

HATE SPEECH AND ITS ROLE IN REVERSE CENSORSHIP

*João Victor Rozatti Longhi **

Abstract: The traditional concept of democracy seems to be in check in the 21st century, especially in limited analysis of Information and Communication Technologies and its impacts. In Brazil, this phenomenon has become especially striking since the second decade of the current century, with the promulgation of a Civil Internet Framework and a General Data Protection Act—to name a few. As a research problem, this paper aims to discuss the impacts of the political use of the Internet and its influences not only focusing on shaping public opinion throughout electoral campaigns and elections, but on the whole deliberation process in the public sphere. Hence the need to discuss certain institutional and regulatory constraints, both in terms of content and data protection, which, while insufficient to contain all the risks arising from this new reality, convey a finetuning of this new institutional guise, which has the power to provide citizens with mechanisms to protect their informational dignity. A few aspects that regard freedom of speech as fundamental right will be analyzed and revisited to showcase the need of State intervention, to an extent, in spite of the difficulties inherent to the web. In the end, an assertive conclusion will attemptedly be extracted.

Keywords: Freedom of speech; regulation; digital populism; democracy.

INTRODUCTION

The traditional concept of democracy seems to be in check in the 21st century, especially in limited analysis of Information and Communication Technologies' impacts. In this sense, special emphasis is given to the role of social media, which gave voice to all kinds of opinions, challenging the legislator to revisit the entire structural archetype of the legal system, with the codification of regulations aimed at dealing with the Internet and its fluidity in terms of deterrence of damaging information such as hate speech or manipulating propaganda.

In Brazil, this phenomenon has become especially striking since the second decade of the current century, with the promulgation of a Civil Internet Framework and a General Data Protection Act—to name a few.

Thus, questions emerge regarding the phenomenon of personalization and the risks brought by social networks to the postulates derived of the democratic principle, with emphasis on the political polarization generated by the deleterious effects of virtual interactions resulting from the massive datification, the stigmatization generated by the practice of profiling, informational pollution, fake news and the phenomenon that

* Public Defender of the State of Paraná. Associate Professor of Civil Law at the State University of Paraná (UNESPAR), União da Vitória campus, Brazil. Email: joaovrlonghi@yahoo.com.br / ORCID iD: <https://orcid.org/0000-0001-7572-5709>

doctrine has conventionally called digital populism—or “populism 3.0”, revisiting the concept coined by Paolo Gerbaudo.

Biasing content and political radicalization stemming from mass access to personal data is a risk to democratic freedoms (including freedom of speech), hurting fundamental rights in a transitional period that reflects the anguish resulting from the dangers that the Democratic Rule of Law is facing in line with the reality in which it has overlapped some of the founding principles of the 1988 Brazilian Constitution.

As a research problem, this paper aims to discuss the impacts of the political use of the Internet and its influences not only focusing on shaping public opinion throughout electoral campaigns and elections, but on the whole deliberation process in the public sphere.

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I. THE CONCEPT OF DEMOCRACY

The dichotomy between the public and private spheres was treated by the doctrine as apparently clear. However, currently

(...) there is sufficient evidence of a certain border disorder, which has become mobile, in some cases confusing, and in numerous themes permeated by problems and principles that have established a new system of communication between public and private.¹

This separation has its roots in the overcoming of the hitherto unquestionable separation of public and private law, which emerges from the postmodern rereading of public law, imposing new nuances on the legal system as a whole, creating what Paolo Gerbaudo defines as ‘a new cleavage in society’.² With origins attributed to Roman law, the concepts of *ius privatum* and *ius publicum* were taken as dogmas, the first being related to the interests of civil society and the second materialized in the figure of its holder and exequent: the State. The distinction is unveiled by classical doctrine as a systematically important phenomenon, since in practice it would be quite clear: in private law, freedom and equality would prevail; in public law, authority and competence.³

The fundamental bases of the Liberal State have roots that go back to

¹ Ricardo Luis Lorenzetti, *Teoria da Decisão Judicial* 39 (Bruno Miragem trans., 2d ed. 2010).

