

Problems in the Crime of Molesting Children on the Internet

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ABSTRACT

In China, the Internet popularizing rate of minors has exceeded 93.7%. Some people regard the Internet as the land beyond law, resulting in the evil claws to the minors on the Internet. In recent years, the scale, severity and complexity of pornographic activities and crimes related to minors on the Internet have been increasing, so the research on cybercrime is very necessary. This study analyzes a new type of crime in recent years, namely, the crime of molesting children on the Internet, aiming to provide corresponding suggestions for the improvement of relevant legislation in China.

Keywords: *Cybercrime, Online, Child molestation, Controversy.*

1. INTRODUCTION

According to the survey, the number of Chinese netizens was about 904 million by March 2020. Among them, the number of netizens aged 10-19 has become the largest group after the group aged 20-39, up to 19.3%. At the same time, among China's netizens, students are the most, accounting for 26.9% [1]. According to "2018 Research Report on China's students' network application" jointly released by the Ministry of Safeguarding Minors' Rights and Interests of the Central Committee of the China Youth League and China Network Information Center (CNNIC) on March 26, 2019, the number of Chinese minor netizens would reach 169 million. Minors account for an increasing proportion in the group of network application, and the network not only provides convenience for them, but also brings great security risks. According to China's first "white paper on the harm of bad network information to children" published by the Central Committee of the Communist Youth League in 2016, nearly 80% of minors have been exposed to pornographic and violent information using computers and mobile phones. According to the statistical analysis on cases of sexual assault on children in 2019 and the report on sexual assault prevention education for children, among 301 cases of sexual assault on children (under the age of 18) disclosed and reported by the news media, 21 cases

were committed online, which were divided into online and offline crimes (sexual assault after online dating), accounting for 9.91%. It can be seen that the Internet has become a platform and a fig leaf for some people to break the law and commit crimes. The network is not a land beyond law, and the illegal and criminal activities are online and offline. The acts that infringe on the legitimate rights and interests of citizens should be regulated. The crime of child molestation on the Internet in recent years is the best example. The "case of child molestation by Luo" (JL No. 43) in the 11th batch of guiding cases published by the Supreme People's Procuratorate on November 18, 2018 defined the nature of the penalty for the crime of child molestation on the Internet. Although the Supreme People's Procuratorate has identified the legal nature and social harm of online child molestation as that of the obscene act of directly touching the children, that is, the perpetrator uses the Internet to touch the body of the children, but there are still some difficult problems in the specific characterization and trial practice of such cases.

2. OVERVIEW OF THE CRIME OF MOLESTING CHILDREN IN CYBERSPACE

2.1 *Current Situation and Different Views*

On November 18, 2018, the Supreme People's Procuratorate announced the "case of Luo molesting children" (JL No. 43) in the 11th batch of guiding cases, which defined the nature of the criminal punishment for child molestation online. In the guidance case, with the purpose of achieving sexual stimulation, the perpetrator asked the child to take pictures and videos of naked bodies and sensitive parts for viewing by inducement, coercion and other means, which seriously affected the child's human dignity and physical and mental health and was also the crime of indecent assault on children.

From May 2015 to November 2026, Jiang, the defendant, falsely claimed that he recruited child stars on behalf of "Xingye studio of child star", "Changcheng film", "Yiran workshop of child star" and other institutions with virtual identity, knew girls on QQ video program, and requested the victim to take nude photos on the Internet on the grounds of checking the height ratio, children's growth and development and the need for interview to carry out obscene actions. In addition, he also threatened to release nude photos of children and forced some girls to carry out naked chatting. As of the time of the crime, 31 children had been molested. After examination, People's Court in Xuanwu District (Nanjing) held that in order to meet the desire for obscenity, Jiang, the defendant, used the network platform to molest many children aged below 14 years old, which had formed the crime of molesting children and should be severely punished, so he was sentenced to fixed-term imprisonment of 11 years according to law.

In January 2019, the Central Committee of the Communist Youth League of China exposed three cases of sexual assault on children through special documentary. In one case, Li, the defendant, once sent pornographic photos and videos to multiple children, and coerced and lured the children to make pornographic videos and carry out naked chatting [5].

