



DEVELOPMENTS IN ITALIAN CRIMINAL LAW ON CYBER-VIOLENCE AGAINST WOMEN

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Abstract:

The growing availability of technologies, virtual content and the widespread diffusion of social media has led to the emergence of a problem - that of cyberviolence - now of global reach and with significant social consequences. In this changed criminological framework, the phenomenon of male violence against women is reinforced. However, the criminal law of recent decades has slowly evolved, providing ever greater protection for women who are victims of violence. Recognition within the Italian criminal system of the so-called cybercrime runs parallel to this adjustment process. The connections between cyberspace and forms of violence against women are evident, capable of harming an even more intimate sphere, that of sexuality and its confidentiality. This intertwining led to the coining of terms such as cyberstalking and cyber harassment in common language and the Italian criminal context. However, the jurisprudential reflection on the risk underlying the emerging phenomena called sexting, sextortion and revenge porn, appears limited. Criminal law, as conceived and created to operate in a static reality, inevitably finds its limitation in providing the victim with protection synchronized for the speed of the digital world. Criminal law thus finds itself reflecting on its adaptability to liquid modernity and necessarily having to dialogue with the new branch of computer law, where the new rights to be forgotten, to the confidentiality and protection of one's data, find space and greater protection. Finally, there is an urgent need to combine protection tools that release from procedural delays and can stop the circulation of harmful content with timescales closer to the flow of current time, to counter the plague of violence against women.

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1. Social media and gender-based violence

Cyberspace is an unprecedented place, free of space-time barriers, which develops far beyond the physical connections between devices and within which social facts are created that inevitably influence the offline world (Dogde, & Kitchin, 2001). In this context, the user, in his central role as a direct content producer (Jenkins, Ito, & Boyd, 2015), feels free to express himself and no longer perceives himself as a unit in itself, but as part of a "global village" built, according to some, on a system of strong intellectual affinity (Barak, 2008). The revolutionary reach of *social media* is remarkable: the countless opportunities that the digital space offers are contrasted by as many risks and dangers.

The network is not limited to be an instrument of the positive exaltation of the potential of the human being. In fact, in the world of constant connectivity and indispensable *social networking*, relational manifestations that inevitably acquire their autonomy and typicality in a criminal key also find expression. This is not surprising as the association between technology and crime appears intuitive as it is ancient and has been changing with the progress of man's progress. From the very first use of the Internet, the criminal world soon realised the possibility of using technical progress for illicit purposes. In this way, increasingly technological delinquency has developed, identified through the generic *cybercrime* label, an umbrella term which groups together a multiplicity of online criminal realities, differently catalogued by literature (Cadoppi, Canestrari, Manna, & Papa, 2019; Clough, 2010) which, however, with the progress of technology, have ended up extending beyond the borders of cybercrime in the strict sense. The characteristics typical of the current cyberspace, such as the absence of space-time coordinates, the possible anonymity, the fluidity of identities, the continuous transfer of data seem to favour both from a quantitative and qualitative point of view the progressive emergence of a new category of criminal and deviant behaviour aimed at affecting the individual (Treadwell, 2012).

The recalled elements act on two levels. On the one hand, they influence the system of decoding the dynamics of the relationship with social and penal norms, increasing disinhibition, neutralizing guilt, reducing ethical-moral brakes and amplifying the overbearance of conflict. On the other hand, the same coordinates involve an exponential expansion of the number of possible perpetrators as much as of possible victims. The online perpetrator is now potentially anyone who with a single click can carry out actions with a high degree of offensiveness and aggressiveness (Owen, 2016). Equally, no one is exempt from the risk of falling victim to it. A condition that, compared to the offline context, suffers from a greater pervasiveness, due to the possibility not only of involvement of one's own more private and personal sphere, if not even intimate, having technologies pervaded every aspect of individual identity, but also of subsequent victimization, resulting from the almost impossible control that can be exercised on

online content, which once put on the net are destined to remain there to be repeatedly viewed and shared.

