

## The Offence of Disclosing Private Sexual Photographs and Films with the Intent to cause Distress under the Criminal Justice and the Courts Act, 2015 (UK)

- Rishika Khare \*

---

### Abstract

*The article discusses the offence of 'disclosing private sexual photographs and films with the intent to cause distress', as laid down under section 33 of the Criminal Justice and the Courts Act, 2015 of United Kingdom. With the increasing instances of abuse of persons on media platforms through private photographs or films, the criminalization of such disclosure as an offence was a necessity. The new act aims to address the offence in a more stringent manner. This article describes the offence as provided for by the new Act and explains the need to categorize the act as a separate offence when related activities were already covered under other statutes. The article also critically analyzes the section in particular, to explain its role in ensuring victim protection. The article in the end underlines the positive change the new law can bring in controlling the act of revenge pornography.*

**Keywords:** *disclosing, sexual, photographs, films, revenge pornography*

---

### Introduction

The Criminal Justice and the Courts Act, 2015<sup>1</sup> was enacted on February 12, 2015<sup>2</sup> to make provisions dealing with offenders, to amend already existing offences and to add certain other new offences.<sup>3</sup> This essay specifically focuses on and critically analyzes the offence of 'disclosing private sexual photographs and films with the intent to cause distress', as laid down in section 33 of the Act.

The section provides "that the disclosure of private sexual photographs and films without the consent of the individual who appears in them and with intent to cause that individual distress" is a criminal offence.<sup>4</sup> The offence as laid down under the section is alternately referred to as revenge porn.<sup>5</sup> Adrienne Kitchen<sup>6</sup> explains that "revenge porn occurs when an [ex-paramour]

---

\* Student, LL.M Law, University of Edinburgh UK (2016); B.A.LL.B. (Hons.), Rajiv Gandhi National University of Law, Punjab, India (2015); s1574014@ed.ac.uk/rishika.khare@gmail.com.

<sup>1</sup> Hereinafter as 'The Act'.

<sup>2</sup> The Act was presented as 'Criminal Justice and Courts Bill' before the House of Commons on February 5, 2014 and was enacted as an Act of the Parliament of the United Kingdom on February 12, 2015.

<sup>3</sup> The Criminal Justice and the Courts Act 2015, The Long Title.

<sup>4</sup> The Criminal Justice and the Courts Act 2015 Circular No. 2015/01, p. 21.

<sup>5</sup> See generally, Daniel Castro & Alan McQuinn, "Why and How Congress Should Outlaw Revenge Porn" (July 2015) 1 ITIF 1, 1 <<http://www2.itif.org/2015-congress-outlaw-revenge-porn.pdf>> accessed 15 February 2016.

<sup>6</sup> Adrienne N. Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chi.-Kent. L. Rev. 247.

posts sexually explicit images of his former lover on the web, often with “disparaging descriptions” and contact information for the victim’s work and home, and sometimes even for her family members”.<sup>7</sup> These incidents have seen a rise in the last decade with the rise in internet access and ease of publication, especially through social media.<sup>8</sup>

The two essentials to the crime are the absence of consent<sup>9</sup> to the disclosure and the intention of cause distress<sup>10</sup>. To elaborate on section 33, sections 34 and 35 define the meaning of ‘disclose’, ‘photograph’ or ‘film’ and ‘private’ and ‘sexual’ respectively. When there is more than one photograph or film, the consent shall apply to each one of them individually unless it has been given generally.<sup>11</sup> Where a picture or a film includes more than one person, the disclosure to qualify as an offence should have occurred without the consent of anyone of the persons “featured in the picture” or the film.<sup>12</sup> If the distress caused was a natural or probable cause of the disclosure which was made without the intention of causing such distress, the act of disclosure shall not qualify as an offence.<sup>13</sup> Further, to qualify as an offence under this section, the private or sexual photograph should be of the individual who is being victimised, so if a person uses an individual’s face on another person’s sexual photograph, it does not constitute an offence under section 33.<sup>14</sup> The victims, in such cases, despite facing harassment or damage to reputation cannot seek protection under this section; he or she may have to resort to other legal recourse.

Sub-sections 3, 4 and 5 to section 33 provide for defences to the offence on the grounds of preventing, assisting or detecting crime<sup>15</sup>; where disclosure is made for the publication of journalistic material with the reasonable belief that publication was or would be made in public

---

<<http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4065&context=cklawreview>> accessed on 15 February 2016.

<sup>7</sup> Ibid, at 247.

<sup>8</sup> See generally, Augustine E. Arimoro, ‘Applying the Law to Tackle Menace of Revenge Porn in Nigeria: Lessons from the United Kingdom’ (2015) 20 IOSR-JHSS 75. <<http://www.iosrjournals.org/iosr-jhss/papers/Vol20-issue10/Version-3/K0201037580.pdf>> accessed on 16 February 2016.

