

The Dilemma and Improvement of the Identification of Child Molestation in Cyberspace

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Abstract. In the modern society with the rapid development of Internet technology, the Internet penetration rate is growing rapidly, and the number of young Internet users is also increasing. However, while the Internet brings convenience to young people, there are also many hidden dangers. In recent years, the act of indecency against children on the Internet has often been exposed in social news, causing widespread public concern, and even many parents of children have panic. At present, there are no clear laws, regulations and judicial interpretations to define it in China, and it is only mentioned in the gist of a few guiding cases. Many related cases involving the act of indecent assault on children in cyberspace have also exposed the shortcomings of its identification in judicial practice. Therefore, it is necessary to further improve the identification of the act of indecent assault on children in cyberspace on the basis of guiding cases. This paper screens and analyzes the existing relevant judicial cases, and summarizes the aspects to be solved in practice. The viewpoint of this paper is based on the theory of "four elements of crime constitution" commonly used in Chinese legal academia, which enriches the understanding and application of the legal interests, objective and subjective aspects of the crime of child molestation in cyberspace.

Keywords: Network obscene, Child molestation, Cybercrime.

1. Introduction

With the development of network and Internet technology, the age of minors' access to the Internet is getting earlier and earlier, and the ways of Internet access are becoming more and more diversified. In 2021, the number of underage Internet users in China will reach 191 million, the Internet penetration rate of minors will reach 96.8 %, and the Internet penetration rate of primary school students will reach 95.0 % [1]. It is the most common and well-known way for minors to play online games. In addition, endless websites and mobile phone software also provide a way for minors to connect with the outside world. Even most primary and secondary schools use the Internet to form groups of students and parents, or use special learning websites to supervise students' academic learning. However, the Internet is a double-edged sword. It can enrich the extracurricular life of minors, make them contact and learn more extensive and fresh knowledge, and bring many risks to minors. From the resent social news and judicial practice, it is easy to find that many criminals require children to provide them with private photos and videos to meet their illegal purposes, and even make more violations of children 's physical and mental health.

At present, there is no clear legal norm in China to give the definition of "cyberspace indecency". Among the cases included in the Notice of the Supreme People's Procuratorate on Issuing the Eleventh Group of Guiding Cases of the Supreme People's Procuratorate, Luo 's Indecent Child Case is a guiding case about indecent children in cyberspace. Luo used dating software to ask for nude photos of 13-year-old girl Xiao Yu through intimidation and indecent assault. The gist of this case points out that the perpetrator takes sexual stimulation as the purpose, and requires children to take nude photos or videos for viewing by deception, coercion or other methods. It seriously infringes on children 's personal dignity and mental health and constitutes indecent child crime. Although the case guidance does not have legal enforcement effect, it still has important reference significance for the identification and conviction of the act of indecency against children in cyberspace.

Some scholars have put forward suggestions to improve the criminal law characterization of the act of molesting children in cyberspace from the aspects of practical considerations, criminal law

regulation and accurate application [2]. Some scholars have summarized the characteristics, types and harms of minors' network sexual assault from the aspects of punishment and prevention of crimes, improved the age determination and gathering plot of minors, and given suggestions for preventing this behavior [3]. Some scholars also focus on the analysis of Luo's case of indecent assault as a guiding case, and make suggestions for judicial determination [4]. Some scholars take the protection of children as the starting point, and put forward suggestions for improving the criminal law regulation of this behavior [5]. This paper analyzes the aspects need to be improved in the identification of indecency in cyberspace. On the basis of the theory of four elements of crime, some suggestions are put forward to further improve the identification of this behavior. It aims to achieve the purpose of using guidance more flexibly according to the actual situation of different cases.

2. The Judicial Dilemma Faced by Dealing with Cases Related to Indecent Assault in Cyberspace

The behavior of child molestation in cyberspace has obvious characteristics of the times, relies on the development of modern Internet technology, and there is no clear law to stipulate it. In the field of judicial practice, there are few guiding cases of this type of case, and there are still many problems and disputes in the identification of this behavior. Through case retrieval on websites such as "pkulaw" and "China Judgment Document Network", cases with similar cases are excluded and screened and representative cases in judicial practice are extracted. After reading and analyzing the content of the case and the reasons for the judgment, many problems in the judicial practice of related cases were found.

Firstly, the judicial practice is not clear about the legal interests protected by this crime. In many judicial cases, most of the case judgments do not clearly point out the legal interests of the infringement of cyberspace indecency. Among them, there are some cases in which children's personality rights and privacy rights are taken as legal interests. In the "Qin 's child molestation case" in Hubei Province in 2017, the judge considered that the perpetrator violated the victim's personality rights and privacy rights. Some cases also regard children's sexual shame as the legal interest infringed by this crime. It can be seen that in judicial practice, there are still differences in the judgment of children 's rights and interests infringed by the act of indecency against children in cyberspace, which needs to be further clarified.

