



Conference proceedings - "Regulating Online Disinformation: Comparative Perspectives," organised by Caucasus International University and Dublin City University, held via platform Zoom on October 1, 2021.

Do not shoot the message: regulating disinformation beyond content in Brazil

Dr. Clara Iglesias Keller ^{a 12}

^a Leibniz Institute for Media Research | Hans-Bredow-Institute (Germany)

WZB Berlin Social Science Center (Germany)

Humboldt Institute for Internet and Society, with the Platform Governance Initiative (Germany)

ABSTRACT

This paper analyses regulatory strategies toward disinformation to demonstrate the importance of policies that do not encompass speech regulation but rather target data handling and structural regulation. Building on social and communications sciences findings sets some premises for the disinformation regulation debate. This includes the paradox faced by regulators referring to liberal democracies' duty to ensure citizens' right to freedom of expression and, at the same time, countermeasure online speech abuses. After analysing and classifying regulatory strategies proposed and implemented in different national contexts, it proposes that statutory regulation should not focus on regulating content or nailing concepts of disinformation but direct efforts at regulating data and digital platforms' business models. Finally, the paper will present and extract key learning from the Brazilian experience, where disinformation campaigns led by the 2018 presidential elections fueled a regulatory debate that gained momentum in 2020 when the country started discussing a new regulatory framework for digital platforms.

Keywords: *Disinformation, fake news, regulation, platform governance, regulatory strategies.*

1. Introduction

The 2018 presidential elections brought digital disinformation to the spotlight of the Brazilian policy debate. As initially reported by the media and later corroborated by academic research (Evangelista and Bruno 2019), Jair Bolsonaro's campaign employed microtargeting techniques to disseminate

¹ clara.keller@wzb.eu

² <https://doi.org/10.55367/KNAY1596>

political marketing and false information mainly through WhatsApp, fueled by questionable use of data. Since then, Brazilian policymakers have been revolving around a burning question for different political actors worldwide: how can governments fight disinformation?

Even though information manipulation is no stranger to the traditional media, digitalisation has, along with other socio-political factors, imposed structural transformations in the public arena of debate (Jungherr and Schroeder 2021, 2), giving a new face and dynamics to the distribution of potentially harmful content. Beyond the technological context, many other aspects add complexity to this setting. Current disinformation campaigns have been associated, for instance, with far-right populist governments, political polarisation, presumably powered by algorithmic curation (Barberá 2020), and possible shifts in media consumption. On another note, policy specialists often blame its spread and other sorts of online harms (e.g., hate speech) on governments' failures to regulate Big Tech. These are just a few of the many perspectives on an intricate and complex subject.

Despite relevant multidisciplinary research efforts, there is still a lot unknown about disinformation. For instance, the jury is still out on its capacity to shape electoral outcomes (Faris et al. 2017) and on the existence and actual relevance of political bots (Rauchfleisch e Kaiser 2020). Empirical evidence is also still mixed regarding disinformation's potential to spread wider or "convince people of political decisions they did not hold before" (Jungherr and Schroeder 2021, 3). However, it is possible to find some common ground, including the realisation that there is no single silver bullet in view. As a multilayered phenomenon, fighting disinformation requires different responses from different actors. For instance, journalistic organisations can perform fact-checking, civil society and government programs can foster media literacy, digital platforms will be responsible for implementing their own moderation and certification procedures, not to mention every individual's responsibility when sharing information.

This paper rests on the assumption that there is also an important role for state regulation in countermeasure disinformation. It analyses regulatory strategies implemented through statutory regulation in different legal contexts to demonstrate the importance of policies that do not encompass speech regulation directly but rather point efforts towards the handling of data and structural regulation.

The case study focuses on the Brazilian experience. Up to 2020, Law 13.834/2019 and a number of regulatory proposals criminalised individual expression or enhanced pre-existing libel and defamation sanctions. Along with the 2020 outbreak of the COVID-19 pandemic, the country watched a shift in strategies to fight disinformation. Bills of law vary from mechanisms that are still user-centred (but do not necessarily regulate content directly, such as requests for full identification of users and their locations as a prerequisite for access to platforms) to measures that target business models (like transparency report and complaint process obligations).

