

THE CRIMINALISATION OF REVENGE PORNOGRAPHY

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ABSTRACT⁵³⁷

Revenge pornography is a current crime which involves disgruntled lovers to upload on social media, intimate pictures of their once loved one with disparaging comments. As soon as the picture is uploaded it is shared within seconds and the victim's life is turned upside down.

The article examines the emotions and legal aspects behind this act of revenge pornography. The introduction focuses on the progress of pornography alongside technology and the growth of sex trade with the development of the internet.

Current Laws are examined to give a good overview of the current Criminal and Civil laws. Criminal laws which specifically target revenge pornography both in Malta and Internationally are also targeted in the article.

KEYWORDS: CRIMINALISATION - REVENGE PORNOGRAPHY - CIVIL LAW - CRIMINAL LAW

⁵³⁷ This article was reviewed by Judge Michael Mallia LL.D.

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Cardinal Bernardin and the Catholic Church consider pornography to be 'a moral issue because it violates human dignity'.⁵³⁹ Throughout time, the interdependent relationship seen between technology and pornography has led to an increase in the pornographic industry. If we take the digitalization of photography as one example, it brought with it increased privacy as the development of photographs could be done at the comfort of one's home without the need to go to any photography shop. Moreover, with a click of a button pornography can be easily accessed to on the computer being 'available to every household connected to the World Wide Web'.⁵⁴⁰

Raskin identifies a "boundless" internet with Niels Van Doorn, claiming that there is the 'sexualization' or 'pornification' of media and society' through a reality TV genre where real people are caught on the camera revealing private sexual performances.'

Halder and Jaishankar specifically stress that harassment and victimization can effortlessly be carried out through non-consensual pornography, or what is commonly known as revenge pornography.⁵⁴¹ Such a cybercrime is considered to target certain sectors of society, particularly children and women, exposing them to 'online-harassment, virtual rape and cyber-prostitution'.⁵⁴²

1. What is Revenge Pornography?

Revenge pornography is a phenomenon which has become widespread through the rapid development of technology. It occurs when,

⁵³⁸ The author is in her last year as a law student at the University of Malta. After a year of research, in her fourth year she did her Research Project on the topic of Revenge Pornography with the title *Criminalising Revenge Porn*.

⁵³⁹ 'Pornography and obscenity- A threat for the Dignity of the Human person' (*Centre For Migration Studies Special Issues*) <<http://onlinelibrary.wiley.com/doi/10.1111/j.2050-411X.1996.tb00130.x/epdf>> accessed 25 February 2016.

⁵⁴⁰ Peter David Goldberg, 'An exploratory study about the impacts that cybersex (the use of the internet for sexual purposes) is having on families and the practices of marriage and family therapists' (Master of Science in Human Development Marriage and Therapy, Virginia Polytechnic Institute and State University 2004).

⁵⁴¹ Debarati Halder and K Jaishankar, *Cyber Crime and the Victimization of Women: Laws, Rights and Regulations* (Information Science Reference 2012).

⁵⁴² *ibid.*

an ex-paramour 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. The purpose of revenge porn is to humiliate and harass former lovers.⁵⁴³

Fundamentally, revenge pornography is a form of cyber harassment intended to 'embarrass, annoy, threaten or bother another individual'.⁵⁴⁴

Revenge pornography can occur in various ways; it can either be through photography or video recording without permission or consensual photography or video recordings which are later stolen and shared. It can also occur through consensual photography or video recording that is intentionally sent to third parties.

Even though this phenomenon may seem to have only cropped up recently, it can be found throughout history, and as early as the 1970's. In fact, during the Kennedy era in the United States, Leon Isaac Kennedy circulated an explicit home video of Jayne Kennedy when the latter left him.⁵⁴⁵

Later on in the 1980's, there was the first court case dealing with this phenomenon regarding a magazine which was published including nude pictures of women with their personal details beneath.⁵⁴⁶ Eventually, in 2008 a new website was set up which put the issue of revenge pornography back on the policy agenda. *IsAnyoneUp.com* was a website that brought back to light the devastating consequences of cyber harassment and revenge porn. The mind behind this website was Hunter Moore, known as the 'self styled king of revenge pornography'⁵⁴⁷. He was labelled as 'the most hated person in the internet'⁵⁴⁸ after permitting users to upload photos of their once loved ones with all their personal details exposing their most private photos to the world. The website

⁵⁴³ Adrienne N. Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chicago-Kent Law Review 247.

⁵⁴⁴ Nancy S. Kim, 'Web Site Proprietorship and Online Harassment' (2009) Utah Law Review 993, 999.

⁵⁴⁵ Michael Salter and Thomas Crofts, 'Responding to revenge porn: Challenging online legal impunity.' in Lynn Comella and Shira Tarrant (eds) *New views on pornography: Sexuality, politics and the law* (Praeger Publisher: Westport 2015).

⁵⁴⁶ Lujan and Billy Wood vs. Hustler Magazine, Inc. 736 F.2d 1084 (5th Cir. 1984) U.S. Court of Appeals for The Fifth Circuit - 736 F.2d 1084 (5th Cir. 1984) (July 23, 1984).

