

Understanding and Application of Aggravating Circumstances in Child Molestation on the Internet

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Abstract: With the popularization and development of the Internet, cyberspace has become a new platform for criminal activities, and the problem of child molestation in cyberspace is becoming increasingly serious. In order to protect the rights and interests of children, this paper believes that the aggravating circumstance of "in a public place in broad daylight" should be applied in the crime of molesting children in cyberspace. Due to the increasing publicity, openness, and social attributes of cyberspace, it has certain characteristics of "public place" to a certain extent, so it should be considered that the crime was committed in a "public place in broad daylight" under certain conditions, and should be punished severely according to the law. In order to avoid inappropriately expanding the scope of crime, the criteria for identifying "public places" and "in broad daylight" should be clarified, and the scope of application should be reasonably defined based on the characteristics of cyberspace.

Keywords: Molesting Children; Cyberspace; Public Place; Aggravating Circumstance.

1. Introduction

Children are the future and hope of a country. In recent years, cases of sexual abuse, including rape and molestation, have been increasing, which has not only aroused public concern but also prompted the country to step up its efforts to punish child sex offenders.

In 2014, the Supreme People's Court, in its publication "Criminal Trial Reference," provided an interpretation of the legal application of "public places" and "in public." It was pointed out that school classrooms, as spaces used by most students on a daily basis, have a certain degree of publicity, and therefore classrooms can be regarded as "public places." In 2018, the Supreme People's Procuratorate, through its 11th batch of guiding cases, further expanded the scope of the concept of "in public" - for crimes of rape and molestation committed against minors in non-explicitly listed places, as long as the place has a certain degree of openness and there is a possibility of being noticed by others or being present, it can be regarded as a public place where the crime was committed in public.

The virtual nature of the internet makes internet crimes difficult to detect. For cases of child molestation committed through the internet, if the crime cannot be applied to the aggravating circumstance of "molesting children in public," it will not be able to effectively punish such serious crimes. Therefore, in certain circumstances, the crime of molesting children through the internet must be applied with the aggravating circumstance of "molesting children in public."

2. The Necessity of the Application of "in Public Places" Aggravating Circumstances in the Crime of Online Child Molestation

"Public indecency in a public place" is a statutory aggravating circumstance stipulated in the criminal law. In current judicial practice, there are few major differences on whether "network space indecency" can be classified as child molestation crime. On the one hand, in view of the lack of

sexual autonomy of children, their voluntary willingness does not affect the fact that "online child molestation" constitutes a crime; On the other hand, the establishment of the crime of child molestation does not require the perpetrator to use coercive means, nor does it limit the scope of molestation to only involving direct physical contact.

But is the Posting of videos of child molestation or live molestation of children through Internet chat rooms or live molestation of children an aggravating circumstance of the crime of child molestation provided for in Article 237 of the Criminal Law, that is, "public molestation of children in public places"? This involves the relevant provisions of the criminal law regarding "public places" and whether such provisions can be applied to cyberspace.

2.1. A "Two-tier society" has Taken Shape

With the development of Internet technology, cyberspace has acquired the same social attributes as the real world. The Internet has completely become the "second space" of human activities, forming a "two-tier society". The Internet is no longer just a tool for communicating and transmitting information, but is integrated into People's Daily life. People can satisfy their different mental and even physical needs by clicking on all kinds of links and viewing all kinds of information. But at the same time, many criminal processes and actions can all be done through cyberspace. The existence of cyberspace has given rise to a new form of criminal behavior, which can be carried out completely in cyberspace and run through the whole criminal process; It can also involve the two major fields of cyberspace and real society at the same time, and realize cross-platform criminal activities. The coexistence of the two crime platforms urgently needs to make the traditional criminal law applicable to the interpretation path and application rules on the two platforms.

In the face of the trend of the reality of cyberspace and the formation of a "two-tier society", in recent years, China's legislature has continuously issued amendments to the criminal law and the supreme judicial organ has continuously improved the relevant judicial interpretation and guidance cases, making the legal net of regulating child molestation

crimes increasingly tight, and at the same time, it has also clarified the applicable boundaries and scales of legal policies.

