

## **CYBERBULLYING AND SEXTING. NEW OPEN FRONTIERS OF CRIMINAL LAW: THE CASE OF SPAIN**

### **CIBERBULLYING Y SEXTING. NUEVAS FRONTERAS ABIERTAS DEL DERECHO PENAL: EL CASO DE ESPAÑA**

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#### **ABSTRACT**

This paper tries to investigate and analyze new crimes such as sexting, cyberbullying and bullying in a comparative way. Cyberbulism is in fact a term which includes a vast range of different behaviors, which many times do not cover criminal figures punishable by any criminal code at national or international level. These are new open frontiers, elements that must necessarily be kept in mind when one comes to the legal side of the issue. In spite of scientific divergences, the aforementioned multiplicity can be brought to unity by recognizing the presence of recurring elements such as aggression, intentionality, repetitiveness, together with the obvious use of electronic and digital communication means. A very important aspect on these figures and new phenomena is the relationship with minors and legal protection at an international and European level in this area of criminal law.

#### **RESUMEN**

Este artículo trata de investigar y analizar nuevos delitos como sexting, cyberbullying y bullying de manera comparativa. El ciberbulismo es, de hecho, un término que incluye una amplia gama de comportamientos diferentes, que muchas veces no cubren figuras criminales castigadas por ningún código penal a nivel nacional o internacional. Estas son nuevas fronteras abiertas, elementos que necesariamente deben tenerse en cuenta cuando se trata del lado legal del problema. A pesar de las divergencias científicas, la multiplicidad mencionada se puede unir al reconocer la presencia de elementos recurrentes como la agresión, la intencionalidad, la

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repetitividad, junto con el uso obvio de los medios de comunicación electrónicos y digitales. Un aspecto muy importante en estas cifras y nuevos fenómenos es la relación con los menores y la protección legal a nivel internacional y europeo en esta área del derecho penal.

#### **KEY WORDS**

Bullying, sexting, comparative criminal law, cyberbullying, digital technology, European criminal law.

#### **PALABRAS CLAVE**

Bullying, sexting, derecho penal comparado, ciberacoso, tecnología digital, derecho penal europeo.

#### **SUMMARY**

**1. FROM BULLYING TO CYBERBULLYING: WORRYING NEW REALITY OR MERE DIGITAL TRANSLATION?; -2.SEXTING BETWEEN MINORS: HARMLESS PRACTICE OR DEVIANT BEHAVIOR?; 3.CYBERBULLYING IN EUROPEAN POLICIES TO COMBAT ONLINE DANGERS; -4.DIRECTIVE 93/2011 IN THE FOOTSTEPS OF THE LANZAROTE CONVENTION; -5.(FOLLOWS) THE SPANISH CONTEXT. THE PROGRESSIVE RECOGNITION OF THE (CYBER) ACOSO (ESCOLAR) IN THE SPANISH LEGAL SYSTEM; - 6.THE ACOSO BETWEEN MINORS IN THE COMPLICATED INTERTWINING BETWEEN PREVENTATIVE-EDUCATIONAL APPROACH AND CRIMINALIZATION CLAIMS; - 7.CYBERBULLYING AND CRIMINAL CODE: BETWEEN THREATS TO MORAL INTEGRITY, PERMANENT ACOSO AND DESCUBRIMIENTO DE SECRETOS; -8.SEXTING AS PORNOGRAPHIC CONDUCT. THE RELATIONSHIP WITH ART. 183 TER OF THE CRIMINAL CODE INTRODUCED BY THE 2010 REFORM; -9.THE REFORM INTERVENTION OF LEY ORGANICA 1/2015 AND THE NEW ARTICLE 197.7, BETWEEN LANDING POINTS AND CONTROVERSIAL ISSUES; -10.CONCLUDING REMARKS; -11.BIBLIOGRAPHY.**

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**1. DEL BULLYING AL CIBERBULLYING. 2. SEXTING ENTRE MENORES. 3. CIBERBULLYING EN LAS POLÍTICAS EUROPEAS PARA COMBATIR PELIGROS VIRTUALES. 4. DIRECTIVA 93/2911 Y LOS PASOS DE LA CONVENCION DE LANZAROTE. 5. EL CONTEXTO ESPAÑOL. 6. EL ACOSO ENTRE MENORES. 7. CIBERBULLYING Y CÓDIGO PENAL. 8. SEXTING COMO CONDUCTA PORNOGRÁFICA. 9. LA REFORMA DE 2015. 10. CONCLUSIONES. 11. BIBLIOGRAFÍA**

#### **1. FROM BULLYING TO CYBERBULLYING: WORRYING NEW REALITY OR MERE DIGITAL TRANSLATION?**

Bullying represents one of the most pervasive manifestations of hostility among

minors<sup>2</sup>, which has always accompanied the context and the educational institution and not still remains at the center of the scientific debate, without a universally recognized definitory label<sup>3</sup>.

Pioneering in this sense is certainly the research conducted by Olweus, who in 1993 framed the phenomenon in those situations in which the victim is repeatedly exposed to negative actions by one or more students<sup>4</sup>. Various definitions<sup>5</sup> followed, which, although based on the studies of the Norwegian researcher, ended up detaching themselves<sup>6</sup>.

The starting point of the scientific investigation on the subject can be found in the study conducted in 2000 by researchers from the University of New Hampshire concerning bullying cases perpetrated by e-mail, chat rooms and instant messaging services<sup>7</sup>. As soon as children begin to use the Internet in their daily lives, new

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<sup>2</sup>JONES S. E., MANSTEAD A. S. R., LIVINGSTONE A. G., Ganging up or sticking together? Group processes and children's responses to text-message bullying, in *British Journal of Psychology*, 2011. SHARIFF S., *Cyberbullying Issues and solutions for the school, the classroom and the home*, 2008. R., *Cyberbullying. Approaches, Consequences and Interventions*, Cambridge University Press, Cambridge, 2016.

<sup>3</sup>KOWALSKI R., LIMBER S., AGATSON P., *Cyber bullying: Bullying in the digital age*, Wiley & Sons, New York, 2008.

<sup>4</sup>According to Olweus Bullying would occur in cases where: “a student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students (...) it is a negative action when someone intentionally inflicts, or attempts to inflict, injury or discomfort upon another (...)”. In this regard, it must be said that in the first studies conducted by Olweus the term bullying did not appear as much as that of mobbing. In fact, attention to time was focused on aggressive attacks by groups of children against individuals. Only when the Norwegian researcher realized that it was rather a phenomenon that develops from a peer-to-peer perspective did the term bullying become prevalent, completely supplanting the other. OLWEUS D. *Bullying at school: What we know and what we can do*, Blackwell Publishing, London, 1993.

<sup>5</sup>Farrington describes as: “repeated oppression of a less powerful person, physical or psychological, by a more powerful person (...) the absence of provocation by the victim” (FARRINGTON D.P., *Understanding and preventing bullying*, in *Criminal Justice*, 4 (4), 1993. ESPELAGE D.L., *Understanding and preventing bullying and sexual harassment in school*, in HARRIS K.R., GRAHAM, S., URDAN, GRAHAM, T., ZEIDNER M., *Apa handbooks in psychology*, American Psychology Association, 2012, pp. 394ss. ZYCH, I., FARRINGTON D.P., LLORENT V.J., *Protecting children against bylling and its consequences*, Springer, Berlin, 2017. ELLIS L., FARRINGTON D.P., HOSKIN A.W., *Handbook of crime correlates*, Academic Press, Cambridge, Massachussets, 2019.). “the systematic abuse of power” (SMITH P.K., SHARP S., *School bullying: Insights and perspectives*, ed. Routledge, London, 1994. SMITH, P.K., *School bylling*, in *Sociologia, Problemas e Práticas*, 71, 2013, pp. 84ss. CATALANO, R., JUNGER-TAS J., MORITA Y., *The nature of school bullying: A cross national perspective*, ed. Routledge, London & New York, 2014. SMITH, P.K., KWAK, K., TODA Y., *School bullying in different cultures. Eastern and western perspectives*, Cambridge University Press, Cambridge, 2016). Rigby affirms that: “bullying involves a desire to hurt another, a harmful action, a power imbalance, repetition, an unjust use of power, evident enjoyment by the aggressor and generally a sense of being oppressed on the part of the victim (...)”. (RIGBY K., *New perspectives on bullying*, K. Kingsley Publishers, London, 2002.).

<sup>6</sup>RIVERS I., SMITH P.K., *Types of bullying behaviour and their correlates*, in *Aggressive Behaviour*, 1994.

<sup>7</sup>JONES M. L., KMITCHELL K.J., FINKELHOR D., *Online harassment in context: Trends from three Youth Internet Safety Survey (2000, 2005, 2010)*, in *Psychology of Violence*, 3 (1), 2013, 53-69. MITCHELL, K.J., JONES L.M., *Cyberbullying and bullying must be student within a broader peer victimization framework*, in *Journal of Adolescent Health*, 56 (5), 2015, pp. 476ss. SALEH F., GRUDZINSKAS, A., JUDGE A., *Adolescent sexual behaviour in the digital age. Considerations for clinicians, legal professionals and educators*, Oxford University Press, Oxford, 2014. MILOSEVIC T., LIVINGSTONE, *Protecting children online. Cybebullying policies of social media companies*, MIT Press, Massachusetts, 2017. RICHARDS T.N., MARCUM C.D., *Sexual victimization. Then and now*, Sage Publications, New York, 2014. HOLT T.H.,

behaviors begin to emerge in cyberspace, immediately attracting strong media attention<sup>8</sup>. Thus was born a new linguistic label: Cyberbullying, used for the first time differently the social role of the victim. Different is the case in which the ultimate purpose is that of social exclusion or, if bullying is carried out through open attacks on the victim, they detect behaviors such as hitting, pushing, beating. In all cases, the impact of bullying can be devastating, causing tragic consequences. A distinction is then made between cases of direct and indirect bullying. In the first hypothesis, a face-to-face interaction takes place between the bully and the victim, which is present when the behavior takes place and is immediately aware of what is happening.

If the existence of a certain degree of overlap between the two phenomena cannot certainly be hidden, the term bullying does not appear as an appropriate category for the ever-changing digital world. Cyberbullying is omnipresent, anonymous, extended with respect to physical distances, difficult to identify, variable in duration, with unknown potential. The substantial differences between them consequently make cyberbullying emerge as a distinct phenomenon, which needs specific and increasing attention from scientific literature and beyond<sup>9</sup>.

To characterize cyberbullying, in spite of other forms of online aggression, is the peer-to-peer dialectic, which involves only and exclusively minors<sup>10</sup>, who can take on

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Examining perceptions of online harassment among constables in England and Wales, in *International Journal of Cybersecurity Intelligence & Cybercrime*, 2 (1), 2019, pp. 27ss.

<sup>8</sup>JONES M. L., MITCHELL K.J., FINKELHOR D., Online harassment in context: Trends from three youth internet safety survey (2000, 2005, 2010), op., cit.,

<sup>9</sup>PATCHIN J. W., HINDUJA S., Measuring cyberbullying: Implications for research, in *Aggression and Violent Behavior*, 23, 2015. STICCA F., PERREN S., Is cyberbullying worse than traditional bullying? Examining the differential roles of medium, publicity, and anonymity for the perceived severity of bullying, in *Journal of Youth and Adolescence*, 42, 2013, pp. 739-750. BALDRY A.C., BLAYA C., FARRINGTON D.P., International perspectives on cyberbullying. Prevalence, risk factors and interventions, ed. Springer, Berlin, 2018. BETTS L.R., Cyberbullying. Approaches, consequences and interventions, ed. Palgrave Macmillan, London, 2016. VAN HASSELT V.B., BOURKE M.L., Handbook of behavioral criminology, ed. Springer, Berlin, 2018. EXTREMERA N., QUINTANA ORTOS C., MÉRIDA-LÓPEZ S., REY L., Cyberbullying victimization, self-esteem and suicidal ideation in adolescence: Does emotional intelligence play a buffering role?, in *Front Psychology*, 9, 2018, pp. 369ss.

<sup>10</sup>CASSIDY W., JACKSON M. BROWN K.N., Sticks and stones can break my bones but how can pixels hurt me, in *School Psychology International*, 30 (4), 2009, 383-402). Equally, there is no clear data on any gender differences that may arise. In fact, if some studies tend to see a negative imbalance towards the female gender that would be more often the victim (for example HINDUJA S., PATCHIN J. W., *Bullying beyond the schoolyard: Preventing and responding to cyberbullying*, Sage Publications, Thousand Oaks, 2009. RAWLINGS V., *Gender regulation violences and social hierarchies in school: Sluts, gays and scrubs*, ed. Springer, Berlin, 2016. CUNHA C., MANUELA M., *Handbook of research on digital crime, cyberspace security and information assurance*, IGI Global, US, 2014. BLACKBURN, LINLIN CHEN I., PFEFFER R., *Emerging trends in cyber ethics and education*, IGI Global, US, 2019. Contra: (LI Q., *Cyberbullying in schools: A research of gender differences*, in *School Psychology International*, 27 (2), 2006, pp. 157-170. LI Q., *New bottle but old wine: A research of cyberbullying in schools*, in *Computers in Human Behavior*, 23 (4), 2007, pp. 1777-1791). Instead, what seems to emerge clearly is a differentiation in the approach to the phenomenon, mainly direct in the case of males, indirect in females. (HINDUJA S., PATCHIN J. W., *Cyberbullying: An exploratory analysis of factors related to offending and victimization*, in *Deviant Behavior*, 29 (2), 2008, pp. 129-156. PATCHIN J.W., HINDUJA S., *Cyberbullying among adolescents: Implications for empirical research*, in *Journal of adolescent Health*, 53 (4), 2013, pp. 434ss. ROBERSON C., *Routledge handbook on victims issues in criminal justice*, ed. Routledge, London & New York, 2017. LIVAZOVIĆ G., HAM E., *Cyberbullying and emotional distress in adolescents. The importance of family, peers and school*, in *Heliyon*, 5 (6), 2019).

different roles within the conflict dynamics<sup>11</sup>. Roles that in turn change significantly compared to the offline variant. The bully, for example, no longer necessarily presents those elements of physical or social prevalence proper to bullying. The powerful tool of anonymity has allowed a reversal of traditional positions, well being now able to be bully who in the physical world would certainly have been a victim of the bullying of others. Cyberbullying ends up detaching itself with its own conceptual autonomy even from the more general cyber-aggression.

Cyberbullying, like other forms of online aggression, can manifest itself through the most diverse technological means, such as computers, mobile phones (smartphones) and above all the most varied social media platforms, whose growing popularity has contributed to increasing cases of cyberbullying worldwide<sup>12</sup>. This close link with the technological reality entails an inevitable influence on the evolutionary level of the phenomenon, clearly representing it both as a medium and as a place of commission. In any case, the technological medium also detects the consequences deriving from it (including the meaning of their actions), accidental on the three traditional elements of repetition, aggression and imbalance of power, to the point of the identification trait of the new phenomenon<sup>13</sup>. Furthermore, the possibility of anonymity<sup>14</sup>. makes it more pervasive. Unlike traditional bullying that is perpetrated by a person known in a limited audience, in these cases the true identity of the bully may be unknown to the victim<sup>15</sup>. With regard to repetition<sup>16</sup>, it should be distinguished between direct cyberbullying, which occurs in the private arena where electronic communications are directed only to the victim and repetition takes on the same contours as in traditional bullying, and indirect cyberbullying, in which, instead, electronic communication sent directly to the victim is forwarded to other people. In such cases, the material can remain indefinitely in the public IT arena, can be viewed

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<sup>11</sup>In this regard, six different categories have been identified: bullies (entitlement bullies), victims of bullies (targets of entitlement bullies), avengers (retaliators), that is, victims of bullying that uses the Internet to make up for the injuries suffered, the victims of the latter (victims of retaliators), the spectators who participated in the problem (bystanders who are part of the problem) or the solution (bystanders who are part of the solution). TAR C.E, PADGETT S., RODEN J., Cyberbullying: A review of the literature, in *Universal Journal of Educational Research*, 1, 2013, pp. 5ss.

<sup>12</sup>GILLESPIE A. A., Cyberbullying and harassment of teenagers: The legal response, in *Journal of Social Welfare and Family Law*, 28 (2), 2006, 124.

<sup>13</sup>KOWALSKI R., GIUMETTI G.W., SCHROEDER A.N., LATTANNER M.R., Bullying in the digital age: A critical review and meta-analysis of cyberbullying research among youth, in *Psychological Bulletin*, 140 (4), 2014.

<sup>14</sup>HINDUJA S., PATCHIN J. W., Bullying beyond the schoolyard: Preventing and responding to cyberbullying, op. cit.,

<sup>15</sup>THOMAS H.J., CONNOR P., SCOTT J.G., Integrating traditional bullying and cyberbullying: Challenges of definition and measurement in adolescents-A review, in *Education Psychology Review*, 27 (1), 2015.

<sup>16</sup>DOOLEY J. J., PYZALSKI J. Cross, D., Cyberbullying versus face-to-face bullying: A theoretical and conceptual review, in *Journal of Psychology*, 217 (4), 2009, which is affirmed that: "the use of information and communication technologies to carry out a series of acts as in the case of direct bullying, or an act as in the case of indirect cyberbullying, intended to harm another (the victim) who cannot easily defend him or herself ". LANGOS C., Cyberbullying: The challenge to define, in *Cyberpsychology Behaviour and Social Networking*, 15 (6), 2012. SCHULTZE-KRUMBHOLZ, A., HESS, M., PFETSCH, J., SCHEITHAUER, H., Who is involved in cyberbullying? Latent class analysis of cyberbullying roles and their associations with aggression, self-esteem, and empathy, in *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, 12 (4), 2018.



publicly countless times, can be distributed, saved and republished at a later time. In doing so, the material is pushed out of the private domain, "escaping" from the bully's sphere of control.

Equally discussed is also the aspect relating to the imbalance of power, considered by some to be completely neutralized by technology<sup>17</sup>, by others, however, strongly amplified<sup>18</sup>. Beyond the different lines of interpretation, it clearly emerges that the unequal and coercive power, which distinguishes bullying from other forms of aggression, takes on a new role in cyberspace. It is no longer tied to a condition of physical superiority but rather to knowledge of the medium and its potential for anonymity<sup>19</sup> or in any case in the ability to humiliate and hit the victim on a large scale. Anonymity is in fact a feature that cyberbullying does not share with its traditional variant<sup>20</sup>.

## 2. SEXTING BETWEEN MINORS: HARMLESS PRACTICE OR DEVIANT BEHAVIOR?

The term sexting, created in the journalistic field around the early 2000s by the juxtaposition of the Anglo-Saxon terms sex (sex) and texting (messaging)<sup>21</sup> to indicate the exchange of messages with a sexual background between adults, is now used almost exclusively to refer to sexual practices engaging minors<sup>22</sup>.

Although the exchange of messages with sexual content cannot be said to be

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<sup>17</sup>LAPIDOT-LEFLER N., DOLEY-COHEN M., Comparing cyberbullying and school bullying among school students: Prevalence, gender, and grade level differences, in *Social Psychology of Education*, 18 (1), 2015. BUCKELS E. E., TRAPNELL P. D., PAULHUS D. L., Trolls just want to have fun, in *Personality and Individual Differences*, 67, 2014, 97-102. ZEZULKA, LAUREN A., SEIGFRIED-SPELLAR, K.C., Differentiating cyberbullies and internet trolls by personality characteristics and self-esteem, in *Journal of Digital Forensics, Security and Law*, 11 (3), 2016. SHIN H.H., BRAITWAITE V., AHMED E., Cyber and face to face bullying: Who crosses over?, in *Social Psychology of Education*, 19, 2016, pp. 538ss. FICHMAN P., SANFILIPPO M.R., *Online trolling and its perpetrators: Under the cyberbridge*, Rowman & Littlefield, New York, 2016.

