

# EXPOSIÇÃO QUE FERRE, PERCEPÇÃO QUE MATA: A URGÊNCIA DE UMA ABORDAGEM PSICOSOCIOJURÍDICA DA PORNOGRAFIA DE VINGANÇA À LUZ DA LEI MARIA DA PENHA

## EXPOSURE THAT HURTS, PERCEPTION THAT KILLS: THE URGENCY OF A PSYCHO-SOCIAL-JURIDICAL APPROACH TO REVENGE PORNOGRAPHY IN THE LIGHT OF MARIA DA PENHA LAW

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Received on: July, 10<sup>th</sup>, 2017

Accepted on: July, 30<sup>th</sup>, 2017

### How to cite this article (inform the current date of access):

SILVA, Artenira da Silva e; PINHEIRO, Rossana Barros. Exposição que fere, percepção que mata: a urgência de uma abordagem psicosociojurídica da pornografia de vingança à luz da Lei Maria da Penha. **Revista da Faculdade de Direito UFPR**, Curitiba, PR, Brasil, v. 62, n. 3, p. 243-265, set./dez. 2017. ISSN 2236-7284. Disponível em: <<http://revistas.ufpr.br/direito/article/view/53834>>. Acesso em: 21 dez. 2017. DOI: <http://dx.doi.org/10.5380/rfdufpr.v62i3.53834>.

### RESUMO

Este artigo apresenta uma discussão em torno da pornografia de vingança (ou exposição não autorizada da intimidade feminina na conjuntura de relacionamentos afetivos domésticos e/ou intrafamiliares), sob o enfoque da violência psicológica e moral, doméstica e de gênero. Destaca-se a naturalização das violências psicológica e moral, observada no comportamento de vítimas, agressores e operadores do direito, e evidenciada nos julgamentos sociais negativos ante a pornografia de vingança, bem como no sentimento de culpa imposto às vítimas desses julgamentos. A partir da gravidade e complexidade das relações estabelecidas entre vítimas e agressores no tipo de crime estudado, embasou-se a necessidade de aplicação da Lei Maria da Penha, considerando a aderência temática ao delito devido à centralidade das questões de gênero, modalidades de violência envolvidas e ainda da existência de garantias processuais mais protetivas. Também foram analisadas as fragilidades dos instrumentos jurídicos comumente aplicados ao objeto de investigação, como tipos penais de injúria e difamação, além da Lei Carolina Dieckmann. Para tanto foram adotados os seguintes procedimentos metodológicos: pesquisa documental, pesquisa bibliográfica e pesquisa normativa, utilizando-se de análise de conteúdo para tratamento dos dados obtidos.

### PALAVRAS-CHAVE

Pornografia de vingança. Violência de gênero. Lei Maria da Penha.

### ABSTRACT

This paper presents a discussion about revenge pornography (or unauthorized exposure of female intimacy in domestic and/or intrafamily affective relationships), under the focus of psychological,

moral, domestic and gender violence. It highlights the naturalization of psychological and moral violence, expressed in the behavior of victims, perpetrators and law operators, something that is also perceived in the negative social judgments against revenge porn and in the feeling of guilt, which is socially imposed on the victims of this kind of crime. Based on the severity and complexity of the relationships established between victims and perpetrators of this type of crime under study, the need to apply the Maria da Penha Law was based on the thematic crime adherence given the centrality of gender issues, on the types of violence involved and on the existence of more protective procedural guarantees within the scope of this law. The weakness of the legal instruments, such as criminal types of libel and defamation, commonly applied to the objects of investigation, was also considered, in addition to the so-called Carolina Dieckmann Law. For this purpose, the following methodological procedures were adopted: documentary research, bibliographical research and normative research, using the content analysis procedure to handle the obtained data.

## KEYWORDS

Revenge pornography. Gender violence. Maria da Penha Law.

## INTRODUCTION

The increasing occurrence of revenge pornography in recent years has drawn scholars' attention to the need to build new paradigms of knowledge because of this issue of the globalized world.

Characterized by embarrassment, humiliation, and negative social judgment, unauthorized disclosure of intimate material can be associated with a variety of situations, such as device intrusion by hackers, extortion, and unauthorized database access.

However, this phenomenon is even more relevant when it comes to revenge that affects mainly women, constituting the overwhelming majority of occurrences, when on the commitment of a relationship.

This specific form of female sexuality exposure is evaluated, which, once transposed into public space, has devastating consequences, considering that society continues to impose strict rules of social and moral conduct to women. In this way, the subjection of the image, body and sexuality of the woman is evaluated in the light of gender violence.

The personal embarrassment resulting from such exposure is generally enhanced by society, friends, family and lawmakers, creating new internal conflicts for the victim and/or potentiating other conflicts that may occur due to the assumption of responsibility for the event, phenomenon of psychological violence of gender.

Based on the facts above, it is possible to understand that revenge pornography is impregnated with the complex issues surrounding gender violence, given the assumptions that the

power between men and women is unequal, which directly affects the behavior of the aggressor, the society's reaction to this type of crime and the vulnerability of the victim.

In this way, Maria da Penha Law is considered the most appropriate normative instrument for the treatment of this phenomenon because of the perfect thematic adaptation to gender violence and the best reception of victims, including suicidal ideation frequently observed when a woman is victim of the type of crime in question.

In addition, the Act is important as it protects adolescents, a significant public in these cases, and in need of deep attention, especially because of the peculiar moment of psychosocial development in which this category of victims is found.

According to all said above, the present study aimed to build scientific foundations in order to enable the understanding of revenge pornography as gender violence, based on the application of Maria da Penha Law to cases related to this issue and demonstrating the weaknesses of other normative instruments commonly applied in Brazil in its confrontation.

Such initiative is justified because it promotes a more objective understanding and a more effective fight against the phenomenon studied and its main consequences. It is observed that the confrontation of the referred crime happens in a conjuncture of doubts of law applicators and still in a context of insufficient theoretical development on the matter.

