

Study on the Determination and the Litigation Procedure Application of the Crime of Cyber Defamation in China

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Abstract

In the incrimination standards of “serious circumstance” of the crime of cyber defamation in Chinese criminal law, distorted data should be excluded from the “quantity standard” and the “quantity standard” should be used only as an auxiliary judgment standard. The “social order” and “the state’s interests” involved as the conditions for public prosecution should be correctly defined, and the simple disturbances of cyberspace order and psychological order cannot be recognized as “seriously undermine social order”. As the landing point of many applicable public prosecution situations, the “adverse social impact” cannot be interpreted through the system to arrive at “seriously undermine social order”. In defamation cases against public figures, the public’s right to freedom of expression and supervision should be taken into account, as well as the public figure’s ability to control social resources. In terms of the applications of litigation procedures, a correct interpretation should be made of the principle of “be investigated only if they are sued”, and the responsibility of public security organs to assist in providing evidence should be implemented. For general cases of cyber defamation, the principle of “be investigated only if they are sued” should be stuck with, and when meeting the conditions for the application of the public prosecution procedures, interests should be weighed between the protection of the public interest and respect for the victim’s wishes, so as to achieve an accurate grasp of the state’s right to public prosecution.

Keywords: the crime of cyber defamation, serious circumstance, social order, the state’s interests, be investigated only if they are sued, public prosecution procedure

1. Introduction

The 52nd *Statistical Report on the Development of the Internet in China*, released by the China Internet Network Information Center on August 28, 2023, showed that as of June 2023, the number of Internet users in China reached 1.079

billion. ¹ In recent years, with the rapid development of the Internet and the dramatic increase in the number of Internet users and

¹ “The 52nd Statistical Report on the Development of the Internet in China Released,” <https://cnnic.cn/n4/2023/0828/c199-10830.html>, last accessed October 22, 2023.

illegal behaviors of online violence have intensified, and cyber defamation has tested the application of the crime of defamation in Chinese criminal law in the context of the Internet era.

On September 6, 2013, the Supreme People's Court and the Supreme People's Procuratorate published the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases* (Interpretation No. 21 [2013], hereinafter referred to as the "*Interpretation*"), which clarifies the four circumstances that should be recognized as the "serious circumstance" of the crime of defamation as stipulated in paragraph 1, Article 246 of Chinese criminal law, as well as the seven circumstances that should be recognized as the "seriously undermine social order or the state's interests" as stipulated in paragraph 2, Article 246 of Chinese criminal law.

On September 20, 2023, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security published the *The Guiding Opinions on Punishing Cyberviolence Violations and Crimes* (No. 14 [2023] of the Supreme People's Court, hereinafter referred to as the "*Guiding Opinions*"), which listed five situations that should be deemed to be "seriously undermine social order" as stipulated in paragraph 2, Article 246 of the Chinese criminal law. In addition, *Guiding Opinions* pointed out that the responsibility of public security organs to assist in providing evidence in the case of defamation should be implemented, that the public prosecution procedures for criminal cases of insult and defamation should be applied in accordance with the law, that the supervision of the filing of cases of cyberviolence crimes should be strengthened, and that people's procuratorates may initiate public interest litigation in the People's Courts according to the law in cases where cyberviolence endangers the public interest. However, there remains controversies over the incrimination standard of "serious circumstance" for cyber defamation and the application of the litigation procedure.

2. Determination of "Serious Circumstance" in the Crime of Cyber Defamation

In Chinese criminal law, the concept of "serious

circumstance" is general, but as a basis for the incrimination of the circumstance crime¹ and the upgrading of legal penalties in other crimes, it has the dual tasks of incrimination and sentencing. In paragraph 2, Article 246 of the Chinese criminal law, "serious circumstance" belongs to the elements of the crime of defamation, so it is a condition of incrimination. Therefore, a correct understanding of "serious circumstance" in the crime of defamation plays a crucial role in judging whether the case constitute a crime.

2.1 Quantity Standard of "Serious Circumstance" in Cyber Defamation Offences

Among the four circumstances listed in Article 2 of the *Interpretation* as being in line with the "serious circumstance" stipulated in paragraph 1, Article 246 of the Chinese criminal law, the focus of the controversy among academics lies in the fact that "is actually clicked or browsed for more than 5,000 times or is forwarded for more than 500 times" as listed in Article 2(1) of the *Interpretation*.