The above three cases are all typical cases of online child molestation in China recently. Although the Supreme People's Procuratorate included "Luo" and other cases as guiding cases, it would be found that in the handling of such cases,

there were different views on the definition of such acts within the public prosecution departments, people's procuratorates and even people's courts all over the country when summarizing the gist of the case judgment. There are also a lot of similarities in such cases. It is summarized as follows:

In multiple judgments, "the object of the molestation is the privacy and personality rights of children. Although there are not physical contacts between the defendant and the victim, the purpose is to stimulate or realize sexual desire. This sexual behavior damages the privacy and personality rights of children and has realistic damages to the body and mind of the victim. Their subjective intention and objective behavior are the constituent elements of child molestation, and their behaviors constitute the crime of child molestation." The object of the crime of child molestation is the right of privacy and spiritual purity of children. In addition, the right of spiritual purity refers to the right of children to develop their good conduct and style. In other words, it is the right of personality of children not to be harmed by injustice in the formation of their conduct style. It can be seen that whether the physical contact between the defendant and the victim is in the same time and space is not the key to identify the obscene behavior.

Taking the case of Luo molesting children as an example, the public prosecution department, the court of first instance and the court of second instance had different opinions, which were listed as follows:

The public prosecution department believed that Luo's criminal act of coercing the victim to take nude photos had greatly affected the victim's personality, self-esteem and mental health, so it should be regarded as the accomplished crime of child molestation;

The Court of First Instance held that the act of coercing someone to take nude photographs was not direct physical contact, which did not constitute the offence of child molestation.

The Court of Second Instance held that Luo's coercion of others to take nude photographs for viewing constituted an accomplished crime of child molestation.

In practice, there were two different opinions on whether the perpetrator's use of network communication tools or indecency without direct physical touch constituted the accomplished offense of child molestation.

According to the first opinion, the accomplished offense of child molestation required the perpetrator to make physical contact of indecent nature with the victim, and when the defendant had not yet made physical contact with the victim, his act was not accomplished offense of child molestation.

In the second opinion, the law for punishing the crime of child molestation was to protect the sexual rights and human dignity of children, and the defendant's request to upload nude photos of children violated the human dignity of children, especially when he blackmailed the victim to meet him with the intention of molestation, the violation of the child's personal legal interest reached a level that should be punished by criminal law, constituting an accomplished offense of child molestation.

2.2 Definition of Online Indecent Assault

At present, there are three theories about cybercrime in academic circles. The first is the "object theory". The mainstream view is to take the Internet as the target of criminal activities and identify Internet criminal acts, that is, acts that damage the integrity, confidentiality and use function of the Internet and the space environment of the Internet [3]; the second view is the "tool theory", that is, "cybercrime refers to the act that endangers society by using computers and the Internet in cyberspace" [4]; the third is the "dual theory of object and tool", which is put forward after summarizing the historical evolution of the Internet, that is, cybercrime is a criminal activity that "uses the Internet as a crime tool or criminal activity object to threaten the security of Internet information system". [4]

The author puts forward the relevant definitions of network indecency as follows:

At present, China's criminal law still lacks a specific definition of sexual assault on children, but according to the "training manual for the prevention of sexual assault on children" in Hong Kong, sexual assault on child refers to the sexual activity with children by coercion, deception, temptation or other means in order to achieve their own or other people's sexual desire or other purposes [6]. According to the definition of relevant laws and regulations of the United States, Britain, France and other countries, online child pornography refers to the activity of illegally producing, providing, holding and disseminating information about child

pornography, such as exposing the body of children under the age of 18 years old and pornographic suggestive content [7]. Sexual assault on children on the Internet refers to sexual activity of any form with children under the age of 18 years old through Internet media, using inducement, coercion and other means [8].

Online sexual assault on children is a new form of sexual assault on children, which refers to the sexual assault on children by criminals using the virtual space of the Internet as the way or place of committing crimes [6].

The so-called crime of molesting children on the Internet refers to the criminal behavior that the perpetrator uses the Internet to molest the child in the virtual space through indirect physical contact, thus affecting the child's personal dignity and mental health [9].