² Paolo Gerbaudo, *The Digital Party: Political Organization and Online Democracy* 177 (2019). According to the author: “The rise of new political parties reflects a new cleavage in society, stemming from technological and economic factors: a fracture between political and/or economic insiders and what I call connected outsiders.”

³ Maurice Hauriou, *Précis de Droit Administratif et de Droit Public* 301 (11th ed. 1927).

the roles of Immanuel Kant's 'empirical man-being' and the 'rational man-being'.⁴ Moreover, it is noted that it was a period marked by the presence of the concept of freedom based on the metaphysics of customs and a "universal law" that imposed on the law an "act" linked to such parameters.⁵ However, the subsistence of the liberal model fostered a rethinking of the State's role in such period, although authors such as John Stuart Mill, Jeremy Bentham, and other supporters of the legal utilitarianism that would thrive in common law pointed to the dangers of a 'tyranny' of the majority, while others, such as Benjamin Constant, would point to the need for a rereading of the antithesis between liberalism and democracy.

In Norberto Bobbio's words,

In this sense, the contrast between liberalism and democracy may also be considered from another point of view: the development of liberal doctrine is closely linked to the economic critique of autocratic societies; the development of democratic doctrine is more closely linked to a critique of political or institutional character.⁶

In the mid-19th century, intense social transformations marked the rise of the Social State, especially after the outcomes of the Industrial Revolution, which enabled a reshaping of the role of the State. The public power then gradually became the direct provider of a series of guarantees from which the protection of social rights and the flexibility of the autonomy of will took shape, allowing a dense overhaul of the institutes of private law and, consequently, also of the public law, with the reinterpretation of the role of the State in the new legal dogmatic. It is important to note that the maturation of private law, in terms of codification, occurs rather earlier than that of public law, which is bound by a wide range of laws spread throughout the ordinance, but without complete doctrinal elaboration and subject to unwanted excessive mutability.

According to Karl Larenz, the overriding purpose of this new model was to prevent "those who are eventually entrusted with the exercise of state power from using it differently from the meaning of law."⁷ And in that very sense, it is possible to understand how important the role of the State has become when it comes to decision-making and deliberations as to the direction of society in the coordination of social life, whose primary goal has become effectively focused at achieving public interest.⁸

⁴ Immanuel Kant, *Fundamentação da Metafísica dos Costumes* 77 (Leopoldo Holzbach trans. 2003).

⁵ Paulo Bonavides, *Do Estado Liberal ao Estado Social* 107 (10th ed. 2011).

⁶ Norberto Bobbio, *Liberalismo e Democracia* 86-87 (Marco Aurélio Nogueira trans. 2017) (freely translated).

⁷ Karl Larenz, *Derecho Justo: Fundamentos de Ética Jurídica* 151 (Luis Díez-Picazo trans. 1985) (freely translated).

⁸ Diogo de Figueiredo Moreira Neto, Novos Institutos Consensuais da Ação Administrativa, 231 *Revista de Direito Administrativo* 91, 91-93 (2003).

The 21st Century arises and what is noticeable is a growing distance between the external intricacies of institutionalized political control and the space in which the most important questions for human life is established: liquid modernity is lived through and in this context, “since the feasibility of action is measured by the power of the tools, little action is expected from the most reasonable people of their local *ecclesia*.”⁹

II. 3.0 POPULISM

In 2013, the so-called “Arab Spring”¹⁰ and its later political results marked a phenomenon of the rise to power of authoritarian regimes, following events arising from social mobilizations at that historic moment, marking a period of significant change for the study of the impacts of social movements on the Internet. The initial tone of optimism about the role of social networks, especially in the matter of empowering ordinary citizens and political participation, has changed:

It is commonly said that nobody predicted the upheavals in the Arab world that began in December 2010 and defined the following year. But that does not mean that nobody saw them coming. The crumbling foundations of the Arab order were visible to all who cared to look. Political systems that had opened slightly in the mid-2000s were once again closing down, victim to regime manipulation and repression. Economies failed to produce jobs for an exploding population of young people. As the gap between rich and poor grew, so did corruption and escalating resentment of an out-of-touch and arrogant ruling class. Meanwhile, Islamist movements continued to transform public culture even as Arab regimes used the threat of al-Qaeda to justify harsh security crackdowns”.¹¹

Indeed, the rise of the so-called ‘virtual activism’, which had its features reshaped beyond the interactions of yore, conveyed struggles for causes linked to the defense of human rights, democracy and participation, has grown and continues to grow.

In Gerbaudo’s point of view,

The cult of participation problematically conflates utopia and praxis, ends and means; the world we want to build and the ways in which we can build it. Collective action runs the risk of becoming merely therapeutic rather than emancipatory, and its nature more ethical and quasi-religious instead of political. This tendency, which reflects the

⁹ Zygmunt Bauman, *A Sociedade Individualizada: Vidas Contadas e Histórias Vividas* 257 (José Gradel trans. 2008) (freely translated).

¹⁰ “Arab Spring” is the nomenclature used to refer to the wave of protests, riots and popular revolutions against governments of the Arab world that erupted in 2011, with the economic worsening caused by the crisis and the lack of democracy in the Middle East countries.

¹¹ Marc Lynch, *The Arab Uprising: The Unfinished Revolutions of the Middle East* 11 (2013).

uncanny resonance between neoanarchism and neo liberalism in their common reflection of individualistic narcissistic tendencies, considers all moves to-wards formalisation as necessarily equating to ossification and sclerotisation rather than, for exam-ple, maturation.¹²

In essence, the phenomenon that is observed is that the Internet is no longer the one originally conceived. New applications have emerged, creating ample space for the domination exercised by few actors (Facebook, Google, Amazon etc.). In Siva Vaidhyanathan's words, Facebook has "a story of hubris of good intentions, a missionary spirit, and an ideology that sees computer code as the universal solvent for all human problems. And it's an indictment of how social media has fostered the deterioration of democratic and intellectual culture around the world."

¹³ Google's situation isn't all that different, as the dominance of said platform leads to a fragmentation of public sphere over the Internet.¹⁴

Those findings are corroborated by the thoughts of Evgeny Morozov, who indicates that the unfolding politics of the concept of e-democracy seems to reveal as a cyber-utopia¹⁵ that provides shape to the formation of a new form of populism—the digital populism. Simply put, what it causes is an 'elective affinity' between social media and populism or a convergence of participation on digital platforms to favor a new ideal against the establishment.¹⁶

Popular support is obtained through the massive use of social networks by leaders, 'elected' or not, on social media. Now with the possibility of direct communication with a large number of followers—whether human or artificial intelligence (bots)—who, in turn, share, comment, respond to opposing posts, quickly and/or in real time, a new format for interactive participation that is able to propagate trending topics and views in seconds emerges and molds more refined and complex ways of communication.

In light of US President Donald Trump's behavior on social media, an emblematic example of this historic moment, it is noticeable the change in attitude of global leaders, because, in terms of communication techniques, Trump relies almost exclusively on the social network Twitter to express his views and generally communicate with the public, with that being the reason why, ironically, some call him "Twitter-in-chief,"¹⁷ in

¹² Paolo Gerbaudo, *The Mask and the Flag: Populism, Citizenship and Global Protest* 244 (2017).

¹³ Siva Vaidhyanathan, *Anti-Social Media: How Facebook Disconnects Us and Undermines Democracy* 3 (2018).

¹⁴ Siva Vaidhyanathan, *The Googlization of Everything (and Why Should We Worry)* 136 (2011).

¹⁵ Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom* 320 (2011).

¹⁶ Paolo Gerbaudo, Social Media and Populism: An Elective Affinity?, 40(5) *Media, Culture & Society* 745, 746 (2018).

