

## **Fake Democracy: The Threats of the Internet to Constitutional Democracy and the Risks of Democratic Governmental Countermeasures**

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*This study uses an interdisciplinary approach to examine the threats to democracy posed by the Internet, especially the issue of disinformation campaigns. In addition, the research questions how governments and society are facing the problem. In recent years, several massive disinformation campaigns against democracies have taken place in different countries. Governments are responding, but their countermeasures also pose risks to democracy and fundamental rights. This article points out the importance of adopting the minimum interventionist measures, without neglecting the risks entailed by a posture of omission.*

*Keywords: internet, fake news, disinformation, misinformation, democracy*

Constitutional democracy is a concept in which there is a compromise between the popular foundation of government and preestablished limits. A constitutional democracy regards popular sovereignty as a central principle, but this does not mean that any majority decision should be legitimated. The political process through which majority decisions are expressed is governed by rules that establish institutions and procedures and guarantee rights for individuals and groups. These rules provide parameters for the decision-making process that are considered legitimate. In short, a constitutional democracy is not a majoritarian democracy, but a democracy that respects the rule of law.

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The relationship between constitutionalism and democracy poses problems at different levels. On the one hand, it presents a tension, since the constituent power's decision restricts the daily manifestation of the will of the majority. On the other hand, the Constitution establishes essential parameters for a better decision-making process. Fundamental rights are part of these preconditions.<sup>1</sup>

When one thinks about democracy, one cannot neglect the role of fundamental rights in guaranteeing its existence. Among these fundamental rights, those relating to communication processes stand out. A democratic decision must be as informed as possible. It is therefore vital to ensure individual freedom of speech and an open media, through which the most significant number of agents will be able to voice their opinions.

The problems faced by democracy arising from the press and broadcasting are already widely known—media ownership concentration<sup>2</sup>, propaganda<sup>3</sup>, hate speech<sup>4</sup>, among others. Moreover, constitutional governments have experience in regulating such media without jeopardizing democracy. Nevertheless, there is still a need to conduct a thorough debate on Internet threats to democracy.

In recent years, massive campaigns that spread lies on the Internet have emerged as real attacks on the foundations of democracy. These attacks are especially problematic at election times, but, more broadly, they are threats that undermine the foundations of democracy: “Pervasive use of disinformation is undermining democratic processes by fostering doubt and destabilizing the common ground that democratic societies require<sup>5</sup>.”

Many governments, such as those of France and Germany, have begun to study or adopt measures to combat disinformation campaigns. This is not an easy problem to solve. It is necessary to better understand the threats to democracy that

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<sup>1</sup> Stephen Holmes has shown that “qualms about constitutional limits on democratic majorities date back at least to the eighteenth century”. He highlights Federalist n. 49, where Madison advises against Thomas Jefferson's views about periodical plebiscites: “because they threatened to nullify democracy-stabilizing constitutional precommitments, periodic plebiscites played into the hands of anti-republican forces”. Holmes, Stephen, *Passions and constraint: on the theory of liberal democracy* (University of Chicago Press, 1997).

<sup>2</sup> C. Edwin Baker, *Media concentration and democracy: Why ownership matters* (Cambridge University Press, 2006).

<sup>3</sup> J. M. Sproule, *Propaganda and democracy: The American experience of media and mass persuasion*. (Cambridge University Press, 1997).

<sup>4</sup> J. Weinstein, Hate speech bans, democracy, and political legitimacy, *32 Const. Comment* 527 (2017).

<sup>5</sup> Kate Starbird, Disinformation's spread: bots, trolls and all of us, *571 Nature* 449 (2019)

arise from the Internet, but it is also important to look at government reactions to such threats.

Democratic and authoritarian states visualize the problem of massive disinformation campaigns differently. While democratic countries see the need to ensure the integrity of their spheres of deliberation, authoritarian states perceive the issue as an opportunity to increase internal control and surveillance<sup>6</sup>.

The approach that must prevail in democratic states is more complex because civil and political rights need to be seriously considered, but these are not variables in states where there are already severe restrictions on freedoms. The enemies of democracy can exploit fear in the face of threats and propose changes that diminish democratic freedoms. The increasing number of electoral processes that are affected by disinformation campaigns<sup>7</sup> is worrying because the world is witnessing a new wave of erosion of democracy, exemplified by the emergence of nationalism and the growth of populist and far-right parties.

In this article, I want to address issues of constitutional democracy related to communication on the Internet. The research focuses on disinformation campaigns on social media as threats to democracy and on the risks contained in the responses that democratic governments are adopting to address the problem. In other words, it analyzes the problem of attacks on democracy on the Internet, and the measures being considered or adopted by states on the grounds that they are combating the creation and spread of false news that distorts political debate. I want to highlight in this article the risks that are present in specific initiatives. Good intentions can hide a menace to constitutional democracy itself, which may represent the mere exchange of one threat for another. In order to identify the measures being taken to combat misinformation, my primary source is the guide published on the Poynter Institute Website<sup>8</sup>, which is updated with the collaboration of Internet users. However, I complement this with other searches on the Internet.

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<sup>6</sup> Ronald J. Deibert, *The Road to Digital Unfreedom: Three Painful Truths About Social Media*, 30 (1) *Journal of Democracy* 25 (2019).

<sup>7</sup> A research of the "Computational Propaganda Project" at the Oxford Internet Institute at University of Oxford has found "evidence of organized social media manipulation campaigns which have taken place in 70 countries, up from 48 countries in 2018 and 28 countries in 2017". S. Bradshaw & P. Howard, *The Global Disinformation Order. 2019 Global Inventory of Organised Social Media Manipulation*,

<sup>8</sup> Daniel Funke & Daniela Flamini, *A guide to anti-misinformation actions around the world*, Poynter (Aug 15, 2019), <https://www.poynter.org/ifcn/anti-misinformation-actions/>.

In order to differentiate between democratic and authoritarian countries, I am using data from Freedom House<sup>9</sup> reports that differentiate between “free,” “partially free,” and “not free states. In addition, I draw on the democratic ranking of The Economist,<sup>10</sup> confirming data on the democratic or non-democratic character of the country.

The objective is to identify the main threats to constitutional democracy from the Internet and the main risks of countermeasures proposed or adopted by democratic governments. For this purpose, based on interdisciplinary literature, I will present several dimensions of the problem that constitutionalists need to reflect on. I want to draw attention to arguments that cannot be disregarded by lawmakers when they are discussing laws to combat misinformation or hate speech, for example.

In this connection, I assume that democracy is in a state of crisis and that there is a wave of democratic backsliding<sup>11</sup> in the world. Many of the processes of weakening democracy have sparked controversy over the use of the Internet in electoral processes, such as in the United States in 2016 or in Brazil in 2018. There have also been many reports of false news being used in debates on the Brexit referendum in the United Kingdom, in the referendum on the independence of Catalonia, and, more recently, in the growing protests of the “Yellow Vests” in France<sup>12</sup>.

### **Communication and democracy**

The roots of democracy are in ancient Greece, as we know. They are found particularly in the so-called “Athenian democracy<sup>13</sup>,” which corresponds to a period of less than two hundred years and had its peak in what is known as the “Pericles century.” In that period, there was already an awareness that communication

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<sup>9</sup> Democracy in Retreat - Freedom in the World 2019, Freedom House (Aug 19, 2019), <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat>.

<sup>10</sup> The Economist Intelligence Unit, Democracy Index 2018: Me too? Political participation, protest and democracy (2018), <https://www.eiu.com/topic/democracy-index>

<sup>11</sup> Democratic backsliding is the “state-led debilitation or elimination of the political institutions sustaining an existing democracy”. N. Bermeo, On democratic backsliding, *27(1) Journal of Democracy* 5 (2016).