At present, there is no specific definition of "the crime of molesting children in cyberspace" in China's criminal law. According to the definition of "cybercrime" by scholars and the definition of "the crime of molesting, insulting women and molesting children" in article 237 of the Chinese criminal law, "whoever forcibly molesting women or insulting women by violence, coercion or other means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. Whoever gathers together or commits the crime mentioned in the preceding paragraph in public shall be sentenced to fixed-term imprisonment of not less than five years. Those who molest children shall be severely punished according to the provisions of the first two paragraphs. In the opinions of author, the behavior of "molesting children on the Internet" should be defined as that the perpetrator uses the Internet to commit sexual assault on children without physical contact in different time and space through some network platforms.

2.3 Characteristics of Crimes of Molesting Children in Cyberspace

Online crime is combined with offline crime; Secrecy and openness coexist; softening is combined with violence; and the collective silence is chosen by most of the minors victimised [10].

The majority of crime subjects have a low level of education and do not hold a legal position; the majority of victimised subjects are primary and secondary school students and are passively silent;

the concealment and softening of the crime is very distinct [11].

In other words, there are characteristic of strong concealment, high rate of stash cases and being difficult to investigate and obtain evidence [12].

Summarizing and sorting out different views, it is found that among the characteristics of the crime of molesting children on the Internet, concealment is the most significant feature. In addition, softening is also obvious. Softening refers to use non-violent means, such as seduction and deception, to require minors to shoot or expose the hidden parts of their bodies.

In addition to the above characteristics, the crime of molesting children in cyberspace also presents the characteristics of one defendant corresponding to multiple victims, which is different from the one-to-one implementation of traditional molesting crimes and sexual assault crimes. The new crime model breaks the restrictions of region and space, not only increases the number of victims, but also expands the geographical scope of victims.

3. DIFFICULTIES IN EMPIRICAL EVIDENCE AND THE ANALYSIS

3.1 Controversies in the Application of the Law by Judicial Authorities

There are some differences in the expression methods between the behavior of molesting children and the traditional sexual behavior of obscene children. Zhang Mingkai pointed out that "the obscene behavior of others was the sexual behavior in the face of others, with sexual meaning and infringing on others." [13] Liu Xianquan believed that obscenity was a sexual act that destroyed the normal sexual shame of ordinary people and infringed on the sexual morality in order to stimulate or satisfy the sexual desire of the perpetrator or a third party [14]. Therefore, whether such sexual behavior constitutes the crime of child molestation has always been debated in judicial practice, and the victims and defense lawyers in these cases often point out that because there are not intuitive body contacts between perpetrator and victim, this kind of molestation online does not constitute the activity scope of the crime of child molestation, and the perpetrator certainly does not commit a crime. At the same time, other understanding judges also have such judges.

In practice, the focus of specific disputes in the trial of judicial organs is as follows:

- Whether children's "voluntary" can exclude the occurrence of online child molestation;

Generally speaking, the criminal act of damage based on the agreement or willingness of the obligee constitutes a legitimate act in the criminal law [15], that is, in this case, the criminal act committed by the perpetrator to the other party is usually not evaluated as a crime. In other words, there are provisions in the law on the rights and interests agreed or voluntarily abandoned by the obligee. Dr. Lin Shantian once made a special summary and gave six requirements for effective commitment to the victim, that is, the protection of legal interests abandoned by the victim must be allowed by the law; the victim should have the right to dispose of the legal interests guaranteed by the law; the victim should have the ability of commitment; the commitment should be based on the victim's own free will; commitments should be explicit before action and can be learned after specific action; the perpetrator should be aware of the guarantee ability of the victim [16].

- Whether the network seduction behavior constitutes the specific implementation behavior of the crime of molesting children;
- Whether the crime of indecent assault on young children must be enforced;

3.2 Difficulty in Obtaining Evidence

This kind of problems is first caused by the characteristics of minors themselves. Due to their age, education level and lack of social life experience, minors often do not know how to protect evidence when their basic rights and interests are infringed and serious crimes occur. However, the real criminal cases caused by the Internet are often in single-line contact. As minors lack legal experience and have no awareness of the protection of fixed evidence at the time of the case, this has also caused great obstacles to the investigation organs in the investigation and evidence collection.

