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Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence

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Abstract

Revenge pornography, or non-consensual dissemination of sexually explicit material, has become a new cyber offence where the perpetrators target the sexual integrity of the victims by sharing the sexually explicit media of a victim online, and therefore seriously damaging both the sexual integrity and identity of the victim. Thus, mainly in countries with Anglo-American law systems, revenge pornography is being treated as a serious sexual offence. On the other hand, the traditional criminal law concept in countries adhering to the continental law system is firmly anchored in the belief that the attacked virtue of revenge pornography is the right to privacy of an individual. Therefore, criminalising revenge pornography only as a privacy violation crime. Consequently, the offence in these countries is not taken as seriously, or punished as harshly, as is the case involving sexual offences. The purpose of this article is multifold: to suggest an ideal criminal law definition for revenge pornography; to explore some dilemmas that the continental criminal law doctrine is facing when dealing with revenge pornography; and to compare criminal law legislations of certain countries of central Europe in order to explicitly propose specific legislative solutions.

Keywords: Revenge Pornography, Non-Consensual Pornography, Sexual Offence, Privacy Violation, Cybercrime, Criminal Law.

Introduction

In the new millennium, also called the digital information age, computer-information systems have completely changed our society. The technological-information revolution has dramatically affected human relations – especially in the field of communications. Digital communication and the Internet have completely changed the functioning of our society. The development of new technologies unfortunately, has spawned various forms of behaviour that are contrary to legally desirable behaviour. In the field of digital technologies, new criminal offences are emerging and are classified as cyber-crimes (Jaishankar, 2018). One such new crime is the publication and dissemination of images with sexual content of others without their consent on the World Wide Web or through

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public digital channels and applications - often referred to as "revenge pornography" or "non-consensual pornography." As with child pornography, this crime can be classified as a content-related cyber-crime (Clough, 2015; Sepec, 2018).

Originally, this offence was most often carried out by disappointed, vengeful lovers who published videos with sexual content of their former partners on the World Wide Web, for which they did not have the consent of the actors in the recording - even if the recording itself was originally made with their consent. The goal of the perpetrator was often to harm and embarrass the victim, thereby directly negatively affecting both his or her constitutionally protected privacy interests and sexual integrity. Revenge pornography can be defined as "*dissemination or posting sexually explicit media without the consent of the individual in the media, particularly where the intent is to shame, humiliate, and frighten the person or otherwise cause them harm*" (Lonardo, Marthland & White, 2016). Revenge pornography is also a form of cyber-bullying, which involves the use of information and communication technology to enforce hostile behaviour by an individual or group that intends to harm others (Razza, 2015). Revenge pornography may include pictures, videos or other media, produced or obtained with or without the consent of the victim and may involve intimate sexual relationship or sexual performance that was meant for personal use of the creator and the one he or she shared the content with, and not for public dissemination.

However, as is often the case with new cyber-crime offences, which are often first recognized by the scholars of criminology, the scope of this phenomenon has far exceeded the expectations of the legislators, which have been very slow to react to this new offence (as is usually the case with traditional criminal law doctrine and social novelties). While there has been an escalation in the criminalisation of this conduct in the United Kingdom in 2015 and 2016, and even before that in the United States, as early as 2004 in New Jersey (Harika, 2014), many European countries in central Europe still do not have legislation in their Criminal Codes that criminalises revenge pornography or they continue to treat such conduct only as a traditional privacy violation offence. Currently there is a dearth of research about this topic in the countries adhering to the continental criminal law system.

The purpose of this article is therefore to present some dilemmas continental criminal law doctrine is facing when dealing with revenge pornography and to compare criminal law legislations of certain countries in central Europe to propose some specific legislative solutions.

1. DEFINITION OF REVENGE OR NON-CONSENSUAL DISSEMINATION OF PORNOGRAPHY AND CRIMINAL LAW DILEMMAS

1.1. Terminology

There is a lively debate in the academic world revolving around the issue of whether the term "revenge pornography" is appropriate at all. The terms that seem synonymous are "involuntary" pornography (Burns, 2015); "non-consensual" pornography (Citron & Franks, 2014; Franks, 2015); "image-based sexual exploitation" (Powell, 2009, 2010); and, "image based sexual abuse" (McGlynn & Rackley, 2017; DeKeseredy & Dragiewicz, 2018).

All these terms refer to the non-consensual dissemination of sexually explicit or intimate images created with or without the consent of the person in the image; images created by the victim himself or herself (selfie); images that have been stolen from a hacked computer or other digital source of a victim; and, even for images that have been doctored by superimposing the face or identity of a victim onto an existing intimate or pornographic image (Henry & Powell, 2016).

Since not all perpetrators are motivated by revenge, and since not all content constitutes or serves the purpose of pornography (Franks, 2015; Flynn, Henry & Powell, 2016) the term revenge pornography seems too imprecise and rigid. Not all perpetrators have vengeful motives. They can disseminate sexual images for reasons such as coercion, blackmail, fun, sexual gratification, social status or monetary gain (Henry & Powell, 2016). Therefore, labelling this form of cyber harassment and abuse as “pornography” inaptly shifts attention away from the action of the perpetrators and onto both the content of the image itself and on the action of the victim (Rackley & McGlynn, 2014).

Different authors have presented alternatives to the term “revenge pornography” and the most adequate seem either “image-based sexual exploitation” by Powell (2009, 2010) or “image-based sexual abuse” by McGlynn & Rackley (2017). Both alternatives offer numerous advantages over the traditional terminology. In particular, they capture a variety of motivations during the non-consensual dissemination of images; the images themselves need not be pornographic but rather are used as a form of sexual exploitation; and, these alternative terms both serve to better capture a broader range of contexts where the image was originally produced (Henry & Powell, 2016).

