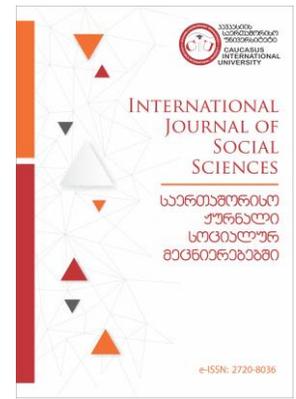




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Disinformation and Crime in Georgia: Can We Criminalise It?

Dr. Ushangi Bakhtadze ^{a 12}

^a Professor of Criminology at Sul Khan-Saba Orbeliani University

ABSTRACT

The impetus of this paper is to explore disinformation, crime, and criminalisation in the context of new media and critically evaluate the statement of whether criminalising media or people who deliberately spread false information is a logical response to this problem. In doing so, the paper firstly tries to define what disinformation is, and then it explores the process of criminalisation, describes the harm principle, and conceptualises the types of harm. The Paper then analysis challenges for defining crime in the era of new media, then it explores the value of free speech and finally infers that the criminalisation of disinformation is an extreme act from the state. It usually causes only remote harm, and therefore, criminalising disinformation shall be resisted.

Keywords: *disinformation, fake news, types of harm, social media, criminalisation*

1. Introduction

With the daily rise of internet use in Georgia and news consumption slowly but steadily shifting to the online space³ questions have been sparked about how to address problems related to disinformation. The problem is even more evident if we think about the fact that sometimes disinformation is the root cause of the crime, and due to new media, the commission and crime control are changing and becoming even more complex, that in turn causes many other problems. According to one research, the majority of

¹ bakhtadze@jgc.ge

² <https://doi.org/10.55367/UHQU2420>

³ Media Checker (2018) "Ways of getting information and influence – trends according to NDI," available at: <http://bit.ly/2FjRR5i> [18.09.2021].

individuals in developed economies will consume more false than true information by 2022 (Panetta K. 2017). Digital deception is commonly recognised as deceptive or misleading content created and disseminated to cause public or personal harm (e.g., post-truth, populism, and satire) or to obtain a profit (e.g., clickbait, cloaking, ad farms, and identity theft) (Fraga-Lamas P. and Fernandez-Carames T. M. 2020). In the context of mass media, digital deception originates either from governments or non-state actors that publish content without economic or educational entrance barriers. As a consequence, these horizontal and decentralised communications cannot be controlled or stopped with traditional centralised tools, and something needs to be done with it.

Recently Georgia experienced its first so-called Facebook crime when the Georgian far-right launched a disinformation campaign, as a result of which one journalist was beaten to death, and approximately 50 others were injured. Facebook crimes mean that crimes or incitement to commit a crime are being documented online and then, without further moderation, are disseminated to the wider public. Thus, it is logical that questions are being asked about the responsibility of new media in crime control responses. To address these problems, for example, laws against spreading fake news and Covid 19 related disinformation have been passed in France, Germany, Malaysia, Russia, and Singapore, but social media companies have argued they are not publishers and have minimal responsibility to vet posts, although they have agreed to conduct some editorial decisions and fact-checking.

2. Research methodology and Discussion

The research methodology for this article includes a review and analysis of the existing literature on disinformation, the principle of harm, the criminalisation of harm, and how fake news, disinformation, and propaganda can lead to harm emanating from social media. The article analyses peer-reviewed journals and case law from Georgian and international courts. During the data-gathering stage, keywords and phrases have been selected to find the most updated literature and articles.

What is disinformation?

The EU Action Plan against **disinformation** defines **this act as verifiably false or misleading information that is created, presented, and disseminated for economic gain or to intentionally deceive the public and may cause public harm.**⁴ Public harm includes threats to democratic processes as well as to public goods such as Union citizens' health, environment, or security. Disinformation does not include inadvertent errors, satire, parody, or clearly identified partisan news and commentary.⁵

⁴ The European Commission and the High Representative (2018) “Action Plan against Disinformation”, 1, available at: <http://bit.ly/2H4sV2M> [18.09.2021].

