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constitutional challenges

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VOL. 8 N.º 3 DEZEMBRO 2021

WWW.E-PUBLICA.PT



COM O APOIO DE:

FCT Fundação
para a Ciência
e a Tecnologia

ISSN 2183-184x

DISINFORMATION, PANDEMIC AND SOCIAL NETWORKS: CONSTITUTIONAL CHALLENGES

DESINFORMAÇÃO, PANDEMIA E REDES SOCIAIS: DESAFIOS CONSTITUCIONAIS

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Abstract: The inoculated origin of the disease; false miraculous remedies; supposed preconceptions on the use of masks; adverse effects of vaccination. These are just some examples of false content which, disguised under the appearance of reliable information, we received, read, and shared with friends or acquaintances since the beginning of the pandemic. And the phenomenon of disinformation during the time of Covid –along with a serious rise in the use of social networks– became a problem of global dimensions with repercussions which are at the centre of new legal challenges. It can be safely said that disinformation has acquired a new dimension: it is now capable of affecting collective legal rights, such as health, safety and the normal functioning of institutions. The aim of this article is to address the scope of the regulatory changes that are approaching, within the scope of the EU, taking into consideration the long-awaited proposal of the Digital Service Act, based on the essential diagnostic and descriptive analysis of the context, as well as the main risks arising from the new communicative paradigm.

Resumo: A origem inoculada da doença; falsos remédios milagrosos; supostos preconceitos sobre o uso de máscaras; efeitos adversos da vacinação. Estes são apenas alguns exemplos de conteúdo falso que, disfarçado sob a aparência de informação fiável, nós recebemos, lemos, e partilhamos com amigos ou conhecidos desde o início da pandemia. E o fenómeno da desinformação durante o tempo de Covid –juntamente com o grande aumento do uso das redes sociais – tornou-se um problema de dimensões globais com repercussões que estão no centro de novos desafios legais. Pode ser dito com segurança que a desinformação adquiriu uma nova dimensão: agora é capaz de afetar direitos legais coletivos, como a saúde, a segurança e o funcionamento normal das instituições. O objetivo deste artigo consiste em abordar o alcance das mudanças preparatórias que se

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aproximam no âmbito da UE, considerando a tão esperada proposta da Lei do Serviço Digital e tendo por base o diagnóstico e análise descritiva do contexto, bem como os principais riscos decorrentes do novo paradigma comunicativo.

Keywords: disinformation; pandemic; freedom of speech; social networks; digital communication.

Palavras-chave: desinformação; pandemia; liberdade de expressão; redes sociais; comunicação digital.

Summary: 1. Context: health crisis and digitalization. 2. Brief analysis of the constitutional problem of disinformation: 2.1. New communicational paradigm. 2.2. Digital communication: determining factors. 2.3. Self-referential bubbles and automation. 3. Infodemic, infoxication and affected rights: 1. Public health. 3.2. Security. 3.3. The normal functioning of institutions. 4. The European answer, on the pathway to truth: 4.1. New aspects of the Digital Service Act. 5. In conclusion. Bibliography.

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1. Context: health crisis and digitalization

The fact that our daily lives changed with the pandemic is obvious. Nevertheless, even though this statement is obvious and that, when we say it today it doesn't mean anything new to us, we still read it and listen to it in different contexts almost daily. Some of the changes will pass, others have come to stay in each household. The *new normal* which we have sadly accepted as a lesser evil to continue with our lives took away hugs, close contact, and group meetings, whether for academic or for leisure purposes; it attempted to take away from us the very essence of what defines the human being as a social being and it disrupted its nature, if it did not do so completely. Now, interpersonal communication – contact, meetings, hugs– can only be virtual.

Since March of 2020, we have been immersed in an accelerated digitalization process which is cut-crossing to all areas¹: the pandemic– or the consequential new wave of impositions regarding the need to reduce contacts– has been a decisive factor in the exponential growth of the use of social networks², communication platforms and applications such as Zoom, Teams or Meet, thanks to which we have been able to participate in multiple video conferences, work from home –when work-family conciliation allows it– or hold meetings at a distance, regardless of how far away it is in terms of kilometres.

Image 1: Rise in Internet and social network use in 2020



Source: “Digital 2021” Bulletin from Hootsuite and We Are Social.

1. For this purpose, online transformation is extended to «many day-to-day activities such as work, schools, universities, the focus of public entities, commerce, entertainment and interpersonal communications». See G. LORETO-ECHEVERRI, «Editorial. Riesgos de desinformación en tiempos de la pandemia de COVID-19», in *Comunicación*, No. 42, 2020, p. 5.

2. The restrictions which were applied to mobility led to a rise in Internet users, as well as to the rise of time spent online. «More than 37 million people in Spain use online networks, which is around 80% of the population, and people also access them through mobile devices (98%) and spend an average of two hours on them per day». With about 90% of Internet users, «WhatsApp has become the most used social network in our country, followed by YouTube (89,3%), Facebook (79,2%) and Instagram (69%)». M. JUSTE, «La pandemia dispara el uso de las redes sociales, un 27% más que hace un año», in *Expansión*, 10 February, 2021.

[caption: Data from January 2020 to January 2021. Growth in comparison to the same period in the previous year]

But it is true that these platforms are not new³. They have occupied a very prominent position for years in the context of digital communication, and there are several theses which analyse their legal consequences and effects from different perspectives⁴. Nevertheless, their role, which was already very much decisive⁵, became the centre around which the daily habits of people all over the world gravitate around.

Very few people recalled a health crisis of this dimension⁶. It is, without a doubt, a situation of immeasurable importance on a public level –the pandemic with most media resonance in history– and, within this context, communication as an «inherent critical factor in any public proceedings, whatever its nature may be», is an essential element with the capacity to –if badly managed– prolong its duration; because «any crisis also involves an additional information crisis»⁷. We have confirmed it during the last two years: disinformation has acquired an entirely new dimension. What starts as a health challenge can easily become a public opinion issue⁸.

Since it started in December of 2019, we have followed the development of the number of deaths and infections with concern, at the same time we have been observing the growth of the curve which has been drawn due to the spread of fake news on the internet. A content –often disguised as reliable information– which nevertheless spreads mistrust among citizens⁹. Messages which are spread

3. In 2016 already 62% of adults from the USA accessed their news through social networks –18% of them on a regular basis– and 44% through Facebook. See J. GOTTFRIED and E. SHEARER, «News use across social media platforms 2016», in *Pew Research Center*, vol. May, 2016.

