

## Fake news, the democratic process and the role of digital platforms<sup>1</sup>

*Fake news, processo democrático e o papel das plataformas digitais*

*Fake news, proceso democrático y el papel de las plataformas digitales*

Gabriela Zanin\*  
Rafael Fonseca Ferreira\*\*

### Abstract:

This article addresses the role of digital platforms in the phenomenon of fake news and its consequences in the democratic process. The problem raised is to discover how the phenomenon of fake news is enshrined in the electoral process, the role of digital platforms in the expropriation of user data for political manipulation purposes, the advent of the post-truth phenomenon and the consequences for Democracy, taking into account the variables of freedom of expression and the right to information. The hypothesis consists of the idea that social networks and digital platforms play a central role in the proliferation of fake news, given their systematic use of algorithms to direct publications “to the taste” of the user, and that this process, combined with post-truth phenomenon, has materially tarnished the democratic process. As a methodology, there is a narrative review made through a bibliographical review and doctrinal research relating to the topic, using the qualitative approach and the inductive method for this purpose, as it starts from specific premises to arrive at a general idea. In conclusion, digital platforms, through the extraction of data from users in order to catalog them and discover their positions with the aim of directing publications, have the capacity of negatively influencing and tarnishing the Democratic process through the systematization of the phenomenon of fake news.

**Keywords:** Fake news; Democratic process; Digital platforms; Freedom of expression; Right to information.

### Resumo:

*O presente artigo aborda o papel das plataformas digitais no fenômeno das Fake News e suas consequências no processo democrático. O problema aventado é descobrir como o fenômeno das fake news se consagra no processo eleitoral, o papel das plataformas digitais na expropriação de dados dos usuários para fins de manipulação política, o advento do fenômeno da pós-verdade e as consequências para a Democracia, tendo em vista as variáveis da liberdade de expressão e do direito à informação. A hipótese consiste na ideia de que as redes sociais e as plataformas digitais têm um papel central na proliferação de notícias falsas e no fenômeno das Fake News, tendo em vista sua sistemática de uso de algoritmos para direcionar publicações “ao gosto” do usuário, e que esse processo, aliado ao fenômeno da pós-verdade, tem maculado materialmente o processo democrático. A título de metodologia, tem-se uma revisão narrativa realizada através de revisão bibliográfica e pesquisa doutrinária referentes ao tema, utilizando-se, para tanto, da abordagem qualitativa e do método indutivo, visto que se parte de premissas específicas para se chegar a uma ideia geral. Como conclusão, tem-se que as plataformas digitais, através da extração de dados dos*

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\*Mestranda em Direito e Justiça Social no Programa de Pós Graduação em Direito e Justiça Social (PPGDJS) da Universidade Federal do Rio Grande - FURG. Advogada Residente na Especialização em Prática Jurídica Social - Residência Jurídica no Programa de Pós Graduação em Prática Jurídica Social da Universidade Federal do Rio Grande. Bacharela em Direito pela Universidade Federal do Rio Grande.

\*\*Doutor e Mestre em Direito pela Universidade do Vale do Rio dos Sinos - UNISINOS; Pós Doutor em Direito e Novas Tecnologias pela Mediterranea International Centre for Human Rights Research (Itália); Pós Doutor em Direito pela UNISINOS (BR); Especialista em Comércio Exterior e Relações Internacionais pela Universidade de Caxias do Sul - UCS. Professor efetivo da Universidade Federal do Rio Grande - FURG junto a Faculdade de Direito na Graduação (Hermenêutica e Jurisdição Constitucional) e no curso de Mestrado em Direito e Justiça Social. Desenvolve pesquisas no âmbito da Constituição, da Jurisdição Constitucional, da Hermenêutica e do Direito e Novas Tecnologias.

*usuários de forma a catalogá-los e descobrir seus posicionamentos com o fito de fazer direcionamento de publicações, têm a capacidade de influenciar negativamente e macular o processo Democrático por meio da sistematização do fenômeno das Fake News.*

**Palavras-chave:** *Fake news; Processo democrático; Plataformas digitais; Liberdade de expressão; Direito à informação.*