2.2. The Protection of Children's Rights and Interests Should be Strengthened

The criminal acts of child molestation are bad in nature, seriously break the bottom line of morality and law, and cause great harm to children's physical and mental health. China has carried out the strictest criminal law protection for the sexual rights of minors, and imposed the heaviest punishment on the illegal acts that violate their sexual rights and interests. Indecency, whether online or in real space, constitutes a serious violation of children's rights to sexual autonomy, and also causes damage to the physical and mental health of the victims. Therefore, it is necessary to include the network indecency act into the category of indecency crime, and investigate its criminal responsibility according to law.

Chinese scholar Professor Yao Jianlong clearly pointed out: "Compared with adults, children have absolute indecency." Once a child's sexual rights are violated, it will have a great impact on his life. In the protection of the sexual rights of minors, the law gives special protection, which is not only the respect for the rights and interests of children, but also in line with the expectations of the whole society for the criminal law.

3. The Specific Application of the Aggravated Provisions of "in Public Places" in the Crime of Online Child Molestation

From the perspective of China's judicial practice, the implementation of online child molestation "in public places" includes three main situations: network space molestation of children, network live molestation of children and through the network spread of obscene video of children. This paper argues that when certain conditions are met, the above three types of indecency against children should be regarded as having aggravating circumstances of "being in public".

First, with the progress of network technology, in a sense, the actor's behavior in cyberspace can be regarded as an extension of his behavior in real life. Furthermore, the development of Internet technology has enabled users and users to have an immersive experience. For some crimes, the line between virtual space and the real world has become blurred. As an indispensable part of modern daily life, cyberspace has in essence fully displayed all the characteristics of public places. Finally, the number of people who carry out traditional criminal activities through the Internet is increasing rapidly, and most of them only use the Internet as a means of committing crimes or as a place of committing crimes. They are still traditional crimes in essence, and they can be characterized and punished according to the existing criminal law and relevant provisions. Therefore, based on the social reality, the scope of application and regulatory boundaries of the aggravating circumstances of "public implementation in public places" should be appropriately broadened, and online indecency against children should be included in the scope of regulation of this crime, which will have a positive promoting effect on strengthening the protection of minors' sexual rights.

3.1. Cyberspace can be Identified as a "Public Place"

In Article 291 of the Criminal Law, for the crime of

gathering a crowd to disturb the order of public places and traffic order, a number of typical types of public places are clearly defined through specific enumerations, including stations, wharfs, civil aviation terminals, shopping centers, parks, cinemas and theaters, exhibition venues, and sports venues. The key to understanding "public place" lies in grasping its essence in combination with real life practice. It not only refers to the real physical place, but also various virtual interactive social places extended and created through the Internet can also be "public places", such as websites and forums open to the public. Even the interactive area of user comments under a certain microblog.

However, some scholars pointed out that there are still differences between cyberspace and public places. Professor Zhang Mingkai said, "Although the public can express their opinions in cyberspace, their bodies cannot enter cyberspace. If cyberspace is recognized as a public place, then when an perpetrator rapes a woman in a private room and at the same time broadcasts the rape on the Internet, it is also "raping a woman in a public place." Not only that, a magazine, a newspaper, a message board is also a public place, because no specific person can post on it. However, such a conclusion may be difficult to accept." Although the current technological development situation, the human body is indeed unable to enter the network space at the physical level, but compared with the traditional paper media, people can make their sensory perception and interactive social scope through the Internet has a greater expansion and extension. Even with the progress of VR glasses technology, some scenes can even make people feel traversed and immersive, so even if the rape of a woman in a private room, once it is broadcast live on the network, there is the possibility of being watched or heard by an unspecified majority. Therefore, in the crime of online child molestation should strengthen the protection of children's physical and mental health and children's sexual rights, if the behavior of online child molestation has the possibility of not specific or most people to see and hear, even in cyberspace should belong to the "public in public" molestation of children. Professor Qu Xinjiu also pointed out that the definition of cyberspace as a public place in the Interpretation of Online Defamation is the result of taking into account human rights protection and social protection, which is scientific and reasonable.