⁵⁴⁷ Nicky Woolf, 'Revenge Porn King' Hunter Moore Pleads Guilty to Hacking Charges' *The Guardian* (New York, 19 February 2015) <<http://www.theguardian.com/technology/2015/feb/19/revenge-porn-hunter-moore-pleads-guilty-hacking-identify>> accessed 28 November 2015.

⁵⁴⁸ Daniel Kreps, 'Revenge-Porn Site Owner Hunter Moore Pleads Guilty, Faces Prison Time' (*Rolling Stone*, 2015) <<http://www.rollingstone.com/culture/news/revenge-porn-site-owner-hunter-moore-pleads-guilty-faces-prison-time-20150220>> accessed 28 November 2015.

saw a staggering 30 million users in just a month, reaching up to \$10,000.⁵⁴⁹ The operator of the site, alongside the hacker Charles Evans who hacked thousands of computers to steal more photos from the victims, were prosecuted and criminally charged on fifteen counts, among which were unauthorised access of private computers and identity theft.⁵⁵⁰ The site was shut down in 2012.

Charlotte Law was one of the victims who had to live with the consequences of revenge porn; her daughter being continually harassed when her pictures were uploaded on the above-mentioned website. Instead of remaining passive to the situation, she vowed to bring the issue to the attention of legislators. Apart from protecting her daughter, she felt a compelling duty to protect other victims, in particular those who had no voice or were petrified to speak up. In Law's words: 'Now it's an issue that's taken seriously and victims are seen as victims as opposed to, 'Oh, you brought it on yourself'.⁵⁵¹

2. Tort Law as a Possible Legal Action

Civil actions have always been important to revenge porn victims as a manner of bringing the perpetrators to justice'. Every individual has the fundamental human right to enjoy a private life. This has been broadened to incorporate not only the protection against physical violence but protects also dignity, intellectual and emotional life.⁵⁵²

Tort scholar William Prosser believed that tort law protects four separate interests namely;

- a) intrusion into a person's seclusion,
- b) public disclosure of embarrassing facts,
- c) publicity that places an individual in a "false light" to the public,
- d) appropriation of a person's likeness⁵⁵³

There is a possibility, at least theoretically, that victims may sue on the basis of 'intentional infliction of emotional stress and public disclosure of private

⁵⁴⁹ *ibid.*

⁵⁵⁰ Jessica Roy, 'Revenge-Porn King Hunter Moore Indicted on Federal Charges' (*Time*, 23 January 2014) <<http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>> accessed 28 November 2015.

⁵⁵¹ Marissa Charles, 'Meet The Angry Mom Who Took Down the King of Revenge Porn' *New York Post* (17 May 2015) <<http://nypost.com/2015/05/17/the-angry-mom-who-brought-down-the-revenge-porn-kingpin/>> accessed 28 November 2015.

⁵⁵² Warren and Brandeis, 'The Right To Privacy' (1890) 4 *Harvard Law Review*.

⁵⁵³ Paul J. Larkin Jr., 'Revenge Porn, State Law, and Free Speech' (2014) 48 *Loyola Law Review* 57.

facts'.⁵⁵⁴ Nevertheless, many professors have criticised the rigidity of the onus of proof required. This is due to the fact that victims must prove that they have suffered severe disabling emotional distress. Sometimes, humiliation, anger and embarrassment are not enough for a claim for damages to be successful.⁵⁵⁵

Article 1031 of the Maltese Civil code provides that: 'Every person shall be liable for the damage which occurs through his fault.'⁵⁵⁶

Any person who feels aggrieved by any act causing him damage on his person or on his property may sue for damages under Article 1045 of the Civil Code. The main elements, which must be proved on a probability basis, are the causal link and the fault on the side of the other party. As to the quantification of damages, these consist of *damnum emergens*, which is the actual damage caused and *lucrum cessans* which includes loss of future earnings due to said damage. A drawback in our system of quantification of damage lies on the fact that no moral damages can be awarded. This lacuna in the law thus prevents revenge porn victims from suing to secure a sum of money as compensation for the unfair stress the perpetrator created.

The defence of right to privacy can also serve as a sufficient basis upon which a case can be based. Nevertheless, Chief Justice Alex Kozinski argues, 'we need to do a better job of protecting our privacy if we expect the law to do the same'.⁵⁵⁷ This indicates that for such a plea to be successful there must be a 'reasonable expectation of privacy'.⁵⁵⁸ Once information or a picture is sent to a third party, there cannot be a legal assumption that the victim wanted it to remain private.

If the comments or the images are injurious to the dignity of the victim, then there may be a case on defamation. This, however, can only be successful if it is proved that what is being alleged is being portrayed as factual and that such comments are slanderous and untrue. Comments cannot be the opinionated, but rather posed a state of fact, as that would not be tantamount to defamation.

Article 11 of the Maltese Press Act allows victims of slanderous claims to sue the alleged perpetrator. This article states: 'Save as otherwise provided in this Act,

⁵⁵⁴ Amanda L. Cecil, 'Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Non consensual Pornography' (2014) 71 Washington and Lee Law Review 2513.

⁵⁵⁵ *Smith vs. Amedisys Inc.*, 298 F.3d 434, 450 (5th Cir. 2002).

⁵⁵⁶ Civil Code, Chapter 16 f the Laws of Malta, art 1031.