⁵ The Commission proposed targeted measures to address the spread of illegal content online, including the Recommendation on measures to effectively tackle illegal content online (C(2018) 1177). See also proposal for a Regulation on preventing the dissemination of terrorist content online COM(2018) 640 as well as the revised Audio-visual Media Services Directive agreed on November 6, 2018.

Often when it comes to spreading false content online, alongside disinformation, feature the terms misinformation and "fake news." It shall be highlighted that even though the broad definition of "fake news" captures "disinformation," these two concepts are not synonymous. Fake news is a type of disinformation (i.e., false information that is spread to deceive) that, to our best knowledge, is currently generated manually. The term was coined due to the controversies witnessed during the 2016 US presidential election (Bayer J. et al., 2019). Nowadays, there is no consensus on the definition of fake news since it may depend on the field of study (e.g., ethics, neuroscience, and economics) or the subjective point of view of a user. Moreover, 'fake news' is certainly not confined to traditional 'news' content alone, as every Internet user is now a source of 'news.' **Generally, fake news can be understood as distorted signals uncorrelated with the truth.** Even though spreading "fake news" is a purposeful act, the creator does not directly or indirectly intend to cause harm to the public. "Fake news," be it a news report, personal story, or other – aims at misleading people with the wrong information. These deceptive ploys are created to push a particular political viewpoint, cause concerns or moral panic, or in some instances, make money for dubious companies or individuals.

Misinformation is a type of false content that is unlikely to harm anyone, and the creator or spreader shares this information only for the reason to get the point across. So, if someone believes that they are sharing the truth (when it is in fact false), they're spreading misinformation.

For example, false information that claims that COVID-19 vaccines are ineffective or even dangerous for pregnant women can cause actual harm as the refusal to vaccinate could lead to the spread of the disease and even the death of pregnant women. This would be disinformation. If someone thinks that s/he is sharing a scientific article that, in reality, is just a post from another user of Facebook who claims that COVID-19 vaccines are dangerous for pregnant women, this would be misinformation. If someone would craft information on COVID-19 vaccines in such a manner to push a particular political viewpoint or cause concerns, this would be "fake news".

| Type of false content | Definition |
|-----------------------|---|
| Disinformation | False content that is intentionally disseminated with intent to harm . It occurs when people <i>intentionally</i> spread information that is false, biased, manipulative, or propaganda. |
| Fake news | Purposefully crafted, sensational, emotionally charged, misleading, or totally fabricated information that mimics the form of mainstream news. It aims at misleading people with the wrong information. These deceptive ploys are created to push a particular political viewpoint, cause concerns or panic, or in some instances, make money for dubious companies or individuals. |
| Misinformation | False content that is unintentionally or unknowingly disseminated. It can be intentionally disseminated but only with the aim to get the point without causing harm. If someone |

| | |
|--|--|
| | believes that they are sharing the truth (when it is, in fact, false), they're spreading misinformation. |
|--|--|

To summarise, even though all the types of false information or content discussed above are very common in everyday life of social media, disinformation is the most dangerous act compared to the other two since at the centre of this action is the intent to cause harm either for economic gain or to intentionally deceive the public. Generally, in liberal democratic societies, if an act causes harm to others, then power can be rightfully exercised over any member of a civilised community or, in other words, criminalised. But this statement needs to be further tested since criminalisation is directly connected with the values and morals of society. Accordingly, all types of criminalisation must be based on a moral theory. Criminalisation must be accompanied by a legal or other solid justificative argument – criminalisation principles. The mentioned principles must be in accordance with liberal values.

On Criminalisation

One of the most repressive acts from the state is putting a criminal law into operation, as it not only restricts a person's freedom of action but at the same time punishes the person for violation of the law (including imprisonment). In today's liberal democratic society, the uppermost principle of which is the rule of law, the daily communication between a person and the state is based on the previously established certain rules of "fair game" and accordingly, the state must not be able to set prohibition for its own citizens. This issue becomes more actual when it concerns criminal prohibition from the state – criminalisation (Bakhtadze U., 2017).

