

## Informational disorder: an analysis under the perspective of the phenomenon and civil responsibility in Brazil\*

### *Desordem informacional: uma análise sob o olhar das características do fenômeno e da responsabilidade civil no Brasil*

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#### Abstract

When using social networks or visiting news websites, internet users are immersed in the informational disorder phenomenon, which is not limited to fake news. Conflicts are not simple on the internet, mainly due to users' freedom of expression and information, which may clash with protecting their personality rights. Considering the current nature of these issues, this study, employing a review of legal doctrine, both legislative and jurisprudential research, aims to analyze the informational disorder phenomenon and briefly present some of the solutions suggested for the problem. Finally, it concludes that, despite the information disorder being a consequence of a free society, one should at least seek to raise awareness about the repercussions of sharing information among internet users.

**Keywords:** Information Disorder. Personality Rights. Freedom of Speech. Civil Liability. Regulation. Internet.

#### Resumo

*Ao usarem redes sociais ou acessarem sites de notícias, os internautas estão imersos no fenômeno da desordem informacional, o qual não se limita ao termo fake news. Na Internet, os conflitos existentes não são simples, principalmente devido à liberdade de expressão e de informação dos internautas, que podem conflitar com a proteção aos seus direitos da personalidade. Tendo em vista a atualidade dessas questões, este estudo, por meio de pesquisa doutrinária, legislativa e jurisprudencial, pretende analisar o fenômeno da desordem informacional e, brevemente, expor algumas das possíveis soluções que vêm sendo apontadas para o*

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*problema. Por fim, conclui que, apesar de a desordem informacional ser consequência de uma sociedade livre, deve-se, ao menos, buscar a conscientização dos internautas acerca da repercussão do compartilhamento de informações em rede.*

**Palavras-chave:** *Desordem Informacional. Direitos da Personalidade. Liberdade de Expressão. Responsabilidade Civil. Regulação. Internet.*

## 1 Introduction

Information clutter is a phenomenon experienced by everyone who uses social media and accesses news sites. To begin the study of this phenomenon, it is important to analyze, even if briefly, the evolution that the Internet has undergone in recent decades until it became what it is today.

Emerged in the 1980s, *web 1.0*, known as the "*web of knowledge*", was marked by the possibility of connection between people, without interactivity. With some structural changes,<sup>1</sup> *web 2.0 was developed*, which became popular as the "*web of communication*" or "*collaborative web*", due to the great interactivity provided by digital platforms. The internet user is no longer a mere consumer of content, but also its producer (Magrani, 2018).

According to Magrani (2018), at a later time, with the crossing of user data, experts began to argue that the *web 3.0 phase had been reached* – a concept that is still fluid and the target of criticism, but already with characteristics that allow it to differentiate itself from other *webs*, such as the new connection poles, in which objects start to interact with people and other objects (an idea related to IoT – *Internet of Things*).

Precisely in the midst of the transition between *web 2.0* and *web 3.0*, the discussion about informational disorder begins – a phenomenon that has come to affect the life of the consumer-content producer. In this sense, reflecting and analyzing how information is thought, created, shared, and interpreted by people becomes fundamental, mainly because people live in the midst of the so-called "informational bubbles", being commanded by algorithms and manipulated, consciously or not, by *bots*, *fake news*, and by their own conceptions and opinions; which often ratify false or partially false information, read and shared daily on their respective profiles. This contributes to the creation of true echo chambers, which undermine the control

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<sup>1</sup> In this sense, Diogo Rais says: What used to be the exclusive role of the press, is now performed in an active and routine way within the scope of the *Web*, in which users act freely, producing the most varied types of content in *Blogs*, instant messaging applications and social networks. What can be observed is that Internet users are not mere passive recipients of information, as was the case with traditional media. We are no longer dealing with passive recipients, who only listen to or watch a message displayed in communication vehicles, but rather with engaged users, who interact and generate content (Rais, 2018, p. 158).

of informational self-determination, or can cause violations of personality rights, such as the right to image, name and honor.

In this context, Castro (2018) states that the idea is increasingly present that, when it comes to online communication, the dissemination of information and the production of content, the issues at stake will not be simple, mainly due to freedom of expression and information, which may conflict with the protection of the personality rights of Internet users. Moreover, when it comes to online content, on the one hand there is the democracy of the content and, on the other, the challenge of distinguishing lies from reality; licit content from illicit content.

Another problem in relation to the theme is that the very concept of truth is not absolute<sup>2</sup>, as each person has their own way of seeing the world. In this way, Moraes (2020) states that studying the phenomenon becomes even more delicate, considering that, as much as the "truth" is subjective, it is not possible to allow the individual to emit information that is known to be false or that is the object of intentional distortions, aiming to mislead the receiver, or cause him some damage.

