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Digital forgetfulness... Study between the requirements of electronic judicial archiving and the right to private life

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Abstract

The accelerated digital and technological development made it possible to make individuals' private lives transparent, enabling them to access special data and data by simply connecting to the network through their own engines, having been in limbo once a certain period of time had passed.

The Algerian legislature had to provide legal protection guaranteeing the right to forget their electronic past and to erase private data that might harm them in accordance with the general interest of society and preserving by mutual support the fundamental rights and freedoms of individuals to be digitally forgotten nationally and internationally.

Keywords: Digital forgetfulness right, electronic judicial archiving, private life, personal data, legal protection.

Introduction

The inviolability of private life and the protection of privacy are fundamental rights enshrined in the constitutions and legislative systems of various countries. In view of the rapid development of information and communication technologies (ICTs), and the growing prevalence of electronic transactions between individuals and public service institutions, accompanied by the large-scale collection and storage of personal data, the unlawful processing and exploitation of such data without legitimate grounds, together with the ease of accessing it, have made infringements of the right to privacy considerably more widespread than in the past. This has posed a genuine threat to this fundamental right. Among the manifestations of its protection is the emergence of the concept of the individual's right to be forgotten, also referred to as the right to digital oblivion, which began to receive implicit recognition under European legislation alongside the development of the digital environment.

This study aims to encourage modern legislation to recognise a new right, namely, the individual's ability to request the erasure of personal data and information relating to their past whenever they so wish.

The significance of this study lies in the fact that personal data may constitute an infringement of an individual's privacy or cause them psychological or material harm. Such data may remain stored in the databases of service providers, companies and search engines across websites and electronic media. Users find it difficult to erase or remove their digital past without the direct intervention of the entities responsible for processing their personal data. It has therefore become imperative for the legislator to establish legal mechanisms that safeguard an individual's right to have their digital past forgotten, to introduce specific criminal-law protection for the integrity and confidentiality of natural persons' data, and to establish criminal liability for data controllers whenever they fail to fulfil the obligations imposed upon them by law.

The descriptive and analytical approaches have been adopted to examine the deficiencies in the legal rules governing the right to be forgotten in the digital environment, a right that has increasingly attracted attention, as previously mentioned, with the widespread proliferation of information technology and the growing complexity of its applications. This approach is adopted in an attempt to address the shortcomings of the existing legal framework.

The central research problem arising from the foregoing may be formulated as follows: To what extent has the Algerian legislator recognised the right to be forgotten in the digital environment, and how effective and adequate are the criminal-law provisions designed to protect this right?

To address this research problem, the study has been divided into two main sections.

- The first section examines the concept of the right to be forgotten in the digital environment.
- The second section investigates the impact of electronic judicial archiving on the right to be forgotten in the digital environment.

Section One: The Concept of the Right to Be Forgotten in the Digital Environment

The capabilities of information and communication technologies and digital memory have made it necessary to establish and recognise a right that protects individuals against the risks arising from the disclosure of their personal information, photographs or events affecting their private lives. Such information may have been published in the past, subsequently lost its relevance

and become outdated over time. This has given rise to the need to grant individuals the right to erase and delete such information whenever the legitimate interest justifying its publication ceases to exist. This is the context in which the right to be forgotten in the digital environment has emerged.

Accordingly, this section will address the definition of the right to be forgotten and clarify its legal nature.

1.1. Subsection One: Definition of the Right to Be Forgotten in the Digital Environment (The Right to Be Forgotten)

The right to be forgotten in the digital environment is regarded as a relatively new concept in the field of protecting the electronic privacy of natural persons. The origins of this right can be traced to the principle advocating the right of a convicted person who has fully served their sentence to resume an ordinary life without being continually reminded by public opinion of the events for which they were convicted.

Legal scholars have differed in their definitions of the right to be forgotten in the digital environment. Some have adopted a narrow interpretation, whereas others have favoured a broader understanding of the concept.

1.1.1. First Subdivision: The Right to Be Forgotten in the Digital Environment in Its Narrow Sense

Article 6 of the French Data Protection and Liberties Act of January 1978 provides that the right to be forgotten in the digital environment consists of an individual's right not to have their personal data retained by the data controller for a period exceeding that necessary to fulfil the original purpose for which the data were collected.

This legislation imposed certain restrictions on data controllers concerning the processing of individuals' personal data, requiring such processing to be carried out fairly and lawfully and prohibiting the retention of data for longer than the period necessary to fulfil the purpose for which they were originally collected.

Some French researchers have also defined the right to be forgotten as follows: "The right that provides individuals with the legal means necessary to exercise their right to be forgotten on the Internet, through limiting the retention of personal digital data and enabling its deletion."