For this purpose, the following research procedures were adopted: document research, bibliographic research and normative research, using the content analysis procedure to treatment of the data obtained. Considering the nature and purposes of the research, it was adopted as a specific time cut for the consideration of the data used the time interval from 2013 to 2017.

Regarding the sources researched, books and articles related to the theme of violence were consulted, specific legislations such as Maria da Penha Law, Penal Code, Civil Code, and Carolina Dieckmann Law. In addition to these materials, studies were carried out by the World Health Organization, the Patrícia Galvão Institute and the Applied Research Institute, all of which were carried out between 2013 and 2017. Materials were also searched in electronic addresses, such as links from publications of the National Council for Research and Post-Graduation in Law (Conpedi), Google Scholar, as well as online databases such as Hei online and Vlex. Regarding the jurisprudential decisions considered, it is noteworthy that they were searched in the Jusbrasil decision index, a mechanism that allows access to court decisions located throughout the country. In terms of both the decisions used and the material consulted online, the following keywords were used as search engines:

revenge porn, internet intimacy, intimate photos/videos, gender violence, psychological violence on the internet and moral violence on the internet.

## 1 WHY SHOULD WE CONSIDER THE REVENGE PORNOGRAPHY, BEFORE EVERYTHING, GENDER VIOLENCE?

Consisting of unauthorized disclosure of intimate content on social networks, revenge pornography has reached significant levels of intensity worldwide, including in Brazil, a country in which violence against women is a growing and long-standing phenomenon<sup>1</sup>.

It is observed that, although physical violence is more visible due to apparent injuries, psychological and moral violence reach alarming numbers, corresponding to approximately 31% of the complaints registered on the Secretariat of Public Policies for Women<sup>2</sup>.

Based on the tragic outcomes, such as isolation and suicides of victims recorded in recent years, the phenomenon has taken on greater importance in the media and scientific areas, drawing attention to the complexity of the crime.

In this context, the concrete experiences show that the liquidity characteristic of Internet platforms, with high destructive power, contribute to reaffirm violations already observed on face-to-face world, such as other forms of psychological and moral violence of gender.

These, when observed in the virtual environment, do not happen on a formally distinct from the real practices, but they reiterate and reproduce the socially constructed discriminations.

As stated by Frank (2015), revenge pornography can be associated with a variety of motives, ranging from device intrusions by hackers to extortion to revenge on the end of an affective relationship.

At all events, the most important is the one when the severity of the cases in which the dissolution of the affective bond is the decisive impulse for the behavior of the aggressor, given the immense

<sup>1</sup> According to information from the Map of Violence 2015, feminicides in Brazil are presented in the proportion of 4.8 per 100,000 women. According to the same study, in a ranking of 83 countries evaluated by the World Health Organization, Brazil ranks the fifth country with the highest number of female homicides.

<sup>2</sup> Although they don't leave physical marks evident, the psychological and moral violence puts at risk the mental and physical health of its victims. According to the World Health Organization, psychological violence is the most common form of intra-family aggression against women, being the precursor of several others, such as Femicide, the most extreme face of violence against women. Cf. COMPROMISSO E ATITUDE. **Lei Maria da Penha**: A Lei é mais forte. Available on: <<https://goo.gl/6NiNZ4>>. Access on: May, 20th 2017.

power of suffering which, in general, accompanies a loving rupture, added to the feelings of embarrassment, humiliation, misery, guilt, revolt and despair caused by exposure of intimacy on the internet.

Given the occurrence of this criminal modality, it is observed that the consequences experienced by the pejorative exposition in a virtual environment compromises physical and mental integrity of the woman, representing a clear configuration of intra-family violence of gender, being the behavior of the aggressor deliberate and conscious, which is the understanding provided in Law 13,104/2015, popularly known as Law of Femicide.

This normative diploma places a high emphasis on the phenomenon of gender violence, highlighting the most extreme aspect of this type of discrimination, typifying it as a qualified homicide or crime against life.

In the Femicide Law, this type of crime considers the murder of women motivated by gender issues, or naturalization of gender roles, in the context of cultural processes, as described in § 2a-A of the norm.

The correlation of the crime studied with gender violence is also observed in a crystalline way in Maria da Penha Law, the main instrument for coping with the problem in Brazil. According to the fifth article, of this Act, domestic and family violence against women consists on actions or omissions based on gender that cause death, injury, physical, sexual or psychological and moral suffering or property damage, constituting a violation of human rights.

Thus, the issues of gender feedback in the social and cultural dynamics constitute the discursive locus for the practice of physical, psychological, sexual, patrimonial and moral violence against women, as in the seventh article of the mentioned Law.

Considering the occurrence of gender violence since the earliest times of human coexistence, as well as its persistence and increasing incidence in the contemporary period, several scholars have used scientific parameters and concepts as an attempt to elucidate the dimensions of this problem.

Beauvoir (1960), for example, contextualized in details the main elements associated with the construction of the feminine image submissive to the man, object of its impulses, desires, possession and control. Etiological factors of a spiritual, cultural and sociological nature help to clarify, therefore, the qualitative difference of behaviors acceptable to men and women in public and private spaces.

Adding more precise contours to this discussion, Saffioti (1987) pointed out that it is within the cultural dynamics that one observes this attribution of meanings and roles distinct from sex, and there are wide-spread discriminations in a naturalization process.

In this sense, Foucault (1999), contemporary author, emphasized the active role of discourses in reaffirming social practices and their respective conservation in the actions of new subjects, notwithstanding the passing of generations and their historical contexts.

The peculiarities of the crime of revenge pornography point to the clear persistence of gender issues in the collective unconscious, despite discourses of pluralism, tolerance and repudiation of gender violence.

Thus, it becomes possible to understand the motives that are the basis of negative social judgments about the behavior of female victims, even in the modern context of defending freedom of expression and individual disposition of the body itself. This happens because of the subjectivity present in the virtual environment is also permeated by morality and its gendered issues (FARIA; ARAÚJO; JORGE, 2015).

