

## SEXUAL CRIMES COMMITTED THROUGH THE INTERNET\*

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### ABSTRACT

If sexual offenses to take into account are only the types of crimes that are prescribed in criminal codes, the concept of sexual offenses would be perceived no more than sexual harassment, molestation, simple sexual assault and qualified sexual assault. However, the concept of sexual offenses is broader than and beyond these in terms of the effects. Especially after the informatics revolution with the internet becoming an indispensable part of our lives and with the transfer of all kinds of personal data including our private lives to social media, the frequency and the impact area of these offenses are increased unforeseeably.

In the pre-internet era, being close enough to a person to have physical contact with him in order to commit a sexual crime is at least a letter, etc. Today, it is extremely easy for the perpetrator to remain anonymous and sexually assault digitally. While it makes difficult to find the perpetrator on the other hand it is an environment that facilitates the commission of the crime. Lately “revenge porn” is the most common example of that ex-partner or spouse shares anonymously the other one's naked images or videos during sexual affair.

Another method of committing sexual crime that digital era brought out, is to force the victim to have sexual intercourse with perpetrator himself or with third parties by blackmailing with the victims' private images or information obtained somehow from the digital environment. Another sexual offense is providing an easy access to the contents including child pornography, animal pornography or violence. Especially these are the methods of committing crime against which the whole world has been fighting.

In this article, I will try to make a general assessment about the sexual crimes which is exactly a very old type of crime, transformation of sexual crime in today's digital world, opportunities that created in a negative way by perpetrators and methods of dealing with them.

**Keywords:** *internet, sexual offense, sexual assault, sexual harassment, cybercrime, revenge pornography, child pornography.*

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## INTRODUCTION

Sexual crimes are generally evaluated differently from other types of crimes, and these crimes have a wide place in the crime-fighting agenda due to the anger of the society towards the crime in question. These crimes targeting sexual inviolability is perceived as more offensive, more disturbing and as a result more serious crimes compared to other types of crimes<sup>1</sup>.

However, both in our country and in the world, the rate of sexual crimes being committed, or at least reported, is increasing every year, and the concept of sexual crime is becoming a source of greater concern for the society. One of the most important phenomena affecting the number and types of sexual crimes is the internet. In this study, I will try to make an overall assessment about the transformation of sexual crimes in today's digital world, which is actually a very old type of crime, the opportunities it creates for the perpetrators of crime in a negative way, the methods of combating them, and revenge porn, which has emerged as a sexual crime and a new phenomenon as a social problem.

### I. Online Sexual Offense

The internet, which is often described as a chaotic, unlawful, and dangerous area. It is a very large network formed by the interconnection of the networks formed by the interconnection of millions of computers around the world<sup>2</sup>. The internet and the web (www-World Wide Web) are different from each other, although they are often used synonymously or assumed to be identical. While the internet is a top concept that expresses all kinds of networks consisting of networks connecting information systems; the web is only one type and sub-part of the internet. Web is the most common type of network on the internet and it provides us an unlimited access and interaction to stored computing devices thanks to websites and web browsers, text, image, sound, etc. Although a large part of internet usage takes place over the web today, it should be reminded that the internet is not just the web.

We all know that the internet, which has become the fastest and easiest way to access information today, has brought radical changes to our world and has affected every aspect of our lives like an epidemic. The aspect of this phenomenon that is of interest to my work is the opportunities it creates for perpetrators of sexual crimes and the sexual crimes committed via the internet as a new type of crime and area of crime.

In fact, sexuality is one of the most used purposes of the internet. In most of the research in this field, the word "sex" is the most searched word on the internet<sup>3</sup>. In other studies, the most searched words are always those associated with sexuality and pornography<sup>4</sup>. It would not be wrong to say that the primary purpose of people's use of the internet is sexuality, considering

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<sup>1</sup> **Terry Thomas**, Sex Crime: Sex Offending and Society, 3rd Ed., Routledge, London, 2016, p. 1.

<sup>2</sup> **Murat Volkan Dülger**, Bilişim Suçları ve İnternet İletişim Hukuku, 7. Ed., Seçkin, 2018, Ankara, p. 80.

<sup>3</sup> **Kerry Sheldon / Dennis Howitt**, Sex \_Offenders and the Internet, John Wiley & Sons, London, 2007, p. 3.

<sup>4</sup> **Abilio C. de Almeida Neto et al.**, "Internet Sexual Offending: Overview of Potential Contributing Factors and Intervention Strategies", in: Psychiatry, Psychology and Law, Vol. 20, No. 2, 2013, p. 169.

that approximately 70% of internet content consists of pornographic content, nearly three million sexual e-mails are sent every day, and approximately one hundred million people access pornographic content daily. Sex on the internet is commonly referred to as “cyber- sexuality” or “cyber-sex”. I will also follow this terminology in my work.

A significant portion of the use of the internet for sexual purposes consists of activities that do not constitute illegality or at least do not constitute a crime<sup>5</sup>. For example, although there are areas that can be abused for the purposes of people such as sex education, erotic product trade, legitimate sexual entertainment, sexual therapy, sex partner search platforms, virtual sex platforms, they are basically legitimate areas<sup>6</sup>. However, the use of the internet for deviant sexual purposes is also not to be underestimated.

Of course, my criterion for deviance here shouldn't be considered legitimate by the legal order. User movements that are seen as morally deviant are not within the scope of our study. However, the adventure of sexual satisfaction in the internet environment often results in addiction<sup>7</sup>. As in gambling addiction, the addiction that always follows the “big hit” brings the person to an illegal line after a point. The person, who is initially provoked by “reasonable” content, needs “deviant” content after a while, then becomes insensitive to sexual perversion and can easily turn into crime as a result<sup>8</sup>. This brings up the phenomenon of the use of the internet for sexual crime. The use of the internet for sexual crime is widely used mentioned as “cyber sexual crime” (cyber sexual criminality), also mentioned as (cyber sexual crimes/offenses) as well as sexual offenses committed on the internet.

Cyber sexual crimes are increasing day by day and cyber sexual crime is becoming more and more common<sup>9</sup>. The use of the internet for deviant sexual purposes and the increase in cyber-sexual crimes are due to the nature of the internet. These reasons can be counted as accessibility, affordability and anonymity<sup>10</sup>. The existence of the internet makes accessible from anywhere at any time and almost free of charge to the opportunities which are essential for engage in deviant sexual behavior. Moreover, it is possible for these actions to be carried out anonymously, by hiding their real identities.

While accessibility and availability facilitate the display of deviant sexual behavior, what attracts cybersex offenders the most is staying anonymous. Although the perception of staying anonymous and not being followed often does not reflect the truth, many people who stay away from crime in real life for fear of being exposed and being caught turn into crime

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<sup>5</sup> **Sheldon / Howitt**, p. 5.

<sup>6</sup> **Sheldon / Howitt**, p. 5.

<sup>7</sup> **Neto and et al.**, p. 170.

<sup>8</sup> **Dana E Putnam**, “Initiation and maintenance of online sexual compulsivity: Implications for assessment and treatment”, in: *Cyber Psychology and Behavior*, 3(4), 2000, p. 361.

<sup>9</sup> **Neto and et al.**, p. 168.

<sup>10</sup> **Alvin Cooper and et al**, “Sexuality on the internet: From sexual exploration to pathological expression”, in: *Professional Psychology: Research and Practice*, 30, 1999, p. 157.

with the assurance of staying anonymous on the internet<sup>11</sup>. According to a study conducted in the United States a major part of cybersex offenders are entry-level criminals with no previous criminal record<sup>12</sup>. In other words, these people do not turn into crime in this way in the physical world. This confirms the thesis that individuals who keep their deviant sexual impulses under control in social life are highly possible to commit crimes because of opportunities provided by the internet environment such as accessibility, availability, and anonymity.

Anonymity on the internet environment also paves the way for potential victims of cyber sexual crime to become more vulnerable. The liberty that pushes the perpetrator to act, paradoxically, lowers the victim's resistance. Moreover, the potential victim, who thinks that his identity is hidden, reveals his emotional world much more easily and becomes open to manipulation<sup>13</sup>. Confidentiality of the victim's identity does not create any protection for crimes that do not target a specific victim<sup>14</sup>.

Another cause of widespread cybersex crime is the insensitivity caused by the internet environment. Conscientious sensitivities and feelings of empathy, which generally serve as a deterrent from crime, lose their effect in the internet environment. The perpetrator, who often does not make eye contact with the victim and does not target a particular victim, becomes detached from his conscientious sensitivities, and becomes desensitized due to the virtual nature of the internet environment<sup>15</sup>. Moreover, with the ease of being in the virtual world, the victim can easily engage in sexual approaches that he would not engage in normal life with various sensitivities, and this feeds the phenomenon of cyber sexual delinquency.

