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# Ways of Legislative Improvement in Response to Technology-Facilitated Sexual Violence

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Korean Women's Development Institute

**Ways of Legislative Improvement in  
Response to Technology-Facilitated  
Sexual Violence**

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## I . Introduction

### 1. Research Purpose and Necessity

Despite an increase in technology-facilitated sexual violence and ensuing changes in gender-based violence, the related laws are still insufficient to cope with the violence. In this background, it is perceived that technology-facilitated sexual violence is possible based on dual sexual norms arising from sexual discrimination, stigmatization of victim women, and the culture that consumes women sexually. With this problem awareness, it is necessary to analyze characteristics of technology-facilitated sexual violence and constantly changing aspects of crimes, review limitations of existing laws, and present ways to improve the laws. This study aims to examine limitations of current laws and prepare ways of legislative improvement focusing on the punishment of technology-facilitated sexual violence and areas of support for victims.

## 2. Research Contents

First, we analyzed characteristics of technology-facilitated sexual violence. Through a literature review and analysis of technology-facilitated sexual violence cases, we identified characteristics of technology-facilitated sexual violence according to technological properties and generated rudimentary data to seek the areas and contents in need of legal response and methods of supporting victims.

Second, we analyzed contents and limitations of laws related to technology-facilitated sexual violence. We looked into the changing process of laws related to the punishment of technology-facilitated sexual violence and support for victims as well as contents and limitations of existing laws, presented the necessity for legislative response, and analyzed the contents of bills on technology-facilitated sexual violence proposed in the National Assembly and legislators' discussion materials for reference when preparing alternatives. Specifically, we examined the related laws, including the Criminal Act, the Act on the Promotion of Information and Communications Network Utilization and Information Protection (hereinafter referred to as the "Information and Communications Network Act"), the Telecommunications Business Act, the Act on the Protection of Children and Juveniles from Sexual Abuse (the "Juvenile Sexual Protection Act"), the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes (the "Sexual Crime Punishment Act"), and the Sexual Violence Prevention and Victims Protection Act (the "Sexual Violence Prevention Act").

Third, we analyzed overseas cases of legislation and policy response to technology-facilitated sexual violence, derived implications and used them as data to prepare legislative alternatives.

Fourth, based on the results of the above analysis, we suggested ways of legislative improvement related to technology-facilitated sexual violence.

### 3. Research Methods

#### A. Literature Review

We reviewed previous studies at home and abroad on technology-facilitated sexual violence, and analyzed relevant existing laws, bills proposed in the National Assembly and committee minutes, and overseas laws and policy cases related to technology-facilitated sexual violence.

#### B. Case Analysis

We analyzed support cases related to technology-facilitated sexual violence with the help of counseling and victim support centers that focus on technology-facilitated sexual violence as well as centers that provide counseling and victim support for overall sexual violence; and collected a total of 275 cases from four counseling centers located in Seoul, entered and analyzed the data.

#### C. Expert Counsel

We received counsel from experienced experts in studying and supporting victims of technology-facilitated sexual violence and reflected their counsel in the following processes of this study: i) when setting directions and making plans for research, ii) when collecting counseling cases and preparing analysis methods, iii) when reviewing directions for case analysis and examining legal limitations of punishing technology-

facilitated sexual violence and supporting its victims, and iv) when seeking alternatives.

## II . Analysis of Characteristics of Technology-Facilitated Sexual Violence Using Counseling Cases

Using the counseling cases of technology-facilitated sexual violence, we found that there were legal and institutional gaps in preventing victimization and supporting victims while types of offence and victimization diversified with technological evolution. Technology-facilitated sexual violence is not only a gender-based violence where women account for an overwhelming majority of victims, but also a type of sexual violence that consumes women as sexual objects. Also, due to the historical process of forming the online culture, the lack of legal and institutional punishments, and mild sentencing of the crime, technology-facilitated sexual violence has evolved as a new type of technology-facilitated sexual violence that produces a lot of victims.

We also found from the counseling cases that technology-facilitated sexual violence had the following characteristics: first, technology-facilitated sexual violence occurred in many cases between intimate relationships, including dating or married couples. There were more counseling cases of taking photos of the other person without the photo-taken person's awareness or seeking consent from the person than those of taking photos with consent from the photo-taken person. This is believed to reflect the attitude of perceiving or acting as if men in

intimate partnerships had the right to their partner women's sex. Second, technology-facilitated sexual violence took place between online relationships through random chatting applications or social media in the digital network environment. In these cases, a lot of women victims were in their 10s and 20s who had a high accessibility to technology and who were socially perceived as 'sexual' beings. Third, the violence arose between business relationships, such as co-workers or business partners. In these cases, victims had to share the same space with offenders, the violence used the relations of human trust, illegal images were likely to be distributed in the workplace, and victims had economic needs for retaining or seeking jobs. Due to these characteristics and elements, business relationships were vulnerable to victimization and response to the violence. On the other hand, if the workplace is well-equipped with the procedures of dealing with gender-based violence incidences except for the distribution of illegal images, the violence between business relationships was likely to be an opportunity to seek problem-solving in the workplace. Fourth, many and unspecified persons participated in the violence through endless distribution and redistribution of illegal images/videos, etc. In these counseling cases, many anonymous persons in addition to the initial distributor of the images participated in the redistribution of them. This resulted in a series of additional and continuous damages and constantly caused anxieties in victims. However, ironically, redistribution was lightly treated in the process of handling the violence cases.

In the counseling cases of technology-facilitated sexual violence centered on illegal images/videos, victims expressed their anxieties about distribution and redistribution as a type of practical and potential damages. Together with damages when the images were actually

distributed, victims' anxieties about possible distribution at any time caused mental damages, including depression, panic disorder, and post-traumatic stress disorder (PTSD). This led to physical pain, further causing mental and physical distress to the extent that victims had to reconstruct their lives or ate away their daily lives, such as thinking about or attempting at committing serious self-harm or suicide. However, legal and institutional procedures treated these anxieties as victims' personal problems at the emotional and psychological levels, and had not taken any particular measure before the images were actually distributed. For example, these anxieties about distribution were not treated as an important issue in the investigation process, nor offenders' digital devices were actively seized or searched for. Due to this passive handling of the cases, redistribution could not be prevented at times. Also, victims' anxieties about distribution were connected with offenders' threat to distribute the images, etc. In reality, distribution of illegal images or videos delivered social and economic damages on victim women's lives, such as making them unable to continue their school or work lives. Because they could not bear the burden of endless distribution and disclosure of personal information, victims changed their names, resident identification numbers, dwelling places, work places, or occupations, and even planned to have plastic surgery. In addition, they could not still receive complete help or support from the investigation agency in the inspection process or from lawyers in the trial process. In frequent cases, victims heard remarks of secondary offence, and in many cases, they were not properly separated from offenders.

What was remarkable through the case analysis was that a new type of technology-facilitated sexual violence and sexual exploitation was emerging according to the evolution of a digital media environment, and

that various types of offences occurred by making use of inadequate legal systems or new technologies. Accordingly, it is urgently required to make up for the systems to support for victims or prevent damages from befalling victims.

According to the results of the analysis of counseling cases, first, one of the outstanding characteristics of the counseling cases of technology-facilitated sexual violence was that stalking, as daily harassment facilitated by digital technologies, was connected to victimization, or it appeared as victimization itself. Stalking can be said to be similar in nature to illegal distribution in that it exercises influence on the victim's social media or on the network of people around the victim linked to the social media. Stalking crime controls the victim by pressuring the victim to think that he or she is actually under the offender's influence. Also, there were stalking cases where the offender not only spread false information or combined images of the victim but also sexually insulted the victim under the victim's feigned name. Such problem as this is related to the fact that current standards for punishing technology-facilitated sexual violence lie in the concept of gendered sexual love, like obscenity and shame. Because narrow understanding of sexual violence in the Sexual Violence Punishment Act had the effect of decriminalizing harassment arising from such crimes as stalking or impersonating the victim, measures for improving this issue need to be prepared.

Second, as it becomes easy to save, copy, and send files, precaution or prevention of illegal image-taking has become impossible. In particular, as saving content, like the online cloud, becomes possible, there is always the possibility of distributing images/videos. In the counseling cases as well, we found that victimization occurred according to technological characteristic that contained the possibility of

distribution at any time. In particular, a series of victimization and various types of technology-facilitated sexual violence crimes took place in connection with each other due to the distribution of the images/videos. Illegal images/videos do not merely become the problem of filming or possessing them without consent. Once distributed by any means, either intentionally or unintentionally, they mass produce offenders of redistribution and illegal distribution afterwards. Even during the investigation and trial periods, victimization continues, and even with passage of time, the images/videos can be redistributed at any time. The problem is that redistribution is poorly treated or addressed as a relatively ‘weak’ crime compared to the primary distribution or redistribution with sure evidence. As confirmed in the cases examined in this study, redistribution too delivers almost the same level of damage on the victims as that of the primary distribution. Not only that, it endlessly and repeatedly afflicts damages. In this regard, redistribution needs to be seriously handled, and legal and institutional improvements need to be considered.

Third, when illegally distributed, victimized women’s personal information was distributed together with illegal images/videos. When threatened with distribution too, these women were threatened to spread their personal information, including their images, in many cases. Even if the threat to distribute personal information did not cause any damage from illegal photo-taking, it is necessary to consider punishing the act of taking personal information for a purpose of using it in a sexual manner.

Fourth, technology-facilitated sexual violence has a characteristic of occurring with a crossover of victims’ identities, including gender, age, and disabilities. Children and youth, and adults with developmental

disabilities were vulnerable to technology-facilitated sexual violence due to not only limits in their intellectual abilities, coping abilities, and social experiences but also poor social conditions. The vulnerability was comprehensively built by i) the absence of social, economic, and political power, ii) economic dependence, iii) the lack of social resources, iv) narrow human relations, v) the status of completely relying on adult guardians, vi) social perceptions and norms about the sexuality of women with disabilities and children. With regard to this, their victimization revealed more and more its character of being aggravated, prolonged, subordinated, and exploited, while their autonomous coping abilities decrease, and their recognition of victimization became selective. However, it should be noted that the analysis of counseling cases in this study was limited in sufficiently revealing the way gender and other identities crossed over. Until now, cases of children, youths, and heterosexual women in their 20s and 30s without disabilities have accounted for the largest portion of victimization. However, it is necessary to further explore cases of illegal image-taking and other technology-facilitated sexual violence in relation to identities, including disabilities, sexual orientation, gender identities, and migration status.

