

Private Life, Object of Criminal Protection in the European Context

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Abstract

The present action comes as a result of some recent legislative changes, at the level of Romania, more precisely the criminalization of "revenge pornography", but not as a distinct act, according to the provisions of the Criminal Code, but as a variant of committing the crime of violation of private life. Taking into account the provisions of the European Convention on Human Rights on the right to private life, we want to analyse to what extent and how the national legislator of other Member States of the European Union understood to criminalize the behaviour mentioned above. Moreover, considering the criminalization of child pornography, from the European Council Convention on Computer Crime, as well as from the Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011, we want to analyse the opportunity of the existence in Romanian legislation of a distinct criminalization, with the name of "revenge pornography", in the same title of the special part of the Criminal Code as the crime of child pornography, taking into account the protected social value, while observing whether such an orientation is found in the criminal legislation of other Member States. Another aspect that will be considered from the perspective of applying the law to different cases brought to justice is that related to international judicial cooperation when the object of criminal protection is private life.

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1. Introduction. The concept of "private life" and its legal protection

The private life of any person benefits from legal protection both from the perspective of international and national law. We consider, on the one hand, art. 8 of the European Convention on Human Rights² and art. 7 of the Charter of Fundamental Rights of the European Union³, and, on the other hand, art. 26 of the Romanian Constitution⁴. Legal protection presupposes, first of all, the provision of a right in a normative act, so that this right is respected by others, and, secondly, the existence of rules by which non-respect of the right entails the responsibility of the one who is guilty

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² Art. 8 of the European Convention on Human Rights, signed in Rome in 1950 and entered into force in 1953, provides the right to respect for private and family life, as follows: „1. Every person has the right to respect for his private and family life, his domicile and his correspondence. 2. The interference of a public authority in the exercise of this right is not allowed except to the extent that it is provided by law and constitutes, in a democratic society, a necessary measure for national security, public safety, the economic well-being of the country, the defense of order and prevention of criminal acts, protection of health, morals, rights and freedoms of others”. Available at: https://www.echr.coe.int/documents/d/echr/convention_ron (last accessed: August 31, 2023). See some aspects in Arta Selmani-Bakiu, Adnan Jashari, *Establishing A Family by the New Technologies for Artificial Reproduction According to the Positive Legislation of North Macedonia in the Light of Comparative Family Law*, „Perspectives of Law and Public Administration”, Volume 10, Special Issue, October 2021, pp. 57-70.

³ Art. 7 of the Charter of Fundamental Rights of the European Union, ratified on December 7, 2000, provides the respect for private and family life, as follows: "Every person has the right to respect for private and family life, residence and the secrecy of communications". Available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT> (last accessed: August 31, 2023).

⁴ In art. 26 of the Romanian Constitution, as amended and supplemented by the Law on the revision of the Constitution no. 429/2003, published in the Official Gazette of Romania no. 758 of October 29, 2003, the legislator talks about intimate, family and private life, as follows: „(1) Public authorities respect and protect intimate, family and private life. (2) The natural person has the right to dispose of himself, if he does not violate the rights and freedoms of others, public order or good morals”. Available at: https://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=2#t2c2s0sba26 (last accessed: August 31, 2023).

of this, from a disciplinary, civil and, ultimately, criminal perspective.

Although provided in several normative acts, as we have shown above, we do not find a definition of this notion in any of these documents. The concept of "private life" was explained by the European Court of Human Rights, in the cases it judged, cases related to the violation of art. 8 of the European Convention on Human Rights. All this information was gathered by the same court in the Guide⁵ to Article 8 of the Convention, and the essence of the content of the document, relative to the concept of "private life", is that it cannot be given an "exhaustive definition"⁶. Thus, as the Court had to rule on the violation or not of the provisions of Article 8 of the Convention in the various cases submitted to the judgment, the scope of this notion became more and more comprehensive. For example, it has been taken into account aspects related to "well-being and dignity (...), health issues/medical treatment (...), personality development (...), physical and psychological integrity (...), personal identity (...), relations with other human beings (..) aspects of social identity (...), the protection of personal data (...), a person's image (...)"⁷, a fact that led to their division into three categories, namely: "a person's physical, psychological or moral integrity, his privacy and his identity and autonomy"⁸.