<sup>18</sup>RASKAUSKAS J., STOLZ A.D., Involvement in traditional and electronic bullying among adolescents, in *Developmental Psychology*, 43 (3), 2007. GULLOTTA T.P., PLANT R.W., EVANS M.A., *Handbook of adolescent behavioral problems: Evidence-based approaches to prevention and treatment*, ed. Springer, Berlin, 2014.

<sup>19</sup>SLONJE R., SMITH P.K., FRISEN A., The nature of cyberbullying, and strategies for prevention, in *Computers in Human Behavior*, 29 (1), 2013

<sup>20</sup>DOOLEY J. J., PYZALSKI J. Cross, D., Cyberbullying versus face-to-face bullying: A theoretical and conceptual review, op. cit.,

<sup>21</sup>CROFTS T., LEE M., MCGOVERN A., MILIVIOJEVIC S., *Sexting and young people*, ed Palgrave, Basingstoke, 2015. MARTELLOZZO E., JANE E.C., *Cybercrime and its victims*, Routledge, London & New York, 2017. MCGOVERN A., CROFTS T., LEE M., MILIVIOJEVIC S., Media, legal and young peoples discourses around sexting, in *Global Studies of Childhood*, 6 (4), 2016, pp. 430ss. CARRINGTON K., HOGG R., SCOTT J., *The palgrave handbook of criminology and the global south*, Palgrave Macmillan, London, 2018. ADORJAN M.C., RICCIARDELLI R., *Cyber risk and youth: Digital citizenship, privacy and surveillance*, ed. Routledge, London & New York, 2018.

<sup>22</sup>JAISHANKAR K., Sexting: A new form of victimless crime?, in *International Journal of Cyber Criminology*, 3 (1), 2009. MCALISTER, R. New technologies, "risk" and sexual offending, in MCCARTAN K. (eds) *Responding to sexual offending*, Palgrave Macmillan, London, 2016. JAISHANKAR K., RONEL N., *Global criminology: Crime and victimization in a globalized era*, CRC Press, New York, 2013. LANGMIA K., TYREE T.C.M., *Social media. Culture and identity*, Lexington Books, London, 2016, pp. 61ss. KROHN M.D., HENDRIX N., PENLY HALL G., *Handbook on crime and deviance*, ed. Springer, Berlin, 2019.

something unknown<sup>23</sup>, it must be recognized as an unprecedented phenomenon, precisely in consideration of the fact that now, in globalized society, content can be produced, transmitted, reproduced and re-edited with extreme ease, being able to move even without the consent or approval of the person portrayed<sup>24</sup>.

Thus only in recent times has sexting been subjected to evaluation by the scientific literature, whose research is still in an embryonic phase. This translates into a conceptual uncertainty, which is already evident at the definitory level<sup>25</sup>.

With regard to the analysis of the prevalence of the phenomenon in relation to its use for sexual encounters<sup>26</sup>, they elaborated limited definitions for sending text messages with erotic and/or sexual content. A necessary expansion of the field of investigation followed, as a consequence of the change in the use of technology by users<sup>27</sup>. These practices were considered with prevailing reference to those digital contents in the form of images or videos, sexually suggestive or explicit, distributed through e-mails, messages, social networks.

However, the pin of the phenomenon is the element of consensuality, which concerns the origin of the content that can be produced by the subject himself or by third parties. The sending of this type of content takes place with a voluntary character, i.e. it is assumed that the subjects involved, be minors or adults, produce the aforementioned sexual erotic content in a voluntary manner, an aspect that underlines the private nature of the phenomenon and, therefore, the expectation of confidentiality of those who share them. An element that assumes a more problematic character, raising in this case the main legal legal implications, when only minors of age are involved<sup>28</sup>.

In fact, although these practices take place mostly within the confines of an intimate relationship (or a desired relationship), the adolescents who put it in place are aware that the contents thus produced are often shared and exchanged with other peers<sup>29</sup>.

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<sup>23</sup>AGUSTINA J., ¿Menores infractores o víctimas de pornografía infantil?: respuestas legales e hipótesis criminológicas ante el Sexting, in *Revista Electrónica de Ciencia Penal y Criminología*, 12, 2010. VANDEN ABEELE M., CAMPBELL S.W., EGGERMONT S., ROE K, Sexting, mobile porn use and peer group dynamics: Boys' and girls? Self-perceived popularity, need for popularity and perceived peer pressure, in *Media Psychology*, 17 (1), 2014, pp. 34ss.

<sup>24</sup>SACCO D., ARGURDIN R., MAGUIRE J., TALLON K., Sexting: Youth practices and legal implications, in The Berkman Center for Internet & Society at Harvard University, 22 June 2010. MARTINEZ PRATHER K., VANLIVER D.M., Sexting among teenagers in the United States: A retrospective analysis of identifying motivating factors, potential targets and the role of a capable guardian, in *International Journal of Cyber Criminology*, 8 (1), 2014, pp. 24ss.

<sup>25</sup>BARRENSE-DIAS Y., BERTCHTOLD A., SURIS J.C., AKRE C., Sexting and the definition issue, in *Journal of Adolescent Health*, 61 (5), 2017, pp. 545ss. BIANCHI D., MORELLI M., BAIOTTO R., CATTELINO E., LAGHI F., CHIRUMBOLO A., Family functioning patterns predict teenage girls sexting, in *International Journal of Behavioral Development*, 43 (6), 2019, pp. 509ss. DODAJ A., SESAR K., Sexting and emotional regulating strategies among young adults, in *Mediterranean Journal of Clinical Psychology*, 7 (1), 2019.

<sup>26</sup>ALBURY K, CRAWFORD K., Sexting, consent and young people's ethics: Beyond Megan's Story, in *Continuum*, 26 (3), 2012. ATTWOOD F., *Sex media*, J. Wiley & Sons, New York, 2017.

<sup>27</sup>COOPER K., QUAYLE E., JONSSON, L., GORAN C, Adolescents and self-taken sexual images: A review of the literature, in *Computers in Human Behavior*, 55, 2016.

<sup>28</sup>KLETTKE B., HALLFORD D. J., MELLOR D. J., Sexting prevalence and correlates: A systematic literature review, in *Clinical Psychology Review*, 34 (1), 2014.

<sup>29</sup>LIVINGSTONE S., GORZIG A., When adolescents receive sexual messages on the internet: Explaining

This finding prompts us to ask ourselves what motivations move today's young people towards adopting such risky behaviors. Even in this respect, there is no clear answer, as the scientific literature has elaborated different interpretative hypotheses<sup>30</sup>. There are those who believe that there must be a confirmation of the change in socio-affective relationships influenced precisely by the constant use of digital media<sup>31</sup>. Sexting would be nothing more than an expressive form of the sexual relationship, which is used to stimulate the attention of the partner (present or future) in order to impress him and thus retain / induce him within the relationship. Obviously, it is clear how this interpretative option is based on an entirely internal perspective, limited to relational dynamics<sup>32</sup>.

Sexting is situated between pornography and photography, between the appropriate and inappropriate<sup>33</sup>, a condition that has given rise to a heated debate not only in the media, but also in the social and legal spheres, which has taken on the contours of social panic, thus generating a wide range of conflicting sentiments that went beyond mere judgments of inappropriateness to the point of signaling the dangers of criminalization in child pornography terms<sup>34</sup>, as happened in many countries, and thus raising the vexatious and controversial question of how the right should be confronted with these new phenomena<sup>35</sup>. This is clearly evident already in correspondence with the first court cases, which emerged on the US scene in the mid-2000s. Starting from the *A.H. v. State of Florida*<sup>36</sup>, which in 2007 had highlighted how

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experiences of risk and harm, in *Computers in Human Behavior*, 33, 2014, pp. 9ss. LIVINGSTONE S.M., HADDON L., GORZIG A., *Children risk and safety on the internet: Research and policy challenges in comparative perspective*, Policy Press, Bristol, 2012. GASSÓ A.M., *Sexting, health and victimization among adolescents*, in *International Journal of Environment Research and Public Health*, 16 (3), 2019, pp. 2366ss. MADIGAN S., *Prevalence of multiple forms of sexting behavior among youth. A systematic review and meta analysis*, in *Jama Pediatrics*, 172 (4), 2018, pp. 329ss. WACHS S., and others, *A routine activity approach to understand cybergrooming victimization among adolescents from six countries*, in *Cyberpsychology, Behaviour and Social Networking*, 23, 2020.

<sup>30</sup>COOPER K., QUAYLE E., JONSSON, L., GORAN C., *Adolescents and self-taken sexual images: A review of the literature*, op. cit.,

<sup>31</sup>LENHART A., *Teens and sexting. How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, Palgrave Macmillan, London, 2017.

<sup>32</sup>BLYTH C., ROBERTS L.D., *Public attitudes towards penalties for sexting by minors*, in *Current Issues in Criminal Justice*, 26 (2), 2014.

<sup>33</sup>HAWAKES G., DUNE T., *Introduction: Narratives of the sexual child: Shared themes and shared challenges*, in *Sexualities*, 16 (5-6), 2013, pp. 624ss.

<sup>34</sup>WILLARD N., *Sexting and youth: Achieving a rational response*, in *Journal of Social Sciences*, 6 (4), 2010. SHARIFF S., *Sexting and cyberbullying: Defining the line for digitally empowered kids*, Cambridge University Press, Cambridge, 2014.

<sup>35</sup>LIEVENS E., *Bullying and sexting in social networks: Protecting minors from criminal acts or empowering minors to cope with risky behaviour?* in *International Journal of Crime, Law & Justice*, 42, 2014. SMITH P.K., STEFFGEN G., *Cyberbullying through the new media. Findings from an international network*, Psychology Press, New York, 2013. KUROSU M., *Human computer interaction. Design practice in contemporary societies*, ed. Springer, Berlin, 2019. VAN ROYEN K., POEZS K., DAELEMENS W., VANDEBOSCH H., *Automatic monitoring of cyberbullying on social networking sites. From technological feasibility to desirability*, in *Telematics and Informatics*, 32 (1), 2015, pp. 90ss.

<sup>36</sup>*A.H. v. State of Florida*, Dist. Ct. App. 2007. BIRKHOLO, M.H., *Freud on the court: Re-interpreting sexting & child pornography laws*, in *Fordham Intellectual Property Media & Entertainment Law Journal*, 23, 2013, pp. 294ss. SHARIFF S., *Sexting and cyberbullying*, Cambridge University Press, Cambridge, 2015. ANGELIDES S., *The fear of child sexuality. Young people, sex and agency*, University of Chicago Press, Chicago, 2019. COUPET S.M., MARRUS E., *Children, sexualiuty and the law*, New York University Press,



the phenomenon raises, *ex multis*, a contrast between the legitimate expectation of confidentiality of the child and therefore his right to maintain sexual relations and the interest pursued by the State and directed the protection of the sexual allowance of the minor, passing through the *Miller v. Skumanick* case of 2009<sup>37</sup>, which, instead, had placed the emphasis on the freedom of expression of the minor even in the sexual sphere.

One wonders, however, whether this profile relates to conduct that would be convicted of the crime of production of child pornography, pursuant to section 827.71 of the Florida penal code. Specifically, the conduct was assimilated to the action of promoting a sexual performance by a minor, through the production, direction or promotion of an inclusive representation of a sexual conduct of a minor of eighteen years, heavily sanctioned. A. H. appealing on appeal against the first instance sentence, he argued that it was detrimental to his right to privacy, a right which is expressly mentioned in the Florida constitutional charter, unlike in other States. The appeal judges, however, considered this claim without foundation since the contents had been taken up by two minors and that, although the same had remained within the couple, there was a risk that this protected area would come out when one of the two minors had decided to share them with third parties. Although Florida constitutionally protects the right to privacy, this should be protected in more limited terms if we are dealing with minors, precisely because, given the immaturity that characterizes this phase of life, they would be more led to unstable relationships. For this reason, therefore, the state interest in protecting them from the risk of their exploitation should prevail, in this case also highlighted by the possibility that a hacker, who entered the computer system of the minor, could become aware of the intimate images produced for then disclose them inside, for example, the pedophile circuit.

The involvement of the adult was mainly identified in the solicitation directed to the minor to send images with sexual content. A conduct that is now referred to as grooming, that is, enticement and which as such undoubtedly finds its legal relevance, being sanctioned by the system. Otherwise, when everything takes place between minors, sexting became aggravated in the hypotheses in the face of an intent to harm or reckless misuse. In the first case, it meant the presence of criminal, abusive behavior, in addition to the creation, sending and possession of sexual material produced by the minor. This category included different situations ranging from sexual abuse by a minor, to the hypothesis of threat, extortion or deception, up to those situations of interpersonal conflict between ex-partners or ex-friends. Instead, the reckless misuse hypotheses did not indicate openly criminal or abusive situations but

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New York, 2015, pp. 156ss. KOSKELA H., MACGREGOR WISE J., *New visualities, new technologies: The new extasy of communication*, Ashgate Publishing, London, 2013.

<sup>37</sup>Otherwise the case (*Miller v. Skumanick*, M.D. Pa. 2009) had concerned the case of three young Pennsylvania teenagers who had photographed themselves naked, therefore not in carrying out sexual acts. These contents were then circulated among peers. Therefore, a debate began on the child pornography nature of the contents and therefore on the freedom of expression of the young women in realizing them. For further analysis see also: STARRANT S., *Gender, sex and politics. In the streets and between the sheets in the 21<sup>st</sup> century*, Routledge, London & New York, 2015. HAFNER C.A., WAGNER A., BHATIA V.K., *Transparency power and control: Perspectives on legal communication*, Routledge, London & New York, 2016, pp. 155ss. SALEH F., GRUDZINSKAS A., JUDGE, A., *Adolescent sexual behavior in the digital age. Considerations for clinicians, legal professionals and educators*, op. cit.,

rather those images taken or sent without the voluntary or conscious participation of the minor portrait.

Experimental sexting was identified, residually, in all those hypotheses in which it could not be said to be aggravated, that is, in which there is the creation and sending of sexual images produced by minors, without the involvement of an adult, the intent to harm or the reckless misuse. Three different sub-categories were equally distinguished. The first included the so-called romantic episodes, in which minors involved in a love relationship produced the material for themselves or for each other, without any desire to distribute it beyond the couple's borders. The second identified the images produced to be sent to peers outside of a sentimental relationship dynamic and for a specific purpose, namely to attract the sexual attention of third parties. Finally, the third category ended up representing a miscellany of options, in which different purposes were identified, but which had not found a precise identification.

In this sense, the use of tendentious terms was emphasized, which built the identification of the conduct and their subdivision on the basis of the underlying reasons, thus sinning in terms of objectivity<sup>38</sup>. Second, others, however, there was a big absentee: Wolak and Finkelhor had not recognized any value to the consent, which, instead, should have been considered just as a distinctive note<sup>39</sup>.

On the basis of the criticisms made, a different classification from the more agile forms was proposed, based on the binary primary sexting-secondary sexting<sup>40</sup>. Developed by Calvert two years earlier, in 2009, it has found its fortune only in recent times, by virtue of its intrinsic neutrality<sup>41</sup>. The phenomenon is divided into hypotheses in which the sexually explicit contents are sent between two subjects and not subsequently forwarded to third parties (primary) by those, however, in which the content is disseminated to others (secondary). A central role is recognized in the consensus that in the first case is supposed to be present, while it appears absent in the second.

The term revenge or revenge ends up circumscribing the reasons that would be underlying it, causing many problems on the interpretative level of the same, especially the legal terms<sup>42</sup>, when, however, the causative range appears to be much wider,

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<sup>38</sup>MORELLI M., BIANCHI M.D., BAIOTTO R., PEZZUTI L., CHIRUMBOLO A., Not-allowed sharing of sexts and dating violence from the perpetrator's perspective: The moderation role of sexism, in *Computers in Human Behaviour*, 56, 2016. DEKESEREDY W.S., DRAGIEWICZ M., *Routledge handbook of critical criminology*, Routledge, London & New York, 2018.

<sup>39</sup>HASINOFF A., *Sexting panic: Rethinking criminalization, privacy, and consent*, University of Illinois Press, 2015.

<sup>40</sup>BLYTH C., ROBERTS L.D., *Public attitudes towards penalties for sexting by minors*, op. cit.,

<sup>41</sup>CALVERT C., Sex, cell phones, privacy, and the first amendment: When children become child pornographers and the Lolita effect undermines the law, in *Common Law Conspectus. Journal of Communications Law and Policy*, 18, 2009, pp. 18ss. MCLAUGHLIN, J.H., Exploring the first amendment rights of teens in relationship to sexting and censorship, in *University of Michigan Journal of Law Reform*, 45, 2012, pp. 322ss. FRADELLA H.F., SUMNER J.M., *Sex, sexuality, law and (in)justice*, ed. Routledge, London & New York, 2016.

<sup>42</sup>KITCHEN A.N., The need to criminalize revenge porn: How a law protecting victims can avoid running afoul of the first amendment, in *Chicago-Kent Law Review*, 90, 2015, pp. 250ss. MITCHELL, K.A., The privacy hierarchy: A comparative analysis of the intimate privacy protection act vs. the geolocation privacy and surveillance act, in *University of Miami Law Review*, 73, 2019, pp. 574ss. LAGESON S.E., MCELRATH S., PALMER K.E., Gendered public support for criminalizing "revenge porn", in *Feminist Criminology*, 14 (5), 2019, pp. 562ss.

sometimes perhaps even too much<sup>43</sup>. Equally also the same term porn, indicative of pornographic can be defined equally problematic<sup>44</sup>. Without considering how much the same revenge porn label can be considered more than demeaning for the victims, to which is added a further victimization to endure<sup>45</sup>. This expression then does not capture one of the main aspects of the phenomenon, namely the legitimate expectation of privacy present for the victims, who place their trust in their partner or in any case in the recipient of the shared content, and which obviously is absent from what is commonly considered pornography<sup>46</sup>. No specific weight is recognized for the element of consent which nevertheless plays a decisive role, since the phenomenon must be divided into two different steps: The first involves the consensual production

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<sup>43</sup>LICHTER S., Unwanted exposure: Civil and criminal liability for revenge porn hosts and posters, in *Harvard Journal of Law & Technologies*, 2013. GOLDMAN E., JIN A., Judicial resolution of nonconsensual pornography dissemination cases, in *I/S: A Journal of Law and Policy for the Information Society*, 14 (2), 2018, pp. 288ss.

