Study on the Dilemma of Judicial Recognition and Regulatory Path of Child Molestation in Network Spacing

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Abstract. The characteristics of cyber-indecency molestation, based on the fact that they are committed over space, are controversial when it comes to determining indecent assault offences. Even though the judicial interpretations provide for some of the criteria for determining cyber-indecency offences against minors, there are still dilemmas in the determination of cyber-indecency offences in terms of the manner of the act, the distinction between the applicable targets of the circumstances, and the aggravating circumstances. In order to further advance the judicial application, the mandatory nature of cyber-space molestation offences should be clearly defined, and the time point for the completion of cyber-space molestation of children should be clarified, so as to further clarify the determination of aggravating circumstances of cyber-space molestation of children, and to construct a typological criminal law application system.

Keywords: cyber-indecency molestation; indecent molestation offence; child molestation.

1. Formulation of the problem

In recent years, cases of online child molestation have occurred frequently. 2023 Data from the White Paper on Prosecution of Minors (2022) issued by the Supreme People's Procuratorate of the PRC shows that although the total number of crimes against minors has declined, cases of sexual molestation are still on the rise.[1] And among these crimes, "spatial molestation" "Online contact, offline sexual molestation" and other crimes account for nearly one-sixth of sexual molestation crimes against minors. [2] Although the Supreme People's Court and the Supreme People's Procuratorate jointly issued the "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law to the Handling of Criminal Cases of Rape and Indecent Molestation of Minors", [3] clearly stipulates the conditions of incrimination for the use of the Internet to commit indecent molestation, there are still major differences in the boundary of the crime of indecent molestation of a child, and in the application of aggravating circumstances. The controversy focuses on the following aspects: First, the behavioral pattern of "committing obscene acts" is unclear, and in practice, there is the question of whether non-immediate audio and video interactions satisfy the "committing obscene acts" in the constitutive elements of the crime of indecent molestation. Secondly, the time point of the attempt at spatial molestation is not clear. As child molestation is an instantaneous crime, [4] the act and the result of legal infringement should be completed at the same time. However, in the case of sending audio-video threats over the Internet, the time point of the attempted molestation could not be confirmed, and even though "molestation without actual contact has the same social harm" was used to prove the unlawfulness of the act of molestation over the Internet, the problem of defining the time of the attempt could not be solved. Taking the guiding case "Luo child molestation case" as an example, [5] the court of first instance found that the defendant Luo forced the victim girl to take nude photos and obtained nude photos through the network does not constitute the crime of child molestation. The court of second instance and the Supreme People's Procuratorate both opposed the judgment of the court of first instance, finding that the defendant's use of the Internet to force the victim to take nude photographs and view them should be evaluated as an attempt to commit the crime of child molestation. The two courts of first instance had very different attitudes towards the act of obtaining nude photographs of children through the Internet, reflecting the dilemmas that existed in judicial practice in terms of factual determination of individual cases and interpretation of legal concepts concerning new forms of cybercrime. [6] The Supreme People's Procuratorate elaborated on the guiding significance of the part
of the judgment only from the "social harm" to elaborate ideas, but still avoid the "molestation of the
time point of the attempted" problem, resulting in the judicial practice of the expansion of the
interpretation of the contradiction with the conflict between the path of the doctrine. Thirdly,
regarding whether cyberspace can be regarded as a "public place" in criminal law and the evaluation
of the number of episodes of "multiple" and "multiple times", there are different doctrinal views, and
there is no uniformity. Third, whether cyberspace can be regarded as a "public place" in criminal law,
and whether the number of "multiple" and "multiple" circumstances can be evaluated, there are
different doctrinal views and no unanimity in this regard, which creates obstacles to judicial
application.

