

THE CRIMINAL PROTECTION OF THE RIGHT TO IMAGE IN THE ALGERIAN LEGISLATION

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Abstract:

The right to one's image is considered one of the personality rights and an element of the private life that must not be violated. However, due to technological advancements, this right has become vulnerable to numerous infringements, which necessitated the intervention of the legislator to protect it criminally. This is what prompted us to search for a definition of the concept of the right to image and its exceptions, in addition to identifying the scope of the criminal protection provided for it.

key words: image, private life, criminal protection, photography, private places.

Introduction:

The right to privacy is one of the most important human rights that an individual enjoys. It encompasses the right to physical safety, the right to honor and dignity, the right to the sanctity of the home, the right to the confidentiality of conversations and private correspondence, and the right to one's image. Various international human rights texts have explicitly stipulated the protection of this later. Additionally, this right is considered one of the personality rights that starts in tandem with the judicial personality and is cancelled with its termination.

In view of the significance of the right to one's image as an aspect of private life, legislations, including the Algerian legislation, has not only provided civil protection for it but has also reinforced it with criminal protection in the Penal Code.

Recent technological advancements have affected all aspects of human life, extending to his/her private life as well. One of the consequences of this development is the possibility of

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taking photographs of a person without their knowledge or permissions. This can even extend to manipulating or changing these images, which represents a violation of their private life and their right to image protected by law.

This is what prompted us to choose this topic, whose importance appears in its relation to a human right, which is the right to privacy, and a personality right, namely the right to one's image. This is in addition to its emphasis on the need to protect it in light of the technological progress and the increasing violations of this right.

Through this research paper, we aim to define the concept of the right to one's image, the exceptions to this right, and the protection decided for it by the Algerian legislation under the Penal Code.

The central question of this study is as follows: What is the scope of criminal protection for the right to image under the Algerian Penal Code?

To address this issue, we employed a descriptive approach in setting definitions, as well as an analytical approach to examine legal texts and reach conclusions. Moreover, the study is divided into two main chapters:

Chapter One: The Concept of the Right to Image

Chapter Two: The Scope of the Right to Image

THE FIRST TOPIC: RECOGNITION OF THE RIGHT TO IMAGE

An image is a prominent feature of a person and serves as an external sign that outlines their physical characteristics and reflects their psychological traits.

FIRST REQUIREMENT: DETERMINING THE RIGHT TO IMAGE

The Algerian legislation did not explicitly define the "image," even though it acknowledged the right to it and decided a legal protection for it.

The right to one's image can be defined as an individual's right to object to the production or publication of his/her image without his/her consent. This applies equally to traditional

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methods of image creation, such as drawing on paper or glass, or modern methods like photography.¹

From the above definition, the right to image encompasses two main elements:

The First Element:

is the right of a person to object to others drawing or photographing him/her without his/her consent. This indicates that permission is required to capture, reproduce, or use the image and that the absence of explicit or implicit consent can lead to legal accountability.

The Second Element:

The prohibition of publishing one's image that has been captured or created for him/her by any means. A person's image can only be published with his/her permission and approval, otherwise its publication will be considered an illegal act that is punishable by law.

Yet, the legislator differentiates in this right between capturing images in public places and capturing them in private places. Taking images in public areas, such as public parks, restaurants and public transportation is permissible. While, capturing images in private places, which can only be accessed with the permission of the owner, requires this latter's explicit consent as well.

SECOND REQUIREMENT: THE CHARACTERISTICS OF THE RIGHT TO IMAGE

The main characteristics of the right to one's image include the following:

- It is One of the Public Rights: also known as human rights. It is granted to every person as a human being regardless of his/her gender, colour, or race. It is also a personality right that is established at birth and only ends with death.
- It is an element of the private life according to the Algerian Penal Code².
- It is a Non-Financial Right: as it is not estimated with money even though its violation results in a financial right, such as compensation for damages in addition to the rights of alimony and care in case of lineage.

¹ Mamdouh Mohammad Khairi Hachim Al-Muslimi, *Civil Liability Arising from the Violation of the Right to Image in Light of the Development of Modern Means of Communication*, 1st ed., Dar Al-Nahda Al-Arabiya, Cairo, 2001. P12

² Order No. 66-156 dated on June 8, 1966, including the Penal Code, Official Journal No. 47, issued on June 10, 1966, amended and supplemented.

