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Videos or intimate images on the internet

In recent years there have been an increasing number of cases of dissemination of intimate images or videos without the consent of the victim, even though there was previous agreement to the recording.

The typical example of this is when a person consents to be recorded while maintaining a sexual relationship or any other intimate act of their life (taking a shower, changing clothes or undressing during an internet communication), which are subsequently published on websites (social networks, forums, pornographic websites, etc.) without their authorization. Commonly these images are released by spite or revenge of an ex-partner after the breakup of the relationship, used as blackmail or a simple joke by a friend.

These new ways of doing public personal and intimate aspects of a person's life raises the question of whether or not it is committing a crime against privacy. In this sense, we agree with the dominant opinion of doctrine and jurisprudence, that the dissemination in these cases should be relegated to the civil sphere, otherwise relegated to other offenses, because these images have been obtained lawfully -as required by the types of discovery and disclosure of secrets of the art. 197.1 and 4 Spanish Criminal Code.

The Spanish Criminal Code punishes privacy attacks that originate in one of these ways:

- Lawful access but with the obligation to maintain confidentiality. It punishes disclosure.
- Unlawful access, not allowed by the victim. It punishes capture, seizure or takeover of documents or electronic data support.
- The publication of confidential information with knowledge of the illicit origin.

In response to this loophole in the current legal system and because of these high profile events, the Preliminary Draft Reform of the Spanish Criminal Code, July 2012, includes an offence under the crimes against privacy, which punishes unauthorized dissemination of images or intimate recordings obtained with the consent of the victim.

The question is whether it is necessary to use the criminal law to crack these cases.

In this regard, some authors believe that the criminal protection model of privacy reflected in the Spanish Criminal Code is based on an illicit access to the private (intimate) sphere of the victim. So that if there is no illegal access cannot be said that we are facing such a serious event for intimacy that deserves criminal sanction.

Consequently, the penalty should be referred to the civil sphere in accordance with the fragmentary principle of Criminal Law.

On the other hand, others authors, in accordance with the Explanatory Notes of the Preliminary Draft reform of the criminal code, consider that the criminalization of these conducts is needed to fill the loophole in the current legal system. Therefore, the Court are punishing some of these cases through other offences like serious injuries (defamation) or as offence against the moral integrity and sometimes they considered that only exists a violation of the right of the self-image, protected by civil law, because it was not possible to see an injury of honour.

In our opinion, in these cases there is not actually an attack towards the honour, but an attack on privacy. Neither the diffusion nor non-consensual disclosure of these images has to be degrading or humiliating for the victim necessarily, meaning that not always that person's dignity is harmed. They are very intimate aspects of private life, embodied in images, shared or not with other, but do not want to be made public.

Therefore the placement of this new precept between offenses against privacy should be positively assessed, as we believe that the new technologies of communication force to review the content given to the privacy as protected legal asset (traditionally linked to the concept of secrecy as a negative liberty of exclusion against third parties), extending it to be a right to control intimate data.

Furthermore, it must be taken into account the changes that have arisen from the use of new technologies. Fundamentally, understanding and safeguarding the right of privacy and, in particular, the use of social networks. At the present time of our society, the idea that intimacy should be preserved has been abandoned for the total opposite: the externalization of aspects related to our privacy has become fundamental for the development of our social life. Our private live should be exposed, because otherwise we are nobody.

This avidity for recognition and notoriety, whilst being in a secure environment, allows people to reserve their anonymity enabling many users to show some form of „online” exhibitionism. A clear example of this phenomenon is the increase of *sexting*; a practice done primarily by minors, which consists of the publication of photos or videos with a sexual content, generated by the sender himself or with his consent using the mobile phone or any other technological device via sms, email, or social network (WhatsApp, Facebook, MySpace, Tuenti). This content ranges from pictures with a seductive attitude, obscene attitude, semi-nude or total nudity, to explicit sex.

The lack of thought, the lack of reflection when it comes to sharing our intimacy, adding the new culture of capturing images of everything that happens around us, leads to the weakening of the degree of awareness when it comes to consenting. In many cases, users -and especially minors born in this digital era- are not aware of the risks, for example, the loss of control of any information that comes out of the private sphere and enters the public domain. So, once the person sends an image or recording to another person with total confidence, this receiver can then forward it to their contacts and enter a massive unstoppable forwarding process, which is aggravated when disseminates on the internet, making it almost impossible to remove and what is more dangerous, becoming a possible prelude to other crimes.

Indeed, photographs or videos with sexual content in the hands of the wrong person can be an element to extort or blackmail. Known as *sextorsion*, a kind of blackmail where someone (minor or adult) uses this content to get something out of the victim, for example,

sending more pictures or videos with sexual content or, even, sexual propositions, and then threatening with its publication. In those cases where an adult blackmails a minor with sexual propositions, we have a crime of *Grooming*. This can also lead to situations of harassment or public humiliation through mocking, insulting, offensive or degrading comments of the intimate images that have been disseminated on social networks, leading to *Cyber bullying* when the victim is a minor.

In our opinion, this mass dissemination of audio-visual content justifies the criminal protection of privacy in these cases, despite having consented for the capture of the images, but not for broadcasting. In other words, this situation of vulnerability in which the victim is, by failing to take precautions or acting with the necessary caution when sending or consenting these intimate images to be taken, should not force this person to withstand such a serious intrusion into their privacy as the pervasiveness of that content is, which also may be the basis for other crimes.

In conclusion, we agree positively with the new criminal offense that the Draft proposes, because it represents a step towards the legal protection of privacy, appropriate for the new digital era.

Now, the criminalization of such behaviour is not enough to protect privacy, especially if we consider how quickly the content can spread, the difficulty of removal and the anonymity provided by the network. It is therefore necessary that this legislation is accompanied by a policy of prevention based on educational guidelines that help users (especially minors) to identify hazards and consequences that the dissemination of an intimate video can cause through cyberspace.

Some of these preventive premises could be:

1. Being aware of the content of images or videos before sending them (reserved matters that can be known by all, only by someone, etc.), the possible consequences and the problems that could arise (blackmail, sexual harassment (*Grooming*) or social harassment (*Bullying*)).
2. Report as soon as possible of these facts in order to halt the spread of these content, because the longer it takes, the harder it is to remove the pictures from Internet.
3. A greater parental control should be essential with minors and their mobile phones or any other devices that allows the recording of sexual content in any place that allows privacy. Webcams are recommended to be used in a common area of the house to reduce recordings of this kind. It is also appropriate that the parental control is done to reduce minors using and resending sexual images.
4. Protect technological devices (mobile phones, personal computers, tablets, etc.) where intimate information with passwords are stored, preventing loss or theft. It is also recommended to turn off the Bluetooth function when it is not needed or the use of antivirus, not to reveal passwords to prevent unauthorized intrusions.
5. It is convenient to increase the obligations of internet service providers regarding the private and intimate content.

All in all the use of new technologies shouldn't be „demonized”, so to stop the dangers that surround our privacy, we should prevent and educate in the „new culture of privacy”.