<sup>44</sup>The reference is here to those who believe that the hypotheses in which the images were obtained through hacking are also to be traced back to this hat. FRANKS M.A., Why we need a federal criminal law response to revenge porn, in *Concurring Opinions*, 2013. Others argue that misogyny or the economic advantage could be valid reasons. KEATS CITRON D., FRANKS, M.A., Criminalizing revenge porn, in *Wake Forest Law Review*, 49, 2014, pp. 348ss. FRANKS M.A., “Revenge porn” reform: A view from the front lines, in *Florida Law Review*, 60, 2017, pp. 1254ss. STOKES J.K., The indecent internet: Resisting unwarranted internet exceptionalism in combating revenge porn, in *Berkeley Technology Law Journal*, 29, 2014, pp. 932ss. BARTOW A., Internet defamation as profit center: the monetization of online harassment, in *Harvard Journal of Law Gender*, 32 (2), 2009, pp. 384ss. LIPTON, J. D., Repairing online reputation: A new multi-modal regulatory approach, in *Akron Law Publications*, 138, 2010, pp. 148ss. MARCUM C.D., *Cyber crime*, Wolters Kluwer, Alphen Aan Den Rijn, 2019. DÖRR, D., WEAVER R.L., *The right to privacy in the light of media convergence: Perspectives from three continents*, W. De Gruyter, Berlin, 2012, pp. 332ss. COHEN-ALMAGOR R., *Confronting the internet's dark side. Moral and social responsibility on the free highway*, Cambridge University Press, Cambridge, 2015, pp. 88ss. WITZLEB N., LINDSAY D., PATERSON M., *Emerging challenges in privacy law: Comparative perspectives*, Cambridge University Press, Cambridge, 2014. REAGLE J.M., *Reading the comments. Likers, haters and manipulators at the bottom of the web*, MIT Press, Massachusetts, 2015. DRAPER N.A., *The identity trade: Selling privacy and reputation online*, New York University Press, New York, 2019. KUZMA J., *Empirical study of cyber harassment among social networks*, in *International Journal of Technology and Human Interaction*, 8, 2013. TRAVIS H., *Cyberspace law: Censorship and regulation of the internet*, ed. Routledge, London & New York, 2013. HOLT T.J., BOSSLER A.M., *Cybercrime in progress. Theory and prevention of technology enabled offenses*, ed. Routledge, London & New York, 2015.

<sup>45</sup>According to Franks, then, pornography is generally to be considered limited to situations of consent between adults, with inevitable consequences in terms of considering the phenomenon. FRANKS M.A., “Revenge porn” reform: A view from the front lines, op. cit.,

<sup>46</sup>In this regard, it must be said how the Google company in one of its Transparency Reports, in June 2015, communicated that it would eliminate from its search results relating to the revenge porn, on the basis of the numerous requests received, as “(...) revenge porn images are intensely personal and emotionally damaging, and serve only to degrade the victims predominantly women. So going forward, we’ll honor requests from people to remove nude or sexually explicit images shared without their consent from Google Search results. This is a narrow and limited policy, similar to how we treat removal requests for other highly sensitive personal information, such as bank account numbers and signatures, that may surface in our search results (...)”. BJARNADOTTIR M.R., Does the internet limit human rights protection? The case of revenge porn, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 7, 2016, pp. 215ss. HAYNES A.M., The age of consent: When is sexting no longer speech integral to criminal conduct, in *Cornell Law Review*, 97, 2012, pp. 402ss. KAYR, P., Sexting or pedophilia?, in *Revista Criminalidad*, 56 (2), 2014, pp. 264ss.

of the image, the second the non-consensual distribution of the same<sup>47</sup>. Now, the discussion on sexting must necessarily take into account also this conceptualization, which progressively sees the erosion of part of the semantic scope of the term sexting in favor of a new linguistic label, that of non-consensual distribution of intimate images.

### 3. CYBERBULLYING IN EUROPEAN POLICIES TO COMBAT ONLINE DANGERS

Even at European level, cyberbullying has been recognized in recent years as a significant problem to be addressed through specific initiatives aimed at regulating the relationship between minors and Internet.

In this sense, there is a reference already at the time of the promotion of the first Safer Internet Program, which began in 2009, when the European Commission defined it as a phenomenon consisting of repeated verbal or psychological harassment, carried out by a group or an individual, which may take multiple forms, then framed a few years later, in 2013, by the European Fundamental Rights Agency, in its annual report Fundamental rights: Challenges and achievements, as "a common threat to the well-being of minors"<sup>48</sup>.

As part of the programs mentioned above, the European Union has adopted a series of initiatives aimed at preventing the phenomenon. One example is the "Delete cyberbullying" project active until 2014, aimed specifically at contrasting the use of the Internet and related technologies to harm other people, in an intentional, repeated and hostile way, a real and substantial danger, capable of cause immediate and significant damage.

Finally, as evidence of the growing attention for the phenomenon there is also the study conducted in 2016 by the European Parliament's Study Center and aimed precisely at providing an overview both from a phenomenological and a juridical point of view, having regard to the different Member States legislations.

### 4. DIRECTIVE 93/2011 IN THE FOOTSTEPS OF THE LANZAROTE CONVENTION

The attention of the European legislator towards forms of abuse related to sexual exploitation and child pornography takes shape through the adoption of the Council Framework Decision 2004/68/JHA49 on the fight against the sexual exploitation of children and child pornography that in addition to responding to

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<sup>47</sup>In this regard, it was stressed that there is no social pressure in adults that has been invoked for minors, however, even in these cases, the discussion cannot totally ignore the possible involvement of coercion. LEE M., CROFTS T., MCGOVERN A., MILIVOJEVIC S., Sexting among young people: Perceptions and practices, in Trends and Issues in Crime and Criminal Justice, 2015, pp. 1-9. WHITEHEAD J.T., LAB S.P., Juvenile justice: An introduction, Routledge, London & New York, 2018.

<sup>48</sup>LIEVENS E. A children's rights perspective on the responsibility of social network site providers, 25th European Regional ITS Conference, Brussels 2014, International Telecommunications Society (ITS).

<sup>49</sup>Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography. OJ L 13, 20.1.2004, p. 44-48. For further details see: NUNO GOMES DFE ANDRADE N., TOMÉ FÉTEIRA, New technologies and human rights. Challenges to regulation, ed. Routledge, London & New York, 2016. SUMMERS S.J., SCHWARZENEGGER C., EGE G., The emergence of EU criminal law. Cyber crime and the regulation of the information society, Bloomsbury Publishing, New York, 2014.

specifically preventive needs, it achieved a progressive homogenization of criminal law.

This brings us to Directive 2011/93/EU<sup>50</sup>, as a result of a long process of maturation that began after the adoption of the Lanzarote Convention in 2007, to which the European Union landed, above all with the aim of curbing the phenomena of abuse and sexual exploitation of minors, increasingly frequent also for the diffusion of information technologies<sup>51</sup>.

The 2011 news thus went to enumerate a series of "minimum standards" relating to the definition of crimes and sanctions regarding the abuse and sexual exploitation of minors, extending the spectrum of protection also to those conducted related to the development and use of new information technologies.

Among these, there are also the conduct concerning child pornography, defined in art. 2 lett. c), such as "any material that visually portrays a minor in explicit, real or simulated sexual attitudes" or "the representation of the sexual organs of a minor for mainly sexual purposes"<sup>52</sup>, and identified in art. 5 in the purchase, possession, distribution, etc.

Still following the trail traced years before in Lanzarote, in paragraph 8 there is the possibility for the States to limit the punishment of obtaining, possessing or producing child pornographic material, if this has been produced and owned by the producer only for private use, provided that images of real minors in sexually explicit attitudes or their genital organs are not used for its realization, and provided that the risk of their spread does not derive from this activity<sup>53</sup>.

Although it can be interpreted as a clear signal of the will of the Member States to want to allow the exclusion of so-called non-problematic or primary sexting<sup>54</sup>, it is clear that the scope of the Directive is more limited than the opening granted by the Lanzarote legislature.

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<sup>50</sup>Directive 2011/93/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, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1-1. CARIAT N., *La Charte des droits fondamentaux et l'équilibre constitutionnelle entre l'Union européenne et les États membres*, ed. Bruylant, Bruxelles, 2016. FLORE D., *Droit pénal européen: Les enjeux d'une justice pénale européenne*, ed. Larcier, Bruxelles, 2014.

<sup>51</sup>Art. 83 TFEU. For further details see also: HATJE, A., TERHECHTE, J.P., MÜLLER-GRAFF, P.C., *Europarechtswissenschaft*, ed. Nomos, Baden-Baden, 2018. SCHWARZE, J., BECKER, V., HATJE, A., SCHOO, J., *EU-Kommentar*, ed. Nomos, Baden-Baden, 2019. KELLERBAUER, M., KLAMERT, M., TOMKIN, J., *Commentary on the European Union treaties and the Charter of fundamental rights*, Oxford University Press, Oxford, 2019. BERRY, E., HOMEWOOD, M.J., BOGUSZ, B., *Complete EU law: Text, cases and materials*, Oxford University Press, Oxford, 2019.

<sup>52</sup>In Recital 9 of the Directive, it is specified as "child pornography often includes the registration of sexual abuse committed by minors by adults. It may also include images of minors involved in explicit sexual attitudes or images of their sexual organs, where such images are produced or used for predominantly sexual purposes, regardless of the fact (...)".

<sup>53</sup>Specifically, art.5, par. 8 of the Directive states that "it is within the discretion of the Member States to decide whether paragraphs 2 and 6 of this article apply to cases where it is ascertained that pornographic material as defined in article 2, letter c), point iv) is produced and owned by the producer for private use only, provided that no pornographic material referred to in Article 2 (c), points i), ii) and iii) has been used for its production, and provided that the activity do not involve any risk of spreading the material (...)".

<sup>54</sup>LIEVENS E., *Bullying and sexting in social networks: Protecting minors from criminal acts or empowering minors to cope with risky behaviour?* in *International Journal of Crime, Law & Justice*, 43 (3), 2014.



## 5.(FOLLOWS) THE SPANISH CONTEXT. THE PROGRESSIVE RECOGNITION OF THE (CYBER) ACOSE (ESCOLAR) IN THE SPANISH LEGAL SYSTEM

The identification of the legal concept of acoso within the Spanish system appears to be marked by a certain degree of problematic nature<sup>55</sup>.

The term acoso<sup>56</sup> identifies a social phenomenon that can invalidate different aspects of human life. However, net of the objective differences determined by the context in which it takes place and the subjective differences deriving from the characterizations proper to the victims who are the recipients of these behaviors, there may be common traits, which would denote their character of persecution. The result is a behavior that is never considered as isolated as a conduct that repeatedly takes place against the victim, preparing possible injuries to legal assets other than freedom, moral integrity, confidentiality and integrity. It is clear how a wide range of behaviors and contexts can be recalled, not without raising evident problematic profiles<sup>57</sup>, including that involving minor subjects<sup>58</sup>.

The problem of bullying appears for the first time in the Spanish legislative speech in 2005, subject of Instruction no. 10/2005 "Sobre el tratamiento del acoso escolar desde el sistema de Justicia juvenil"<sup>59</sup>, issued by the State Prosecutor's Office

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<sup>55</sup>MENDOZA CALDERON S., El derecho penal frente a las formas de acoso a menores. Bullying, ciberbullying, grooming y sexting, Tirant Lo Blanch, Valencia, 2013.

<sup>56</sup>The real academy of spanish language defines acoso, as "la acción y efecto de acosar" ossia: "1. Perseguir, sin darle tregua ni reposo, a un animal o a una persona; (...) 3. Perseguir, apremiar, importunar a alguien con molestias o requerimientos". Si bien el acoso puede darse, por tanto, cuando se importuna a alguien con peticiones y preguntas insistentes ("no me acoses" solemos decir entonces)<sup>1</sup>, lo propio del acoso-al menos del que debe interesar al Derecho penal-es más bien esa idea de persecución sin tregua ni descanso, que en algunos sistemas comparados se tipifica como hostigamiento y/o molestia grave y que se acaba encauzando como un supuesto de violencia doméstica cuando se produce, como tantas veces, en este ámbito particular". It must be specified how the Spanish legal system knows different types, attributable to a wide range of cases, of which the forms of acoso laboral and acoso inmobiliario are clearly illustrated, subject to typing through the reform of the penal code implemented through the Organic Ley n. 5/2010.

<sup>57</sup>The stickiness of the term was raised both by the doctrine and by the Spanish jurisprudence. In this sense, for example, the pronouncement of the Audiencia Provincial de Álava of 27 May 2005 (rapporteur D. Jaime Tapia Parreño) which identifies the confused outlines can be recalled. LOSADA N., LOSADO R., ALCANZAR M.A., BOUSO J.C., GOMEZ-JARABO G., Acoso escolar: desde la sensibilización social a una propuesta de intervención. Reflexiones desde la legislación español, in Letras Jurídicas, 2007.

<sup>58</sup>As regards the criminal law perspective, the phenomenon of acoso was originally connected exclusively to an attack on sexual freedom, in particular with the conduct carried out in the workplace. It is no coincidence that with the introduction of the new code of 1995, the acoso sexual has found its typing in art. 184 of the Criminal Code, not without controversy also regarding the linguistic label. MENDOZA CALDERON S., MARTINEZ GONZALEZ M.I., El Acoso en Derecho Penal: una Primera Aproximacion al Tratamiento Penal de las Principales Formas de Acoso, in Revista Penal, 5, 2006. PÉREZ VALLEJO, A.M., FERRER F.P., Bullying ciberbullying y acoso con elementos sexuales: desde la prevención a la reparación del daño, Dykinson, Madrid, 2016.

<sup>59</sup>INSTRUCCION n. 10/2005, "Sobre el tratamiento del acoso escolar desde el sistema de Justicia juvenil". It must actually be said how the very first definition of bullying is found in the annual memorial of the Defensor del Menor de la Comunidad de Madrid (2005), issued following the suicide of Jokin Ceberio obviously with limited reference to the Madrid territory, with which it was defined "acción reiterada a través de diferentes formas de acoso (físico o psicológico) u hostigamiento entre dos alumnos o entre un alumno y un grupo de compañeros en el que la víctima está en situación de inferioridad respecto al

following the suicide of the fourteen year old Jokin Ceberio, who committed suicide on 21 December 2004 in Hondarribia<sup>60</sup>, after being victim of constant bullying by his comrades, and whose death shocked Spanish public opinion. A media case that later emerged as a symbol of an increasingly emergent perceived situation, as clearly highlighted by a subsequent study conducted on the subject<sup>61</sup>.

Consisting of the juxtaposition of the complicated noun and the adjective escolar, the term ends up confining the manifestation of these behaviors to the school environment only<sup>62</sup>. In this sense, the aforementioned Education, in compliance with the scientific studies conducted up to the time, identified the phenomenon under examination in those accidents between pupils or students, repeated over time and with a violent character, identified in physical aggressions, threats, insults, put in place with a view to a hierarchical relationship of subjecting the victim to the will of his attacker<sup>63</sup>. A definition found, especially in its elements of continuity and gravity and not without controversy, also in the interpretation provided by both the doctrine and the subsequent jurisprudence<sup>64</sup>.

It is in this process of contextualization that cyberbullying is gradually being introduced, a term that appears for the first time, albeit briefly, in a report of the Spanish Ombudsman of 2007, called "Violencia escolar: El Maltrato entre Iguales en la Educación Secundaria Obligatoria ( 1999-2006). Nuevo estudio y actualización dell'Informe 2000"<sup>65</sup>. However, in a framework that still placed itself in the timid approach, there was no reference to a distinct phenomenon as to a

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agresor o agresores”.

<sup>60</sup>The case was decided then decided by the SAP of Guipúzcoa with the ruling of 15 July 2005, n.1009, which for the first time condemned, in the second degree, minor subjects for having committed bullying, thereby recognizing the their criminal responsibility for crimes of moral integrity, acquitting them, however, on charges of inciting suicide.

<sup>61</sup>We refer precisely to the 2006 Informis Cisneros VII, which for the first time reported bullying as an alarming issue, defined as “un continuado y deliberado maltrato verbal y modal que recibe un niño por parte de otro u otros, que se comportan con él cruelmente con el objeto de someterlo, apocarlo asustarlo, amenazarlo y que atentan contra la dignidad del niño”. INFORME CISNEROS VII,

<sup>62</sup>In this sense: “muchos de los actos encuadrables en al acoso escolar han sido frecuentamnete cosndierados parte integrante de la experiencia escolar, inherentes a la dinamica propia del patio del colegio”.

<sup>63</sup>Which we can see that: “incidentes entre alumnos o estudiantes que se prolongan durante un período de tiempo, pudiendo consistir en actos violentos que lo integran: agresiones físicas, amenazas, vejaciones, coacciones, insultos o en el aislamiento deliberado de la víctima que degenera en una relación jerárquica de dominación- sumisión entre acosador/es y acosado (...) o emocionalmente que es menos visible para los profesores, pero que es extremadamente doloroso (...)”.

<sup>64</sup>HERRERO C., Delincuencia de menores. Tratamientos criminológico y jurídico, Dykinson, Madrid, 2005. MENDOZA CALDERON S., MARTINEZ GONZALEZ M.I., El Acoso en Derecho Penal: una Primera Aproximacion al Tratamiento Penal de las Principales Formas de Acoso, op. cit., And according to the jurisprudence: “una conducta de persecución física y/o psicológica intencionada y reiterada o repetida por algún tiempo (...) no es suficiente un incidente aislado, sino varias actuaciones mantenidas en el tiempo, esto es, una persistencia en la agresión, todo ello, presidido por la voluntad de causar un mal (daño o miedo) a la víctima y situarla en un plano de inferioridad respecto del agresor o de un grupo” . SAP Madrid 15 November 2010, n.611.

<sup>65</sup>DEFENSOR DEL PUEBLO, Violencia escolar: El Maltrato entre Iguales en la Educación Secundaria Obligatoria (1999-2006). Nuevo estudio y actualización del Informe 2000, Madrid, 2006. LI Q., CROSS D., SMITH P.K., Cyberbullying in the global playground: Research from international perspectives, J. Wiley & Sons, New York, 2011.

technological "variant of offline bullying, of which it was felt a greater potential harmful effect<sup>66</sup>.

Over time, a more decisive awareness of the presence of the phenomenon and of its conceptual autonomy matures. In the face of the terminological confusion, which sees different linguistic labels follow one another (cyberacoso, acoso a menores a través de Internet, cybernetic acoso, electrónico, digital), and on the other the exponential increase in the cases of news<sup>67</sup> and the consequent echo media, there is a need for a stabilization of the concept, implemented by the Observatory for Information Security which in 2010 provides a first definition, indicating it as "acoso entre iguales en el entorno TIC e incluye actuaciones de chantaje, vejaciones e insultos de niños a otros niños"<sup>68</sup>. Definition later conceived also in the Memoria de la Fiscalía General del Estado 2012 and 2013<sup>69</sup>, where the accent is placed on the wide range of shades and gradations of intensity that characterize the phenomenon.

At the same time, the pulse of the situation is also probed by the Spanish courts that recognize its existence without however providing a specific conceptualization<sup>70</sup>, thus leaving open a gap never resolved even by the legislator.

## 6. THE ACOSO ENTRE MENORES IN THE COMPLICATED INTERTWINING BETWEEN PREVENTATIVE-EDUCATIONAL APPROACH AND CRIMINALIZATION CLAIMS

The awareness of the existence and affliction of bullying had brought out a debate both political and doctrinal, in which a general preventive-educational approach prevailed, in the wake of a policy already adopted in relation to forms of youth violence<sup>71</sup>. After all, the acoso escolar was perceived as a violent expression of the dynamics of the school environment<sup>72</sup> and this had led to recognizing the role of the school in the fight against the phenomenon.

In this sense, the adoption of Organic Ley no. 2 of 3 May 2006, as a reform of the education system, which placed the emphasis on education as a tool for prevention

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<sup>66</sup>Which we can see that: "es necesario señalar que probablemente el hecho de utilizar los nuevos instrumentos tecnológicos para el acoso escolar no pueda considerarse de forma simple como una nueva categoría de maltrato, sino como una forma para hacer los abusos más ofensivos para las víctimas (...)"

<sup>67</sup>ORJUELA LOPEZ, L., BELKIS, F. CLAMESTRA VILLEN, J., MORA-MERCHAN, J. A., ORTEGA-RUIZ R., Informe sobre Acoso escolar y ciberacoso: propuestas para la acción, Madrid, 2013.