The *Interpretation* takes the number of clicks, browse and retweets of defamatory information in cyberspace as the determination of "serious circumstance" in the crime of defamation, and establishes exact figures to provide quantitative incrimination standards for the crime of defamation, with the consideration that, generally speaking, the more times of clicks, browse and retweets implies that the wider the scope of the spread of the defamatory information, and the more serious damage to the victims' right to reputation it causes. At the same time, the establishment of exact standards strengthens the predictability of the law, avoids the judiciary from possessing too much discretionary power, and provides concrete operational standards for the judicial practice. However, many scholars have raised objections to this. Some scholars have suggested that it is difficult to achieve justice in individual cases by relying solely on the form of judging the aggravation of the circumstances, which makes the judiciary form a mechanical dependence on the number of clicks, browse, and retweets for the conviction and sentence, and neglects to make value judgments on the substance of the

¹ In Chinese criminal law, the circumstance crime is a type of crime in which the subsection of the Criminal Law expressly stipulates that the "serious circumstance" or "wicked circumstance" is a condition for the establishment of the crime provided for.

cases.¹ Some scholars have questioned the constitutionality of the “quantity standard”, arguing that the use of “more than 500 retweets” as one of the “serious circumstance” negatively affects the freedom of expression and is a restriction of the fundamental rights of citizens that stipulated in the Constitution, and that the use of the number of clicks, browse, and retweets as a criterion is not in line with the principle of proportionality between the means and the purpose of protecting the others’ right to reputation.² And there is also a scholar raising “criminal jurisprudence challenge”, arguing that the requirement of “is actually clicked or browsed for more than 5,000 times or is forwarded for more than 500 times” leads to a situation in which whether a person meets the criteria for defamation is not determined solely by his or her own actions, but rather by the actions of others, and it is not in line with the basic principles of Chinese criminal law: adaptation of responsibility to crime, self-responsibility, and the unity of subjectivity and objectivity.³

The determination of the quantity standard of “serious circumstance” for the crime of defamation has not yet been finalized in the academia, and the *Guiding Opinions* have not responded to the controversy. However, relying exclusively on quantity standard to recognize “serious circumstance” in the crime of defamation is limited in judicial practice and has insufficient theoretical basis, and the reasons are following:

Firstly, the number of clicks, browse and retweets often does not truly reflect the scope of the spread of defamatory information, and does not imply that the victims’ right to reputation has been seriously damaged. There exists a large number of “internet water army”, which can brush data mechanically or manually, and the webpage may be maliciously clicked and forwarded, or accidentally intervened by third-party behaviors. Another possibility is that

the number of clicks, browse and retweets is not high, but the scope of the attention and audience of the defamatory information is extremely high, causing serious damage to the victim’s right to reputation.⁴

Secondly, relying exclusively on quantity standards may fall into legalism and lead to mechanized criminalization. The famous scholar Alport once put forward a formula on the spreading speed and scope of rumors: the spreading speed and breadth of rumors = importance of the event × ambiguity of the event.⁵ Chinese scholar Yan Fuchang has also researched the issue and proposed: $R \approx i \times a \times a' / c$ (R: Rumor, i: importance, a: ambiguity, a': anxiety, c: criticize ability).⁶ According to the formula, due to the constraints of the public’s cognition and judgmental abilities, the breadth of the dissemination of defamatory information does not represent the true psychological state of the public, and it is impossible to know whether the defamed person’s right to reputation has been seriously damaged.

Thirdly, the *Interpretation* did not explain the criteria for calculating the data, leading to inconsistent standards in the determination process by different courts, and the different impact of the number of clicks, browse and retweets on the sentencing criteria in practice. For example, in the “Wang v. Tang Defamation Case”,⁷ the court of first instance found that it was technically impossible to eliminate the distorted data such as the victim’s own clicks, others’ intentionally inflated clicks, and clicks made by website administrators to maintain the website, and ultimately ruled that the defendant was not guilty of the charges; while in the “Yang Zongcai Defamation Case”,⁸ the court of first instance did not adopt the perpetrator’s claim that “a large number of clicks were intentionally clicked by the perpetrator himself or by his friends and relatives,” but instead relied on the

¹ Jin Honghao and Yang Yingze. (2022). The Comprehensive Judgment of “Serious Circumstances” in Cyber Defamation Crimes. *Journal of National Prosecutors College*, (3), p. 112.

² Yin Peipei. (2014). Constitutionality of “Sharing Defamatory Information Forwarded over 500 Times Will Be Punished”. *ECUPL Journal*, (4), p. 154.

³ Li Xiaoming. (2014). Whether defamation Behavior Constitute a Crime Should not be Determined by Other People’s Behavior. *Tribune of Political Science and Law*, (1), p. 186.

⁴ Du Ximing. (2013). Practical issues on Implementation of Criminal Defamation in Used of Information Network. *Journal of Law Application*, (11), p. 10.

⁵ Allport [U.S.]. (2003). *The Psychology of Rumors*. Translated by Liu Heping, Liang Yuanyuan, and Huang Li, Liaoning Education Press, 2003 edition, p. 17.

⁶ Yan Fuchang. (2016). *Research on Internet Rumors*. China Literature Press, 2016 edition, p. 122.

⁷ Dazhou City Tongchuan District People’s Court of Sichuan Province (2017) Sichuan 1702 Criminal Judgment No.132.