In recent years, the academic community has begun to gradually recognize the nature of public places in cyberspace when some crimes are determined. Many social activities and discussions in today's social life are mostly carried out in cyberspace. With the popularity of online conference platforms such as Dingding and Zoom, as well as the vigorous development of Internet communities, people can use Internet technology to achieve work, study and social activities that were previously only carried out in the physical reality of the social environment at anytime and anywhere. Therefore, in reality, the public gathering space can be regarded as a public place, there is no reason to think that cyberspace is not a public place.

3.2. In Cyberspace Can be Identified as "Public"

According to the provisions of the criminal law, the aggravating circumstances constituting the crime of child molestation not only need to meet the spatial elements of the violation occurring "in a public place", but also must meet the conditions of "in public", the two are indispensable, and

jointly constitute the statutory aggravating circumstances of "in a public place in public".

This article believes that the identification of "public" in the network indecency children should be judged comprehensively from the following three aspects: first, it must have the objective existence of "public". When the perpetrator commits an act of indecency, there must be other realistic and specific people present in addition to the actor and the victim, and it can generally be considered that there are three or more people to meet the conditions for the establishment of "many". For example, the perpetrator sets up a live broadcast room on an open Internet platform to broadcast the process of child molestation in real time, so that an unspecified majority of people can enter the live broadcast room to watch; Second, there must be a realistic possibility of "public", which is determined or presumed according to the objective facts in the course of the crime. For example, when the perpetrator conducts "space molestation" on children, although he uses software such as Tencent Conference or ZOOM to open a room, he sets a password or specific conditions to broadcast live only within the range of three people, but most people cannot enter the room to watch. In fact, only a few people, such as the perpetrator and the murdered child, are in the broadcast room, which does not have the possibility of "public"; Third, "public" must be real-time, that is, "public" must occur in the process of child molestation crime, if only after the perception or after the majority of people watch it cannot be identified as "public". For example, the perpetrator in the private network platform or chat room and other occasions to molest children at the same time of recording, video, in the process of molestation is not easy to be detected by the victim or there is no specific majority of people to watch, but after the video uploaded to the network for people to click, watch, it should not be evaluated as "in public".

3.3. It is not Appropriate to Extend the Interpretation of "in a Public Place" in Cyberspace Indefinitely

Protecting the physical and mental health of children is the core purpose of establishing the crime of child molestation. Including the act of child molestation in the network environment into the scope of the regulation of the crime and applying the statutory aggravating circumstances, not only does it not exceed the boundary of the legal interpretation of the crime, but also conforms to the general expectation of the public to the justice of the law. In doing so, however, care must be taken to avoid unduly expanding the scope of what constitutes a crime.

3.3.1. The Meaning of "In A Public Place" Should be Reasonably Expanded

In order to avoid wrong limitation or improper expansion of the scope of application of legal norms, the interpretation and application of "in a public place" in this crime should pay attention to the following two aspects:

First, only a platform with openness can be identified as a "public place". The so-called open platform generally refers to the "public domain" platform, which refers to the platform type that an unspecified majority of registered users on the platform can freely register, access and use. In the case of online child molestation, whether the Internet space is a "public place" should be specifically judged, and the closed or semi-closed Internet space should not be identified as a

"public place". For example: Tencent meeting room with password, or just one-on-one private chat through WeChat, QQ and other communication tools. For most ordinary Internet users, it is unlikely that they will be able to break the key, force their way into a room, and access chat messages. However, if the offline molestation of children or "space molestation of children" process is not encrypted live or encrypted but there are still three or more network users in the room, it can be directly identified as an aggravating circumstance of child molestation. Because, in the network broadcast, online users can click the link, freely enter and exit the network platform in a variety of broadcast rooms. These users are constantly browsing information in the network, if the network platform is not identified as a "public place" obviously does not conform to the reality of social life.