The intervention of criminal law in protecting a person's private life intervenes *ultima ratio*, and requires the observance of two general principles of criminal law, namely the legality of criminalization and the legality of criminal law sanctions. Therefore, a person cannot be held criminally liable for an act that, at the time of its commission, was not considered a crime, and the person cannot be sanctioned outside the legal framework established for the crime committed⁹. Thus, we find that it is necessary, first of all, for the act of violation of private life to be described in a criminal norm or, in other words, to be defined in the criminal law, in the legislation of a state. Secondly, regardless of the marginal name of the norm criminalizing the act of violation of private life, which is found in the legislation of a state, it is essential that the constituent elements, as well as the special limits of the sanction provided by law for that act, have a correspondent in the criminal law of other states to allow international judicial cooperation, should it be needed.

As the legislation of a state, including the criminal one, must be modified and supplemented constantly, in order to be able to keep up with the evolution of society, ensuring protection for all people, at all levels of social life, there are situations in which the recurrence of certain behaviors in the plan of objective reality imposes the criminalization of an act. This is the situation of criminalizing the act of "revenge porn" in Romanian legislation, an aspect explained in the Explanatory Memorandum¹⁰ to the normative act by which art. 226 of the Criminal Code¹¹ was amended and supplemented.

The act of violation of private life is described in art. 226 of the Criminal Code. In the form prior to the modification of the provisions of this article by Law no. 171/2023, art. 226 of the Criminal Code provided the following:

„(1) Touching the private life, without right, by photographing, capturing or recording images, listening with technical means or audio recording a person in a home or room or in an annex of it or of a private conversation is punishable by imprisonment from one month to 6 months or a fine. (2) The disclosure, broadcast, presentation or transmission, without right, of the sounds, conversations

⁵ Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng (last accessed: August 31, 2023).

⁶ Guide to Article 8 of the Convention, p. 25, available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng (last accessed: August 31, 2023).

⁷ Ibid.

⁸ Ibid.

⁹ For some considerations see Mireille M. Caruana, *The reform of the EU data protection framework in the context of the police and criminal justice sector: harmonisation, scope, oversight and enforcement*, International Review of Law, Computers & Technology, 33:3, 2019, pp. 249-270, DOI: 10.1080/13600869.2017.1370224; Claire Fenton-Glynn, *The Right to Respect for Private Life*, *Children and the European Court of Human Rights*, Oxford, 2020, online edn., Oxford Academic, 21 Jan. 2021, <https://doi.org/10.1093/oso/9780198787518.003.0003>, accessed 1 Apr. 2024.

¹⁰ For details, see the Explanatory Memorandum to Law no. 171/2023 for the amendment and completion of art. 226 of Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 532 of June 15, 2023, available at: <https://www.cdep.ro/proiecte/2019/600/00/6/em686.pdf> (last accessed: September 1, 2023).

¹¹ It is about Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, with subsequent amendments and additions.

or images provided in para. (1), to another person or to the public, is punishable by imprisonment from 3 months to 2 years or a fine. (3) The criminal action is initiated upon the prior complaint of the injured person. (4) The act committed: a) by the person who participated in the meeting with the injured person during which the sounds, conversations or images were recorded, does not constitute a crime, if it justifies a legitimate interest; b) if the injured person acted explicitly with the intention of being seen or heard by the perpetrator; c) if the perpetrator catches the commission of a crime or contributes to proving the commission of a crime; d) if it captures facts of public interest, which are significant for the life of the community and whose disclosure presents greater public advantages than the damage caused to the injured person. (5) Placing, without right, technical means of audio or video recording, in order to commit the acts provided in para. (1) and para. (2), shall be punished with imprisonment from one to 5 years".