⁸ Chengbu Miao Autonomous County People’s Court of Hunan Province (2018) Hunan 0529 Criminal Judgement No.156.

whole available data to make a judgment of “serious circumstance”. For another example, in the “Mao Chunhua defamation case”,¹ the post was clicked more than 6,000 times, and the court ultimately ruled that the number of clicks exceeding 5,000 was a serious circumstance, and sentenced to one year’s fixed-term imprisonment for the crime of defamation; while in the “Cheng Jianbin Defamation Case”², the number of clicks was as high as 431,536, and the court ultimately sentenced to two years’ imprisonment for the crime of defamation, the latter data quantity being more than seventy times that of the former, while the final sentence was only one year more in prison. It can be seen that the criteria for determining the number of clicks, browse and retweets and the sentencing criteria varies greatly in judicial practice.

Finally, the *Interpretation* has been released for more than ten years, during which time social platforms such as TikTok, Weibo, Kuaishou, Zhihu and others have developed and grown, and the number of users has skyrocketed. Not to mention the influencer and other groups with large numbers of fans, ordinary internet users can also publish post to get tens of thousands of likes, retweets or comments to the situation of several million, reflecting that “clicked on or browsed more than 5,000 times, or has been forwarded more than 500 times” has become relatively easy.

2.2 The Proper Way to Apply “Quantity Standard”

Although the “quantity standard” has the disadvantages of inaccurate data, mechanized criminalization, and lowering the threshold of criminalization, the full significance of network data cannot be denied. To a certain extent, the number of clicks, browse and retweets can reflect the breadth of dissemination of the defamatory information. Although there may be cases of malicious clicks and retweets to increase the number of data, the perpetrator, by posting the defamatory information into the cyberspace where it may be browsed by an unspecified majority of the people, is able to recognize that the defamatory information has the possibility of expanding the scope of dissemination, and thus the network data is by no means irrelevant to the perpetrator. The “quantitative standard”

therefore has some value, but needs to be applied correctly. The judgment of “serious circumstance” should avoid legalism and mechanical law enforcement, and the eyes of the judiciary should flow between facts and norms.

2.2.1 “Quantity Standard” Needs to Be Applied Strictly on the Basis of Actual Data, Excluding Distorted Data

The *Interpretation* explicitly requires that the calculation of network data quantity needs to be “actually” clicked on, browsed or forwarded, and as the facts of the case, the network data should be “dehydrated data”, and the number of distortions or the clearly unreasonable number of times should be excluded through examination. For example, the number of times should be calculated on the basis of user accounts, and only one time should be counted if the same user has clicked, browsed or forwarded multiple times. The correct calculation of data is a difficult point in practice, and should be accurately grasped at both the technical and legal levels.

2.2.2 “Quantity Standard” Can Only Be Used as an Auxiliary Criterion of Serious Circumstance

“Serious circumstance” is a comprehensive evaluation element in circumstance crimes, including factors in the subjective aspects (the perpetrator’s purpose and motive) and the objective aspects (the time, place, method, object, and consequences of the crime) of the criminal acts.³ No matter how important the single case facts⁴ are, they can not be the basis for the “serious circumstance” of the whole case, and “serious circumstance” should be the evaluation of all the constituent elements. Retweets, clicks, the number of browse can only be used as the auxiliary judgment standards, but not as the only judgment standard. In determining the “serious circumstance”, the subjective viciousness of the perpetrator, the degree of harm caused by the defamatory information, and the reality of the damage to the victim’s right to reputation should be combined to make a comprehensive judgment on the severity of the infringement of legal interests.

3. The Determination of “Seriously Undermine Social Order or the State’s Interests” in the

¹ Ningbo Intermediate People’s Court of Zhejiang Province (2019) Zhejiang 02 Criminal Judgement No.826.

² Shangluo Intermediate People’s Court of Shanxi Province (2016) Shanxian 10 Criminal Judgement No.64.

³ Li Xiang. (2018). *Study on the Circumstance Crime*. Peking University Press, 2018 edition, p. 21.

⁴ The “single case facts” refers to the objective case facts that determine whether a crime is constituted in judicial practice.

Crime of Cyber Defamation

The Chinese criminal law provides that the crime of defamation is a “be investigated only if they are sued” case, and that if the victim does not request the perpetrator to be held criminally liable, the people’s court can not impose penalties on the perpetrator for the crime of defamation, “with the exception of cases that seriously undermine social order or the state’s interests”. This means that the public prosecution procedures are applied in cases of defamation that seriously undermine the social order and the state’s interests. In 2009, the Ministry of Public Security issued the *Notice concerning Strictly Handling Insult and Defamation Cases According to the Law* (Notice of the Ministry of Public Security [2009] No. 16), which listed the circumstances of “seriously undermine social order or the state’s interests”, and that was refined in *the Interpretation* in 2013. The *Guiding Opinions* reiterated the circumstances of “seriously undermine social order”, but the list of circumstances is not the same as before. In judicial practice, the problems are that the identification of “seriously undermine social order or the state’s interests” is unclear and the line between the public prosecution conditions and the incrimination standards of “serious circumstance” is blurred.