However, the term “revenge pornography” does have one major advantage over proposed alternatives – its popular use in public and academic discourses (similar to the term “child pornography”, which is plagued with inconsistencies, however it is still widely used in the law doctrine – also in the Convention on Cybercrime of the Council of Europe and in the European Union Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography). It is the author’s opinion that the definition of the term itself is far more important than the label attached to it.

1.2. The criminal law definition

Henry & Powell (2016) define revenge pornography as “*the non-consensual distribution of sexually explicit or intimate images of another person without their consent.*” Although a very sensible definition, it has two drawbacks. First is the over usage of consent in the definition – if the distribution is non-consensual there is no need to add “without their consent” at the end of the definition. The second, much more problematic drawback is the addition of the phrase “intimate images” in the definition. Intimate is defined as private, personal, and therefore intimate images refer to very personal or private images. One can think of many examples of situations in which private images can have absolutely nothing to do with sexual exploitation or sexual abuse, and only affect the personal integrity, good name and honour of an individual (e.g. picture of a private moment when a person is sitting on the toilet in the bathroom, however no intimate body parts are revealed). Another deficiency in this definition rests with the use of the term

“distribution”, which has a more industrial meaning as a process of marketing and supplying goods; and in law often refers to the transmission of inherited property to its heirs after taxes, debts, and costs of the estate have been paid (Farflex, 2019). The term “dissemination” is therefore preferred.

It is also preferred to use the singular instead of plural in definitions since a non-consensual distribution of one image or a singular movie clip can have just as serious psychological effects (Kamal & Newman, 2016; Dawkins, 2014) on the victim as the distribution of multiple images. Therefore, the definition “*non-consensual dissemination of sexually explicit image of another person*” seems from the criminal law perspective better. A detailed analysis of each part of the definition is needed for further study.

Some legislation, for example the California Penal Code (Harika, 2014,) goes as far as demanding that the perpetrator has the criminal intent (i.e. mens rea), to actually cause serious emotional distress, and that the depicted person suffers serious emotional distress. Other legislations explicitly demand that the dissemination of images seriously affects a person's privacy (e.g. Slovenian Criminal Code, 2017). This is problematic from two aspects. Firstly, perpetrators often disseminate revenge pornography for profit motive or simply for fun and have no intent to cause serious emotional distress to the victim or to negatively affect his or her privacy interests. Secondly, it opens the door to secondary victimization in the courtroom, where the victim must be examined on the question of whether he or she actually suffered serious emotional distress.

Therefore, it is the author's opinion that the “ideal” legal definition does not include serious invasion of a victim's privacy. Nor does it include the perpetrator's intent to cause serious emotional distress and proof that the victim suffered serious emotional distress. Rather, the intent (mens rea) of the perpetrator should only cover the wilful dissemination of sexually explicit content. That is to say, where the perpetrator is aware that the individual depicted in the content did not consent to such sharing, nevertheless he shares it intentionally.

1.2.1. Interests attacked by revenge pornography

When analysing crimes we must always identify the specific interests that the criminal law protects with a certain criminal offence. Legally protected interests, or virtues, are socially approved values and objects that are safeguarded by criminal law. Interests can be private or public and range from life, body and limb, sexual integrity and identity, privacy, personal data, property, national security, a country's monetary system, or health system, etc.

Many authors have proposed that revenge pornography should be treated as either technology facilitated sexual violence (Henry & Powell, 2016), cyber-sexual violence (Cripps & Stermac, 2018), sexual abuse (Citron & Franks, 2014), sex crime (McGlynn, Rackley & Houghton, 2017) or even as “cyber rape”, and that therefore the virtue attacked is sexual identity and the sexual integrity of a person. We could call this the modern approach, which considers revenge pornography as a serious sexual offence.

On the other hand, the traditional concept of continental criminal law is firmly anchored in the belief that the attacked interest of revenge pornography is the right to privacy of an individual, and his or her right to dignity and good name. Therefore, the criminal codes of continental Europe often define revenge pornography as an offence

against the privacy, dignity and personal integrity of an individual – meaning only as a privacy violation crime. Consequently, in these countries the offence is not taken as seriously as in countries where this is a sexual offence.

Privacy is considered as one of the fundamental constitutional and internationally protected values. The International Covenant on Civil and Political Rights protects it in Article 17 and the European Convention on Human Rights in Article 8. Human privacy is “more or less the area of human life, whole of its actions and engagements, feelings and relationships, which are characteristic and constitutive, that are shaped and maintained by a person alone or alone with the closest ones with whom he is in an intimate community, and that he has a sense of security against the public's intrusion or anyone unwanted” (Slovenian Constitutional Court, 1994). An individual's privacy is seriously affected if there is a picture or a video clip with sexual content of him or her on the World Wide Web or is distributed through digital media. New digital technologies pose an even greater threat to individuals' privacy rights since images can be quickly uploaded onto web applications and quickly viewed by a large number of people who can save or upload those images to other digital public channels. Criminal protection of privacy is therefore of key importance. Criminal law must envisage the specifics of new digital technologies and consider these when forming new incriminations.

