

DISCUSSION ON JUDICIAL APPLICATION OF CRIME OF ILLEGAL USE OF INFORMATION

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ABSTRACT

The advent of the Internet era has brought new challenges to society, with traditional criminal law proving insufficient in effectively regulating information - related crimes in social networks. To address this, China's judicial system has introduced crimes like illegal use of information networks to govern network - based offences. However, when the crime of illegal use of information networks was initially established, it faced issues such as unclear criminal definitions and overly broad behavioral scopes. In this context, this paper systematically analyzes the flaws and negative implications of the crime of illegal use of information networks. Subsequently, the "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law to Criminal Cases such as Illegal Use of Information Networks and Assistance in Information Network Crimes" (hereinafter referred to as the "Interpretation") proposed the "compromise theory" to enhance the regulation of this crime. While the author acknowledges the appropriateness of applying the "compromise theory" in the "Interpretation", it is argued that the determination of "serious circumstances" regarding the establishment of communication groups for criminal

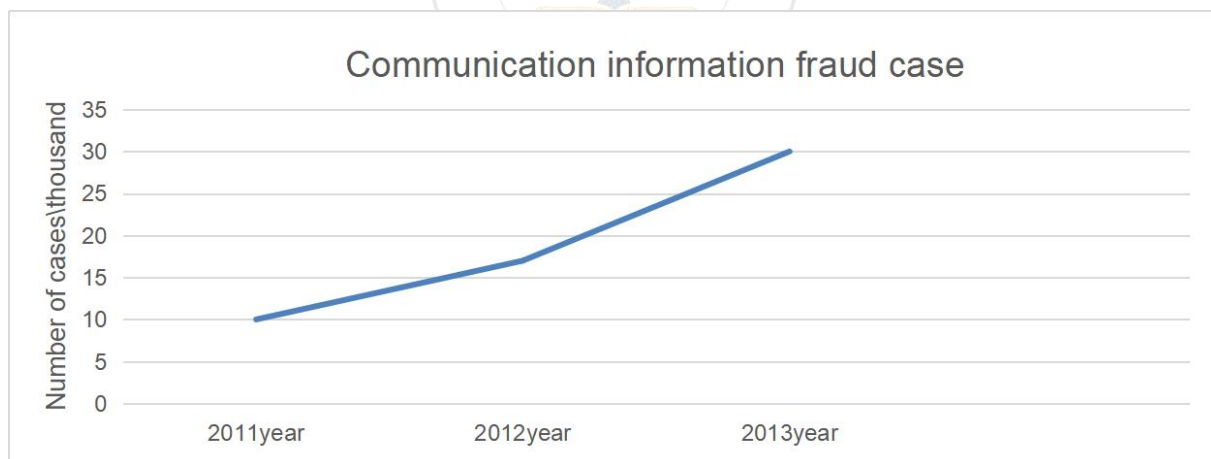
purposes in the "Interpretation" lacks rigor. The author contends that using the number of members in a communication group to assess the seriousness of circumstances is more appropriate than relying on the number of such communication groups established.

Keywords: Crime of illegal use of information; Serious circumstances; Illegal crime

1. DISCUSSION ON "ILLEGAL CRIME" BEHAVIOR

1.1 The background and function of the crime of illegal use of information and its judicial interpretation

Before the emergence of the Internet, the traditional means of criminal investigation could still effectively deal with all kinds of crimes in society and maintain social order. However, the change of the world is impermanent and rapid. Just as the emergence of Watt's steam engine technology led the industrial revolution and let the people of the world enter a new stage, the emergence of the Internet also let us enter the door of the new world. Science and technology is a double-edged sword. Although the Internet makes our life more convenient and rapid, the crises in it are also various.



According to a news report in 2011, the direct losses caused by Trojan horses and fraudulent websites to Chinese netizens reached 5.19 billion yuan in 2010¹. With the emergence of the Internet, cyber crimes have also been born, and the forms of cyber crimes are diverse and highly secretive, making people impossible to guard against. The Internet is a

¹ "2010 Network security inventory: the most easy to let Internet users lose money ten things," last modified January 26, 2011, <https://m.sohu.com/n/279093713/>.

big network, connecting people all over the world, and connecting victims and criminals who have never met each other. Using the Internet as a tool of crime, criminals can assemble criminal gangs online in a short period of time and commit fraud against unspecified people online, who may be thousands of miles apart and have no communication with each other offline. To deal with such trans-regional, secret, scattered distribution of criminals and victims of cyber crimes, the traditional means of criminal investigation and trial in the complete investigation of the whole chain of cyber crimes are faced with no small challenge. As the cases of communication information fraud increase year by year².