4. Among others, A. BOIX PALOP, «La construcción de los límites a la libertad de expresión en las redes sociales», in *Revista de Estudios Políticos*, No. 173, 2016, pp. 55-112; J. DE MIGUEL BÁRCENA, «Las transformaciones del derecho de la información en el contexto del ciberperiodismo», in *Revista de Estudios Políticos*, No. 173, 2016, pp. 141-168; R. M. GARCÍA SANZ, «La difícil relación del instituto de la opinión pública y los procesos de comunicación pública en Internet: la desinformación desafiando las garantías constitucionales», in *UNED. Revista de Derecho Político*, No. 106, 2019, pp. 77-104; M. RODRÍGUEZ-IZQUIERDO SERRANO, «Las empresas tecnológicas en Internet como agentes de seguridad interpuestos», in *Revista Española de Derecho Constitucional*, No. 117, 2019, pp. 77-100; and C. PAUNER CHULVI, «Noticias falsas y libertad de expresión e información. El control de los contenidos informativos en la red», en *Teoría y Realidad Constitucional*, No. 41, 2018, pp. 297-318.

5. D. FREELON & C. WELLS, «Disinformation as Political Communication», in *Political Communication*, No. 2, vol. 37, 2020, pp. 145-156.

6. To the fact that this pandemic was unheard of we should add «elements such as uncertainty or fear»; factors which are strictly connected to the spread of false news, which become particularly relevant considering the fact that we are before the «first global phenomenon of these characteristics in the digital era». See C. FAJARDO-TRIGUEROS y R. RIVAS-DE-ROCA, «La acción de la UE en España ante la “infodemia” de desinformación por el COVID-19», in *Revista de Estilos de Aprendizaje / Journal of Learning Styles*, No. 26, vol. 13, 2020, p. 20.

7. F. AZNAR FERNÁNDEZ-MONTESINOS, «El mundo de la posverdad», in *Cuadernos de estrategia*, No. 197, 2018, p. 35.

8. *Ibid.*

9. R. K. NIELSEN, R. FLETCHER *et al.*, *Navigating the ‘infodemic’: How people in six countries access and rate news and information about coronavirus*, in *Reuters Institute for the Study*

as a manipulation instrument and that feed the virus with disinformation which can affect –and does, indeed, affect– collective rights, such as people’s health¹⁰ or security, among others.

In this sense, it is important to question to what point the communication scenario in the digital era is a determining factor; which elements are favoured in these circumstances? Has the threat of disinformation changed with the pandemic? Which are the new rights which are affected by fake news? What are the monitoring possibilities and in which context are we moving in regarding the EU? This article aims at proposing a reflection on these issues, with the objective of offering a series of ideas and some certainties –a diagnosis of the main threats we should face– which may be used as a starting point to law approach the problem. It would certainly be a challenge, but a structured set of ideas on the context will allow us to analyze the scope and adequacy of the new regulations that are being processed in Europe. Technological development and the new challenges arising from the evolution of social reality require determining the future of digital governance and this is the focus of the second part: the content of the Digital Services Act, as an update of the legal regime and the operation of social platforms and networks.

2. Brief approach to the constitutional problem of disinformation

2.1. New communicational paradigm

At the end of the twentieth century, still within the context of what can be called classical journalism, Michael Grannat¹¹ distinguished four stages in the «progression in the answer of the media to a crisis»¹². The first phase is the outburst: an avalanche reaction of the media, who flock to the location of the events, to obtain data, images and sufficient material to be the first to talk about them. After this initial moment, there is the investigation phase: the media set out to construct a serene account of the facts and to stand out from the rest by offering a relevant information product. The third phase is the «manhunt»; search for the culprit, responsible for the error or cause of the crisis. Finally, we reach the phase of the afterword; this is the phase which tends to last for the longest period. It is focused not only on the result and assessment of the crisis, but also its subsequent consequences: the status of those affected, judgement. At this phase, it is common that the media carry out special programmes or documentaries.

of Journalism & University of Oxford, Ed. Reuters Institute for the Study of Journalism, University of Oxford, Oxford, 2020.

10. «Thousands of people have been the victims of disinformation [...] many have intoxicated themselves by following recommendations as extreme as ingesting chlorine», following a recommendation published on social networks. G. LORETO-ECHEVERRI, *op cit.*, p. 6.

11. Director of communications to the British Presidency for the media during the 90’s decade.

12. M. DE MIGUEL RAMÍREZ, «La gestión de crisis ante el terrorismo», in *Boletín de Información*, No. 296, 2006, p. 18 and 19.

Nowadays it is a different set up. The classical information pattern has been substituted by another pattern in which traditional media no longer plays a role in the construction process of public opinion¹³. Immediacy takes over everything. Reaction periods are shortened¹⁴ –which preoccupies and occupies the management of the moment– as is the period for political reaction.

The change in paradigm which can be observed today is the result of a gradual –but simultaneously staggering– process of transformation of classical patterns; «a revolution»¹⁵ in which the path is opened for new players and new risks, which call for the necessary task of revising the applicable laws¹⁶ to adapt them to the current technological challenge.

Users are no longer mere receiving parties of information. This role, which was initially passive and static, opens the way to a scenario where individuals alternate in the positions of sender and receiver, accordingly¹⁷, blurring the traditional divisive line between the moment of the creation and the consumption of information. Any citizen may design content and publish it with a daily act as simple as swiping their finger over the screen of their smartphone¹⁸ –a miniature computer which fits in the pocket of a pair of trousers–. Sophisticated programmes and applications at our reach allow us to store and share archives in any kind of format –text, images, sound and video– through platforms which gather us in virtual interactive communities in real time: social networks.

It is true that much has been written¹⁹ on the effects of what sociologist Manuel Castells²⁰ described as being of «a network society», but it is convenient to start pointing out –in a non-exhaustive manner– its fundamental characteristics; the defining traits of the new technological framework²¹, which are determining factors and inevitably reflect on the legal concepts we work with.

13. The internet involved a transformation and, in this sense, «the role that newspapers mainly played in shaping public opinion has been progressive debilitated». J. DE MIGUEL BÁRCENA, *op cit.*, p. 143.

14. *Ibid.*, p. 145 y ss.

15. G. M. TERUEL LOZANO, «Libertad de expresión y censura en Internet», in *Estudios de Deusto*, No. 2, vol. 62, 2016, p. 43.

16. M. RODRÍGUEZ-IZQUIERDO SERRANO, «El discurso de odio a través de Internet», in *Miguel Revenga Sanchez (dir.), Libertad de expresión y discursos del odio*, Ed. Universidad de Alcalá, Servicio de Publicaciones, 2015, pp. 149-150.

17. J. M. BALKIN, «Free Speech is a Triangle», in *Columbia Law Review*, No. 118, 2018, pp. 2011-2056.

18. What previously required a complex process involving journalists, publishers, press printers and points of distribution is at the reach of anyone who disposes of a mobile phone and access to the Internet today.

19. Here, we will limit ourselves to mention those elements which directly influence the subject under analysis of this paper.

20. M. CASTELLS, *La sociedad red: una visión global*, Ed. Alianza Editorial, 2006.

21. The ideas developed herein have been previously approached in A. GALDÁMEZ MORALES, «Verdad y cánones de veracidad», in *Estudios de Deusto*, No. 2, vol. 70, 2021. (in press).

2.2. Digital communication: determining factors

It may be useful to establish an initial classification according to the subjective or objective aspects of these traits or defining elements. We will start by the second group, in which we have framed these characteristics and –objective– effects stemming from the means which is understood as being the communication channel.

