

THE CONSTITUTIVE ELEMENTS OF THE CRIMINAL OFFENCE REPRESENTED BY COMMUNICATION OF FALSE INFORMATION. CASE STUDY: FAKE NEWS IN SOCIAL MEDIA

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In the present societal context, considering the tensions created among the population by the measures adopted by the Romanian Government in order to prevent the spread of the SARS-COV-2 virus, the correct and truthful information represents a primordial need for the people, who can be susceptible to the influences caused by any information, provided by any source. Without discussing about the psychological factors that determine people to give up to the filters through which they analyse information received in extraordinary situations, and taking into consideration the fact that the speed at which information is spread and consumed in the online medium, especially in social media, surpasses the speed at which information from official sources, which must be subjected to processes of approval, certification and signature, is spread, this research aims to create an incursion in the constitutive elements of the criminal offence represented by the communication of false information, in regard to the specific case of the spread of fake news in social media, with a potential effect on the national security.

Keywords: criminal offence; spread; fake news; social media; national security;

INTRODUCTION

In the year 2020, the whole world, including Romania, was subjected to great challenges in all fields of activity, from the SARS-COV-2 virus point of view. At national level, in order to exist the possibility to create the legal framework necessary for the prevention of the spread of this virus, the state of emergency was declared for a 30-day period (Decree no. 195/2020), that was later extended with another 30 days (Decree no. 240/2020). Because of the effects of the legislative instruments that were used in the time of the state of emergency for the restriction of citizen rights in order to prevent the spread of the virus, a prolific environment was created for the propagation of false news, also known under the name of “fake news”, phenomenon that can have negative effects against the national security. The lack of predictability of the measures and restrictions that were about to be adopted and made public, the necessity for adapting them on a daily basis depending on how the pandemic evolved, and the complicated process of signing, approval and publication of official documents, led to the situation in which the citizens were informing themselves from drafted normative acts, that were spread through social media (Facebook, WhatsApp etc.). The high level of trust that the people had in their colleagues or friends from their social media groups led to the fact that drafts of Government decisions, or those of the National Committee for Special Emergency Situations, spread in these groups, were considered as being authentic, especially that, most of the times, they were the normative acts that were adopted with little to no modification from the shared drafts.

One such case that provoked an immediate reaction from the population was that of “*Decision no.14 on 20.03.2020 of the Technical-Scientific support group for management of highly contagious diseases on the territory of Romania*”. This document, which contained drastic restrictions for citizens, was spread using the WhatsApp platform, in the morning of 20 March 2020. The document had a similar form to the decisions already adopted by the institution, even though it lacked the stamps and signatures that are specific to an approved document. Nevertheless, the document spread very fast, and a lot of the recipients considered that the document was authentic, thus creating a state of unrest among the population. Consequently, an intervention from the representatives of the issuing institution was mandatory, in order to explain that the document was just a draft for internal use only, that was subjected to study, and it produced no effects, because it was not approved

at the time. Also, the decision to inform the criminal prosecution bodies, regarding the fact that a criminal offence was committed, namely the one stated by article 304 from the Penal Code (Law 286/2009) of distributing information that was not destined for the general public. Questionable is that the measures taken by the authorities, informing the criminal prosecution bodies about the offence previously mentioned, is enough in such cases, especially because the communication and spread of false news is covered by article 404 from the Penal Code (Law 286/2009). Thus, a more detailed analysis of the criminal offence previously mentioned is necessary, and the way in which “fake-news” from social networks, and their spread, grasp the limits of this criminal offence, and for the direct applicability of the analysed law principles, the case previously mentioned regarding “*Decision no.14 on 20.03.2020 of the Technical-Scientific support group for management of highly contagious diseases on the territory of Romania*”, will be of reference.

THE CRIMINAL OFFENCE OF COMMUNICATION OF FALSE INFORMATION/“FAKE-NEWS” JURIDICAL CONSIDERATIONS

Article 404 from the Penal Code regarding the criminal offence of communication of false information stipulates that: “*Communication or spread, through any means, of news, data or false information, or forged documents, knowing the fact that they are forgeries, and through which the national security is endangered, can be sanctioned with a sentence with one to 5 years of prison*”. (Law 286/2020). Right from the text provided for the article, it can be observed that the incrimination of acts that involve the communication of spread of fake news of information, with the condition that these endanger the national security. Verifying the prerequisites for incrimination can be made if the other constitutive elements of the criminal offence are met.