### **Resumen:**

*El presente artículo aborda el papel de las plataformas digitales en el fenómeno de las fake news y sus consecuencias en el proceso democrático. El problema planteado consiste en descubrir cómo se consolida el fenómeno de las fake news en el proceso electoral, el papel de las plataformas digitales en la expropiación de datos de los usuarios con fines de manipulación política, el surgimiento del fenómeno de la posverdad y las consecuencias para la Democracia, considerando las variables de la libertad de expresión y del derecho a la información. La hipótesis consiste en la idea de que las redes sociales y las plataformas digitales desempeñan un papel central en la proliferación de noticias falsas y en el fenómeno de las fake news, dada su sistemática basada en el uso de algoritmos para dirigir publicaciones “al gusto” del usuario, y que este proceso, aliado al fenómeno de la posverdad, ha afectado materialmente al proceso democrático. En cuanto a la metodología, se adopta una revisión narrativa a través de revisión bibliográfica y doctrinaria relacionada con el tema, utilizando para ello el enfoque cualitativo y el método inductivo, ya que se parte de premisas específicas para llegar a una idea general. Como conclusión, se afirma que las plataformas digitales, mediante la extracción de datos de los usuarios para catalogarlos y descubrir sus posicionamientos con el objetivo de dirigir publicaciones, tienen la capacidad de influir negativamente y comprometer el proceso democrático mediante la sistematización del fenómeno de las fake news.*

**Palabras clave:** *Noticias falsas; Proceso democrático; Plataformas digitales; Libertad de expresión; Derecho a la información.*

## **1 Introduction**

The evolution of the technological environment has made the environment for debate, information and communication even more comprehensive in the globalized world. The expansion of access to multiple opinions and sources of information promoted by new technologies points, at least initially, to a strengthening of the public sphere and democratic practices in the digital environment.

Unfortunately, on the other hand, what has been observed in recent years is that this digital environment has proven to be a fertile ground for the spread of misinformation, including in the political sphere, going against the expected democratic trend. Thus, it is undeniable that the discussion about the influence that these new networks and their systems have on the democratic process becomes relevant to the academic environment.

In this scenario, this article aims to investigate the impacts of digital platforms and social networks on the contemporary democratic process, with an emphasis on the antidemocratic effects caused by their operating systems, especially with regard to the extraction and use of user data for the purpose of segmenting political content.

The study discussed here starts with the following problem: can the virtual environment, especially digital platforms and social networks, through their systematic data extraction in order to profile users, and the resulting phenomena of fake news and post-truth, negatively influence the democratic process? The hypothesis put forward is that social networks and digital platforms play a central role in the proliferation of fake news, given their systematic use of algorithms to direct publications “to the taste” of the user, and that this process, combined with the phenomenon of post-truth, has materially tarnished the democratic process.

As a justification, it is necessary to state that this reality brings legal and academic challenges, since the unbridled evolution of technology outpaces advances in legislation in attempts to regulate this environment, requiring more drastic regulation of ICTs in order to hold accountable all those involved in the disinformation phenomena that affect Democracy. Furthermore, strategies are needed for legislation that protects the democratic process and citizens' free choice without compromising the right to freedom of expression and the right to information.

The aim of this work is to verify whether digital platforms and social networks, through their systematic extraction of user data, lead to disinformation phenomena and tarnish democracy. The aim is also to: i) analyze the systematic action of social networks and digital platforms in extracting user data and using it for political purposes; ii) discuss the influence that this systematic action has on democratic processes combined with other phenomena such as post-truth and its consequences on constitutional guarantees such as freedom of expression and the right to information; and iii) propose regulatory and social alternatives to mitigate risks to the integrity of democratic processes.

## **2 The phenomenon of fake news in the face of the democratic process**

### **2.1 What is fake news?**

The processes of production, accumulation and transmission of information have accompanied the entire historical evolution of life in society. The *modus operandi* through which human beings have gone and continue to aggregate knowledge about the facts they experience and encounter, that is, their way of forming information, can be understood as the

Process of forming meanings of facts, based on knowledge, events, speculations, actions and projects, whose content is influenced by the environment in which the subject is inserted, confirming facts and trends, which can result in the accumulation of knowledge and the construction of memory. (Basan; Borges; Faria, 2020, p. 86).

In this sense, it is understood that the formation and transmission of information are vital to the maintenance of societies, given that they bring together knowledge and the construction of memory of the subjects involved.

With the evolution of the means of communication, and especially after the advent of information and communication technologies (ICTs) as well as the consecration of the digital society and digital platforms, the means of forming information and the forms of communication have been completely modified.

In a society that lives online, the communication pattern cannot be the same as that of those societies that communicated through smoke signals. Nowadays, all – or at least the vast majority – of interpersonal contacts and searches for information are now carried out through the digital environment, which has become the most sought-after gateway to access the world. In the reality consecrated by social networks, “connected individuals become dependent on virtual flows of information and social integration and digital networks, in fact, become fundamental links in the acceleration of life and the fragmentation of the present” (Wilke, 2020, p. 11).

The Internet has made life in society easier, given that people no longer need to spend so much time and face so many obstacles in order to access and disseminate their opinions. The improvement of digital technologies has had an impact on various areas of life, from the way we communicate, to searching for information, to connecting with the world in all its parameters and possibilities. Seen from this perspective, the context of networks has an undeniable potential to facilitate community life and, in the political sphere, has a broad democratic basis, since it directly affects the constitutional right to information.