<sup>12</sup> H. Agnew, French ‘gilets jaunes’ protests have stoked ‘fake news’ surge, says study, *Financial Times* March 13, 2019 (July 2, 2020) <https://www.ft.com/content/a4eabbea-459e-11e9-a965-23d669740bfb>

<sup>13</sup> J. Thorley, *Athenian democracy* (Routledge 2005).

processes were fundamental for democracy. The importance of dialogue for democracy in this period is recorded in several texts. In the famous speech given by Pericles in honor of the dead in the first year of the Peloponnesian War, reported by Thucydides, there is strong praise for the role that dialogue plays in Athenian society. To quote Pericles:

We Athenians are able to judge at all events if we cannot originate, and, instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all. Again, in our enterprises we present the singular spectacle of daring and deliberation, each carried to its highest point, and both united in the same persons; although usually decision is the fruit of ignorance, hesitation of reflection.<sup>14</sup>

The following two terms that express this concern with the debate are “isegoria” and “parrhesia.” The “isegoria” idea contains a requirement that everyone in the Assembly has the opportunity to speak, without imbalance, while the literal meaning of “parrhesia” is ‘saying everything’<sup>15</sup>.

Many works associate “parrhesia” and “isegoria” with modern freedom of expression. However, these Greek concepts cannot be seen simply in the form of the negative liberties affirmed by first constitutionalism—a classical liberal constitutionalism. There is, in the concept of isegoria, a concern for equality among those who address the Assembly, while “parrhesia” carries a concern for frankness in speech: “If ‘isegoria’ was fundamentally about equality, then, ‘parrhesia’ was about liberty in the sense of license—not a right, but rather an unstable privilege enjoyed at the pleasure of the powerful<sup>16</sup>.”

This concern with regard to speech demonstrates that democracy and communication have had an umbilical connection since the emergence of democratic forms of government. Deliberation in democratic procedures needs to be well informed. On the one hand, communication free of constraints fosters a more conscious and therefore more legitimate democratic decision. On the other hand, the citizen's need to obtain information in order to position himself in the

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<sup>14</sup> Thucydides, *The History of the Peloponnesian War*, MIT (May 15, 2019) <http://classics.mit.edu/Thucydides/pelopwar.2.second.html>.

<sup>15</sup> M. Landauer, *Parrhesia and the demos tyrannos: Frank speech, flattery and accountability in democratic Athens*, 33.2 *History of Political Thought* 185 (2012)

<sup>16</sup> T. Bejan, *The Two Clashing Meanings of 'Free Speech'*, *The Atlantic* (May 15, 2019) <https://www.theatlantic.com/politics/archive/2017/12/two-concepts-of-freedom-of-speech/546791/>.

debate requires that such constraints be avoided. Despite Athenian democracy being a society without media, in which communication was face to face, its concern for the conditions of communication was associated with the option for a democratic model.

Modernity<sup>17</sup> resuscitated the old idea of democracy as the government of the people. However, this new experience was faced with the challenge of deliberating in societies with a large number of members; since then, it has constructed a specific form of democracy: representative democracy. In the design of this new democracy, the autonomy of the individual, represented by so-called human rights, has also been a matter of concern.

As we have seen, democracy and communication in the inaugural Athenian experience had strong ties. In the situation of direct personal contact in which the Athenians lived, there was already a concern for guaranteeing participation in the debate. In the new democracy of modernity, the question of communication reappears. However, the problem has increased in severity. In modern societies, the novelty in communication is the media. Following its emergence, public deliberation has become mediated<sup>18</sup>. We are no longer talking about personal contact, face-to-face, but about media that deepen the asymmetry between individuals, especially between those who have access to such means of communication and those who do not.

In the nineteenth century, newspapers flourished with technological developments that facilitated the printing of newspapers. In the United States, partisan journalism was replaced by professional and commercial journalism via emerging major media companies.<sup>19</sup> This growth in the role of the press also

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<sup>17</sup> Here, we use "modernity" to refer to a set of transformations that the world has experienced in the eighteenth and nineteenth centuries and that involve changes in various spheres, such as social life, political institutions and law. "Democracy" as we know it today is part of this series of institutional changes. "The formation of modernity in the late eighteenth and early nineteenth centuries is the first major period of cultural crystallization when transformations in different parts of the world are directly interconnected. (...) modernity is a global condition that now affects all our actions, interpretations, and habits, across nations and irrespective of which civilizational roots we may have or lay claim to. In this sense, it is a common condition on a global scale that we live in and with, engage in dialogue about, and that we have to reach out to grasp." B. Wittrock, *Modernity: One, none, or many? European origins and modernity as a global condition* 129(1) *Daedalus* 31 (2000).

<sup>18</sup> B. I. Page, *Who deliberates?: Mass media in modern democracy* (University of Chicago Press 1996).

<sup>19</sup> J. G. Baldasty, *The commercialization of news in the nineteenth century* (University of Wisconsin Press 1992); J. W. Carey, *The Mass Media and Democracy: Between the Modern and the Postmodern* 47 *Journal of International Affairs* 1 (1993)

coincides with the urbanization, industrialization, and expansion of suffrage movements. In a more complex society, newspapers become an essential means of the circulation of information, thereby becoming sources of civic action.

After the emergence of radio and television, the impact of the media substantially increased. The reach of these new media goes far beyond the printed word that, until then, constituted the mass media. The new media posed a grave problem of inequality, further increasing the gap between those who have access to media outlets and those who do not. Clearly, this had a direct impact on the decision-making process, and this concern was already visible in the debate on the nature of broadcasting at the beginning of the last century.<sup>20</sup> However, the treatment of broadcasting as a public service or activity under regulation represented a brake, in economically developed countries, on its partisan use. In some fragile democracies, the lack of regulation has allowed the development of large media economic groups that have made extensive use of their outlets<sup>21</sup>.

The media are central to the democratic debate, which makes their agents more concerned with what will be reported in the media rather than the content of the political discourse itself. Electoral campaigns can be almost as depoliticized as publicity campaigns promoting other products launched on the market. Media is a crucial tool for creating the image and selling the candidate, but it is also extensively used to destroy or cause harm to the image of politicians or political parties. This prominence became evident, and the problem of the relationship between media and democracy took another turn following the emergence of the Internet.

When it became widely accessible in the 1990s, the Internet was hailed for its potential capacity to strengthen democracy. When referring to democracy, analysts often emphasized the ease of access to information and the broadening of the space for dialogue that the Internet provided. Bill Gates, one of the most influential agents in popularizing the personal computer and the Internet, published

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<sup>20</sup> M. S. Mander, The public debate about broadcasting in the twenties: An interpretive history 28 *Journal of Broadcasting* (1984)

<sup>21</sup> Even in constitutional democracies with a tradition of media regulation, limits on regulation can also result in imbalance in the democratic debate. This, in our view, is the case in the United States with the Supreme Court's decision that ruled that it was unconstitutional to restrict donations of money by corporations for election campaigns. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) <https://www.supremecourt.gov/opinions/09pdf/08-205.pdf>

a text in 1996 in which he foresaw a promising future in the relationship between the Internet and democracy and stated that “The result will be a better-informed vote and probably greater participation.”<sup>22</sup>

Until recently it was common to find positive opinions about the relationship between the Internet and democracy. This is because the Internet has indeed brought instruments that can enhance democratic processes. It has become one of the most important spaces for the circulation of information. One example of the positive consequences of the Internet has been that political and social movements have been able to network more quickly and easily.<sup>23</sup> We can also highlight the increasing transparency of government data, which strengthens citizenship.

One of the high points of the belief in the democratizing virtues of the Internet was the so-called “Arab Spring” movements, which started in Tunisia in late 2010 and spread across the Middle East and North Africa in 2011. Crowds rose against dictators as a result of articulations made by social networks.<sup>24</sup> These uprisings showed in practice the potential of social media articulation. Notwithstanding the potential of the Internet to foster democratic engagement, it is no longer possible to maintain hope for the improvement of democracy without engaging in a discussion on the threats that the Internet presents.

There was the good use of networks to erode authoritarian regimes in the “Arab Spring,” but authoritarian leaders also turned their attention to social media to enforce surveillance and stalk opponents. An example of this is the action of agents of the Saudi dictatorship on social media. Critics of the Saudi crown have had their honor and dignity attacked in a violent way as part of a campaign of intimidation.<sup>25</sup> In 2018, in the most serious attack to date on a dissident, the

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<sup>22</sup> B. Gates, Internet will improve democracy, *Deseret News*, (May 26, 2019) <https://www.deseretnews.com/article/502545/INTERNET-WILL-IMPROVE-DEMOCRACY.html>.