¹⁷ B. Anderson, Tweeter-in-Chief: A Content Analysis of President Trump's Tweeting Habits, 8(2) *Elon Journal of Undergraduate Research in Communications* 36

reference to the presidential role of “Commander in Chief” under the US Constitution (Article II, Section 2).

In Donald Trump’s posts, there are often short texts and simple language, understandable and easily grasped by any follower. As for the content, in turn, there is a mixture of personal opinions with controversial facts, which are later challenged by traditional media for the controversial nature permeated by fake news, conspiracy theories, ironies etc.

According to Cass Sunstein, “with these ideas in view, I have stressed the serious problems for individuals and societies alike that are likely to be created by the practice of self-insulation – by a situation in which many of us wall ourselves off from the concerns and opinions of our fellow citizens”.¹⁸ It is important to note that the context of communications—particularly social networks—reveals that there is an environment fraught with dangers in order to preserve fundamental rights, especially those of the first dimension (public freedoms).

The so-called web 3.0 creates the perfect ecosystem for such situations, as it is marked by real-time network operability, uninterrupted data storage, hyperconnectivity, linked to person-to-person (P2P), human-to-human (P2P), human-to-machine (H2M) or between machines (M2M) communications that demand a vast technical apparatus. Moreover, several authors have indicated a transition towards the predominance of web 4.0, which is characterized by the presence of the ‘Internet of Things’.

Parallel to this, the idea of “3.0 populism” indicates the coherence in tune with the present moment of technological development, which advances in accordance to the resignification of the concept of democracy¹⁹ and the imminence of digital populism²⁰, in an environment of widespread misinformation and attacks to democratic institutions. Therefore, the freedoms of expression and communication are now a potential targets, among other fundamental rights closely linked to human dignity.

In Paolo Gerbaudo’s words,

At the heart of the culture of contemporary social movements there lies a third fundamental tension: that between evanescence and fixity. On the one hand, contemporary popular movements are characterised by ‘liquid’ forms of organising; in which the use of social media by social networking sites is geared towards superseding the authoritarian tendencies of ‘solid’ organisations like parties and trade unions, in the effort of avoiding the ‘iron law of oligarchy’. On the

et seq. (2017).

¹⁸ Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* 252 (2017).

¹⁹ Rubens Beçak & João Victor Rozatti Longhi, O Papel das Tecnologias da Comunicação em Manifestações Populares: A Primavera Árabe e as Jornadas de Junho no Brasil, 10(1) *Revista Eletrônica do Curso de Direito da UFSM* 391 (2015).

²⁰ Andrew Keen, *The Internet Is Not the Answer* 140-42 (2015).

other hand, these movements require the invocation of a sense of locality or ‘net locality’, which involves bestowing them with some degree of fixity, a ‘nodal point’ in their texture of participation.²¹

Indeed, the proposal for a digital democracy or e-democracy presupposes the presentation of solutions to problems concerning the dynamics of network interactions, and overcoming adversities regarding digital inclusion and exclusion, and the degree of political-democratic engagement of the population. That’s the core argument that concerns the cloudiness that permeates one’s knowledge of the uses and control of the Internet, notably in the face of economic power dominance of the ‘communication empires’²², private corporations that have risen to the plateau of hegemonic entities in the control of social media.

Examples such as the protection of personal data and information security, which are complementary to one another, although both are linked to the postulates of confidentiality, integrity and availability, provide a fertile environment for the diffusion of news and information leaks that come from numerous portals designed to serve a variety of purposes. For this reason, this new virtual reality has provided access to user data (personal data), with unique relevance, imposing on companies and organizations a special care for the security of data and user privacy.

To the extent that regards the freedom of speech, the problem of increasingly sophisticated news personalization, which reveals a content policy put forth by most providers—especially on social media—forming true content bubbles through which application users receive information targeted to their “preferences”, results in a growing process of radicalization where people are gradually moving to the extremes and failing to dialogue with others from different positions. Therefore, some sort of regulation is to be expected in communicational freedom.