Information allows the construction of critical judgment and knowledge capable of guiding decision-making. For this reason, the right to it is enshrined in the Federal Constitution of 1988, in art. 5, XIV, which establishes that “everyone is guaranteed access to information and the confidentiality of the source is protected, when necessary for the exercise of their profession”. The Constitution also guarantees access to public information, to be provided by public bodies (art. 5, XXXIII), a guarantee that was subsequently regulated by the Access to Information Law (Law No. 12,527/2011).

Reasonableness requires that any and all dialogue, whether inside or outside the digital environment, should be based on facts and not the other way around. However, while technological evolution has facilitated this access and communicative exchanges around the world, on the other hand, it has also contributed to the access and dissemination of misinformation, both accidentally and deliberately, going against what was expected from such a broad environment with so much information added all the time.

The right to information, in its three nuances – to inform, to be informed and to be informed – is exactly the opposite of this. Its protection by the legal system only occurs because it is related solely to “(...) true information, and it is unreasonable to imagine that the Law protects the possibility of someone being informed based on something that is harmful or reporting something that could harm others or Society” (Faustino, 2023, p.9).

In this sense, the duty of truth contained within the right to information is related to the duty of caution of those who are going to inform - mainly to seek appropriate sources -, because if this person has the right to inform, the listener has the right to be informed (Faustino, 2023, p.9).

With the world of possibilities established by the internet, instead of removing the duty of caution from those responsible for creating or transmitting information on it, on the contrary, they have the responsibility to increase it. As Zanon Júnior (2010, p.147 *apud* Faustino, 2023, p.9) rightly points out, “although the expression of thought is free, when related to the right to inform and be informed, a need for truth in the content is presumed”.

This means that, under any circumstances, facts cannot be subject to distortion of any kind, and should only provide the basis for debate. It turns out that, especially in the digital environment and during political periods, factual truth has been manipulated, biased and distorted according to political objectives and personal or group interests, since, as “facts and power are in the same realm of reality” (Wilke, 2020, p. 13), facts are constantly harassed by and for power.

It was in this context that the problem of the present study emerged and became established, which is a disinformation process that permeates the democratic environment and which came to be known as the phenomenon of Fake News.

This emerging phenomenon gained this name when it showed itself in the form of an unbridled dissemination of false news, fake news. Wilke (2020, p.13) defines it as “information published with the intention of deceiving in order to harm individuals, collectives, organizations, institutions, with the aim of obtaining economic or political gains.

The consequence of this fraudulent news is disinformation”. Thus, it can be understood that this is information – usually of a political nature – that is distorted, with the aim of obtaining personal benefits to the detriment of a third party.

This phenomenon brings with it a problematic potential for distorting reality, especially since it can be formed by deliberately false news as well as true news taken out of context, sensationalist, and dishonest. Whether intentional or not, deliberately aiming to misinform the interlocutor or not, the consequence is always the same: a society that is politically uninformed and relies on fake news to make decisions that will change the political destiny of its realities.

## **2.2 Fake news, democracy and the role of digital platforms**

The information crisis observed on social media can be the subject of several speculations about its reasons. One of the variables to be observed is the fact that the population itself is constantly used as an instrument to disseminate false narratives, a situation that seems to worsen during election periods. Whether due to attachment to an ideological narrative, because they aim to achieve their own interests by electing a candidate or because they truly believe in the news they are transmitting, groups with the same political position begin to exhaustively share fraudulent, false or biased political content, initiating the process of mass disinformation.

This process has been particularly emerging in groups formed by people with the same interests or political positions on social media. David Weinberger (2004) gave these “ideological bubbles” the name Echo Chambers. According to the author (*apud* Wilke 2020, p. 16), such chambers are “spaces on the internet where people with similar affinities tend to listen only to those who already agree with them”. In the current reality, examples include WhatsApp groups, Facebook pages etc.

An interesting observation about the Echo Chambers addressed by Weinberger is that they bring with them a paradox: instead of users using the ease established by networks to access the vast published views and check the facts with which they come into contact, these people start to seek information only in groups that share the same narrative, the same ideological position. And the worst part: they never check the information that is transmitted and shared in these groups.

The consequence is that, if this news is fake news, it will be transmitted, stored, kept in the memory of each of these people who did not check it and transmitted to new individuals, restarting the cycle. Thus, people who were already politically uninformed have their bias reinforced due to the Echo Chamber.