In view of such a crime pattern with new characteristics of The Times, China's criminal law has made relevant adjustments. On April 8, 2011, 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 Criminal Cases of Fraud was promulgated, which stipulates that the use of telecommunications technology means such as sending short messages, making phone calls, and the Internet is used to defraud an unspecified majority of people, and the amount of fraud is difficult to verify, but under one of the following circumstances: Shall be identified as "other serious circumstances" as provided for in Article 266 of the Criminal Law, and convicted and punished for the crime of fraud (attempted) : (1) sending fraudulent information for more than 5,000 articles; (2) making fraudulent telephone calls more than 500 times; (3) committing fraud by egregious means or causing serious harm. This solves part of the problem of cybercrime, but in order to better deal with cybercrime and maintain the healthy order of the network, the criminal law regulation is moved forward, and the preparatory behavior is implemented, which is a necessary means to meet the needs of punishing cybercrime. Although with the development and convenience of the network, the network crime is repeatedly banned, but the network crime is destined to occupy a position in the Internet information age, which is inevitable in the information age. According to information obtained from the Ministry of Public Security, China solved 200,000 telecom fraud cases in 2019, and the police arrested 163,000 suspects, a decrease of 3.1 percent from

² "2010 Network security inventory: the most easy to let Internet users lose money ten things," last modified January 26, 2011, <https://m.sohu.com/n/279093713/>.

the previous year³.

We can see that China's criminal law has made legal adjustments to cybercrime is still a little effective. However, the crime of illegal use of information network is faced with the embarrassing situation of "being empty" and "pocketing" after its promulgation. According to Article 287 of the Criminal Law of the People's Republic of China, "Whoever uses information network to carry out any of the following acts, if the circumstances are serious, may be sentenced to fixed-term imprisonment of not more than three years or criminal detention." It can be seen that this crime deals with a minor case, and this crime itself is the result of the implementation of the preparatory act of a criminal act. Therefore, some scholars believe that the distinction between the administrative illegal acts and criminal acts carried out in the crime of illegal use of information network actually brings challenges to judicial practice⁴.

Some scholars believe that the crime of illegal use of information network is vague and the applicable boundary is not clear, resulting in the local court in the practice process of "false" this crime, or in the specific conviction and sentencing imbalance⁵. For example, In the Suzhou case, the defendant Tan Mou sent the fraudulent information of "brush order to obtain commission" to the unspecified Taobao users through the "Aliwangwang" platform, and profited from it⁶.

That was convicted of helping letters in the first instance, the second trial was changed to illegal use of information network crime . The main reason for these problems is that the "illegal crime" in the crime of illegal use of information network has not been qualitatively explained; And there is no unified standard for the "serious circumstances" in the crime of illegal use of information network. In order to better maintain the healthy order of the Internet,

³ "The trend analysis of telecom network fraud," last modified February 3, 2021, https://m.sohu.com/a/448524021_100068090.

⁴ Puyu,Dong,. "Analysis on the applicable boundary of the crime of illegal use of information network" Journal of Dalian University of Technology(2020): 84-90.dio:10.19525/j.issn1008-407x2020.06.010.

⁵ Zongchuan Qin, "Research on judicial identification of crime of illegal use of information network" Journal of Guizhou Police College(2020): 48-56.dio:10.13310/j.cnki,gzjy.2021.04.007.

⁶ Zhangyu Tan,Yuanshang Zhang vs Suqian City Procuratorate. Crime of illegally using information network

On September 4, 2019, the 23rd meeting of the 13th Procuratorial Committee of the Supreme People's Procuratorate adopted the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in Handling Criminal Cases such as Illegal Use of Information Network and Assistance in Information Network Criminal Activities, which came into force on November 1, 2019. In the Interpretation, it is clear that "illegal crimes" include criminal acts and types of acts stipulated in the specific provisions of the Criminal law, but have not yet constituted a crime. It also clearly quantified and gave examples of the criteria for determining "serious circumstances". The author enters the crime of illegal use of information network as the keyword in China Judgment Documents Network, and can get the number of cases related to the crime of illegal use of information network in the judgment documents network each year. By drawing them as ICONS, we can see that after the promulgation of the Interpretation in 2019, the number of cases related to the crime of illegal use of information network has increased significantly. The clear identification standard allows local courts to dare to use the crime, and will not be persuaded to withdraw by the original vague crime, saving the crime from the situation of "being imaginary". The promulgation of the "Interpretation" has improved the plight of the crime of illegal use of information network to a certain extent, provided a clear legal basis for combating network information crime, and can better protect the rights and interests of citizens.

