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ESCOLA DE LISBOA DA FACULDADE DE DIREITO DA UNIVERSIDADE CATÓLICA PORTUGUESA

MASTER OF TRANSNATIONAL LAW

**THE CRIMINALIZATION OF FAKE NEWS IN PORTUGAL:
ASSESSING THE NEED TO SOLVE TOMORROW'S
PROBLEM, TODAY**

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Lisbon, August 2022

*Mãe,
foi por e para ti.*

Acknowledgements

Mãe, Pai e João,

obrigada pelos ensinamentos, pelo carinho e pelo acompanhamento de uma vida.

Família (dos domingos na casa da Gilda),

obrigada pela fé que têm em mim e por acreditarem mesmo quando eu não acredito.

Guilherme,

obrigada pela caminhada conjunta de todos os dias e pelo amor.

Beca,

obrigada não basta face o teu papel aqui, bem o sabes.

Amigos de e para sempre,

obrigada pelo encorajamento e por torcerem sempre por mim.

“Malta” do escritório,

obrigada pela paciência das últimas semanas.

Professor Pedro,

obrigada pela disponibilidade.

Católica (Professores, Funcionários),

obrigada pelos últimos 6 anos, fica a saudade.

(...),

obrigada por não desistires.

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Abstract and Keywords

Abstract: Fake News are not, by any means, a phenomenon exclusive to our times; however, through globalisation and digitalisation, they have grown to become one of *the* challenges of our times, as can be confirmed by their intervention in pivotal moments such as the 2016 US Presidential Elections and the 2020 Covid-19 Global Pandemic. A great conceptual confusion leads different realities such as mis-, dis- and mal-information to be lumped together and erroneously treated interchangeably, adding another unnecessary layer of complexity to an issue that is not, *per se*, easy to resolve. In this sense, and after clarifying the reality we are dealing with (disinformation as the dissemination of knowingly false, public interest content, shared by the agent with the intent to mislead the target audience, obtain a gain and cause public harm), recognising its challenges and implications (such as their impact on human rights and their contribution to the erosion of trust and confidence in democratic institutions) and accounting for its potentiating factors (such as the anatomy of modern news consumption, the role of social media, Artificial Intelligence, content bubbles and echo chambers, *etc.*), it becomes relevant to reflect on what society's reaction to it ought to be. While several possible reactions outside the legal sphere may be identified (such as investing in media literacy and quality journalism, *etc.*), the usefulness of legal intervention is undeniable. Whether this intervention requires legal innovation (or whether it can stand on the shoulders of existing legislation) and whether or not such innovation lies in the realm of criminal law must be pondered against other interests with resort to a proportionality assessment.

Keywords: Criminalization, Disinformation, Fake News, Human Rights, Proportionality

List of Abbreviations

APAD	Action Plan against Disinformation
Art.	Article
Crim. Code	Portuguese Criminal Code
CRP	Constitution of the Republic of Portugal
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
p./pp.	Page/Pages
PCHRDA	Portuguese Charter of Human Rights in the Digital Age
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

1. Introduction

1.1. Introductory Remarks

I. The term we have, in recent days, coined and popularised as Fake News does not describe, by any accounts, a new phenomenon. The dissemination of inaccurate, adulterated or blatantly fabricated information has been around for centuries, millennia even¹. From Octavian's smear campaign against Mark Antony, to the 1835 Great Moon Hoax, passing through the 1917 German corpse factory story², all these examples are symptoms of an information disorder that humanity simply cannot seem to shake off.

While, indeed, Fake News merely constitutes the rechristening of an old practice, today's information landscape is laced with challenges that make it ever more dangerous and concerning.

II. Just as Fake News were once boosted by Gutenberg's invention of the printing press³, so were they, once again, by the development of the Internet and, more recently, by the digital revolution that empowered most of us (from the privileged Western perspective) to hold in our hands interconnected devices which allow us to, with a couple of clicks, both access and reach the world.

This necessarily implies an increase in the dissemination but also in the reach and influence of Fake News, be them driven by mere neglect or objective ill intent, with a potential rippling effect throughout the various sectors of society.

III. These risks and concerns have not been completely ignored by the relevant stakeholders. So much so that in 2018 the European Commission presented the APAD, which was followed up on by the Portuguese legislator in May 2021, with the adoption of the PCHRDA. Its Art. 6, under the heading "right to protection against disinformation", foresees that the State must ensure the "*protection of society against natural or legal persons (...), who produce, reproduce or disseminate narratives deemed to be disinformation*".

In this light, the relevance of the topic becomes evident; among the many aspects and ramifications that could be analysed, we are, in this dissertation, particularly concerned with the criminal law sphere.

¹ HANLEY & MUNORIYARWA (2021), PP.157-172

² MATTHEWS & POSETTI (2016), PP. 2-15

³ *Ibid.*.

IV. The Fake News phenomenon is located within a spectrum that ranges from relatively innocuous distortion or manipulation to blatant (and dangerous) weaponization of information.

When reaching the most severe end of the spectrum one could argue or debate the need to address the issue at that which is considered to be the gravest level of the legal order: criminal law.

V. Concerns such as the interest in and the need to legislate *vs.* the last *ratio* logic of criminalization, the slippery slope into censorship argument, *etc.* will be addressed in this dissertation.

1.2. Structure

I. This dissertation is divided into two main moments: following a brief introduction to contextualise the reader on the main issues and concerns to be addressed, (i) the Fake News phenomenon is explored. After becoming familiarised with the key concepts and aspects surrounding the issue, the reader is invited to reflect on the (ii) legal implications of the matter.

II. Whilst diving into the Fake News phenomenon, and as a starting point, the core notions of Misinformation, Disinformation and Fake News, sometimes (erroneously) used in an interchangeable manner, will be clarified and the relevant definitions to be adopted for the purposes of the dissertation will be stabilised. Taking a step further, and in order to illustrate this phenomenon, two case studies where Fake News took particular relevance will be laid out: the 2016 US Presidential Elections and the 2020 Covid-19 Global Pandemic. Following this assessment, the factors responsible for potentiating, nowadays, this phenomenon will be explored.

III. After this initial approach, a reflection on what the due legal reaction should be will ensue.

Firstly, we will explore examples of already existing proposals and solutions: regarding Europe, the European “Action Plan against Disinformation” will take particular relevance and its concretization in Portugal, Art. 6 PCHRDA, will likewise be briefly examined.

The next step will be to analyse the (un)necessity of new (legislative) action against Fake News, particularly in light of the possibly already existing solutions in the Portuguese criminal legal order. To assess the need for action, the proportionality principle will be equated.

2. The Fake News Phenomenon

2.1. Misinformation, Disinformation and Fake News

I. Fake News, as popularised by Donald Trump through his Twitter account in the beginning of 2017⁴, is a term now used to describe many realities and many times in conjunction with equally vague concepts such as “post-truth” and “alternative facts”. If you were to ask the former US-president, Fake News could probably be defined as any piece of information that construes him at an unfavourable light; unfortunately, for many this is how the concept has taken off: as a label to affix to any type of content one is not in line with, so as to attempt to discredit or demean it; either this or as a blanket term to describe false content and information in general.

This perception and use, however, does not accurately represent the subtlety of the issue and concept, nor is it sufficient for the purposes of this dissertation.

II. The information disorder, as a large-scale information pollution phenomenon in the face of an ever-increasing tendency for the development and dissemination of inaccurate, adulterated or fabricated information, unfolds in a spectrum⁵ that is affected particularly by two relevant variables: the content of the information itself, on the one hand, and the intent of the agent - be them a natural or legal person - conveying such information, on the other.

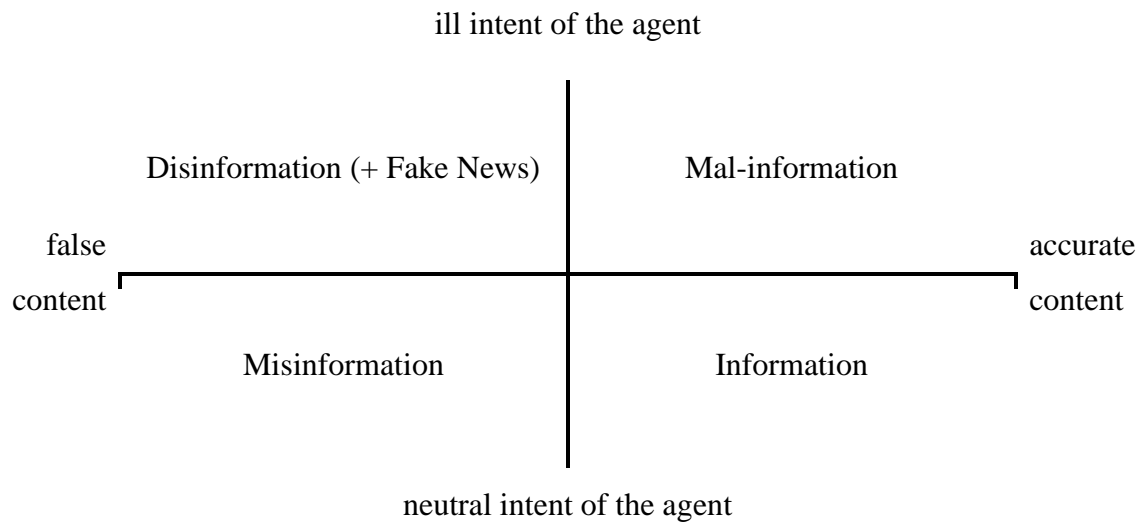
Among these, which take special relevance for our analysis, likewise the identity and characteristics of the agents that created and distributed the content, as well as that of the target audience, and the reasonable and anticipated average interpretation of the content conveyed are also of particular interest.

III. In summary, and at the risk of oversimplification since many other concepts could be relevant (conspiracy, rumour, *etc.*)⁶, said spectrum could be summarised and diagrammed, for the purposes of this dissertation and according to the two variables identified above as being the most relevant, as follows:

⁴ MENEZES (2018), pp. 37-53

⁵ IRETON, POSETTI, WARDLE, DERAKHSEHN, FADIL, MANTZARLIS, TREWINNARD, BELL (2018), pp.44-55

⁶ KALSNES (2018), pp. 2-17



Thus, the key concepts to consider reveal themselves: those of information, misinformation, mal-information and disinformation⁷.

IV. Information, by exclusion and in juxtaposition to the ensuing notions, comprises content, be it text, image, audio, video or other, which is descriptive or representative of reality in an authentic (*i.e.*, “worthy of acceptance or belief as conforming to or based on fact”⁸), accurate (“conforming exactly to truth or to a standard”⁹) and, most of all, verifiable (susceptible of being confirmed, proven and/or demonstrated as factual, authentic or accurate) manner, typically, even though not exclusively, the result of competent and ethical journalistic-type work and divulged in the public interest.

Information is the standard against which all content should be reviewed and, as such, in the context of this dissertation, it will prove a useful concept so as to better establish what should (or not) constitute Fake News, warranting the corresponding treatment.

V. Misinformation refers to content which is false (*i.e.*, untrue), inaccurate (*i.e.*, does not find exact correspondence in a factual reality) or otherwise misleading (*i.e.*, induces a mistaken belief or impression); the distinctive factor regarding misinformation (particularly with reference to disinformation), however, lies within the disseminating agent’s intention: those who create and share this content are not originally aware of its false, inaccurate or

⁷ *Ibid.* footnote 5; CARDOSO, BALDI, PAIS, PAISANA, QUINTANILHA, COURACEIRO (2018), pp. 15-19; QUANDT, FRISCHLICH, BOBERG, SCHATTO-ECKRODT (2019), pp. 1-5; RUBIN (2018), pp. 1013-1034; SHU, WANG, LEE, LIU (2020), pp. 1-17; WARDLE & DERAKHSHAN (2017), pp. 20-25

⁸ <https://www.merriam-webster.com/dictionary/authentic>, last consulted in 23.07.2022

⁹ *Ibid.*

misleading character, rather deeming it to be true. As such, they do not intend to maliciously spread false information when sharing this type of content¹⁰.

This conduct may not be worthy of legal reprisal in many cases; nevertheless, in others, it may be chalked up to negligence of the agent and acted upon accordingly, as required, where the agent has failed to observe the *bonus pater familias* standard upon assessing the information and verifying its accuracy *prior* to dissemination. This standard, and the assessment conducted, must necessarily vary in intensity according to, among others: (i) the agents themselves (their personal characteristics, knowledge level, experience, *etc.*), their social exposure and reach (whether or not they are in the public sphere, for instance), the extension (restricted or not) and type of audience they target (*e.g.*: children, educated vs. “uneducated” population, *etc.*), *etc.*; and (ii) the content being shared (*e.g.*: sensitive - and, as such, requiring added caution and scrutiny -, of public relevance vs. relatively inconsequential, *etc.*).