The term sexual crimes mean crimes committed against sexual inviolability. According to traditional acceptance, these are sexual harassment, sexual assault and sexual intercourse crimes oriented towards adults or minors, regardless of their gender identity patterns. While some of these crimes are not considered possible to be committed via the internet (e.g., qualified sexual assault, sexual intercourse with a minor), their forms committed via the internet (e.g., sexual harassment) should be considered within the scope of cyber sexual delinquency. These crimes, which are defined by criminal laws, mostly about physical contact between the perpetrator and the victim. However, the types of crimes that stand out in terms of cyber sexual delinquency are crimes that mostly target children, such as contactless abuse in the virtual environment, temptation for contact abuse planned in the real environment, or child pornography. In addition to the fact that these crimes are being committed more intensely than

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<sup>11</sup> **Sheldon / Howitt**, p. 8.

<sup>12</sup> **Kimberley Mitchell / Janis Wolak / David Finkelhor**, "The Police posing as juveniles online to catch sex offenders: Is it working?", in: *Abuse*, 17(3), 2005, p. 247.

<sup>13</sup> **Neto and et al.**, p. 170.

<sup>14</sup> **Peter Briggs / Walter T. Simon / Stacy Simonsen**, "An Exploratory Study of Internet- Initiated Sexual Offenses and the Chat Room Sex Offender: Has the Internet Enabled a New Typology of Sex Offender?", in: *Sexual Abuse: A Journal of Research and Treatment*, 23(1), 2011, p. 73.

<sup>15</sup> **Neto and et al.**, p. 171.

traditional sexual crimes on the internet, the attention of politics, public opinion and law enforcement forces also focuses on these crimes<sup>16</sup>.

When dealing with sexual crimes committed on the internet, I think to interpret the concept of “sexual crime” a little more broadly, and to deal with some acts of a sexual nature, even if they are based on consent, within this scope. In this context, I will evaluate the concept of revenge porn.

## II. Sexual Harassment Through the Internet

### A. Normative Place of Sexual Harassment

The crimes regulated under the title of “*Crimes Against Sexual Inviolability*” by the Turkish Penal Code (TPC) No. 5237 are; sexual assault, sexual abuse of children, sexual intercourse with a minor and sexual harassment. For sexual assault, sexual abuse of children and sexual intercourse with minors, physical intimacy and physical contact between the perpetrator and the victim is mandatory, that’s why it is not possible to commit these crimes online on the internet. Although “virtual sex” or “cybersex” the remote sex phenomenon based on stimulating and satisfying each other through written, verbal and visual communication on the internet, is becoming more and more widespread, these actions that doesn’t contain physical contact or intercourse and they cannot cause the occurrence of sexual assault or sexual intercourse with a minor due to the principle of legality of crimes and punishments and the prohibition of expansionary interpretation in criminal law<sup>17</sup>. In this respect, it is possible to say that it is not possible to commit these three types of crimes over the internet and they are outside the concept of cybercrime.

In terms of these crimes, the internet can only be used as an intermediary within the scope of preparatory actions. Although the use of the internet as a preparatory tool in terms of combating crime and delinquency is also a subject worth examining<sup>18</sup>. I will not go into this aspect of the subject since the framework of my work is constitute into the boundaries of criminal law. In this regard, I will only deal with the crime of sexual harassment.

### B. Definition

Sexual harassment crime is regulated in the Turkish Penal Code with the article 105. According to this, “*A person who sexually harasses a person is sentenced to imprisonment from three months to two years or a judicial fine upon the complaint of the victim, and to imprisonment from six months to three years if the act is committed against a child*”<sup>19</sup>. As can

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<sup>16</sup> Majid Yar, “The policing of Internet sex offences: Pluralized governance versus hierarchies of standing”, in: *Policing & Society* Vol. 23, No. 4, 2013, p. 483.

<sup>17</sup> Briggs / Simon / Simonsen, p. 74.

<sup>18</sup> Yar, p. 484.

<sup>19</sup> The full text of Article 105 of the TPC titled “Sexual harassment” is as follows:

(1) A person who sexually harasses a person is sentenced to imprisonment from three months to two years or a judicial fine, upon the complaint of the victim, and to imprisonment from six months to three years if the act is committed against a child.

(2) (Amended: 18/6/2014-6545/61 art.) The crime;

be seen, this definition has been made based on the term “harassment”, but no explanation of the harassment has been made.

According to the Turkish Language Institution, the dictionary meanings of harassment is<sup>20</sup> “to disquiet, to disturb”. According to a slightly more comprehensive definition, harassment is to annoy, disturb or put somebody to inconvenience”<sup>21</sup>.

Non-sexual harassment is not covered by article 105<sup>22</sup>. For this reason, the main concept that we need to consider is the concept of sexual harassment. This concept, which has no definition in basic dictionaries, is defined by the justification of the law and the doctrine. According to the justification of Article 105, sexual harassment is “*Sexual behaviors that do not constitute a violation of the victim’s bodily immunity*”. There are many definitions in the doctrine that define sexual harassment broadly which includes molestation, limitedly from male-to-female behaviors only<sup>23</sup>. I believe that these definitions, which were made by considering the old Turkish Penal Code regulation numbered 765, are out of date. According to one definition among definitions, which I think is current and pertinent, “*sexual harassment consists of sexually harassing the victim*”<sup>24</sup>. According to another view, sexual harassment is “*any kind of offensive verbal or written sexual act that does not contain physical contact targeting sexuality of individual or individuals*”<sup>25</sup>. Based on these definitions, sexual harassment; can be made verbally, in writing or with body movements. The important thing is to target the victim, but to carry out sexual behavior without physical contact with the victim.

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- a) By taking advantage of the convenience provided by a public duty or service relationship or family relationship,
  - b) By guardians, educators, caregivers, foster families or people who provide health services or have protection, care, or supervision obligations,
  - c) By taking advantage of the convenience of working in the same workplace,
  - d) By making use of the convenience provided by postal or electronic means of communication,
  - e) By display,
- imposed according to the above paragraph is increased by half. The victim due to this act; if he/she had to quit his/her job, leave school or his/her family, the penalty to be imposed cannot be less than one year.

<sup>20</sup> Türk Dil Kurumu Güncel Türkçe Sözlük, [http://tdk.gov.tr/index.php?option=com\\_bts&arama=kelime&guid=TDK.GTS.5cd546ee19b156.34835455](http://tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid=TDK.GTS.5cd546ee19b156.34835455), 10.05.2019.

<sup>21</sup> Büyük Larousse, C. 18, İstanbul, 1986, p. 11134.

<sup>22</sup> On the other hand, the messages sent by the accused to the victim over the phone, which were understood to have no sexual content from the descriptions of the incident, were sent by the Supreme Court of Appeals: “If my love is in my heart, if happiness is in your hand, if two words are what you want, I love you”, “You are my 61st minute, 13th month, 5th season, My 7th sense, 3rd eye, 2nd heart, you are more than anything, you are different in every way because you are my dear”, “I love you my love” are seen to be considered as sexual harassment, see: Penal Department No 2 of the Supreme Court 23.9.2013, File Number. 2011/29772, Decision Number 2013/21228. It is stated in another decision that if the accused sends the “I love you” message to the victim more than once in three days, it will be considered within the scope of the execution of a decision to commit a crime and the act will constitute a chain of sexual harassment, again in this direction: Penal Department No 14 of the Supreme Court, 21.1.2015, File Number 2014/11220, Decision Number 2015/436. However, as the feeling of love cannot be associated with sexual purposes, it is clear that only sexually motivated acts should constitute the subject of the crime of sexual harassment. For this reason, the Supreme Court should revert from its erroneous jurisprudence on this issue.

<sup>23</sup> For these definition: **Mehmet Emin Artuk / Ahmet Gökçen / Mehmet Emin Alşahin / Kerim Çakır**, Ceza Hukuku Özel Hükümler, 17. Ed., Adalet, Ankara, 2018, p. 330.

<sup>24</sup> **Mahmut Koca/İlhan Üzülmöz**, Ceza Hukuku Özel Hükümler, 4. Ed., Adalet, Ankara, 2017, p. 337.

<sup>25</sup> **Artuk / Gökçen / Alşahin / Çakır**, p. 330.

Although the authors used the expression “contrary to moral cleanliness” in the first definition above, I do not agree with this. The first reason for this is that although most of the immoral acts are crimes, some immoral acts are not defined as a crime (e.g., adultery), and some crimes are not immoral (e.g., crimes against the Law on Meetings and Demonstrations). Therefore, crime and immorality are not the same concepts and cannot be explained with each other. On the other hand, in sexual crimes, not “immoral acts”, but acts aimed at the sexual freedom of the individual are prohibited and punished. It is not possible to explain the types of crimes in which the protected legal value is the sexual freedom of the individual with “immorality”. This statement of mine does not deny the fact that most of the sexual crimes are “considered immoral” in today’s society, this is true. However, the norm of criminal law should not be explained by immorality. Therefore, even if it is not perceived and/or accepted as immoral by the individual or society, an act towards the sexual freedom of the individual will constitute a sexual crime act.