1.2 The definition of "illegal and criminal" behavior

Since the scope of "illegal crimes" was not officially determined before the introduction of the 2019 Interpretation, the academic community debated on the scope of "illegal crimes", and finally basically formed three mainstream theories -- expanding theory, limiting theory and compromise theory. In view of the expanded theory, such scholars believe that "illegal crimes" include general illegal acts with relatively minor circumstances that do not constitute crimes, and also include serious illegal acts with serious circumstances that constitute crimes⁷.

But the author believes that if we want to use the expanded theory to explain the "illegal

⁷ Hui Zhang, "Research on the legal application of charges related to cyber crimes." *Modern Law Science*(2019):156-167.doi:10.3969/j.issn.1001-2397.2019.04.12.

crime" in the crime of illegal use of information network, then we must first face a legal theory problem. Article 13 of the Criminal Law of the People's Republic of China stipulates that "if the circumstances are significant and minor, they are not considered to be crimes". This "provisos" criminalizes preparatory acts for significant and minor criminal acts, while the crime of illegally using information network is the result of advancing the regulation of criminal law, which is the implementation of preparatory acts. Under normal circumstances, we would think that the social harm of the crime will be greater than that of the preparatory act. Therefore, if we adhere to the extended theory of "delinquency", a strange phenomenon occurs: the preparatory act of a crime with greater social harm is not considered a crime, but the preparatory act of a lesser social harm is considered a crime. This is clearly a violation of Article 13 of the Criminal Law. Moreover, the author also believes that the expansion of the crime of illegal use of information network obviously gives the criminal law a greater initiative, and the greater initiative is easy to make the criminal law too "active" to intervene in the life of the people, easy to violate the personal rights and interests of the people, which will cause the hidden danger of excessive criminal law. In view of the limitation theory, this kind of scholars believe that "illegal crimes" only need to include and meet the requirements of criminal law⁸.

If the restriction theory of "illegal crime" in the crime of illegal 11 use of information network does not violate the proviso of Article 13 of the Criminal law, but it violates the provisions of Article 3 of the criminal law, "If the law expressly stipulates that it is a criminal act, it shall be convicted and punished according to the law"⁹.

If an illegal and criminal act has met the constituent elements of the criminal law, then why not directly in accordance with the relevant criminal law provisions of the legal provisions for punishment? This makes the crime of illegal use of information network become cumbersome. Moreover, the author thinks that the legislative purpose of the crime of illegal use of network information should not be ignored when considering the scope of

⁸ Mingkai Zhang, Criminal jurisprudence(China: Law ,2021),1381

⁹ Chenbing Hong, "The interpretation theory of the crime of illegal use of information network "live" but not "widespread." Social sciences in Qinghai(2021):161-169.doi:10.14154/j.cnki.qss.2021.01.022.

"illegal crime" of illegal use of information network crime. The crime of illegal use of information network is to better maintain the order of network security and was born, and because the Internet has the characteristics of fast spread, wide spread, affecting a large number of people for a long time and concealment, the Internet can rapidly expand the minor social harm behavior, which is why we pay special attention to the reason of Internet security. Therefore, in order to better fight against network crimes, illegal use of information network crimes have the characteristics of "hitting early and hitting small". Therefore, advocating the so-called "reducing the limit" will go against the legislative intention, so that the legislative purpose of the crime of illegal use of network information can not be effectively achieved. The last theory is "compromise theory", which is also adopted in the Interpretation, that is, "illegal crime" includes criminal acts and the types of acts specified in the specific provisions of the criminal law, but has not yet constituted a crime. Under this theory, if a perpetrator's "illegal crime" is a general illegal act that does not belong to the content of the provisions of the criminal law, it is not considered as a crime. In this case, the rights of the criminal law are restricted to a certain extent, so that the individual rights and interests of the people can be protected, and will not be excessively criminalized. It also conforms to the legislative purpose of the legislator, and can play a role of "hitting early and hitting small". The "compromise theory" divides the penalty boundary between the advance law and the criminal law, and avoids the arbitrary and rash conviction of the judicial system¹⁰.