Starting from June 18, 2023, the content of article 226 of the Criminal Code, keeping the same marginal name, namely "violation of private life", is as follows: "(1) Touching private life, without right, by photographing, capturing or recording images, listening with technical means or audio recording a person in a home or room or in an annex of it or of a private conversation is punishable by imprisonment from one month to 6 months or a fine. (2) The disclosure, broadcast, presentation or transmission, without right, of the sounds, conversations or images provided in para. (1), to another person or to the public, is punishable by imprisonment from 3 months to 2 years or a fine. (2¹) The disclosure, diffusion, presentation or transmission, in any way, of an intimate image of an identified or identifiable person according to the information provided, without the consent of the depicted person, likely to cause him mental suffering or harm his image, is punishable by imprisonment from 6 months to 3 years or a fine. (2²) By intimate image we understand any reproduction, regardless of support, of the image of a naked person, which fully or partially exposes the genitals, the anus or the pubic area or, in the case of women, the breasts, or which is involved in a sexual relationship or sexual act. (3) The criminal action is initiated upon the prior complaint of the injured person. (4) The deed provided in para. (1) and para. (2) does not constitute a crime if it is committed: a) by the person who participated in the meeting with the injured person during which the sounds, conversations or images were captured, if it justifies a legitimate interest; b) if the injured person acted explicitly with the intention of being seen or heard by the perpetrator; c) if the perpetrator catches the commission of a crime or contributes to proving the commission of a crime; d) if it captures facts of public interest, which are significant for the life of the community and whose disclosure presents greater public advantages than the damage caused to the injured person. (4¹) It does not constitute a crime the act provided in para. (2¹) if the perpetrator catches the commission of a crime or contributes to proving the commission of a crime. (5) Placing, without right, technical means of audio or video recording, in order to commit the acts provided in para. (1) and para. (2), shall be punished with imprisonment from one to 5 years". Therefore, the act of "revenge porn" is the one described in paragraph (2¹) of art. 226 of the Criminal Code although this marginal designation is not found in the Criminal Code, but it is mentioned in the Explanatory Memorandum to the law by which paragraph (2¹) was introduced in art. 226 of the Romanian Criminal Code.

From the Explanatory Memorandum¹² to Law no. 171/2023 we learn that this act is also criminalized in three other states at the level of the European Union, namely France, Germany and Malta.

In art. 226-2-1 of the French Criminal Code¹³ it is provided as follows: „When the offenses

¹² Available at: <https://www.cdep.ro/proiecte/2019/600/00/6/em686.pdf> (last accessed: September 3, 2023).

¹³ Available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000006165309/#LEGISCTA000006165309 (last accessed: September 4, 2023). In art. 226-1 of the French Criminal Code it is provided: willfully violating the privacy of another's private life, by any means, is punishable by one year's imprisonment and a fine of 45,000 euros: 1° By capturing, recording or transmitting, without the consent of their author, words spoken in a private or confidential capacity; 2° By fixing, recording or transmitting, without the person's consent, the image of a person found in a private place. 3° By capturing, recording or transmitting, by any means whatsoever, the real-time or delayed location of a person without their consent. When the acts mentioned in para. 1° and 2° of this article were carried out in full view of the interested parties without their opposition, although they were able to do so, the consent of the interested parties is presumed. When the acts mentioned in this article have been carried out on the person of a minor, consent must come from the holders of parental authority. When the acts are committed by the victim's spouse or common-law partner or the partner linked to the victim by a civil solidarity pact, the penalties are increased to two years' imprisonment and a fine of 60,000

provided in articles 226-1 and 226-2 relate to words or images of a sexual nature taken in a public or private place, the penalties are increased to two years of imprisonment and to €60,000 of fine. The same penalties apply to the act, in the absence of the person's consent for dissemination, of bringing to the attention of the public or a third party any recording or document relating to words or images of a sexual nature, obtained, with the express or presumed consent of the person or by themselves, using one of the acts provided in article 226-1".

We find that the provisions of art. 226 para. (2¹) of the Romanian Criminal Code are similar to those in art. 226-2-1 of the French Criminal Code, but words of a sexual nature are not taken into account, although they also define a person's private life, as a whole, and it is not expressly provided that intimate images are obtained with consent or not of the person depicted in them.

