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Constitution, democracy, regulation of the Internet and electoral fake news in the Brazilian elections

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Abstract

In the last general election held in Brazil, Laura Chinchilla, a representative of the Organization of American States (OAS) observer mission, considered the massive use of fake news through social networks, notably WhatsApp, an "unprecedented" phenomenon. The statement registers a state of novelty and, at the same time, uncertainty in the legal and social scenario of the Brazilian democracy, which since 1996 has strongly invested in the computerization of the electoral process and has specifically regulated the phenomenon of Internet use in the electoral process. Thus, a great question arises about the role that the advances of the digital world, more specifically the Internet and social networks, can play in defining the democratic agenda, especially when they place on the one hand democratic legitimacy and respect for human rights and on the other the extent of economic and social power (including its abuse) enhanced by individuals and groups. In this way, this work seeks to analyze the legal frameworks for the use of the Internet in the Brazilian elections and how the existing normativity responds to the fake news phenomenon and its implications for the full realization of constitutional democracy. In order to do so, the paper proposes a comparison between the existing legislation in Brazil on electoral use of the Internet and its appropriation and effectiveness (or absence thereof) in decisions of the Brazilian electoral courts, including the Superior Electoral Court, seeking to understand how the established dialogue between norms and judicial decisions reflects more or less effectiveness of the existing regulation for the use of the Internet and social networks in the elections, delimiting if the degree of effectiveness presented accomplishes or frustrates the constitutional bases of democracy in Brazil.

Keywords

Constitution; democracy; regulation of internet; fake news; Brazilian elections.

Constituição, democracia, regulação da internet e fake news nas eleições brasileiras

Resumo

Nas últimas eleições gerais realizadas no Brasil, Laura Chinchilla, representante da missão de observação da Organização dos Estados Americanos (OEA), considerou o uso massivo de notícias falsas (fake news) por meio de redes sociais, notadamente o WhatsApp, um fenômeno "sem precedentes". A declaração registra um estado de novidade e, ao mesmo tempo, incerteza no cenário jurídico e social da democracia brasileira, que desde 1996 investe fortemente na informatização do processo eleitoral e regulou especificamente o fenômeno do uso da Internet no mundo. Assim, surge uma grande questão sobre o papel que os avanços do mundo digital, mais especificamente a Internet e as redes sociais, podem desempenhar na definição da agenda democrática, especialmente quando colocam, por um lado, a legitimidade democrática e o respeito aos direitos humanos e, por outro, a extensão do poder econômico e social decorrente da internet e das redes sociais (incluindo a possibilidade de seu abuso) por indivíduos e grupos. Dessa forma, este trabalho busca analisar os marcos legais para o uso da Internet nas eleições brasileiras e como a normatividade existente responde ao fenômeno das notícias falsas (fake news) e suas implicações para a plena realização da democracia constitucional. Para tanto, o artigo propõe uma comparação entre a legislação existente no Brasil sobre uso eleitoral da Internet e sua apropriação e efetividade (ou ausência dela) nas decisões dos tribunais eleitorais brasileiros, incluindo o Tribunal Superior Eleitoral, buscando entender como o diálogo estabelecido entre normas e decisões judiciais reflete mais ou menos efetividade da regulamentação existente para o uso da Internet e redes sociais nas eleições, delimitando se o grau de efetividade apresentado realiza ou frustra as bases constitucionais da democracia no Brasil.

Palavras-chave

Constituição; democracia; regulação da internet; fake news; Eleições brasileiras.

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Introduction

In 1996, Brazil introduced the Direct Recording Electronic Voting Machine (DRE) in municipal elections, allowing the substitution of manual vote on paper ballot in the choices of mayors and city counselors within the cities with more than two hundred thousand registered voters.

The computerization of the voting process in Brazil already had precedents in the totalization of the electoral results of the Brazilian general elections of 1994 and was a project built through a technical partnership between the Electoral Justice (which in Brazil also has the function of organizing and administering the elections, besides being a judicial body), the Armed Forces, the Ministry of Science and Technology and the Ministry of Communications of the country, through a committee of experts that brought together lawyers and computer technicians from the mentioned bodies¹.

The development of the electronic ballot box is contemporary to the dissemination and popularization of Internet access in Brazil that took place in the second half of the 1990s, bringing with it a belief in technological progress that was also associated with the political bases of Brazilian new democratic period institutionalized in the 1988 Constitution.

Two decades later, the application of information technology to the electoral process is a matter of analysis and reflection from another angle, no longer a hope of affirming democratic citizenship, but rather of uncertainty about the course of democracy. In a context of political polarization radicalized by the practice known as of fake news, Laura Chinchilla, a representative of the Organization of American States (OAS) observer mission to the 2018 Brazilian general elections, considered the massive use of information manipulation through social networks, notably WhatsApp, an "unprecedented" phenomenon².

In the time gap that separate the two events, Brazil enacted the Brazilian Civil Rights Framework for the Internet (2014), a law that establishes principles, guarantees, rights and duties for the use of the Internet in Brazil. At the same time, the electoral legislation itself was updated to regulate political propaganda on the Internet during the elections.

¹ According to the website of the Brazilian Superior Electoral Court, "In 1994, at the Presidency of Justice Sepúlveda Pertence, for the first time, the results of the general elections were given by the central computer of the Superior Electoral Court. In 1995, in the administration of the Justice Carlos Velloso, the work of computerization of the voting process began. A commission of lawyers and computer technicians presented a prototype of the electronic ballot box. For the elaboration of the technical project of the, Direct Recording Electronic (DRE) Voting Machine, including the equipment and the programs, a working group was formed that counted on the collaboration of specialists in informatics, electronics and communications of the Electoral Justice, of the Armed Forces, of the Ministry of Science and Technology and the Ministry of Communications. Parallel to the studies of the requirements and premises for the construction of the Direct Recording Electronic (DRE) Voting Machine, the Superior Electoral Court sought to sensitize not only the functional body of the Electoral Court to the grandiose enterprise but also the other Powers, the Legislative, on which the adequacy of the law depended to enable the implementation of electronic voting, and the Executive, which should provide the necessary financial resources". Information available in portuguese at: <http://www.tse.jus.br/imprensa/noticias-tse/2016/Agosto/eleicoes-seguras-saiba-como-surgiu-a-urna-eletronica-e-por-que-ela-esta-em-constante-processo-de-evolucao>. Access: August, 20, 2019.

² Chinchilla's declaration is reproduced by the Brazilian State News agency: <http://agenciabrasil.ebc.com.br/en/politica/noticia/2018-10/spread-fake-news-brazil-unprecedented-says-oas>. Access: May 29, 2019.

Despite of these initiatives, the DRE technology that was an ally two decades ago became a source of mistrust, as the electoral fake news phenomenon projected the very political radicalization experienced by the Brazilian society in this decade.

Based on a preliminary reflection on the projections of information technology and the advances of the digital world in contemporary society, especially with regard to the construction of the democratic agenda, this paper aims to analyze the constitutional and legal bases of Internet regulation in the electoral process in Brazil. Also, it analyzes to what extent the pre-existent normative arsenal has been interpreted by the courts, particularly the electoral courts, to combat political and economic abuses related to the spread of fake news by digital social networks in the context of elections.