The object of the offence

The *legal object* is represented by the close connection between the right and the obligation of the Romanian state to have its information, data and documents protected, regarding their truthfulness and authenticity in the moments of disclosure. What should also be noted is the fact that in the majoritarian doctrine these data, documents and information are used not only with international organisations but also in the relationship of the state with its citizens, “*the creation of a frame of complete national security*” (Dobrinoiu et al., 2014) being an essential prerequisite.

In the analysed case, it is imperative to remark the fact that the data that is disclosed to the public and spread through social platforms and news oriented

web-sites, especially emphasises the relation of the state with its citizens, taking into consideration that at the moment of disclosure and spread to the public, on the Romanian territory it was established the state of emergency, and the restriction of citizens' rights was directly targeted by the document in discussion. Moreover, because in the clarifications from the Strategic Communication Group, it was mentioned that was just a draft (Strategic Communication Group, 2020), it cannot be denied that the state's right to have its documents protected was violated.

Material object

The material object of the criminal offence analysed through this research is, according to the doctrinal opinion (Dobrinou et al.), the medium through which the information, news or data are transmitted. To be remarked is the fact that in the case in which they are transmitted through spoken words, directly or through audio-video means, the criminal offence has no material object. The information, data and documents cannot be analysed distinctly from the medium on which they are found. The material object is therefore considered as being the information or data themselves, which are specifically bound to the medium on which they were initially found.

There are also opinions according to which the criminal offence is without a material object (Streteanu, 2008), because information, data and news cannot be linked to a physical existence, the medium through which they are distributed being just the means of committing the offence. This is also the opinion that is adopted by the author of this article, because the multitude of mediums, through which and the speed at which they are transmitted, by itself, does not directly affect the data, news and information.

In the case of Decision no.14 on 20.03.2020, this was transmitted as an electronic document, and it was spread, including on the news websites, maintaining the form and appearance of an official document.

The subject of the criminal offence

The direct active subject (author to the criminal offence of communicating false information) can be any responsible individual, who knows about the false character of the communicated or spread information. The lawmaker did not condition the quality of the active subject of the criminal offence. The deed in discussion can be committed by one or more persons, in participation. These could be co-authors, instigators or accomplices. Although the active subject is not circumstantiated, it can be remarked that there are specific categories of people that would have it very easy to commit such a criminal offence. For example, people which activate in the field of mass media, or individuals with duties in the public administration in the field of developing and/or keeping the documents. Therefore, particular attention must also be given to the intent when committing an offence (Cioclei et al., 2016).

The active subject in the present case, the individual who had access to the draft of the document from the Technical-Scientific support group for management of highly contagious diseases on the territory of Romania, who disclosed the document to the public, with an official appearance, without any mention of a draft, and even if it was not approved, becomes the active subject. The intent of the person who spread the document cannot be ascertained, but the immediate effects which it produced, in the short period till the official clarification, can be followed. The immediate reaction of the public that received the document through social media platforms was the result of the speed at which information is spread in this media, but also of the high capacity of the public to process the information which they are presented with.

The passive subject

The main passive subject of this criminal offence is the state. There is the possibility of a secondary passive subject, when the data, information or documents refer to a state authority that is prejudiced, maintaining the condition of creating a danger regarding national security. In the analysed case, the National Committee for Special Emergency Situations can be considered a secondary passive subject, as a prejudiced state authority, if the national security was endangered.

The objective aspect

The objective aspect of the criminal offence is constituted from two parts. The lawmaker incriminated first of all the communication of data, information, news or documents that are fake, and secondly their spread.

The difference between the communication and spread is that through communication one aims to directly inform another person or persons in order to obtain the desired results, and through spread one aims to transmit the false information in such a way that it reaches the public, which leads to obtaining the desired results (Ibid.). In both cases, the fulfilment of the following three conditions is necessary: the information must be false, it must endanger the national security, and the perpetrator must know that the spread/communicated pieces of information are false.