As criminal law is the strictest means of social control, a negative influence of which follows a person till the end of his/her life, its usage must be minimised. Thus, the main hypothesis that the state needs to follow is the following: when the state is performing criminalisation of some act, a person's life (including rights) and values must be privileged compared with the state's interests. These interests are deeply enshrined with politics, and it is hard to deny that criminalisation is a political process, the process during which politics by means of criminal legal policies are penetrating into a legal world, the process, which in spite of everything, must be guided by legal principles, rules and standards (Persak N. 2007) It must be based on the fact that criminalisation of a human's act represents revealing of enormous power from the state, which forms our values, divides the population into guilty and unguilty categories, restrains humans' freedom and can (applying proper sanctions for appropriate acts) significantly worsen their life (Schonscheck J., 1994). For this reason, the remainder of this paragraph will briefly overview the main starting principle for criminalisation – the harm principle.

Harm Principle as a basis for criminalisation

We have seen that disinformation is a type of act that is intended to cause harm to others. Traditionally a starting point of a talk about criminalisation is the harm principle, which cannot be discussed without such a philosophical opinion as liberalism. One of the main principles of liberalism is the following statement of John Stuart Mill: "The only one justificative reason, because of which it is acceptable to

apply force on a member of the civilised world against his/her own will is that others must be protected from harm. Personal wellbeing of a person committing an act, whether moral or physical, is not a sufficient ground for the state to intervene in this person's act" (Mill J. S., 1859).

The harm principle expressed in this way is a negative restriction, which means that in a case when there is no harm or no danger of harm, the state is not authorised to intervene in its citizens' "activity." Accordingly, when talking of the harm principle, a question is naturally arising about the consequences of the act: Does it harm anybody? According to the harm principle, justification of prohibition of the act only because of its immorality, as it is supposed by the supporters of criminal prohibition, will not be sufficient. They must prove that an act is followed by certain negative effects inflicting other people's life (Feinberg J., 1986).

But what is meant by harm? For example, Stuart Mill does not give anything concrete connected with it, and so the harm principle interpreted by him can be deemed to be unlimited. According to Feinberg, harm is the "obstruction of a human's some interest, giving in or devastation."⁶ A human is harmed when his/her one or several interests turn out to be in a worse state than they were before the committed act. Everybody has future perspectives and plans to make their life better. When men are harmed, it means that their perspectives are getting worse. But it does not mean that their life always gets worse. They might reach the intended goals, but it is not a determiner. A determiner is that a man is reaching his goals with more difficulties than in a case when there is no harm. In other words, it is less important that the act is unlawful but the fact that an analogous act has a negative influence on human wellbeing. For example, health damage is harmful because, in such a case, a human is not able to satisfy his/her demands.⁷ Damaging or destroying a thing is inflicting harm, as it deprives a victim of the opportunity to dispose the thing at his/her own discretion.

Following the harm principle, the essence of the criminalisation of an act is avoiding harm. In the harm-based prohibitions, harm is a component of crime or a descriptive element of a crime. For example, murder does not exist without a person's death – just a person's death is the harm justifying the criminalisation of this act. But except for murder, a person's life can be protected by the prohibition of attempted murder, an unlawful bearing of arms, violation of traffic safety rules and etc. This means that there exist several types of harm, which on the stage of criminalisation needs to be taken into consideration.

Direct harm

Immediate and direct is such a type of harm that directly does harm to a person's health or property. In such cases, wrongfulness is based on harm. For example, when A harms the health of B, his act *prima facie* is wrongfulness and potentially is the ground of criminalisation. In other words, infringement on the health of B is wrongfulness, as it harms him. Suppose A hurts B and breaks his hand. Why is this act

⁶ *ibid*, 34.

