



Proof of Marital Infidelity in the Digital Environment: Between the Nature of Electronic Evidence and the Right to Privacy

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Abstract

Electronic marital infidelity is one of the novelties generated by technology and the use of the digital environment, where social media platforms have become spaces in which spouses commit this type of infidelity. The pressing question that arises is how a victimized spouse can prove the infidelity of the other party. Are text messages, audio recordings, and videos admissible as means of proof? On the other hand, another issue arises: if the aggrieved party obtains electronic evidence proving the spouse's infidelity, would this be considered an infringement on the right to privacy in general and the right to digital privacy in particular, given that this right is guaranteed under constitutions? This is what this research paper addresses.

Keywords: electronic marital infidelity, social media, electronic evidence, right to digital privacy

Introduction:

The digital environment, having penetrated all households, has become a parallel world to the real environment, where people communicate through modern means, form friendships, and develop acquaintances that sometimes surpass their real-life relationships. Since the family is the basic unit of society, it is not isolated from these societal developments, especially as family members spend long hours in front of their phones or computers, communicating with people from different parts of the world. This can open the door to attachment and infidelity if one party is in a marital relationship, which is commonly referred to as electronic marital infidelity. Many factors may fuel this type of infidelity, including weak religious restraint, the ease of committing it compared to real-life infidelity, and emotional neglect of one spouse, particularly the neglect of a wife by her husband due to his prolonged absence or continuous conflicts and incompatibility between the spouses.

Although electronic infidelity is not explicitly criminalized by most legal systems, it is generally agreed upon that it constitutes a moral harm that can justify judicial separation if conclusively proven. Since the burden of proof lies with the spouse alleging electronic infidelity, the claimant



must obtain evidence to present to the courts; however, many legislations consider the act of obtaining such evidence itself an infringement on the right to privacy. Electronic evidence of marital infidelity—whether photos, messages, or other digital traces—serves on one hand as proof of infidelity, but on the other hand, its collection may infringe on the other spouse's right to privacy. This raises the following key question: Can the aggrieved spouse prove infidelity using electronic evidence obtained by inspecting the other spouse's phone or hacking social media accounts, or would this violate the other spouse's privacy, rendering such evidence inadmissible in court?

To clarify this topic, understand its boundaries, and explore its details, we employed the descriptive method to grasp the various concepts and terminology related to the research topic and the analytical method to examine legal texts concerning adultery, marital infidelity, and the right to privacy.

To answer the research problem, we adopted a two-axis plan:

- **First Axis:** Privacy of evidence in cases of marital infidelity in the digital environment
- **Second Axis:** Proving marital infidelity in the digital environment as a violation of the right to privacy

First Axis: Privacy of Evidence in Cases of Marital Infidelity in the Digital Environment

The law grants the claimant the right to prove their claims using various means of evidence stipulated by legislation, whether in criminal or civil matters. Electronic or digital evidence in its various forms falls within these means, giving it significant importance, especially with the spread of technology and the rise of cases of marital infidelity in the digital environment. In this axis, we will discuss the characteristics of electronic evidence (secondly) and the challenges facing electronic evidence (thirdly), but first, it is necessary to define electronic marital infidelity.

First: Concept of Marital Infidelity in the Digital Environment

Technological development and easy access to the Internet and electronic devices such as phones and computers have created a new type of communication between one spouse and other individuals in the virtual world, forming friendships and, in many cases, crossing the boundaries set by religion and law for married couples and even unmarried individuals.

1. **Definition of Electronic Marital Infidelity:** Electronic marital infidelity is defined as any illicit relationship outside the bounds of marriage, whether by the husband or the wife, carried out via phone or the Internet. It also includes illicit relationships through social media and phone communications, particularly calls and electronic chats between both genders in a virtual world. Electronic marital infidelity uses modern technology to betray the other spouse and is a new form of non-traditional marital infidelity. It may escalate into real-life infidelity if circumstances allow, highlighting the seriousness of this phenomenon on the family.

This type of infidelity can range from flirtatious words or audio-visual communication to actual physical encounters. Its danger lies in its ease of execution: owning a phone or computer and



an Internet subscription is sufficient to commit it without leaving home or office. Therefore, the only effective deterrent remains the conscience and religious restraint of the spouses.

