

Study on the Criminal Law Qualification of Internet Selfie-type Child Molestation

-- Based on the Perspective of Luo's Child Molestation Case

Liwen Tang

School of Law, Anhui Normal University, Wuhu, China

istangliwen@163.com

Abstract

The Supreme Prosecutor's guiding case of child molestation, Luo, identified the act of using the Internet to make children send nude photos of themselves and watch them as the crime of child molestation. This paper calls it an act of child molestation by Internet selfie, which consists of four stages: (1) The perpetrator asks the child to send nude photos. (2) The child obtains nude photos of himself. (3) The child sends nude photos through the Internet. (4) The perpetrator successfully receives and watches the nude photos in four stages. Each act in isolation does not constitute the crime of child molestation, while the act of child molestation by Internet selfie should be analyzed as a whole. Taking (1) + (2) + (3) + (4) as a whole is appropriate, and the overall act constitutes child molestation. The perpetrator's receiving and viewing the nude photos implies the attempt of molestation, and the legal benefit infringement occurs at the same time.

Keywords

Online Selfie-type Child Molestation; Child Molestation; Summary Offense; Criminal Law Characterization.

1. Question Presentation

With the rapid development of the Internet medium, molestation cases are disclosed to the public with high frequency. The common application of short video, live streaming, online chatting and dating functions in APPs and websites has led to an increase in criminal disputes caused by the new type of sexual abuse "Conducting molestation by the network of space " year by year. People gradually realize the harm of Internet child molestation, but the existing criminal law and judicial interpretation of China do not have clear provisions on such act. For such cases, judicial personnel have a large space of discretion. In November 2018, the Supreme People's Procuratorate released the 11th batch of guiding cases, and the child molestation case of Luo (Prosecution Case No. 43) has been widely discussed.

1.1. Basic Facts of the Case

Luo added the girl Xiao Yu (13 years old) as a friend through instant messaging software QQ. After they chatted, Luo learned that Xiao Yu was a junior high school student and still demanded her nude photos through verbal intimidation. The victim refused and deleted Luo from QQ. Later, Luo pressured Xiao Yu through her alumni Zhou to add her as a friend again, and registered another QQ number with the fictitious identity of "Li " to add Xiao Yu as a friend. After that, Luo used the identity of "Li " to threaten and intimidate Xiao Yu in QQ, while using Zhou to continue to exert pressure. Xiao Yu was forced to take ten nude photos of herself as requested by Luo, and sent them to Luo via QQ for viewing.

The first instance found that the defendant Luo forced the victim girl to take nude photos and obtained the nude photos through QQ, which did not constitute the crime of child molestation. The district people's procuratorate filed a protest, arguing that the first instance failed to judge the substantive elements of the crime of child molestation in terms of infringing on the human dignity and mental health of children. The defendant's defense argued that there was no physical contact between Luo and the victim and that the act did not constitute child molestation. The second instance judgment adopted the protest opinion of the district people's procuratorate that the molestation could be committed over the Internet, and ruled that the defendant Luo's use of the Internet to force children to take nude photos and watch them constituted the children molestation (attempted) [1].

1.2. Controversial Focus

Child molestation refers to all acts that violate a child's right to sexual inviolability such as groping, playing with and sucking on sexually sensitive parts of the child. [2] Judging from the changes of the first and second instance judgments alone, the controversial point in this case seems to be whether the molestation can be carried out in the network across the air. In fact, there is little controversy in the academic and judicial practice on this point. When the "naked chat" chaos was frequent as early as more than ten years ago, there was a question whether the molestation can be carried out in the network of space. In this paper, we believe that it is a reasonable interpretation that molestation can be carried out in the network over space. First of all, molestation emphasizes the inviolability of the violation, and molestation in network of space does not exceed the proper meaning of the word "molestation". China's criminal law does not explicitly point out that molestation must occur in the real physical space, molestation in the network of space for interpretation does not violate the principle of legally prescribed punishment for a specified crime. Secondly, with the popularity of the Internet and the advent of the era of self-media, the number of Internet users continues to surge, and the frequency of people using online chatting tools continues to climb. The phenomenon of molestation occurring on the Internet is also increasing year by year, and the degree of infringement on legal interests is no less than that of molestation in direct contact. Therefore, the inclusion of the scope of criminal law regulation is also a realistic need in today's society. [3]