In essence, one can briefly conceptualize communicational freedoms as a genre that encompasses the full range of the inalienable right to freely communicate. Freedom of belief, speech, expression, association, (or otherwise) regulation of media ownership, media, and, lately, the Internet, are some of the media of this great genre, each one worthy of a detailed analysis of the numerous problems involving its core aspects.

The expression “free speech” is suggested by Nigel Warburton in a broad sense that is not restricted to the spoken word—strict sense—but to a significant range of expressions such as the written word, music, movies, videos, photographs, drawings, arts and etc. After all, the focus should be not on how an idea is expressed but on the idea itself, its impacts, the listeners, the understanding of the expressions used, the general context, etc. For this reason, as a rule, situations related to the

²¹ Paolo Gerbaudo, *Tweets and the Streets: Social Media and Contemporary Activism* 166 (2012).

²² Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* 255-57 (2012).

legal aspects of communicative freedoms are not linked to the use of the word in private environments, but in “places” ranging from a poem to profiles on social networking sites.²³

Warburton points out that there are two major orders of fundamentals concerning freedom of expression: one of moral order and one of instrumental order. The latter highlights the benefits of a society where freedom of expression is guaranteed economically (by providing information for citizens) and socially, promoting people’s happiness and the pluralism of ideas. However, it also highlights the moral order as the foundation that contains an almost consensual intrinsic value: the promotion of the dignity of the human person and the autonomy of the individual.²⁴

It should be noted that the author subsequently draws terminological distinction between free speech and freedom of expression. The idea of expression, he argues, would more accurately express the subjectivity of the one who communicates a fact to a particular public. Warburton’s example is of a possible communication by a Chinese citizen about the so-called Tiananmen Square massacre (1989) in the present day: what the Chinese government prohibits is a subjectively and critical negative narrative about that fact, as the fact itself remains intact.²⁵

In Portuguese, however, it is difficult to visualize a distinction between “freedom of speech” and “freedom of usage of the language” (if such translation is even possible). However, part of the doctrine uses certain categorizations to justify diverse legal regimes in the exercise of communicative freedoms, in a different setting as that of freedom of expression, that, in Guilherme Peña de Moraes’ words, encompasses the possibility of expression of intellectual, scientific, artistic and social activities, bringing with it the obligations of compensation or reparation for moral damages, possibility of right of reply, prohibited anonymity and censorship.²⁶

III. REGULATING THE #REPUBLICDIVIDED

Tim Wu has been a vocal force in terms of user attention being considered the main input for the content delivery industry in line with the prospection of users’ personal data²⁷, forming a data-rich market that becomes the driving force of a new economy, as narrated by Viktor Mayer-Schönberger and Thomas Ramge²⁸, permeated by contemporary

²³ Nigel Warburton, *Free Speech: A Very Short Introduction* 5 (2009).

²⁴ Warburton, *supra* note 23, at 16.

²⁵ Warburton, *supra* note 23, at 6.

²⁶ Guilherme Peña de Moraes, *Curso de Direito Constitucional* 573-74 (7th ed. 2015).

²⁷ Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* 267 (2016).

²⁸ Viktor Mayer-Schönberger & Thomas Ramge, *Reinventing Capitalism in the Age of Big Data* 6 ([year unavailable]). According to the authors: “Conventional markets

propaganda techniques, especially electoral propaganda, advancing over lands previously unexplored by marketing of products and services, such as influence and personalization.

The possibility of convincing the user about the importance or necessity of a service or product through more subtle, eventually subliminal forms of advertising is, in itself, an intrinsic danger in this new ‘attention economy’. In turn, personalization means the provision of user-directed content in accordance with the interpretation of data about someone—information of any nature, extracted from or derived from information about a previously constituted dataset—and, thus, the so-called attention economy develops by advancing on this plan, not only because of the way users handle personal data, but mainly because of its regulation (or its lack thereof).

