



New technologies, Social Media and Democracy

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ABSTRACT

This article aims to consider the impact of new technologies in the Brazilian elections of 2018, questioning about the possibilities of its transformation with the prominent use of social networks to directly connect citizens and candidates, without the customary intervention of political parties and traditional media. It also aims to discuss the role of fake news in the electoral process and the means to fight it, so it does not denature the free thought formation as a human right essential to the practice of citizenship in the new digital age.

Keywords: democracy; new technologies; political pluralism; fake news.

Nuevas tecnologías, medios sociales y democracia

RESUMEN

Este artículo tiene como objetivo considerar el impacto de las nuevas tecnologías en las elecciones brasileñas de 2018, cuestionando sobre las posibilidades de su transformación con el uso destacado de las redes sociales para conectar directamente a los ciudadanos y los candidatos, sin la intervención habitual de los partidos políticos y los medios de comunicación tradicionales. También se pretende discutir el papel de las noticias falsas en el proceso electoral y los medios para combatirlas, para que no desnaturalicen la formación del libre pensamiento como derecho humano esencial para el ejercicio de la ciudadanía en la nueva era digital.

Palabras clave: democracia; nuevas tecnologías; pluralismo político; fake news.

Novas tecnologias, mídias sociais e democracia

RESUMO

Este artigo visa considerar o impacto das novas tecnologias nas eleições brasileiras de 2018, questionando as possibilidades de sua transformação com o uso proeminente de redes sociais para conectar diretamente cidadãos e candidatos, sem a habitual intervenção dos partidos políticos e da mídia tradicional. Visa também discutir o papel das falsas notícias no processo eleitoral e os meios para combatê-las, para que não desnaturalize a livre formação do pensamento como um direito humano essencial à prática da cidadania na nova era digital.

Palavras-chave: democracia; novas tecnologias; pluralismo político; notícias falsas.

INTRODUCTION

This text presents the first approximation to the post-doctoral research problem of the co-author, under the orientation of Prof. Jose Luis Bolzan de Moraes at the PPGD (Post-Graduation in Law Program) of the Law School of Vitória/ES with the title *Democracia, Novas Tecnologias e Instituições e Garantias Eleitorais* (Democracy, New Technologies and Electoral Institutions and Guarantees). The paper was developed during the co-author stay as a Visiting Scholar at the University of Seville, Spain, in January of 2019, under the supervision of the Philosophy of Law Department Professor, Doctor Alfonso Julios-Campuzano.

Since the Paleolithic, humankind seeks to surpass its own limits through technology. The image of the primitive man making artefacts of flint rock, the discovery of fire, written word, the use of the printing press, the telegraph, the radio, electricity, the dissemination of television, getting to the current way of communications, the absence of geographical or spatial limitations with the use of the Internet, all of them are symptomatic of the relentless technological evolution and its application in the recesses of life. The First Industrial Revolution, as a great landmark of the occidental society, allowed the use of steam machines to amplify production, a moment in which the technological process was submitted to a big stimulus, very accelerated in the decades following World War II with the massive use of robotics in the industry, gaining another form in the end of the second millennium by means of new communications technologies in the core of the cybernetic evolution, the later one already regarded as a fifth generation fundamental right (Wolkmer, 2019).

It is the society of sensors (De Menezes Neto & Bolzan de Moraes, 2018), in which investments are made in clairvoyant computers, that utilizes mathematical analysis of past data supplied by humans connected to the network. There are sensors everywhere, inserted in completely automatized smart homes, using cellphones, watches, bracelets, clothes, automobiles and home appliances to generate sounds, images, numbers, feelings and emotions. That is, monitored people and environments irradiate data that is accumulated, processed and mined, transforming information in money or power (De Menezes Neto & Bolzan de Moraes, 2018). The "network" is the new ideology of boundless capitalism.

This escalation hit everybody, from the most intimate personal, ludic, and sensory spaces to the professionals of any area, reaching politics, transforming democracy, and revolutionizing the vote as a mechanism of external control of public representation.

The expansion of popular participation through social networks on the Internet gives a new face to democracy, stemming from the information flow instantaneity, the suppression of physical barriers, and the feeling of direct cooperation with the political representatives. The network communication overthrew governments, incited

social movements, and elected important leaders throughout the World, brought politics to the heart of families, opposing generations, ignoring distances and limits to the debate, be it age, subject or even commitment to the veracity of information (*e. g.* fake news, that should be treated as a dysfunction that contaminates the freedom of communication and the right to be correctly informed).

Undoing the myth of neutrality, this communication also makes the invisible and alien manipulation possible, as seen in the recent scandal from the United States of America that resulted in the election of Donald Trump by interference of Russian agents acting against the adversary candidate, Hilary Clinton, whose political instances was not favorable to them —ending in a criminal lawsuit before the Grand Jury of the District of Columbia (EUA Criminal No. 18 U.S.C. §§ 2, 371, 1349, 1028A, 2018)—. Another dramatic example, generating an endless crisis in Europe, is the so-called *Brexit* scandal, *i. e.* the referendum made by the United Kingdom to decide about staying or exiting from the European Union. The company known as Cambridge Analytica acted in this case, hired by the group that wanted the exit from the bloc. As in the USA case, by using data from millions of Facebook users as base, that company developed software capable of influencing voters' choices by coordinating the spending on publicity aimed at segregated groups such as undecided voters, aiming to persuade them.