In view of this, this study, based on doctrinal, legislative and jurisprudential research, intends to analyze the phenomenon of informational disorder in two stages. At first, it will deal with the analysis of the phenomenon regarding the characteristics of the information conveyed on the Internet and the motivational and structural characteristics that support it. In a second moment, the study of the existing system in the Brazilian legal system to instrumentalize the imputation of civil liability in the face of damages suffered by Internet users as a result of the content conveyed by third parties and the possible proposals to change this model will be addressed. All so that it is possible to reflect on the phenomenon in Brazil and on the search for the best solution to order the informational disorder.

## 2 The phenomenon of informational disorder

When dealing with informational disorder, the first term that comes to mind is *fake news*. The term gained great popularity from 2016 onwards, with the US elections, with the Cambridge Analytica scandal, with Brexit and, in Brazil, with the 2018 elections, in addition

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<sup>2</sup> In the words of Ronaldo Porto Macedo Junior, "it is important to remember that the concept of truth is controversial. Even in areas where scientific knowledge is usually accepted, there can be deep disagreements about historical facts [...]. On the other hand, it seems absurd to accuse someone of disseminating *fake news* for affirming that God created the world in seven days" (Macedo Junior, 2018, p. 143).

to being usually invoked by politicians around the world in an attempt to discredit the news or information conveyed. However, studies show that reducing the entire complex phenomenon of informational disorder to the term *fake news* is wrong. As an example, Wardle and Derakhshan (2017), in a report commissioned by the European Council entitled *Information Disorder*, state that it is necessary to abandon the use of the term *fake news*: first, because, as already mentioned, it is inadequate to describe the complex phenomenon of information pollution; and, second, because the term has begun to be used and appropriated by politicians around the world, starting to carry a purely ideological imprint.

When examining the phenomenon of informational disorder, Wardle and Derakhshan (2017) mention that there are three different types of information: (a) *mis-information* (which is false information, shared by a person who, as a rule, had no intention of harming a third party), (b) *dis-information* (which is fake news created and disseminated to harm a person, a social group, an organization or a country) and (c) *mal-information* (which is news that, although it has a real basis, is edited and disseminated with the purpose of causing damage).

To better clarify these various situations, the authors mention that the three categories of information are divided into two circles with a part of intersection between them. On the one hand, there is *mis-information* (false content) and, on the other, *mal-information* (harmful content); at the point of intersection, there is *dis-information* (false and harmful content) (Wardle; Derakhshan, 2017). Thus, the imputation of civil liability and the consequences of the act can take place in different ways, depending on the type of information.

False information and those that, although true, are aimed at causing harm to someone, are not new and were not invented with the Internet or with the creation of social networks. They have always existed. Thus, what is of concern and becomes the object of analysis is not the naïve lie or intentionally false content itself, but rather, as mentioned by Frazão (2020), the sum of circumstances that enhances the dissemination of the lie or harmful content, as well as the increase in its effects: such as (a) the growing use of the Internet, that allows citizens to publicly disclose their opinions and versions of the facts without any care for veracity; (b) the growing role of platforms, which play the role of content managers by filtering the information that will reach users through algorithms; (c) the existence of communication applications that can be used for mass shootings (although today more controlled) with wide penetration; and (d) the presence of many people who interact anonymously on the Internet and robots<sup>3</sup>.

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<sup>3</sup> The author also mentions that "the information society and economy do not receive this name by chance, but rather in the face of the clear recognition that information is today the most important form of power and can be exercised by means hitherto unthinkable" (Frazão, 2020).

For this reason, in view of the classification of information as *mis-information*, *dis-information* and *mal-information*, it is verified, as Wardle and Derakhshan point out, that it is not reasonable to summarize the complex phenomenon of informational disorder to the term *fake news*, precisely because it is not just facts or fake news in this context.

Still, after differentiating the types of information, the authors' study points out that the process of creating and disseminating information goes through three elements: (a) the agent (who is the one who creates, produces and distributes the information); (b) the message (which is what is conveyed); and (c) the interpreter (who is the one who receives and interprets the message). In this idea, anyone, when creating and sharing content, becomes an agent; what is shared (whether licit or illicit) becomes a message; and the one who receives the content becomes an interpreter, being able to share the information, or not. However, the reasons for the interpreter to share the content can be numerous: it can be in agreement with the message and have the same intention as the agent (the one who created it), as well as it can be in disagreement and with the opposite intention to the agent. Regardless of the reason, sharing content generates visibility on the network.