The network is only a media tool, the use of the network to commit molestation may differ greatly from each other. For example, there are obvious differences in the "immediacy" of the use of the network to webcast nude chat and to send nude photos. The fact that the case is only about whether molestation can occur in the network seems to be a case of attempting an ineffective solution and failing to see the crux. Therefore, the controversy in this case should focus on the act itself. It focuses on whether Luo's act of forcing children to take and view nude photos on the Internet is child molestation in the sense of criminal law. According to the relevant provisions of China's criminal law on child molestation (Article 237(3) of the Criminal Law of the People's Republic of China provides that a person who exerts molestation on a child shall be sentenced to fixed-term imprisonment of not more than five years. If one of the following circumstances exists, the person shall be sentenced to fixed-term imprisonment of not less than five years: (a) Molestation of a child more than one or repeatedly. (b) Molestation of a child in a crowd, or in public under aggravating circumstances. (c) Causes injury to a child or other serious consequences. (d) Molestation approach is bad or have other terrible circumstances.), whether a child is voluntarily molested or not does not affect the establishment of the crime of child molestation, so it does not matter whether the perpetrator uses force or other means to achieve the molestation. As a result, a new type of child molestation was abstracted from Luo's child molestation case---Internet Selfie-type child molestation, which is the act of using the Internet to make children send nude photos and watch them on their own. The legislation does not confirm whether Internet Selfie-type child

molestation constitutes a child molestation crime in criminal law, and there is a possibility of "different trials for the same case" and miscarriage of justice, and the legal rights of both the victimized child and the suspect are at risk of being violated. The criminal law characterization of Internet Selfie-type child molestation is a new problem that needs to be solved. [4]

2. Basic Definitions and Features of Internet Selfie-type Child Molestation

Internet Selfie-type child molestation is a new phenomenon that emerged along with the development of Internet social tools, and only a comprehensive analysis of it can further study the criminal law characterization of Internet Selfie-type child molestation.

2.1. The Concept and Characteristics of Internet Selfie-type Child Molestation

Internet Selfie-type child molestation is the act of using the Internet to make a child send nude photos and watch them on their own. The perpetrator may use coercion, enticement or just request to make the child send nude photos (including photos or videos of nude or sensitive parts, which will be referred to as nude photos hereafter) to him voluntarily for viewing. Combining the facts of the case, it can be concluded that the characteristics of Internet Selfie-type child molestation are as follows.

1. Autonomy. Autonomy reflects the connotation of "selfie", which refers to the child's freedom of will to dispose of nude photos of himself by sending them, but does not require the child to take nude photos of himself immediately. The child's free use of nude photos on electronic storage devices also falls under the category of "selfie". While children may be coerced or tricked into sending nude photos in cyberspace, their freedom of will may not be restricted in real space. In real space, the accomplice act of taking nude photos and sending them without the child's knowledge deprives the child of his or her freedom of discipline, which does not correspond with the Internet Selfie-type child molestation. For example, in the child molestation case of Zhou in Xuzhou, the perpetrator Zhou used online social tools to instigate Da Hong (16 years old) to take pictures of his sister Xiao Hong (8 years old)'s sensitive parts, and Da Hong then took pictures of Xiao Hong's sensitive parts and sent them to Zhou while Xiao Hong was asleep. In this case, Xiao Hong did not have the freedom to dispose of her nude photos, which did not belong to Internet Selfie-type child molestation. (The Paper. Man sentenced for instigating 16-year-old girl to take nude photos of 8-year-old sister online. Democracy and Law.com 2017-08-16. <http://www.mzyfz.com/cms/dianxinganli/xingshizhian/anjianzhiji/html/1162/2017-08-16/content-1286286.html>.)

2. Non-immediacy. Internet social chatting is different from video calling in that the time between receiving and sending messages from both sides of the chat is not synchronized. When children expose their sensitive parts or naked body, the perpetrator does not see and cannot see it, but only receive the nude photos sent by children can he watch. And with the help of webcasting, video calls nude chat is not Internet Selfie-type child molestation. The perpetrator's molestation and children's exposure of their own naked body is simultaneous, which is not essentially different from the real space under the viewing the naked body of children. [5]

3. Linkage. Internet Selfie-type child molestation is a collection of a series of acts, and it includes that the perpetrator requests or asks the child to send nude photos of himself through the network, the child takes or finds out nude photos, the child sends nude photos through the network and the perpetrator receives and watches the nude photos. This series of acts are closely linked and interlocked, and any missing link does not constitute the Internet Selfie-type child molestation.