⁷ *ibid*, 53.

prima facie wrongful? Because the hand belongs to B and it's broken by A. Accordingly, nothing more is necessary to prohibit the act (Bakhtadze U., 2017). In other words, prohibition, in this case, is straightforward. If an act causes direct harm to others and the harm is also wrongful, then we have a *prima facie* case for criminalisation. This means that action needs to be criminalised if there are no other balancing factors.

Accordingly, in deciding on a criminalisation issue, a legislator must take into consideration the **severity of the harm, the probability of its occurrence and adapt them to the social value of the act to be prohibited and the degree of intervention in human freedom** (balancing factors). *The bigger the severity of the harm and the probability of its occurrence is, the more justified is the criminalisation of the act; and just the opposite, the more valuable and important is the act or the more restricts criminalisation the human freedom, the more unjustified is the prohibition of the act.* When prohibiting the act except for freedom, other human rights must be paid attention to, such as **freedom of speech, personal privacy, etc.**

Remote harms

There are types of action that become harmful by tending to diminish the resources that underpin wellbeing, not immediately but remotely. For instance, selling a firearm which is a crime does not in itself harm anybody, but the action is still criminalised since it puts a person in a position where subsequently s/he may harm another person. This possibility is an implicit feature of many inchoate offences, such as incitement to murder.

While it may sometimes be appropriate, very often, there are difficulties in basing criminalisation on remote harms, especially those predicated on the eventual criminal choices of third persons. To invoke the Harm Principle, we have noted, an action must not only be conducive to harm—it must also be wrong. This constraint is particularly apposite to the criminal law (Simester A. P., Hirsh Von. A., 2011). Punishment embodies by its nature an element of blame or censorship; it is not obvious that a person may properly be condemned for her non-harmful action just because that action happens to be linked, through chains of complex social interaction, to the subsequent injurious behaviour of some separate and autonomous person. It seems unjust to impose penal censure on D, at least where D has little or no ability to control the potential harmful choices of E and where D has not sought to assist or encourage those choices.

Secondary harms

The last type of harm shares the indirect character of remote harm. Harm can also occur when people are affected by the prospect, rather than the actuality, of wrongful action. One reason why the state sometimes intervenes to prevent public nuisance, for example, is not that the relevant action is harmful, but rather that avoiding it causes great inconvenience. In such cases, the constraint imposed by the Harm Principle is satisfied not by the nuisance itself but by the precautions required to forestall it. For example,

the main reason why graffiti is prohibited in many countries of the world is not that this action is harmful to anybody, but correction of the consequences of this act is connected with great problems.

It is important to emphasise that when the talk is about the criminalisation of the act, which causes secondary harm, it is necessary to prove that the act is wrongful despite the harm. So, the wrongfulness of the act becomes very important. For the prohibition of the act, it is not enough only the fact that one person does not like someone's behaviour. For example, A does not like it when B walks his dog in the street. Accordingly, he does not come out in the morning and thinks that he must make a high fence in order not to see B's behaviour every morning. Clearly, A is harmed from the action of B, but A can only demand the prohibition of the analogous act, as an act causing harm, only if it is wrongful. Accordingly, the wrongfulness of B's act must be existed objectively and not only in A's imagination.

Discussion

As was shown in this chapter, in order for a state to justify the criminalisation of action, it needs to follow the principles of criminalisation. The starting point for this needs to be the harm principle, which entails that the state can only intervene in its citizens' actions if an act causes harm or danger of harm to others. But as was seen in this chapter harm principle is not tied to intrinsically harmful actions; rather, the principle is about wrongful actions that lead to harm. When prohibiting the act, attention shall be paid not only to the wrongful harm of the action but also to other human rights, such as **freedom of speech**. This latter right is extremely important in our case since, while talking about the criminalisation of disinformation, the value of free speech needs serious consideration, which is the basis of modern democratic society.