While it refers to the spread of false information, misinformation is not what this dissertation aims to address, since it is not, as will be seen, strictly subsumable to the concept of Fake News.

VI. Mal-information is the term that usually describes information which is genuine and based on reality (*i.e.*, information as above described), but which the agent shares with the *a priori* intent to cause harm¹¹.

While this phenomenon may be relevant, at the criminal level, in light of certain statutory types of crimes (such as insult¹² - *injúria*, Art. 181 Crim. Code -, invasion of privacy - *devassa da vida privada*, Art. 192 Crim. Code -, *etc.*), it does not particularly concern the topic of this dissertation, *i.e.*, ascertaining the need for the criminalization of Fake News.

VII. Finally, and more relevantly in light of the aforementioned topic, disinformation concerns false (*i.e.*, untrue), fabricated (*i.e.*, made up or artificially created), adulterated (*i.e.*, altered or manipulated) or simply inaccurate content - at last, the infamous Fake News -, knowingly recognised or recognisable as such by the agent, created and/or shared with the intent to actively and deliberately mislead, deceit or sway its target audience¹³.

The deceptive content which is the object of the disinformation phenomenon, *i.e.*, Fake News, may be disseminated with several intents that vary from the pedagogical (regarding Fake News intentionally disseminated in order to raise awareness and illustrate the relevance of the

¹⁰ *Ibid.* footnote 5

¹¹ *Ibid.*

¹² Translations made throughout this dissertation into the English language, from concepts and excerpts originally in the Portuguese language, are mere free translations made by the author for convenience purposes.

¹³ *Ibid.* footnote 5

issue, its detection and control, exposing people to disinformation, which is pre-emptively debunked, in an attempt to better equip them to detect it in the future - *inoculation theory* -¹⁴), to the downright manipulative (regarding Fake News intended to confuse and persuade audiences to support *vs.* undermine, welcome *vs.* fear, exult *vs.* resent certain ideas, actions, groups, individuals, *etc.*). While some intents (such as the educational) could be construed as a cause for exclusion of guilt within any eventual statutory type of crime to be drawn up to address Fake News, this would not prove necessary if the definition of disinformation were further developed, as some authors propose, so as to *a priori* account for and encompass yet another dimension: that related to the consequences deriving from the dissemination of disinformation itself.

As such, in order to be considered disinformation (and in order to warrant the corresponding treatment) the dissemination of the false content should have the intent to cause (or simply the potential to cause, in particularly grievous matters, such as those related to life and health, for example) public harm - understood, in general, as a threat to democratic processes, public peace and order, and other core societal values -, in light of the nature - public interest - of the content being shared in itself. The inclusion of this *criteria* and, therefore, exclusion of false content which promotes the occurrence of harm in the realm of the relationship between private actors from the concept of disinformation, is possible since other statutory types of crime already foreseen (such as defamation - *difamação*, Art. 180 Crim. Code - or offence to organisation, service or legal person - *ofensa a organismo, serviço ou pessoa colectiva*, Art. 187 Crim. Code -, for example) are better fit to address this reality.

Some authors further propose that, in order for the dissemination of false content to be included in the disinformation category, it should result or, in a less restrictive manner, be intended by the agent to result, upon dissemination, in some sort of gain (normally direct economic gain, although it can relate to marketing interests and publicity gains, among others)¹⁵. The less restrictive (and, as such, more encompassing) construction is to be adopted, in the context of this dissertation.

In this sense, the relevant definition of disinformation shall refer to the creation and/or dissemination of false, fabricated, adulterated or inaccurate public interest-content, knowingly recognised or recognisable as such by the agent, that creates and/or shares such content with

¹⁴ LINDEN (2015), pp. 171–173

¹⁵ *Ibid.* footnote 7

the intent to mislead or deceive the target audience, to obtain personal or institutional gain¹⁶ and to cause, or accepting the potential to cause (depending on the matter at stake), public harm (all concepts, as better defined above).

It is the realm of disinformation that Fake News come into play: as a vehicle through which such disinformation is operated, the false content in itself. Some have argued that the term Fake News is not sufficiently precise to fully and accurately describe the disinformation phenomenon¹⁷. Others have defended that the term is too negatively charged, too polemic, too far gone in the public eye in order to be used institutionally¹⁸. However, for the purpose of this dissertation, the term will be reclaimed as being of valid use within the disinformation phenomenon. Even though, strictly speaking, Fake News would constitute disinformation's object (*i.e.*, the false content giving rise to it) and, as such, a subject within this phenomenon, for simplification purposes and throughout this dissertation, the expressions (disinformation and Fake News) will be used interchangeably to refer to the same reality above defined in finer detail as disinformation.

VIII. It is important to clarify and distinguish these concepts, coming back to them, as necessary, to define and differentiate between the conducts that should and should not warrant legal reaction (the use of click-bait headlines, for instance, and the use of decontextualized information or misleading captions, illustrations, *etc.* might not necessarily fulfil the criteria to be considered Fake News) as well as to clearly set the boundaries on what is or not to be admissible within the conducts themselves (satire, parody and other forms of irony and humour, even if resorting to exaggeration and distortion of information, for example, should be accounted for), so as not to risk jeopardising other legally protected interests (such as, more relevantly and anticipating what will subsequently be discussed, freedom of expression).

2.2. Implications and Challenges

I. Fake News have spread their reach across many sectors of society. They pose challenges to life as we know it that go far beyond what we are even able to perceive as of now.

¹⁶ Sometimes the intent to mislead and to obtain gain are presented as alternative criteria; however, so as to restrict the concept, in a balancing act against the moments where it was previously widened, these criteria were designed as cumulative.

¹⁷ GELFERT (2018), pp. 84-117; QUANDT, FRISCHLICH, BOBERG, SCHATTO-ECKRODT (2019), pp. 1-5; WARDLE & DERAKHSHAN (2017), pp. 20-25

¹⁸ *Ibid.*

The mere tip of the iceberg that is exposed allows us to understand the graveness of the situation, but be it because we are simply unaware of the colossal amount of false information we are, even if subliminally, exposed to every day, be it because we are not yet able to grasp the full sweeping effect disinformation will have in the long run, there is no telling what the implications that lurk below the surface are.

Nevertheless, when speaking about Fake News some immediate and more evident challenges are repeated across various sources.

II. In the first place, it is easy to establish the relationship between disinformation and digital violence. Certain concerning behaviour patterns that have become commonplace among the online sphere, such as cyber -bullying, -stalking and -harassment, evidentiary of controlling and coercive tendencies, are propitiated with the resort to Fake News¹⁹.

The type of incendiary and divisive content typically associated to and object of disinformation campaigns, often correlated with sensitive matters such as race, ethnicity, nationality, religion, sexuality, gender identity, social background and political inclinations, coupled with the manner through which such content is construed, in many instances with resort to hateful and offensive speech (intentionally devised to disturb and instigate violence and hostility towards certain groups of individuals, feeding polarisation and emphasising divisions through the stimulus of alternative news ecosystems and the creation of kindred audiences progressively less inclined to tolerate dissenting opinions, thus eroding the foundational shared principles that unite societies), causes individuals' convictions, demeanours, attitudes and eventually conducts to be changed (more often than not, for the worse).

III. In turn, this worrisome ramification of disinformation bled into the downfall of people's trust and confidence in democratic institutions.

The free flow of information and the sense of community and shared experience, as well as free discourse and debate, have always been *conditio sine qua non* of a healthy democracy. Fake News go precisely for the throat of such pillars, imposing false narratives and seeding confusion, polarisation and divide: at the eyes of the public, information becomes unreliable, governments and parliaments lose credibility and, among others, Courts become untrustworthy.

As faith in institutions plummets, propaganda spreads and certain political agendas are furthered, feeding off of the manipulation of fears and ignorance and the stereotyping of certain groups of individuals, like the sword of Damocles, hanging over the rule of law's head.

¹⁹*Ibid.* footnote 5

IV. The subliminal conditioning of audiences' judgement, of course, flows into a well-known and documented use of disinformation: election and democratic processes' tampering.

The illegitimate and unjustified interference of foreign actors in domestic elections has happened again and again and a blatant example occurred during the 2016 US Presidential Elections, which will be further discussed below.

The intrusion in citizens' political rights does not end here, however; in some cases (and sometimes in conjunction with the role played by foreign actors), domestic actors are also at work.

Take the illustrative case of the 2018 Brazilian Presidential Elections. The use of direct communication with audiences, through personal social media platforms, to foster an artificial sense of mutual understanding, likeness and proximity, the mediatization and manipulation of content into conspiracy-riddled falsehoods, the creation of a "us and them" rhetoric, resorting to the opponent as a scapegoat for all things evil and wrong (many times personally and gratuitously attacking their character, rather than discussing ideas and adding to valuable and constructive debate) as well as the discrediting of legitimate (albeit inconvenient) news and academic sources, resulted in the creation of an extravagant political persona, not afraid to speak the "truth", in the eyes of many citizens who got their information through WhatsApp conversations and messages, forwarded from group to group, reaching the thousands in minutes²⁰. This political farce got Jair Bolsonaro all the way to the office of President of the Federative Republic of Brazil and the same tactics that were used to get him there, remained in use all throughout his presidency mandate.

The possibility to vote in an informed manner, free from interference, was likewise hampered in the 2016 UK's Brexit Referendum. Emotional and value-driven citizens made their choice to leave the European Union based on manipulative notions propagated by both sides of the (Leave vs. Remain) spectrum only made easier, once again, by a decline in trust in politicians, experts and "*traditional media gatekeepers*"²¹, coupled with the fulminant use of social media as a source of information, casting the shadow of doubt over democratic institutions' ability to genuinely and accurately reflect the free choices made by citizens (rather than the mass mirroring and mimicking of the predetermined choices made and surreptitiously imposed by a select few). To such an extent was disinformation rampant and prominent in this decision-making process, that the day after the Referendum's results were announced, "*What*

²⁰ VISCARDI (2020), PP. 1135-1154

²¹ MARSHALL & DRIESCHOVA (2017), PP. 89-105

is the EU?" was ranked by Google's search engine as the second most popular question relating to the European Union posed by its users in the UK.

V. Sometimes, however, rather than a pacific power-transition, the use of disinformation can result in far deadlier immediate results. In the context of the Russian invasion of Ukrainian territory, disinformation is currently being used as a war weapon²².

False TikTok videos, reproducing events that occurred in the context of previous, unrelated conflicts are being passed as current and, on the way, amassing millions of views from the platform's particularly young and impressionable users, gathering and propagating, among them, disinformation and a lack of perception regarding the real scale and consequence of the current conflict, choosing dramatic effect over information and portraying unrealistic situations in exchange for views and clicks, to catch up with and profit from the platform's interaction-oriented business model.

A generalised attempt to pass old information as new, through decontextualization and blatant lies, or, in the reverse side of the coin, the effort to dismiss current atrocities as water under the bridge, shed light on the creation of a digital divide intended to obstruct the circulation and identification of the truth, leaving behind a trail of deception, doubt and counterinformation which may prove very challenging to detangle.

Whether or not successful, manipulations such as the ones occurring swing public opinion and influence people's perceptions, attitudes and susceptibility or likelihood to act, further deflating or inflating morale, which, in a war scenario, may have significant impacts in the long-run outcome of the situation.

VI. Online disinformation has, as such, a necessary impact on human rights, protected under international instruments as well as under Portuguese constitutional law itself.

As alluded to, Fake News hinder freedom of expression. This right, enshrined in Art. 19 of both the UDHR and the ICCPR (as well as Art. 37 CRP) branches out into freedom of speech and of opinion and is closely linked to, at a deeper individual level, freedom of thought, in this case, more relevantly, understood as the right to freely entertain, form and hold, as well as to subsequently (and publicly) externalise, opinions, without undue external interference and pressure.

Discourse should, of course, be free so as to facilitate the process of "*seek[ing], receiv[ing] and impart[ing] information and ideas*"²³ across frontiers and mediums; and, as a consequence of this free flow of information and ideas (which admittedly do not have to be

²² <https://www.bbc.com/news/60867414>, last consulted in 23.07.2022

²³ Art. 19 UDHR

“limited to ‘correct’ statements, (...) [since] the right [to freedom of expression] also protects (...) ideas that may shock, offend and disturb”²⁴), it is only natural that each agent procures to further their ideals, in an attempt to influence people who will, in turn and necessarily, form their own opinions and convictions based on their environment and these external influences.

