

Research on the Issue of Standards for Applying Criminal Law to Case Cyber Defamation

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Abstract. With the development of the Internet, the connection between real society and cyberspace has gradually become closer. While the Internet has brought great convenience to people's lives, it has also given rise to many new problems, with cyber defamation being a typical issue. However, in the current governance of online defamation, the limitations of traditional defamation regulations have become apparent due to the unique nature of cyberspace. Considering the fundamental principles of freedom of expression and Internet defamation, providing targeted recommendations for addressing the challenges present in China's current laws on Internet defamation is crucial. Specifically, it is important to clarify the standards of criminal law applicable to Internet defamation offenses, establish clear criteria for intervention in both public and private prosecution of such offenses, and maintain a balance in relationships. To achieve this, continuous improvement of relevant laws and regulations is necessary to address the challenges of the Internet era, protect individuals' legitimate rights and interests, and maintain order and healthy development in cyberspace.

Keywords: Cyber defamation; Freedom of speech; Penalties; Sentence of liberty.

1. Introduction

On 7 July 2020, Wu from Hangzhou was secretly photographed by supermarket owner Lang while picking up a courier. Lang and He fabricated WeChat chat records, spreading rumours Wu cheated the courier. In early August, the rumour was forwarded on the Internet, causing serious physical and mental harm to Wu and creating a huge public opinion storm in the community. Wu took measures to protect her rights [1]. However, Wu's case is not an isolated incident. With the rapid development of information technology, it has become increasingly convenient to express opinions through the Internet, but it also brings negative impacts to individuals and society. Article 35 of the Chinese Constitution stipulates that citizens of the People's Republic of China have freedom of speech, press, assembly, association, procession and demonstration. Based on this, some scholars have suggested that freedom of speech is not entirely controllable, and once it exceeds its boundaries, it can highly significantly affect social order [2]. As a result, the increase in socialization and the accelerated development of information technology have led to a tendency for online speech to become restricted, disorderly, and emotional. The scope of freedom of expression has also shown a tendency to be over-interpreted with the advancement of information technology, particularly when some unlawful elements misuse the concept of freedom of expression to infringe upon the legitimate rights and interests of others.

Based on this, cleaning up the online public opinion environment is a current issue that cannot be ignored. When the civil law and administrative law systems fail to achieve their legislative purpose, criminal law, as the last resort to maintain the bottom line of social morality, should intervene in behaviors that infringe upon legal interest. Given the current state of social development, this paper analyzes behaviors that exceed the limits of freedom of expression and constitute the crime of online defamation. It also examines the application standards of criminal law for online defamation from the perspective of criminal elements. The aim is to propose suggestions for the governance of online defamation under criminal law in China and provide advice for the healthy development of China's online environment.

2. The Basic Jurisprudence of Freedom of Expression and Internet Defamation

2.1. A full understanding of what constitutes the concepts of freedom of expression and online defamation is a prerequisite for accurately defining the applicable standards of criminal law for online defamation offenses.

2.2. The legal Character of Freedom of Expression

Freedom of speech is one of the fundamental rights and interests granted to citizens by the Constitution. Article 35 and Article 51 provide, in principle, for citizens' freedom of expression [3]. However, in today's highly developed era of online information technology, online platforms provide more convenient conditions for people to express their opinions. Based on the development of the internet, freedom of speech currently exhibits the following characteristics.

Firstly, equality. The equality of freedom of expression on the Internet is mainly manifested in the Internet's disregard for the distinctions among Internet users. In contrast to the class-based nature of traditional public opinion, online platform eliminates the disparities in status and occupation that exist in real life, creating an equal environment for all. This allows individuals to transcend real-life identity barriers and express their views more freely.

Secondly, concealment and disorder. On one hand, the current online environment has varying standards regarding permissible speech. The implementation of a real-name system on the Internet has not been universal due to concerns about citizens' personal information and network security. This poses technical and forensic challenges in managing and tracking anonymous IDs during online opinion management. In essence, speech made by individuals through anonymous IDs carries significant covert power. On the other hand, the hidden nature of online freedom of speech allows individuals to bypass moral and legal constraints, neglect proper standard of free speech, and express opinions that may harm national interests and the legitimate rights and interests of others. This, to some extent, contributes to a disorderly online public opinion environment.

Finally, dissemination. Some scholars have pointed out that the Internet is characterized by its trans-temporal and spatial nature, allowing information to be disseminated worldwide and viewed simultaneously by people expressing their opinions [3]. It is evident that interconnected nature of freedom of expression has amplified the dissemination of information, making it more robust and widespread.