<sup>68</sup>Which is affirmed that: "en una forma más exhaustiva, el ciberbullying supondría el uso y difusión de información lesiva o difamatoria en formato electrónico a través de medios de comunicación como el correo electrónico, la mensajería de texto a través de teléfonos o dispositivos móviles o la publicación de videos y fotografías en plataformas electrónicas de difusión de contenido. La clave, en algunos casos, sería una situación en que acosador y víctima serían niños, compañeros de colegio o instituto o personas con las que la víctima se relacionaría en la vida física". OBSERVATORIO DE LA SEGURIDAD DE LA INFORMACIÓN, Guía legal sobre el ciberbullying y grooming, Madrid, 2010.

<sup>69</sup>FISCALIA GENERAL DEL ESTADO, Memorias 2012-2013.

<sup>70</sup>The following SAP Las Palmas judgments, no. 209; SAP Valencia March 14, 2014, n. 107.

<sup>71</sup>The ombudsman already made it clear how "la respuesta normal debe ser, además de la acción preventiva, la que se produce en sede de disciplina escolar". DEFENSOR DEL PUEBLO, Violencia escolar: El Maltrato entre Iguales en la Educación Secundaria Obligatoria (1999-2006). Nuevo estudio y actualización del Informe 2000, op. cit.,

<sup>72</sup>VILLEGAS FERNANDEZ J.M., LAFONT NICUES L., Acoso moral, in MARCOS GONZALEZ J.I., La tutela frente al acoso moral: laboral, escolar, familiar e inmobiliario, del silencio a la palabra de la Ley penal, ed. Aranzadi, Navarra, 2006.

and resolution. An approach that recalled the slightly previous legislative intervention on gender violence, implemented by means of the Ley Organica n.1 of 2004 (Medidas de Protección Integral contra la Violencia de Género).

It was, moreover, a choice, the one that veered on the prevention side, which was also agreed by the majority of the criminal law doctrine. In this sense, for example, Subijana Zunzunegui stood, according to which the bullying policies should be based on the use of preventive tools, avoiding giving in to the often too strong tendency to find refreshment in the penal field to face the urgent social problems of great media appeal<sup>73</sup>. Agreed Cuerda Arnau recalled how a residual role in criminal intervention should be recognized, as the last tool to be activated only in the face of conduct capable of creating a significant risk for the victim<sup>74</sup>.

The approach to acoso escolar, the lesser known form of acoso within the Spanish penal circuit, was immediately divided between the need to recognize the minor a series of suitable tools and the tendency towards the criminal law of the "seguridad", a contrast that certainly arises as a profound and generalized reaction to the crime events involving minors such as victims and perpetrators.

In this phase, the criminal law remained confined to a residual hypothesis, and in any case without prejudice to the guarantees provided by the legal framework for the criminal liability of the minor<sup>75</sup>, first of all that of the non-imputability of the minor under the age of 14<sup>76</sup>. However, especially following the aforementioned cases as a

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<sup>73</sup>According to the author: "la tendencia, abonada por la necesidad de ubicar en el punto neurálgico de la agenda política temas de gran calado mediático, de desplazar al campo penal la discusión de los problemas sociales SUBIJANA ZUNZUNEGUI I.J., El acoso escolar. Un apunte victimológico, in Revista Electrónica de Ciencia Penal y Criminología, 9, 2007.

<sup>74</sup>CUERDA ARNAU M.L., Acoso escolar y Derecho Penal de Menores. Estudios sobre la responsabilidad penal del menor, in Colección Estudis Jurídics, 2006.

<sup>75</sup>First of all, the presumption of non-imputability of a minor under the age of fourteen. The reference standard in this sense is art. 19 of the Criminal Code, ie the Ley Organica of 23 November 1995 and its subsequent modifications, identifying this punishable threshold, which must be accompanied by the provisions of the Ley Organica de Responsabilidad Penal de Menor (LORPM) n. 5 of 12 January 2000, in the matter of criminal liability of the minor, which integrates educational, sanctioning and guarantee perspectives, with the principle of the best interests of the minor. It must also be remembered how the Instruccion de la Fiscalia General de Estado of 6 October 2005, n. regarding the treatment of bullying within the juvenile justice system, established that in order to comply with the ne bis in idem principle, the so-called triple identity of subjects, facts and basis of the criminal and administrative case should not be recognized. MIR PUIG S., Derecho penal, parte general, Dykinson, Montevideo, 2008.

<sup>76</sup>A system of regulation of criminal liability is deduced which on the one hand deprives the under-14-year-old minor of criminal imputability, recognizing in such cases the applicability of measures of an exclusively educational and / or welfare nature and on the other identifies the minor among the 14 and 18 years of age, a criminal liability different from that applied to adults, in that it is informed of more educational than sanctioning requests. It must be said that the Spanish juvenile criminal law system has undergone considerable changes over time. In fact, the previous penal code of 1973 identified the imputability threshold in reaching the age of sixteen and the minor age was then lowered with the penal code of 1995. However, the organic draft law on the criminal responsibility of minors was presented in October 1998 and approved only in January 2000. For this reason, a second paragraph was inserted in the seventh final provision of the 1995 code, which established the entry into force of the new one after six months from its publication in the BOE (Boletín Oficial del Estado). aimed at excluding the entry into force at that time of art. 19. Consequently, the current regulatory framework entered into force on 25 May 1996, but the provisions of the previous discipline of 1973 continued to apply to minors until 13 January 2001, when, repealing this discipline, the regulations entered into force. 'art. 19 of the Criminal Code and LO 5/2000 of 12 January on the criminal liability of minors (LORMP), which, furthermore, up to

matter of fact, sparks of criminalization seemed to rekindle, an expression of an emergency-type criminal approach<sup>77</sup> or in any case of the aforementioned tendency to provide criminal solutions to social problems of media interest<sup>78</sup>.

The aqueous became soon subject to a specific intervention by the Spanish legislator operated through the Ley Organica of 22 June 2010, n.5, which saw the typing, for example, of the aqueous laboral or mobbing and of the so-called real estate<sup>79</sup>. In this reforming intervention, however, neither acoso escolar nor cyberacoso found space, thus remaining without its own typicality. In the face of the lack of a reference case, the jurisprudence has assumed a decisive role in the identification of the criteria that determine the phenomenon and the range of applicable criminal rules which, like what previously happened for traditional bullying<sup>80</sup>, appears broad and including different types of cases: From crimes to honor, to those for the protection of moral integrity, to stalking up to specifically computer crimes<sup>81</sup>. Although the first timid requests for criminalization have not found room for realization, according to Miró Llinares, the temptation towards new typologies, fueled by the strong communicative power of the phenomenon, but even more by the dimensional reference frame: Cyberspace cannot be said to be completely dormant<sup>82</sup>.

## 7.CYBERBULLYING AND CRIMINAL CODE: BETWEEN THREATS TO MORAL INTEGRITY, PERMANENT ACOSO AND DESCUBRIMIENTO DE SECRETOS

The criminal relevance of the acoso escolar both online and offline has mainly been traced back to crimes against moral integrity, which, in the interpretation provided by the jurisprudence of the Supreme Court, pertains to all profiles of the

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the modification made through the Ley Organica of 4 December 2006, n.8 could, in certain cases, also apply to infra-21 year olds.

<sup>77</sup>MUÑOZ CONDE F., Las reformas de la parte especial del Derecho penal español en el 2003: de la "tolerancia cero" al "Derecho penal del enemigo, in Revista General de Derecho Penal, 3, 2005.

<sup>78</sup>Queralt refers to a trend: "buscar insertarse en una modernidad solo oficialista". QUERALT J., Derecho penal español. Parte especial, Dykinson L.S., Madrid, 2015.

<sup>79</sup>Through the aforementioned reform made through the Ley Organica 5/2010, art. 173.1 now also applicable to those who, in the context of any working or official relationship, and availing themselves of their relationship of superiority, carry out against another, in a repeated form, hostile and humiliating acts which, without reaching the point of constituting degrading treatment, presuppose a serious harassment (acoso) against the victim and to those who repeatedly perform hostile or humiliating acts, which, without reaching the point of constituting degrading mistreatment, have as their object the impediment of the legitimate use of the home, regulating the so-called real estate mobbing.

<sup>80</sup>MORENO MARTÍNEZ J.A., Problemática de la violencia escolar: mecanismos jurídicos de protección, in La Responsabilidad civil y su problemática actual, Dykinson, Madrid, 2007.

<sup>81</sup>According to case: SAP Cantabria 25 May 2012, n. 291: "El maltrato o acoso escolar, conocido popularmente en los medios de comunicación pero también en el ámbito de la sociología y la educación por el término anglosajón "bullying" (literalmente, intimidación o acoso, derivado del sustantivo "bully", matón/a y del verbo "to bully", meterse con alguien, intimidarle) -"ciberbullying" cuando se comete utilizando la informática e internet, también denominado "ciberacoso"- es un fenómeno frecuente en nuestros días y que en ocasiones pasa desapercibido (...) y aislamiento social, bien impidiendo a él o la joven participar, bien ignorando su presencia y no contando con él en las actividades normales entre amigos o compañeros de clase (...)"

<sup>82</sup>MIRÓ LLINARES F., Derecho penal, ciberbullying y otras formas de acoso (no sexual) en el ciberespacio, in Revista de Internet, Derecho y Política, 16, 2013.



human personality<sup>83</sup>. This is testified not only by the aforementioned Jokin case, but also by subsequent jurisprudence<sup>84</sup>, which seems to have also met with the support of doctrine<sup>85</sup>.

Reference standard is art. 173. 1 of the Criminal Code, which, by protecting human dignity, responds to the need to avoid inhuman and degrading treatment, protecting the person's right to be respected in his own dignity<sup>86</sup>. This is a residual case, applicable to anyone who inflicts degrading treatment on another person, seriously impairing their moral integrity.

This is a criminal offense strongly criticized for the presence of a high legal insecurity dependent on the wide and indeterminate scope of the rule, which inevitably shows a clear conflict in terms of convergence with the principle of taxation<sup>87</sup>, and for this reason subjected to the continuous scrutiny of the Spanish

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<sup>83</sup>To the legal good of moral integrity, the Spanish legal system recognizes autonomous consideration, which also finds space within the constitutional charter in art. 15, which specifically states how “*todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes (...)*” TAMARIT SUMALLA J.M., *De las torturas y otros delitos contra la integridad moral*, in QUINTERO OLIVARES G., *Comentarios al Código Penal Español. Tomo I*, ed. Aranzadi, Pamplona, 2016. PÉREZ MACHÍO A., DE VICENTE MARTÍNEZ R., JAVATO MARTÍN M., *De las torturas y otros delitos contra la integridad moral*, in GOMEZ TOMILLO M., *Comentarios prácticos al Código Penal. Tomo II. Los delitos contra las personas*, ed. Aranzadi, Pamplona, 2015. The constitutional jurisprudence that defined it a "complex right", composed of three elements: the opposition to the victim's will, the physical or mental suffering to the victim, the demeaning and humiliation of the same, was also asked. DEL MAR DÍAZ PITA M., *El bien jurídico protegido en los nuevos delitos de tortura y atentado contra la integridad moral*, in *Estudios Penales y Criminológicos*, 17, 1997. MUNOZ CONDE affirms that: “*el derecho de la persona a ser tratada conforme a su dignidad sin ser humillada o vejada, cualesquiera que sean las circunstancias en las que se encuentre y la relación que tenga con otras personas*”. MUÑOZ CONDE F., *Derecho penal. Parte especial*, ed. Tirant Lo Blanch, Valencia 2015.

<sup>84</sup>Jokin (SAP Guipúzcoa, 15 July 2005, n. 1009); SAP Castellón, 2 February 2010 n.32; SAP Córdoba 4 April 2008 n.78; SAP Castellón 31 July 2007 n.159.

<sup>85</sup>GARCIA F., *Responsabilidad penal derivada del acoso escolar*, in RIVAS VALLEJO .M., GARCIA VALVERDE M., *Tratamiento Integral del Acoso*, ed. Aranzadi, Navarra, 2015; NUNEZ A. B., *El acoso ante la realidad social: instituciones y asociaciones de tutela frente al acoso*, in RIVAS VALLEJO M., GARCIA VALVERDE M., *Tratamiento Integral del Acoso*, ed. Aranzadi, Navarra, 2015.

<sup>86</sup>Art. 173.1: “1. El que infligiera a otra persona un trato degradante, menoscabando gravemente su integridad moral, será castigado con la pena de prisión de seis meses a dos años. Con la misma pena serán castigados los que, en el ámbito de cualquier relación laboral o funcional y prevaliéndose de su relación de superioridad, realicen contra otro de forma reiterada actos hostiles o humillantes que, sin llegar a constituir trato degradante, supongan grave acoso contra la víctima. Se impondrá también la misma pena al que de forma reiterada lleve a cabo actos hostiles o humillantes que, sin llegar a constituir trato degradante, tengan por objeto impedir el legítimo disfrute de la vivienda (...).” See how the two forms of acoso from 2010 are provided in the next two paragraphs: “2. El que habitualmente ejerza violencia física o psíquica sobre quien sea o haya sido su cónyuge o sobre persona que esté o haya estado ligada a él por una análoga relación de afectividad aun sin convivencia, o sobre los descendientes, ascendientes o hermanos por naturaleza, adopción o afinidad, propios o del cónyuge o conviviente, o sobre los menores o personas con discapacidad necesitadas de especial protección que con él convivan o que se hallen sujetos a la potestad, tutela, curatela, acogimiento o guarda de hecho del cónyuge o conviviente, o sobre persona amparada en cualquier otra relación por la que se encuentre integrada en el núcleo de su convivencia familiar, así como sobre las personas (...).”

<sup>87</sup>SAP Santa Cruz de Tenerife, 18 June 2012, n. 127, who, in complaining about the taxation conflict, recognized the crime in question as “*absolutamente abierto al utilizar expresiones vagas que no responden adecuadamente al principio de taxatividad*”.

jurisprudence.

Having said that, for the configuration of the crime a conduct is required, free in its manifestation<sup>88</sup>, which must result in the victim being inflicted with degrading treatments, which must result in an event of serious injury to moral integrity, such as to make people perceive feelings of terror, inferiority, fear, or vexatious and humiliating sensations. On the other hand, without prejudice to the principle of minimal intervention proper to criminal law, mistreatment must have a certain minimum level of seriousness, which can depend on various circumstances of the case, such as duration, physical and mental effects and obviously, as in the case of cyberbullying, the age of the victim.

Those acts of humiliation that cannot qualify as degrading or that do not produce the required gravity inevitably end up not falling within the field of applicability of the standard, once absorbed in the contravention of "falta de vejaciones"<sup>89</sup>, previously envisaged in art. 620.2 c.p.<sup>90</sup>, of the criminal code, now decriminalized as a result of the 2015 reform (Ley Organica 1/2015), but not with reference to vulnerable subjects, with respect to whom, pursuant to art. 173.4, is still considered as a minor crime<sup>91</sup>.

It must be added that in the interpretation traditionally accepted by jurisprudence the expression "degrading trait" would then presuppose a permanent or in any case repeated behavior. Interpretation reversed in some pronouncements, which ended up recognizing the applicability of the rule also with reference to punctual conduct, always characterized by a certain gravity in their attack on the protected legal asset<sup>92</sup>.

Precisely with reference to the repetitiveness of the pipelines, an element that distinguishes the phenomenon under examination, albeit with the specific features indicated, must refer to the permanent offense crime referred to in art. 172 ter, incorrectly defined by some as the first European criminal provision against

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<sup>88</sup>MANJÓN-CABEZA OLMEDA A., Torturas. Otros delitos contra la integridad moral, in GARCÍA ÁLVAREZ, F.J, Derecho penal español.Parte especial, ed. Tirant Lo Blanch, Valencia, 2011. CABRERA MARTÍN M., La victimización sexual de menores en el código penale español y en la política criminal internacional, Dykinson S.L., Madrid, 2019.

<sup>89</sup>Thus, for example, a 2009 ruling was expressed, which recognized this offense in the conduct of a minor who had uploaded a photo of the victim online accompanied by the phrase "se busca delincente en fuga, si la ven, avisenme, se les da recompensa", SAP Guipuzcoa, 24 June 2009, n. 232.

<sup>90</sup>According to art. 620.2 of criminal code: "(...) Serán castigados con la pena de multa de diez a veinte días: Los que causen a otro una amenaza, coacción, injuria o vejación injusta de carácter leve, salvo que el hecho sea constitutivo de delito (...)"

<sup>91</sup>Art. 173.4 "Quien cause injuria o vejación injusta de carácter leve, cuando el ofendido fuera una de las personas a las que se refiere el apartado 2 del artículo 173, será castigado con la pena de localización permanente de cinco a treinta días, siempre en domicilio diferente y alejado del de la víctima, o trabajos en beneficio de la comunidad de cinco a treinta días, o multa de uno a cuatro meses, esta última únicamente en los supuestos en los que concurren las circunstancias expresadas en el apartado 2 del artículo 84. Las injurias solamente serán perseguibles mediante denuncia de la persona agraviada o de su representante legal.

<sup>92</sup>See the case: SSTS, 2 April 2003, n. 489 and the sentence: STS 8 May 2002, n. 819, which is affirmed that: "siempre que en esa conducta única se aprecie una intensidad lesiva para la dignidad humana suficiente para su encuadre en el precepto; es decir, un solo acto, si se prueba brutal, cruel o humillante puede ser calificado de degradante si tiene intensidad suficiente para ello (...)"

cyberbullying. Mistakenly, as it should rather be spoken normally against stalking<sup>93</sup>. The legislation of 2015, which included this new crime in the Spanish criminal article, was driven by the intent to criminalize those persecutory conduct that before then had not found specific typing in the criminal code<sup>94</sup>. Approach to which it arrived, with evident delay compared to other European jurisdictions, on the basis of the joint finding, of doctrine and jurisprudence, of the impossibility of resorting in some cases to existing criminal cases, such as the aforementioned art. 173.1 or the crimes of amenazas and coacciones, not adequately aimed at protecting the compromised legal property.

The new crime, inserted among those placed to protect the freedom of the subject, among the so-called coacciones, presents itself as a broad type of crime, including different types of conduct<sup>95</sup>. Listed in the text of the standard, they are criminally relevant in the presence of certain characterizing elements. First of all, it must be an acoso. Here, therefore, that five years after the 2010 reform, the term acoso returns to be the center of legislative attention, not without strong criticism given the already mentioned stickiness of the same. Regardless of its forms of manifestation, the aqueous must be insistent and repeated, only repeated actions being sanctioned in this way, which have a certain temporal extension and which must produce the serious alteration of the victim's daily life<sup>96</sup>.

If art. 172 ter has as its object the criminalization of the so-called persecutory acts, and not the bullying and its cyber variant, represents one of the main instruments of protection.

Finally, the crime of "revelacion y descubrimiento de secretos", foreseen and sanctioned by art. 197 of the penal code. This is a case that has become recurrent in practice, forced to approach with constant attacks on the legal property of privacy or confidentiality, which in Spain finds specific reference to art. 18.1 of the constitutional charter<sup>97</sup>. Obviously it is a concept, that of intimidación, with a broad definitional link<sup>98</sup>,

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<sup>93</sup>FRAILE COLOMA C., Artículo 172ter, in GÓMEZ TOMILLO, Comentarios Prácticos al Código Penal. Tomo II. Los delitos contra las personas. Artículos 138-233, ed. Aranzadi, Pamplona, 2015. CÁMARA ARROYO S., Las primeras condenas en España por stalking: cuestiones penales y criminológicas del nuevo delito de acecho o acoso predatorio, in La Ley Penal, 121, 2016.