<sup>9</sup> The Criminal Justice and the Courts Act 2015, s 33(1)(a).

<sup>10</sup> The Criminal Justice and the Courts Act 2015, s 33(1)(b).

<sup>11</sup> The Criminal Justice and the Courts Act 2015 s 33(7)(a).

<sup>12</sup> Explanatory Notes to the Criminal Justice and Courts Act 2015, para 37. <<http://www.legislation.gov.uk/ukpga/2015/2/notes/division/2>> accessed on 16 February 2016.

<sup>13</sup> The Criminal Justice and the Courts Act 2015, s 33(8).

<sup>14</sup> The Crown Prosecution Service, ‘Revenge Pornography – Guidelines on prosecuting the offence of disclosing private sexual photographs and films’ Policy and Prosecution Guidelines CPS <[http://www.cps.gov.uk/legal/p\\_to\\_r/revenge\\_pornography/](http://www.cps.gov.uk/legal/p_to_r/revenge_pornography/)> accessed on 16 February 2016.

<sup>15</sup> The Criminal Justice and the Courts Act 2015, s 33(3).

interest<sup>16</sup>; where disclosure is made out of belief that photograph or film had been previously disclosed for a reward and the person *had no reason to believe* that the previous disclosure was made without the consent of the individual in the photograph or film<sup>17</sup>. With respect to these defences, Sandra Paul<sup>18</sup> observes from the practical view that “the difficulties with evidencing these defences is to an extent ameliorated by the evidential burden shifting from the defence to the prosecution once sufficient evidence of the “matter” has been adduced”.<sup>19</sup> Though in the court practice, proving the negative can be difficult<sup>20</sup> on the other hand, theoretically, the defences keep the principle of *addressing public interest over a private interest* together. Another factor that needs consideration, while discussing the defences, is the protection of innocent perpetrators, like children who do not understand the harm which will be consequent to the disclosure.<sup>21</sup> Since, there is no specific provision to the protection of persons who are incapable of judging the harm of the disclosure, the protection in such matters should be warranted through the practice in court of law where it will have to be proved that there was no intention to do the act.

Danielle Citron<sup>22</sup> in her study estimates that out of all the victims, almost 60 to 70 per cent of them are women.<sup>23</sup> They often receive “threats of rape, false prostitution ads, calling victims “sluts” - even when the victim is a man.”<sup>24</sup> The language of section 33 defines it as an offence for a *person* disclosing photographs or films without the consent of an *individual*, making it a gender neutral offence. In UK, during the enactment of the law, Maria Miller, the UK Cultural Secretary, stated that “[by] putting this in place, the government has given young women the opportunity to protect themselves from their lives being blighted” highlighting the victimization of women.<sup>25</sup> In practice, in the US, “[despite] the gender-neutral text in revenge porn legislation,

---

<sup>16</sup> The Criminal Justice and the Courts Act 2015, s 33(4).

<sup>17</sup> The Criminal Justice and the Courts Act 2015, s 33(5).

<sup>18</sup> Sandra Paul is a Senior Associate and a Criminal Law Solicitor at Kingsley Napley LLP, London.

<sup>19</sup> Sandra Paul, ‘The offence formally known as revenge porn’ (Kingsley Napley, Criminal Law Blog, 13 April 2015) <<https://www.kingsleynapley.co.uk/news-and-events/blogs/criminal-law-blog/the-offence-formally-known-as-revenge-porn>> accessed on 16 February 2016.

<sup>20</sup> Ibid.

<sup>21</sup> The Crown Prosecution Service (n 14).

<sup>22</sup> Danielle Citron is a Professor of Law and Privacy Expert at the University of Maryland, who studied the subject in depth for her book *Hate 3.0: A Civil Rights Agenda to Combat Online Harassment*.

<sup>23</sup> Lorelei Laird, ‘Victims are taking on ‘revenge porn’ websites for posting photos they didn’t consent to’ (American Bar Association Journal, 1 November 2013) <[http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/)> accessed on 17 February 2016.

<sup>24</sup> Ibid.

<sup>25</sup> Augustine E. Arimoro (n 8) 78; *See also*, Siobhan Fenton, ‘Revenge porn Laws: First person found guilty under new laws to be sentenced today’ (Independent, 7 August 2015) <<http://www.independent.co.uk/news/uk/crime/revenge-porn-laws-first-person-found-guilty-under-new-laws-to-be-sentenced-today-10444898.html>> accessed on 18 February 2016.

advocates and scholars have described and promoted revenge porn statutes as laws that protect women rather than serve all people regardless of gender”<sup>26</sup>. Since the specific law is fairly new in the UK, the matters for prosecution and the practice in the courts will assess in the future, the extent of gender neutrality ensured for protection against revenge porn.