⁵⁵⁷ Paul J. Larkin Jr., 'Revenge Porn, State Law, and Free Speech'(2014) 48 Loyola Law Review 57.

⁵⁵⁸ Kristin M. Beasley, 'Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 Illinois University Law Journal 69.

whosoever shall, by any means mentioned in article 3, libel any person, shall be liable on conviction to a fine (multa).⁵⁵⁹ A civil as well as a criminal libel case may be instituted and the charged person can also become even liable to imprisonment in criminal proceedings.

Copyright law is another law which may aid revenge porn victims to get the justice they deserve and ultimately order website owners to take down their photo. However, this remedy requires the victim to register the photo under copyright law. Theoretically, this may seem to be a good defence, but in practice almost no victim holds copyright over their photos which were only taken and sent to their loved one. Moreover, if the photos were not taken consensually, that is, the victim was not aware of the explicit videos or photos, copyright law cannot be of any use.⁵⁶⁰

The Maltese Copy Right Act states that all artistic works are eligible for copyright.⁵⁶¹ Therefore, any image can be subject to this act if registered correctly following the procedure established by law. In this way no person can, without the author's consent, 'mutilate, modify, distort or subject to any other derogatory action any work during its term of copyright in a way prejudicial to the honour or reputation of the author'.⁵⁶²

Realistically however, the last thing on the victim's mind is to actually register something which was meant to remain private.

Apart from the poof required, civil actions may turn out to be time consuming and costly to victims, as well as being too emotional due to the extreme media coverage and public attention. In addition, there is no guarantee that revenge porn websites will abide by the court judgment and take down the photos, which is ultimately what the victim wants.⁵⁶³

3. Freedom of Speech and Expression vs. Right to Privacy

In countries where freedom of speech is an ultimate right, laws against revenge pornography may be seen as restricting freedom of speech. In fact this was the main point of discussion in the US, where they have one of 'the most influential law[s] to protect the kind of innovation that has allowed the Internet to thrive

⁵⁵⁹ Press Act, Chapter 248 of the Laws of Malta, art 11.

⁵⁶⁰ Adrienne N. Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chicago-Kent Law Review 247.

⁵⁶¹ Press Act, Chapter 248 of the Laws of Malta, art 2; "'publication" means any act whereby any printed matter is or may be communicated to or brought to the knowledge of any person or whereby any words or visual images are broadcast'

⁵⁶² Copyright Act, Chapter 415 of the Laws of Malta, art 12.

⁵⁶³ Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, 358.

since 1996'.⁵⁶⁴ Section 230 of the Community Decency Act in the United States, states that, 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.⁵⁶⁵

Therefore, websites which upload photos or videos sent to them by individuals are not deemed to be the owners of the material. Nonetheless, we find Federal Courts who have tried going around this by stating that this protection is not absolute. Once websites 'invite' people to post images immunity is no longer guaranteed. This is however not the position of the majority of courts and until a general rule is acquired, ambiguity persists.

The balance between freedom of speech and the right to privacy was examined in the case *JPH vs. XYZ*.⁵⁶⁶ In this case, Judge Popplewell interestingly utilises the European Convention on Human Rights as a defence to provide the victim with an interim order to stop the defendant from posting plaintiff's explicit photos online. In fact, the judge quotes Article 8 arguing that every individual has a right for private and family life, and that this case was motivated by revenge and blackmail rather than public interest.⁵⁶⁷

4. Criminal law

'Criminal law has long prohibited privacy invasions and certain violations of autonomy'.⁵⁶⁸

In the case *Union Pac. Ry. Co. vs. Botsford* (141 U.S. 250, 252 (1891))⁵⁶⁹, Supreme Court Justice Jude Horace Grey wrote,

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass . . .

In the *Akayesu* case,⁵⁷⁰ the International Criminal Tribunal for Rwanda said that 'sexual violence is not limited to physical invasion of the human body and may

⁵⁶⁴ 'CDA 230: The Most Important Law Protecting Internet Speech' (*Electronic Frontier Foundation*) <<https://www.eff.org/issues/cda230>> accessed 2 February 2016.

⁵⁶⁵ Community Decency Act, art 230.

⁵⁶⁶ [2015] EWHC 2871; High Court (Queen's Bench Division); 10 October 2015.

⁵⁶⁷ Criminal Code, Chapter 9 of the Laws of Malta, art 8.

⁵⁶⁸ Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, 358.

⁵⁶⁹ *ibid.*

include acts which do not involve penetration or even physical contact.⁵⁷¹ Therefore, taking the above into consideration, the mere fact that revenge porn does not include physical contact does not reduce its gravity and is still to be considered as a sexual assault.

With the advance of technology, new forms of crime, known as cyber crime, began to evolve, such as cyber harassment and cyber stalking. Legal systems had to keep up with these advancements and new laws started to emerge regulating the World Wide Web. There is a general consensus that a person cannot 'abuse, threaten, or harass' another person. This reasoning certainly aided the fight against revenge pornography. However, as in every other case of harassment, the proof required is quite subjective and this may pose a difficulty to the prosecution to prove the charges.

We find cases where the victim is blackmailed by the perpetrator, taking possession over the victim's life by making the latter abide by what they want. In such cases, blackmailing laws may be utilised by the prosecution once enough proof is brought regarding the threats made to the victim.

