

DISINFORMATION, MISINFORMATION AND LIMITS ON FREEDOM OF EXPRESSION DURING THE COVID-19 PANDEMIC: A CRITICAL INQUIRY

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Abstract: The recurring controversy over the limits of freedom of expression is today inextricably linked to the phenomenon of disinformation and misinformation on social networks. We thus address this phenomenon in the first place, along with the strategies deployed in the last decade to fight it. The controversy is then analyzed in the context of the recent COVID-19 pandemic and the institutional response it has generated worldwide, with a main focus on the situation in the United States and the EU. Finally, a critical examination of this response follows, along with some facts and reflections regarding the current post-pandemic scenario.

Keywords: Disinformation, misinformation, freedom of expression, right to information, fact-checking, censorship, COVID-19.

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1. INTRODUCTION: THE CRISIS OF THE RULE OF LAW AS A CONTEXT

It is almost commonplace by now to say that respect for the rule of law on our planet has been sub-optimal for a while, and that the political and legal response to the COVID-19 pandemic has only aggravated the situation². This is, in fact, a crisis that had been brewing beforehand with the rise of political populism, the increasingly frequent recourse to accelerated or emergency procedures in the drafting of laws, the growing difficulties in exercising constitutional control over them, the erosion of the separation of powers, the emerging digital authoritarianism, etc. The reaction to the pandemic has not only increased the contempt for these formalities, checks and balances, but has also brought with it a correlative decline in the protection of fundamental civil and political rights (privacy, labor, suffrage, religious freedom, freedom of movement and assembly,

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² Check indexes <https://www.icnl.org/covid19tracker/> and <https://findings2021.monitor.civicus.org/in-numbers.html>, plus the editorial note at <https://www.economist.com/international/2022/06/07/the-pandemic-has-accelerated-a-global-decline-in-the-rule-of-law>. These and all subsequent hyperlinks have been revised as of July 22nd, 2023.

freedom of enterprise, etc.), almost always with the same *leitmotif*: it is preferable to minimize risks, and so prioritize security over freedom. It is no coincidence, for example, that in the United States, during the pandemic, the use of the expression “(out of/in) an abundance of caution” became widespread in order to justify numerous restrictive decisions (see Gray, 2020; Kesler, 2020). This is a paternalistic reflex that can be traced back to the reaction of Western countries to the 9/11 attacks, but now seems to be reaching higher levels worldwide (van Aardt, 2022).

Obviously, this is a process with many nuances and variations. To begin with, the erosion of the rule of law and of traditional civil and political rights are much more blatant in authoritarian and semi-authoritarian regimes than in standardized democracies, where respect for the law and a strong rights culture seem to be in place, and one can only detect this drift by using a magnifying glass. However, the expansion of governmental power during the pandemic has also raised open reservations among citizens and experts in these societies as well (as to Spanish legal doctrine alone, see recent studies by Biglino and Durán, 2021; Martínez-Sicluna and Carabante, 2022; or Blanquer, 2023). In this sense, one could say that the European Union publishing an annual report on the observance of the rule of law in its member countries since 2020 is not good news exactly.

As we will try to show here, freedom of expression must surely be counted among the rights affected by this decline, along with others directly associated to it such as freedom of thought and opinion, the right to disseminate and receive information, or the public’s expectation that authorities behave transparently. Again, it is true that freedom of expression seems to be theoretically guaranteed in the West (see e.g., European Commission, 2020b: §2.3), and that, using the pandemic as a pretext, attacks on this right in other parts of the planet have been deemed much more severe³ (even leading to a famously inventive “blank sheet” strategy by demonstrators against the harsh COVID policies in China⁴). However, none of this prevents us from observing a slow but net decline in the quality of freedom of expression and other related liberties and rights in our very own environment (see, e.g., Gosztonyi, 2023). The following is an attempt to argue how and why this situation has come about.

2. FREEDOM OF EXPRESSION, DISINFORMATION AND MISINFORMATION: A PRELIMINARY APPROACH

2.1. Narrowing down the phenomenon of disinformation

The contemporary on-going debate about freedom of expression and its limits is inextricably linked to the phenomenon of disinformation. In this sense, one may as well

³ Extensive reports at <https://www.voanews.com/a/covid-19-hit-press-freedom/6137699.html>, and also at <https://features.hrw.org/features/features/covid/index.html>. The UN Human Rights Council reported these attacks from the beginning as well, with express reference to countries such as Belarus, Cambodia, China, Iran, Egypt, Myanmar or Turkey: <https://www.ohchr.org/en/press-releases/2020/07/covid-19-pandemic-exposes-repression-free-expression-and-right-information>. As a matter of fact, a sort of digital authoritarianism has been underway in China and other countries years before the pandemic arrived (see Shahbaz, 2018).

⁴ <https://www.bbc.com/news/world-asia-china-63778871>.

consider that no action aimed at disinforming should be protected under the umbrella of freedom of expression. If such strategies are tolerated, one would add, the possibility of being adequately informed is endangered, freedom of thought and opinion are conditioned, and decision-making processes, both individual and collective, end up being adulterated.

But what do we exactly mean when we talk about disinformation? In this regard, an academic distinction has been established for some time now among three neighboring notions: disinformation in the strict sense, misleading information or misinformation, and malicious information or malinformation (Wardle and Derakhshan, 2017: 20 ff.). The concept of *disinformation* specifically alludes to the creation and mass dissemination of verifiably false or incorrect information in the knowledge that it is so and with the intent to deceive its recipients⁵. Whoever disseminates *misinformation*, on the other hand, spreads wrong information but does so unconsciously, without intent to deceive. Finally, *malinformation* would include all those communications that, beyond their veracity, are intended to offend or to cause certain harm to others: malicious leaks, hate speech, online harassment strategies, etc.⁶

Disinformation includes, therefore, a material element –the falseness of what is disseminated–, a cognitive element –being aware of its falseness–, and a volitional element –the intention to deceive or confuse– (Botero Marino, 2017: 69-70). The popular expression *fake news* picks up a very similar idea since the term *fake* implies not only objective falseness but also imposture. This volitional nuance, however, is not always stressed enough, and may also get lost in translation to other languages (e.g., *noticias falsas* in Spanish), thus making it difficult to distinguish between disinformation and misinformation. Maybe for this reason, and because of the wear and tear that it has been suffering as a weapon in the political contest, the expression *fake news* tends to be avoided in the most recent academic literature (as Magallón-Rosa, 2022: 52 points out).