Against this background, this paper builds on existing literature and comparative experiences to assess Brazil's regulatory framework. As a secondary goal, the paper also aims to offer a taxonomy for regulatory strategies against disinformation that can serve different political contexts. The methodology used for the research is an analysis of relevant literature, as well as national and international legal provisions, policy initiatives repositories, grey literature, and corporate documents.

2. Scope and methodology

This paper is based on three scope decisions. The first one regards the concept of *regulatory strategies*, which refers to the promulgation of rules by governments, and monitoring and enforcement mechanisms (Black 2001). Specialised literature shows some consensus on the need for a multi-complex approach toward disinformation (Benkler 2019), one that encompasses, among others, fact-checking, media literacy, and the role played by digital intermediaries (Marsden, Meyer, and Brown 2020; Schulz, Wolfgang 2019). While recognising the need for multidimensional counteractions to address this multidimensional phenomenon, I will focus on the formal normative instruments adopted by states through legislative rule-making processes.

The second decision refers to the concept of *disinformation*, here understood as "false or misleading information that is intentionally spread for profit, to create harm, or to advance political or ideological goals" (Marwick et al., 2021). This definition is in tune with relevant conceptual literature on the topic, which attempts to make sense of the different and yet blurred communication practices that are part of what has been named the "information disorder" (Wardle and Derakhshan 2017). Since the expansion of practices related to the spread of false information through digital means, the terminology employed for these phenomena has evolved, allowing greater accuracy and differentiation among phenomena.

While the term "fake news" is still used for scientific purposes by some authors, there is an apparent movement away from it in the literature, mostly due to its restricted technical relevance (Dan et al., 2021). A relevant part of the conceptual debate in the English language builds on the distinction between disinformation and misinformation – the latter being commonly referred to as information that is "false by definition"¹⁰ but has not been disseminated with a specific purpose to cause harm. The intent is recognised as the element that differentiates misinformation and disinformation (Wardle and Derakhshan 2017; Marwick et al. 2021; Guess and Lyons 2020), as "[d]isinformation is meant to deceive, while misinformation may be inadvertent or unintentional" (Guess e Lyons 2020, 11).

The distinction between misinformation and disinformation holds fundamental relevance to the debate about regulatory policies in liberal democracies, where counteractions against disinformation mingle with the ever-delicate exercise of regulating freedom of expression. In legal systems where freedom of expression is promoted both as a subjective and a collective right (Machado 2002, 379), states are usually bound to duties of absenteeism (meaning that public authorities must refrain from impeding expression) as well as of intervention (for preserving a pluralistic and equal sphere of debate). Because classifying and countering disinformation intrinsically depends on a judgment on the substance of an expression – i.e., is it false? – countermeasures against such practices hold an increased risk of promoting chilling effects or even censorship.

The third decision refers to the Brazilian framework as a case study. Scientific debates about disinformation have flourished in this national context since the 2018 elections (Evangelista and Bruno 2019; Valente 2019; Rais and Sales 2020), even more so after COVID-19 pushed the policy debate further. While the paper's findings and arguments are extracted from international literature and global experiences of disinformation regulation, it approaches a diagnosis for the Brazilian case.

It also identifies possible issues in the current proposals, as well as possible lessons for the global debate.

3. Discussion - Regulatory strategies towards disinformation

Regulatory strategies towards disinformation can have different targets. For a better understanding of this variety, their efficiency, and their implications, I propose that these policies are categorised into three groups: (1) policies focusing on individual expression; (2) policies aiming at the collection, handling, and use of personal data; and (3) policies implementing structural regulation of digital intermediaries, targeting their business models. These three categories are not static, as a single policy can aim at more than one of these targets simultaneously (for instance, structural regulation that can affect individual speech). Also, this taxonomy is not meant to exhaust all types of regulatory policy that can be implemented but rather to provide a simplified overview of current regulatory trends.

In the first group, policies are directed at the content of an *individual expression* and mostly aim at coercing individuals from publishing and spreading disinformation. Most of them criminalise individual expressions, enhance pre-existing libel and defamation sanctions, and grant authorities or digital platforms the power to remove content. This is the case for the only Brazilian law in force to date that aims at regulating disinformation (Law 13.834/2019), according to which it is a crime to attribute the practice of a crime or infraction to someone of which they are innocent, and thus cause administrative and criminal investigations for electoral purposes.³ Most of these initiatives are criticised for imposing disproportionate restrictions on the right to freedom of expression since their implementation can also impact legitimate speech by causing what is known as chilling effects (Khan 2021, 3). They are also known to have limited efficacy since focusing on individual acts of conduct does not address the handling of data nor the structural and power dynamics that allow the implementation of massive disinformation campaigns in the first place.