2.3. Elements of the Offence of online Defamation

The emergence of online defamation cases is one of the manifestations of the traditional defamation offenses adapting to a completely new social environment within the context of the modern society's trend towards networking. Therefore, from the perspective of the four elements of the offence, cyber defamation retains the fundamental characteristics of traditional defamation offenses but is more complex and abstract.

Firstly, the subject of the offence. In terms of the type of subject, the offense of cyber defamation is similar to traditional defamation in that it applies to natural persons. However, compared to the traditional defamation where both the fabricator and disseminator are usually individuals, the subject of the Internet defamation may be separated from the fabricator and the disseminator. In related cases, there may not be a direct connection between the fabricator and the disseminator of the information. The fabricator may take advantage of the onlooker mentality of some netizen to publish false content, leading the onlookers to inadvertently become disseminators of the fabricated information.

Secondly, the object of the offence. According to Criminal Code, the object of defamation is a citizen's right to honour [4]. In our country, the right to honor can be understood in three parts: internal honour, external honor, and subjective honor. Internal reputation can include a citizen's human dignity. External reputation involves social evaluation, and subjective reputation focuses more on a citizen's personal sense of honour [5]. This paper considers that Criminal Code protects both the

external honor and the subjective reputation of citizens. Compared to the definition of subjective and internal honor, external honor is more intuitive, and the criteria are more uniform. In contrast, subjective and internal reputations are shaped by an individual's self-assessment, principles, and other factors. Therefore, the object of cyber defamation is the same as the object of traditional defamation, which is a citizen's right to honor.

Further, the subjective aspect of the offence. Both cyber defamation and traditional defamation require the perpetrator to have subjective malice, meaning that they knowingly spread content with the intention of causing a serious infringement of legal interests. Some scholars argue that the subjective malice in cyber defamation should encompass both direct and indirect intent as outlined in criminal law doctrine. In other words, if the perpetrator is aware that the fabricated or disseminated information does not align with reality and adopts a *laissez-faire* attitude, they should be considered to have criminal intent [6]. This paper contends that this perspective holds significant innovative value in the academic community and provides guidance on holding new criminal subjects, such as "internet water armies" and "mass online commentators", accountable in case of online defamation [7].

Finally, the objective aspects of the offence. According to the 2013 Interpretation of Several Issues on the Application of Law to the Handling of Criminal Cases Involving the Use of Information Networks for the Purpose of Committing Defamation and Other Criminal Cases, the objective aspect of the crime of Internet defamation in China is demonstrated by the perpetrator fabricating and disseminating fictitious information that severely harms the personality and reputation of another person. However, the Chinese judiciary has acknowledged the challenges of criminalizing online defamation compared to traditional defamation. To address this, relevant explanations have been issued to clarify and establish conditions for defining the offense, such as "aggravating circumstances", "mass dissemination of information", and "serious consequences". Overall, these measures help to balance the need to protect individual rights while also considering the unique characteristics of online communication and information-sharing.

2.4. Freedom of Expression and the Definition of the Offence of Internet Defamation

As mentioned earlier, this paper explains the concepts of freedom of expression and online defamation, as well as the criteria for recognizing them. However, drawing a clear line between freedom of expression and online defamation is currently a focal point of research in both theoretical and practical circles. In particular, the challenge lies in leveraging criminal law to regulate and monitor the speech environment effectively while also safeguarding citizens' right to freedom of expression. This essay examines various perspectives from theoretical and practical circles to shed light on how best to navigate this complex issue. By synthesizing these viewpoints, the aim is to contribute to a better understanding of the balance between combating online defamation and upholding the fundamental right to freedom of expression.

Firstly, the external honour doctrine. As noted earlier, some scholars argued that the offense of defamation protects not only the objective honor but also the external honor of citizens, based on the legislative purpose of the offense. Thus, the external honor doctrine posits that the boundary between freedom of expression and cyber defamation lies in the fact that the exercise of freedom of expression by citizens should uphold the right to honour of others. According, freedom of speech may be deemed to have exceeded its bounds if it aims to infringe on another person's right to reputation or if it results in objective damage to their external honor. By this reasoning, criminalizing online defamation can be justified as a means of safeguarding the external honor of citizens and ensuring that individuals can exercise their freedom of expression without fear of unwarranted attacks on their reputation [8].