In this regard, this paper attempts to explore the boundaries of criminal punishment for child
molestation in the network era, clarify the objective behavioral requirements of child molestation,
and incorporate the behaviors that meet the unlawful connotation of child molestation into the scope
of regulation of traditional child molestation. At the same time, based on clarifying the unique
characteristics of network screen molestation of minors, which are different from offline molestation,
and based on the impact of the Interpretation on the application of the law, the systematic
interpretation path of network molestation of minors is constructed to help in the thorough protection
of minors' rights in the era of the network, as well as in the optimization of the mode of social
governance of minors' crimes.

2. Interpreting the Current Situation: Current Judicial Characterization of
Cyberspace Molestation

The Interpretation pays attention to the extremely high criminal hazards of sexually molestationing
minors, insists on severe punishment following the law, and further clarifies the conditions of
incrimination and the criteria for determining aggravating and aggravating circumstances in the
commission of related crimes. As mentioned above, in recent years, the frequency of cases in which
coercion or enticement is used to require minors to engage in naked online chatting and taking videos
or photos of private parts has increased significantly, and such behavior seriously affects the physical
and mental health of minors, and does not differ substantively from traditional contact molestation,
and is consistent with the typology of molestation.[7] On this basis, article 9 of the Interpretation
explicitly characterizes this conduct as "molestation", which should be criminalized and punished if
the elements of the Criminal Law are met.

In the case of cyberspace molestation, based on the non-contact and virtual nature of cyberspace,
whether the same victim sends multiple audio and video recordings at different points in time, and
the same audio and video recordings spread to more than one network user can be recognized as
multiple times; and whether the network aggregation and the network public platform scenarios can
be recognized as a congregation and a public place, respectively, are interpreted in light of the current
recognition standards as follows:

2.1 Criteria for recognizing "multiple" and "repeated" presence in cyberspace

Concerning the application of the "multiple" child molestation aggravating circumstances in
physical space, both the theoretical and judicial practice circles have used the Opinions on Several
Issues Concerning the Application of Law to the Trial of Criminal Cases of Robbery and Snatching
and the Guiding Opinions on Several Issues Concerning the Application of Law to the Trial of
Criminal Cases of Robbery, both of which were issued by the Supreme Prosecutor's Office and the
Supreme Court, as the basis. Therefore, "multiple" was defined as more than three times.

The application of "multiple persons" and "multiple times" in the context of the Internet is
controversial. In the era of rapid exchange of information, the determination of applicable
circumstances has become a topic of debate. The number of times and duration need to be integrated
to fully consider the aggravating circumstances. The cases of "molesting two children and molesting
one child multiple times for a short period" were found not to be cases that should be subject to
aggravating circumstances,[7] while the cases of "molesting one child for a long time through social networking software",[8] and "molesting more than three children multiple times", were found not to be cases that should be subject to aggravating circumstances. [9] were recognized as aggravating circumstances.

2.2 Determination of the object of attribution in the case of "mobbing"

Aggregation in the crime of indecent molestation refers to the gathering of several people by the prime mover to commit indecent molestation, but it is not required that the participants all commit the indecent molestation themselves; if a person commits the indecent molestation himself, and the other participants gather around to watch and create an uproar, it also belongs to aggregation to commit the crime. [10]From this, we can see that mobbing emphasizes the psychological oppression of the victim by a large number of participants or spectators, and its focus is on a large number of people. In the judicial practice, for child molestation that there is no disagreement on the crowd situation, the main controversy is the crowd situation should be subject to aggravated punishment of the subject of the scope of the subject of the judgment criteria. At present, there are views that "'crowd' only includes gatherers and active participants",[11] Therefore, it should be the gatherers and active participants as the subject of aggravating circumstances; there are also views that "'crowd' includes the gatherers and active participants as the subject of aggravating circumstances; there are also views that "'crowd' includes the gatherers and active participants as the subject of aggravating circumstances. There is also a view that "'crowd' includes all participants except the gatherers",[12] but it does not further elaborate its view on the subject of the application of aggravating circumstances.