In the second group are policies that target *data*, generally represented by regulatory frameworks that address the collection, treatment, and storage of personal data for different purposes. Specific mechanisms can include restrictions on data gathering and accumulation for political microtargeting purposes – like in Japan, where “the capture of personal data on the electorate, and the communication of personalised political messaging” is understood to be “largely prohibited” by the current legislation (Bennet and Oduro-Marfo 2019, 6). Strategies focused on regulating personal data have a central role in the disinformation debate since the harvesting of personal data for political advertisement purposes has been at the centre of mass disinformation strategies (Cadwalladr 2017; Evangelista and Bruno 2019; Dobber, Ó Fathaigh, and Zuiderveen Borgesius 2019). For this reason, such strategies can be

³ Other countries have adopted or discussed similar measures centred on the production and spread of disinformation, such as Ethiopia, Singapore, Belarus, and Kenya. See Halefom H. Abraha, 2019, The problems with Ethiopia's proposed hate speech and misinformation law. Media@LSE. Retrieved from <https://blogs.lse.ac.uk/medialse/2019/06/04/the-problems-with-ethiopias-proposed-hate-speech-and-misinformation-law/>; Agence France-Presse, 2019, Chilling: Singapore's fake news law comes into effect. The Guardian. Retrieved from <https://www.theguardian.com/world/2019/oct/02/chilling-singapores-fake-news-law-comes-into-effect/>; Daniel Funke and Daniela Flamini, 2018, A guide to anti-misinformation actions around the world. Poynter. Retrieved from <https://www.poynter.org/ifcn/anti-misinformation-actions/>.

deemed central, if not more important, to combat disinformation than strategies centred on content, like, for instance, fact-checking (Nenadić 2019).

As per the third and last group of measures, policies focusing on *structure* are understood to be regulating intermediaries whose platforms can be misused for disseminating disinformation. These initiatives usually target the business models of such agents and possibly a broader category of online harms rather than disinformation specifically – disinformation can be considered central to their implementation, though. European literature has identified such policies as a shift from liability to responsibility (Frosio 2017) or "from liability to duty" (Mac Síthigh 2020). They encompass mechanisms that aim to embed these business models with transparency and accountability, encouraging "a new ethics of responsible platforms, which can provide certainty, fairness, and accountability of enforcement of speech rules, but ensure that speech control is strictly autonomous from the state" (Tambini 2019). These tools are associated with a "duty of care" (as phrased in the UK Online Harms Paper). Among them are "general monitoring obligations" (Kuczerawy 2019), often adopted through mechanisms such as transparency report obligations or complaints investigation procedures. As much as a shift to the structure is welcome, it is important to note that these initiatives are not necessarily free speech friendly.

4. Conclusion - Learnings from the Brazilian case

Up to early 2020, the vast majority of anti-disinformation policies proposed in Brazil are of the first group – based on the criminalisation of individual expressions. This is the case for the only federal law in force specifically regulating disinformation, article 20 of Law 13.834/2019 (which amends the National Electoral Code to add article 326-A). According to its terms, it is a crime to attribute someone innocent to a crime in the context of an election and provoke criminal investigations, as mentioned above. Proposals towards structural regulation are rare, and the data protection law from 2018 has been facing a series of implementation challenges.

This landscape drastically changed in April 2020, as the country went through a shift in policy proposals and numerous bills with different strategies came to light. Their focuses vary widely. On the one hand, there are bills targeting mechanisms that are still user-centred but not necessarily regulating content directly, such as requests for full identification of users and their locations as a prerequisite for access to platforms. On the other hand, there are measures targeting structure, like obligations of content removal, advertisement, and complaint process transparency, as well as specific obligations for messaging apps (a clear attempt to tackle WhatsApp for its role in the 2018 disinformation campaign). These mechanisms were originally spread in different bills, and currently, most of them are gathered in the proposal known as Bill of Law 2.630/2020 – entitled "The Law for Freedom, Transparency, and Responsibility in the Internet." In parallel, the country's data protection framework has seen significant progress, with the Supreme Court recognising data protection as a fundamental right (Mendes and Keller 2020) and the data protection law coming into force in 2020, two years since its approval by Parliament. The federal government also proceeded with establishing a data protection authority based on a questionable institutional model. Instead of an independent administrative body, the Brazilian Authority for Data Protection is hierarchically bound to the Presidency – which brings a new set of concerns to these and other fields.