Acts of sexual harassment can be grouped under three main categories: gender harassment, unwanted sexual attention, and sexual coercion<sup>26</sup>. In gender harassment, the perpetrator warns the victim about her gender in a hostile or annoying way. Unwanted sexual attention is the giving of disturbing attention to the victim through one-sided sexual behavior or statements. Sexual coercion, on the other hand, is the suppression or coercion by threatening of the victim to engage in sexual behavior. The subject of this pressure may be acts that will be the subject of sexual assault or abuse crimes, as well as sexual behaviors that are not covered by these crimes, such as sexual exposure or forcing someone to declare that he/she is sexually desiring the perpetrator

### **C. Forms of Sexual Harassment**

Acts of sexual harassment taking place on the internet is called by the name cyber sexual harassment similarly to other types of cyber sexual crimes. All three types of face-to-face sexual harassment exist on the internet. Cyber sexual harassment act appears in the following forms: active verbal, passive verbal, active graphic, and passive graphic<sup>27</sup>.

In active verbal harassment, the perpetrator sends harassing written or verbal sexual messages to the victim. Active verbal harassment acts, which we encounter mostly in the form of written messages in the early days of the internet, are encountered frequently today, with the spread of internet-based communication applications such as Whatsapp, and internet platforms that enable verbal communication. In passive verbal harassment, the perpetrator does not share his message by targeting a specific victim directly, but for potential victims. The active graphic sexual harassment act is performed very similarly to the active verbal act, but by using obscene visuals. In passive graphic harassment, the perpetrator shares the obscene image without targeting a particular victim. Passive acts of these types of actions do not constitute a crime as

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<sup>26</sup> **Azy Barak**, “Sexual Harassment on the Internet”, in: Social Science Computer Review, 23(1), 2005, p. 79.

<sup>27</sup> **Barak**, p. 81.

a rule but may constitute sexual harassment under certain conditions. I will discuss these in detail below.

#### **D. Types of Sexual Harassment**

##### **1. Gender Harassment**

Gender harassment is a concept that many types of internet users are frequently exposed to. It is possible for sexual harassment to occur through active verbalization. Derogatory comments targeting a gender should be evaluated in this context. Comments containing hatred and humiliation, especially towards transgender people, are a clear example of gender harassment. Disturbing sexual comments which are not directly derogatory but disturbing is also gender harassment. Obscene jokes and comments that do not openly express a sexual interest towards the addressee or that do not compel the addressee are in this way. Such comments, which are not requested and not welcomed by the addressee, are harassment and may lead to sexual harassment. Active verbal sexual harassment is usually committed in areas such as chat rooms and forums and via internet communication tools (e-mail, WhatsApp, etc.). 62% of the average internet user are exposed to such unwanted sexual content <sup>28</sup>.

Gender harassment can be verbal or graphic. Sending sexually explicit images to an addressee via internet communication tools is the main example of this. Sexual harassment occurs when erotic or pornographic content is sent to an addressee who does not want them and who is uncomfortable with this. The problem of how to determine the disturbingness of the graphic material occurs at that point. For example, a simple photograph containing nudity is not the same as a violent pornographic image. Moreover, the personality traits of the addressee and the relationship between the receiver and the sender will also determine the perception of any content as offensive. These are the variables that exist in terms of sexual harassment acts that take place in the physical environment, and the same problems in determining the harassment nature of the act are also present in terms of acts that take place outside the internet. At this point, I think that the current approaches in the doctrine and jurisprudences will be valid and guiding in terms of actions taking place on the internet.

Verbal and graphic gender harassment can also occur in passive forms. Verbal or visual content may have been published on the internet for potential victims, without targeting a specific addressee or addressees. This is how the audio, text and images published on the websites, and the details of the account information (bio) on some platforms are displayed.

The most important factor in describing a sexually explicit post as harassing is the consent of the people. Been different than erotic or pornographic web sites that adults can access with consent, harassing posts attracts the addressees by misleading promotions or coercive mechanisms (auto-redirects, pop-ups, etc.). 75% of internet users who are involuntarily exposed to sexual content are not specifically addressed to these contents. They have turned to

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<sup>28</sup> Barak, p. 79.

these contents themselves due to automatic redirects, pop-ups or misleading results in the search engine<sup>29</sup>. This shows how common passive gender harassment is.

Although gender harassment in passive forms is quite common. It is not possible them to constitute a crime within the meaning of article 105 of Turkish Penal Code. In the regulation of the article, the condition of harassing “*anyone*” is clearly sought, and it is obligatory for the victim to be a specific person. Behaviors in which the perpetrator violates the sexual immunity of random people with actions whose addressees are not clear are not considered as sexual harassment, if the conditions exist, it may cause indecent acts regulated in article 225 or obscenity crimes regulated in article 226 of Turkish Penal Code. For example, this is how a person speaks with obscene content or displays obscene images in a public place without targeting anyone. The same criteria is valid in the internet environment. For this reason, passive forms of sexual harassment, which are classified as sexual harassment in different disciplines, especially behavioral sciences, do not constitute sexual harassment in the sense of criminal law.

## **2. Unwanted Interest**

Unwanted attention is the offensive (harassing) expression of interest in sexual matters aimed at a specific victim. This type of harassment, which takes place through individual communication, is in the form of the perpetrator asking the victim questions about his/her genitals, sexual life, or other intimacy issues, or inviting, encouraging or persuading the victim to acts of a sexual nature. Unlike gender harassment, here the perpetrator intends to direct the victim to a reciprocal sexual act. The intended act may be a sexual act that will take place in a physical environment or an act that will take place in a virtual environment (e.g., webcam display or cybersex). An active action by the perpetrator is mandatory for harassment in the form of unwanted sexual attention. This action can be a verbal or graphic action, but in any case, it must be an active action.

Cybersexual harassment in the form of unwanted attention can be in an aggressive manner or in a more moderate and inviting style. The important thing is that this action is perceived as harassing and disturbing for the victim. At this point, I have to refer to the criteria regarding sexual harassment in the physical environment. As for the internet, I believe that the act must be clearly offensive in order to qualify as harassment, especially on platforms where sexual interest is common, such as finding a sexual partner or forums for chatting with sexual content. Of course, on such a platform, the addressee of a non-aggressive interest may also be disturbed by this interest. But in this case, it is possible to say that the perpetrator will benefit from the provisions of mistake regulated in article 30 of Turkish Penal Code and the crime will not occur due to the mistake provisions that removes the intent.

## **3. Cybersexual Coercion**

Cybersexual coercion, on the other hand, is a different and perhaps more severe form of harassment than gender harassment and unwanted sexual attention. Cybersexual coercion refers to the pressure of the victim towards sexual intercourse by means of coercion available or

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<sup>29</sup> Barak, p. 79.

possible in the virtual environment. Cybersexual coercion could carry through by the forcing tools such as compulsion, threat, blackmail, etc. used in traditional sexual coercion, it can be also done by means of an unlimited number of coercive means specific to the internet environment. Although physical coercion is not possible in the virtual environment, it is possible to force the victim on an equivalent scale to physical coercion by using informatics facilities. For example, the victim can be coerced in a way that is equivalent to physical coercion by means of cyber espionage methods such as forcibly redirecting the victim to certain pages, not being allowed to leave a website or communication channel, installing harmful applications that transmit or receive images or sounds on information systems. In this case, the crime of sexual harassment occurs but a coercion which is not physical does not cause compulsion crime that regulates in the article 108 of Turkish Penal Code according to the principles of prohibition of comparison and expansionary comment

Threatening the victim by mentioning that he/she will incur certain harm in the physical environment or on the internet is also a frequently encountered type of sexual coercion. In particular, the perpetrator, who seizes the obscene images of the victim by force or consent, forces the victim to have sexual intercourse by threatening to spread them on the internet. In addition to the crime of sexual harassment, “*Threat*” (Article 106 of the TPC), “*Blackmail*” (Article 107 of the TPC) “*Entering the IT system*” (Article 243 of the TPC), “*blocking the system, destroying or changing the data*” (Article 244 of the TPC) and crimes against private life and the confidential sphere of life regulated between Articles 132 and 138 of the TPC will find application in case of forcing victim by methods such as threats, blackmail, seizure of information equipment, intimidation by spreading obscene photographs. In addition to these, the "crime of persistent pursuit" added to the Turkish Penal Code with Article 8 of the Law No. 7406 dated 12.05.2022 should now be taken into account in terms of the actions mentioned here.

In addition, the act of *stalking which does not involve heavy coercion and does not constitute another crime*, can also be a convenient tool to put pressure on the victim. The victim, who realizes that he/she is constantly being traced and followed on the internet, may feel compelled to have sexual intercourse demanded by the perpetrator. As with the physical pursuit of a person in real life, *stalking for sexual purposes on the internet* may constitute cyber sexual harassment in the form of sexual coercion, and TPC in the meaning of article 105, it may cause the formation of sexual harassment crime.