<sup>94</sup>In the preamble of Ley Organica 1/2015 is affirmed that: "También dentro de los delitos contra la libertad, se introduce un nuevo tipo penal de acoso que está destinado a ofrecer respuesta a conductas de indudable gravedad que, en muchas ocasiones, no podían ser calificadas como coacciones o amenazas. Se trata de todos aquellos supuestos en los que (...) a la que se somete a persecuciones o vigilancias constantes, llamadas reiteradas, u otros actos continuos de hostigamiento (...)"

<sup>95</sup>Art. 172 ter: "1. Será castigado con la pena de prisión de tres meses a dos años o multa de seis a veinticuatro meses el que acose a una persona llevando a cabo de forma insistente y reiterada, y sin estar legítimamente autorizado, alguna de las conductas siguientes y, de este modo, altere gravemente el desarrollo de su vida cotidiana: 1ª La vigile, la persiga o busque su cercanía física. 2ª Establezca o intente establecer contacto con ella a través de cualquier medio de comunicación, o por medio de terceras personas (...)"

<sup>96</sup>VILLACAMPA ESTIARTE C., El delito de Stalking. Comentarios a la reforma penal de 2015. ed. Aranzadi, Navarra, 2015.

<sup>97</sup>Art. 18 affirms that: "(...) se garantiza el derecho al honor, a la intimidad personal y familiar y a la propia imagen (...)". In this choice there must be a certain degree of foresight of the Spanish legislator who, together with the Portuguese one, was a pioneer in the positiveization of this right and in elevating it to the rank of fundamental right.

<sup>98</sup>TOMÁS-VALIENTE LAZUNA C., Capítulo I. Del descubrimiento y la revelación de secretos, in GÓMEZ TOMILLO M., (a cura di) Comentarios Prácticos al Código Penal. Tomo II. Los delitos contra las personas.

which includes on the one hand the right to the exclusion of third parties' intrusion into one's private life and on the other the right to control the advertising of information relating to the own person<sup>99</sup>

The rich articulation of the criminal provision appears to be aimed at protecting the aforementioned legal asset in the face of the conduct of the one who, in order to reveal a secret or to compromise the privacy of others, without the consent of this, appropriates cards, letters, e-mails or other personal documents or intercepts communications or uses systems for capturing the image or sound or other communication signal<sup>100</sup>.

The result is a wide range of protection that has also found application in some cases of cyberbullying<sup>101</sup>, but assuming a new application as a consequence of the reform carried out with the Ley Organica 1/2015, which has added a further paragraph to the aforementioned rich article, the seventh paragraph, with inevitable consequences also for the phenomenon, but above all in terms of non-consensual distribution of intimate images, as we will see later.

Spanish sexual criminal law has also undergone a profound transformation, interspersed with important legislative stages, in order to emancipate itself from the predominant concept of sexual morality, gradually abandoned to make way for the more modern concept of individual freedom. This path, which originated around the seventies of the last century, also discounts the innovation brought about by the adoption, in the aftermath of the fall of the Franco regime, of the Constitutional Charter of 1978, which with its fundamental rights guarantee system of the person had a direct impact on criminal matters, as well as on the recognition of the minor as a legal subject. The constitutional tense provides in chapter III of Title II, among the inspiring principles of social and economic policy, the obligation of public authorities to ensure social, economic and legal protection to the family and, within this, also to childrens<sup>102</sup>.

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Artículos 138-233, ed. Aranzadi, Pamplona, 2015.

<sup>99</sup>With reference to the concept of confidentiality, an evident evolution in the jurisprudence of the constitutional court and of the Supreme court is visible. At the beginning it is configured with negative value as the right of the owner to demand a non-interference of third parties in private life, a consideration that evolves over time to assume a positive content, placing the value of confidentiality in relation to the freedom of action of the subject and his right to control information relating to his person and to the knowledge that third parties may have of the same. Therefore, this right implies, in the words of the Tribunal Costitucional (n.70/2002), "la existencia de un ámbito propio y reservado frente a la acción y conocimiento de los demás, necesario, según las pautas de nuestra cultura, para mantener una calidad mínima de la vida humana". The Supreme Court also places itself in this line with the ruling STS 357/2007, which stated that article 18 of the constitutional text guarantees the right to secrecy, to remain unknown, that others do not know who we are or what let's make.

<sup>100</sup>MORALES PRATS F., Título X. Delitos contra la intimidad, el Derecho a la propia imagen y la inviolabilidad del domicilio, in QUINTERO OLIVARES G., (a cura di), Comentarios al Código Penal Español. Tomo I (Artículos 1 a 233), ed. Aranzadi, Pamplona, 2016.

<sup>101</sup>In this sense, we can cite for example a case decided in 2009 and concerning a group of teenagers who, after physically attacking a partner at school, had resumed the attack on their cell phone, then sending it to other companions. SAP Malaga, 16 September 2009, n. 452.

<sup>102</sup>The reference is herein to art. 39, which specifically establishes: "Los poderes publicos aseguran la proteccion social, economica y juridica de la familia. Los poderes publicos aseguran, asimismo, la proteccion integral de los hijos, iguales estos ante la ley con independenciam de su filiacion, y de las madres cualquiera que sea su estado civil. La ley posibilitara la investigacion de la paternidad.". Similarly,

Despite the need to create a new penal code, completely inspired by the new Charter, the process aimed at realizing it however was not immediate. This proceeded to amend the 1973 code several times during the following decade. One of the most significant interventions is represented by the Ley Organica 3/1989, which replaced the ancient and ancestral column of "delitos contra la honestidad" with that of "delitos contra la libertad sexual"<sup>103</sup>. This is a change that inevitably leads to a definitive construction of sexual criminal law on the concept of sexual freedom as a protected legal asset, which takes shape definitively in the new penal code of 1995, which represents the culmination of this legislative process of freeing the whole sexual offenses from the formal dimension of public morality.

In the wake of this change, as well as by virtue of the challenges taken in the international sphere<sup>104</sup>, the Spanish legislator, starting from the nineties, begins to focus its attention on the minor subject, so as to guarantee him a wider protection in the criminal sphere. In this sense, Ley Organica 1/1999 follows, which introduces the concept of integrity as an object of protection, combined with sexual freedom, which connects directly with the right not to suffer interference in the personality formation process, an authentically relevant element in the sphere of protection of crimes against minors<sup>105</sup>.

It was a reform that did not only lead to the modification of the heading of the title dedicated to "delitos contra la libertad sexual" now of the "delitos contra la libertad e indemnidad sexuales", but also to the change of the different criminal cases<sup>106</sup>. This trend towards the intensification of the sexual protection of minors under

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as a general principle, it is also possible to recall art. 48, according to which "los poderes publicos promovieran las condiciones para la participacion libre y eficaz de la juventud en el desarrollo politico, social, economico y cultural.", as well as article 20, paragraph 4, which recalls that freedom of thought expression "tienen su limite en el respeto a los derechos reconocidos en este Titulo, en los preceptos de las leyes que lo desarrollen y, especialmente, en el derecho al honor, a la intimidad, a la propia imagen y a la proteccion de la juventud y de la infancia."

<sup>103</sup>In Exposicion de Motivos della Ley Organica 3/1989 which is declared that: "La necesidad de una reforma de los llamados delitos contra la honestidad delCodigo Penal es una exigencia que cada dia se perfila con mayor nitidez y es reclamada desde amplias capas de la sociedad. Una primera modificacion se impone: Respetar la idea de que las rubricas han de tender a expresar el bien juridico protegido en los diferentes preceptos, lo que supone sustituir la expresion honestidad por libertad sexual, ya que esta es el autentico bien juridico atacado (...)"

<sup>104</sup>In the aforementioned art. 39 of the Constitution, fourth paragraph, reads as "(...) los niños gozarán de la protección prevista en los acuerdos internacionales que velan por sus derechos". Provision that allows to support the internationalization of child protection. DOLZ LAGO MJ, Derechos, justicia y estado constitucional, Un tributo a Miguel C. Miravet, Universitat de Valencia, Valencia, 2005.

<sup>105</sup>The concept of sexual integrity tends to protect the process of formation of the child in sexual matters as free development of the personality, in order to avoid being subjected to practices that prevent adequate sexual education and cancel or limit the exercise of authentic freedom sexual, ability to freely decide on his preferences in matters relating to this area of human life. Therefore, sexual freedom is denied to minors of a certain age for reasons connected with their development and well-being, and for this reason, the protected legal asset in these cases is called indemnidad sexual. AGUSTINA J., ¿Menores infractores o víctimas de pornografía infantil?: respuestas legales e hipótesis criminológicas ante el Sexting, op. cit., pp. 30ss.

<sup>106</sup>See the: Exposicion de Motivos of Ley Organica 11/1999 there is a need of: "(...) modificar las normas contenidas en el Codigo Penal, relativas a los delitos contra la libertad sexual, las cuales no responden adecuadamente, ni en la tipificacion de las conductas ni en la conminacion de las penas correspondientes, a las exigencias de la sociedad nacional e internacional en relacion con la importancia



age then becomes typical of the 2000s, which are characterized by three fundamental stages: LO November 25, 2003, n.15, LO June 22, 2010 n.5 and last LO 2015. In fact, with the Ley Organica 15/2003, in 2003 directed on the one hand to modify the crimes against freedom and on the other hand to carry out an important reform of the crime of child pornography, the legislature continues in the intent to harmonize its legislation with the protection needs required by society<sup>107</sup>

Then follows the Ley Organica n.5 / 2010, the twentieth modification of the penal code, issued by the Spanish legislator in order to comply with the provisions of the Council Framework Decision 2004/68/JHA<sup>108</sup>. In this sense, the novella signals, the entry into the criminal article of new criminal cases to the detriment of minor subjects, specifically inserted in a chapter of new coinage entitled "de los abusos y agresiones sexuales a menores de trece años" (articles 183 bis and ter of the criminal code)<sup>109</sup>, also introducing the well-known and contested crime of child grooming or soliciting of a minor, identifying those conducts aimed at obtaining the trust of the minor and then abusing them<sup>110</sup>, determining and raising the age of sexual consent from thirteen to sixteen years, not without raising, on this side, heavy criticisms for the choice to have actually gone much further than the advances in protection proposed by the aforementioned Directive<sup>111</sup>, bringing out "a certain Europeanizing pan-pantheism, a bad legislative technique, a inflación criminal y penal y un doble discurso sobral grooming, a phenomenon which instead found its first affirmation in the Lanzarote Convention of the 2007, ratified in Spain on 1st December 2010.

To be accused is certainly a path of reform that under the pretext of protecting the free exercise of sexuality has actually directed towards a progressive drift of the

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de (...) no puede ser siempre determinante de la licitud de unas conductas que, sin embargo, podrian ser licitas entre adultos (...)"

<sup>107</sup>See the Exposicion de Motivos of law of 2003 which is affirmed that: "(...)se ha abordado una importante reforma del delito de pornografia infantil, endureciendo las penas, mejorando la tecnica en la descripcion de las conductas e introduciendo tipos como la posesion para el propio uso del material pornografico en el que se hayan utilizado menores o incapaces o los supuestos de la nominada pornografia infantil virtual (...)"

<sup>108</sup>See the Exposicion de Motivos, par. XIII: "En el ambito de los delitos sexuales, junto al acrecentamiento del nivel de proteccion de las victimas, especialmente de aquellas mas desvalidas, ha de mencionarse la necesidad de trasponer la Decision Marco 2004/68/JAI del Consejo, de 22 de diciembre de 2003, relativa a la lucha contra la explotacion sexual de los ninos y la pornografia infantil". However, this is an incorrect reference as this decision of the European Union does not present any reference: RAMOS VÁZQUEZ J.A., Política criminal, cultura y abuso sexual de menores. Un estudio sobre los artículos 183 y siguientes del Código penal, ed. Tirant Lo Blanch, Valencia, 2016.

<sup>109</sup>VILLACAMPA ESTIARTE C., El delito de online child grooming o propuesta sexual telemática a menores, op. cit.,

<sup>110</sup>See ex multis: MENDOZA CALDERON S., El derecho penal frente a las formas de acoso a menores. Bullying, cyberbullying, grooming y sexting, op. cit., RAMOS VÁZQUEZ J.A., Política criminal, cultura y abuso sexual de menores. Un estudio sobre los artículos 183 y siguientes del Código penal, op. cit., SUÁREZ-MIRA RODRÍGUEZ C., Abusos sexuales a menores: arts. 182, 183 y 183 bis CP, in GONZÁLEZ CUSSAC J. L., Comentarios a la reforma del Código Penal de 2015, ed. Tirant Lo Blanch, Valencia, 2015

<sup>111</sup>SUÁREZ-MIRA RODRÍGUEZ C., Abusos sexuales a menores: arts. 182, 183 y 183 bis CP, in GONZÁLEZ CUSSAC J. L., Comentarios a la reforma del Código Penal de 2015, op. cit., pp. 604ss. Vives Anton es igualmente crítico, quien subrayó cómo esta erosión de los valores democráticos de suma importancia se produjo con esta reforma. VIVES ANTÓN T. S., La reforma penal de 2015: una valoración genérica, in GONZÁLEZ CUSSAC J. L., Comentarios a la reforma del Código Penal de 2015, ed. Tirant Lo Blanch, Valencia, 2015.

criminal law towards populist positions<sup>112</sup>, while giving life to a discipline, that to protect of the minor, increasingly uneven<sup>113</sup>.

The aforementioned and uneven path of reform also intervened to modify the ex lege recognition recognized for the sexual self-determination of the minor. The milestones of this process are certainly the already mentioned reforms of 2010 and 2015.

Before 2010 there was a certain degree of consensus regarding the existence of a presumption iuris et de iure of inability to validly allow in sexual matters up to a certain threshold age, identified in the thirteenth year of age, in compliance with the provisions of the then 181.1 pc<sup>114</sup>. Security that fails with the 2010 reform which, by eliminating any reference to this presumption, limits itself to providing for in art. 183.1 criminal code the criminal liability of the person who carries out acts that attack the sexual integrity of a child under thirteen<sup>115</sup>.

In this context, Ley Orgánica 1/2015 is inserted, which, in art. 183 quater, elevates the age of sexual consent to sixteen. A choice made by the Spanish legislator, which certainly reflected in his intentions the will of external pressure<sup>116</sup>. To this must be added how the 2015 reform also brought with it the inclusion, at the end of the chapter "De los abusos y agresiones sexuales a menores de dieciséis años", always in art. 183 quater, of a cause of exclusion of criminal liability based on consent<sup>117</sup>.

In compliance with the indications addressed by Directive 2011/93/EU, this provision, which configures a sort of Romeo and Juliet clause<sup>118</sup>, provides for a

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<sup>112</sup>CUERDA ARNAU M. L., Irracionalidad y ausencia de evaluación legislativa en las reformas de los delitos sexuales contra menores, in Revista Electrónica de Ciencia Penal y Criminología, 19, 2017.

<sup>113</sup>FERNÁNDEZ NIETO J., Reforma del Código Penal: hacia una nueva dimensión de la protección de la víctima de los delitos de sexting y grooming, in Diario La Ley, 2016.

<sup>114</sup>CARUSO FONTAN M.V., Nuevas perspectivas sobre delitos contra la libertad sexual, ed. Tirant Lo Blanch, Valencia, 2006 which is affirmed that: "existe una presunción iure et de iure de falta de consentimiento válido en menores de trece años y una presunción iuris tantum de capacidad para consentir en edades posteriores".

<sup>115</sup>El tema del bien legal protegido ha sido ampliamente discutido en la doctrina, ya que se basa en la dicotomía entre la libertad sexual y la integridad sexual. La libertad sexual de las personas a quienes no se reconoce legalmente la capacidad de autodeterminación en la esfera sexual se entiende como el derecho a no interferir en el proceso de formación de la capacidad de decidir libremente, en particular cuando dicha interferencia deriva de adultos o en casos donde el menor no puede relacionarse en un campo de juego nivelado. Por lo tanto, el hecho se traduce en abuso sexual, ya que el abusador obtiene una ventaja sobre el niño sin que el niño pueda establecer un consentimiento válido. A diferencia del concepto de integridad sexual o indemnidad, que puede decirse más tarde como TAMARIT SUMALLA J.M., ¿Son abuso sexual las interacciones sexuales en línea? Peculiaridades de la victimización sexual de menores a través de las TIC, in Revista de Internet, Derecho y Política, 15, 2018.

<sup>116</sup>COMMITTEE ON THE RIGHTS OF THE CHILD Concluding Observations: Spain, 2007. 23-24: "Preocupa al Comité que la edad relativamente baja para el consentimiento sexual, los 13 años de edad, vuelva a los niños más vulnerables a la explotación sexual (...) El Comité recomienda que el Estado Parte considere la posibilidad de elevar la edad de consentimiento sexual para brindar una mayor protección contra los delitos abarcados por el Protocolo Facultativo".

<sup>117</sup>Art. 183 quater "El consentimiento libre del menor de dieciséis años excluirá la responsabilidad penal por los delitos previstos en este Capítulo, cuando el autor sea una persona próxima al menor por edad y grado de desarrollo o madurez". OGALLAR B.F., El derecho penal armonizado de la Unión Europea, Dykinson S.L, Madrid, 2014, pp. 214ss.

<sup>118</sup>VILLACAMPA ESTIARTE C., El delito de online child grooming o propuesta sexual telemática a menores, in VILLACAMPA ESTIARTE C., AGUADO-CORREA T., Delitos contra la libertad e indemnidad sexual de los

restriction of the scope of operation of the criminal response provided for in the previous articles, i.e. consolidated at the legislative level through the aforementioned reforms, relates to the effects of child sexual abuse and, therefore, to the damage it can cause to the victims. On the other hand, the jurisprudence considers that it implies the right of the minor not to suffer interference in the process of sexual training appropriate to his age and the theme of sexual abuse and aggression towards minors, in the presence of the accumulation of a chronological requirement, that of age, and a physiological one, relevant to the developmental maturity. Precisely, the exemption of criminal liability, with reference to articles 183 bis and ter<sup>119</sup>, works if there has been valid consent to sexual activity expressed by the subject under sixteen years of age and if the author is in turn younger than or next to this age and has a certain degree of maturity and development.

A perspective that does not seem, however, to have brought about any change in the so-called pornographic freedom. The discipline envisaged in the field of child pornography (art. 189 et seq), has maintained its original applicability for the protection of minors under eighteen years of age, without any space of relevance for a possible consent validly given by them to said activity<sup>120</sup>, for which, even in the aftermath of the 2015 reform, within the Spanish context there is no freedom of the child in participation in pornographic acts, in the elaboration of said material, as in its further distribution<sup>121</sup>

A difference, that between freedom to sexual acts and pornographic non-freedom, which has been explained, as already indivate, in light of the different conceptualization of the activity on which the granting or not of freedom falls. On the one hand, maintaining a free sexual relationship is considered part of the normal development of the person's sexuality, of which adolescence represents a fundamental stage. It is an activity that belongs to the private sphere, in which the subjects participate without any constraint. In the case of pornography, however, given the public vocation of the content, different legal assets such as dignity and honor would be related, which therefore require adequate protection, strengthened in the case of the child<sup>122</sup>. In this sense, for example, the Fiscalía General de Estado expressed itself

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menores. Adecuación del Derecho Español a las demandas normativas supranacionales del protección, Thomson Reuters Aranzadi, Madrid, 2015.