The episode that recently highlighted the risks of a rule-free environment with regard to personal data protection and attained large political dimensions involved two companies: Cambridge Analytica and Facebook Inc., in a scandal perpetrated based on the terms of use of the social network controlled by the latter. In a nutshell, the British policy consultancy paid small amounts for a few thousand users to fill out application forms, totaling more than 87 million Internet users, but given the ability to gain access to the personal data of other users connected to them (their “friends”).²⁹

According to Cass Sunstein, “When people find themselves in groups of like-minded types, they are especially likely to move to extremes. And when such groups include authorities who tell group members what to do, or who put them into certain social roles, very bad things can happen.”³⁰

In the Brazilian Constitution, it is interesting to note the distinction, *a priori*, between freedom of expression (in Article 5) and the rules on media provided for in the specific chapter of Articles 220 *et seq.*

Those rules present a series of prerogatives to the media, expressly applying to electronic media (Article 222, § 3º), with the same principles of Article 221. In terms of legislation, directing the study to the field of Information and Communication Technologies, Law No. 13.709/2018 uses the expression “freedom of expression, information, communication and opinion” as one of the foundations of the discipline of protection of

have been highly useful, but they simply can’t compete with their data-driven kin. Data translates into too much of an improvement in transactions and efficiency. Data-rich markets finally deliver what markets, in theory, should always have been very good at—enabling optimal transactions—but because of informational constraints really weren’t. (...) The promise of data-rich markets is not that we’ll eradicate these market failures completely, but that we’ll be able to greatly reduce their frequency and the resulting financial devastation.”

²⁹ See Gustavo M. Martins & João Victor Rozatti Longhi, *Fake News e Vazamento de Dados: A Fratura Exposta do Marco Civil da Internet no Brasil* (2018), <https://www.jota.info/opiniao-e-analise/artigos/fake-news-e-vazamento-de-dados-09042018>.

³⁰ Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* 2 (2012).

personal data in the country (Art. 2, III). The Brazilian Internet Civil Framework (Law No. 12.965/2014) deals with the freedoms of “expression, communication and expression of thought” as a principle for the usage of the Network (Art. 3, I).

Although it is not an exhaustive enumeration, nor a tight distinction between the forms of concretization of communicative freedoms, a connection may be established for the purposes of this work, in a sense that the genre “communicational freedom” functions as a concept that encompasses freedom of creed and consciousness, on the one hand, and even that of expression and communication, on the other hand. The latter, in turn, unfolds in freedoms of intellectual, artistic, scientific expression etc.; also, in freedoms of opinion, in the more strict sense that designates the special rules on freedom of the press, that govern the constitutional regime of the media, and that have been granted differential normative status of overacting to the materialization of journalistic information and the prohibition of censorship, as established by the Brazilian Supreme Court in the precedent ADPF 130/DF.

Nevertheless, despite the possibility of conceptual differentiation, it will be the casuistry that best reveals to what extent it is a legitimate exercise or not of communicative freedoms, since any social network text reveals to a large extent the author’s subjectivity, environment in which the differences between one exercise of law and the resulting liability become even more blurred.³¹

This makes it very difficult to establish absolute *a priori* rules on such freedoms, as there may possibly be a collision with other fundamental rights. Something that will not only be done by the judge, the ultimate interpreter, but also by the legislator, whose function is to pre-ponder values in apparent conflict. In this sense, Daniel Sarmento and Claudio Pereira de Souza Neto say:

The legislator, by editing legal norms, also resolves in the abstract certain collisions, weighing interests. When, for example, the criminal legislator criminalized books of racist content (art. 20 of Law No. 7.716/89), he sought to resolve a tension of fundamental rights positivized in the Constitution: on the one hand, freedom of speech and the press; on the other, the principles of equality and human dignity of the victims.³²

In Brazil, although a legal system specifically aimed on Internet regulation is still under construction with the approval of the Internet Civil Framework (Law No. 12.965/2014, MCI) and the General Data Protection Law (Law No. 13.709/2018, LGPD), the absence of a fundamental right to data protection makes its protection still incomplete. Tackling that, an Amendment Proposition to the Federal Constitution

³¹ Daniel Sarmento & Claudio Pereira de Souza Neto, *Direito Constitucional: Teoria, História e Métodos de Trabalho* 496 (2d ed. 2017) (freely translated).