### **III. The Concepts of Non-Consensual Pornography and Revenge Porn**

Non-consensual pornography<sup>30</sup> as a new form of sexual harassment can be defined as the creation, shooting and/or dissemination of intimate and sexual images of the victim<sup>31</sup>. In this respect, the definition of non-consensual pornography includes images obtained without the consent of the victim (e.g., recording of the person secretly or records of sexual assault), as well as images that the person consents to be given or recorded based on their private relationship<sup>32</sup>.

On the other hand, as a mediatic term, revenge pornography means the non-consensual sharing of<sup>33</sup> sexual and private photos or videos that the victim consents to be recorded or given to the person by their ex-partner, with the aim of “revenge” after the relationship ends. The prevalence of the concept of revenge porn brings with it the erroneous use of the term in place of any form of non-consensual pornography. However, non-consensual pornography is not always carried out for the purpose of revenge<sup>34</sup>. For example, the perpetrator recording the images of the act he/she committed during sexual assault; it can also act to silence and humiliate the victim by spreading these images and threatening the victim to spread them<sup>35</sup>. The perpetrators also act with motives to gain financial gain, damage the victim’s reputation and harm the victim’s social relations<sup>36</sup>.

However, the use of the term pornography is also a subject of criticism. As in the example of England and Wales, the word pornography, which is preferred in legalization studies, has not been appropriate because the publication of pornography is carried out especially for the purposes of sexual pleasure and the action containing images can be perceived

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<sup>30</sup> The creation of sexual images of people emerged as a new phenomenon with technological developments. With fake video technology, the face of a person whose photos are owned only is mounted on the face of the actress in a porn video. As the tools for producing videos called “deepfakes” become more powerful and easier to use, people find the opportunity to transfer their sexual fantasies to the internet. While the most popular fake pornographic images feature celebrities, anyone who has enough photos or videos for the software can make a deepfake video or photo. Of course, these videos can be produced not only for pornographic purposes, but also for the purpose of politically exploiting a political figure. However, in the context of our subject, perpetrators who cannot obtain the images of their ex-partners, but who want to abuse the person with a sense of revenge, can commit the crime in question by creating these images.

<sup>31</sup> **Danielle Keats Citron / Mary Anne Franks**, “Criminalizing Revenge Porn”, in: Wake Forest Law Review, Vol. 49, Issue 1, 2014, p. 345; **Clare McGlynn / Erika Rackley**, “Image-Based Sexual Abuse”, Oxford Journal of Legal Studies, Vol. 37, 2017, p. 534; **Matthew Hall / Jeff Hearn**, *Revenge Pornography: Gender, Sexuality and Motivations*, Routledge, London, 2018, p. 15; Cyber Civil Rights Initiative (CCRI), 2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report, p. 3.

<sup>32</sup> **Citron / Franks**, p. 345.

<sup>33</sup> **Clare McGlynn / Erika Rackley / Ruth Houghton**, “Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse ”, in: *Feminist Legal Studies* 25-1, 2017, p. 25; **Hall / Hearn**, p. 14; European Parliament’s Policy Department for Citizens’ Rights and Constitutional Jobs, *Cyber Violence and Hate Speech Online against Women* 2018, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL\\_STU\(2018\)604979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf), 10.05.2019, 17; **Asher Flynn / Nicola Henry / Anastasia Powell**, *More than Revenge: Addressing the Harms of Revenge Pornography*, Summary Report of the ‘More than Revenge’, in: Roundtable, Monash University, 2016, p. 4.

<sup>34</sup> **Mary Anne Franks**, *Drafting an Effective “Revenge Porn” Law : A Guide for Legislators*, Cyber Civil Rights Initiative, 2016, <http://www.cybercivilrights.org/guide-to-legislation/>, 10.05.2019, p. 2.

<sup>35</sup> **Asher Flynn / Nicola Henry / Anastasia Powell**, “Image- based Sexual Abuse”, in: Walter S. DeKeseredy and Molly Dragiewicz (Eds.), *Routledge Handbook of Critical Criminology*, 2nd Ed., Routledge, London, 2018, p. 306.

<sup>36</sup> **McGlynn / Rackley / Houghton**, p. 38; **Flynn /Henry/ Powell**, p. 4.

as a choice for this entertainment or it has the meaning of giving legitimacy to the actions<sup>37</sup>. The use of the word pornography has also been criticized as it may suggest that photographing oneself naked or engaging in sexual activity is in itself pornographic<sup>38</sup>.

In contrast to a concept produced by the media, such as revenge porn, in parallel with the above reasons, there is an intense work on naming this subject and a terminology confusion in this direction. Image-based sexual harassment<sup>39</sup>, technology-assisted sexual assault<sup>40</sup>, non-consensual pornography<sup>41</sup>, involuntary pornography<sup>42</sup> and revenge porn<sup>43</sup> were preferred by various authors in the doctrine.

Since I focus on the dissemination rather than the acquisition of images in my work, I will use non-consensual pornography and the most common term, “revenge porn”, which is accepted by the public, in the scope and context I have stated above.

### A. The Qualification of the Images That Make up the Subject of Revenge Porn

Revenge porn<sup>44</sup> consists of obtaining intimate and sexually explicit photos or videos of victims and disseminating them online or physically<sup>45</sup>. While the acquisition phase takes place

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<sup>37</sup> **McGlynn / Rackley / Houghton**, p. 38.

<sup>38</sup> **Franks**, p. 2.

<sup>39</sup> **Asher Flynn / Anastasia Powell / Nicola Henry / Adrian Scott**, “Image- based sexual abuse: The extent, nature, and predictors of perpetration in a community sample of Australian residents”, *Computers in Human Behavior*, Vol. 92, 2019, p. 393; **McGlynn / Rackley**, p. 535; **Walter S. DeKeseredy / Martin D. Schwartz**, “Thinking Sociologically About Image- Based Sexual Abuse: The Contribution of Male Peer Support Theory”, *Sexualization, Media, & Society* Vol. 2, Issue 4, 2016, p. 1.

<sup>40</sup> **Anastasia Powell / Nicola Henry**, “Sexual Violence in a Digital Age”, in: *Palgrave Studies in Cybercrime and Cybersecurity*, Palgrave, London, 2017, p. 5; **Anastasia Powell / Nicola Henry**, “Embodied Harms: Gender, Shame, and Technology-Facilitated sexual Violence”, in: *Violence against Women* Vol. 21, Issue 6, 2015, p. 759; **Anastasia Powell / Nicola Henry**, “Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research”, in: *Trauma , Violence , & Abuse ,* Vol . 19, Issue 2, 2015, s. 195.

<sup>41</sup> **Citron / Franks**, p. 346; **Franks**, p. 2.

<sup>42</sup> **Anne Burns**, “In Full View: Involuntary Porn and the Postfeminist Rhetoric of Choice”, in: C. Nally / A. Smith (Eds), *Twenty – first Century Feminism: Forming and Performing Femininity*, Palgrave, London, 2015, p. 93.

<sup>43</sup> **Hall / Hearn**, p. 14.

<sup>44</sup> Victims of these crime are mostly women. Research by the Cyber Civil Rights Initiative revealed that 90% of the victims were women. See: Cyber Civil Rights Initiative Cyber Civil Rights Statistics on Revenge Porn, <https://www.cybercivilrights.org/revenge-porn-infographic/>, 10.05.2019. This also applies to other types of cybersex crimes. In the United States National Survey on Violence Against Women, cyber stalking, it has been determined that 60% of the victims of stalking are women. The Study to Stop Online Abuse (Working to Halt Online Abuse, WHOA) according to the records of face-to-face interviews with victims, 72.5% of cyber sexual harassment victims between 2000 and 2012 were women. Working to Halt Online Abuse (WHOA), *Online Harassment / Cyberstalking Statistics*, <http://www.haltabuse.org/resources/stats/>, 10.05.2019, **Citron / Franks**, p. 345. Except for women, what we can consider as a sexual minority; lesbians, gays, bisexuals, trans people, intersex people (LGBTI) are more likely to be victims of cybersexual crimes. This situation is basically no different from the traditional physical sexual harassment crime. As a matter of fact, online sexual violence and harassment in cyberspace is based on socially constructed heterosexual beliefs and attitudes about gender and sexuality. Acting with motives of power and control, perpetrators blame, humiliate and stigmatize the victim for their differences. See also: **Powell / Henry**, “Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research”, p. 196-198.