Francisco Balaguer Callejón (2018) explains both cases as clear examples of democratic regression that affects the State's volition construction internalized by the work of global agents in search of their own interests, already unveiling the networks' lack of neutrality. Despite that, the networked society's positive potential is fantastic, stimulating popular participation in the management of public businesses, giving new communication channels to the rigid model of the current —and in crisis— representative democracy, the possibility of greater visibility of powers through the access of information related to State's and its manager's¹ practices being an example of that.

However, there is a necessary investment in educational public policies to capacitate citizens to fight digital illiteracy. To educate is, still, an inexpensive and long-lasting remedy against manipulation using hate and prejudice. It also allows the development of abilities regarding the adequate use of technology for leisure, work, school, family, and, fundamentally, politics. Furthermore, because not everything is goodness in the digital realms exploited by the great capitalistic platforms, the development of effective mechanisms of control, regulation and accountability is crucial to avoid the violation of rights. Therefore, the theorem is how to utilize new technologies, interconnecting people, and reducing distances between local and global, in order to update and strengthen human rights and democracy itself.

With that picture, this paper aims to foment the debate to offer contributions to the exercise of citizenship in social networks in Brazil, having the political rights as an

¹ In Brazil, for example, there was the adoption of the LAI: Information Access Law, n° 12.527/2011.

immediate horizon. Revision of literature and jurisprudence research were the techniques adopted to reach the conclusions presented at the end, all under the benchmark of citizenship and pluralism as foundations of the State (Art. 1, subsections II, III and V, of the Brazilian Constitution), that has the duty to promote and stimulate scientific and technological qualification (Art. 218 of the Brazilian Constitution).

Divided in three parts, the paper begins with a broad location of the subject in the Brazilian elections and the use of WhatsApp as a publicity vehicle of free and simplified access, but enabling the creation of fiefdoms, thus hindering the flow of dissenting information and external control due to end to end cryptography. The debate over the app's access block as a sanction to collective rights violation in direct accountability to the technology owner is also presented in this part. After that, the communications model that the new technologies brought to the elections in Brazil, surpassing the paradigm of radio and TV as the major media vehicles to political rights and the possibility of exclusion of political parties, will be introduced. Lastly, the network's manipulation as abuse of media vehicle will be presented, an illicit act that should be looked upon by the control bodies towards making all the involved, user and beneficiary candidates (without forgetting the platforms, due to the malicious use of technology) accountable.

2. THE 2018 BRAZILIAN ELECTIONS IN THE "NETWORK"

The impact of new technologies with the prominent role of group chats in the last Brazilian elections has amplified the debate over the necessary protections of political guarantees, even more so than to individual rights to communication, specially free thought formation and pluralism, keys in making the democratic system legitimate.

The highlight was the intense viral spread of fake news and hate speech without any limitation, made secret by end to end cryptography, with evidence of manipulation by economic groups aiming to affect the election's result (Campos Mello, 2018). The use of personal data to illicitly access the network (Campos Mello & Rodrigues, 2018), and the boosting of content without legal authorization were present, bluntly colliding with the law and the inviolability of privacy, legal tenets fixed in the Brazilian Civil Rights Framework for the Internet (Presidência da República do Brasil, 2014), made to allow some governance over the network.

In the same way to what happened in the United Kingdom with the *Brexit* referendum and in the USA elections with *Facebook*, the Brazilian campaign strategy regarding WhatsApp was the creation of an "ecosystem" (Roque & Bruno, 2018) from "interests that are not restricted [only] to politics" (Roque & Bruno, 2018).

Esther Solano Gallego (2018) explains that WhatsApp groups are formed like fiefdoms, "based on proximity, affinity and trust relations where strangers and those that dare to disturb the harmony with dissenting opinions will be blocked", prohibiting

the flow of divergent positions. This is the negative nodal point of this communications practice because "without dissenting opinions there is no democracy" (Solano Gallego, 2018), besides, it prepares "the terrain to the spread of fake news in an undemocratizing information process" (Solano Gallego, 2018). Turning communications into a fiefdom, supported by superstition and prejudice, created to cloud and accentuate fear, brings to the spotlight, in another view, the disbelief in the traditional scientific process of mediation to interpret the facts of politics.

In former times, "it was socially agreed and established that politicians, press, teachers, intellectuals were the mediators to understand the World" (Solano Gallego, 2018) opening the possibilities to the path of knowledge and information. The point is that nobody knows anymore who decides what is true, even if it is temporary and factual (Popper, 1974), in the disintermediation process that flows into anti-intellectualism and ignorance as virtues. It is the fight of science against the post-truth, and the defense of the apolitical as a safeguard in the public arena. Oreste Massani (2018) says that it is the misery of the new populist political class that reverberates in all public life, poisoning it.

The struggle against falsehood and hate as electoral campaign engine can only be made through digital literacy, with human rights education and lots of good quality information made by multiple media channels, guided by basic ethics of information publishing: the demonstration of facts absent of distortion and the responsible checking of the source. There should be a constant stimulus to the free press and to the multiple means of communication, so the focus will be on inhibiting immediatism, which inhibits reflection and the intellectual maturing process of plural societies. All of that without reducing the urgent necessity to deeply know the formative structure of the network, extremely cloudy and controlled by unspeakable economic interests, as well as the building of new habits to break the trance of many of the connected citizens. This is one of the basic elements to use the network that claims the fulfillment of the promise made by the Brazilian Constitution: to foster and encourage technological training (Presidência da República do Brasil, 1988) in order to achieve political emancipation in the digital age.