Fifth, there were many cases of victimization through personal broadcasting on the Internet. In many similar cases, victims were mobilized for sexual-purpose broadcasting. In other words, women were invited to appear on the personal Internet broadcasting so called ‘buddy room’ and to have them expose their breasts or genitals, or broadcast masturbation in real time. In many other cases, victims had to enter a contract for appearing on the ‘buddy room’ based on their financial debts or ‘sponsorship.’ In still other cases, offenders broadcast the ‘buddy room’ after making victim women drunk or drugged. In these cases, it

was difficult to leave evidence due to the characteristic of real-time/live broadcasting. In the cases where images were captured and spread during the broadcasting, it was difficult to find out who spread the images and where the images were spread. In the cases where they were drunk or drugged when broadcasting, victims were hardly aware of the situation, so it was difficult to report or initiate an investigation of victimization.

Sixth, there was the issue of evidence that could be posed from two aspects. First, evidence was not properly seized or searched for. Seizure of or search for digital devices, including mobile phones, tablet PCs, and laptops that might store evidence, is an important process of preventing additional distribution of the images. But many victims thought that evidence was not actively seized or searched for in the police investigation process. Also, while seizure or search was not properly done, offenders frequently said that they lost mobile phones or laptops or that the devices were broken. In these cases, additional measures were not taken. Second, images/videos submitted as evidence were edited in a way that prevented victims from proving their victimization. In a representative case, the images submitted by the offender were taken and edited to look as if the victim gave consent for the image-taking or sexual relations. In other cases, images were edited in such a way to make it difficult to prove through the images whether the victim used the offender's drug even if it was suspected; the scene of giving consent while drunk without being aware of it during the image-taking was interpreted as actually giving consent; and the image-taking or real-time streaming continued on the ground of receiving consent from the victim. These cases were where evidence was likely to be maliciously used for the victims due to the ways of image-taking and editing that did not reveal the victims' inability to resist.

Seventh, due to the current way of distributing sexual abuse materials via a closed platform operated largely for the unknown or paid subscribers, it was difficult to identify the current status of occurrence or size of victimization. For example, conditional meetings or suggestions for ‘sponsorship’ through random chatting applications or personal direct mail made it difficult to estimate the current occurrence and size of victimization due to their closed and individualized character. This problem was not revealed until victims attempted to make it known to the outside.

Eighth, there were many cases of using illegal images/videos for online broadcasting or as video clips to attract customers. A new type of sexual exploitation like this had a characteristic of sex-trafficking for the purpose of profit-making as well as a stronger characteristic of sexual violence, or a characteristic of accompanying the victimization of technology-facilitated sexual violence. In particular, sex-trafficked women were found to suffer double or triple the damages from technology-facilitated sexual violence. According to the counseling cases, offenders not only perpetrated sexual abuse more easily by using illegal images but also continued and expanded the violence by financially exploiting the victim women or demanding another image through threats. Despite sexual and monetary exploitations, victim women were in a situation where they had to suffer all damages due to the risk of punishment for having been engaged in prostitution and the fear of distributing illegal images. Technology-facilitated sexual violence was used as a device that made it easier to exploit women sexually and monetarily. The legal reality that stipulates sex trade as illegal seems to deliver greater damage on them. Likewise, changes in the media environment and technological development have evolved the

perpetration types of technology-facilitated sexual violence, when they encounter with the existing gender culture, including a society's dual structure of judgment towards women's body and sex. As a consequence, women have experienced various types of victimization that are not encompassed by laws and systems. Technology-facilitated sexual violence has been discussed as an illegal behavior and crime, and legislations enacted to prevent the violence. In spite of this, attention should be paid to the constant occurrence of related accidents. To improve this situation, it is necessary to take diverse measures for legal, institutional, and socio-cultural improvements. Even if laws and systems cannot encompass them through the analysis of counseling cases, it is necessary to prepare measures for institutional improvement focusing on the aspects of damage and distress that women suffer in common.

### **III. Limitations of Laws on Technology-Facilitated Sexual Violence**

#### **1. Limitations of Reflecting Characteristics of Technology-Facilitated Sexual Violence**

Globally, the evils and illegality of technology-facilitated sexual violence have been considerably underestimated. As long as a standard is set based on the crimes that leave only a limited impact when a criminal act takes place once and comes to an end, it is possible to let the damage even from the one-time act persist and be repeated. It is also difficult to properly assess the illegality of and liability for a crime of technology-facilitated sexual violence that many anonymous strangers can conspire with each other and expand perpetration and victimization

even if they do not organize a criminal group. Due to taking the traditional type of crimes for a standard, falling victim to technology-facilitated sexual violence is trivialized, the statutory cap on its punishment is still low despite the amendment of laws, and sentences are formed at a lower level. This is closely related to the practices of socially widespread collusion and normalization of technology-facilitated sexual violence.

Digital content can maintain the quality of its original without being worn out or extinct however many times it goes through duplication. Also, its copy can be infinitely saved online or offline without costing much. Because of these characteristics, it is difficult to figure out how many copies are made once content is created. Also, there is no point distinguishing the duplicate from the original. Also, it is possible to preserve digital content perpetually, and restore the content even when deleted. It is not just easy to transform digital content to other format but also high-level expertise is not required to transform the content.

Crimes taking place based on online spaces by using digital content, such as making, processing, and distributing sexual images, do not correspond to the traditional concept of sexual violence based on physical reality. As for technology-facilitated sexual violence, however, its requisite elements as a criminal offence, meaning of falling victim to sexual violence, investigation methods and management of evidence, judicial proceedings, disposal of forfeited goods, statutory penalty and sentencing criteria, content and methods of protecting and supporting victims are all established with the traditional concept of sexual violence as a model. For this reason, the laws that could not reflect a newly emerged type of behavior caused gaps in both punishment and support for victims.

## 2. Demand for Sexual Shame and Punishment of Obscenity

The Criminal Act, a general law, applies to taking and distributing sexual images/videos by using a camera, etc., child and youth sexual exploitation materials, and distribution of obscene information via information and communications network. The crimes of making and circulating pornographic pictures as set out in the Criminal Act is based on the concept of “obscenity.” These crimes and obscenity by using communications media commonly demand that they arouse sexual stimulus or sexual shame.

The concept of “sexual shame” recognizes only a particular type of shame among the victim’s various emotions as the victim’s reasonable and normal emotion. Demanding “shameful emotion” from sexual violence victims are criticized in that it strengthens dual and discriminative norms of sexuality. Reflecting such issues, the court as well tries to construe the concept of sexual stimulus and sexual shame in a broader sense.

From the aspect of legal interests to be protected, the court no longer talks about the protection of social morality only. The crime of obscenity by using communications media and the crime of making sexual images/videos by using a camera, etc. are prescribed to protect the right to sexual self-determination, moral right, and sexual freedom as personal legal interests and to establish sound sexual customs as social legal interests.

The court has shown changes in interpreting sexual shame as a major concept and legal interest to be protected from the crimes of technology-facilitated sexual violence. However, it is difficult to expect stable legal interpretation when the concept is completely left to the

court's interpretation while leaving the concept as it is. For this reason, it is necessary to legislatively reflect changes in the criteria for the court's interpretation related to sexual shame. All the same, victimization of sexual violence is denied in practice due to the concept of sexual shame. In punishing technology-facilitated sexual violence, there strongly remains the character of punishing behavior that violates social morality.

The penal clause for the reason of obscenity bans a wide range of sexual expressions. Combined with the norm of sexual purity required of women and sexual violence victims, this leads to exclude from protection women as "violators of moral norms." If women made sexual expressions online using their own body, etc. and fell victim to technology-facilitated sexual violence due to the behavior, their sexual expressions can become obscene materials and place women in danger of being punished. For this reason, they give up seeking a remedy for damages from technology-facilitated sexual violence through criminal justice.

### 3. Legal Limitations of Punishing Technology-Facilitated Sexual Violence

#### A. Omission and Imbalance of Punishment due to the Way of Listing Provisions

The Sexual Crime Punishment Act and the Juvenile Sex Protection Act stipulate criminal acts and aspects of distributing illegal images/videos, edited materials, and child and youth sexual exploitation materials in the way of listing them one by one. The Sexual Crime Punishment Act punishes any person who takes photos of another person's body, distributes, sells, leases, provides, or openly exhibits or screens the

photos so taken and who does the before-mentioned acts for the purpose of profit-making, possesses, purchases, stores, or watches the photos. The Juvenile Sexual Protection Act punishes any person who produces, imports, exports, or provides child or youth pornography or sexual exploitation materials, who advertises or introduces, publicly exhibits or displays, purchases, possesses, watches the materials for the purpose of distribution or provision, who sells, lends, distributes, or provides them for profit-making purposes, who possesses or transports them for any of such purposes, or publicly exhibits or displays them. As such, the listed criminal acts and aspects in the two laws are not in agreement.

The way of listing the sexual exploitation materials is borrowed from the crimes of producing and distributing pornography in the Criminal Act. Listing specific acts and aspects may be helpful for securing clarity. However, the problem is that acts and aspects of crimes by using digital images have a different character from pornography that takes on physicality, nor are they formally fixed because of ever-present possibilities that a new type of crime may appear at any time. As such, while undergoing interpretation in the investigation and trial process, it was impossible to punish a behavior even if it had a similar meaning and criminality to that of the listed acts. For the interpretation of the wording, the behavior was deemed not to be included in the listed acts.

This way of listing criminal acts digs into interpretation of wording of listed types of acts one by one rather than reflecting legislative intent. The more specifically a variety types are listed, the more difficult it is to add a new type. When a new problematic case cannot be embraced in the already-prescribed types, serious imbalance ensues in punishing similar acts. It is not until a person commits a certain crime by using an unimaginable means in the existing laws and evades the laws that

the loophole can be filled posteriorly through legislative procedures.

### B. Limitations of “Against Will”

Article 14 and Article 14-2 of the Sexual Violence Punishment Act prescribe acts of taking photos or videos of a person, and editing or distributing them ‘against the will of the photo-taken person.’ In some cases, we found that the requirement for no punishment against will in technology-facilitated sexual violence caused a problem related to the scope of consent and the authenticity of the consent. In the process of asking whether image-taking, editing, and distribution were done against will, it was not questioned whether consent was obtained with regard to its content, purpose, method, and scope, respectively. Furthermore, the will is not always questioned in a state where the will can be freely expressed based on sufficient information. The process of questioning the will is at times ambiguous, and ‘consent is given against will’ at other times by a deceptive scheme or force, through violence or intimidation. At still other times, the images are taken without a prior notice or the images are used posteriorly beyond the scope of consent. Due to the possibility of infinite duplication of digital content, the content is not always distributed within the purpose of its distribution. Though some of the above acts can be punished according to the existing laws, they are left to legal interpretation of the investigation agency or the court.