Boix Palop points out what may be the most relevant of these elements: the capacity of mass dissemination of content that «historically would be in one sphere, whether it is private or restricted, which is typical of relationships of familiarity [...] and that today have a much wider reach»²². Potentially viral messages from the moment of publication, due to the emergence of platforms,²³ which facilitate virtual contact between people and the flow of information. In this sense, the social networks which raise more interest are those which allow not only interaction with other contacts, but also the dissemination of content of a discursive nature, as is the case of Twitter and Facebook. WhatsApp or Telegram have a different way of functioning, which also facilitates the exchange of opinions and information, even if on an individual level or in small groups. It is on these platforms that we most frequently come across problems related to the limits to the exercise of freedom of expression and information, which is something that does not occur with other social networks such as, for example, Instagram or YouTube –mainly focused on the publication of images and videos– and therefore, home to another type of specific problems around audio-visual material.

It is the former social networks²⁴ that operate without being considered conventional media, like «forums»²⁵ or communication channels with the capacity to accommodate the construction process of public opinion. Their role as channels of the new communication system cannot be ignored, mainly due to the reach of their messages; a reach which can be measured as physical distance (everything has a further reach), in the number of information recipients

22. A. BOIX PALOP, *op cit.*, p. 4.

23. There is abundant bibliography about the functioning of social networks. For a more in-depth study about from the perspective of the social sciences. MOLINA, «Análisis de redes y cultura organizativa: una propuesta metodológica», in *Revista Española de Investigaciones Sociológicas*, No.71-72, 1995, pp. 249-263; SANTOS, *Redes sociales y sociedad civil*, Ed. Centro de Investigaciones Sociológicas, Colección Monografías, Madrid, 2008. If one prefers a general focus from a historical and technical perspective regarding the more well-known social networks (Facebook, Twitter, MySpace y LinkedIn), see CASELLA, *The social networks: an introduction*, (Ebook), 2015.

24. Like Twitter and Facebook.

25. The need to determine the nature of these forums and sub-forums, lies in the determination of their – public or private- nature; this is essential at the moment of approaching the debate on the regulation of the speech which is disseminated within them, «in a context in which the classical separation between private forums and public forums seems to fade». V. J. VÁZQUEZ ALONSO, «Twitter is not a public forum but Trump's profile is. On private censorship and of digital platforms in the USA», in *Estudios de Deusto*, No. 1, vol. 68, 2020, p. 478. See also L. B. LIDSKY, «Public Forum 2.0», in *Boston University Law Review*, No. 155, vol. 91, 2011, pp. 1975-2028; N. FELDMAN, «If Trump Can't Block Twitter Users, Twitter Can't Either», in *Bloomberg*, 24 May, 2018.

(subjective reach), and in terms of time. The temporal scope, which also grows considerably, is what can be considered the second determining element: permanence.

Content has a wider reach as well as a longer lifespan. The messages which are spread are stored –they are not issued, but instead this content is permanently *posted*– on digital servers, unless we act to the contrary; this becomes particularly dangerous when we are looking at false content which is created in a fraudulent manner through portals «which look like webpages and are intended to trick internet users and profit from publicity revenue with each click»²⁶. This is produced, among other things, due to universal access²⁷ –which would be the third determining trait– and which leads us directly to the subjective element of the new digital communication framework, which can be placed under a single category: the players of the information society.

In the context of free access, in which users operate alternately in the roles of sender and receiver accordingly, and interact instantly with other individuals, the divisive line between content creators and their audiences is blurred. Until now, we used to identify the traditional media as main subjects, as well as journalists and media professionals on one hand and, on the other, those who received the information in question, as well as readers, listeners, and TV viewers. A triangular scheme²⁸, with a balance which becomes complicated with the irruption of multiple players. On one hand, platforms, social networks, and digital information transmission channels stand out in the role they play in content dissemination²⁹; on the other, citizens broadcast messages and act as reporters at the stage which is necessarily prior to creation, thereby breaking the barrier between them and journalists.

The purpose of this brief note regarding traits and fundamental characteristics is to draw a communicational mosaic in which speed and immediacy³⁰ take the spotlight from old practices such as the reflection and the serene address of the issues in question³¹. Consumer patterns are also inverted: instead of looking

26. C. PAUNER CHULVI, *op cit.*, p. 302.

27. Anyone with access to new technologies can operate on the internet, from anywhere in the world, as an information sender or receiver.

28. J. M. BALKIN, *op cit.*, pp. 215-217.

29. Platforms which are technological companies and, nevertheless, are given an ever-growing responsibility as «intermediary warrantors» in content management M. RODRÍGUEZ-IZQUIERDO SERRANO, «Las empresas tecnológicas en Internet como agentes de seguridad interpuestos», en *Revista española de derecho constitucional*, No. 39, vol. 117, 2019, p. 98. In the same line of thought, L. COTINO HUESO, «Responsabilidad de intermediarios y prestadores de servicios de internet en Europa y Estados Unidos y su importancia para la libertad de expresión», in *Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, No. 17, 2017, pp. 1-32.

30. J. C. SUÁREZ VILLEGAS, «Aspectos éticos y deontológicos de la actividad periodística online. Su percepción por los profesionales», in *Revista Latina de Comunicación Social*, No. 70, vol. 1, 2015, p. 97.

31. The demand for «immediate, constantly updated information, which rebroadcasts everything that happens, almost live, imposes new patterns of information production which don't go well with professional diligence duties and with the comparing of sources which is necessary due to the limits of truth». J. C. SUÁREZ VILLEGAS & J. CRUZ ÁLVAREZ, «Problemas éticos de la

for information by buying a newspaper, today information finds us instead, inundating us and persecuting us in the form of short headlines which show up on our screens as quickly as they disappear, shortly followed by another message. It is the perfect breeding ground for fake news and lies created with a certain purpose in mind to travel the internet, inevitable influencing public debate.

2.3. Self-referential bubbles and automation

Since the Cambridge Analytica scandal,³² the focus is on what we can consider one of the big risks of the present day. Social networks have made a type of communication possible which is «complete for all human beings»; it has become an interaction and information consumption space³³; nevertheless, «simultaneously, they may also be used as a platform to launch any sort of untruth, and even a specific disinformation campaign or propaganda»³⁴.

Available in over one hundred languages in most countries on the planet³⁵, Facebook stores «the life and digital identity» of almost two billion active users a day³⁶ and of an average of more than two thousand seven hundred million users per month. A growing tendency which is becoming generalized –as the most recent data shows³⁷– to other platforms: YouTube and WhatsApp, also register more than two thousand three hundred million monthly users; Instagram –one of the social networks with greater projection– has more than one thousand two hundred million active users per month; and Twitter overtook the amount of three hundred and fifty million in the same period.

instantaneidad informativa en el entorno digital», in B. LLOVES & F. SEGADO (coords.), *I Congreso Internacional de Comunicación y Sociedad Digital*, 2013, p. 7 and 8.