Pedro García Aguado and Francisco Castaño Mena (2017) suggest that educating children to keep them safe in social networks with good examples, autonomy, control and responsibility, is a major contribution for drawing basic public policy also destined to young people and adults (Balaguer Callejón, 2018).

Besides education, another essential element is the control over the use and flow of other fonts of information and leisure, focusing the crucial warning from Francisco Balaguer Callejón (2018) regarding the multiple technical means at the network dis-

posal to manipulate public opinion². The control, after education, would protect the deliberative democracy, making sure that, to the adequate shaping of public opinion, a multiplicity of individuals and points of view present in the social setting are represented and allow a minimum draft of what is to come.

2.1 WhatsApp and Judicial Control

The number one social networking app in Brazil, WhatsApp ensures anonymity to many members of its exponential chain of contacts. Its ease of use makes it a powerful tool at the reach of everybody, requiring only a cellphone and internet access. From there to global access, without spatial boundaries, it is just a matter of time—little time, by the way—to reach a community of more than one billion people³, and integrate it at the same time.

The group communication, made secret by the app's cryptography, makes sure that only the recipient of the message has the key to unscramble the information of the sender, effectively creating the ideal environment to the toxic sharing of hate speech and fake news that irradiate through the network without limits, at the same time weakening this communication channel, made vulgar in its innovative generational role in politics.

The siege of dialogue, which causes the impoverishment of the communications process, produces not only illiteracy and intolerance. Strictly speaking, it hits the heart of democracy, since the hostility towards the different⁴ and the idiocy making of the masses through information manipulation (Ferrajoli, 2011, p. 55) is a millenary strategy to dominate. It presents itself equally as an illicit capable of imposing liability for the social damage caused, because the speech has the power to violate collective rights, particularly political ones, and in this case cannot be sheltered under the robe of individual free speech.

Citizenship is the practice of taking part in the public life with emphasis in the communication process to debate, vote, and take part in public matters: "These rights are only fully put into action when the public available information is not manipulated according to some interest, public or private" (Dias, 2017, p. 172). In this context, the State cannot renounce to the control and restriction of this technology to protect

² Original text: "La interacción entre redes sociales y democracia comienza a ser problemática. La reflexión sobre esa tensión creciente se ha centrado hasta ahora en la incidencia negativa de las redes sociales en el espacio público en cuanto que la creación de perfiles está generando filtros que producen burbujas (...) en las que quedan 'aislados' los usuarios, provocando diversas disfunciones. Entre ellas, la fragmentación del espacio público, la radicalización creciente de los diversos sectores de opinión que se mueven dentro de esas 'burbujas', la proliferación de las fake news, que se ve favorecida por la lógica de la polarización (...)"

³ This number was reached in July 2017, as per the company blog (https://blog.whatsapp.com/?l=pt_br).

⁴ Ferrajoli (2011) very well speaks of them subject in the third chapter of his work, highlighting that the crisis of democracy pass through the "denigrazione dei dissenzienti e dei diversi".

human rights: It must activate the Brazilian Civil Rights Framework for the Internet, inaugurated with Law No. 12.965 from April 23rd, 2014, that has important rules destined to the network governance and users protection, registering warnings, fines, temporary suspension, and even the prohibition of activities, as sanctions.

Besides, Brazil has experimented with the controversial suspension of WhatsApp in 2016, reaching the Federal Supreme Court through the abstract constitutionality action No. 5527, and the claim of non-compliance with the fundamental precept No. 403. During those occasions, the Federal Supreme Court lifted the block —determined due to the company refusal to provide data of users seemingly involved in criminal activities—. The precautionary measure was given because of a supposed protection of communications freedom, leaving a thorough exam to the ruling on the merit of the actions (Supreme Federal Tribunal of Brazil, 2016). Afterwards, exploring the subject in a public hearing (Supreme Federal Tribunal of Brazil, 2017a), the Federal Supreme Court chose elements linked to the right of information and to be informed, pondering limits to the judge acts, outside of the institutions of electoral guarantees, because the act was done during a period of time previous to the elections, and the app was not a subject of experimentation in the electoral process.

Even though they are incomplete, significant contributions from pundits, companies and entities involved are presented, making clear that, up to 2014, the application was not encrypted. Nowadays, that shows the possibility of using reverse engineering to remove the privacy from conversations between users when the illicit use is verified, breaking the major argument of the platform to prevent control. It was also made evident that the block does not hinder the network usage by other applications or providers, absent any obstruction to the right to be informed by other channels. Logically, this does not exempt that any sanction has to be adopted as a last possibility and supported on logical and coherent justification, under the substantial adversarial procedure so that it does not join the ranks of arbitrariness involving the network.

Elsewhere, the system administrators' duty to keep a connections register is evident, as determined by the Brazilian Civil Rights Framework for the Internet, in order to check potential criminal links. Under the terms of the same defining law, if after a judicial order the provider does not make the questioned content, it is without doubt that it may be liable for individual or collective damages.