Moreover, this paper seeks to outline the potential conflict between constitutional values such as democratic legitimacy and electoral morality, on the one hand, and on the other, the freedoms of expression and communication equally guaranteed as constitutional rights.

In order to do so, the paper proposes a comparison between the existing legislation in Brazil on electoral use of the Internet and its appropriation and effectiveness (or absence thereof) in decisions of the Brazilian electoral courts. This analysis includes the Superior Electoral Court, in order to understand how the established dialogue between norms and judicial decisions reflects effectiveness of the existing regulation.

To this purpose, electoral court decisions about the phenomenon of fake news will be selected, based on the bases of consultation of jurisprudence of the Brazilian Electoral Justice, seeking to analyze the decision standards that they outline.

In the end, normative and jurisprudential standards to combat the spread of electoral fake news in the Brazilian courts will be analyzed, as well as the interaction of institutional actors (legislator and judges). Last, the paper will offer some reflections on the proposals to improve fake news electoral regulation.

1. Contextualizing Fake News: democracy, internet and network society

It is not possible to understand the phenomenon of fake news in the last Brazilian elections without analyzing the impact of the internet and digital technologies in the contemporary world and the advance of social networks, particularly in Brazil.

Spanish sociologist Manuel Castells locates the emergence of the culture of virtual reality in the tension between alphabetic communication and sensory communication. That goes back to the emergence of the alphabet itself in Ancient Greece, which made it possible to bridge the

gap between oral communication and written speech, providing the mental infrastructure for cumulative, knowledge-based communication (Castells, 1999, p. 413).

Also, according to Castells, the alphabetical order, by separating written communication from the audiovisual system's system of symbols and perceptions, has relegated the world of sounds and images behind the scenes of the arts, which deal with the private domain of emotions and the public world of the liturgy (Castells, 1999, p. 413b).

Castells then points to the emergence of the internet as a historical transformation that comes in the wake of the resumption of audiovisual culture by film, radio and television, representing a revolutionary technological transformation, of dimensions similar to the emergence of the alphabet, because the formation of a hypertext and a metalanguage that, for the first time in history, integrates into the same system the written, oral, and audiovisual modalities of human communication, and the potential integration of text, images and sounds into the same system - interacting from multiple points, in the chosen time (real or delayed) in a global network, in conditions of open access and affordable price - fundamentally changes the character of human communication (Castells, 1999, pp. 413-414).

The technological transformations promoted by virtual culture and digital social networks are not isolated from the social and cultural development of contemporary societies. On the contrary, they are at the same time a reflection of the scientific progress generated by these societies and impose challenges regarding knowledge, its access and production - something that did not go unnoticed by Umberto Eco in a 1999 interview:

Up to the present, society has been filtering for us through manuals and encyclopedias. With the Web, all the knowledge, all the possible information, even the less pertinent, is there, at our disposal. Then one wonders: who does filter it? I use two research programs called Altavista and Yahoo on the Internet. The big difference between them is that Yahoo is still handmade invoice and filters the information. Altavista, on the contrary, gives us everything without any sorting. Imagine that you are looking for information on coffee culture. If you order coffee from Yahoo, it can give you filtered information (we have to say so!) about all the sites where coffee is actually talked about scientifically. Altavista, on the contrary, gives you the list of millions of site where the word coffee is used. (...) The inability to filter is the impossibility of discriminating (...). Moral of the history: in the face of the Web you have neither rule to select information nor rule to forget what does not deserve to be preserved. Only certain selection criteria are available to those who are intellectually prepared to surf the Web (...). Last summer I was on the field without my library and needed information on Immanuel Kant. I activated the Web and found an incredible amount of information about my philosopher. Since I have a good philosophical culture, I was able to eliminate the maniacs, the fanatics, the sites that produced only information of the level of the secondary course, and little by little I was able to select, say, the ten sites that gave me valid information. But I am, as it were, a specialist, I have a life of study behind me ... And for the others, all the innocents who are searching the Web for what it is necessary to know about Immanuel Kant, what is happening? They are certainly more lost than the little boy from a hamlet who finds in the parson's house only an old history of philosophy written by an eighteenth-century Jesuit (Carrière et al, 1999, pp. 189-191)

Well, Altavista does not exist anymore, but Google's search logic certainly corresponds to or equals broadly to that described by Eco. More important than the search browser are the central ideas defended by Umberto Eco: the end of mediation of knowledge by digital communication and the absence of rules to select and qualify the knowledge that we access through the internet.

In his Republic.com, Cass Sunstein builds a close argument, warning that internet poses a real danger by equipping individuals with filtering technologies so precise that they completely avoid, in a way not possible in real life, the chance encounters and shared experiences necessary to deliberative democracy (Sunstein, 2001).

The importance not only of search browsers but of digital platforms and companies themselves as a means of sociability and communication is reminded by David Runciman, when he explains the reach of Google and Facebook (and why not remember WhatsApp and Instagram?) in our daily lives, since they are not limited to the monopoly of a kind of good but monopolize many things at the same time, and provide something that we become dependent on - we rely on their platforms and products for our communication. At the same time, they influence what we say to each other, by how they shape what we see and hear (Runciman, 2018, p. 142).

All of this has an impact on the democratic process, both in the capacity and in the quality of the public deliberation that we carry out in a constitutional democratic.

Indeed, Robert Dahl emphasizes that a democratic process requires enlightened understanding, by which each member of the political community must have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences. This connects directly with the control of democratic agenda - so far as enlightened understanding is a preliminary step for members of the political community to take full advantage of the opportunity to decide what matters are to be placed on the agenda (Dahl, 1998, pp. 37-38).

When we bring the transformations that the internet and digital communications have brought in our way of interacting with other people and projecting this to the political domain, there is an un-negligible tension to be noticed. It refers to the expansion of the space of public debate at the same time that it is not based on any mediation rules produced and shared by (re) known institutions, such as political parties, religions, unions, the press, associations and social movements.

At the same time as technology extends the inclusion of citizens in the process of public deliberation through virtual Internet space and digital social networks, it poses the challenge of an arena not regulated by previously accepted criteria of filtering and validation. Traditional

institutions (political parties, associations, churches, etc.) are also unable to effectively impose criteria for selection and qualification of the debate. This virtual "anarchy" generates a sphere that may be appropriate of the most diverse forms for exploitation by political and economic forces.

Unsurprisingly, David Runciman points out that our dependence on this technology leaves us ready to be exploited - in the words of the author, in the land of technology addicts, the one who navigates cleverly is king (Runciman, 2018, 134). This is the point in the story where fake news fits - the relationship between information, digital space, and power.

Initially, there is a question of predicament to be addressed. Here the adjective makes the difference, for although false and fake are related words, they do not express exactly the same thing.

The Oxford Online Dictionary gives us the following meanings for false: not according with truth or fact; incorrect; not according with rules or law; made to imitate something in order to deceive; artificial; not sincere; illusory; not actually so; disloyal; unfaithful³. In turn, fake is defined in the following terms by the same dictionary: thing that is not genuine; a forgery or sham. As a verb, there is a more interesting definition: Forge or counterfeit (something); make (an event) appear to happen; trick or deceive someone⁴.

Although everything fake is false the contrary does not necessarily proceed. The false is linked to inaccuracy, in the sense of not corresponding to reality. Fake refers to manipulation for purposes of forgery, tampering or fraud, for purposes of gain or advantage.