Secondly, the doctrine of public order. The degree of intervention by public prosecution in cases of defamation, where private prosecution is prevalent and public prosecution is the exception, requires careful consideration. Our Criminal Code uses "serious harm to public order" as a criterion for the intervention of the Public Prosecution Service. Therefore, the public order doctrine posits that the

boundary between freedom of expression and cyber defamation should be based on whether the expression aims to disrupt public order or results in such disruption [9]. However, this perspective has been a subject of ongoing debate regarding the definition of “public order” and whether the online public opinion environment should be considered part of public order. Some scholars argue that the order of cyberspace fails under public order, yet in judicial practice, triggering public disorder should not encompass disturbances in cyber public order but rather disturbances in the societal order of the physical world [10]. Some scholars believe that in the new context of the “two-tier society”, the concept of public order should be redefined and extended to encompass both the Internet and physical reality [11]. This paper argues for an expanded scope of public order, contending that in today’s networked information age, the notion of society is no longer confined to the physical realm alone. With the increasing prevalence of online activities, cyberspace has become increasingly integrated with society and has exerted a significant impact on the real world. The emergence of online defamation, not as a novel offense but rather as a cyber manifestation of traditional defamation, serves as evidence that the Internet can no longer be regarded as a lawless domain.

Finally, the doctrine of the principle of moderation. There is no question regarding the legitimacy of freedom of expression as one of the fundamental rights granted to citizens by the Constitution. However, as society evolves, conflicts arise between the rights of citizens and between citizens and public rights. In the context of regulating online defamation, there exists a tension between individuals’ right to honor and their right to freedom of expression. The principle of moderation posits that, when faced with conflicting rights, the legislature and judiciary should strive to objectively and effectively balance such conflicts [12]. If the legislative principles of the Constitution are adhered to, citizens have the right to freely express their views without being subject to government censorship or restriction. The boundary between freedom of expression and online defamation should be even less quantified in specific circumstances. Instead, it should be analyzed on a case-by-case basis, taking into account the actual circumstances of the case. Similar cases should not be generalized. In this regard, scholars have proposed that the social bottom line of criminal law should be fully utilized by seeking to resolve problems through alternative social means where possible, rather than resorting to punishment in non-essential cases.

3. Governance Dilemmas of Internet Defamation Offenses and Suggestions to Address Them

As mentioned earlier, there are a number of difficulties in the course of the administration of online defamation offenses, as described below.

3.1. Controversial Definition of Terms used in legal Texts

Firstly, the determination of “fabrication”. The term “fabricate” originally referred to creating false information out of the air. According to the High Court’s interpretation, “fabrication” is categorized into three types: “fabrication and dissemination”, “falsification and dissemination” and “knowing dissemination”, and “knowingly disseminating” [13]. However, in practice, there still exists a certain judicial blind spot in determining “fabrication”. For example, judicial interpretations do not offer a clear definition regarding the extent to which tampering should be considered part of the definition offence during legal proceedings. In other words, it is uncertain whether partial fabrication, retaining some truth about the event, or complete fabrication of false facts constitute defamation. This paper argues that the degree of fabrication should consider the relevance between the fabricated content and the facts, focusing on the details, while ensuring alignment with the actual situation. The concept of “seven parts truth and three parts falsehood” can be viewed as a normal information error in the dissemination process, not necessarily constituting defamation. Special cases, such as discrepancy between the disseminator’s subjective understanding and the actual situation, require consideration of the source of information and the disseminator’s intent.

3.2. Deficiencies in the Regulation of the Liability of special Subjects

In the case of the defamation involving a woman picking up a courier in Hangzhou, the most controversial issue is the accountability of online platform managers. It is argued that managers of online platforms should be held accountable for the dissemination of defamatory information due to negligent management. Some scholars believe that “the online platform services, acting content developers, should conduct pre-release audits of information content. They also have an obligation to manage the content of published videos. When audited videos lead to negative social impacts, the platform should bear legal responsibility in such cases [14].” This paper argues that assigning the obligation of censorship to online platforms. Scholars have contended that the law should not mandate online platforms to censor content. Overemphasizing the social impact of videos in determining online platform responsibility may heighten governance risks for these platforms [15]. Firstly, imposing a censorship obligation on online platforms would increase the workload of platform staff. Given the large number of internet users in China, content regulation demands significant manpower and material resources, thereby raising operational costs for the platforms. Secondly, excessive consideration of social impact as a criterion may shift audit focus, diminishing the importance of content authenticity. This could infringe upon citizens’ freedom of expression rights. Therefore, the primary criterion for video censorship should remain the authenticity of content.