From the public hearing it is possible to start the debate regarding the governance of the "technological tools present in each electoral period" (Presidência da República do Brasil, 1997, Art. 57-J), delineating public policy dedicated to the "good practices on electoral campaigns on the internet" (Presidência da República do Brasil, 1997, Art. 57-J). The progression of the debate, necessarily, goes through foment of self-regulation by initiative from the platforms themselves and participation of civil society, so that, for example, in WhatsApp case:

- a) A restriction to send again messages to infinite groups of recipients is implemented, precaution already adopted in other countries.
- b) The combat of fake accounts or manipulated by bots is constant.
- c) The creation of efficient communication channels to user complains and the suspension of the manipulated accounts, publishing periodical reports.
- d) The adoption of educational programs of democratic good practices, publishing messages stimulating respect to different opinions, to sexual freedom and to pluralism.
- e) To reserve slots to free political publicity, allowing the access of the poorer.
- f) A list of communication vehicles or webpages of fact-checking entities is kept, allowing source checking and fake news notification.
- g) The adoption of an *ombudsman*, made of various sectors of society.

Actually, in reference to the broad control, accompanied by the internal effort, the signing of national and international pacts is essential to internet governance in search of transparency and cooperation of the platforms, looking for the protection of goods and political rights as benchmarks.

3. ELECTORAL COMMUNICATION'S NEW MODELS

Certainly, the use of technological instruments in the electoral area is not something new in Brazil. It was announced in the 1980s⁵, and driven by the first electronic voting in the 1996⁶ elections; nowadays biometrics that allow the identification of each voter through the capture of personal data from a electronic fingerprint activated terminal are being used, reinforced by the online candidacy registration⁷. Also, the explosion of applications that gives access to services provided by the electoral judicial branch, as voter registration⁸, electoral illicit reporting⁹, internet fundraising and the

⁵ By the Law No. 6996 of June 7th, 1982, and Law No. 7444, of December 20th, 1985, that regulated the use and electronic processing of data in the electoral services.

⁶ Determined by Law No. 9100 of September 29th, 1995, that the vote reception will use an electronic ballot box, nowadays incorporating biometrics.

⁷ The candidacy registration request has become fully electronic, including the transmission of biographical info over the internet. This system is currently regulated by the Resolution No. 23.548/2017 of the Superior Electoral Tribunal, making possible real time checking and from anywhere on the planet through the Internet.

⁸ The *e-título* is an electronic version of the voter registration card that can be used to vote. The tool is available in virtual stores, as Play Store or Web Store, and needs just the voter personal data to generate a QR Code to crosscheck the apps information and the electoral judicial branch database.

⁹ Named "Sparrow", this application allows the reporting of illicit acts, including the transmission of photos and other data about the infringement using the network directly to the electoral judicial branch.

real time submission of campaign accountancy reports¹⁰, allows another perception to the communication model *en vogue*.

Today is different from that time, when the proximity was face to face between candidates and citizens, the vote was registered in a paper ballot, and the major communication vehicles, the so-called hot media, were radio and TV. Curiously, as remembered by Oreste Massari (2018), television broke into the political campaigns "starting with the famous debate between Nixon and Kennedy on September 26, 1960" (p. 10), being for many years the starlet of electoral processes. In Brazil, the apex was in the 2014 campaign, with the debate between Dilma and Aécio during the second round reaching millions of viewers at prime time. However, there was a sharp decline in the 2018 election due to the communications migration to social networks, as it will be commented in this paper. Aware of the use of technology in the electoral area, it is not too much to imagine the possibility of completely virtual elections in a near future, through the use of the blockchain¹¹.

Understanding the massive use of technology on electoral process it is not too much to consider the possibility of having elections conducted completely in a virtual environment in a near future, by using blockchain, for example, as Estonia does since 2005, currently voting even by cellphone (Simões Gomes, 2018); Sierra Leone, for the first time in March of 2018, experimenting the use of booths in one region of the country's capital (Müller, 2018); more recently, the Saratov Oblast region in southern Russia elected members of the Youth Parliament by means of this technology on December 2018, with a decentralized network distributed over voting booths, in a poll that lasted around seven hours and had forty thousand voters (Rocha, 2018). Before Russia, Switzerland and the USA State of West Virginia have made state parliamentary elections using blockchain (Rocha, 2018). Just a short distance from surpassing the already advanced paradigm of the electronic voting, the following question arises regarding the electoral publicity: is the hot media benchmark obsolete?

3.1 Electoral Publicity in the Network: The Overcoming of the Radio and TV Communication Paradigm

Under the aforementioned technological influx, the electoral publicity, previously concentrated in vehicles as radio and TV, was transferred to instant messaging applications, Facebook, Twitter, Instagram, and video hosting (with the creation of

¹⁰ The DivulgaCandContas gives remote access to all candidates' data and their accountancy, such as amount and source of financing, allocation of spending, direct and indirect donors, in other words, allows the checking of the formal financing of candidacies through a web hosted system.

¹¹ Blockchain, a chain of blocks, is explained in this way: "Imagine a huge notebook, in which the content is public and free to access and in which all the transactions made in the world are registered. The most interesting part is that the notebook is collective written, through consensus, in a way that every financial user can ceaselessly check the noted information. In a simplified way, the blockchain would be this notebook. It is an enormous decentralized and public data bank that, in the case of Bitcoin, monitors who is the owner of a certain amount of bitcoins. (...)" (Chagas Tavares & Drummond Teixeira, 2018).