The author supports the "compromise theory" adopted in the Interpretation very much. The author also believes that the Interpretation can be viewed as a whole, so the "serious circumstances" in the Interpretation can be used to explain the rationality of the "compromise theory". Article 287 of the Criminal Law stipulates that "Whoever uses information networks to commit any of the following acts, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined." According to the provisions, it can be understood that no matter the act 1, 2 or 3, it must be based on the seriousness of the circumstances. And there are clear examples

¹⁰ Huaisheng Li, Information network crime handling practice and case analysis(China: China Legal,2023),127.

of "seriousness of circumstances" in the Explanation. For example, those who publish more than 100 pieces of relevant information on the website; Sending relevant information to more than 2,000 user accounts. The crimes of using network information to slander and illegal use of information network are both using the network to spread illegal information in terms of behavior mode, and the prison term of both of them is less than three years. Both of them are misdemeanors regulated and have certain similarities. Therefore, the author takes "serious circumstances" in the use of network information for defamation as an example, and its judicial interpretation stipulates that "the same defamation information is actually clicked or browsed more than 5,000 times, or forwarded more than 500 times; "It can be seen that the crime of defamation as a criminal act and the crime of illegal use of information network as a preparatory act are not much different from the conditions of" serious circumstances ". This is enough to reflect the legislators' restraint to the preemptive regulation of criminal law, and to give citizens adequate protection of personal rights and interests." The compromise theory "not only does not violate the legal principle, but also limits the expansion of the criminal code. In the author's opinion, the compromise theory" is the appropriate interpretation of the crime of "illegal crime" in the crime of illegal use of information network.

2. RESULT AND DISCUSSION

2.1 The necessity of "serious circumstances"

Although in the above article, the author explained that the crime of illegal use of information network is placed in the situation of "pocketed" and "virtual", there are factors in the law that do not clearly quantify the identification criteria of "serious circumstances", but this does not mean that the use of "serious circumstances" in the initial legislation is inappropriate. First of all, we should understand that the "serious circumstances" in the crime of illegal use of information network is the criminal composition of the crime, rather than aggravating the circumstances.

As the aggravating circumstances of the "serious circumstances" to deal with the crime of robbery or intentional injury in the class of charges, as long as the occurrence of such

behavior, it constitutes a crime, no matter the seriousness of the circumstances. In the crime of illegal use of information network, "serious circumstances" is the constitution of the crime, is the boundary between crime and non-crime, when the perpetrator does not reach the point of serious circumstances, the behavior is not considered to be a crime. When the legislator legislates, the standard circumstances of "serious circumstances" are not quantified, which makes "serious circumstances" have a kind of inherent ambiguity. It is precisely because of this fuzziness that the basic criminal policy of combining punishment and leniency can be better implemented in the handling of crimes¹¹.

And this kind of fuzziness makes the crime of illegal use of information have certain flexibility when dealing with cases, and can better adapt to The Times. For example, from the end of 2016 to the beginning of 2017, when the judicial interpretation of the crime of illegal use of information network was not yet issued, in the case of Liang Yiyuan in Jiangsu Province, the defendant set up multiple network platforms and developed platform members, and organized a large number of drug users in the form of virtual rooms to gather on the network platform to take drugs in the form of videos¹². 14Suzhou Intermediate People's Court held that Liang's behavior of building online platforms to take drugs met the crime of illegal use of information networks. Although there was no clear criterion for determining "serious circumstances" at that time, the court held that the online platforms set up by Liang attracted many drug-related personnel, and some drug-related personnel reached drug transactions on Liang's platforms, and should be sentenced for drug trafficking. The social impact is bad, which is in line with the serious circumstances of the crime of illegal use of Internet information. Therefore, the court found Liang guilty of illegal use of information network and illegal possession of drugs.

2.2 The criteria for determining "serious circumstances"

¹¹ Mingkai Zhang, "On "Serious Circumstances" as Constitutive Elements in the specific Provisions of Criminal Law." Journal of Zhongnan University of Political Science and Law (1995) : 14-19.doi:10.16390/j.cnki.issn1672-0393.1995.01.003.

¹² "The Supreme People's Court issued ten typical cases of drug (drug-related) crimes in 2022," last modified June 27, 2022, https://m.thepaper.cn/baijiahao_18767254?sdkver=7113dde9.