In art. 208E of the Maltese Criminal Code¹⁴, whose marginal title is "Non-consensual taking or disclosure of private sexual photographs and films" it is provided as follows: „(1) Whoever, with an intent to cause distress, emotional harm or harm of any nature, takes or discloses a private sexual photograph or film without the consent of the person or persons displayed or depicted in such photograph or film shall on conviction be liable to imprisonment for a term of up to five years or to a fine (a fine) of not less than four thousand euros (€4,000) and not more than eight thousand euros (€8,000), or to both such imprisonment and fine. (2) A person shall not be guilty of an offense under this article if: (a) he has disclosed the sexual photograph or film where the sexual photograph or film were taken with the consent of the person or persons displayed or depicted in such photograph or film, solely to the person or persons displayed or depicted in such photograph or film; or (b) the disclosure was necessary for the purpose of preventing, detecting or investigating a crime; or (c) to the extent that it is reasonably required, the disclosure is authorized by a court or tribunal in the course of judicial proceedings: provided that where authorisation is so granted by a court or tribunal, the sexual photograph or film shall, without delay, be sealed by the registrar or deputy registrar of that court or tribunal and shall only be accessible by the parties to the suit or to their authorized legal representatives. (3) When the offense provided for in this article is committed as a means or in the context of blackmail the punishment shall be increased by one degree. (4) In this article: "taking" shall refer to the unauthorized taking of sexual private photos and films, by any means; "disclosure" shall be construed as also including the publication, distribution, trade, circulation or unauthorized use of private sexual photographs and films, by any means; "private" shall refer to any photograph or film which was never intended for public consumption; "sexual" shall include the description of all or part of a person's exposed genitals or pubic area, or, in the case of females, of the breasts, or of any content that, when taken as a whole, a reasonable person would consider to be sexual because of its nature; "photograph or film" means moving or still image or data, stored by any means, which is capable of conversion into a moving or still image".

We find that the legal text of the Romanian Criminal Code is closer to that of the Maltese Criminal Code than to that of the French Criminal Code, the definition of "intimate images" in art. 226 para. (2²) of the Criminal Code is a faithful representation of the definition of the term "sexual" according to art. 208E para. (4) of the Maltese Criminal Code, and the special justifying cause from para. (4¹) of art. 226 of the Romanian Criminal Code has a counterpart in the provisions of art. 208E para. (2) let. b) from the Maltese Criminal Code.

In art. 201a para. (3) of the German Criminal Code¹⁵, whose marginal name is „Violation of intimate privacy and of rights of personality by taking photographs or other images", it is provided as follows: „Whoever 1. produces or offers to procure for a third party for a consideration or 2. procures for themselves or for a third party for a consideration an image showing the nakedness of another person under 18 years of age incurs a penalty of imprisonment for a term not exceeding

euros. In art. 226-2 of the French Criminal Code it is provided that: „It is punished with the same punishment the fact of keeping, bringing or allowing it to become known to the public or to a third party or using in any way whatsoever any recording or document obtained using one of the acts provided in article 226-1. When the offense provided in the preceding paragraph is committed through the written or audiovisual press, the specific provisions of the laws which govern these matters are applicable with regard to the determination of the responsible persons".

¹⁴ Available at: <https://legislation.mt/eli/cap/9/eng/pdf>, last accessed: September 4, 2023.

¹⁵ Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1935, last accessed: September 7, 2023.

two years or a fine”.

We note that compared to the provisions of the Romanian Criminal Code, those of the German Criminal Code have a narrower scope, being limited to the production or procurement for a third person of an image exposing the nudity of a person under 18 years of age, i.e. a minor. The German legislator considers sufficient in the context of this criminalization the exposure in an image of the nudity of a person under the age of 18, it is not necessary that this nudity be of a sexual nature. Logically interpreting, using per a contrario reasoning, the legal text of the German Criminal Code, the exposure in an image of the nudity of a person over the age of 18 does not fulfill the content of this criminalization, regardless of whether the nudity is sexual or not¹⁶.

2. Aspects regarding the norm of criminalization of revenge porn, described in art. 226 para. (2¹) of the Romanian Criminal Code

