

Regulatory Disputes to the Crime of Online Insult and Defamation in China

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Abstract: The digital network era has significantly improved society and the economy, and network security protection has become a significant concern. The criminal regulation of these emerging types of cybercrime should be promptly addressed, given their frequent occurrence. Online violence and rumors have always been the focus of attention in constructing network security. Network personal information crime is not an unfamiliar crime field, its essence is a new form of combining the network as a medium of transmission or using network technology to connect traditional crimes. The insult and defamation crimes in the network are among the significant instances of online personal information crimes, which refer to behaviours that infringe on individuals' rights, such as privacy and honour, using violent words in cyberspace. Because of their intersectionality, online insults and defamation crimes are extremely easy to be ignored. In reality, judicial and administrative agencies have different criteria for and disposal of violence in online insults and defamation. Hence, identifying research on Internet insults and defamation has become an essential issue in the legal community and judicial activities. This article summarizes and discusses the confirmation of participating entities, whether the behavior of the actor's dissemination constitutes a crime, and the illegal obstacles caused by cyber insults and slander behaviors, and summarizes the corresponding conclusions.

Keywords: cybercrime, insult, defamation

1. Introduction

There is a significant increase in society's attention to online speech crimes. Germany introduced the offence of 'hate speech' under Section 192a of the Criminal Code. It stipulated the behavior of publishing discriminatory and insulting comments on social media in the 'Network Enforcement Act'. The 'Act on the Punishment of the Spread of Computer Viruses' in Japan includes criminal penalties for using the Internet to damage the reputation or credit of others. As early as 2013, China issued judicial interpretations on online insults and defamation crimes. Compared to the criminalization of traditional offences, stricter laws are required for online insulting and libelous behavior. The insulting crime has undergone new changes compared to the actual traditional form, which is mainly reflected in the three aspects, including subject, behavior, and quantitative standards. These changes test the response to criminal law [1]. Researchers have gradually advanced with the standard system's

continuous evolution. They establish a comprehensive quantitative standard system that meets the characteristics of cyber violence crimes [2]. Crimes of online abuse and defamation are only a part of online violence and online speech crimes, but they are fundamental offences. Therefore, an in-depth controversial exploration of this type of crime is required.

2. Challenges to Regulatory Implement

2.1. Objective Aspect: ‘Serious Circumstances’ as Incriminate Criterion

It is questionable whether using numbers alone to determine the impact of insult and defamation behavior online is appropriate. One of the critical characteristics distinguishing online insult and defamation from regular abuse and slander is its highly contagious nature. While online platforms provide people with efficient lives, they also make it easier for offenders to commit crimes. Thanks to the Internet, traditional insult and defamation behaviors are no longer limited to real-life relationships and small-scale distribution. Insults and defamatory acts towards strangers may also have enormous diffusion effects, leading to various consequences. The impact of psychological damage can range from causing ‘social death’ to the victim to triggering depression and even Post-Traumatic Stress Disorder (PTSD), which may prompt the victim to take more extreme actions.

Criminal codes in various countries set the standard for criminalizing online insults and defamation by examining the ‘public impact level’. According to the Criminal Law of the People’s Republic of China and the Interpretation of Several Issues on the Application of Law to Criminal Cases Involving Defamation through Network (hereafter the Network Defamation Judicial Interpretation), online insult and defamation constitute ‘serious circumstances’ when the same slanderous information is clicked, viewed more than 5000 times, or forwarded more than 500 times. However, only using quantitative criteria such as ‘clicks’, ‘views’, and ‘forwards’ to judge whether there are ‘serious circumstances’ is insufficient [2]. For example, in the case of Suning, Hebei province, after breaking up with Zhang, Yue disseminated Zhang’s nude photos and videos that he had taken on his personal WeChat and Kwai App, then sent them to Zhang’s family. According to the investigation, the viewing volume exceeded 600 times. After the incident, Zhang was under immense public pressure and ultimately committed suicide. In this case, the insulting information Yue disseminated on the personal social platform did not meet the standard for criminalization based on the view times. If there were no severe consequences, such as the victim’s suicide, Yue would have escaped punishment.