2. Ruling on Electronic Marital Infidelity: In Islamic law, any act leading to adultery or marital betrayal is prohibited. Online friendships between a spouse and another person fall under the rules prohibiting seclusion between a man and a non-mahram woman. Even fantasies or sexual imaginings are prohibited, as they can result in moral corruption. Prophet Muhammad (peace be upon him) emphasized that sins can occur through all senses: “The eyes commit adultery through looking, the ears through listening, the tongue through speech, the hand through grasping, the feet through walking, and the heart desires and wishes.” Electronic marital infidelity is thus criminalized morally, as it constitutes enjoyment outside the marriage contract.

In Algerian law, electronic marital infidelity is not explicitly criminalized. While adultery requires physical consummation, electronic infidelity does not meet this criterion. Some legal scholars propose classifying it as a form of “passive adultery” under criminal law, as virtual sexual activity, whether via chat or multimedia, seeks sexual gratification. Marital infidelity, even in its electronic form, may lead to divorce claims, especially harm-based divorce, entitling the injured spouse to compensation.

Second: Characteristics of Electronic Evidence

Electronic or digital evidence refers to any data obtained from digital devices or networks that can be collected, analyzed using specific software, and presented in court. Direct evidence may include text messages and audio-visual recordings of explicit sexual content between a spouse and another person. Indirect evidence may involve social media interactions, comments, likes, or shares.

The key characteristics of electronic evidence include:

- 1. Scientific and technical nature:** Digital evidence consists of electronic data and information perceived through devices and analyzed via software.
- 2. Modifiability:** Digital evidence can be manipulated through various applications, including altering images or audio.
- 3. Ease of replication and transfer:** Digital evidence can be easily copied and shared globally via digital communication tools.
- 4. Technological dependency:** Accessing digital evidence often requires specific devices, software, or Internet connectivity.
- 5. Recoverability:** Advances in technology allow deleted digital evidence to be recovered using specialized applications.

Third: Challenges Facing Electronic Evidence

Despite its advantages, digital evidence faces several challenges:

- Lack of intentionality in electronic infidelity or denial by the accused spouse complicates proof.
- Non-conclusiveness of digital evidence, due to its modifiability and potential for forgery, raises doubts in courts.



- Difficulty verifying account ownership due to potential hacking.
- Algerian law does not recognize electronic evidence for proving adultery, as it requires physical consummation. Courts often encounter electronic marital infidelity cases, but such evidence rarely satisfies legal requirements for criminal charges.

Second Axis: Proving Marital Infidelity in the Digital Environment as a Violation of the Right to Privacy

In this axis, we define digital privacy (first), outline situations where no violation occurs depending on how electronic evidence is obtained (second), and clarify behaviors constituting privacy infringement (third).

First: Concept of the Right to Digital Privacy

Constitution's guarantee individuals the right to privacy, including protection of private life and confidentiality of communications. Digital privacy is an extension of traditional privacy rights and concerns the individual's ability to control how information about them is accessed, shared, or used.

Second: Limits of Privacy Between Spouses

Although marriage merges lives physically and emotionally, each spouse retains privacy rights. Algerian law protects private conversations under Articles 137 and 303 of the Penal Code and the Postal and Electronic Communications Law No. 18-04, penalizing unauthorized interception or disclosure of communications. Privacy within marriage thus remains a legal and ethical boundary that cannot be arbitrarily breached.

Third: Legitimacy of Digital Evidence Depends on How It Is Obtained

The legality of using digital evidence in marital infidelity cases depends on whether it was obtained lawfully. Evidence gathered through unauthorized access to a spouse's device or accounts may constitute a violation of privacy and may be inadmissible in court, highlighting the tension between proof of infidelity and the right to digital privacy.