<sup>119</sup>Ante este cambio, Dolz Lago, quien se inclina hacia una visión del activo legal protegido en los crímenes bajo examen como un activo colectivo relacionado con la infancia, subrayó la apertura del legislador de 2015 hacia una re-comprensión en dicho activo también del 'adolescencia. DOLZ LAGO MJ, La infancia como bien jurídico colectivo protegido penalmente, in Diario de la Ley, 2018. Sin embargo, elevar la edad mínima de consentimiento también ha encontrado una fuerte oposición dentro de parte de la doctrina. Por su parte, Cuerda Arnau subrayó la irracionalidad manifiesta y la falta de cualquier fundamento sociológico, lo que confirmaría una tendencia preocupante del legislador español a hacer del derecho penal sexual un campo de experimentación con vientos populistas y oportunistas. CUERDA ARNAU M. L., Irracionalidad y ausencia de evaluación legislativa en las reformas de los delitos sexuales contra menores, op. cit.,

<sup>120</sup>DEL LA ROSA CORTINA J.M., Los delitos de pornografía infantil. Aspectos penales, procesales y criminológicos, ed. Tirant Lo Blanch, Valencia, 2011.

<sup>121</sup>FERNANDEZ TERUELO J.G., Derecho Penal e internet. Especial consideración de los delitos que afectan a jóvenes y adolescentes, Lex Nova, Valladolid, 2011. MIRÓ LLINARES F., La respuesta penal al ciberfraude. Especial atención a la responsabilidades de los muleros del phishing, in Revista Electrónica de Ciencia Penal y Criminología, 15, 2013, pp. 13ss.

<sup>122</sup>According to: Rueda Martin, el problema en el ciberespacio se complica por tres razones en este

with a pronouncement of n.3 of 29 November 2006<sup>123</sup>

In this sense, the decisive hub was a ruling by the Supreme Court in 2010, sentence no.803, which did not limit itself to stating that the behaviors punished by child pornography are united by the fact that the taxable person is a minor of 18 years (or incapable) and that their consent is invalid because there is a legal presumption in the sense that they have no conditions of freedom for the exercise of sexuality by them, when said exercise implies their use by third parties for pornographic or exhibitionistic purposes, but he also specified that, as regards the protected legal right, it would not be the sexual indemnity of the minor's personality, but his dignity as a minor or his right to his own image, to justify this irrelevance of the consent of those who have less than 18 years who decide to intervene in the preparation of pornographic material, even without abuse of superiority or deception, when such consent, on the contrary, it would be valid for the practice of sexual relations<sup>124</sup>. For its part, the doctrine had also observed it: numerous were the underlying issues and strong was the possible compromise of fundamental rights such as honor, intimacy and confidentiality. Evidence that emerges with particular reference to sexting. In this sense, the aforementioned ruling acknowledges a particularity of the Spanish approach to the legal debate that arose on the matter, which senses the strong damage to the dissemination of the material, considered to be detrimental to the legal good of *intimididad*.

Therefore, it is evident that with reference to the case of sexting between minors, the assessment of the influence of the validity of the consent appears fundamental, thus making us reflect on the specific criminal type applicable.

### **8.SEXTING AS PORNOGRAPHIC CONDUCT. THE RELATIONSHIP WITH ART. 183 TER OF THE CRIMINAL CODE INTRODUCED BY THE 2010 REFORM.**

Even in the Spanish context, the discussion regarding sexting inevitably entails its evaluation in the light of the legislation on child pornography<sup>125</sup>.

According to Agustina, sexting revealed a contrast between the autonomy in

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sentido: debido a su inmadurez, la menor dificultad para comprender la trascendencia del consentimiento y los efectos en la esfera de su personalidad vinculados al ciberespacio; La vulnerabilidad aumenta debido a la incapacidad de controlar la publicidad de los datos, mientras que la falta de control restringe la posibilidad de una respuesta defensiva. RUEDA MARTIN M.A., La relevancia penal del consentimiento del menor de edad en relación con los delitos contra la intimidación y la propia imagen, in *Indret: Revista para el Análisis del Derecho*, 4, 2013.

<sup>123</sup>Which is affirmed that:“(...) onforme a nuestro derecho, los menores de dieciocho años siempre están protegidos frente a su utilización por terceras personas con fines pornográficos, por lo que se parte de la irrelevancia del consentimiento de los menores para intervenir en la producción de este material, aun cuando tal consentimiento pudiera haberse reputado válido para la práctica, en su caso, de las relaciones sexuales sybyacentes (...)”.

<sup>124</sup>Aquí están las palabras precisas pronunciadas por la Corte Suprema, según las cuales “las conductas descritas en el art. 189 tienen en común que el sujeto pasivo es un menor de 18 años (o incapaz) y que su consentimiento es no válido al existir una presunción legal en el sentido de que no concurren condiciones de libertad para el ejercicio de la sexualidad por parte de estos, cuando dicho ejercicio implica su utilización por terceras personas con fines pornográficos o exhibicionistas (...)”.

<sup>125</sup>MARTINEZ OTERO J.M, BOO GORDILLO A, El fenómeno del sexting en la adolescencia: descripción, riesgos que comporta y respuestas jurídicas, in GARCIA GONZALEZ J., La violencia de género en la adolescencia, ed. Aranzadi, Navarra, 2012.

the management of their sexual freedom by adolescent minors and those juridical positions dominated by the traditional moralism that had characterized the policies justifica esa irrelevancia del consentimiento de los menores de 18 años que deciden will intervene in the elaboration of the pornographic material, including sin mediar abuso de superioridad o engaño, cuando ese consentimiento, por conversely, is serious valid for the practice of relaciones sexuales cuando no mediasen tales circunstancias<sup>126</sup>. Unlike Mendoza Calderon, in assessing the issue the problem was more on the level of evaluating the means that could be said to be most effective in dealing with the phenomenon, mostly of an educational nature<sup>127</sup>.

The interconnection between the social phenomenon and this legislation was first underlined in 2008 when a minor was found guilty by the Juvenile Court of Terragona of the crime of "posesion de material pornografico"<sup>128</sup> for having convinced his peer to send him photos that the they portrayed naked and/or in sexually connoted poses. It was the first court case celebrated in the Iberian country that progressively brought out the awareness of the existence of sexting among young people in public opinion and institutions<sup>129</sup>.

Even in the Spanish panorama, however, the doctrine has been spent emphasizing the specific purposes underlying the legislation on child pornography and aimed at protecting minors from such exploitation practices<sup>130</sup>. As noted, these would be phenomena, child pornography and sexting, which indicate two different situations. In the first case, the images of minors are exploited for sexual purposes and the minor appears clearly as a victim of sexual exploitation, while in sexting the starting point is in self-production or production with the consent of the minor.

That said, the starting point is represented by the concept of child pornography. Despite the numerous changes to which the current code has been subjected since the

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<sup>126</sup>GARCIA GONZALEZ J., La violencia de genero en la adolescencia, op. cit.,

<sup>127</sup>MENDOZA CALDERON S., El derecho penal frente a las formas de acoso a menores. Bullying, ciberbullying, grooming y sexting, op. cit.,

<sup>128</sup>El caso en realidad se colocó en un contexto de mayor complejidad. Como el menor de quince años había contactado a su víctima, también de quince años a través de un servicio de mensajería instantánea, utilizando una identidad falsa. Después de ganarse la confianza de la niña, la convenció de desnudarse y masturbarse frente a la cámara de video de la computadora, para así poder obtener imágenes de estos actos. En los días siguientes intento extorsionar a la joven con otros contenidos de este tipo, esta vez con la participación de una amiga, detrás de la amenaza de publicar los primeros en línea. Dentro de la computadora del niño, la autoridad investigadora también encontró otros contenidos pornográficos, algunos incluso muy extremos, relacionados no solo con la niña sino también con otros menores (Juzgado de Menores Terragona, 30 de diciembre de 2008). AGUSTINA J., ¿Menores infractores o víctimas de pornografía infantil?: respuestas legales e hipótesis criminológicas ante el Sexting, cit., pp. 33ss.

<sup>129</sup>In 2011, a first study called Guide on adolescence and sexting was published; which is and as prevenrilo80, according to which 4% of the children interviewed, between the ages of 13 and 16, confirmed that they had been photographed or, in any case, had recovered with their cell phones in sexually explicit poses, the 8% stated that they had been at least once a recipient of this type of content. The official recognition is a little later, as can be read, for example, in Instruction n. 7/2013 of the Secretary of State for Security, called "Plan Director parala la convivencia y mejora de la seguridad in los centros educativos y sus entornos", or in the 2014 Memoria della Fiscalía General de Estado, where there is a growing attention towards the phenomenon and a contextual call to raise educational precautions on the one hand and to update the regulatory tools on the other.

<sup>130</sup>AGUSTINA J., ¿Menores infractores o víctimas de pornografía infantil?: respuestas legales e hipótesis criminológicas ante el sexting, op. cit., pp. 41ss.



late 1990s, no legislative definition has been entered into until novella no. 1/2015. In fact, although the 2010 reform had received the requirements included in the framework decision 2004/68/JHA<sup>131</sup>, in the elaboration of the related Anteproyecto there was no clarification relating to the concept of child pornography material, thereby meeting, already in the drafting, not a few criticisms.

In this unresolved framework, ample interpretative space was left to doctrine and jurisprudence, which thus came to develop criteria for the identification of the material as pornographic, identified in the existence of a libidinous content, tending to excite or satisfy sexual instincts and devoid of artistic, literary, scientific or pedagogical value, together with the offensive potential of representation according to the standards relating to sexuality<sup>132</sup>. The result was, however, a particularly elastic definition, which for this raised strong doubts of contrast with the principle of legality<sup>133</sup>, as well as an evident friction with sexting.

The legislator, with the 2015 reform, which, as we said, transfers what was laid down by Directive 2011/92/EU<sup>134</sup>, to the article of the code, thus invades a land until then dominated by doctrine and jurisprudence, trying to satisfy the aforementioned legality requirements<sup>135</sup>, obviously not meaning complete immunity from criticism. It reads clearly in the Exposición de Motivos how the insertion of a legal definition has as its ultimate aim to put an end to the interpretative doubts that emerged up to that time, while providing a clear configuration in art. 189<sup>136</sup>.

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<sup>131</sup>Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13, 20.1.2004, p. 44-48. For further details see also: BULLOUGH V.L., *Adolescence sexuality and the criminal law: Multidisciplinary perspectives*, ed. Routledge, London & New York, 2014. GOMES DE ANDRADE N.N., TOMÉ FÉTEIRA, VIOLA DE AZEVEDO CUNHA M., *New technologies and human rights: Challenges to regulation*, ed. Routledge, London & New York, 2016. SUMMERS S.J., SCHWARZENEGGER C., EGE G., *The emergence of EU criminal law: Cyber crime and the regulation of the information society*, op. cit., BULLOUGH, V.L., *Adolescence, sexuality and the criminal law: Multidisciplinary perspectives*, op. cit.,

<sup>132</sup>QUINTERO OLIVARES G., MORALES PRATS F., *Comentarios a la parte especial del derecho penal*, ed. Aranzadi, Navarra, 2007, pp. 334ss.

<sup>133</sup>FERNANDEZ TERUELO J.G., *Concepto de pornografía infantil y modalidades típicas comisivas tra la reforma del Código Penal operada por la Ley Orgánica 17/2015 de 30 marzo: la pornografía infantil y la que no lo es (aunque se calique como tal)*, in CUERDA ARNAU M.L., FERNÁNDEZ HERNÁNDEZ A., *Menores y Redes Sociales. Ciberbullying, ciberstalking, cibergrooming, pornografía, sexting, radicalización y otras formas de violencia en la red*, ed. Tirant lo Blanch, Valencia, 2016.

<sup>134</sup>To observe the preparatory work for the reform, no specific explanations emerge regarding the political-criminal reasons that pushed the legislator towards a new reform of juvenile pornography crimes, finding in the Exposición de Motivos the limited reference to the transposition of the aforementioned Directive. It appears, in fact, evident that there has been an almost total translation regarding the content of the Directive, having only in limited cases the Spanish legislator used that margin of discretion provided by the international text to modulate the space of intervention of the penal sanction.

<sup>135</sup>OSSANDON M.M., *La técnica de las definiciones en la ley penal: Análisis de la definición de material pornográfico en cuya elaboración hubieren sido utilizados menores de dieciocho años*, in *Política Criminal*, 18, 2014.

<sup>136</sup>It is clear that the Spanish legislator opts for an almost total reception of the definition provided by the Directive, with two exceptions. The first concerns the replacement of the term incapable with the expression "person with discapacidad necesitada de especial protección". The second, on the other hand, concerns the so-called technical pornography which, however, it typifies through a confused and difficult interpretation. FERNANDEZ TERUELO J.G., *Concepto de pornografía infantil y modalidades típicas comisivas tra la reforma del Código Penal operada por la Ley Orgánica 17/2015 de 30 marzo: la*

By virtue of the intervention, the new formulation of art. 189.1 provides in the second paragraph a complex articulation divided into four paragraphs. The first two refer to the so-called real pornography with object, respectively, the representation of the child in the act of a sexually explicit conduct or of the genital organs of the same. Otherwise, paragraph three refers to technical pornography and paragraph four to virtual pornography<sup>137</sup>. Editorial criticized for the display complexity and lexical redundancy.

The picture emerges of a legal definition full of interpretative gaps and redundant descriptions, well subsumed in the first.

It must then be said how the reform has invested at a wider scale, not limited to the introduction of the indicated definition, in an attempt to resolve the systematic illogical finding and repeatedly raised that had characterized the rule until 2015.

Less serious, if not an exclusion from criminal responsibility. In this sense, it seems that we can see a reference to cases characterized by consensuality<sup>138</sup>. Otherwise, for those who were not consensual, the way of criminalization was preferred, with proposals for intervention in this sense<sup>139</sup>.

As noted by Colas Turegano, the legal assets would be different in that in the crimes of child pornography the sexual allowance of minors is protected, protecting them from practices harmful to their own training process, while sexting rather underlies the intimacy of the subject, injured at the moment of diffusion<sup>140</sup>.

Before the introduction of the changes made by the 2015 criminal reform, these behaviors did not meet a clear response from the system through the existing criminal cases, creating a bag of possible impunity or an adherent to child pornography<sup>141</sup>.

In this regard, the provisions of the Circular of the Fiscalía General n./2015 concerning "los delitos de pornografía infantil tra las reforma operada por LO 1/2015", which underlined the atypical nature of personal communication directed against

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pornografía infantil y la que no lo es (aunque se calique como tali), op. cit.,

<sup>137</sup>Art. 189, 1<sup>st</sup> lett., "A los efectos de este Título se considera pornografía infantil o en cuya elaboración hayan sido utilizadas personas con discapacidad necesitadas de especial protección: a) Todo material que represente de manera visual a un menor o una persona con discapacidad necesitada de especial protección participando en una conducta sexualmente explícita, real o simulada. b) Toda representación de los órganos sexuales de un menor o persona con discapacidad necesitada de especial protección con fines principalmente sexuales. c) Todo material que represente de forma visual a una persona que parezca ser un menor participando en una conducta sexualmente explícita, real o simulada (...)"

<sup>138</sup>MARTINEZ OTERO J.M, BOO GORDILLO A, El fenómeno del sexting en la adolescencia: descripción, riesgos que comporta y respuesta jurídica, in GARCIA GONZALEZ J., La violencia de género en la adolescencia, op. cit.,

<sup>139</sup>Agustina, for example, had proposed inclusion in the art. 189 of the criminal code of the following paragraph: "Del mismo modo será castigado quien, debiendo velar por el adecuado desarrollo o educación de un menor o de un grupo de menores, no pusiere los medios para impedir las conductas descritas en el apartado c) del presente artículo, siempre que tuviere conocimiento de ello, sin perjuicio de la responsabilidad civil que pudiere derivarse" AGUSTINA J., ¿Menores infractores o víctimas de pornografía infantil?: respuestas legales e hipótesis criminológicas ante el Sexting, op. cit., pp. 43ss.

<sup>140</sup>COLAS TUREGANO A., Los delitos de género entremenores en la sociedad tecnológica: rasgos diferenciales, in CUERDA ARNAU M.L., FERNANDEZ HERNANDEZ A., Menores y Redes Sociales. Ciberbullying, cyberstalking, cibergrooming, pornografía, sexting, radicalización y otras formas de violencia en la red, Tirant Lo Blanch, Valencia, 2016.

<sup>141</sup>JIMÉNEZ SEGADO, C. La novedosa respuesta penal frente al fenómeno sexting, in Actualidad Jurídica Aranzadi, 2016.

another minor who gives his consent and that he has reached the age of sexual consent. It specifically states that if the material has been processed with respect to a minor over the age of sixteen with the full consent of the same and in conditions that totally exclude the risk of being disclosed to third parties, there should be a formally unlawful conduct, since there is no injury of the legal good.

In this context, the further intervention promoted by the legislator in 2015 through the inclusion of a new case in art. 183 ter of the Criminal Code, second paragraph, defined by some commentators as sexting, and which imposes the sentence of imprisonment from six months to two years to the one who, through internet, telephone or other technological means, contacts a minor of sixteen and carries out acts aimed at deceive him in order to obtain pornographic material or to show to him images of this kind in which the same is present or a minor appears<sup>142</sup>. The Exposición de Motivos reads how the inclusion of this new paragraph in the article responded to the need to protect minors from new abuses committed through the internet or other means of communication<sup>143</sup> in compliance with the provisions of art. 6, second paragraph, of Directive 2011/92/EU<sup>144</sup>.

Built in assonance with the crime of child grooming, inserted following the 2010 reform in art. 183 bis and then moved in 2015 to the first paragraph of art. 183 ter, again outlines a case that gains ground in terms of criminal protection, which is decidedly anticipated. Anticipation that would find its rationale in the desire to eliminate any unwanted interference in the development of the child's formation process with regard to the delicate sexual matter.

The new case was thus already indicated in the so-called Anteproyecto, encountering strong criticism especially from the doctrine, which proposed, if not the elimination of the rule thus indicated, the inclusion at least of the "Romeo and Juliet" clause<sup>145</sup>. But it was not so.

In this sense, according to part of the doctrine, there could be no refuge even in

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<sup>142</sup>Art. 183 ter, 2nd lett.: "El que a través de internet, del teléfono o de cualquier otra tecnología de la información y la comunicación contacte con un menor de dieciséis años y realice actos dirigidos a embaucarle para que le facilite material pornográfico o le muestre imágenes pornográficas en las que se represente o aparezca un menor".

<sup>143</sup>Which is declared that: "la protección de los menores frente a los abusos cometidos a través de internet u otros medios de telecomunicación, debido a la facilidad de acceso y el anonimato que proporcionan, se completa con un nuevo apartado en el artículo 183 ter del Código Penal destinado a sancionar al que a través de medios tecnológicos contacte con un menor de quince años-errore poi corretto in seguito avendo proprio tale intervento innalzato a sedici anni la soglia dell'età del consenso- y realice actos dirigidos a embaucarle para que le facilite material pornográfico o le muestre imágenes pornográficas".