<sup>45</sup> When revenge porn is mentioned, the first thing that comes to mind is the dissemination activities carried out on the web, but this activity is not necessarily performed in the form of online sharing. Revenge porn can be carried out by spreading the images of the victim from hand to hand. This is the case in an incident that took place in the USA in 2007. In the incident, the perpetrator made several DVD copies of the video in which the victim recorded sexual and intimate images. The perpetrator, out of anger at the end of his relationship,

with the consent of the victim because of the special relationship between the perpetrator and the victim, the images are recorded by the perpetrator or shared with the perpetrator by the victim. The dissemination of images takes place without the consent of the victim and in some cases even without his/her knowledge, and the perpetrator's sense of revenge for the termination of the relationship due to reasons such as rejection or deception activates the perpetrator. Since the subject of the crime is intimate and sexually explicit, obscene images of the victim, it is necessary to define and frame these concepts beforehand.

## 1. Obscene Image

First of all, obscene images must be images that may harm the victim sexually. In this respect, the attack of the perpetrator should aim and harm the personality dignity and sexual autonomy of the victim by revealing the sexual identity of the person<sup>46</sup>.

Undoubtedly, images that include people's genitals/regions or during sexual activities will be considered obscene. Like these, when all images are taken into account, images that might be considered sexually explicit by a reasonable third party may also be considered obscene. The reasonable third-party criterion has been adopted by the UK legislator<sup>47</sup>. For example, although a person's foot is not considered a sexual region, it can create a sexual image within the nature and context of the images.

## 2. Privacy

Obscene images are often included in the scope of someone's privacy and private sphere. However, this is not always the case. While nude photos taken by people for erotic magazines will be classified as sexually explicit images, they do not qualify as privacy. On the other hand, nude photos that people sent privately to someone they are in a relationship with are considered both sexual and private images<sup>48</sup>.

An important question to be answered at this point is whether sharing the image of a person with another person or persons will be considered publicizing the images. The answer to this question, of course, should be no, sharing a photo with someone does not mean that he/she consents to the fact that this content can be shared with everyone and accessible to all other people.

As a matter of fact, in obtaining the images constituting the first stage of revenge porn, consent-based sharing is generally involved as a result of the trust the person has in his/her private relationship, and the disclosure and dissemination, which constitutes the second stage,

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dispersed these copies by randomly placing them on the windshields of cars, along with the victim's name, address, and phone number. The victim, who was unaware that her images were recorded and distributed, were visited many times by men who perceived the video as a sexual proposition, and she was disturbed by numerous phone calls. For the event, see: **Citron / Franks**, p. 350.

<sup>46</sup> **McGlynn / Rackley**, p. 543.

<sup>47</sup> UK Legislation, Criminal Justice and Courts Act 2015, Sec. 35.

<sup>48</sup> **McGlynn / Rackley**, p. 544.

takes place without consent and mostly without knowledge<sup>49</sup>. However, this sharing is personal and does not give the authority to spread this share. For example, when we extend our bank card to the cashier to make a payment, this cashier will not be able to use that card for personal payments, or if sensitive data is shared with doctors for disease diagnosis, doctors will not be able to share this data with others, and the same will be true for photos that people send to their loved ones<sup>50</sup>. The first action I took in the example is “*Banking or misuse of credit cards*” (Article 245 of the TPC); just as the second act will constitute the crimes of “*unlawful giving of data*” (Article 136 of the TPC), revenge porn will also give rise to various crimes in terms of the way it is committed in the point of Turkish Criminal Law. Since this subject will be examined in detail below, I will not go into details.

Another issue worth discussing in terms of private images is whether the images are private, even if they are taken in the public domain. The images were not taken in the public domain does not directly render the contents private, the fact that they were taken in the public domain does not necessitate the acceptance of the publicity of the images<sup>51</sup>. At this point, only the will of people to spread their images and their openly revealing this with their words or behaviors can make the images public. Then it is not possible to separate the public space and private life with sharp lines<sup>52</sup>, and there may be privacy demands covering the private space of the people in the public space. In this respect, the place where the images were taken is not decisive.

Finally, the main criterion to be taken in terms of private image should be how wide the environment the image owner wants the content to be accessible. This environment may consist of a single person as well as more than one person, as a small group, but this does not change the private nature of the images. However, it should be presumed that any sexual image is also privacy of a person. The publicity of obscene images can only occur if the owner of the image consents to be published by a certain person or persons or publishes it with his/her consent<sup>53</sup>.

## **B. The Issue of Whether Revenge Porn Can Be Considered as a Crime Against Sexual Immunity**

Whether revenge porn will be considered as sexual harassment or only as behaviors that violate the privacy of individuals' private life and personal data rights is another debatable issue of the concept. I have to point out that there is no doubt that revenge porn violates the privacy of private life, but considering such behaviors only as privacy-violating behaviors; causes the

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<sup>49</sup> However, in the first stage of the crime, it may be possible to secretly monitor the victim. While the images taken secretly are undoubtedly a violation of privacy, the images obtained based on consent also have the quality of a private image, since there is no consent for sharing.

<sup>50</sup> Citron / Franks, p. 355.

<sup>51</sup> McGlynn / Rackley, p. 545.

<sup>52</sup> Helen Nisselbaum, “Protecting Privacy in an Information Age: The Problem of Privacy in Public”, in: Ethics & Behavior, 1998, p. 208, 209.

<sup>53</sup> McGlynn / Rackley, p. 544.

mistake of not taking into account the way of targeting the sexual freedom and autonomy of individuals in terms of sexual, sexist and legal value.

Determining whether an act violates sexual immunity requires determining what constitutes an attack on sexual immunity. Attack on sexual immunity characterized as<sup>54</sup> abusive, intimidating, coercive, threatening, and violent attacks on sexual identity, sexual autonomy, and integrity. When all these factors are considered, it is understood that the experience of the victim in terms of the consequences of the crime, the action directed by the perpetrator is basically identical with the crime of sexual harassment and that the crime is a new way of committing the crime only with technology.

Article 40 of the Council of Europe Convention on the Prevention and Combating of Violence Against Women and Domestic Violence (Istanbul Convention) defines sexual harassment as this: *“The parties agree that any act that has the effect of violating the dignity of a person or is carried out for this purpose, and in particular humiliating, hostile, insulting, humiliating shall take the necessary legislative or other measures to ensure that any undesirable, verbal or non-verbal or physical conduct of a sexual nature is subject to criminal or other legal sanction when creating an aggressive or offensive environment.”*

When the definition is taken into consideration, it is understood that it is necessary to determine whether an act is sexual assault based on the nature of the sexual assault on the victim and the legal value towards which the perpetrator is directed. In this respect, non-consensual pornography, and revenge porn, as well as an attack on sexual immunity, should find a place in criminal laws as a derivative of sexual harassment or as a form of perpetration or as an independent type of crime.

As a matter of fact, many countries make revenge porn the subject of legal regulations and they are working on regulating it as a type of crime in terms of criminal law, and these studies are followed by many non-governmental organizations in the world. The first of the revenge porn laws was enacted by Israel in 2014, which classifies revenge porn as a crime that violates sexual immunity and imposes a prison sentence of up to 5 years for its perpetrators. In Belgium, with the law passed in 2015, both revenge porn and voyeurism were regulated as crimes that require imprisonment from 6 months to 15 years. The Criminal Justice and Courts Act of England and Wales, which came into force in 2015 defined revenge porn as a crime and imposed a prison sentence of up to 2 years for the perpetrators. In the United States, 45 states have revenge porn laws, including Washington DC.

The most recent regulation was brought by Italy. The law, called “Code Red”, aims to protect women from violence and *stalking and to punish perpetrators of revenge porn*. Under Italian legislation criminalizing revenge porn, perpetrators will face up to six years in prison or a fine of up to 15,000 Euros.

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<sup>54</sup> **Liz Kelly**, “The Continuum of Sexual Violence”, in: J. Hanmer / M. Maynard (Eds), Women, Violence and Social Control, Explorations in Sociology, Palgrave Macmillan, London, 1987, p. 46; **McGlynn / Rackley / Houghton**, 36.

### C. Effects of Revenge Porn on the Victim

The spread of revenge porn has many negative effects on the victim, either directly or indirectly. These effects can be gathered into three main groups. These can be counted as physical, psychological and financial harm to the person, violation of personal dignity and privacy, and prevention of sexual freedom and expression.

First of all, revenge porn has a heavy psychological impact on its victims. People are faced with high rate anxiety and panic attack problems at a very high rate due to the fact that the most private areas of their lives are opened to the access of many people and the feelings of humiliation and shame they experienced<sup>55</sup>. Due to the nature of revenge porn which is constantly accessible by everyone on the internet, these mental problems that people have experienced are constantly repeated. This situation does not allow the psychological wounds to be healed, and the victims cannot get rid of this feeling of humiliation and shame. People live with the thought that their images are being accessed by other people every day, and in the words of the famous American sportscaster Erin Andrews, whose naked images were spread on the internet by a pervert, *“they can’t get rid of being victimized every day”*<sup>56</sup>.