<sup>23</sup> M. Castells, *Networks of outrage and hope: Social movements in the Internet age* (John Wiley & Sons 2015).

<sup>24</sup> R. Jamali, *Online Arab Spring: Social Media and Fundamental Change* (Elsevier Science 2014).

<sup>25</sup> K. Benmer et al., *Saudis' Image Makers: A Troll Army and a Twitter Insider*, *New York Times* October 20, 2018 (May 19, 2019) <https://www.nytimes.com/2018/10/20/us/politics/saudi-image-campaign-twitter.html>.

journalist Jamal Khashoggi was murdered by the Saudi regime and immediately a strong disinformation campaign around the fact was put in place.<sup>26</sup>

The Internet reproduces many of the problems already known in other media, but, even worse, it brings new problems and gives a new dimension to some already familiar ones. Nowadays, there is widespread concern about the threats that the Internet poses to democracy. Everyone knows that misinformation and hate speech have long been part of politics,<sup>27</sup> but these problems have other aspects specifically related to the Internet. The global reach and speed of the dissemination of information on the Internet make it difficult to rectify or deny some false information and combat offensive language effectively. And in many cases, it is difficult - or impossible - to identify the offender.

Social media play a crucial role in this issue, for better or worse. When it emerged, social media changed the shape of the Internet. Platforms like Facebook or Twitter became meeting points where most Internet traffic starts and where people find almost all the information they consume, increasing the power of these companies. The Internet environment has become more centralized and, therefore, more controlled. Social media companies have taken on the role of mediators, controlling the content that people may or may not display.<sup>28</sup>

### **Democracy and dialogue in democratic decision-making**

The core of democracy is the sharing of decision-making power among people. In constitutional democracies, decision-making processes are carried out by means of procedures regulated by the Constitution. These procedures should be as open as possible to citizen participation, and they must include a set of guarantees.

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<sup>26</sup> J. Stubbs, K. Paul, T. Kahlid, Fake news network vs bots: the online war around Khashoggi killing, November 1, 2018, <https://www.reuters.com/article/us-saudi-khashoggi-disinformation/fake-news-network-vs-bots-the-online-war-around-khashoggi-killing-idUSKCN1N63QF>

<sup>27</sup> H. Arendt, Truth and politics, *New Yorker*, February 18, 1967 (July 20, 2020) <https://www.newyorker.com/magazine/1967/02/25/truth-and-politics>. L. Eko, New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet, 28 *Loyola of Los Angeles International and Comparative Law Review* 69 (2006).

<sup>28</sup> About transforming a more open internet into one where social media centralizes traffic, through the personal experience of Hossein Derakhshan, an Iranian blogger who was arrested in 2008 and released in 2014, when he found the Internet totally different, see H. Derakhshan, The Web We Have to Save - The rich, diverse, free web that I loved — and spent years in an Iranian jail for — is dying. Why is nobody stopping it?, *Medium* July 14, 2015 (Aug 2, 2019) <https://medium.com/matter/the-web-we-have-to-save-2eb1fe15a426>.

Guarantees related to communication, such as freedom of expression, the right to information, and freedom of the press, are among the most important rights for democracy.

Ideally, a democratic decision should be made by analyzing as much information as possible. To understand what is at stake, the citizen needs to interact with other citizens, not only to know the opinions of others but also to understand their opinions and all information available.

Interaction in society is fundamental to the human learning process<sup>29</sup>. Often, in the first contact with information, we make inaccurate or distorted readings. When one person expresses their opinion on an issue to another person and receives a different opinion in response, both become more able to understand the subject they are discussing. In this interaction, we may be urged to review our sources or consider other interpretations. There is a set of studies that show this power of social interaction in ensuring the accuracy of the interpretation. In theory, therefore, the greater the diversity of our interlocutors' thinking, the greater our capacity for social learning.

A recent study by researchers of the University of Pennsylvania confirms this idea of social learning, but it also demonstrates that this learning is limited when we are in contact with people we know have different political positions to ours.<sup>30</sup> The experiment tested social interaction in a discussion on climate change. The researchers divided the experiment participants into four groups<sup>31</sup>. All were exposed to the NASA (National Aeronautics and Space Administration) data on climate change and had to interpret it to arrive at the best possible understanding. There was a reward based on the accuracy of the interpretation. NASA's interpretation was

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<sup>29</sup> I. Jung et al, Effects of different types of interaction on learning achievement, satisfaction and participation in web-based instruction, 39 (2) *Innovations in education and teaching international* 153 (2002). D. J. Watts & P. S. Dodds, Influentials, networks, and public opinion formation, 34(4) *Journal of consumer research* 441 (2007). E. Bakshy et al, Social influence in social advertising: evidence from field experiments, *Proceedings of the 13th ACM conference on electronic commerce* 146 (2012).

<sup>30</sup> Douglas Guilbeault et al., Social learning and partisan bias in the interpretation of climate trends 115 *Proceedings of the National Academy of Sciences* 9714 (2018)

<sup>31</sup> One group was made up of people with the same political position, who individually answered the questions. Three other groups were made up of people with different positions. In one of these plural groups, the participant did not know the political position of the others. In the other two groups, political position was exposed: (a) in one group, the average of the members' understandings was presented alongside the logos of the American Republican and Democrat parties; (b) in the other group, each participant saw information about the understanding reached by four people from whom he knew the political position.

what the researchers used as a parameter. Thus, they considered the most accurate interpretation the one that came closest to the official understanding. Participants had the opportunity to change their understanding after being exposed to the opinions of others. After answering a number of questions, there were opportunities to rethink the answers. In the case of plural groups, at that moment, each participant was exposed to the understandings of others.

On the basis of this experiment, the researchers found that the ability to understand the data increased when the participants were exposed to the opinions of others, but this was greater in the group that did not know the participants' political views. In the groups whose political position was exposed, political prejudices reduced the participants' ability to understand. The worst results were found in the group in which people were identified by political party logo: "Social learning was prevented, and baseline levels of polarization were maintained."<sup>32</sup> For the researchers, their results suggest that "Minimizing the salience of partisanship in structured bipartisan networks can offer a useful strategy for improving public understanding of contentious scientific information in settings where polarizing issues can lead to biased interpretations."<sup>33</sup>

These results are compatible with another study that analyzed what happens after partisan people were exposed to opposing views. People self-identified as Democrats or Republicans received a monetary incentive to follow a Twitter bot. Each partisan group followed a bot that shared tweets with opposing political ideologies. The researchers found that after one month, political opinion had become more radicalized.<sup>34</sup>

## Disinformation and the crisis of democracy

### *The model of constitutional democracy under attack*

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<sup>32</sup> Id. 9716

<sup>33</sup> Id. 9718

<sup>34</sup> Researchers recognize limits that avoid that results are used as an "evidence that exposure to opposing political views will increase polarization in all settings". The results "should not be generalized to the entire US population, because a majority of Americans do not use Twitter". And they advert that the research "not study people who identify as independents, or those who use Twitter but do so infrequently." See Christopher A. Bail *et al*, Exposure to opposing views on social media can increase political polarization, 115 Proceedings of the National Academy of Sciences 9216 (2018).

“Constitutional democracy” is an expression that summarizes a political way in which people decide public affairs through procedures specified in a constitution. The term is the rich combination of the noun “democracy,”— in other words, the government of the people — and the adjective “constitutional,” — in other words, relative to the constitution.<sup>35</sup> A constitutional democracy presupposes adherence to the rule of law.<sup>36</sup> Then, the deliberation of public affairs is conducted in accordance with procedural and substantive limits, including the rights of individuals and groups. The constitution establishes such limits, which are guaranteed by the action of independent institutions, such as judicial institutions, regulatory agencies and media outlets.