Secondly, the reasons for the identification of specific cases are not sufficient. In most of the existing judgments on the act of molesting children in the space, there is no specific analysis of the infringement of the personal rights of the victim caused by the perpetrator in the case including physical and mental injuries, as well as the damage caused by the act to the public interest. For example, in the judgment of "Zhao Yuxi 's child molestation case" in 2019, it simply lists the facts of the case and does not analyze the facts and the harmful results of the case. According to the author's inference, it may be due to the protection of the victim 's right to privacy, but it also exposes problems such as incomplete and inaccurate identification standards.

Thirdly, the definition of crime and non-crime is not clear. In terms of crime identification, most of the judicial practice upholds the principle of protecting children's rights and interests, resulting in a large amount of conviction and unclear reasons for conviction, which easily leads to wrong judgments. While protecting the legitimate rights and interests of children, judicial justice should also be taken into account. Therefore, the definition of indecent behavior in cyberspace should be further clarified in practice.

3. Analysis of the Reasons for the Legal Regulation of Children 's Indecency in Cyberspace

3.1. The Particularity of Network Spaced Indecent Behavior

First of all, the network spaced indecent behavior is secret. The perpetrator coerces the victimized children to meet their sexual desires through the Internet, but the Internet social space is relatively private and difficult to detect by others. Due to their immature mind, poor ability to distinguish and respond, and fear and shame of sex, children generally do not actively explain to guardians, teachers or public security organs in time after being violated. Most of the murdered children are silently subjected to mental stress and pain, and there are few strong emotional reactions or physical scars. As a result, many children are unable to withstand stress and pain after long-term abuse, and are only noticed by others when they show abnormal behavior. In addition, even if the indecent act is found by others, it is difficult to trace.

Secondly, the network spaced indecent behavior is easy to operate. The popularization of mobile Internet and mobile communication equipment makes it more convenient for individuals to contact and use mobile communication equipment. In order to obtain more users, the design of mobile communication equipment is developing towards the characteristics of easy operation, which makes it easier and cheaper for criminals to obtain and use mobile communication equipment and network as criminal tools. In addition to criminals, mobile devices such as mobile phones are also very common among minors.

Thirdly, the network space indecent behavior has continuity. Most of the perpetrators in the traditional child molestation crime are passion crimes. The perpetrators have an absolute advantage in physical strength and intelligence compared to the victimized children. Most of the indecent acts end in a short period of time. In fewer cases, the perpetrators have repeatedly indecently assaulted the same victimized child for a long time. Such perpetrators are mostly personnel who have special responsibilities for children. However, in the crime of online child molestation, once the perpetrator has the private information of the victimized child, he will use this as a bargaining chip to continuously put forward various illegal requirements to the victimized child.

Fourthly, the indecent behavior of the network is diffuse. Many criminals will use their controlling position on the victimized children, requiring the victimized children to meet with them offline, commit indecent assault with physical contact, and even rape. In addition to pursuing their own sexual stimulation, they will also organize "prostitution" for others to commit crimes, and profit from them, breeding more crimes.

3.2. The Necessity of Perfecting the Identification of the Act of Molesting Children in Cyberspace

3.2.1. Criminal justice in this field needs to be improved

By clarifying the identification of child molestation in cyberspace, criminal justice can be improved from multiple levels. In terms of conviction, the constitutive elements of the act of molesting children in cyberspace should be more strictly defined to prevent missed or wrong judgments. In terms of evidence and proof, more comprehensive evidence from multiple perspectives should be collected, strive to achieve the standard of 'facts are clear, evidence is indeed sufficient', and judge objectively and fairly on issues such as 'crime and non-crime', 'this crime and that crime' through interest measurement.

3.2.2. Promote the protection of the legitimate rights and interests of children

According to statistics, since 2014, the media has publicly reported more than 300 cases of sexual assault on children under 14 years old every year, among which the cases of sexual assault on children by means of network are also increasing year by year. Among the 317 cases of sexual assault against children reported by the media in 2018, there were 39 cases of sexual assault by using the Internet. Among them, 16 cases belong to the act of molesting children in the air mentioned in this paper, that

is, criminals trick children into sending nude photos, nude videos, naked chats or indecent acts [6]. Children are a special group of Chinese citizens. Although they are young, they have unlimited development potential and are the future talents and backbones. Children have the characteristics of immature physical and psychological development and are vulnerable to criminals. China's Constitution clearly stipulates that "the state respects and protects human rights". If the personal rights of citizens are not effectively protected, the democratic rights and other rights conferred by the Constitution are impossible [7]. Protecting the legitimate rights and interests of children by improving the judicial field also responds to the national call and the requirements of the basic law.