Cass Sunstein tells us that Rumors are nearly as old as human history, but with the rise of the Internet, they have become ubiquitous – however, the danger lies in the false rumors, false rumors, of which fake news are inextricably linked, if not their current manifestation, since they impose real damage on individuals and institutions, and they often resist correction. They can threaten careers, relationships, policies, public officials, democracy, and sometimes even peace itself (Sunstein, 2014).

Fake news have gained relevance in contemporary communication precisely linked to political and electoral processes. In this sense, Jon Roozenbeek and Sander van der Linden trace the origin of contemporary political use of the term "fake news" and concerns about the risks this poses to the democratic process:

³ Oxford Dictionary online definition of "false" available at: <https://en.oxforddictionaries.com/definition/false>. Access: May 29, 2019.

⁴ Oxford Online Dictionary definition of "fake" available at: <https://en.oxforddictionaries.com/definition/fake>. Access: May 29, 2019.

Although not new (Cooke, 2017), the spread of false information has become synonymous with the term “fake news”. A Google Trends analysis reveals that this term began to gain relevance in US Google searches around the time of the US presidential election in 2016, and has remained popular since¹. The risk that fake news poses to evidence-based decision-making is increasingly recognized by governments. For example, UK parliament recently launched an investigation into how “fake news” is threatening modern democracy (Harriss & Raymer, 2017) and the World Economic Forum (2013) ranked the spread of misinformation as one of the top risks facing the world today. (...) a majority (64%) of Americans report that fake news has left them feeling confused about basic facts (Barthel, Mitchell, & Holcomb, 2016), and a study carried out by YouGov (2017) found that while many people believe they can tell the difference between true and fake news, only 4% of those surveyed could systematically differentiate the two. Similarly, a survey conducted by Ipsos MORI found that 75% of Americans who were familiar with a fake news headline thought the story was accurate (Silverman & Singer-Vine, 2016). This is concerning because the functioning of democracy relies on an educated and well-informed populace (Kuklinski et al., 2000) and as such, the spread of misinformation has the potential to undermine both science and society (Lewandowsky et al., 2017; van der Linden et al., 2017a). For example, the viral spread of misinformation on issues such as climate change and vaccines can undermine public risk judgments about not only the state of scientific agreement but also the perceived seriousness of these issues (Lewandowsky et al., 2017; van der Linden et al., 2017b). (Roozenbeek and Sander van der Linden, 2018, pp. 3-4).

Therefore, the use of fake news in electoral processes is not new and has already been disseminated by other forms of virtual communication. According to Cass Sunstein, rumors frequently spread through informational cascades – and on the Internet, informational cascades occur every day (Sunstein, 2014).

In the 2006 elections the Brazilian Higher Electoral Court had already had to deny news that if half of the votes plus one were void there would be a new election with new candidates⁵.

⁵ The President of the TSE (Supreme Electoral Court), Marco Aurélio Mello, for once has thrown out a myth that has been circulating for months on the Internet: that elections for federal or state legislators would be annulled if more than half of the votes were void. According to the Justice, there is no law that contains this determination. The rule also does not exist in the Constitution. Marco Aurélio begins with the constitution: "The Charter requires that the elected president be at least 50% plus one of the valid votes, excluding whites and nulls votes. But if, by hypothesis, 60% of the votes are white or void, which I do not believe will happen, the 40% of the votes given to the candidates will be valid. It is enough for one of the candidates to obtain 20% plus one of those votes to be elected. Folha also wanted to know if the Electoral Code (Law 4.737, of 1965) would not support the thesis that 50% of void votes would result in the annulment of the election. Marco Aurélio Mello answered in a categorical manner: "No." In fact, what has happened in the currents circulating on the Internet is a misreading of the Electoral Code and some old decisions of the TSE, which left room for doubt. Article 224 reads as follows: "If the nullity reaches more than half of the country's votes in presidential, state, federal and state elections or municipal elections in municipal elections, other votes shall be prejudiced, and the Court shall mark a day for a new election within a period of twenty (20) to forty (40) days." The fact is that the "nullity" referred to in this article 224 of the Electoral Code is that resulting from fraud, any wrongdoing or accident during the electoral process. For example, when someone uses a fake document to vote on behalf of a third party, or when the polls go astray or are stolen. This is clear in paragraph 2 of this article, which mandates the Public Prosecution Service to "immediately punish the guilty ones." "Anyone who votes void by will or by mistake is not guilty of anything and cannot be punished, even because the vote is secretly given," says Marco Aurélio. To reinforce his understanding, he cites articles prior to 224, which also deal with voidness of votes. Article 220 states that there is an annulment if the vote was "before a bureau not appointed by the electoral court", "on false voting sheets", held "on a date, time, or place other than that designated or terminated before 5:00 pm" or "when the essential formality of the secrecy of the suffrages is disregarded". That is, nothing that is related

But the story never stopped circulating and the rise of online social networks only increased the dissemination of the "news", which led to further denials by the Court in other elections held after 2006⁶.

The problem of electoral fake news was already an issue during the Brazilian 2014 General Elections, although false election information was not called that way at that time⁷, but the issue of digital media as a mean for abuse of political power remained on the agenda of the electoral courts and in 2018 the then President of the Court, Justice Luiz Fux, came to consider that elections influenced by fake news could be annulled⁸. In spite of the declarations of the then President of the Supreme Electoral Tribunal, fake news, mainly from the mass dissemination through the WhatsApp telephone application, acquired unprecedented dimensions in the Brazilian elections.

The foreign press's view on the subject reveals the scale of the fake news phenomenon and its massive use in the 2018 elections, which was associated to the main candidates of the Brazilian Presidential Election during the second-round vote: Fernando Haddad's and the elected

to the null vote given by the voter. "Voto nulo não invalida eleição, diz Marco Aurélio". Article of report by Fernando Rodrigues for Folha de São Paulo newspaper. Available at: <https://www1.folha.uol.com.br/folha/brasil/ult96u82610.shtml>. Access: May 29, 2019.

⁶ News/press release available at the Superior Electoral Court website: <http://www.tse.jus.br/imprensa/noticias-tse/2014/Agosto/eleicoes-2014-mais-de-50-dos-votos-nulos-nao-podem-anular-um-pleito>. Access: May 29, 2019.

⁷ Journalist Reinaldo Azevedo talks about the misinformation of the 2014 presidential elections, while reverberating a report in the newspaper O Globo, which tells the story of a maid who was receiving messages from the WhatsApp application with negative information about a candidate: "(...) the housemaid M.L.S received on Wednesday night a message suggesting that, if elected, the PSDB candidate for the Presidency, Aécio Neves, could end the Bolsa Família program. Mother of three pre-teen children, she receives about R\$ 500 and was drawn last August to receive a house from the Minha Casa Minha Vida program. The Housing Department of the Federal District government despatched 50,000 letters to the program saying they would have been drawn. M.L.S was one of them and waits to be called to receive the property. And she's scared she might lose everything. "My neighbor also received this message last night. And she told me that there in Minas Gerais, where Aécio was governor, they are saying that he is not a good person, 'said M.L.S". AZEVEDO, Reinaldo. "UMA INDÚSTRIA CRIMINOSA CONTRA AÉCIO – Beneficiária do Bolsa Família recebe mensagem com ameaça velada de que Aécio acabará com programa" (A CRIMINAL INDUSTRY AGAINST AÉCIO - Bolsa Família recipient receives message with veiled threat that Aécio will end up with the program"). Revista Veja, available at: <https://veja.abril.com.br/blog/reinaldo/uma-industria-criminosa-contra-aecio-8211-beneficiaria-do-bolsa-familia-recebe-mensagem-com-ameaca-velada-de-que-aecio-acabara-com-programa/>. Access: May 29, 2019.