Finally, when analyzing the phenomenon, Wardle and Derakhshan (2017) state that it is important to consider the life of informational disorder as having three phases: (a) creation (when the message is created); (b) production (when the message is transformed into a publication); and (c) distribution (when the message is disseminated or taken to the public). Considering the three phases of information, the authors point out that it is of crucial importance that users use the *fact-checking* services available online, in order to check the veracity of the information conveyed (preferably, before it is shared), as well as that the ability to identify robots and fabricated content is developed. Providing stimulus for the development of digital education for the media is the idea defended internationally by several scholars on the subject<sup>4</sup>.

Disinformation resulting from generalized informational disorder is very harmful, mainly because it cultivates a "culture of dishonesty", an idea coined by Schulman (2014), which finds protection in the idea of freedom of expression. Such thinking is intensified by the politics of post-truth, which concerns the fact that appeals to emotion and personal beliefs have more influence in shaping public opinion than mere objective facts – which ends up being the engine of disinformation, having a greater dissemination value (Bolesina; Gervasoni, 2020). The more controversial the message, the more often it will be shared and the more visibility it will have.

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<sup>4</sup> Something that, in the words of David Goldberg, could be understood as: "*so, at the very least, let us start with developing, (1) simple lessons relating to thinking before liking or sharing; (2) how to avoid filter bubbles; and (3) understanding the threats posed by exposure to information*" (Goldberg, 2018, p. 440).

In a research report called *Media Manipulation and Disinformation Online*, Marwick and Lewis (2017) analyze media manipulation and online disinformation, explaining in detail some of the reasons for the agent to create the message, turn it into a *media product* and share it on the Internet. In the study, they state that the actors who create and disseminate disinformation, propaganda and *fake news* (treated in the global context of information disorder) are usually motivated by the combination of two or more reasons, which can be ideological (usually inserted in a context of polarization), financial (because spreading fake news makes more money and generates more sharing than spreading true news),<sup>5</sup> by *status* and attention (which is verified by the number of *likes*, shares and comments).

However, what appears to each of the Internet users, when accessing the Internet and social networks, is not necessarily what appears and is offered as content to other users, because what is posted and shared by Internet users is filtered by an algorithm, which aims, as mentioned by Branco (2018), to please the user, making your experience the best it can be. This mechanism was called by Parisier (2021) a "bubble filter", which, in short, is an algorithm that analyzes the personal preferences of the internet user based on browsing habits to create a pattern and direct content (Bolesina; Gervasoni, 2020). According to Branco (2017), the bubble in which the individual is inserted limits diversity, given that he is less subject to criticism and opinions contrary to his own, and the range of information he receives is limited, precisely because these bubble-filters are characterized by being personalized, invisible and by impeding the individual's decision-making autonomy by delivering "unilaterally structured standards" (Bolesina; Gervasoni, 2020).<sup>6</sup>

Frequently, Internet users share, in their profiles, completely implausible information, simply because what is written, even if in disagreement with the possible truth, is closely related to their personal desires and opinions. The interpreter shares the information without any brief reflection, or consultation of sources, without realizing that he is in a true echo chamber (an environment where he finds only beliefs and content similar to his worldview and opinion).<sup>7</sup>

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<sup>5</sup> Several studies and research have attested that false content has greater dissemination power, that is, it is more shared among users than true content. By way of example: Vosoughi, Roy and Aral (2018).

<sup>6</sup> When dealing with this issue, Gustavo Carneiro builds a very interesting analogy, stating that a social network, such as Facebook, is like a food court, in which the algorithm becomes the waiter of an all-you-can-eat restaurant, in which the order of the dishes (content and posts) and the number of times they are offered to the customer (user) are defined by the platform. In addition to consuming or not consuming the dishes (reading or not the post/accessing or not the *link*), customers are still asked to say if they liked them ("like", comment), if they rejected them (react to the post) or if they recommend them to others (share the post) (Carneiro, 2020, p. 5).

<sup>7</sup> These echo chambers are, in fact, extremely dangerous, since in them people find only opinions that reinforce their prejudices based on supposed facts. In this sense: ASH, 2016, p. 208.

Such chambers are very successful because the people who are there rely on a process of false legitimization of the information shared (Bolesina; Gervasoni, 2020).

Both the motivational factors of the agent and the interpreter, as well as the structural factors of the social networks themselves, are interconnected, intensifying the phenomenon of informational disorder. And the excess of information makes it impossible for everything to be effectively read with (true) attention and to be the object of (minimal) reflection. Branco (2017) describes the picture well as: too much information, too little time, distortion of history (due to his way of seeing the world) and laziness are factors that foster the field of post-truth.

