

# CIVIL LIABILITY ON SOCIAL MEDIA: AN ANALYSIS PROPOSAL IN LIGHT OF CICERO'S POLITICAL THOUGHT

## A RESPONSABILIDADE CIVIL NAS REDES SOCIAIS: UMA PROPOSTA DE ANÁLISE À LUZ DO PENSAMENTO DE CÍCERO

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### Abstract

The steady growth of Internet access has led to a significant increase of social media in the last decades. The high speed at which information spreads online, in an increasingly connected society, indicates the harmful potentiality of the inappropriate use of social media. There is increasing concern about the impact of hate speech and the spread of fake news, as well as the dissemination of intimate images, nude photos or pornography without consent. This study examines whether the concept of virtue as proposed by Cicero is applicable to the contemporary legal apparatus and its compatibility with civil liability standards when confronted with damages due an abusive exercise of free speech on social media. A deductive approach and literature review were used in this research. Many of the concepts discussed by Cicero have been incorporated into Western law throughout history, such as good faith and the common good, which place limits on the exercise of individual freedoms, such as freedom of expression, and also provide important guideposts for the interpretation and application of the entire legal system. Reason, prudence and moderation must be present to ensure respectful and productive debate among members of society. The abusive exercise of the right to free expression, with negative effects on third parties, violates the precepts of justice ("do no harm" and "to give each his own") and requires the enforcement of civil liability as an appropriate means of redress.

**Keywords:** Freedom of expression; social media; civil liability; virtues; Cicero.

### Resumo

A contínua popularização do acesso à internet permitiu um expressivo crescimento das redes sociais nas últimas décadas. A alta velocidade com que as informações são difundidas no meio virtual, em uma sociedade cada vez mais conectada, sinaliza a po-

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tencialidade lesiva da utilização inadequada das redes sociais. É crescente a preocupação acerca dos impactos da disseminação de discursos de ódio e notícias falsas, além do compartilhamento não autorizado de nudez e pornografia. Esse estudo objetiva investigar se a concepção de virtude proposta por Cícero, dialoga com o atual aparato jurídico-normativo – e, em especial, com o instituto da responsabilidade civil – frente aos danos decorrentes do exercício abusivo da liberdade de expressão nas redes sociais. Essa pesquisa recorreu ao método dedutivo e à revisão bibliográfica. Muitos conceitos tratados por Cícero foram incorporados pelo pensamento jurídico ocidental ao longo da história, a exemplo da boa-fé e do bem comum, os quais impõem limites ao exercício das liberdades individuais, como a liberdade de expressão, além de representar importantes balizas a orientar a interpretação e a aplicação de todo o ordenamento. A razão, a prudência e a moderação devem se fazer presentes para a preservação de um debate produtivo e respeitoso entre os membros da comunidade. O exercício abusivo da liberdade de expressão, com repercussão negativa na esfera de terceiros, viola os preceitos de Justiça (“não fazer mal a outrem” e “dar a cada um aquilo que lhe é devido”), reclamando a aplicação da responsabilidade civil como mecanismo apto à reparação dos danos.

**Palavras-chaves:** Liberdade de expressão; redes sociais; responsabilidade civil; virtudes; Cícero.

**Sumário:** Introdução. 1. Os meios digitais e os danos à dignidade da pessoa humana. 2. Os limites da liberdade de expressão no sistema jurídico brasileiro. 2.1. A liberdade de expressão e uma ordem constitucional pluralista. 2.2. A liberdade de expressão e o abuso de direito no Código Civil de 2002. 3. A responsabilidade civil como resposta à reparação dos danos. 3.1. Tratamento normativo pelo Código Civil. 3.2. Marco civil da Internet (Lei nº. 12.965/14). 3.3. Evolução jurisprudencial. 4. A virtude em Cícero e a atualidade de suas lições para orientar o tratamento jurídico da responsabilidade civil e da liberdade de expressão nas redes sociais. 4.1. A proposta de Cícero em “Dos Deveres”: a centralidade da ideia de virtude. 4.2. Inspirações cicerianas para reflexão sobre o tema. Considerações finais. Referências.

## INTRODUCTION

The growth of the Internet and the rise of social media have led to a revolution in communication, facilitating the decentralization of sources for content production, and providing information at high speed, with global reach.

However, the abusive exercise of free speech on social media has proven to be potentially harmful to the democratic State under the rule of law, with the possibility to influence the electoral process, discredit public institutions, spread misinformation and fear, and violate rights to one's image, honor, privacy, and intimacy.

This paper examines whether the concept of virtue as proposed by Cicero is applicable to the contemporary legal apparatus and its compatibility with civil liability standards when confronted with damages due an abusive exercise of free speech on social media.

The hypothesis presented is that the concepts discussed by Cicero can provide a relevant contribution for the regular exercise of freedom of expression and, furthermore, establish guidelines for the interpretation and application of laws in the context of the problem statement.

The answers to these questions were obtained by studying legislation, legal doctrine, and precedents on the subject. As far as Cicero's thought is concerned, this work has focused mainly on the discussion of the work "On Duties".

The study of the problem was conducted by means of the deductive reasoning. First, an overview of the harmful potentiality of abusive exercise of freedom of expression in social media was provided. Then, the limits of free speech and civil liability were examined as a possible governmental response to the harm caused. Finally, Cicero's teachings on virtue were addressed and an attempt was made to identify the reflections and contributions of his lessons on this topic.

Cicero's thought is the result of the combination of law and philosophy, with a great contribution to practical ethics. The Brazilian legal system has adopted a number of the principles and values discussed by Cicero, such as solidarity, good faith, and the common good, which serve as important interpretive guidelines in the application of civil law.

Social media companies can help promote moderate, reasonable, and responsible use of their platforms by formulating, through self-regulation, terms of use that establish minimum ethical standards of conduct, without prejudice to the imposition of content-restrictive measures or sanctions on offending users, if it is done in accordance with the adversary system and ensures the possibility of judicial review.

Civil liability is an appropriate means to achieve Cicero's ideal of justice by promoting redress and preventing the continuation of illegal acts in the social environment. The magnitude of the impact of the proliferation of illegal content due to the high speed at which information is disseminated online challenges the creation of a formula that reconciles the protection of freedom of expression with a swift and effective system of civil liability.

## 1 DIGITAL MEDIA AND THE HARM TO HUMAN DIGNITY

According to the 2021 National Household Sample Survey (PNAD) conducted by the Brazilian Institute of Geography and Statistics (IBGE), 90.0% of national households have access to the Internet<sup>3</sup>.

As reported by Statista<sup>4</sup>, Brazilian users spent an average of more than 4 hours per day on social media in 2019. According to 2021 data<sup>5</sup>, Brazil represents the fifth largest user population of social media in the world and the second largest outside Asia, second only to the United States.