YouTube channels). That shows a seeming overcoming of the radio and TV paradigm as great assets in the dispute. That could be verified in the governor state elections in Rio de Janeiro and Minas Gerais, in which both the elected, first time runners in small and little known coalitions or parties, won by a considerable margin —71,80% and 59,87%, respectively—, leaving behind long time leaders and of known command over this technology (Superior Electoral Tribunal of Brazil, s. f.). The presidential election had even richer examples, although the elected one was already a member of the federal parliament for around thirty years: Hardly a newbie. The difference, actually, was the pioneer usage of private networks made by WhatsApp and the public communications through Twitter, Facebook, Instagram and YouTube, abandoning debates on television, reinforcing the instantaneity of the direct contact between candidate and voters, and transforming the mass communication directed to the elections.

The digital revolution has reached the masses in an completely expansive manner (Castells, 2017), imposing the modernization of the communicative and representative acts, as rightly affirmed by Perez Luño (2014) with support on Habermas without overcoming the hot media, but significantly diminishing its role. In this way, traditional political institutions —*e. g.* parties— must take hold of new communication models, overcoming the analog format and intending some mediation in the digital society (Soares & Silva Ângelus, 2018), with the warning of Manuel Castells (2013) that the self-communications of the masses should be a technological platform for the culture of autonomy.

This autonomy, also announced by Perez Luño (2014), allows “the direct and immediate participation of citizens” (p. 17) heading to a society with no political parties, as he defended, but not without the risk of the “privatization of what is public by a charismatic leader” (Soares & Silva Ângelus, 2018, p. 126). In other words, the direct connection may create personalism, fertile ground for populism, as seem in the recent elections in the USA, Italy, Hungary, Poland, and Brazil.¹² Another problem is the atomization of social relations, reinforcing the prevalence of the strongest, not necessarily the best and most elaborate argument in favor of democracy, in the defense of their own marketing benefit, guided by global agents, as reported by Francisco Balaguer Callejón (2018). In addition, the rejection of traditional processes of popular demonstration in favor of the direct connection to the political leaderships announces a kind of *end of the State*, in a “process of deconstitutionalization” (Bolzan de Moraes, 2018) and emptying of its structures putting at immediate risk the democratic model, repeating the old authoritarian way of power shared between the ruling elite¹³ in detriment of the people.

¹² To achieve an excellent understanding of the world phenomenon, it is recommended the reading of Rivero *et al.* (2017).

¹³ According to Alfonso de Julios-Campuzano (2018), “Un análisis superficial de la historia reciente nos puede llevar a la conclusión de que el gran triunfador de nuestro tiempo es el sistema democrático como forma de organización política. Pero, desafortunadamente, no parece que esta conclusión sea del todo correcta. Ciertamente es que la democracia moderna – entendida como sistema de organización política

3.2 *The Place of Freedom*

To any deliberative society that aims to be long-lasting, it is essential to keep the politics as the place of freedom (Arendt, 2008) against the manipulation, discrimination and prejudice, structuring it to implement citizenship as the vector to full fruition of political rights inseparable from democratic plurality.

With this value identified, it is made visible that what is called new is actually old, because the means have changed (communication technology) but the longstanding formula of making and accumulating richness at the expense of manipulation and human rights violation is the same in the deliberate alienation of the "rules of the game" (Levitsky & Ziblatt, 2018). Constitutional rules of democracy aimed at mutual tolerance and modelled on pluralism need to be revived, "restraining that the routine of political competition transforms into a battle field with no rules" (Levitsky & Ziblatt, 2018, p. 103) stimulated by interests prejudicial to citizens.

In Brazil, the electoral courts are responsible for the inspection and enforcing of those rules, as special organisms whose function should be to implement guarantees to virtual or physical citizenship. It is urgent, in this way, that the legal-State breaches the immobilism regarding the network manipulation. Manuel Castells (2017) emphasizes that the relation between society and technology is of the State's and its power institutions' interest, considering that it is a "decisive factor in the general process, as it reflects and organizes social forces".

Technological advancements should be used to reinforce citizenship without forgetting about the need of instruments capable of protecting human rights against abuse. This means that the understanding of the use and destination of new technologies by the organisms of control and inspection is a pressing need, without surrendering to the global market fed individualism, predator of local interests, or the refusal of the offers that intelligence brings to new systems of rights.

The balance between collective and individual cannot create uncertainty over the assertion of the former and the relativization of the latter, always starting on the process-guarantee structured in broad defense, adversarial proceeding, and reasoning of decisions.

que distribuye el poder entre la ciudadanía mediante formas representativas de gobierno – es hoy una realidad triunfante, generalmente extendida más allá del contexto geográfico em que vino a nacer. Pero podemos plantearnos si esse sistema de organización política responde efectivamente a las exigências de articulación de formas esencialmente democráticas de organización social, esto es, si la democracia es, em nuestros días, um modelo de organización social que obedece a los postulados emancipatorios de libertad e igualdad reales, o si trata tan sólo uma forma de reparto de cuotas de poder entre las elites dominantes" (p. 157).