If only 5,000 views are set as the criterion for criminalization, the impact on the victim is hard to estimate when the viewing volume is 4,500 or 500 views but 400 of them know the victim in real life. Whether the amount meets the threshold does not match the result of severe legal interest infringement. For instance, the perpetrator spreads false information on the platform with a low exposure rate. Alternatively, he spreads to the account with few friends and low promotion. In addition, he may also release the content visible only to acquaintances, such as in groups of friends, companies or homeowners. Therefore, the harm of the offender’s behavior in disseminating seriously infringing information about the victim’s privacy and insulting the victim online cannot be measured solely by numbers.

2.2. Subject Aspect: Whether Participants Who Contribute to the Commission of the Crime Are Accomplices

There is a clear category to identify criminal participants. From a sociological perspective, due to the accessibility of the Internet, various participants see the legality of their conduct differently. It is hard to verify the veracity of insulting and defamatory information released by others. From a psychological point of view, the anonymity of the Internet offers those who spread insulting and defamatory information a feeling. They could hide behind and reduce their guilt toward the victim.

However, while the Internet offer convenience, its diversity may also make criminal participants victims of other forms of online insults and defamation, feeding the loop and making its eradication challenging.

Zheng Yuehua, a Chinese girl, shared a photo of the moment she expressed her delight to her grandfather in the hospital with her postgraduate's acceptance letter on social media. However, unscrupulous netizens insulted her just because of her pink hair. Zheng ultimately committed suicide due to severe depression. Amy Everett also suffered a similar thorn. She was a moderately famous child star in Australia and experienced widespread online bullying at the age of fourteen. Before her suicide, she left a painting and wrote, 'Speak even if your voice shakes'. Internet bullying has different subjects, including insults and defamation producers, comment followers, Internet trolls, and regulatory platforms, all responsible for this crime. Not all similar activities that are classified as crimes can constitute crimes. For other participants who are not speech senders, each role's contribution to the result varies, and some helpers do not have subjective malice but cause serious consequences objectively. If not regulated by criminal law, it may condone the public's irresponsibility for their speech and behavior.

2.3. Illegal Deterrence: The Determination of Behavior 'Suspension' and 'Termination'

Similar to traditional insults and defamation, 'publicness' is also an important condition for the crime of cyber insults and slander. The breadth and depth of information dissemination are the criteria for measuring the extent of abuse and defamation. If crime is an economy, then some parts of this economy have evolved into an 'attention economy' in the information age. The more attention gathered, the greater the harm to legal interests [3]. For online insults and defamation, it satisfies three levels of 'freedom of speech - civil infringement - criminal offence'. Within the scope of civil infringement, the perpetrator should promptly stop the behavior, delete the disseminated information, apologize and compensate the victim. Therefore, when the conduct involves a criminal offence, whether the means of preventing civil infringement will cause illegal obstruction has become a controversy for the conviction of this crime.

Compared to direct violence, online soft violence is a new type developed based on soft violence. In 2019, the Opinions on Several Issues Concerning the Handling of Criminal Cases of Implementing 'Soft Violence' were issued. Soft violence refers to the perpetrators who seek illegal benefits or form illegal influences against others or in relevant places, including harassment, entanglement, clamor, gathering crowds to create momentum, which can cause fear, panic, and psychological coercion, or affect and restrict personal freedom, endanger personal and property safety, and affect everyday life, work, production, and business. The main difference between soft and hard violence is that hard violence is supported by tangible means of violence, such as physical harm, mainly relying on 'fists'. In contrast, soft violence does not primarily rely on tangible physical harm. Soft violence perpetrators mainly adopt measures such as 'psychological attacks' [4]. The psychological consequences caused by online soft violence are long-term and cannot be estimated immediately. For example, after a perpetrator insults and defames a victim online, the victim suffers moderate depression. The perpetrator deletes the original post and apologizes to the victim after the content has fermented but does not take any other measures to stop the further spread of the content. The perpetrator adopts the 'termination' method at the objective level but only achieves the effect of 'suspension'. At this time, there may be disputes over determining the perpetrator's behavior.