³² A. Mukerjee, *The Internet Trap: Five Costs of Living Online* 40 et seq. (2018).

(PEC 17/2019) includes said fundamental right on the constitutional text.³³

Even so, the general law of Brazilian personal data protection brought undeniable advances, although its concepts do not have the rich details of European regulations, among others. To clarify, personal data, according to the Brazilian law, is the “information related to an identified or identifiable natural person” (Art. 5, I, Law No. 13.709/2018). In addition, as a subspecies, given the need for specific legal treatment, sensitive data (Art. 5, II) and anonymised data (Art. 5, III) are regulated as well.

The general rule regarding the disposition of personal data by the user must comply with the so-called principle of consent (Art. 7, I), which must be obtained in writing or by other unambiguous means, and may be revoked at any time, the controller being responsible for burden of proof on compliance with such requirements (Art. 8, *caput*, and §§ 1, 2 and 3).

On the matter of the liability of personal data processing agents, who are the operator and controller of the data (Art. 5, VII, VIII and IX, LGPD), Articles 42 *et seq* define objective liability, either by action (Art. 42, *caput*), or by omission (art. 44), caused by the violation of their duties as service providers. Said conclusion is drawn *a priori* and is broadly based on the absence of any mention of the subjective guilt of the agent, and there is also an exhaustive list in Article 43 about the causal link excluders, referring essentially to the absence of service, the observation of the duties of conduct legitimately expected by the data subject and the exclusive fact of the victim, logic similar to the civil liability for consumer accident in the Consumer Protection Code (Art. 14 *et seq.*).³⁴ Those main guidelines are clearly inspired on the European General Data Protection Regulation (GDPR).³⁵

Finally, highlighting the sanctions of Articles 52 *et seq*, which deal with administrative liability of data processing agents, it is important to mention the relevance of supervision, prosecution and sanctioning that shall be incumbencies of the national authority.

The Authority should be a special autarchy, linked to the Ministry of Justice with administrative independence, absence of hierarchical subordination, fixed mandate and stability of its leaders and financial autonomy. (Art. 55, *caput* and § 3). Its duties (Art. 56) would be, among others, to ensure the protection of data, to elaborate guidelines for the National Policy on Protection of Personal Data and Privacy; to supervise and enforce sanctions, by means of due administrative process and respecting the contradictory; to comply with holder-controller petitions; to promote education and related studies on data protection and privacy;

³³ Bruno Ricardo Bioni, *Proteção de Dados Pessoais: A Função e os Limites do Consentimento* 92-93 (2019).

³⁴ R.F.V. Dresch, *Fundamentos da Responsabilidade Civil pelo Fato do Produto e do Serviço: Um Debate Jurídico-Filosófico entre o Formalismo e o Funcionalismo no Direito Privado* 138 (2009).

³⁵ C.S. Castro, *Direito da Informática, Privacidade e Dados Pessoais* 229 (2005).

to draw up a national policy; etc.

Article 58 would deal with the National Council for the Protection of Personal Data and Privacy, which would have a multi-stakeholder format, with components from the government, the scientific sector and the CGI.br (the Internet controller in Brazil). Its competences would be (Art. 59) to propose strategic guidelines and provide subsidies for national policy, suggest actions for the ANPD, and disseminate the culture of personal data protection.