If it is clear that consent was obtained by using violence or intimidation, it is easy to include the act in the image-taking against will. If consent was acquired by using deceptive scheme or force, it is reasonable to encompass the act in the image-taking against will through interpretation. However, if a deceptive scheme was used to get consent,

there arises a problem, depending on the case, when it becomes ambiguous whether crimes of taking photos/images by using a camera, etc. and distributing the photos/images prescribed in the Sexual Violence Punishment Act can be applied to the case. In a case where there was deception in the image-taking itself regarding the deceptive means, the image-taking can be interpreted as done against will. In the following cases, however, it is judged that victims are responsible for their choice because their images were not taken or distributed against will: i) where images were taken of a person by obtaining consent from the person who did not know the sexual meaning of the images, ii) a deceptive means was used in the process of persuading a person to take and spread the person's images, such as deceiving the person into believing that she/he would earn money from the image-taking or that evidence should be made to prove damages from other crimes, iii) where it was deemed that the images were taken and distributed with consent as a result of the victim's 'reasonable judgment,' and iv) where the purpose of taking and distributing images was mistaken, for example, when consent was obtained to take and post images by informing the victim that they would be used for the purpose of a model, but then the images were posted on a pornography distribution site in whole or in part.

If a law depends on the superficial will of the image-taken person, the law runs into barriers in judging whether persons with developmental disabilities fell victim to technology-facilitated sexual violence. Crimes of sexual violence committed against persons with mental disabilities, autism, or borderline disorders are relatively less known, and aspects of the crimes are not revealed well.

The crime of taking pornography by using a deceptive scheme or force subject to the Act on the Punishment of Arrangement of Commercial

Sex Acts, etc. (hereinafter called the “Sex Trafficking Punishment Act”) can be applied to sexual image-taking by using a deceptive scheme or force. However, this clause is established when ‘images, etc. expressing obscene content, including sexual intercourse,’ are taken. As such, the taken images should be proved as obscene materials, and compared to the crime of taking images using a camera, etc. the photo-taking targets are limited. Therefore, though it has a higher statutory cap on punishment than creating sexual images/videos by using a camera, etc. the clause does not tend to be applied well. In addition, even when the victims are included in the targets of protection and support as victims of sexual violence victims, they face a risk of being left out in practice from the scope of protection and support because the Sex Trafficking Punishment Act is not applicable to this case.

### C. Imbalance between Crime and Punishment

Once illegal images/videos are distributed online, they can be duplicated and spread infinitely because of the characteristics of online space and digital files. Then they are altered and processed in a different form to be produced and redistributed as secondary content and to be sexually consumed by a multitude. Even if support for their deletion is provided, there is no assurance of complete deletion online or of no further occurrence of victimization. In this regard, the illegality of non-consensual distribution is higher than non-consensual image-taking. Nevertheless, the current laws reveal imbalance between crime and punishment because they prescribe the same statutory cap on punishment for both the crime of taking images and the crime of distributing them. The statutory cap is set higher for the crime of distribution for the profit-making purpose only, and habitual offenders are simply sentenced

to aggravated punishment.

It is necessary to review an aggravated punishment clause on image-taking for profit. Not just distribution, provision, public exhibition, or screening of images/videos, but also even sales and lease that already connote the expectation of exchange of favor in return (a quid pro quo) in the concept came to be distinguishable based on whether the act has a profit-making purpose or not. As a result, there appeared the defensive logic that ‘the images were sold but the purpose was not for profit-making,’ and even the logic was at times reflected in the determination of punishment. However, it is improper to distinguish the acts that already connote the expectation of favor in return based on whether the act has a profit-making purpose or not. This is because it is important to additionally punish sexual exploitation to gain profit, whether big or small, not only through sales or lease as business but also through illegal images.

#### D. Limitations of Response to Victimization of Anxieties

Though there is an increase in the victimization of anxieties about distribution of digital images, it is difficult to respond to such victimization. Once made, digital content can be preserved perpetually, and spread rapidly and easily. Once the content is spread, it is almost impossible to completely delete the content. A severe damage can occur even when image-taking is merely presumed and even when the other person is likely to possess digital images. But it is difficult to take any legal action before collecting evidence for distribution of the images. When victims express their anxieties about distribution or even when they are threatened with distribution, the investigation agency is reluctant

to respond to them after simply checking that ‘any crime has not yet taken place.’ This problem has been pointed out, but this shows the limitations of laws that have been made focusing on posterior response. Since the introduction of the crime of threat or/and coercion by using photos, etc. in 2020, the act of threat or coercion to distribute illegal images has been punished. But it is not sure whether this crime can be applied to cases where it is impossible to prove the existence of illegal images. Even when investigation or punishment of threat or/and coercion is carried out, it cannot resolve anxieties about possible threat or/and coercion in the future. Because the crime of threat or coercion punishes the act of threat or coercion only, there is no legal basis for forcing the offender to delete the images that are used as a means of threat.

The crime of taking photos by using a camera, etc. checks only if the photos were taken and distributed against the victim’s will. This is related to the victimization of anxieties. For example, suppose a case where photos were taken under mutual agreements and the other person possessed the photos, but the person who possessed the photos did not express any intention to distribute them.<sup>1)</sup> Suppose another case where the other person was provided with photos or images that the victim had already had by offering a price for the images, deceiving the victim by fraud, or giving psychological burdens with a tenacious demand for the images; even if the other person possessed the images, this person did not express any intention to spread them. The image-taken person or the victim can be anxious about the fact that someone has her or his sexual images, thinking that the images have already been spread or she or he might be threatened to spread them.<sup>2)</sup> The victim may want to delete

1) 김정혜(2020), 디지털성폭력 피해자 보호·지원 방안, N번방 방지법 그 한계를 해결한다: 디지털성폭력 근절을 위한 21대 국회 입법과제, 국회여성아동인권포럼, p.37.

2) 김여진(2020), 디지털 성폭력 피해자 지원 체계에 대한 현재의 문제점과 과제, N번방 방지법 그

her/his sexual images because she no longer wants the other person to possess them. Or even when the victim provided the images, she/he may not have wanted the other person to continuously possess them. However, the crime of taking photos by using a camera, etc. asks about whether the photos were ‘taken or distributed against will.’ No clause or provision can be applied to the above-mentioned cases nor is there any means to enforce the other person to delete the images. In other words, once the other person possesses sexual images that are not taken against will, the other person’s possession of the images cannot be stopped even if the images are the victim’s images. As such, the victim’s right to self-determination is infringed upon and the victimization of anxieties persists. Judging from the fact that the image-taken person no longer wants the other person to possess the images, the ‘possession obtained from distribution against will’ and the ‘possession in a state where the images are not distributed yet’ are fundamentally the same. However, while the former constitutes the crime, the latter does not because the possession cannot even be stopped force. Therefore, it is necessary to prepare ways of resolving such irrational issues.

#### E. Limitations of Applying the Crime of Threat or Coercion by Using Images/Videos

As the crime of threat or coercion by using images/videos (Article 14-3) was newly established in the Sexual Crime Punishment Act in May 2020, the act of threat or coercion by using “images or duplicates that may arouse sexual desire or shame” came to be punishable. However, if a person threatens or coerces another person by using deep fake videos,

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한계를 해결한다: 디지털성폭력 근절을 위한 21대 국회 입법과제, 국회여성아동인권포럼, pp.54-55.

etc. prescribed in Article 14-2 of the Act, it seems difficult to apply Article 14-3) to this case. In other words, if a person threatens or coerces to produce and distribute sexual content by using the victim's personal information, if a person threatens or coerces to produce and distribute deep fake images/videos even without making them yet, or if a person does any other act that is very similar to these cases even if the person has not used sexual images/videos, these acts are excluded from the crime of threat or coercion by using the images.

#### F. Failure to Reveal the Attribute of Online Sexual Harassment as Sexual Violence

Online sexual harassment, consisting of texts, signs, sounds, photos, images, videos, or content with many types combined, cannot be fully explained of its ills as gender-based violence. As long as it does not fall under illegal images/videos, edited materials, and children or juvenile sexual exploitation materials, the crime of obscene acts by using means of communication media, the crime of libel, the crime of contempt, the crime of porno distribution, etc. apply to online sexual harassment. A particular expression can become sexual harassment because sexual discriminative social norms are at work. However, in the crime of obscene acts by using communications media and the crime of porno distribution, obscenity and violation of social morality are main grounds for their punishment. Also, the crime of libel and the crime of contempt depend on already-gendered social evaluation for their interpretation to protect external honor. Therefore, existing laws have limitations of being unable to reveal the attribute of online sexual harassment as sexual violence.

### G. Lack of Regulations on the Misuse of Personal Information

Of the deletion support cases in 2020 at the Support Center for Digital Sexual Crime Victims, a high proportion or 15.7% accounted for disclosure cases of identifiable personal information, including the victim's name, nickname, address, age, year of school admission, affiliation, and telephone number, together with the disclosed images.<sup>3)</sup> We found from the counseling cases as well that victimization of technology-facilitated sexual violence aggravated and expanded as it accompanies personal information. Therefore, it is necessary to discuss regulation of cases where personal information is used for technology-facilitated sexual violence by using the information that is available online.

The Personal Information Protection Act, which regulates the protection of identification personal information, cannot handle the problem of using disclosed personal information by persons other than the personal information controller because it consists largely of duties of the 'personal information controller'<sup>4)</sup> who manages personal information as part of his/her duties. Article 70(2) of the same law applies to a case where "a person obtains any personal information processed by third parties by fraud or other unjust means or methods, and provides it to a third party for a profit-making or unjust purpose." As such, it seems difficult to apply this clause to a case where a person obtains another person's personal information, and uses the information while committing technology-facilitated sexual violence. Furthermore, if a person obtained personal information not 'by fraud or other unjust

3) 한국여성인권진흥원(2021), 2020 디지털 성범죄 피해자 지원 보고서, pp. 32-33.

4) The term "personal information controller" means "a public institution, legal person, organization, individual, etc. that processes personal information directly or indirectly to operate the personal information files as part of its activities." (Article 2(v) of the Personal Information Protection Act).

means or methods' but by collecting information disclosed on the social network profiles or posted by the victim, Article 70(2) cannot be applied to the case. For this reason, many types of distributing the victim's personal information together with illegal images/videos, edited materials, or images that sexually insult the victim can evade punishment as sexual violence.