Such discriminations are observed in the behavior of the aggressor, who, assuming the condition of possessor of the body and the sexuality of the victim, publishes the female intimacy in a deliberate and non-consensual way. In this way, there is a reaffirmation of socio-cultural discourses, which, by disapproving the permissive behavior of the victim, intensify the feeling of guilt and self-punishment even when they are victims of gender violence.

The fostering of guilty feelings within the victims is therefore a strong additional indication of the occurrence of gender violence, given that it emerges simultaneously as a reflex and as a catalyst for the psychological injuries evidenced, causing a consequent aggravation of this type of crime, the psychological punishment that the victim emotionally imposes to herself (FERNANDES, 2015).

In the case under study, this guilt chiefly accuses the woman who boldly shared her intimacy and furthermore mistakenly chose someone to enjoy the status of her mate.

This way, all kinds of violence are justified on the basis of the choices and attitudes of the victim. In the case of revenge pornography, the reversal of guilt is fostered by speeches condemning permission to film or photograph the body, as well as the exercise of sexuality outside the limits imposed by gender.

## **2 WHY THE REVENGE PORNOGRAPHY MUST BE CONSIDERED MORAL AND PSYCHOLOGICAL VIOLENCE, ETIOLOGICAL FACTORS OF BODY INJURY?**

Considering the gender discriminations asserted by the aggressor and by the society itself in cases of revenge pornography, making victims' real contacts available on pornographic sites and social networks is often a tactic adopted by the perpetrators, facilitating persecution by strangers.

Facing this situation, a process of vulnerability of the victims begins, exposed to physical and virtual attacks and subjected to harassment by unknown individuals. This way, the severity of the violence practiced in social networks is evidenced (CITRON; FRANKS, 2014).

In this discussion, Porto and Richter (2015) highlight the aptitude of virtual platforms for online violence, such as cyberbullying, the practice of aggressive attitudes, offensive and emotional disruption of victims. Because of the instantaneous reach of thousands of people, the consequences of such violence take on even more serious dimensions than face-to-face assaults, given the insignificance of the temporal and spatial barriers that characterize cyber spaces. This is what Porto and Richter (2015) say.

In this context, professionals who deal daily with revenge pornography warn of the severity of their consequences, enhanced by the specific circumstances of the virtual world, such as visibility, ease of content propagation, and access without limits from the physical world.

Due to the fluid nature of the virtual world, the difficulty of investigating crimes and making perpetrators accountable contributes to the aggravation of the suffering experienced by the victims.

This intense discomfort is characterized by the vulnerability of psychic health, with frequent episodes of anxiety, depression, fear, sadness, anger, stress, headaches and stomachaches, sleep disorders, lack of appetite, among others (PORTO; RICHTER, 2015).

In this discussion, Guimarães and Dresh (2014) call attention to the serious damage to the integrity of the victims, through the imbalance of their emotional and somatic health, given the significant impairment of the feeling of self-esteem due to feelings of guilt.

Going deeper on the scientific discussions about the relationship between psychological violence and psychic, emotional or psychosomatic imbalance, several authors have constructed the conclusion that perceiving the psychological violence of domestic and gender, exercised in a chronic and continued way as element causing bodily injury, a thesis that perfectly matches the complexity of the effects of revenge pornography on the health of victims.

For example, Fernandes (2015) describes the consequences of psychological torture to mental integrity by enumerating the following symptoms: disorders, stress and post-traumatic

cognitions, substance abuse or dependence, low self-esteem, problem solving deficit, suicide, among others.

Thus, while damage to body integrity frustrates the safety of some physiological element of the victim, in health damage, the effects can transcend mere physiology, causing alterations of the body's functions and psychic disturbance.

Despite the urgency of the State's understanding and confrontation of revenge pornography, given the danger it poses to the life of the victims, Brazilian institutions are still slow to do so.

This delay is due to the mistaken perception that the main legal asset protected in these cases is honor, not health, a majority thesis that deviates the main focus of discussion and excludes the application of Maria da Penha Law, a more protective legal instrument to the victims and with better potential of reprimand of the aggressor.

In this sense, the importance of multidisciplinary scientific studies on revenge pornography is highlighted, in order to have instruments to the incorporation of new approaches and procedures to the institutions of the justice system, so that they can give an effective response to the problem.

Reinforcing the perception that the aforementioned crime implies bodily injury due to the physical and emotional damages that cause to the health of women, nongovernmental entities and professionals from diverse fields of knowledge have acted in a way to gradually raise the consciousness of the scientists and operators of the law:

In revenge pornography, the honor of the victim is attained, **but how is her health? Many women move away from work, from family, have their mental health devastated. We can consider the issue of bodily injury, since the victims end up suffering from psychic problems.**

M. H., prosecutor of the Coordination Office for Combating Cyber Crimes of the Public Prosecutor's Office of Minas Gerais, during the *Talk Without Fear Forum 2014*<sup>3</sup> (emphasis added).

Considering these dangers of sexual exposure of victims in cases of revenge pornography, a number of countries have adopted legislative and administrative measures to curb the aggressor's behavior and provide shelter to the victims.

Among the major States that have already adopted specific legislation for revenge pornography, the following stand out<sup>4</sup>: Philippines; Victoria/Australia; Canada; Israel; the United Kingdom; the United States of America

<sup>3</sup> AGÊNCIA PATRÍCIA GALVÃO. **Dossiê de Violência de Gênero na Internet**. Available on: <<https://goo.gl/ZGSfrb>>. Access on: August, 24th, 2016.

<sup>4</sup> See more at CYBER CIVIL RIGHTS INITIATIVE. **38 States + dc Have Revenge Porn Laws**. Available on: <<https://goo.gl/shULwB>>. Access on: May, 9th, 2017.



(there are state legislations in 16 of the 50 states, including Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, New Jersey, Pennsylvania, Texas, Utah, Virginia, and Wisconsin).