3.1 The Determination of “Seriously Undermine Social Order”

3.1.1 The Interpretation of “Social Order”

When it comes to the determination of “social order”, some scholars believe that social order is a state of affairs that manifests itself in the orderly public life of social subjects in accordance with the common rules of life, including the physical order in public places, as well as the organized order formed by people observing the rules of life in non-physical places.¹ Other scholars emphasize the dominant feature of public power in the social order, pointing out that the social order is an organized state of affairs in which people’s daily lives are managed by state agencies, departments, units, and other entities with public power.² The latter emphasizes public power, but ignores the state of people consciously following the rules in

order to maintain their lives. The order in which the organs of public power perform their functions is the means, and the order in which the public lives is the purpose, and the both are in an antagonistic and unifying relationship. Thus, the concept of “social order” should include the orderly state of society formed by the public in the state of nature in accordance with the common rules of life, the order of public authorities performing their functions, as well as the orderly, stable, interconnected and organic relations between the public and public authorities.³ Social order, as an objectively existing abstract concept, is projected in different aspects in real life, such as working order, management order, production order, traffic order, and place order.

In the academia, there remains controversy in the relationship between cyberspace order and social order. Some scholars have put forward the idea of a “two-tier society”, arguing that network order is not virtual, and that real society and network society coexist in contemporary society.⁴ Scholars who hold the negative view believe that having “public nature” is not the same as “public order”, and that cyberspace, while certainly public, is ultimately virtual and does not belong to the “public order” of real space.

There is no doubt that the determination of order in cyberspace needs to be dependent on the real social order. Firstly, cyberspace has public nature and authenticity, and cyberspace order is the reflection of real social order. People’s behavior in cyberspace is an extension of their behavior in real space, as some scholars have said, cyberspace order is a real order with the network as a means of connection, attached to the real spatial order, and the nature of the network in the order-type crime is not changed by the recognition of the real existence of cyberspace.⁵ Secondly, cyberspace does not have a sole spatial dimension in the sense of the Chinese criminal law. Cyberspace belongs to the

¹ Gao Mingxuan. (1998). *The New Chinese Criminal Jurisprudence* (the second volume). China Renmin University Press, 1998 edition, p. 808.

² Liu Yanhong. (2016). *Criminal Law* (the second volume). Peking University Press, 2016 edition, p. 353.

³ Gong Xinhui, Ma Luyao. (2023). “Reorientation of the Basis for Determining the Elements of ‘Seriously Disturbing Social Order’ in the Crime of Fabricating and Deliberately Disseminating False Information”. *Journal of Sichuan Police College*, (3), p. 35.

⁴ Yu Zhigang, Guo Zhilong. (2014). Identification Standards of Two-Tiered Society and Serious Public Disorder. *ECUPL Journal*, (3), p. 135.

⁵ Jing Lijia. (2017). Order in Cyberspace and Legitimacy of Criminal Law’s Intervention. *Criminal Law Review*, 52, Law Press, 2017 edition, p. 100.

absence of space, people can only carry out signal transmission, symbolic expression and meaning conveyance, unlike its corresponding presence of space, people in cyberspace cannot perceive specific places and environments. Cyberspace also exists on the basis of material, so the biggest difference between cyberspace and real space does not lie in materiality, but in the fact that cyberspace can create a kind of mind space composed of information and imagination outside of the real material space,¹ and this kind of order in the space of the mind obviously cannot be a legal interest to be protected by the Chinese criminal law. Lastly, the order of cyberspace does not have an exclusive legal interest separate from the order of real space. The collective legal interests protected by the Chinese criminal law should be closely related to individual legal interests, and can be decomposed or reduced to individual legal interests, undermining the social order means breaking the smooth and peaceful state of life of the unspecified majority of the people in the society, which requires the disorder of the physical order of the society rather than the disorder of the order of the cyberspace alone, so disturbing the order of the cyberspace does not have the independent punishability.

Mere psychological and information order cannot be evaluated as social order. In some cases, the perpetrator's defamatory acts had at most a negative impact on the public's sense of psychological security and the order of information on the Internet, but the judicial authorities recognized them as "seriously undermine social order". For example, in the "Lang and He Defamation Case in Hangzhou" (Prosecution Case No. 137), the procuratorial authorities held that the two defendants had chosen their target of infringement arbitrarily, causing panic among unspecified members of the public and a decline in the sense of security and order in society, and that the defamatory information had circulated on the Internet on a wide scale, triggering a large number of vulgar comments, and had caused a serious shock to the public order of the network, seriously endangering the cyberspace order and meeting the provisions of the "seriously undermine

social order".² While the reality is that, "public panic" is a subjective psychological state, which is abstract and difficult to measure. That real or false, positive or negative information intertwined with each other is an inherent phenomenon of human society. People's psychological state is often affected by the news media rendering or gossip, and it is difficult to match with the real situation of the social situation, so the criminal law should not be forced to intervene in people's psychological order. However, if the defamatory information causes serious disruption of the social reality space, then it should be recognized as "seriously undermine social order". Therefore, to be assessed as "seriously undermine social order", it should be required that the consequences of undermining the social order have been produced in the real space.