However, these definitions have been subjected to a number of criticisms, primarily because they fail to encompass the full substance and scope of this right.

They are confined to the issue of data retention on the Internet and overlook the retention of data within electronic storage systems. Furthermore, they fail to address the nature of the data that may be erased from digital memory, as well as the period of time that must elapse before users may request the exercise of their right to be forgotten in the digital environment and the erasure of their data.

Moreover, the aforementioned definitions do not appear to be compatible with the boundless nature of the Internet, within which this right operates. This has prompted certain researchers to adopt a broader definition of the right to be forgotten in the digital environment (Ben Oukil, 2022).

2.1.1. Second Subdivision: The Right to Be Forgotten in the Digital Environment in Its Broad Sense

Proponents of this approach argue that it is necessary to adopt a broader definition of the right to be forgotten in the digital environment. Nevertheless, they differ as to the extent to which this concept should be expanded.

Some define it as "the individual's right to exercise control over and manage any information of a personal nature relating to them".

The French National Commission for Information and Liberties (Commission nationale de l'informatique et des libertés – CNIL) has also defined it as "the right that grants its holder the ability to exercise temporal control over their personal data, with a view to obtaining the right to delete or erase such data whenever they so wish".

According to these two definitions, individuals are entitled, throughout their lives, to exercise control over their digital memories and dispose of them whenever they wish, whether by deleting them entirely or partially.

Another definition considers that the right to be forgotten in the digital environment primarily concerns digital data relating to an individual's past, irrespective of its accuracy, truthfulness or significance. Every individual is therefore entitled to remove such content from the Internet or make it difficult to access, thereby causing that information to disappear from collective memory and gradually fall into oblivion. An example would be an individual requesting the deletion of a video clip or a personal photograph circulated on social networking platforms.

The broader approach to defining the right to be forgotten in the digital environment is consistent with the position adopted by the French National Commission for Information and Liberties (CNIL), which expressly indicates that, once the purpose for which personal data were collected has been fulfilled, there is no longer a need to retain them, and they should therefore be erased upon the expiry of the prescribed retention period (Ben Oukil, 2022).

1.2. Subsection Two: The Legal Nature of the Right to Be Forgotten in the Digital Environment

Given that the right to be forgotten in the digital environment constitutes an effective mechanism enabling natural and legal persons to exercise control over their digital past on the Internet and to request the deletion or modification of personal information whose continued availability to third parties may cause serious harm to their social and professional lives, it is necessary to examine this mechanism and determine its legal nature.

1.2.1. First Subdivision: The Right to Be Forgotten as an Element of the Right to Privacy

According to this doctrinal position, the right to be forgotten in the digital environment constitutes one of the elements of the right to privacy. Its proponents consider that this right encompasses all personal elements, including personal data, on the grounds that information that was publicly available and published in the past may become part of an individual's private life in the future. In other words, information that was once public may subsequently acquire the character of confidential or private information and therefore fall within the scope of the individual's right to be forgotten.

The French judiciary has adopted this approach. In this regard, the Paris Court of First Instance delivered a judgment on 15/02/2002 in the case of (Google/Dianna Z). The facts of the case concerned the discovery by the claimant, D.Z., of video clips depicting her in indecent positions through a Google search. She subsequently sought the removal of the indexing of those clips from the search engine's content.

Google refused her request on the grounds that it lacked the authority to manage the content in question. The court, however, considered that the search engine had participated in the relevant decision-making process and held that the claimant's privacy had been infringed, recognising that she was entitled to have past events in her life forgotten.

2.2.1. Second Subdivision: The Right to Be Forgotten as an Independent Right

This doctrinal position considers that the right to be forgotten in the digital environment differs from the right to privacy in terms of its temporal dimension and substantive scope, notwithstanding the overlap between the two rights where the rights-holder has not consented to the relevant disclosure.

According to proponents of this view, the temporal distinction lies in the fact that the right to be forgotten is not limited to recent events; rather, it also encompasses events that occurred a long time ago. This temporal dimension is a distinctive characteristic of the right to be forgotten.

As regards its substantive nature, the right to be forgotten is broader in scope than the right to privacy, since it encompasses facts and events of all kinds, whether public, private or confidential.

This reflects the objective pursued by the right to be forgotten in the digital environment, particularly because the element of privacy may no longer exist in such circumstances, given that the information may already have been disclosed to the public, whether with the consent of the rights-holder or for reasons relating to the public interest, such as facts concerning crimes, legal cases, historical events or other matters falling within the public's right to know (Tijani, 2019).