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- It is an Inalienable and an unwaivable Right: It cannot be transferred or waived neither with nor without compensation. However, a person may authorize taking images of him/her and publishing them, which falls within the scope of the powers granted by this personality right.

- It is an Imprescriptible Right: The right to one's image is a permanent right that only ceases with death.

- It Cannot Be Seized: Since the right to one's image is inalienable and unwaivable, it cannot be seized because seizing it would lead to its disposal.

- The right to one's image, like any other personality right, does not pass on to heirs: The right to one's image is not part of an individual's assets or estate, therefore, it cannot be transferred to heirs. However, the right to compensation resulting from the right to one's image does pass to the heirs.

THE SECOND TOPIC: THE LIMITS OF THE CRIMINAL PROTECTION FOR THE RIGHT TO IMAGE

The legislator has prohibited a number of actions that are considered an infringement of the right to image. Yet, there are some cases in which it has permitted taking and registering pictures without permission for the sake of the public interest.

FIRST REQUIREMENT: THE CRIMINALIZATION OF INFRINGEMENTS ON THE RIGHT TO ONE'S IMAGE

The legislator has determined the cases that are considered an infringement on the image and has decided criminal penalties for them.

Firstly: Cases of Violating the Right to Image

There are two cases in which an act is considered a crime if it affects a person's right to the image. These cases are the following:

1-The First Case

This form is highlighted in Article 303 bis and can be defined as follows:

a-Capturing the Image:

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This refers to fixing an image onto a medium using a device such as a camera. The misdemeanour can extend later to distorting or modifying the image in order to alter its appearance, especially with technological advancements that led the cameras to become extremely small and imperceptible. It is worth noting that it is also possible to alter images using artificial intelligence or even create an image of someone in a location where he/she was not actually present.

The prohibition here applies to all individuals, whether adults, minors, public figures or ordinary people.

b-Registering the Image:

This involves storing the image in a location where it can be accessed later, such as recording a person in a video to be viewed online or shared with others. The perpetrator would be punished for merely recording it without the person's consent, regardless of whether the image is published or not.

c-Transmitting the Image:

This refers to sending the image to others, transferring it to another person's social media account, or publishing it online for purposes such as defamation, distortion of somebody's reputation, or promotion of goods. The intent behind transmitting the image does not matter.

2- The Second Case (Retention, Use, or Publication)

This form is specified in Article 303 bis 1. It refers to the following:

- Retention: Intentionally keeping the image in one's possession after it was obtained through illegal means.
- Use: This involves the perpetrator using the image for any purpose, whether legal or illegal, as long as the means of obtaining it was unlawful.
- Publication: This means allowing others to view the image or facilitating their access to it regardless of the technique used to produce, transmit, record, use, or publish the image. This provision aims to expand the protection system and provide a broad guarantee for the right to one's image in the face of the evolving technologies.

Secondly: The Conditions for Criminalization

For the above-mentioned actions to be criminalized and punished for, the following conditions must be met:

1. The Acts Must Be Committed in a Private Place

The legislator has stipulated that for these acts to be criminalized, the image must be captured in a private place. Whereas, if the image is taken in a public place, such as a stadium; theatre; or beach, it would not be considered a crime. A private place is defined as "a location whose access depends on the consent of the person who owns it."³

A problem arises when an image is taken in a public place and then altered, distorted, and published without the consent of the person being photographed with the intent of harming him. In such cases, responsibility is raised not for capturing the image but for the subsequent distortion made.

2. The Person Must Be Photographed Without His/her Consent

For the crime of infringing on the right to one's image to be established, the image must be captured without the person's consent. However, if the person agrees on the capture of his/her image, the crime would not be established. Consent can be explicit, such as written or verbal approval, or implicit, such as when a friend takes a photo of another friend for memories. In the latter cases, the lack of objection is considered an implicit consent.

For consent to be valid, the following conditions must be met:

- Consent must be provided by a person in the age of discernment.
- Consent must be given prior to or simultaneously with the Act. The consent provided after the act has been committed is not valid.
- Consent must be specific and precise. It should be limited to the specific act or subject for which it was given and should not extend to something else.

3. The Moral Element

The crime of infringing on the right to one's image is an intentional crime that requires both the elements of knowledge and intent. The individual must be aware that he/she is taking an image of a person in a private place and must intend to perform this act without obtaining the person's consent.