The information process only occurs when there is respect for the veracity of the fact, the existence of a counterpart, argumentation and verification of sources. There is no way to consider oneself truly informed without verifying the veracity of that information, or at least having contact with other versions of that news. Thus, environments such as Echo Chambers on social networks become fertile grounds for the proliferation of fake news during election periods because, given the narrative comfort of these environments, there is no longer any debate and checking of information, and fake news quickly proliferates.

Unfortunately, this is only the tip of the iceberg of the phenomenon. As if that weren't enough, in addition to sharing being done by users with the same ideological stance in their "information bubbles", what has been observed is that the modus operandi of digital platforms no longer prioritizes verifying the veracity of the shared fact itself, aiming only for it to be shared by the largest possible number of users, generating engagement, massification, and clicks.

The structure of social networks and the way their algorithms map and disseminate publications and information according to users' tastes directly influences the maintenance of this phenomenon. This is because what occurs is practically the formation of a large-scale Echo Chamber, as a person interacts and engages with a publication of a certain content, and from that moment on, the algorithm of that network starts to bombard them with similar content, without controlling the content and veracity of those facts.

This system was only able to be implemented because, thanks to digital platforms and their procedures, the entire context of social organization was changed. This had already been predicted by Castells (2011) when he discussed how the emergence of networks would interfere in the political organization of individuals:

They may leave the squares, to return to them periodically, but they will not leave the social networks and the minds of those who participate in them. They are no longer alone and have lost their fear. Because they have discovered new forms of organization, participation and mobilization that have come out of the traditional channels, which a part of society, the majority of young people, distrust. The parties and institutions will also have to learn to live with this emerging civil society. If not, they will be emptied from within as citizens move from Wikicamps to this networked democracy, yet to be discovered in a collective practice that has its roots in each person. (Castells *apud* Basan; Borges; Faria, 2020, p. 78).

As Castells warned, social networks have become the core of contemporary social life. With this, they also bring with them new forms of political organization and mobilization. Within this new structuring of Democracy, made possible by the digital environment, the proliferation and rooting of fake news is almost consecrated as a pathology.

Regarding the consequences of this phenomenon for the democratic process, Bucci (2018, p. 27 *apud* Wilke, 2020, p. 16) cites as an example Donald Trump's campaign for the presidency of the United States of America in 2016, which convinced half of the country's population that Barack Obama had been born in Kenya in less than two days. Another controversial case that demonstrates the damage caused by this phenomenon to Democracy was the case of Cambridge Analytica, which used user data to direct behavior for political purposes, discussed below.

The authors Fornasier and Beck explain how this systematic collection and processing of user data occurs, in order to catalog it and enable the targeting of political content on a social network. In the case they addressed, the *modus operandi* of the company Cambridge Analytica through the social network Facebook was dissected, directly affecting the 2016 American elections:

CA's *modus operandi* was divided into three attack fronts: the first was responsible for collecting, storing and processing personal data on Facebook, including, by way of example, personal photos, insignificant everyday posts, friends list, list of blocked people, groups that people joined and groups in which they actively participate. [...]. By clicking to take the test on Facebook, however, almost all users (those who did not read the terms and conditions of the survey and the application's privacy policy) gave CA access to collect their personal data – by way of example: age, color, religion, height, region where the individual lives and works, their geolocation, where they usually walk, their walking pace, access to all their posts, photos and files that were posted on this social network. (Fornasier; Beck, 2019, p. 187-188).

Thus, with access to any and all information already made available by that user on the platform, the company's procedure for cataloging user data began and, thus, with access to almost all data from the vast majority of American voters, Cambridge Analytica was responsible for processing and manipulating it for political purposes.

The authors, when reporting the second stage of the company's procedures during the 2016 US elections, refer to another group being responsible for mining the information from the database obtained, in order to search for undecided votes in the American Confederate States. Thus, in states such as California, Florida and New York – usually known as “joker states”, where votes can swing either Democratic or Republican – employees were tasked with creating targeted attacks of fake news on votes, which they call “persuadable” (Fornasier; Beck, 2019, p.188-189).



The consequence was a true unethical manipulation of American Democracy. The procedure ended with the mass production and dissemination of fake news, targeting these strategic users, with the intention of artificially fostering social polarization and manipulating their political positioning. The last group of Cambridge Analytica employees managed, successfully and contrary to everything that had been desired by the Founding Fathers (founders of the United States of America), to polarize groups in the same way as in the “Brexit” in the United Kingdom (Fornasier; Beck, 2019, p. 189).

This entire phenomenon and its mode of operation are consecrated thanks to the context solidified by digital platforms, which Shoshana Zuboff (2019) called the Era of Surveillance Capitalism. The systematics of Surveillance Capitalism allows it to exist because the technological structure of information technologies, especially on social networks, transforms user interactions in the digital environment into data.