Since the enactment, an argument against making a new category for this offence is that “similar behaviour” was previously covered under social media guidelines and other legislations.<sup>27</sup> However, considering the nature and scale of the matter, the Government “brought forward amendments to create a new criminal offence”<sup>28</sup> With the terminology “private sexual photograph or film” instead of the words “indecent” or “obscene”, as used in the Malicious Communications Act, 2003, the defined offence seeks to move a step ahead in providing wider protection and attaching more gravity to the offence.<sup>29</sup> Another welcomed change attaching seriousness to the offence and which “provides a stronger remedy to victims”<sup>30</sup> is the increased length of imprisonment, from six months to two years.<sup>31</sup> The more specific definition to the offence and increased punishment is a positive change as it would encourage porn site regulators and the social-media site operators to take down the categorical offensive contents and “to set up more stringent policies”<sup>32</sup> preventing something damaging to be promoted.<sup>33</sup>

---

## References

- 1) Arimoro A. E., ‘Applying the Law to Tackle Menace of Revenge Porn in Nigeria: Lessons from the United Kingdom’ (2015) 20 IOSR-JHSS 75.

---

<sup>26</sup> Amy Lai, ‘Revenge Porn Legislation Activists and the Lessons from Sexual Harassment Jurisprudence: Gender Neutrality, Public Perceptions, and Implications’ (2015) Social Change NYU 53, 55 <[https://socialchangenyu.test.files.wordpress.com/2015/11/lai\\_final-11-17-15.pdf](https://socialchangenyu.test.files.wordpress.com/2015/11/lai_final-11-17-15.pdf)> accessed on 18 February 2016.

<sup>27</sup> See generally, College of Policing, ‘Revenge Pornography: Briefing Notes’ (May 2015) <<http://library.college.police.uk/docs/appref/briefing-note-revenge-pornography-may-2015.pdf>> accessed on 19, February 2016. See also, The Crown Prosecution Service (n 14); See also Legal Advice Centre, ‘The Law and Revenge Porn (England and Wales)’ (April, 2015) School of Law, QMUL 1, 6-7 <<http://www.qlegal.qmul.ac.uk/docs/151857.pdf>> accessed on 19 February 2016.

<sup>28</sup> Explanatory Notes (n 12) para 37.

<sup>29</sup> See generally, Andy Phippen, ‘New social media offences under the Criminal Justice and Courts Act and Serious Crime Bill: the cultural context’ (2015) Ent. L. R. 82, 83.

<sup>30</sup> Legal Advice Centre (n 27) 7.

<sup>31</sup> Andy Phippen (n 29) 83.

<sup>32</sup> Ami Lai (n 26) 61.

<sup>33</sup> Ibid.

- 2) College of Policing, 'Revenge Pornography: Briefing Notes' (May 2015) <<http://library.college.police.uk/docs/appref/briefing-note-revenge-pornography-may-2015.pdf>> accessed on 19.
- 3) Fenton S., 'Revenge porn Laws: First person found guilty under new laws to be sentenced today' (Independent, 7 August 2015).
- 4) Kitchen A. N., 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chi.-Kent. L. Rev. 247.
- 5) Lai A., 'Revenge Porn Legislation Activists and the Lessons from Sexual Harassment Jurisprudence: Gender Neutrality, Public Perceptions, and Implications' (2015) Social Change NYU, 53.
- 6) Laird L., 'Victims are taking on 'revenge porn' websites for posting photos they didn't consent to' (American Bar Association Journal, 1 November 2013).
- 7) Legal Advice Centre, 'The Law and Revenge Porn (England and Wales)' (April, 2015) School of Law, QMUL 1, 6-7 <<http://www.qlgal.qmul.ac.uk/docs/151857.pdf>> accessed on 19 February 2016.
- 8) McQuinn A., & Castro D., "Why and How Congress Should Outlaw Revenge Porn" (July 2015) 1 ITIF 1, 1 <<http://www2.itif.org/2015-congress-outlaw-revenge-porn.pdf>> accessed 15 February 2016.
- 9) Paul S., 'The offence formally known as revenge porn' (Kingsley Napley, Criminal Law Blog, 13 April 2015).
- 10) Phippen A., 'New social media offences under the Criminal Justice and the Courts Act and Serious Crime Bill: the cultural context' (2015) Ent. L. R. 82.
- 11) The Crown Prosecution Service, 'Revenge Pornography – Guidelines on prosecuting the offence of disclosing private sexual photographs and films' Policy and Prosecution Guidelines CPS.

### Law Sources

- 1) Criminal Justice and the Courts Act 2015
- 2) Criminal Justice and the Courts Act 2015 Circular No. 2015/01
- 3) Explanatory Notes to the Criminal Justice and Courts Act 2015