With special attention to the protection of psychological health, committed on acts of gender-based violence, other countries make use of legislation that is consistent with the peculiarities of psychological damage<sup>5</sup>. Among these, Spain adopted measures to control sexist advertising, while Portugal expressly prohibited psychic mistreatment of the spouse, in accordance to the provisions of the Criminal Code. In France, modern jurisprudence has recognized the crime of habitual psychological violence (*violença psicológica*) as a conduct capable of causing depression, loss of self-esteem, panic, psychosomatic illnesses, insomnia and eating disorders. In Argentina, criminal legislation provides modalities of psychological and symbolic violence, the latter consisting of the perpetuation of gender inequalities through stereotypes that naturalize the subjection of women. With regard to psychological violence, Argentine law provides for expertise carried out by a gender professional, in order to prepare a technical report aimed at materializing psychological violence. In Israel, the Domestic Violence Act typifies the crime of stalking, understood as harassing or intimidating harassment. Other countries also establish this same criminal type, such as Hungary and Germany. In Brazil, the cases of suicide<sup>6</sup> registered in recent years as a result of victims perceiving themselves irreversibly exposed in social networks have awakened the need to adapt the institutions of the justice system to the new challenges brought about by the increase in the relational complexity characteristic of the globalization process.

### **3 WHY DO YOU URGE TO REVIEW THE PERCEPTION OF REVENGE PORNOGRAPHY OBSERVED IN THE MAJORITY LEGAL SPEECH?**

Despite the visibility of the revenge pornography in Brazil in recent years, especially due to suicides widely reported by the media, unfortunately there are still many doubts and failures regarding the application of relevant legislation to cases, among which: Criminal Code, Maria da Penha Law, Carolina Dieckmann's Law and Civil Registry of the Internet.

Because of this lack of legal consensus, which configures the unsatisfactory confrontation of this crime, members of the federal legislative power have evidenced the need to

<sup>5</sup> See FERNANDES, V. D. S. **Lei Maria da Penha** / O Processo Penal no Caminho da Efetividade: Abordagem Jurídica e Multidisciplinar. São Paulo: Atlas, 2015.

<sup>6</sup> For more info, check out the news BOCCHINI, L. Quem é Culpado pelo Suicídio da Garota de Veranópolis? **Carta Capital**, 2013. Available on: <<https://goo.gl/RUzRLQ>>. Access on: May, 20th, 2017.

establish specific legislation for the case. In this sense, several bills are being submitted to the Brazilian National Congress to amend the Penal Code and Maria da Penha Law.

From the civil point of view, Brazilian judges and courts have mostly understood that revenge pornography injures intimacy, private life and honor, giving the obligation to indemnify for moral damages, reasoning that reveals their failures before the absence of protection to the integrity physical or psychological nature of the victim, understood from the scientific point of view as health integrity.

From a criminal perspective, the offense has been faced by classifying as crimes against honor based on Chapter V of the Penal Code, articles from 138 to 145. In this classification, it is also observed the lack of attention to integrity to health, foreseen in article 129 of the Penal Code, rarely applied.

In addition to the lack of categorization of revenge pornography as a bodily injury, there is also a lack of understanding of the crime, while other criminal types described by Fernandes (2015) related to violence against women, such as: Illegal constriction<sup>7</sup>, threat<sup>8</sup> and extortion<sup>9</sup>.

According to whom advocates of this strict, deficient and limited framework applied to crimes against honor, this is the main legal asset injured when facing the crime of revenge pornography. It is understood by objective honor the status of the individual next to the collective and by subjective honor the status of the person in relation to itself.

With regard to the practice of revenge pornography, the criminal types commonly and erroneously applied to specific cases are those of defamation and injury, since non-consensual exposure damages the subjective aspect of honor by associating an offensive fact with the reputation of the victim in the case of defamation, and tarnishes the honor of the individual, injuring his dignity and decorum in the case of injury.

The jurisdiction to prosecute crimes against honor in the forms of libel and defamation, especially in the case of the dissemination of videos and photos of sexual content, has been established

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<sup>7</sup> “Illegal constriction Article 146 of the Penal Code – Force someone by violence or serious threat, or after having reduced by any other means the capacity for resistance, not doing what the law allows, or doing what she do not send.” In a situation of revenge pornography, this offense can be configured when, for example, the abuser gives orders to have sexual relations with the victim, threatening to injure his honor by spreading intimate material.

<sup>8</sup> “Threat Art. 147 of the Penal Code – Threatening someone, by word, writing or gesture, or any other symbolic means, to cause him unjust and grave harm.” In this case, remission to an unfair and serious evil, such as the disclosure of photos on a pornography site, for example, differentiates the threat from illegal embarrassment.

<sup>9</sup> “Extortion Art. 158 of the Criminal Code – Force someone, through violence or serious threat, and with the intention of obtaining for themselves or for others undue economic advantage, to do, to tolerate doing or not doing anything.” In this case, the abuser requires economic advantage, otherwise the intimacy of the victim is exposed.

in the Special Criminal Courts, whose subject matter and procedures are regulated in Law 9,099/95, with the new wording given by Law 11,313/06.

In such cases, there is the possibility of agreement and renunciation of the right of complaint or representation, demonstrating once again the fragility of this punitive system facing the magnitude of the considered crime, considering the disproportion of the damage caused to the woman and the effective protection of this, because the criminal action depends exclusively on the representation of the offended, not including, in addition, multidisciplinary monitoring of that or the aggressor. Finally, the penalties correspond to offenses of low potential.

In accordance with article 62, of the Special Criminal Courts Law, Law 9,099/95, the process will be guided by the criteria of orality, informality, procedural economy and speed, with the propose, whenever possible, to reparation of the damages suffered by the victim and non-custodial sentence.

Attention is drawn to the lack of correspondence between the legal objectives of the criminal courts, solving simple disputes in a shorter time frame, and revenge pornography, a complex crime that demands constant follow-up of victims and specific legal measures.