32. The British daily newspaper *The Guardian* revealed that the company had used an application –personality test– to store data of over 50 million Facebook users, with the objective of establishing psychological profiles and to direct specific campaigns to certain audiences. It was a determinant factor in Trump's electoral victory in the 2016 presidential elections. See ADSUARA VARELA, «La protección de datos en los procesos electorales: ¿Qué ocurrió en el caso Cambridge Analytica? The chronicle in “Cambridge Analytica” español», in *El Cronista del Estado Social y Democrático de Derecho*, No. 88-89, 2020, pp. 152-163.

33. According to the data of the Digital News Report 2020, produced by the Reuters Institute, Facebook has become the favourite social network to obtain information: 36% of respondents resort to it to obtain information. In second and third place, we have YouTube (21%) and WhatsApp (16%). Twitter is in fourth place (12%), despite being considered by other users as a mainly informative platform.

34. L. ESTEBAN VILLAMOR, «Introducción», in *Cuadernos de estrategia*, No. 197, 2018, p. 11.

35. Except for the few countries which forbid access, such as Afghanistan, Bangladesh, China, North Korea, Cuba, United Arab Emirates, Eritrea, Iran, Libya, Pakistan, Syria, Tunisia, and Vietnam.

36. J. A. DÍAZ LIMÓN, *Derecho en tiempo de Zuckerberg. Estudio jurídico sobre las condiciones, políticas y normas de Facebook*, Ed. Tirant lo Blanch, Valencia, 2019, p. 15.

37. Registered in January 2021, according to the report «Digital 2021. Global Digital Overview», produced by Hootsuite y We Are Social. Full report available at <https://www.juancmejia.com/wp-content/uploads/2021/03/Digital-2021-Global-overview-report.pdf>

The scale of the numbers and, specifically, of the information –which is very valuable in qualitative and quantitative terms– which can be extracted from the individual behaviour of each of these users, justifies to a certain extent that social networks have converted themselves in an important negotiation factor for many companies. This is due to a phenomenon called microtargeting –or micro-segmentation–, «a technique based on statistic algorithms» that allows users to be analysed, individualised, and classified, according to preferences and expectations shared on the internet. Thus, based on these behaviours, products and consumer goods are offered³⁸, and messages are oriented to the creation of imaginaries³⁹ or to their consolidation. With each “like”, with each search, information is transferred to an automated calculation system, designed to process and learn about our online behaviour. And our intelligence and decision-making capacity no longer belongs exclusively to us: there are operational systems with access to a great quantity of information and the possibility of organizing metadata while applying a descriptive logic. The algorithm evaluates, corrects, draws conclusions, and modifies procedures, developing what we know as artificial intelligence (AI), which is here to stay⁴⁰.

Generally speaking, the use of our data is concerning⁴¹; particularly the use which is related to the manipulation of public opinion based on automated disinformation campaigns –and its consequences for democracy– designed from opaque algorithms⁴². Because, in this context, the assimilation of elements of false information can determine the emergence of others and increase cognitive distortion fed by communication biases⁴³, bubble filters and so-called «echo chambers»⁴⁴, which contribute even more to the fragmentation of society⁴⁵, dispersed in ideological and cultural subgroups.

Therefore, the order in which content is presented to us is not by chance. It is the result of an algorithm which gives more or less prominence to certain publications in detriment of others, according to the expectation of the receiving party. And it has been proven that the algorithms which use social networks can reproduce biases or deviations⁴⁶, even though this has nothing to do with the

38. F. AZNAR FERNÁNDEZ-MONTESINOS, *op cit.*, p. 37.

39. R. ARRANZ MARTÍNEZ, «La creación de imaginarios», in *Boletín IEEE*, No. 10, 2018, pp. 348-360.

40. J. L. MANRIQUE, «Populismo y posverdad , ¿sólo tendencias?», in *Revista Inmanencia*, No. 1, vol. 5, 2016, p. 161.

41. The processing of data can respond to exclusively commercial purposes.

42. They are opaque, not only from a logical mathematical standpoint, but also from a subjective perspective: we do not know their procedure, internal functioning, nor the identity of whoever pulls the hidden strings behind the anonymity which is offered by a webpage.

43. P. C. WASON, «On the failure to eliminate hypotheses in a conceptual task», in *Quarterly journal of experimental psychology*, No. 3, vol. 12, 1960, pp. 129-140.

44. E. PARISER, *The filter bubble: what the Internet is hiding from you*, Ed. Penguin Press, London, 2011.

45. J. ABRAHAM FERNÁNDEZ, «Algoritmos, las nuevas armas de ¿construcción? masiva», in *Boletín IEEE*, No. 5 (enero-marzo), 2017, pp. 478-492.

46. This happened in the case of Twitter’s algorithm, which preferred faces with certain features. J. PÉREZ COLOMÉ, «El algoritmo de Twitter elegía caras femeninas, blancas y delgadas. Un concurso de programadores lo demostró», in *El País*, 19 de agosto, 2021.

specific preferences of a system which lacks a certain sensitive or semantics intelligence⁴⁷ and, thus, does not have the capacity to attribute meaning to these images. If it shows us a result with a certain racial or gender tendency, it is the product of the information which has been previously compiled and of the data which has been provided by the users.

Something similar occurs with the algorithm which censors the images of naked bodies on social networks. It is configured to detect percentages of skin, and when an image exceeds this percentage, it is automatically blocked; the same goes for an image which shows a female nipple –which does not occur if it is the nipple of a male–. Notwithstanding, there is a lack of sensitivity which disappears with automation.

How can we protect ourselves from the threat of automated disinformation campaigns? We are talking about campaigns, often designed with algorithms which work without the necessary coverage and an adequate normative framework that could bring security from a legal perspective. Which are the new risks of disinformation during pandemic times? Let's investigate this further.

3. Infodemia, infoxication and affected rights

The inoculated origin of the disease; false miraculous remedies –such as sodium chlorite or bleach–; the supposed harms of using a mask; the adverse effects of vaccination, are all just some examples of false content⁴⁸ which we were allowed to receive, read and share, disguised under the appearance of reliable information, with one click, with friends and acquaintances since the beginning of the pandemic. The disinformation phenomenon has, in fact, «converted itself into a health problem»⁴⁹; an unprecedented situation, which led the World Health Organization to use the term «infodemic»⁵⁰, to warn about the risks of a structural problem –the disinformation pandemic– which, in a short period of time, reached a global dimension⁵¹. The term has been defined as «an overabundance of information –some of which is exact and some of which is not– which makes it hard for people to find credible and reliable sources»⁵². This fact, which can be attributed to the rise in the volume of false information which circulates on

47. «All these qualitative studies regarding images attribute a semantic intelligence to the human being, which machines do not yet possess. Artificial intelligence or deep learning are not able to discern certain meanings and connotations of the images». P. DÍAZ ALTOZANO, G. PADILLA CASTILLO *et al.*, «Sexualización de niñas en redes sociales: la necesidad de inteligencia semántica en Instagram», en *Investigaciones Feministas*, No. 1, vol. 12, 2021, p. 34.