3. Sorting out the dilemmas: an analysis of the dilemmas of criminalizing indecent acts over the Internet

However, while recognizing that the Interpretation pays dynamic attention to real cases, we should also be concerned that some of the interpretations and the ambiguity of the application of the circumstances therein have caused difficulties in the judicial application of the present day.

3.1 The "coercive" element of indecent molestation from a distance is unknown

About the elements of the traditional crime of child molestation, there is a difference of opinion as to whether or not "coercion" is included as a necessary condition. The affirmative generally looks to the reasoning of the Supreme Court's judicial decisions and analyzes the similarity of the interests protected in the context of the systemic location of the crime to arrive at an analysis of the necessity of coercion. On the other hand, the negatives tend to analyze, through textual interpretation, that the formulation of the crime does not have the restriction of "coercion", nor does it have the requirement of "violence, coercion or other means of coercion", and there is no restriction of coercive elements.[13] At the same time, there are also scholars who, from the perspective that cyberspace molestation can constitute the crime of child molestation, believe that the possibility of coercion does not exist in cyberspace, and deduce that the crime of child molestation does not require the element of coercion.[14]

Although the author supports the child molestation crime does not have to exist in a coercive manner, in the case of forced molestation should be aggravated, visible molestation coercion of the judgment on the molestation of the crime of aggravating circumstances is very important. [15] Determining the standard for online child molestation is complex due to factors such as anonymity and the virtual nature of online space. Examples of typical situations include coercion of molestation through internet chat and luring to commit molestation through internet chat. Unclear nodes characterize the "attempted act" of molestation in the air.

The determination of the point in time at which a criminal act has been completed will affect the judgment of guilt and innocence.
As for the reason why non-real-time child molestation, i.e., non-instantaneous audio/video interactions, does not constitute a crime, scholars mainly analyze and reason from the instantaneous nature of the crime of child molestation, which denies the existence of a point in time when the criminal act is attempted.[16]

A completed crime is a crime that is established and ends at the same time as the result of the infringement of legal interests. [17] At the same time, according to the criterion of criminal attempt, the crime of child molestation should be behavioral, i.e., the perpetrator commits and completes the acts of the constituent elements stipulated in the sub-rule of the criminal law, then the crime is established as an attempted crime. [18] On this basis, scholars believe that the act of infringing upon the legal interests of children is not the act of the child filming and sending the audio-video of the child's private parts, but rather the act of the perpetrator viewing the audio-video, which violates the child's right to sexual self-determination and sexual shame. [19] However, the judicial decision to avoid the judgment process of the attempt node, only from the social harm will be included in the scope of criminal law, is not conducive to the subsequent judicial practice, but also needs to be further following the characteristics of the network molestation of clear molestation of attempted nodes of practice, to effectively promote the Interpretation of the implementation of the judiciary.

3.2 Aggravating circumstances for the crime of cyber-spaced molestation are not identified

At the level of the determination of aggravating circumstances, the non-contact characteristics of cyberspace molestation have led to new difficulties in the determination of aggravating circumstances for molestation crimes, such as "mobbing" and "publicity in a public place", thus affecting the effective punishment of cyberspace molestation. Although the above has analyzed the number of situations of traditional gatherings and the reasons for the suppression of aggravating circumstances, however, because in the case of network spatial molestation, the gathering of three or more people to carry out the molestation is carried out through virtual cyberspace, due to the network communication set up unidirectional transmission or limited rights and so on, the victim may not know that there is a situation of gathering of the person who molests in the space. [20] At the same time, the perpetrator is not sure whether the criterion of number of persons has been met due to the above reasons. Under such circumstances, whether or not it can be recognized as a mob and who is to be held liable for the aggravating circumstance of mobbing need to be further clarified.