What freedom of expression, and the correlated rights wish to ensure, among others, is that each person is allowed to fully and purposefully develop their personality. For such to be possible, the line must be drawn between admissible persuasion and illegitimate manipulation, operated with resort to objectionable methods such as disinformation, which intrudes and constrains the intimate sphere of individuals' identities through misrepresentations, particularly considering that the right to freedom of expression does carry with it “*special duties and responsibilities*”²⁵, which must be pondered and may result in certain restrictions upon the performance of a proportionality assessment, as will ensue in this dissertation.

Subsequently, and as alluded to, the rights provided for in Art. 21 UDHR and 25 ICCPR (as well as Art. 48 and following of the CRP) are also at high risk when considering the influence of Fake News, since the possibility to take part in public affairs and in genuine elections “*guaranteeing the free expression of the will of the electors*”²⁶ implies the sound operation of a quality democracy which, in itself, is diminished and incompatible with the exploitation of and distortion caused by disinformation.

Linked to all that was previously mentioned, particularly regarding digital violence, the impact the digital age, and the generalised disinformation phenomenon that ensued, had and has, daily, on the right to privacy - alongside the right to honour and reputation -, protected under Art. 12 UDHR and 17 ICCPR (as well as Art. 26 CRP), is immeasurable.

A whole new array of threats and vulnerabilities were unveiled, spanning over the occurrence of gratuitous yet targeted aggressions in the online environment that may lead to “*violence, discrimination or hostility against identifiable groups in society*”²⁷ (eventually safeguarded by already existing and well known statutory types of crimes, such as defamation - *difamação*, Art. 180 Crim. Code - and persecution - *perseguição*, Art. 154-A Crim. Code -), to the heightened susceptibility to cybersecurity incidents and to the collection, processing and sharing of personal data intended to micro-target certain types of (disinformation) content, against the very principles set in Art. 5 of EU’s General Data Protection Regulation (such as

²⁴ <https://www.osce.org/files/f/documents/6/8/302796.pdf>, last consulted in 28.06.2022

²⁵ Art. 19(3) ICCPR

²⁶ Art. 25 ICCPR

²⁷ <https://www.ohchr.org/en/documents/thematic-reports/ahrc4831-right-privacy-digital-age-report-united-nations-high>, last consulted in 28.06.2022

“lawfulness, fairness and transparency” of processing, *“purpose limitation”* and *“data minimisation”*).

Likewise health (protected under Art. 12 ICESCR and Art. 64 CRP) and life (Art. 3 UDHR and 6 ICCPR as well as Art. 24 CRP) itself, arguably the most basic and fundamental of all human rights, could also be susceptible to peril owing to the disinformation pandemic.

As will be seen, Fake News regarding illnesses and ailments have astounding spreading rates, propitiating disease prevention behaviours and medical treatment decisions that may actually prove harmful and detrimental to health.

On the other hand, and on a more dire note, the right to life is also possibly endangered, as previously implied, when disinformation reaches the war context, potentially exacerbating the number of lives lost or, at the very least, unduly placed in harm's way.

All these rights are foundational cornerstones of a free and democratic society, based on the rule of law. As such, their hindrance by any means, including through disinformation, should be combated in all fronts.

Of course this fight may also result in the handicap of other essential principles and, as such, must be balanced against all relevant interests, as will be further discussed below.

VII. Not all these challenges, such as online violence, would be directly addressed through the criminalization of Fake News as previously defined, for the notion set only encompasses false information with a particular public relevance.

Notwithstanding, this criminalization might prove useful in filling certain existing gaps in the current legal order, leaving the rest of the work, where possible and adequately applicable, to pre-existing statutory types of crimes. Of course, to ascertain whether criminalization is the correct path to take, many interests should be previously pondered.

2.2.1. The 2016 US Presidential Elections example

I. A well-documented case-study on the use of disinformation and its consequences within the electoral context concerns the 2016 US Presidential elections, which pitted Donald Trump and Hillary Clinton against each other, resulting in the outcome we have all come to know.

Given the characteristics and possible applications of Fake News, it is only natural (even though regrettable) that they would emerge in the political context, and this has been so, in one way or another, ever since ancient times²⁸.

The dynamics and influence of disinformation in the 2016 elections in particular remain, to a great extent, unsettled²⁹, however, given the controversy and debate surrounding the issue and the unexpected turn of events it set in motion, and considering this is a paramount, extensively researched event in the realm of Fake News, the usefulness of analysing certain examples of false content circulated at the time, and testing them out against the definition of disinformation set for the purpose of this dissertation, becomes clear.

II. The false or misleading content created and shared in connection with this electoral process in specific seems to be endless and, after all these years, it is still possible to find unheard-of stories that circulated the web in the months leading up to the November 2016 election. Some of the most famous (or rather infamous) headlines, however, will forever be committed to memory³⁰:

“Pope Francis shocks world, endorses Donald Trump for president”. While the article, originally published by “WTOE 5 News” (a website that has since been deactivated) is no longer available, its content is rather self-explanatory, considering its heading. In short, it was claimed that Pope Francis had taken a stance regarding the US elections and decided to endorse Donald Trump as the better suited candidate for the office of president. Needless to say, this never occurred. In fact, during a press conference held sometime after the news first broke, the Pope clarified that, as a rule, he never expressed his opinion regarding electoral campaigns and that there were obstacles to be surpassed by both candidates, further stating, in a subsequent interview, that Fake News were a sickness³¹.

“FBI agent suspected in Hillary email leaks found dead in apartment murder-suicide”. This article, posted by “The Denver Guardian” mere days before the election, is, likewise, no longer accessible online. It pertained, however, to the alleged suicide of an FBI agent responsible for the investigation (and leak) of Hillary Clinton's private server emails, from her time as a Secretary of State. The news, besides being subsequently debunked as false, originated from a website that, while claiming to be *“Denver’s oldest news source”*, never actually existed

²⁸ CARDOSO, BALDI, PAIS, PAISANA, QUINTANILHA, COURACEIRO (2018), PP. 15-19; HANLEY & MUNORIYARWA (2021), PP. 157-172; MATTHEWS & POSETTI (2016), PP. 2-15

²⁹ <https://www.npr.org/2018/04/11/601323233/6-facts-we-know-about-fake-news-in-the-2016-election?t=1661431826842>, last consulted in 23.07.2022

³⁰ https://www.cnn.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html?_source=facebook, last consulted in 23.07.2022

³¹ *Ibid.*

in a legitimate manner, going as far as including in its contact address the address of an unoccupied parking lot³².

“#Pizzagate”. Perhaps one of the most bizarre (and that is saying a lot) stories circulated at the time of the election had to do with the conspiracy created around some emails released from Hillary Clinton’s campaign team where the term “pizza”, mentioned in the context of the arrangement of social gatherings, was interpreted as being a code related to a child abuse, sexual slavery and human trafficking scheme, motivating several articles on the matter. Astonishing as this may sound, it actually resulted in the armed attack of a Washington *pizzeria*³³.

All in all, are these examples of disinformation, according to the criteria established in this dissertation?

III. Beforehand, it might prove beneficial to explore the consequences and other relevant matters - such as origin - related to these and other examples of false content surrounding the 2016 elections.

While there is no denying that the election process *stricto sensu* was legitimate, in the sense that the American public lawfully voted and elected their preferred candidate, as was their prerogative, one cannot help but wonder what the true extent of the undue influence exerted was, especially when it came to forming in the public the conviction of who such favourite candidate actually was.

Just over 25% of “*voting-age adults*” visited websites with false-content-based stories in the lead up to the election³⁴; among these stories it cannot be denied that the most prominent leaned in support of Donald Trump, to the detriment of Hillary Clinton³⁵.

Following the results of the 2016 elections, and as the role played by false content became clearer, a study conducted by Ohio State University professors³⁶ set out to understand the influence such content may have had on voters who changed their voting orientation from Democrat (having voted for Barack Obama in 2012 and, as such, predictably going to vote for Hillary Clinton in the 2016 election) to Republican (ending up voting for Donald Trump in 2016). They found there to be a very strong link between belief in certain false stories (such as the Pope endorsement one) and the switch between voting tendencies.

³² *Ibid.*

³³ <https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html>, last consulted in 23.07.2022

³⁴ GUESS, NYHAN, REIFLER (2018), PP. 1-33

³⁵ <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>, last consulted in 23.07.2022

³⁶ <https://theconversation.com/trump-may-owe-his-2016-victory-to-fake-news-new-study-suggests-91538>, last consulted in 28.06.2022

Even though this is still a highly controversial conclusion, faced with these facts, some authors³⁷ have advanced that the election of Donald Trump would have been rather unlikely, were it not for the influence of false-content-based stories.

To add another level of complexity to the matter, however, it is important to consider that some (not to say most) of the actors behind the creation of some of these stories were not mere conspiracy theorists or innocuous John Does, looking for some laughs.

In fact, it has been established that, particularly with regard to the 2016 US presidential election, the influence of foreign states and non-state actors was rampant, a true personification of the matryoshka doll imagery, where the real puppet master was hidden away behind troll armies, Kremlinbots and hackers with harmless nicknames that did not denounce the destructive potential they would actually hold. Russia's Internet Research Agency (IRA) alone *“purchased around 3.400 advertisements on Facebook and Instagram during the US 2016 election campaign and, according to a 2019 Report, ‘Russian-linked accounts reached 126 million people on Facebook, at least 20 million users on Instagram, 1.4 million users on Twitter, and uploaded over 1.000 videos to YouTube’”*^{38 39}.

Certainly not all of those who were exposed to the false stories interacted with, consciously perceived or were even affected by them; however, even if a fraction of the exposed public ended up *“ultimately influenced by them, the close election race could have resulted in an entirely different presidential outcome”*⁴⁰.

All this is evidentiary of structural and institutional lacks that left US citizens' human (and constitutional) rights, as better described before, unprotected.

IV. Returning to the operative definition of disinformation set for the purpose of this dissertation the key elements to account for are: (i) the creation and/or dissemination of false, fabricated, adulterated or inaccurate – verified, when considering the examples provided where the subject matter of the news could be easily debunked by fact-checking - (ii) public interest - verified, when considering the above mentioned news centred around candidates for public office and an electoral process - content, (iii) knowingly recognised or recognisable as such by the agent - this would necessarily depend on a case-by-case analysis, but it is not unreasonable to assume that the stories *sub judice* were, at the very least, recognisable as false by most of the actors disseminating them, according to the average diligent man standard -, (iv) that creates

³⁷ By way of example: <https://www.theguardian.com/commentisfree/2016/nov/14/fake-news-donald-trump-election-alt-right-social-media-tech-companies>, last consulted in 28.06.2022

³⁸ MUELLER (2019)

³⁹ COLOMINA, SÁNCHEZ & YOUNGS (2021), p. 15

⁴⁰ *Ibid.* footnote 36

and/or shares such content with the intent to mislead, deceit or sway the target audience - in most of the above mentioned cases, this intent could be identified -, (v) to obtain personal or institutional gain - once again, and particularly when considering the geopolitical interests behind the spread of some of the provided examples, this criterion would not be difficult to fulfil - and (vi) to cause, or accepting the potential to cause (depending on the matter at stake), public harm - whether the election of one candidate over the other, in the democratic process at stake, could be construed as causing public harm or not, the mere unrest and divide intentionally created by the stories circulated could suffice to fulfil this criterion -.

As such, in most of the cases under analysis, it could be argued that the set disinformation concept applies and, as such, that the according reaction should ensue.

2.2.2. The 2020 Covid-19 Global Pandemic example

I. By now we are all surely through with hearing about Covid-19, its ramifications, its causes, its symptoms, its treatment. However, there was a time, not so long ago, where we were all thirsty for information and knowledge on the topic. Faced with an unprecedented (at least in recent times) pandemic, we were all craving guidance on what to do and what to expect.

This was, of course, breeding ground for false content to proliferate, almost freely: “[a] poll by Ofcom in the United Kingdom found that almost half (46%) of the United Kingdom population reported exposure to Fake News about the coronavirus (...). In particular, amongst those exposed, nearly two-thirds (66%) reported seeing it on a daily basis, which is problematic as repeated exposure is known to increase belief in Fake News (...). Moreover, a recent analysis of the most viewed coronavirus YouTube videos found that over 25% of the top videos about the virus contained misleading information, reaching over 62 million views worldwide”⁴¹.

We shall briefly explore this occurrence, attempting, once again, to test out our definition of disinformation against real life examples to confirm its viability and applicability.

II. Early on during the pandemic stories about home remedies that could prevent infection started to circulate, such as gargling with salted or lemon-infused water; from there, it took only a leap to graduate from relatively innocuous (albeit pointless) household items to the ingestion or injection of bleach⁴², culminating in the regrettable endorsement of the study

⁴¹ LINDEN (2020), PP. 644-648

⁴² <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters>, last consulted in 31.08.2022

of this practice by the very own (then) president of the US in the presidential briefing we have all come to know.