Needless to say, disinformation is not a new phenomenon, given that numerous political propaganda practices developed throughout history more than fit into this description. What is new, however, is the way in which “digital technology has enabled pathways for false or manipulated information to be created, disseminated and amplified by various actors for political, ideological or commercial motives at a scale, speed and reach never known before” (UN Human Rights Council, 2021: I. 2).

⁵ This definition has been endorsed by international documents on the subject such as UN-OSCE-OAS-ACHPR, 2017. The preambles to the 2018 EU Code of Practice on Disinformation (European Commission, 2018) and to the Strengthened Code of Practice in Disinformation 2022 (European Commission, 2022) refer to *disinformation* in similar terms, as the false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm. Both preambles go on to clarify that disinformation does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising. *Misinformation*, in turn, is defined in the 2022 Strengthened Code as the false or misleading content shared without harmful intent whose effects can still be harmful (see European Commission, 2022, preamble, note 7).

⁶ The analysis of *malinformation*, its various manifestations and implications and its compatibility with freedom of expression far exceeds the limits of this paper, focused only on addressing the phenomenon of mis- and disinformation during the COVID-19 pandemic.

The transition from paper press to social media as the preferred form of access to information has been decisive in the rise of disinformation. Social networks first transformed our relationship with the media, then the way of doing politics, and now are the main stage for cultural and ideological battles (Magallón-Rosa, 2022: 62). Moreover, the high potential diffusivity of online disinformation is a powerful weapon in contemporary hybrid wars, and so, counteracting this disinformation has become part of the national security policies of States.

Among the events that would explain the evolution of disinformation and its combat throughout this century we should probably mention, at least, the so-called Global War on Terror started by the Bush Administration after 9/11, the social and political upheavals and revolutions of 2008-2012 (Arab Spring, Occupy Wall Street, the Spanish 15-M movement, etc.), the electoral processes of 2016 (Brexit referendum, election of Trump as U.S. President), the COVID-19 pandemic, and the Russian invasion of Ukraine (Magallón-Rosa, 2022: 53). The sheer variety and complexity of these events –on which it is not possible to delve right now– should lead us to a first conclusion: disinformation and propaganda can be and indeed are used by political and social actors across the ideological spectrum and in any political regime. And in all these cases, naturally, those who aspire to control the discourse will try to pass off their critics as dangerous disinformers. It is not difficult, therefore, for this struggle to evolve into a spiral of mutual accusations, where the desire to selflessly find the truth ends up being the first victim.

2.2. The fight against disinformation on the web: fact-checking agencies and other strategies

However, it is obvious that misinformation is an evil to be avoided, and that the possibility of accessing truthful and contrasted information is something as essential as it is urgent in our digital era.

It is in this context that –among other available means of combatting disinformation, such as legal regulation or the setting of Codes of practice– online fact-checking agencies have been emerging in recent times. Needless to say, scientists and professional journalists have always prided themselves on verifying their data. But that was, and still is, a task previously performed by those responsible for the information, whereas the verification now provided by these agencies follows the dissemination and is external to it.

The emergence of these entities took place in the United States at the beginning of the century, along with the expansion of the web 2.0. In 2015, the Poynter Institute for Media Studies established the International Fact-Checking Network (IFCN), which today brings together and supervises the performance standards of more than a hundred agencies⁷. The aftermath of the controversial electoral processes of 2016 triggered the implementation of these organizations worldwide, and especially in the rest of the

⁷ <https://www.poynter.org/ifcn/>.

Anglo-Saxon world, continental Europe and Latin America (where there is a regional network, Latam Chequea, incardinated in the IFCN)⁸.

In fact, these agencies do not so much pursue malicious disinformation as the false information that underlies it, since it is easier to verify the data transmitted than the dispatcher's intent, and the potential harm to the receiver is similar in both cases. This is how the fight against both phenomena has now been unified (and the expression *mis- and disinformation* has become commonplace).

But these agencies, as we were saying, aim to give credit to information that is disseminated by others, mainly blogs, digital media –including websites of legacy media, such as newspapers, magazines, radio broadcasting companies and tv networks, which often also have internal verification systems– and social networks. Among the latter, platforms like Facebook, YouTube, WhatsApp or Instagram are the ones that, due to their billions of users, are exposed to a greater risk of misinformation, and also the ones that have been taking several self-regulatory measures, and/or incorporating fact-checkers in a more visible way⁹. Along these lines, they have been adopting several strategies (Botero Marino, 2017: 82-83): algorithms to verify sources, images and keywords; notifications and flags; more or less overt deferral of publications and users deemed as suspicious (ranking, visibility filtering); and, ultimately, removal of publications and suspension of accounts (de-platforming).

The existence of these moderation policies has famously raised thorny questions: if they take on editorial functions, do the networks really act as mere intermediaries among users who share content? They are private companies for sure, but also, and increasingly so, new virtual public squares. Does their moderation imply then, as some have wondered (see Oremus, 2022), a modern-day kind of censorship, distinct from and complementary to that of the public authorities? What role should the fundamental rights of users, such as freedom of expression, due process, effective judicial protection, etc., play in this context?

Undoubtedly, the introduction of external fact-checkers brings respectability to the editorial work of the networks. And although some have raised objections about their methodology and effectiveness (e.g., Uscinski & Ryden, 2013), or even about their transparency and independence (see notes 38-39 below), there is nothing that should prevent us *prima facie* from qualifying the work of these agencies as laudable and even

⁸ <https://chequeado.com/latamchequea/#/>.