Up until 2016, revenge porn terminology did not exist under Maltese Law. However, on the 3rd October 2013, the Court of Appeal was faced with a case which shed light on the Maltese position on revenge porn. The case was ***Police vs. Michael Ellul Vincenti***,⁵⁷² in which case the court revoked the sentence of the First Court punishing the accused for one year imprisonment suspended for two years. In this case, Ellul Vincenti was accused of being in possession of pornographic material and for illegally distributing such material with the intention of causing distress to the victim, his wife during the proceedings for separation. The picture was taken without her knowledge and put online together with her work telephone number. The Court of Appeal disagreed with the first court in saying that there was no proof beyond reasonable doubt that the accused was the perpetrator. In fact, Judge Michael Mallia, presiding the case indicated that the prosecution managed to prove a state of fact, that the husband despised his wife so much that he would do anything to degenerate her dignity. This is why the accused was given a suspended sentence on the basis of Articles 208, 252, 256 of Chapter 9 and Article 35(1)(d) of Chapter 399 of the Maltese Law.

⁵⁷⁰ *The Prosecutor vs. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998).

⁵⁷¹ Mary Anne Franks, 'Combating Non-Consensual Pornography: A Working Paper' (2014) University of Miami School of Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537> accessed 25 November 2015.

⁵⁷² *Il-Pulizija vs. Michael Ellul Vincenti*, per Mr Justice Mallia, Court of Criminal Appeal (Inferior), 3 October 2013.

Eventually, in 2014 we had another very important case, namely *Police vs. Cyrus Engerer*.⁵⁷³ Mr Engerer was in a relationship with a certain Mr Camilleri and when they called off their relationship, explicit photos of Mr Camilleri, which were stored in his private computer, were stolen and circulated amongst his friends and colleagues. Mr Engerer was accused of having stolen those photos from the Mr Camilleri's computer, of abusing of his position and circulating pornographic material with the intention of harming Mr Camilleri's dignity.

The first court acquitted Mr Engerer from the charges brought against him since it found no link between the IP address from which the images were sent and the accused. Even though the court acknowledged that the only person who had real interest and motive to harm the victim, it was not satisfied that the proof brought, was beyond reasonable doubt, as required by Maltese procedural law. The Attorney General appealed from the sentence. The Court of Appeal had a different interpretation and by quoting English jurist Pollock C.B.:

There may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.⁵⁷⁴

The only person with a motive was Mr Engerer himself and this was enough proof to incriminate him, thus finding him guilty and sentencing him to two year suspended sentence. Moreover, the Court of Appeal had also found a link between the accused and the IP address from which the images were distributed. No civil case for damages was brought forward by Mr Camilleri against Mr Engerer.

Theoretically this was a classic case of revenge pornography, yet the Maltese courts could not make use of such terminology as it was alien until a few months ago. Saying this, it does not mean that we have not witnessed further cases of revenge porn. In 2014, explicit photos of a number of Maltese girls were uploaded on the popular website *Tumblr*. The Maltese newspaper Times of Malta spoke to psychologist Fleur Mifsud Bons who said that 'there is then a high risk of mental health difficulties such as depression as well as suicide'.⁵⁷⁵ In gathered

⁵⁷³ *Il-Pulizija vs. Cyrus Engerer*, per Mr Justice Mallia, Court of Criminal Appeal (Inferior), 8 May 2014.

⁵⁷⁴ Exall (1866) 4 F & F 929.

⁵⁷⁵ Kristina Chetcuti, 'Explicit 'Selfie' Pictures Webpage Is Closed Down' *Times of Malta* (Malta, 10 January 2014) <<http://www.timesofmalta.com/articles/view/20140110/local/Explicit-selfie-pictures-webpage-is-closed-down.502043>> accessed 29 November 2015.

statistics, 93% of the victims have said that they have suffered considerable emotional distress.⁵⁷⁶

5. Criminalisation of Revenge Porn

It may be stated that current civil and criminal laws are not enough to cover situations of revenge porn. Many scholars have pushed and are still pushing for the criminalisation of revenge porn and the drawing up of laws which may aid the prosecution in the fight against such crime. In fact, it has been stated that,

It is true that existing legal paradigms are being utilized more effectively. But, even in their totality, available civil laws are inadequate in their capacity to combat the speed, breadth and potency with which revenge porn exacts a toll on its victims. Denying victims and future victims criminal legal remedies unique to revenge porn would be to perpetuate its injustice.⁵⁷⁷

Many different countries have opted to follow this trend and have criminalised the illegal sharing of explicit photos. Such states include the United Kingdom (Hereinafter referred to as 'UK'), which is one of the few states that has enacted a law targeting revenge pornography. These laws were enacted and enforced in April 2015, criminalising revenge porn with a punishment of up to two years imprisonment.⁵⁷⁸

In October 2014, the Justice Secretary of the UK agreed to an amendment to the Criminal Law which stated: 'It shall be an offence for a person to publish a private sexual image of another identifiable person without their consent where this disclosure causes distress to the person who is the subject of the image'.⁵⁷⁹ This saves exceptions including disclosure to police during a criminal investigation, disclosure in the public interest, and if the person genuinely thinks they were already disclosed.⁵⁸⁰

⁵⁷⁶ End Revenge Porn, 'Power in Numbers' (2014)

<<http://www.endrevengeporn.org/revenge-porn-infographic/>> accessed 5 January 2016.