This data, as demonstrated in the case of Cambridge Analytica, is collected, stored, processed and sold to companies interested in identifying users and discovering what type of (mis)information they are susceptible to. According to Wilke (2020, p.19), “[...] It has also expanded the segmentation of information, a fundamental aspect for triggering specific fake news, which appears as a kind of fake news tailored to certain groups of individuals who need to be mobilized”.

Thus, if a given user demonstrates increasing interaction with a given type of content, their access, search, likes/dislikes and sharing data will be stored by BigTechs, such as Google, Meta and Microsoft, which use them to interact with that content, processed in order to catalog their profile and, finally, sold to those interested in producing content aimed exclusively at that audience.

According to Shoshana Zuboff, all of this is possible because Surveillance Capitalism

Unilaterally claims human experience as raw material for the translation of behavioral data. Although some of this data is applied to the improvement of products and services, the rest is declared as the owner's behavioral surplus, feeding advanced manufacturing processes known as “machine intelligence” and manufactured into prediction products that anticipate what a given individual would do now, in a little while and later. Finally, these prediction products are traded in a new type of behavioral prediction market that I call future behavior markets (Zuboff, 2019, p. 21).

In this way, the behavioral surplus of users becomes a bargaining chip and, in the political context, based on each user's interactions on the social network, their likes/dislikes, shares and searches are collected and sold in order to identify each user, so that they can be

politically mobilized through the targeting of publications on this network. And this is exactly what happened in the 2016 US elections.

This system facilitates the breaking of ties with true Democracy, because according to Ana Luiza P. C. Marques (2021, p. 29), there is:

- (i) the breaking of ties with the democratic regime, which, more than being despised – as in classical neoliberalism – comes to be seen as an obstacle to the development of the economic activity of surveillance capitalists; (ii) the lack of commitment of technology companies to the quality of information; (iii) the increase in social polarization, due to the design of technology platforms; and (iv) the personalization resulting from this same design, which leads to the absence of a minimum common content for users of digital platforms. (Marques, 2021, p.128).

What can be seen from Ana Luiza P. C. Marques's view is that democratic regimes in their essence do not combine with these capitalist surveillance activities. Furthermore, this factor becomes even worse when the source of behavioral surplus and object of targeted advertising becomes the user-voter.

Even though Cambridge Analytica no longer exists, there are indications and surveys that demonstrate the creation and recreation of countless other companies, in Brazil and around the world, with the same purpose, such as Ponte Estratégia, in Brazil (Fornasier; Beck, 2019, p. 190).

The scale of interference in the democratic process that this phenomenon can reach is absurd, considering that a single company, for around 20 years and allegedly non-profit, managed, in the run-up to the 2016 US elections, to obtain 1,500 reference points per individual for a population greater than 300 million citizens at the time (Fornasier; Beck, 2019, p. 187).

As an example, one can imagine the following situation: it is known that a certain population group harbors an aversion to a certain political party. The system present in the era of Surveillance Capitalism allows us to know the feelings and opinions of these users, the “information bubble” to which they belong, their fears and political positioning.

Manipulation occurs when the interaction data of these people is sold to interested parties, who will know what type of (mis)information should reach these voters so that they feel emotionally affected and, therefore, inclined to share it, giving rise to a cycle of misinformation that will tarnish the democratic electoral process.

A discourse is created against the system or against opponents, formed by fake, fraudulent, biased and manipulated news in order to create “us against them” and “us against the system”, and which destabilizes the democratic system, the electoral process and trust in

the press, as well as in the information provided by any journalist or government entity. The consequence is the material stain of the democratic process, as voters begin to rely on misinformation – tailored to each of them – to justify the choices that will determine the future of society.

## 2.3 The role of populist leaders

Populist leaders play a fundamental role in this endeavor. In those moments when the population finds itself destabilized, distrustful and disillusioned with its representatives, charismatic leaders come up with easy solutions, proposals to give “a voice to the people” and, targeting and affecting the emotions of voters, resurrect, in a distorted way, the feeling of representation.

For Eatwell and Goodwin (2020, p. 59-71), the context often referred to as “populism” can be understood as the home of extremist denialists and an increasingly important step on the path to fascism. This is because, in essence, it is represented by charismatic leaders who apparently speak on behalf of the people and, to this end, use common and crude language to simulate proximity to the “real” masses.

Thus, if it is in the interest of a populist candidate’s campaign, democratic institutions themselves are placed as enemies in the new discourse. The consequence is the erosion, first of the electoral process, and then of Democracy itself. According to Levitsky and Ziblato:

Some do it with a single blow. More often, however, the attack on democracy begins slowly. For many citizens, it may, at first, be imperceptible. After all, elections continue to be held. Opposition politicians still have their seats in Congress. Independent newspapers still circulate. The erosion of democracy happens gradually, often in very small steps. Taken individually, each step seems insignificant – none of them actually seems to threaten democracy. In fact, government initiatives to subvert democracy usually have a veneer of legality. (Levitsky; Ziblato, 2018, p. 30).