2.2. The Dangers of Internet Selfie-type Child Molestation

The serious infringement of legal interests by the act is a necessary result element to constitute the child molestation. The specific analysis of the harm of Internet Selfie-type child molestation

can only support the qualitative study of the criminal law of the act, which is mainly reflected in the following three dimensions.

1. The infringement on the physical and mental health and human dignity of children is serious. The naked body or sensitive parts of the child are illegally viewed by others in the form of photos or videos, and the victimized child knows that the molestation is taking place. The victimized one even personally sends the naked photos of himself to the perpetrator, which will undoubtedly cause serious harm to the physical health and especially the mental health of the child. With the increase of age, such traumatic events may cause unstable emotions such as depression, anxiety and a strong sense of insecurity among the victimized children, and even lead to self-harm and suicide. With the development and popularity of the Internet, the number of child molestation cases using the Internet is increasing year by year. (See the collection of 39 judgments on Internet molestation in the Judicial Instrument Network, with only 1 case per year from 2014 to 2017, 4 cases in 2018, 7 cases in 2019, 10 cases in 2020, and 14 cases in 2021. The number of child molestation cases has been increasing year by year in recent years, which coincides with the rapid development trend of China's network in recent years.) Moreover, with the high rate of hidden cases, the possibility of infringement on children's physical and mental health and human dignity is greater, and the social harm is obvious. [6]

2. The degree of harm is similar to that of naked-chat child molestation. The biggest difference between naked chat child molestation and Internet Selfie-type child molestation is the presence or absence of immediacy. In the case of nude chat molestation, the child's sexual rights are violated when the nude body is exposed and the child knows that the perpetrator is committing molestation, whereas in the case of Internet Selfie-type molestation, the child is not in the same reality when the perpetrator sees the nude photos and the child does not know when his nude photos will be seen. However, this does not mean that children in Internet Selfie-type molestation are less vulnerable to the legal benefits than in nude chat child molestation. Although the child does not know when his or her nude photos will be seen, when the nude photos are successfully sent, the child knows that his or her nude body will be seen by others. It is only a matter of time when his or her right to make sexual decisions is violated.

3. The harm is more serious than the child molestation in real space. In Internet Selfie-type child molestation, the perpetrator obtains nude photos of the child through the Internet, which means that the perpetrator can spread the nude photos of the child both on the Internet and in reality. Then, it becomes known to the public, which can bring great insecurity to the child mentally and cause more serious harm to his physical and mental health and human dignity. [7] For example, in the child molestation case of Luo, he obtained nude photos of the victim child and threatened to open a room with him or else the nude photos would be released to the public. The child molestation in real space does not have the medium of the Internet, so its infringement of legal interests is not as serious as Internet Selfie-type child molestation as a whole.

2.3. Extraterritorial Criminal Legislation

Child molestation has always been the focus of attention in the criminal laws of countries around the world, and there is a great commonality in the institutional norms and values of countries on this issue. Summarizing the reasonable experience of the governance of Internet Selfie-type child molestation in foreign countries can provide reference for the characterization of the criminal law of Internet Selfie-type child molestation in China.

2.3.1. Civil law system

1. Germany

German law also considers non-physical contact to be an act of molestation. Article 176 in *German Criminal Code* states that anyone who exposes the sexual organs of a child under the age of 14, shows or watches pornographic books or films with him, or takes and distributes

child pornography, engages "sexually intimidates" or in pornographic chatting, etc., is regarded as molestation. They are punishable by deprivation of personal liberty for 6 months to 10 years. [8] The definition of child molestation in German criminal law is broader, as long as the sexual inviolability of the child is compromised.

2. Japan

In Japan, showing a child a nude photo of a specific person, taking a nude photo of a child, or forcibly kissing a child are all considered as forcible molestation. [9] In November, a 22-year-old male elementary school teacher Shinoda Yasuaki in Moriya, Ibaraki, was arrested on suspicion of forcible molestation in cyberspace. He disguised himself as a schoolgirl through social networking software and induced a 9-year-old girl to send him nude photos. Japanese law recognized his acts as forcible molestation. The Japanese criminal law on child molestation is quite detailed and comprehensive, and the definition of molestation is broader than the German criminal law. It can be said that the criminal law reflects most of the situations that involve the possible violation of children's sexual rights. It includes molestation by guardians, objective molestation committed by a person having no purpose of satisfying the sexual desire, and display of articles containing molestation are all considered molestation.