48. «La COVID-19 y sus bulos: 1.207 mentiras, alertas falsas y desinformaciones sobre el coronavirus», in *Maldita.es*, 3 December, 2021.

49. R. SALAVERRÍA, N. BUSLÓN, *et al.*, «Desinformación en tiempos de pandemia: tipología de los bulos sobre la Covid-19», in *El Profesional de la Información*, No. 3, vol. 29, 2020, p. 2.

50. «La desinformación frente a la medicina: hagamos frente a la “infodemia”». Available at: <https://bit.ly/31nwJXc>

51. With foreseeable effects much beyond the borders of any given State.

52. Novel Coronavirus (2019-nCoV) Situation Report - 13. World Health Organization, 2 February 2020.

different topics, gains a particular relevance when we relate it to the current pandemic, due to the consequences which stem from it on rights as sensitive as health rights, for example⁵³.

Lies are not a novelty; nor is the political use of manipulation. Plato's «noble lie» was already a justification to hide all which was considered necessary from the people, in order to safeguard the stability of power⁵⁴. Examples of the use of lies are well known and abundant⁵⁵ in public discourse; nevertheless, it is now –and this moment is not by chance– that we are incorporating this in the dictionary of new concepts⁵⁶, to describe and systematize the mosaic of *informational disorders*⁵⁷, in the *era of post-truth*⁵⁸.

At this point, it is important to use the *2017 Council of Europe report on information disorder* to adopt a semantic clarification which stems, as a reference point, from the intentionality criteria. Thus, we differentiate between: a) *dis-information*, which corresponds to intentionally false information; a «series of lies and falsehoods which are deliberately created in order to hurt a person, a social group, a government or a country»; b) *mis-information*, which is information that, even though it does not completely coincide with the truth –and is not true– was not created with the intention to deceive or damage; and, lastly, c) *mal-information*, which –even though it can be true– corresponds to content which is used and disseminated with the intention to cause harm, whether it is to a person, a social group, an organization or a country.

This differentiation is particularly relevant because it makes us analyse «not only the content of the –false– information and the damage causes», but also the subjective element, in other words, the intention with which it was created⁵⁹.

53. C. FAJARDO-TRIGUEROS y R. RIVAS-DE-ROCA, *op cit.*, p. 20.

54. PLATÓN, *La República*, Ed. Centro de Estudios Políticos y Constitucionales, Madrid, 2006.

55. H. J. NEUBAUER, *Fama. Una historia del rumor*, Ed. Ediciones Siruela S.A., Madrid, 2013. (Translation by Germán Garrido Miñambres).

56. «Disinformation»; «alternative facts»; or «informational pathologies», are some of the neologisms. R. DARNTON, «The True History of Fake News», in *The New York Review of Books*, 13 February, 2017; R. RUBIO NÚÑEZ, «Los efectos de la posverdad en la democracia», en *UNED. Revista de Derecho Político*, No. 103, 2018, pp. 191-228.

57. COUNCIL OF EUROPE, *Information Disorder: Toward an interdisciplinary framework for research and policy making*. DGI(2017)09, 2017.

58. «Emotion determines the perception of social reality, with a greater influential capacity than facts and verified evidence». This is the definition of the term *post-truth*, the word of the year in 2016, according to the prestigious Oxford Dictionary. In English: «relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief». OXFORD DICTIONARIES, «Definition of post-truth» [Online]: <https://en.oxforddictionaries.com/definition/post-truth> [Consulted: 03/04/2019]. In the Dictionary of the Spanish Royal Academy, we can find the following definition: «deliberate distortion of a given reality, which manipulates beliefs and emotions for the purpose of influencing public opinion and social attitudes». «Definición de posverdad - Diccionario de la lengua española - Edición del Tricentenario» [Online]: <https://dle.rae.es/?id=TqpLe0m> [Consulted: 03/04/2019].

59. R. SERRA CRISTÓBAL, «De falsedades, mentiras y otras técnicas que faltan a la verdad para influir en la opinión pública», in *Teoría y Realidad Constitucional*, No. 47, 2021, p. 225.

And this raises issues, which are not minor, in the sense that any legal proposal should not only determine what the truth is⁶⁰ –and, if it is the case, the existence of legal damage due to the lack of truth– but also, approach the difficulty which the subjective element involves: analysis of the intentionality⁶¹ with which content has been placed in circulation, –because not all wrong information can be classified as disinformation⁶²– this is something which belongs to the personal sphere of each person and that, in any case, will always be very hard to demonstrate.

It is obvious that the magnitude of the events raised concern among public powers on a worldwide level; regulatory proposals are debated to face what has become one of the main legal challenges of our time. It is not by chance that fake news⁶³, of which we started hearing about during the American presidential campaigns in 2016⁶⁴, occupy the centre of today’s debate, not only in our more immediate surroundings, but also in the international context⁶⁵ and in the European agenda. Provided that this is a central issue for Constitutional Law, its examination from the perspective of the Spanish legal context is justified for two main reasons:

60. In the words of Foucault, «truth is a thing of this world; it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its ‘general politics of truth’». M. FOUCAULT, *Microfísica del poder* (eds. Julia Varela y Fernando Álvarez-Uría), Ed. La Piqueta, Madrid, 1992, pp. 175-189.

61. Rubio Núñez explains this by quoting H. ARENDT, *Verdad y mentira en política*, 2017. He speaks of «misinformative intent» or «intent to influence», normally with electoral or economic interests. See R. RUBIO NÚÑEZ, *op cit.*, p. 202.

62. Only when the content has been constructed with the purpose of deceit. «The only fake news is information which is fictitious or fraudulent, and which is disseminated with knowledge of its inaccuracy. It is important to differentiate false and unacceptable news from other information which contains errors, but which can be the object of constitutional protection », in accordance with the limits of relevance and truth. C. PAUNER CHULVI, *op cit.*, p. 312.

63. Neologism translated literally to Spanish as «fake news». Elected ‘word of the year 2017’ by Collins English Dictionary, which gave it the following definition: «false, often sensational, information disseminated under the guise of news reporting». See COLLINS DICTIONARY, «Word of the Year 2017» [Online]: <https://www.collinsdictionary.com/word-lovers-blog/new/collins-2017-word-of-the-year-shortlist,396,HCb.html> [Consulted: 03/04/2019].

64. For Urías, «it is a category that up to only a few months ago nobody used and that, nevertheless, swiftly attached itself to our daily language ». He points out, as many other authoritative voices have, that the role that US President Donald Trump played in the extraordinary dissemination of the word, «which he frequently uses in his tweets, while appropriating himself of an idea which began to be used against him: to expose the manipulation carried out by some American information companies which, during the electoral campaign, did not hesitate to fabricate scandalous news with the intention of harming democratic candidate Hillary Clinton». See J. URÍAS MARTÍNEZ, «Noticias falsas (fakenews) y derecho a la información», in *Al revés y al derecho*, InfoLibre, 1 February, 2018.