Section Two: The Impact of Electronic Judicial Archiving on the Right to Be Forgotten in the Digital Environment

1.2. Subsection One: Definition of Electronic Judicial Archiving

First Subdivision

Electronic archiving is also referred to as the organisation of electronic records, according to the definition adopted by the Arab Information Club. It is defined as follows:

"Scanning documents and storing them on electronic media, and linking these media to an index and search database, thereby enabling direct access from the index or search facility to the image of the document itself.

Others define it, or refer to it, as automated archiving or document management systems. These systems enable documents to be scanned, indexed and converted into digital data, while simultaneously providing users with numerous methods of retrieving, accessing and electronically exchanging such documents with ease.

As a comprehensive and concise definition, electronic archiving may be described as documents that are produced, stored and received in electronic form through computer devices and equipment" (Djelloul, 2020).

Accordingly, an electronic judicial archiving system is a system designed to store, preserve and index documents and files electronically, generate detailed reports containing various types of data, and enable such information to be retrieved and consulted at any time and from any location.

Second Subdivision

There are numerous methods of archiving data, including electronic archiving, which can be implemented across various fields. Archiving itself encompasses several different types, including the following:

1. **Digital Archiving:** This type of archiving concerns the preservation of the digital archives of public and private institutions and organisations. It includes documents, photographs, videos, audio files, digital libraries and other forms of digital material.
2. **Personal Digital Archiving:** This concerns the preservation of individuals' digital archives. This type of electronic archiving includes photographs, videos, files, electronic messages, personal documents and other related materials.
3. **Public Digital Archiving:** This concerns the preservation of the digital archives of government bodies, public institutions, libraries, archives, museums and other cultural institutions. It includes government documents and digital archival records.
4. **Specialised Digital Archiving:** This concerns the preservation of digital archives relating to specific fields, such as scientific research, medicine and the arts.

2.2. Subsection Two: The Impact of Archiving on the Right to Be Forgotten in the Digital Environment

First Subdivision: The Position of the Algerian Legislator

The scope of criminalisation under Algerian legislation requires that the protection of the right to be forgotten in the digital environment be supported by criminal-law safeguards through the enactment of deterrent legislation imposing criminal penalties on anyone who infringes the right to digital privacy.

Accordingly, it is necessary to examine the position of the Algerian legislator regarding the recognition of the right to be forgotten in the digital environment. Although the Algerian legislator has not expressly enshrined this right, this does not preclude its existence as a legal concept that may be inferred indirectly from the substance of certain legal provisions governing it.

1. The Algerian Constitution of 2020:

The Constitution has accorded particular importance to personal data and recognised its protection as a fundamental right guaranteed by law. This may be regarded as an indirect reference to the right to be forgotten in the digital environment.

The Constitution has enshrined the inviolability of private life in all its dimensions and provided legal protection for each of its constituent elements, including personal data. This represents an important step towards safeguarding human rights in Algeria, including the right to be forgotten in the digital environment (Constitution, 2020).

2. Law No. 18-07:

This Law was enacted to establish the rules governing the protection of natural persons in the context of the processing of personal data, in accordance with the principles of respect for human dignity, private life and public freedoms, and to ensure that such processing does not prejudice individuals' rights, conduct or reputation (Law No. 18-07, 2018).

3. The Law on Electronic Signatures and Electronic Certification:

Article 42 thereof stipulates that:

"Electronic certification service providers shall preserve the confidentiality of data and information relating to the electronic certification certificates issued."

Article 45 further provides that:

"Electronic certification service providers may not collect the personal data of the data subject without their explicit consent. Furthermore, they may collect only the personal data necessary for the issuance and retention of electronic certification certificates, and may not use such data for purposes other than those for which they were collected."

Articles 70 and 71 of the same Law prescribe stringent criminal penalties applicable to electronic certification service providers found to have violated its provisions (Law No. 15-04, 2015).

4. The Algerian Civil Code:

Article 47 provides that:

"Any person who has suffered an unlawful infringement of any of the rights inherent in their personality may seek the cessation of such infringement and compensation for any damage sustained."

There is no doubt that the continued availability of unwanted personal data on the Internet may constitute a manifest infringement of an individual's right to moral integrity and personal freedom, as well as the freedom of their family. This may necessarily lead to restrictions on their social activities (Najat, 2022).

With regard to criminal provisions, the Algerian legislator, through Law No. 18-07, has strengthened the penalties applicable to violations of the provisions of this Law under the chapter entitled "Criminal Provisions". The prescribed penalties include terms of imprisonment ranging from two to five years and fines ranging from twenty thousand (20,000) to one million (1,000,000) Algerian dinars. The applicable sanctions vary according to the nature of the offences committed by the data controller, the subcontractor or any other person whose conduct results in a violation of the provisions of this Law.

