and excessive" and as a result what kinds of online press reports can be erased in enforcing such a right. This study will propose a ground on which enforcement of the right can be rejected and hence enrich the legal framework surrounding the right.

1.6 Hypothesis

The right to be forgotten can be applied in a way that is not detrimental to the freedom of the media, especially regarding online press reports

1.7 Theoretical framework

The main concept that this research will take into account is the concept of proportionality as conceived by Ronald Dworkin This concept is a tool used to determine if a given policy is

justified in limiting a particular right in the pursuit of the protection of another.[13] The test generally employs a four-point evaluation process in order to determine this. The steps are that the policy in question must pursue a legitimate aim, the policy must be a suitable means of achieving the goal, it must be the least restrictive means of achieving the goal and that the burden placed on the right holder must not be disproportionate.[14] This theory is relevant to this research because it provides a useful framework for evaluating if the right to be forgotten can be applied proportionally in a manner that does not impact the right to access to information and the freedom of speech. Of course, the concept of proportionality is not without its criticisms, the most common being that it inadvertently creates a hierarchy of values. This in the opinion of some runs the risk of judges making arbitrary decisions, because they would be able to justify these decisions using the principle of proportionality.[15] Another criticism against this concept is that it would erode the separation of powers in government because it would give the judiciary the ability to rule on the actions of the other arms.[16] This research will take cognizance of these criticisms in its attempt to reconcile the right to be forgotten with the freedom of the media as it attempts to strike a balance between the two.

1.8 Literature Review

In his journal article, Antani examines the feasibility of implementing the right as understood in jurisprudence from the European Union in the United States of America's legal regime, primarily through analysing the Costeja Gonzalez case and highlighting reactions to the ruling, including concerns about administrative burdens expressed by Google executives and instances where the right was perceived as impinging on free speech, citing examples of journalists' complaints.[17] Antani contrasts American conceptions of free speech with European privacy concerns and

[13]Möller K, "Dworkin's Theory of Rights in the Age of Proportionality", London School of Economics and Political Science, Law, Society and Economy Working Paper Number 11, 2017, 8, -https://eprints.lse.ac.uk/87555/1/Moller_Dworkin_Author.pdf - on 18 February 2024

[14] Möller K, "Dworkin's Theory of Rights in the Age of Proportionality", London School of Economics and Political Science, Law, Society and Economy Working Paper Number 11, 2017, 8, -https://eprints.lse.ac.uk/87555/1/Moller_Dworkin_Author.pdf - on 18 February 2024

[15]-http://www.glawcal.org.uk/glawcal-comments/arguments-against-the-application-of-the-principle-of-proportionality- on 18 February 2024.

[16]-http://www.glawcal.org.uk/glawcal-comments/arguments-against-the-application-of-the-principle-of-proportionality- on 18 February 2024.

[17] Antani R, "The resistance of memory: Could The European Union's right to be forgotten exist in the United States?", 30(4), *Berkeley Technology Law Journal*, 2015, 1179.

discusses which types of content should fall under the right, advocating for a narrow interpretation to facilitate better application to specific erasure requests.[18] He also addresses the concept of internet exceptionalism and its potential fading support, exemplified by Reddit users' voluntary removal of links after a celebrity photo hack.[19] Ultimately, he concludes that for the right to be forgotten to be applicable in the U.S., it must be narrowly defined to align with evolving privacy conversations in the internet age, considering the balance between free speech and privacy and the responsibility for defining the right, suggesting that search engines, courts, and legislatures play a role in its delineation, cautioning against broad interpretations that could hinder its evolution in tandem with changing attitudes toward privacy online.[20] My research will add onto the existing body of work because it will take into consideration the Kenyan perspective on the freedom of the media and attempt to create a framework for balancing the individual's right to be forgotten and the free speech of the media by proposing a framework for distinguishing which online press reports qualify as excessive and irrelevant and which ones are in the public interest. I will accomplish this by attempting to definitively define what the terms "irrelevant and excessive" and public interest mean.

In the journal article titled, "The Right to Be Forgotten in European Union Law: Data Protection Balanced With Free Speech?". The authors sought to examine the impact of the Costeja ruling on the right to be forgotten as well as its worldwide impact. They opine that this right was conceptually drawn from the person's individual sense of dignity, which is accompanied with self-determination, in that they get to choose what information about themselves they can share with others.[21] They also conclude that the right as a matter of informational privacy can actually work to enhance the values of free speech and truth seeking as well as the facilitation of democracy, and the only question they deemed pertinent in order to ultimately enhance these values is to ask what could be done in properly balancing informational privacy rights with the

[18] Antani R, "The resistance of memory: Could The European Union's right to be forgotten exist in the United States?", 1183.
[19] Antani R, "The resistance of memory: Could The European Union's right to be forgotten exist in the United States?", 1199
[20] Antani R, "The resistance of memory: Could The European Union's right to be forgotten exist in the United States?", 1199
[21] Park A and Youm K, " The Right to be Forgotten in European Union Law: Data Protection Balanced with free speech?" 93(2), *Journalism and Mass Communication Quarterly*, 2016, 289.

freedom of expression.[22] They write that the lack of clarity of the right to be forgotten in the Data Protection Directive resulted in the European Court of Justice giving a vague definition of the right in the Google Spain case, even though they see this as an incremental step towards the evolving European Union law on the right.[23] They ultimately conclude by saying that if the EU continues to rely on the Google Spain case, it is not reasonable to expect a fairly balanced right to be forgotten, given that there wasn't much balancing between the two rights.[24] This research will differ from the discussed body of work given that it will incorporate interpretations of freedom of the media from the Kenyan context, through statutes like the Kenyan Constitution, The Data Protection Act of 2019 and relevant case law regarding freedom of the media. This research will also attempt to incorporate an African perspective on these concepts by relying on regional instruments such as the Malabo convention.