2.3.2. Common Law System

1. the United Kingdom

To punish the inducement of child molestation, the UK passed *Child Molestation Act of 1960* in the 1990s. The Act makes it an offense to commit a significant act of molestation with a child under the age of 14 or to induce him or her to commit a significant act of molestation with a third person. A conviction on indictment is punishable by imprisonment for a term not exceeding two years; or, a summary conviction is punishable by imprisonment for a term not exceeding six months, or a single and concurrent fine, and the consent of the victim is not a defense. *Sexual Offenses Act of 2003* provides that causing or provoking a child under the age of 13 to engage in "sexual activity" in specified circumstances is punishable by life imprisonment upon conviction on indictment. In addition to this, the Act provides details on the various circumstances of child sex offenses and describes in detail the elements of the crime for each type of child sex offense.

2. the United States

The crime of "public molestation" under the criminal law of each state in the US corresponds to the crime of molestation in China, but the definition varies from state to state. Some states such as Colorado and Georgia include "lewd caressing or indecent fondling of other's body" in the category of molestation. Two-thirds of the states in the US use the American Law Institute's *Model Penal Code* as a model for their criminal laws, and the latest version features a hierarchy of sexual assault cases, such as rape and sexual assault as first-degree, second-degree and third-degree felonies. Alabama further subdivides sexual assault into rape, sexual torture, sexual abuse, and exhibitionism. [10] Despite the strict laws in the states of the US, the reality is that the incidence of sex crimes in the US is still high. This has more to do with the US judicial system. On the one hand, many places in the US, such as the military, are eager to provide victims with "confidentiality agreements" and "paid private meal". On the other hand, such crimes are difficult to obtain evidence and the judicial process is lengthy, which makes many victims back off.

2.4. Qualitative Analysis and Specific Determination of Internet Selfie-type Child Molestation

2.4.1. Internet Selfie-type Child Molestation should be Recognized as Child Molestation

The infringement degree of the legal interests of children's physical and mental health and human dignity by Internet Selfie-type child molestation is comparable to that of direct contact

child molestation. However, the determination of the latter and the result of the infringement of legal interests is very clear. The legal interests of children are infringed when the perpetrator commits molestation such as picking and touching the sensitive parts of children. [11] The Selfie-type child molestation is a collection of acts. When did the molestation lead to the infringement of the child's legal interests? The act is divided into four stages of acts: (1) The perpetrator asks the child to send nude photos. (2) The child obtains nude photos of himself or herself on his or her own (usually in the form of a selfie). (3) The child sends nude photos via the Internet. (4) And the perpetrator successfully receives and views the nude photos. Any one of these four acts alone do not belong to molestation, while only coercion, luring act is obviously not molestation. Children who take nude photos of themselves does not violate the physical and mental health of children, while the ones who send nude photos to others is at best indecent others rather than being indecent. Viewing nude photos is obviously not molestation, otherwise as long as searching for nude photos of others to watch in the network is regarded as molestation, which will lead to a wide range of striking in the criminal law.

In this paper, we believe that it is appropriate to analyze whether or not Selfie-type child molestation, i.e. (1) + (2) + (3) + (4), constitutes molestation as a whole, rather than isolating and splitting it. This overall act is an act of molestation, and the violation of the child's legal interests occurred when the perpetrator viewed the nude photos sent by the child. It fully satisfies the characteristic of "instant offense" of molestation, i.e., the result of the violation of legal interests occurs simultaneously when the indecent act is completed. The act of molestation is broadly understood to imply the act of violating the right to sexual decision. In the act of molesting a child by taking a selfie on the Internet, the perpetrator uses coercion and enticement to make the child take nude photos, and then the perpetrator receives and views the nude photos through the Internet. The children have not reached the age of sexual consent, and the perpetrator of course violates the child's sexual decision-making right. [12] The legal term "act" does not allow only one action to take place, but a series of actions (phases of actions) that make up a whole act is common in criminal law. Although the child victim took and sent the nude photos on his own initiative, the child's act is predicated on the "request" or "demand" of the perpetrator, and the child is always psychologically influenced by the perpetrator to act. This is why (1), (2), and (3) cannot be separated from each other. As for (4), it is clear that the act cannot be separated from the first three acts, and that it is only when the perpetrator receives and views the nude photos that the act of molestation is fully completed (attempted), and that the violation of legal interests occurs.