#### H. Impossibility of Punishing Crimes including Illegal Image-Taking, etc. of Sex-Trafficking Situation

It is a long-time problem that women involved in sex trafficking, including prostitution, cannot report their falling victim to various crimes in a sex trafficking situation due to the risk of being punished as sex traders. In the same context is the problem of taking and distributing images/videos of women in a sex trafficking situation against their will, or threatening and coercing to combine and distribute the images. However, characteristics of technology-facilitated sexual violence cause the victimization to become even more complicated. Because paying for sexual service is often perceived as purchasing the full authority to physically use the other person for a certain period of time, sex buyers at times regard the act of taking photos of the other person's body as being included in the 'service' of sex trade regardless of the other person's will. Moreover, even if the crime of image-taking by using a camera, etc. or the crime of making children and juvenile pornography is added to the crime of image-taking without consent, sex buyers know that the other person too will be punished for sex trade if the other person reports illegal photo-taking. For this reason, sex buyers do not think they will be punished for their act of illegally taking and distributing the images. When it comes to the possibility of punishment, illegal

image-taking in a sex-trafficking situation can be ‘safer’ than illegal image-taking in a situation outside of sex trade. In a society where there exists a stigma on women’s sexual behavior and sexual trade or prostitution, both the possibility of disseminating the sexual images/videos taken of them and disclosure of their sex trade history can be crucial threats to women. As such, the image-taken women undertake both the risk of getting punished for prostitution and the risk of getting their images/videos disseminated.

This situation enables sex trade for the purpose of making profits through the distribution of the images/videos rather than risking punishment for illegal image-taking. By simultaneously buying sex and taking illegal images/videos in the situation, sex buyers can seek their safety, secure a means of controlling the other person, and pursue tangible and intangible profits, including ‘reputation,’ earnings, and power, through the distribution of the images/videos. Going beyond committing another crime by taking advantage of the victim’s being unable to report the crime, they secure the possibilities of making other profits by continuously exploiting the other person or using the images.

#### I. Narrow Definition of Online Stalking and Limitations of Response

Online stalking often makes it possible to obtain and distribute illegal images/videos and to perpetrate online technology-facilitated sexual violence. Also, online stalking itself occurs as a type of technology-facilitated sexual violence. As such, online stalking and technology-facilitated sexual violence take place closely related to each other. However, because the current laws acknowledge the scope of stalking in a narrow sense only, they have limitations of protecting

victims from technology-facilitated sexual violence.

Online stalking is limited to any act that causes anxiety or fear by “having information reach the other person” in the Information and Communications Network Act and the Act Concerning the Punishment, etc. of Stalking Crime (hereinafter called the “Stalking Punishment Act”) as well. However, even if it is not a means of having information directly reach the other person, including email, messages, and comments, there can be very diverse ways of stalking to watch and control the other person, and a new type of stalking can emerge at any time according to technological changes. As a result of defining stalking as a behavior of having information “reach” the other person online, restrictive measures as well are composed of limiting any act of approaching the other person by using telecommunications. Online stalking by using means other than approaching the other person can be either punished or unpunished because it is divided into individual behaviors depending on whether its content constitutes other crimes or not. Therefore, there will be no other means that can control the continuation of stalking.

#### J. Limitations of Punishing the So-Called “Online Grooming”

“Online grooming” was introduced as an example of legislation in Article 15-2 (Conversation for the Purpose of Children and Juvenile Sex-Trafficking) of the Juvenile Sex Protection Act. However, this crime is limited to any behavior that has a sexual meaning in itself among grooming behaviors. Grooming is a preparatory phase of sexual exploitation of children to get monetary or non-monetary gains by sexually using children for adultery, molestation, production of child and youth sexual exploitation materials, and soliciting sex. It also refers to

a series of process that the offender builds trust with children to make them unaware of sexual exploitation or endure sexual exploitation so as to, at least, prevent their active resistance to or disclosure of their victimization.

If any conversation itself with a child has sexual meanings, or if the offender lures or encourages a child to do sexual behavior, grooming has already progressed considerably to reach the stage of sexual exploitation or just before the stage. Due to the characteristic of grooming that builds trust, it is difficult for the child's guardian or a third person to discover any act of grooming before reaching the phase of sexual exploitation. Even if the act was discovered, it would be difficult to prove if the behavior was for the purpose of sexual exploitation or simply for daily interaction. Even given the difficulties of proof, the current law is restricted to any behavior closer to sexual exploitation per se, and thus falls far short of revealing the context of grooming as an overall process.

As Article 15-2 of the Act punishes online behavior only, the current law cannot embrace a type of grooming that occurs offline or that initially begins online but worsens offline. Also, as the other person is prescribed as a child or youth, it is difficult to regulate the grooming of adults with developmental disabilities who are vulnerable to sexual-purpose grooming.

#### **4. Limitations of the Process of Handling Technology-Facilitated Sexual Violence**

##### **A. Insufficient Reflection of Characteristics of Digital Content in the Investigation of Illegal Images/Videos, etc.**

Once generated, digital content is sustainable without alteration or

extinction, and even if deleted, it can be restored to some degree. Even if duplicated, digital content has no change in its quality, and it can be duplicated and kept in various storage media. Due to these characteristics, it is possible to restore digital content even if deleted from storage devices. Once created, illegal images/videos can be kept intact not just in image-taking devices but also in numerous online and offline digital spaces. Recently, recording devices have continually become smaller in size and larger in capacity; communications networks have become high-performance; and services have expanded to use and synchronize online storage spaces, including cloud, drive, and Webhard that prevent data loss and enable access to data without restrictions of time and space. With these developments, the same file can be routinely stored in numerous spaces. Not only that, users can also set up to backup or synchronize files automatically in online storage spaces simply by storing them in image-taking devices or in other specific devices without the process of duplicating the files one by one.

Therefore, the possibility of restoring the files and various methods of keeping them should be considered in the investigation process, judgment, and disposal of illegal images/videos after the ruling. In spite of this, several counseling cases showed that the investigation agency did not even confiscate smart phones, accepting the offender's statements that the offender 'deleted the file' or 'lost the smart phone.' Or another problem was that only smart phones and image-taking devices were investigated without considering the possibility of duplicating the images. These problems arose from the difficulties of issuing a warrant, the lack of knowledge of the officer in charge of the case, and the absence of standards for handling illegal images.<sup>5)</sup>

5) 김현아·서혜진·강소영·박지영·우지혜(2021) criticized the following cases; i) where distribution of

## B. Risk of Disclosing the Victim's Information and Illegal Images/Videos

The victim's personal information can be noted in the overall process of handling a case, including reporting and filing, victim examination and testimony, submission of evidence and petitions, ruling, and claim for compensation. The victim's personal information can also be released for a third person or provided for the suspect or the accused to exercise right to defense in the investigation and trial process. In the case of technology-facilitated sexual violence, the victim's information can be additionally disclosed to the offender or to a third person, thereby having the risk of leading to another perpetration.

Also, victim support centers raised the issues that the leakage of personal information aggravated the damage or scared the victim to give up seeking a remedy for the damage. For example, in a case, the accused identified the victim's information through petitions of the victim's acquaintances and by viewing and copying the materials that the victim submitted, then combined and intentionally distributed the information online.<sup>6)</sup> In another case, the victim eventually gave up filing a claim for damages because she was afraid of her personal information additionally exposed, though she had at first actively participated in the procedure of dealing with the case to the extent that she appeared in

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illegal images persisted even after investigation because no consideration was given to the problem that cloud interoperability enabled illegal images to be synchronized not only in image-taking devices but also in other storage devices, ii) where illegal image-taking was reported on the spot and the police was dispatched on the scene, but in the mean time, the perpetrator reset the smart phone, and the police did not confiscate the device, and iii) where the investigator in charge of the case did not take any measure, saying that no evidence would come from the forensic of the smart phone even if conducted. Presented by 김현아·서혜진·강소영·박지영·우지혜(2021), 발제, 디지털성범죄 피해자 법률지원 간담회, 한국여성변호사회, pp.15-16.

6) 김혜경(2021), 성폭력 처벌 및 피해자 권리/보호 관점에서 본 스토킹 법제화, 스토킹 피해자 보호와 지원 강화를 위한 입법과제, 한국여성정책연구원·국회의원 정춘숙(더불어민주당), p.52.

court to give testimony to the damage even without being summoned as a witness.<sup>7)</sup>

To prevent disclosure of the victim's personal information in the process of dealing with a case, Article 7 of the Act on the Protection of Specific Crime Informants, etc. (hereinafter referred to as the 'Crime Informant Act') prescribes a system to prepare documents with pseudonyms of specific crime informants, etc. and separately manage their identity management cards from the police investigation phase. This provision is applied *mutatis mutandis* to victims of sexual violence crimes subject to Article 23 of the Sexual Crime Punishment Act. The problem is that the system to protect sexual violence victims does not work properly in many cases of technology-facilitated sexual violence. Also, when technology-facilitated sexual violence is treated as a crime other than sexual violence crime, it is difficult to apply this procedure of protecting personal information. Furthermore, because the system of using pseudonyms on the written reports of sexual violence crime is applied to investigation and trial of sexual violence crimes only, it is impossible to use pseudonyms in the procedures for damage remedy, including compensation order and claim for damages in a civil case.

As illegal images, edited materials, and child or youth sexual exploitation materials are submitted as evidence together with the victim's personal information, this poses a problem of managing illegal images, etc. as evidence in the whole process of handling the case. According to Article 134-8 of Regulations on Criminal Procedures, the examination of evidence should be conducted, in principle, by a method of replaying the medium of recording to listen to or watch it. However,

7) 이희정(2021), 지지동반자 지원사례 관례분석: 디지털 성범죄 피해지원 현장을 중심으로, 디지털 성범죄 관례분석 간담회, 나무여성인권상담소, p.35.

in technology-facilitated sexual violence, the victimization is treated as trivial or there appears secondary victimization based on mechanical application of laws in the following cases: i) where victimized images/videos are replayed in a hearing without ordering the audience to leave the court or in a jury trial, ii) where part of the images/videos is attached to a written judgment, and iii) where the images/videos are replayed in an open space or suddenly without notice to the victim in the investigation process as well. In crimes related to sexual image-taking, the taken images are not mere evidence but the result of victimization itself, and watching the images constitutes a type of crime. Due to these characteristics, receiving counseling, collecting and submitting evidence, identifying the images in the investigation and trial process, and request for deletion, and the process itself of seeking a damage remedy, and handling the case can be experienced as another damage or expansion of victimization to the victim.<sup>8)</sup> Nevertheless, consideration is not given to these aspects of illegal images/videos.