In the article, " The Right to be Forgotten: A Philosophical View", the author discusses the various philosophical underpinnings of the right to be forgotten, by juxtaposing them against the philosophical underpinnings surrounding other competing interests such as the freedom of speech.[25] The author concedes that the debate between all these variables is indeed complicated and that this is because, like all other ethical principles, the principles of free speech and privacy need to be reconciled in different ways.[26] The author writes that a way to fruitfully approach the impasse that exists between the two principles is to look at the information in question and the difference between accessibility and availability.[27] He concludes his articles by stating that the right is having a significant effect on European philosophical tradition.[28] He adds to this that we must make sure that the right kind of personal information is remembered in order to ensure that they do not undermine someone's future and that such information that is "forgotten" should not resurface unnecessarily.[29] This research will focus on the legal concepts related to the ethical principles discussed in the article, such as privacy and free speech. However, it will also be

[22] Park A and Youm K, " The Right to be Forgotten in European Union Law: Data Protection Balanced with free speech?", 289.
[23] Park A and Youm K, " The Right to be Forgotten in European Union Law: Data Protection Balanced with free speech?", 290.
[24] Park A and Youm K, " The Right to be Forgotten in European Union Law: Data Protection Balanced with free speech?", 290.
[25] Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), 165.

[26] Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), 166.
[27] Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), 167.
[28] Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), 178.
[29] Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), 179.

important, as the author insisted, to reconcile the ethical principles of free speech and privacy in different ways, given the fact that these ethical principles are so opposed to each other. To this end this research will feature some philosophical arguments in order to determine the best way to reconcile the two values, especially regarding the media's free speech and privacy rights.

It is clear from existing literature that this right is not absolute by any means. Even though it is given a wide berth in European courts and statute, it is limited in its scope. There are indeed concerns regarding the potential of the right negatively impacting the freedom of speech. There is also the concern of internet exceptionalism, whereby the internet is seen by many to be a complete record of history which should not be interfered with. There is also very little scholarship on this right that caters to the Kenyan legal context and thus it is imperative that the research takes this into account. This research will therefore aim to fill the gap of the lack of Kenyan perspective and propose a framework that best ensures that media freedoms are not unfairly impacted.

1.9 Research Methodology

This research project will rely on doctrinal research methodology. The sources that will be relied upon in fulfilment of this are primary sources which include judicial decisions and statutory law from the European Union. The secondary sources will include, journal articles, peer reviewed studies and any other reliable internet source.

1.9.1 Research Limitations

This research will not be without its limitations. The first limitation is that of time, given that there is a submission deadline for this paper. There are also the constraints of using doctrinal legal research, which include the fact that it draws heavily from legal concepts, rules and principles which are drawn from statutes, legal literature and case law. The problem with this is that it tends to ignore social realities on the ground. These limitations can be remedied by striving to complete the research in good time and trying as much as possible to include real world perspectives surrounding the concepts to be discussed in the paper.

1.9.2 Chapter Breakdown

Chapter one of this study presents the background to this research, which provides an overview of the research topic. It highlights the background of the problem and the objectives of the research and puts forward some research questions that the study seeks to answer.

Chapter two will discuss and outline the legal and institutional framework surrounding the right to be forgotten in Kenya. It will make use of case law, statute and legal opinions in order to get a clear picture of what the right to be forgotten in Kenya is made up of, as well as the legal framework surrounding the freedom of the press.

Chapter three investigates and proposes what kinds of information in online press reports could be qualified as irrelevant and excessive.

Chapter four will seek to analyse what the public interest is and consequently what kinds of information in online press articles should not be erased in application of the right to be forgotten.

Chapter five will present the findings of the research snd make recommendations based on the findings. .

CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORK SURROUNDING THE RIGHT TO BE FORGOTTEN IN KENYA

2.1 Legal Framework

2.1.1) The Constitution of Kenya (2010)

The Constitution of Kenya provides for the right to privacy for all individuals, safeguarding them from unwarranted searches of their person, home, or property; unlawful seizure of their belongings; unwarranted disclosure of their personal or family matters; and violations of the confidentiality of their communications.[30] This is the right upon which the right to be forgotten is predicated because the right to be forgotten ultimately aims to protect the privacy of the person. It also provides that every person has the right to erasure of misleading information that affects the person.[31] This is the grounding of the right to be forgotten in Kenya in its Constitution.

Freedom of the media is guaranteed by the Constitution.[32] The freedom of the media in forms such as electronic or print or any other such form is only to be restricted to the extent specified by article 33(2), which include citement to violence, hate speech, and propaganda for war.[33] This article mandates that there shall be no state interference on the media. The state is not allowed to control, interfere with, or penalise individuals or entities for their opinions, views, or the content they broadcast, publish, or disseminate.[34] Lastly the Constitution also mandates that Parliament shall create an independent body that: operates free from government, political, or commercial influence and represents diverse societal interests. establishes, monitors, and enforces media standards.[35]

Some key takeaways from this is that the Constitution imagines that the relationship between media freedoms and the privacy of individuals to be a balancing act. In practice, the media often has to seek information on public figures or private citizens in furtherance of the public interest. However, the right to privacy implies that such information should not be disclosed unless it

[30] Article 31, *Constitution of Kenya*, (2010)
[31] Article 35(2), *Constitution of Kenya*, (2010).
[32] Article 34, *Constitution of Kenya*, (2010)
[33] Article 33 (2), *Constitution of Kenya*, (2010)
[34] Article 34 (2), *Constitution of Kenya*, (2010)
[35] Article 34 (5), Constitution of Kenya, (2010)

serves a legitimate public interest. The Constitution suggests that the "public's right to know" should be balanced against individual privacy rights, especially when personal matters are involved without a legitimate public justification. This trend of thought can be illustrated by Article 24 , which provides that a right or fundamental freedom cannot be limited except by law and even then the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[36]

2.1.2)The Data Protection Act (2019).