⁸ The president of the Superior Electoral Court (TSE), Luiz Fux, said on Thursday (06/21) that the Electoral Justice may cancel an election if it is proven that its result was influenced by the dissemination of false news, calls fake news. According to the Justice, the measure is provided for in Brazilian law. "Article 222 of the Electoral Code provides for the annulment of any election if the result is the result of a fake news broadcast in a massive and influential way in the result," he recalled. "It is clear that this demands a collection of evidence, a cognition and a deep knowledge of what was practiced. But the law provides for this type of sanction," Fux said during an international seminar on the topic at the TSE headquarters in Brasília. The court president explained that a possible annulment must be decided at the end of an election process, after the evidence has been presented, and with the possibility of the parties involved manifesting themselves. Candidates who feel prejudiced can sue Justice. "Eleição influenciada por fake news pode ser anulada, diz Fux". Available at the DW Brasil website: <https://www.dw.com/pt-br/elei%C3%A7%C3%A3o-influenciada-por-fake-news-pode-ser-anulada-diz-fux/a-44341168>. Access: May 30, 2019.

President Jair Bolsonaro - these accounts can be found in a number of relevant newspapers and news networks in English-speaking countries, such as the New York Times (United States), The Guardian and BBC (United Kingdom)^{9 10 11}.

⁹ “As Brazil nears the climax of its bitterest and most polarized election in recent history, academics and digital activists fighting to stem a rising tide of fake news say that accurate coverage of the campaign risks being drowned out by the sheer volume of lies being spread on Facebook and WhatsApp. On Monday, Brazil’s electoral court ordered Facebook to remove links to 33 fake news stories targeting Manuela D’Ávila, a communist party politician and the vice-presidential candidate for Fernando Haddad of the Workers’ party (PT). (...). In the electoral court’s ruling, Judge Sérgio Banhos gave Facebook 24 hours to provide the IP addresses of computers used to register the accounts that posted the fake news stories – and the personal details of the page administrators. Facebook said it would obey the ruling, and the links have already been removed. According to court documents, the pages included video edited to include images from a demonstration in Rio de Janeiro, images of two naked people kicking crucifixes, D’Ávila talking about an anti-homophobia campaign, and “images that hypersexualised children”. Court documents said the film asked the viewer: “She wants to be vice-president for Lula’s Workers’ party. What do you think?” (...) Bolsonaro’s campaign has attacked Haddad and the PT over a programme of educational material aiming at fighting homophobia in schools produced while he was minister of education under President Dilma Rousseff in 2011 but never distributed. Fake news items have deluged Brazil’s garrulous social media networks with material suggesting that he and D’Ávila want to “sexualise” children. (...) Meanwhile, some on the left have lied about Bolsonaro’s proposals to abolish taxes for Brazilians who earn less than five times the minimum salary – around £977 a month – instead alleging that he intends to increase taxation on the poorest, Ortellado said. Others have spread fake stories claiming that a knife attack that left Bolsonaro seriously injured was faked to boost his polling”. “Brazil battles fake news tsunami amid polarized presidential election”. By Dom Phillips: Available at: <https://www.theguardian.com/world/2018/oct/10/brazil-fake-news-presidential-election-whatsapp-facebook>. Access: May 30, 2019.

¹⁰ “Over the past few months, the 120 million Brazilians who use WhatsApp, the smartphone messaging application that is owned by Facebook, have been deluged with political messages. The missives, spread through the country by the millions, have targeted voters ahead of Brazil’s fiercely contested presidential election. (...). One popular WhatsApp message displayed the name of a presidential candidate, Luiz Inácio Lula da Silva, next to the number 17. When Brazilians vote, they punch in a number for a candidate or party in an electronic voting machine. But the information in the photo was wrong. The number 17 was for Mr. Bolsonaro’s party. Mr. da Silva was no longer even in the race. His running mate, Fernando Haddad, had taken his place. Brazil’s top electoral court ruled on Aug. 31 that Mr. da Silva, who is serving a 12-year sentence for corruption, cannot run for a third term. The misleading message was just one of millions of photos containing disinformation believed to have reached Brazilians in recent months. A study of 100,000 WhatsApp images that were widely shared in Brazil found that more than half contained misleading or flatly false information. (...) “Disinformation Spreads on WhatsApp Ahead of Brazilian Election”. By [Mike Isaac](#) and [Kevin Roose](#). Available at: <https://www.nytimes.com/2018/10/19/technology/whatsapp-brazil-presidential-election.html>. Access: May 30, 2019.

¹¹ “Political campaigners in Brazil have used software that scrapes Facebook for citizens’ phone numbers, and then automatically sends them WhatsApp messages and adds them to WhatsApp groups. Almost three weeks ago, 147 million voters in the country went to the polls for legislative elections and the first round of the presidential elections. (...). A BBC investigation has discovered that efforts to support various parties and candidates - covering state, federal and senate votes - have used the bulk message technique. (...) Some of the devices involved in the data scraping can send up to 300,000 messages at a time. They are sold via the internet and some sellers claim their use is hard to trace. (...). The scheme violates WhatsApp-owner Facebook’s rules. In the view of some experts, it could also constitute an electoral crime. For its part, Facebook says it has banned hundreds of thousands of suspicious WhatsApp accounts and closed several Facebook pages and accounts linked to a marketing group believed to be supportive of Bolsonaro. The scraping software allows its clients to choose a target audience by searching for keywords, pages or public groups on Facebook. In fewer than 10 minutes and 10 clicks, it is possible to gather almost 1,000 phone numbers. Data can be group by city, gender and interests. Contacts can also be gathered by: using details voluntarily provided by a candidate’s supporters; buying databases sold legally in Brazil; using information stolen or bought illegally from telephone service providers (...) (BBC, United Kingdom). MAGENTA, Matheus;

In common, foreign media narratives tell of the massive use of fake news through dissemination from digital platforms, notably WhatsApp, and how the use of digital technology and social networks has enhanced a political polarization amplified by misinformation and aggressiveness.

Thus, the context of the last Brazilian presidential elections makes it necessary to analyze normative instruments available to face the problem of fake news and misuse of internet in the electoral process, and how this connects with the constitutional and legal provisions on internet regulation, as well as the judicial responses to the phenomenon.

2. The constitutional and legal basis for electoral regulation of the internet in Brazil

The regulation of the internet in the electoral process in Brazil is a complex normative structure. It encompasses democratic legitimacy principles and rules foreseen in the Constitution, electoral morality and political rights provided by the Brazilian Civil Rights Framework for the Internet and other specific provisions on electoral propaganda in the General Law of the Elections.

Article 5, sections IV and IX, of the Brazilian Constitution ensure the free expression of thought (banning anonymity) and of intellectual, artistic, scientific and communication activity, regardless of censorship or license. This is reinforced by Article 220, which states that the manifestation of thought, creation, expression and information in any form, process or vehicle shall not be restricted, subject to the provisions of the Constitution¹².