## 5. Legal Limitations of Supporting Victims of Technology-Facilitated Sexual Violence

The legal ground for supporting victims of technology-facilitated sexual violence was prepared not in a way that integrates the victims in the support system for sexual violence victims, but in a form that separates them from the existing support system for sexual violence victims. A new legal ground was recently established for the State to conduct a new type of support called “support for deleting the victimized

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8) Seung-Hui Seo(2017), A study on Characteristics and Countermeasures of Cyber Sexual Violence, *Ewha Journal of Gender and Law* 9(3), p.69 ; 김혜정(2020), 디지털성범죄 피해자 보호 및 지원을 위한 방안: 텔레그램 성착취 사건 피해 지원을 중심으로, *여성과 인권* 23, p.76.

images/videos.” In other words, the support centers for sexual violence victims did not conduct support for victims of technology-facilitated sexual violence as part of supporting sexual violence victims. Instead, a new institution was established to perform a newly introduced type of support for deletion. In this process, supporting technology-facilitated sexual violence victims was split up from the support system for sexual violence victims, thereby weakening the one-stop support for victims that had long been implemented. The deletion support was provided for only part of technology-facilitated sexual violence. This made it difficult to provide the support comprehensively together with various types of already-implemented support for sexual violence victims. Content related to the support for technology-facilitated sexual violence victims was not reflected in the job descriptions of the support centers for sexual violence victims or in the counselor training courses. Not only this, though the Support Center for Digital Sexual Crime Victims has provided its support service largely for technology-facilitated sexual violence victims since 2018, no legal basis is prepared yet for establishing the center or for their job responsibilities.

The scope of the deletion support is limited to illegal images/videos and edited materials, etc. and child and youth sexual exploitation materials. As such, deletion or blocking of digital data collected from various types of online activities cannot be included in the scope of the support. Some examples for these activities include i) online activity under the victim’s feigned name, ii) operation of online accounts in the assumed name of the victim or people around the victim, iii) distribution of data in the form of combining the victim’s personal information and sexual meaning if not illegal images/videos or child and youth sexual exploitation materials, and iv) dissemination of sexual content other than

the taken images/videos. In this case, the victim should directly report to the information and communications service provider, and request for the deletion of the data. However, it is difficult for the victim as an individual to respond to the situation when the service provider does not take proper measures or asks the victim to present a legal ground or evidence for deleting or blocking the data. There may also arise a situation in which the victim should provide personal information additionally for the private enterprise in order to delete the data. The provision that requires identification of the victim to receive the State's deletion support may become another obstacle too.

Various laws, including the Sexual Violence Punishment Act, Juvenile Sexual Protection Act, Information and Communications Network Act, and the Criminal Act, can be applied to technology-facilitated sexual violence depending on the victim's age, the possibility of specifying the victim in the images/videos, the victim's will to give testimony, legal interpretation by the investigation agency or the judicial institution, or even the investigation method. Due to this, the possibility of supporting the victim is determined depending on which law is applied and whether the victim is included in the category of 'sexual violence victims.' This is related to the fact that technology-facilitated sexual violence is not conceptualized as sexual violence but addressed as a 'pornography' or a general issue of defamation. When the meaning of the violence as sexual violence disappears through the selection of penal provisions, the necessity for protecting and supporting gender violence victims disappears too together with the meaning.

## IV. Overseas Cases and Implications

As the evils and seriousness of technology-facilitated sexual violence are widely recognized, penal provisions have expanded the requisite elements of such offences and criminality of the violence in foreign countries, like in Korea. Because it is important, more than anything else, to fill the gaps of the punishment laws for the intervention of the investigation agency, etc. overseas countries have continually reviewed and amended limitations of related laws and regulations.

Regarding the non-consensual distribution, overseas countries have sought to expand and introduce the requisite elements of the offences and the limitation period in response to the severity of damages from unlimited redistribution and difficulties of permanent deletion due to the nature of network that is always connected and proliferating in real time. Concerning online grooming as well, they have amended the penal provisions in the direction of punishing sexual communication itself with a child as they have begun to recognize the seriousness of sexual conversations exchanged online without directly contacting the child. Some of the overseas countries have also prepared a general system to protect victims, including measures for preventing the occurrence and spread of damages. In Canada, the peace bond has already existed separately from handling criminal cases. Australia too has already had a civil sanction system. The two countries have introduced and used these systems even more actively to technology-facilitated sexual violence, like the crime of non-consensual distribution. It is notable that they have expanded the authority of their respective dedicated organization to make prompt response, including deletion, by granting strong power to collect identification information and other data.

As can be seen from the examples of Canada and the UK, overseas countries have introduced a behavior restriction system with a new content, such as restrictions on using the Internet, in accordance to the environment and characteristics of technology-facilitated sexual violence. In other words, they have introduced a protection device with a new content, such as the order to restrict the use of the Internet and other digital networks conditionally or unreservedly between posteriori punishment and non-punishment. On the other hand, Korea's probation system, its terms of compliance, and content of emergency measures still consist mostly of behaviors of physical contact, including prohibition of access, without responding to technology-facilitated violence. Therefore, it is necessary to consider introducing the behavior restriction system that directly prescribes the use of network and its devices when constituting Korea's probation system and the content of emergency measures.

Overseas cases show that for investigation, they make active use of a system to preserve digital evidence, or investigation under false identities. Though they apply a warrant requirement to seizure and search, they respond to non-consensual distribution and some other cases by introducing a special case of simplifying the requirement. In particular, Canada has established an explicit provision that allows the investigation agency to collect evidence and materials without revealing their identities and to disguise their identities for investigation prior to the occurrence of the victimization. This provision applies not only to a case where preservation of electronic evidence is demanded but also to other cases related to online grooming.

Overseas cases reflect characteristics of technology-facilitated sexual violence in the design of their legal systems that once technology-facilitated sexual violence occurs, it is very difficult to recover from the

damage of the violence. Regarding non-consensual distribution, Canada has legislated special cases concerning the peace bond or the preservation of electronic evidence, thereby expanding their application to a situation where there is a reasonable ground for suspecting that damage will occur even before any act is done.

## V. Ways of Legislative Improvement for Stronger Response to Technology-Facilitated Sexual Violence

### 1. Secure Punishment of Technology-Facilitated Sexual Violence and Impose Responsibilities on Offenders

#### A. Improve Provisions on Crimes of Taking Images/Videos by Using Camera, etc. Combining and Distributing the Images

##### 1) Delete the requirement of “sexual stimulus or shame”

Taking images/photos by using a camera, etc. in Article 14 of the Sexual Violence Punishment Act, distribution, etc. of deep fake videos, etc. in Article 14-2, and threat or coercion by using images/videos, etc. in Article 14-3 of the same law have in common “sexual stimulus or shame” as requisite elements of criminal offences. Seen from the purpose of protecting the victim’s privacy, moral right, and right to sexual self-determination, it is reasonable to judge the illegality of the abovementioned behaviors solely based on whether the offender attained a consent from the depicted person, not based on the obscenity of the content of the images or such emotion as sexual shame. For this reason, the absence of consent from the depicted person should be the main

requisite element of the offences, and “sexual stimulus or shame” should be revised to a neutral term, like ‘sexual.’ Here the criteria for judging the meaning of ‘sexual’ can be presented through the court’s interpretation. Also, the meaning should be judged by comprehensively considering not only the photographer’s intention to regard the other person’s body as a sexual object, but also the detail, situation, and place of taking the photos/images, and the general public’s perceptions of being ‘sexual’ according to “changes in culture, customs, and values of a society and of the time.”<sup>9)</sup>

- 2) Establish a concept that encompasses acts of taking and editing the images/videos

By establishing a concept called ‘creating,’ it is worthwhile to discuss ways of encompassing acts of a person who takes, duplicates, edits, synthesizes, or processes photos, images, etc. as prescribed in Article 14 and Article 14-2 of the Sexual Violence Punishment Act. Though ‘taking’ photography is a concept that clearly expresses the act of taking photos or images of a person’s body or face, sexual images are not made by the method of ‘directly taking the images of the body’ alone. As such, the Sexual Violence Punishment Act had to add an explanation that the crime includes ‘duplicates of duplicates’ without being satisfied with additionally listing various acts and methods, such as ‘images/videos or duplicates,’ ‘edited, synthesized, processed or duplicated materials.’

Even equipped with such a complicated structure, an act should go through a confusing or consumptive judgment that ignores the purpose of legislation. For example, it is confusing whether taking photography

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9) Constitutional Court of Korea, 2016Hun-Ba153 Decided December 29, 2016.

of photos, not a person's body, can be seen as a duplicate of the photos or as a processed material; whether editing duplicates, not original images, falls under the crime of editing images subject to Article 14-2; and whether threat by using images re-taken of photos that are edited with sexual implications contained in the photos of everyday life falls under the crime of threat by using images as described in Article 14-3.

Even specified acts like this should go through several steps before a crime is established. For example, to establish the crime of distributing deep fake videos, etc. i) there should be 'photos or videos taken of a person's face or body,' ii) 'the photos or videos should be edited, synthesized or processed,' and iii) the 'edited, synthesized and processed materials of the photos so taken should be distributed, sold, leased, provided, or openly exhibited or screened.' If any of these steps is not established, even a very similar act to these listed acts is not prohibited as a crime.

'Creating' is a concept that embraces any act of making sexual images of a person by using whatever means, including directly taking photography of a person's body, duplicating the original photos or duplicates, taking photography of, editing, synthesizing, or processing photos or duplicates. In other words, if any act of 'creating sexual images without the other person's consent' is prescribed to be punished, this concept of creating can embrace 'taking photos' in Article 14(1) of the Sexual Violence Punishment Act and 'editing, etc. in Article 14-2(1) of the same law.<sup>10)</sup> If the law is amended this way, 'making' child or youth sexual exploitation materials in the Juvenile Sexual Protection Act too should seek ways of unifying the concept. Threat or coercion by using

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10) But, if the concept of 'image' is used, it still has a limitation of being unable to include editing, etc. of sounds prescribed in Article 14-2.

photos/videos in Article 14-3 can be punished as threat or coercion by using the images so created.

3) Improve provisions on listing the acts of distributing and consuming sexual images

Article 14 and Article 14-2 of the Sexual Violence Punishment Act and Article 11 of the Juvenile Sex Protection Act stipulate a list of acts of distributing and consuming sexual images. But this way of listing criminal acts one by one needs to be revised to a comprehensive concept, such as “any act of obtaining or using sexual images without the other person’s consent, making other persons recognize the images, or facilitating the spread of the images.’