In addition, the victim’s contact information, social media accounts and addresses can also be found and associated (doxxing) on the pages where images of people are shared<sup>57</sup>, and this poses the danger of not only psychological but also physical harm to the exposed victims<sup>58</sup>. Victims, who become open to follow-up through information, live in fear of being exposed to sexual assault, and for some, this situation turns into reality.

Founder of Cyber Civil Rights Initiative and pioneer of the “End Revenge Porn” movement, Holly Jacobs is also one of the victims of the crime. In the incident that happened to Jacobs, sexually explicit photos obtained by her ex-partner were spread through hundreds of websites, and her curriculum vitae and e-mail address were shared with users<sup>59</sup>. In the posts made by some websites, there were informations that did not reflect the truth, such as she had sex for money and had sexual intercourse with her students.

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<sup>55</sup> Cyber Civil Rights of the Initiative according to his research on this subject, 93% of the victims experience severe mental distress and anxiety problems.

<sup>56</sup> **Citron/Franks**, p. 364; **Hall / Hearn**, p. 19.

<sup>57</sup> This harassment technique, known as doxing, is a method of personal data; addresses, phone numbers and then posting this information.

<sup>58</sup> According to a study conducted by the American computer security software company McAfee in 2013, the social security numbers of 2% of the victims, the work addresses of 14% and the home addresses of 16% are disclosed. Again, the e-mail addresses of 26% of the victims, the social media information of 49% and the identity information of 59% are exposed together with the obscene posts. See: McAfee, “Love, relationships, and technology: How we expose ourselves today”, (2013), <https://promos.mcafee.com/offer.aspx?id=605366&culture=en-us&cid=140612>, 10.05.2019.

<sup>59</sup> **Citron / Franks**, p. 367, **Franks**, p. 13, **Michael Salter**, “Responding to revenge porn: Gender, justice and online legal impunity”, Paper delivered at: Whose justice? Conflicted approaches to crime and conflict, University of Western Sydney, 2013, p. 3, [https://www.academia.edu/4585975/Responding\\_to\\_revenge\\_porn\\_Gender\\_justice\\_and\\_online\\_legal\\_impunity](https://www.academia.edu/4585975/Responding_to_revenge_porn_Gender_justice_and_online_legal_impunity), 10.05.2019.

Jacobs applied to the police against this situation, the law enforcement officers stated that nothing could be done about this as she had shared the photos with his ex-boyfriend voluntarily. Jacobs explains that because of revenge porn; she had to change her name, change her job, stop making academic publications in her field despite being a doctoral student, and change her e-mail address four times and her phone number three times<sup>60</sup>.

Victims may also have to face the financial consequences of the crime<sup>61</sup>. Information about the person accessible over the web becomes a decision maker in recruitment processes<sup>62</sup>. This situation causes people to be unable to find a job or to leave their jobs. Victims working in a job cannot continue their business life due to the pressure they may face in the workplace, the fear that people will attack them, and the sense of shame they experience in the society. Another case of revenge porn which is about Hollie Toups a 33 year old teacher, nude photos of the victim was shared on a porn site, along with her home address and Facebook profile. Toups states that she could not leave the house alone because she did not know what would happen to her<sup>63</sup>. It is seen that not only people cannot continue to work, but also employers who are aware of the situation terminate the victim's employment<sup>64</sup>.

Similarly, victims have to change the schools they study in and the cities they live in, avoid expressing themselves in society, and close their social media accounts<sup>65</sup>. In fact, as a result, victims of this crime are forced to isolate from social life. As a matter of fact, unlike the crimes against sexual immunity, the entire internet world is a witness to the crime.

Another consequence of the crime manifests itself in the attack on the dignity of the person and the violation of the of private life<sup>66</sup>. While obscene photos of the person, which should be kept private, are accessible to everyone on the internet, it in itself damages the honor

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<sup>60</sup> **Holly Jacobs**, "Being A Victim Of Revenge Porn Forced Me To Change My Name", Thought Catalog, <https://thoughtcatalog.com/dr-holly-jacobs/2013/11/being-a-victim-of-revenge-porn-forced-me-to-change-my-name/>, 2013, 10.05.2019.

<sup>61</sup> **Mycglynn / Rackley**, p. 547.

<sup>62</sup> A study conducted in 2009 on this subject reveal that the information obtained from the web and the opinion obtained as a result of the information of the candidates play an extremely important role in the recruitment process. 80% of human resources officials conduct web research about candidates and 89% of those who do state that the opinion they have gained from these research affects the recruitment process. In addition, information obtained online about 70% of the eliminated candidates plays a role. See: **Cross - Tab**, Online Reputation in a Connected World, 2009, [https://job-hunt.org/guides/DPD\\_Online-Reputation-Research\\_overview.pdf](https://job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf), 10.05.2019. While this was the case even 10 years ago, it can be said that today's social media presence of individuals plays a significant role not only in their recruitment processes, but also in their entire lives.

<sup>63</sup> **Citron / Franks**, p. 351.

<sup>64</sup> **Citron / Franks**, p. 351; **Danielle Keats Citron**, "Revenge porn should be a crime in US", 2014, CNN, <https://edition.cnn.com/2013/08/29/opinion/citron-revenge-porn/>, 10.05.2019.

<sup>65</sup> **Mary Anne Franks**, "The Fight Against Digital Abuse : The View from the US", 2015, Womensaid, <https://www.womensaid.ie/16daysblog/2015/12/15/the-fight-against-digital-abuse-the-view-from-the/>, 10.05.2019. As a result of sexual harassment, the victim's having to quit his job, leave school or his family is regulated in the Turkish Penal Code as the aggravated state of the sexual harassment crime due to its consequences. Even if the sexual harassment is not continuous or has ended, if the psychological effects of the act prevented the victim from maintaining a healthy relationship and caused him to leave, this situation will find application.

<sup>66</sup> **McGlynn / Rackley**, p. 549.

and dignity of the person, as I have mentioned before, along with these images, often insulting and insulting articles are shared about the victim, and in this sense, it is an attack on the spiritual personality.

In the case of cyber sexual crimes and revenge porn, sharing such posts sends a message to women that this can happen to them, even if she they are not at the center of harassment<sup>67</sup>, <sup>68</sup> and behaviors of people who don't participate directly to the harassment but showing the same attitude towards women or think that "it's just for a little bit fun" become legitimized. In this respect, attacks with revenge porn don't only target the dignity of the related person but also it also targets the women's community and identity.

In terms of violating the privacy of private life, acquiring the images, which is the first stage of the crime, is not a violation since it is usually done with the consent of the victim in revenge porn, but the spreading of these images without the consent and knowledge of the people undoubtedly constitutes a violation of the privacy of the private life of the people. On the other hand, this situation also constitutes a violation of the right to protection of personal data, as it will eliminate the rights and control area of data subjects over personal data.

Finally, sexual personality, expression, and autonomy, which are a reflection of spiritual personality, are also values damaged by crime. Moreover, due to the fact that victim women share their images with consent at first, they are perceived by the society as the main responsible for the crime and the initiator of the action, and the victims are considered the main responsible for their own abuses<sup>69</sup>. This point of view, unfortunately, softens the attitude of the society towards the crime and delinquency as we say, lowers the guard of the victims.

#### **D. Proliferation of Revenge Porn - Websites**

The role of smartphones and internet access in the prevalence of revenge porn and its emergence as an important social problem cannot be denied<sup>70</sup>. Technology not only changes the way crimes are committed, but also shows this effect in terms of sexual crimes. The spread of private sexual images of people on websites where such sexual content is shared, and the sharing of personal images of many famous names in the cloud system, has become one of the news we frequently encounter in the press today<sup>71</sup>.

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<sup>67</sup> McGlynn / Rackley, p. 550.

<sup>68</sup> In fact, all kinds of pornographic content, whether it is revenge porn or not, objectifies women for the sexual experience of men and strengthens the perception of women as a used and owned commodity as a general practice. See: **Jeremy Waldron**, *The Harm in Hate Speech*, Harvard University Press, Boston, 2012, p. 74.

<sup>69</sup> McGlynn / Rackley, p. 551; Micheal Salter / Thomas Croft / Murray Lee, "Beyond Criminalization and Responsibilisation: Sexting, Gender and Young People Current Issues in Criminal Justice", Vol. 24(3), 2012–13, p. 309; Hall/Hearn, p. 21.

<sup>70</sup> McGlynn / Rackley, p. 536; Flynn /Henry/ Powell, p. 4.

<sup>71</sup> The scandal, in which the accounts of many famous people called "Celebgate", especially the famous Hollywood actress Jennifer Lawrence, were hacked and their obscene photos were shared, took place in 2014. Lawrence, in a statement, called the theft of her photos a sex offence. **Vanity Fair**, "Jennifer Lawrence Calls Photo Hacking a "Sex Crime", 2014, <https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>, 10.05.2019. Ryan Collins, one of the perpetrators was sentenced to 18 months in prison in the court proceedings in USA, for stealing photos from the information system. BBC, "Celebgate hack: Collins sentenced over nude photos theft", 2016, <https://www.bbc.com/news/technology-37796986>, 10.05.2019.