At the same time, the above definition of traditional public places has to assume that the perpetrator and the victim are both in the same physical place in space and time to commit the act in person. However, in the case of network spatial cyber harassment, the perpetrator can go in and out of the live broadcasting platform at will, and the number of people without the identity of the border of social group chat and other cyberspace to implement the harassment behavior has the characteristics of non-contact, the victim is not in the same physical space of the perpetrator, at this time, whether or not to recognize cyberspace as a public place there is still to be resolved controversy, there is still a case of a different judgment of the same in the judicial practice of chaos.


4.1 Clearly defining the mandatory nature of the crime of cyber-indecent molestation

Coercion in criminal law involves the use of coercive means by the perpetrator and the violation of the victim's will. It can be physical or mental. In cases of network molestation of children, the perpetrator often uses the threat of exposure of privacy and damage to reputation to intimidate the victim and force compliance. This creates mental coercion and threat, which can be just as effective as physical coercion. It can be seen that the network-spaced molestation of children needs to fully consider the victim's age, cognitive ability, psychological tolerance, and other factors. Under the
thinking ability of children, we cannot require them to seek help from the police or refuse to contact and communicate with the police in the same way as mature adults.

At the same time, the cyber-level offense of molesting a child across space has also met the level of coercion in the sense of criminal law. The author through the study of a large number of judicial cases, analysis found that suffered coercion and long-term network molestation of children are subject to the perpetrator disseminating their privacy, damaging their reputation, informing their parents, and other reasons for the threat, to be subjected to the mental level of coercion under the mandatory behavior, against their will and was wrongfully violated. For example, in the case of Wang molesting children forcibly molesting them, tried by the Jiangyin Municipal People's Court in Jiangsu Province, Wang posed as a minor female on social software and lured the victims to send photos of their private parts for viewing by exchanging secrets because if they didn't continue to provide the photos, their privacy would be published on the Internet, and up to 25 children were forced to send the photos out of fear. [21]In this type of practice, the threat of exposing their privacy has succeeded in imposing coercive behaviors on children who have not yet been exposed to the world and achieving the intended unlawful purpose against their will. It is thus clear that the coercive nature of spatial molestation should be judged based on the existence of psychological pressure and prolonged mental coercion on the victim.

4.2 Clarification of the time point for the commission of acts of child molestation over the Internet

In the crime of child molestation, the immediacy of the violation of legal interests does not affect the determination of the point in time when the criminal act is completed, and the completion of the overall act of the perpetrator forcing the child to film and send audio and video of his or her private parts can be regarded as the completion of the criminal act of molestation. That is to say, "sexual molestation" is not necessary for the victimized child to perceive the fact and nature of sexual molestation at that time. [22]When a child is coerced or induced by the perpetrator, the act of filming a hidden part of the audio-visual recording against his or her will has violated the child's right to sexual personality, even though he or she may not have realized that his or her sexual rights had been infringed upon. If it is mechanically required that the perpetrator must be present and watch while the child is being filmed or sent, then it will be confused with traditional offline child molestation. The reason why the criminal law separately emphasizes that the unlawful act of online child molestation is a crime is to respond to the non-direct contact characteristics of the Internet and to further improve the legal system for the protection of children's sexual rights. In determining the point of time at which an act of molestation is committed, whether or not the commission of the act is "synchronized" with the results of the infringement is not a key factor in deciding whether or not the act is child molestation. [23]In non-real-time transmission-type child molestation, the victim filming and sending the audio or video under the perpetrator's enticement or coercion is the main act that causes infringement of their sexual personality rights. Whether or not the communication is in real-time affects the degree of infringement, but it is not the key to determining whether the act of indecent molestation can be attempted.