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<sup>3</sup> NERY, Carmen, BRITTO, Vinícius, *Internet já é acessível em 90,0% dos domicílios do país em 2021*, 16 Sep. 2022, Available at: <<https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/34954-internet-ja-e-acessivel-em-90-0-dos-domicilios-do-pais-em-2021>>, Accessed on: 29 Nov. 2022.

<sup>4</sup> BIANCHI, Tiago, *Average daily time spent on social media in Brazil from 2012 to 2019 (in minutes)*, 12 May 2022, Available at: <<https://www.statista.com/statistics/1052092/brazil-time-social-media/>>, Accessed on: 29 Nov. 2022.

<sup>5</sup> BIANCHI, Tiago, *Social media usage in Brazil – Statistics & Facts*, 22 Nov. 2022, Available at: <<https://www.statista.com/topics/6949/social-media-usage-in-brazil/>>, Accessed on: 29 Nov. 2022.

The second half of the 1990s was a significant milestone in the history of social media<sup>6</sup>, when the first digital platforms appeared, specially designed to bring together friends or people with common interests through the sharing of experiences, memories, and opinions between a well-defined group of people.

Nowadays, the scope of social media goes beyond the eminently social dimension that was prominent in the 1990s. Currently, social media can be described as platforms for entertainment and information that have a significant impact on the consumption of traditional media such as radio, television, and print media<sup>7</sup>.

In addition, social media are increasingly taking the place that streets, coffee shops, and town squares used to occupy. As Maíke Wile dos Santos<sup>8</sup> notes, social media have enabled the emergence of a new public space, as they promote open debate among citizens on various topics of social interest.

The development of social media has given rise to a new dynamic in which the users play an increasingly significant role and are key social actors in the exchange of ideas, information, and opinions.

The ability to share multiple posts simultaneously, with the potential for thousands of views, demonstrates the reach and speed of dissemination of content generated on such platforms.

The dynamics that permeate social media gives voice to different social groups and provides more visibility to different social agendas in the political arena. In this way, social media can be used to express citizens' criticisms and serve as important tools of political pressure for changes in the collective interest that resonate in parliament and the executive branch.

As Fábio Cesar dos Santos Oliveira<sup>9</sup> notes, the Internet not only overcome geographical and cultural barriers, but also promotes political articulation among different social groups, benefiting especially the minorities or people with low political participation.

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<sup>6</sup> *Classmates.com* is considered to be the first relevant social network. Launched in 1995, it sought to help users to find class members and colleagues from school and colleges in the United States. The platform was still active to dozens of users between the '20s and the '80s. In: LISBOA, Alveni, CIRIACO, Douglas, *Qual foi a primeira rede social da história?*, 04 Jan. 2022, Available at: <<https://canaltech.com.br/redes-sociais/qual-foi-a-primeira-rede-social-da-historia-205714/>>, Accessed on: 29 Oct. 2022.

<sup>7</sup> According to the “*Digital News Report*”, made by Reuters in collaboration with Oxford University, the internet and social networks are the main news sources for Brazilians, leading to a sharp decrease of TV and print consumption between 2013 and 2021. In: SOUTTO, Breno, *Redes sociais e online são as maiores fontes para consumo de notícias, mas o público ainda os vêem com desconfiança*, 22 Oct. 2021, Available at: <<https://elife.com.br/index.php/2021/10/22/redes-sociais-e-online-sao-as-maiores-fontes-noticias-do-pais-mas-publico-ainda-os-veem-com-desconfianca/>>, Accessed on: 29 Oct. 2022.

<sup>8</sup> SANTOS, Maíke Wile dos, “Problemas públicos em plataformas privadas: a responsabilidade civil de mídias sociais por danos decorrentes de conteúdos gerados por terceiros”, *Revista de Direito Civil Contemporâneo*, v. 6, n. 20, jul./sep. 2019, pp. 253-304.

<sup>9</sup> OLIVEIRA, Fábio Cesar dos Santos, “Uma nova democracia representativa? Internet, representação política e um mundo em transformação”, *Revista de Direito Administrativo*, v. 264, Sept/Dec. 2013, pp. 187–221, Available at: <<https://doi.org/10.12660/rda.v264.2013.14081>>, Accessed on: 09 Jan. 2023.

Furthermore, free access to the Internet enables a closer approach and interaction between voters and the government, as it allows for broader publicity of the government's actions and, consequently, greater monitoring by society.

However, the misuse of social media risks causing great harm, considering that the Internet disseminates information with a reach and speed that is incomparable to any other means of communication.

In this context, social media are used as a tool to spread hate speech and fake news, as well as to insult others and spread illicit nudity or pornography (revenge porn). There are various motivations for the dissemination of such content via social media, *e.g.* election campaign purposes, political ideologies, and revenge and private justice.

The use of social media to spread fake news during election periods or to incite acts of violence (such as the episode that led to the invasion of the U.S. Capitol in January 2021<sup>10</sup>) demonstrates the extent of the problem with negative implications for the democratic system.

The flow of false or manipulated information limits people's perception of reality and the issues surrounding it, impairs their critical thinking, and prevents them from making truly free and conscious decisions.

The spread of unfounded rumors (such as the existence of an alleged madman in the neighborhood or the cancelation of a social benefit) can cause panic and social anxiety. Similarly, the dissemination of false or distorted data (such as ineffective cancer drugs or false information about the efficacy of vaccines) can be deeply harmful, especially when it involves issues of collective interest, such as public health.

In this context, the term "post-truth" has gained notoriety. First used in 1992 by Steve Tesich<sup>11</sup>, a Serbian American screenwriter, the term refers to the tendency of the emotional (*pathos*) to prevail over the rational (*logos*) when it comes to holding certain beliefs, even when the facts prove otherwise.

According to Mathew D'Ancona<sup>12</sup>, post-truth is not to be confused with lying, but represents an indifferent attitude of society towards it. It is, in summary, a social tendency to reconsider the objectivity of facts in favor of the opinion of the issuer, even if it has no factual or scientific basis. Post-truth thus provides a favorable environment for the spread of fake news, the effects of which are amplified by the high speed and unlimited reach of information disseminated in virtual space.

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<sup>10</sup> MCEVOY, Jemima, *Capitol Attack Was Planned Openly Online For Weeks – Police Still Weren't Ready*, 07 Jan. 2021, Available at: <<https://www.forbes.com/sites/jemimamcevoy/2021/01/07/capitol-attack-was-planned-openly-online-for-weeks-police-still-werent-ready/?sh=422144f876e2>>, Accessed on: 29 Nov. 2022.

<sup>11</sup> On the Occasion, Steve Tesich employed the term "post-truth" to address the resistance of Americans to seek to understand the truth in the Watergate and Iran-Contra Cases, among other episodes. *In: TESICH, Steve, A government of lies (Political ethics)*, The Nation, New York, n. 254, 1992, pp. 12-13.