The Brazilian Constitution also affirms the democratic rule of law and popular sovereignty as bases of the Republic, and in art. 14 reaffirms these principles through the universal suffrage, establishing in paragraph 9 of the latter article the protection of the normality and legitimacy of elections against abuse of economic power as constitutional principle; and in paragraph 10 of art. 14 it provides that the elective term may be challenged before the Electoral Court within a period of fifteen days counted from the diplomation, instructed the action with evidence of abuse of economic power, corruption or fraud¹³.

GRAGNANI, Juliana; SOUZA, Felipe. "How WhatsApp is being abused in Brazil's elections". BBC News Brasil. Available at: <https://www.bbc.com/news/technology-45956557>. Access: May 30, 2019.

¹² Available in the Portuguese original version at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access: May 30, 2019.

¹³ Available in the Portuguese original version at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access: May 30, 2019.

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Brazilian Civil Rights Framework for the Internet, in turn, ensures not only freedom of expression on the internet but also human rights, personality development and the exercise of citizenship in digital media; plurality and diversity; the social purpose of the network; the preservation and guarantee of net neutrality; and promoting access to information, knowledge and participation in cultural life and in the conduct of public affairs, as well as imposing the responsibility of agents according to their activities¹⁴ (Article 2, Sections II, III and IV, Article 3, Sections I, IV and VI, and article 4, section II, of the Law).

General Law of The Elections (Law 9504/1997) brings a specific chapter on internet advertising, without prejudice to other provisions that involve the network, such as financing of electoral expenses with internet services.

Article 57-A of Law 9504/1997 allows electoral propaganda on the Internet as of August 15 of the electoral year, while art. 57-B states that such advertising may be carried out in certain ways: I - on the candidate's site, with an electronic address communicated to the Electoral Court and hosted, directly or indirectly, in an Internet service provider established in the country; II - on a party or coalition site, with an electronic address communicated to the Electoral Court and hosted, directly or indirectly, in an internet service provider established in the country; III - by means of an electronic message to addresses registered free of charge by the candidate, party or coalition; IV - through blogs, social networks, instant messaging sites and similar Internet applications whose content is generated or edited by: a) candidates, parties or coalitions; or b) any natural person, as long as he does not engage in content pushing. According to Paragraph 2 of article 57-B It is not allowed to broadcast electoral content by registering an internet application user with the intention of falsifying identity.

Article 57-C of Law 9504/1997 states that it is prohibited to use any type of electoral advertisement paid on the Internet, except for the content, since it is unequivocally identified as such and exclusively contracted by parties, coalitions and candidates and their representatives. In the form of paragraph 1, it is prohibited, even if gratuitously, the transmission of electoral propaganda on the Internet, in places: I - legal entities, whether or not for profit; II - official or hosted by organs or entities of the direct or indirect public administration of the Union, the States, the Federal District and the Municipalities.

Article 57-D of the General Election Law provides that the manifestation of thought is forbidden, anonymity is forbidden during the election campaign, through the internet-computer network, with the right of reply, in case of offenses or disclosure of untrue content.

¹⁴ Brazilian Civil Rights Framework available in the Portuguese original at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/12965.htm. Access: May 30, 2019.

Finally article 57-I of the General Election Law provides that at the request of a candidate, party or coalition, subject to the rite provided for in art. 96 of this Law, the Electoral Court may determine, within the scope and technical limits of each internet application, the suspension of access to any content transmitted that fails to comply with the provisions of this Law, and the number of hours of suspension shall be defined in proportion to severity of the infraction committed in each case, observing the maximum limit of twenty-four hours.

In general terms, the constitutional and legal normative basis that supports the regulation of the internet in the Brazilian electoral process seeks to balance pluralism, freedom of expression and access to information within the scope of the elections with measures that avoid abuse of economic power and undermine the equality of conditions in the electoral contest.

3. Judicial responses to electoral fake news in Brazilian elections: limitations and challenges – freedom of expression, hate speech, narrative disputes and electoral balance

Regarding the confrontation of fake news in the electoral process, Judicial decisions of the Brazilian electoral courts usually point out this need to balance freedom of expression during the electoral period and repression of fake news as a way to combat abuse of economic power and asymmetries that could compromise equal conditions in electoral competition - as can be observed in the following two ruling decisions of the regional electoral courts of the states of Pernambuco and Amapá:

ELECTIONS 2018. INTERNAL APPEAL. ELECTION REPRESENTATION. REMOVAL OF INTERNET CONTENT. FAKE NEWS. ABSENCE. DENIED.

1. Not having observed the occurrence of offensive content and known as untrue, does not constitute negative propaganda to induce reprimand by the electoral justice, in that it consists in the mere exercise of freedom of expression.
2. Appeal dismissed (REGIONAL ELECTORAL TRIBUNAL/AMAPÁ - RP: 060158958 MACAPÁ - AP, Judge: RIVALDO VALENTE FREIRE, Judgment Date: 04/25/2019)¹⁵.

ELECTIONS 2018. ELECTORAL REPRESENTATION. ELECTORAL PROPAGANDA. INTERNET. BLOG. UNTRUE CONTENT. FAKE NEWS. EXTRAPOLATION OF THE FREE MANIFESTATION OF THOUGHT. REQUEST TO CLEAR. DEFERRED. PROCEDURE OF THE REQUEST.

1. Dissemination of false news on the Internet, which exceeds the right of freedom of expression, 2. Content published in 2018, dating to the 2014 elections. Fake news, no judicial process or investigation to investigate them. 3. Freedom of expression is limited by restrictions in a democratic society to protect the reputation and rights of others and does not extend to the disclosure of untrue or offensive news to the honor of others. 4. Provision of Representation. Maintenance of preliminary injunction, for Plenary referendum.

¹⁵ Available in the Portuguese original version at: <https://trt-ap.jusbrasil.com.br/jurisprudencia/706899861/representacao-rp-60158958-macapa-ap?ref=serp>. Access: May 30, 2019.

(REGIONAL ELECTORAL COURT - RP: 060037894 RECIFE - PE, Judge: STÊNIO JOSÉ DE SOUSA NEIVA COELHO, Judgment Date: 10/01/2018)¹⁶.

This is not a simple balance though, especially because when it comes to electoral fake news there are issues that are relevant about the limits to freedom of expression, either as a way to prevent asymmetries and manipulations in the electoral process, or to face hate speech against certain social groups and even against democratic and republican values.

Still, the specter of censorship and state control of information remains hovering in the air, especially when art. 57-I of the General Election Law deals with the possibility of suspension of content transmitted on the Internet or on digital media that violates the provisions of the law.

Robert Dahl sums up this fear by explaining that like freedom of expression the availability of alternative and relatively independent sources of information is required by several of the basic democratic criteria, which leads him to consider that citizens must have access then to alternative sources of information that are not under the control of the government or dominated by any other group or point of view (Dahl, 1998, pp. 97-98).

The risks to corporate abuse of economic power in the electoral process are evidenced by David Runciman, expressly citing the United States Supreme Court decision in the case of Citizens United (2010), a non-profit organization, against the Federal Electoral Commission, extending to individuals the same right to individual citizens' freedom of expression, which means that companies have an unlimited right to buy political influence (Runciman, 2018, pp. 141-142), especially through the misuse of the internet.