⁵⁷⁷ Elisa D'Amico and Luke Steinberger, 'Fighting for Online Privacy with Digital Weaponry: Combating Revenge Pornography' (2015) 26 New York State Bar Association: Entertainment, Arts and Sports Law Journal 24, 29.

⁵⁷⁸ Criminal Justice and Courts Act 2015, art 33.

⁵⁷⁹ 'Revenge Porn-What you need to know' (*South-West Grid for Learning Trust*, 2015) <http://www.revengepornhelpline.org.uk/documents/RP-Helpline_web.pdf> accessed 8 December 2015.

⁵⁸⁰ Dan Bunting, 'Revenge Porn: What Is the Law and What are the Issues?' (*Halsbury's Law Exchange*, 17 February 2015) <<http://www.halsburyslawexchange.co.uk/revenge-porn-will-the-new-laws-make-any-difference/>> accessed 17 February 2015.

In this specific crime, there is the need to establish that the person who disseminated the photos 'intended to cause distress to the subject of the images'.⁵⁸¹ This has prompted campaigners to hold that given the emotional damage caused, the circulation of photos without one's consent should be enough proof of wrong-doing. Moreover, photo-shopped images also fall out of the mentioned law.⁵⁸²

An interesting ruling by the German Courts on the issue of revenge pornography concerned a man who had taken a number of explicit photos of his partner to which she had consented. After their end of relationship, the woman demanded the deletion of these photos but the man failed to comply. It was reported that the court weighed in favour of personal right over the ownership rights of the photographer. The court also specified that was the case only in nude photos and not any other photo but certainly here the right of privacy was seen at a higher level than that of expression.⁵⁸³

Yifat Kariv, an Israeli legislator labels this crime as virtual rape indicating that a harsher law should be present to diminish the rate of such crime. In fact, according to the new law in Israel, the perpetrator may risk five years imprisonment.⁵⁸⁴ Moreover, being also a civil offence, compensation of 50,000 NIS without proof of damage may be awarded to the victim, while a higher compensation can be accorded if actual damage is proved.⁵⁸⁵ In Israel, there is no need to prove damages but the act itself is enough to trigger compensation.

It was only after *Audrie's case* in Saratoga,⁵⁸⁶ in which a teen committed suicide due to explicit photos taken when she was drunk were uploaded and shared with

⁵⁸¹ 'Part Two: Non-Consensual Sharing of Private, Intimate Images' <<http://www.gov.scot/Publications/2015/03/4845/5>> (*Scottish Government*, March 2015) accessed 17 February 2015.

⁵⁸² Dan Bunting, 'Revenge Porn: What is the Law and What are the Issues?' (*Halsbury's Law Exchange*, 17 February 2015) <<http://www.halsburyslawexchange.co.uk/revenge-porn-will-the-new-laws-make-any-difference/>> accessed 17 February 2015.

⁵⁸³ Philip Olterman, 'Revenge Porn' Victims Receive Boost from German Court Ruling' *The Guardian* (Berlin, 22 May 2014) <<https://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>> accessed 29 June 2016.

⁵⁸⁴ Yifa Yaakov, 'Israeli Law Makes Revenge Porn a Sex Crime' *The Times Of Israel* (6 January 2014) <<http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/>> accessed 12 February 2015

⁵⁸⁵ Batya Ungan-Sargon, 'What Israel's new 'Revenge Porn' Ban Means' (*Tablet*, 9 January 2014) <<http://www.tabletmag.com/scroll/158870/what-israels-new-revenge-porn-ban-means>> accessed 16 December 2015.

⁵⁸⁶ Irving DeJohn, '3 teens admit to attacking Audrie Pott, leading her to commit suicide' (*Daily News*, 15 January 2014) <<http://www.nydailynews.com/news/national/audrie-pott-attackers-admit-attack-caused-commit-suicide-article-1.1580284>> accessed 16 December 2015.

all the community, that Californian legislators felt that they should update their Criminal law to cater for this new phenomenon. Californian law says,

(4)(A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.⁵⁸⁷

Many legislators noted that this law does not cover the modern trend of 'selfies' that is, when pictures are taken by the victim himself rather than by a third party. The law fails to cover those who hack computers to steal photos and distribute them. Moreover intention is required for the requirements of the law to be fulfilled.⁵⁸⁸

In 2015, the State of Illinois, as international newspapers noted, passed a law 'with teeth'.⁵⁸⁹ Illinoisan legislators were careful to draft a law that punishes the perpetrator for the harm caused rather than on the intention to actually cause harm. This puts emphasis on a state of fact rather than on a subjective intention.

This law also uses the criterion of the 'reasonable person' to consider whether persons are able to comprehend that such pictures are to remain private. This is an interesting criterion introduced by Illinoisan law since there must be a level of expectation that the victim actually wanted the images to remain private. The crime is punished by a maximum of three years.⁵⁹⁰

6. The Maltese Position

⁵⁸⁷ California Penal Code of 1873, Stat, 47 (4)(A).

