

THE ROLE OF THE INTERNET IN THE 2018 ELECTIONS

BAP
TISTA
LUZ

ADVOGADOS

/ Haloá Lucas Silva Reuben

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Introduction

One fundamental value that the Brazilian electoral legislation¹ and, in general, the legislation of democratic countries must protect is the equality of conditions in electoral contests. With the advent of the digital means of communication the fronts in which electoral disputes unfold have rapidly changed; as a result, the stability of such equality has been challenged.

There are some prominent cases related to possibly undue forms of influence in elections which have put the matter to international political debate. Iconic is, for instance, the case of the alleged foreign intervention in the 2016² US presidential elections and the purported influence of Cambridge Analytica³ in the case with the Brexit campaign (the exiting of the UK from the European Union).

¹ § 9º do art. 14 of CF

² United States of America v. Internet Research Agency (and others). At <https://www.justice.gov/file/1035477/download>, access May 11, 2018.

³ Leaked: Cambridge Analytica's blueprint for Trump victory. At <https://www.theguardian.com/uk-news/2018/mar/23/leaked-cambridge-analyticas-blueprint-for-trump-victory>, access on April 15, 2018.



The concept of fake News and related terms must by all means provide precision when it comes to their use.

Within the Brazilian context, innovations in the legislation⁴ allow social networks and the Internet to be legally used in campaigns so as to endorse candidates through the promotion of content.

The world context, and more specifically the Brazilian context, with the growing importance of the digital environment in electoral disputes, requires that some understanding be established over the matter. What are the concepts? The risks? What does the legislation actually impose? Which jurisprudential understanding is applicable?

In addition, there is significant room for debate over the uncertainties and risks related to the legislative changes and the technological advance. We look to bring as many answers and relevant questions as we can.

The widely popularized term fake news has misinformation⁵ as its central element. Although, at first glance, it seems to be characterized by the broadcast of false news, a closer look will lead us to the conclusion that it is more than that.

First, although seeking to gain credibility, fake news which usually comes in a journalistic format, does not stick to a single format. A tweet, a text through WhatsApp, even a Facebook post, may have content that, escaping from the journalistic format, gains credibility looking to misinform.

⁴ Art. 57-C of Law 9.504/1997; Art. 24 of Res. 23.551/2017 of TSE.

⁵ Sobrevivendo nas Redes: Guia do Cidadão, p. 43. At <http://fundacaoofhc.org.br/files/sobrevivendo%20nas%20redes.pdf>, access May 15, 2018.



Its content tends to be sensationalistic, shocking, as a hidden and hitherto undisclosed truth, which aim is the mass broadcast with as much significant impact as possible. The degree of novelty and the emotional reactions to the news lead to a faster and broader diffusion⁶.

Specifically, as to the truthfulness of the content, fake news may or may not be completely false - a true story out of context, or old news that is no longer valid, for example, are ways to generate misinformation without the use of strictly false information. Exaggeration and lack of context can be as effective as some fully invented content.

The motivation for creating and broadcasting fake news vary. Although the main interest is political in nature, typical of an electoral contest, its economic motivation can be as relevant.

To the best of our knowledge, multiple access to websites, regardless of their content, generates income from advertising - a mass diffusion directing the site to advertising content will result in profit for the owner of the website. It should be then understood that more than one motivation is present, either simultaneous or not - political, for the promotion of the candidacy or political ideals, and economic, only for the sake of profit, regardless of the content of a website.

An iconic scenario of fake news is the 2016 US presidential elections, which was largely responsible for bringing the term fake news to notoriety. In these elections, the possible interference of Russians through fake news is worth of attention⁷.

⁶ <http://science.sciencemag.org/content/359/6380/1146.full>

⁷ At <https://www.justice.gov/file/1035477/download>, access June 1, 2018.



fake news -related Bills

There is no specific legislation in such regard today. Due to the evidence of the matter, however, there are some bills pending in Congress.

Senate Bill 473 and Projects 9554, 8592 and 6812 characterize the broadcast of false or incomplete news in different ways. What everyone seems to have in common is the potential to violate freedom of expression.

Care should therefore be taken in the analysis of the proposed projects. While recognizing the relevance of the topic and its potential for interference in the electoral process, the criminalization of the production and broadcast of fake news can easily become an act that may be characterized as censorship.