3.3. Dispute over the Scale of Prosecutorial Involvement

In the process of transferring libel cases from private to public prosecution, the current public prosecution standard is no longer adequate to address constantly evolving social problems. The existing criteria for public prosecution intervention are rigid and ambiguous when confronted with new social issues. For example, the term “aggravating circumstances” is over-quantification in current judicial governance, such as citing “5,000 views, 5,000 retweets, and 500 times” in judicial interpretation, making case consideration too rigid [16]. Secondly, the application of the public prosecution standard is unclear. In Hangzhou courier defamation case, the Criminal Law’s criterion for transferring defamation offenses from private to public prosecution is that it seriously endangers society’s interests. However, where the nature of the case does not rise to the level of the State, the criteria for the involvement of the Public Prosecution Service in the case warrants academic discussion. Some scholars have suggested that the case is an example of the State actively defending individual rights and interests, but that it is not very instructive regarding seriously endangering society interests, and that the Public Prosecutor’s Office intervention should still be based on the clarifying the criteria [17]. The State intervenes in the sphere of private rights and interests not only to limit the infringement of individual rights by private rights but also to limit its own rights’ scale.

4. Optimizing the Governance Path of online Defamation in China

With the rapid development of the Internet, online defamation cases have taken on new dimensions. However, the insufficient supply of the traditional criminal law system and the gradual rigidity of judicial standards have led to the fact that China’s current criminal law cannot effectively govern the criminal act of online defamation. Based on this, this paper proposes the following optimized governance path.

4.1. Improving the Governance of online Defamation

In the case of the “Hangzhou woman picking up express delivery was defamed”, the offense’s definition was the main point of contention. In the current governance of online defamation, the judicial cases for traditional defamation are often used as a reference, which to some extent cannot meet the diverse and complex needs of online defamation. Therefore, controversial issues such as the scale of public prosecution intervention are bound to arise. Based on this, this paper argues that a new criminal law system should be shaped through judicial interpretation on the existing foundation to provide legal support for online defamation governance more in line with current social reality. Meanwhile, the U.S. is currently advocating for a decriminalized governance model for online

defamation, which is different from China's self-representation process [18]. In the United States, where there is no private prosecution process, defamation offenses are decreasing, and most states have decriminalized defamation, focusing justice on the victim's aggression. In China's current cyber governance context, the judiciary can shift its focus appropriately to the violations suffered by the victim and more accurately identify the harm suffered by the victim.

4.2. Clarifying the Scope of Responsibility of special Subjects

In the case of online defamation, the regulation of the responsibility of special subjects represented by online platforms is likewise one of the best ways to combat the problem of online defamation. Although some scholars have pointed out that the regulation of online speech should not be imposed on online platforms. It is true that an unjustified increase in the management obligations of the online platform will increase the operating costs of the online platform is not conducive to the operation and development of the platform. At the same time excessive speech regulation by platforms is equally an infringement of citizens' right to free speech expression.

However, it does not mean that online platforms have no responsibility. As intermediaries for network users to express their views, online platforms' profitability is directly related to the number of users and views. According to the principle of "consistency of rights and responsibilities", online platforms have the obligation to actively manage their platforms. Internet service providers need to be aware of and mindful of speech that is detrimental to citizens' interests and should not engage in negligent or overconfident behavior [19]. This paper argues that in the governance process of online defamation, it is possible to regulate the management behaviors of special subjects such as online platforms. This can include regular checking of online public opinion, data preservation on sensitive topics, and confidentiality of users' personal information. For issues arising from the platform's management behavior in online defamation cases, the platform's management behaviour should be subject to corresponding legal liability.

5. Summary

The internet is not an extra-legal place, and the growth of free speech has led to a greater willingness to use the rights granted by the Constitution. However, improper use of the right to freedom of expression poses a number of challenges to society as well as to the law. Therefore, it is incumbent upon every citizen to maintain the clean wind of online public opinion, and citizens should be responsible for their own speech and behaviour whenever and wherever they are. Based on this, this article believes that the management of defamation offenses on the Internet nowadays should appropriately adjust the way and scale of application of the criminal law provisions, adjust the traditional way of application of defamation offenses, and raise the incriminating standard of defamation offenses, strictly taking the standard of "damaging the public order and the public security of the country" as a criterion. As for the protection of rights and interests at the citizen level, legal means other than criminal law can be introduced to build a governance system that combines criminal law and general law. It is worth noting that there is still a lot of controversy regarding the issue of cyber defamation due to the actual development of the Internet at the present time. Therefore, it is recommended that theoretical and practical circles should strengthen research and discussion on the governance of online defamation.

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