Although, in essence, we agree with the arguments expressed in the Explanatory Memorandum to Law no. 171/2023, regarding the need to criminalize revenge porn in the Romanian Criminal Code, however, we cannot fail to note certain inconsistencies between the aspects presented in the above-mentioned document and the decision¹⁷ of the High Court of Cassation and Justice no. 51/2021, issued to resolve a legal issue, in the sense that "the typicality of the crime of violation of private life in the way criminalized by art. 226 para. (2) of the Criminal Code is not conditional on possessing sounds, conversations or images made without right, by photographing, capturing or recording images, listening with technical means or audio recording of a person in a home or room or in an annex of it or of a private conversation"¹⁸. Thus, for the existence of the crime of violation of private life, as it is described in art. 226 para. (2) of the Criminal Code, sounds or images can also be owned legally, "without right" being their "disclosure, broadcast, presentation or transmission" to another person or to the public. We consider, therefore, that, in part, the act of revenge porn was already provided by the criminal law, in the content of para. (2) of art. 226 of the Criminal Code. In support of this statement, we present arguments in the following. First of all, the phrase "intimate image", which the legislator uses in the content of art. 226 para. (2¹) of the Criminal Code, is included in the notion of "image", already used in para. (2) of the same article. It is about a connection from part to whole. Secondly, from the perspective of the material element, we note that the legislator has taken up the alternative normative modalities from the content of the variant from para. (2) of art. 226 of the Criminal Code. The phrase "in any way", used in para. (2¹) is superfluous because even in its absence, as in para. (2) of art. 226 of the Criminal Code, where we do not find such a phrase, from the interpretation of the rule, it appears that disclosure, diffusion, presentation or transmission, in any form, without the consent of the person depicted in the image, is prohibited. Thirdly, the phrase "identified or identifiable persons according to the information provided", contained in para. (2¹), is included in the notion of "person" used in para. (2) of art. 226 of the Criminal Code, being a connection from part to whole. In the sense of para. (2) of art. 226 of the Criminal Code, as long as the material element is made without right, it is irrelevant for the existence of the crime if the person in the content of the image is identified or identifiable, thus protecting the private life of any person. Fourthly, from the perspective of the immediate prosecution of the crime described in para. (2¹) of art. 226 of the Criminal Code, the scope of applicability of the rule is narrower than in the case of the crime from para. (2) because it is represented by a state of abstract danger for the protected social value, namely "private life", but which is likely to cause this person in the image mental suffering or harm of his image. And these two possible consequences are included, also in a connection from part to whole, in the immediate consequence of the offense from para. (2) of art. 226 of the Criminal Code, represented by a state of danger for the protected social value. Fifthly, from the aspects revealed by

¹⁶ Isadora Neroni Rezende, *The proposed Regulation to fight online child sexual abuse: an appraisal of privacy, data protection and criminal justice issues*, „International Review of Law, Computers & Technology”, online 2024, DOI: 10.1080/13600869.2024.2324548.

¹⁷ Available at: <https://www.iccj.ro/2021/06/24/minuta-deciziei-nr-51-din-24-iunie-2021-2/>, last accessed: September 3, 2023.

¹⁸ Idem.

the jurisprudence of the European Court of Human Rights and contained in the Guide regarding Article 8 of the Convention, the concept of "intimate image", as defined in para. (2²) of art. 226 of the Criminal Code, is limited to the notion of a person's "image", and his right to private life also includes the protection of his image.

Since we stated at the beginning of the second section of our paper that, in part, the criminalization of para. (2¹) was included in the norm from para. (2) of art. 226 of the Criminal Code, we want to specify that the legislator had not considered in the content of para. (2) of art. 226 of the Criminal Code the situation in which the image would have been taken in a different place than "the dwelling or the room or the annex of it", for example, in the toilet of a restaurant. Under the conditions of para. (2¹) of art. 226 of the Criminal Code, it is a crime of violation of private life to disclose, broadcast, present or transmit, without the consent of the depicted person, an image of him, only if the image is intimate, in the sense of the definition in para. (2²), regardless of the place where this intimate image would have been made, that is, in our example, in the toilet of a restaurant, if the conditions regarding the form of guilt and those related to the immediate follow-up are also met. On the other hand, if the image of a person caught in the toilet of a restaurant is disclosed but the image is not intimate, this act is not covered by the criminal law. From the perspective of the definition of "intimate image", considering that, in accordance with the rules of legislative technique¹⁹, the meaning of the terms used is that of current speech, we consider that in order to meet the requirements of clarity and predictability of the norm of incrimination, the adjective "nude" should be excluded from this definition because, according to the Explanatory Dictionary of the Romanian language²⁰, "nude" means "completely undressed"²¹, or, in essence, if the person in the disclosed image, exposing "totally or partially his genitals, anus or pubic area or, in the case of women, also the breasts, or who is involved in sexual intercourse or sexual act", but keeping an item of clothing on the upper part of the body (for example: a sweatshirt that is unzipped) or on the bottom of the body (for example: a pair of trousers or a skirt pulled down towards the knees), the image in question would no longer fall within the legal definition of "intimate image". We believe that the essence of the definition of "intimate image" is the total or partial exposure of the areas mentioned by the legislator, not the fact that the person is naked or not. The same reasoning applies to the last sentence of the definition, in the sense that, if the person in the image, involved in a sexual relationship or sexual act, is not nude, this image disclosed, broadcast, presented or transmitted would no longer realize the content of this crimes, as described in para. (2¹) of art. 226 of the Criminal Code, and, in none of these two hypothetical examples, the act could not be included in para. (2) of art. 226 of the Criminal Code, if the person in the image was not present at the time the images were taken in a home or room or in an annex of it.