⁹ In 2016, Google News launched the “Fact Check” label to identify articles whose information had been verified by news publishers and/or fact-checking organizations. That same year Facebook created an external verification program for its publications, which has been joined in each country by various organizations (e.g., in March 2019 Facebook reached an agreement in Spain with the agencies Maldita.es, Newtral and AFP Spain). Twitter, on its part, did not externalize its moderation system but mostly relied on internal workers. All in all, it is worth highlighting the peculiar schizophrenia of the networks in this matter, as it is well known how their algorithms not only personalize content but also tend to feed sensationalist publications to prolong the attention of their users in order to monetize it. This business model is, therefore, at the root of the problem.

necessary. The problem comes when their verifying zeal, combined with the moderating action of the platforms, acquires potentially censorious tones. Because it is not the same to provide accurate data in order to expose an easily refutable hoax as it is to filter or suppress a debatable information or a controversial opinion. And yes, it is wholly reasonable that misleading online information, malicious or not, is exposed and sometimes even reported or eliminated, but when and how? Who watches the watchers, so that the freedom of expression of users/citizens and the free formation of public opinion are not trampled along the way?

It should be remembered at this point that, in principle, and in the light of international law, States are obliged to protect the right of everyone to seek, receive and disseminate any type of information or ideas, regardless of their content¹⁰ and even of their veracity, impartiality or correctness¹¹, for even doubtful information and controversial opinions are useful to strengthen the vigor of democratic debate. This is something, in fact, that has been at the basis of the liberal State since its formation (Magdaleno Alegria, 2006: 42-56). The only speeches radically rejectable *per se* would be the apology of war or hatred when they represent a *direct* incitement to violence, and the (misnamed) child pornography (see Botero Marino, 2017: 71-72 and the quotes therein). Apart from that, maliciously misleading information is only legally prosecutable when it appears as a necessary means to violate certain rights of others (as in cases of slander or fraud, where someone's honor or assets are damaged; or in certain crimes against the market and consumers: see Magdaleno Alegria, 2006: 292 ff.; Espaliú-Berdud, 2022, 8-9). In other words: unless they incur in objective contents typical of certain limited speeches or constitute an essential means to commit an illegal action, neither disinformation nor misinformation are punishable by law. For more than a decade, social networks like Facebook, Twitter or YouTube have been deleting posts for "glorifying violence" or offering "harmful and dangerous content", categories that are much more vague and restrictive of freedom of expression than what is usually prescribed by law¹². This is probably the reason why controversies about censorship in the social networks proliferated during the second half of the last decade.

And then the pandemic arrived.

3. THE INFORMATION CRISIS ASSOCIATED WITH THE COVID-19 PANDEMIC AND ITS INSTITUTIONAL MANAGEMENT

The COVID-19 pandemic has consolidated the undeniable political interest in the fight against mis- and disinformation, now decisively linked not only to national security

¹⁰ See article 19 of the Universal Declaration of Human Rights; art. 10.1 of the European Convention on Human Rights; art. 19.2 of the International Covenant on Civil and Political Rights; art. 13.1 of the American Convention on Human Rights; and art. 11 of the Charter of Fundamental Rights of the EU.

¹¹ IACHR, Advisory Opinion OC-5/85, §67 ff; UN-OSCE-OAS-ACHPR, 2017: 2a. The case law of the ECHR is abundant here: e.g., *Times Newspapers Ltd v. United Kingdom* of 10 March 2009; *Renaud v. France* of 25 February 2010; or *Brzezinski v. Poland* of 25 July 2019. In Spain, among others, see STC 214/1991 of November 11, or STC 176/1995 of December 11; in the USA, *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *United States v. Alvarez*, 567 U.S. 709 (2012), or *Matal v. Tam*, 582 U.S. (2017).

¹² E.g., the standard set in the United States since *Brandenburg v. Ohio* 395 U.S. 444 (1969) refers to speech intended to incite or produce, with some degree of success, an imminent unlawful conduct.

but also to public health. This task has been framed within a huge, commendable effort by the authorities to guide the population towards reliable sources on the reality and possible origin of the virus, its various ways of contagion, the strategies to prevent and fight it, etc. However, and most regrettably, there has not always been coherence between the proclaimed principles and their execution. As we will try to show here, the whole process has been tinged with an excessive paternalism (van Aardt, 2022) that has discouraged and even repressed legitimate debate.

3.1. From the UN to YouTube: a multilevel response to the infodemic

The fear and uncertainty that followed the initial spread of the SARS-CoV-2 virus was the occasion for unfounded rumors of all kinds (something that the WHO Director-General Tedros Adhanom Ghebreyesus soon described as an *infodemic*¹³), and also for severe attacks on freedom of speech and press in certain countries, duly reported at an international level (UN-OSCE-IACHR, 2020).

This information crisis triggered an attempt of coordinated response by international organizations, states, associations, fact-checking agencies, platforms and the media. Initially, guidance came from institutions such as the UN/WHO, the Council of Europe and the European Union.

The World Health Organization guidelines were the basic template for action by all the world's authorities in their fight against COVID-19. In addition, and while acknowledging the dangers of disinformation as a weapon, the UN Human Rights Council specifically recalled the importance of ensuring freedom of expression in two reports by Special Rapporteurs David Kaye and Irene Khan. The former, in April 2020, called for academic and scientific freedom, including freedom of expression and the freedom to seek, receive and impart information (UN Human Rights Council, 2020: II. 12); a year on, the latter urged States to recalibrate their responses to disinformation, and to foster free, independent and diverse media (UN Human Rights Council, 2021: VI. 85-93). Council of Europe Commissioner for Human Rights Dunja Mijatovic also urged that measures to combat disinformation around COVID-19 should not undermine press freedom (Council of Europe, 2020).

In 2020, the EU Parliament drafted two important Resolutions on this crisis. Among other proposals, the first one, of 17 April, urged to establish a European information source to ensure that citizens had access to accurate and verified information, and called on social media companies to put in place proactive measures to stop disinformation and hate speech in relation to COVID-19 (European Parliament, 2020a: §54); while the second one, dated 25 November, called for greater collaboration between online platforms and law enforcement authorities, stressing that the removal of illegal content is done quickly and subjected to safeguards, such as judicial review (European Parliament, 2020b: §35). In turn, the European Commission issued a Communication on 10 June

¹³ His words at <https://www.who.int/dg/speeches/detail/munich-security-conference>. A typology of these unfounded rumors can be found in Ramón-Vegas *et al.*, 2020.

(European Commission, 2020a)¹⁴ in which, after identifying the main challenges posed by the COVID infodemic, asked for more transparency and a greater role for platforms during the crisis, declared its support for fact-checkers and researchers, and at the same time recalled the need for authorities to be accountable for their actions and to guarantee freedom of expression and democratic debate.