The disinformation spread by agents, especially by toxic figures such as *trolls*, *fakers*, *haters* and *bullies* (agents unbound by any commitment to telling the truth, who act maliciously on targets), added to the loss of credibility of the traditional media in recent years<sup>8</sup>, may violate good faith, the social function of freedom of expression and good morals (Bolesina; Gervasoni, 2020). On some occasions, the act performed by the agent may constitute an abuse of the right to freedom of expression and communication, which will be even more evident if the act manifestly violates a right of the individual's personality.

Thus, once the characteristics of the phenomenon have been briefly analyzed, it becomes essential to verify the possibility of imputing responsibility to the offender (usually the agent) or, if it is impossible to identify him, to social networks; and the possibility of, to a certain extent, trying to "control" and/or structure a better "control" over the informational disorder<sup>9</sup>.

### 3 The imputation of civil liability for the content published on the internet

In the context of informational disorder, it is necessary to define who will have the duty to indemnify for the content broadcast. However, this is not an easy task, due to the "evident tension between freedom of expression and measures to combat disinformation" (Rais, 2018), which has numerous faces – whether false facts and disinformation in general sense (which

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<sup>8</sup> In this sense, Bruno Terra de Moraes states that "[t]he seems to have emerged, thus, a perverse vicious cycle: the lack of credibility of the mainstream media has made the ground conducive to the dissemination of *fake news*; the *fake news* they become more accepted as something true; this further deepens the distrust of the mainstream media, which feeds back into the cycle" (Moraes, 2020, p. 186).

<sup>9</sup> In this sense, it is worth mentioning that, in the words of Anderson Schreiber, "defending absolute freedom on the internet does not lead to an internet without rules or to a 'free territory', as is usually maintained, but rather to an internet governed exclusively by rules instituted by each private agent, without any guarantee that such rules will be constructed in a transparent way or that they will respect, at the end of the day, fundamental rights. [...] In this scenario, the right should not be seen as an enemy of freedom of expression on the internet, but, on the contrary, as an essential instrument to ensure its protection and promotion." (Schreiber, 2015, p. 25).

covers more general issues that harm the collectivity), or offenses to the personality rights of specific targets (whose protection is already instrumentalized by the legal system)<sup>10</sup>.

As it is content published by a third party on the Internet, the greatest tension lies in the fact of deciding on its removal or suppression through jurisdictional tools that, in a repressive, abstract and/or preventive way, may attack freedom of expression and represent censorship (Rais, 2018). In addition, and perhaps even more questionable, is to decide who is legitimized for this power.

In the Brazilian legal system, there is still no specific law to deal with the phenomenon of informational disorder (at least with regard specifically to disinformation), so that, for the analysis of the imputation of civil liability arising from the content conveyed, the Civil Rights Framework for the Internet (MCI - Law 12.965/2014), in conjunction with the Civil Code and the Federal Constitution, can provide the regulation and guidance of a large part of the implications of the phenomenon. It is based on the premise that freedom of expression, neutrality and privacy are some of the principles, enshrined in Article 3 of the MCI, that guide network life.

On the Internet, the imputation of civil liability is based on a notion of breach of a prior duty combined with the occurrence of damage derived from the breach of a legally protected legitimate interest. Thus, the agent (the one who conveys the publication) will have the duty to indemnify, for example, if the message produced and conveyed violates a right of the personality of the offended party, causing him damage. According to Leonardi (2005), the social network, in turn, will have the duty to indemnify when it fails to comply (or act diligently) in relation to a previously established duty, which may arise from the Law, moral precepts subordinated to free will or some contractual stipulation (such as, for example, the terms of service of social networks). causing damage to the Internet user or, depending on the case, increasing the extent of damage caused to him by a third party.

In light of the Marco Civil, social networks do not have the duty to monitor or control the content posted by users. In practice, however, several social media terms of service provide that the content (or even the profile) may be removed or unavailable, if the platform comes to understand that it is offensive content or contrary to its terms of service. Likewise, some platforms, such as Facebook and Twitter, have already been developing tools and mechanisms to alert users about the possible questioning of the veracity or legality of the content conveyed

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<sup>10</sup> Whether with regard to injunctive relief (through which the Judiciary controls the malicious dissemination of content that violates personality rights), or with regard to reparatory/compensatory relief (in case of damage to be compensated). In this sense: Pereira (2019).

by the user<sup>11</sup>. This, however, is part of the private autonomy of social networks<sup>12</sup>, not constituting (at least so far) a duty established by the Brazilian legal system.