This Act entered into force on the 25th of November of 2019.The purpose of the Act is to give effect to Article 31 of the Constitution, regulate the processing of personal data, outline the rights and obligations of data subjects and processors, and establish the Office of the Data Protection Commissioner. For a fruitful outlining of the Act and how it relates to the right to be forgotten, it's important that a first look is taken at how various terms are defined in the Act. This is a technical field and thus it's imperative to get the meaning of terms correct.

A data controller is defined as a natural or legal person, determines the means and purpose of processing personal data.[37] This term is used alongside the term data processor numerous times throughout the Act. A data processor is defined as a natural or legal person which processes personal data on behalf of the data controller.[38] Personal data is defined to be any information that relates to an identified or an identifiable person.[39] Finally, sensitive personal data is taken by the Act to mean data revealing the individual's race, health status, ethnic or social background, beliefs, genetic and biometric information, property details, marital status, family information (including the names of their children, parents, or spouse), sex, or sexual orientation.[40]

The right to be forgotten, or as it is known in Kenyan jurisprudence, the right to erasure, is found in the Data Protection Act. A data subject may request the immediate erasure or destruction of personal data that is no longer authorized for retention, irrelevant, excessive, or unlawfully obtained.[41]

[36] Article 24, *Constitution of Kenya*, (2010).
[37] Section 2, *Data Protection Act.* (Act No. 24 of 2019).
[38] Section 2, *Data Protection Act.* (Act No. 24 of 2019)..
[39] Section 2, *Data Protection Act.* (Act No. 24 of 2019).
[40] Section 2, *Data Protection Act.* (Act No. 24 of 2019).
[41] Section 40(1), *Data Protection Act*, (Act No. 24 of 2019).

Section 40(3) states that if a data processor or controller is required to erase or correct personal data under subsection (1), but the data is needed as evidence, they must restrict its processing instead of deleting or modifying it. Additionally, they must inform the data subject within a reasonable time.[42] Section 26 also provides that a data subject has the right to erasure of misleading data about them. Section 39 provides a limitation on the processing and storing of data for as long as necessary except when the storing is consented to by the data subject, statutorily required, necessary for a lawful purpose,; or for historical, statistical or other related purposes.[43].

2.1.3) The Data Protection (General) Regulations (2021)

This piece of subsidiary legislation was issued in 2021, with its main objective being operationalising the Data Protection Act. The General Regulations expand on the right to be forgotten. According to the Act, a data subject can request a data processor or controller to erase their personal data under certain conditions. These include situations where the data is no longer needed for the purpose for which it was collected, the data subject withdraws their consent, or they object to the processing and there is no legitimate reason to continue. Additionally, a data subject can request erasure if their data is being used for direct marketing and they object to it, if the processing is unlawful, or if deleting the data is necessary to keep in line with a statutory duty.[44] The regulation even goes as far as to add grounds where the right does not apply, such as when the erasure would conflict with the right to freedom of expression and information, legal obligations exist that require the retention of such data, where the retention of the data is required for public interest purposes such as historical archiving, statistical purposes or other related and if the data is required for the establishment of defence of a legal claim or if the data is required by an official body in carrying out its functions[45]

A comparative look between Regulations and the Act reveals some key differences in how they approach the right to be forgotten. The regulations add some more grounds upon which a data subject can request for erasure of data held by data processors or controllers such as if the data subject no longer consents to their data being processed, the data is no longer necessary for the

[42] Section 40(3), *Data Protection Act*, (Act No. 24 of 2019).
[43] Section 39, *Data Protection Act,* (Act No. 24 of 2019).
[44] Regulation 12*, Data Protection (General) Regulations*, (2021).
[45] Regulation 12 (4), *Data Protection (General) Regulations*, (2021).

purpose for which it was collected, if the data subject does not consent to the processing of such data and no legitimate grounds exist for their objection to be denied or if the erasure would be pursuant to a legal obligation. The regulations also specify when the right to erasure does not apply, while the Act merely mentions a limitation on the processing or retention of the data in Section 39.[46] The regulation also gives guidelines on how to apply for erasure by providing a form in its First Schedule and stipulates that there shall be no charge to be levied on the application and that the data processor or regulator must respond to the request for erasure within fourteen days.[47]

In summary the Act has a more general scope regarding the right compared to the regulations. The regulations serve to provide practical guidelines through which the right can be applied.

2.1.4) The Media Act (2007)

The purpose of this Act as indicated in its long title is to provide for the creation of the Media Council of Kenya as well as provide ethical guidelines for journalists and media for their self regulation. The Act defines a journalist as anyone with a diploma or degree in mass communication from a recognized institution and acknowledged by the Media Council of Kenya. It also includes individuals who were practicing journalism before the Act's commencement, those with qualifications recognized by the Council and who earn a living through journalism, or anyone who regularly practices journalism and is recognized by the Media Council of Kenya.[48] This definition is useful to note because, in today's increasingly digitised world, anytone can engage in journalistic activities, especially through methods like social media posts and blogs. For the purpose of this project, special attention will be given to journalists as defined by the Act in the course of discharging their functions as such

Section 35 in particular provides for how information by the media is to be treated by journalists. It provides that the media should, freely and independently, inform the public on issues of public importance in a manner that is free and accurate. They should also do so while making sure to separate opinion from fact and avoid offensive coverage of sensitive matters such as nudity, violence and ethnic biases[49] This section also provides that the media shall observe high

[46] Section 39, Data protection Act, (Act No. 24 of 2019).
[47] Regulation 12, *Data Protection (General) Regulations,* (2021).
[48] Section 39, Media Act, (Act No.3 of 2007)
[49] Section 35 (1), *Media Act*, (Act No. 3 of 2007)

professional standards in line with the code of conduct outlined in the Second Schedule to the Act.[50] Finally this section provides that the Media Council of Kenya shall not seek to direct or control journalists in executing their professional duties. [51]

The second schedule as referred to in Section 35(2) of the Act provides for the code of conduct for the journalistic profession. This code covers a wide variety of areas such as accuracy and fairness, independence, integrity, accountability, the covering of sectarian, religious or ethnic conflict and other such issues. A quick reading of the second schedule reveals that the code is comprehensive, prioritises accuracy, impartiality and the respect of individuals rights. The code promotes accountability on the part of the media by emphasising the importance of correcting errors and public engagement via public complaints. The media's freedom of expression is balanced against the ethical obligations of journalists and the media at large. This serves to promote public trust in the media as a source of unbiased, fair, timely and ethically sourced and delivered news.