At the same time, the Supreme People's Procuratorate issued by the Luo child molestation case can also be further improved through the idea of its referee reasoning part. Luo's molestation is actually by a series of behavior combinations, first of all through the network social networking tools to add the victim, followed by psychological coercion to force the victim to send nude photos against their will, and finally to obtain nude photos to satisfy their sexual stimulation. As far as this case is concerned, on the one hand, this series of behaviors infringes on the victim's sexual personality rights and interests, harming the victim's physical and mental health and social customs, and its harmful consequences are consistent with the traditional indecent molestation, with a certain degree of social hazards, and has already reached the degree of should be harshly punished. On the other hand, when the victim is induced and coerced by the perpetrator to take photographs of his or her private parts and transmit them directly to the perpetrator through the Internet, the victim's right to sexual
personality and his or her derived right to sexual privacy are already harmed after the photographs
are successfully sent, thus reaching the criterion for the crime to be accomplished.

In summary, as long as the perpetrator in the case makes the child experience sexual experience
and receive sexual stimulation through online tools, infringes on the child's right to sexual personality,
and jeopardizes the child's sexual autonomy and sound development, it can constitute the crime of
child molestation. The incrimination standard for this type of crime should focus on the impact of the
act on the child's right to sexual personality at the level of legal interests and the magnitude of social
harm, and should not take "whether the act is synchronized with the result of the infringement" as the
key element in judging whether the act of online child molestation is a crime that has been
accomplished or not.

4.3 Clarifying the determination of aggravating circumstances for child molestation over the
Internet

4.4.1 Identification of the target of liability for "mobbing" type of online child molestation

The author suggests that the aggravating circumstances of mob-type child molestation should be
limited to the primary elements and active participants. All participants are aware they are committing
the crime and act together, violating the same legal interests. Aggravated penalties are not contrary
to the principle of legality of crimes and penalties.

Focusing further on the determination of the aggravating circumstance of child molestation in the
context of cyberspace, the criterion of congregation should also be met. Since this aggravating
circumstance emphasizes the infringement of the victim's legal interests by a large number of people,
it is necessary to categorize the network spatial molestation into real-time transmission-type child
molestation and non-real-time transmission-type child molestation. In the case of real-time
transmission-type child molestation, if the perpetrator uses the Internet to send invitations to
unspecified two or more persons to watch real-time child obscene videos, and establishes a video call,
voice call, or live broadcasting platform that can be watched by more than one person at the same
time, and induces or coerces the child to engage in real-time display of private parts or obscene
performances, then it will be consistent with the infringement of the legitimate interests of the
gathering of a large number of people to molest a child in the physical space, such as if the viewers
are aware of each other's existence and are known to each other. are aware of each other's presence
and the number of known persons is three or more, then all the actors involved in the real-time
transmission of child molestation shall be punished as the subject of the aggravating circumstance of
attribution. Internet technology expands the scope of users and provides a direct platform for social
interaction. We should analyze the problem of classifying cyberspace as a public place in a specific
way, such as in the case of public webcasting or inviting users in and out of social platforms. In cases
where the perpetrator can only transmit content privately, cyberspace should not be recognized as a
public place for indecent molestation.

For non-real-time transmission-type child molestation, since the perpetrator, as an organizer,
planner or conductor, transmits the content to two or more other persons and more than two other
persons to receive the terminal, there is a difference in the time when the other two or more other
persons watch the content, and there will not be a simultaneous number of people in a large number
of oppressive situations, which weakened the degree of suppression of the mobbing of child
molestation in the physical space, there is no aggravating circumstance in the case of the mobbing of
child molestation and it is natural. There is no aggravating circumstance for mobbing child
molestation, and naturally, there is no corresponding object of attribution. As for the perpetrator who
sends private audio and video of children, it should be further based on whether the number of people
spreading it reaches more than three to judge whether it constitutes the aggravating circumstance of
a "multi-person" type of child molestation. The recipient of audio and video data doesn't commit the
crime of child molestation since there is no direct contact with the child and the data is not in real-
time. Administrative penalties may apply based on the extent of dissemination.
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To summarize, in the mobbing situation of cyber indecent molestation, the subject of liability should be judged depending on whether the child molestation is of the real-time transmission type or not. If it is a real-time transmission type of molestation, it is necessary to further determine whether the participants know that the number of people has reached the standard of mobbing, and ultimately determine whether the primary offender alone is aggravated or whether all the participants constitute an aggravated offender.