<sup>12</sup> D'ANCONA, Matthew, *Pós-verdade: a nova guerra contra os fatos em tempos de fake news*, Barueri, Faro Editorial, 2018, Translation by Carlos Szlak, pp. 9-10.

## 2 THE LIMITS OF FREEDOM OF EXPRESSION IN THE BRAZILIAN LEGAL SYSTEM

## 3 FREEDOM OF EXPRESSION IN A PLURALIST CONSTITUTIONAL ORDER

The Brazilian Federal Constitution of 1988 represents an important historical and legal milestone, as it restores the democratic system (Art. 1, *caput*) and establishes an extensive list of fundamental rights and guarantees.

The constitutional order of 1988 is the result of an intense political debate, and it encompasses various interests and ideologies. In this sense, the Constitution establishes, as fundamental rights, the exercise of freedom of thought (Art. 5, IV, of the FC) and freedom of expression (Art. 5, IX, of the FC). In parallel, the Constitution includes other values such as the dignity of the human person (Art. 1, III, of the FC), the democratic regime (Art. 1, of the FC); the principle of equality (Art. 1, of the FC), personality rights, including privacy, private life, honor, and image (Art. 5, X), among others.

The constitutional system must be understood as a unity, with internal integrity and coherence, even if there are apparent conflicts due to the pluralistic aspect of the Brazilian Constitution.

As J.J. Gomes Canotilho<sup>13</sup> teaches, the unity principle determines that the Constitution must be interpreted in its entirety to avoid antinomies and antagonisms. This principle is the basis for a non-existent hierarchy among constitutional rules.

Meanwhile, Canotilho<sup>14</sup> asserts that the principle of practical concordance “imposes the coordination and combination of conflicting legally enforced interests in order to avoid the (total) sacrifice of one in relation to the other”.

Robert Alexy presents important contributions on the subject. He proposes the balancing of interests as an appropriate technique to resolve the apparent conflict between constitutional rules. According to Alexy<sup>15</sup>:

*If two principles compete, for example if one principle prohibits something and another permits it, then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. This is what is meant when it is said that principles have different weights in different cases and that the more important principle on the facts of the case takes precedence.*

Therefore, Alexy argues that given the specifics of the hard case, the interpreter should weight the conflicting values differently and determine which one

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<sup>13</sup> CANOTILHO, José Joaquim Gomes, *Direito Constitucional e Teoria da Constituição*, 7th ed., Coimbra, Almedina, 2012, pp. 1.223-1.224.

<sup>14</sup> *Ibid.*, p. 1.225.

<sup>15</sup> ALEXY, Robert, *A Theory of Constitutional Rights*, New York, Oxford University Press, 2010, Translation by Julian Rivers, p. 47.

should prevail in the factual situation, without, however, overruling the lesser principles.

The above-described techniques and principles are important to guide the judge in conflicts involving freedom of expression and other values protected by the rule of law.

#### 4 FREEDOM OF EXPRESSION AND THE ABUSE OF RIGHT IN THE 2002 CIVIL CODE

As stated in the explanatory statement, prepared by Professor Miguel Reale, the 2002 Civil Code consists of three guiding principles, namely: ethicality, sociability and operability (or realizability).

Ethicality is based on human dignity, good faith, and good customs. Sociability expresses the collective interest prevailing over the individual, which includes the social function of property and contracts. Finally, operability proposes a simplification of the legal structure to facilitate its understanding and application, thus creating a system that can have an impact at the social level.

The concept of abuse of rights is provided for in Article 187 of the Civil Code and stands for the exercise of a right that does not comply with the limits set by socio-economic purposes, good faith, or good customs. Therefore, it is a dysfunctional exercise of a right.

The abuse of a right is closely related to the principle of sociability, since it is contrary to the social purpose of the violated precept, to the principle of ethicality, since it is contrary to good customs<sup>16</sup>, and to objective good faith, which is understood as honest and loyal behavior that should govern relations between private parties.

According to Miguel Reale's three-dimensional theory of law<sup>17</sup>, the abuse of rights is an open and dynamic concept that encompasses the systematic change of its meaning in a given period and social context that shape the values of an interpreter, regardless of textual changes.

Freedom to express one's thoughts (Art. 5, IV, of the FC) and freedom of expression (Art. 5, IX, of the FC) represent an important civilizational advance in our society, hence the concern for their explicit inclusion in the constitutional text. However, it is not an absolute right, and must be reconciled with the other constitutional values, which is done by the technique of balancing of interests, considering the circumstances of each case.

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<sup>16</sup> The enunciation number 413 of the V Civil Law Journey states that: *"the good customs foreseen in Art. 187 of the Civil Code have a subjective nature, destined to control the social morality of a certain time; and an objective nature, to allow the syndication of the violation of legal business in matters not covered by the social function and by objective good faith"*.

<sup>17</sup> REALE, Miguel, *Teoria Tridimensional do Direito*, 5th ed., São Paulo, Saraiva, 2003.

## 5 CIVIL LIABILITY AS A POSSIBLE ANSWER TO DAMAGE REMEDIATION

## 6 CIVIL CODE LEGAL TREATMENT

Maria Helena Diniz<sup>18</sup> defines civil liability as “*the implementation of measures that oblige someone to repair moral or material damage caused to a third party due to an act performed by himself or by a person for whom he is responsible, or due to a fact of a thing or animal under his guard, or even due to a simple legal imposition*”.

Therefore, the one who causes damage to a third party through the practice of an illicit act is obliged to repair it to restore the previous state, or, if this is not possible, to pay a sum of money as compensation (Art. 927 and Art. 186, both of the Civil Code).

Likewise, the abusive exercise of a right that results in injury to a third party has the legal consequence of the obligation to compensate (Art. 927 and Art. 187, both of the Civil Code). However, some legal scholars<sup>19</sup> interprets that the abuse of rights, as an independent category of illegality, requires intervention regardless of the damage caused.

Civil liability standards are founded on different constitutional norms, such as: the right of action (Art. 5, XXXV, of the FC); the right of reply (Art. 5, V, first part, of the FC); the right to compensation for property damage, moral and image (Art. 5, V, final part, of the FC), and the right to compensation for the violation of personality damages, such as privacy, private life, honor and image (Art. 5, X, of the FC).

The establishment of civil liability is traditionally linked to the fulfillment of three conditions, namely: a) the practice of an action or omission, consisting in a tort or an abuse of rights, b) the existence of material or moral damage, and c) a causal link.

As for the first condition, in the case of subjective liability, fault assessment is required. In the case of strict liability, the analysis of the fault factor is not required due to the risk of the activity or due to legal requirements (*e.g.* in the field of consumer relations or in the environmental field).