Right from the outset, States had the direct responsibility for the on-site control the pandemic (De la Sierra, 2020: 38-41), and that was also the case when it came to address the disinformation generated around it. Some governments, however, took advantage of the circumstances precisely to disinform, continuing with their usual propaganda strategies (e.g., Russia, China, Iran, North Korea). The rest opted for an increasingly strict control of public opinion, although with a singular difference: while in autocracies there were Internet shutdowns and persecution of journalists, in democratic states this control was not *against* platforms and media, but *through* them.

Let us briefly take Spain as an example. In April 2020, the Spanish Government openly acknowledged that it was monitoring social networks to detect potentially dangerous or criminal speech and disinformation campaigns¹⁵. According to the Minister of the Interior such a monitoring had no political purpose at all, and it was the platforms themselves, following their own protocols, that eventually decided on the removal of the publications. Yet months later, the *Orden PCM 1030/2020* established a plan to fight disinformation with a control structure directly dependent on the Government¹⁶. The goal, approved by the National Security Council, was to counteract “the deliberate, large-scale and systematic spread of disinformation, which seeks to influence society for interested and spurious purposes”, and the justifying context, the infodemic generated by the COVID-19 crisis¹⁷.

Among the fact-checking agencies, the IFCN centralized strategies against mis- and disinformation at a very early stage through the so-called “CoronaVirusFacts Alliance”¹⁸.

¹⁴ For their part, the EU Rule of Law Reports of 2020-2022 make numerous considerations on freedom and pluralism of information but barely mention disinformation.

¹⁵ See in this regard <https://www.elmundo.es/tecnologia/2020/04/15/5e95fe5dfc6c8305188b4644.html>. Such *cyber-patrolling* on- and offline has become routine for many States, and has already been denounced (see, e.g., Amnesty International, 2020).

¹⁶ Neighboring countries such as Italy, France, Belgium and Germany have not gone that far. France, in particular, decreed in June 2020 that outlawing online content by administrative means is unconstitutional: <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>.

¹⁷ My translation. See *Orden PCM/1030/2020, de 30 de octubre, por la que se publica el Procedimiento de actuación contra la desinformación aprobado por el Consejo de Seguridad Nacional*, available at: <https://www.boe.es/eli/es/o/2020/10/30/pcm1030>. Although it has not been formally applied yet, the relevance and legitimacy of that Order are being subjected to severe criticism: thus, Peralta Gutiérrez, 2021; or De la Nuez, 2022.

¹⁸ Check <https://www.poynter.org/coronavirusfactsalliance/>, where it can be read: “The Alliance was launched in January 2020 when the spread of the virus was restricted to China but was already causing rampant misinformation globally”.

The major social networking companies, for their part, issued a joint statement in March 2020 committing to tighten their content moderation policy (Douek, 2020), automating it to a greater extent in the face of lockdowns, and admitting that this would entail certain mismatches¹⁹. Twitter went on to consider misleading any posts that contradicted the guidance of health authorities²⁰. YouTube pledged to remove content contrary to official sources and, like Twitter, set out a long list of examples²¹. In all cases, the commitment implied taking down information and opinions held to be false, whether or not there was malice on the part of the author of the publication.

3.2. Was there content moderation, or rather censorship?

International organizations and States requested a greater role for fact-checkers and platforms to tackle the COVID-19 infodemic, and they got it. But all of them also pledged to act with transparency and respect for freedom of expression and democratic debate, and they were not so careful at that. They certainly refuted a fair amount of nonsensical information (bleach as a remedy for COVID, the alleged microchips inside the vaccines, and some other unfounded rumors clearly linked to the propaganda wars) and promoted, as planned, the messages of the health authorities. But whether out of their own bias or out of docility to power, platforms, media and agencies also insistently aborted some legitimate scientific debates—even more legitimate, if possible (as has been noted by Niemiec, 2020: 2), because it is such an unknown disease— and disqualified its promoters. Some dubious data were taken as true, and others were leaked that the public had a right to know but that contradicted the narrative of the States and the WHO. In short, content that could not be peacefully classified as disinformation or misinformation was suppressed.

Was that censorship, strictly speaking? Where the suppression responded to more or less veiled instructions from the political power, it clearly was. In the other cases it may be thought so too, since the classic definition of censorship as something prior and exclusively linked to a public authority is already proving inadequate (García Morales, 2013). It certainly must be inadequate for a time like ours, in which the convening capacity and the consequent volume of content of the most successful platforms have turned them into true postmodern agoras—something that the platforms themselves, by the way, often boast about (Niemiec, 2020: 1).

The account of the more evident cases begins in the United States, where some very well-qualified scientists argued from day one against the official health guidelines²². University professors such as John Ioannidis (Stanford), Stephen Baral (Johns Hopkins), Jay Bhattacharya (Stanford), Sunetra Gupta (Oxford) or Martin Kulldorff (Harvard) opposed indiscriminate lockdown policies to address the pandemic. These last three academics, in

¹⁹ <https://about.fb.com/news/2020/12/coronavirus/#content-review>.

²⁰ <https://help.twitter.com/es/rules-and-policies/medical-misinformation-policy>. Even some Presidents of Government were reprimanded: <https://www.theverge.com/2020/3/30/21199845/twitter-tweets-brazil-venezuela-presidents-covid-19-coronavirus-jair-bolsonaro-maduro>.

²¹ https://support.google.com/youtube/answer/9891785?hl=es&hl=es&ref_topic=9282436.

²² A compendium of both versions (official and dissenting) in Liester, 2022.

addition, led a formal Declaration on the matter and presented it publicly in Great Barrington, Massachusetts on October 4, 2020²³. Later on, Bhattacharya himself, Prof. Aaron Kheriaty from UC Irvine and Brett Giroir (former director of the Food and Drug Administration) among others defended the superiority of natural immunity over vaccines, Kulldorff wrote about the inconvenience of vaccinating children and adolescents, etc. Prestigious doctors like Jamie Metz, or Robert Redfield (ex-director of the U.S. Centers for Disease Control and Prevention), seriously doubted the natural origin of the virus, while others including Robert Malone and Andrew Bostom warned about the side effects of mRNA vaccines. All of their statements and claims were directly qualified as erroneous by the authorities and the fact-checking agencies, and all of them were (and mostly continue to be) either attacked or ignored by the media and the academic establishment²⁴.