3.3 Freedom and Anonymity in the Political Arena

Political publicity is one of those collective rights essential to the democratic process because, by means of it, citizens can inform and be informed about propositions, ideas, projects and programs from parties and candidates, allowing the adopting of opinions regarding their choices. This right is structured in the freedom of speech; however, it does not accept anonymity, as determined in the subsection IV of Art. 5 of the Brazilian Constitution. Violating this fundamental rule of the democratic game, viral content in WhatsApp with biased information or hate speech, in such a way that it is impossible to identify source or authorship, allows anonymity that also maculates freedom and equality, offending the purpose of political publicity.

In this way, the abuse of the mass media vehicle, with a strong denaturation of the rational communication process, emerges. Unfortunately, however, as Maitê Chaves Nakad Marrez (2018) pontifies, "the Internet is the field in which the verification of power abuse has the least chance to happen, especially on social networks", because, as he says, "it is a democratic environment, free and with increasing accessibility" (Chaves Nakad Marrez, 2018). That is why "there is not a single ruling from the Superior Electoral Tribunal, published, that has affirmed the abuse of mass media vehicles exclusively on social networks" (Chaves Nakad Marrez, 2018).

The state of the art regarding the Brazilian electoral process (as well as in the USA) repels the premise in which the network is democratic. In the examples here discussed, new technologies were used to pervert and artificialize the debate, making the voters easy prey for the predator's manipulation. That is why the myth of a free and democratic Internet, when there is not even the knowledge of its structure and clear self-regulatory policies are nonexistent, needs to be denounced. This will fight the ignorance that puts the Judiciary always running after the damaging facts, without technical capabilities to understand them and evaluate the impact in the electoral process, incapable, therefore, of protecting the public debate against pernicious influences.

Recently, the Minister Edson Fachin, at the Superior Electoral Tribunal, confessed the problem:

(...) there are certain subjects that are coming to the courts, between them is this, in which we have the impression of being in a race behind the facts.

As the always remembered and great Brazilian thinker Milton Santos have written, "the trampling of the events unmakes the knowledge" and we go in this race trying to reconstruct it, having, sometimes, the perception that the technological revolution, especially in the second half of the XX Century, left us with the feet in the end of the IX Century (*sic*) and the head in the XXI Century.

Therefore, it is a kind of Procrustes' law in which we try to adapt the fact and the circumstances. Here we have one such case, the boosting of content with all

the vicissitudes that cybernetics projects in this group of ideas. (Superior Electoral Tribunal of Brazil, 2018a)

In the face of that, essential advice is the training of legal professionals to know, effectively, the ins and outs, in order to efficiently fight the bad use of new technologies.

3.4 *The Bad Use of Technology*

The colonization of private life in the network, damaging to the self-determination and to citizens' freedom of information, is described by Perez Luño (2014)¹⁴ after reading the political scientist Giovanni Sartori, who denounces the annulment of critical thinking by the excessive use of new technologies from the permanent flux of information that imposes critical thinking's inertia. Sartori has coined the phrase *lumpenintelligentia* to translate the impoverishment of intelligence and the shortening of critical thinking that the constant submission to the network imposes, making the distinction between right or wrong, true or false harder, thus creating the intellectual proletariat.

As a counterpoint to Sartori, in an important dialectical exercise, Perez Luño (2014) also shows the contribution of Carl Sunstein, for whom the use of technology offers major possibilities to political renewal of the democratic life, but with the risk of fragmentation which hinders collective options and political programs, maybe impairing the structural cohesion of the republican experience. For the North American, the risk factor is the consumer user, preoccupied exclusively with personal gain projecting his activities in the network to the attainment of egoistical benefits. Francisco Balaguer Callejón (2018), in his turn, is extremely preoccupied with the dismantling of constitutionalism by means of the insertion of global agents in local electoral process, outside of the State itself and the Constitution.

From what can be captured, it is probable that the connection through the network, without intermediates and with the feeling of total freedom and kinship, was fed more slowly by the distrust in traditional communication's relations, because they demand investigation of facts and source checking. This can also have happened by the means of conservative forces union around specific subjects creating gated groups and exempt to criticism, and by the fear that it self-absorbs and inhibits the expansion of ideas. Equally, it can happen through the hedonist egoism of the consumer-predator. That is, many possibilities, but only one confirmation: Transactions of great profit for the giants of world technology are present.

¹⁴ Original text: "Sartori responsabiliza a los nuevos medios tecnológicos y, en particular, a la TV de haber creado un post-pensamiento, que supone la anulación del pensamiento crítico. Sartori denomina a quienes hoy detentan las NT de la información "hombres-bestias", y los acusa de exaltar una "comunicación perenne", que incapacita para "articular ideas claras y diferentes". Lejos de forjar ciudadanos libres y responsables, las NT han promovido una "Lumpenintelligentia, un proletariado intelectual sin ninguna consistencia intelectual".

It is enough to check that the business implicating popular expression in the USA case and in Brexit involved the handling of a huge volume of sensitive information (big data) deposited by the platform users (mainly Facebook), headed to companies that bought it for analysis and mining in collaboration with electoral communication and publicity companies, that irrigate those connections using the personality evaluation of the voter to guide him through the algorithm¹⁵. Elias Jacob Menezes Neto and José Luis Bolzan de Morais (2018) explain that "[the] knowledge that comes from the analysis of these predictive algorithms are extremely opaque – although they let the individual transparent for the analysis of the ones in power." These are simulated realities, speculative, that end in the guiding of the citizen by the interests of the one that handles the technology. The risk format presented removes the legitimacy of the unlimited use of new technologies, and returns the problem for the pondering over the creation of public policies of control and prevention.