‘Obtaining’ sexual images include not only possessing, purchasing, importing, and storing the images as listed in the present laws, but also obtaining the images without consent even if the image-taking and distribution were not against the depicted person’s will, such as hacking and possessing the images that were taken with consent but not distributed yet. ‘Using’ sexual image refers to any act of using the images without the depicted person’s consent, including watching the images. Any act of processing and distributing <sup>11)</sup> the images going beyond the scope of consent given to take and distribute the images can be included in the act of ‘using the images without consent.’ The act of ‘making other persons recognize the images’ includes the acts listed in the current laws, such as distributing and circulating, selling, exporting, leasing and lending, providing, publicly displaying and screening, but also acts that are not listed in the laws, such as presenting

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11) Of course, distribution going beyond the scope of consent can be embraced in ‘any act of making other persons recognize the images without consent.’

and transporting the images to links connected to sexual images. ‘Any act of facilitating the spread of the images’ includes transporting, advertising, and introducing the images for commercial purpose as stipulated in Article 11(2) of the Juvenile Sexual Protection Act, but also any act of distributing search words accessible to sexual images even if it is not for commercial purpose, and any act of providing a space that makes it easy to spread sexual images without the depicted person’s consent, such as opening and operating an online space for the main purpose of distributing illegal images.

With the above as the basic type,<sup>12)</sup> any act for profit-making purpose or gaining profits through such an act should be punished with a higher penalty.

Selling and lending the images in exchange for favor in return should be rightfully included in the act of making profits as seen from the Juvenile Sexual Protection Act. However, the requirement for ‘using information and communications network’ is unnecessary because most of the distribution is conducted by using information and communications network. Therefore, it is reasonable to exclude the requirement from the crime of distributing the images for profit-making purpose subject to Article 14(3) (Photo-taking by Using a Camera, etc.) of the Sexual Violence Punishment Act.

#### 4) Secure balance between crime and punishment

Though non-consensual image-taking and non-consensual distribution are prescribed with the same statutory punishment, it is difficult to see

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12) But, if it is prescribed as the above, acts with different statutory punishments will be included in the same provision. Therefore, further discussion is needed about how to differentiate the statutory punishments and whether it suffices to reflect the difference in the criteria for sentencing.

their illegality and degree of damage as being the same. This is because one single distribution online can be disseminated indefinitely, and it is difficult to terminate the victimization time-wise. By reflecting the higher illegality of distribution than photo-taking, the Sentencing Commission at the Supreme Court of Korea set different criteria for sentencing despite the same statutory punishment for photo-taking and distribution.

Photo-taking against the depicted person's will is included in the concept of 'molestation' that "objectively causes sexual shame or disgust to the general public and infringes on the victim's sexual freedom as an act against good sexual moral sense."<sup>13)</sup> As violence or threat does not necessarily precede indecent assault and a violent act itself can be recognized as an act of molestation, a sudden molestation should be included in the crime of indecent assault.<sup>14)</sup> Seeing from these rulings, it is believed to be reasonable to increase the statutory punishment for photo-taking against the will up to at least the same level of indecent assault, and to set punishment for the crime of distribution with a higher penalty than the crime of photo-taking.

Regarding the aggravated punishment of distribution for profit-making purpose, as long as the provision of listing the acts and aspects of distribution is maintained, it would be proper to amend the related clauses in the Sexual Violence Punishment Act to the way of prescribing the crimes in the Juvenile Sexual Protection Act. In other words, acts of selling and lending that already include a quid pro quo or exchange of favor in return in the concept itself should be excluded from non-profit making act. This will resolve the problem of reducing punishment on the ground of 'having sold the images but not for making profit.'

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13) Supreme Court Decision 2019Do15994 Decided March 26, 2020.

14) Supreme Court Decision 2019Do15994 Decided March 26, 2020.

If the acts and aspects of distribution are amended to “any act of obtaining or using sexual images without the other person’s consent, making other persons recognize the images, or facilitating the spread of the images” as suggested earlier, it will suffice to establish a separate provision to additionally punish a person who distributes the photos, etc. for sexual purpose or for monetary gains from the act of distribution.

#### B. Review Improving Provisions on Crimes Related to Illegal Image-Taking by Using Fraudulent Scheme or Power

Because using a deceptive scheme means an absence of valid consent, it would be reasonable to encompass in image-taking against will any case where the images were taken with consent that was obtained by using the other person’s full or partial misunderstanding, mistake, or ignorance regarding the image-taking and distribution. Also, if the victim gave consent to image-taking and distribution due to misunderstanding, mistake, or ignorance mainly caused by the victim’s developmental disabilities, it would be improper to see this as a valid consent. However, further analysis is needed because there are counseling cases and lower instance precedents that do not embrace the image-taking by using a deceptive scheme or force in photo-taking by using a camera, etc.

With relation to this issue, it is advisable to consider making use of Article 18(1)(iv) of the Sex Trafficking Punishment Act, which prescribes punishment for the crime of “taping videos, etc. depicting obscene content by a deceptive scheme or force.” By moving the location of the crime of image-taking by using a deceptive scheme or force to the Sexual Violence Punishment Act, it is necessary to make it clear that the crime is included in the crimes of sexual violence, to ensure that the victim is effectively protected and supported as a sexual violence

victim, and to broaden the scope of photo-taken persons. By judging image-taking by a deceptive scheme through this, it is believed to be helpful in admitting that there was no valid consent.

### C. Improve the Crime of Threat or Coercion by Using Photos, etc.

The scope of threat or coercion by using photos. etc. in the Sexual violence Punishment Act should be expanded to embrace any act of threat or coercion that can hardly be included in ‘photos or duplicates (including duplicates of duplicates) that may arouse sexual desire or shame.’ As the requirement ‘sexual desire or shame’ is repeated in this provision, it is necessary to replace the requirement with such a neutral concept as ‘sexual.’ Seen from the current laws, threat or coercion by using photos. etc. should also include the edited, synthesized, or processed materials of the photos, videos, sounds as prescribed in the crime of ‘distributing deep fake videos, etc. in Article 14-2 of the Sexual Violence Punishment Act’ and threat or coercion by using child or youth sexual exploitation materials in the Juvenile Sex Protection Act. Even if there is no photo or edited material yet, this can be the same threat as there exists a photo or edited material from the aspect of threatening or coercing the victim. As such, the amendment bill should be prepared in the direction of clarifying that the crime embraces any threat or coercion i) by pretending to possess photos or edited materials when there are actually no such photos or edited materials or ii) by using sexual images, etc. together with a threat that the offender will create images, etc. with sexual meanings through taking or editing the images in the future, or obtain them by any other means.

Supposing that the provision would be amended to embrace the act

of taking and editing images as suggested earlier, the act of ‘threat or coercion by using the victim’s sexual images’ should be punished. Likewise, it is required to prepare ways of encompassing cases where there are no sexual images.

#### D. Establish a New Provision to Punish the Crime of Possessing Sexual Images/Videos against Will

A new crime of possessing illegal photos, etc. (Article 14(4)) was enacted in 2020 when the Sexual Violence Punishment Act was amended. But the crime is established only when the possessed photos, etc. are taken against the photographed person’s will or when the photos or duplicates were distributed against the will even though it was not against the depicted person’s will at the time when they were taken. In other words, if the photos are taken with the other person’s consent or the self-taken photos are kept by receiving them via transmission from other person, this act does not fall under the crime of possessing the images. This is because the photos or images are not distributed without consent or taken against the depicted person’s will at the time of taking the photos, etc.

Even if the photo-taken person gave consent at the time of photo-taking or directly sent the photos, it is unreasonable to deem with this fact alone that the person gave the other person the right to possess the sexual photos permanently or allowed the other person to use the photos for any purpose unless they are distributed to a third person. With regard to this, some may argue that there is no basis for prohibiting the possession of photos/images taken with consent, pointing out that a person cannot exercise power over an object when the object is given of the person’s own will and thus possessed by the other person.

However, possessing and disposing sexual images/videos that are out of the hand of the depicted person is already prohibited in part and treated as a crime. Specifically, the crime of possessing the photos applies to the following cases: i) where the ‘owner’ of sexual photos distributes them against the photographed person’s will, ii) where the owner watches photos/images distributed against the depicted person’s will, and iii) where the owner simply possesses the photos without re-distributing them.

In the practice of sexuality in Korean society, there are various situations in which women’s consent to take sexual photos or transmission of sexual images are not conducted according to their perfect free will. Also, depending on the gender, gender identities, and sexual orientations, there are considerable differences in the stigma imposed when sexual images are disclosed. Given this, the act of a third person’s possessing sexual images even when the depicted person does not consent any longer causes violation of sexual freedom. In the same context, a third person’s possessing sexual images of the depicted person even when the former has no intention to distribute them afflicts a substantial victimization of anxieties to the latter.

Therefore, it is necessary to establish a new provision to punish the ‘act of possessing sexual photos against the explicit consent of the depicted person’ or the ‘act of continuing to possess the person’s photos without justifiable reasons despite the person’s request for deletion.’<sup>15)</sup> It is also necessary to make a standard norm that active measures should be taken for deleting the photos in all the data storage media possessed or managed by the owner of the photos when it is made clear that continued possession of the photos goes against the depicted person’s will.

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15) Counsel of Hye-ryeong Cha, lawyer at Dike Law Firm (14 Dec. 2021.).

### E. Reveal the Attribute of Online Sexual Harassment as Sexual Violence

It is necessary to consider revising Article 13 (obscene behaviors by using communications media) of the Sexual Violence Punishment to a crime of ‘sexual harassment by using communications media.’ It is also necessary to consider seeking ways of amending the law to punish a person who uses harassing expressions by making the other person a sexual object. Here, sexual harassment is a narrower concept than sexual insult that makes the other person feel sexually humiliated or disgusted by sexual speech and behavior. Sexual harassment is established when a person has an intention to harass the other person by making the other person a sexual object, not a human being. But this does not mean that sexual harassment becomes a complete criminal offence. ‘Expressions’ can include all the speeches, sounds, writings, pictures, and videos that fall under online sexual harassment among the requisite elements described in the current crime of obscene behaviors by using communications media.<sup>16)</sup> If ‘the other person’ becomes an object’ like in the amendment bill on the sexual harassment clause, the crime is established only when the other person of the expressions and the person who is made a sexual object are the same person. As such, it is difficult to include cases where a person posts sexually insulting writings on the open bulletin or on the online group talk room, with no person to be made a sexual object. With a person prescribed as the object, the crime of insult in the Criminal Act is not restricted only to acts done in front

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16) Among the requisite elements described in the current crime of obscene behaviors by using communications media, it is difficult to include any act of delivering by mail an object that hardly falls under ‘expressions.’ However, if such an act occurs together with a different type of stalking, the act can be regulated with prohibition of access and punishment through the Stalking Punishment Act. Of course, even in this case, it is difficult for the act to constitute a crime of sexual violence.

of an insulted person. Given this, it is not deemed excessive to state a ‘person’ as the object of sexual harassment. It is reasonable to interpret that sexual harassment includes any act of combining sexually insulting writings, sounds, photos, etc. with daily photos or personal information, then posting them online. Not only this, sexual harassment also includes any act of using sexually insulting expressions that have a risk of lowering the victim’s or the writer’s personal value under the assumed name of the harassed person.