3.3 No Compensation for Mental Damage

After experiencing sexual assault, minor victims will suffer double trauma both mentally and physically. Therefore, they must "heal" for a long time, during which they must invest huge money, time and energy. Physical and even mental trauma will accompany them for life. However, the current

criminal law and criminal procedure law do not stipulate that minors have rights to demand compensation for mental damages after being sexually assaulted. In the long run, it is not conducive to the protection of minors.

3.4 Being Difficult To Control

The number of minor netizens is huge, and they come from different families. Their growth environment and education level are very different, and their overall quality is also uneven. In addition, the information content of the network platform is complex, and child pornography and violence fill the whole process. Minor netizens lack judgment and discrimination on the network information content, and are very easy to be disturbed by the bad information of the network platform. The huge group of minor netizens, the complex information of the network platform, the insufficient monitoring ability and the backward monitoring technology have added considerable difficulties to the control and supervision of the network platform.

3.5 Others

Self-discipline of network enterprises is poor; the issue of jurisdiction has also created obstacles for severely cracking down on the criminal activities of molesting children in the space; the supervision mechanism is not perfect; the responsibility is not fully implemented.

4. CRIMINAL JURISPRUDENCE ON THE CRIME OF MOLESTING CHILDREN IN CYBERSPACE

4.1 Clarifying the Difference Between This Crime and That Crime

4.1.1 Difference Between the Crime of Molesting Children in Cyberspace and the Crime of Obscene Pornography (the Crime of Spreading Obscene Articles)

At present, in China's criminal system, online pornographic crime of minors has not formed an independent concept, but a sub-item of related pornographic crime. However, China's criminal law has stipulated some charges against pornographic network crimes, such as "the crime of making, copying, publishing, selling and disseminating pornographic articles for profit". If the circumstances are especially serious, they can even

be sentenced to life imprisonment. However, it is certain that indecent behavior without physical contact can also form the crime of indecent assault on children, but the characterization of specific behavior is one of the important issues. The nature of indecency leads to constant disputes in practice. If the perpetrator changes one-to-one sexual interaction into one-to-two, one-to-three or one-to-many sexual interaction, how shall we define it? For another example, if the perpetrator disseminates the obtained naked pictures, videos and other information of children through the Internet, will the behavior continue to constitute the crime of molesting children or the crime of spreading obscene articles due to the spread of obscene articles? The key to distinguish the two crimes lies in whether the purpose of obtaining pornographic materials of minors is to make profit.

4.1.2 Difference From the Crime of Forced Prostitution

If the perpetrator threatens the child with obtained pictures and videos to have a naked chat with a third person by deception or inducement, or even directly communicates with a third person to take photos and videos and other child molestation activities, does it constitute the crime of forced prostitution?

4.1.3 Difference From "Crime of Organizing Obscene Performances"

The crime of organizing pornographic performances refers to the act of controlling others to perform pornographic performances by means of recruitment, employment, coercion, inducement and sheltering. If the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

4.2 Opinions on the Above Dispute Focus

4.2.1 Whether Children Under the Age of 14 Years Old Have Sexual Autonomy

Through the provisions on the act of raping young girls in Article 236 of the criminal law and the provisions on articles 19 and 20 of the "opinions on punishing sexual crimes against minors according to law" of the "two Supreme People's Courts and two Ministries" in 2013, it is found that China's criminal law denies children's free will or sexual consent for sexual acts out of the foothold of protecting minors.

4.2.2 Whether the Network Inducement Constitutes the Implementation of the Crime of Indecency

In form, online seduction has been inseparable from the subsequent obscene behavior, and its evaluation can be included in the obscene behavior. In essence, the main object of legal interest protected by the criminal law of child molestation is children's physical and mental health. Therefore, if there is a real risk to this legal interest, it is necessary to determine and start the implementation of the crime. Moreover, because the crime is an executive crime and does not require results, it constitutes the crime of indecent assault on young children.

4.2.3 Whether the Crime of Child Molestation Must Be Committed by Mandatory Means

The provisions of the criminal law do not refine its specific behaviors, but to some extent, it can still be seen that the behavior of child molestation has the tendency to be defined as mandatory molestation from the official position.