2.1.5) Access To Information Act (2016)

This Act, which entered into force on the 21st of September 2016, is meant to give effect to Article 35 of the Constitution. The Act holds information to be all records held by a private or public entity.[52] Personal information according to the Act has a wide definition. It covers aspects of an individual's life such as any data that can identify an individual. This includes details such as race, gender, sex, pregnancy status, marital status, nationality, ethnicity, social origin, age, physical and mental health, disability, religion, beliefs, culture, language, and birth. It also covers an individual's education, medical, criminal, and employment history, as well as financial transactions.[53]

However this Act is specially focused on information held by private and public entities and the disclosure of information held by such bodies.[54] The focus of this research paper is information contained within online press articles. The information has already been disclosed and hence this

[50] Section 35 (2), *Media Act*, (Act No. 3 of 2007)
[51] Section 35 (3), *Media Act*, (Act No. 3 of 2007)
[52] Section 2, *Access to Information Act*, (Act No. 31 of 2016)
[53] Section 8, *Data Protection Act*, (Act No. 24 of 2019).
[54] Section 4, *Data Protection Act*, (Act No. 24 of 2019).

Act is only relevant as far as it provides insight into what could be considered personal data under the Kenyan legal regime.

2.2) Institutional Framework

2.2.1) Office of the Data Protection Commissioner

Structure

As established earlier, one of the objectives of the Data Protection Act is to establish the Office of the Data Protection Commissioner. The ODPC is established as a body corporate with perpetual succession and a common seal as well as a state office. It is also capable of suing and being sued, entering into contracts and holding property as well as any other legal acts that may be necessary for carrying out their function.[55] The Office is composed of the Data Commissioner as its chief and accounting officer as well as any other staff that they have the power to appoint.[56] The Public Service Commision is charged with advertising the vacancy of office within seven days of its occurrence, receive applications, shortlist candidates, publicise their nomination, conduct interviews of the shortlisted candidates, and submit the names of three qualified candidates to the president who, with the National Assembly's approval, appoints one of them as the Commissioner.[57]

Functions

The functions of the the office include, ensuring that compliance with the Act and enforcing its provisions, registration of data controllers and processors, handling of complaints related to data protection right by individuals or organisations, promoting awareness regarding data protection rights through campaigns, trainings and issuing of guidelines, developing and publishing guidelines, codes of practice and policies to help organisations comply with data protection

[55] Section 5, *Data Protection Act*, (Act No. 24 of 2019).
[56] Section 5 (3), *Data Protection Act*, (Act No. 24 of 2019).
[57] Section 6, *Data Protection Act*, (Act No. 24 of 2019).

principles, conducting audits to ensure compliance with the Act and collaborating with international data protection bodies to ensure adherence with global data protection standards.[58]

Powers

The Office can initiate, out of its own will or on the basis of a complaint made to them, investigations into alleged violations of the Act.[59] It can also issue enforcement notices to data processors and controllers who are in breach of the law, impose fines and penalties on organisations that are in breach of the provisions of the act requesting any information that may be necessary for their functions such as an audit and developing and issuing guidelines for data processors and controllers to follow.[60]

2.3) Findings

In conclusion the ODPC plays a crucial role in upholding privacy rights and in particular the right to be forgotten. The legal and institutional framework surrounding the right to be forgotten and media freedoms has made significant steps towards upholding the privacy of individuals, particularly regarding the right to be forgotten. The Data Protection Act and Constitution imagine a balance between media freedom and the right to be forgotten, but implementing this balance in practice can be challenging. The Constitution protects media freedom, yet privacy rights imply limitations on public access to personal information. The freedom of the media is also guaranteed, but it is limited in the Constitution as well as some ethical principles it is required to adhere to, to ensure that they respect the rights of others. Kenya's laws do not fully clarify when privacy should override public interest, especially in cases involving public figures or matters deemed newsworthy. Its laws also do not provide a clear definition of what qualifies information as being irrelevant or excessive.

[58] Section 8, *Data Protection Act*, (Act No. 24 of 2019).
[59] Section 9 (a), Data Protection Act, (Act No. 24 of 2019).
[60] Section 9 , Data Protection Act, (Act No. 24 of 2019)

CHAPTER 3: IRRELEVANT AND EXCESSIVE INFORMATION IN THE DIGITAL AGE.

3.1) Introduction

A quick glance at the dictionary definition of the word excessive is that it is " exceeding what is usual, proper, necessary, or normal". Its synonymes include, unconscionable and extreme.[61] Irrelevant is defined as "net relevant or inapplicable". Its synonyms include, impertinent and immaterial.[62] As established in previous chapters, the Kenyan legal regime in listing the grounds for erasure under the right to be forgotten lacks a clear delineation of what constitutes irrelevant or excessive information. My aim in this chapter is to investigate and propose what kinds of information should fall under the aforementioned categories using various ethical and philosophical considerations. This is because ethics can provide answers to the areas that the law is silent on, as well as being a framework for evaluating the justness of the law itself.