This is the model that has been widely adopted in complex western pluralistic societies. The twentieth century saw, especially after World War II, the expansion of the number of constitutional democracies.<sup>37</sup>

However, the trend has changed. There are many warnings in recent specialized literature about a crisis of democracy, which is marked by the growing role of groups and leaders with authoritarian political positions.<sup>38</sup> In the last few years, we have witnessed the rise of a new populism in democratic states. This is not a phenomenon noticeable only in countries with fragile constitutional democracies; it also affects the United States and Europe. At least two countries in the European Union are already undergoing a profound process of destroying the primary conditions for democracy: Poland<sup>39</sup> and Hungary<sup>40</sup>. Once in power, these leaders focus on weakening the watchdog institutions and centralizing more powers.

In a speech in 2014, Viktor Orbán,<sup>41</sup> one of the most visible leaders of this trend, said that the “Hungarian nation is not a simple sum of individuals, but a

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<sup>35</sup> The term also contains a tension between the two terms, which can be seen as paradoxical. We fail to address the paradox because it is not directly related to the theme of this paper.

<sup>36</sup> Rosenfeld, M., The rule of law and the legitimacy of constitutional democracy, 74 S. Cal. L. Rev., 1307 (2000).

<sup>37</sup> O’Loughlin et al., The diffusion of democracy, 1946–1994, 88 (4) *Annals of the Association of American Geographers*, 545 (1998).

<sup>38</sup> See S. Levitsky & D. Ziblatt, *How Democracies Die* (Crown, 2019); David Runciman, *How democracy ends* (Harvard University Press, 2018);

<sup>39</sup> W. Sadurski, *How Democracy Dies* (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, 1 *REVISTA FORUMUL JUDECATORILOR* 104 (2018)

<sup>40</sup> M. Bogaards, *De-democratization in Hungary: diffusely defective Democracy*, 25 *Democratization* 1481 (2018)

<sup>41</sup> Viktor Orbán, Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp, Website of the Hungarian Government, (july 27, 2019)

community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state." This term was first used in 1997 by Fareed Zakaria<sup>42</sup> when he was warning of the growth in the number of the regimes in which elections are held but fundamental rights are not respected. Zakaria stated that "It has been difficult to recognize this problem because for almost a century in the West, democracy has meant liberal democracy – a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property" And he also condemned that kind of democracy: "Democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war". Thus, Orbán's choice of the term reveals much about how he understands the concept of democracy.

Despite this phenomenon being a trend in the world, each country has its specificities, which do not prevent us from recognizing standard features in some of these movements. These leaders identify and manipulate fears that exist in the population. Myths in politics are not uncommon;<sup>43</sup> however, this new wave of populist leaders overuses them in their rhetoric. Usually, they choose social groups such as immigrants as enemies, speak as advocates of particular "traditional values," and relativize the importance of some human rights.

This rhetoric gambles on polarization, stigmatizing opponents of the leader. Although coexistence between different opinions is a feature of democracy, high rates of polarization can be dangerous. Milan Svobik<sup>44</sup> showed that depending on the intensity of polarization, part of the electorate might be willing to sacrifice democracy in order to benefit its party's policies. He reminds us that populist leaders, such as Orbán, Erdogan, and Chávez, gamble on polarization after winning the elections. He states that

each has succeeded in transforming his country's latent social tensions into axes of acute political conflict and then presented his supporters with a

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<https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>

<sup>42</sup> Fareed Zakaria, *The rise of illiberal democracy*, 76 *Foreign Aff.* 22 (1997).

<sup>43</sup> Raoul Girardet, *Mythes et mythologies politiques* (Éditions du Seuil, 1986)

<sup>44</sup> Milan Svobik, *Polarization versus Democracy*, *Journal of Democracy*, 30 20 (2019).

choice: Vote for a more redistributive Venezuela, a migrant-free Hungary, a conservative Turkey – along with my increasingly authoritarian leadership - or vote for the opposition, which claims to be more democratic but offers less appealing policies and leadership.<sup>45</sup>

It is in this context of the weakening of constitutional democracy that we experience the emergence of massive disinformation campaigns on the Internet. The two phenomena are linked, feeding on each other. An example is the case of Jair Bolsonaro in Brazil. His rhetoric is representative of this trend. He regards human rights as the rights of bandits, opposes environmental preservation and economic development, and stigmatizes minorities such as native Brazilians and LGBTI.<sup>46</sup> His election victory is directly linked to the extensive sharing of lies about his opponents on the Internet.<sup>47</sup>

This discussion involves understanding the boundaries of constitutional democracy. Since it is a concept that involves procedural and material limits to the democratic decision-making process, it absorbs the debate about its defense well. After the Second World War, Western democracies adopted many restrictive measures against clearly non-democratic political groups.<sup>48</sup> The idea of militant democracy to justify restrictive measures must be implemented with moderation because there is a risk that the concept is invoked to justify restrictions that are themselves dangerous to constitutional democracy.<sup>49</sup>

### *How misinformation erodes constitutional democracy*

Unfortunately, real life is far from what we consider to be the ideal conditions for a democratic decision. We do not interact only with people who are

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<sup>45</sup> Idem

<sup>46</sup> G. F. Santos, *Brazilian Constitutional Democracy at a Crossroads*, X *Scienza e Pace* 1 (2019) <https://scienzaepace.unipi.it/index.php/it/item/510-brazilian-constitutional-democracy-at-a-crossroads.html>

<sup>47</sup> E. Bracho-Polando, *How Jair Bolsonaro used 'fake news' to win power*, *The Conversation*, Jan 9, 2019, <https://theconversation.com/how-jair-bolsonaro-used-fake-news-to-win-power-109343>.

<sup>48</sup> The best known cases are those in Germany, which banned the parties *Nationaldemokratische Partei Deutschlands* (NPD) and *Kommunistische Partei Deutschlands* (KPD). However, several European countries have taken a decision to ban parties. Angela K. Bourne & Fernando Casal Bértoa, *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945-2015)*, 13 *European Constitutional Law Review* 221 (2017):

<sup>49</sup> Jan-Werner Müller, *Protecting popular self-government from the people? New normative perspectives on militant democracy*, 19 *Annual review of political science* 249 (2016).

honest in their speech. Moreover, some agents in the political debate deliberately use false information to manipulate the debate.

The use of lies in political debates is not something new. There are countless historical records of using false information to stigmatize opponents and win supporters. However, we need to pay more attention to the problem. Moreover, the spread of lies has already been used as an instrument in international politics, as in the case of the rumor spread by the former Soviet Union that the US had created the AIDS virus in a laboratory<sup>50</sup>. However, concern about its consequences has recently become a significant issue for scholars and political leaders. The growth of this concern is directly linked to the expansion of the Internet, which has taken a central role in people's lives.

Since 2016, after the U.S. elections and the Brexit referendum, there has been growing concern about the effects of massive disinformation campaigns against democracy. The presence of false news in the political debates in 2016 in the United States and the United Kingdom was so significant that the Oxford Dictionary chose "post-truth" as the word of the year. Despite being an expression that, according to the dictionary site, had been used since 1992, in that year, it was used exhaustively.<sup>51</sup> Similarly, the phrase "fake news" was chosen as Word of the Year by the Collins Dictionary the following year.<sup>52</sup>

The fact that disinformation campaigns are actual threats to democracy has become more evident when the problem affects countries with more fragile democratic systems, such as Kenya<sup>53</sup> in 2017, Brazil<sup>54</sup> in 2018, and Indonesia<sup>55</sup> and India<sup>56</sup> in 2019. In these and other countries, there were many allegations that professional networks spread lies misrepresenting the democratic debate.

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<sup>50</sup> D. R. Grimes, Russian fake news is not new: Soviet Aids propaganda cost countless lives, *The Guardian*, Jun 14, 2017, <https://www.theguardian.com/science/blog/2017/jun/14/russian-fake-news-is-not-new-soviet-aids-propaganda-cost-countless-lives>

<sup>51</sup> Oxford Dictionaries, Word of the Year 2016 is..., <https://languages.oup.com/word-of-the-year/word-of-the-year-2016>

<sup>52</sup> J. Hunt, 'Fake news' named Collins Dictionary's official Word of the Year for 2017, *Independent*, Nov 2, 2017.