4.3 Macro Issues Behind the Biggest Focus

That is whether the traditional criminal law can be applied in double-layer society. Double-layer social structure refers to the gradual transition of Internet space combining virtual and real from a single information media to a living platform. Internet behavior is not only a simple virtual activity, but also is gradually given a new social meaning, resulting in a new social structure integrating cyberspace and real space [17]. In the double-layer society, the traditional criminal law is constantly challenged. Whether the traditional criminal law can still be applied provides new thinking.

4.4 Crime of Molesting Children in Cyberspace and Children's Right of Privacy Online

The fourth edition of the "civil code" expressly stipulates that natural persons have the right of privacy and other rights. In the relevant judicial interpretations, the Supreme People's Court directly or indirectly mentioned the protection of citizens' right of privacy. The "tort liability law", implemented in 2010, regards the right of privacy

as a separate civil right for the first time, thus identifying the important position of the right of privacy in civil law.

The "law on the protection of minors" also defines the basic privacy rights of minors, which cannot be illegally disclosed.

The "prevention of juvenile delinquency act" also expressly states that the personal information of minors cannot be disclosed or inferred.

Among the specific acts of molesting children on the Internet, there are some cases that people illegally obtain children's private pictures and videos and then spread them on the Internet for illegal disclosure.

4.5 Crime of Possession Type

Some criminal suspects defraud children of privacy photos or videos through the Internet, constituting the crime of indecency. Does the possession of such pornography be considered another crime? Will it be included in the crime of child molestation?

In many developed countries, not only the production and dissemination of child pornography is a crime, but also the possession itself is a crime. In 1990, the U.S. Supreme Court held that it was a crime to "hold or watch a nude photo of a child or a pupil under guardianship that was not the children-in-law" in *Osbornev* (the party in this case had four nude photos of a 14-year-old girl at home).

However, "there is a demand, there is a market". From a long-term perspective, China's criminal law should not only severely crack down on the criminal acts of molesting children or spreading pornographic information of children on the Internet, but also consider including the acts of browsing and holding a considerable amount of pornographic information of children in the range of punishment.

4.6 Protection of the Sexual Rights of Boys Over the Age of 14 Years Old

The crime of rape is only committed against women, so a large number of cases of sexual assault on boys can only be solved with the crime of molesting children. In addition, the crime of molesting young children also limits the criminal object to children under the age of 14 years old. As a result, girls over the age of 14 years old can be held accountable for molesting and insulting

women, while boys who are molested and sexually assaulted can only be punished by public security punishment or minor intentional injury crime, resulting in a legislative gap in the protection of boys' sexual rights and interests over the age of 14 years old. Therefore, there is a problem. In the existing cases of online indecency, the victims are generally girls. What if the victims are boys over the age of 14 years old? Because the behavior mode is online indecency, there is neither coercive means nor physical contact. It can not be defined according to offline behavior, that is, public security punishment and intentional injury crime. How to protect their rights should be paid attention to.

5. CONCLUSION

With the development of society, new social risks and types of crime emerge in an endless stream. At the same time, criminal law should also be the "last means" to maintain the social order. Facing the new types of crimes against personal rights and health rights, the criminal law should regulate them while maintaining its modesty. Child molestation does have great harm to children's body and mind. Even through the media of network, online molestation may develop into offline criminal behavior, so it must be regulated.

At present, although the deserved nature of criminal punishment has been clarified for this type of cases in China's judicial practice, there are still some problems in judicial application. For example, there is a lack of relevant judicial interpretation of network indecency, the difficulty of determining the nature of the case and the specific problems applicable to the crime, such as distinguishing between crime and non-crime, clarifying this crime and that crime, etc. By analyzing the difficult problems of molesting children in cyberspace in China and analyzing the relevant academic views, the author puts forward criminal thoughts on this type of crime, including the distinction of relevant charges, the criminalization of new behaviors, the scope of protection objects and so on.

Molesting children in cyberspace is very harmful to society. Criminal law is only one of the means. To solve such thorny problems, the joint efforts of all sectors of society are necessary. It is hoped to provide some ideas and paths for the improvement of relevant laws.

AUTHORS' CONTRIBUTIONS

This paper is independently completed by Yi Li.

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