3.2) Bentham's Utilitarianism

Utilitarianism as imagined by Jeremy Bentham, one of the first of the classical utilitarians, is an ethical theory that proposes the rightness or wrongness of an action is determined by how much it contributes to the greatest good for the greatest number of people.[63] Utility according to Bentham is the "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness or to prevent the happening of mischief, pain, evil, or unhappiness".[64] This property is maximised when pleasure is promoted, because Bentham believed in hedonistic utilitarianism, which is the belief that the only way to determine the value of an event or an action is the amount of pleasure that that action or event produces.[65] Bentham justifies this position by saying that nature puts man under the guidance of two sovereign

[61] <https://www.merriam-webster.com/dictionary/excessive> on 18th Novemeber 2024.
[62] <https://www.merriam-webster.com/dictionary/irrelevant> on 18th November 2024.
[63] Dimmock M and Fisher A, "Utilitarianism" in Dimmock M and Fisher A (eds) , *Ethics for A Level*, 1st ed, Open Book Publishers, 2017, 14.
[64] Dimmock M and Fisher A, "Utilitarianism", 13.
[65] Dimmock M and Fisher A, "Utilitarianism", 13.

masters, pleasure and pain and that it is for them to determine what man ought to do as well as what he shall do.[66]

According to Dimmock and Fisher, one of the key features of Bentham's utilitarianism is that it is teleological or consequentialist in nature. This means that it insists that the moral value of an event can only be judged by the consequences it produces.[67] If one action produces as a consequence more pleasure or more utility than another action, utilitarianism proposes that the action that produces the greatest amount of pleasure out of all the available options is the morally sound choice. Bentham's utilitarianism is also relativistic as opposed to absolutist.[68] This means that his theory of utilitarianism, judges the morality of action by the utility it produces, rather than the morality of the action itself, as opposed to absolutists who believe that certain actions are morally wrong regardless of the context or the consequences.[69] Following this logic, this means that according to Bentham, it would be morally defensible to torture a terrorist in order to obtain information that would save countless lives, because the torture, which in itself a morally reprehensible and painful act, would promote greater pleasure for society at large

Bentham's utilitarianism is also maximising in that it requires that the greatest pleasure or utility is promoted for the greatest number of people possible.[70] This means that an action, even if moral on the face of things, does not necessarily promote the greatest good for the greatest number of people, it will not be ethical for the simple reason that the action or event did not achieve the maximum possible amount of good for the maximum possible amount of people. Bentham's utilitarianism is finally impartial.[71] This is because it insists on the maximum possible amount of pleasure or utility for the maximum possible number of people. In this consideration, all interests are equally considered because no special preference is given to any category of people.[72]

Admittedly in real life, ethical dilemmas are more complex than we'd like to imagine. For this reason Bentham formulated a framework for evaluating what action should be taken in order to maximise the utility or pleasure for the greatest possible number of people known as the Hedonic

[66] Dimmock M and Fisher A, "Utilitarianism", 13.
[67] Dimmock M and Fisher A, "Utilitarianism", 14.
[68] Dimmock M and Fisher A, "Utilitarianism", 14.
[69] Dimmock M and Fisher A, "Utilitarianism", 14.
[70] Dimmock M and Fisher A, "Utilitarianism", 15.
[71] Dimmock M and Fisher A, "Utilitarianism", 15.
[72] Dimmock M and Fisher A, "Utilitarianism", 13.

Calculus or the Felicific Calculus.[73] This tool evaluates pleasure or utility based on its intensity, duration, certainty, proximity in time, likelihood of generating additional pleasures, any accompanying pain, and the number of people who might benefit from it.[74]

Utilitarianism is not without its criticisms of course. The first one, according to Dimmock and Fisher is that pleasures are different in their nature so it would be near impossible to judge them on the same standard i.e. the Hedonic/Felicific Calculus.[75] Another criticism they offer is that there is the problem of relevant beings in the calculation of pleasure.[76] Utilitarianism in its analysis of pleasure does not consider the impact of the actions chosen on other beings such as animals.[77] An example of this would be if a government in response to overpopulation closes down a national park in order to create more space for human habitation and builds housing projects there. Arguably, this action would produce the greatest good (providing housing and easing population pressure) for the greatest possible number of people (the residents of the city). This action would also result in the destruction of the habitat for the animals and result in theri displacement as well as disturb the ecological balance in the area.

Another criticism Dimmock and Fisher have of Bentham's Utilitarianism as an ethical theory is that it often demands high standards of ethical conduct, which can be often unrealistic.[78] It also results in a tyranny of the majority because of its relativistic nature. It does not provide for any absolutist positions such as an absolute right to democracy, which can lead to oppression of minorities.[79] Bentham's utilitarianism, which focuses on outcomes because of its consequentialist nature tends to also ignore the intentions of the actor.[80] Bentham's Utilitarianism also does not consider that actors may not always be partial in choosing the action to pursue when faced with an ethical dilemma. They may come under the influence of their feelings, character and general sense of integrity.[81]

Bentham's utilitarianism, despite its limitations, still remains useful as an ethical theory in my view. This is because it provides the core insight that consequences do matter and should be

[73] Dimmock M and Fisher A, "Utilitarianism", 16.
[74] Dimmock M and Fisher A, "Utilitarianism", 16.
[75] Dimmock M and Fisher A, "Utilitarianism", 16.
[76] Dimmock M and Fisher A, "Utilitarianism", 17.
[77] Dimmock M and Fisher A, "Utilitarianism", 17.
[78] Dimmock M and Fisher A, "Utilitarianism", 17.
[79] Dimmock M and Fisher A, "Utilitarianism", 17.
[80] Dimmock M and Fisher A, "Utilitarianism", 18.
[81] Dimmock M and Fisher A, "Utilitarianism", 19. .

considered in making decisions, especially when the ethical dilemma at hand is complex and affects many people.

3.2.1) Applying Bentham's Utilitarianism.

As previously discussed, Utilitarianism in resolving ethical dilemmas demands that the action should secure the maximum possible pleasure for the greatest possible number of people. The ethical dilemma here is between an individual's right to be forgotten and the freedom of the media. Therefore in qualifying what information contained in online press articles amounts to being excessive and irrelevant the utilitarian would say that its information whose continued availability on the internet is one likely to cause societal pain e.g enabling discrimination and cyberbullying rather than societal pleasure eg facilitating informed public discourse. So through these considerations if information about an individual falls under the aforementioned description, the online press article could be delisted from a search engine, unless there are more compelling reasons that would warrant the articles continued availability, which would maximise societal pleasure.

3.3) Kantian Ethics.