From the perspective of the last sentence of the definition of "intimate image", in accordance with the aspects found in the norm of criminalizing the act of rape, described in para. (1) and (2) of art. 218 of the Criminal Code²², we believe that this definition should also include "other acts of vaginal or anal penetration" because, currently, if the person depicted in the image is involved in such an act mentioned in the last line, this hypothesis is not covered by the legal provision, but it is actually possible and, if such a pose is broadcast, it affects a person's private life, the broadcast being done without their consent. The phrase "sexual act" from the existing definition of "intimate image" includes exclusively oral or anal sexual acts, as also referred to in the norm of criminalizing the act of rape, from the content of art. 218 para. (1) of the Criminal Code.

It is the legislator's right to criminalize distinctly and to sanction with a punishment whose special limits are higher, a behavior that represents a part of a whole that already benefits from a legal

¹⁹ Found in Law no. 24/2000 regarding the legislative technical norms for the elaboration of normative acts, republished in the Official Gazette of Romania no. 260 of April 21, 2010, with subsequent amendments and additions.

²⁰ Available at: <https://dexonline.ro/definitie/nud/definitii>, last accessed: September 5, 2023.

²¹ Idem.

²² According to art. 218 para. (1) and (2) of the Criminal Code, the crime of rape consists of: „(1) Sexual intercourse, oral or anal sexual intercourse with a person, committed by coercion, making it impossible to defend oneself or to express the will or taking advantage of this state, is punished with imprisonment from 5 to 10 years and the prohibition of the exercise of certain rights. (2) The same punishment will apply to any other acts of vaginal or anal penetration committed under the conditions of para. (1)”.

provision, but we consider it necessary to analyze the overall legislative framework in order to note the opportunity to include the rule of criminalization in an already existing article, within the title regarding crimes against the person, or to create a new article, in another title of the Criminal Code, namely the one relative to crimes that affect certain relations regarding social coexistence, where we find child pornography criminalized, the difference in option being given by the sphere of social values that the legislator mainly wants to protect. The criterion of the generic legal object of the crimes is the one that is taken into account in the division of the special part into titles.

Including the norm of criminalizing revenge porn in one of the paragraphs of art. 226 of the Criminal Code, we find that the legislator's option to place this crime in the category of crimes against the person also determined the generic legal object of the crime in question. If a distinct article had been created, in the title where the crime of child pornography is, described in art. 374 of the Criminal Code, namely in the title regarding crimes that affect social relations, the generic legal object would have been different, as can be seen from the name of the title.

On the other hand, at the level of the other three states in whose legislation revenge porn is criminalized, from the perspective of where the norm of criminalizing this act is placed in their criminal code, we find that there are three different situations. Thus, in the German Criminal Code, revenge porn is criminalized in a paragraph of the article in which the violation of privacy through photographs or other images is described, a model followed by the Romanian legislator. In the Maltese Criminal Code, revenge porn is described in the part of sexual crimes, different from the option of the Romanian legislator, and in the French Criminal Code, the crime of revenge porn is described in a separate article, in the part relative to crimes against private life. We therefore note that there is not a unified vision on where to find this criminalization within crimes against the person. But, uniformly, none of the mentioned states placed the crime under discussion next to that of child pornography.