In this changed criminological picture the phenomenon of male violence against women is reinforced (Martellozzo & Jane, 2017). The growing availability of technologies, virtual content and the wide diffusion of social media has led to the emergence of a problem - that of cyberviolence - now global in scope and with significant social consequences. The target is not only those women known to the general public, from professionals in the performing arts to institutional or power figures, who, because of the role they play, are most exposed. It is the entire gender that pays the price. To date, it is estimated that as many as 73% of women have been victims of online abuse, of which 18%, or around 9 million women, have suffered serious consequences (UN Broadband Commission for Digital Development, 2015).

2. Violence against women, Internet and development of Italian Criminal Law

Criminal law in recent decades has slowly evolved, providing ever greater protection for women who are victims of violence. The slow process of adapting the discipline finds its primary stage in the Law of 5 August 1981, n. 442, repealing the so-called crimes committed for reasons of honour (Basile, 2013), which consecrated the principle of subordination of the woman concerning the man, who had the ownership of the female body. Despite the capital scope of the reform, the real revolution can be found in the approval, twenty years after the first presentation in Parliament, of the Law of 15 February 1996, n. 66, with which, in full renewal with respect to the previous discipline, sexual crimes were recognized no longer as a crime harmful to public morality and morality, but as a crime against personal sexual freedom (Cadoppi, 2002). Therefore, sexual violence and sexual freedom were fully recognized in the Italian criminal law language, thus arriving at a new conception not only juridical but also cultural and social of women's sexuality, considered from then on, an expression of the freedom of the person. Subsequently, the Penal Code, for the protection of freedom and sexual self-determinism, provides new tools in the fight against violence against women, including minors, through the adoption of Law of 3 August 1998, n. 269, on the exploitation of prostitution, pornography and sex tourism against minors. Furthermore, the increased role of women and the changed social sensitivity has thus led to further regulatory changes, such as the inclusion of crimes of persecutory acts, as provided for in article 612-bis of the Penal Code, among crimes against personal freedom, later modified by the well-known anti-femicide decree (Law Decree 14 August 2013, n.93), to rewrite the system of protection against gender-based violence (Recchione, 2013).

Recognition within the Italian criminal system of the so-called cybercrime runs parallel to this adjustment process. Initially, with the law 23 December 1993, n. 547, only the so-called *computer crimes* were regulated, that is, those series of criminal conduct typical of the first phase of the Internet and aimed at affecting only systems or data (Sarzana di S. Ippolito, 2010). The spread of the Internet on a large scale forces the legislator to adapt the penal code to protect the individual from the aggression committed

against him through the use of Information Technology. This leads to the Law 18 March 2008, n. 48, of ratification of the Budapest Convention on cybercrime, stipulated in 2001, which modifies the previous regulation and extends the spectrum of protection of the penal legislation on the subject in compliance with the commitments made at a supranational level.

Thus, the first glimpse of a first conjuncture begins to emerge between the two guidelines followed by the penal legislator. This interweaving is first of all seen in the area of the protection of children from the risk of online sexual exploitation. In this sense, first the Law of 6 February 2006, n. 38, on the subject of child sexual exploitation and child pornography on the Internet, followed, then, by the Law of 1 October 2012, n. 172, ratifying the Lanzarote Convention, which, *ex multis*, penalizes for the first time in Italian law the solicitation of minors online. As society evolved, the intertwining has become increasingly tightened, especially in correspondence with the emergence of new threats from cyberspace.

3. Cyberstalking and cyber harassment

Cyberstalking enters the common language and subsequently also in the Italian criminal law context, as a result of the Legislative Decree 93/2013, then converted by Law 15 October 2013, n. 119; the legislator recognizes to those repeated threats or harassment, which provide the victim with anxiety, fear or alteration of his life habits, committed "through IT or telematic tools", an aggravated sanctioning treatment compared to the basic case of persecutory acts envisaged by the article 612-bis of the Italian Penal Code. The jurisprudence, on previous occasions, had recognized the existence of the phenomenon. Already in 2010, the Court of Cassation, finding itself having to decide on the case of a man who, following the end of a relationship, had sent messages, images and videos to his former partner through the social network Facebook, some of which portrayed the author and the victim in the act of sexual intercourse, he had, in fact, introduced the term "*cyberstalking*" into the legal narrative (Criminal Cassation, Section VI, July 16, 2010, no. 32404). This event paved the way for subsequent decisions in this regard, as the legislator decided to emphasize the greater pervasiveness of the IT medium. However, this decision gave rise to many criticisms from the doctrine, which immediately went against the legislative intervention, which was considered totally unjustified and unnecessary (Recchione, 2013).