Even though the traditional view on revenge pornography as a privacy violation crime seems outdated, it has some benefits. Although a person having their naked photos disseminated on the World Wide Web may well suffer serious emotional distress (Dawkins, 2014; Kamal & Newman, 2016), nonetheless we cannot say that the person was physically violated – which is the assumption made by legislators enacting legislation criminalizing sexual crimes, where the attacked virtue is the sexual integrity of the person. Some argue that revenge pornography should be treated the same as child pornography, namely as a form of unprotected speech (Desai, 2015), and that since it has the same effects on the victims as does child pornography (Dawkins, 2014) it should be equally treated as a sexual offence. However, there is a key difference. With child pornography there will always be actual sexual abuse of a child when the child pornography is created (this will not be the case when a person is only appearing to be a minor engaged in sexually explicit conduct, but is actually older than 18 years, or when creating realistic images representing a minor engaged in sexually explicit conduct – virtual child pornography). However, a state has an interest in protecting children from any kind of abuse (Desai, 2015), and criminalization of any kind of child pornography, even virtual, where no child was actually abused, is necessary to shut down the "distribution network" of child pornography and therefore to reduce the sexual exploitation of children (Citron & Franks, 2014). Child pornography can also be used for the grooming of children into performing sexual acts (Šepec, 2018). On the other hand, revenge pornography often only exploits misuse of trust and consists of dissemination of images that the victim consented to making, thereby affecting the personal integrity of the victim without actually physically or sexually harming the victim. The disparate legal treatment of child pornography and revenge pornography therefore seems justified.

However, due to the fact that one's sexual integrity comprises not only his or her physical/corporal sexual sphere, but also his or her psychological/mental sexual sphere –

that is to say his sexual development, sexual functioning, sexual expression, sexual identity and privacy, we believe that revenge pornography should be regarded as a sexual offence, since the consequences on one's sexual integrity are much more similar to other sexual offences (especially child pornography or sexual violence and abuse) than to privacy offences.

The interests that legislators seek to protect and safeguard with revenge pornography laws, whether they be sexual integrity and sexual identity; personal integrity; or the privacy and good name of the individual, will have a dominant effect on how the criminal offence is classified in the country's criminal code – as a sexual crime or only as a privacy violation crime, and on how seriously the police and the state prosecutor's office treat the offence.

1.2.2. *Non-consensual*

Traditional continental criminal law doctrine adheres to the view that the object of protection of revenge pornography is the individual's right of privacy, through which his or her sexual identity should also be protected. Under this view, privacy is a typical disposable asset that the individual can voluntarily renounce or give consent to its potential breaches. Since privacy is a typical disposable virtue, there can be no doubt that anyone (except for children, mentally disabled persons or those with diminished mental capacity) can freely consent to the public dissemination of his or her images. This also means that if the perpetrator publishes recordings with sexual content of his or her self, there is no criminal offence (unless these recordings are provided to children, which can be a specific crime in itself). There is also no crime if one disseminates images with sexual content of another, if that other person gives consent to that kind of dissemination (which is normally the case of consensual adult pornography).

The consent of the injured party is a construct of modern criminal law which, when given appropriately (expressed voluntarily, unequivocally and in an appropriate formal form when needed), excludes the material unlawfulness of the criminal offence (Ashworth & Holder, 2013). Bavcon (2009) defines the consent as a situation where the alleged victim or victim of a crime agrees with the disputed behaviour at the time of the execution (also Jescheck & Weigend, 1996).

It is imperative to point out that the consent of the victim must relate not only to the making of the image, but also to the publication or dissemination of this image to the public. The absence of consent is the basic condition-giving rise to the revenge pornography offence. The wilful sharing of an image with a partner does not constitute consent to sharing that image with others. Creating an image of another without that person's explicit consent, even in the absence of sexually explicit content, can constitute a specific criminal offence against the personal integrity and privacy of a person and is not necessarily connected with any kind of sexual exploitation, extortion or other sexual or non-sexual abuse.

How do we deal with situations where "consent" is provided, but under mistaken facts or circumstances, or for example under the influence of force or deception?

The fundamental position of the continental criminal law doctrine is that consent will not be valid when the perpetrator misrepresents the facts to the victim or knows about his or her mistake, and abuses this in order to carry out a criminal offence. This is the so-

called "responsibility for the abuse of law" doctrine (Roxin, 1992). There are certain exceptions to this rule, however. Roxin (1992) would thus find consent valid in situations where the consent is given mistakenly, but where that mistaken belief would not have detracted the person from giving consent – also called minor or insignificant mistake. It is however indisputable that the consent will not be valid when the perpetrator forces it, for example by threat or fraud.

The Anglo-American criminal law doctrine is less strict than the continental doctrine and allows for a number of exceptions to the principle of invalidity of consent. According to this doctrine, a mistake on the part of the giver will affect the validity of the consent only if it concerns the content or level of danger that may be causally connected to the legitimate interest of the consent giver. Confusion about the accompanying circumstances is often irrelevant as is the motives of the participants (McAuley, McCutcheon, 2000; Ormerod, 2005). In principle, fraud will vitiate the given consent. However, there are also instances where this would not be the case, for example in situations where the fraud does not have any substantive effect on the insured legal interest (Boohlander, 2009; Simester, Spencer & Sullivan, 2010). Force or threat will vitiate the consent whenever it rises to the level of excluding or seriously jeopardizing the individual's ability to make a free decision. Therefore, it is undisputed that the crime of robbery is committed in a situation when the perpetrator threatens another with a knife and in order to prevent bodily injury the one held at knifepoint must give the perpetrator his watch worth two thousand dollars. On the other hand, it would be difficult to prosecute a director of a company for the offence of rape or sexual assault when a subordinate worker offers him or her sexual services in order to avoid dismissal.² The fact that the complainant in an ideal situation would not agree to the act does not intrinsically deny the existence of the given consent. In this respect, real and not ideal circumstances are relevant for the law. Factors such as economic needs, stress or social expectations do not by themselves vitiate the validity of the given consent (McAuley & McCutcheon, 2000).