3.2.3. Contribute to the construction of a harmonious society

The harm of cyberspace indecency is far more than the harm to individual children. Protecting citizens' personal rights and maintaining social order is an important task of criminal law. The criminal law regulation of this behavior and the suppression of crime are conducive to providing a safe and healthy environment for children as a vulnerable group, so that parents and teachers can more safely let children contact new things and experience the convenience brought by the network society.

4. The Optimization Path of the Identification of Child Molestation in Cyberspace

4.1. Clarify the Legal Interests of the Infringement of Child Molestation in Cyberspace

The crime of child molestation should have its own independent legal interests, that is, the physical and mental health of children. It is generally believed that the legal interest infringed by the crime of forced indecency and insult is the shame of sex. Although the crime of indecent assault on children and the crime of compulsory indecent assault and insult are stipulated in the same law, the legal interest of the crime of indecent assault on children cannot be equal to the legal interest of the crime of compulsory indecent assault and insult. The object of the crime of child molestation is children, specifically minors under the age of 14. For these minors under the age of 14, they are in the stage of physical and psychological growth and development, and their world outlook and outlook on life are not yet fully formed, so they do not fully have sexual consciousness and sexual shame. Therefore, in the process of legislative protection, it is unreasonable to take children 's immature 'sexual consciousness' and 'sexual shame' as the object of legal interest protection.

From the perspective of physical health, since children's sexual organs are not yet fully developed, sexual assault on children will damage their sexual organs, and sexual assault may also lead to pregnancy of girls. From the perspective of psychological harm, immature children lack the necessary understanding of sexual behavior. Violent sexual assault can lead to children 's distorted understanding of sexual behavior. At the same time, violent behavior can cause fear, self-denial, and even psychological abnormalities to cause mental illness.

In form, legal interest refers to "the interest protected by law". The judgment of illegality is a more substantive judgment than the judgment of conformity of constitutive requirements. The important method of substantive judgment is the measurement of legal interest. Clarifying the legal interests infringed by the crime of indecent assault on children and distinguishing it from the legal interests protected by the crime of compulsory indecency and insult, in the field of judicial practice, it is conducive to improving the accuracy of judges' judgment of cases and avoiding misjudgment. It is an important manifestation of the principle of legality.

4.2. The Identification of the Objective Aspects of the Act of Molesting Children in Cyberspace

4.2.1. The perpetrating act of crime

If the perpetrator only conducts network lure without causing actual harmful results, it is an act of committing child molestation crime. Sexual assault crimes such as child molestation and rape are all

behavioral crimes rather than consequential offenses. They are basically the consensus of the theoretical and practical circles. From the perspective of sociology, this is out of the need for the protection of women and children. In judicial practice, there are actors who lure children on the Internet for the purpose of satisfying sexual desires but fail to succeed for reasons other than will. For example, children refuse to send naked photos and videos. This situation should be convicted of the attempted crime of indecent assault on children, and the punishment should be lighter or mitigated. The defendant Yan disguised himself as a teacher and doctor through chat software, and deceived 31 underage female students to expose their private parts in the name of physical examination. Four of them refused, which made them unsuccessful. The court of first instance held that the failure of the four cases to succeed for reasons other than will was an attempted crime and could be given a lighter punishment than that of the completed crime [8]. From this case, it can be seen that only 4 of the 31 female students refused, which shows that in most cases, the perpetrator can still achieve the purpose of controlling the victim's psychology and dominating the victim's behavior through the way of network inducement.

In specific cases, there are few cases in which the perpetrator forces the victim to send photos, videos or chat with his video in a threatening and forced manner, and most of the acts are carried out by other means, such as temptation, deception. In this case, even if the child is voluntary, the act should be considered to constitute the crime of child molestation. The description of the crime of child molestation in China's criminal law is different from that of compulsory indecency. In order to strengthen the protection of children's rights and interests, it does not emphasize that the behavior of the perpetrator must be "mandatory". Children's minds are immature, vulnerable to temptation, and do not form a correct and mature sexual consciousness, so it is difficult to make sexual choices from a favorable perspective. Article 236 of the Criminal Law of China stipulates that the rape of a young girl under the age of 14 is rape and should be severely punished. It can also be seen from the provisions of Articles 19 and 20 of the "SPC issues opinions on sexual assault against minors" that the criminal law, based on the position of protecting minors. It denies that children have sexual autonomy or sexual consent based on the position of protecting minors.