3. The Critical Analysis of Controversial Issues

3.1. Discussion on the Spread Scope of Cyber Insults and Defamation Crimes

The limits of citizens' freedom of expression online became the first issue to be discussed. Freedom of speech is a fundamental right granted to citizens by the Constitution, which encourages citizens to express their opinions and actively participate in the management of public affairs [5]. Therefore, whether objectively disseminated content is criminalized should be discussed case by case. Evaluation of the work of public officials falls within the scope of citizens' freedom of expression, and there should be some tolerance for it. False remarks in other situations go beyond citizens' freedom of expression and should be regulated.

Combined with the requirements of the criminal policy of combining moderation and leniency in the criminal law and returning to the criminalization standards of online insults and defamation in the law, 'serious circumstances' has become the primary condition for discussing criminalization. The Network Defamation Judicial Interpretation stipulates the quantitative standard of 'serious circumstances', which clarifies the determination of the crime of online insult and defamation, but also arouses debate in academic circles. Some scholars question whether this quantitative standard is unreasonable because there is a possibility of helping others to commit crimes, and the behavior of others is also taken into account in the process of determination [6]. Moreover, some scholars believe that this provision is reasonable and legal in that with the increasing penetration rate of the Internet, it is widespread for the information posted on the Internet to be browsed and forwarded by others, and the perpetrator should foresee this [7]. The scope of its dissemination rapidly expands with the rise in clicks, views, and forwards of insulting and defamatory content, and the infringement of others' legal interests becomes serious. Nevertheless, on a low-exposure platform or merely in a small area, it is feasible for insulting or libelous information to spread. The scope of dissemination is within the victim's life circle, such as family, colleagues, friends, etc. In that case, the legal infringement caused is comparable to that of a platform with high exposure, but it cannot be convicted.

This article cannot quantify the harm of insulting information to the victim's personality. When we measure whether online insults are serious, we need to consider whether the insults have lowered the victim's social evaluation. Furthermore, whether the abuses substantially damaged the reputation and honor rather than simply relying on numbers to measure. Although these amount standards are essential, the particularity of cybercrime determines that its harmfulness does not mainly rely on these standards. After cyberdefamation crimes are investigated and dealt with, their harmfulness will not be eliminated from cyberspace quickly or even cannot be eliminated. The amount standard cannot accurately quantify the degree of legal infringement of cyberspace crimes. For example, if defamatory information is clicked and viewed 4,000 times or 5,000 times, there is no essential difference in the damage to the victim's reputation [2].

3.2. Determination of Criminal Subjects of Internet Insult and Defamation

The subjects of online insult and defamation are generally divided into four layers. First, the sender of the speech, directly creates insulting and defamatory speech and publishes it on the Internet, which is the critical subject of the online insult and defamation crime. The second is professional perpetrators, commonly known as 'Internet trolls', whose job is to support and repost speeches, and they will also get corresponding rewards when the tasks are completed. If their subjective purpose is only to obtain economic benefits, which is different from the traditional insult and defamation crimes that intentionally damage the reputation of others. In that case, whether such subjects can be convicted of insult and defamation crimes is debatable. The third is opinion supporters, commonly known as 'keyboard warriors'. These subjects rely on the secrecy of the Internet to comment wantonly on

various events, express their dissatisfaction, and lead Internet users to a climax of public opinion. Their behavior strongly supports the initial behavior. The fourth layer is the media. The negligence or laissez-faire of platform reviewers has led to the spread of cyber violence. If the platform fails to fulfil its review obligations in time, it will also become an independent criminal subject of other crimes. Since most of the communication media are work units, the subject of the crime of insult and defamation is a natural person, which excludes work unit crimes. Therefore, the directly responsible person in charge or other responsible persons should be investigated directly. Compared with traditional insult and defamation crimes, the scope of the subject has been expanded. The rumor spreaders of insult and defamation information are also included in the range of formal regulation, blurring the boundaries between them and the rumor-makers [8]. Strong concealment, a wide range, and many criminal subjects have aggravated the difficulty for judicial organs to crack down on.