3.1.2 The Definition of "Adverse Social Impact"

The *Guiding Opinions* list five circumstances that "seriously undermine social order" as the conditions for public prosecution of defamation, and except for the last circumstance "other circumstances seriously undermining social order", the remanent four circumstances all takes the principle of "adverse social impact" as a landing point. The expression of "adverse social impact" is rather abstract, and it is still debatable whether it can be the starting point for "seriously undermine social order".

The terms "adverse social impact" and "seriously undermine social order" should not be equated. According to the principle of systematic interpretation, the criminal law should have the same or similar understanding of "adverse social impact", therefore, we can refer to the understanding of "adverse social impact" in other criminal crimes such as the crime of dereliction of duty of judicial staff. *Provisions of the Supreme People's Procuratorate on the Criteria for Opening Cases of Malfeasance and Infringement Crimes (Interpretation No. 2 [2006] of the Supreme People's Procuratorate)* and *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Hearing Criminal Cases Involving Malfeasance in Office (I) (Interpretation No. 18 [2012] of the Supreme People's Court)* both include the term "adverse

¹ Dai Jinshu. (2019). Punishment Basis of Fabricating and Intentionally Spreading False Information Crime — Inspecting the Determination Standards of "Severely Disturbing Social Order". *Journal of Zhejiang Police College*, (5), p. 69.

² Gazette of the Supreme People's Procuratorate of the People's Republic of China, No. 4 of 2022 (General No. 189), p. 37.

social impact” as a manifestation of the harmful result of the crime of abuse of authority and the crime of negligence of duty, “significant loss of public property, the state and the people’s interests”, emphasizing that the destruction of the credibility of the judiciary is a kind of abstract destruction and that it does not require the results of the damage being a material damage in real space. However, for defamation to be subject to the conditions of public prosecution, it should reach the level of “seriously undermine social order”, which is not an abstract destruction. Based on the previous understanding of “social order”, the situations listed in the *Guiding Opinions* should cause serious disruptions to the normal state of existence of working, living, learning, etc., which are observable in reality, and are specifically manifested in the consequences of real damage in the physical space, such as traffic jams, loss of control of governmental management order, and damages to life and property. Therefore, according to the systematic interpretation, the “adverse social impact” in the *Guidance* cannot be interpreted as “seriously undermine social order”, and the enumerated circumstances should clearly indicate the actual results of the damage to the social order, rather than being based only on “adverse social impact”.

3.1.3 The Determination of “Defaming Several Persons or Spreading Defamatory Information Several Times” as a Condition for Public Prosecution

One of the circumstances listed in the *Interpretation* as “seriously undermine social order or the state’s interests” is “defaming many persons, which causes adverse social consequences”, which is reiterated in the *Guiding Opinions* as “defaming several persons or spreading defamatory information several times, creating an adverse social impact”, adding the situation of “spreading defamatory information several times”. The focus of attention should be on the reason why “defaming several persons or spreading defamatory information several times” can become a public prosecution condition for the crime of defamation.

The No.3 Criminal Division of the Supreme People’s Court stated, “The perpetrator’s uninterrupted malicious defamation of many people has not only violated the victim’s right to reputation, but has also actually seriously

undermined the social order.”¹ Generally speaking, the greater the number of defamatory persons and the number of times defamatory information is spreaded, the greater the subjective malice of the perpetrator, and the greater the purposefulness of the serious damage to the victim’s right to reputation and the wide dissemination of defamatory information, which is a reflection of the greater seriousness of the perpetrator’s defamatory acts, rather than a reflection of the greater disruption of the order of the society. Therefore, the mere “defaming several persons” and “spreading defamatory information several times” can only be regarded as serious circumstance and cannot be equated with “seriously undermine social order”, and the conditions for instituting public prosecutions can only be met when the consequences of the damage are real in the physical space.

3.1.4 The Determination of “Derangement, Self-Mutilation, Suicide or any Other Serious Consequence” as a Condition for Public Prosecution

The problem is that there is a blurring of the line between “leading to serious consequences such as mental disorder or suicide of the victim or any of his or her close relatives, and having an adverse social impact” as a condition for public prosecution and “serious circumstance” as a incrimination standard. In the *Interpretation*, “causing serious consequences such as mental disorder, self-inflicted injury, or suicide of the victimized person or his/her close relatives” as “serious circumstance” becomes the incrimination standard for the crime of defamation, while the *Guidance Opinions* make “leading to serious consequences such as mental disorder or suicide of the victim or any of his or her close relatives, and having an adverse social impact” as “seriously undermine social order” to applying public prosecution procedures for the crime of defamation, and the criterion for the differentiation between the two is again grounded in “adverse social impact”. In judicial practice, however, the judiciary does not seem to have paid much attention to “adverse social impact”.