Another key issue is the problem of hate speech, which was extremely sensitive in the Brazilian general elections, as shown by Ana Clara Panontin Scarabelli, in an article for DiggIt Magazine:

A tremendous amount of fake news was shared about Fernando Haddad, presidential candidate from the left wing. The news ranged from the distortion of his government program, to rumors about his character and personal life, theories that link him to communist and extremist parties, and even more gruesome news such as the "Gay Kit" or the erotic baby bottles. One of these messages reports that the former mayor distributed erotic baby bottles with penis-shaped nipples to children in public schools (...) Haddad's aim would be to combat homophobia and to teach kids how to be gay. In fact, the "Gay Kit", as it was dubbed by Haddad's opponents, is a project called School Without Homophobia, which the Ministry of Education, then under the management of Fernando Haddad, presented in 2011 with the support of several organizations. The goal of the project would be to provide training to teachers to deal with LGBT rights, fight against violence and prejudice, and create respect for diversity among young people and adolescents. However, the project was never implemented in schools. (...) The fake news stories also involved Bolsonaro's family. Image (...) shows his son, Flávio Bolsonaro, wearing a T-shirt saying "Moviment nordestinos [people from the northeast part of Brazil] go back to your home. Rio [de Janeiro] is not the place for

¹⁶ Available in the Portuguese original version at: <https://tr-pe.jusbrasil.com.br/jurisprudencia/634057023/representacao-rp-60037894-recife-pe?ref=serp>. Access: May 30, 2019.

donkeys". The image was widely shared on social media, even after it was proved that it was made in Photoshop. (Scarabeli, 2018).

An additional difficulty in the institutional and judicial confrontation of fake electoral news is the diffuse nature of its propagation on the Internet by the various digital platforms, reinforced by the very disconnect character between the hierarchy of Internet corporations such as Facebook, and their network (Runciman, 2018, p. 148).

The manifestations of institutional actors show a belief in the preservation of public debate and the circulation of ideas, thus favoring freedom of expression, to the detriment of control or intervention over content. A recent speech by Minister Luis Roberto Barroso, of the Brazilian Supreme Court, at the Brazilian National Conference on Internet (2019) is paradigmatic in this sense, especially when it shows frustration over the ideal of the internet as a new democratic agora, but also revealing skepticism in establishing regulatory and judicial standards to confront the political use of fake news due to the complexity of defining fake and non-fake:

The network was created to be an online digital public sphere, meeting democracy demands inspired by the Greek ideal of the Agora, he said. But, on the contrary, there is a perception that it has produced a "tribulation, with communicative enclaves, that people with formed opinion speak to their equals, when they do not speak for themselves. (...) there are still campaigns of misinformation and deliberate circulation of false news and hate speech" How to deal with this phenomenon? (...). Should you remove the fake news or put a stamp on it being false? Above all, who decides what is false or not? Do we want to interfere in this?¹⁷.

In the case law of the Superior Electoral Tribunal, this fear of regulating fake news, either with suspension of content, fine or granting of a right of reply, as it would represent undue intervention of ideas in the electoral debate is clearly shown by the following decision given by the Court in the second round of last presidential election (2018):

(...) on October 20, 1818, an event was held in Fortaleza, at which time the candidate Fernando Haddad received a sacred bible from Erineudo Lima, representing an act of incontestable symbolism, given the great significance of the sacred scriptures; b) "circulated in the networks the grotesque hypothesis that candidate Fernando Haddad would have thrown the bible in the trash. Numerous were the publications disseminating this lie and condemning Haddad for the conduct that falsely imputed to him. (...) c) was assembled in the video to insert an excerpt from an interview granted by Manuela D'Avila, disseminating false information that the candidate claims not to be Christian and therefore, along with

¹⁷ 'Ao tentar ser esfera pública digital online, internet frustrou expectativas'. Ministro Luis Roberto Barroso, do STF, encerrou o CONET 2019. By Guilherme Pimenta. Available at: <https://www.jota.info/coberturas-especiais/liberdade-de-expressao/ao-tentar-ser-esfera-publica-digital-online-internet-frustrou-expectativas-07052019>. Access: May 30, 2019.

Haddad, would have thrown in the garbage the sacred bible received from gift; and d) "the manifestations of the persons represented attack Manuela D'Avila and Fernando Haddad, with untrue, defamatory and insulting information, without any legitimacy or foundation, constituting a veritable political manifesto that attacks the candidates, without any contradictory possibility, counterpoint or debate "(p.9). In the end, they plead the merits of the representation for the exercise of the right of reply, under the terms of art. 58, paragraph 3, item IV, of Law no. 9,504 / 1997, as well as the definitive exclusion of the publications questioned and the imposition of a fine for those represented. (...) The Deputy Electoral Attorney General is in favor of partial knowledge of the representation and, in that extension, the dismissal of the request for a right of reply. The opinion presents the following agenda (ID 2005138): Elections 2018. Electoral representation. President. Irregular advertising. Removing content. Absence of supervenient interest in acting. Right of reply. Controversial Narratives. Right of criticism of freedom of expression. The representation that seeks the removal of content from the Internet and the granting of a right of reply is impaired when the supervening loss of the interest to act, due to the closing of the electoral process, and, consequently, of the campaign acts, is impaired. (...) In another vertex, regarding the penalty of a fine, it is not possible to influence the hypothesis of the case. It is frightened that art. 23, § 6, of Res.-TSE nº 23.551 / 2017 is categorical in stating that "the spontaneous manifestation on the Internet of natural persons in political-electoral matters, even in the form of praise or criticism of a candidate or political party, shall be considered electoral propaganda in the form of item IV, but shall observe, however, the limits established in paragraph 1 of art. 22 of this resolution". In fact, it must be concluded that the spontaneous manifestations of a natural person on the Internet, carried out through blogs, social networks or instant messaging sites, do not constitute illicit electoral propaganda that can be held accountable, even when the content conveyed - positive or negative - to deal with political-electoral matters, so as not to give rise to a pecuniary penalty on users of the network. In the case of a possible falsehood regarding the content of the video in question, it can be verified by the Internet users themselves, thus prevailing the free circulation of ideas and their public confrontation, in order to safeguard the freedom of expression and thought of the people. I reiterate that control over the content or level of criticism conveyed, whether acceptable or not, must be carried out by civil society itself, since the performance of the Electoral Justice in the Internet and social networks, even though it involves the honor and reputation of politicians and candidates, should be minimalist, under penalty of silencing the discourse of ordinary citizens in the democratic debate. (REPRESENTATION (11541) -0601846-67.2018.6.00.0000- [Right of Response, Position - President of the Republic, Position - Vice President of the Republic, Political Propaganda - Electoral Propaganda - Internet] -FEDERAL DISTRICT-BRASILIA SUPERIOR ELECTION COURT – Judge: Justice Luís Felipe Salomão - Date of decision / judgment: 07/12/2018)¹⁸.