According to the behavior pattern, the criminal law theory generally holds that insult and defamation are composed of plural acts. That is to say, only two acts of ‘fabrication’ and ‘dissemination’ can constitute the sole perpetrator of the crime of defamation [9]. The legal interests infringed by this crime are the personal dignity and reputation rights of others. Professor Zhang believes that simply using fabricated facts is enough to slander others and cause legal interests to be violated [7].

3.3. The Continuous State of the Crime of Online Insult and Defamation

Internet insult and defamation crimes must maintain their criminal status continuously. The consequences of this kind of constant crime can even extend to continuous offenses. The spread of false information online harms other people. Even after the rumor-maker stops, the repercussions can still be felt and harm the victim. The suspension of the continuing state should be necessary to ensure that those affected can resume their regular lives. According to judicial practice, the crime of online insult and defamation cannot be prevented by ‘timely deletion of false information’ and ‘apology statement’.

As a result, the ongoing status of the act should be ‘suspended’ rather than ‘terminated’. Additionally, the obstacle of illegality cannot stop the suspension of the continuous state. If the offender is found to have committed a criminal offence but stopped causing harm in time, he can be considered to have shown penitence and suspension. It is a sentencing circumstance of mitigating penalty below the minimum statutory prescript because he reduces damage to spread. For insult and slander, if the perpetrator takes timely measures to prevent and eliminate the influence when the spread scope is small, the behavior itself does not constitute a criminal offence, making discussion of the issue of the continuous state meaningless.

4. Solutions to Address New Challenges

4.1. Objective Aspect: ‘Serious Circumstances’ as Incriminate Criterion

Instead of using a single quantitative criterion, evaluate the case facts holistically and identify ‘serious circumstances’ based on the actual spread extent and impact. Because insult and defamation crimes are circumstance offenses, the victim’s legal interests were violated in a way that cannot be quantified. As a result, the judicial organ cannot mechanically apply the numerical criteria of ‘serious circumstances’ in the Network Defamation Judicial Interpretation. Further substantial judgments are made based on the premise of confirming the existence of false information [10]. Indicate whether this information seriously infringes on the rights of others’ reputations, lowering their social evaluation.

Identify the dissemination range of insults and slander from online and offline dissemination. Its essence is still traditional offline dissemination when rumor-makers propagate online within the

victims' social circles. Hence, judges should set aside quantitative rules and treat online insults and defamation as a traditional crime of insult and defamation to determine the magnitude of dissemination among acquaintances. The quantifiable standards can be used to measure the effect of online dissemination. The precise value in the quantitative measure is derived from the recurrent summarization of different network platform measuring indicators by the public security organizations, which has a certain reference value [11]. However, this standard should aim at the same victim, multiple platforms cumulative count, and count the number of people as the standard of judgment rather than the number of times [12]. In addition, the actual browsing views and forwarding amounts should be 'dehydrated', excluding the false dissemination amount, the victim's click, browse or forwarding times, platform maintenance, and other data.

4.2. Using 'Knowledge' and 'Intention' to Determine the Subject of This Crime

At the subjective level, 'knowledge' and 'intention' should be utilized to assess online insult and defamation offenders. Negligence may not apply to offenses involving speech. 'Knowledge' and 'intention' must coexist in order to demonstrate this crime. Countries have differing opinions on the legal liability of rumor-makers and mongers. According to the criminal law theory, there are only unilateral accessories or, at best, unilateral abettors. In the case of unilateral accessories or abettors, the offender can only intentionally do the act of aiding or abetting and never engage in executive conduct. In most circumstances, there is no express joint criminal clause between rumor mongers and rumor manufacturers. However, they might be regarded as a joint offence if they consciously plan to humiliate or discredit a person or organization collectively. In addition, the criminal cognition of professional criminals like Internet trolls should vary. In Chinese criminal law, such businesses or collective groups could be regarded as engaging in 'illegal business operation' activity. Online platforms should also be susceptible to civil penalties if they do not carry out their supervision duties. In severe cases, they may be found guilty of refusing to fulfill the information network security management responsibility.