The causal link expresses the connection between the damage and the offender's commissive or omissive conduct. However, this condition has been mitigated in the context of environmental obligations due to their *propter rem* nature<sup>20</sup>.

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<sup>18</sup> DINIZ, Maria Helena, *Curso de Direito Civil Brasileiro*, São Paulo, Saraiva, 2014, p. 50.

<sup>19</sup> In that sense, the enunciation number 539 of VI Civil Law Journey states that: “*the abuse of right is an autonomous legal category with regard to civil liability. Therefore, the abusive exercise of legal positions defies control regardless of damage*”.

<sup>20</sup> This understanding is supported by Precedent 623 of the STJ (Superior Tribunal of Justice), which reads as follows: “*environmental obligations have a propter rem nature and may be claimed against the current and/or previous owners, it is up to the claimant to choose whether to file proceedings against one or another*”.

The duty not to injure third parties derives from a series of precepts and values included in our legal system, such as the pursuit of the common good (Art. 5 of the Introduction Act to Brazilian Law – LINDB), the dignity of the human person (Art. 1, III, of the FC), solidarity (Art. 3, III, of the FC), as well as the general clauses of social function (Art. 5, XXII, of the FC and Art. 421 of the CC) and good faith (Art. 422 of the Civil Code).

Article 5 of the LINDB enshrines an important rule of interpretation, stating that the law must be applied in such a way as to fulfill social purposes and the requirements of the common good.

The dignity of the human person (Art. 1, III, FC), as a supreme value guiding the application and interpretation of the law, is opposed to physical or moral injury, and its redress is a legal duty.

Solidarity (Art. 3, III, of the FC), in summary, means the aversion to individualistic and selfish behavior, directed against human conduct that is contrary to the common good. In the civil order, solidarity is guaranteed by the social function and good faith, that apply to different categories of private law, such as property and contracts.

According to the principle of social function (Art. 5, XXII of the FC and Art. 421 of the CC), parties may not act solely and exclusively based on their own interests. They must take into account the consequences of their actions for third parties and the community. Meanwhile, good faith (Art. 422 of the CC) recommends that parties behave according to minimum ethical standards and act honestly and loyally in civil relations.

Therefore, the acts or omissions of the offender, usually negligently or intentionally violating a duty of conduct and affecting the rights of third party, give rise to the duty to compensate or make good for the damage caused.

Article 944 of the Civil Code established proportionality as an appropriate criterion for the amount of compensation, considering the extent of the damage suffered by the injured party. Similarly, Article 5, V, of the FC establishes that the right of reply to the injured party must be proportional to the damage suffered.

The trial by fairness is admissible when it is expressly authorized by the law, as in the case of Art. 413 of the CC (equitable reduction of the penalty in case of partial fulfillment of the obligation or abuse of the penalty clause) and Art. 944, sole paragraph, of the CC (equitable reduction of the penalty in case of disproportion between the gravity of the fault and the damage).

## 7 BRAZILIAN CIVIL RIGHTS FRAMEWORK FOR THE INTERNET (LAW NO. 12.965/14)

In order to regulate the new social reality resulting from the rise of Internet and social media use, Law No. 12.965/2014, also known as the Brazilian Civil Rights Framework for the Internet, was sanctioned.

Articles 18 and 19 of said law provide that Internet service providers are not civilly liable for damages caused by content created by third parties, unless they fail

to take the necessary steps to make the infringing content inaccessible, after a specific court order.

Article 21 of aforementioned law enshrines the subsidiary liability of Internet providers and excludes the need for a court order in the case of publication of pornographic images and videos, as long as the victim notifies the provider, giving minimum information to identify the content and the legitimacy of the request.

The solution adopted by the legislator shows its interest in protecting freedom of expression, which is the basis for the use of the Internet in Brazil (Art. 2 of Law no. 12.965/14). In this way, Internet service providers, as a rule, can be forced to remove abusive content from their platforms only after a specific court order.

However, some legal scholars, such as Anderson Schreiber<sup>21</sup>, believe that the requirement of judicial review to hold the Internet providers accountable is incompatible with the dynamism and speed necessary to combat the abusive exercise of freedom of expression in the virtual environment, due to the peculiar characteristics that permeate the flow of information on the cyberspace, such as the high speed of content dissemination and its global reach.

The rule adopted by the legislator is disconnected with the tendency to give preference to alternative means of resolving disputes and ignores the current situation of lawsuit overload in the Brazilian Judiciary<sup>22</sup>.

Law No. 12.965/2014 introduces a judicial review clause that considers the filing of the lawsuit as a prerequisite for the protection of the victim's fundamental rights and not as a last resort in favor of the offender's liability. In this sense, Schreiber<sup>23</sup> concludes that Art. 19 violates the principle of access to justice (Art. 5, XXXV, of the FC), as well as the constitutional right to full compensation for damage to honor, privacy, and image (Art. 5, X, of the FC).

Luna van Brussel Barroso<sup>24</sup>, on the other hand, believes that the Brazilian legislation is appropriate. Holding social media accountable without a prior court order could lead to massive removal of content posted by users on their platforms, with a focus on dubious or potentially problematic content. This phenomenon is referred to as the “*chilling effect*” and expresses concerns that the exercise of freedom of expression may be disproportionately restricted.

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<sup>21</sup> SCHREIBER, Anderson, “Marco Civil da Internet: Avanço ou Retrocesso? A responsabilidade civil por danos derivado do conteúdo gerado por terceiro” in: LUCCA, Newton de, SIMÃO FILHO, Adalberto, LI-MA, Cíntia Rosa Pereira (coord.), *Direito e Internet III: Marco Civil da Internet, Lei nº 12.965/2014*, Tome II, São Paulo, Quartier Latin, 2015, pp. 290-291.

<sup>22</sup> The Brazilian Judiciary had 77.3 million cases pending, awaiting a definitive solution at the end of 2021. The average processing time for a case is 4 years and 7 months. In: BRAZIL, National Justice Council, *Justiça em Números 2022: ano-base 2021*, p. 104, Available at: <<https://www.cnj.jus.br/wp-content/uploads/2022/09/justica-em-numeros-2022-1.pdf>>, Accessed on: 12 Dec. 2022.

<sup>23</sup> SCHREIBER, *op. cit.*, pp. 290-291.

<sup>24</sup> BARROSO, Luna van Brussel, “O Judiciário, o Twitter, a liberdade de expressão no século XXI” in: PIO-VESAN, Flávia, DIAS, Roberto (coord.), *Liberdade de expressão e constitucionalismo multinível: jurisprudência do STF, diálogos jurisdicionais e desafios contemporâneos*, São Paulo, JusPodivm, 2022, p. 106.

The constitutionality of Art. 19 of Law No. 12.965/2014 is being considered in Extraordinary Appeal No. 1.037.396. The Federal Supreme Court (STF) has already recognized the general repercussion (theme No. 987), and the appeal is pending trial.