Another decision from the same court adopts a similar approach in boundary contexts of not limiting / punishing the use of fake news in favor of freedom of expression and the right of criticism as essential to the debate of ideas:

REPRESENTATION (11541) -0601635-31.2018.6.00.0000- [Right of Response, Political Propaganda - Electoral Propaganda - Internet] - FEDERAL DISTRIBUTION - BRASILIA - SUPERIOR COURT ELECTORAL. (...) However, once the 2018 electoral process has been finalized, there is no longer any procedural interest in the judgment of the representation, in relation to the request to grant a right of reply, for the alleged offense transmitted on the Internet during the election campaign. (...) If the identity or anonymity is not verified and the adoption of an extensive interpretation for fines is prohibited, it is impracticable to grant the

¹⁸ Available in the Portuguese version at: <https://tse.jusbrasil.com.br/jurisprudencia/657149893/representacao-rp-6018466720186000000-brasilia-df/inteiro-teor-657149903>. Access: August 20, 2019.

application for sanction to those responsible for the dissemination of content that is offensive. In addition, Res.-TSE no. 23,551 / 2017, in its § 6 of art. 23, removes the responsibility of natural persons spontaneously appearing on the Internet in political-electoral matters - in the form of praise or criticism of a candidate or political party - through blogs, social networks, instant messaging sites and Internet sites whose content is generated or edited.¹⁹

Both decisions show difficulties for electoral judges in dealing with the scope of fake news in the elections, despite the normative instruments existing in Brazilian law as a legal basis for application to the fake news case.

From a structural perspective, there are limitations of the Brazilian Electoral Justice adjudication, since these courts and judges carry out judicial functions, and also organizes the elections (Articles 22 and 23 of the Electoral Code, in to the Superior Electoral Court). It was not by chance that the two cases were judged after the elections and considered that there was loss of the object of the process.

The judicial decisions of the Superior Electoral Court and Justice Barroso's speech also reveal a reverential tone regarding freedom of expression and an attempt to preserve the Internet to the fullest as a space for public debate, even though fears and findings of problems are evident.

However, the use of freedom of expression, without some essential counterpoints (right of reply, right to access quality information, pluralism, respect for differences) has the potential to reinforce offensive discourses against minority groups and confuse political criticism with to measure the extent to which the latter may have in terms of disrupting the necessary equality in the electoral process.

There is a belief that poses fake news as a matter of lack of information, something that would be solved with a good fact-checking system and with a broader scope of debates, through more space for exposure of other perspectives, as a great market of ideas.

There are problems with this approach. Fake news do not concern a problem of knowledge, but a problem of narrative. Here the myth of Plato's cave and its interpretation by the South Korean philosopher Byung-Chul Han can be quite illustrative.

In short, Plato's cave myth or allegory is about a group of people live under the earth in a cave-like dwelling, where they have been in this dwelling since childhood, shackled by the legs and neck, in a place where the only one thing for them to look at is whatever they encounter in front of their faces, and since they are shackled, they are unable to turn their heads around. There is some light allowed, namely from a fire that casts its glow toward them from behind,

¹⁹ Available in the Portuguese version at: <https://tse.jusbrasil.com.br/jurisprudencia/655491596/representacao-rp-6016353120186000000-brasilia-df/inteiro-teor-655491604?ref=feed>. Access: August 20, 2019.

while between the fire and the shackled people runs a raised walkway at a certain height. A low wall has been built in the length of the walkway, like the low curtain that puppeteers put up, over which they show their puppets. Outside the cave people carry all sorts of things: animals, plants, wood and stone. When people walk along the walkway, the prisoners can see shadows of the objects they are carrying cast on to the wall – so they believe the images/shadows of the objects are “real”, since they never saw real objects. At some point a prisoner is set free from the chains and, leaves the cave, and along with that, is cured of his lack of insight, when he got into the sunlight, his eyes are filled with the glare. It would obviously take some getting accustomed. Later, however, he would be able to view the things themselves (the beings, instead of the dim reflections). Finally he would be in the condition to look at the sun itself, not just at its reflection whether in water or wherever else it might appear. Eventually this person who had gotten out of the cave decides to go back down, to inform the people shackled there about his findings, but they don't believe him and actually threaten to kill him if he attempts to liberate them from the chains and set them free ²⁰.

One interpretation of Plato's cave myth is that the allegory makes a distinction or highlights the opposition between empirical or sensorial knowledge and the truth reached from philosophical knowledge. But, in fact, it can be perceived also as an allegory on power.

Even though fake news play with disinformation as a strategy of power, they constitute a dispute over beliefs in the sense of building a winning narrative, not a true narrative, becoming part of a play in motion in the theater of political narrative. In this sense, Byung-Chul Han 's reflections on Plato's cave myth help to better understand the logic of the cave as a theater where the narrative develops:

Looking more accurately, it is seen that Plato's cave was structured as a theater. The prisoners are sitting there as spectators in front of the palace. Between them and the fire behind their backs there is a path, along the way accompanies a low wall, which resembles those boxes "that the traveling artists build to represent before the spectators, and in which they present their pieces." Along the wall are all kinds of instruments, columns with images and other figures of stone or wood, that appear over the wall and throw their shadows in the wall to where the prisoners look attentively. Some of those who carry the images speak while they carry them, others are silent. And since the prisoners cannot turn around and look back, they think it is the images themselves that speak. Plato's cave is, therefore, a theater of shadows ... those who are trapped in the cave do not see the images of the shadows of the real world; on the contrary, they attend a theater (...) indulge in a play, a narrative. The cavern of Plato does not present, as it is usually interpreted, diverse forms of knowledge, but diverse forms of life; namely the narrative way of life and the cognitive way of life. Plato's cave is a theater. Theater as the world of narrative contrasts with the allegory of the cave as a world of knowledge (...) (Han, 2012, pp. 87-89).

²⁰ Plato's The Allegory of the Cave. Republic, VII 514 a, 2 to 517 a, 7 Translation by Thomas Sheehan. Available at: <https://web.stanford.edu/class/ihum40/cave.pdf>. Access: May 30, 2019.

Unlike Plato's cave, where light and shadows oppose as a metaphor of truth and ignorance, mediated by a narrative, information in the society of transparency is a phenomenon devoid of negativity - more information and more communication does not clarify the world, nor make it clairvoyant (Han, 2012, pp. 92 and 96).

The prisoners of the cave, seeing his companion who returned from the light of the outer world, are confronted by a narrative they do not know, whereas those who are there experienced only the darkness of the cave. Likewise, fake news operate strongly within circles of trust - their reproduction is shared in virtual bubbles that connect with small communities, later enlarged – deliberation among like-minded people often entrenches false rumors, since the exchange of information intensifies preexisting beliefs (Sunstein, 2014).

The “world (or life) we know”, opposed to that narrative brought by those who came from outside the “cave”, even if it's the people who lived previously there and eventually went out to see the “sun”, represented by the confrontation of fake news with facts, data, statistics, science, and all knowledge that can be checked and opposed to false / fake information disclosed in trust circles and powered by digital social media.

On the other hand, French philosopher Bruno Latour offers a distinct but close diagnosis on post-truth and fake news as part of a narrative logic, since he questions whether the problem of fake news refers to a matter of fact and information, putting the heart of reflection on the loss of shared institutions:

People complain about fake news and post-truth, but that does not mean we're less able to reason. In order to maintain respect for the media, science, institutions, authority, there must be a shared world. It's a subject I studied in the past. For the scientific facts to be accepted, it takes a world of respected institutions. For example, on vaccines it says, "These people went crazy, they're against vaccines." But it's not a cognitive, informational problem. Those who are against will not be convinced with a new article in The Lancet. These people say, "This world is against this other world, and all that is said in your world is false." (...) If public life is spoiled by people who consider that - no matter what you say - this is not their world, the facts are of no use.²¹

Therefore, a key question that must be asked about fake news as a narrative dispute and to some extent as an extreme manifestation of belief is the degree of reliability in institutional mediators such as the Electoral Justice and the press.