<sup>53</sup> T. Wadhwa, Kenya's Election Proves Fake News Is A Serious Threat To International Security, *Forbes*, Aug 14, 2017, <https://www.nytimes.com/2019/04/29/opinion/india-elections-disinformation.html>.

<sup>54</sup> E. Bracho-Polando (n. 29).

<sup>55</sup> K. Lamb, Fake news spikes in Indonesia ahead of elections, *The Guardian*, March 19, 2019.

<sup>56</sup> S. Patil, India Has a Public Health Crisis. It's Called Fake News, *The New York Times*, April 29, 2019, <https://www.nytimes.com/2019/04/29/opinion/india-elections-disinformation.html>.

A set of reasons recommend avoiding the use of the term “fake news.” However, in particular, the term is usually unhelpful because of its limited capacity to define this complex phenomenon. The problem is not only that the news is false, but it also involves the objectives of those who create and spread it and the way it is spread. Moreover, some politicians use the term “fake news” to attack the news that they do not like. Trump is an example. He repeatedly calls all news that displeases him “fake”, in a movement to discredit the media and consequently weaken democracy.<sup>57</sup> But he is not alone. Leaders like Viktor Orbán<sup>58</sup> and Rodrigo Duterte<sup>59</sup> also accuse the mainstream media of spreading “fake news”.

In a work addressed to the Council of Europe, Claire Wardle and Hossein Derakhshan<sup>60</sup> proposed a typology by dividing the phenomenon into three kinds of information disorders:

**Dis-information.** Information that is false and deliberately created to harm a person, a social group, organization or country.

**Mis-information.** Information that is false but not created with the intention of causing harm.

**Mal-information.** Information that is based on reality, used to inflict harm on a person, organization, or country.

The spread of these kinds of information has negative effects on democracy. Right now, the main question is the extent of the problem. We cannot yet blame the disinformation campaigns exclusively for the current wave of democratic decay. Moreover, we cannot even say that (suprimi o artigo) disinformation alone led to the election outcomes in the US in 2016 or Brazil in 2018. However, mal-, dis-, and misinformation on the internet can deepen the problem of democratic decadence. Disinformation campaigns affected the two electoral periods cited.

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<sup>57</sup> D. Smith, ‘Enemy of the people’: Trump’s war on the media is a page from Nixon’s playbook, September 7, 2019, <https://www.theguardian.com/us-news/2019/sep/07/donald-trump-war-on-the-media-oppo-research>

<sup>58</sup> IPI – International Press Institute, Hungary seeks power to jail journalists for ‘false’ COVID-19 coverage, March 23, 2020, <https://ipi.media/hungary-seeks-power-to-jail-journalists-for-false-covid-19-coverage/>

<sup>59</sup> P. Ranada, Duterte calls Rappler ‘fake news outlet’, Rappler, January 16, 2018. <https://www.rappler.com/nation/193806-duterte-fake-news-outlet>

<sup>60</sup> C. Wardle & H. Derakhshan, Information Disorder: Toward an interdisciplinary framework for research and policy making’ (Council of Europe, 2017) <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>>.

Some recent research has scrutinized the problem and have helped us to understand it better<sup>61</sup>. In particular, several studies focus on the North American elections of 2016<sup>62</sup>. During this period, the social media most used to disseminate misinformation were Facebook and Twitter<sup>63</sup>. Researching the flow of news sharing on these media platforms is easy because the posts are open, which makes it simple for researchers to access the data.

Following the latest US presidential election, the phenomenon of fake news was extensively discussed. There was widespread use of fake news by supporters of both candidates<sup>64</sup>. Many people even questioned the results because of the large amount of false pro-Trump news. One of the methods adopted in the research was to understand the impact that the disinformation campaigns had on these elections. The aim is to understand who consumed such content.

In this way, in an attempt to understand the phenomenon in the 2016 US elections, Hunt Allcott and Matthew Gentzkow studied possible impacts of "fake news" on voters' decisions. The researchers administered questionnaires to voters investigating whether they believed certain news or not.<sup>65</sup> They found that the primary consumers of false news favorable to a particular candidate are voters already predisposed to vote for that candidate. It suggests that the consumption of

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<sup>61</sup> Among other research, I recommend: H. Allcott, M. Gentzkow & C. Yu Trends in the diffusion of misinformation on social media, 6(2) *Research & Politics* 2053168019848554 (2019). E. K. Vraga & L. Bode. Defining misinformation and understanding its bounded nature: using expertise and evidence for describing misinformation, 37(1) *Political Communication* 136 (2020). M. Fernandez & H. Alani, Online misinformation: Challenges and future directions, *Companion Proceedings of the The Web Conference 2018* 595 (2018).

<sup>62</sup> Among other research, I recommend: A. Guess, B. Nyhan & J. Reifler Selective exposure to misinformation: Evidence from the consumption of fake news during the 2016 US presidential campaign, 9(3) *European Research Council* 4. (2018). C. Shao, et al. Anatomy of an online misinformation network, 13(4) *PloS one* e0196087 (2018).

<sup>63</sup> A. Fourny et al., Geographic and Temporal Trends in Fake News Consumption During the 2016 US Presidential Election, 17 *CIKM* 6 (2017). [http://erichorvitz.com/CIKM2017\\_fake\\_news\\_study.pdf](http://erichorvitz.com/CIKM2017_fake_news_study.pdf)

<sup>64</sup> "we confirm that fake news was both widely shared and heavily tilted in favor of Donald Trump. Our database contains 115 pro-Trump fake stories that were shared on Facebook a total of 30 million times, and 41 pro-Clinton fake stories shared a total of 7.6 million times" H. Allcott & M. Gentzkow, Social media and fake news in the 2016 election, 31(2) *Journal of economic perspectives* (2017).

<sup>65</sup> "We then present new data on the consumption of fake news prior to the election. We draw on web browsing data, a new 1,200-person post-election online survey, and a database of 156 election-related news stories that were categorized as false by leading fact-checking websites in the three months before the election." H Allcott & M. Gentzkow, Social Media and Fake News in the 2016 Election, 31 *Journal of Economic Perspectives* 211 (2017).

fake news happens mostly in bubbles, which reduces the electoral impact of such news.<sup>66</sup>

The fact that the consumption of false news by the public who already has strong political views is higher than that of the general public does not make the problem any less critical. The problem still exists, even when the acceptance of false news content is mostly restricted to supporters because this consumption of false news can lead to radicalization. Without being influenced by false news, a supporter might, in theory, be more likely to change his position when subjected to an honest debate with more reliable news and different opinions.

We need to know who is spreading false news on the web, and we should understand their motivation. It is true that there are organized political groups and professional networks consciously acting to confuse and weaken political systems. These schemes make extensive use of social bots. However, there is also the active participation of citizens consciously or unconsciously spreading this content. Gordon Pennycook and David G. Rand<sup>67</sup> used analytical reasoning tests to assess whether this ability was linked to belief in false news or not. The results of their study associated belief in fake news with laziness rather than partisan bias: “the evidence indicates that people fall for fake news because they fail to think; not because they think in a motivated or identity-protective way.”

Many other studies seek to understand how and why false news is spread on the Internet. An MIT research group published a paper last year that found that the decision to post distortions or lies on social networks matches a human need for novelty.<sup>68</sup> The group developed relevant research about fake news sharing on Twitter. With access to Twitter data from 2006 to 2017, the authors analyzed around 126,000 rumors that were shared by more than three million people. They classified the rumors as true or false using information from content-checking sites.

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<sup>66</sup> Another study, which interviewed former Obama voters, found that fake news was a reason for the change of some of those voters, who voted in 2016 for Trump. See R. Gunther et al., Trump may owe his 2016 victory to “fake news,” new study suggests, *The Conversation*, February 15, 2018, <https://theconversation.com/trump-may-owe-his-2016-victory-to-fake-news-new-study-suggests-91538>.