James Madison's view is that the separation of powers—and their respect for the compartmentalities and attributions of each of their organs—corresponds to the best form of mutual containment (checks and balances), without which declarations of rights would be mere paper barriers.³⁶ Returning to the subject of deliberative democracy and manipulation of the public sphere by mass violations of citizens' right to privacy, the protection of personal data is not the only point that should be explored. In other words, it is not only by protecting citizens from misappropriation of their information that the misconduct to adopt this or that candidate, or political position, in a popular consultation will be avoided. What is to be avoided is that the public sphere be flooded with fake news, extreme speeches against minorities, apology to crime, and other distortions considered harmful to the fulfillment of its function.

In other words, many question whether, by having efficient data regulation as on Europe, such distortions could be avoided in the democratic debate as seen today. What can be asserted is that any hypothetical answer would be impossible to accurately gauge. But it may be said that if there were an adequate data protection policy, with strong regulation by authorities—especially in the US—the major data processing agents would adopt greater security practices, and perhaps the manipulation of the debate on social networks would be much smaller. For this reason, it is necessary to enforce this right, under penalty of even more harmful distortions and social damages of unprecedented proportions.

CONCLUSIONS

The fundamental point of the study of the impacts of Information and Communication Technologies (ICTs), especially of the Internet, on the recent delineation of the democratic principle, lies in the problem of shortening the distance between the State and civil society, as it is noted a sensitive distortion of the use of the web for purposes different from those conceived in its origin.

As for social networks, there are several harmful effects of the so-called 'filter bubbles', in which citizens consume content supposedly

³⁶ James Madison, Federalist No. 51, in *The Federalist Papers* 416 (Alexander Hamilton, James Madison & John Jay, Star Publishing 2013).

directed to their preferences, favoring the emergence of trends that fracture the notion of the public sphere. Thus, there is a risk that the provision of content with propagandistic character will result in an environment of extreme political polarization, highly damaging to the debate and, consequently, with great potential harmful to the democratic principle.

The contemporary concept of digital populism or ‘3.0 populism’, drawn especially from Paolo Gerbaudo’s concerns, has special relevance for understanding this phenomenon as communicational techniques are expanded in a universe marked by the massification of data, not only to influence campaigns and elections, but to interfere with the whole deliberation process in the public sphere.

Firstly, with regard to the problem of social networks, he highlighted the harmful effects of so-called filter bubbles, in which citizens consume content supposedly directed to their preferences, in a technique known as cross-marketing. However, when applied to the provision of propagandistic content, the end result is an environment of extreme political polarization, highly detrimental to debate and consequently to the democratic principle.

The situation aggravates the issue of mass access to personal data. The famous Cambridge Analytica case was an example in which Internet political advertising companies had access to personal data of millions of people, influencing electoral processes and public consultations around the world.

In conclusion, it can be asserted that personal data protection laws would not necessarily prevent cases like this, but protecting this fundamental citizen right would make it difficult to influence such deliberative processes for toxic content, such as fake news and hate speech.

In conclusion, certain institutional and regulatory constraints, especially in the field of data protection, may help, but will not be sufficient. Even so, it needs an independent Data Protection Agency as a means of providing citizens in Brazil with institutional mechanisms to protect their informational dignity, under penalty of becoming yet another enunciation of rights with “paper limits”.

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João Victor Rozatti Longhi

Public Defender of the State of Paraná. Associate Professor of Civil Law at the State University of Paraná (UNESPAR), União da Vitória campus. Postdoctoral Researcher in the International Post-doctoral Programme in New Technologies and Law at the Mediterranean International Centre for Human Rights Research (MICHRR – Università “Mediterranea” di Reggio Calabria), Italy. Postdoctoral Researcher in Law at UENP. Ph.D. in State Law from the Law School of the University of São Paulo (USP). Master’s Degree in Civil Law from the State University of Rio de Janeiro (UERJ). Bachelor of Laws from São Paulo State University (UNESP), with an exchange period at the University of Santiago de Compostela, Spain.

Email: joaovrlonghi@yahoo.com.br

ORCID iD: <https://orcid.org/0000-0001-7572-5709>