The need for a court order as a prerequisite for social media providers liability does not mean that they cannot set minimum ethical standards of conduct based on their terms of use and take steps to restrict content and punish offending users, as long as they do so according to the adversary system and with the possibility of judicial review.

Currently, there are several legislative proposals in National Congress of Brazil against the spread of disinformation on social media, such as Bill No. 2630/2020, which addresses issues such as the legal status of social media, digital advertising, journalistic content, user data sharing and content moderation.

## 8 LEGAL PRECEDENTS EVOLUTION

The issue on civil liability of Internet providers has shown significant differences in understanding and interpretation among Brazilian courts in recent years, especially after the enactment of Law No. 12.965/14.

Initially, Brazilian courts based their decisions on the general rule of liability in the absence of a specific law. Therefore, the court understood the applicability of the theory of economic activity risk, referred to in Art. 927, sole paragraph, of Civil Code. The providers were objectively liable for damages caused by the use of their platforms, insofar as they have made this service technically possible and have benefited economically from it. In other words, the assessment of fault was irrelevant to the liability of Internet providers.

In this sense, the Second Panel of the Superior Court of Justice (STJ) ruled in its decision on Special Appeal (REsp) No. 1.117.633/RO<sup>25</sup>, that due to their economic activity, Internet providers are responsible for “*controlling possible abuses and ensuring the personality rights of Internet users and third parties.*”

Later, on Special Appeal (REsp) No. 1.193.764/SP<sup>26</sup>, the Third Panel of the STJ ruled out the strict liability of Internet providers on the grounds that monitoring the content of information posted by users is not an essential activity of the service provided.

In this decision, the STJ agreed with the argument of subjective liability for omission in the sense that providers have the duty to take the necessary measures to “*identify each individual user, prevent anonymity, and attribute specific and certain authorship to each expression.*”

In the same decision, they ruled that once Internet service providers are notified of illegal content, they must remove it immediately, on pain of joint and several liability with the direct author of the damage.

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<sup>25</sup> BRAZIL, Superior Court of Justice, Second Panel, Special Appeal (Recurso Especial) No. 1.117.633/RO, Rapporteur: Minister Herman Benjamin, Brasília, 26 Mar. 2010.

<sup>26</sup> BRAZIL, Superior Court of Justice, Third Panel, Special Appeal (Recurso Especial) No. 1.193.764/SP, Rapporteur: Minister Nancy Andrighi, Brasília, 14 Dec. 2017.

Under the Civil Rights Framework for the Internet, courts have ratified the application of subjective liability for Internet providers. However, the initial term for attributing liability to providers was shifted from notification of victims to noncompliance with the court's decision.

Based on Article 19 of Law No. 12.965/2014, the Third Panel of the STJ<sup>27</sup> ruled that the aggrieved user must provide accurate URL information, as a “*safe criterion for verifying compliance with court decisions that decide on the removal of content on the Internet*”.

However, there are decisions of the STJ that mitigate the rule of Art. 19 of Law No. 12.965/14, which stipulates that the civil liability of Internet providers depends on noncompliance with a court order.

The Third Panel of the STJ, on Special Appeal (REsp) No. 1.629.255/MG<sup>28</sup>, ruled out the general rule of Art. 19 of Law No. 12.965/14 for cases in which the litigation took place before the entry in force of the Brazilian Civil Rights Framework for the Internet.

Besides, the Fourth Panel of the STJ, on Special Appeal (REsp) No. 1.783.269/MG<sup>29</sup>, relied on the standard of full protection of minors (Art. 18 of the Brazilian Child and Adolescent Statute and Art. 227 of the Federal Constitution) to conclude that the Internet providers are required to remove content that violates the rights of children and adolescents as soon as the offensive nature of the publication becomes known, regardless of any specific court order.

The non-responsibility theory, widely used in U.S. law, has met with little interest in Brazilian courts and was not chosen by the legislature when it enacted the Civil Rights Framework of the Internet was enacted. According to this theory, Internet providers are exempt from liability for the content posted on their platforms. Then the liability for damages caused by illegal content should rest solely with their own creators.

The non-responsibility theory is the least protective from the victim's perspective, as it limits liability for damages to the offender. On the other hand, the strict liability thesis, based on the economic activity risk theory, is the most favorable to victims because it allows for compensation by Internet providers, regardless of the identity and economic and financial situation of the user who created the offensive content.

Overall, the recent STJ's decisions have moved from the thesis of strict liability to the thesis of subjective liability of Internet providers, while changing the initial term of their liability under the Civil Rights Framework of the Internet.

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<sup>27</sup> BRAZIL, Superior Court of Justice, Third Panel, Special Appeal (Recurso Especial) No. 1.629.255/MG, Rapporteur: Minister Nancy Andrighi, Brasília, 22 Aug. 2017.

<sup>28</sup> BRAZIL, Superior Court of Justice, Fourth Panel, Interlocutory Appeal in Appeal in Special Appeal (Agravo Interno no Agravo em Recurso Especial) No. 1.783.269/MG, Rapporteur: Minister Marco Buzzi, Brasília, 16 Oct. 2020.

<sup>29</sup> BRAZIL, Superior Court of Justice, Fourth Panel, Special Appeal (Recurso Especial) No. 1.783.269/MG, Rapporteur: Minister Antonio Carlos Ferreira, Brasília, 14 Dec. 2021.

- 9 VIRTUE IN CICERO AND THE PRESENT RELEVANCE OF HIS LESSONS TO GUIDE THE LEGAL TREATMENT OF CIVIL LIABILITY AND FREEDOM OF EXPRESSION ON SOCIAL MEDIA
- 10 CICERO'S THOUGHTS ON "ON DUTIES": THE CENTRAL IMPORTANCE OF VIRTUE

Marcus Tullius Cicero (106 – 43 BC) was considered a man of great renown in the classical period of Roman Law. Cicero was a “*novus homo*”, being the first in his family to work for the Government. An orator, rhetorician, and lawyer, Cicero held positions of high prestige, reaching the highest point of his public career as consul. Cicero wrote a large number of literary works on various subjects such as: politics, morals, theology, law, oratory, and rhetoric.

As for Cicero's thought, this paper will focus mainly on the discussions of virtues in his last theoretical work “On Duties”. It was written in 44 BCE in a context of political turmoil, immediately after the assassination of Julius Caesar in March of that year<sup>30</sup>.

Cicero wrote “On Duties” in honor of Marcus, his second born and only male child, who was studying oratory and philosophy in Athens. Nevertheless, Cicero makes it clear, in several excerpts<sup>31</sup>, that his teachings and warnings are directed primarily at young Romans from the ruling class who are trying to decide how to behave in private life, towards their peers, and in public life, toward their fellow citizens.