1.2.3. Dissemination

Dissemination means to scatter, spread, promulgate (Farflex, 2019) or any kind of similar action that has the effect that the image becomes publicly known or available. The perpetrator must communicate the image to the public through any medium (television, newspaper, web portal or other publicly accessible web site, social network ...) or by another act that results in informing the public of the sexually explicit content of the victim. Legislators can decide that the dissemination must be made public – meaning that the content must be made available to a broader circle of people (broader than family members or personal acquaintances) or that any kind of dissemination suffices (e.g. showing the image to a friend or sending it to the employer of the victim). Since the perpetrators often send images to the employer of the victim, which in turn can lead to dismissal or major difficulties at work (State v. Parsons, 2011; Dawkins, 2014) it does not seem reasonable that legislators would demand dissemination only to a public forum. Any

² This could present a different criminal offence of a violation of sexual integrity with abuse of position, if the state has implemented such an offence.

kind of dissemination with the purpose to cause harm to the victim should be considered criminal.

Methods of dissemination are quite diverse and can include text messages, social media, posts, email, uploading media to pornography websites or revenge pornography specialized websites, as long as the media becomes available to the public or third parties who were not entitled to view the image. When the perpetrator disseminates the image, he or she must act with intent and knowledge that the person in the image did not consent to such sharing. This in turn means that sharing images from a website with amateur pornography not knowing that the content is in fact non-consensual pornography, must not be criminal, since the person sharing the content lacks the harmful intent that must be present for committing the criminal offence. Committing the crime out of negligence is theoretically possible (a husband mistakenly copies a recording of a sexual intercourse with his wife into a folder shared with others via the peer-to-peer³ exchange program). However, this does not seem appropriate, since the goal of the revenge pornography criminalisation is to punish only those who disseminate such images deliberately and with malicious intent.

1.2.4. Image

An image is defined as a representation of an external form of a person or object (Farflex, 2019). Therefore, the term image includes photos, recordings, videos or any kind of similar media that can represent an individual. The term image is broad enough that it can cover any kind of carrier of explicit sexual content. Some legislation (as the New Jersey Code) specifically define these carriers as “disclosure of any photograph, film, videotape, recording or any other reproduction of the image”, while others (as the California’s Senate Bill 255) rely upon a more general definition of any recording of an image. The term image also includes a drawing of another. However, the author believes that a drawing of another, even if sexually explicit, should not be regarded as a revenge pornography offence (it could however present an offence of defamation - libel).

It must be pointed out that legislators should not use the plural form in its definitions. Paragraph VI of Article 143 of the Slovenian Criminal Code (2017) requires a public dissemination of "recordings or messages" – the legal term is used in plural form, which means that in accordance with the principle of legality, and the linguistic interpretation of the legal text as the fundamental explanatory method in continental criminal law (Bele & Šepec, 2011), the publication of a single recording or message is not sufficient to complete the crime. If the legislator wanted to penalize the publication of one video file or one message, it should have used the singular form in the text of the article. This is of course a logical absurdity, since the perpetrator of revenge pornography often disseminates only one recording or picture of the victim. It is also quite clear that the publication of one such recording very well may seriously affect the privacy interests and sexual integrity of the victim in the recording and should be sufficient by itself to constitute a crime.

³ Peer-to-peer file sharing is the distribution and sharing of digital media using peer-to-peer (P2P) networking technology, where the peers of such networks are end-user and no distribution server is required.

The main method of interpreting legal norms in criminal law is the linguistic method, which is only the first stage in determining the possible verbal meaning of a legal rule. Yet at the same time the degree that determines the external limit, which the interpreter must not overstep (Pavčnik, 2004). In continental criminal law, this is the fundamental method of interpretation in accordance with the principle of legality (*lex certa et lex scripta*). Therefore, if the legal text clearly states that the perpetrator must publish videos or messages – that is, in an obviously indisputable plural form – then in accordance with the principle of legality (*lex certa* principle), and the linguistic interpretation of the text, it is not permissible to spread criminal law repression to cases where only one video or message is published. It is quite probable that, when writing the legal text, the legislator has made a reckless error, which cannot be interpreted to the detriment of the perpetrator. In case of the so-called "legislator mistakes," where the legislators enact something they did not actually intend, and where the text is logically meaningful, the judge cannot interpret the text of the norm with his own explanation until the legislator corrects the mistake (Novoselec & Bojanić, 2013). If the legislators have made a mistake by using poor normative wording when drafting a criminal offence, it is not the role of the court to correct this mistake to the detriment of the defendant. The court is not justified in extending the scope of criminal norm repression from the plural definition to a singular consequence; nor may the court even assume such a result is self-evident. Therefore, we should be very careful when dealing with the plural form in criminal law to avoid legislative mistakes such as currently present in the Slovenian Criminal Code, as this can result in practice in the unsuccessful prosecution of this crime.