Thirdly: The Procedures of Prosecution and Punishment:

The initiation of public prosecution for this crime requires filing a complaint. Therefore, the public prosecution is initiated according to the general rules as the Public Prosecutor initiates

³ Mouhamed Abdel Fatah Chtiya, Criminal Protection of the Right to Personal Image - A Comparative Study - Al-Mofaker Journal, Vol. 14, No. 2, June 2019. P76

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it once learning of the crime. This contrasts with some legal systems according to which initiating public prosecution for such a crime requires a complaint from the victim.

It should be noted that this crime is considered a misdemeanour and that the attempt to commit it is punishable by the same penalties prescribed for the completed crime.

If the acts stated in the first form (capturing, registering, or transmitting images) are proven against the accused, the penalty would be imprisonment from six months to three years and a fine of 50,000 DZD to 300,000 DZD.

While, if the actions fall within the second form (retention, use, and publication), the penalty would be imprisonment from six months to three years and a fine of 50,000 DZD to 300,000 DZD.

If these actions are committed by the press, the media law would be applied.

It is important to note that the victim's forgiveness terminates any criminal prosecution. Therefore, it would have been preferable if the legislator had required filing a complaint to initiate the prosecution rather than completing the prosecution and trial before the victim's forgiveness is confirmed.

SECOND REQUIREMENT: THE LEGITIMACY OF INFRINGEMENTS ON THE RIGHT TO ONE'S IMAGE

The Code of Criminal Procedures⁴ allows judicial police officers and members of the judiciary in certain cases to take photographs, retain them, and register them without the person's knowledge or consent. This must be in accordance with the specific procedures defined by law and in specific types of crimes as well.

Firstly: Crimes in which the Right to Image can Be Violated

The legislator has excluded some cases from the crime of violating the right to image. These later refer to the case of taking and registering pictures in private places, even those prepared for residence, by judicial police officers within the framework of combating some committed crimes. These crimes involve drug crimes, crimes that cross national borders, crimes affecting the automated processing of data, money laundering crimes, terrorism, exchange

⁴ Order No. 66-155 dated on June 8, 1966, including the Code of Criminal Procedure, Official Journal No. 48, issued on June 10, 1966, amended and supplemented.

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crimes, and corruption crimes if the investigation of flagrant crimes or the preliminary investigation has necessitated so.

It is noted that all of these crimes are dangerous and emerging crimes that affect the public order of society and pose a danger to individuals at the same time.

Secondly: Persons Authorized to Conduct These Procedures

The Public Prosecutor and the investigating judge are the only persons allowed to grant the permission of conducting these procedures. The Public Prosecutor is competent to grant permission in cases of discovering the above-mentioned crimes and in the evidence-gathering phase, while the investigating judge may grant permission during the investigation phase.

The permission to conduct the mentioned procedures is only granted to judicial police officers.

Thirdly: Conditions for Conducting These Procedures

To take, record, or retain images in the above-mentioned crimes, the following conditions must be met:

- The crime must be one of the specified crimes mentioned previously.
- A written authorization must be obtained from the Public Prosecutor or the investigating judge.
- The authorization must specify the time and place.
- The written authorization is valid for a maximum of 4 months and may be renewed according to the needs of the investigation or inquiry.

The aim of these provisions is to allow the judiciary to monitor compliance with these conditions with the aim of preventing any violation of the legality of procedures and infringement on individual rights.

Although this text seriously infringes on the right to privacy in general and the right to image in particular, combating the crimes and maintaining the public security serve a significant public interest. Thus, sacrificing some aspects of privacy may be acceptable in order to protect the interests of both individuals and society as a whole.

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Conclusion:

With the advancement of technology in contemporary times, the right to image has become vulnerable to various forms of infringement, which necessitates increased efforts to protect it.

Through our research paper, we have reached the following conclusions:

- The increase in image infringement is linked to advancements in technology and artificial intelligence.
- Criminal protection of the right to image encompasses all its aspects and penalizes all forms of infringement.
- The legislator has extensively broadened the exception mentioned in Article 65 bis 5 of the Penal Code, which impacted the right to image and the right to privacy.

Based on these findings, we propose the following recommendations:

- The necessity of implementing preventive measures to preserve the right to image, especially against Internet publications.
- Amending Article 303 bis of the Penal Code in order to increase the penalty to a maximum of five years of imprisonment and not less than three years.
- Introducing aggravating circumstances for this crime, especially when images are published to harm an individual's honour or reputation.
- Expanding the protection to include public spaces, particularly in light of technological advances that facilitate image modification and alteration.

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