Bypassing the issue of treatment and taking a step back to the source of the problem, we all remember the conspiracy theories that spread from the get-go regarding the origin of the virus being traceable back to a lab in Wuhan⁴³.

And still yet in the realm of conspiracy theories one could never forget the rumour that 5G technology was at the root and aggravating the symptoms of Covid-19⁴⁴.

Could all these constitute examples of disinformation as previously defined?

III. Before concluding, we shall look into the possible, and in some cases deadly⁴⁵, consequences of this phenomenon.

The circulation of this information adversely impacted the efficiency of institutional attempts to contain the spread and minimise the consequences of the disease, by increasing the bias against expert opinions, decreasing compliance with public guidelines⁴⁶ and distorting people's risk perception, which, in turn, has been linked to the individual enactment (or lack thereof) of precautionary Covid-safety measures⁴⁷ and to the rates of vaccination aversion, impacting the potential for herd immunity.

In short, anything from downplaying the effects of the virus - as proven by the absence of social distancing detected through the geo-location of over 60 million phones in government supportive areas, after Brazil's President made light of the situation⁴⁸ -, to shedding doubt on its manner of propagation, passing through, as seen, speculating about its treatment methods and conspiring regarding its origin clearly is capable of causing negative and grievous impacts on public health.

On the other hand, false 5G-related content has also been associated with mob attacks, acts of vandalism and violent intentions in general⁴⁹, culminating in the destruction of about 50 phone masts in the UK alone.

IV. The dissemination of the information exemplified in II., insofar as such information is false or, at the very least, inaccurate (in the sense that it does not conform to widespread and

⁴³ <https://www.science.org/content/article/scientists-strongly-condemn-rumors-and-conspiracy-theories-about-origin-coronavirus>, last consulted in 19.02.2020

⁴⁴ <https://www.bbc.co.uk/news/technology-52370616>, last consulted in 31.08.2022

⁴⁵ <https://www.bbc.com/news/world-53755067>, last consulted in 28.06.2022

⁴⁶ FREEMAN, WAITE, ROSEBROCK, PETIT, CAUSIER, EAST, JENNER, TEALE, CARR, MULHALL, BOLD, LAMBE (2022), PP. 251-263

⁴⁷ DRYHURST, SCHNEIDER, KERR, FREEMAN, RECCHIA, BLES, SPIEGELHALTER, LINDEN (2020), PP. 994-1006

⁴⁸ AJZENMAN, CAVALCANTI, DA MATA (2020), PP. 2-14

⁴⁹ JOLLEY & PATERSON (2020), PP. 628-640

commonly accepted standard), and considering its “public interest” subject matter (*i.e.*, health), fulfils criteria (i) and (ii) of the definition of disinformation set out above.

The intent-related elements of the definition, considering their “agent-centric” nature, would necessarily depend on a case-by-case assessment. Nevertheless: whether the content was “recognised as such” (*i.e.*, false or inaccurate) by the conveyer varies, however, in most situations it results clear that it is, at least, “recognisable as such” (according to the *bonus pater familias* standard, adapted based on the agent and the content itself), thus fulfilling criterion (iii); it is likewise relatively easy to identify, through the dissemination of most of the content in question, the intent to, if not mislead or deceit, at least sway (*i.e.*, strongly influence and control) audiences, resulting in criterion (iv) being verified; the same could be said regarding personal gain and criterion (v), for at least regarding exposure and popularity there would presumably be some gain to be had by the disseminating agent.

Finally, and even if no actual harm were caused (which was not likely the case regarding the examples provided), in view of the issues at hand (life and public health and safety), it would suffice that the dissemination of the content in question could, in potence, cause public harm, which is evidently the case, thus fulfilling criterion (vi) and resulting in the high probability of most of the content circulated in the context of the above-provided examples being classified as disinformation and treated accordingly.

2.3. Potentiating factors

I. Fake News are not a challenge exclusive to our times, as seen; however they certainly prove more challenging in our times than ever before.

This is due to many factors, the first of which being the nature of the content we are dealing with in itself. Fake News, at least for the relevant purposes of this dissertation, arise in the context of particularly sensitive and relevant public interest matters and are usually construed in a sordid and suggestive manner, that intrinsically incites audiences to further interact with them.

II. On another note, the way we consume information nowadays has also proven to be a relevant factor: a significant share of society, particularly when considering the younger (and most impressionable) age groups, gets their daily fix of information not from the written press or even from radio or the television, but rather from the internet and, some would say concerningly, from social media. This entails that each day, a high flow of information makes its way to and from devices connected all over the world: some of these devices may be operated

by reputable news agencies, others, by internet trolls and bots, who have become frighteningly efficient in disguising the information they convey as legitimate.

Whereas trolls are real online users (seldom reliably self-identified, rather the result of the creation of alternative profiles and aliases) who interact with others via deliberately provocative and inflammatory posts and comments, with the intent to insult, disturb, create divide and, many times, spread disinformation within the online ecosystem, bots are pieces of software specifically designed to perform routine and repetitive online operations, both good - such as provide online customer support, for example, regarding simple user queries - and bad - such as copiously send out certain types of content, for instance, thus propitiating the spread of disinformation -, in an automatic and fast manner, with little to no human intervention beyond the programming and fine tuning stage.

Even though trolls can also be deployed by the agents of disinformation to spread Fake News (lifting the veil on yet another layer of complexity surrounding this topic, which is not to be addressed in such a limited and focused dissertation: that of authorship - *autoria* - and complicity - *cumplicidade* - regarding any crime that could be foreseen in the context of Fake News), they are somewhat limited (in their scope and potential) by their human nature; the same is not to be said regarding bots, which, due to the fact that they are, by design, automated and, sometimes and with resort to Artificial Intelligence, self-correcting and improving, are capable of sweepingly and swiftly spreading disinformation, constituting prime weapons of mass informational destruction.

News, good and bad, legitimate or fake, have the potential to circle the world in minutes, cascading from person to person and finding little to no resistance in the way. This is potentiated by the general openness and anonymity of social media, where everything goes and truth, accuracy and accountability seem to have “left the chat”.

III. The reverse side of the coin is, in itself, another challenge: while the circulation and dissemination of information and content is at an all-time high, trust in the news ecosystem is at an all-time low. As such, the way people interpret and react to “real”, legitimate news has been affected and the ability to sort the wheat from the chaff has been compromised.

In fact, False News were found, by a 2018 MIT study, to have a 70% higher likelihood of being shared, via the social media platform Twitter, comparatively to the truth⁵⁰.

This concerning statistic is propitiated by the fact that Fake News (or simple digital) literacy is neither stimulated nor prioritised by the relevant actors, *i.e.* governments as well as

⁵⁰ VOSOUGHI, ROY, ARAL (2018), PP. 1146-1151

online platforms, in particular, social media platforms. Audiences which are *a priori* vulnerable are not encouraged or taught how to fact-check, cross-reference information, select trustworthy sources or overall critically assess the content they access, which necessarily correlates with the wildfire spread of Fake News.

IV. Furthermore, the fact that reality is becoming less and less stable and increasingly manipulable is also a relevant factor.

Fake News are spread through methods that go beyond the more obvious and intuitive devising and spreading of false written or pictorial content. Nowadays, the dissemination of un-curated and inaccurate user-generated content through hyper-realistic digital manipulations of audio and video, made possible with resort to sophisticated yet widespread software, is also common. Deepfakes are, in a nutshell, just that: audio and video content which is partially or wholly synthesised with resort to Artificial Intelligence and Machine Learning.

They have been characterised as Fake News “on steroids”, exacerbating the already worrisome age of disinformation with the possibility of putting words that were never spoken into anyone’s mouth and placing those same people in situations that never occurred. This label does not seem too out of place considering the high (and ever increasing) popularity of video (the usually preferred medium of Deepfakes) and its generalised perception as a reliable source of accurate information (it is not an easy task to convince audiences that seeing is no longer necessarily believing).

There is undoubtedly a lot of power to be had from manipulating video and the prospect of a completely fabricated video still posing as authentic is not necessarily encouraging in the fight against disinformation.

V. Adding upon the potential to be manipulated, there is the real danger that reality and truth (or a resemblance thereof) will become gradually more personalised.

The confirmation bias phenomenon entails that people tend to believe and accept with greater ease anything that would validate their previous assumptions and beliefs, be them fact or fiction (particularly when these two realities become indiscernible). This leads to biased subjective “content bubbles” and “echo chambers”, outside of which individuals resist trusting, resulting in increasing societal fragmentation⁵¹, generalised scepticism of news and some previously well established and regarded institutions.

⁵¹ KALPOKAS (2021), PP. 2-9

A further difficulty that arises in this context is related to the “continued influence effect” of disinformation, which entails that people may maintain their trust and reliance on false content even after it has been exposed and proven as such⁵².

VI. To add insult to injury, since accountability in the online world is virtually non-existent and mostly non-consequential, the sense of impunity makes it so that it is fair game to disseminate any type of information or content, with no regard to how it is going to be perceived and, many times, even with the unmasked intent to persuade “*consumers to accept biased or false beliefs for political or financial gain*”⁵³.

On the other side, also regarding the dilution of accountability, but not from the agent’s perspective, there is the so-called liar’s dividend to be wary of. There is the risk that the guilty will be provided with plausible deniability, exploiting the newfound scepticism regarding news to get away with everything, passing true content as fake and in this way avoiding accountability. This is already happening: even former US president, Donald Trump, attempted to dismiss as Fake News Access Hollywood’s 2016 recording where he was heard making lewd comments about women.

VII. Though countless more factors could be recalled, these should already prove quite elucidative of the direness of the situation and should be enough to give a sense of the underlying ramifications of Fake News, a good segue to what is to come when we explore what steps could be taken to counter some of the more pressing concerns that are identified.

⁵² ECKER, LEWANDOWSKY & TANG (2010), PP. 1087-1100

⁵³ SHU, WANG, LEE & LIU (2020), PP. 1-17

3. Legal Reaction

3.1. Current Panorama

No legal order in the world has, as of yet, built a robust legal infrastructure to address disinformation. Some attempts to provide legal advancements on the matter, however, have been made throughout the Globe⁵⁴. Regretfully and not underestimating its relevance, a comparative review of legislation thus far adopted will not be conducted. Nevertheless, a quick look around two particularly useful regulatory experiences - at the EU and Portuguese national level - will briefly ensue, as examples of different approaches that indicate legislator and regulator's concern in addressing the issue.

3.1.1. EU level: the European “Action Plan against Disinformation”

I. The institutionalised identification of disinformation as a serious threat and the corresponding recognition that it warrants a consolidated reaction and response at the EU level dates back, if not earlier, to March 2015, when “*the European Council invited the EU’s High Representative for Foreign Affairs and Security Policy to develop an action plan on strategic communication, in cooperation with Member States and EU Institutions, to address Russia’s on-going disinformation campaigns*”⁵⁵.

What ensued was the creation, within the European External Action Service - EU’s diplomatic service -, of the “East StratCom Task Force”, in 2015, and the “Western Balkans Task Force” and “Task Force South”, in 2017, all aimed at addressing “EU-foreign” disinformation and designing positive and effective communication strategies⁵⁶.

This concern and the activity of these work groups, as well as others specifically assembled by the European Commission to provide actionable suggestions on how to tackle disinformation, resulted in the 2018 European Commission's Communication “Tackling online disinformation: a European Approach” (COM(2018) 236), where the challenges of disinformation (mainly those related to democracies and democratic processes) were identified

⁵⁴ See, by way of example, MESQUITA, CARVALHO, PEREIRA, PUGA, AZEVEDO, MOUTA & SOARES (2019), pp. 19-30; DURACH, BARGAOANU & NASTASIU (2020), pp. 5-20; RENDA (2018), pp. 18-24; CARSON & FALLON (2021), pp. 2-45; TORONTO (2018), pp. 167-206

⁵⁵ https://www.eca.europa.eu/lists/ecadocuments/ap20_04/ap_disinformation_en.pdf, last consulted in 23.07.2022

⁵⁶ https://www.eeas.europa.eu/eeas/questions-and-answers-about-east-stratcom-task-force_en#11232, last consulted in 23.07.2022

and their possible antidotes were presented, in the manner of objectives to be pursued by public and private actors alike. In short, the Communication identified as guiding principles the promotion of: transparency, trustworthiness and accountability in the online ecosystem; resilience of election processes; media literacy; quality journalism; and strategic communication⁵⁷.

The Communication was followed, likewise in 2018, by several initiatives, such as a free and fair European Elections Package (updated, in 2021, to include several “*measures to reinforce democracy and protect the integrity of elections*”⁵⁸, which include proposed limitations on targeted political advertising) and a Code of Practice on Disinformation (through which “*relevant players in the industry agreed (...) on self-regulatory standards to fight disinformation*”⁵⁹, likewise updated, in 2022, to further empower users, researchers and fact-checkers all the while discouraging purveyors of disinformation through demonetisation).