<sup>67</sup> Gordon Pennycook & David G. Rand, Lazy, not biased: Susceptibility to partisan fake news is better explained by lack of reasoning than by motivated reasoning, 188 *Cognition* 39 (2019).

<sup>68</sup> V. Soroush et al., The spread of true and false news online’ 359 *Science* 1146 (2018).

The study found that fake news is broadcast more quickly and is more widely shared than true news.

An important discovery of the research was about the feelings associated with sharing rumors. While investigating the words used in the responses to the tweets that were shared, the authors found that the messages that shared false news had words associated with surprise – which corroborates the hypothesis of the role of novelty – and disgust, while the true news had words associated with sadness, anxiety and trust. Another interesting finding of the study, deconstructing beliefs about news sharing, is that fake news feeders are mostly people with few followers, who publish little and spend little time on Twitter.

The research also showed that, contrary to what many people think, there is no significant difference between the role of robots and that of real people in sharing these contents. When the profiles with behavior that appeared to be that of a robot were removed from the sample, the numbers of fake news shares remained similar: “false news spreads farther, faster, deeper, and more broadly than the truth because humans, not robots, are more likely to spread it.”

This discovery does not minimize the problem of using social bots. These machines play a crucial role in the process of spreading false news because they are used to amplify the reach of low credibility content. Research that analyzed 14 million messages spreading 400,000 articles on Twitter during ten months in 2016 and 2017 showed strong evidence of strategies that use social bots. According to researchers, “First, bots are particularly active in amplifying content in the very early spreading moments, before an article goes ‘viral.’ Second, bots target influential users through replies and mentions.”<sup>69</sup>

Another question that we need to highlight is the age of the users who most share fake news on social networks. A large study showed that in the 2016 U.S. elections, people over 65 were more likely to share such news.<sup>70</sup> These data reinforce the concern with user behavior and confirm the importance of deepening digital literacy strategies.

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<sup>69</sup> Chengcheng Shao et al., The spread of low-credibility content by social bots, 9 *Nature communications* 4787 (2018).

<sup>70</sup> A. Guess et al., Less than you think: Prevalence and predictors of fake news dissemination on Facebook, 5 *Science Advances* (2019), <https://advances.sciencemag.org/content/5/1/eaau4586#F1>.

### **Government's initiatives and its risks**

There are now, worldwide, a considerable number of proposals to combat some of these threats, and it is widely believed that in the coming years, many solutions will emerge. However, constitutionalists need to alert authorities as to how much care must be taken in the adoption of repressive measures. We need to discuss situations and public decisions in which repressing the behavior of Internet users that threaten democracy may represent a risk to democracy. The answers to the problem may be as hazardous as the problem itself.

This problem has different dimensions that need to be considered, such as the time when disinformation campaigns are carried out and the identification of which agents participate in it. Thus, the electoral moment is a time to be especially protected, and among those who threaten democracy, attacks by foreign agents are more serious.<sup>71</sup>

The distribution of false or offensive information on the Internet is a problem for a democratic state at any time. However, during an electoral period, the threat is much more severe, mainly because of the time limitation of this process. When we speak of an electoral process, we do not speak of simple daily dialogue. We are talking about a purpose-oriented dialogue: choosing authorities or ideas that will guide public policies that affect everyone's lives. Thus, the choice made through false information is a choice vitiated by fraud. Such malpractices undermine the legitimacy of the electoral process because people lose confidence in the system when deliberate manipulation of information decides elections.

These debates must also aim to protect national deliberative processes against threats of foreign interference. Russian interference is an issue in a number of democracies.<sup>72</sup> This is not about speculation or conspiracy theories. There are

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<sup>71</sup> A study published by Australian Strategic Policy Institute has identified Russia and China as responsible for misinformation attacks in some countries. The research has found different motivations in activities of the two countries. According to the study, for Russia, "a key objective is to erode public trust in democracies and to undermine the idea that democracy is a superior system." China, on the other hand, seeks ensuring that its interests are promoted across all party lines". F. Hanson, S. O'Connor, M. Walker, L. Courtois, Hacking democracies: Cataloguing cyber-enabled attacks on elections (Australian Strategic Policy Institute 2019).

<sup>72</sup> Lysenko, Volodymyr & Catherine Brooks, Russian information troops, disinformation, and democracy, 23 *First Monday* (2018), <https://firstmonday.org/article/view/8176/7201>.

many reports showing that disinformation campaigns that affected the US elections<sup>73</sup> and the Brexit referendum<sup>74</sup> in 2016; the referendum in Catalonia in 2017;<sup>75</sup> and, more recently, the waves of "Yellow Vests" protests in France, were planned and coordinated outside the countries in question. After all, these processes of active political participation are moments in which the national community decides its destiny.

Democracies are not the only ones acting on this problem. The most interventionist initiatives come precisely from countries that are only partially free or non-free. In some cases, there is the creation of new types of crimes in the legislation, the establishment of new authorities (which take the position of censors), and the arrests of people accused of spreading false news. Well-known dictatorships, such as Saudi Arabia<sup>76</sup> and Egypt<sup>77</sup>, increased the crackdown on dissent on the grounds that they are merely addressing the spread of fake news.

In countries in transition to authoritarianism,<sup>78</sup> characterization of information as "fake news" is used for political manipulation. Hungary is an example. While promoting misinformation, the government accuses news that it dislikes of being fake news.<sup>79</sup> Under attack from media outlets loyal to Orbán, Facebook has had enormous difficulty in Hungary in enforcing its policy of flagging fake news and acting against agents promoting misinformation.<sup>80</sup>

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<sup>73</sup> Robert S. Mueller, III, Report On The Investigation Into Russian Interference In The 2016 Presidential Election' (U.S. Department of Justice, 2019) [https://www.justice.gov/storage/report\\_volume1.pdf](https://www.justice.gov/storage/report_volume1.pdf).

<sup>74</sup> Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Final Report (UK House of Commons, 2019) <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>.

<sup>75</sup> Committee on Foreign Relations, Putin's asymmetric assault on democracy in Russia and Europe: implications for U.S. National Security (United States Senate, 2018) <https://www.foreign.senate.gov/imo/media/doc/FinalRR.pdf>.

<sup>76</sup> A. Harwood, Saudi Arabia threatens five years in jail for anyone making fun of its government online, *Mirror* (Sep 5, 2018) <https://www.mirror.co.uk/news/world-news/saudia-arabia-threatens-five-years-13199363>.

<sup>77</sup> S. Islam, In 'fake news' crackdown, Egypt is a world leader on jailing journalists, bloggers and social media users, *Los Angeles Times* (Dec 18, 2018) <https://www.latimes.com/world/la-fg-egypt-fake-news-arrests-20181218-story.html>.

<sup>78</sup> Countries that maintain a democratic shape - have periodic elections - but do not guarantee a reasonable set of fundamental rights.

<sup>79</sup> Gergely Szakacs et al., EU Commission rebukes Hungary's new media campaign as 'fake news', *Reuters* (Feb 19, 2019) <https://www.reuters.com/article/us-hungary-eu-election-campaign/eu-commission-rebukes-hungarys-new-media-campaign-as-fake-news-idUSKCN1Q8II0>.

<sup>80</sup> Emma Graham-Harrison & Shaun Walker, Hungary: the crucible for faulty efforts by Facebook to banish fake news, *The Guardian*, (May, 18 2019), <https://www.theguardian.com/world/2019/may/18/hungary-crucible-facebook-attempt-banish-fake-news>.

Among the countries considered free (democratic), France was the first to adopt a legislative act clearly against disinformation. In 2017, the French presidential elections were adversely affected by political propaganda campaigns using social bots, including ones that had already been detected in the US presidential campaign the year before.<sup>81</sup> After a full year of debates, at the end of 2018, the National Assembly passed a law<sup>82</sup>. It is legislation specifically directed at combating mis- and disinformation campaigns. The legislation displayed a particular concern for the campaign period, when it is possible to apply for an order of Internet content removal. During the three months prior to the elections, there are a number of duties of transparency on the part of the online platforms. The concern about foreign influence is also clear. The Electoral Council may suspend the broadcasting of a platform controlled or influenced by a foreign government if it finds that that government is attempting to influence the elections, especially by spreading false news.