For *harassment*, however, the same innovative results have not been reached. The article 660 of the Italian Penal Code, which governs the contravention of simple, unrepeatable harassment, currently does not provide for any explicit reference to IT or telematic tools. So, if on the one hand, the penal code "typifies" cyberstalking, it neglects to consider cyber harassment. The text of the legal provision merely states that for the commission of the offence, i.e. harassment, it must take place alternatively in a public place, open to the public or by telephone. Precisely in consideration of a warned void of protection that could have assumed the dimensions of a black hole with the evolution of the technological instrument, also awaiting the lack of understanding of the harmful

power of the same, the interpretative work subsequently moved, placing the no more emphasis on the compatibility between new tools and the telephone medium as on the size of the social platforms, as can be clearly seen in a well-known pronouncement of 2014. Hence, the Court of Cassation comes to equate social networks such as Facebook with a place, specifically a place open to the public. The social network is thus considered like a square, even if it is immaterial, due to the number of accesses and visions it guarantees, realizing, as can be read between the same lines of the pronouncement, "*a scientific evolution that the Legislator had not arrived at to imagine*" (Criminal Cassation, Section I, September 12, 2014, no. 37596). Certainly, revolutionary interpretation, but according to some, it is not enough. Part of the doctrine, in fact, draws the attention of the legislator to the need to modify the rule in question, but consistent with the aforementioned reform of the crime of persecutory acts, with respect to which the contravention referred to in Article 660 of the Italian Penal Code arises in a relationship of criminal progression (Ubiali, 2015).

4. Sexual Cyber Violence: sextortion, sexting and revenge porn

In recent years, forms of violence against women have emerged that can harm an even more intimate sphere, that of sexuality and its confidentiality. Already from the first large-scale diffusion of technologies, as already demonstrated, the connections between cyberspace and the attacks on women's sexuality are evident, especially at a young age. Sexual violence thus also takes on a virtual role and jurisprudence intercepts the change by stating that "*the crime of sexual violence, consisting in the accomplishment by the offended person, of sexual acts on himself, can also be committed remotely, that is by telephone or other electronic communication equipment*" (Criminal Cassation, Section III, 26 September 2012, n. 37076). Thus, in cyberspace sexual abuse not only changes its "*locus commissi delicti*", but sees its objectification process intensified. The object of the abuse, in fact, is no longer so much the relationship as the filming of it, in the form of digital content, image or video. The exchange of intimate content has, therefore, become a possible element of consensual interaction. However, the *sexting*, i.e. the sending of sexually explicit content within the relationship, if consensually produced, does not take on the contours of a problematic practice, except with limited reference to minors given the possible friction with the legislation on child pornography (Bianchi, 2016). The problem is caught in a subsequent and not consensual dissemination of content. Diffused in the net, they circulate endlessly in the unlimited digital space, giving rise to an effect of the second victimization, accompanied by tragic consequences. This is the risk underlying the emerging phenomena called *sextortion* and *revenge porn*, with respect to which, given the more than recent nature, especially in the Italian context, the jurisprudential reflection appears limited.