Among these initiatives emerged a Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, the European APAD (JOIN(2018) 36).

II. It was adopted in preparation of the 2019 European Parliament elections and in light of the “*more than 50 presidential, national and local/regional elections being held in Member States by 2020*”⁶⁰, as a response to the challenge made by the European Council, which called “*for measures to protect the Union’s democratic systems and combat disinformation, including in the context of the upcoming European elections*”⁶¹.

It clearly follows from this framework that the main implication of disinformation that concerned and led the EU to take action was its potential impact on democratic processes, based on evidence that internal actors within the Member States, as well as EU-foreign actors, be they state, state-sponsored or non-state actors, deploy Fake News in an attempt to “*influence societal debates, create divisions and interfere in democratic decision-making*”⁶², frequently within the context of hybrid warfare⁶³. This concern (albeit limited and not by any means all-encompassing of the many challenges brought about by Fake News, as better described above⁶⁴)

⁵⁷ <https://eur-lex.europa.eu/legal-content/en/txt/pdf/?uri=celex:52018dc0236&from=en>, last consulted in 23.07.2022

⁵⁸ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/democracy-and-electoral-rights_en, last consulted in 23.07.2022

⁵⁹ <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>, last consulted in 23.07.2022

⁶⁰ https://www.eeas.europa.eu/sites/default/files/action_plan_against_disinformation.pdf, last consulted in 23.07.2022

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016JC0018>, last consulted in 23.07.2022

⁶⁴ *Vide supra* 2.2.

is not unjustified, considering that sources⁶⁵ indicate that more than 30 countries are actively and identifiably making use of disinformation and other manipulation campaigns, with an array of motivations and consequences.

To tackle this issue, the APAD departed from the identification of four main fields of action aiming at: (i) the improvement of EU institutions' capabilities to "*detect, analyse and expose disinformation*"; (ii) the strengthening of "*coordinated and joint responses to disinformation*"; (iii) the mobilisation of the private sector to take on disinformation; (iv) the promotion of awareness as a means to improve societal resilience to disinformation campaigns.⁶⁶

The APAD advanced investment in digital data analysis tools and the inclusion of skilled specialists within EU institutions' and Member States' workforces, as well as the promotion of detailed assessments on the reach and real impact of Fake News, as privileged means to improve detection and analysis of disinformation.

Moving on to its second pillar of intervention, the APAD, understanding that the key to effectively tackling disinformation lays in "*political determination and unified action, mobilising all parts of governments (including counter-hybrid, cybersecurity, intelligence and strategic communication communities, data protection, electoral, law enforcement and media authorities)*"⁶⁷ created a Rapid Alert System to enable real-time communication regarding active disinformation campaigns and the exchange of information and insights on possible response strategies, facilitating a coordinated response among EU institutions and EU Member States.

The APAD also revealed the extent of EU's commitment to including private actors in the fight against disinformation, by stressing the importance of monitoring, accompanying and furthering the implementation of the Code of Practice on Disinformation (subscribed by very relevant actors such as Google, Facebook and Twitter), to ensure its swift and deep-seated compliance.

As a final step, the APAD established the objective of improving societal resilience to Fake News through the development of targeted campaigns to enable audiences to recognise and expose disinformation (fostering media literacy), while at the same time raising awareness to the importance of the issue and the scale of the negative effects it entails. The recognition

⁶⁵ <https://freedomhouse.org/report/freedom-net/freedom-net-2017>, last consulted in 23.07.2022

⁶⁶ *Ibid.* footnote 60

⁶⁷ *Ibid.*

and (financial) support of the work of independent media and quality journalism, as well as the creation of multi-disciplinary teams of fact checkers was also identified as a priority.

III. All in all, the APAD represents a non-binding call to action. Through this instrument the EU provides Member States (and other actors) with actionable suggestions on how to respond to disinformation, urging them “*to cooperate in carrying out the actions set out in this Action Plan*”⁶⁸.

Altogether, while at the EU level no legislation specifically and exclusively addressing disinformation, as an all-encompassing phenomenon with multifaceted challenges, has been enacted as of yet (the APAD did not intend or achieve this), it results clear that Fake News and EU regulation are not two ships passing in the night.

In fact, certain challenges of disinformation (those clearly prioritised at the EU level) have been surgically addressed within other correlated - albeit non-binding - instruments (such as the aforementioned Code of Conduct on Disinformation); while others have been accounted for, even if not directly, in proposals that are set to eventually result in the adoption of binding solutions, as is the case of the Digital Services Act and the updated Elections Package which includes proposals for legislative measures concerning electoral rights, the statute and funding of European political parties and transparency regarding targeted political advertising.

While Fake News, as a whole, have yet to be addressed in a comprehensive and enforceable manner, it is safe to say that several indicators (such as the European Commission's recommendation for the use of sanctions, where appropriate, to prevent the illicit use of personal data to manipulate the outcome of elections⁶⁹) point to the fact that tolerance to this reality is becoming ever slimmer at the EU level.

3.1.2. National level: Art. 6 of the “Portuguese Charter of Human Rights in the Digital Age”⁷⁰

I. The national legal panorama has not been blind to the Fake News phenomenon either. In this sense, and following up on the challenge addressed by the APAD to the Member States, Portugal enacted the PCHRDA.

This diploma has had a rocky path: since its seemingly uncontroversial approval, in April 2021, publication, in May 2021, and entry into force, in July 2021, issues concerning its

⁶⁸ *Ibid.*

⁶⁹ <https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex%3a52018dc0637>, last consulted in 23.07.2022

⁷⁰ See Annex

constitutionality have been raised across the board, which have led to its submission for constitutional review (on the initiative of both the President of the Republic and, roughly one year later, the Ombudsman) and to the presentation of several proposals and counter proposals aiming at its alteration and/or partial revocation. While the Constitutional Court never did pronounce itself on the issue, just this month the partial revocation of one of the most controversial Articles of the PCHRDA (coincidentally the Art. that is relevant for the matter presently at hand) was published.

II. Disregarding the ups and downs, this diploma proclaims, within the context of the digital environment, certain “human rights” such as the right: to freely access such environment; to freedom of expression and creation within this digital world; to freedom of assembly, demonstration and association online; to identity and privacy; to net neutrality; to the development of digital skills; to be forgotten; to cybersecurity; to protection against abusive geo-localization; to a digital class action; among others, related to Artificial Intelligence and digital platforms.

Alongside these, the right to protection against disinformation (Art. 6) is also foreseen, to the dismay of many.

III. This PCHRDA was severely scrutinised and criticised, both in general and considering the particular content of the ill-fated aforementioned Art. 6.

Transversely speaking, there is the fear that the precarious solutions laid out in the diploma will be rendered useless or promptly dismissed in light of the EU regulatory movement that is brewing.

Besides this, the rights foreseen in this Charter were understood by some as mere online transpositions of already existing offline rights, being, as such, devoid of useful content.

Furthermore, they are construed in a somewhat counterintuitive manner. While rights always imply effort and protection on the State's side, the provisions of the PCHRDA mainly focus on the duties impending on the State to ensure network infrastructures and to promote a healthy digital environment, rather than on the prerogative of the users to enjoy it.

Adding insult to injury, some have alleged that, given the highly complex subject-matters of the diploma and its own (confusing) nature - which serves both proclamatory and programmatic intents -, incompatible with proper (and essential) densification, in the instances where the provisions foreseen are not completely redundant, they are dangerously laconic and insufficient⁷¹.

⁷¹ https://direitosdigitais.pt/comunicacao/noticias/128-editorial-a-carta-portuguesa-de-direitos-humanos-na-era-digital#nota_1, last consulted in 23.07.2022

The overuse of overly simplified, vague and indeterminate concepts (such as “*demonstrably false or deceptive narrative*”, “*threat to democratic political processes and public policy-making processes*”, etc.), which require densification, is likewise a critique that is appointed both to the instrument and also, and with greater intensity, to Art. 6.

A “*law restricting rights, liberties and guarantees [as some understood to be the case of Art. 6, potentially in conflict with the freedom of expression and information foreseen in Art. 37 CRP when it defined disinformation and attributed to the Regulatory Authority for the Media the competence to hear and decide on complaints made against entities accused of engaging in disinformation] must have sufficient constitutional density, not resting on vague and indeterminate concepts nor referring the essence of the regime to acts that are not legislative in nature, thus respecting the parliamentary law reserve*”⁷². In sum, this is what Art. 6 is accused of: a disproportionate and excessive restriction on another fundamental right (that is not justified or demonstrably necessary, given the vagueness of the norm), in detriment of Art. 18 CRP; and a violation of the principle of parliamentary law reserve⁷³.

The underlying fear is that, in the attempt to broaden the catalogue of fundamental rights (as allowed by Art. 16 CRP), the right to freedom of expression, very dear to the Portuguese, in light of our recent history with dictatorship, will be limited⁷⁴ in a manner close to censorship. Even though this risk is not immediate, rather being based on a slippery slope, worst-case scenario extrapolation of what was indeed the word of Art. 6, there is an argument to be made here: “[t]he eternal story of all censorship is this: to protect people from what is bad for them to read, see or hear. It is for their own good. Even if they don't want it, they have the right to be protected”⁷⁵.

IV. Even though some of the criticism is justified and legitimate, most of it is based on an (understandable) overly cautious interpretation that reads a bit too much into Art. 6.

Firstly, this provision could be seen as, rather than a restriction on freedom of expression, a form of protection of the right to be informed (likewise foreseen in Art. 37 CRP), which “*could [in turn] lead to the rule not being considered unconstitutional, as long as it were*

⁷² <https://www.presidencia.pt/atualidade/toda-a-atualidade/2021/07/artigo-sexto-da-carta-portuguesa-dos-direitos-humanos-na-era-digital/>, last consulted in 23.07.2022

⁷³ *Ibid.*

⁷⁴ https://ionline.sapo.pt/artigo/773678/a-inconstitucionalidade-da-carta-portuguesa-de-direitos-humanos-na-era-digital?seccao=opinioao_i, last consulted in 23.07.2022

⁷⁵ <https://jornaleconomico.pt/noticias/direitos-da-era-digital-no-melhor-pano-cai-a-nodoa-744157>, last consulted in 23.07.2022

*interpreted in conformity with the Constitution, guaranteeing that no censure of any kind would ever result from it*⁷⁶.

Furthermore, the “(...) *damage* [this provision could cause] *would also be controlled: without legislation to develop the regime* [legislation that could actually represent an open door to the reintroduction of censorship and which would have to be well thought out and executed], *the options taken would be little more than empty words*”⁷⁷.

V. Nevertheless, the doubt shed upon the norm generated among the public opinion a great fear which fuelled (mainly unnecessary and unproductive) controversy that, in turn, shamefully deterred the important discussion regarding the underlying, essential issue (disinformation), barring us from moving forward and postponing to the future and to supranational sources any further intervention.

All this actually resulted in the revocation of most of Art. 6 PCHRDA; the essential (to allow for future developments) is still in force, though: a commitment from the Portuguese State to comply with and further EU’s APAD and the fight against disinformation.

3.2. (Un)Necessary Action?

3.2.1. Exploring possible existing solutions outside the legal sphere

I. At this point it becomes imperative to reflect, prior to any incursions in the legislative plane and in the spirit of “regulating less, but better”, on the necessity to solve the challenges posed by Fake News with resort to legislation and, in particular, with its corresponding criminalization.

In order to make this assessment, a useful starting point passes through the exploration of alternative solutions located outside the legal sphere, so as to ascertain whether they can be considered sufficient to fully and efficiently address the complexity of the issues brought about by Fake News and better alluded to above⁷⁸ or whether the stricter and more coercive hand of the law must be summoned in order to avoid what some authors have already coined as the “infocalypse”.

Faced with the deep damage Fake News have the potential to cause, it becomes evident that urgent thought, care, and action need to be put into place (be it through legislation and

⁷⁶ <https://portal.oa.pt/ordem/processo-legislativo/carta-portuguesa-de-direitos-humanos-na-era-digital/>, last consulted in 23.07.2022

⁷⁷ https://direitosdigitais.pt/comunicacao/noticias/128-editorial-a-carta-portuguesa-de-direitos-humanos-na-era-digital#nota_1, last consulted in 23.07.2022

⁷⁸ *Vide supra* 2.2.

criminalization, or not) so as to ensure a cohesive and combined effort across the various sectors of society, capable of providing for a durable fix to the problem or, at least, of strengthening and capacitating society to live healthily alongside it. This could and should be done drawing inspiration on all that has been said before.

