THE IMPACT OF THE DIGITAL ERA ON LAW

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From a French perspective, the emergence of digital technology in economic exchanges and social relations has disrupted legal systems like no other technological revolution before it. An overview of these challenges will be set out under three different strands, mainly based on recent jurisprudence of the French Council of State (Conseil d'État) and Constitutional Council (Conseil constitutionnel).

The digital revolution: a source of completely new legal questions

Firstly, the digital revolution has resulted in the emergence of new questions. Existing legal instruments, we can assume, do not grasp these new legal questions or correctly understand such questions. Two main examples shall be considered.

The right to be forgotten

The active or even passive exposure of a person's activities or opinions on the Internet (social networks, blogs, information sites, etc) leaves lasting traces in the form of personal data, which can be found through search engines months and years later. The magnitude of this phenomenon has given rise to the notion of a 'right to be forgotten', which stems from a legitimate concern for the protection of privacy.

No legal text, however, has clearly laid down this principle or guaranteed its protection. As we know, the CJEU, faced with this issue, has taken an audacious and pragmatic approach in its case law to deal, as far as is possible, with the tools provided under Directive 95/56/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[1] In order to do this, the Court had to overcome several obstacles, mainly the following two. The first was bringing search engine operators within the scope of the Directive by considering them as 'controllers' determining the purposes and means of the processing of personal data within the meaning of Article 2 of the Directive. This

[1] CJEU, 13 May 2014, Google Spain SL,Google Inc v Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez, Case C-131/12.

is not obvious as the search engine does not have any real control over material that it blindly indexes under search results. The second involved drawing rights of opposition and rectification from Articles 12 and 14 for the benefit of persons whose data was included under search results. This would mean an obligation on search engines to delete certain search results which appear when a person's name is searched, where the search results provide links to web pages published by a third party, and such increased publicity violates their right to privacy in a manner which is disproportionate. This is a right to have certain search results removed, or a right to be forgotten.

However, the Conseil d'État was directly confronted by the difficulties associated with implementing this right to be forgotten developed under case law in four cases brought before it. These cases involved information in relation to an alleged intimate relationship, a person's ties to the Church of Scientology, the involvement of a person in case to do with the financing of a political party, and a person's sexual assault conviction. However, the French administrative court has identified no fewer than eight serious difficulties in the handling of these cases justifying numerous preliminary questions being addressed to the CJEU.[2] Among these difficulties, the question of whether restrictions on sensitive data such as personal opinions, beliefs, health or sex life apply to search engines as well as to other 'controllers' of processing of personal data arises. A further question is whether ignorance of such obligations implies an obligation to comply with a request to remove certain search results. Another difficulty is if an exceptions relating to journalism, and artistic or literary expression can apply where search engines link to personal data. In some weeks, the Conseil d'État will also examine the question of the territorial scope of the obligation to remove search results.

The Luxembourg Court will decide and find the best - or least bad - solutions; but, as we can see, the attempt to bring search engines and the issue of the right to be forgotten under the remit of the Directive of 24 October 1995 above all shows its inadequacy, and we cannot afford to fail to adopt ad hoc texts.

The fate of personal data upon a person's death

This movement has also resulted in an entirely new issue being posed by the digital revolution, that being the fate of personal data after a person's death: to what extent are rights of access and rectification guaranteed to a person during their lifetime passed on to their successors?

[2] CE, Assembly, 24 February 2017, Nos. 391000, 393769, 399999 and 401258, Mme Chupin, M. Tizioli, M. Constantinoff et M. Drusian, to be published in the Recueil (Reports).

In the absence of written law in this area, nuanced jurisprudence has gradually been constructed. In essence, the Conseil d'État has ruled that the right to respect for private life extends beyond a person's death, so that the sole quality of being the person about whom the information is concerned does not suffice in order to be regarded as 'concerned' within the meaning of Article 39 of law no 78-17 of 6 January 1978 relating to data processing, files and freedoms, and therefore, for example, to benefit from the right of access.[3] This is not the case except in the very particular circumstances where the applicants inherit the object of the requested information.[4] Recently, the Conseil d'État has made another derogation from the general principle so that, where the victim of a tort dies, that person's successors must be regarded as 'persons concerned' within the meaning of Articles 2 and 39 of the law of 6 January 1978, as amended, for the exercise of the right of access to personal data concerning the deceased, to the extent necessary to establish the damage suffered by the deceased with a view towards compensation. In effect, the right to compensation for a tort is included in the assets handed down to a person's successors, who, under the first paragraph of Article 724 of the Civil Code are automatically seized of the property, rights and actions of the deceased, or if the victim themselves has taken an action for damages before their death or the successors later take such an action.[5]

These jurisprudential solutions supplemented, as best they could, the silence of the law in respect of this new question, and in terms of the future, the legislator has fortunately taken it upon itself to enact section 63 of law no. 2016-1321 of 7 October 2016 for a Digital Republic supplementing for this purpose the law of 6 January 1978 by a new Article 40-1. This provides that the right of access is extinguished on the death of the person concerned and that his or her successors may exercise this right of access only to the extent necessary, in particular, for the organisation and settlement of his inheritance.