#### F. Cope with Crimes of Technology-Facilitated Sexual Violence by Misusing Personal Information

It is necessary to prepare a revised bill to stipulate aggravated punishment in the following cases: i) where the offender produces and distributes sexual photos, etc. in a manner that can identify the depicted person, ii) where the offender distributes sexual photos, etc. in a way that enables personal identification by combining personal information to the photos, etc. iii) where the offender distributes sexual photos, etc. against the will of the depicted person who can be identified by other person even if this other person has not produced them, and iv) where identifiable personal information is included in its content, supposing a new clause on ‘sexual harassment by using communications media’ would be established.

#### G. Add the Person Whose Images/Videos Are Illegally Taken in Sex-Trafficking Situation to the Category of Sex Trafficking Victims

Sex-trafficking women are exposed to illegal image-taking and other

crimes on the ground of sex trade but cannot receive remedies for the damages. To resolve this problem, sex trafficking should be conceptualized as sexual exploitation, and women involved in prostitution treated as non-criminals. However, seeing the topography of discussion about sex trade in Korean society, it seems difficult to predict that such improvements will be achieved in a short period of time. Granting these realistic limitations, and even if the current legal system that punishes women involved in sex trafficking is maintained, it is necessary to seek an alternative to practically enable to punish at least the crime of illegal image-taking, etc. in a sex trafficking situation. As a tentative alternative, it is necessary to consider ways of adding the following persons to the concept of “sex-trafficking victims” in the Sex-Trafficking Punishment Act: i) a person who becomes the partner of a sex buyer for the purpose of illegal image-taking, ii) a person whose photos are illegally taken by using the sex-trafficking situation, and iii) a person whose deep fake videos, etc. are taken prescribed in the crime of “distribution, etc. of fake videos, etc.”

In addition, to make it clear that sex trade for the purpose of illegal image-taking, etc. and that illegal image-taking in a sex-trafficking situation corresponds to sexual exploitation, it is necessary to revise the laws to stipulate aggravated punishment of the following persons: i) a person who buys sex to commit the crime of creating images/photos by using a camera, etc. or the crime of “distribution, etc. of deep fake videos, etc.” and ii) a person who committed the crime of making images/photos by using a camera, etc. or the crime of “distribution, etc. of deep fake videos, etc.” by using a sex-trafficking situation. This makes it possible to additionally punish the act of taking photos against will under the excuse that the photos are needed to advertise sex trade, etc.

#### H. Broaden the Definition of Online Stalking and Measures against Offenders

Technology-facilitated sexual violence may take place in a way of online stalking or accompany online stalking. Given this, it is necessary to include in the Stalking Punishment Act various types of online stalking that are left out in the current law, and conceptualize them as stalking. To impose restrictions on the offenders accordingly, provisional measures, victim protection order, and so forth, need to be diversified. The definition of stalking behavior should be expanded, and “other acts equivalent to this” should be prescribed as a supplementary requirement, thereby minimizing the gaps arising from technological changes or from the emergence of a new type of behavior. Also, it is ineffective to limit restrictions on the stalker to the ‘prohibition of access to the victim.’ only. The court should be able to issue an order to prevent the recurrence of various types of stalking, and needs to be flexible in issuing an order that is most suitable for each matter.

#### I. Expand the Scope of the So-Called “Grooming” Crime

The crime “conversation, etc. for the purpose of sexual exploitation” in Article-2 of the Juvenile Sexual Protection Act was introduced as a ‘legislation on the so-called online grooming.’ By expanding this crime, it is necessary to amend this provision to regulate not just the act of sexual exploitation itself but also ‘grooming’ as a preparatory phase of sexual exploitation. Also, instead of limiting the crime “conversation, etc. for the purpose of sexual exploitation” to behaviors of using information and communications network, the law should be amended to be able to regulate the following behaviors: i) approaching children and youth, and

adults with developmental disabilities for the purpose of sexual exploitation and ii) soliciting them to be subject to sexual exploitation. Because adults with developmental disabilities will be included in the law if amended, it would be appropriate to move the provision from the Juvenile Sexual Protection Act to the Sexual Violence Punishment Act. Though it is difficult to prove the purpose of approaching the target person, this limitation can be resolved by adding the purpose of “sexual exploitation.” This enables to restrict only exploitive approach rather than comprehensively prohibiting sexual interaction of children and youth, and adults with developmental disabilities.

#### J. Expand the Responsibilities of Offenders and Issue a Compensation Order

Though victims of distribution have to consume a lot of time and effort, more than anything else, to delete the victimized photos, etc. there is almost no method to continually secure responsibilities from offenders who committed the crime of distribution. The State provides support for deleting illegal photos and monitoring their distribution situation, but its support has limitations. As such, victims pay digital undertakers and other private service providers the cost for monitoring the situation in many cases. Therefore, by integrating the damage compensation order to a criminal trial, if possible, it is necessary to issue an order to compensate for the cost for deleting and monitoring the victimized photos/images, the estimated cost required for doing so in the future, the medical cost arising from the illegal photo-taking and distribution, and the losses and compensation. The compensation should be ordered to be paid at the same time when a criminal decision is made. In the current law, it is possible to issue a compensation order for some crimes. But

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the court seldom issues the compensation order for the reason that it is difficult to specify the damage amount, and accordingly application for the compensation order is not made a lot. When it comes to the cost required for deleting the distributed photos, etc. only, the amount of damage is relatively clear compared to other types of damages. The cost required in the future too can be sufficiently calculated only if a certain period is set. Because it is impossible to guarantee a complete deletion of the victimized photos/images and the distribution can be resumed at any time, the period to calculate the cost required for the deletion in the future may not be limited, either. Nevertheless, the court should make criteria for the purpose of issuing the compensation order together with the ruling of the criminal trial, and have the victim file a claim for monetary compensation as a civil case. If the court gives up issuing the compensation order for the reason that it is difficult to calculate the cost, this means that the court does not even perform its role that it can. Because the spread of the victimized photos/images started from the initial distribution of the initial disseminator, it is not excessive at least to hold the initial disseminator responsible for the continued distribution. In addition to promoting the compensation order for the distribution of victimized photos/images, it is necessary to revise the law to include the crime of technology-facilitated sexual violence as it is not included in the scope of the compensation order. Also, it is necessary to include the crime of dissemination, etc. of deep fake videos, etc. and the crime of production and distribution, etc. of child and youth sexual exploitation materials in the types of crimes to which compensation can be ordered subject to the Act on Special Cases Concerning Expedition of Legal Proceedings.

#### K. Alleviate the Application of the Limitation Period

The impact of the crime of making and distributing illegal photos/images cannot be terminated. Even if any act of offence is committed only once, its victimization can ensue repeatedly and continuously. In some cases, it is impossible to reckon from a certain date for the limitation period because it is difficult to pinpoint the time of distribution online. In this regard, it is necessary to review whether application of the limitation period should be alleviated or excluded for the following acts: i) not only producing, importing, and exporting child and youth sexual exploitation materials but also distributing the materials prescribed in the Juvenile Sexual Protection Act, and ii) distributing illegal photos in the Sexual violence Punishment Act. At least with regard to the act of distribution for the profit-making purpose, application of the limitation period should be excluded, or the limitation period should be reckoned from the date when the victim became aware of the fact of distribution. Through such amendment, the offender should be held responsible for repeated and continued victimization.

### **2. Improve Investigation into Technology—Facilitate Sexual Violence and Reinforce Measures to Block the Spread of Illegal Sexual Images/Videos**

#### A. Make it Mandatory for the Investigation Agency to Check Distribution and to Request Deletion and Blocking in the Investigation Process

Illegal photos, etc. can be distributed online as digital files or even without the photographer's intention. Distribution itself is a crime, and the possibility of distribution is an important cause for the victimization

of anxieties. Even if the victim cannot present evidence for distribution and the suspect denies the charge of distribution, it is necessary to check whether the photos are distributed, in order to reduce the victim's anxieties and to disclose the suspect's further crimes. It would be difficult to check the distribution based on the illegal photos, etc. that are not distributed yet. But at least it would be possible to check if the identical files have ever been distributed by comparing them to the photos, etc. recorded in the public DNA database.

At present, as the victim in person checks whether illegal photos, etc. are distributed and requests for the deletion support, this aggravates the victimization. If the victim cannot secure the victimized photos/images, it is impossible to check whether the photos/images are distributed. Even if they were distributed, it is difficult to apply for the deletion support. If the investigation agency or the court secured the photos when the victim could not, there should be a method of duplicating the evidence. However, in the current regulations and practices, it is not easy to duplicate the photos/images that the victim has not submitted.

Illegal photos, etc. that have not been distributed yet can be scrapped through the investigator's seizure or confiscation or the court's ruling, but checking whether they are distributed should precede this method. On the other hand, photos, etc. that have already been distributed online needs the deletion support. Checking the distribution and applying for the deletion support should be carried out as promptly as possible. Though the victim needs to be provided with information on the current status of distribution and deletion, the victim should not be forced to apply for these procedures without fail. Having the procedures progress without the victim's effort, if possible, through cooperation with the investigation agency and victim support centers will suit the purpose of

protecting and supporting the victim.

If the investigation agency secured the victimized photos, etc. during the investigation process, it should be made mandatory for the investigation agency in cooperation with the Support Center for Digital Sexual Violence Victims to preemptively check via the public DNA database whether they are distributed. If the photos, etc. are distributed, the deletion support should be provided. Even when the police requests to information and communications service providers or bulletin managers and administrators for the deletion and blocking, it is necessary to make it a principle to connect with other organizations that can conduct related duties, including the Support Center for Digital Sexual Violence Victims. Then, they will be able to record data on the DNA database, additionally delete the photos, etc. and monitor the distribution. However, if the victim does not request in person for the deletion support and if the victim in person clearly expresses intention to refuse the support, the illegal photos, etc. should be excluded from the scope of registering on the public DNA database for follow-up monitoring. Also, child and youth sexual exploitation materials should be included in the scope that the investigation agency checks whether illegal photos, etc. are distributed and requests for the deletion support and blocking.

#### B. Seize and Search Online Repository and Other Data Storage Media Besides Photo-Taking Devices

Digital content has characteristics of easy duplication without reducing the value of the duplicated files, almost no cost for keeping the files, and the possibility of losing the files due to software or hardware errors. Due to these characteristics of digital content, the files tend to be stored at the same time in several data storage media. This implies that seizing

and searching the photo-taking devices alone in the investigation process is highly likely to miss the photos, etc. that the suspect possesses.