Second, how to identify "public" in cyberspace should also be reasonably grasped. There are still differences between cyberspace and physical space. Among them, the judgment of "public" can be judged by "the number of people present" or "the flow of people in the place" in the physical space. However, in cyberspace, due to the existence of a variety of network platforms, and each platform for the judgment of "traffic" also has a different and complex calculation method, so in cyberspace for the identification of "public" should adhere to the substantive judgment. For example, real-time video software such as online live streaming is usually in the form of "live room", "discussion group", "post" and other smaller levels. If the "room" is accessible to all users at will or is clearly marked or clearly implied on the home page or in a prominent place of the website, it shall be regarded as "public" even if the number of people watching or browsing is not more than three; If the number of viewers is large when the live broadcast room does not begin to broadcast obscene acts, but after the obscene acts begin to set an entry password or only specific members to watch, the total number of real-time viewers is not up to three, then even if there are many online users of the entire live broadcast platform at that time, it should not be presumed to be "in public".

3.3.2. Online Child Molestation Must Reach the Level of "Serious Circumstances"

In understanding the definition of "public molestation of children in public places and the circumstances are egregious", it is necessary to adhere to the principle of implementing special protection for children, and comprehensively consider such as the body parts involved in molestation, the means used, the length of time, whether coercive behavior is used, and the degree of physical and mental damage caused to children. One or more factors, such as whether the perpetrator has a bad record of sexual assault in the past, to ensure that accurate and appropriate judgments are made. For the crime of child molestation, Amendment to the Criminal Law adds the condition of "being in public and in bad circumstances in a public place" before the statutory aggravating circumstances can be applied. This is to prevent the judicial authorities from ignoring the severity of the "public in a public place" molestation of children in judicial practice and applying the aggravation clause mechanically, so it is necessary to set reasonable conditions for the degree of "bad circumstances".

In addition to meeting the behavior pattern clearly listed in the crime, the behavior of the perpetrator must also meet the criteria of "serious circumstances" or "bad circumstances" to constitute a crime. At present, China's legislation and judicial interpretation have not yet clearly pointed out that under what circumstances is "in a public place" "bad circumstances."

What is the standard for what constitutes "egregious circumstances" in cyberspace? Only by clarifying the standard of "bad circumstances" can we help the scientific and reasonable identification of the aggravating circumstances of the crime of child molestation.

Article 2 of the "Network Defamation Interpretation" stipulates: "The use of information network to defame others in one of the following circumstances shall be identified as the" serious circumstances "provided for in the first paragraph of Article 246 of the Criminal Law: the same defamation information is actually clicked, viewed more than 5,000 times or forwarded more than 500 times..." Based on the information of clicking, browsing and forwarding on the Internet, the seriousness of the harm to society is measured. In this paper, we should combine the characteristics of the Internet and make a comprehensive judgment on the "bad situation" from the aspects of the number of viewers, the scope of transmission and the impact. If when the perpetrator has just opened the network broadcast but the number of people entering the live broadcast room has not reached more than three or the number of visitors is low, the platform has detected and blocked the live broadcast room, which means that the network obscene behavior has not reached the "public in a public place", should not be identified as "bad circumstances".

4. Conclusion

With the development of the information age, cyberspace and real space have been integrated and inseparable. Online child molestation is not only a violation of individual rights, but also a serious destruction of children's physical and mental health. Although this kind of behavior breaks through the limitation of traditional physical space, it still belongs to the scope covered by traditional criminal law and should be severely punished by law. In order to prevent the improper application of the law resulting in the infinite expansion of the criminal circle, it is necessary to clarify the two concepts of "public place" and "public". This requires that when judging such crimes, we should not only take into account the special

characteristics of cyberspace, but also comprehensively consider the level of public cognition and the openness of network activities, so as to reasonably define the scope of application of legal provisions and ensure that the crime and punishment are compatible.

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