1.2.5. Sexually Explicit

The term "sexually explicit" concerns the nature and content of the image (Henry & Powell, 2016). Different legislations utilize a range of terms, from "intimate images", "private sexual material", "nude or semi-nude images", "sexually explicit" images (Henry & Powell, 2016) or "with sexual content". We prefer the term "sexually explicit" content, since this is also the term used in the Convention on Cybercrime (2001), even though the Convention only covers child pornography and does not cover revenge pornography. Although Justice Stewart's "test" for obscenity as set forth in *Jacobellis v. Ohio* (1964), "I know it when I see it" (Gewirtz, 1996) seems like an appropriate test for adjudging what constitutes sexually explicit content, the principle of legality, as the core principle of continental criminal law, demands a less subjective test than the one pronounced by Justice Stewart. Instead, the wording prescribing the offence must be as precise as possible to place the public on adequate notice of what is in fact criminal. It therefore is imperative that the law text leaves no room for doubt about what in fact constitutes sexually explicit content (*lex certa*). Sexually explicit conduct, for the purpose of revenge pornography, covers at least: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between two adults⁴ of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area (Explanatory report on the Convention, 2001).

⁴ If one of them is a minor this will be child pornography.

Sexually explicit content will therefore cover any content where a person appears in any kind of sexual act - whether it be with a person, an animal or only with himself, and regardless of the form of sexual practice (penetrating, non-penetrating), but it may also be a display of an individual in a sexual role or at least the display of his sexual organs. A picture of a person in his/her underwear or where his/her sexual parts are concealed will therefore not suffice when revenge pornography is viewed as a sexual crime, even if the individual's privacy can be severely affected by the non-consensual publication of his or her partially naked body. While this could present an offence against personal integrity and privacy of the individual, it does not fall within the meaning of revenge pornography. We believe that drawing such a line is essential. Otherwise, any kind of non-consensual image dissemination can be regarded as revenge pornography. If we view revenge pornography as a sexual offence then the virtue attacked by the perpetrator must be one's sexual integrity. However, one's sexual integrity cannot be severely damaged if one's sexual organs are not revealed and where the image reveals no sexual act.

There is a dilemma whether nudity by itself constitutes sexually explicit content. If sexual organs are shown then the answer to this question is yes. If not, then the content is not sexual, even if the one using the content uses it for his/her own sexual gratification (Sepec, 2018). The objective criteria of determining whether the content is sexually explicit should always supersede the subjective criteria based on the purpose for which the content is used (R. v. Sharpe, 2001).

Some laws are very clear and absolute when defining sexually explicit content. Alaska's revenge pornography law, for example, defines it as »the genitals, anus, or female breasts of the other person« (Dawkins, 2014). California's Penal Code defines revenge pornography in article 647(j)(4) as the image of the intimate body part or parts of another identifiable person, where »intimate body part« is defined as "any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing" (Bloom, 2014). It is quite interesting that certain legislators include the female breasts in the definitions, since they are not sexual organs per se. However, men nevertheless view breasts as sexually desired parts of the woman's body. It is of the utmost importance that the law clearly defines what kind of content it prohibits. The vaguer the definition, the greater discretion the judge or jury has to decide whether certain content represents what the legislator defined as »sexual« content. In other words, vaguely-defined terms lead to legal uncertainty and consequently legal security is compromised, as it is very likely that personal preferences of the judge or jurors will play the defining role in determining whether someone actually illegally disseminated sexually explicit content. In criminal law, the definition of a legal condition of a crime cannot be based on the personal preferences of the one passing judgment.

The next big question is whether the sexual conduct in the image must be real or whether simulated or virtually created content suffices. When dealing with child pornography, simulated sexual acts are treated the same as real sexual acts (Explanatory report on the Convention, 2001). On the other hand, with revenge pornography caution is advised. Non-consensual dissemination of simulated sexual content should only be criminalised when there is no doubt that such content would hurt the sexual integrity of the person depicted in the image. If only his or her good name would be affected, this

should be regarded as a separate criminal offence against personal integrity, privacy, good name and honour of the victim, and not as a revenge pornography crime. We will analyse virtually created content in the following section.

1.2.6. Another Person

Images must relate to another person who can be recognized and identified. Blurred, unclear or defected images from which the person in them is not recognizable and where it is not possible to determine who the images are referring to are not sufficient for the completion of the revenge pornography offence. However, the construct of an attempt is possible if the perpetrator deliberately wants the public to view the sexual image of a particular person, but does not succeed – e.g. when uploading the image that would clearly display the victim in a sexual act to a website or a web application, the quality of the image deteriorates so that the identification of the victim is no longer possible.

We also see no reason why dissemination of images that have been doctored by superimposing the face or identity of a victim onto an existing intimate or pornographic image (Henry & Powell, 2016), or sexualised photoshopping (McGlynn, Rackley & Houghton, 2017), should not be regarded as a criminal offence. These altered images can have the same effect on the mental state and on the personal and sexual integrity of the victim as an image of his/her actual body. While the generated images might not be real, the harms are very real (McGlynn, Rackley & Houghton, 2017). Victims of sexualised photoshopping have experienced loss of dignity, harassment, sexual and other abuse (Jeffreys, 2014; Blott & Martin, 2016). New technology permitting photoshopped images presents a completely new offence that was not possible in the past. Furthermore, cyber technology did not exist in today's form. Criminal law practice and legislation must be especially diligent when facing new cyber-crimes, as traditional criminal law doctrine is very slow to adapt to the changes cyber revolutions bring to bear (Šepec, 2018).