However, everything has advantages and disadvantages. For the crime of illegal use of information network, this crime is the implementation of preparatory acts, and the sentence is less than three years, indicating that the crime is a misdemeanor. In such a special case, not clear "serious circumstances" identification criteria will make the crime dare not use in judicial practice, so that this crime into the "be empty" and "pocket" situation. It is also a general trend to define the "serious circumstances" in the future, to clarify the scope of criminal law's attack, and to limit the expansion of the criminal code. The standard identification of "serious circumstances" in the crime of illegal use of information network in judicial interpretation is mainly reflected in the following aspects: (1) the content, quantity and dissemination of information. The crime of illegal use of information network is a network crime. One of the characteristics of network crime is that the information of network crime spreads rapidly and widely, and it is very easy to expand the social harm. The social harm caused by the spread of information can be inferred by the number of likes and reposts. For this reason, many cybercrimes such as defamation have rules about the amount of likes or retweets that constitute a crime. The reach of a message can be judged by the number of domain names set up. In the judicial interpretation of the crime of illegal use of information networks, it is stipulated that "the establishment of communication groups for the implementation of illegal and criminal activities and the number of more than three" shall be considered as "serious circumstances". However, the author believes that this interpretation is not rigorous, the perpetrator set up three communication groups does not mean that there are enough people in the communication group, if there are only three or four people, or there are repeated group members, then the width and breadth of the spread of social harm is small. It should not be regarded as "serious circumstances". The author believes that it is more reasonable to stipulate the number of people in the group on the basis of the original. (2) illegal income: the amount is often the key factor to distinguish administrative wrongful and criminal wrongful¹³. Therefore, the amount of illegal income is essential in the determination standard of quantifying "serious circumstances". (3) The number of information clicked or

¹³ Wangyuan Xie, *Cybercrime and Security*(China: China Renmin University,2018),365.

forwarded, the number of groups and website members: the criteria for determining the seriousness of the illegal use of information and network crimes without obtaining benefits are the number of clicks and forwards of illegal information, the number of users and communication groups disseminating illegal information, and the number of website members as the key factors to distinguish administrative and criminal wrongfulness. When a certain number is reached, it can be shown that the social dissemination of the illegal information has reached a certain breadth, and the social harm caused by it is large enough, and criminal law regulations should be applied. (4) The burden of administrative punishment: the purpose of the law is to deter the people from committing crimes, and hope that those who have committed crimes can reform and return to the right path. Although the administrative punishment is to deal with the minor illegal acts of social harm, but this does not mean that we can repeatedly touch the legal red line, for repeated offenders should come up with more severe measures to punish him. From the perspective of infringement of legal interests, the burden of administrative punishment means the accumulation of infringement of legal interests. When it is regulated by administrative punishment for many times, its infringement of legal interests also accumulates to the point that it can be regulated by criminal law. Therefore, it is very reasonable to take the burden of administrative law as the condition of criminal punishment. The development of the world has brought about great changes in our society, and new risks have also been born in the changes. However, our country's judicial system has been continuously following up to improve the relevant laws, hoping to better maintain our social order. In the judicial interpretation of the crime of illegal use of information network, the identification of the "illegal crime" and the quantification of the "serious circumstances" can be seen that the judicial progress of China's network crime. Although there is still a small defect in the quantification of "serious circumstances" in the judicial interpretation, the author believes that our law will be more perfect in the future.

3. CONCLUSION

The advent of the Internet era has given rise to a new breed of social network information

crimes, presenting a formidable challenge to traditional criminal law. To effectively combat these crimes, China has introduced the crime of illegal use of information networks. However, since its inception, this crime has faced issues such as ambiguous criminal definitions and broad behavioral boundaries, which have posed challenges to judicial practice.

The 2019 Interpretation of the Supreme People's Court and the Supreme People's Procuratorate represents a significant step forward. By adopting the "compromise theory" to define "illegal crimes," it not only circumvents potential legal contradictions but also aligns with the legislative intent of the crime. This approach effectively curbs the over - expansion of criminal law while safeguarding the legitimate rights and interests of citizens. Moreover, the Interpretation's quantification of "serious circumstances" provides clear legal criteria for local courts, enabling them to apply this crime more confidently.

Nonetheless, there are still areas for improvement. In the determination of "serious circumstances," the current stipulation regarding the establishment of communication groups for illegal and criminal activities, which focuses solely on the number of groups, is not rigorous enough. Considering the number of people in the group in addition to the number of groups would lead to a more reasonable and accurate assessment. This adjustment would better reflect the actual social harm caused by the illegal use of information networks.

In general, the continuous improvement of relevant laws and regulations, such as the Interpretation, reflects the adaptability of China's judicial system to new - era challenges. Despite the existing minor flaws, with the continuous development of society and the judicial system, it is expected that the laws related to the crime of illegal use of information networks will become more comprehensive and precise. This will further enhance the effectiveness of combating network information crimes, ensuring the healthy operation of the network environment and safeguarding the legitimate rights and interests of the public.

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