4.2.2. The harmful results of crime

In judicial practice, it can be judged whether the punishment should be aggravated by the result and severity of the harm caused by the perpetrator's indecent act in cyberspace. At the level of physical injury, in most cases, the perpetrator only asks the victim for the relevant photo video when implementing the network spaced indecency, which will not cause substantial damage to the victim's body. However, there are still a few perpetrators who require the victim to make actions with certain meanings in the photo video. When such actions cause damage to children's body organs, medical methods should be used to test the degree of damage.

At the level of psychological harm, when the act causes serious psychological harm to the victim, the punishment should be increased. In the immature stage of growth, many children cannot get out of the shadows after suffering from indecent assault, rape and other injuries, and even suffer from depression, schizophrenia and other mental illness, and even children choose to commit suicide to end their spiritual pain. In specific cases, the victim can be professional psychological assessment to determine the degree of psychological harm caused by the perpetrator.

In addition to the harm caused to the victim himself, the indecent act of cyberspace may also endanger the public interest. For example, in the 'public' implementation of the network space indecent acts against children, should be identified as the aggravating circumstances of the crime of child molestation. The amendment of criminal law in China clarifies and improves the aggravating circumstances of the crime of child molestation [9]. The judicial interpretation of handling criminal cases such as defamation by using information network also has guiding significance for the interpretation of the concept of public places. It stipulates that the dissemination of false information on the information network is Article 293, stipulates that "causing trouble in public places" in criminal law of China [10]. "Public" should include children's pornographic live broadcast through the Internet, and the dissemination of children's pornographic images in public cyberspace with stakeholders and

openness. This kind of behavior not only violates the victim's physical and mental health and personal dignity, but also destroys the social atmosphere, and even is imitated, which can easily cause social panic. Therefore, for causing significant social repercussions, endangering the public interest of the network space indecent acts, should be increased penalties.

4.3. The Identification of the Subjective Aspects of the Act of Molesting Children in Cyberspace

4.3.1. The purpose and motivation of the perpetrator

In China's current judicial practice, the crime of child molestation is still based on the standard of "tendency crime", which requires the perpetrator to subjectively meet the purpose of sexual stimulation, but this provision is controversial in academia. The author believes that the 'one size fits all' standard is easy to cause unreasonable conviction in criminal justice. It should be determined according to the specific circumstances of the case and the purpose and motivation of flexible judgment behavior.

However, there are still some behaviors that are difficult to identify the subjective illegality of the perpetrator, which may constitute a cause of crime, as illustrated here. Firstly, if the two sides in a relationship, one to the other to send or send each other with a private part of the behavior of exposed photos, there may be the possibility of guilt. When one party has reached the age of 16 and the other party is a child under the age of 14, for the purpose of sexual stimulation, etc., one party sends nude photos, private parts, and photo videos with sexually suggestive features to each other or both parties. In general, it can constitute a crime of child molestation. The rapid development of the Internet, especially instant messaging tools, has provided a new place for young people to explore sex. In the traditional era, the 'puppy love' in the physical space has more expression forms in the Internet era [11]. Adolescence is an important stage in the psychological growth of adolescents, including the establishment of sexual cognition. Due to their ignorance, curiosity and longing for sex, adolescents understand the body by sending and watching obscene images to promote love between couples. Relationships are reasonable and acceptable behaviors without causing physical and mental harm. In this behavior mode, Judicial staff should analyze the formation basis of love relationship and whether the behavior causes physical and mental harm to one party, and judge from multiple angles. Special attention should be paid to the fact that if a party is only to satisfy sexual stimulation, by means of luring, threatening, etc., so that children can establish a relationship with them in an involuntary situation, it should still be considered as the crime of child molestation. In a love relationship, if one party forces the other party under the age of 14 to shoot obscene videos, which seriously endangers the physical and mental health of the other party, it should also be recognized as child molestation. Secondly, the use of the Internet for medical examination also has diversified characteristics in terms of whether it constitutes the crime of child molestation. With the development of online consultation, more and more patients are taking medicine through this simple, convenient and less expensive way. For children, it is also likely to choose online consultation due to fear and unwillingness to add burdens to parents. During the interrogation process, the doctor will ask the patient to take and send photos of the affected area, especially when facing gynecological examination, involving privacy sensitive parts, which can constitute a crime. It should be noted that the range of body parts in the photograph should not exceed the needs of medical examination, and patients should not be forced to take photos when they are unwilling to send them. Doctors who conduct online consultations should have professional qualifications and relevant certificates. For the act of counterfeiting professionals to ask children for body photos containing private parts, which violates children's physical and mental health and sexual shame, it should be found to constitute child molestation.