4.4.2 Analysis of the Criteria for Determining "Public Places" in Cyberspace

First, the term "public space" should be clarified in light of the characteristics of the Internet. The essential reason why cyberspace can become a public place is whether information can be shared openly. If the recipient of the information can easily perceive the existence of the indecent act and watch it, it can constitute public child molestation in a public place. Taking a chat space created by the same social platform as an example, first of all, it should be judged whether the purpose of the establishment of the chat space is to commit an indecent act, if members do not need a password, passphrase, "administrator" confirmation or need to be introduced by members to enter the space; or if members can enter the space even though they need a password, passphrase or "administrator" confirmation; or if members can enter the space without a password, passphrase or "administrator" confirmation. administrator" confirmation, but the threshold of entry is relatively low and the mobility of the members is large or the number of members is large, which can be more easily perceived by others, should also be recognized as a public place. After cyberspace can meet the definition of a public place, it should be further determined by the "in public" standard mentioned above, to determine whether it meets the extent of the range to judge whether it constitutes an "in public" type of aggravating circumstances of child molestation on the Internet. Given the trend of high incidence of cybercrime, to facilitate the determination of aggravating circumstances of cyber child molestation in practice, the most direct way is to clarify the interpretation of "public place" and "in public" in cyberspace in the form of judicial interpretation, so that it can be directly cited in the decision of the case. The most direct way is to clarify the interpretation of "public place" and "in public" in cyberspace in the form of judicial interpretation, which can be directly cited in the case adjudication to improve the efficiency and synchronization rate of dealing with cyber molestation crimes, and to avoid different judgments in the same case.

To protect the legitimate rights and interests of children and to improve the legal system for the management of cybercrime, cyberspace should be interpreted as a "public place", which is in line with the requirements of systematic interpretation. The terminology of the criminal law system is relative, if the same terminology is interpreted in the same way regardless of the occasion, it is not the requirement of the system interpretation, but contrary to the coordination requirement of the system interpretation. [25]Some scholars believe that if public places are extended to cyberspace, it would be impossible to explain the crime of "mobbing and fighting in public places" and "theft in public places". However, just based on semantic analysis, it can be seen that it is not possible to realize the above situations in cyberspace. However, child molestation crimes are committed in a variety of ways, including real-time transmission of live broadcasts, as well as non-real-time transmission of sending private parts of the audio-video or photographs, etc., which do not need to be located in the same physical space, and therefore belong to the reality of the possibilities. If the application of the interpretation is directly abandoned due to the inability to interpret some of the crimes, it will not be conducive to the development of the legal system.

Internet technology expands the scope of users and provides a direct platform for social interaction. We should analyze the problem of classifying cyberspace as a public place in a specific way, such as in the case of public webcasting or inviting users in and out of social platforms. In cases where the perpetrator can only transmit content privately, cyberspace should not be recognized as a public place for indecent molestation.
5. Conclusion

As a new type of crime, cyber child molestation is controversial in terms of theoretical viewpoints, criminalization standards, and penalty rules. Although the Supreme Prosecutor and the Supreme Law are regulated by judicial interpretations, there is still room for improvement in the legal provisions for cybercrime at this stage. With the development of information network technology, improvement of the relevant laws and regulations will need to keep pace with the times, the protection of children's rights and interests in the network era relies on Criminal Law as the last line of defense in the legal system, to clarify the composition and aggravating circumstances of network molestation of children and the distinction between the crimes, still need to be concerned about the legal theoretical circles, the practical circles, and even the whole society.

References

[3] Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Rape and Indecent Assault of Minors, Legal Interpretation [2023] No. 3, promulgated on May 25, 2023, effective June 1, 2023.