II. As such, and almost as a sort of preventive medicine, the priority should be education as a manner to proactively immunise audiences against the information disorder⁷⁹.

Knowledge is power and promoting technology and digital media literacy both among the population, particularly among the most vulnerable and exposed sectors of society, and the policymakers, as those responsible for administering and monitoring the treatment and cure to this disorder, would be a necessary previous step to any other attempt to solve the problem.

This is easier said than done, of course, and under no false pretences, this should be seen as a long-term (expensive) investment solution both in terms of implementation and results/roll-out, but also, and on the flip side, in terms of effectiveness and permeation in audiences.

Nevertheless possible options (inspired by the above alluded to *inoculation theory*⁸⁰), in conjunction with more traditional teaching methods, are already being explored, like what is happening (with particular interest, considering the didactic and interactive nature of this experiment, in theory more equipped to appeal to the younger, particularly vulnerable audiences) with the “Bad News” game developed by Cambridge University that puts users into the shoes of Fake News creators, raising awareness to what are the indicators of such content⁸¹.

The fact remains that until we have a discerning public, capable of spotting Fake News, and knowledgeable regulators, skilful at creating realistic and practical policies and, where imperative, laws, all the other alternatives will inevitably prove insufficient.

III. A second step approach would be to fight fire with fire. This is to say that there are technological pseudo-solutions to be considered.

A first technological proposal could entail the use of Artificial Intelligence to detect, flag and remove Fake News. This is a particularly promising solution regarding a specific sub sector of Fake News: Deepfakes.

Machine Learning could be used to expose Deepfakes. Though detection is still in the probability spectrum, there are dead giveaways that could be considered when spotting a fake: discrepancy between expected and actual file size (Deepfakes contain less information, being, therefore “lighter” than the original video), abnormal blinking and eyelid movement patterns,

⁷⁹ GUESS, LERNER, LYONS, MONTGOMERY, NUHAN, REIFLER, SIRCAR (2020), PP. 15536-15545

⁸⁰ *Vide supra* 2.1.

⁸¹ LINDEN & ROOZENBEEK (2019), PP. 570-580

unmatching lip-voice synchronisation, unnatural looking teeth and skin, robotic movement and tone, and even irregular blood pulsation detected through colour variations in the temple, where several blood vessels are located ⁸².

The flagging and removal of fraudulent Deepfake (or, in general, any disinformation) content would also imply a special commitment from social media platforms, that would have to be, unlike what happens in the UA, for example, held accountable. Many platforms like Discord, Gfycat, and Pornhub have already completely banned Deepfake technology from their websites, while others like Twitter are making an effort through the labelling of synthetic media, thus raising awareness between its users to the dangers of engaging with and sharing such content; even Facebook, that was initially very resistant to deleting abusive Deepfakes, hosted a “Deepfake Detection Challenge”.

This proposition, nonetheless, is one that loses value in the long run; with the technological advancements that are already occurring, sooner rather than later it is predicted that this detection method will be rendered completely useless.

In this light, a second technological solution is proposed: a so-called digital provenance one. According to it, content should be authenticated even before it could spread. This would be made possible by preparing devices and hardware (cameras, smartphones, computers, *etc.*) to have the ability to digitally “stamp” audio, videos, photos and texts with an indelible watermark that would attest to their legitimacy; this would be unalterably encoded into a public blockchain where anyone could authenticate their content and use that authentication for later reference, to compare with suspected fakes or to attest to its authenticity.

Of course, this option too has its challenges: for it to work there would have to be agreement and coordinated action from all device producers, as well as technology to recognize this watermark and tools for (social) platforms to screen its existence before allowing for content use and upload. The creation of this infrastructure seems to be still a long way away.

None of these options are, as is evident, fool proof and certainly do not substitute the crucial role played by a healthy dose of common sense, that would allow people to decide when to trust and when to doubt.

IV. The final, third option lies in the realm of regulation and legality. There are things to be said and done regarding this possibility but those will be deferred to the proper moment, in the following section.

⁸² SPIVAK (2019), pp. 342-343

V. Despite the promise and merit of all the previously mentioned “solutions”, it becomes clear that there is no silver bullet for combating the downsides of Fake News and this will probably be a cat and mouse game where solutions and technological advancement employed less honourably will be at each other’s tails at all times, alternating when it comes to who takes the lead.

3.2.2. Exploring possible existing solutions within the Portuguese criminal jurisdiction

I. Abstracting from the possible application of solutions outside the legal sphere, and not detracting from their merit, it now becomes relevant to reflect back on the challenges identified as being posed by disinformation and whether or not these already find adequate responses among the Portuguese criminal jurisdiction.

So as to better redirect this research back to its main subject matter - *i.e.*, the assessment of the necessity and relevance of specifically criminalising Fake News in Portugal -, the brief analysis that will ensue shall focus exclusively on the Portuguese national jurisdiction and, within it, on the criminal jurisdiction and the statutory types of crime (departing from those foreseen in the Crim. Code) that may find applicability in light of that which is the suitable reaction to address disinformation: that is, a negative, repressive reaction, aiming at furthering the fight against and suppression of Fake News and their consequences, *via* the deterrence of their spread though the fostering of accountability of disseminating agents.

II. Firstly, it is useful to revisit the concepts of mis- and disinformation⁸³ so as to home in on the phenomenon actually and presently at stake.

It is easy to get lost in our common sense perception of what Fake News ought to be (this is, simply, false content and information). However, as this would entail too wide of a phenomenon, which would, in turn, include too many conducts and, consequently, impair the viability and effectiveness of a legal reaction, the concept set for the purposes of this dissertation zones in on a subset of false content. As such, the disinformation phenomenon pertains to, as previously mentioned, (i) the creation and/or dissemination of false, fabricated, adulterated or inaccurate (ii) *public interest* content, (iii) knowingly recognised or recognisable as such by the agent, (iv) that creates and/or shares such content with the intent to mislead, deceit or sway the target audience, (v) to obtain personal or institutional gain and (vi) to cause, or accepting the potential to cause (depending on the matter at stake), *public harm*.

⁸³ *Vide supra* 2.1.

It is also beneficial to recall the main implications and challenges of disinformation⁸⁴ that should be addressed by the statutory types of crime under review, in order to assess whether or not these should be considered adequate and sufficient to efficiently tackle the issue.

As such, the main concerns linked to (even if not necessarily fulfilling the concept of) disinformation, that should be pivotally accounted for, are: their impact on human rights such as life, health, freedom of expression, privacy, honour and reputation (linked to digital violence); and their contribution to the erosion of trust and confidence in democratic institutions, which, in turn, is correlated to grave geopolitical impacts arising out of election and democratic processes' tampering and the weaponization of information in warfare context.

III. As a starting point, it should be clarified that no statutory type of crime in Portugal specifically addresses Fake News *per se* (be them understood according to their commonplace definition or to the definition set for the purpose of this dissertation). All the same, no single statutory type of crime responds to all the aforementioned concerns.

Nevertheless, certain statutory types of crimes could be interpreted as directly or indirectly tackling some of the alluded to concerns, individually considered, even if they were not originally thought out for the disinformation context.

Taking into account the broader, mainstream definition of Fake News some statutory types of crime become immediately relevant.

Even though these are significant, which justifies their referencing in some sources⁸⁵, they mostly solve problems that do not fit within the set concept of disinformation, *i.e.*: problems originating in the context of private-to-private relationships, most times lacking the public interest and public harm aspects that are essential to disinformation as defined for the purposes of this dissertation, as well as problems that are absolutely independent and that emerge regardless of the existence or not of disinformation.

This is not to say, notwithstanding, that they lose any usefulness: on the contrary, they help deal with some of the more day-to-day consequences of Fake News *lato sensu*, which are, in many senses, connected to the issues surrounding disinformation, just at a “smaller” scale.

And just the same, as will be seen, it is possible, to a certain extent, to argue their extension beyond their usual realm of applicability and conclude that, through a current interpretation effort, they also apply to and help deal with various cases and instances of disinformation.

⁸⁴ *Vide supra* 2.2.

⁸⁵ By way of mere example, see KLEIN & WUELLER (2017), PP. 5-13

IV. These statutory types of crime are: defamation - *difamação*, Art. 180 Crim. Code⁸⁶; offence to organisation, service or legal person - *ofensa a organismo, serviço ou pessoa colectiva*, Art. 187 Crim. Code⁸⁷; invasion of privacy - *devassa da vida privada*, Art. 192 Crim. Code⁸⁸; discrimination and incitement to hatred and violence - *discriminação e incitamento ao ódio e à violência*, Art. 240 Crim. Code⁸⁹; spread of disease, tampering with analysis or prescription - *propagação de doença, alteração de análise ou de receituário*, Art. 283 Crim. Code⁹⁰; and voter fraud and corruption - *fraude e corrupção de eleitor*, Art. 341 Crim. Code⁹¹.

V. Defamation and offence to organisation, service or legal person, as crimes against, respectively, honour and good name (understood as reputation before the community, but also, and regarding defamation, as the inherent dignity of any individual), could be easily perpetrated by a piece of false information simply stating, for example, “A [person or company] misappropriated hundreds of thousands of euros in donations”. The possibility of such crimes being considered as apt to address (at least certain types of) disinformation is contingent on two situations.

Firstly, the piece of false information conveyed must be susceptible of constituting Fake News as defined, *i.e.*, besides fulfilling all the remaining relevant criteria - falsehood of the information and recognition of such by the agent, accompanied by the intent to mislead and obtain a gain -, the content should deal with matters of public interest (this would happen regarding the example provided were A, for instance, a politician or a governmental entity) and the intent to cause public harm must be identified in the perpetrator (this would be verified, for instance, if the disseminating agent were a member of the political opposition looking to create divide among electors).

Secondly, said Fake News must be the vehicle through which the good name of another is offended, otherwise these crimes will not be triggered, since they do not apply indiscriminately to all disinformation *per se*, but only to such disinformation that could simultaneously constitute an attack on the legal good they are intended to protect.

The possibility to pose scenarios where false information offensive to good name (and as such, susceptible of constituting the practice of the above mentioned crimes) may also be classified as Fake News, allows us to conclude that these statutory types of crime are indeed,

⁸⁶ See Annex

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

albeit limitedly and certainly not in an entirely satisfactory manner, able to respond to certain instances and challenges of disinformation, despite not having been thought out to address the issue.

VI. Invasion of privacy (which may occur in concurrence with other crimes referenced herein) is, in many instances, connected to and at the base of disinformation campaigns. Just take, once again, the Pizzagate conspiracy, where the leak of private, innocuous emails (in themselves accurate and true) was the source of and spiralled into a Fake News frenzy regarding human trafficking. While the invasion of privacy that could be invoked here⁹² is not necessarily related to or dependent on the disinformation aspect of the conduct, its claim could indirectly serve the purpose of attacking the related Fake News and result in their collapse.

Once again, this statutory type of crime was not created with the resolve to acknowledge and counter disinformation, but its use, in connection with Fake News specifically based on and that demonstrate the necessary existence of a prior and integral invasion of privacy - which must always exist, of course, so that this crime is summoned - (*e.g.*: where the content of private⁹³ emails is divulged as the starting point for the false allegations), may result in the deterrence of these specific instances of disinformation.

VII. Discrimination and incitement to hatred and violence may also occur *via* disinformation (*e.g.*: just take a news article that, based on false statistics and information, and fulfilling the relevant criteria to be considered Fake News for the purposes of this dissertation, provides “5 reasons why people from the religious community -x- are worthless and why you should steer clear of them”).

In this sense, the statutory type of crime addressing discrimination could also result applicable to cases of disinformation and, even if not “intentionally” and always dependant on the discriminatory/incendiary nature of the Fake News, end up addressing this subset of disinformation.

VIII. Finally, and departing from the case studies previously provided⁹⁴, at least two statutory types of crime might prove interesting: spread of disease, tampering with analysis or

⁹² With all the precautions inherent to the fact that we are talking about the privacy sphere of people with social notoriety, the compression of which always implies a less demanding weighing than would be done regarding "ordinary" people, in view of legitimate and relevant public interests. See ALBUQUERQUE (2021), pp. 818-822.

⁹³ Were the content of the correspondence not private, it would still be possible to apply the same reasoning presented in this section, only with recourse to a different statutory type of crime (that of violation of correspondence or telecommunications - *violação de correspondência ou de telecomunicações*, Art. 194 Crim. Code).

⁹⁴ *Vide supra* 2.2.1. and 2.2.2.

prescription, to address disinformation's challenges to health and voter fraud and corruption, to address Fake News' challenges to democracy.