At the same time, for some behaviors that are not implemented by satisfying sexual stimulation, when they cause certain harmful results, the crime of child molestation should also be identified, so as to better curb the behavior of child molestation. For example, the act of inducing children to take private photos and videos and use them for profit, and the act of molesting children in order to satisfy the revenge psychology. It is true that children's physical and mental health is harmed. If the act of

harming children is allowed to continue because of adhering to the theory of specific tendencies or the principle of 'no guilt in doubt' then the law becomes the umbrella of the offender, which is obviously incorrect [12]. The flexible application of the subjective constitutive element of "the perpetrator's purpose of satisfying sexual stimulation" can effectively balance the conviction and sentencing of cyber spaced indecency in criminal justice, which is in line with the 'principle of suiting punishment to crime' of China 's criminal law.

4.3.2. The identification of children 's age "knowingly"

The knowledge of criminal intent refers to the objective factual factors that are indispensable to constitute a certain intentional crime under the law. It is roughly equivalent to the content of the objective elements of the crime including the understanding of the nature of the behavior, the understanding of the harmful results, and the understanding of the legal behavior object. Knowing the age of children belongs to the understanding of the legal object of behavior. There is no clear legal provision on the definition of children's age in the criminal law. China 's academic and judicial practice circles tend to narrow the 'children' to minors under the age of 14 [13]. In 1989, the Supreme People's Court issued and implemented the "Approval of the Supreme People 's Court on how to divide the age limit of infants and young children in the case of trafficking in human beings" pointing out that "children over the age of six and under the age of fourteen". Although it has now expired, it still has reference significance in the field of judicial practice. When the perpetrator commits indecent acts in the network, whether the victim is informed of the victim under the age of 14 is an important criterion for conviction. Only when the victim is known to be a child can it be recognized as the crime of child molestation.

In judicial practice, when the perpetrator 's knowledge of the age of the child is not significant, a variety of methods can be combined to determine whether the perpetrator knows that the victim is under 14 years old. Firstly, the identity information displayed by the victim on the Internet is worthy of attention. Most online chat and dating software can display the user's avatar, nickname, age and other information, and even in some websites, users can choose to fill out more detailed personal information such as birth date, work unit or school.

When the victim directly displays information such as birthday, age or school that directly indicates his or her age, he or she can basically be identified as knowing. When the information displayed by the victim is not detailed enough, the age can be inferred by combining the characteristics of avatar, nickname and personal signature. Secondly, Consulting the chat records of the perpetrator and the victim can help to infer whether the victim is active or reveals his age under the temptation of the perpetrator, and whether the tone of the chat content sent by the victim is significant enough to indicate his age. Thirdly, the physical development of children under the age of 14 is usually immature. Whether their face, body shape, especially sexual organs are mature can reflect their development. Through the photos and videos sent by the victims, the judiciary can preliminarily judge whether the perpetrator is aware of his age. In addition, the victim's daily necessities can often indirectly explain his age, such as textbooks and notebooks used in school.

In judicial practice, in terms of the reference and identification of "knowingly", the judgment of most cases does not specify the identification process of ' whether the perpetrator knows the age of the child ' in detail, and even if it is involved, the identification method is not involved and disclosed. The reason for this result may be that the perpetrator 's "knowing" in the case is more obvious, or it may be because the judge believes that "knowing" is not a necessary element. The author believes that the "knowing" of the perpetrator cannot be ignored, because the conviction and sentencing need to consider the possibility of the perpetrator's illegal understanding. The criminal law is modest, emphasizing the protection of the legitimate right of defense of criminal suspects and other legitimate rights and interests, and protecting them from illegal censure.

5. Conclusion

Nowadays, with the rapid development of Internet technology, the risks of the network exist everywhere, and the regulation of online indecent assault on children is imminent. Based on the guiding gist of the typical case of "Luo's case of child molestation", this paper puts forward some suggestions on the identification of child molestation in cyberspace on the basis of the four elements of crime. The author believes that the identification of cyber spaced indecent acts should also be further clarified and systematized. At the legislative level, the act of molesting children in cyberspace should still be included in the formal judicial interpretation and clearly defined as a formal source of law in judicial practice. At the social level, parents and schools should guide children correctly, surf the Internet healthily, establish correct sexual concepts, enhance their awareness of self-protection, and avoid criminals from finding opportunities from children themselves.

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