Although the matter is recent and it still needs to be interpreted more refined and unified by a large part of the country's courts, the framework of revenge pornography only as a crime against honor or unlawful civil liability for the obligation to indemnify, disconnected from gender violence that has been the predominant tendency in higher courts and in some state courts, as can be seen in the following judgments:

CIVIL APPEAL. ADHESIVE RESOURCE. INDEMNIFICATION ACTION. EXPOSURE OF INTIMATE PHOTOS ON THE INTERNET. OFFENSE TO INTIMACY AND PRIVACY. DAMAGE TO THE PICTURE CONFIGURED. [...] Although the author has naively trusted her former boyfriend, letting herself be photographed in erotic positions, there was breach of trust on the part of the defendant, who divulged the images due to revenge, a conduct that is deserving firmly ethical and legal reproach. [...]. BRASIL. Tribunal de Justiça do Rio Grande do Sul. **Apelação Cível Nº 70065184418**, Nona Câmara Cível. Relator: Eugênio Facchini Neto. Julgado em 26/08/2015. Available on: <<https://goo.gl/4CGFJQ>>. Access on: July, 2<sup>nd</sup>, 2017.

Most of decisions handed down by Brazilian courts, among them the TJMA, the majority view is observed in the sense of condemning the aggressor to the payment of moral damages.

Thus, one can observe the perception of the severity of the damages caused to the victim in some decisions, although a correlation with the violence of gender, foreseen in Maria da Penha Law, is not observed. In this sense, it is worth noting another decision issued by the TJRS:

CIVIL APPEAL. CIVIL RESPONSABILITY. ACTION FOR INDEMNIFICATION FOR MORAL DAMAGES. EXHIBITION OF INTIMATE PHOTO IN A SOCIAL NETWORK WITHOUT AUTHORIZATION [...] DAMAGE MORAL *IN RE IPSA* [...] **Moral damage**

**characterized. Unlawful act consisting of the unauthorized exposure of an intimate photo in a large social network, it being impossible to specify the size of the exposure suffered by the author.** Damage of the species *in re ipsa*. The effective proof of the damage is waived, and proof of the wrongful act and causal link are sufficient [...]. (emphasis added). BRASIL. Tribunal de Justiça do Rio Grande do Sul. Apelação Cível nº 70052257532. Nona Câmara Cível. Relator: Iris Helena Medeiros Nogueira. Julgado em 12/12/2012. Available on: <<https://goo.gl/zLwJwr>>. Access on: July, 2<sup>nd</sup>, 2017.

In other cases it is regrettably perceived that macho and patriarchal concepts introjected and naturalized, including in trials, contribute to the interpretation that the victim collaborated with the practice of the act and is therefore considered co-responsible for its consequences, which interferes directly in the arbitration of moral damages, as can be observed in a decision of the TJMG.

CIVIL APPEAL – FEMALE BODY – PHOTOS OF INTIMATE PARTIES – DISCLOSURE BY THE INTERNET – UNCERTAIN AUTHORITY – MORAL DAMAGES – DENIAL OF INDEMNIFICATION – EFFECTIVE PARTICIPATION OF THE VICTIM – INDEMNIFICATION DECREASED.

“The photos in gynecological positions that exhibit the most absolute intimacy of the woman are not sexy. They have more bitter definition.

– The position of those who weaken the concept of morality can authorize evaluation consistent with this position.

– If there is doubt as to the origin of the disclosure of photos taken by webcam cannot be fixed a culprit.

**Victim who participates in an effective and preponderant way for the consummation of the fact has to be taken into account in fixing the condemnation.** BRASIL. Tribunal de Justiça do Estado de Minas Gerais. 16ª Câmara Cível. **Apelação Cível nº 1.0701.09.250262-7/001**. Relator: José Marcos Rodrigues Vieira Julgado em 23/07/2015. Available on: <<https://goo.gl/K2bzGn>>. Access on: July, 8th, 2017.

So, it can be seen that not even legal decisions escape the macho concepts and cultural stereotypes that permeate socially valid gender issues, which explains the iatrogenic and technically hyposufficient transposition of moral and unethical and/or bioethical judgments to Law.

Such judgments, far from transdisciplinary scientific parameters, further weaken the protection of victims in these cases, increasing the damage already caused to them, configuring a second order of violence or more serious and cruel than the first: the institutional violence.

In the overwhelming majority of cases, despite the perception surrounding the very serious damage done to the victim, the courts continue to typify revenge pornography merely as a crime against honor, especially as common libel and defamation, disconnecting it from its clear gender, in general, intra family relations.

The simplistic, reductionist and technically insufficient understanding prevails in order to understand and to treat the offense on the screen, as can be exemplified in the decision given below by the TJPR:

PENAL. APPEAL. CRIMES OF INJURY AND DEFAMATION. ARTS. 139 AND 140 OF THE CRIMINAL CODE. AGENT POSING AND DISCLOSES INTIMATE EX-GIRLFRIEND PHOTOS ON THE INTERNET. IMAGES AND TEXTS POSTED IN ORDER TO RETRATE HER AS A PROSTITUTE EXPOSED TO GET CUSTOMERS AND PROGRAMS [...] Commits the crimes of defamation and injury qualified by the use of means that facilitates its propagation articles 139 and 140, with 141, II of CP the agent who put on the Internet erotic and unauthorized images of ex-girlfriend, as well as texts making her pass as a prostitute. BRASIL. Tribunal de Justiça do Paraná. **Apelação Criminal nº 756.367-3** (NPU da 4ª vara criminal da comarca de Maringá. Interessado: Ministério Público. Relator: juíza Lilian Romero.

In a diametrically opposite sense, doctrinal studies progressively advance in order to provide scientific subsidies for framing revenge pornography as violence against women<sup>10</sup>. In this sense, they stand out because of their transdisciplinary understandings and in accordance with the complexity and specificity characteristic of gender violence, considering in particular their intra family modality.