Thus, under the terms of Article 19 of the MCI,<sup>13</sup> the platform will only be held liable for content published by a third party when it fails to remove the illegal content, after receiving a court order specifically identifying the URL (the location on the network) of the<sup>14</sup> content to be removed. Two exceptions to the regime of Article 19 are provided for in the Law, in Article 21 and in the second paragraph of Article 19. These are cases of nudity and pornography and copyright. In these cases, the duty to remove the content arises from the receipt by the social network of an extrajudicial notification sent by the injured party<sup>15</sup>.

In this sense, Longhi (2014) states that the legislator's choice to establish these exceptions in the MCI is not exempt from criticism, since, in exceptional cases, the harmful conduct would not need a value judgment to constitute the illegality of the content, which would not be the case in relation to other violations of personality rights, in which the victim will have to file a complaint with the Judiciary if he wants the content removed (it is not too much to mention that These rights are equally protected, and there is no hierarchy in the Brazilian legal system in this regard).

On the Internet, the risk of rights violations is high, since the speed of the advance of technological innovations (and, consequently, the speed of propagation of damage in cyberspace) is flagrantly disproportionate compared to the delay in reacting by the Law to the

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<sup>11</sup> Some examples of tools are agencies for checking the veracity of facts, information verification seals and profiles Online and the warnings that the post or message is being shared by many users.

<sup>12</sup> "It is worth mentioning, however, that companies can, as a rule, take such measures, if anchored in the terms of use of the platforms. As private entities, in principle, they are free to decide how they want to regulate the environment created by them" (Souza; Teffé, 2018, p. 186).

<sup>13</sup> As is well known, the constitutionality of Article 19 of the Marco Civil is being questioned in a regime of general repercussion, by RE 1037396 – Topic 987 – of the rapporteurship of Justice Dias Toffoli. Regarding the subject, Anderson Schreiber states that "Article 19 of the Civil Rights Framework for the Internet preferred, however, to promote true shielding of the so-called application providers, greatly stifling the protection of fundamental rights and resulting in the unconstitutionality of the rule [...]. That is why countless cases continue to knock on the doors of the Judiciary, culminating in the discussion, now submitted to the STF, on the constitutionality of Article [...]. Interpretation in accordance with the Constitution is possible, as argued in this text, but it requires flexibility in the requirement of a court order in the protection of fundamental rights. Only time will tell how our Supreme Court will position itself and what virtual environment it will finally be possible to build" (Schreiber, 2020, p. 26).

<sup>14</sup> Such a requirement is the subject of several questions, since "a quick reading of the terms and conditions of these providers reveals that the providers clearly have technological tools so that, *per se*, and without the user providing additional information, not even the URL, any content that is considered to violate the rights of third parties is removed, falling to the ground the technological limitations alleged by the servers when requesting the accurate presentation of the URL's, considering the notorious existence of content identification tools without the need for specific indication of the URL" (Queiroz, 2020, p. 308).

<sup>15</sup> This was the general rule before the entry into force of the Civil Rights Framework for the Internet in Brazil. It is the form that, in part, is adopted in the North American system, known as *notice and takedown*. There, however, although it is an extrajudicial procedure, the author of the publication is allowed to contradict before the removal of the post by the platform.

challenges arising from them (Queiroz, 2020). Thus, with regard to the phenomenon of informational disorder, the real problem arises, above all, from the sum of at least three factors.

First, the immersion of people in their informational bubbles. In these bubbles, the subjects can appear as agents, interpreters or even targets of the messages conveyed, and can also cause damage to third parties. Secondly, social networks, as much as they do not have the duty to control content, effectively control it through algorithms and other structural processes (this does not necessarily occur to provide an environment in which Internet users can use the available services in order to satisfactorily exercise their rights and freedoms in cyberspace). And, thirdly, the judicial machine represents the effective and legitimate tool for claiming a large part of the rights of Internet users, with the risk of the process always being considered just another one to overwhelm the "moral damage industry" (Schreiber, 2015), regardless of the real severity of the damage.

In the current situation, it is practically unfeasible to "pierce the bubble" and get out of the vicious cycle of informational manipulation in which network users are inserted, due to the algorithms of the platforms, to which almost total unimputability is recognized<sup>16</sup>.

Part of informational self-determination is directly violated because the freedom to choose (at least not consciously) what one wants to see, read and follow in the *feeds* on the platforms is not adequately exercised<sup>17</sup>. Thus, in addition to verifying whether or not the agent is the author of the content and whether he should be held responsible for the damages caused to third parties, it is appropriate to question whether, in the absence of a specific target, and in view of the impossibility of, in the face of the informational cascades, locating the agent producing the message, if it should not be the responsibility of the social networks themselves, at least jointly and severally (Queiroz, 2020), indemnify users for taking advantage and promoting, or at least not discouraging informational disorder<sup>18</sup>.