In parallel with the developments, revenge porn has also become a considerable industry. Hunter Moore's popular website "Is Anyone Up?" was viewed by more than 300,000 daily before it was shut down in April 2012<sup>72</sup>. Moore had created a download form within the site, which was based on the American 1996 Internet Communications Order, which severely limited the liability of the content provider<sup>73</sup>. Along with filling out the form and uploading the images to the content provider's website, people also assumed the legal responsibility in this regard.

Due to American legislation, Moore could not be held responsible for his abusive and humiliating behavior. This website was giving place to obscene images of people, along with their identity information and social media accounts. Moore also did not respond in any way to victims' requests for content to be removed. The section of the site called "Daily Hate" consisted of complaints from people whose images were shared without consent. In this section, Moore included images of the victim along with her complaint, leading to further of abuse and psychological violence<sup>74</sup>.

However, it proved very profitable for Moore to manage the website in question<sup>75</sup>. Moore earned a monthly income of between \$8,000 and \$30,000 from the ads he placed on the site. But in 2012, an investigation by the FBI began investigating Moore's links to hackers. Moore was closed the website due to the developments and his house which located in California State, was also raided in 2013. It turned out that Moore had paid hackers to steal sexually explicit images from password-protected computers and email accounts<sup>76</sup>. Moore, who was arrested in 2014, was sentenced to 5 years and 6 months in prison<sup>77</sup>. Of course, the sentencing of Moore didn't stop those who wanted to profit from revenge porn. Today it is estimated that there are over three thousand websites that only provide revenge porn content<sup>78</sup>.

Even if the perpetrator obtains, saves, or doesn't save the images for his own access only; these images are ultimately uploaded to these websites created for the sharing of images. The economic development of the sector serves the perpetrators to act with financial motives and the prevalence of the sector serves the purposes of humiliating the victim and perpetrating psychological violence.

Of course, the most severe and offensive form of these images are those taken during sexual assault. In an incident that took place in the United States in 2013, two high school football players sexually assaulted a 15-year-old teenage girl, was caused a great echo in the

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<sup>72</sup> **Dave Lee**, "IsAnyoneUp's hunter Moore: 'The net's most hated man'", 2012, BBC, <https://www.bbc.com/news/technology-177842232>, 10.05.2019 ; **McGlynn / Rackley / Houghton**, p. 29.

<sup>73</sup> **Salter**, p. 4.

<sup>74</sup> **Salter**, p. 4.

<sup>75</sup> **Salter**, p. 4; **Hall / Hearn**, p. 21.

<sup>76</sup> **Citron / Franks**, p. 368.

<sup>77</sup> **Abby Olheiser**, "Revenge porn purveyor Hunter Moore is sentenced to prison", 2015, Washington Post, [https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/?utm\\_term=.c77228683d0f](https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/?utm_term=.c77228683d0f), 10.05.2019.

<sup>78</sup> **DeKeseredy / Schwartz**, p. 2.

media<sup>79</sup>. The main reason why the issue is covered in the media is that while the perpetrators sexually assault, they broadcast it online and live. While the images were later used to humiliate and harass the victim, the victim also faced with many death threats. On the other hand, the aforementioned images also revealed the crime committed against the young girl who did not remember anything about the incident due to the violence she was subjected to.

Another aspect of websites that is important in terms of revenge porn is that these websites mediate crime. While the perpetrator who wants to take revenge is found at the first stage in the dissemination of the images, revenge porn websites mediate the commission of the crime by making the images accessible to the entire internet world. While these websites, which can be called “secondary distributors”, cause the images to spread to everyone and become “viral”<sup>80</sup>, they sometimes increase the unfair content of the crime by sharing the images with some humiliating statements and data of individuals .

#### **E. Evaluation Of Revenge Porn in Terms of Turkish Penal Code**

Revenge porn behavior may be suitable for a number of crimes in the TPC, depending on the way it is committed. First of all, since the images of the persons are in the nature of personal data, in the event that the images were recorded without consent in the first stage of the crime, the act constitutes the crime of “*recording personal data*” (Article 135 of the TPC). Since these intimate and obscene images are related to the sexual life of the data subject, the perpetrator should be punished in accordance with the qualified version of this crime. Similarly, in the first stage, if the images are stolen from the victim’s computer, e-mail or the cloud system he or she is using, the perpetrator’s actions, it constitutes the crime of “entering the information system” (Article 243 of the TPC) and the data belonging to the perpetrator from the victim’s accounts it is sent to another system, it constitutes the crime of “*blocking the system, corrupting, destroying or changing the data*” (Article 244/2 of the TPC). In addition, since these images are in the nature of the personal data of the victim, the crime of “*Giving or seizing the data unlawfully*” (Article 135 of the TPC) will also be in question. Similarly, the perpetrator who uploads pornographic images to the website and the website administrators who share these images with everyone can be held responsible for the crime of “obscenity” (Article 266 of the TPC).

It is certain that the crime of “*Violating the privacy of private life*” (Article 134 of the TPC) will constitute in terms of obtaining and publishing images, including images related to private areas of individuals. If the perpetrator uses the images of revenge porn to threaten the victim, the crime of “*Threat*” regulated in Article 106 will be applied but if this threat includes and aims to the sexual intercourse under compulsion and without consent of the victim, revenge porn can be also used as a tool for sexual assault.

Finally, revenge porn can be evaluated in terms of the crime of “*sexual harassment*” (Article 105 of the TPC). The scope of the sexual harassment crime, which protects the sexual

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<sup>79</sup> McGlynn / Rackley / Houghton, p. 35.

<sup>80</sup> McGlynn / Rackley, p. 541.

freedom, identities, sexual self-expression, and autonomy of individuals, consists of any behavior that does not create physical contact but harass people for sexual purposes. By committing the act of revenge porn, the perpetrator directs towards the legal value protected by crime, aims to wear down the victim sexually and to restrict his sexual freedom. In addition, considering that the revenge porn have the characteristics of all kinds of sexual assault; harassing, frightening, coercive, threatening characteristics, it should be accepted that the act constitutes an attack against sexual immunity. In this respect, in my opinion, the perpetrator of revenge porn should also be held responsible for sexual harassment.

In addition, content provider web site administrators will be held responsible as financial aid/co-perpetrator if they have set up their sites solely for revenge porn or disclosure. Since social media platforms such as Facebook, Twitter and Instagram are not specific to the sharing of revenge porn, a participation will cannot be mentioned here. However, for websites that create platforms for sharing revenge porn and turn it into a financial income, there is a willingness to participate and their causal contribution to the commission of the crime.

However, none of the above crime norms fully meet the content of the injustice I have defined above. This reciprocity is valid both in terms of crime type and sanction. Violation of privacy with the motive of revenge, especially the dissemination of nude and/or sexual intercourse photos and images over the internet is a different type of action in itself. This difference exists in terms of both the movement element and the moral element of the crime. On the other hand, the corresponding sanction in terms of the effect of the crime on the victim, their relatives and society should be higher than the penalties for the crimes mentioned above. Therefore, it is clear that a new crime norm is needed in this area as well. Since the legal value protected by this type of crime is the sexual freedom of the individual, the crime type should be included in the crimes against sexual freedom.

#### **IV. Child Pornography**

Child pornography can be defined as sexually satisfying, abusive images including images containing the child's genitals/regions, with the psychological terminology of "pedophiles", who have pornographic, deviant behaviors towards children<sup>81</sup>. The child in the image may be a real child engaged in sexual activity, or the creation of sexual content by creating extremely realistic images of a minor who is not in reality is also within the scope of child pornography. It is a widely shared view that data on child pornography and pedophiles' practices in the virtual space, such as conveying ideas, fantasies, and opinions, play an important role in nurturing, encouraging, and facilitating crimes against children<sup>82</sup>.

One of the biggest harms that can happen to children via the internet and which is regulated as a crime type in the criminal law of many foreign countries in comparative law, these pornographic contents for children and the use of children in the preparation of these

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<sup>81</sup> **Yaman Akdeniz**, *Internet Child Pornography and the Law*, Ashgate, London 2008, p. 9-11; **Max Taylor / Ethel Quayle**, *Child Pornography: An Internet Crime*, Brunner-Routledge, London, 2003, p. 3.

<sup>82</sup> **Füsün Sokullu Akıncı**, "Avrupa Konseyi Siber Suç Sözleşmesi'nde Yer Alan Maddi Ceza Hukukuna İlişkin Düzenlemeler ve İnternette Çocuk Pornografisi" İÜHFM, İstanbul, C: LIX S: 1-2, 2001, p. 31; **Dülger**, p. 200.

contents<sup>83</sup> constitute one of the most important problems encountered due to the internet<sup>84</sup>. This important issue has been the subject of many national and international legal texts in terms of both the effect of children on these contents and the use of children as objects in obtaining these contents. The production, distribution, and possession of child pornography data, especially through cognitive systems, is increasing day by day. Therefore, The European Convention on Cybercrime has obligated the contracting states to make important regulations in this area due to the fact that this situation has become destructive in terms of the health and psychosocial development of the children and because of the concerns it creates.