Regarding spread of disease, the challenge inherent to the application of this statutory type of crime to the phenomenon at hand lies in understanding whether the dissemination of Fake News about Covid-19, for instance, could be construed as the spread of a "*contagious disease*" and, in turn, as the creation of a "*danger to the life (...) of others*".

Departing from the reasoning behind this provision, it should be said that, with this incrimination, the legislator intended to react "(...) *against the spread of contagious diseases, even when such spread is due to negligence*"⁹⁵. The agent (intentionally or carelessly) committing this crime may be "(...) *anyone, even if they are not the sick person*"⁹⁶, provided that the disease in question is grievous (which is, indisputably, the case of Covid-19) and adequate to result in the creation of a real danger to the life and health of others (note that the other, in this situation, while possibly being an individualised person, is understood as a "*representative of the community*" that is, in light of an "*ex ante evaluation*", being endangered⁹⁷).

Spread, in this context, "(...) *corresponds, in a sense, to the idea of dissemination*"⁹⁸, including phenomena ranging from the typical transmission of a disease from one person to another, to cases of biological warfare where food and water supplies are contaminated, for example. In addition to this, it so happens that the dissemination "(...) *can derive from an omission of duties (as a rule, medical duties, but it can also derive from (...) other general duties of care that are imposed in specific circumstances), which aim exactly at preventing such propagation*"⁹⁹. It derives from the preceding that the omission of duties of care when reporting on these kinds of situations, specially concerning public and political figures and particularly when considering the specific circumstances surrounding a global pandemic, could, as such, be seen as a manner of disseminating the disease. And even if this were not so, "(...) *in view of the wording of the statutory type, behaviours that could be regarded as eventually aiding dissemination [as is the case of Fake News on the subject] could also be considered as forms of (possibly parallel) authorship [of the crime under analysis]*"¹⁰⁰.

⁹⁵ GARCIA & RIO (2018), PP. 1247-1248

⁹⁶ ALBUQUERQUE (2021), PP. 1085-1087

⁹⁷ CUNHA (1999), PP. 1006-1016

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

All in all, despite its dubiousness, it would be shocking that a conduct which has the intent and the result of spreading a disease (as could be argued to be the case of disinformation on Covid-19), did not also fall under this statutory type of crime. In this sense, and based on the interpretation of this Art. advanced by the doctrine, it is possible to argue that the disseminating agents of Fake News regarding Covid-19 (and other diseases) could be punished under Art. 283 Crim. Code.

Moving on to our remaining case study, regarding election tampering, it becomes relevant to analyse the crime of voter fraud and corruption. This statutory type of crime intends to protect the freedom of decision of each voter and, concomitantly, the veracity of the electoral results and aims at preventing anyone from causing another to vote in a certain way, with resort to fraudulent misrepresentation.

Regarding this statutory type of crime, its potential applicability in the field of democracy-targeting Fake News is clearer. The manipulation operated by Fake News may, in all likelihood and as seen¹⁰¹, influence (even if subconsciously) and cause people to vote in a certain way; furthermore, this manipulation certainly resorts to fraudulent misrepresentation, understood as a “*form of acting upon one's volition, such as (...) deception (...)*”, whereby “*(...) the “mere” lie, a declaration by the agent not in line with reality (...), adequate to cause the mistake (...)*” is sufficient to fulfil the statutory type of crime¹⁰². As such, and despite the suppression of the direct reference to “false news” that existed in a previous version of the Art. (which was carried out, we believe, for the sake of mere simplicity, not intending to remove from its scope this type of conduct, which will always be included in the broader category of “fraudulent misrepresentation”), nothing seems to stand in the way of the conduct of the disseminating agent, regarding this type of disinformation, being subsumed to Art. 341 Crim. Code.

IX. Furthermore, the creation and spread of Fake News may also encourage certain conducts that could end up constituting in themselves the perpetration of other crimes that impair freedom of decision and action, such as, among (potentially more grievous¹⁰³) others, those of threat - *ameaça*, Art. 153 Crim. Code¹⁰⁴ -, e.g.: A, aiming at boosting the clout of his current-affairs blog and advertisers’ interest in the same, publishes an online news article where he states, without any basis and (internally) recognising the false character of the information,

¹⁰¹ *Vide supra* 2.2.1.

¹⁰² SEIÇAS (1999), pp. 303-307

¹⁰³ Such as homicide - *homicídio*, Art. 131 Crim. Code - or offence against physical integrity - *ofensa à integridade física simples/grave*, Art. 143 and 144 Crim. Code -.

¹⁰⁴ See Annex

that “crime rates among religious community -x- are 80% higher than average”, hinting that “something should be done about it”, in the hopes that this shocking type of content would move people to visit his blog more often (according to the set definition, this could be considered disinformation); B reads this article and, upon finding C, a member of this community, on the street, proclaims “You’re a dead man walking!”; constraint - *coação*, Art. 154 Crim. Code¹⁰⁵ -, *e.g.*: Based on the same news article, B, upon finding C about to enter his place of worship, for a religious ceremony, deters him from doing so by stating “If you go in, this will be your last day on earth!”; or even harassment - *perseguição*, Art. 154-A Crim. Code¹⁰⁶ -, *e.g.*: Based on the same news article, B begins following C and leaving menacing notes in his mailbox, leaving him terrified.

These crimes are, nevertheless and as can be understood, applicable to the “consequence” of the false information rather than to the false information itself doing much to deter potential correlated consequences of disinformation, but not necessarily to deter the underlying conduct in itself (the creation and spread of the original Fake News) and its direct consequences. In other words, while it could be tempting to see these crimes as potential dissuasive factors of Fake News (since they address some of their possible indirect consequences), and, as such, as solutions to the issue, from where we stand, they should not be considered to be effective ones. In fact, they will not likely discourage the agents creating and spreading disinformation from doing so given they neither address that conduct specifically nor do they result, in all likelihood, in consequences for the same. All this considering that it would not be possible to establish an adequate causal link between the conduct of spreading disinformation itself and the damages caused by the threat, constraint or harassment (for this to happen the dissemination of Fake News would have to be, in general and abstract, adequate and appropriate to cause the damage, which is not the case), so much so that the agents of both actions (*i.e.*, those who disseminate Fake News and those who, motivated by them, threaten or constrain or harass other people) are not usually coincident.

Note that this consideration does not take into account, nor will this be developed in this dissertation, the relevant and interesting questions that could be posed (and that could introduce *nuance* to the discussion and even reverse the previous statement) regarding authorship - *autoria*, Art. 26 Crim. Code - and complicity - *cumplicidade*, Art. 27 Crim. Code - in light of

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

the eventual relationship between the Fake News creator/spreader, as instigator or (moral) accomplice, and the perpetrator of the aforementioned crimes, as immediate author¹⁰⁷.

X. All in all, it is safe to say that the Portuguese (criminal) legal order is not entirely devoid of solutions that could address both false information *lato sensu* and disinformation.

The fact that the statutory types of crimes analysed were not initially thought out for or intended to address Fake News (which may pose additional interpretation and practical application difficulties - related to attribution, traceability, *etc.*), or the fact that they do not address disinformation *per se*, but only subsectors of Fake News, inasmuch as they intertwine with the realities which those crimes actually intended to focus on, does not prevent them from, through the operation of a current interpretation, being used to tackle certain aspects of disinformation.

This is not to say that they could not benefit from a revamping, so as to clarify their applicability in light of current day challenges, such as Fake News, however it is possible to argue that some of them can be resorted to and applicable to this reality, as is.

3.2.3. Proportionality and the (non)necessity of a new regime

I. At this point we must finally examine, in light of the existing criminal-legal panorama that has already been outlined, the need for the enactment of further legislation criminalising the Fake News phenomenon in Portugal.

It should be said that this is not, by any means, the preferred solution: in a 2020 report, UNESCO warned that States should “[a]void criminalising disinformation to ensure that legitimate journalism and other public interest information are not caught in the nets of “fake news” laws” and “[e]nsure that any legislation or regulation responding to disinformation crises (...) is necessary, proportionate, and time-limited”¹⁰⁸.

From this effective summary, a very relevant lesson can be drawn: legislating in the criminal sphere necessarily implies increased caution and restrictions.

II. Firstly, in order for action to be warranted, we must be before criminal-legal goods, understood as interests or goods of eminent social importance (*i.e.*, fundamental and

¹⁰⁷ About the concepts of instigation and complicity (and their distinction from close but, autonomous concepts, such as that of mediated authorship) see, by way of mere example: GOMES (2019) (for considerations on instigation), RAIMUNDO (2018) (for considerations on complicity), Acórdão Tribunal da Relação de Coimbra, 12.09.2007 (for the distinction of mediated authorship and instigation), Acórdão Tribunal da Relação de Coimbra, 24.04.2018 (for the distinction of instigation and complicity)

¹⁰⁸ https://www.broadbandcommission.org/wp-content/uploads/2021/02/wgfoedisinfo_report2020.pdf, last consulted in 23.07.2022

indispensable to the functioning of society) which, as such, “*the criminal norm seeks to protect*”¹⁰⁹.

The determination of which are the specific legal goods that criminal law can legitimately protect stems from the CRP which, at the outset, clarifies in its Art. 18(2) that: “[t]he law may only restrict rights, liberties and guarantees [this restriction is necessarily implied for criminalisation to occur] *in the cases expressly provided for in the Constitution, and restrictions must be limited to what is necessary to safeguard other constitutionally protected rights or interests*”. In this sense, “*the idea (...) that between the constitutional axiological order and the legal order of legal goods there must be some sort of mutual reference relationship becomes indisputable*”¹¹⁰. As such, we must look at the CRP and at the rights therein enshrined to understand which are the legal goods worthy of criminal protection.

Concerning disinformation, the identification of these legal goods does not pose much of a challenge. The (constitutional) fundamental rights previously alluded to in the course of this dissertation (life, health, freedom of expression, participation in public life, privacy, honour, reputation, *etc.*)¹¹¹ are certainly criminal-legal goods, so much so that they are even in the base of the statutory types of crimes analysed in the preceding section (which were deemed to be applicable to Fake News). This entails that their protection would naturally justify the intervention of the “*sanctioning system that has the most severe punitive instruments available in the legal order*”¹¹²: criminal law.

III. However, this is not all that there is to it. Precisely because “*criminal law represents the most powerful and severe reaction to unlawful acts that the legal order can have (...) its action must be limited to the most significant offences against the most important individual and collective constitutionally recognized interests*”¹¹³.

The admissibility of criminal law’s intervention unfolds in two distinct levels: on the one hand, there is a deficit prohibition, meaning that, while no absolute obligation to criminalise exists, ensuring the effective protection of these legal goods is a duty of the State (which may be forced to resort to criminalisation in case no other intervention proves sufficiently effective); on the other hand, there is an excess prohibition, meaning that criminal law should only be called upon, given its grievous and restrictive nature, subsidiarily and as a *ultima ratio* option.

¹⁰⁹ MARQUES DA SILVA (2018)

¹¹⁰ DIAS (2016), P. 251

¹¹¹ *Vide supra* 2.2. and 3.2.1.

¹¹² BRANDÃO (2017), PP. 239-266

¹¹³ *Ibid.*

The “duty” to criminalise does not seem to exist regarding Fake News: as was seen, alternative interventions, with varying degrees of efficiency, can be devised.

As such, to test the need for criminalisation on the realm of disinformation, this possibility must pass the sieve of the proportionality principle, to ensure that any restriction that may be imposed on other fundamental rights is proven to be necessary to pursue a legitimate purpose and constitutes indeed the least restrictive means to achieve it.

IV. This principle, as an optimization mandate, is performed through a balancing act¹¹⁴ that takes into account the means used by the legislator and the desired goals, contemplating three moments¹¹⁵: that of the assessment of (i) adequacy, (ii) necessity and (iii) *stricto sensu* proportionality¹¹⁶.

In order to be considered adequate, the means used must prove apt and suitable to effectively reach the intended goal. In the case *sub judice*, it is clear that criminalising Fake News would be an adequate means to pursue and reach the goal that is fighting and deterring disinformation, thus fulfilling the first requirement.

In order to prove necessary, the means resorted to must pass a cost-benefit assessment: it should not be possible to identify the existence of an alternative means which, albeit equally effective, is less detrimental or aggressive to the fundamental rights in question. Here is where the idea of criminalising Fake News crumbles.

All the rights that the criminalisation of disinformation would aim to protect would have to be balanced against that which such criminalisation would (mainly) impact: the right to freedom of expression.

Freedom of expression includes the right to disseminate and access information which does not have to be necessarily true, accurate or correct. While indeed this right does carry with it special duties and responsibilities that may justify that it be subject to certain restrictions, these (restrictions) shall be strictly limited to what is necessary to attain objectives such as the protection of national security or of public order, health or morals, that would otherwise, and with resort to alternative means, be unattainable.