In order to verify if the first condition is fulfilled, the notion of "*false information*" needs to be further explored. The Penal Code incriminates the offences of forgery and use of forgeries, in a well determined manner, especially regarding official documents. Thus, defining the notion of "*false documents*", in the sense of art. 404 Penal Code, can be done with ease. On the other hand, the notions of "*false news, data or information*" are not clearly defined by the lawmaker. In order to better understand these definitions, we need to make an incursion in the lawmaker's thoughts, regarding the concept of "*fake news*", in the year 2020,

also regarding the fact that it represents a modern phenomenon, which was not so widespread at the moment of the creation of the New Penal Code in 2009. In the National Defence Strategy, suggestively entitled *“Together for a more secure and prosperous Romania in a world marked by new challenges”*, we find at the 8th point of the introduction the fact that: *“The evolutions from the technological domain determines the diversification and growth of the complexity of security risks and threats, like cybernetic attacks, activities specific to the criminal domain (hostile actions/of influence carried out in the public space, disinformation, spread of false/fabricated news etc.), and possibly harmful and destabilising effects of the import of new technologies of civil use within asymmetrical and hybrid actions, generating new security challenges”*. (Romanian Parliament, 2020). Thus, the lawmaker frames the action of spreading false/fabricated news under the concept of disinformation, which is considered to have a harmful effect on national security.

In the European Commission’s Plan of action against disinformation, this concept is defined as being a *“series of information that is verifiably false or misleading, which is created in order to obtain an economic gain, or to deliberately mislead the public in order to create a public prejudice. Public prejudice includes threats regarding the democratic processes, but also public assets like the health, the environment or the security of the Union’s citizens. Disinformation does not include unintentional errors, satire, parody or news and partisan comments that are clearly identified as such”*. (European Commission, 2018).

In the case analysis regarding Decision no.14 on 20.03.2020, it must be analysed if the content of the document is part of the category of information which may be considered disinformation according to the definition above given. Although the document represented just a draft for internal use only, in the moment it was publicly disclosed through the use of social media, it could be considered a document containing a *“series of information that is verifiably false or misleading”*, because it was not an officially approved document, but it had the appearance of such a document, using the specific format of the decisions which were already adopted till that moment, and also using the distinct marks of the supposed issuing institution. Even the title, *“Decision no. 14 on 20.03.2020”*, denotes the immediate applicability of the measures contained in the document, and the first paragraph can mislead any reader about the official and mandatory character of the document: *“Taking into consideration the increase of infections with SARS-COV 2 at national level, on 20 March 2020, the members of the Technical-Scientific support group for management of highly contagious diseases on the territory of Romania, discussed the measures needed to be taken in order to prevent the spread of infections. The members decided the following: (...)”*. (Gândul, 2020).

Analysing the document from the perspective of its effects, in comparison with the definition given to disinformation by the European Commission, it cannot be appreciated if it was publicly disclosed and spread in order to create an *“economic gain”*, but it certainly had as an effect the misleading of the public, with the potential to create a public prejudice under the form of a threat related to *“the democratic processes and (...) the health, the environment or security of the citizens”* (European Commission, 2018), taking into consideration the fact that the document consisted of a series of drastically restrictive measures which targeted the citizens’ freedom of movement, constitutional right, which could be restricted only by law, according to article 25, paragraph 1 from the Romanian Constitution (Romanian Parliament, 2003). Thus, the question arises if this type of document could bring a prejudice to national security. Article 1 from Law 51/1991 regarding the national security of Romania, defines this concept as being, the *“state of legality, balance and social, economic and political stability, necessary for the existence and development of the Romanian state as sovereign, unitary, independent and indivisible, maintaining the lawful order, and also the climate of unrestricted exercise of rights, freedoms and obligations of citizens, according to the democratic principles and norms, established through the Constitution”*. (Romanian Parliament, 2014). Taking into consideration the contents of the previously mentioned article, we can assess that through the creation, in the eyes of the citizens, of an apparent restriction of rights that are guaranteed by the Constitution, a prejudice is created to the Romanian state, affecting the *“state of legality, balance”* and also affecting the *“climate of unrestricted exercise of rights, freedoms (...) according to the democratic principles (...) established through the constitution”*. As a result, the sole creation of a perception in the citizens’ eyes, through misleading, that would affect the previously mentioned principles, could be considered a threat to national security.

The third requirement necessary for the fulfilment of the objective side requirements of the criminal offence is decisive, according to the Romanian Constitutional Court: *“the action of communicating or spreading news, data, information or documents become relevant from a penal point of view, only under the condition that the perpetrator knew about their unreal character, at the moment when the crime was committed. This means that any doubt about the authenticity of the communicated or spread information makes the criminal offence’s constitutive elements unable to be fulfilled, producing the same effect as the cause of no liability in case of error. This situation derogates from the normal rule in this field (according to which error must not be mistaken for doubt, the latter meaning that the perpetrator is aware that he cannot fairly represent the reality in which he should not act, and, if he does act – even though he is aware that he is unsure of the reality -, will be criminally responsible for the deed, because*