Very interesting, and probably extremely dangerous from the perspective of revenge pornography, are the so-called “deepfakes” applications that by using a person's photo library and a combination of open-source AI software, including Google's TensorFlow, and face-swapping algorithms, one can create pornographic AI-doctored videos of that person. These in turn could be used to create fake news, for harassment, extortion and bullying (Vincent, 2017). People on Reddit and Discord have been found thinking aloud about the possibilities of creating fake porn videos of their crushes or exes, and asking for advice on the best ways to do it (Cole, 2018). This means that there is no need for the perpetrators to own or steal a video recording of the victim with sexually explicit content, as they can virtually create such content solely based on normal pictures of that person. This could lead to a dangerous revolution in revenge pornography. Criminalising the creation of such content (even for one's personal usage) is a dilemma to be solved in the future.

1.3. Is Criminal law repression needed?

The question that is often presented is whether non-consensual dissemination of pornography should constitute a criminal offence and as a serious crime be punished with imprisonment, or, alternatively, whether civil law, administrative law, and other sanctions

suffice. Some could argue that since revenge pornography is not defined in the Convention on Cybercrime it therefore does not present a serious cyber-crime offence. However, almost 20 years have passed from the time the founding fathers wrote the Convention. In the cyberspace arena, this is an enormous period and many new technologies (cryptography, blockchain to name a couple) have emerged every year. As revealed in Hunter Moore's website *Is Anyone Up?* in 2010 (Poole, 2015) serious revenge pornography crimes have increased in recent years. Previously, before the revelation of the extent of other problem, the criminal law saw no need to criminalize such conduct. Today, there is no doubt that law has to take a stand on how to deal with revenge pornography.

Citron and Franks (2014) argue that civil lawsuits are ineffective and illusory. Civil litigation is ineffective, because it cannot prevent the dissemination of an image through digital channels. Most disclosers know they are unlikely ever to be sued, since most victims do not have the time and money to bring claims, and further, it makes little sense to sue perpetrators with few or no assets to satisfy a judgment. Therefore, criminalizing non-consensual pornography is appropriate and necessary to convey the proper level of social condemnation (Citron & Franks, 2014). Although the non-consensual distribution of pornography does not physically violate the victim, the consequences are mentally severe enough to justify criminal law repression. Kamal & Newman (2016) report the significant mental health implications of revenge pornography, which often include severe emotional distress, anger, guilt, paranoia, depression, or even suicide. Victims suffer from similar enduring mental health effects as described by victims of child pornography, such as depression, withdrawal, low self-esteem, and feelings of worthlessness (Kamal & Newman, 2016; Dawkins, 2014; Bloom, 2018). A substantial body of research has shown that civil, copyright, administrative, other non-criminal sanctions, are insufficient as remedies, and that further criminalizing non-consensual pornography is both appropriate and necessary to convey the proper level of social condemnation for this behaviour (Citron & Franks, 2014). Criminalisation is justified, however, only for conduct that causes harm to others or creates an unacceptable risk of harm to others (Ashworth & Horded, 2013). Feinberg (1988) supports penal legislation that would be effective in preventing, eliminating, reducing harm to others and when there is no other non-criminal means that is equally effective at no greater cost to other values. Some states in Europe have a positive obligation to protect fundamental human rights after the European Convention on Human Rights, of which Article 8 of the Convention protects the right to privacy. Therefore, there can be no doubt that criminalising revenge pornography is justified and needed, since it causes great harm to victims; invades their privacy and through its sexual integrity; and, by criminalising it, the state can prevent or at least reduce the harm it has on the victims.

2. COMPARATIVE REVIEW OF THE LEGISLATIONS IN THE CENTRAL EUROPE

Revenge pornography was criminalised in England and Wales in April 2015, via sections 33-35 of Criminal Justice Act (2015), and subsequently in Northern Ireland in February 2016 via sections 51-53 of Justice Act Northern Ireland (2016). Within a year of

the enactment of Criminal Justice Act 2015, there were already 206 successful prosecutions of the offence (Oriola, 2018).

While the United Kingdom enacted true revenge pornography laws, the European countries adhering to the continental criminal law system criminalise revenge pornography mainly as an adjunct to, or under the auspices of, traditional privacy and personal data offences.

In Germany, by way of example, as the backbone of the continental criminal law doctrine, one's privacy is safeguarded with the Act on Copyright and Related Rights (2017). At the European Union level, Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data - General Data Protection Regulation (GDPR) – provides such protection. Under these regulations, if the privacy rights of a victim are infringed, the individual affected can seek civil law remedies, which include cease and desist orders, rectification and compensatory damages (Nigam, 2018). In December 2015, The German Federal Court (Bundesgerichtshof, BGH), upheld an earlier ruling from a regional court that held that a man did not have the right to keep intimate photos of his ex-lover just because she had consented to taking them in the first place. The photographer was ordered to delete any photos that showed his ex-lover naked, nearly naked, in her underwear, or before, during, or after intercourse. The Court ordered that he would, however, be able to keep photos of her clothed in everyday situations, under the rationale that such images would not damage her reputation (Garza, 2015). Criminal law repression is defined in Article 201a (Violation of intimate privacy by taking photographs) of the German Criminal Code (StGB, 2018): “whosoever without authorization creates or transmits a picture of another person located in a dwelling or a room especially protected from view and thereby violates his or her intimate privacy shall be liable to imprisonment not exceeding two years or a fine.” The same penalty is provided when the perpetrator, “without authorization, creates or transmits an image that displays the helplessness of another person and thereby violates the highly personal sphere of the person depicted.” The sentence is the same for someone who uses or makes such a picture available to a third person. It is also punishable “to enable access to a third person to a picture that is capable of causing considerable damage to the personal image of the depicted person, or to make, produce, offer to produce and give to others images related to the nakedness of a person under the age of eighteen years” – which is essentially child pornography.