Before that, in 2017, Germany introduced a law aimed at compelling Internet platforms to maintain a policy against illegal content<sup>83</sup>. Companies are obliged to take action against content considered crime in the criminal code, have a transparent policy, and report it to the government. Under this law, companies are required to remove content “manifestly unlawful” within 24 hours of receiving the complaint<sup>84</sup>.

Despite being a law restricted to combat content already declared illegal by the criminal code, it was widely criticized. It entails the same problems as other laws when defining what content is “illegal”. But there is a more serious problem: companies responsible for social media have a duty to identify and therefore define this “illegality”. It was also worrying that authoritarian governments used the German

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<sup>81</sup> Emilio Ferrara, Disinformation and social bot operations in the run up to the 2017 French presidential election, 22 *First Monday* (2017) doi: <https://doi.org/10.5210/fm.v22i8.8005>.

<sup>82</sup> LOI n° 2018-1202 du 22 décembre 2018. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037847559&categorieLien=id>

<sup>83</sup> *Netzwerkdurchsetzungsgesetz* vom 1. September 2017. <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>

<sup>84</sup> B. Knight, Germany implements new internet hate speech crackdown, *Deutsche Welle* (January 1, 2018) <https://www.dw.com/en/germany-implements-new-internet-hate-speech-crackdown/a-41991590>

example in justifying their new repressive laws, and international human rights organizations presented a set of suggestions aiming to change the German law.<sup>85</sup>

The European Union does not seem inclined to follow Germany or France's example. In preparation for the recent elections, the European Commission has chosen the path of dialogue with digital platforms, proposing agreements in which companies act against disinformation. In 2018, representatives of advertising and digital platform companies agreed to comply with a self-regulatory Code of Practice to address online disinformation<sup>86</sup>. Nevertheless, after the European elections the European Commission's discontent with the actions of social media companies was apparent. The European Commission accused social media platforms "of giving a misleading picture of their efforts to remove fake accounts spreading politically motivated disinformation<sup>87</sup>".

Many democratic countries are avoiding enacting laws for now, as they are aware of the risks to civil and political rights. However, that does not mean they are neglecting the problem. In many of these countries, task forces have been set up to study the problem or act on legislation that already exists. There is also an increase in initiatives aimed at improving digital literacy among citizens.

The United Kingdom has chosen to improve children's education by preparing them at school to recognize the risks implicit in false news. The Department of Education recently announced a digital literacy initiative aimed at state school students.<sup>88</sup>

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<sup>85</sup> Human Rights Watch, Germany: Flawed Social Media Law.NetzDG is Wrong Response to Online Abuse (February 14, 2018) <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>. Article 19, Germany: Responding to 'hate speech' (2018) <https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-'hate-speech'-v3-WEB.pdf>.

<sup>86</sup> Samuel Stolton, EU code of practice on fake news: Tech giants sign the dotted line, Euroactiv (Oct 16, 2018) <https://www.euractiv.com/section/digital/news/eu-code-of-practice-on-fake-news-tech-giants-sign-the-dotted-line/>

<sup>87</sup> Daniel Boffey, EU disputes Facebook's claims of progress against fake accounts, The Guardian (Oct 29, 2019) <https://www.theguardian.com/world/2019/oct/29/europe-accuses-facebook-of-being-slow-to-remove-fake-accounts>

<sup>88</sup> C. Cockburn, Schools to teach children about fake news and 'confirmation bias', government announces, The Independent (July 15, 2019) <https://www.independent.co.uk/news/education/education-news/fake-news-schools-education-online-risks-confirmation-bias-damian-hinds-government-a9004516.html>.

Despite suffering a bombardment of fake news,<sup>89</sup> Sweden and Finland are also choosing to avoid repressive laws. Finland is investing in digital literacy and awareness<sup>90</sup>. Both countries are among the top five in the media literacy ranking compiled by the Open Society Institute<sup>91</sup>. They are avoiding adopting new repressive rules; instead, they are investing heavily in raising public awareness with citizen involvement. It is important for the world to follow the experience of these countries. Sweden has chosen to create a new authority to promote news with reliable content<sup>92</sup>.

In addition to the problem of creating new laws to combat disinformation, we also need to be careful not to justify using the fight against disinformation as an alibi for taking more drastic measures against social media users, even using existing criminal legislation. Italy and Taiwan are the only countries considered free by Freedom House in which there is news of arrests related to combating misinformation as a result of monitoring by the Poynter Institute. In the case of Italy, the arrest has no relation to political acts. It was a case of false social media profiling to assign disgraceful ratings to companies on the Trip Advisor website. The monitor of the Poynter Institute states that a Chinese outlet reported more than 110 arrests because of "fake news" in Taiwan. On the monitor of the Poynter Institute, it is described that a Chinese outlet reported more than 110 arrests because of "fake news" in Taiwan. However, when I opened the link that is available in the website,

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<sup>89</sup> Freja Hedman et al., News and Political Information Consumption in Sweden: Mapping the 2018 Swedish General Election on Twitter, The Computational Propaganda Project (Sep 3, 2018) <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/09/Hedman-et-al-2018.pdf>.

<sup>90</sup> Kati Pohjanpalo, Russia's Neighbor Finland Mounts Defenses Against Election Meddling, Bloomberg (Mar 28, 2019) <https://www.bloomberg.com/news/articles/2019-03-28/eu-s-bulwark-to-russia-mounts-defenses-against-election-meddling>. Henri Mikael Koponen & Helsingin Sanomat, Finland remains resistant to 'fake news', disinformation, International Press Institute (Jan, 24, 2018) <https://ipi.media/finland-remains-resistant-to-fake-news-disinformation/>.

<sup>91</sup> Open Society Institute Sofia, The Media Literacy Index 2019: Just think about it, November 29, 2019, <https://osis.bg/?p=3356&lang=en>

<sup>92</sup> "Sweden to create new authority tasked with countering disinformation," The Local (Jan 15, 2018) <https://www.thelocal.se/20180115/sweden-to-create-new-authority-tasked-with-countering-disinformation>

the news speaks that 110 people prosecuted, not arrested.<sup>93</sup> Nonetheless, there are other news stories about arrests<sup>94</sup> in Taiwan.

There seems to be no way round the problem without the direct involvement of the companies responsible for social media. These companies that created social media have great power and are part of the problem, so they have to be part of the solution. Democratic governments could demand that social media companies adopt more actions against the use of bots and enforce more vigilance against professionally organized disinformation campaigns. On the other hand, these companies need to adopt more transparent practices. These measures could lead to negative outcomes, such as the establishment of private censorship. This risk is visible in the event of Twitter blocking advertising by the French Government on the grounds that the platform complied with French anti-misinformation legislation.<sup>95</sup>

After the 2016 US presidential election, Facebook was heavily criticized for not acting to prevent the proliferation of misinformation. In response, the platform announced later that year that it was partnering with fact-checking organizations.<sup>96</sup> Now, there is a net of more than 50 partners working in 42 languages. But these partners and Facebook admit that the platform needs to do more and to improve their practices.<sup>97</sup>

We must not forget that this issue is not limited to challenging governments, so civil society needs to engage in finding the solution. Nor should it be the sole responsibility of companies that own social media to combat the spread of false news on social media. There are many digital literacy experiences and fact-checking

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<sup>93</sup> L. Chung, Taiwan gets tough over fake news blamed on Beijing 'disrupting its democracy', *South China Morning Post* (Jul 27, 2019) <https://www.scmp.com/news/china/politics/article/3020261/taiwan-gets-tough-over-fake-news-blamed-beijing-disrupting-its>.

<sup>94</sup> J. Reinl, 'Fake news' rattles Taiwan ahead of elections, *Al Jazeera* (Nov 22, 2018) <https://www.aljazeera.com/news/2018/11/news-rattles-taiwan-elections-181123005140173.html>

<sup>95</sup> BBC News, Twitter blocks French government with its own fake news law (Apr 3, 2019) <https://www.bbc.com/news/world-europe-47800418>.