On the other side of the coin, we have Kant's ethical theory. For Kant, actions can be judged independent of the consequences they produce, i.e. the rightness or wrongness of an action is in the action itself, regardless of the context in which triage action was taken.[82] Kant's ethical theory is deontological in nature, because it places more focus on duties and responsibilities rather than the outcome of our actions.[83] Kant takes this position because in his view, human beings are rational, moral beings who are able to "take a step back" and examine their choices, according to Dimmock and Fisher in their book chapter regarding Kant's ethical theory.[84]

One of the key ideas in Kant's theory of ethics, according to Dimmock and Fisher, is that of duty.[85] Dimmock and Fisher offer an illustrative example to explain what they imagine duty to be

[82] Dimmock M and Fisher A, "Kantian Ethics" in Dimmock M and Fisher A (eds) , *Ethics for A Level,* 1st ed, Open Book Publishers, 2017, 31.
[83] Dimmock M and Fisher A, "Kantian Ethics", 31.
[84] Dimmock M and Fisher A, "Kantian Ethics", 32.
[85] Dimmock M and Fisher A, "Kantian Ethics", 32.

according to Kant. Imagine your friend tells you that they are pregnant, and they swear you to secrecy. Most people would feel that they would have to keep that information secret, no matter how tempting the proposition of engaging in gossip may be. They would feel that it is their duty to do so, no matter their personal feelings on the matter. The authors also point out that Kant differentiates acting in accordance with duty and acting for the sake of duty. The example offered to make this distinction is whereby a person gives a beggar money out of sympathy, empathy or any such emotion while another, despite his inclination ot to give the beggar money, still does so[86]. The latter will have acted for the sake of duty while the former has acted in accordance with duty, because something else other than duty has moved them to act in such a manner i.e. empathy.[87] The action of the latter has moral worth because they lacked the desire to help out the beggar, but still chose to take a step back as a rational being does and give the beggar money.

The second defining idea of Kant's theory of ethics according to the authors is that of good will. According to them, good will is something that is good regardless of the effects.[88] They explain the good will by considering Mahatma Gandhi's non violent resistance against the British. Even though he must have felt great pain and the urge to fight back against the officers that would beat him, he stood strong and did not retaliate. In the authors' view, Kant would have said that his good will shone through "like a jewel". Gandhi's good will made him act peacefully in the face of violence and thus his action has moral worth.[89]

The final aspect of Kant's moral theory I'd like to discuss is the categorical imperative. The categorical imperative is the moral law that people should follow when they want to act out of duty.[90] According to Dimmock and Fisher, there are three formulations of the categorical imperative. The first one is, "act only according to that maxim through which you can at the same time will that it become a universal law".[91] This is a test to see which maxims are morally permissible and if thus if we act for the sake of these maxims, we are acting out of duty and our actions have moral worth. The second formulation of the categorical imperative is, "So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means"[92] According to Dimmock and Fisher, this means that

[86] Dimmock M and Fisher A, "Kantian Ethics", 34.
[87] Dimmock M and Fisher A, "Kantian Ethics", 34.
[88] Dimmock M and Fisher A, "Kantian Ethics", 33.
[89] Dimmock M and Fisher A, "Kantian Ethics", 33.
[90] Dimmock M and Fisher A, "Kantian Ethics", 35.
[91] Dimmock M and Fisher A, "Kantian Ethics", 35.
[92] Dimmock M and Fisher A, "Kantian Ethics", 35.

we should treat human beings with dignity because they are rational agents as opposed to using them as a means to an end.[93] Human beings are ends in themselves. The final formulation of the categorical imperative is, "every rational being must so act as if he were through his maxim always a lawmaking member in the universal kingdom of ends".[94] According to the authors this means that actions can be grouped into right and wrong actions, regardless of circumstance and therefore there cannot be a set of moral rules for each and every instance.[95]

3.3.1) Applying Kant's Ethical Theory.

In following the first formulation of Kant's categorical imperative, a maxim that would allow the retention of excessive irrelevant information in the form of online press articles that defeats the expectation of privacy and justice for individuals would not be morally permissible because it can't be universalised This is because it could not be willed into a universal law applying to everyone. The continued availability of irrelevant or excessive information that would undermine the dignity of the data subject who is human would be morally and ethically impermissible because of such violation and would thus go against the second formulation of the categorical imperative. Such information includes information that would result in people being used as objects of sensationalism and entertainment as well as instruments of profit making for media houses.

Thus there would be a moral duty for data controllers to uphold the human dignity of such affected persons once they request that the offending article be erased. They would have to follow such a duty, regardless of any other motivation they might have such as profit making or ensuring that the internet is a record of everything that has ever happened.

3.4) Findings

From the ethical arguments made above, we can thus deduce that irrelevant and excessive information can be taken to mean information that no longer serves an ongoing societal benefit

[93] Dimmock M and Fisher A, "Kantian Ethics", 38.
[94] Dimmock M and Fisher A, "Kantian Ethics", 35.
[95] Dimmock M and Fisher A, "Kantian Ethics", 39.

(facilitating informed discourse etc), that no longer serves its original purpose and whose continued availability and scope violates an individual's dignity.

CHAPTER 4: PUBLIC INTEREST AND PUBLIC FIGURES.

4.1) Introduction.