Most of the time, the modus operandi of these populist leaders, in their electoral endeavor based on fake news, consists of directing attacks through social media to anyone who questions their narratives. Interestingly, these speeches do not oppose or diminish the importance of Democracy, but rather state that it can only be achieved through their own methods.

The consequence is the erosion of Democracy itself, given that the deep-rooted thinking is that the solution to problems can only be achieved through those politicians and those

speeches, and the opposition's proposals cease to become the core of the debate, giving way to personal attacks and the dissemination of lies.

### **3 The post-truth phenomenon**

One of the ways found to make this disinformation strategy work, especially in a political context, was to directly attack voters' emotions, fears and feelings when sending them news/information. This is observed, for example, because in these groups, “we are discursively created in opposition to the other, discursively unintelligible” (Kalpokas, 2019, p. 64-65).

The social context that fosters this phenomenon, called the “post-truth era”, has been one of the main reasons pointed out by researchers for the systematic use of fake news to have entered the doors of the Brazilian democratic process with such assertiveness, especially in recent years. When post-truth becomes established, factual truth loses value, and in turn, the appeal to the emotions of the message receiver gains prominence.

The term was first used in 1992 by a Serbian-American playwright, Steve Tesich, when referring to conflicts occurring in the Middle East at the time (Tesich, 1992 *apud* Basan; Borges; Faria, 2020, p. 86). However, given the emergence of the phenomenon of disinformation in 2016, during the presidential race in the United States of America, Oxford Dictionaries recognized the term post-truth as the word of that year, having attributed to it the meaning of “circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief” (Washington Post; 2016 *apud* Pansieri; Kraus; Pavan, 2021, p. 4).

It was in 2016 that post-truth encompassed this political spectrum, given the growing capacity, through ICTs and with the aim of manipulating American voters, to generate “an endless number of versions of events” (Basan; Borges; Faria, 2016, p. 86). Thus, what occurs is a phenomenon of manipulation of facts, sometimes formed by information that is neither true nor false, in order to affect a certain feeling or personal belief of the listener. This is even more possible because, in the context of elections or democratic crises, for example, facts and events are difficult to verify, and the creation of a falsehood or a post-truth becomes even easier.

Thus, facts that were previously considered indisputable become the target of suspicion, as those interested in fomenting polarization manipulate voters – whether they already share

their ideological position or not – by distorting information in order to affect the emotions of those voters. Against the backdrop of a post-truth era, they begin to emotionally attach themselves to that narrative, since the veracity of the fact itself will matter little compared to the emotional impact of that information.

A true attachment to the narrative is created, with little regard for the veracity of the facts that will be shared and disseminated, as long as they reiterate a bias of thought and convince other people that it may be true. In this way, another variable is added to the erosion of Democracy.

## **4 Fake news, post-truth and social networks: consequences for the democratic process**

As demonstrated, social networks have established themselves as the perfect environment for the consummation of post-truth and the propagation of fake news during the electoral period. The dissemination of fake news on networks depends solely on the type of behavior that this voter-user demonstrates when accessing the platforms, since their data will be collected and processed in order to offer them more content with which they will interact.

From the moment that traditional media outlets – which verify the source and veracity of information – lose ground and social networks and Echo Chambers become the primary sources for searching for information about elections, voter-users become pseudo-journalists.

Thus, the BigTech system, which enables the existence of Surveillance Capitalism, is the key step for populist leaders to act, Echo Chambers to function, fake news to spread throughout the country and the phenomenon of fake news to influence the democratic process.

Fornasier and Beck (2019, p.193) address the interference in the North American democratic process, when they highlight that “[...] Cambridge Analytica, with its practice, left the world not without first destabilizing democratic processes in some of the world's greatest powers; millions of citizens had their intimacy and privacy collected via social media in exchange for electing the candidate who paid the company the most”.

The combination of all the factors discussed, with a society marked by a deficit in digital education and literacy, which is now highly polarized in political terms, ends up creating a fertile space for populist discourses to grow, post-truth to take hold, and methods of disseminating disinformation on social media to look like the closest thing to achieving an electoral victory.

The consequence is that the democratic process itself is tarnished, even if not in the formal sense, but in the material sense, since a vote based on disinformation cannot be considered a free choice. Furthermore, the guarantee of freedom of expression is distorted by being used as a shield to violate other constitutional guarantees, such as the right to information.