New media and challenges for defining crime

There is a wide consensus in Georgia that crime is a wrongful and guilty act provided for by the Criminal Code of Georgia that results in punishment. Basically, this definition is the outcry of the principle of legality, which states that there is no crime without the law. But the harder question is what shall constitute a crime? It shall be argued that what is defined as being a crime is a reflection of the values of mainstream society and that it is a crime because it causes harm. Based on this, is knowingly or unknowingly posting false information online that causes harm a criminal activity? For example, in the US, after the Boston Bombing, citizens identified the wrong person as the bomber and incited harassment against his family, which brought them unnecessary pain as he was missing but had committed suicide (Lee D., 2013). Should this be a crime? Should these individuals be held responsible for the harm caused to the wrongly identified person's family? Similarly, in the case of the Chibok girls, who were kidnapped in Nigeria, news reports that were posted and reposted on social media said that the Chibok girls were not really kidnapped and claimed the story was a fake. This is thought to have negatively impacted the humanitarian effort to rescue the girls (Busari, S. 2017). Clearly, here as well, harm is evident, but should those who posted claims that this human rights crisis was fake be held responsible? In the case of Georgia, hours after the bank robber took hostages and escaped with half a million USD, someone created a Facebook profile of the alleged bank robber and was posting different types of false information about

the whereabouts and the reasons for committing this crime. This also had a negative effect on proper investigation, and even at the period of writing this article, the criminal has not been found. Should the person who created a false profile and posted misinformation be held responsible?

In all of these cases we can see the social harm that was caused—in one case, a wrongly identified suspect's family experienced harassment, and, in the other two cases, an effective investigation may have been delayed. As mentioned at the beginning of this paragraph, the consensus definition of crime suggests that what is defined as crime is generally agreed upon. As crimes using new media are relatively new, there might not yet be agreement about this behaviour as a criminal. Another definition of crime, the interactionist definition, argues that behaviour becomes criminal when society constructs it as criminal (Siegel, L. 2015). With these new media examples, it may be that it will take time for society to begin to view this behaviour as criminal. In the meantime, cases like these draw attention to how new media is challenging definitions of crime and the pursuit of justice. These examples also showed us that even though it is evident that such kinds of false information causes harm and falls under the harm principle, the question still remains, is it enough to declare disinformation as a crime and thus, restrict free speech? In order to answer this question in the next chapter I will briefly overview the value of free speech.

Value of Free Speech

Freedom of expression is a fundamental human right enshrined in the Georgian Constitution. It reinforces all other human rights, allowing society to develop and progress. The ability to express our opinion and speak freely is essential to bring about real change in society. Having this in mind, the Constitutional Court of Georgia has several times reiterated that a free society consists of free individuals who think freely, hold independent and different opinions and participate in democratic processes, which entails the exchange of opinions and debates.⁸ Moreover, according to the European Court of Human Rights⁹ and the Constitutional Court of Georgia¹⁰, freedom of speech covers not only those opinions and expressions that are acceptable to everyone and are favourably received but also those ideas, opinions or statements which are unacceptable to the government, part of the society or certain individuals, which can cause shock and public outrage. From this, it is inferred that there is no democratic society without freedom; there is no freedom without free speech. Since Georgia is trying to be on the track of a liberal democratic society, then the only option is to maximally protect freedom of speech.

It is a widely acknowledged fact, at least in Georgian legal circles, that the best way to go against people who have different views and challenge them is the best way to move forward. Having said that, it is also worth noting that In Georgia, periodically, certain initiatives are put forward which are aimed at limiting freedom of expression, which has become a dangerous trend. For instance, in 2015, the High Council of

⁸ The judgment of October 26 2007 of the Constitutional Court of Georgia on the case N2/2/389 Maia Natadze and others vs. the Parliament of Georgia and the President of Georgia, II, 13.

⁹ Handyside v The United Kingdom, § 49.

¹⁰ The judgment of September 30 2016 of the Constitutional Court of Georgia on the case N1/6/561,568 Georgian citizen Yuri Vazagashvili vs. the Parliament of Georgia, II, 40.