Another aspect we want to highlight, related to the inconsistencies between the content of the Explanatory Memorandum to Law no. 171/2023 and the criminalization norm of revenge porn, is that of the passive subject of the crime. Thus, in the Explanatory Memorandum it was stated that the passive subject can only be "an adult, if the victim is a minor, the act receiving a different classification", namely the crime of child pornography, described in art. 374 para. (1) of the Criminal Code²³.

In essence, the reasoning is correct, but different from other situations where the legislator expressly specified that it is an adult, in the case of the crime of revenge porn, this specification is not made, but the existence of the crime is conditioned by the lack of consent of the person depicted in the intimate image. However, a person's ability to consent is closely related to his full exercise capacity. According to the provisions of art. 37-40 of the Romanian Civil Code²⁴, the full exercise capacity is acquired at the age of 18, the age of majority, but also by the minor, through marriage or if, upon reaching the age of 16, for valid reasons, the court of guardianship recognizes it. Therefore, the minor who has the civil capacity to consent can also be a passive subject of the crime of revenge porn. The problem that would arise, from this perspective, would be that of differentiating between the crime of revenge porn and that of child pornography, when the passive subject is a minor with full exercise capacity. We believe that the difference between the two crimes is given, first of all, by the distinct generic legal object. Secondly, it also differs from the perspective of the special legal object. Thus, the special legal object of the crime of revenge porn is represented by the set of social relations that appear and develop regarding the protection of a person's private life²⁵. The special legal object of the crime of child pornography is represented by the set of social relations that appear and develop with regard to the protection of public order and peace and the protection of the child's

²³ According to art. 374 para. (1) of the Criminal Code: "The production, possession, procurement, storage, exposure, promotion, distribution, as well as making available, in any way, of pornographic materials with minors are punishable by imprisonment from one to 5 years".

²⁴ Represented by Law no. 287/2009 regarding the Civil Code, republished in the Official Gazette of Romania no. 505 of July 15, 2011, with subsequent amendments and additions.

²⁵ Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, „California Law Review”, vol. 64, no. 4, 1976, pp. 871–901. JSTOR, <https://doi.org/10.2307/3479919>.

privacy. Thirdly, it must be determined in each individual case what was the intention of the perpetrator, in the sense that he or she intended to cause mental suffering or harm to the image of the passive subject, by disclosing, broadcasting, presenting or transmitting an intimate image of him, the act being revenge porn, or the intention was to endanger public order and peace and to harm the privacy of the passive subject, by, for example, distributing pornographic materials with minors²⁶, the act being that of child pornography.

We would also like to address the issue of the difference between the crime of revenge porn and that of outrage against good morals, described in art. 375 of the Criminal Code, when the latter consists of "the act of the person who, in public, exhibits or distributes without right images that explicitly show a sexual activity, other than the one referred to in art. 374, (...)". We consider this aspect because no clarification was made about it in the Explanatory Memorandum to Law no. 171/2023. Beyond the difference in the legal object of these two crimes, that of outrage against good morals being found in the same title as that of child pornography, and of distinct alternative normative ways of achieving the material element, even if the notion of "intimate image" is, in part, synonymous with that of "image that explicitly presents a sexual activity", what differentiates the two crimes is the condition of place, imposed by the legislator for the crime of outrage against good morals, namely "in public"²⁷, aspect which is not provided in the norm of criminalizing the act of revenge porn.

Last but not least, we would like to address the crime of revenge porn by referring to the crime of computer forgery²⁸, described in art. 325 of the Criminal Code, when any of the alternative normative ways of achieving the material element, which is committed "in any way", as provided in the incrimination norm, is committed concretely by introducing "without right, of computer data, resulting in untrue data, in order to be used for the production of legal consequences". In a concrete case, what would be observed when a person opens an account on a public social network with the identification data of a person and uploads intimate pictures of that person to that account? We consider this example taking into account the decision²⁹ issued by the High Court of Cassation and Justice on appeal in the interest of law no. 4/2021 by which the court ruled that: "The act of opening and using an account on a social network open to the public, using as a username the name of another person and entering real personal data that allows to identify him, meets two of the essential requirements of the crime of computer forgery provided in art. 325 of the Criminal Code, respectively that the action of entering computer data is carried out without right and that the action of entering computer data results in data inconsistent with the truth". And intimate images and information provided so that the person depicted in them can be identified or identifiable, entered into a computer system³⁰, are computer data³¹, within the meaning of the criminal law. We believe that in this case, the disclosure of intimate images through the computer system is equally the content of two crimes, namely the violation of private life, described in art. 226 para. (2¹) of the Criminal Code, and computer forgery, described in art. 325 of the Criminal Code.