First, the term fake news is quite broad, and even unduly interpreted when it comes to its identification. Second, there is a common lack of knowledge about the content of what is being broadcast - the relevant part of such broadcast is mostly conducted by individuals who do not necessarily identify the content as it really is. Should these individuals be held liable? While the debate on the matter is well accepted either by the Congress, the Electoral Justice or the Press, its criminalization is a response that encroaches in the territory of freedom of the expression with the potential to cause harm rather than to come up with a solution.

The Internet in the Brazilian Electoral Legislation

In a very specific manner the Brazilian electoral legislation regulates the period in which electoral propaganda can be conducted, who can



finance campaigns and under what terms, also bringing innovation, e.g. as of the 2018 elections content will be allowed for boosting over the Internet.

The period restriction with the permission of electoral propaganda has already been a relevant challenge in its own right, along with the very definition of what is included as electoral propaganda. The point seems secondary, but it is highly important, as will be seen below.

How would it be possible to tell from political activity that which specifically has an electoral objective? After all, politicians who may become candidates defend, day in day out, their ideas and positions. The jurisprudence has settled the understanding that electoral propaganda is that which is marked by the implicit or explicit request of a vote⁸.

The permission for boosting provided for in art. 57-C of Law 9504/1997 has the following marks:

- i) permission for boosting political propaganda exclusively for political campaigns;
- ii) permission only for boosting, but not propaganda;
- iii) boosting content only, which promotes a candidate without criticizing others.

Such characterization implies the need for clarity of what is, first of all, the very notion of boosting. As it turns out boosting is a word literally used by social network Facebook, characterized by the expanded exposure of content already existing in the social network. That is, it is not about creating content to be exposed

⁸ Pursuant to art. 36-A of Law 9.504/97 broadcast of parliamentary acts does not constitute advanced electoral propaganda as long as the candidacy is mentioned, or votes are requested or electoral support - TSE, Ag- n° 28428, Judge appointed João Otávio de Noronha, j. November 28, 2013, DJE Februray 14, 2014



exclusively in some advertising space, but rather expanding content that can be accessed normally, without such boosting.

Therefore, we can identify one differentiating factor from online electoral propaganda (which is strictly prohibited): the content must be preexisting independent from the boosting.

Considering the first point, we can understand that there is a prohibition on the boosting of political propaganda by anyone other than the candidate's own official campaign, under specific conditions set forth in the legislation (as an indication of the electoral slate, etc.). Together with the permission for any individual to boost personal content, there is a need to distinguish between content that can be boosted by anyone and content that is prohibited, that is, a clarity of what is characterized as electoral propaganda. Does the definition by virtue of the jurisprudential understanding of request for votes remain valid? How will the control be performed, considering the possibility that such boosting, when coming from dispersed individuals, can it be pulverized?

Possible answers are in the line of assuming that there will be continuity in the understanding of what electoral propaganda is - only implicit or explicit requests for votes. Similarly, it can be assumed that the control mechanisms will remain essentially the same - the cross-control carried out by the campaigns themselves, which identify undue propaganda trigger the Electoral Justice.

There is considerable questioning⁹ regarding effective control, especially under the scope of campaign financing. The lack of

⁹ Fake news and "a crônica do caixa 2 anunciada". At <https://www1.folha.uol.com.br/opiniaio/2018/04/ricardo-r-campos-juliano-maranhao-e-fabricio-benevenuto-fake-news-e-a-cronica-do-caixa-2-anunciado.shtml>, access May 15, 2018



transparency would imply the impossibility of effectively raising amounts used in the campaign, resulting in a true tax-evasion campaign over the Internet.

The second point is closely related to what is meant by boosting. The legislation clearly prohibits¹⁰ "any kind of electoral propaganda paid on the Internet," except for boosted content. We have to point out that the term "boosting" is extracted from the product of social network Facebook, from which arises the question of its application to other companies. In this sense, the regulation of the law brings a definition¹¹ that covers other products, as long as they potentialize access to the content boosted. Considering that Resolution 23.551/2017 was prepared by the Higher Electoral Court itself, it is expected that the trials will adhere to what is set forth in the resolution, namely:

Art. 32. For purposes of this resolution, we consider:

XIII - boosting of content: mechanism or service which, through hiring from the providers of the application over the Internet, potentialize the reach and the broadcast of the information to reach users, who, under normal circumstances, would not have access to the content;

Pursuant to such definition, it is expected that YouTube ads and sponsored content in Google searches, among others, fall into the category. The effective reception of the courts against concrete cases of products of technology companies where the distinction between boosting and paid advertising is not clear has yet to be concluded.