Given the way the legal text is formulated, and based further on the fact that the offence is classified in Chapter 15 (Violation of privacy), it is evident that StGB classifies revenge pornography as a typical privacy violation crime. The scope of criminalisation is quite broad as it covers any kind of creation or transmission (dissemination) without authorization (consent) of the person in the picture. The typical revenge pornography scenario, where sexual pictures (that are not displaying one's helplessness) are taken with consent or even provided by the victim itself (selfies) and later disseminated by the perpetrator (without consent) are therefore covered by the criminal offence under Article 201a. In view of the fact that the Act only permits a sentence of up to two years of imprisonment or a fine clearly indicates that the offence is not regarded as serious as sexual offences.

France, as the second pinnacle of the continental criminal law, and in contradistinction to Germany, has implemented revenge pornography as a criminal offence pursuant to the Digital Republic Law (2016), which modified Article 226-2 of the French Penal Code that sanctions “non-consensual sharing with the public or a third party of any recording or document relating to words or images of a sexual nature obtained with the express or presumed consent of the person by recording, fixation, or transmission, with up to 2 years of imprisonment and up to 60.000 euros fine.”

The French definition is clearly more oriented toward revenge pornography, as the sexual nature of the images is a necessary condition for committing the offence, however no specific revenge intent is needed from the perpetrator. The perpetrator’s intent only covers non-consensual sharing of an image of sexual nature that was made with the consent of the person in the image. Article 226-2 of the French Penal Code (2018) is placed in the chapter of crimes against privacy, so clearly the offence is regarded as a privacy violation offence with quite serious consequences in the case of conviction.

Spain also classifies revenge pornography as an offence against privacy in Chapter X of the Penal Code of Spain (2015), titled Rights against Personal Dignity. Article 197 paragraph 7 of the Code states: “If an individual, without the authorization of the person concerned, disseminates, discloses or transfers to third parties images or audio-visual recordings of the person concerned that have been obtained with the consent of the person at the place of residence or any other place away from the sight of others, he shall be punished with imprisonment of three months up to one year or a fine, or with six to twelve months imprisonment, when the disclosure would seriously undermine the personal privacy of that person.”

The issue of revenge pornography gained wide public exposure in Spain in 2012 when a nude video involving a public official (Olvido Hormigos Carpio) was published online (Olmo, 2015). Again, we see an obvious privacy violation motive as the dominant virtue protected by the criminal law – sexual content is not even mentioned in the criminal offence. Even though the penalty for the crime in Spain is fairly minimal, nevertheless the legislative text leaves no room for doubt that dissemination of any kind of sexual image, which will always seriously undermine one’s personal privacy, is deemed illegal. However, it is clear that Spain does not see revenge pornography as a sexual offence, but only as a minor privacy violation offence.

The legal notion of “seriously undermining one’s privacy” can also be found in the Slovenian Criminal Code (2017), which criminalizes revenge pornography in paragraph VI of Article 143 as follows: “Anyone who publicly announces recordings or messages of another person with sexual content without the consent of that person and thereby seriously affects his or her privacy shall be punished by imprisonment of three months up to three years”. The problematic usage of plural form has already been discussed in section 1.2.4.

The legal condition, namely “seriously affects his or her privacy,” is the consequence of the perpetrator’s act, which the perpetrator must be aware of and will it (direct intent), or at least consent to it (*dolus eventualis*), and does not constitute an objective condition of criminality or strict liability. In doing so, whether the individual’s privacy rights have been adversely violated is assessed in the same way as defamation. This means that violation of privacy must be objective, but it is not necessary that the victim subjectively felt seriously

affected (although it depends on whether the victim will press charges for prosecution of the crime), which is quite possible if the person is mentally less developed, emotionally thawed or an exhibitionist (in the medical sense of the word). Whether a recording or message can objectively cause severe impairment must be assessed according to the time, circumstances, habits, persons and other socially relevant circumstances (Deisinger, 2002).

Nevertheless, what is the legal meaning of the phrase "seriously affects his or her privacy." If the legislator explicitly requires that images are of sexual content, the privacy of a person in them will practically always be (objectively) affected. The perpetrator who publishes such images is surely aware that the person's privacy will also be affected by the publication of the images. Perhaps therefore, the entire legal condition is unnecessary. This is not the case in the Spanish Penal Code, where the legislation does not specify that the image must be of a sexual nature. The Slovenian Criminal Code classifies revenge pornography in the chapter of offences against basic human rights, which seems quite appropriate. However, this is set forth as a subchapter of an offence against personal data, which again points out that the virtue of the offence is personal privacy.

The Netherlands deals with revenge pornography only through the offence of defamation – libel (*smaad* or *smaadschrift*) and slander (*laster*) – contained in the Criminal Code (2012). However, the Criminal Code does not specifically provide that revenge pornography is a sexual offence. There is a problematic gap in the law because of the fact that under the existing Criminal Code sharing pornography only with one contact or a private group does not amount to defamation and is therefore not punishable (Olmo, 2017). On 15th November 2018, Minister Grapperhaus (Justice and Security) submitted a legislative proposal from to the House of Representatives aimed at more effectively combating criminality. The proposal includes a chapter on Abuse of Sexual Visual Material as a separate crime with the possible sentence of two years of imprisonment. Under the terms of this proposal, "revenge pornography" involves the public disclosure of sexual, visual material featuring a person, with the intent to embarrass or harm that individual. In addition, the creation of sexual visual material without the subject's permission – such as making up-skirt photos or videos in public – will be a punishable offence. The same would apply to the possession and dissemination of such images (Government of the Netherlands, 2018).