²⁶ According to art. 374 para. (4) of the Criminal Code: „By pornographic materials with minors we understand any material that presents a minor or an adult person as a minor, having explicit sexual behavior or that, although it does not present a real person, credibly simulates, a minor engaging in such behavior, as well as any depiction of a child's genitalia for sexual purposes.”

²⁷ According to art. 184 of the Criminal Code: "The act is considered committed in public when it was committed: a) in a place that by its nature or destination is always accessible to the public, even if no person is present; b) in any other place accessible to the public, if two or more people are present; c) in a place inaccessible to the public, but with the intention that the deed be heard or seen and if this result occurred in relation to two or more people; d) in a gathering or meeting of several people, with the exception of meetings that can be considered to have a family character, due to the nature of the relationships between the participating people".

²⁸ In art. 325 of the Criminal Code it is provided as follows: "The act of entering, modifying or deleting, without right, computer data or of restricting, without right, access to these data, resulting in data that does not correspond to the truth, in order to be used to produce a legal consequence, constitutes a crime and is punishable by imprisonment from one to 5 years".

²⁹ Available at: <https://legislatie.just.ro/Public/DetaliuDocumentAfis/238047>, last accessed: September 7, 2023.

³⁰ According to art. 181 para. (1) of the Criminal Code: "Computer system means any device or set of devices interconnected or in a functional relationship, one or more of which ensures automatic data processing, with the help of a computer program".

³¹ According to art. 181 para. (2) of the Criminal Code: "Computer data means any representation of facts, information or concepts in a form that can be processed by a computer system".

3. Aspects regarding international judicial cooperation when the object of criminal protection is private life

International judicial cooperation is particularly important in the process of preventing and combating any type of crime, including when the object of criminal protection is private life. For this reason, we want to highlight the need for an adequate legislative framework in support of cooperation between the competent authorities of different states to ensure the prosecution of those who have committed crimes that affect a person's private life. Regarding international judicial cooperation, the provisions of international legal instruments, such as conventions, treaties, agreements etc., will be taken into account, first of all. Secondly, judicial cooperation will be considered based on a request sent through diplomatic channels by the requesting state, with the written assurance of reciprocity. In this second situation, regarding Romania there is Law³² no. 302/2004 on international judicial cooperation in criminal matters, which contains the rules that must be respected in the matter. In accordance with the provisions of art. 1 paragraph (1) from Law no. 302/2004, it applies to the following forms of international judicial cooperation in criminal matters: a) extradition; b) surrender based on a European arrest warrant; c) the transfer of proceedings in criminal matters; d) recognition and execution of decisions; e) transfer of convicted persons; f) judicial assistance in criminal matters; g) other forms of international judicial cooperation in criminal matters". In the matter of extradition, for example, the rule is that of double criminality, even if there are differences between the legal qualification and the name given to the same crime by the laws of the two states between which the question of judicial cooperation arises. The exception, that of the lack of double criminality as a necessary condition for judicial cooperation, must be provided by the international convention or the international legal instrument applicable in that situation. In the matter of the European arrest warrant, also from the provisions³³ of Law no. 302/2004, we note that the crime of violation of private life is not found in the list of 32 crimes for which it is not necessary to fulfill the condition of double criminality. Therefore, in accordance with the provisions of art. 97 para. (2) from Law no. 302/2004, "for facts other than those provided in para. (1), surrender is subject to the condition that the facts that motivate the issuance of the European arrest warrant constitute a crime according to Romanian law, regardless of its constitutive elements or its legal framework".

4. Conclusions

Considering the desideratum and the need to harmonize criminal legislation at the European level, we believe that it is opportune to address the issue of criminal protection of private life because an adequate legal framework will allow those who are guilty of committing such crimes to be held criminally liable.

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³² Republished in the Official Gazette of Romania no. 411 of May 27, 2019, with subsequent amendments and additions.

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