During this period, Roman legal thought was guided by an eminently casuistic perspective that focused on the resolution of concrete cases, with emphasis on the actions of jurists. Cicero thus seeks to improve the Roman experience by bringing law and philosophy together.

Eduardo Bittar and Guilherme de Assis Almeida<sup>32</sup> say that “*Cicero does not limit himself to describe purely and simply the Roman Law of his time or its cultural roots, but its natural roots and foundations within the framework of a typically philosophical research*”.

Cicero's contribution is in practical ethics, with emphasis on social morality and politics. Ethics is not seen in contemplation, but in human behavior, guided by reason.

“On Duties” is divided into three books. In Book I, Cicero defines the idea of moral goodness; in Book II, Cicero defines what is expedient or one's advantage; and in Book III, he examines the proper way to resolve the conflict between the honorable and the expediency.

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<sup>30</sup> Cicero expressed ideas against tyranny. After Julius Caesar's death, Cicero advised a Senate's convocation to restore the Republic, which did not happen. Mark Antony then assumed power, acting in an equivalent manner to the previous dictator.

<sup>31</sup> CICERO, Marcus Tullius, *On duties*, Cambridge, Harvard University Press, 1913, Translation by Walter Miller, Book I, 117, 121 e 147; Book II, 44-51.

<sup>32</sup> BITTAR, Eduardo C. B., ALMEIDA, Guilherme Assis de, *Curso de Filosofia do Direito*, 16th ed., Rio de Janeiro, Atlas, 2022, *E-book*, p. 147.

Cicero<sup>33</sup> states that moral goodness can be divided into four cardinal virtues: wisdom, justice, courage or magnanimity, and modesty or temperance, which are interrelated and mutually dependent.

In summary, wisdom consists in the “*full perception and intelligent development of the true*”; justice corresponds to “*the conservation of organized society, with rendering to every man his due*”; courage or magnanimity represents “*the greatness and strength of a noble and invincible spirit*”, which leads a man to despise the external world and repel injustice; and modesty or temperance stands for “*the orderliness and moderation of everything that is said and done, wherein consist temperance and self-control*”<sup>34</sup>.

The first dictate of justice is that no man should harm another unless provoked by injustice<sup>35</sup>. The pursuit of private interests does not entitle us to inflict harm on others. In this context, Cicero mentions the example given by Chrysippus, according to which a runner in the quest for victory must not trip or push his competitors<sup>36</sup>.

Failure to comply with this principle (“do no harm”) is an act of injustice that may result from a commissive conduct, in which the injurer directly harms someone, or from an omissive conduct, in which the injurer fails to repel the harm, even though he could.

In this sense, Cicero<sup>37</sup> states that “*he who, under the influence of anger or some other passion, wrongfully assaults another seems, as it were, to be laying violent hands upon a comrade; but he who does not prevent or oppose wrong, if he can, is just as guilty of wrong as if he deserted his parents or his friends or his country.*”

Injustice can be the result of fear, that is, so that man acts in advance to avoid being the target of the injury that he has predicted. In most cases, however, people are wrongly tempted in order to secure a personal goal; in this vice, avarice is generally the dominant motive, for gaining fame and glory<sup>38</sup>.

The injustice done as a result of a brief and transient disturbance of the mind indicates a less harmful circumstance, which is the characteristic of reckless carelessness or fault; whereas the injustice resulting from deliberation and premeditation indicates a more harmful circumstance, which characterizes intent or malice<sup>39</sup>. The malicious act may be done by force or by fraud<sup>40</sup>. Fraud is the most abominable, while the individual practice it to the utmost of their ability, do it in such a way that they appear to be good men. Fraud can occur by means of “*by pretense, by empty show, by hypocritical talk and looks*”, or by means of

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<sup>33</sup> CICERO, *op. cit.*, Book I, 15.

<sup>34</sup> *Ibid.*, Book I, 15, 65-66 e 93.

<sup>35</sup> *Ibid.*, Book I, 20; Book III, 72.

<sup>36</sup> *Ibid.*, Book III, 42.

<sup>37</sup> *Ibid.*, Book I, 23.

<sup>38</sup> *Ibid.*, Book I, 24-26.

<sup>39</sup> *Ibid.*, Book I, 27.

<sup>40</sup> *Ibid.*, Book I, 41.

dissimulation, with concealment<sup>41</sup>. The second dictate of justice is “*to lead men to use common possessions for the common interests, private property for their own.*”<sup>42</sup> This second conception of justice shows the concern to give to each his due, as well as to promote, in relation to each thing, its adequate purpose.

Cicero makes it clear that the pursuit of one's well-being must not be at the expense of the common good, as this would make man vicious and turn him away from justice<sup>43</sup>. Furthermore, the basis of justice is good faith, which means “*truth and fidelity to promises and agreements*”<sup>44</sup>.

Through reason, men become capable of recognizing their own nature and its purposes, leading themselves to a virtuous life. Virtue is characterized by rationality, which is supported by a reasonable motive and is free from undue haste or carelessness<sup>45</sup>.

In the event of a conflict between duties, one must weigh the various courses of action and determine the one that should prevail, based on the degree of necessity of each duty, which varies according to circumstances. Therefore, it is up to man to become a good calculator of duties through habit and practice<sup>46</sup>.

According to Cicero, what is considered morally wrong under ordinary circumstances turns out not to be morally wrong depending on the circumstances. In this context, he presents tyrannicide as a legitimate action because tyranny represents extreme opposition to common interests and must be eradicated from the community<sup>47</sup>.

Cicero presents moral rectitude and expediency as inseparable values, so that when what is expedient becomes harmful, it ceases to be honorable<sup>48</sup>.

Virtue develops only through the performance of duties as a habit. Therefore, the honorable man must constantly turn away from the pleasures and utilities that distract his soul from virtue. In this regard, Cicero states that “*we must keep ourselves free from every disturbing emotion, not only from desire and fear, but also from excessive pain and pleasure, and from anger, so that we may enjoy that calm of soul and freedom from care which bring both moral stability and dignity of character*”<sup>49</sup>.

Therefore, the human passions must be restrained by the exercise of reason and language, so that man can act prudently and thoughtfully, asserting and protecting what is true.<sup>50</sup> The same is taught in the following excerpt<sup>51</sup>:

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<sup>41</sup> *Ibid.*, Book III, 37.

<sup>42</sup> *Ibid.*, Book I, 20.

<sup>43</sup> *Ibid.*, Book II, 62.

<sup>44</sup> *Ibid.*, Book I, 23.

<sup>45</sup> *Ibid.*, Book I, 101.

<sup>46</sup> *Ibid.*, Book I, 59.

<sup>47</sup> *Ibid.*, Book III, 19 e 32.

<sup>48</sup> *Ibid.*, Book III, 101.

<sup>49</sup> *Ibid.*, Book I, 69.