65. The following information is a good example regarding the debate which developed beyond our borders: C. SILVERMAN, «This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook», in *BuzzFeed News*, 16 November, 2016; C. DEWEY, «Facebook fake-news writer: ‘I think Donald Trump is in the White House because of me’», in *The Washington Post*, 17 November, 2016; C. BERNISH, «Zuckerberg Just Revealed Facebook’s 7-Point Plan to Censor “Fake News” and It’s Chilling», in *Activist Post*, 21 November, 2016.

Firstly, democratic legitimacy requires the existence of a free public opinion⁶⁶. As we know, Freedom of Information is structured in western societies as an essential element of democracy; it is a basic guarantee to create and to maintain public opinion, which is a necessary preliminary step in the entire process of democratic legitimation⁶⁷. Nevertheless, disinformation as a side effect of fake news has the capacity of adulterating the formation process of the abovementioned public opinion, as well as the decision-making process of voters. Without sufficient information on the functioning of public affairs, it is not possible to carry out an adequate control regarding its management⁶⁸; so, at the moment of voting, there would be a lack of a basis to do so: the presumption that citizens act based on a decision that takes into consideration all relevant elements of judgement falls through⁶⁹. Due to this, until now, the concern was focused on its effect on electoral procedures: disinformation as a distorting element in the shaping of opinions, as we have seen in the last electoral calls of international relevance⁷⁰.

The second reason is that the classical legal understanding of freedom of information –and its limits– has become obsolete⁷¹. Art. 20.1 d) of the Spanish Constitution recognizes the right of all citizens to «freely issue truthful information by any means of dissemination»⁷², but the delimitation of its content takes into account journalists and conventional media outlets, that are players who, in the current scenario, have lost the monopoly of informative discourse⁷³.

66. The Constitutional Court had this understanding when it stated that «the freedoms in article 20 of the Constitution are not only fundamental rights of the individual, but also mean the recognition of free public opinion, which is an institution that is inseparable from political pluralism, a core value of the democratic State, and through it these freedoms are afforded an efficiency which transcends that of the average efficiency which belongs to other fundamental rights», STC 121/1989, 3 July, FJ 2.

67. This point was consolidated in repeated constitutional and European jurisprudence. On the link between freedom of information and the guarantee of free public opinion, consult STC 6/1981, of 16 March; STEDH, of 24 May 1988, Müller v. Switzerland case.

68. «For a citizen to freely shape his opinions and to participate in a responsible manner in public affairs, he also has to be widely informed in a manner which allows him to reflect on different and even opposing opinions», STC 159/1986, 16 December, FJ 6.

69. Robert Dahl proposes a list of requirements for the creation of what he calls a decisive majority. The fifth requirement is that «all individuals possess identical information on the several existing alternatives». See R. A. DAHL, *A preface to democratic theory*, Ed. University of Chicago Press, Chicago-Londres, 1956, p. 71.

70. The 2016 American presidential elections, the Brexit consultation, or the independence consultation of the 1st of October.

71. On the need to reformulate constitutional rights before the threats of new challenges of the digital world D. ORDÓÑEZ SOLÍS, «La reformulación de los derechos fundamentales en la era digital: privacidad, libertad de expresión y propiedad intelectual», in *Revista Europea de Derechos Fundamentales*, No. 25, 2015, pp. 401-433.

72. This is what is stated in article 20 of the Spanish Constitution. Other international texts with similar content can also be consulted, namely, those such as article 10 of the ECHR (European Convention of Human Rights) or article 11 of the CFREU (Charter of Fundamental Rights of the European Union).

73. This is what is known as «mass *self-communication*», defined by Castells as «the communication which we select ourselves, but which has the potential to reach the masses in general terms, or people or groups of people we select on our social networks», M. CASTELLS, *Comunicación y poder*, Ed. Alianza Editorial, Madrid, 2009, p. 88.

Added to this, in the current context of a global scale pandemic, new risks have emerged attached to other collective rights which are also being affected. They are essentially three: public health, security, and the normal functioning of institutions.

3.1. Public health

Since December 2019, a big quantity of false information has been spread, affecting health as a protected right⁷⁴. The thematic classification of lies which has been produced by a recent study⁷⁵ identifies three main categories: 1. Science and health; 2. Politics and government; 3. Others. Those from the first group –the most relevant one– are lies regarding topics involving health and science related to the pandemic, including: «lies directly related to science»; «false health recommendations»; «falsehoods related to healthcare management»; and «lies disseminated by supposed medical staff or falsely attributed to professionals and public institutions». The problem is that certain miraculous cures and treatments or home-made remedies –far from healing the disease– place the health of those who decide putting them into practice in danger, whether they do so due to lack of knowledge or for any other reason.

3.2. The normal functioning of institutions

Apart from affecting their original legitimacy, as we saw above; disinformation is also influencing the functioning of institutions, and it may –if it is the case – affect the actions of public authorities. Falsehoods related to healthcare– hospitals and equipment– and lies attributed to supposed healthcare staff or public health institutions –the World Health Organization– correspond to 23% and 15% of those which are included in this category⁷⁶.

3.3. Security

Disinformation has the capacity to generate chaos and confusion in society. The management of Covid-19 –and its derivations in the field of communication –have challenged societies and governments, regardless of their degree of development⁷⁷; along with other threats and other risks, the «vulnerability of

74. Article 43 Spanish Constitution: «1. The right to health protection is recognised. 2. It is incumbent upon the public authorities to organise and safeguard public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all concerned in this respect».

75. R. SALAVERRÍA, Nataly BUSLÓN *et al.*, *op cit.*, p. 9.

76. *Ibid.*

77. R. SERRA CRISTÓBAL, «Los riesgos del Covid-19 más allá de la salud», in *Al revés y al derecho. Infolibre*, 12 April, 2020.

states, their economic balance and that of their citizens» rises. In this context, we place fake news which fed conspiracy theories in the second category of the abovementioned classification: politics and government. In this case, most of the lies are related to the direct administration of various governments, with political parties and with international policies⁷⁸.

Messages spread with the intention of manipulating can even have an effect beyond borders and affect the relations between different states, but security is not an unambiguous concept and, when we say that it can be damaged, we are referring to a damage of a different nature. Thus, we can speak of national security, public security and economic security, human security, democratic security and so on⁷⁹. «Security is the basis on which a society can develop, preserve its freedom and the prosperity of its citizens, and guarantee the stability and good functioning of its institutions»⁸⁰. The legal instruments that, on the basis of the framework of the Constitution, regulate fundamental aspects in this sense are: laws applicable whenever an exceptional state is declared – such as a state of emergency, a state of exception and a state of siege–, to National Defense, to Security Forces and Bodies, to the protection of the security of citizens, to the protection of critical infrastructures, to civil protection, to the external action service of the State or to private security. Nevertheless, we should be mindful of another risk connected to the temptation of overvaluing security as a protected right and accept all to swiftly that our freedoms should yield in its favour⁸¹.