This is because, even if the MCI has defined the competence of the Judiciary to resolve the conflict between freedom of expression and any violation arising from the content conveyed

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<sup>16</sup> It is worth remembering, however, that "using the absolute character of freedom of expression as a subterfuge to cover up irresponsible business models seems to be the complete subversion of constitutional values, which have always had existential subjective situations as a corollary of the axiological epicenter of the order: the dignity of the human person in all its aspects. In other words, using the fundamental right to freedom of expression as the basis for the "non-imputability" of any and all intermediaries in the network hides the protection of a single fundamental right to the detriment of all others: free enterprise" (Longhi, 2020, p. 306).

<sup>17</sup> On this point, it is interesting to note that the algorithms themselves can often and even cause the content posted by a certain user to be ignored by making it impossible for other users to view the post: it is the so-called *Ghost banning*, or "phantom banishment" (In this sense: Sarlet; Siqueira, 2020, p. 547).

<sup>18</sup> Also in this sense, João Quinelato states that "the conduct of content providers who, sometimes, aware of the flagrant untruth of the material, allow the dissemination of false information on their respective platforms, will assume a relevant concern in this logical itinerary" (Quinelato, 2020, *Electronic book*).

by third parties, this cannot (or, at least, could not) relieve social networks of the duty to seek to develop effective instruments for collaboration with users to resolve concrete conflicts – or, at least, to generate more and better quality information – precisely in order to prevent the spread of illicit activities in cyberspace. Thus, in the same way that users cannot dress in the mantle of freedom of expression to do whatever they want on social networks<sup>19</sup>, they cannot dress in the mantle of neutrality and non-imputability so that they "give a standing ovation" to the chaos resulting from informational disorder, which can have irreversible consequences, including for democracy.

In the face of the great wave of disinformation resulting from the phenomenon under analysis, some efforts have already been taken by some of the main platforms in an attempt to stop, or rather order, the excess and digital informational disorder, such as limiting the reach of false information, demonetization (which frustrates the expectations of those who pay to accelerate the sharing of disinformation and/or illicit content), the contextualization of content to users and greater transparency regarding the terms of services (rules) of the platforms (Pielemeier, 2020). Likewise, some instruments to combat disinformation have also been developed, with agencies that check the veracity of facts gaining prominence<sup>20</sup>.

However, Matucci Giuditta (2018) ponders that, considering the informational excess, it would be impossible for the interpreter to check the content and messages of everything he reads. In this sense, the author mentions that the gaze should turn, in a general panorama, to the problem of identifying who dictates the rules of the "bubble filters": private companies, through a mechanism of self-regulation, or public subjects, in a process of heteroregulation or co-regulation? Which brings to the discussion the question that is at the center of the national and international public debate: to regulate or not to regulate the phenomenon of informational disorder or, more specifically, of disinformation?

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<sup>19</sup> In fact, it is important to consider that freedom of expression is not an absolute right, and there is constitutional legitimacy in limits imposed on the abuse of the right to freedom of expression, which may give rise to civil redress and the duty to cease the damage caused by the content published on the Internet. Likewise, it is important to mention that the adequate protection of such freedom "should not understand it as a right of a negative nature from a legal point of view, relegating the Internet to the *laissez faire* of an environment where the will of large providers tends to prevail over the rights of citizen-users" (Longhi, 2020, p. 317).

<sup>20</sup> In Brazil, for example, the agency Aos Fatos developed the robot Fátima, which works on Twitter sharing the correct information when faced with false information. In a similar project, Lupe was created, which is the result of a partnership between Agência Lupa and Facebook, which aims to check the veracity of phrases related mainly to politics. The Vaza, Falsiane! Project, funded by Facebook, was also developed, which is aimed at education on how to identify fake news and prevent its spread. And finally, just to bring one more example, the Institute of Technology and Society of Rio de Janeiro also developed PegaBot, an initiative with the purpose of analyzing the history of posts on the social network profile to identify, based on behavior patterns, the probability of the profile being a human or a robot.

In Brazil, given the absence of a law to deal specifically with the phenomenon, several bills on *fake news*, accountability of platforms, criminalization of the sharing of disinformation, etc. The first bill dates from 2005, and twenty-one of them were proposed in 2020 (Miranda, 2020). The most famous Bill is PL 2630/20, which aims to institute the Brazilian Law on Freedom, Responsibility and Transparency on the Internet (Brasil, 2020) (known as the "*Fake News Law*") and to create measures to combat the dissemination of false content on social networks and private messaging services (platforms with more than two million users).