<sup>50</sup> *Ibid.*, Book I, 93.

<sup>51</sup> *Ibid.*, Book I, 102.

*The appetites, moreover, must be made to obey the reins of reason and neither allowed to run ahead of it nor from listlessness or indolence to lag behind; but people should enjoy calm of soul and be free from every sort of passion. As a result strength of character and self-control will shine forth in all their lustre. For when appetites overstep their bounds and, galloping away, so to speak, whether in desire or aversion, are not well held in hand by reason, they clearly overleap all bound and measure; for they throw obedience off and leave it behind and refuse to obey the reins of reason, to which they are subject by Nature's laws. And not only minds but bodies as well are disordered by such appetites. We need only to look at the faces of men in a rage or under the influence of some passion or fear or beside themselves with extravagant joy: in every instance their features, voices, motions, attitudes undergo a change.*

The idea of sociability is present in Cicero's thought. Men are organized in a kind of natural fraternity and develop a bond of cooperation. Through reason and speech, the processes of teaching and learning, communicating, discussing, and reasoning bring people together and unite them<sup>52</sup>.

Men's coexistence should be guided by respect for the law and for common goods<sup>53</sup>. Life in society should be guided by natural reason, so that mutual aid among citizens through the exchange of favors and services, whether rendered or received, enables the sharing of common utilities. In this regard, the excerpt below follows<sup>54</sup>:

*But since, as Plato has admirably expressed it, we are not born for ourselves alone, but our country claims a share of our being, and our friends a share; and since, as the Stoics hold, everything that the earth produces is created for man's use; and as men, too, are born for the sake of men, that they may be able mutually to help one another; in this direction we ought to follow Nature as our guide, to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together, man to man.*

According to Cicero, when guiding social behavior, justice must be considered “*the sovereign mistress and queen of all the virtues*”<sup>55</sup>.

The honorable man must act in accordance with propriety, and he must respect others, to despise the thinking of others is typically arrogant behavior. To wrong one's fellow man is the opposite of justice<sup>56</sup>.

In the case of injustice, it is a duty to impose a punishment, in retaliation for the evil caused and necessary to prevent its recurrence by the offender himself and by other members of the community<sup>57</sup>. The punishment must extend to all offenders and must be applied to the degree of the offender's culpability.

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<sup>52</sup> *Ibid.*, Book I, 50.

<sup>53</sup> *Ibid.*, Book I, 51.

<sup>54</sup> *Ibid.*, Book I, 22.

<sup>55</sup> *Ibid.*, Book III, 28.

<sup>56</sup> *Ibid.*, Book I, 99.

<sup>57</sup> *Ibid.*, Book I, 34.

The sentence must not be influenced by anger, otherwise moderation will not be possible in determining the punishment. Equity, then, is the appropriate criterion to guide the judge, as Cicero explains<sup>58</sup>:

*We should take care also that the punishment shall not be out of proportion to the offence, and that some shall not be chastised for the same fault for which others are not even called to account. In administering punishment it is above all necessary to allow no trace of anger. For if anyone proceeds in a passion to inflict punishment, he will never observe that happy mean which lies between excess and defect. This doctrine of the mean is approved by the Peripatetics—and wisely approved, if only they did not speak in praise of anger and tell us that it is a gift bestowed on us by Nature for a good purpose. But, in reality, anger is in every circumstance to be eradicated; and it is to be desired that they who administer the government should be like the laws, which are led to inflict punishment not by wrath but by justice.*

The magistrate should preserve honor and dignity, enforce the law, and guarantee good faith among men. The magistrate, as the representative of the city, should be entrusted with people of great spirit, especially those who devote their lives to public affairs, and philosophers<sup>59</sup>.

Thus, the decision of the magistrate aims to restore the balance in the relations between the parties, to achieve the ideal of justice by giving to each what is due.

## 11 CICERO'S INSIGHT FOR THE THEME STUDY

The present theme presents great intersections with the concept of virtue proposed by Cicero, indicating how current and relevant his thought is.

Philosophy, from Cicero's perspective, consists in elevating men's actions to the level determined by natural law, which should also be aimed by positive laws.

The current legal system has a series of values present in Cicero's work, such as respect for the common good and good faith.

Along these lines, Art. 5 of the Introduction Act to Brazilian Law (LINDB) perceives the common good as a value to guide the interpretation and enforcement of the entire legal system. The prevalence of the collective interest imposes limits on the exercise of individual liberties, barring the abusive exercise of rights (Art. 187 of the CC), in addition to restricting the autonomy of will in private relations, which is achieved through the general clauses of good faith (Art. 422 of the CC) and the social function (Art. 421 of the CC).

Cicero's principles of justice (“do no harm” and “serve the common good”) are intrinsically related to the notion of civil liability, as a legal precept applicable to repair the damage resulting from a tort.

The notion of justice, as the ability to give to each what is due, also allows us to draw another parallel with civil liability. The doing of wrong creates a situation of inequality between the parties, and it is up to the judge to reestablish the balance,

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<sup>58</sup> *Ibid.*, Book I, 69.

<sup>59</sup> *Ibid.*, Book I, 72 e 124.

giving each party what is rightfully theirs, by returning to the previous state or, if this is not possible, by imposing a monetary compensation.

Cicero asserts that the sentence must be imposed according to the extension of the offender's culpability. Although Cicero does not exactly distinguish between punishment and reparation, we can correlate his teachings to the incidence of proportionality, as a criterion to determine the *quantum* of compensation, as provided in Art. 944 of the Civil Code and Art. 5, V, of the Federal Constitution.

The entry of judgment made by a judge free from anger, as Cicero said, is the foundation of the required impartiality to ensure proportionality when setting the sentence.

Furthermore, regarding the offender's conviction, Cicero invokes equity. The trial by fairness is admitted when expressly authorized by law, as in the case of Art. 413 of the CC (equitable reduction of the penalty in case of partial fulfillment of the obligation or abusiveness of the contractual penalty clause) and Art. 944, sole paragraph, of the CC (equitable reduction of the penalty in case of disproportion between the severity of the fault and the damage).

The subjective liability, mitigated to a great extent in our legal system, is related to Cicero's notions of intentional misconduct and fault.

The use of social media for the purpose of disseminating hate speech, fake news, insults, and revenge porn goes against the virtues of the good and honorable man, as Cicero taught.

The virtuous man must seek the truth (wisdom), have greatness of mind not to be subject to the unjust (courage), control his passions (temperance), not harm others (justice), and respect what others think (propriety).

Reason, aimed at the pursuit of a virtuous life, must be present when using digital platforms, so that man, through the exercise of prudence and moderation, must overcome individual desires, such as hatred and revenge.