In this way, the most superficial understanding is observed as the most used, in the sense of the strict framing of revenge pornography as a crime against honor, paying attention to the injuries to the psychological health and physical integrity of the victim.

In addition to the possibility of criminalizing pornography as a crime against honor or psychological violence against women, in Brazil there is also the possibility of framing the conduct in the list of cybercrimes, provided in Law 12,737/2012, popularly known as Carolina Dieckmann's law.

The legislation was promulgated in a context of discussions about individual warranties before the publication of unauthorized intimate photos of the actress Carolina Dieckmann, who faced the threats of extortion, refused to pay the amount required by hackers, who published the content intimate on the internet.

Thus, Carolina Dieckmann's Law reflected the moment of complexity arising from the emergence of new information management systems and intimacy disposition, characteristic of the globalization process.

According to the law, cybercrime is considered to be: Invasion of an alien computer device of any kind for the purpose of obtaining, adulterating or destroying data or

<sup>10</sup> See the following scientific studies: BUZZI, V. M. **Pornografia de Vingança**: Contexto Histórico-Social e Abordagem no Direito Brasileiro. Florianópolis: Empório do Direito, 2015. MORELLI, J.; AMIRTON, A.; MEIRELLES, F. S. L. Violência de gênero no século XXI: a pornografia de vingança. **Revista da EMERJ**, Rio de Janeiro, v. 18, n. 71, p. 88-93, nov./dez. 2015; VALENTE, M. G. et al. **O corpo é o código**: estratégias jurídicas de enfrentamento ao revenge porn no brasil. InternetLab: São Paulo, 2016.

information; installation of any vulnerability to the computing device in order to obtain an unfair advantage; production, offering, distribution, sale or diffusion of a computer device or program in order to allow the invasion of a computer device or the installation of vulnerabilities, among others.

However, it is also possible to identify weaknesses in the enactments of the legislative act, especially with regard to the definition of “computer device”, which is not systematized in a broad and clear way, considering that there are a multitude of existing devices capable of storing data subject to violation.

Likewise, there are problems in choosing the term “invade”, which does not cover the act of having access to intimate content without invasion, as in the case of video and photo shared on Whatsapp app (SILVA; SILVA, 2014).

In addition to Carolina Dieckmann’s Law, in Brazil it is also possible to register the Civil Internet Framework as a norm aligned with rights in the context of the information society. Promulgated in 2014, this law regulated the use of the Internet by establishing principles, duties and guarantees to users of the network, also determining the relevant state obligations.

Notwithstanding the majority view to classify revenge pornography as a crime against honor, fortunately there are also more reasonable arguments for its framing in Law 11,340/2006, popularly known as Maria da Penha Law, as psychological and/or moral violence.

#### **4 WHY IS MARIA DA PENHA LAW THE MOST ADEQUATE LEGAL INSTRUMENT FOR PROCESSING AND JUDGING THE VENGEANCE PORNOGRAPHY CRIME?**

In the context of revenge pornography, psychological violence against women becomes as devastating as physical aggression or even more serious than this, given the high potential for harm and ease of sharing sexually-oriented videos and images. Such gravity has awakened in courts the idea that the victim has the right to forget memories that cause her emotional pain or suffering, such as intimate material published on the internet, easily accessible and permanently exposed.

The law was promulgated in the context of combating domestic and family violence against women, considering the value attributed to the family institution, the basic nucleus of the State, mainly aimed at full protection of the dignity of women, whose fundamental rights are ensured in a way that achieve equality of rights with men and enjoy them

regardless of class, race, ethnicity, sexual orientation, income, culture, educational level, age and religion. In its article 7, related to forms of domestic and family violence against women, it reproduces the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, also known as the “Convention of Belém of Pará”, of which Brazil is a State party signatory.

In this discussion, Fernandes (2015) draws attention to the importance of combating violence against women, considering their proportions and severity. According to the author, violence against women is not a private matter, but a serious public health problem, which affects thousands of women worldwide, leading to physical and mental problems that are often irreparable. In addition, gender violence also implies harmful effects on the sons and daughters of the victims, as they tend to repeat the patterns of behavior to which they are exposed, in any of their modalities, whether they are subject to future violence or reproducing them in their interpersonal relations (FERNANDES, 2015).

Dias (2011) notes that the infra-constitutional legislator has been careful to define the types of violence against women judiciously, since the precision of the terms and the legal forecast of the conduct are in line with the principle of legality, the vector of all branches of Law. Following the same line of reasoning, Fernandes (2015) points out that with Maria da Penha Law, there was a rupture of the traditional criminal procedure, in order to protect the woman guaranteeing the effectiveness of the judicial protection, in view of the rereading of roles traditionally attributed to actors in the justice system. Thus, the Police Delegate provides immediate relief to the victim, and must ensure her protection, while the Attorney General assumes the role of intervener in the social reality; the Judge, contrary to the procedural limits of the principle of inertia, may adopt protective measures on his own initiative, and the accused, in turn, may be compelled to modify his behavioral pattern (FERNANDES, 2015).

According to article 5 of Maria da Penha Law, domestic and family violence against women is any action or omission based on gender that causes death, injury, physical, sexual or psychological suffering and moral or property damage. Thus, we observe the election of the *gender* concept for the typification of this type of violence.

The role of attitudes characterized as violence against women was amplified by Maria da Penha Law, which, in addition to domestic violence, the aggressions that affect the woman’s body, also typifies the aggressions covered by psychological, moral and patrimonial factors, enumerated in the Article 7 of the aforementioned law. In this discussion, Fernandes (2015) points out that physical violence consists of offending the integrity or corporal health of the woman, causing damage to health or

physical integrity, leaving or not apparent marks. According to the author, the severity of the lesions identifies actual pathways, bodily injury – understood as damage to physical and mental integrity – torture, homicide, among others.