⁵⁸⁸ Michelle Daniels, 'Model Revenge Porn Legislation or Merely a Work in Progress?' (2014) 46 *McGeorge Law Review* 297.

⁵⁸⁹ Barbara Herman, 'Illinois Passes Revenge Porn Law with Teeth: 'Other States Should Copy,' Says Privacy Lawyer' (*International Business Times*, 1 JUNE 2015) <<http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974>>; accessed 31 October 2015.

⁵⁹⁰ 'Cyber Civil Rights Initiative Seven Reasons Illinois is Leading the Fight Against Revenge Porn' (*Cyber Civil Rights Initiative*, 31 December 2014) <http://www.cybercivilrights.org/seven_reasons_illinois_is_leading_the_fight_against_revenge_porn> accessed 16 December 2015

On the 12th July 2016 Parliament passed radical amendments to the law which introduced revenge porn terminology in our law. The article stated:

208E. (1) Whosoever, with an *intent to cause distress or emotional harm*, 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 two years or to a fine (multa) of not less than three thousand euro (3,000) and not more than five thousand euro (5,000), or to both such imprisonment and fine.⁵⁹¹

This law is very similar to its English legal counterpart, especially in the part where intent to cause distress or emotional harm is required. Maltese criminal law follows the Latin phrase '*Actus non facit reum nisi mens sit rea*'. It means that it must not only be proved that the person actually committed the crime but also had the mental capacity to commit such crime. The perpetrator must, apart from intention have the capability of understanding the actions being committed. This is an important step in criminal procedure to bring proof beyond reasonable doubt that the alleged perpetrator actually committed the crime.

The legislator may also require what we call a specific intent. Thus apart from the general rule of *mens rea*, a further specific intent must be proved in order to incriminate the person. The prosecution has to prove that the alleged offender had the intent to cause harm to the victim. Such intent distinguishes between perpetrators motivated by personal desire to harm the victim and others motivated by other reasons. Nevertheless, it seems to disregard perpetrators who, rather than committing the crime for personal or emotive reasons, they do so for financial return or fame. This group of people do not fall under this article of law and even though the consequences on the victim might be devastating, they might escape without punishment.

This is why revenge porn advocates are seeking to push forward amendments to do away with the need for proof of motive and intent and focus on the act being criminal in itself. Regardless of the motive, the consequences on the victim are still devastating and the emotional stress and psychological trauma certainly cannot be side-lined.

The law continues by giving definitions which may aid in defining whether a case falls under Article 208E.

⁵⁹¹ Criminal Code, Chapter 9 of the Laws of Malta, art 208E (emphasis added).

The law starts by providing the definition of 'private', "'private" shall refer to any photograph or film taken without the consent or knowledge of the person or persons depicted therein, or to any photograph or film which was never intended for public consumption;⁵⁹²

For a photograph to be private it has to be taken without the consent or knowledge of the victim. This part excludes the recent phenomenon of 'selfies'; a practice which has taken over the traditional way of photography. The victim would have taken the picture him/herself and sent to the boy/girlfriend. Figures show that this practice of sexting is very popular amongst teenagers who are more keen to explore their sexual identity, but is resulting in devastating consequences to teenagers who are vulnerable to peer pressure.

The second part then refers to the sharing of photos which are meant to be private. So even if the victim took the photo him/herself, it was never meant to be made public. However, the problem arises because the victim may have consented to disclose explicit pictures within a small group of people but would not have wanted them to be viewed by the whole world. The wording in the law makes it difficult to prove that the victim actually wanted the picture to remain 'private' in this sense.

Sub Article 3 also defines what a sexual act is: "'sexual" shall include the depiction 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'.⁵⁹³

The definition is quite general as it tries to cover several acts, which according to the general public, are deemed to be sexual in nature. Lewd acts may thus also fall under this definition.

Similar to English law, Maltese law presents the test of the reasonable man. The average man is kept as the basis to decipher whether an act is sexual or not.

7. The Right to be Forgotten- A Ray of Hope

During a parliamentary question session, Mr Marc Tarabella, from the S&D Group, made reference to the problem of revenge pornography and asked how the EU is addressing the issue and what level of protection is being provided to victims.⁵⁹⁴ An answer was provided by Ms Jourová on behalf of the Commission.

⁵⁹² *ibid.*

⁵⁹³ *ibid* art 208E(3).

⁵⁹⁴ Marc Tarabella (S&D) Parliamentary Question for European Commission (29 June 2015).