Well, this is not really the case of the criminalisation of Fake News. The objectives laid out by the criminalisation may be (roughly) achieved, with varying degrees of effectiveness, with resort to alternative means (those previously laid out¹¹⁷) which do not necessarily entail a

¹¹⁴ ALEXY (2014), p. 819

¹¹⁵ For an alternative dogmatic construction, even if leading to the same conclusion, see REIS NOVAIS (2019), pp. 95-146

¹¹⁶ SILVA (2018), pp. 249-259

¹¹⁷ *Vide supra* 3.2.1. and 3.2.2.

further constriction on the right to freedom of expression, being less detrimental to the same and not posing the much feared risk of an eventual downfall into censorship.

As such, in the conflict between freedom of expression and the other fundamental rights which the criminalisation aimed to (further) protect, the former comes out victorious, thus determining that the criminalisation of Fake News is not a strictly necessary step to its eradication.

Finally, and even though this assessment loses some relevance in light of the above, in order to pass the *stricto sensu* proportionality test, the measure proposed must be balanced and neither deficient nor excessive in its pursuit of the established goal. As follows from the preceding, the criminalisation of disinformation could be understood as an excessive measure to fulfil its objective, thus failing this rationality and “good measure” test.

V. All in all, just as much as disinformation can easily damage and constrict human rights¹¹⁸, so can the measures devised to fight it. Legislative action against disinformation carries with it high risks and the potential for legal and political abuse.

As such, to tackle this issue “*difficult trade-offs and delicate policy balances*”¹¹⁹ have to ensue in order to guarantee that no erosion of rights occurs, “*(...)for instance, by government interference with internet services; state censorship or restrictions to online speech; and obstacles to the proper functioning of media outlets*”¹²⁰, determining even more grievous consequences to democracy and a breach of essential correlated human rights, such as that of freedom of expression.

Furthermore, the criminalisation of Fake News is not likely to holistically resolve the issue. In fact, a sizable (and perhaps more challenging) slice of the problem would be left on the fringes of regulation: while it would, in theory, suffice to bring private actors to justice, it would do little to address States’ intervention in the propagation of Fake News, that would depend on the summoning of International Law - through, among other instruments¹²¹, the principle of non-intervention which “*protects the area in which sovereignty allows states to decide freely (...) with respect to [other states’] interventions that are ‘coercive’*”¹²² and is likely

¹¹⁸ *Vide supra* 2.2.

¹¹⁹ [https://www.europarl.europa.eu/regdata/etudes/stud/2021/653635/expo_stu\(2021\)653635_en.pdf](https://www.europarl.europa.eu/regdata/etudes/stud/2021/653635/expo_stu(2021)653635_en.pdf), last consulted in 23.07.2022

¹²⁰ *Ibid.*

¹²¹ Such as the (albeit limited in scope and reach) International Convention concerning the use of Broadcasting in the Cause of Peace, part of the moral disarmament effort that followed the aggressive use of political propaganda during World War I, that prohibits “*any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast*” (Art. 3).

¹²² BAADE (2019), pp.1357-1376

to be breached by deliberately false information “*intended to produce dissent or encourage insurgents*”¹²³.

In this sense, from all that was previously said, both regarding already existing alternatives and the fragilities and risks associated with further legislative intervention in the criminal plane (in light of a sound proportionality assessment), it results clear that the costs of criminalising Fake News in the Portuguese legal order, as of now, outweigh the benefits, wherefore the non-necessity of a new (criminal) regime becomes evident.

This is not to say, however, that there is no space for discussion regarding the enactment of future (sensibly repressive) regulation, provided it departs from a different approach and is grounded on a different legal sphere.

¹²³ JAMNEJAD & WOOD (2009), PP. 345-374

4. Conclusion

I. Technology does not have an intrinsic (moral) value; it is neutral and human intent is to blame either for the good or bad that may come from it. This being said, however, information has borne the brunt of a lot of the bad that technology has had to offer and Fake News, their force, influence and contaminating reach across the various sectors of society, are here to prove just that.

The challenges they have brought about, those herein alluded to and many others, are up to us, as a society, to face. This, of course, is easier said than done: as previously stated, there is no silver bullet to solve this issue, no “(...) *single solution could address all challenges related to disinformation. At the same time* [though], *inaction is not an option*”¹²⁴ and we cannot afford to throw in the towel just yet.

When it comes to future steps, as anticipated, much is still to be done to effectively counter disinformation, and both the legislative and non-legislative approaches should be pursued and articulated in order to ensure the best possible outcome.

II. Departing from the non-legislative angle, the importance of learning should not be underestimated. Trying to make sense of the mess Fake News leave behind is a herculean endeavour indeed, however, before any informed and coherent action could be taken, stakeholders and policymakers must get to grips with the (war on) reality we are facing, and all its ramifications. As such, this phenomenon, its scale, methods and instruments, ought to be further investigated and studied by qualified researchers so that the “*precise nature and potential impact of disinformation*”¹²⁵ can be ascertained.

Building on the education aspect, States should foster an adequate information policy so as to cultivate media and digital literacy and empower citizens to recognise and fight disinformation for themselves, in the long run.

Besides this, communicating with and involving the relevant stakeholders - in particular social media platforms, advertisers and media conglomerates -, raising awareness among them and nurturing their cooperative relationship with (national and international) public authorities, based on the identification of the common enemy - Fake News - and the mutual recognition of each party's roles and responsibilities, is essential to allow for the panoptic understanding and comprehensive response this issue warrants.

¹²⁴ <https://eur-lex.europa.eu/legal-content/en/txt/?uri=celex:52018dc0236>, last consulted in 23.07.2022

¹²⁵ *Ibid.*

Following this line of reasoning, a set of obligations and duties could be established and incumbent upon said stakeholders, compliance with which could earn them, for instance, quality seals - such as the “Clean & Safe” Covid-19 seal -, according to specific, objective and delimited criteria (that should pose no fear, unlike the frenzy surrounding Art. 6 PCHRDA would suggest). These duties would necessarily concern compliance with journalistic principles and processes, as well as with regulatory guidelines (such as the ones foreseen in EU’s Code of Practice on Disinformation), and the instatement of other good practices regarding users (countering fake accounts and signalling bots and dubious content), fact-checking (through a network of independent fact-checkers), transparency (particularly with reference to sponsored content and targeted political advertising) and the eventual rights to correction and reply¹²⁶.

On the flip side, these duties should be accompanied by the recognition of the crucial democratic role performed by these players, translated into the enactment of proactive investment policies to reward and promote high quality and innovative forms journalism and to incentivise the development of a free and pluralist media, that, through customization and interactivity, would ensure the exposure of society to diversified content and sources, allowing for comparison and contradiction during the online experience which would, in turn, reinforce trust on and the reliability of democratic institutions.

III. Alongside this approach, aiming at countering and neutralising the impacts of disinformation, a legislative approach, aiming at repressing Fake News’ creation and dissemination at the source, through the direct accountability of the individual actors responsible for their creation and spread, could also be explored.

The interest in having a well-defined legal infrastructure - which would not necessarily pass through the criminal law sphere as of yet - in place to address disinformation is undeniable.

Notwithstanding, while law should not be exclusively reactive, rather anticipating challenges *in lieu* of merely addressing them *post factum*, the truth is that little benefit may come from hastily regulating a reality that is not fully understood or even defined yet. Legislative efforts will not be fruitful until there is a communal consensus regarding the need for and extent of the intervention required and, as perceived from the reaction to the adoption of Art. 6 PCHRDA, Portuguese society is neither ready for nor convinced of the benefits of restrictively regulating this matter (weighed against other legitimate interests - such as freedom

¹²⁶ Inspired by international law instruments such as the 1953 Convention on the International Right of Correction (Correction Convention) and the 1936 International Convention concerning the use of Broadcasting in the Cause of Peace, for instance, that, while not necessarily applicable as such to the issue and circumstances at hand, remain useful and insightful sources.

of expression - that, due to the country's recent history and traumas, are very dear to citizens' hearts). The legislator's role in a democratic society, that of legally addressing societal concerns in the name of and in the manner accepted, at a given time and place, by its electorate, is not consistent with the paternalistic imposition of what it deems best and, as such, it cannot and should not substitute itself to the will of the people. All the more since the need, pertinence or viability of legislative innovation to address and hold individual actors of disinformation accountable as a manner to fight Fake News, particularly in the realm of criminal law, does not result obvious, as concluded from the previous reflection¹²⁷.

As such, and until further information is gathered and we are finally ready to lay the first stone, the already existing legal solutions should be explored and updated, through doctrinal and jurisprudential constructions based on a current interpretation, in order to clarify their applicability to the new challenges brought about by timeless realities such as Fake News.

IV. All in all, the damage Fake News will inflict is, to a great regard, dependent on our reaction as individuals and as a society.

When, as is the case with Fake News, reality becomes an opinion and we are seemingly given a licence to misbelieve the truth, finding our way back and ensuring we do not become apathetic puppets is a responsibility that lies in all of our shoulders and that exists regardless of the establishment of a statutory type of crime specifically intended to deter and punish those who lie as a form of living.

¹²⁷ *Vide supra* 3.2.3.

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ANNEX

In this Annex, the translation of the relevant excerpts of some of the above mentioned legal provisions is provided, for reference purposes.

Art. 6 PCHRDA

1 - The State shall ensure compliance in Portugal with the European Action Plan against Disinformation, in order to protect society against natural or legal persons, de jure or de facto, who produce, reproduce or disseminate narratives deemed disinformation.

2 through 6 - [revoked]

Art. 153 Crim. Code

1 - whoever **threatens** another person with the **commission of a crime against** life, physical integrity, personal liberty, sexual freedom and **self-determination**, or property of considerable value, in a manner likely to cause such person fear or anxiety, or to **impair their freedom of determination**, shall be punished by imprisonment of up to 1 year or fine of up to 120 days.

(...)

Art. 154 Crim. Code

1 - whoever, by means of **violence** [which can be psychological] **or threat** of serious harm, **constrains another person to an action** or omission, or to support an activity, shall be punished by imprisonment of up to 3 years or fine.

(...)

Art. 154-A Crim. Code

1 - whoever repeatedly **stalks or harasses** another person, by any means, directly or indirectly, in a manner likely to cause them fear or anxiety or to **impair their freedom of determination**, shall be punished by imprisonment of up to 3 years or fine (...).

(...)

Art. 180 Crim. Code

1 - Whoever, addressing a third party, **imputes to another person**, even in the form of a suspicion, **a fact or formulates a judgement** about him/her that is **offensive to his/her honour**

or regard, or reproduces such an imputation or judgement, shall be punished by imprisonment of up to 6 months or fine of up to 240 days.

(...)

Art. 187 Crim. Code

1 - Whoever, without having grounds to believe, in good faith, that they are true, **states or spreads untrue facts that may offend the credibility, prestige or trust owed to** a body or service that exercises public authority, a **collective person**, an institution or corporation, shall be punished by imprisonment of up to 6 months or fine of up to 240 days.

(...)

Art. 192 Crim. Code

1 - Whoever, without consent and with intent to **intrude upon the private life** of any person, namely the intimacy of family or sexual life:

a) **Intercepts**, records, registers, uses, transmits or **discloses** conversation, telephone communication, electronic mail messages or detailed billing;

b) Captures, photographs, films, records or discloses **images of people or intimate objects or spaces**;

c) Secretly observes or listens in on anyone who is in a private place; or

d) Discloses **facts concerning another person's private life or serious illness**;

shall be punished by imprisonment of up to 1 year or fine of up to 240 days.

(...)

Art. 240 Crim. Code

(...)

2 - Whoever publicly, **by any means intended for dissemination**, namely through apologia, denial or gross trivialization of crimes of genocide, war or against peace and humanity:

a) **Provokes acts of violence** against a person or group of persons based on their race, colour, ethnic or national origin, ancestry, religion, sex, sexual orientation, gender identity or physical or mental disability;

b) **Defames or insults** a person or group of people based on [the same categories mentioned before];

c) **Threatens** a person or a group of persons based on [the same categories mentioned before];

or

d) **Incites violence or hatred** against any person or group of persons based on [the same categories mentioned before];
shall be punished by imprisonment from 6 months to 5 years.

Art. 283 Crim. Code

1 - Whoever:

a) spreads a **contagious disease**;

(...)

and thereby **creates danger to the life** or serious danger to the physical integrity of others shall be punished by imprisonment from 1 to 8 years.

(...)

Art. 341 Crim. Code

Whoever, in an election (...):

a) Through fraudulent misrepresentation, causes a voter to vote, prevents him from voting or **causes him to vote in a certain manner**;

(...)

shall be punished by imprisonment of up to 1 year or fine of up to 120 days.

(...)