he accepted the socially dangerous result, thus acting with indirect intent). In other words, only the subject that knows about the false character of the spread data, information or communication is criminally liable, but not the person that has doubt about their value of truth, even though, from an objective point of view they are unreal. Thus, in the legislative frame we find a transposition of an older orientation, of doctrine and case law, that stated that the criminal law does not sanction the communication or spread of data and information just for the simple reason that their authenticity was not confirmed, but it takes into consideration the false data or information, and also the false documents, thus the perpetrator cannot be made criminally liable for the disclosure or data, information or documents with about whose authenticity he was unable to know about” (Decision no. 273/2000). Although the previously cited decision refers to the provisions of the article from the old penal code, the prosecution of the discussed deed can be found under the same form, the judgement of the Constitutional Court of Romania finding its applicability in the case of the new provision too. Regarding the analysed case, it remains for the criminal prosecution bodies to determine if the person who disclosed and spread “Decision no.14 on 20.03.2020”, had doubts about the value of truth of the document’s contents, although it is hard to accept the fact that the disclosure, in good conscience, of a document that was not subjected to the process of approval, represents a version in which the perpetrator does not know about the unreal character of the disclosed information.

The immediate consequence of the criminal offence stated in article 404 Penal Code is the creation of a perilous state that affects national security, and regarding the causality link, a direct relationship between the deed of disclosing false information and the state of peril for the national security is mandatory. Both estimating the impact of the deed against national security and the direct relationship with the created state remain to be determined by the bodies with responsibilities in this field.

The subjective aspect

Regarding the subjective aspect, the lawmaker only takes into consideration the form of offence with intent. This is the reason why a more detailed analysis of the way in which the author of the deed perceived the disclosed information, according to the decision of the Romanian Constitutional Court, previously mentioned. Also, from the doctrine, it can be noted that if “*the author has doubts regarding to the character of presented information, but chooses to expose them do the public opinion, no matter how irresponsible or devoid of professional deontology would be his activity, especially when he is a journalist, he cannot be held criminally responsible*”. (Cioclei et al.).

Forms of the criminal offence and sanctions

For the communication of false information, the lawmaker sanctions only the criminal offence consumed under the form of the effective realisation of the communication or spread of false information, having the requirement of creating a state of peril for the national security. An important fact to remark here is that the consumption of the criminal offence is not conditioned by the effective reception of information by the targeted public, if the simple spread of this information can create prejudice to national security. Also, according to article 412, paragraph 2 from the Penal Code, the attempt is not punishable (Law 286/2009).

The criminal offence of communicating false information is punished with prison from one to five years, no matter the way of committing the criminal offence.

CONCLUSIONS

Taking into consideration the premise from which this research has started, analysing, from the perspective of the Penal Code, a part of the phenomenon spread on social networks, which is in continuous development, known under the name of “fake news”, and realising a real parallel through the use of the case of “*Decision no. 14 on 20.03.2020*”, some conclusions can be drawn regarding the way in which article 404 from the Penal Code, regarding the criminal offence of communicating false information, finds its specific applicability over the documents disclosed and/or spread using the online medium.

The constitutive elements of the criminal offence stated by article 404 in the Penal Code can also be easily found in cases in which the false information communicated aims to misinform the general population, and the fact that we find this concept defined by the European Commission in the “*Action Plan against Disinformation*”, with similarity to the way in which the Romanian lawmaker understands the concept of communicating false information, only strengthens the conviction that the applicability of the discussed criminal offence must be extended in order to also grasp the communication made through social networks, especially that some of them are already considered public domain (Decision 4546/2016). Moreover, the recognition on the part of the Romanian lawmaker of the danger that disinformation represents, under the different forms that it takes, for the national security, in a legislative act such as the country’s National Defence Strategy for the period 2020-2024, shows the necessity of revising concepts that are applicable in cases similar to that of “*Decision no.14 on 20.03.2020*”, and also strengthening the legal instruments in order to incriminate such deeds.

As such, for the improvement of the legal framework that finds application in the analysed cases, a *Lex ferenda* proposition can be made, by introducing a new

paragraph in the content of article 404 from the Penal Code: “(2) *With the same punishment are sanctioned the offences mentioned in paragraph (1), committed with the aim to misinform the general population in order to create a situation that brings peril to national security*”, thus facilitating the incrimination in cases similar to that of “*Decision no.14 on 20.03.2020*” for the effects produced on the target audience, and not only by sanctioning the criminal offence according to article 304 Penal Code regarding the offence of disclosing secret or classified information.

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