In this sense, can fact checking be an appropriate verification tool and what would be its limitations? Is fact checking trusted by all political players? These are essential questions to be

²¹ Bruno Latour: “O sentimento de perder o mundo, agora, é coletivo”. Interview to Marc Bassets. El País. Available at: https://brasil.elpais.com/brasil/2019/03/29/internacional/1553888812_652680.html. Access: May 30, 2019.

answered when we think about the fake news problem within the digital agora that the Internet became.

The idea that public debate can correct itself, and that good fact-checking is sufficient, greatly broadens the scope of freedom of expression without requiring, in return, respect for shared democratic and republican values such as equality, respect, inclusive citizenship and recognition of the other. If the electoral dispute becomes a narrative dispute, then the Electoral Justice fails to be this institutional mediator recognized by the parties and frustrates the objective of maintaining the morality and legitimacy of the elections.

Although Justice Barroso's questions is legitimate (who can define what is fake news or not and should it be defined?), some parameters can be traced: such as the fight against hate speech and its interference in the electoral process, and the regulation of the political use of the Internet in elections with the supervision of the Electoral Justice.

To answer these questions we can draw on the ideas of Daniel Sarmento, who outlines some standards to repress the hate speech and preserve freedom of expression at the same time. Three of the standards that the author offers are relevant to the electoral process: a) avoid trivialization, repressing only explicit manifestations of hatred and intolerance, fighting against others by public criticism; b) take into account the composition of the auditorium; 3) to analyze the medium used for dissemination, with greater control for the mass media (Sarmiento, 2010, pp. 261-262).

Another challenge posed by the fake news issue is how to handle legal answers engaging in prejudice and political persecution - a relevant fear especially when it comes to courts, bodies that must be guided by impartiality and independence.

On one hand, the use of fake news in the internet during electoral processes is widespread on different sides of the political spectrum. On the other hand, the biggest beneficiaries are clearly identifiable - Trump in the 2016 US presidential election, the Brexit campaign in the UK, Bolsonaro in the 2018 Brazilian presidential election. How to handle this?

This is not a simple answer for legislators, regulators, and judges in the electoral field, for all that must be weighed and balanced to come to a conclusion and propose countermeasures to fake news. On one hand, the ideal of the digital agora as a democratic expression, which includes free public debate and political pluralism must be weighed in; on the other, the preservation of the basic conditions for deliberation, respect for individual and collective fundamental rights, including the protection of minorities and socially vulnerable groups, and of the electoral debate itself from hate and abusive economic power.

One measure that can be adopted would be to increase the exposure time and talk of the candidate, group or party reached on the Internet or in the medium of exposure of the electoral

fake news, without necessarily restricting that of a political opponent or electoral competitor. This could expand the speech space of the affected and allowing his/her defense speech and his proposals to have greater scope than the offenses and the hate speech addressed to him/her. A sort of right of reply directed to the entire community, even if the responsible for fake news and offenses, or the direct beneficiary thereof, is not clearly identifiable.

In the area of abuse of political and economic power, the normative instruments foreseen in Brazil for the repression of fake news are adequate, but their application by the courts is timid and ineffective. This can be attributed to excessive self-restraint of electoral judges, whether in respect of freedom of expression, or in deference to popular sovereignty by vote.

This is important to outline because there is a strong need for cooperation between private actors and electoral authorities to face the fake news phenomenon: self-regulation and fact checking are important, but should not be isolated from the exercise of electoral jurisdiction and the regulation of electoral use of the internet

Also, there should be an increased process of monitoring the digital development of the electoral process with constant data crossing and working in partnership with tax authorities, internet technical management committees and civil society may be one way.

Other outstanding issues relate to institutional improvement, namely, the need to separate judicial and electoral functions from the Electoral Court, dividing the work of supervising the electoral process of that of judging it. This has potential to avoid work overload of judges that at the same time have to perform the classic jurisdictional functions and those who have to organize, regulate and supervise the electoral process administratively.

This would also allow electoral judges to be equidistant in judging the conflicts that surround the balance between freedom of expression, repression of hate speech, and the confrontation of abuse of economic power. While regulating electoral agents and to manage the electoral process they could act in the design of rules and in the administrative application or investigation of fake news offenses more efficiently.

Conclusion and a future vision of a democratic internet

The worldwide expansion of the Internet represented a process of transformation of human communication that brought about significant changes in our way of interacting. At the same time, the loss of shared institutions and the network structuring process of contemporary sociability creating space for the emergence of expression of the phenomenon of electoral fake news.

When it comes to analyzing the legal scenario of the regulation of the use of the Internet in Brazil, the Legislative seems to have done its homework well: the Constitution, the Brazilian Civil Rights Framework for the Internet and the General Election Law are appropriate normative bases to prevent and repress the diffusion of fake news, regardless of whether the production of specific legislation is relevant, to address the specificities of the phenomenon.

The issue does not seem to be the absence of a normative framework to deal with fake news in the electoral process, but rather the difficulties of the electoral courts in applying the existing norms for conflicts involving the diffusion of fake news in digital social networks.

Concerning the role of electoral courts, the absence of an appropriate balance between the freedoms of communication and expression and net neutrality on the one hand and the principles of the normality and legitimacy of elections and the equality of electoral conditions on the other lead to an undue restriction of the latter constitutional values to the detriment of those constitutional freedoms. This, in turn, can be easily appropriated by economic and political groups to achieve their interests, distorting themselves as a means of ensuring pluralism.

Hermeneutic difficulties become even more dangerous for democratic debate when the fake electoral news also takes on the form of hate speech. In this case, excessive judicial self-restraint in favor of freedom of expression can be configured in the consecration of the freedom of the strongest, leaving certain minorities and social groups vulnerable, and creating political tensions that unbalance the electoral process.

The precedents of the Superior Electoral Tribunal also demonstrate institutional difficulties for the application of norms of regulation of the electoral use of the Internet to fake news. The combination of judicial and non-judicial functions in the electoral processes creates a labor overload, which projects the resolution of electoral judicial conflicts after the end of the elections, when the scope of the trials is limited, and when the electoral result has already consolidated.

In this scenario, a forward-looking vision of the democratic internet must include tackling fake news as a way of preserving the digital agora's own ideal. If net neutrality and pluralism of ideas cannot allow censorship, neither can it lay the foundations for the internet as a mechanism for the propagation of hatred and subversion of the democratic electoral process by the power of the economic and social groups.

The internet as a digital agora and as a new frontier of democracy can prove to be a fable, an idyllic narrative of the global digital village; it may be a perversity, translated by electoral fake news as a machine for spreading the hatred and asymmetry of economic and social power that exploits the internet, just as the answer may be contaminated by the shadow of censorship and paternalism; and it can be an alternative, a hope, an ideal to pursue, of an internet as a

democratic and inclusive space that protects minorities and allows all political actors a relevant voice in the democratic electoral process. The path of electoral regulation of the internet is still uncertain, but a future vision of the democratic internet cannot give up.

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