<sup>144</sup>"El que, con fines sexuales, determine a un menor de dieciséis años a participar en un comportamiento de naturaleza sexual, o le haga presenciar actos de carácter sexual, aunque el autor no participe en ellos, será castigado con una pena de prisión de seis meses a dos años. Si le hubiera hecho presenciar abusos sexuales, aunque el autor no hubiera participado en ellos, se impondrá una pena de prisión de uno a tres años." 183 ter, 1st lett.: "El que a través de internet, del teléfono o de cualquier otra tecnología de la información y la comunicación contacte con un menor de dieciséis años y proponga concertar un encuentro con el mismo a fin de cometer cualquiera de los delitos descritos en los artículos 183 y 189 (...) Las penas se impondrán en su mitad superior cuando el acercamiento se obtenga mediante coacción, intimidación o engaño (...)".

<sup>145</sup>VILLACAMPA ESTIARTE C., El delito de online child grooming o propuesta sexual telemática a menores, op. cit., pp. 139-188.

the criminal exclusion clause pursuant to art. 183 quater, which is based on the free consent given by the minor of sixteen years, as there would be an evident incompatibility precisely with the requirement of the minor's embedding<sup>146</sup>. On closer inspection, on the contrary, the obvious and disturbing consequence must be grasped: if the minor sends the photo of another minor he will be liable for the distribution of pornographic material<sup>147</sup>. The step from victim to author is short.

The wording of the norm seems to refer only to those acts aimed at the deception of the inexperienced minor, acts aimed at taking advantage of the child's sexual inexperience and behaving a serious risk for his/her mental well-being, as well as for the development of his/her training process<sup>148</sup>. The acts supported by the deception must then be directed to facilitate pornographic material or the display of images. This second case could be understood as a preparatory conduct with respect to the crime of using the minor for the purpose of processing child pornography, provided for and punished by art. 189, second paragraph, characterized by the use of technology., Which could result in a competition of rules, which would however be resolved in favor of the second offense, in compliance with the principle of absorption referred to in art. 8, third paragraph, of the penal code, thus implying the uselessness of the intervention, confined to a mere applicability to the attempted area.

To this must be added how, in spite of the location, there is an evident rupture, not very consistent, with the aforementioned concept of child pornography, equally the son of the 2015 reform, of which we do not see the reference to any of the four different meanings now provided.

The consequences in reference to sexting<sup>149</sup>, are therefore inevitable, involved in an overlapping of inconsistent criminal rules, which on the one hand do not seem to leave room for the consensuality of the minor and on the other hand fail to address the consequences that derive from the diffusion of the intimate material, the which can be referred to another provision promoted by the 2015 legislator: The crime provided for in art. 197.7 of the criminal code<sup>150</sup>

## **9.THE REFORM INTERVENTION OF LEY ORGANICA 1/2015 AND THE NEW ARTICLE 197.7, BETWEEN LANDING POINTS AND CONTROVERSIAL ISSUES**

It has been said that the offensive of sexting is played not so much, or only, on the level of production of intimate content as above all on that of diffusion. Well, before the 2015 reform, the conduct of the one who decided to disclose said content, undermining the bond of trust proper to the closed and intimate circle in which the exchange took place, did not qualify as a conduct against criminally prosecutable intimacy<sup>151</sup>.

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<sup>146</sup>QUINTERO OLIVARES G., Comentarios al Código Penal Español. Tomo I, ed. Aranzadi, Pamplona, 2016.

<sup>147</sup>RAMOS VÁZQUEZ, J.A., Grooming y Sexting: art. 183 ter, in GONZÁLEZ CUSSAC J. L., Comentarios a la reforma del Código Penal de 2015, ed. Tirant Lo Blanch, Valencia, 2015, pp. 621-626.

<sup>148</sup>RAMOS VÁZQUEZ, J.A., Grooming y Sexting: art. 183 ter, op. cit.

<sup>149</sup>MENDOZA CALDERON S., El derecho penal frente a las formas de acoso a menores. Bullying, cyberbullying, grooming y sexting, op. cit.

<sup>150</sup>DOVAL PAIS A., ANARTE BORRALLA E., Efectos de la reforma de 2015 en los delitos contra la intimidad, in Diario La Ley, 2016.

<sup>151</sup>DE LAS HERAS VIVES, MORALES PRATS F., Protección penal de la intimidad. Una revisión crítica a

If the jurisprudence sought to remedy the legislative gap, resorting to the cases in force, the doctrine was in contrast with regard to the need or not to intervene creatively on the other hand. In this sense, there were those who stressed the strong detrimental extent of these spreads, which could also have serious consequences for the victim<sup>152</sup>. Others recognized, however, how the use of the criminal instrument, and its function of general-negative prevention could have acted as a brake on the non-consensual diffusion of sexual content<sup>153</sup>.

The primary observation raised obviously followed the risk of invalidating some fundamental principles of criminal law, first of all that of the so-called minimal intervention, which wants criminal law as *extrema et ultima ratio*. In light of the aforementioned principle, the criminal intervention in the matter of intimacy injury should have been limited to cases in which the content had been obtained illegally<sup>154</sup>. Another principle that would seem to be at risk is that of the so-called fragmentation of criminal law<sup>155</sup>.

For its part, the jurisprudence offered different solutions, all attributable, albeit with different approaches, to the aforementioned regulation on the subject of the rediscovery of secrets, pursuant to art. 197 of the penal code. In Martínez Otero's

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propósito del nuevo artículo 197.7 del código penal español, Universitat Autònoma de Barcelona, Barcelona, 2018. TOMÁS-VALIENTE LANUZA C., Delitos contra la intimidad y redes sociales (en especial en la jurisprudencia más reciente), in *Revista d'Internet, Dret i Política*, 2018, pp. 33ss. PÉREZ RIVAS N., La regulació de la prohibició de aproximarse a la víctima en el código penal español, in *Ius et Praxis*, 22 (2), 2016. BACIGALUPO SAGGESE S., FEIJOO SÁNCHEZ, B., IGNACIO ECHANO BASALDUA J.I., Estudios de derecho penal. Homenaje al profesor Miguel Bajo, Rditorial Universitarias Areces Ramón, Madrid, 2018.

<sup>152</sup>VILLEGAS GARCÍA, M. A., Imágenes íntimas e internet. Cerco legislativo a la venganza privada en la red, in *Actualidad Jurídica Aranzadi*, 2014.

<sup>153</sup>PUENTE ABA L.M., Difusión de imágenes ajenas en Internet: ¿ante qué delitos nos encontramos?, in CARBONELL MATEU J.C., CUERDA ARNAU M.L., GONZÁLEZ CUSSAC J.L., ORTS BERENGUER E., Constitución, derechos fundamentales y sistema penal. Semblanzas y estudios con motivo del setenta aniversario del profesor Tomás Salvador Vives Antón, Tirant Lo Blanch, Valencia, 2009. A.A.V.V., Curso de derecho penal: Parte general, Ediciones Experiencia, Madrid, 2018.

<sup>154</sup>CASTELLÓ NICÁS N., Delitos contra la intimidad, el derecho a la propia imagen y la inviolabilidad del domicilio, in MORILLAS CUEVA L., Estudios sobre el Código Penal Reformado (Leyes Orgánicas 1/2015 y 2/2015), Dykinson SL, Madrid, 2015. MARTÍNEZ OTERO J.M., La difusión de sexting sin consentimiento del protagonista: un análisis jurídico, in *Derecom*, 12, 2013, pp. 11ss. COLÁS TURÉGANO A., La importancia del consentimiento del sujeto pasivo en la protección penal del derecho a la propia imagen. A propósito de la propuesta de modificación del art. 197 CP anteproyecto de octubre de 2012, in *Revista Boliviana de Derecho*, 15, 2013. MENDO ESTRELLA A., Delitos de descubrimiento y revelación de secretos. Acerca de su aplicación al sexting entre adultos, in *Revista Electronica de Ciencia Penal y Criminología*, 18, 2016, pp. 6ss.

<sup>155</sup>In this sense, the reconstruction proposed by Martínez Otero of a parallelism with the hypotheses of professional secrecy must be remembered, however underlining how it is not the same expected situation that in the first case the obligation arises within a relationship protected by ethical rules and which finds its source in a necessity, such as professional consultations, unlike, therefore, a love relationship or a relationship of trust with a third party. In any case, within the report in which the phenomena in question occur, an obligation to secrecy would arise voluntarily, to keep the content exchanged within the report. MARTÍNEZ OTERO J.M., La difusión de sexting sin consentimiento del protagonista: un análisis jurídico, op. cit., Opinion opposed by Moral Prats to believe that the equation in necessary confidants kept in secret cannot be said to be acceptable, but rather a: "generalización de una obligación penal de amplísimo espectro". MORALES PRATS, F., La proyectada reforma de los delitos contra la intimidad a propósito del caso Hormigos, in *Revista Aranzadi de Derecho y Proceso Penal*, 31, 2013.



opinion, the typing of these behaviors would have ended up protecting unconsciousness or irresponsibility. In fact, it would be as insidious as foreseeable consequences for an adult and a criminal intervention in this sense would therefore be denoted by a certain paternalistic coloring. On the same, very hard, he says “la probidad y bonhomía en las relaciones de amistad o sentimentales, la lealtad, la fidelidad a la palabra dada, no son bienes jurídicos que corresponda al Derecho penal tutelar (...) para evitar la difusión de imágenes íntimas hay que fomentar conductas responsables en las personas, no proteger-¡penalmente!-su inconsciencia cuando realizan de modo tan voluntario como irresponsable exhibiciones de su intimidad que posteriormente escapan de su control”<sup>156</sup>.

In particular, we remember the ruling of the SAP of Granada of 5 June 2014, n.351, called to judge on the responsibility of a minor who had sent to the companions of the football team an image sent to him by his fifteen-year-old girlfriend, who portrayed her naked, content, which later spread beyond the circle of friends. In this case, the court affirmed that the fact did not place itself in the bed of the criminal typicality of art. 197.1 since the boy had not appropriated the image of the young woman, having been voluntarily produced and sent by the same, which at the time had exceeded the minimum age established for sexual consent or thirteen years of age<sup>157</sup>.

Coeval but only a few months earlier is, instead, the pronouncement of the SAP of Ourense of March 26, 2014, n.131, relating to a similar case. A young woman had sent photos in which she appeared naked to her ex-boyfriend, who in turn had sent them to a friend, who contacted the girl, forcing her to send him more photos under the threat of disclosing them. In this case, it was decided for the criminal liability of the author pursuant to the provisions of art. 197.2 of the criminal code<sup>158</sup>.

It was always the article referred to in art. 197, placed to protect the legal property of privacy or confidentiality, as mentioned above.

Nevertheless, apart from some, and in any case limited, sentences of condemnation, the existence of multiple acquittals had highlighted the need for a reform that would avoid the risk of impunity in the commission of certain illegal acts.

It is in this contrast that the intervention carried out by Ley Organica 1/2015<sup>108</sup> is located, which, in its Exposición de motivos, indicated among its objectives that of modifying the crimes foreseen in the matter of intimacy with the aim of "providing solutions to problems of lack of typicality of some conducts "with specific reference to

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<sup>156</sup> MARTÍNEZ OTERO J.M., El nuevo tipo delictivo del artículo 197.4º bis: la difusión no autorizada de imágenes íntimas obtenidas con consentimiento, in Diario La Ley, 2013.

<sup>157</sup> Specifically, the board of judges states how “las conductas que recoge el citado artículo 197 del Código Penal exigen, con carácter general, un acceso inconsciente a un secreto. Pues bien, en el supuesto de autos, ni hubo acceso por cuanto los tres acusados lo que hicieron fue recibir, y no acceder, un mensaje de imagen, ni cabe hablar de no consentimiento cuando lo que desencadena la difusión "en cascada" del mensaje es un acto previo de la menor que es su remisión al teléfono móvil del chico con el que mantenía una relación. Y tal consentimiento debe considerarse válido aunque Amparo sea menor de edad y cuente a fecha de los hechos con quince años de edad (...) al amparo de la Ley Orgánica de 5 de mayo de 1982 de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen (...).”

<sup>158</sup> In this pronouncement it was stressed how: “si bien es cierto que no hubo apoderamiento indebido de las fotos discutidas, al encontrarse las mismas lícitamente en poder del acusado exnovio de la enunciate, también lo es que el artículo 197.2, en su último inciso, impone la misma pena a quien, sin estar autorizado, utilice dichos datos de carácter personal o familiar en perjuicio de su titular (...).”

those images that are obtained with the consent, which however are disclosed against the will of the taken subject<sup>159</sup>.

Political-criminal choice by some, however, strongly criticized as considered expressive of a growing "punitive"<sup>160</sup> or "opportunist" populism, and therefore not necessary<sup>161</sup>. This position was also expressed in art.108. In favor of this typing, the Consejo General del Poder Judicial expressed himself in his opinion to the Anteproyecto of the Ley Orgánica, in which he stated that "ha de convenirse con el prelegislador en la existencia de esa laguna de impunidad que debe ser cubierta, otorgando una mejor tutela el derecho a la intimidad y a la propia imagen, que hoy resulta insuficiente ante las posibilidades que las nuevas tecnologías ofrecen para atacar el aspecto de la intimidad personal, ante la difusión de grabaciones-subrepticias o no-en redes sociales o Internet. En el actual artículo 197 c.p. (...)"<sup>162</sup> occasion of the meeting of the Fiscales Delegados de Menores, held in October 2014, in which it was stated that these unauthorized disclosures should be addressed within the juvenile jurisdiction with a view to a solution proportionate to the circumstances of the case and that for this reason could well refer to the provisions of art. 173.1 criminal code in the matter of crimes against moral integrity, given the degrading humiliation that ensues for the victim after the propagation of these contents.

The novella brings with it the codification of a new crime<sup>163</sup>, in paragraph 7 of

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<sup>159</sup>Clearly it can be read in the Exposición de Motivos de la Ley organic on the XIII side: "los supuestos a los que ahora se ofrece respuesta son aquellos otros en los que las imágenes o grabaciones de otra persona se obtienen con su consentimiento, pero son luego divulgados contra su voluntad, cuando la imagen o grabación se haya producido en un ámbito personal y su difusión, sin el consentimiento de la persona afectada, lesione gravemente su intimidad". In this sense, the study commission of the Consejo general of the Poder Judicial, which affirmed how: "ha de convenirse con el prelegislador en la existencia de esa laguna de impunidad que debe ser cubierta, otorgando una mejor tutela al derecho a la intimidad y a la propia imagen (...) en redes sociales o Internet".

<sup>160</sup>MORALES PRATS F. La reforma de los delitos contra la intimidad artículo 197 CP, in QUINTERO OLIVARES G., (a cura di), Comentario a la Reforma Penal de 2015, ed. Aranzadi, Pamplona, 2015, which is affirmed that:"una vez más frente a la detección de un problema se acude al Código Penal como medio de posible resolución del mismo". In this sense: Moartinez Otero affirmed that: "(...) este caldo social sólo necesitaba la concurrencia de un escándalo mediático (...) para atraer la atención del Ejecutivo y propiciar la creación de un nuevo tipo delictivo" MARTÍNEZ OTERO J.M., La difusión de sexting sin consentimiento del protagonista: un análisis jurídico, op. cit., QUERALT J., Derecho penal español. Parte especial, op. cit.,

<sup>161</sup>In this sense, the Consejo Fiscal also posed, who in his report to the Anteproyecto, stated that the conduct that he wanted to protect actually already enjoyed adequate criminal coverage under art. 173.1 of the Criminal Code, declaring: "en definitiva, y recapitulando, entendemos que las conductas que tratan de ser sancionadas por el nuevo tipo propuesto, pueden ya subsumirse en el tipo contra la integridad moral, por lo que no sería estrictamente necesaria su creación ex novo, creación que por lo demás puede generar nuevos problemas (...) del alcance de la mirada de terceros) y en otros casos se detecta una redacción simplemente descuidada (la intimidad personal de esa persona)". COMISIÓN DE ESTUDIOS E INFORMES DEL CONSEJO GENERAL DEL PODER JUDICIAL, Informe al Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, 2013.

<sup>162</sup>COMISIÓN DE ESTUDIOS E INFORMES DEL CONSEJO GENERAL DEL PODER JUDICIAL, Informe al Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, 2013.

<sup>163</sup>It must be said that the consent to the introduction of this rule in the Spanish penal system has been welcomed by all political forces. Proposed by the popular group, it also found support from the socialist group, at least in general terms, having proceeded to request an amendment of the original text. CASTELLÓ NICÁS N., Delitos contra la intimidad, el derecho a la propia imagen y la inviolabilidad del

art. 197, which precisely sanctions the conduct of the person who, without the consent of the person, disseminates, reveals or transfers to third parties images or audio portraying the same obtained with consent in a domicile or in any case out of the reach of the gaze of third parties, if the disclosure compromises seriously the personal confidentiality of the person involved. Conduct suppressed under the sentence of imprisonment from three months to one year, aggravated in the case of a minor victim (incapacitated person, sentimental partner or in the presence of gainful purposes)<sup>164</sup>.

It began to be discussed whether such conduct deserved a criminal response and, therefore, their typing within the code or, on the contrary, reference should be made to the civil instrument prepared by Ley Organica 1/1982, in the matter of Derecho al Honor, a la Intimidad Personal y Familiar, ya la Propia Imagen. However, it had become evident to the Spanish legislator as the previous formulation of art. 197 was the expression of forms of attack on the good of traditional confidentiality, very far from a context, however, such as the digital one in which the speed or almost immediacy in the possible diffusion inevitably entails an increase in the risk for the legal good.

A councilor from the municipality of Los Ybenes, Olivod Hormingos, voluntarily sent some videos with sexual content to the partner with whom she shared an intimate relationship at the time, who then spread the contents online. The media case soon became judicial. Prosecuted for the crime referred to in art. 197, the subject was later acquitted as “la plena voluntariedad y consentimiento de la denunciante en el envío del citado video a través de su teléfono móvil al imputado, quiebra desde el inicio la posible subsunción de los hechos denunciados en un delito contra la intimidad previsto y penado en el artículo 197 del Código Penal (...)”<sup>165</sup>.

He then expressed himself towards the consideration of the new rule as a multi-offensive crime, considering relevant other legal assets, such as the right to the image and inviolability of the home<sup>166</sup>. However, the majority doctrine tends to consider only

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domicilio, in MORILLAS CUEVA L., Estudios sobre el Código Penal Reformado (Leyes Orgánicas 1/2015 y 2/2015), op. cit.,

<sup>164</sup>Art.197.7: “Será castigado con una pena de prisión de tres meses a un año o multa de seis a doce meses el que, sin autorización de la persona afectada, difunda, revele o ceda a terceros imágenes o grabaciones audiovisuales de aquella que hubiera obtenido con su anuencia en un domicilio o en cualquier otro lugar fuera del alcance de la mirada de terceros, cuando la divulgación menoscabe gravemente la intimidad personal de esa persona. La pena se impondrá en su mitad superior cuando los hechos hubieran sido cometidos por el cónyuge o por persona que esté o haya estado unida a él por análoga relación de afectividad, aun sin convivencia, la víctima fuera menor de edad o una persona con discapacidad necesitada de especial protección, o los hechos se hubieran cometido con una finalidad lucrativa.”

<sup>165</sup>AJPII Orgaz, 15 March 2013.