The notion, proposed by Cicero, of man as a calculator of duties resembles the theory of balancing of interests, proposed by Alexy, in that both converge on the need to balance values in light of the concrete circumstances, although the former is addressed to citizens and the latter to the magistrate.

In a society where people behave according to the principles of solidarity, good faith and social function, a productive and respectful debate is preserved, creating a bond of cooperation among community members, allowing the sharing of data and information useful to knowledge and progress in the social environment.

To this end, social media can draw up terms of use that impose minimum ethical standards of conduct for their users, encouraging the use of their platforms in a prudent and responsible manner. Moreover, social media have a commercial interest in dissociating their services from the practice of illicit and immoral behaviors, under penalty alienating investors and impacting the financial sheet of their business.

The terms of use should be written in plain language, and any measures to restrict content or punish users should be implemented transparently, respecting the

adversary system, even if deferred<sup>60</sup>. Furthermore, these decisions are subject to control by the Judiciary.

Eventual abuses in the exercise of freedom of expression, with negative repercussions to third parties, must lead to the offender's liability, as a necessary measure for damage compensation, as well as to avoid its recurrence by the offender himself and by other members of the community.

Therefore, civil liability standards are a fundamental mechanism for promoting justice, reestablishing the balance between the parties, which has been damaged by the practice of a tort. The conviction of the offender must be entered by an impartial judge and in accordance with the principle of proportionality.

In conflicts between freedom of expression and other fundamental rights, the judge must operate a "calculation of duties", analyzing the peculiarities of the fact under discussion, to establish which value should prevail case by case. For example, if the information spread is true and there is public interest in its disclosure, most likely the right to information will prevail, even if the facts damage the honor and image of a person linked to the event.

In the same way, the judge must examine whether there was the offender's intention to dishonor a third party, using, for example, excessive use of language, in order to identify whether he acted in the legitimate exercise of criticism or whether there was abuse of the right of freedom of expression, leading to liability.

The factual elements should also elucidate in the identification of the extent of the damage, contributing to determine the *quantum* of compensation. Furthermore, the principle of proportionality should guide the judge in defining the most appropriate mean to reparation measures, including the removal of the offensive content or the adoption of less drastic measures, such as the offender's retraction, the information rectification, or the right of reply.

## 12 FINAL CONSIDERATIONS

The rise of the internet and social media has sparked a revolution in mass media. The popularization of the internet in the last decades resulted in an expansion and decentralization of sources for content production, as well as shortening distances and geographic barriers, which facilitate the articulation and mobilization of multiple social agendas from different groups. This movement contributed to positive transformations in contemporary society, such as the promotion of freedom of expression and political pluralism, and the oversight of acts by the government, which are fundamental attributes of the Democratic State of Law and republican ideals.

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<sup>60</sup> According to the principle of horizontal effect of fundamental rights, respect for fundamental rights and guarantees must prevail in relations between private parties. Based on this theory, the Supreme Federal Court (STF) has ruled, for example, that the exclusion of a partner from an association requires the observance of the adversary system. *In: BRAZIL, Supreme Federal Court, Second Panel, Extraordinary Appeal (Recurso Extraordinário) No. 201.819-8/RJ, Rapporteur: Minister Ellen Gracie, Brasília, 08 Jun. 2004.*

On the other hand, the internet made it possible to disseminate, on a large scale and at great speed, information disconnected from the reality of the facts and without the observance of technical-scientific accuracy. The internet has also allowed the dissemination of practices of private revenge, hate speech and intolerance.

Thus, the abusive exercise of freedom of expression in the virtual environment has harmful effects on the democratic State under the rule of law, considering the possibility of influencing electoral processes, generating misinformation and social fear, and violating personality rights, such as honor, image, private life and intimacy.

Cicero's main contribution is in practical ethics, with emphasis on social morality and politics. Only rational living is capable of leading man to a virtuous life. The cardinal virtues, presented by Cicero, can constitute directions to guide the regular exercise of freedom of expression on the internet.

Social media must not be misused for selfish reasons and to fulfill individual desires, becoming a vehicle for the dissemination of lies, hatred and revenge. On the contrary, the use of social media can be a tool for achieving the common good if oriented by reason, prudence, and moderation to create an open space for the healthy and respectful exchange of ideas and information. This movement expresses the idea of sociability formulated by Cicero, in the sense of creating a bond of cooperation between community members capable of promoting teaching, learning, communication, discussion, and judgment.

As we have seen, the Brazilian legal system has adopted a number of concepts and values discussed by Cicero, such as good faith and the common good, which serve as important interpretive guidelines in the application of civil law.

Freedom of expression is not an absolute value, as it is inserted in a pluralistic constitutional order, which protects a series of values that are often antagonistic to each other. Conflicts between the right to free speech and other constitutional values must be overcome using the technique of balancing of interests, which resembles Cicero's "calculator of duties." In that sense, the judge, based on the peculiarities of the concrete case, must weigh the values involved and determine which one should prevail.

The abuse of freedom of expression is the result of a dysfunctional exercise of the right to free speech, alien to socioeconomic purposes, good faith or good customs. Any damages resulting from the abusive exercise of free speech require the application of civil liability as a legal precept for damage prevention and redress to restore the balance between the parties and promote Cicero's concept of justice.

The notion of proportionality, present in Cicero's thought, is the legal criterion for the amount of compensation, considering the extent of the damage suffered by the injured party. Proportionality must also guide the definition of the most appropriate measures for resolving concrete cases, meaning the removal of infringing content should only be implemented when the adoption of less drastic measures, such as rectifying the information or the right of reply, proves to be inefficient.

Social media companies may contribute to the promotion of moderate, reasonable and responsible use of their platforms by establishing, through self-regulation, terms of use that establish minimum ethical standards of conduct, when done in accordance with the adversary system and with the possibility of judicial review.

Content in “grey areas” can be initially classified as illegal behavior, subject to restrictions or removal, or as lawful behavior, depending on the different conceptions about the limits of freedom of expression that guide the user policy of social media companies, which is positive in a democratic society that values diversity and pluralism of ideas.

The enactment of the Brazilian Civil Rights Framework for the Internet enshrined subsidiary liability as a form of liability for Internet service providers and established non-compliance with a court order as the starting point for liability. The solution chosen by the legislator aimed to avoid the massive removal of any and all potentially questionable or problematic content, which could result in a disproportionate restriction of freedom of expression on the Internet (“chilling effect”).

In spite of this, the magnitude of the impact of illegal content dissemination due to the high speed at which information is disseminated poses a challenge for the creation of a formula that balances the protection of freedom of expression with an effective system of civil liability in order to safeguard the rights of victims.

The right to freedom of expression in the virtual space is a very complex issue that calls for joint solutions, including the possibility of self-regulation by social media companies, the improvement of legal precepts, and the development of measures to raise public awareness in order to allow the construction of a virtual environment in line with the concept of virtue formulated by Cicero.

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