The aforementioned Bill arrived at the Chamber in mid-2020, amid many controversies, given that, on the one hand, there are those who believe that the proposed measures are necessary in the face of the important fight against the financing of fake news and disinformation, while, on the other hand, there are those who believe that the measures contradict the precepts of the Civil Rights Framework for the Internet and can lead to censorship. It is questioned, in fact, whether a law aimed at curbing the phenomenon of disinformation would not be an undue intervention in the freedom of expression of Internet users.

In response, Martins and Longhi (2020), like several other scholars, argue that the statement that the aforementioned Bill would promote censorship is wrong, because, in reality, it aims to establish prohibitions in the face of conducts that promote disinformation (such as inauthentic accounts, artificial disseminators, and artificial dissemination networks that disseminate unlabeled sponsored information or content). In addition, they maintain that the bill establishes the responsibility for platforms to act transparently regarding the content that circulates through the submission of reports, the adoption of measures against disinformation (such as the removal of content and profiles, respecting, as a rule, due process with the guarantee of full defense and adversarial proceedings) and sanctions that do not provide for crimes, establishing a maximum warning with an indication of a deadline for the adoption of corrective measures or a fine of up to 10% of the economic group's revenue in Brazil in its last fiscal year. In the opinion of Martins and Longhi (2020), the PL would not derogate from the MCI, despite bringing specific duties to social networks in order to ensure the fight against disinformation and the spread of illicit activities, seeking to

distribute the duties of protection of fundamental rights, attributing to private *players* the need to be involved in the production of rules, inducing self-regulation in a role in which the public power walks side by side, instituting minimum standards, such as disinformation, attacks on honor etc. (Martins; Longhi, 2020).

In the face of the entire context of *fake news*<sup>21</sup>, here understood with the idea of disseminating false content of an ideological and political nature, the Electoral Code, which already provided for the punishment of those who published information known to be untrue during elections, was updated by Congress in 2019, and began to consider the practice as a crime of "slandorous denunciation for electoral purposes", and a penalty of up to eight years is provided for anyone who imputes to someone a falsely attributed fact knowing of his innocence (Art. 326-A).<sup>22</sup> Similarly, for example, in France, in 2017, a law was enacted that introduced a change in the Electoral Code to try to promote greater control of disinformation during the three months before the votes, establishing a series of duties of collaboration of social networks in the fight against disinformation (França, 2018)<sup>23</sup>.

In contrast to state regulation, another model of "content control" is that of self-regulation. From there, the control of posts and the determination of their removals, whose analysis would be up to the Judiciary in the traditional regulation model, passes into the hands of the platforms<sup>24</sup>. In this sense, since 2016, in Europe, a Code of Conduct (European Commission, 2020) has been in force, which includes several commitments made by platforms, to adopt clear and effective procedures for analyzing notifications received for illegal content (especially with regard to the dissemination of hate speech on the Internet), to submit reports to Member States<sup>25</sup>, among other issues. Several provisions of this Code are present in the platforms' own

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<sup>21</sup> According to Ingo Sarlet and Andressa Siqueira, the term *fake news* as the well-known "rumors", making the differentiation both because the *fake news*, adapted to technology and the development of communicative media, are disseminated instantaneously on the Internet, as well as because they are inserted in a specific context with the objective of creating a "fallacious sphere" about something or someone in order to deceive the interpreter (Sarlet; Siqueira, 2020, p. 541).

<sup>22</sup> In this sense, Resolution 23,610/2019 of the Superior Electoral Court regulated several issues related to the electoral campaign and illicit conduct in electoral campaigns, including manifestations on social networks, blogs, personal websites and applications. In its Article 27, § 6, it provided that manifestations by individuals on their profiles on social networks are not considered electoral propaganda (BRASIL, 2019). In this sense, it can be interpreted that the dissemination of untrue facts by manifestations of individuals on social networks, as they are not electoral propaganda, cannot be criminalized (Sarlet; Siqueira, 2020, p. 554).

<sup>23</sup> In addition to France, several countries around the world have been enacting laws to try to effectively combat the phenomenon of information disorder. In this sense, see: Valente (2019, p. 9).

<sup>24</sup> This is what happens, for example, with Facebook, which has the Independent Oversight Board, the body responsible for decisions about the platform, such as suspending content or user accounts. It was this body that decided, given the seriousness of the circumstances, to suspend the accounts of former US President Donald Trump for a period of at least two (2) years from January 7, 2021, after Trump allegedly incited his supporters to storm the Capitol on January 6 of the same year. It was also decided that, from that moment on, Facebook will no longer assume "that the speech of politicians is necessarily of public interest, subjecting the authorities to the rules applied to all users", which implies the prohibition of harassment, discrimination and hate speech (Alves, 2021).