As alerted,

The idea that the predictive analysis system – simulated realities – derive from high technology end obscuring what they, in fact, are: speculative models of the future. Make decisions based on these systems, under the false reason that their conclusions are science truths, has direct consequences to human rights. (De Menezes Neto & Bolzan de Morais, 2018)

On the other hand, to unveil the capitalist, manipulator of the network face far away from the democratic neutrality, does not mean to disregard other factors to the process of disintermediation that grows in volume and speed with new technologies in the long-lasting crisis of political representation. The main one is the lack of effective channels of participation in the political process. One cannot believe that the citizen takes part in the political life only on each election, depositing the vote to parties and candidates that are also only seen in that time. The fatigue of this model is evident with the shrinking, each day sharper, of voter's turnout. Following this path, the alleged surpassing of parties by the digital agora will be discussed next.

3.5 Is it Time to Surpass Political Parties?

In the context of usage, classified as weak, Perez Luño (2014) asserts that new technologies in the political process would strengthen the channels of parliamentary representation through the vast possibilities of communication with citizens, gathering important suggestions from the feedback stimulated by the network. His forecast is that representation would serve direct democracy in a subsidiary way, prevailing the participation and popular will without filters (Perez Luño, 2014).

¹⁵ This means that the business, aside from generating Money, gives even more power to the ruling elites.

Perez Luño (2014), bringing the most relevant contributions to what he called "strong use of tele-democracy", lines up the following political reflections to support a society without parties:

- a) A society without parties makes the practicality of a real and effective democratic power possible, returning it to the hands of the people.
- b) A society without parties allows the shift of political prominence from parties to the citizens.
- c) A society without parties avoids electoral systems' dysfunctions, overcoming injustices, inequality, and shortcomings of proportional systems.
- d) A society without parties corrects representation distortion, as, for example, populations that are not included or are in smaller proportion than should have been.
- e) A society without parties joins efforts to block the system corruption through the acts of stronger pressure groups.
- f) A society without parties makes a channel to eliminate the manipulation of public opinion feasible (Perez Luño, 2014).

As an essential legal property, this author notes that tele-democracy allows the actual and conscientious participation of citizens in the legislative process, democratizing Law and giving effectiveness to its commands (Perez Luño, 2014).

Perez Luño (2014), although aware of the positions of Giovanni Sartori and Carl Sunstein noting the various shades and the risk of naive simplifications or enthusiasm over new technologies to democracy, assures that tele-democracy allows for the ethical revival of the responsible and reciprocal practice of democracy. In his opinion, the strong use of tele-democracy results in the overcoming of political parties in favor of the direct connection with political representatives. Perez Luño (2014), despite his optimistic defense, warns against the juridical, political and ethical dangers of tele-democracy, such as risk of manipulation, commodification of the public area, impoverishment in the making of rules, individualism, emptying of communal values, invasion of privacy, and cybercrime. That is exactly what is recently being observed, removing trust from the participation through the network.

In a different way, Oreste Massari (2018) believes that politics without parties is power without responsibility, leading to a populist liberal democracy, even though he acknowledges that parties have a tendency to adapt to digital activism, changing themselves into something else to what society was used to, *e. g.* the Five Stars Movement (M5S) in Italy, owner of a digital platform named Rousseau (Massari, 2018).

In Brazil, the existence of 35 parties, of which 34 shared 1.7 billion Brazilian reais spent on the 2018 elections (Superior Electoral Tribunal of Brazil, 2018b), and the ongoing registry application of more than 75 (Superior Electoral Tribunal of Brazil, 2019) on the electoral judicial branch, is a trend that does not validate the premise of the surpassing, at least for the time being.

4. MANIPULATION OF NETWORKS AS ABUSE OF MASS MEDIA

The spread of false, manipulated or out of context information as a standard of intervention over elections (Campos Mello, 2018) brings to the table the abuse of mass media in its virtual form, inviting also to ponder about the liability of the companies that supply the technology to protect political guarantees and human rights.

The offer is of accountability for direct or indirect violation of political rights¹⁶, demanding the setting of parameters and review of the jurisprudence that fixates the "impossibility of a legal person to figure as a defendant in judicial electoral investigations based on Art. 22 of the Supplementary Law n° 64 of May 18, 1990"¹⁷.

To manipulate communication through social networks in order to hit the election outcome, aside from the impoverishment of the political maturity and free thought, is an authoritarian tendency that disservices the democratic ideal and cannot be considered as the only individual practice of political publicity, occasionally censored with a fine, as the Superior Electoral Court has been doing. In this sense, it is imperative to put in effect the control of political communication without prior-censorship, but away from the naivety of protecting the individual freedom that hides barbaric acts of economic groups that violate the authenticity of the elections outcome for personal gain. More than ever it is necessary to relativize the economic individual right to favor human rights. Taking hold of that premise, the electoral jurisprudence will have to be reviewed to classify the denaturing of network communications as abuse of mass media, dismissing the previous rulings, for example, in the Action n° 0600963-23, reviewed by Minister Luís Felipe Salomão, published during the Superior Electoral Court session on September 13th, 2018 (Superior Electoral Tribunal of Brazil, 2018a).