Until 2019, Italy has not enacted any specific laws or criminal law articles regulating revenge pornography. Limited protection was offered, however, both through the Data Protection Code (2003) and the libel and slander offences of the Penal Code (2015). In 2016, there was a shocking revenge pornography case in Italy that ended with the suicide of the victim Tiziana Cantone, who found no legal recourse under the existing Italian law. In response to this and other cases, the Italian legislators passed a Cyberbullying Act (2016), making it illegal to post insults or defamatory messages concerning a minor online; blackmail them on the internet; or, steal their identity (Colleti, 2017). The law presents a high protection mechanism. A serious shortcoming in the Act, however, is that it only applies to minors under 18 years of age.

In July 2019, Italy adopted a new act named "Codice rosso" in order to regulate various forms of sexual violence, especially against women. "Codice rosso" introduces a new article 612 in Italian Criminal Code regulating the distribution of pornographic

images and videos, the so-called “revenge pornography”. The new article stipulates in paragraph one that anyone, after recording or stealing, sending, donating, selling, posting or distributing images or videos of a person with explicit sexual content, that is allegedly private, without the consent of that person, shall be punished with a prison sentence of one to six years and a fine of between 5,000 and 15,000 euros. Paragraph two of the same article also punishes with the same penalty those who have received or otherwise obtained the pictures or videos referred to in the first paragraph, and who send, donate, sell, publish or distribute them without the consent of the displayed persons, in order to cause them harm. Paragraph three increases the sentence if a spouse commits the act, whether divorced or divorced, or by a person who is or has had an intimate relationship with the person concerned or if the act is committed by computer or electronic means. Paragraph four increases the sentence if the act is committed against a physically or mentally weak person or to the detriment of the pregnant woman (Calleti, 2018).

With the new law, the quality of criminal repression of revenge pornography in Italy has drastically improved. The nature of the sentence (imprisonment with up to six years that can be increased with paragraph three and four) shows that Italy is regarding revenge pornography as a serious sexual offence that protects the sexual integrity of an individual, and not only as a minor privacy violation offence. With the new legislation Italy has become the county in continental Europe with the most severe and serious approach to revenge pornography.

The Croatian Criminal Code (2018) stipulates in the first paragraph of Article 144 (Unauthorized image recording) that “whoever in an apartment or a space specifically protected from viewing creates an unauthorized image of another, uses that image or makes the image available to a third party and thereby violates his or her privacy, shall be punished by imprisonment for a term not exceeding one year.”

Again, this is a very evident privacy offence, since it is classified in Chapter XIV of the Criminal Code titled “Crimes against Privacy.”

In January 2019, there was a revenge pornography scandal in Serbia. The husband of the famous singer Jelena Karleuša sold her naked photographs to the press after he allegedly was cheated on. She complained that the law has let her down and even asked the Serbian President for help. However, the Serbian Criminal Code seems quite capable of dealing with such cases, as paragraph 1 of Article 145 of the Serbian Criminal Code (2016), titled “Unauthorised Publication and Presentation of Another’s Texts”, stipulates that “whoever publishes or publicly presents another’s text, portrait, photograph, film or a phonogram of a personal character without consent of a person who has drawn up the text or to whom it is related, or without consent of the person depicted on the portrait, photograph or film or whose voice is recorded on a phonogram, or without consent of the person whose consent is mandatory by law and thereby significantly violates the private life of that person, shall be punished with a fine or imprisonment up to one year.” Creation of such images or recordings is a criminal offence pursuant to Article 144. Again, this is a pure privacy violation offence classified in Chapter XIV titled “Crimes against the Basic Human Rights”, and there is no need that the content is of a purely sexual nature. The case of Jelena Karleuša is still on-going.

Conclusion

As seen from this short comparative analysis, continental criminal codes define revenge pornography as a privacy violation offence, often not even demanding the content to be sexually explicit. The focus of continental criminal law systems is therefore on the violation of privacy – and not on the sexual integrity of the individual (which is safeguarded by “true” sexual offences). Although most European countries do criminalize revenge pornography, it is evident that it is mostly not seen as a special offence, that would need a separate incrimination (exceptions are Slovenia, Italy and France), but is usually only a part of a more traditional privacy violation offence. It is quite possible that the Police and the State Prosecutor’s Office will not treat such offence as seriously as they would sexual offences. This approach varies drastically from the countries of the Anglo-American law system, where revenge pornography is regarded as a sexual offence, since the consequences for the victims are quite similar to other sexual offences (like child pornography). As of July 2019, with the adoption of the new legislation “Codice rosso”, Italy has become the country in continental Europe with the most severe and serious approach to revenge pornography.

Since revenge pornography is a relatively new cyber offence, the goal was to present an “ideal” criminal law definition with detailed analysis of each legal part of the offence, since every word in the definition must meet the strict standards of the principle of legality as the core principle of the continental criminal law system. Poor definitions in the criminal code can have serious detrimental effects in legal practice, resulting in unsuccessful prosecutions of the crime. Precise criminal definition is a prerequisite for combating this new criminal offence in the future, which will only gain new dimensions (e.g. creation of pornographic AI-doctored videos of a person – the so-called deepfakes). Legislators all over the world must therefore be prepared to deal with this new cybercrime phenomenon.

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