¹ No.3 Criminal Division of the Supreme People’s Court, *Comprehension and Application of the Interpretation of Several Issues of the Application of Law in Hearing Criminal Cases of Defamation Committed Using Information Networks*, People’s Judicature, No. 21, 2013, p. 21.

In practice, there are gaps in the logic of the prosecuting authorities' decisions to prosecute such cases, but the act of prosecuting itself is proper. Defamation under the Chinese criminal law protects the legal interests of the human dignity and reputation of others, while causing serious consequences such as mental disorders, suicides and self-inflicted injuries is a serious impairment of the victim's right to life and health. When the defamatory information has caused serious damage to the victim's reputation and has a legal causal relationship with serious consequences such as mental disorder, self-inflicted injury, suicide, etc. of the victim or his/her close relatives, the defamatory behavior of the perpetrator reaches a particularly serious level and breaks through the scope of the protection of the legal interests of the crime of defamation, and at this time, even if there is no serious damage to the social order of the reality of the space, it is also necessary to apply the public prosecution procedure so as to shorten the statute of limitations for the punishment, enhance the deterrent effect of punishment, give the parties concerned effective incentives from the society, and promote the stability and harmony of the social order.

3.2 *Balance Between the Right to Freedom of Expression, Supervision and Human Dignity*

The Ministry of Public Security issued the *Notice of the Ministry of Public Security on Handling Insult and Defamation Cases in Strict Accordance with the Law* on April 3, 2009, stating that: "It is unavoidable for some members of the public to complain about and air their grievances about some negative social phenomena, or even to make some radical remarks. If the criticisms, grievances and radical remarks of the masses are regarded as insults and defamation and are resolved by the use of criminal or public security penalties, not only are penalties not justified by the law, but they may also intensify contradictions and may even be exploited by people with ulterior motives, taking the opportunity to attack China's social system and judicial system and affecting the image of the Party and the Government." However, following the introduction of the *Interpretation* in 2013, the threshold for public prosecution authorities to intervene in defamation cases has been significantly lowered. Procuratorial authorities often consider defamation against government agencies and public figures such as officials, as "seriously undermine social order or the state's

interests" for the purposes of public prosecution, and the practice remains to be discussed.

In 1964, in the case of *New York Times v. Sullivan*, the U.S. Supreme Court introduced the "true malice" rule and the concept of "public official", pointing out that when a public official seeks compensation for false statements related to his or her functions, he or she must prove that the false statements were made out of the actor's "true malice". Since then, the scope of application of the "true malice" rule has been expanded from public officials to public figures. Extraterritorial experience is worth learning from, as public reason can only be preserved if people's freedom of expression in relation to public events is guaranteed.

In Chinese criminal law, the object of the crime of defamation is a citizen's human dignity and right to reputation, thus government organs, with their public administration functions, cannot be the object of the crime of defamation. The expression of general public opinion on topical social events through the Internet is an important way of supervising governmental organs and participating in democratic political life. Whereas public figures are those who participate in major public affairs or play a role in decision-making on public affairs, as well as those who are well known to the majority of people in society and have a certain degree of prestige or popularity, the Chinese criminal law should limit the protection of the public figures' right to reputation.

On occasions involving public affairs and public interests, in order to prevent the abuse of public power, citizens have the right of democratic supervision conferred by the Constitution. Citizens in the exercise of the right to supervise, the operation of public power and public figures of the information asymmetry, it is inevitable to produce radical emotions, but whining and complaining are not completely worthless. In recent years, many corrupt officials have been punished, which is the result of the masses to actively exercise the right to expression and supervision on the network. On the other hand, the crime of defamation should not be used to restrict citizens from expressing dissenting opinions on the Internet, and "seriously undermine social order or the state's interests" is a condition for the public prosecution, rather than a constituent element. If the expression of citizens exercising the right to supervise public figures is regarded as the defamation of public

figures, it infringes on citizens' right to supervise and freedom of expression, and may lead to a serious consequence of "chilling effect" of statements. Public figures have more social resources than ordinary people, and they can adequately respond to defamatory information through news, statements, press conferences, etc. to eliminate the adverse effects, thus defamatory information against public figures should not be easily sued for the crime of defamation through the public prosecution procedures.

3.3 The Determination of "Seriously Undermine the State's Interests"

The concept of "the state's interests" is rich and varied, manifesting itself externally in the national image, national sovereignty, national security, national development interests, national dignity, etc., and internally in the unity of the regime, political stability, national property, economic development, etc. It is short of specificity and comprehensiveness that the *Interpretation* defines "seriously jeopardizing the state's interests" as "damaging the national image" and "causing adverse international influences".