4. The European answer, on the path to transparency

During the past years, international bodies have become aware of the need for a transversal approach to face the problem and, in general, there is a tendency to advance towards the consolidation of common principles. Therefore, within the framework of the Council of Europe, we must mention the recommendations of the Venice Commission on the use of technology in electoral procedures⁸². Even though it is true that they are circumscribed to a very specific moment–the elections– which is particularly threatened by the risks of disinformation and the treatment of personal data, these are general guidelines which could easily be extendible as minimum parameters for an adequate approach to

78. R. SALAVERRÍA, N. BUSLÓN, *et al.*, *op cit.*, p. 9.

79. R. SERRA CRISTÓBAL, «Los riesgos del Covid-19 más allá de la salud», *op cit.*

80. Law 36/2015, of 28 September, of National Security. Preamble.

81. We can very well apply the words of Revenga on this point: «when the exercise of freedom of expression collides with national security [...] the shock produces utterings and “adventures” which generally lead to wining the case in the public debate». M. REVENGA SÁNCHEZ, «La seguridad nacional y las “aventuras” de la libertad de expresión ante el Tribunal Europeo de los Derechos Humanos», in *La libertad de expresión y sus límites*, 2008, p. 23.

82. CDL-AD (2019) 016-e. Joint report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (in short, in Spanish, “DGI”), on Digital Technologies and Elections, adopted by the Council for Democratic Elections in its 65th meeting (Venice, 20 June 2019) and by the Venice Commission, on its 119th Plenary Session (Venice, 21-22 June 2019).

digital technologies, at least in the European context. In broad terms, the main recommendations are centred around:

- Guaranteeing public debate and the right to freedom of expression. Following this, the necessary regulation of the treatment of content published by social networks, but always safeguarding the exercise of rights.
- Reinforcing the scope of action of electoral bodies based on clear, previously established legislation.
- In the same manner, the establishment of a clear and updated legal framework. This is a subject which is in constant evolution and laws should evolve at the same time because, if they don't, it is easy for the regulation to become obsolete.
- Guaranteeing that the Internet is a space for free interaction, with no pre-established biases.
- Effectively guaranteeing the right to the protection of personal data, in all its phases: collecting, storing and using the data at a later date.
- Foster international cooperation, as well as public/private cooperation. The impulse of coregulation and self-regulation, both with sufficient guarantees and real operational capacity.

It is true that we are dealing with general suggestions of a broad nature, and, in this sense, their true practical use could be questioned. Nevertheless, this characteristic can allow for its application in very different territorial contexts; this is an advantage which should not be disregarded if we consider the planetary extent of the issue which is before us in the face of the global technological evolution.

The inertia of the past years shows that the big platforms have become an indispensable vehicle for interpersonal communication; for the definite exercise of freedom of expression and information. In this sense, they should comply with a series of duties and obligations in an attempt to guarantee the difficult balance between the protection of users –and their fundamental rights– and the maximum possible development of the potential the Internet and new technologies offer.

Regardless of the place where their headquarters is based, social networks operate in most countries in the world. Although, beforehand, this can be interpreted as an obstacle in legal terms –before the difficulty to determine the applicable legal framework– it tends to overcome itself in the most simple manner: platforms accept the norms which rule in different territories, and adapt their functioning to them. In the context of European «multilevel governance»⁸³, the protection of

83. I. PERNICE, «El constitucionalismo multinivel en la Unión Europea», in *European Law Review*, No. 5, 2002, pp. 511-525.

rights is developed in legal spaces which go beyond the constitutional exclusivity of each nation-State⁸⁴, so it is necessary to incorporate a supranational perspective to the study of any fundamental right⁸⁵.

4.1. New aspects of the Digital Service Act

In the context determined by the abovementioned problems, the approach to the existing regulation in terms of services pertaining to the Information Society leads us to ask ourselves what we can expect from Europe. The answer is encouraging: twenty years after the entry into force of Directive 2000/31/CE on e-commerce⁸⁶, two important –and expected– law proposals which are destined to modify the legal ecosystem of platforms are in the making⁸⁷.

The last steps draw out a legislative path with the potential to inspire the national laws of member-states which, for the first time, intend to deal with disinformation problems, the lack of transparency of algorithms, or foreign interference in democratic processes. As the responsible European commissioner for this area, Margrethe Vestager, stated during the presentation of the Digital Services Act⁸⁸, «what is illegal offline, should also be illegal online». Furthermore, as a necessary update of an obsolete legal framework, the new law seeks to comply with objectives such as security in the digital scenario, to facilitate the traceability of the owners of digital services, to regulate the activity of big technological companies and to raise transparency standards⁸⁹. It is foreseen that it will be applicable to «intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services» (Article 1.3). For this purpose, in the search for the adaptation of the obligations to the size of each company, there are up to four levels of responsibility: the higher the level, the greater the amount, and the more in-depth measures shall be applied. The proposal –which still awaits approval– introduces novelties which deserve to be sufficiently analysed, although we must not forget that there is always the possibility that these proposals are modified.

84. F. BALAGUER CALLEJÓN, «Constitucionalismo multinivel y derechos fundamentales en la Unión Europea», in *Estudios en homenaje al profesor Gregorio Peces-Barba*, Ed. Dickinson, Madrid, 2008, vol. 2, p. 134; Y. GÓMEZ SÁNCHEZ, *Constitucionalismo Multinivel*, Ed. Sanz y Torres, Madrid, 5ª., 2020, p. 46.

85. P. HABERLE, «El constitucionalismo como proyecto científico», in *Revista de Derecho Constitucional Europeo*, No. 29, 2018.

86. As Recital 1 of the proposal points out, during these twenty years, «services related to the information society and particularly intermediary services became an important part of the economy of the Union and of the daily lives of its citizens». There has been the emergence of «new and innovative business and service models, such as social networks and online markets [...]». Nevertheless, digital transformation and the growing use of such services also involves new risks and challenges, not only for individual users but also for society as a whole».

87. The Digital Services Act (DSA) and the Digital Markets Act (DMA).

88. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/CE (COM (2020) 825 final).

89. The part around which more controversy has been generated pertains to the control of illicit content disseminated through social networks (articles 8 and 14).

In Section I of Chapter III (Articles 10-13) there are general provisions or, in other words, provisions that are applicable to all service providers, regardless of size. They are fundamentally oriented towards guaranteeing cooperation with national authorities, transparency, and access to information by users:

- One single contact point and legal representative. Service providers are required to establish a «single point of contact allowing for direct communication, by electronic means, with Member States' authorities, the Commission and the Board referred to in Article 47». The necessary information for this type of contact –which should be simple– «shall be made public and shall specify the official language or languages of the Union which can be used to communicate» (Article 10).

Providers of intermediary services who do not have an establishment in the EU, but which offer services in the Union shall «designate, in writing, a legal or natural person as their legal representative» (Article 11).