A discussion into media freedoms and the right to be forgotten cannot be fruitful in any way without mentioning public figures and the public interest in the information in question. Public figures in fulfilling their function as such give up some of their freedom, which includes some information regarding their private lives. Therefore this begs the question as to whether there is indeed an inflection point whereby information about a public figure no longer serves the public interest and violates their privacy rights despite the fact they have given up some of their privacy. Of course in order to facilitate this discussion a clarification of terms is in order. The first term is public figure. A public figure is widely understood to be someone who has attained a certain level of recognition in society. The difference in opinion comes in the question of who in particular qualifies to be recognized as a public figure. This is an especially pertinent question given how quickly news spreads over the internet. Anyone is in danger of becoming suddenly well known. This position is supported by Yanisky-Ravid and Lahav. They find that the question, "can anyone be a public figure?" can be answered in the positive.[96] In their analysis of United States case law, they find that the courts have found in many instances that public figures can include, celebrities in the entertainment industry, those who hold or have held in the past public officials, criminals, inventors, researchers or academics, war heroes, newsworthy individuals, and unwilling public figures, such as witnesses to a crime..[97] They conclude that the definition of public figures is so wide as to not only include future public figures i.e. people who are related to those are inadvertently thrust into the limelight.[98]

[96] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 19(4) *University of Pennsylvania Journal of Constitutional Law*, 2017, 980.
[97] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 981
[98] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 981

4.2) The Balloon Theory

In their journal article Yanisky-Ravid and Lahav propose a theory to better understand how privacy rights work especially in relation to public figures. They claim that everyone should enjoy the right to privacy including public figures. In the Balloon Theory, they imagine privacy rights as a balloon that exists to protect privacy rights and can change in size to accommodate various realities.[99] For public figures, this theory is subject to two limitations, the first being that their balloon is smaller than that of the average person. [100] The second limitation is that the mechanisms determining the scope of protection (the size of the balloon) are controlled by different rules depending on the unique circumstance. [101] They justify this by claiming that rules should be flexible enough to fit different situations, especially since there isn't a rigid list as to who qualifies as a public figure in the digital age i.e the balloon of privacy can change in size depending on the circumstance[102] The rules should also be flexible because it would be inappropriate to predetermine an allowable extent of harm regarding the harm caused by a privacy violation, as the assessment of such harm is unique to a specific individual, and should not be uniform for every person who falls under the definition of "public figure," especially in the digital age.[103]

They go on to describe the instances in which a public figure should ideally be able to be covered under the balloon of privacy. The first instance is where the information is private in that it contains personal intimate details that do not contribute to the fulfillment of their public role.[104] The second instance is whereby the information serves mainly as a form of voyeurism and if the information is not the kind that the public figure would expose by their own volition.[105]

---

[99] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000.
[100] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000.
[101] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000.
[102] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000
[103] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000
[104] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000
[105] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1000

4.3) The Three Principle Filtering Method

This method as proposed by Yanisky- Ravid and Lahav is used to determine what information, if any, about public figures should be allowed to exist. It consists of three principles, the relevance of the information to the public, if the information is necessary to learn about the world around us and proportionality.[106]

4.3.1) Relevancy of the private information

As I have defined previously using Bentham's Utilitarianism and Kantian Ethics that irrelevant information includes information that no longer serves an ongoing social benefit, that no longer serves its original purpose and who's continued availability violates an individual's dignity. Yanisky-Ravid and Lahav seem to support my position. They argue that any information relevant to a public figure's functions that might influence the public, even if it reduces their privacy, should be published.[107] To further illustrate their point they use the example of the leader of a country. From the privacy balloon they undoubtedly have a very small balloon given the influence they exert. Therefore it would be reasonable to expect that information about them would be of great value to the public. Even private information such as about vacation habits, their spouses, how they treat their children and any ailments they may have may be key pieces of information that the public is entitled to because they ultimately influence how the public sees them.[108] The wider and deeper the influence of the politician in question, the wider and deeper the range of private information can be published according to this principle. Of course there are restrictions to this rule, the chief one being that some information should always remain in the sphere of privacy such as intimate relationships with family members or drinking habits of a politician, unless such behaviour speaks to their suitability for office.[109] In short, the information must be directly connected to the purposes they serve as a public figure. Therefore this means that if someone were to become an unwilling public figure overnight, such as a witness to a

[106] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1001.
[107] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1001.
[108] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1001.
[109] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1002.

crime, the information about them in online press articles should be information that relates directly to the purpose for which they became a public figure.

4.3.2) Access to information necessary for learning about the world and being a member of society.

The authors agree that information is a tool for survival and that human beings often make decisions based on the information available to them, in this case the major source being the internet.[110] The basic test for this principle is that if the information imparts important knowledge on "handling" life, it should be expressed.[111] This principle is centered on the type of information itself, rather than the person the information about as seen in the first principle. The example offered by the authors is that of a public figure suffering from a contagious ailment. Publishing of such information would be justifiable on the ground that such information is necessary for the public to be educated about the disease especially if it's of a contagious nature. If the disease is of no informative value to the wider public, the public figure suffering from the illness should enjoy their privacy.[112]

In the case of unwilling public figures, the authors also offer an illustrative example to show that publication of private information in this instance is also permissible if the information is of some societal value. The example they offer is of a missing child. In pursuit of the child's whereabouts and their safe return home, media outlets would be justified in publishing intimate details about the child in order to ensure that the wider public can identify them if they come across them and do the needful such as calling the authorities.[113]

[110] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1003.
[111] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1003.
[112] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1004.
[113] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1004.

4.3.3) The Proportionality Rule

The key test under this principle is that the publication must achieve the purpose that the private data was published for, to a degree to which it is most necessary to the public.[114] This test proposes that the breach of privacy must only go as deep as necessary for the story and to follow the first two principles of the filtering method without going into further detail. An example I would offer to support this train of thought where an online press article refrains from mentioning the graphic details of a murder or any other unnecessary detail that is completely irrelevant to the story the media house is trying to break. It is important to distinguish this from proportionality as understood by Dworkin, which seeks to establish if a given policy is justified in limiting a particular right in the pursuit of the protection of another.[115] This is because proportionality as understood by Yanisky-Ravid and Lahav seeks to establish if the personal data is directly related to the purposes of the story being told.

4.4) United Kingdom Conception of Public Figures and Public Interest.