Article 9 of the Convention is about child pornography. With this article, it is aimed to strengthen the measures to protect children especially from sexual exploitation, to reorganize the relevant articles of the national criminal law systems of the contracting countries in line with this convention, and to create more effective provisions against the use of information systems in sexual crimes against children by making these if there is no regulation on this issue.

The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, which aims to prevent and fight against sexual exploitation and abuse of children, to protect the rights of victims of sexual exploitation and abuse, and to develop international cooperation in the face of this social problem, includes preventive and protective measures and criminal law and criminal policy provisions. Turkey signed the aforementioned convention on 25 October 2007 in Lanzarote and with the “*Act on the Approval of the Protection Against Protection of Contract*” on 10 December 2017, numbered 6084, the contract named “*Council of Europe Sexual Exploitation and Abuse of Children*” has become a part of our domestic legal system. Producing, suggesting, distributing, owning, and viewing pornographic publications about children on the internet are considered criminal acts according to Article 20 of the Convention.

“*The crime of obscenity*”, which includes child pornography, is regulated under Article 226 of the third part of the TPC, titled “*Crimes against society*”, under the seventh section titled “*Crimes against public morals*”. This crime prohibits behaviors that violate the general morals and harm the psychological and physical integrity of children, who constitute the material subject of the crime. The first issue that needs to be mentioned regarding the regulation is that an open-ended and changing over time concept such as “obscene” preferred in naming the crime<sup>85</sup>. Using the word “pornography” instead of the word “obscene” will make the type of crime much better and more identifiable.

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<sup>83</sup> Austrian Penal Code, section 207a; Belgian Penal Code, article 383; Canadian Penal Code, Section 163.1; Danish Penal Code, section 235; New French Penal Code, articles 227-23; German Penal Code, section 184 (3), Child Pornography Act 1996, section 2; Dutch Penal Code, section 240b, Norwegian Penal Code, section 211; Swedish Penal Code, part 16 section 10a; British Child Protection Act 1978, section 1, appended to the Criminal Justice and Public Order Act 1994; see: **Ulrich Sieber**, Crimes on the Internet and the Tracking of Crime on the Internet: Which Measures Are Recommended in the Light of New Developments in the Global Information Society?, Trans: Yener Ünver / Mustafa Temmuz Oğlakçioğlu, Özyeğin University, 2014, p. 51.

<sup>84</sup> **Sieber**, p. 52.

<sup>85</sup> **Dülger**, p. 496.

Apart from this, the fact that child pornography is not regulated as a separate crime, especially by taking the relevant articles of the European Cybercrime Convention as an example, constitutes an important shortcoming for the TPC<sup>86</sup>. Attempting to organize a wide area of crime such as pornography in a single article is the main source of inadequacies in the provision. In the regulation, situations such as how and by which method the obscene publications will be sold and displayed are given in detail. Regulations regarding those who sell, export, store and engage in other acts of such content do not provide sufficient clarity. Parallely to the explanations above, all acts of child pornography carried out over data transmission networks should be made a separate type of crime<sup>87</sup>.

An important point that I would like to point out is that the perpetrators who commit acts of abuse against children over the internet could be punished by article 103 of TPC. I don't think they can be punished accordingly. Although this view seems to be against the principle of legality in crime and punishment at first glance, when the crime norm is carefully examined, it is seen that there is no violation of this principle. In addition, this norm should be applied based on the purpose of the historical legislator in creating this type of crime and the method of interpretation appropriate to the purpose to be made in the face of the developing society and emerging problems.

Let's consider the issue through an example: The perpetrator recognized a child under the age of eighteen from a social media account, somehow obtained nude images and used them as a means of blackmail, thus breaking the will of the child and allowing her to sit in front of her computer completely naked. Let's assume that the perpetrator provides her to fondle herself or insert an object into her vagina and/or anus, recorded these images and shared them on the internet.

In the article 103/1 of TPC, the expression "person who sexually abuses the child" is used for the simple version of the crime, and it is further stated that "all kinds of sexual behavior" should be understood from sexual abuse. In the type of crime, no other factor is sought for children who have not completed the age of fifteen or who have not developed the ability to perceive the legal meaning and consequences of the act, while it is stated that only sexual behavior performed against other children based on coercion, threat, cheating, or any other reason affecting the will is abuse. On the other hand, in the second paragraph of the crime, inserting an organ or other object into the body is regulated as a qualified form of the crime. Performing the act by using force and threat against children who have not completed the age of fifteen or who have not developed the ability to perceive the legal meaning and consequences of the act, is also regulated as a qualified state that increases the punishment of the crime. In that case, it is a crime to commit this act against minors who cannot perceive what the action taken against them is and its consequences, and who has weak or no will power is crime, also committing this crime against children who has will by force, threat. In other words, the crime is committed either against a child with weak or no will or against a child whose will is affected.

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<sup>86</sup> Dülger, p. 496.

<sup>87</sup> Dülger, p. 498.

In that case, it is possible to apply article 37/2 of TPC in this matter. The perpetrator commits sexual acts on himself and abuses the child, by deceiving and/or threatening the child, whose will he/she weakens or who already has a weak will, by turning him/her into a tool. In my opinion, this interpretation is in accordance with both the principle of legality in crime and punishment and the purpose of the norm.

If it is stated that this norm cannot be applied by objecting to my opinion, with the criminal law requirements (it may be due to both theoretical and practical requirements), then it should be accepted that there is a legal gap in this regard and a regulation should be made urgently.

In terms of article 102 of TPC, this interpretation is not impossible but more difficult due to the type of crime. However, this difficulty does not change the fact that adults are abused in the same way. Therefore, the legislator should fill the legal gaps in this matter as soon as possible.

In spite of the fact that the lawmakers bind child pornography to sanction with criminal law instruments, it is seen that the crime has not decreased, but raised with the developments in information communication technologies. According to the research that “End Child Prostitution and Trafficking” (ECPAT) organization made with UNICEF, the number of people arrested for child pornography offenses increased by 30 percent between 2000 and 2006, and doubled in 2009<sup>88</sup>. American Attorney General Eric Holder’s words: *“Sadly, we’ve seen a historic increase in the distribution of child pornography, the number of images shared online, and crimes against child sexual immunity, tragically, the only place we see a decline is in the ages of the victims.”* reveal the gravity of the situation<sup>89</sup>.

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<sup>88</sup> ECPAT International, “Trends in online child sexual abuse material”, 2018, <https://www.ecpat.org/wp-content/uploads/2018/07/ECPAT-International-Report-Trends-in-Online-Child-Sexual-Abuse-Material-2018.pdf>, 10.05.2019.

<sup>89</sup> The United States Department of Justice, Child Pornography, 2017, <https://www.justice.gov/criminal-ceos/child-pornography> 10.05.2019.

## **Conclusion**

The internet, which radically changes all areas of our lives, inevitably affects crimes and the way they are committed. Sexual crimes are also at the center of this effect of the internet, and changes are observed in the number and types of sexual crimes. The number of cyber sexual crimes, which represent sexual crimes committed via the internet, is increasing day by day and cyber sexual crime is becoming increasingly common.

The basis of this transformation experienced by sexual crimes with the internet is based on the negative opportunities created by the internet for criminal offenders. Widespread accessibility and availability of necessary facilities to engage in deviant sexual behavior with the existence of the internet, and the ability to carry out these acts anonymously are the main reasons for the expansion of the cyber sexual delinquency field.

The prevention of cyber sexual crime phenomena, which can be grouped under the main headings of cyber sexual harassment, non-consensual pornography, and child pornography, will only be possible if the legislators realize the reactions of the victims and quickly implement the legal regulations that will protect individuals in this regard. Many countries, especially about revenge porn, which is a type of cyber sexual assault, have entered a feverish legislative work on cyber sexual crimes. While the aforementioned legislative activities are carried out, it is essential to take into account this feature of the internet, which is the most important area of expression of people today, and to strike a reasonable balance with the rights of individuals based on freedom of thought and the aim of protecting victims from cybersexual threats.

In terms of Turkish criminal law, a separate crime norm regarding revenge pornography should be established; due to the devastating effect it has on the victim, the victims' relatives and the society, the sanction should be severe as in other crimes against sexual freedom and should be regulated as an independent type of crime among crimes against sexual freedom. In the case of sexual abuse of the child over the internet, either article 103 of TPC should be applied or a separate type of crime should be created by making use of the agency of indirect perpetrator. A separate crime norm must be regulated for acts of sexual abuse of adults over the internet.

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