She said that the practice of revenge porn certainly breaches the right to private life as protected by the EU Charter of Fundamental Human Rights. Being a private crime, it is however up to the domestic public authorities to seek efficient ways to aid the victims. Nonetheless, she reports that there are yet no concrete projects targeting revenge pornography. Ms Jourová also makes reference to the right to be forgotten which has specific legal basis in Article 16 of the TFEU to implement Article 8 of the European Convention on Human Rights (Hereinafter referred to as the 'ECHR').⁵⁹⁵

The Courts of Justice of the European Union (Hereinafter referred to as 'CJEU') has also given its contribution on this matter, bringing in the concept of the right to be forgotten. In the case *Google Spain SL, Google Inc. vs. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*,⁵⁹⁶ of the 13 May 2014, the CJEU ruled that victims have the right to request search engines to take away any links showing their personal information especially when such data is 'inaccurate, inadequate, irrelevant or excessive'.⁵⁹⁷

This was a ground-breaking decision which gave victims a ray of hope and some form of ultimate closure. In July 2015, the country's data protection authority (Hereinafter referred to as 'CNIL'), ruled that this was not enough and demanded;

Google to apply the right to be forgotten to all searches on all Google domains. It said at the time "in accordance with the CJEU (European court of justice) judgment, the CNIL considers that in order to be effective, delisting must be carried out on all extensions of the search engine and that the service provided by Google search constitutes a single processing."⁵⁹⁸

A group of academics sent an open letter to Google on the importance of the right to be forgotten. In fact, these academics indicate that with the Right to be Forgotten, Google and other search engines have the right to make decisions on

⁵⁹⁵ 'Answer given by Ms Jourová on behalf of the Commission' (*European Commission*, 3 December 2015) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-010481&language=EN>> accessed 28 November 2016.

⁵⁹⁶ C-131/12 *Google Spain SL and Google Inc. vs. Agencia Española de Protección de Datos* [2014] ECR I-317.

⁵⁹⁷ 'Fact sheet on the Right to be Forgotten Ruling' (European Commission) <http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf> accessed 28 November 2016.

⁵⁹⁸ Alex Hern, 'Google Takes Right to Be Forgotten Battle to France's Highest Court' *The Guardian* (19 May 2016) <<https://www.theguardian.com/technology/2016/may/19/google-right-to-be-forgotten-fight-france-highest-court>> accessed 6 July 2016.

the balance between right to privacy and right of access to information which are two of the most essential fundamental human rights. Nonetheless, they continue, 'the vast majority of these decisions face no public scrutiny, though they shape public discourse.'⁵⁹⁹ Due to this, they believe that the implementation of the ruling is a sensitive step which needs to be taken with care and done in the most transparent manner.⁶⁰⁰

The 14th April 2016 was a ground-breaking day for the European Union as it voted for tougher rules on the right of privacy, especially on data protection. The rules voted to give more power to authorities to charge companies heavy fines for data breaches. The new laws aim at pushing a 'digital single market' between all countries of the European Union to increase cooperation on the matter. In Vivian Redding's words, the person who proposed the amendments, 'This is a historic day for Europe. This reform will restore trust in digital services today, thereby reigniting the engine for growth tomorrow.'⁶⁰¹

8. Statistics

During my research on the topic, I reviewed several statistics, namely in the UK and USA where the law is relatively new, to discern whether the criminalisation of revenge porn was a step forward or a futile exercise. Statistics indicate that throughout the years, sexual crimes have increased considerably with 15% of adults responding that they have, at least once, received sexts (statistic gathered in 2010).⁶⁰²

Sexting is another modern phenomenon which deserves another discussion in its' own right as it has become even more popular amongst teenagers. This is a way of sending explicit selfies to third parties which are not necessarily one's partner. This however can easily lead to revenge pornography since once the photos are in the possession of a third party they become easy to distribute.

⁵⁹⁹ Jemima Kiss, 'Dear Google: open letter from 80 academics on 'Right to be Forgotten' *The Guardian* (14 May 2016) <<https://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten>> accessed 6 July 2016.

⁶⁰⁰ *ibid.*

⁶⁰¹ Samuel Gibbs, 'European Parliament Approves Tougher Data Privacy Rules' *The Guardian* (14 April 2016) <<https://www.theguardian.com/technology/2016/apr/14/european-parliament-approve-tougher-data-privacy-rules>> accessed 6 July 2016.

⁶⁰² 'Lovers Beware: scorned exes may share intimate data and images online' (*McAfee*, 4 February 2013) <<http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>> accessed 10 February 2016. The study was conducted from December 14 through December 30, 2012 by MSI International with a total of 1,182 online interviews with ages between 18-54. Interviews among respondents were split evenly by age and gender, and achieved geographic distribution according to the US census.

In a separate study conducted in 2013, McAfee found out that,

13% of adults have had their personal content leaked to others without their permission. Additionally, 1 in 10 ex-partners have threatened that they would expose risqué photos of their ex online. According to the study, these threats have been carried out nearly 60% of the time.⁶⁰³

The above figures are the reason why many were pushing for the drafting of new laws to prohibit and punish the distribution of explicit photos of an ex-lover. In the UK, the law was introduced in 2015 and in just over a year several cases have been reported. In fact, in a UK press release it was stated that in just six months, 1800 calls were made to a helpline dedicated to revenge porn victims. This means that there were 280 individual new cases in a few months.⁶⁰⁴ Through a freedom of information request from 14 Police forces in the UK, it was reported that there was an increase in both revenge porn allegations with victims raging from below 18 years and others aged in their 60's, and that police action had been taken.