<sup>96</sup> L. H. Owen, Clamping down on viral fake news, Facebook partners with sites like Snopes and adds new user reporting' *Nieman Journalism Lab* (Dec 15, 2016) <https://www.niemanlab.org/2016/12/clamping-down-on-viral-fake-news-facebook-partners-with-sites-like-snopes-and-adds-new-user-reporting/>.

<sup>97</sup> L. H. Owen, Full Fact has been fact-checking Facebook posts for six months. Here's what they think needs to change, *Nieman Journalism Lab* (Jul 29, 2019) <https://www.niemanlab.org/2019/07/full-fact-has-been-fact-checking-facebook-posts-for-six-months-heres-what-they-think-needs-to-change/>.

agencies that have emerged from initiatives on the part of non-governmental institutions.

When we examine the problem from a perspective that takes fundamental rights seriously, especially freedom of speech, fact-checking initiatives and digital literacy are less damaging strategies. In isolation, they do not solve the problem and have limited effects, since these strategies require the agreement of people, who must be open to awareness campaigns and a willingness to check whether the news is true. That is why such initiatives produce more effects in societies with a longer democratic tradition and higher levels of education. Unfortunately, there is also a side effect that can adversely affect mainstream media, as the many critical people may come to doubt everything.<sup>98</sup>

One of the biggest struggles in addressing disinformation campaigns that spread false or offensive news is choosing who will arbitrate; whoever has the power to decide the nature of the news can abuse that power. Thus, the fewer government officials who can act on deciding what is true or false, the better. There will always be a risk that governments will persecute those who hold specific political opinions in the name of combating threats on the Internet. The ideal is to invest in more information for society, which decides on the true or false nature of the information. Enforcement should be seen as the last alternative.

Misuse of the defense argument against misinformation may misrepresent this cause. An example of this misuse was the decision of the Brazilian Supreme Court that banned the publication of an interview with former president Luiz Inácio Lula da Silva. The former president gave interviews to two media outlets, but their publication in the election period was banned by a decision of the Vice President of the Court, who argued that the interview with Lula, who was not a candidate, could cause an information disorder in the elections.<sup>99</sup> Ironically, amid elections affected by actual disinformation campaigns, this judicial decision forbidding the publication of an interview used the fight against disinformation as justification.

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<sup>98</sup> K. Clayton et al., Real solutions for fake news? Measuring the effectiveness of general warnings and fact-check tags in reducing belief in false stories on social media, *Political Behavior* 1 (2019)

<sup>99</sup> Carolina de Assis, After criticism from Brazilian and international entities, Supreme Court revokes censorship it imposed on news sites, *Knight Center for Journalism in the Americas* (Apr 18, 2019) <https://knightcenter.utexas.edu/blog/00-20800-brazilian-and-international-organizations-criticize-federal-supreme-court-decision-cen>.

## Conclusion

Electoral periods influenced by the use of massive disinformation campaigns erode democracy. The democratic decision itself is negatively affected because the voter, in choosing how to vote, is led to consider false premises. Failure to properly understand the issue may lead us to legitimize disproportionate responses from governments that may cause other problems or justify an omission that may exacerbate the problem.

Legal scholars - especially scholars of constitutional law - need to engage in an interdisciplinary debate. There is a great effort under way to understand the problem of disinformation in other areas, such as media studies, computer science, and psychology. These studies can provide constitutional law researchers with a set of knowledge that will help them come up with answers to the challenges facing the constitutional state.

This is a challenge that will not be met by the national state alone. As the Internet has no boundaries, it is necessary to articulate governments and involve international organizations in the pursuit of solutions. Criminal investigations and prosecutions can hardly reach the agents responsible for disinformation campaigns. However, there are other reasons to reduce the role of criminal law in solving this problem. Democratic government actions need to be careful to prevent the fight against misinformation from becoming an alibi justifying the persecution of certain political groups. The criminalization of agents should be reserved for cases of intentional misinformation campaigns with the potential to erode the credibility of democratic institutions or to destroy the image of people, companies, or social groups. However, some less interventionist measures can be taken by non-governmental actors that can help detoxify the political debate.

Digital literacy is an activity that can promote a more critical attitude towards the news to which people are exposed. As shown in this article, people's lack of familiarity with internet use and lack of critical analysis of received content are among the reasons why false information goes viral. Thus, awareness-raising campaigns need to focus on specific social groups according to age and educational

level, and the campaigns should be held accountable by addressing the harmful consequences of spreading this type of information.

Fact-checking agencies also play an essential role in combating misinformation. They provide inputs for those who want to combat misinformation campaigns, so they need to be encouraged. This initiative is not one that should come just from media companies because the work involved interests the whole of society. Thus, academia and companies must also act in this direction.

Because of the role that social media have in people's lives today, social media companies have an extra responsibility. Those responsible for social networks must take into account problems such as the dissemination of misinformation and polarization. The companies that manage social networks need to include policies that guarantee pluralism.

Initiatives in democratic countries that prioritize protecting the integrity of elections are on the right path. Elections generally involve short periods of debate and deliberation which, when concluded, will produce consequences for years to come. Usually, democracies regulate electoral campaigns to avoid deliberations becoming distorted, thus establishing laws to restrict manipulations by government or economic power<sup>100</sup>. It is not reasonable to let the vote be decided primarily on the basis of disinformation, misinformation, or malinformation.

The reaction is urgent. Rapid technological development will amplify the problem, since the falsification of videos makes it increasingly challenging to identify a new phenomenon called "deep fake." More than a reaction, it is necessary to think beforehand, to be prepared for the new attacks of the enemies of democracy. However, besides being rapid, it must be cautious. Any action taken by democratic governments must take into account both aspects of constitutional democracy: the integrity of popular decision-making and the guarantee of the rights of individuals.

The debate focuses on the importance of defending constitutional democracy and the limits of the instruments for this defense, which leads to a reflection on the resilience of the constitutional state. Constitutional democracy

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<sup>100</sup> D. I. Weiner, & B. T. Brickner, Electoral Integrity in Campaign Finance Law, 20 New York University Journal of Legislation and Public Policy 101 (2017). R. Briffault, Public funding and democratic elections, 148(2) University of Pennsylvania Law Review 563 (1999). E. Alexander, ed. *Comparative political finance among the democracies* (Routledge 2019).

must be seen as a continuous learning process, guided by principles. The various setbacks in history have taught us that the passage of time is not a mere evolution towards paradise. Democracy and constitutionalism – with their civilizing content – have always met resistance. It is essential now to recognize that there is a crisis in democracy and that it is directly linked to the way the internet is being used. However, as we come up with solutions, we need to prevent these evils from bringing in their train other evils, by disregarding or minimizing the importance of fundamental rights, by merely exchanging threats that clearly represent the risk of setbacks.

Constitutional democracy is tested in these extreme situations when rights threats need to be addressed, but the solutions have the potential to create new threats to other rights. In this matter, *laissez-faire* authorizes wars that tend to be harmful to democracy. We also cannot disregard the risks of foreign interference in national deliberative processes. Combating the spread of misinformation is fundamental to upholding democracy and, therefore, to guaranteeing citizens' political rights. Nevertheless, the answer to the problem must involve a strong commitment to guaranteeing freedom, especially freedom of speech.<sup>101</sup> The defense of freedom requires that we avoid establishing an authority with the power to decide what is true or false.

In this quest for solutions, we have to recognize this principle: a constitutional democracy should not react against its enemies using certain types of instruments, because, in so doing, it would threaten the very existence of such a constitutional democracy. We cannot launch an attack on those who threaten our democracies as if we were kamikaze democrats, endangering the whole democratic structure when we are responding to an enemy attack. All options at our disposal need to seriously consider the defense of individual and collective rights, which can transform our democracies into more resilient regimes.

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<sup>101</sup> Irimi Katsirea, "Fake news": reconsidering the value of untruthful expression in the face of regulatory uncertainty, *Journal of Media Law*, 10:2, 159-188.