<sup>25</sup> The last report presented, for example, in June 2020, dealt with the 5th evaluation, which showed that the Code continues to deliver positive results, with the examination of 90% of notifications in 24 hours and with 71% of reported content removed by the platforms. The full report can be found in: Reynders (2020).

terms of service, so it is not uncommon for users to have posts unavailable and accounts removed by the social networks themselves, in a preventive manner.

In Germany, the German Law to improve the application of the law on social networks *has been in force since 2018* (Germany, 2018). In summary, the Law establishes a system of regulated self-regulation, which applies to social networks with more than two million users and does not reach platforms with journalistic or private messaging content, determines that illicit content, defined by the Penal Code, which concerns the "violation of the personality rights of third parties or that disturbs the public peace by the degradation of certain groups" (EIFERT, 2018), must be removed by social networks after 24 hours of receiving a notification or within seven days for complex cases. There are, however, criticisms of the German law as well as those related to the *Fake News Law* in Brazil, with regard to censorship and the unconstitutional delegation (CUEVA, 2018) to the private sector of State activities, which has a monopoly on the repression and punishment of illegal behavior, among others (Junior, 2018).

According to Cueva (2018), it is true that self-regulation (or even regulated self-regulation) tends to be more agile in identifying illicit content and suppressing it, which is essential to avoid the spread of effects that tend to cause damage that is often irreversible. For this reason, much has been defended about the creation of a *compliance system* in our country, which would tend to ensure transparency and control through auditable routines and procedures. In this sense, as the Minister says when dealing with the subject, the reservation of jurisdiction (state regulation) and the self-regulation of platforms should not necessarily be seen as exclusive.

In view of the analysis of the phenomenon and the need to think about how the informational disorder, which greatly harms democracy in our country, could be ordered, it is verified that, even with self-regulation, the criminal prosecution of crimes and the reparation of damages caused by the dissemination of illegal content could proceed independently. These would thus be complementary systems that, at the end of the day, would aim to reduce the extent of damage on social networks, especially with regard to the violation of the personality rights of Internet users.

#### **4 Final considerations**

Dealing with the phenomenon of informational disorder, as can be seen, is not an easy or simple mission. And, obviously, this study did not intend to exhaust the theme, but only to make

the necessary cuts to enable the analysis of aspects related to the phenomenon, such as the characteristics of the information conveyed on the Internet and the motivational and structural characteristics that support it. All so that, in a second moment, it would be possible to analyze the existing system in our country to instrumentalize the imputation of civil liability in the face of damages suffered by Internet users as a result of the content published on the Internet. From all the analysis, at least it seems, there is only one certainty: there are countless questions, especially in view of the right to freedom of expression of Internet users, as to the best solution to try to "order" the informational disorder to which we are all subjected when accessing the Internet and social networks.

In fact, it can be said that informational disorder is the price of living in a free society<sup>26</sup>. However, it must be taken into account that such freedom is not absolute in the Brazilian legal system. And, in view of this, the great asymmetry of information and the almost total inability of Internet users to distinguish for themselves what is "true" from what is "lies" and what is licit from what is illicit means that only state intervention (through the Judiciary) or only the self-regulation of social networks cannot be considered the best solutions in isolation, either because they are flawed (each for their own reason), or because they find limits in their own internal structures.

Thus, more important than raising the flag for one or another way of better "ordering disorder", one should reflect on the need to strengthen the protection of Internet users, whether against the State (which should not be seen as an enemy of the process of strengthening communicative freedoms, but as an agent that must intervene to seek to order informational disorder), or in the face of social networks (which, although seen as "giants of communication" – the true possessors of the tools, both to deal quickly with a possible illegal act, avoiding the spread of damage on the Internet, and to make the user increasingly enjoy the technological advances provided by the generations of *webs*).

Finally, it is also important to remember that, regardless of what is considered, according to the time, as the best way to protect personality rights on the Internet, we will usually be dealing with *lives* and *people*, so that preventing damage to them from being perpetrated (or continuing to produce effects) should be the primary objective. It is not by chance, therefore, that one seeks, at all costs, to regulate the phenomenon. However, it should be borne in mind that an initial solution, possibly more efficient than all the others that have been proposed, is to

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<sup>26</sup> An idea that can stem from the call *marketplace of ideas*, which is a thought that maintains that "the best way for a democratic society to determine what would be the best idea among so many is to let them confront each other in the field of ideas". See: Quinelato (2020, p. 465-487).

effectively seek to make Internet users aware that everything that is produced as content, what is read, what is interpreted and what is shared always generates *consequences* (whether visible and immediate or not).

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