Thus, the cycle is consecrated. The population finds itself attached to a feeling of betrayal by the representatives it elected, needing a leader to give it a voice. The populist leader emerges with the promise of being “the true representative and spokesperson of the people” (Mounk, 2018, p. 42), solving problems quickly and easily, and “fighting the system.” The population becomes emotionally attached to that narrative, even if it is based on false information, because they feel validated, and shares it, consecrating the post-truth. Democratic institutions and the electoral process itself become targets of distrust. In D’ancona’s view (2018, p. 2), it was the crisis of confidence in Democracy that provided the very basis for the post-truth, as it began with the population’s discontent with the positions of elected officials.

As stated, the behavior of voters consumed by this system only contributes to the perpetuation of the problem. Some are consumed by post-truth without any trace of critical thinking, others are deliberately lying with political interests in mind, and they become true machines for the dissemination of fraudulent and biased speeches and, when challenged, they seek to justify themselves by the freedom of expression.

The constitutional guarantee of freedom of expression is enshrined in art. 5, items IV and IX and 220 of the Constitution. These provisions establish that “the expression of thought is free, and anonymity is prohibited” (art. 5, IV), “the expression of intellectual, artistic, scientific and communication activities is free, regardless of censorship or license” (art. 5, IX) and that “the expression of thought, creation, expression and information, in any form, process or vehicle, shall not be subject to any restriction, in accordance with the provisions of this Constitution” (art. 220, caput), with “any and all censorship of a political, ideological and artistic nature being prohibited” (art. 220, §2).

It is noteworthy that, since its advent, the internet has become one of the main means of exercising freedom of expression (Silva; Silva; Gonçalves Neto, 2021 p. 6). However, more often than not, it has been used – because it guarantees anonymity or thanks to its algorithmic capacity – in a way that exacerbates this guarantee to the detriment of other constitutionally guaranteed protections. The right to freedom of expression cannot be considered in an

absolute manner, without considering the current constitutional structure, the need to respect other rights and the axiological hierarchy constructed by weighing freedoms and rights (Silva; Silva; Gonçalves Neto, 2021).

When there are conflicts of constitutional norms, such as freedom of expression, the right to true information and popular sovereignty, the weighing technique must be used, ensuring the application of the norm that best suits the legal system (Sampaio, 2013 *apud* Silva; Silva; Gonçalves Neto, 2021, p.7). In this sense, “the dignity of the human person is indicated as the basis for the interpreter's performance, having an important weight in the weighing system” (Silva; Silva; Gonçalves Neto, 2021, p. 7).

In this sense, Hannah Arendt (2016, p. 182) points out that “the same occurs when the liar, without the power to make his falsehood convincing, does not insist on the biblical truth of his assertion, but intends this to be his ‘opinion’, to which he claims constitutional right”. This guarantee cannot be used to commit crimes, and when it is put in check by other fundamental rights such as those that advocate human dignity or democratic institutions that guarantee the Democratic Rule of Law, it must be relativized.

Today, there is some legislation in Brazil to combat disinformation in the digital environment. The Electoral Code, in its art. 323, provides for the penalty of imprisonment of two months to one year or a fine for anyone who disseminates false facts during electoral propaganda or campaigning. The Election Law (Law No. 9,504/1997), in turn, establishes a fine for anyone who conducts electoral propaganda on the internet by unduly attributing its authorship to third parties, in addition to providing for detention for hiring people with the aim of offending the image of candidates.

In addition to these provisions, the Fake News Bill (Bill 2,630/2020) is currently being processed in the National Congress, which aims, according to the Summary, to establish rules regarding the transparency of social networks, the responsibility of providers, combating disinformation and sanctions for non-compliance.

However, although the lack of application of legal provisions cannot be confused with the absence of legislation, it is undeniable that the protection and regulation currently existing in the country are insufficient to curb such practices, given the unbridled evolutionary process of social networks and technology giants, phenomena for which Brazilian legislation was not prepared.

For now, even with the advent of the Internet Civil Rights Framework (Law No. 12,965/2014) and the General Data Protection Law (Law No. 13,709/2018), the existing

legislation does not cover the protection of user data, and given the direct consequences of this phenomenon on voters, nor does it cover the maintenance of the fairness of the democratic process.

The position of the Supreme Federal Court and the Superior Electoral Court, in turn, has been more assertive, as can be seen from the analysis of Direct Action of Unconstitutionality (ADI) 7261/DF. This action was filed by the Attorney General of the Republic, seeking the declaration of unconstitutionality of articles 2, caput and §§1º and 2nd, 3rd, caput, 4th, 5th, 6th and 8th of Resolution No. 23.714/2022 of the TSE, which aims to “combat disinformation capable of affecting the integrity and fairness of the electoral process in Brazil” (art. 1º), and was judged on October 26, 2022.