According to Law No. 18-07, for digital evidence to be considered legitimate and thus accepted by the judge in proof, the process of collecting digital evidence must comply with the principles outlined below to ensure its legality:

- There must be a legal basis for processing the data, such as a judicial order, and the person concerned must be informed that their data is being collected as evidence, except in specific legally defined exceptional cases.
- Evidence must be collected for a specific and legitimate purpose, such as investigating a case, and the data obtained cannot later be used for other purposes. Publishing collected evidence on social media constitutes defamation.
- Strict security procedures must be applied, such as encrypting the data and restricting access, to prevent leakage, alteration, or destruction of digital evidence, ensuring that it is not tampered with from the moment of collection until presentation in court.



- The evidence must clearly indicate marital infidelity, and the process of collecting evidence must be proportional to the severity of the act to be proven; unnecessary data should not be collected.

Third: Behaviors Constituting a Violation of the Right to Privacy in Collecting Digital Evidence

In attempting to collect digital evidence to prove the other spouse's infidelity, one spouse may violate the right to privacy, turning from a victim into a perpetrator of a privacy violation crime. Even if evidence proving the other spouse's infidelity is obtained, it will not be admissible due to its illegality. Some of these behaviors include:

- Accessing email, social media accounts, or messaging apps by stealing passwords or hacking constitutes a crime of violating the confidentiality of private communications under Article 303-bis 1 of the Algerian Penal Code.
- Installing spyware on the other spouse's phone or computer to record calls or audio-visual conversations without the other party's knowledge constitutes a crime of invading privacy and spying on private conversations, according to the same article.
- Installing hidden cameras in private rooms such as bedrooms or bathrooms to record or film the other party is a serious violation of bodily sanctity under Article 303-bis of the Penal Code. There is no exception in Algerian law allowing a spouse to spy on the other spouse using hidden cameras, as the marital relationship does not eliminate privacy rights or bodily integrity.

Conclusion:

At the conclusion of this study entitled *Proof of Marital Infidelity in the Digital Environment: Between the Nature of Electronic Evidence and the Right to Privacy*, which aimed to clarify the conflict that may arise between one spouse attempting to prove the other's infidelity and the potential infringement on the right to privacy, we reached a number of findings, the most important of which are:

- Electronic marital infidelity is defined as any illicit relationship outside the bounds of marriage, whether by the husband or wife, conducted via phone or the Internet.
- Electronic or digital evidence is any information obtained from digital devices or networks, collected and analyzed using specific software, and presented in court. Direct digital evidence includes text messages and audio-visual recordings of explicit sexual content between a spouse and another person, while indirect evidence appears in social media interactions such as comments, likes, and shares.
- Scientific evidence is characterized as technical and scientific, modifiable, easily replicated and transmitted, technologically dependent, and recoverable after deletion.
- Several challenges face digital evidence in proving electronic infidelity, including difficulty proving intent or denial by the accused spouse, non-conclusiveness of digital evidence, difficulty verifying account ownership, and the fact that electronic messages,



photos, and videos are not legally recognized proof of marital infidelity under Algerian law.

- Digital privacy is an extension of traditional privacy, connected to information technology and its uses. The right to digital privacy allows individuals to determine when, how, and to what extent information about them is accessed.
- Despite physical and emotional integration between spouses, each retains the right to privacy. Marriage does not terminate the legal personality to which this right is attached.
- For digital evidence to be considered legitimate, there must be a legal basis for processing the data, such as a judicial order. Evidence must be collected for a specific and legitimate purpose, and the person must be informed except in exceptional cases. Strict security procedures must be applied, the evidence must clearly indicate marital infidelity, and collection must be proportional to the severity of the act.

We follow these findings with several recommendations, which are as follows:

- Explicitly criminalize electronic marital infidelity in the Penal Code and define it in Family Law as a legitimate reason for harm-based divorce.
- Explicitly recognize the validity of digital evidence, whether photos, messages, chats, or recordings, and admit it to prove harm in divorce cases.
- Establish legal procedures for collecting digital evidence to ensure the right to digital privacy is not violated.
- Create specialized units in the digital environment under the supervision of the Public Prosecutor's Office to adjudicate disputes related to privacy violations in the digital environment.
- All social actors, including media, civil society, and higher education institutions, bear the responsibility to raise awareness about the seriousness of behaviors leading to electronic marital infidelity, the boundaries of digital privacy between spouses, and the legitimate and illegitimate ways of collecting digital evidence.

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