There were journalists who echoed these expert dissenting voices in the scientific community: notable among them was Alex Berenson, whose Twitter account ended up being suspended because of it. Republican politicians such as Lauren Bobert and Marjorie Taylor Green or Democrats like Ro Khanna also experienced the *moderation* of social networks on this matter.

Since the end of 2022, and after the purchase of Twitter by the controversial Elon Musk, investigative journalists including Matt Taibbi, Bari Weiss, David Zweig, Michael Shellenberger, or Alex Berenson himself²⁵, have been receiving access to the company's internal communications and publishing the *Twitter Files*, where they have documented the censorship previously exercised in that social network, which included strict visibility filtering, removal of tweets, suspensions and account closures. And what is more important, they have convincingly connected it to the covert action by programs such as the Stanford Internet Observatory's Virality Project or the Atlantic Council's Digital Forensic Research Lab, pharmaceutical companies like Pfizer or Johnson & Johnson, and, in particular, by several departments and agencies of the Federal Government itself (Homeland Security, FBI, CDC, FDA), first during Trump's presidency and then in Biden's tenure as well²⁶. Specifically, installments 10²⁷, 13²⁸, 18²⁹, 19³⁰ and 20³¹ of this series prove in detail how

²³ <https://gbdeclaration.org/>. It has subsequently come to light that Google altered its search algorithm to decrease the visibility of the text: <https://www.spiked-online.com/2020/10/12/why-has-google-censored-the-great-barrington-declaration/>, and that the National Institutes of Health quietly encouraged a few days later a counter-declaration (see Magnes & Harrigan, 2021) which became effective on October 14th: <https://www.johnsnowmemo.com/john-snow-memo.html>.

²⁴ It is only fair to add that there were some respectful and constructive debates as well, such as this one organized at Johns Hopkins University: <https://www.youtube.com/watch?v=p78RLWjSKpA&t=6s>.

²⁵ Taibbi and Weiss, by the way, have already had serious disagreements with Musk in the last months that give food for thought as to whether the tycoon's interest has more to do with refloating his own social network than with freedom of expression, but none of this invalidates their investigations.

²⁶ See also one of these journalists' testimony before the U.S. Congress about this "censorship industrial complex" in Shellenberger, 2023, esp. 4-8, 22, 45-46.

²⁷ <https://twitter.com/davidzweig/status/1607378386338340867>.

²⁸ <https://twitter.com/alexberenson/status/1612526697038897167>.

²⁹ <https://twitter.com/mtaibbi/status/1633830002742657027>.

³⁰ <https://twitter.com/mtaibbi/status/1636729166631432195>.

³¹ <https://twitter.com/thackerpd/status/1649037538663727106>.

some of the characters referred above (Bhattacharya, Kulldorff, Bostom, Giroir, Berenson, etc.) and many other users were shadow-banned and/or censored by Twitter at the request of one or more of these collusive actors for sharing heterodox opinions on the origin of the SARS-CoV-2 virus, the need for COVID vaccination passes, the importance of natural immunity, or for disseminating scientific studies on the side effects of the new vaccines. At the request of the U.S. federal authorities, even dissenting publications that relied upon official or government-endorsed data were removed, as were others whose veracity was privately acknowledged but which could potentially fuel vaccine hesitancy, thus jeopardizing the campaigns that were taking place at the time³². In addition to these stories, an extra installment of the Files by Andrew Lowenthal recently dealt with similar COVID-related censorship requests by the Australia's federal Department of Home Affairs³³.

Platforms like Google, LinkedIn, Facebook, Microsoft or Pinterest adopted similar policies during this time, and some of them were also part of several government meetings³⁴ that, apparently, slid towards censorship. In fact, and while another journalistic investigation underway points to the CDC requesting to suppress content on Facebook and Instagram (Soave, 2023; also, Shellenberger, 2023: 44), the House of Representatives Judiciary Committee Chairman released on July 27, 2023 a series of unredacted emails provided by Meta executives, showing the massive pressure that the White House and other entities put on the social media giant during the pandemic.

In Europe, where the institutional scrutiny of digital content moderation has usually been more intense than in the U.S. –and also more transparent³⁵–, there is a lack of data to affirm that such collusion has taken place. Nevertheless, the few public dissenters in the European scientific and academic community have met with similar reprobation. The list here has included Assem Malhotra, Carl Heneghan, Tom Jefferson or Karol Sikora in the UK, and already within the EU, Didier Raoult, Agnès Buzyn, Christian Perronne and Luc Montagnier in France; Knut Wittkowski in Germany; Mattias Desmet in Belgium; Thomas Lars Benfield in Denmark; scientists traditionally critical of the pharmaceutical industry such as Peter Gøtzsche, also in Denmark, or Joan-Ramon Laporte in Spain; philosophers such as Giorgio Agamben and Jordi Pigem; biologists like Jon Ander Extebarria... Some of them opposed the mass lockdowns, others the vaccination policies or the indiscriminate use of masks, etc. It is not necessary to share any of their statements, more or less refutable, to recognize that almost all of them have been, not just answered back, but also fiercely discredited on and off the Internet (Nogrady, 2021). This attitude was also reproduced, by the way, in the opposite

³² Although it has been noted that some parts of the Twitter Files may contain inaccuracies or loose ends (see https://www.youtube.com/watch?v=a597e6Wv_xg), the information they provide on the handling of the pandemic is particularly solid and documented. Without any possible rebuttal at hand as they are faced with original sources, the tactic of the wrongdoers –government, social networks, legacy media– has been to attack the motivations of the journalists (even threatening them in some cases: see, e.g., <https://nypost.com/2023/04/20/democrat-stacey-plaskett-threatens-twitter-files-journalist-with-prison/>) and claiming that the information has been cherry-picked, but without providing any counterevidence to contextualize what is being reported there.

³³ <https://twitter.com/NAffects/status/1661104541004079107>.

³⁴ <https://www.reuters.com/article/us-health-coronavirus-white-house-exclus-idUSKBN2AJ1SW>.