So far, in this ongoing process, it is still unclear if and in what form the policies currently on the table will be approved. In any case, we do not know if they will deliver the promised gains in efficiency and legitimacy. Still, we can already identify a few takeaways from this debate.

On the bright side, it is clear that disinformation practices are fueling an overdue debate on the regulation of a broader range of online harms. The first drafts presented were mostly focused on regulating disinformation, bringing definitions for the term, and a series of mechanisms aiming, for instance, at fighting coordinated behaviour or improving intra-platform fact-checking and content flagging. As the debate evolved, most of these measures were replaced with mechanisms that apply not only to disinformation but also to hate speech, copyright infringement, and even to the enforcement of community standards (as the transparency reports apply to all sorts of content moderation). Even though their scope broadened, the official justifications of these proposals are still related to how disinformation threatens democracy.

On a less optimistic note, as much as this shift of focus from content to structure is welcome, individual rights are still threatened in different ways. Depending on the way platforms' duties of care are crafted, they can either directly violate privacy or freedom of speech or generate incentives to do so. For example, some of the proposals towards messenger apps have the potential of becoming massive surveillance systems like data retention as a way for authorities to identify and trace the spread of disinformation. Other draft provisions mandate immediate removal of illegal content (to be defined and judged as so by the platforms themselves) and civil identification as a requirement for social media profiles. This last measure has been highly criticised as silencing marginalised and politically threatened groups. In a country like Brazil, which is drastically marked by social inequality, such a measure has the potential to exclude great parts of the population with limited access to formal documentation.

This shows that even by trying to dodge restrictions on individual expression, what might initially seem like a safer way to regulation, can lead down the wrong path. Respecting free speech and regulating disinformation beyond content means taking a holistic view of what is a wide and complex phenomenon, which should not be reduced to what can and cannot be said.

References

- Barberá, Pablo. 2020. "Social Media, Echo Chambers, and Political Polarization." In *Social Media and Democracy: The State of the Field, Prospects for Reform*, organizado por Nathaniel Persily e Joshua A. Tucker, 345. Cambridge New York Port Melbourne New Delhi Singapore: Cambridge University Press.
- Benkler, Yochai. 2019. "Cautionary Notes on Disinformation and the Origins of Distrust." *Social Science Research Council, Mediawell*. <https://mediawell.ssrc.org/expert-reflections/cautionary-notes-on-disinformation-benkler/>.
- Bennet, Colin J., and Smith Oduro-Marfo. 2019. "Privacy, Voter Surveillance, and Democratic Engagement: Challenges for Data Protection Authorities." UK Office of the Information Commissioner for presentation to the 2019 International Conference of Data Protection and Privacy Commissioners (ICDPPC). The University of Victoria.
- Black, J. 2001. "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World". *Current Legal Problems* 54 (1): 103–46. <https://doi.org/10.1093/clp/54.1.103>.
- Cadwalladr, Carole. 2017. "The great British Brexit robbery: how our democracy was hijacked." *The Guardian*, 2017. <https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy>.
- Dan, Viorela, Britt Paris, Joan Donovan, Michael Hameleers, Jon Roozenbeek, Sander van der Linden, and Christian von Sikorski. 2021. "Visual Mis- and Disinformation, Social Media, and Democracy." *Journalism & Mass Communication Quarterly* 98 (3): 641–64. <https://doi.org/10.1177/10776990211035395>.
- Dobber, Tom, Ronan Ó Fathaigh, and Frederik J. Zuiderveen Borgesius. 2019. "The Regulation of Online Political Micro-Targeting in Europe". *Internet Policy Review* 8 (4). <https://doi.org/10.14763/2019.4.1440>.
- Evangelista, Rafael, and Fernanda Bruno. 2019. "WhatsApp and Political Instability in Brazil: Targeted Messages and Political Radicalisation." *Internet Policy Review* 8 (4). <https://doi.org/10.14763/2019.4.1434>.
- Faris, Robert M., Hal Roberts, Bruce Etling, Nikki Bourassa, Ethan Zuckerman, and Yochai Benkler. 2017. "Partisanship, Propaganda, and Disinformation: Online Media and the 2016 US Presidential Election". Cambridge, U.S.: Berkman Klein Center for Internet & Society at Harvard University. <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33759251>.
- Frosio, Giancarlo. 2017. "Why keep a dog and bark yourself? From intermediary liability to responsibility". *International Journal of Law and Information Technology*, 1–33. <https://doi.org/10.1093/ijlit/eax021>.