The term *sextortion* is still largely unknown and is representative of a new declination of the extortion phenomenon; it relates to various types of multimedia content, images or videos, with intimate content, used to obtain sexual favours from the victim, both adult and minor, behind the threat of their online diffusion. Beyond the possible application of purely computer-related crimes, if the images were obtained

through the abusive entry into the victim's computer system (Nicola & Powell, 2016), the extortion case provided for in article 629 of the Penal Code is to be recalled, which precisely configures the extortion in the conduct of those who, through violence or threat, by forcing the victim to do or omit something, obtain an unjust profit, causing the victim an unjust damage. Obviously, this is a clearly spurious case of any reference to the computer or communication medium. However, one of the most problematic aspects that can be grasped is the extortion damage that would qualify, in fact, in its exclusive patrimonial nature. It follows, therefore, that if the threats to the victim do not result in cash payment or the carrying out of sexual acts by the same, the aforementioned crime cannot be configured and must rather refer to the case of sexual violence referred to in article 609-bis of the Penal Code. In fact, in a previous case, which took place before the diffusion of new technologies, the subject had threatened the victim to spread photomontages that represented her in obscene poses, in the absence of the delivery of a videotape containing footage of the same in as many sexually explicit attitudes. On this occasion, the legitimacy judges, precisely in consideration of the lack of pecuniary damage, excluded the configuration of the extortion crime referred to in article 629 of the Penal Code in favour of the different configuration of the crime of sexual violence pursuant to article 609-bis of the Penal Code (Criminal Cassation, section III, 23 May 2006, n. 34128).

Better known is, instead, the so-called *revenge porn*, that is the non-consensual diffusion of intimate contents. The jurisprudence, together with the already mentioned article 612-bis of the Penal Code, on the subject of persecutory acts, has tried to respond to the requirements of protection thus raised, making recourse to other cases, among which the crime of defamation, in the form provided for in the third paragraph of article 595 of the Penal Code, about the diffusion of images concerning the private life of the person (of which, however, the possible sexually explicit character is not noted). Moreover, it is by now "ius receptum" that defamation through the Internet constitutes a hypothesis of aggravated defamation according to article 595 of the Penal Code, paragraph 3, in that it is committed with another (with respect to the press) means of publicity suitable to determine the greater diffusivity of the offence that justifies a more severe penalty treatment (ex multis Criminal Cassation, Section V, 10 July 2008, n. 31392). It is understood, however, that in the case of revenge porn it is not only honour that is compromised. There is a violation of confidentiality, i.e. the privacy of the victim who, after having consensually shared intimate content with his partner, with the (implicit) agreement of use of the same within the relationship, is exposed to public mockery. The reference criminal norm is governed by extra-codicem regarding privacy and penalizes precisely the illegal treatment of personal data if it has been committed to profit from it or cause damage and only where damage is caused. Damage that has been defined several times by the legitimacy judges as "*any prejudicial effect that may derive from the arbitrary conduct of others*" (Criminal Cassation, Section V, 29 September 2011, n. 44940).

Therefore, still weak and fragmented protection seems to emerge, concerning a theme that will arise in the future with ever greater pervasiveness. The lack of a specific rule aimed at pursuing such conduct is perceived as a void of protection, especially if

analysed in relation to what is provided for in other European and non-European systems. However, through article 10, paragraph 1 of Law n. 69 of 19 July 2019, the new Article 612-ter was included in the Penal Code, which reads "*illegal dissemination of sexually explicit images and videos*" and is intended to punish anyone who publishes on the Internet, without the express consent of the persons concerned, private images or videos, however, acquired or held, made in intimate circumstances and containing sexually explicit images, with the consequent dissemination of sensitive data, with the intent to cause moral damage to the person concerned. Thus, we can see a growing desire to respond to an emerging phenomenon, perceived as a "*gender crime, perpetrated almost exclusively against women*".

5. Conclusions

The protection offered against new forms of gender-based violence has weaknesses, partly the result of the intrinsic inability of the system itself to provide the victim with protection synchronized with the speed of the digital world. In this dynamic of rapid evolution, criminal law, as conceived and created to operate in a static reality, inevitably finds its limitation. Criminal law thus finds itself reflecting on its adaptability to liquid modernity and necessarily having to dialogue with the new-born branch of computer law, where the new rights to oblivion, confidentiality and the protection of one's personal data are given space and greater protection. There is an urgent need to put side by side instruments of protection that are free from the lengthy procedures and can stop the circulation of harmful content with timing closer to the current passage of time, to combat the plague of violence against women.

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