³⁵ See the Directive 2000/31/EC on Electronic Commerce and, more importantly, the new EU Digital Services Act (a.k.a. Regulation (EU) 2022/2065 on a Single Market for Digital Services) referred below.

direction: in Sweden, which opted for a less restrictive health policy, those who were critical of it were sometimes met with identical hostility (Lenzer and Brownlee, 2020).

3.3. Lessons to be drawn from this information crisis

In the words of Archibald Cox (a Harvard law professor who, quite interestingly, served as Solicitor General of the United States in the 1960s and then as a Special Prosecutor for the Watergate case): “no man, no committee and surely no government has the infinite wisdom and disinterestedness to accurately and unselfishly separate what is true from what is debatable, and both from what is false” (Cox, 1986: 8). On one hand, it is only natural and legitimate that in a situation of serious risk to public health and safety the authorities should demand compliance with their health policies. Likewise, they should try to counteract the circulation of unfounded rumors that may compromise those policies. But what these authorities should not claim or take for granted by any means is a scientific infallibility that they do not possess, and use it to prevent or to get in the way of reasonable disagreements among experts (Cuadros Aguilera, 2022: 51). Even more so when they are confronted with a new pandemic, as it has been the case with COVID-19³⁶. This unwise approach to the problem of disinformation on scientific issues seriously limits the possibility of correcting critical errors later on (Niemiec, 2020: 2-3), damages the respectability of science itself, making it too politicized, and undermines society's confidence in it.

The striking effort to silence scientific debates that we have seen in this pandemic has turned the authorities' point of view into official truth, so much so that challenging it has triggered media, professional and even personal persecution of dissidents (Shir-Raz *et al.*, 2022), whether they were scientists or not, as the well-known *Djokovic v. Australia* case made clear a little while ago (García Ruiz, 2022). Curiously enough, on some issues this point of view has been mutating, as it were: for example, at first the usefulness of masks or child vaccination was discarded, and then both were massively adopted; now we read claims about the origin of the virus or the efficacy of vaccines that until not long ago were openly repressed, etc. What is most striking, in either case, is the conviction with which the slogans are transmitted, with no room for disagreement.

In the worst-case scenario, some of the criticisms made by the dissenting experts could have possibly been labeled as misinformation, but never as disinformation. In fact, sometimes they were hypotheses as plausible –or even more so– than the official position (e.g., the inappropriateness of vaccinating children and adolescents), and they were coming from reputed professionals with no conflict of interest. In contrast, the *Twitter Files* and other communications now uncovered in the course of legal proceedings³⁷ are clearly

³⁶ Prof. Martin Kulldorff has noted how in previous contemporary pandemics –influenza, polio, Asian flu, swine flu– the scientific debate was not closed, nor were mass lockdown measures adopted: in fact, public health protocols for pandemics prior to COVID-19 advised isolation only for the sick and the most vulnerable. Check <https://www.spiked-online.com/2020/10/09/lockdown-is-a-terrible-experiment/>.

³⁷ Most notably, *Judicial Watch v. U.S. Department of Health of Human Services*, 1:21-cv-00625 (D.D.C.); *Dressen v. Flaherty*, 3:23-cv-00155 (S.D. Tex.); *Missouri v. Biden*, 3:22-CV-01213 (W.D. La.); and *Berenson v. Biden*, 1:23-cv-03048 (S.D.N.Y.).

showing that, at least in the United States, it was rather the actions of federal authorities, pharmaceutical companies, fact-checking institutions and technological platforms that engaged in censorship and even disinformation (Shir-Raz *et al.*, 2022).

If the authorities and pharmaceutical companies were perhaps motivated by an interest in controlling the discourse, the role of tech platforms and fact-checkers in all this is more complicated to describe. In the case of the former, it is a fact that their business model fosters sensationalism to a certain extent, and that counteracting disinformation goes in the opposite direction. It is also a fact, however, that even before the pandemic they were accused of filtering content with hardly any procedural guarantees and not infrequently with political implications involved (Vogels *et al.*, 2020). Those moderation policies, it seems, are even yielding to the dictates of governments now. As for the fact-checkers, the real problem is not so much the nature of their activity, which can be easily justified, as their actual independence³⁸. In addition to that, there is still no regulation regarding the methodologies used in this verification process, which inevitably raises doubts about its transparency and/or impartiality. Be that as it may, urging agencies and networks to stop disinformation is, in practice, inviting them to be overzealous, especially when publications are monitored either by reinforced algorithms³⁹, or by people with résumés that let show some evident biases and/or lower scientific qualifications than those of the disavowed (Clarke, 2021). One way or another –and this is what should raise suspicions– the verdict of fact-checking agencies and social networks on whether or not to allow COVID-related publications during the pandemic simply never contradicted the WHO/CDC/EU official guidelines.

The first victim here has been, naturally, the freedom of expression and opinion of dissenters, which has been rudely censored. By the way, this has also led to considerable self-censorship, in medical professionals and academics as well as in ordinary citizens (the famous *chilling effect*, in an expression coined by Justice William J. Brennan; see Pech, 2021 here). After such a scenario, it is therefore necessary to fine-tune the jurisdictional protection of freedom of expression, and even to urgently review the legal definition of censorship, in order to recover an open and frank debate, not only in health issues, but in many other fields. The new conditions under which public opinion is being formed in our century seem to demand it.

The second major victim has been the citizens' right to information, which the public authorities must always strive to ensure, while creating the conditions for a plural democratic debate and being themselves thoroughly accountable (see Moretón Toquero, in Biglino and Durán, 2021: 221-252). Leaving statistics or geolocation issues aside, there are other major concerns to be resolved in this regard, such as the opacity of the agreements signed with some pharmaceutical companies –which were denounced last

³⁸ It is widely known that several technology companies and foundations with interests in the pharmaceutical industry are financing the IFCN (<https://www.poynter.org/international-fact-checking-network-transparency-statement/>), or that there are countries with public-funded fact-checking agencies (such is the case of EFE Verifica in Spain).

³⁹ <https://maldita.es/malditatecnologia/20200428/redes-sociales-automatizacion-contenidos-normas/>.

autumn in the framework of an *ad hoc* committee of the EU Parliament (see European Parliament, 2022)– or the poorly-informed consent given by the vast majority of citizens to the administration of COVID vaccines.