In this precedent, examining the report against a businessman that was paying to boost Facebook posts about a candidate supported by him, even though that kind of spending could not have been done by a natural person¹⁸, the spending

¹⁶ "Companies should consider the probable impacts over human rights from of their activities, what will lead, for example, in the monitoring of activities of its subsidiaries or entities under direct or indirect control of the mother company. The diligence should lead, as well, in the identification and evaluation of any real or potential violation to human rights if created from the transnational commercial activity, also in the prevention of those violations, which applies to the parent company, its subsidiaries or any other under direct or indirect control" (Lopes Saldanha, 2018).

¹⁷ Citing as an example among thousands, Superior Electoral Tribunal of Brazil (2010).

¹⁸ According to Presidência da República do Brasil (1997), "Art. 57-C. É vedada a veiculação de qualquer tipo de propaganda eleitoral paga na internet, excetuado o impulsionamento de conteúdos, desde

was declared illegal and the practice was prohibited to avoid the interference of economic power in the electoral process, but the final ruling was disappointing because the Court decided that the "intervention was minimal" in individual rights, without even measuring the capability of damage to collective rights. If anything, it said that it had done "damage control by acting promptly to get rid of the illicit act and, if necessary, applying a fine" (Superior Electoral Tribunal of Brazil, 2018c). The action was transformed into "other procedures", even though it was a case of an electoral judicial investigation to inquire abuse, without making clear which and why; the ruling did not fulfill the obligation for reasoning, thus revealing the lack of knowledge about the network as a communication area stronger than radio or TV, and even more manipulated than these traditional channels.

It was expected that, acknowledging limitations to the specific action in the precedent that were restricting the Court in some way, at least the Public Prosecutors Office, *custus societatis*, should have positioned itself and designed the investigation under the optics of the abuse of mass media. It could not have chosen not to act. Certainly, it should invoke the general clause of Article 22 of the Supplementary Law nº 64 that regulates the "bad use of mass media vehicles in benefit of political party or candidate" (Presidência da República do Brasil, 1990), as cause to impose a fine, but also ineligibility and annulment of the registry or the certificate of the politician, even though he could be only the recipient of the bad use result.

In a systemic reading of the legal framework, it is impossible to apply Articles 57-A and 57-J of Law No. 9504/97 in isolation. In the same way, the liability of companies for cooperating for the illicit result must be reviewed using a rule set in the Brazilian Civil Code (Presidência da República do Brasil, 2002), Article 927, that determines the duty to repair the damage derived from the illicit act, confirmed by the Article 19 of Law nº 12.965 (Presidência da República do Brasil, 2014), if the platform does not make arrangements to end the illicit act.

que identificado de forma inequívoca como tal e contratado exclusivamente por partidos, coligações e candidatos e seus representantes. § 1o É vedada, ainda que gratuitamente, a veiculação de propaganda eleitoral na internet, em sítios: I - de pessoas jurídicas, com ou sem fins lucrativos; II - oficiais ou hospedados por órgãos ou entidades da administração pública direta ou indireta da União, dos Estados, do Distrito Federal e dos Municípios. § 2o A violação do disposto neste artigo sujeita o responsável pela divulgação da propaganda e, quando comprovado seu prévio conhecimento, o beneficiário à multa no valor de R\$ 5.000,00 (cinco mil reais) a R\$ 30.000,00 (trinta mil reais). § 2o A violação do disposto neste artigo sujeita o responsável pela divulgação da propaganda ou pelo impulsionamento de conteúdos e, quando comprovado seu prévio conhecimento, o beneficiário, à multa no valor de R\$ 5.000,00 (cinco mil reais) a R\$ 30.000,00 (trinta mil reais) ou em valor equivalente ao dobro da quantia despendida, se esse cálculo superar o limite máximo da multa. § 3o O impulsionamento de que trata o caput deste artigo deverá ser contratado diretamente com provedor da aplicação de internet com sede e foro no País, ou de sua filial, sucursal, escritório, estabelecimento ou representante legalmente estabelecido no País e apenas com o fim de promover ou beneficiar candidatos ou suas agremiações."

CONCLUSIONS

The new technologies used during the Brazilian elections imposed the reconfiguration of political communication and the overcoming of major paradigms, but also allowed for the manipulation and the targeting of votes through fake news and hate speech, conjuring the need to fixate marks for the responsible use and the control of the technology.

The distribution of fake, manipulated or out of context news, as well as the outpouring of private funding to pay for boosts in social networks as a standard of intervention in elections, demands protection of collective rights in opposition to freedom of speech in social networks, especially to cease the selling of this service—that is, a bad use of mass media—, block the application, and to make all the involved—candidates, parties, users, and platforms—responsible for it. By the way, the participation of platforms in the creation and distribution, lacking orders emanated from judicial rulings to stop the damage, demands civil liability with damage reparation, without excluding the block or prohibition of functioning in the country.

Before controlling the network, digital education is needed to break from the manipulative communication fiefdoms and the increase in dialog, with the many actors of the democratic society acting together for the search of international governance by means of signing pacts for protecting political rights.

To quell the ignorance and allow the adequate usage and proportional control, legal professionals, in particular state organisms, must qualify themselves to avoid running behind the facts with an analog head in a fast paced digital world, using, for example, contributions from the society offered during public hearings, listening to scientists of diverse fields, and, essentially, adopting as a mark the protection of citizenship to proliferate and make democratic society's human rights effective.

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