The Three Principle Filtering is undoubtedly a useful method to use in trying to strike a balance between the public interest and the privacy rights of public figures. However this theory is majorly based on the privacy laws of the United States of America, which may not be as persuasive in the Kenyan jurisdiction compared to the United Kingdom's conception of the same. Therefore this research project would be incomplete if we did not include the United Kingdom's conception of the relationship between the privacy rights of public figures and the public interest. Perhaps one of the more popular cases that illustrates the United Kingdom's position on this relationship is the case of Campbell v Mirror Group Newspapers Ltd. In this case, Naomi Campbell, a famous model, was photographed leaving a Narcotics Anonymous meeting after publicly denying that she was a drug addict. These photographs were then published in the Daily Mirror which was owned by the defendant. She sued the MGN limited in court for breaching her privacy. However what was interesting in this case was that she was not suing them for disclosing the fact that she was a drug addict but rather for revealing the location of her

[114] Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 1006.
[115]-http://www.glawcal.org.uk/glawcal-comments/arguments-against-the-application-of-the-principle-of-proportionality- on 18 February 2024.

Narcotics Anonymous meetings.[116] The case was ultimately determined by the UK House of Lords who came to the conclusion that the defendant had violated the plaintiff's privacy by majority vote. The rationale for this decision was a balancing test conducted by the House. The balancing test consisted of determining whether the claimant had a reasonable expectation of privacy and if successful in their claim, whether this would impact the freedom of expression of the defendants. They decided in favour of Campbell because according to them, her right to privacy outweighed the freedom of expression of the defendant. However the dissenting opinion by Lord Hoffman and Lord Nicholls stated that the defendants were well within their rights to publish the photos in question, because the story that had been published was that she had been recovering from drug addiction and allowing those pictures to be printed alongside the story was within the margin of appreciation of the editors of the paper.

From this it is clear that the United Kingdom's conception of privacy rights of the public figures is not too far off from the American conception of the same, specifically the Three Principle Filtering method. This is because an element of proportionality is shared between the two conceptions. However the Three Principle Filtering method is more developed because it contains more considerations such as the relevance of the information in question and if the information is key to learning about the world and how it works. Therefore the American and English conceptions on the relationship between privacy rights of public figures and the public interest are quite similar and thus leads to the conclusion that the Three Principle Filtering tests would have a place in the Kenyan jurisdiction.

4.5) Findings

From the theoretical perspective given above we can begin to discuss the right to be forgotten, public figures and the public interest. From the above we can see that even though public figures "donate" their privacy to some degree, they still ought to enjoy a certain amount of privacy initially. The Three Principle Filtering Test merely seeks to ensure that the public is still kept informed and that media houses are still allowed to carry out their functions. It is important that for the test to come to a suitable conclusion, each and every step must be followed. I believe the test to be especially relevant when it comes to politicians in Kenya. Corruption is one of the great

[116] C*ampbell v Mirror Group Newspapers (2004)*, The United Kingdom House of Lords.

evils bedevilling this country and such a test would be key in preventing perpetrators from seeking articles that mention them adversely from being delisted from internet search results.
This serves to ensure that the public is well informed about their misdeeds and thus they make informed choices. If they were allowed to apply for erasure and it were granted in every instance, it would amount to censorship of the media, which undermines a democratic and just society. The Three Principle Filtering Test ensures that the public is kept informed about the world around them and that they make informed decisions based on the information available to them online in the form of online press articles. More and more people use the internet as their main source of information and to erase each and every article which breaches someone's privacy but passes all the principles of the test, the internet would become an incomplete record of information and this would hamper decision making in the general population.

CHAPTER 5: FINDINGS AND RECOMMENDATIONS

The key finding of this research is that the right to be forgotten should have expanded meaning in order to avoid ambiguity in its interpretation, particularly regarding what constitutes irrelevant and excessive information. This interpretation arrived at in Chapter Three is based on ethical consideration from two seemingly oppositional ethical theories. Media houses in reviewing applications for erasure should thus take into consideration this interpretation because it takes over from where the law is silent and ensures that the dignity of data subjects is upheld and that the public is still informed.

Even in the case of public figures, media houses should employ the Three Principle Filtering Test in ensuring that a just and fair outcome is arrived at for the public figure in question. Just because they have chosen to give up some of their anonymity does not mean that they should not enjoy some degree of privacy. This is especially true in the internet age, where information spreads like wildfire via online press articles which are often shared between users with just the click of a button.

My hope is that even in the age of the internet, where someone's most intimate details are a simple Google search away, that people still have their privacy respected and upheld, and that media houses can use these ethical and theoretical considerations I have outlined in making decisions on how to approach reporting of stories online and that internet search engines use these considerations in making decisions as to which articles to delist.

BIBLIOGRAPHY

Journal Articles

Antani R, "The resistance of memory: Could The European Union's right to be forgotten exist in the United States?", 30(4), *Berkeley Technology Law Journal*, 2015.

Park A and Youm K, " The Right to be Forgotten in European Union Law: Data Protection Balanced with free speech?" 93(2), *Journalism and Mass Communication Quarterly*, 2016.

Floridi L, "The Right to be Forgotten: A Philosophical View", 23(1), *Annual Review of Law and Ethics*, 2015.

Yanisky-Ravid S and Lahav B, "Public Interest vs. Private Lives - Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model" 19(4) *University of Pennsylvania Journal of Constitutional Law,* 2017.

Online Resources

<https://gdpr.eu/right-to-be-forgotten/?cn-reloaded=1 >

<http://www.glawcal.org.uk/glawcal-comments/arguments-against-the-application-of-the-principle-of-proportionality>

Working Papers

Möller K, “Dworkin’s Theory of Rights in the Age of Proportionality”, London School of Economics and Political Science, Law, Society and Economy Working Paper Number 11, 2017, , <https://eprints.lse.ac.uk/87555/1/Moller_Dworkin_Author.pdf> on 18 February 2024

Chapter in Book

Dimmock M and Fisher A, “Utilitarianism” in Dimmock M and Fisher A (eds) , *Ethics for A Level*, 1st ed, Open Book Publishers, 2017.

Dimmock M and Fisher A, “Kantian Ethics” in Dimmock M and Fisher A (eds) , *Ethics for A Level*, 1st ed, Open Book Publishers, 2017.