It must constitute the crime of insult and libel when the rumor-maker and the monger are the same individuals. Otherwise, the monger just propagates the fake information that the rumor-maker has only created but not published. It appears that the monger is 'well aware and still spread' should result in a conviction for this offense. On numerous social media platforms, 'Internet trolls' and 'keyboard warriors' are to blame for the sharp increase in online insults and defamation. Whether this kind of subject is liable can be estimated through their subjective viciousness. If they only carry out online insults and slander for remuneration, they do not have personal malignancy and cannot be charged with this crime. The organizer bears the major responsibility, and not every Internet troll needs to be found guilty.

4.3. The Termination of Continuous State Should Eliminate Effects in Time

Negative effects should be promptly eliminated once the continuous state of cyber insult and defamation is terminated. While the effects are being removed, the continuous state is suspended. In other words, even after the behavior has ceased, the impact of online insults and slander may persist. Hence, it is necessary to ensure the suspension of continuous state, which may include requiring rumor-makers and mongers to remove false information, make public apologies and other measures. The crime suspension should consider both the 'promptness of the act' and the 'extent of the impact'. If the perpetrator deletes the original content and issues apologies in a small range of personal social circles. It cannot be viewed as the suspension of the continuous state in this situation.

In some cases, some netizens may not comprehend the discontinued crime of the perpetrator. For instance, even if the rumor-maker apologized or the state organ issued pertinent statements, some

netizens would obstinately believe that the rumor-maker had to apologize since the victim had an interest in the state organ. Another example is targeted online insults and defamation of women. How some netizens create stereotypical definitions of victimization by mixing daily impressions of the victims with these fabrications. Even the rumor-maker's apologies could not change their opinion of the female victim. Therefore, while assessing whether the effect has been eradicated, the victim's perspective should be taken into account. After the offender takes measures to neutralize the impact and the victim does lessen the injury from the offender, it can be regarded as the obstruction of incrimination.

5. Conclusion

On numerous online platforms, insults and defamation are widespread. The perpetrators assume they can defame others online with spiteful remarks, which seriously damages one's reputation and is difficult to reverse. It is incredible how something essentially free of charge can have such a negative impact. As a result of the primacy effect, the public frequently has predetermined notions about victims, and it is challenging to change these presumptions. Additionally, traditional charges cannot regulate it effectively, and the Network Defamation Judicial Interpretation is still controversial. Therefore, in an effort to aid in the appropriate application of pertinent rules and regulations in judicial practice, this study analyzes online insults and libel behaviors from three perspectives including objective, subjective, and illegal deterrence. Given the academics' debate over the quantitative standard of 'serious circumstances', it is suggested that 'serious circumstances' should be assessed through the actual dissemination range and impact. Secondly, using 'knowledge' and 'intention' to identify the subject of this crime from the perspective of practice. Finally, the termination of the continuous state of the offence should be to eliminate the influence of the behavior in time. The criminal offence should not be prevented because of the civil cessation of infringement and deletion of false information.

The current research, which mainly focuses on the case facts that were extensively addressed in China, still has a lot of flaws. Due to space restrictions, it is unable to address all facets of the crimes involving online insults and defamation, as well as provide additional information on the solutions. Furthermore, it is critically necessary to conduct thorough research on the crimes of abuse, slander, and network offense. Ten years have passed since the Network Defamation Judicial Interpretation was released. With the rapid development of the Internet, there have been more in-depth studies on online insults and defamation in the academic community during the past ten years. The Network Defamation Judicial Interpretation, as well as other pertinent cybercrime regulations, need to be updated. In an effort to strengthen the delayed and controversial provisions, advance the regulation of cyberviolence and cyberspeech offences, and maintain a stable and diverse online environment.

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