It is still too early to say whether the law has been successful or not. Figures show an increase in cases of Revenge Porn and Ms Sarah Green, acting director of End Violence against Women, remains positive and argues that this shows that the new law is encouraging victims to step forward as they feel that they are now being taken seriously.⁶⁰⁵

Dr Holly Jacobs took this crime very seriously and set up a movement namely the Civil Cyber Rights Initiative (Hereinafter referred to as 'CCRI'). This movement was set up to enforce the need for the criminalisation of revenge porn and to provide assistance to the victims. The official website presents important statistics which indicate that one in ten ex partners have been blackmailed by threatening to post explicit images online and that 60% of the blackmailers followed through with their threats.⁶⁰⁶

⁶⁰³ *ibid.*

⁶⁰⁴ Government Equalities Office, MP Caroline Dinenage, MP Nicky Morgan, 'Hundreds of victims of revenge porn seek support from helpline' (*GOV.UK*, 23 August 2015) <<https://www.gov.uk/government/news/hundreds-of-victims-of-revenge-porn-seek-support-from-helpline>> accessed 28 November 2016.

⁶⁰⁵ Dr Heather Brunskell-Evans, 'Want to Stop Revenge Pornography? Then We Need to Overhaul Mainstream Porn' (*University of Leicester*, 17 JULY 2015) <<http://www2.le.ac.uk/offices/press/think-leicester/arts-and-culture/2015/want-to-stop-revenge-pornography-then-we-need-to-overhaul-mainstream-porn>> accessed 20 february 2016.

⁶⁰⁶ 'Power in Numbers' (*Cyber Civil Rights Initiative*, 3 January 2014) <<http://www.endrevengeporn.org/revenge-porn-infographic/>> accessed 27 February 2016.

CCRI survey results were achieved from a survey that was hosted on [endrevengeporn.org](http://www.endrevengeporn.org)

Ms Sarah Green leads an important campaign based on two important issues. Primarily the police and courts should have the expertise to prosecute and charge alleged perpetrators. Moreover a better sexual educational system should be in place from early stages to teach the little ones to not only protect their privacy but to respect other people's privacy based on equality and consent.⁶⁰⁷

Dr Jeff McAllister, a London based lawyer representing revenge porn victims, emphasises on better civil laws which allow victims not only to get the criminal justice they deserve but to also sue for damages for the emotional, psychological and financial losses they suffer due to such act. We must remember that victims are not only abused psychologically by their most personal photos being exposed alongside their personal details, but employers might also reject them leading to loss of promotions and jobs. The requirement to prove intention to cause distress may hinder the fight against the spreading of revenge porn since those who re-distribute the pictures do not have this intention and are thus exempt from punishment. While this law is a good start, more needs to be done.

9. Conclusion

When I started my research on the topic I barely knew what the subject involved and this was a problem in itself. This boils down to weak sexual education. In Malta things have changed over the years but a social stigma still remains. Some victims decide not to report cases due to fear of being labelled a 'whore'. An important tangent from this is the education to be given not only to the public but also to the Malta Police Force to deal with reports as soon as they are filed. We must remember that members of the police force are the only people that can offer actual help to the victims.

On the twelfth of July, 2016 a new law was passed after a long discussion in Parliament which saw the two sides in Parliament agreeing to criminalise revenge pornography⁶⁰⁸. Before this, such terminology was alien to our country. Therefore, this was an important step in our legal history for the protection of our citizens, and more importantly for our youths, who reach a vulnerable age at

from Aug 2012-Dec 2013. Participants self-selected into the study by visiting our website and filling out the survey on their own accord. Results depicted are reflective of a female-heavy sample, due to most of our site visitors being women.

⁶⁰⁷ Allison Bazinet, Moriah Daugherty and Ryan Lau, 'Anti-Revenge Porn Act' (2015) <<http://www.law.georgetown.edu/academics/centers-institutes/privacy-technology/upload/anti-revenge-porn-act.pdf>> accessed 5 February 2016.

⁶⁰⁸ 'Amendments to laws on pornography, freedom of expression and vilification of Religion' (*Television Malta*, 13 July 2016) <<http://www.tvm.com.mt/en/news/amendments-to-laws-on-pornography-freedom-of-expression-and-vilification-of-religion/>> accessed 26 August 2016.

which they start experimenting, forgetting about the devastating consequences an act today can have in their future.

Dr Andy Ellul, a leading Maltese criminal lawyer, introduced me to a new concept namely that of 'Breach of Trust'. This concept is wider than revenge pornography in the sense that apart from criminalising the spreading of explicit photos between lovers, in this case, it also targets activities which are meant to remain private between friends but end up being publicised over the internet.

This is a very interesting concept which certainly is entitled to a discussion of its own. Nevertheless, the *raison d'être* behind both concepts; revenge porn and breach of trust, is to punish whoever publishes media which was meant, and expected to, remain private.

I end my article with a quote by Hillary Clinton, when she was asked on her position on Revenge Porn,

Don't take it personally because it can knock you to your knees if you take it personally," she said. "The online culture of bullying young women is horrible and even the most confident, well prepared girl has to be worrying, like why are people picking on me? Why are they saying these things about me? What is happening here? We have got to stand up against that."⁶⁰⁹

⁶⁰⁹ Sam Levine, 'Hillary Clinton Vows to End Revenge Porn as President' (*The Huffington Post*, 29 June 2016) <http://www.huffingtonpost.com/entry/hillary-clinton-revenge-porn_us_5773dc4fe4b0352fed3e85cd> accessed 19 July 2016.