<sup>166</sup>In this sense Martínez Otero, this right would then be violated: “en la medida en que la persona que difunde sexting ajeno sin permiso dispone de la imagen de un tercero sin contar con su consentimiento”. MARTÍNEZ OTERO J.M., La difusión de sexting sin consentimiento del protagonista: un análisis jurídico, op. cit., Otherwise, on the other hand, for others the right to the image should not be understood as an autonomous legal asset but as a declination of confidentiality VALEIJE ÁLVAREZ I., Intimidad y difusión de imágenes sin consentimiento, in CARBONELL MATEU, J.C., CUERDA ARNAU, M.L., GONZÁLEZ CUSSAC, J.L. y ORTS BERENQUER, E. (ed. by), Constitución, derechos fundamentales y sistema penal. Semblanzas y estudios con motivo del setenta aniversario del profesor Tomás Salvador Vives Antón, Tirant lo Blanch, Valencia, 2009.

the good of confidentiality in its positive variant protected by the norm<sup>167</sup>. Beyond the consideration of the legal asset to be identified, the case introduced qualifies as an alternative mixed type, being able to take place alternately by disseminating, revealing or transferring the material in question to third parties. These are pipelines, although semantically different, which in terms of pipeline construction do not present significant differences, since it seems sufficient that the material reaches third parties' knowledge<sup>168</sup>.

It is evident, then, that conduct must necessarily be malicious. If the subject discloses the contents negligently, no criminal liability is provided, without prejudice to the possibility of acting civilly<sup>169</sup>. What emerges clearly is the role of consent. Differently from the previous discipline, the lack of the same must emerge in the diffusion phase. Before the entry into force of the 2015 reform, the most significant obstacle to the sanctioning of this type of conduct was found precisely in the competition of the initial consent, which falls on the production of the material, as the discipline of the disclosure of secrets, in terms in which art. 197, was punishable only when the disseminated material had been the subject of unlawful obtaining within the terms provided for in the aforementioned article.

The particularity of the new provision, in paragraph seven, is rooted precisely in the fact that the owner of the protected legal property allowed, at a given time, access to a third party to a private part of his privacy. The contents of the provision in question, in the form of images or audiovisual footage, are not specifically identified, except in terms of the aforementioned cosensuality<sup>170</sup>.

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<sup>167</sup>Regarding the scope of the norm, Spanish doctrine appears divided. According to some, it would be an extension of the protection of the legal property of intimacy through which the phenomenon known as "revenge porn". COLAS TUREGANO A., *Nuevas Conductas delictivas contra la intimidad* (art 197, 197 bis, 197 ter), cit. Otherwise, others believe that there is no certainty that the new case allows to pursue all those acts harmful to intimacy, which are traced back to the aforementioned practice, such as the case of: "reenvío de esas imágenes sin el consentimiento de quien las remite y protagoniza". CASTINEIRA PALOU M.T., ESTRADA I CUADRES A, *Lecciones de derecho penal. Parte especial*, ed. Atelier, Madrid, 2015.

<sup>168</sup>As well highlighted by Gonzalez Cussac, the commission of the crime in question provides for the following requirements to be met: "primero, obtener imágenes o grabaciones de la víctima con su anuencia; segundo, difundir, revelar o ceder a terceros esas imágenes o grabaciones sin su consentimiento; tercero, que se hayan filmado o grabado en lugares privados; y, cuarto, que menoscaben gravemente la intimidad del afectado". GONZÁLEZ CUSSAC, J.L., *Delitos contra la intimidad, el derecho a la propia imagen y la inviolabilidad del domicilio*, in VIVES ANTÓN T.S., BUJÁN PÉREZ C.M., ORTS BERENGUER E., CUERDA ARNAU M.L., CARBONELL MATEU J.C., BORJA JIMÉNEZ E. Y GONZÁLEZ CUSSAC J.L., *Derecho Penal Parte especial*, Tirant lo Blanch, Valencia, 2015.

<sup>169</sup>COLAS TUREGANO A., *Nuevas Conductas delictivas contra la intimidad* (art 197, 197 bis, 197 ter), op. cit.

<sup>170</sup>Regarding the type of content, the doctrine has raised some doubts, in particular, for example, videos without audio or screen shots, called screenshots. In this sense Castello Nicas has pointed out how "la grabación sin audio, puede comprenderse perfectamente en la dicción del término imágenes", mientras que las grabaciones de audio "no están comprendidas en la dicción del precepto (...), por lo que quedan fuera de su ámbito de protección". CASTELLÓ NICÁS N., *Delitos contra la intimidad, el derecho a la propia imagen y la inviolabilidad del domicilio*, in MORILLAS CUEVA L., *Estudios sobre el Código Penal Reformado (Leyes Orgánicas 1/2015 y 2/2015)*, op. cit., *Contra*: COLAS TUREGANO A., *Nuevas Conductas delictivas contra la intimidad* (art 197, 197 bis, 197 ter), op. cit., In any case, it must be remembered that the Fiscalía General del Estado in a recent circular, n.3 / 2017, clarified that the contents that for the present case are those that: "aun no mediando imágenes, pueden percibirse por el sentido auditivo".

In this regard, doubts have been raised regarding the ways in which the content was obtained and, therefore, whether this must have been obtained by the active subject with the consent of the passive one, or whether the self-produced content is also valid in this sense and then sent to the active subject, the so-called selfie. The majority doctrine has expressed itself in favor of both types of content<sup>171</sup>, although there are those who, on the other hand, tend to consider only the cases that go beyond self-production<sup>172</sup>. The standard then requires that the place where the image or video is taken is the home or other place away from the sight of third parties. This is a highly problematic, as it mixes on one hand a concept clearly defined as the home, with an expression, "lugar fuera del alcance de la mirada de terceros", which on the other hand appears totally indeterminate<sup>173</sup>.

What is striking is the absence of a characterization of the material in sexual or at least intimate terms, as this criminal offense can also be applied to different contexts<sup>174</sup>. Consequently, it can be critically pointed out how the disposition exceeds, and by far, the scope of the non-consensual distribution of intimate images, being able to apply to all those situations that affect the private sphere of a subject, therefore, in addition to sexuality, also the health, religious beliefs, political orientation, etc. In order to delimit the applicability of the rule, it is required that the disclosure conduct, carried out alternately according to one of the three indicated behaviors, seriously threatens the personal intimacy of the subject taken over. This is an indeterminate criterion that entrusts the judge with a wide discretionary assessment in the definition of what may appear to be such a serious violation of confidentiality<sup>175</sup>.

Finally, it must be said that this is clearly a crime of its own, since only the person who obtained the contents, with the consent of the victim<sup>176</sup>, without age distinctions, is being sanctioned, an element that is relevant only as a function of the

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FISCALÍA GENERAL DEL ESTADO, Circular 3/2017, sobre la reforma del código penal operada por la LO 1/2015 de 30 de marzo en relación con los delitos de descubrimiento y revelación de secretos y los delitos de daños informáticos, 2017.

<sup>171</sup>VILLEGAS GARCÍA, M. A., *Imágenes íntimas e internet. Cerco legislativo a la venganza privada en la red*, op. cit., CASTINEIRA PALOU M.T., ESTRADA CUADRES A, *Lecciones de derecho penal*, op. cit.

<sup>172</sup>MUÑOZ CONDE, F. *Derecho penal. Parte especial.*, Tirant lo Blanch, Valencia, 2017.

<sup>173</sup>According to Munoz Conde in the indicated terminology "se pueden incluir las relaciones íntimas mantenidas en un lugar público, aunque al abrigo de la mirada de terceros, por ejemplo, en un lugar apartado de un parque público, o en una playa desierta" MUÑOZ CONDE, F. *Derecho penal. Parte especial*, op. cit., TOMÁS-VALIENTE LAZUNA C., Capítulo I. Del descubrimiento y la revelación de secretos, in GOMEZ TOMILLO M., (a cura di) *Comentarios Prácticos al Código Penal. Tomo II. Los delitos contra las personas. Artículos 138-233*, ed. Aranzadi, Pamplona, 2015. It must be reported that perhaps this problematic expression could have been replaced if the amendment proposed by the Socialist Group, identifying an "otro lugar al resguardo de la observación ajena", clearly concerning the gaze of other people or intervention in the facts, had found space I resumed. According to Martin Otero, this would be a completely superfluous expression with no legal relevance, which could have been replaced by the reference rather to private places, as opposed to those open to the public, already incorporated in the Ley Organica 1/1982. MARTÍNEZ OTERO J.M., *La difusión de sexting sin consentimiento del protagonista: un análisis jurídico*, op. cit.

<sup>174</sup>CASTINEIRA PALOU M.T., ESTRADA CUADRES A, *Lecciones de derecho penal. Parte especial*, op. cit.

<sup>175</sup>MENDO ESTRELLA A., *Delitos de descubrimiento y revelación de secretos: acerca de su aplicación al sexting entre adultos*, op. cit., QUERALT J., *Derecho penal español. Parte especial*, op. cit.

<sup>176</sup>COLAS TUREGANO A., *Nuevas Conductas delictivas contra la intimidad (art 197, 197 bis, 197 ter)*, op. cit.



burden of the sanctioning treatment in the presence of a minor victim. In this sense we grasp the most particular of the problematic knots.

If the criminal law appears to be firm in limiting the relevance of the consent of the minor, it would in fact result in a contradiction in terms of recognizing the relevance to the consent given when sending these materials. It was therefore stressed that in relation to the new case in question, the offenses provided for in art. Should apply for the victim under the age of 16 197, paragraphs 3 and 5, as the consent is in fact irrelevant, consequently, for the purposes of the applicability of paragraph 7, only the age group between 16 and 18 years old as a minor. An escape route that does not eliminate the possible competition, however, the aforementioned solicitation crime referred to in art. 183 ter of the criminal code.

## 10.CONCLUDING REMARKS

Cyberbullying is in fact a term that includes within a vast range of different behaviors. An element that must necessarily be kept in mind when one falls on the legal side of the matter. In spite of scientific divergences, the aforementioned multiplicity can be brought to unity by recognizing the presence of recurring elements such as aggression, intentionality, repetitiveness, together with the obvious use of electronic and digital communication means.

It is on this point that the long-standing question arises whether it is a mere digital translation of the phenomenon or rather a new reality, on the etiology of which the reflection is still embryonic. If, as mentioned above, cyberspace has a strong influence on relational dynamics, even criminal and deviant ones, it is not surprising that this type of youthful aggression also changes its forms. However, this cannot flatten in the context of a mere transfer of bullying to the online sphere. It is evident that cyberbullying, as a particular variation of the more general phenomenon of online aggression or cyber aggression, has relevant peculiarities. Coming out of the dynamics of the school yard, it is in fact omnipresent (in time and space). The audience of possible victims, such as that of the attackers, who can take advantage of identity manipulation, is indefinite and infinite, no longer attributable to those imbalances of power embodied in the bully victim relationship. How indefinite and infinite is the public that assists, sometimes making themselves complicit, with clicks, of subsequent victimizations, which can, as happened, reach more than tragic, if not fatal, outcomes.

The result is a phenomenon that escapes the categories, too extensive and indeterminate, whose boundaries soon lap, to faces including them, other phenomena. And that's how cyberbullying is sometimes also stalking, sometimes it's hate speech, sometimes it's offended, sometimes it's harassment. Sometimes, it has been said, it is sexting. In reality, sexting is something else. Even more recent than cyberbullying, against which an antecedent does not seem to discount, the phenomenon is in fact linked to the theme of sexuality. Sexuality and cyberspace, sexuality and minors. Two aspects that stir up new fears in the first case, ancient and rooted in the second. It is not by chance that it is one of the aspects of human life where it is better understood how technology no longer acts only as a medium, but as a real space.

It is not surprising that young people are involved in it, combining two different statuses that of the digital native, a constant user of the network, and that of the preteen/teenager, by nature attracted by the discovery and investigation of the self

and the other. And it is obviously here that Baumanian fear emerges even more than in cyberbullying. After all, the theme of sexuality, of a biological nature, inevitably clashes with the world of morals, law and religion which stigmatize and marginalize, above all what is not known, or in any case condition its evolution and social perception. Here in this dynamic between delictum and peccatum the phenomenon of sexting emerges accompanied by a growing moral panic and a pressing social anxiety.

Phenomenon that, if again compared to the aforementioned cyberbullying, it weighs even more on the weight of its recent character, which on the one hand sees a limited scientific interest and on the other a certain terminological confusion. Sexting is in fact cloaked in a chaos that invades the signifier and the meaning, with heavy repercussions on the level of legal discourse, which, in dealing lightly with the theme (on the few occasions in which it deals with it), blows up definitions and terms between them different to indicate the same concept or, conversely, uses the same term for as many different meanings. Wanting to break a lance in favor, it must be said how a difficulty of conceptualization is also found in the constant search for scientific literature for a taxonomy that does it justice.

If, however, pornography is considered, not without criticism, habitus of the adult individual, as a possible declination of sexuality, this cannot be said for the minor for whom it is in fact delictum et peccatum. So what is sexting? Is it pornography or something?

The heart of the matter lies in consensuality, which becomes an indispensable distinctive feature. Here, the own or primary sexting, following the classification proposed by Calvert, is covered entirely by the consent that denotes the production (sometimes self-production) and the sharing of the content within the couple or relational dynamics. In this sense, it could be considered as one of the manifestations of intimacy that Homo internecticus can enjoy. Next to cyber sex, there would also be cyber porn.

Consensuality can disappear in the hypotheses in which the content thus produced is then shared with third parties both through instant messaging applications (such as WhatsApp and Messenger) or in the public square of social media (such as Facebook or Instagram). It is therefore no longer the pleasure of intimate sharing that moves the person who acts. There has often been talk of pornographic revenge, which has led to the successful term revenge porn, which has entered the media language of recent years. In hindsight, there are several reasons that can move towards such conduct, which would be reductive and limiting to limit to revenge.

Therefore, sexting also incorporates two different phenomena: on the one hand, the actual sexting and on the other, what one prefers to define in more neutral terms as a non-consensual distribution of intimate images. In the middle is the consensus, which settles, or which is entrusted to settle, the issues that arise and that also affect the adult, but which become even more relevant with reference to the minor.

If for the adult the critical issues emerge in the hypotheses without consensuality, which actually turn into situations of abuse, for the minor the problematic profiles go back to the actual sexting, on which the moralisms related to minor sexual relationship and on the other the tensions towards the protection of the same from the risk not only of a non-consensual distribution of intimate images,

defined in this case also as sexual cyberbullying, but from the involvement of said contents in the child pornography circuit.

It is quite evident that the aforementioned Copernican revolution also unfolds its effects in this sense. The result is a change of perspective for a legislator accustomed to protecting minors from the dangers of abusing adults, first of all child pornography, which has become rampant with the spread of the Internet. Now the reflection is placed in a modified reality also on the level of the intersubjective relationship. Hence the need to reflect and rethink the protection tools, which must be able to respond both to the promotion needs of the child and to protect the child through mechanisms that respond to the needs dictated by a world such as the current one that is not only collapsed of reality, but of different space-time dynamics. And, as always happens when moral panic and social anxiety outline the boundaries of old and new fears, criminal law comes to the test. In the face of general insecurity, the tool is invoked which in itself responds precisely to the purpose of protecting the security of the individual and the peaceful coexistence of the associates. The legislator is looking for the maximum rigor of the penalty as the only panacea able to stem the social alarm and respond to security needs. It is well known, however, how we deal with often emphasized needs, the result of a process of construction and social representation. Moreover, as Giddens would say, insecurity and risk are in fact marks typical of modernity<sup>177</sup>. This results in socially constructed expectations of protection that contrast with the company's ability to protect these issues. An imbalance that inevitably ends up enhancing sensitivity towards perceived risks and thus producing security frustration.

Insecurity, risk and collective action are closely linked.

To play an important role in the construction of moral panic is certainly the media factor, which emphasizes the theme by framing it in terms of threat. Thus, the representation provided by the media, thanks to the emphasizing and distorting effect of this narrative, affects the perception of the individual, stirring anxieties and consequent requests for response. A picture that is captured with greater significance when the minors are involved. It is through this interpretative lens that the phenomena of cyberbullying and sexting must be read, as well as the involvement of the legislator in the dynamics created by them. There is immediate evidence of this in the comparative survey conducted.

It is no coincidence that the first instances of criminalization led in the contexts considered to an effective check up of the applicable legislation in an attempt to find deficiencies and shortcomings (mostly technological). In this sense, the investigations and parliamentary debates that preceded the aforementioned legislative measures move, on the basis of an alleged inefficiency of the system in providing adequate safeguards. What emerges is a reference to a range of different criminal cases, aimed at protecting the most disparate legal assets such as integrity, reputation, honor, confidentiality, identity, but also the inviolability of computer systems, up to the good of life, in the most extreme cases. Leaving aside this last hypothesis, to be relegated to the area of exceptionalism, together with the so-called IT crimes, which are only tangentially relevant in fact, the attention is essentially concentrated, regardless of the

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<sup>177</sup>COHEN S., *Folk devils and moral panics: The creation of the mods and rockers*, Psychology Press, New York, 1972.

reference system, in the cases of harassment, threat, stalking, defamation.

The theme allows us to abandon the boundaries prescribed by the phenomenon to reach much wider, distinct and meaningful shores of reflections. This leads to the inevitable reflection on the value of criminal law in cyberspace, a space, once again, aterritorial, aspatial, and above all fast, quick in its manifestations. A connotation that inevitably falls on the level of protection and, therefore, of the determination of the response tools.

The clutch with sexting is evident, a clutch, as we said, raised by jurisprudential practice. Moreover, the descriptions thus provided may well apply to those proper to the phenomenon, especially if we consider that all the aforementioned disciplines protect the under-eighteen-year-old minor. A broader protection that responds perfectly to the logic of protection of abuse, in line with supranational obligations, the result of an era in which the child limited, because there was no other way, his sexual freedom to sexual acts. It was not in fact conceivable that pornography could be a practice exercisable by the minor, also thanks to the tendential consideration in a negative key also of adult pornographer. For this reason, the rules on child pornography do not present any mechanism of salvation that removes the minor from the area of punishment as those conduct mentioned are an expression of the consensuality of a private experience. The role of consensus of the child emerges with arrogance, a theme that again forces us to reflect beyond the phenomenon. As we know, the participation of the minor in social life is guaranteed, but in some cases subject to conditions, given its nature of being in the making. This is how there is an age to express one's sexual consent and now also for the digital one, differently identified in the legal systems considered. As far as pornography is concerned, this does not find consideration in this graduation of relevance of the minor in the context of the company's action. A fact that has been alternatively considered as a foreclosure to the minor of the possibility of manifesting his sexual freedom or as a condition to be kept in light of the deviant or in any case particularly risky character of the behavior. But, in the writer's opinion, the evidence today clearly shows how it cannot be defined as deviant, since deviant defines what is contrary to social rules, but it is evident how these are changing. Rather, continuing along this road has the effect of limiting the rights of the child, a limitation that cannot be justified tout court, without alternative solutions, in light of the highest interest in protection from pedophile risk.

The large picture described has acknowledged a problem resulting from our time, whose treatment cannot be postponed further. Evidence of which can also be found in the growing attention of the supranational community, which can be seen in the recent reports promoted respectively by the Monitoring Commission of the Budapest Convention, for cyberbullying, and by that of Lanzarote, for sexting, which has been mentioned. At this point one wonders what the prospects should be towards, at least for the European context. As far as cyberbullying is concerned, this has clearly shown that it does not require criminal intervention, which improves its protection services. Otherwise, for sexting we hope to take a position that will gather the hand outstretched by the Lanzarote Convention by setting up a specific cause of non-punishment in terms of child pornography, in order to avoid that jurisprudence enters again in interpretative paths beyond borders.

That absolute role recognized by the State as the only subject assigned to the

prevention of crimes is breaking down, as never before, in view of the aforementioned trilaterality, does the protection of minors pass through a multi-stakeholder approach. Moreover, wanting to remember once again that, with respect to offensive facts, criminal law cannot be applied where a reliable political-criminal strategy has not been outlined before, involving different sectors of the legal system to prevent and manage similar facts.

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