4. SOME FACTS AND THOUGHTS ON DISINFORMATION, CENSORSHIP AND FREEDOM OF EXPRESSION IN THE POST-PANDEMIC ERA

On May 5, 2023, the Director-General of the WHO announced that the COVID-19 pandemic was no longer considered a public health emergency of international concern⁴⁰. Meanwhile, trials have begun in various parts of the world demanding that official authorities, pharmaceutical companies and other organizations take responsibility for their management of the crisis⁴¹. Some of these lawsuits are related to controversies between mis- or disinformation and freedom of expression, and they have already brought about, e.g., a decision by the First Instance Court of Varese (Italy) rejecting a challenge by a Facebook user who was suspended from the social media for spreading fake information about COVID-19⁴², a sentence by a federal court in California which has prohibited the State from enforcing a bill punishing doctors for alleged COVID-19 misinformation⁴³, or an injunction granted by a U.S. District Judge temporarily prohibiting several federal agencies and officials of the Biden administration from interacting with social media companies about “protected speech”⁴⁴. In the U.S Congress, several hearings are taking place to inquire the Federal Government and the rest of the actors involved about the suspected collusion among them both in the management of the pandemic and in some other matters of public order⁴⁵.

⁴⁰ See <https://www.who.int/news-room/speeches/item/who-director-general-s-opening-remarks-at-the-media-briefing---5-may-2023>.

⁴¹ A thorough tracking of these trials at: <https://www.covid19litigation.org/news>. Standing out among them are several lawsuits for damages derived from side effects of COVID vaccines, particularly in the U.S. and Germany (e.g., <https://www.reuters.com/business/healthcare-pharmaceuticals/biontech-faces-first-german-lawsuit-over-alleged-covid-vaccine-side-effects-2023-06-11/>). All in all, it seems that the legal liability of pharmaceutical companies is going to be small, if not inexistent, since what has been leaked from the contracts signed between them and the States is that only the latter would be responsible for paying any compensation set by the judges. See <https://www.biospace.com/article/will-u-s-vaccine-makers-face-lawsuits-over-covid-vaccine-side-effects-like-biontech-is-/>.

⁴² Tribunale Ordinario di Varese, Sezione Prima Civile, RG n. 2572/2021 (Repert. n. 1181/2022, del 02/08/2022).

⁴³ *Hoeg v. Newsom*, 2:22-cv-02147 WBS AC (E.D. Cal. Apr. 11, 2023). Along with others mentioned in note 37 above, perhaps the most notable awaiting case on this matter is *Changizi v. U.S. Department of Health of Human Services*, recently filed with the U.S. Court of Appeals for the Sixth Circuit.

⁴⁴ The pending case is *Missouri v. Biden* (cit. supra), and the judge’s decision has been recently upheld by the U.S. Court of Appeals for the 5th Circuit. See <https://www.ca5.uscourts.gov/opinions/pub/23/23-30445-CV0.pdf>.

⁴⁵ <https://reclaimthenet.org/stanford-pressured-over-failure-to-provide-censorship-documents>. There are even attempts at the moment there to pass a law in order to prevent such collusions in the future (<https://reclaimthenet.org/disclose-government-censorship-act-2023>), although it is highly doubtful whether they will be successful. Curiously enough, and according to section 230 of its Communications Decency Act, the United States still consider social networks as mere intermediaries and not as the content publishers they have long been (sometimes by incitement, and sometimes not so much).

The end of the global health emergency has not, however, meant a break in the fight against mis- and disinformation in the Western world. Right before the pandemic, the disinformation officially pursued was mostly that associated to foreign destabilizing interference, with election periods as particularly critical moments (see here the 2018 French legislative reform⁴⁶, or programs such as Stanford's Election Integrity Partnership). This is also the case now: disinformation hybrid strategies in the networks and the media are in fact more present than ever, and especially around the war in Ukraine, undoubtedly the hottest post-pandemic scenario. A remarkable example in this regard would be the Western countries' ban on RT and other Russian broadcasters from March 2022 onwards.

However, the most significant development in the fight against disinformation in the post-COVID world is the open surveillance and control of ordinary domestic discourse. In the United States, combating disinformation before and during the pandemic was once associated with the Global Engagement Center (GEC), an interdepartmental agency created in 2017 at the behest of the Departments of State and Defense. Although its mission was theoretically restricted to countering foreign attempts of disinformation, suspicions that the GEC might have been overstepping its role for some time now appear to be turning into evidence, and have already reached the House of Representatives and the Senate⁴⁷. In parallel to this body, the Disinformation Governance Board (DGB) was created in April 2022 within the Department of Homeland Security to openly pursue disinformation speeches among the national population, but it was so widely criticized from the beginning that it was dismantled a few months later. But the story does not end here: as soon as the DGB was closed, the Foreign Malign Influence Center (FMIC), attached to the Director of National Intelligence, began operating in September 2022. Although several of its functions overlap with those of the GEC, and some see it as a mere covert continuation of the DGB, the FMIC's officially preceding unit is the Election Threats Executive, also attached to the National Intelligence Office.

In turn, the EU has recently approved two important documents to combat disinformation. In October 2022, the Parliament and the Council gave the green light to the long-awaited *Digital Services Act*, which had been already announced at the end of 2020⁴⁸. In line with the previous Directive 2000/31/EC on Electronic Commerce⁴⁹, the

⁴⁶ See <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037847559>. The French Constitutional Council validated the law in December 2018 (decisions no. 2018-773 DC and 2018-774 DC), after some reservations concerning interpretation, in order to guarantee the balance between freedom of expression and the need for a clear and unmanipulated electorate vote.

⁴⁷ <https://foreignaffairs.house.gov/press-release/mccaul-hfac-members-demand-answers-on-gecs-role-in-censorship/>. The episode has already been addressed in another documented installment of the Twitter Files by Matt Taibbi: <https://twitter.com/mtaibbi/status/1631338661479424014> and has also been dealt with in political analysis: <https://thefederalist.com/2023/04/19/meet-the-shadowy-group-that-ran-the-federal-governments-censorship-scheme/>.

⁴⁸ The official name of this new Digital Services Act is *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services*. See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R2065&qid=1687694050920>.

⁴⁹ <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex%3A32000L0031>.