The contested provisions, in summary, prohibit the sharing of knowingly untrue facts that affect the integrity of the electoral process; allow the TSE to determine that they be removed by the platforms, under penalty of a fine; authorize the TSE Presidency to extend the collegiate decision on disinformation to other identical situations and to temporarily suspend profiles that systematically produce fake news. Thus, one can perceive an assertive position on the part of the TSE in the fight against disinformation.

When called to comment, the STF, in turn, decided – by majority – that there were no elements that would lead to the decree of unconstitutionality of the rule. Among the arguments used, it is worth mentioning 1) the TSE did not exceed its normative competence when legislating on Electoral Law, as it is the legitimate holder of police power over electoral propaganda; 2) there is no rule of law or free society in a representative democracy that does not preserve, even with bitter and borderline remedies, the very normality of elections. As the grounds for the decision indicate, the STF's position is marked by the consideration of fundamental rights, such as freedom of expression and the integrity of the electoral process. The Court seeks to ensure freedom of expression, but understands that it is not absolute and must comply proportionately with the Brazilian constitutional framework.

With all this in mind, there is an urgent need for a more assertive position on the part of the Brazilian Legislature in combating the problem. There must be clearer and more combative regulation of the digital environment in Brazil, in order to hold accountable the platforms that 1) expropriate users' data to transform it into products without their consent; 2) use it as a basis for carrying out targeted attacks with the aim of manipulating elections; and 3) fail to monitor the dissemination of fake news on social networks, fueled by the use of algorithms.



Forcing those responsible to remove the content or temporarily suspend it from the platforms is not enough to effectively solve the problem. This is because once published, the content reaches hundreds of thousands of people around the world in just one second, and cannot be completely “deleted”. Solving the problem gives rise to civil, criminal and administrative liability for both the creators of fraudulent content and the companies responsible for cataloging users to sell their data and facilitate the dissemination of misinformation.

Regulations must ensure the protection of freedom of expression, while combating the dissemination of fake news that threatens the democratic process in the country. In fact, candidates themselves must be held accountable when they make clearly biased or fraudulent statements with the aim of manipulating voters, a form of accountability that has not been effective when these acts are committed on social media. In addition, public policies on digital education and digital literacy must be developed to equip citizens with knowledge about how to find sources in the world of networks.

Two examples of recent international regulatory frameworks are the Digital Services Act of the European Union and Loi No. 2018-1202 of 22 December 2018 relative à la lutte contre la manipulation de l’information of France.

The first, which came into force in November 2022, “aims to ensure a safe, predictable and reliable online environment in which fundamental rights are protected” (art. 1, 2, b of the DSA-E). This regulatory example covers not only companies located in the European Union, but also those that serve users in that location from another country (art. 1, 3 of the DSA-E). Operators of digital intermediation services were prohibited from hosting or disseminating illegal content – that is, content that violates the law of the European Union or of a Member State – although there is no general obligation to monitor. Unfortunately, there are no regulations on the criteria for verifying the alleged illegality of questionable content.

As for civil liability, “liability only arises when they are informed that actually or allegedly illegal material is available on their platform and have not reacted in accordance with the regulation” (Nettesheim, 2022, p.23). In short, the fundamental responsibility for the dissemination of illegal content remains with users who act illegally, with operators being responsible not for the content of others, but for their own incorrect conduct, when they become aware of the content and fail to act (Nettesheim, 2022).

In the other example cited, referring to French legislation, there is a clearer fight against false information and the manipulation of information. The law was enacted in 2018 with the

aim of combating fake news during election periods. Although it does not provide for safeguards for satirical/humorous content, which could become a problem, it addresses the concept of fake news directly – fausses nouvelles –, demonstrates concern about the problem of the extraterritoriality of fake news and provides for penalties of imprisonment and fines (Meneses, 2019, p.10).

## 5 Conclusion

In view of the analysis developed here, by way of conclusion, we have confirmed the hypothesis that digital platforms and social networks play a central role in the disinformation process that has tarnished Democracy in recent years, especially through the expropriation of user data and the algorithmic capacity used to reinforce biases. This system, combined with other factors such as the existence of populist leaders and phenomena such as post-truth, have allied themselves in the erosion of democratic processes.

The democratic process does not truly exist when the choice of representatives is not made in a free and informed manner. Uninformed or biasedly informed freedom is not freedom, and, therefore, there is no Democracy. Furthermore, Brazilian legislation always seems to be playing catch-up when it comes to regulating the digital space, as the legislative process is very slow to keep up with the evolution of networks.

Therefore, it is understood that there is an urgent need to protect the democratic system and the free choice of representatives, through the regulation of the digital environment so that it can control and prevent the dissemination of fake news with political objectives. This is because Democracy cannot be weakened by phenomena that move faster than the power of state regulation.

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