The digital revolution: old legal regimes becoming obsolete

Not content with raising entirely new issues for which existing legal tools are ill-suited, the digital revolution renders a series of old administrative regimes obsolete; causing them to await their impending death. Three examples will be discussed.

Licences to show films at the cinema

[3] CE, 8 June 2016, No 386525, Mme et MM. Rafrafi, Recueil p 235
[4] CE, 29 June 2011, No. 339147, Ministre du budget, des comptes publics et de la réforme de l'État c/ Mme Guhur et autres, T. pp. 937-939, concerning the balances of the deceased's bank accounts, such as those traced under the bank account database known as FICOBA
[5] CE, 7 June 2017, no. 399446, Garrido, to be published in the Recueil

The administrative authority and the courts continue to enforce an old system that prohibits the theatrical representation of minors in films of a particularly violent or sexual nature; the screening of films is covered under Articles L. 211-1 and R. 211-12 of the Code of Cinema and Animated Images with Minister for Culture responsible for issuing such licences, subject to restrictions depending on the content of the film.

This system has not changed in any major way since the early 1960s, even though case law has adapted to changing social mores.[6] It has responded and continues to respond to legitimate concerns about the protection of youth and respect for human dignity.

However, it is clear that the current regime loses much of its meaning given the access of minors to the same violent or pornographic films on the Internet, which the relevant authorities cannot or do not wish to restrict.

Taxis and hybrid bicycles

Administrative supervision of the taxi profession was originally justified on solid grounds by, on the one hand, taxis occupying the public road waiting for or seeking customers and consequently, the necessity to ensure that the traffic police put quantitative restrictions in place, and on the other hand, the need to control the knowledge of taxis of the city in which they carried out their business. Each of these justifications has been strongly affected by the mobility services on offer in the digital revolution.

In large metropolises around the world, conflicts between taxis and companies such as Uber are alive and well; this conflict takes place particularly in the legal context, from the commercial or administrative point of view. In France in particular, it should be noted that the old system tries to respond by extending its logic and modes of operation to what comes along, but these attempts are probably futile.

Thus, the legislator had the idea of giving taxis the ability to inform their clients of the distance from their location and the availability of their vehicles, this provision of Article L. 3210-2 of the Transport Code, from law no 2014-1104 of 1 October 2014 relating to taxis and chauffeur-driven cars was struck down, as being in breach of Article 8 of Directive 98/34/EC of the European Parliament

[6] for recent decisions in the context of art, see CE, 1 June 2015, No. 372057, Association Promouvoir, Recueil p 178, on violent films, and CE, 30 September 2015, Nos. 392461 and 392733, Ministre de la culture et de la communication et autres c/ Association Promouvoir, T. p 557, on films with sex scenes.

and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.[7]

Supervision of the content of radio and television broadcasts

The considerable progress of freedom of expression allowed by the Internet,[8] and the competition between the various modes of dissemination unquestionably raises the question of the durability of certain rules governing the content of the services offered by radio or television broadcasts. It becomes strange that television programmes are subject to a form of control (in France, this is done by an independent authority, the Conseil Supérieur de l'Audiovisuel or Audiovisual Board), given the use by these services of the radio frequencies which are part of the public domain, while videos that are otherwise analogous and searchable on YouTube or any comparable service are not subject to this same control.

But this development is paradoxically accompanied by what appears to me, in a personal capacity, as a kind of tension involving the competent authorities in the public domain that remains under their control. Many examples illustrate this; two shall be mentioned.

The first is a ruling of 25 June 2014 of the Conseil Supérieur de l'Audiovisuel regarding an awareness message about Down Syndrome, which presented a positive view on the life of young people with Down Syndrome and encouraged people to strive for their inclusion and development in society. This message had been broadcast several times on various television channels, and was described by the Conseil as 'likely to be controversial' and as having a 'purpose which might appear ambiguous' when presented to a pregnant woman confronted with a personal choice as to whether or not to have a termination, and invited publishers, in the future, to avoid spreading such a message in advertisements.[9]

The second concerns electoral propaganda broadcasts on the television as part of the election campaign by political parties and groups. The electoral code provides for and regulates official campaigns by granting various parties a broadcasting time which depends in particular on their representation in the outgoing Assembly. In the age of the Internet, the official campaign has lost much of its importance, with public opinion paying little attention to it. It was nevertheless considered to have a sufficiently foundational role in the fair expression of the vote that the administrative and constitutional judges urgently re-examined the relevance of the rules in force within the framework of a priority constitutional