2.4.2. Establishment of the Specific Circumstances of the Crime of Child Molestation

The object of child molestation is the child's physical and mental health and human dignity, and the objective aspect is that the perpetrator makes the child take and send photos or videos of his or her naked body or sensitive parts for later viewing. In the guiding case, Luo "requested" (The author believes that the "child" here refers to mental condition in accordance with their peers to normal children, otherwise it is not necessary to discuss the offender just "requests" the children to send nude photos. The Internet child molestation on those children whose mental state are not normal, and causing serious violations of children's physical and mental health, shall constitute the child molestation.)the child to send nude photos. For example, Luo only asked "send a nude photo", and the child voluntarily took nude photos and sent them to Luo. Luo's act of requesting the child to send the nude photos voluntarily and to watch it is an act of molestation, but the circumstances of the crime is comparatively minor. In addition, although the act is completed when the perpetrator views the nude photos of the child, the successful receipt of the nude photos means that the perpetrator has taken the nude photos for himself and could view them at any time. Therefore, in judicial practice, the successful receipt could be considered as an attempted molestation. The subject of Internet Selfie-type child molestation is a natural person over the age of sixteen and has the ability of criminal

responsibility, with intentional subjective aspect and the purpose of sexual stimulation or satisfaction of sexual desire.

3. Conclusion

Taking the child molestation case of Luo as a perspective, this paper identifies the object of the study, Internet Selfie-type child molestation. It analyzes its characteristics, harms, and overseas legislation to clarify the need to criminalize Internet Selfie-type child molestation and the obvious trend of worldwide criminal legislation. The criminalization of child molestation is in line with the principle of criminality, and the act of molestation can be a series of closely related steps, and only when these steps are combined as a whole can the act of molestation be established and the relevant legal interests be infringed. The criminalization of Internet Selfie-type child molestation is indeed a new step forward in China's criminal justice in terms of child molestation, but it does not break through the "summary offence" nature of molestation, and the legal interest is infringed upon completion of the act, which is still unchanged. Many countries are gradually including more and more acts that violate children's right to make sexual decisions as child molestation crimes, and there is a trend of broadening the boundary of child molestation in both criminal legislation and justice, which echoes the importance of protecting children's physical and mental health and human dignity. The healthy growth of children is the cornerstone for the prosperity of the country, society and a family, and the increasingly rampant child molestation on the Internet in recent years needs to be reasonably regulated by criminal law. We hope that this paper will be beneficial to further research in the field of child molestation on the Internet and help build a harmonious Internet environment that promotes the healthy development of children's body and mind.

References

- [1] Supreme People's Procuratorate 11th batch of guiding cases. [https:// www. spp. gov.cn/ spp/ jczdal/ 201811/ t20181118_399377. shtml](https://www.spp.gov.cn/spp/jczdal/201811/t20181118_399377.shtml),2018-11-18.
- [2] Liu Yanhong Criminal Law (II). Beijing University Press ,2014:67.
- [3] Yuan Ye. The criminal law characterization of child molestation over the Internet [J], Juvenile Crime, 2019(4).
- [4] Shao Shougang. Networked evolution of child molestation crimes and criminal law response--Analysis of Internet child molestation cases during 2017-2019 as a sample[J]. Research on Youth Crime Prevention, 2020 (03):48-57.
- [5] Cao Hongjun. Judicial determination of the crime of child molestation over the Internet [J]. China Prosecutor, 2020(18):13-16.
- [6] Wang Zhengxun, On the Determination of the Degree of Illegality of Indecent Acts [J]. Research on the Modernization of the Rule of Law, 2018(4): 92-106.
- [7] Ruan linyun. Objective explanation of remote molestation in the context of double-layered society[J]. Juvenile Crime,2020 (06):102-110.
- [8] Lan Yuejun, Legislation and judicial protection of sexual abuse of minor victims[J]. Journal of Guizhou University for Nationalities (Philosophy and Social Science Edition), 2019(4) :119-183.
- [9] Yuan Haoran, Research on the Governance of Child Molestation [J]. Journal of Hubei Police Academy, 2020 (3).
- [10] Li Cong and Cao Hong. On the construction of the prevention and control mechanism of sexual crimes against children in China--A lesson from the experience of prevention and control of sexual crimes against children in the United States[J]. Journal of Guangxi Police Academy,2018,31(06):19-25.
- [11] Duan Weili. Expansive interpretation and sentencing balance of child molestation--Taking a typical case of child molestation as an entry point[J]. Application of Law, 2020(16):118-130.

- [12] Wu Pengfei and Yu Pengfeng. "Opinions on Punishing Crimes of Molestation against Minors": An Analysis of Some Issues from the Perspective of Children's Rights Protection [J]. Theory and Reform, 2014(4) :154-157.