Guess, Andrew M., and Benjamin A. Lyons. 2020. "Misinformation, Disinformation and Online Propaganda." In *Social Media and Democracy. The State of the Field, Prospects for Reform.*, por Nathaniel Persily e Joshua A. Tucker. Cambridge University Press.

Jungherr, Andreas, and Ralph Schroeder. 2021. "Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy." *Social Media + Society* 7 (1): 205630512198892. <https://doi.org/10.1177/2056305121988928>.

Khan, Irene. 2021. "Disinformation and freedom of opinion and expression. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression." A/HRC/47/25. United Nations, General Assembly.

Mac Síthigh, Daithí. 2020. "The Road to Responsibilities: New Attitudes towards Internet Intermediaries." *Information & Communications Technology Law* 29 (1): 1–21. <https://doi.org/10.1080/13600834.2020.1677369>.

Marsden, Chris, Trisha Meyer, and Ian Brown. 2020. "Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?" *Computer Law & Security Review* 36 (April): 105373. <https://doi.org/10.1016/j.clsr.2019.105373>.

Marwick, Alice, Rachel Kuo, Shanice Jones Cameron, and Moira Weigel. 2021. "Critical Disinformation Studies - A Syllabus." Center for Information, Technology, and Public Life - University of North Carolina at Chapel Hill. <https://citap.unc.edu/research/critical-disinfo/>.

Mendes, Laura Schertel, and Clara Iglesias Keller. 2020. "A new milestone for data protection in Brazil." *Internet Policy Review*, Opinion, maio. <https://policyreview.info/articles/news/new-milestone-data-protection-brazil/1471>.

Nenadić, Iva. 2019. "Unpacking the 'European Approach' to Tackling Challenges of Disinformation and Political Manipulation." *Internet Policy Review* 8 (4). <https://doi.org/10.14763/2019.4.1436>.

Rais, Diogo, and Stela Rocha Sales. 2020. "Introdução". In *Fake News: A conexão entre a desinformação e o direito.*, organizado por Diogo Rais. Revista dos Tribunais.

Rauchfleisch, Adrian, and Jonas Kaiser. 2020. "The False Positive Problem of Automatic Bot Detection in Social Science Research." Organizado por Fabiana Zollo. *PLOS ONE* 15 (10): e0241045. <https://doi.org/10.1371/journal.pone.0241045>.

Schulz, Wolfgang. 2019. "Roles and Responsibilities of Information Intermediaries: Fighting Misinformation as a Test Case for Human-Rights Respecting Governance of Social Media Platforms." 1904. Aegis Series. Hoover Institution, Stanford University. https://www.hoover.org/sites/default/files/research/docs/schulz_webreadypdf.pdf.

Tambini, Damian. 2019. "Rights and Responsibilities of Internet Intermediaries in Europe: The Need for Policy Coordination." *CIGI - Centre for International Governance Innovation* (blog). 28 de outubro de 2019. <https://www.cigionline.org/articles/rights-and-responsibilities-internet-intermediaries-europe-need-policy-coordination>.

Valente, Jonas C. L. 2019. “Regulando desinformação e fake news: um panorama internacional das respostas ao problema”. *Comunicação pública*, nº Vol.14 nº 27 (dezembro). <https://doi.org/10.4000/cp.5262>.

Wardle, Claire, and Hossein Derakhshan. 2017. “Information Disorder: Toward an interdisciplinary framework for research and policymaking.” (2017) 9. Council of Europe Report. Council of Europe.