[7] CE, 9 March 2016, Nos. 388213, 388343 and 388357, Société Uber France et autre, Association Taxilibre et autre, Syndicat des artisans taxis de l'Essonne, T. pp. 607-664-677

[8] On this issue we can refer to the speech delivered in Cyprus on 28 April 2017 by the Vice-President of the Conseil d'État, Jean-Marc Sauvé, at the Council of Europe

[9] See below the decision rendered in the case by the Conseil d'État, 10 November 2016, Nos 384691, 384692 and 394107, Mme Marcilhacy et autres, Recueil at p 509.

question raised in the June 2017 elections, which were considered to disadvantage the political groups not previously represented in the outgoing Assembly. This was the case with the En Marche! movement, to the point of undermining equality before the law in a disproportionate manner.[10]

The digital revolution: renewing old questions

Finally, the digital revolution forces us to look differently at old issues that remain relevant but need to be re-evaluated in the light of the possibilities and dangers of the Internet. A great many illustrations could be given; three of these will be considered.

Taxation and allocation of taxing powers between States

Businesses have not waited for the Internet to construct tax planning strategies in order to optimise the differences in tax systems between states. However, the development of digital communications, with electronic commerce, data business and collaborative economics, greatly favours these phenomena. In this context, the criteria for the distribution of taxing powers between states, as traditionally established by bilateral tax treaties, are no longer perfectly ideal, as is shown by the difficulty of taxing Google in countries where its search engine generates advertising revenue.

As a result, the OECD's BEPS (Basic Erosion and Profit Shifting) programme has the objective of 'tackling the fiscal challenges posed by the digital economy' under action 1, in particular to provide international consistency in company taxation. This includes a redefinition of the term 'permanent establishment' to include the concept of having a significant digital presence and, where appropriate, specific taxes on the digital economy, including a withholding tax on digital transactions.

New modes of production and employment law

The public report of the Conseil d'État in 2017, published in September, focuses its general considerations on uberisation, which refers to the impact of new modes of production permitted by digital developments on labour relations. In a whole range of sectors, traditional wage-earning is no longer the preferred form of organisation, which means rethinking employee protections and career paths. This point will be considered to in the Conseil d'État report.

Security and freedom

[10] CC, May 31, 2017, No. 2017-651 QPC, Association En marche!

On the issue of balancing security and freedom, which is as old as the administrative police itself, digital usage raise new questions. The resolution of these issues is made even more difficult in the context of terrorist attacks. Two examples can be given.

The first concerns the access of police services, and particularly intelligence services, to metadata kept by telecommunications operators, otherwise referred to as connection data, his being the data relating to the source and the recipient of a communication, the duration and date of the exchanges, the equipment and the telephone numbers or IP addresses used, and the location of the persons concerned. Although such data does not provide information about the content of the communications, and for this reason the Conseil constitutionnel excludes them from being covered by the right to the secrecy of correspondence in the strict sense,[11] this data, generated in spite of themselves by individuals when they use various online services, are a formidable source of information for the relevant competent services, in the knowledge they provide regarding a person's daily habits, his permanent or temporary places of residence, his activities, social relationships and the places he frequents.

The resulting risk of privacy is, however, the subject of cautious vigilance by judges, both at constitutional and European level. The Luxembourg court even held that European Union law, interpreted in the light of Articles 7, 8 and 11 of the European Charter of Fundamental Rights, precluded a Member State from requiring operators to keep this data in a general and indistinguishable manner for a certain time, which is of lesser importance once the conditions around access to this data by services is strictly supervised. In the Court's view, an obligation to conserve data can only validly relate to 'data pertaining to a particular time period and/or a particular geographical area and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime.'[12] This strong development under case law poses difficulties for many Member States in the context of terrorist attacks.

The second example is the recent attempt by the French legislator to adapt to the observed phenomena of radicalisation of certain individuals by frequenting jihadist sites, by specifically repressing article 421-2-5-2 of the penal code resulting from Law No. 2016-731 of 3 June 2016 strengthening the fight against organised crime and terrorism and their financing and improving the efficiency and guarantees of criminal proceedings, the usual consultation of terrorist websites, directly to the commission of terrorist acts, or those who make an apology for such acts when they include, for this purpose, images showing the

[11] CC, 24 July 2015, No. 2015-478 QPC ,Association French Data Network et al., cons. 16
[12] CJEU, gr. ch, 21 December 2016, Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, Cases C-203/15 and C-698/15

commission of such acts.[13] The Conseil Constitutionnel opposed this, by holding that the mere consultation of such a website was not a demonstration of the will of the person concerned to commit terrorist acts or even his adherence to the ideology expressed on those websites.

It is often found that, from a legal point of view, the Internet is both a solution and a problem. There is no doubt that legislators and judges will need some time to construct a framework that is appropriate to deal with these issues.

[13] CC, February 10, 2017, No. 2016-611 QPC