¹⁰ Art. 57-C of Law 9.504/1997

¹¹ Art. 32, XIII of Resolution 23.551/2017



The third point in the characterization of art. 57-C of Law 9504/1997 relates to the type of content, specifically to a prohibition of critical content. The article states, in its third paragraph, that boosting must be carried out "only for the purpose of promoting or benefiting candidates or their associations".

This is an expression which can clearly be detrimental to the political debate, depending on the interpretation given to the legal text - if it is a case of prohibition of any content with negative analysis of competitors or to prevent comparisons in which a given candidate results in a relatively lower position, there is an effective impediment of a legitimate tool for electoral campaigns.

Thus, the electoral law and its regulation, by the TSE, determine a set of rules¹², especially of transparency, to be observed in the boosting of electoral propaganda.

First, boosted content should have the exclusive purpose "of promoting or benefiting candidates or their associations." It must also be unequivocally identified as such, being mandatory to include CNPJ or CPF of the person in charge of advertising, as well as the expression "Electoral Propaganda".

Another requirement is that it be hired exclusively by "political parties, coalitions and candidates and their representatives,". The term "representatives" specifically standing for the financial administrator of the campaign.

¹² Art. 57-C of Law 9.504/1997; Art. 24 of Res. 23.551/2017 of TSE.



Cambridge Analytica

The case of Cambridge Analytica is related to the issue of boosting since their modus operandi was closely connected to the targeting mechanisms existing in social networks, more specifically those of Facebook.

The case raises the question of the use of personal data, collected in social networks, to establish a correlation between certain profiles and effective means of convincing - rather than detailing the profiles and establishing individualized strategies, the information allowed for the design of content whose impact turned out effective.

This is essentially the use of a micro-targeting technique, in which voters were exposed to messages specifically designed for greater effectiveness.¹³

Briefly, the case: more than 10,000 ads were hired by Cambridge Analytica in favor of the Republican Party's presidential campaign during the 2016 US elections. The algorithm for targeting these ads utilized Facebook profile data of more than 87 million of people.¹⁴

The positioning of technology companies

Although Facebook¹⁵, Google and other social networks do not see themselves as evaluators of the content made available on their platforms, and considering the nature of their business models, the

¹³ At <https://www.theguardian.com/uk-news/2018/mar/23/leaked-cambridge-analyticas-blueprint-for-trump-victory>, access June 1, 2018.

¹⁴ At <https://www.theguardian.com/technology/2018/apr/08/facebook-to-contact-the-87-million-users-affected-by-data-breach>, access June 1, 2018.

¹⁵ At <https://www.cnbc.com/2018/02/02/mark-zuckerberg-doesnt-want-to-be-your-news-editor.html>, access June 14, 2018.



initiatives¹⁶ are increasing in the sense of evaluating and curbing practices that may be classified as abusive.

The standard posture is that the one responsible for the content is the one who makes it available, that is, the user.

There is, however, some change in progress. The different emblematic cases of manipulation, whether Cambridge Analytica or the case of intervention in the United States elections, have raised the question about other forms of performance of these platforms. A Facebook¹⁷ initiative to assess fake news in a partnership with Aos Fatos and Agencia Lupa is being released in May 2018.

Conclusion

What position to adopt before the 2018 elections? What to expect from the dispute under a digital perspective? It would be easy to hold a pessimistic position, since the issues and points of controversy are many, but it should be understood that a negative impact has already been observed in the elections in some other countries. As there is close attention to the Electoral Justice, the candidates and parties on the subject and despite the uncertainties and risks, there is no reason to fear.

In this sense, any bill criminalizing fake news is undesirable due to the potential conflict with the freedom of expression, freedom of press as the possibility of causing real censorship.

¹⁶ At <https://learningenglish.voanews.com/a/facebook-google-struggle-to-fight-fake-news/4074886.html>, access June 14, 2018.

¹⁷ At <https://www.poder360.com.br/midia/facebook-divulga-nova-ferramenta-de-checegamento-noticias-falsas/>, access May 10, 2018



Innovations in the legislation consequently, although potentially impacting from the point of view of broadcasting information and campaigns, are not per se risky to the electoral process.