In practice, cases in which public prosecution procedures were applied on the basis of "seriously undermine the state's interests" mainly involved defamation of Party and state leaders, such as the "Deng Tao Defamation Case"¹, in which the defendant Deng Tao "openly used his mobile phone to slander state leaders", "damaging the image of state leaders and state, and seriously undermining the state's interests", and on these basis, the procuratorial organ instituted a public prosecution. It should be recognized that national image, as the soft power of the country, plays an increasingly important role in international competition, and that the Party and state leaders are representatives of the national image and are closely linked to the state's interests. When the perpetrator's defamatory acts against the leaders of the Party and state are serious, they directly damage the national image, and the public prosecution procedure should be applied to such cases. It should be noted, however, that "seriously undermine the state's interests" in the cases of defamatory acts against the reputation of the Party and state leaders should be strictly

differentiated from the "public figures" referred to above, and that leading cadres of state organs or enterprises and public institutions at local levels should be excluded. The scope of the Party and state leaders should be interpreted strictly in the light of the provisions of Chinese Constitution and Constitution of the Chinese Communist Party, and should not be expanded arbitrarily, as this may result in an infringement of public's right to freedom of expression and supervision. At the same time, other groups that represent the national image and have a bearing on the state's interests should also be considered, such as diplomats participating in international conferences and negotiations, athletes fighting for the honor of the country in international competitions, etc., and it is still necessary for the interpretation to clarify.

In addition, as mentioned above, the state's interests are manifested in a variety of ways, both internally and externally, and the *Interpretation* is incomprehensive as it only deals with "damaging the national image" and "causing adverse international influences". However, the *Interpretation* can hardly enumerate all the circumstances, and it should be recognized that circumstances other than those enumerated that seriously jeopardize the country's sovereignty, security, interests in development, state property, economic development, etc., should be categorized under the category of "any other circumstance which seriously undermines the state's interests", which should be subject to regulation.

4. The Application of "Be Investigated Only If They Are Sued" and the Public Prosecution Procedure in Cyber Defamation Cases

Paragraph 2, Article 246 of the Chinese criminal law stipulates that: "Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state's interests." Therefore, the intervention of public power in cyber defamation cases mainly includes passive intervention and active intervention, the former is the judicial organ intervening because the victim takes the initiative to sue, and the latter is the public prosecution organ exercising its power to initiate public prosecution in cases of "seriously undermine social order or the state's interests".

4.1 The Legislative Purpose and Contingent Interpretation of "Be Investigated Only If They Are

¹ Hotan District Intermediate People's Court of Xinjiang Uygur Autonomous Region (2018) Xinjiang 32 Criminal Judgement No.43.

Sued” in Internet Defamation Cases

4.1.1 The Purpose of the “Be Investigated Only If They Are Sued” Legislation and Problems with It

Generally, the condition of “be investigated only if they are sued” is legislated for many reasons. Firstly, defamation cases involve the privacy and reputation of the victim, in order to safeguard the special interests of the victim in the private sphere, the law respects the victim’s will and gives the victim the right to sue the perpetrator. If the state mandates the application of the public prosecution procedure, it may further expose the victim’s privacy or expand the scope of defamatory information, causing secondary harm to the victim. Secondly, the circumstances of the criminal case may be minor, and there may be a close relationship between the perpetrator and the victim, and the victim may be willing to resolve the case through reconciliation. Thirdly, it can reduce the cost of judicial operation.

Traditional defamation mainly occurs in specific occasions between relatives, friends and acquaintances, and the subject, result and object of the act are relatively clear, so it is reasonable for the victim to abide by the provision of “be investigated only if they are sued”. However, with regard to the acts of cyber defamation, there are some dilemmas in requiring victims to filing their private prosecutions, such as being difficult to obtain evidence, adduce evidence and prove. While China’s Criminal Procedure Law stipulates that in order for the people’s courts to accept private prosecution cases, there must be “a clear defendant” and “evidence proving the defendant’s criminal facts”, which makes it difficult for victims of cyber defamation cases to file a case. In this regard, some scholars have suggested that some cyber defamation cases, where there are genuine difficulties in providing evidence for the victim, should be directly dealt with public prosecution procedures.¹ However, such proposition would run counter to the legislative purpose of limiting the national prosecution power.

Amendment (IX) to the Criminal Law of the People’s Republic of China in 2015 added the provision of “where the victim files a complaint with the people’s court on the commission of the conduct as provided for in paragraph 1 through

the information network, but it is indeed difficult to provide evidence, the people’s court may require the public security authority to provide assistance”, which indicates that the legislator is aware that the victim is lack of the ability to collect evidence. The *Guiding Opinions* reiterate this provision, stating “upon examination, the people’s court deems it indeed difficult for the victim to provide evidence, the people’s court may request public security organs to assist”, however, this provision is still ineffective in providing relief to victims. On the one hand, this provision will give the people’s courts too much discretion, with no specific criteria for determining whether the victim to provide evidence is indeed difficult, and the people’s courts may have the right to choose whether or not to request the assistance of the public security authorities. On the other hand, there are still no provisions on the stage of application of the public security authorities’ assistance in providing evidence.