Therefore, the investigation should not simply stop by checking the photos/images after seizing and searching the photo-taking devices only. Rather, the scope of seizure and search should be determined while keeping in mind the possibilities of the photos/images being automatically or manually stored in online accounts, including cloud, email, and social network service that are linked to the photo-taking devices through information and communications network, or being transmitted to other devices using the network.

Also, illegal photos/images kept in online data storage media, like cloud, can be accessed and deleted through various devices. In this case, the suspect can conceal the evidence by getting access to the cloud and deleting the illegal photos/images while seizure and search are underway. Therefore, a legislative alternative is required to block a third person from approaching the cloud from the investigation agency's start to the end of seizure and search.<sup>17)</sup>

On the other hand, if the photos/images subject to confiscation are kept in cloud or other online data storage media that do not belong to the accused, it is impossible to confiscate the cloud server. Therefore, it is a valid method to confiscate and discard the illegal photos/images kept in the cloud by completely deleting them.

### C. Make it Mandatory to Confiscate Data Storage Media

It is necessary to establish a new provision on the mandatory

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17) 조아라(2017), 이용자 디바이스를 통한 클라우드 데이터의 압수·수색에 관한 고찰, 2016년도 법관연수 어드밴스 과정 연구논문집(as cited in 차주희(2021), 지정토론, 디지털환경과 성범죄의 진화: 디지털성범죄와 성매매를 중심으로, 법원 현대사회와 성범죄연구회, p.60).

confiscation of data storage media that have ever stored illegal photos, edited materials, child and youth sexual exploitation materials, etc.<sup>18)</sup> Article 48(3) of the Criminal Act states that “where a part of documents, books and drawings, special media records, including electromagnetic records, etc. are subject to confiscation, only that part shall be destroyed.” However, unless a file is ‘completely destroyed to be unrecoverable by any means,’ the file cannot be seen as being destroyed. As such, it should be made mandatory to confiscate the storage media that have ever stored illegal photos, etc. However, the purpose of making it mandatory to confiscate the devices of taking illegal photos/images or the storage media keeping the taken photos/images is to fundamentally block the possibility of restoring the illegal photos/images produced or obtained from criminal acts, rather than confiscating the criminal tools. For example, if the photos are taken by a digital camera that is connected to the wireless Internet and set to transmit the photos to other devices after taking them, the memory card of the camera where the photos are stored or a third storage medium to which the photos are sent through the wireless Internet, rather than the camera itself, should be confiscated to suit the purpose of mandatory confiscation. A photo-taking device without a storage function has the meaning simply as a criminal tool. On the other hand, data storage media that have ever stored illegal photos/images are tools used for criminal acts and at the same time include materials created or obtained from the criminal act. The storage media also contain the traces of materials produced or obtained from the criminal act. As such, the data storage media can be seen as prohibited goods because they are objects that can restore materials created or

18) 김영미(2016), 카메라등이용촬영죄 등 법적용의 문제점 및 개선방안, 온라인 성폭력 실태 및 피해자 지원을 위한 심포지엄, 한국여성변호사회, p.105.

obtained from the criminal act.

#### D. Order to Delete Illegal Photos, etc.

It would be an ideal procedure to completely block the possibility of dissemination in the future by seizing and confiscating all the photos/images the accused possesses while going through the investigation and trial processes. However, there surely can be photos/images that are not subject to seizure and confiscation. Therefore, it is necessary to amend the law to make it mandatory to order to delete all the photos/images possessed by the accused or posted in the accounts that the accused possesses and can manage along with the court's sentencing a guilty verdict, including suspended sentence, or notice of a summary order.

At this time, based on the current laws, the scope of deletion order should include not only photos, etc. in Article 14, edited materials, etc. in Article 14-2 of the Sexual Violence Punishment Act, and child and youth sexual exploitation materials in Article 11 of the Juvenile Sexual Protection Act, but also photos, etc. in Article 14-3 (threat or coercion by using photos, etc.) of the Sexual Violence Punishment Act. Then, the photos taken with consent but used as a means of threat without being distributed yet will not be left out from the scope of deletion order.

### **3. Strengthen Support for Technology-Facilitate Sexual Violence Victims**

#### A. Improve Online and Offline Accessibilities to Victim Support

It is necessary to improve accessibility to counseling through the

website of the support centers for technology-facilitated sexual violence victims. The support centers' demand for the victim's personal information to apply for the deletion support and the website design without consideration for people whose mother tongue is not Korean language or for gender queers function as barriers to access to the State's support for the victims or assistants who fell victim to the disclosure of information, including sexual images/videos, on the online space. Therefore, it is necessary to improve the support centers' counseling website in such a way that all people, regardless of age, language, disability, or sexual identity, can access to the centers, get information, and request for support, with expectation of security and the minimum burden. In addition, the Enforcement Regulation of the Sexual Violence Prevention Act has a provision that requires, in principle, the victim's personal identification to apply for the deletion support. However, if the victim in person applies for the support, the provision that requires the victim to submit personal identification should be deleted through the amendment of the provision. Even when the victim's family or designated agent applies for the support, it will be enough for the staff to ask the applicant's intention.

Communication for supporting the report and deletion of the victimized photos/images can be done online. But physical distance too is important for constant counseling, medical support, legal counsel, investigation and trial support, livelihood support, or housing support to restore the damage.<sup>19)</sup> The Support Center for Digital Sexual Violence Victims, which performs a central role in supporting the deletion, is located in Seoul. Though counseling centers for sexual violence victims are located across the nation, it is not certain yet how many of them can support

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19) 김정혜(2020), p.35.

technology-facilitated sexual violence victims, including the deletion request. Therefore, it is necessary to seek ways of improving accessibility to the support service nationwide. In supporting technology-facilitated sexual violence victims at the nationwide counseling centers for sexual violence victims, the issue of accessibility is closely related to the content of support at the centers and the issue of improving the supporters' competencies.

#### B. Improve the Support System for Technology-Facilitate Sexual Violence Victims and Conduct Professional Education for Supporters

Technology-facilitated sexual violence does not occur in a particular type alone. The victimization of distribution of photos/images often accompanies various types of gender-based violence, including sexual violence, domestic violence, and sex trafficking. At this time, it is reasonable to provide support for the victims in one place in an integrated manner, if possible, rather than separately conducting counseling on the deletion support, counseling and support for gender violence victims other than the deletion support, the victimization of distribution, and so on. The victims' experiences as well should be interpreted and approached comprehensively. To do so, it is necessary to expand the competences and services of the overall support system for sexual violence victims rather than merely strengthening a "specialized area" of supporting technology-facilitated sexual violence victims.<sup>20)</sup>

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20) 김여진(2020), 디지털 성폭력 피해자 지원 체계에 대한 현재의 문제점과 과제, N번방 방지법 그 한계를 해결한다: 디지털성폭력 근절을 위한 21대 국회 입법과제, 국회여성아동인권포럼, pp.55-56.

In a situation where the support system for technology-facilitated sexual violence victims is expanding, it is necessary to conduct additional research to review the current status and comprehensively devise the support system. This aims to provide an integrated one-stop support for the victims without splitting up technology-facilitated sexual violence victim support from sexual violence victim support. This study suggests a few alternatives that are worthwhile to review as follows:

First, add support services for online victimization of technology-facilitated sexual violence to the service scope of counseling centers for sexual violence and sex-trafficking, and include technology-facilitated sexual violence victim support in the support systems for sexual violence and sex-trafficking victims, thereby strengthening the competencies of supporting the victims. Second, prepare a legal basis for establishing and operating the Support Center for Digital Sexual Violence Victims, and specify the roles in building and operating networks between the support centers for sexual violence victims and affiliated organizations related to professional education for supporters of technology-facilitated sexual violence victims and support for technology-facilitated sexual violence victims across the nation. Third, legislate a law to lay a basis for conducting professional education to improve the competencies of supporters of technology-facilitated sexual violence victims.

### C. Expand the Scope of the Deletion Support

There can exist the necessity for deleting information that infringes on the victim's personal character with i) content of the victim's personal information and sexual insult combined and ii) sexual post, etc. under the feigned name of the victim that do not fall under photos, edited

materials, etc., child and youth sexual exploitation materials but are distributed on the information and communications network. The practice of victim support seems to be performed by interpreting and applying the current laws to the full extent. Of course, it is possible for the victim to directly request for the deletion to information and communications service providers. Currently, many victims use the method of directly responding to the violence. However, the process itself of attempting to delete the victimized photos/images can be easily an extension of the victimization of technology-facilitated sexual violence due to the attribute of technology-facilitated sexual violence. Also, it is no easy process that an individual requests for the deletion to a private enterprise while proving the victimization of technology-facilitated sexual violence. Furthermore, information and communications service providers are less likely to actively respond to request from an individual compared to the request from the State or organizations. This will aggravate the victim's distress in reality.

It would be proper to prepare a legal basis for enabling the victim to receive support from the State. To do so, the obscene behaviors by using communications media should be revised to 'sexual harassment by using communications media' including the acts of sexual harassment online, as suggested before. Also, information that falls under sexual harassment by using communications media should be included in the scope of deletion support from the State. Also, disclosing personal information and photos, etc. of the victim of sexual violence crime via information and communications network is a criminal act that has already been prohibited in Article 24(2) of the Sexual Violence Punishment Act. Therefore, it is necessary to clearly state that support for deleting the disclosed information shall be included in the scope of comprehensive

support for the victims.

#### D. Increase Recipients of Support for Sexual Violence Victims

As the scope of sexual violence in Article 2(i) of the Sexual Violence Prevention Act is limited to the crimes of sexual violence in the Sexual Violence Punishment Act, “victims of sexual violence” subject to protection and support are also limited to victims of sexual violence crimes. As such, by amending the Sexual Violence Prevention Act, a legal ground for supporting sexual violence victims should be prepared regardless of whether or not a “crime” is established. Also, only the definition “sexual crime against children and youth” should be left in the Juvenile Sexual Protection Act, but the definition “sexual violence crime against children and youth” deleted. However, the terms should be “sexual violence crime against children and youth” or “sexual exploitation of children and youth”, not “sexual crime against children and youth.” By doing so, it is necessary to clarify that acts of producing and distributing child and youth sexual exploitation materials, or sex-trafficking of children and youth are sexual exploitation of children and youth and sexual violence against them as well. At the same time, it is proper to unify the protective measures for sexual violence victims by including “sexual violence crime against children and youth” in the concept of “sexual violence crime” prescribed in the Sexual Violence Punishment Act.

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