In turn, psychological violence marks the beginning of the process of victim domination by the aggressor through the attitude of control and his demotion. Manifested subtly in its early stages, it gives emotional control to the victim. It does not consist in an isolated act, but in a pattern of relationship, of crimes in contest, cyclical and endlessly repeated in the most diverse forms. The consequences of this type of violence are serious and varied, such as: emotional damage, decreased self-esteem, loss of full development, victim degradation, control of actions, behaviors, beliefs and decisions (FERNANDES, 2015).

In addition to these modalities, law also deals with sexual violence, the imposition of sexual acts against the will of the injured woman and the violence of property, and subordination of that to the aggressor through the deprivation of economic resources, for example.

Lastly, Maria da Penha Law also dispensed with moral violence, a conduct that causes suffering through slander, injury or defamation, reaching the victims very aggressively, given the rigidity with which society values female morality.

At this point, another aspect of revenge pornography, understood as the unauthorized intimate exposure of the victim, whose moral behavior tends to be socially disapproved stands out. This moral violence provided in Maria da Penha Act, characterized as gender violence, is much more appropriate to the crimes under discussion than the mere undifferentiated moral offense under the Penal Code.

According to Silva and Alves (2015), there are solid foundations for the criminalization of psychological violence, manifestation of gender violence, as a crime of bodily harm to health based on the caput and §9, article 129, of the Brazilian Penal Code, combined with article 7, II, of Law 11,340/2006. The authors point out that, both within the scope of the Public Prosecutor's Office and the Judiciary Power, it is still uncommon to condemn the aggressor solely based on the practice of domestic and gender-based psychological violence. These cyclical and chronic aggressions imply a significant impairment of women's self-esteem, attitudes, development and beliefs, causing embarrassment, isolation, limitation to the right of coming and going, and, therefore, impairment of the psychological health of the victim.

In this discussion, it is worth noting the denunciation offered by the Public Prosecutor's Office of São Paulo in the year 2012, legal reasoning in which the corporal injuries and imbalance of



the victim's health were the main arguments for the accusation of the aggressor, author of psychological violence using virtual media.

Elaborated in 2012, the procedural piece presents an innovative thesis regarding the transdisciplinary understanding of gender violence, the resulting violence and its real effects on the lives of the victims. Consequently, the effective protection of the victim is observed by combining the criminal type of bodily injury with the provisions of Maria da Penha Law:

[...] The accused, **prevailing in domestic relations, offended the health of his ex-wife [...] causing him psychic injury of a serious nature**, with incapacity for habitual occupations for more than thirty days and weakness of the psychic function, according to the expert's report of fls. 231/240 ... The threats and offenses to the psychic sphere of the victim were practiced by the accused through emails [...], cell phone messages, as well as web pages. [...] In 2008, threats and harassment by the accused became more intense, a fact that led to the drafting of several bulletins of occurrence and notarial records by the victim, **as well as the granting of urgent protective measures [...]** Thus, **the victim was diagnosed with posttraumatic stress (ICD 10 F43.1), [...]** Therefore, we conclude **that the woman was physically injured by a serious offense by permanent injury of a psychic nature**. [...] In fact, it is extracted from the aforementioned expert report that the offense to **the victim's psychic health resulted in incapacity for habitual occupations for more than thirty days and in weakness of the psychic function, because the post-traumatic stress disorder that the attack has lasted for over a year ... In view of the foregoing, the Public Prosecutor's Office denounces LEAB as an infraction in articles 129, paragraph 1, I and III, article 129, paragraph 10 of the Criminal Code, with provisions of Law 11,340/06 [...]** (emphasis added). BRASIL. Ministério Público do Estado de São Paulo. **Ação Penal 0038488-38.2011.8.26.0002**. Inquérito Policial 239/2011 – 3ª Delegacia de Defesa da Mulher Available on: <<https://goo.gl/VxMk8L>>. Access on: May, 1<sup>st</sup>, 2017.

It is observed that domestic violence of gender occurs in a cyclical, repeated, chronic way and is authored by someone with a strong affective value for the victim, either past or present, which in turn increases the guilty feeling of the same and makes it difficult for her to obtain family or friends' social support to report violence suffered on the grounds that she is "harming, for example, the father of her children". Without social support and usually feeling guilty about its connection with the aggressor, the victim deferred to the maximum the search for protection by the Justice System, thus revealing the complexity and destructive power of this type of violence and its consequences.

Psychological violence constitutes a form of domestic violence of gender that deserves special attention, since either occurring in the midst of other types of violence, or occurring in isolation, implies intense suffering for the victims, who commonly describe it as more painful than physics violence, for example. Therefore, depending on its destructive power and consequences for the victim, it should be understood as a health damage, given the need for transdisciplinary interpretations to describe this element (SILVA; ALVES, 2016). In this sense, Anibal Bruno (1976) states that disturbances to the psyche are also bodily injury,

or damage to health, including states of unconsciousness or insensitivity determined by the use of anesthetics or intoxicants. In addition, physical or mental depression, fainting, confusional states, and other manifestations of nervous or psychic disturbance are also observed, with the production of purely physical pain being indifferent to the configuration of health threat, since psychic pain is also measurable and its examination is possible (BRUNO, 1976).

Thus, it is observed that in cases of revenge pornography several aggressive behaviors are related, among them: psychological violence (health damage), patrimonial violence (need to change address and employment, besides the cost of medical, psychological and payment to lawyers) and moral violence (slander and defamation), notwithstanding the superficial and suppressive understanding of the magnitude of the pain caused by this type of crime present in the daily practice of courts and police stations.

As for the revenge pornography, Lins (2015) emphasizes that the correspondence of the conduct with the psychological violence could imply solutions, given the greater protection brought by the greater semantic and normative scope of the criminal type, contrary to the limited framework commonly adopted by the System of Justice. To do so, it is necessary for legal operators to acquire transdisciplinary knowledge, so that they can characterize revenge pornography as domestic gender violence. The following characterizing elements that should be observed in pornography crimes of revenge are: power relations based on gender; any of the plans of violence foreseen in the Law, whether physical, psychological, patrimonial, moral or sexual; family unit, or because of any relationship of affection (SILVA; ALVES, 2016).