Second Subdivision: The Legal Enumeration of Cases Involving Breaches and Infringements of Personal Data

The following acts constitute cases of infringement or breach relating to personal data:

- Processing personal data despite the objection of the data subject, making false declarations, or continuing processing activities after the withdrawal of the relevant authorisation or declaration.
- Processing personal data for purposes other than those declared, or collecting data through fraudulent or unfair means.
- Allowing unauthorised persons to access personal data, or obstructing the activities of the National Authority.
- Prosecuting any person who accesses the national register without being authorised or responsible for doing so, as well as any data controller who, without legitimate justification, refuses to comply with the rights to information, access, rectification or objection.

- Any failure to notify the National Authority of breaches involving personal data. The penalties reach their maximum level in cases involving the unlawful transfer of personal data to a foreign country in breach of the law, or the retention of personal data relating to criminal offences, convictions or security measures.
- Where a legal person commits a violation of the Law, the Algerian legislator has referred the matter to the Penal Code. Furthermore, pursuant to Article 73 of Law No. 18-07, any attempt to commit one of the aforementioned misdemeanours is punishable by the same penalty prescribed for the completed offence, while penalties are doubled in the event of recidivism (Najat, The Right to Be Forgotten in the Digital Environment as a Mechanism for the Protection of Personal Data, 2022).

Conclusion

The tremendous technological developments in information technology, together with the parallel advancement of communication technologies, have resulted in the widespread circulation of personal data and information. This has created considerable difficulties in monitoring and controlling such data, particularly since the previous legal and regulatory frameworks did not provide sufficiently adequate standards for protecting individuals' private lives. Consequently, the right to privacy has become increasingly vulnerable.

As a result of developments in legislative frameworks in this field, the right to be forgotten in the digital environment has emerged. This right enables individuals to request the erasure of their personal data, subject to certain conditions and regulatory safeguards, while taking into account the statutory exceptions provided for by law, alongside other rights recognised by the legislator under Law No. 18-07 relating to the protection of personal data.

The findings of this study may be summarised as follows:

1. The right to be forgotten in the digital environment constitutes one of the elements of the inviolability of private life, a position supported by French judicial practice.
2. The enactment of Law No. 18-07 reflects an effort to adapt the legal framework to developments taking place within the legal systems of numerous countries, which seek to establish legal frameworks allowing for the optimal use of modern technologies across various fields while respecting individuals' fundamental rights and freedoms.
3. It appears that the Algerian legislator has prescribed penalties which, in our view, are insufficiently deterrent in certain offences relating to the right to be forgotten in the digital environment, particularly when compared with the penalties imposed by the French legislator under the Penal Code, which provides for more severe sanctions, especially in respect of fines.

Accordingly, one of the criticisms levelled against Law No. 18-07 is that it was enacted very late, particularly given that Algerian personal data had, until relatively recently, been accessible to foreign companies operating in Algeria in highly sensitive sectors, including mobile telephone and landline telecommunications companies, Internet service providers and others. The nature of their processing activities, the purposes for which such data were processed, and the means through which they could be protected or erased were not adequately known.

In order to ensure a comprehensive and effective legal framework governing the right to be forgotten in the digital environment, one that genuinely safeguards individuals' personal data, privacy and the possibility of erasure, the following proposals should be taken into consideration:

1. Expressly enshrining the right to be forgotten in the digital environment in legislation, while ensuring a balance between this right, the freedom of information and the freedom of the press.
2. Establishing the right to be forgotten in the digital environment through the criminalisation of the collection and storage of personal data beyond the period necessary to fulfil their intended purpose, as well as the criminalisation of failure to adopt the necessary measures to protect and secure such data. This should also include criminalising the failure to respond to a data subject's request for the erasure, blocking or rectification of digital data and information relating to them, in accordance with the approach adopted by the French legislator.
3. Seeking the international recognition and universalisation of this right, given the global nature of the exploitation of personal data and information once an individual becomes connected to the Internet.
4. Establishing the liability of service providers, at least at the national level, in cases involving infringement of this right, and adopting technical and technological mechanisms to ensure the effective implementation of the right to be forgotten in the digital environment, together with appropriate protective measures and safeguards, subject to clearly defined conditions, the most important of which are effectiveness and integration, so that such mechanisms cannot be separated from the data intended to be protected.
5. [No source specified in the active document.]
6. Establishing a procedural framework consistent with the provisions of Law No. 18-07 relating to the protection of personal data, ensuring that litigants' data are preserved, kept confidential and adequately protected.
7. Establishing clear and explicit legal mechanisms guaranteeing individuals the effective exercise of their right to be forgotten, including the possibility of bringing legal proceedings against search engines where they refuse requests for the erasure of personal data.

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