DSA refuses to impose a general obligation on platforms to monitor the legality of content uploaded by users beforehand. Notwithstanding, it charges them greater obligations of transparency and diligence in the removal of illegal content that may again pose serious risks to freedom of expression. Specifically, the DSA obliges the largest online platforms –such as Twitter, LinkedIn, Google (YouTube), Meta (Facebook, Instagram), Microsoft, TikTok, Amazon, etc.– to periodically submit content moderation and risk mitigation reports to the EU starting August 2024. For its part, the European Union will supervise social media platforms’ policing of “harmful” information, which could potentially include health misinformation. In order to do so, the European Commission grants itself powers to require social media platforms to take actions to prevent, eliminate or limit any use of their services that might contribute to a threat to public security or public health. To top it all, these obligations are backed up by substantial fines of up to 6 percent of the company's worldwide turnover for non-compliance. On the bright side, the DSA will also oblige platforms to establish a transparent internal system for handling user complaints about their decisions.

The second relevant document is *The Strengthened Code of Practice on Disinformation 2022* (European Commission, 2022), which replaces that of 2018, and which accompanies the DSA in this matter. Among its many specific measures, seeking to strip disinformation of economic benefit is probably the most clever (see section II (d-f)). Apart from that, the Strengthened Code broadens the tools that empower users, e.g., to detect and flag false or misleading content, increases the coverage of fact-checking across EU countries and languages, and establishes a more robust monitoring and reporting framework both at EU and Member State level, the implementation of which will undoubtedly provide occasions for new controversies surrounding more or less reasonable limitations on freedom of expression and opinion.

In the eyes of the EU and other Western powers, both texts are part of a broader process aimed at regulating and governing the oligopoly formed by the large technology platforms, whose vast infrastructural and gatekeeping power is being blamed for the growing deterioration of both social welfare and the stability of our democracies. In this sense, the DSA and the current policies of the U.S. Free Trade Commission seem to be moving from a regulatory model centered on the management of discourse to one more focused on the governance of the actors that control information flows (Jiménez and Cancela, 2023).

The major social networks, meanwhile, remain trapped in their peculiar schizophrenic loop, that is to say, between a business model prone to monetize sensationalist publications and a more or less induced but undeniable moderating zeal. Even Twitter 2.0, which takes pride in tackling disinformation with greater respect for freedom of expression⁵⁰, continues to moderate content. With respect to the European Union, and in view of its new legislation, Twitter 2.0 (now in the process of becoming a larger platform

⁵⁰ This newly acquired respect is reflected, among other things, in the promotion of the Community Notes to the detriment of vertical corporate fact-checking.

by the name of *X*) certainly seems to have no choice⁵¹. The same with aggravation is true in other parts of the world, such as China, India and Turkey, where Twitter has recently been in the news for compromising with government censorship requests⁵². Ultimately, every website needs to have some basic level of moderation, or they quickly become absolutely useless. The important thing here, as in any other decision of distributive justice, is not to find a solution that satisfies everyone –something almost impossible by definition– but (a) to be able to adequately justify the criteria that have been used in this moderation work; and (b) to use the invisibilization and suppression of allegedly fraudulent content as the last resort, prioritizing whenever possible any other types of measures that are more respectful of freedom of expression.

When it comes to assuming the complexity involved in content moderation and, more particularly, in the fight against online disinformation, we almost fully enter the realm of paradox. Because, as Cotino Hueso (2022: 235) points out, disinformation is undoubtedly a disease for democracy, but the available remedies can be even worse. If we want to achieve something positive here, we must be humble and possibilistic, and fight disinformation with caution, also knowing that this is a war, both for its complexity and its current dimensions, which may be lost from the start. Indeed, disinformation now makes use of very powerful and previously non-existent technological tools. The fast-paced development of AI makes possible a level of manipulation and falsification without precedent in history. This would lead us to another thorny issue that can only be touched upon here: that of algorithmic (gender, racial, political) biases, and beyond that, the question about the (impossible) neutrality of technology, and of the public authorities that regulate it.

Since the pandemic arrived, we seem to have grown accustomed to the fact that mis- and disinformation must be controlled by the authorities at all costs. But on second thought, that is far from being a smart move. The task of identifying lies and truth in information should ultimately correspond to citizens, not to technological platforms or political power. What is up to the latter is to assume mis- and disinformation with resilience, and to respond to it with more information, more democratic debate, more awareness and more training of civil society in a critical spirit (Peralta Gutiérrez, 2021). And in order to get there, it is essential to promote media literacy, quality journalism, and a free and plural media, as bastions of democracy and human rights. In fact, most of the recommendations of international institutions on the matter in recent times have been along these lines (see, among others, UN Human Rights Council, 2021; European Commission, 2020b; European Parliament, 2020b). With one caveat: thinking it through, it is really not so much a matter of promoting as of not hindering, that is, of removing obstacles and confronting attitudes that run counter to all these goals.

⁵¹ The feud between Elon Musk and Thierry Breton (the current European Commissioner for Internal Market) is giving much to talk about here, but with the DSA in force, Twitter –which has recently withdrawn its signature from the Strengthen Code– stands to lose in practice. In Breton's own words: “In Europe, the bird will fly by our rules”.

⁵² <https://www.washingtonpost.com/politics/2023/05/15/elon-musk-about-face-government-censorship/> and <https://reason.com/2023/05/17/elon-musk-turkey-twitter-censorship-free-speech/>. As to China, see also Gosztanyi, 2021.

In the end, we must keep in mind that both freedom of expression and the fight against mis- and disinformation are necessary. That is why they must be defended simultaneously, and not be subjected to an excessive ideological back-and-forth. However, it should also be remembered that they are not on the same level: whereas freedom of expression is an absolutely basic individual and social good in a democratic State, whose restriction must always be justified, fighting mis- and disinformation should only be legally protected – as it was stated above– when the pursued communication represents a direct incitement to violence, or becomes a necessary means to violate the rights of others. Even if a few other scenarios might be added to the list (e.g., a serious attempt to manipulate electoral processes through false campaign speech comes quickly to mind), the point here is that to make mis- and disinformation always, or in most cases, legally objectionable is not a wise policy: it compromises freedom of expression itself, and amounts to making the public power the universal and permanent arbiter of truth.

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