- Information included in the terms of service. Another of the measures which the DSA brings is –probably one of the measures which generates more problems from an application perspective– the one which establishes transparency obligations regarding algorithms; as well as those related to when and how they are applied:

Providers of intermediary services shall include information on any restrictions that they impose regarding the use of their service [...] shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review. It shall be set out in clear and unambiguous language and shall be publicly available in an easily accessible format (Article 12).

Besides receiving this information, users may decide if they prefer to receive the content in chronological order of publication, or in the order established by the algorithm.

- Transparency report. They shall publish «at least once a year, clear, easily comprehensible and detailed reports on any content moderation they engaged in during the relevant period» (Article 13).

We still do not know which companies –or of which size– will be the ones which occupy different levels of obligations and responsibility. In any case, on a higher general level –where SMEs and micro enterprises are excluded– the elaboration of an annual more detailed transparency report is required which, among other things, should include information regarding the «use made of automatic means for the purpose of content moderation, including a specification of the precise purposes, indicators of the accuracy of the automated means in fulfilling those purposes and any safeguards applied».

In this same level we can find a group of measures designed to tackle disinformation, the propagation of lies and, in general, to control illicit content, which was one

of the points which generated more controversy, with obvious repercussions on the exercise of the right to freedom of expression. Nevertheless, it is important to make clear that platforms continue to be exempt of responsibility regarding the content which is published on them –which is attributed to the author– even though they are equipped to adopt a series of measures in this regard:

1. Trusted flagger positions are created, which are in charge of tracing and detecting illegal content that requires verification. They should be entities with proven expertise on this subject, according to the following requirements:

- a) it has particular expertise and competence for the purposes of detecting, identifying and notifying illegal content;
- b) it represents collective interests and is independent from any online platform;
- c) it carries out its activities for the purposes of submitting notices in a timely, diligent and objective manner (Article 19).

2. In its turn, the platform should inform the user which is responsible for the publication of the removal of the content (Article 15), while establishing an adequate complaint system and a subsequent conflict resolution system:

Online platforms shall provide recipients of the service, for a period of at least six months following the decision referred to in this paragraph, the access to an effective internal complaint-handling system, which enables the complaints to be lodged electronically and free of charge, against the following decisions taken by the online platform on the ground that the information provided by the recipients is illegal content or incompatible with its terms and conditions:

- a) decisions to remove or disable access to the information;
- b) decisions to suspend or terminate the provision of the service, in whole or in part, to the recipients;
- c) decisions to suspend or terminate the recipients' account.

3. Online platforms shall ensure that their internal complaint-handling systems are easy to access, user-friendly and enable and facilitate the submission of sufficiently precise and adequately substantiated complaints. (Article 17).

4. Platforms may suspend «for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content» (Article 20).

Finally, among the measures foreseen for «very large platforms» –those with an average monthly number of active users equal or above 10 % of the population

of the Union⁹⁰– we have the detection, analysis and evaluation of so-called «systemic risks», namely:

- a) the dissemination of illegal content through their services;
- b) any negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child, as enshrined in Articles 7, 11, 21 and 24 of the Charter respectively;
- c) intentional manipulation of their service, including by means of inauthentic use or automated exploitation of the service, with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security (Article 26).

Moreover, they are obliged to elaborate detailed six-month reports (Article 27) and to undergo, at least once a year, external independent audits regarding compliance of their obligations (Article 28). Furthermore:

Very large online platforms that use recommender systems shall set out in their terms and conditions, in a clear, accessible and easily comprehensible manner, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters (Article 29).

Ultimately, we are dealing with a legal package which is progressing regarding platform transparency obligations, advocating for clear and simple information to explain the privacy policy, automated recommendation filters and digital service conditions.

5. In conclusion

Thousands of citizens participate on a daily basis in the constant exchange of content through platforms and digital communication channels at their reach, without gaining awareness –in most cases– of what the possible consequences may be. Programming algorithms designed to process information which makes it possible to not only elaborate personal profiles, but also for society to segregate, with eminently political or economic purposes has become a generalized practice. Since the beginning of the pandemic, in addition to the health crisis, we are in a protagonist role in a disinformation crisis: a false information pandemic with the capacity to destabilize the political system and to affect the health of citizens, transforming what started out by being a healthcare challenge into a public opinion issue.

90. Among which we have Google, Facebook or Amazon.

But, if we base ourselves on the assumption that communication is a necessary tool to the development of society itself, as a guarantee of pluralism, and of the effective distribution of resources, we must agree that any proposal involving limitations should be carefully approached. Because, even besides the risks, the previously described threats cannot be used as a justification for the imposition of an official truth which would not have any possibility of constitutional adjustment. There is no absolute truth, it continues to belong –in most cases– to the sphere of relativism; nevertheless, it is possible to, in the opposite sense, delimit what is incorrect, false and, especially what is intentionally false. Because, even if a democratic State cannot and should not impose the truth, it should find a way to articulate a way to limit the capacity to lie, whenever such a lie causes damage. And those contents, which are created in a fraudulent manner, with the purpose to deceive, manipulate or affect security, public health, or the functioning of institutions, are an illegitimate interference in the right of citizens to receive truthful information.

So where should the next steps be directed to? It seems clear that the adequate path is to focus on more and more transparency every day, and in a greater number of sectors and activities. The above-mentioned threats stem from tools in which economic, political and commercial interests participate, which will be very difficult to eradicate. In their turn, efforts on the part of legal practitioners should be directed towards the consolidation of sufficient standards to guarantee the legal security of users. In this sense, the Digital Services Act has been updating the legal regime pertaining to digital services, incorporating measures which are focused on the fact that the functioning of the platforms should be, in its essence, transparent. The intention is not to regulate their management but to lift the veil which covers it. The decision-making process is still theirs, as are any other demonstrations of corporate autonomy, but it is important to guarantee that, when decisions are adopted, we understand why. If the rules of the game change, the social network in question should explain, in a clear and simple manner, what these new rules are and to which point they affect their users. And –which is what we are most interested in– the translation of the source code of the algorithms, as well as the intrinsic bias involved in their programming and the result of their application.

As for the chapter on content control, we will still have to wait to see what the proposed measures will be once their issuing proceedings are finalized. In any case, the option of attributing the responsibility to detect, analyse and evaluate the so-called «systemic risks» to the social network, among which the dissemination of illicit content, can lead us to the dangerous scenario of the self-censorship which is carried out by the platform itself.

Instead, it is preferable to have a regulation which approaches the general issues that arise from the functioning of digital platforms, leaving the remit of disinformation control to a public body. We need structural norms in terms of transparency, due diligence, responsibility, appeal procedures... Definitely, mechanisms to control the compliance with the obligations which are imposed, and to provide trust and legal security to users. A new framework for the

advancement of technologies which transfers the real value of transparency and of information to society; two principles- which are unbreakably united- commissioned in the european context and incorporated, in the last years, as fundamental axes around which all spheres of public action should revolve, are called upon today to extend themselves with the same efficiency to determine the future of digital governance in Europe. The technological development and new challenges due to the evolution of the social reality demand this.

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