Justice published a statement calling on the government and other political parties, civil society, interest groups as well as the media, while exercising freedom of expression to refrain from statements that can damage the authority and prestige of the Judiciary and can cause loss of public trust towards the court.¹¹ Although there was no further discussion on this issue, such statements created a threat of restriction of freedom of expression. Yet another example is related to the attempt to impose liability for insulting religious feelings. Recently there were dangerous legislative initiatives with regard to imposing liability for insulting religious feelings, which are totally contradictory to Constitutional standards of freedom of expression.¹²

Now when we live in the age of disinformation and fake news and when we have examples of France, which adopted a law on November 20 2018, aimed at combating the spread of fake news during the pre-election period; Germany, whose content moderation duties in legislation — exemplified by Germany's Network Enforcement Act — tends to lead to the creation of systems where private actors are tasked with applying criminal law and other national legal provisions under short deadlines and the threat of very heavy fines and many other countries who try to deal with disinformation with criminalisation, it is very tempting for Georgia to go down this path as well.

3. Conclusion

Elsewhere in this paper, it was mentioned that disinformation is false content that is intentionally disseminated **with the intent to harm**. It occurs when people intentionally spread information that is false, biased, manipulative, or propaganda. It was also established that as criminal law is the strictest means of social control, a negative influence of which follows a person till the end of his/her life, its usage must be minimised or to put it another way, criminal law shall be used a last resort. From this derives the statement that criminalisation shall also be used as a last resort, and it shall be justified. In order for this to happen, the criminalisation of certain act needs to follow principles of criminalisation. The starting point for this is the harm principle, which entails that the state can only intervene in its citizens' actions if an act causes harm or danger of harm to others.

Clearly, disinformation falls under the harm principle. In most cases there is no direct harm, but at least remote harm is at hand, which means that action tends to diminish the resources that underpin the wellbeing of certain groups of people or society not immediately but remotely. Even more, disinformation is *intended* to cause harm. So, it is safe to say that the action falls under the harm principle, and there is a *prima facie* case for its criminalisation. But when prohibiting the act, while the state is balancing the pros and cons of criminalisation, other side factors need also be taken into calculus. Namely, attention shall be paid not only to the wrongful harm of the action but also to the level of restriction of human rights, in this case - freedom of speech. If the freedom of speech has the value that is shared in this paper, then we can simply recall one of the main propositions of this paper: *the more*

¹¹ IDFI, Threat Posed to Freedom of Expression in Georgia, May 13 2019
https://idfi.ge/en/threat_posed_to_freedom_of_expression_in_georgia [18.09.2021].

¹² *Ibid.*

valuable and important is the act or the more restricts criminalisation the human freedom, the more unjustified is the prohibition of the act. This means that even though action falls under the harm principle and is a good candidate for regulation, we need to think again when we decide to criminalise this action. Freedom of speech is of such a big value that its restriction with the strictest means of social control needs to be restrained. The need for restraint in criminalising disinformation derives from the fact that freedom, and therefore democracy, will be irreversibly damaged. Since disinformation causes only remote harm, this means that the actual severity of the harm caused by the disinformation remains in doubt. Even if some harm arises out of disinformation, punishing (imprisoning) the suspects is a disproportionate response. Yet the problem is not just one of proportionality. It also concerns the state's power to make itself the sole moderator of the content or the arbiter of what is true or false. Moreover, before an act is criminalised, the costs and means of enforcement need to be taken into account. If criminal law cannot be enforced,¹³ Or its enforcement is inefficient, then this will cause inflation of criminal law itself and will be the basis of overcriminalisation. This latter problem already exists in Georgia.

To sum up and respond to the main question of this paper, it shall be stressed that disinformation, even though it is harmful action, **shall not be criminalised**, but it definitely needs to be regulated. There are several means of regulation at hand that are beyond the scope of this paper and needs further elaboration. Nevertheless, here I state several of them that can be used instead of criminalisation: Decentralised content moderation; Creation of social media councils; Introduction of trustworthiness checkers; Introduction of reliable fact-checkers; Introduction of reputation systems for publishers; Regulation by means of civil law etc.

¹³ see the example of Sri Lanka, where disinformation is criminalised, but its enforcement is a huge challenge.

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