4.1.2 Contingent Understanding of the Provision of “Be Investigated Only If They Are Sued”

Article 98 of the Chinese criminal law provides for the meaning of “be investigated only if they are sued”: “The phrase ‘To be handled only upon complaint’ in this law refers to handling a case only when the victim files a complaint. If the victim is unable to file a complaint because of coercion or intimidation, a people’s procuratorate and the victim’s close relatives may also file the complaint.” However, this provision still does not clarify the connotation of “complaint” and “handle”, and does not indicate to whom it should be sued and by whom it should be handled. The mainstream view in the academia is that the provision of “be investigated only if they are sued” refers to the victim filing a private prosecution to the people’s court before the trial, which requires the victim to have a clear defendant and to collect sufficient evidence to eliminate reasonable doubt. However, this requirement is obviously too harsh for victims in some cyber defamation cases, and it is necessary to re-examine the concepts of “sue” and “private prosecution”. Some scholars have suggested that the provision of “be investigated only if they are sued” is a limitation to the national prosecution power, emphasizing that criminal prosecution procedures cannot be carried out against the will of the victim, and that the public authority can only intervene in criminal proceedings when the

¹ Zhou Libo. (2023). Criminal Law Governance of Cyber Violence Crime. *Research on Rule of Law*, (5), p. 50.

victim takes the initiative to denounce or prosecute. If the victim denounces to the public security authorities, the public security authorities shall build the case for investigation and transfer it to the public prosecution authorities for examination and prosecution; if the victim denounces to the procuratorial authorities, the procuratorial authorities shall request the public security authorities to build the case for investigation or bring a public prosecution.¹

The following is the correct interpretation of the “be investigated only if they are sued” provision. Firstly, “sue” is not the same as “private prosecution”, but a way to initiate private prosecution, and the will of the victim determines whether or not to prosecute the crime. The sue can be made to the people’s court or to the public security or the procuratorial authority. Secondly, with regard to proof of evidence, the right to sue should be unbundled from the burden of proof, and the specific criteria of “indeed difficult” should be clarified. Thirdly, the public security organs’ assistance in providing evidence should, as appropriate, be used throughout all stages of the criminal proceedings, including the examination of the case, the court hearing, the adjournment of the trial, and the second trial, in order to fully and accurately ascertain the facts of the case. Finally, at any stage where the victim withdraws his or her sue, the people’s court, the public security organ or the procuratorial organ shall terminate the trial, withdraw the case or make a decision to end the prosecute, and the victim shall always remain the role of decision-maker and promoter of the proceedings. The provision of “be investigated only if they are sued” is to give free will to the victim, rather than impose a heavier burden of litigation in which the victim only has the right to initiate litigation but not the ability to ensure that the proceedings are carried out smoothly.

4.2 Application of the Public Prosecution Procedure in Cyber Defamation Cases

Paragraph 2, Article 246 of the Chinese criminal law provides for the exclusion of “seriously undermine social order or the state’s interests” for the application of the public prosecution procedure, the reason for which is that the procuratorate has the right to file a public

prosecution in order to protect the interests of society and state when the object of the defamatory act has been harmed beyond the scope of the legal interests protected by the crime of defamation and reaches the public sphere. As some scholars believe, when the harm caused by defamation exceeds the individual’s ability to withstand, it breaks through the scope of personal legal interests and should be regarded as a crime that causes harm to the social order and be pursued by transforming the private prosecution procedure into the public prosecution procedure.²

The initiation of the public prosecution procedure in the crime of defamation is a supplement to the provision of “be investigated only if they are sued”, which should be used with caution. The purpose of it is to enable the cases, which meet the general constituent elements of the crime of defamation and have serious consequences such as seriously undermining the social order and the state’s interests as well as the right to life and health of the citizens, to be handled properly through the public prosecution procedure, so as to realize the unique value of the application of the crime of defamation. Cyber defamation cases should generally stick to the provision of “be investigated only if they are sued”, and the public power can only be involved in the cases of “seriously undermine social order or the state’s interests”, as enumerated in the *Interpretation* and the *Guiding Opinions*. At the same time, the public prosecution process should also be activated with respect for the relevant expression of the victim’s will, as the public power should not unduly encroach on the will of the victim.

5. Concluding Remarks

With the rapid iteration of Internet technology, more and more illegal and criminal behaviors including the cyber defamation, are carried out with the help of the Internet, which should be evaluated correctly in the Chinese criminal law. Controversial issues such as the determination of “quantity standard”, the determination of “seriously undermine social order or the state’s interests”, the understanding of “be investigated only if they are sued”, the application of private prosecution and public prosecution procedures,

¹ Zhang Mingkai. (2015). On the Disputed Issues of Internet Defamation. *China Legal Science*, (3), p. 79.

² Che Hao. (2021). The Legal Interest Structure and Litigation Mechanism of Defamation. *Criminal Science*, (1), p. 77.

etc. should be proposed to improve the criminal legislation and judicial application. The application of private prosecution and public prosecution procedures, should be put forward to improve criminal legislation and judicial countermeasures, with a view to safeguarding the legitimate rights and interests of citizens and the public interest of society, creating a good cyberspace environment and maintaining a harmonious and stable social order.

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