In this discussion, the characterization of revenge pornography as psychological violence would have important legal consequences such as humanized care, follow-up of the victim by an interdisciplinary team, unavailability of criminal action and the possibility of applying protective measures by the competent court, as well as victim and aggressor by various institutions, in view of the seriousness of the violence.

In addition to the greater suitability to protect the mental health of women victims of revenge pornography, it is also worth noting the greater acceptance regarding the continuation of criminal action in case of Maria da Penha Law application, based on the unavailability of the action, the sharing of interests of the State and the victim. In this discussion, the central problem does not consist in the absence of legal fills to frame the revenge pornography in Maria da Penha Act, as a manifestation of psychological violence, considering that a significant part of the cases happens due to a preexisting affection relationship between the parts.

The problem consists in the lack of understanding of the character of the revenge pornography as an injury or violence to the psychological health of the victim, a perception that is not yet observed in legal pieces produced by lawyers, members of the Public Ministry and Judiciary.

This is one of the conclusions recorded in the book *The Body is the Code: Legal Strategies for Coping with Revenge Porn in Brazil*, which included documentary and field research that contributed significantly to the elucidation of revenge pornography and institutional difficulties in its confrontation.

What we realize is that Maria da Penha Law has not been deployed by lawyers or by the Public Prosecutor's Office, which is surprising, since in most of the cases we analyzed, some kind of relationship between the parties was identifiable. When we entered the field, we did not think that this would be a big question: it seemed to us that the subject we were dealing with would clearly be a case of psychological or even moral violence provided in Maria da Penha Law, when the relationship between the parties could be verified. **It was surprising, therefore, that the same position had not been verified on the part of the actors and actresses of the justice system – we are not talking about cases in which magistrates denied the application of the law, but it does not even appear among the requests of the accuser** (VALENTE et al., 2016, emphasis added).

So, it is necessary to investigate the elements that prevent the recognition of pornography from revenge as psychological violence against women, in order to observe from this the possible consequences in the effectiveness resulted from the division of powers between Criminal Court and Court of Woman Appeal.

In this sense, Santos (1996) problematizes the legalistic and simplistic formation of Brazilian legal professionals, highlighting their inability to face the complexity of social conflicts brought to the demand of the Justice System, still anchored in determinism, positivism and scientific rationalism, elements that are not compatible with the paradigms of current conflicts.

Based on the legal-dogmatic paradigm, this theoretical instrument is based on the elimination of extra normative elements at the moment of application of the norms, autonomy of Law, separation between this and its social purposes and limitation of legal problems to the proceedings without attention to their connection with reality (SANTOS, 1996).

That is why Santos (1996) points out that this normativist, bureaucratic and positivist culture, imprinted on legal practitioners from a deficient legal formation, constitutes a barrier to the transformation of institutions of justice, urgent due to globalization, increased inequalities and depoliticization of the social aspect.

In this perspective, also attentive to the deficiencies of the training of the operators of law, Fernandes (2015) highlights the consequences of these considering the violence of

gender, among which is the revictimization and/or institutional violence, arising from the imperative of those who have the legal duty to act and protect.

## 5 CONCLUSIONS

Consisting of unauthorized disclosure of photos, messages, recordings or videos with sexual content, revenge pornography may be associated with various motivations, presenting a greater scale of gravity in the form of reprisal at the end of an intimate relationship.

As discussed in the present work, the characterization of gender violence is clearly present in the behavior of the aggressor, negative social judgments regarding the exposure of female sexuality and the situation of vulnerability of the victim. Thus, in view of the practice of revenge pornography, it becomes urgent to apply legal instruments focused on understanding the concept of gender violence, such as Maria da Penha Law.

Currently, most Brazilian jurists and courts, including TJMA, have interpreted revenge pornography merely as an attempt on objective and subjective honor, a fact that generates the obligation to indemnify regulated by the Law of Special Courts and the Law of Cyber Crimes, the complexity of this phenomenon, as well as making its real power of harm and consequences invisible to the victim.

Evaluating the pillars of this majority understanding, the present study demonstrated that such perception proves to be inefficient and inadequate to the treatment of revenge pornography, since it only protects honor, completely ignoring the serious injuries caused to the health of the victim, inherent to continued psychological violence perpetrated by someone with intense affective attachment to the victim, both past and present.

The main weaknesses of Carolina Dieckmann's Act were also discussed with regard to the effective combat of the crime in question, such as the absence of specific protection of the female sexual dignity, and the lack of its applicability to the crimes practiced by sharing the material in question.

Considering the deficiencies of the perceptions observed predominantly in the Brazilian legal discourse on revenge pornography, Maria da Penha Law is characterized as the most adequate legislation to deal with it, given the complexity of the phenomenon, in view of its correspondence with the forms of violence envisaged in Law 11,340/2006, which are strengthened because they occur in a virtual environment.

It is concluded, therefore, that the prosecution of revenge pornography based on Maria da Penha Law favors a better understanding of the scope of the phenomenon, also allowing the substantial modification of the nature of the criminal action to be proposed as well as the attribution of new meanings to the roles of all actors in the justice system when faced with the seriousness and complexity of the phenomenon studied in this article.

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Versão em inglês elaborada por Luciana Almeida Menezes, doutoranda no Programa de Pós-Graduação em Direito da Universidade Federal do Paraná (PPGD–UFPR), mediante seleção conduzida conforme as normas do Edital de Apoio à Editoração e Publicação de Periódicos Científicos da UFPR – 2017, da Pró-Reitoria de Pesquisa e Pós-Graduação (PRPPG–UFPR).

Original em português disponível em <<http://dx.doi.org/10.5380/rfdufpr.v62i3.53834>>.