

## FREEDOM OF EXPRESSION DURING ELECTIONS: BETWEEN YESTERDAY AND TODAY

## LIBERDADE DE EXPRESSÃO EM TEMPOS DE ELEIÇÕES: ENTRE O ONTEM E O HOJE

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**Abstract:** Freedom of expression corresponds to the right to free expression of thought, information, and communication, while also expressing someone's will and, no less important, respect in that space, which could generate damages in cases that social limits are exceeded. In any case, when in an electoral race, there is a loosening of limits of freedom of expression for election candidates that are based on facts. Conversely, from the information society and the emergence of fake news, disinformation and manipulation of individuals, especially by those who are seeking public positions, it is a new reality, which also brings problems for ensuring the abovementioned right. Hence, by using the bibliographical review and the deductive approach, the authors seek to demonstrate the existence of freedom of expression from before and another of today, notably due to the State's actions becoming from protective to violating the said right, culminating in the weakening of democracy. In conclusion, freedom of currently, expression is corrupt by the idea of being able to do everything and being able to say anything, and that this situation causes obstacles to democracy and the guarantee of human dignity.

**Key-words:** Freedom of expression. Election Period. Ricardo Canese v. Paraguay Case. Information Society. Disinformation.

**Resumo:** Liberdade de expressão corresponde ao direito de livre manifestação de pensamento, de informação e comunicação, ao mesmo passo que também se apresenta sua vontade e, não menos importante, do respeito nesse espaço, podendo gerar reparação em casos que ultrapassem um limite social. De toda sorte, quando em corrida eleitoral, tem-se um afrouxamento dos limites da liberdade de expressão para candidatos à eleição que estejam amparados em fatos verdadeiros. Noutro giro, a partir da sociedade de informação e do surgimento de *fake news*, desinformação e manipulação de indivíduos, especialmente por aqueles que pleiteiam cargos públicos, estar-se diante de uma nova realidade, a qual traz problemas para a assecuração do direito em comento. Assim, utilizando-se de revisão bibliográfica e do método de abordagem dedutivo, busca-se demonstrar a existência de uma liberdade de ontem e outra de hoje, notadamente pela atuação estatal passar a ser de protetora para violadora do referido direito, culminando no enfraquecimento da democracia. Conclui-se que o direito à liberdade de expressão se encontra hoje corrompida pela ideia de tudo poder fazer e tudo poder falar. Essa situação causa empecilhos para a sustentação da democracia e da própria da dignidade humana.

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## **Introduction**

In the electoral field, respect – and not tolerance – should be considered extremely important, as it imposes empathy and appreciation of others. It is easier to be tolerant of someone than to respect them. Tolerance means understanding that we are different and, even if one does not share the same opinions, it is possible to be capable of allowing the presence of others. Respect goes further; it recognises the other as a human being and, therefore, as a similar person within a multiplicity, recognising oneself as a holder of consideration; a holder of respect.

When talking about freedom of expression during elections, the authors expect a healthy environment with open debates to better understand the candidates. Therefore, democracy would be in a good position to fulfill its role in society. Meanwhile, within society, freedom of expression can also generate friction and damage to the right to express oneself at election time. Historically, freedom of expression has been a powerful tool that democratises voices across societal strata. But, its current manifestation appears tainted with mis/disinformation, especially within electoral contexts.

Therefore, through the deductive approach method and the theoretical-documental research technique, in addition to the necessary dogmatic analysis, a study on the freedom of expression at election time will be carried out. Firstly, after analysing the doctrinal meaning of the freedom of expression, the authors will proceed with a jurisprudential analysis in order to extract and interpret its meaning for the Inter-American Court of Human Rights. In addition, in the following topic, taking into consideration the definitions found, they will examine the role of freedom of expression in current democratic regimes and how mis/disinformation has been decisive for its (dis)assembly.

In other words, they will examine the balance between freedom of expression, respect, and democracy during elections, focusing on yesterday and today, particularly considering the information society individuals are inserted in, and the disinformation that it brought along. In order to help with such analysis, the authors will also take into consideration the *Ricardo*

*Canese* Case from the Inter-American Court of Human Rights against Paraguay, which debates freedom of expression not only in a democratic society, but also during an electoral campaign.

Hence, concisely, central to the authors' inquiry, is the understanding of the evolution of democracy within the ever-shifting contours of freedom of expression, especially in face of contemporary challenges, such as misinformation in the digital age, and the attacks such right has been suffering throughout the world. After all, although there is currently 89 democracies around the world (Fundação FHC, 2022), "almost half of countries have suffered setbacks in the democratic process in the last five years" (Velert, 2023, s.p.), showing this topic is of great importance in international relations.

### **1. The Freedom of Expression from before**

The free act of expressing thoughts and opinions through speech, in written and unwritten ways, in artistic, scientific, journalistic forms, among others, is closely related to the Democratic Rule of Law and democracy, in which we may truly see an effective representation of the population, and which takes into account the demands and perspectives of the entire society.

All these facets of expression constitute freedom of expression. Despite one may say freedom of expression is a single right, others may see it as plural as it has different modulations. After all, it can mean freedom of opinion, freedom of the press, artistic expression freedom, among others. Nevertheless, despite ramified, freedom of expression represents one of the rights with the greatest human and social value. For Santos (2012, p. 38), "freedom of expression is considered by legal literature as a fundamental human right and a prerequisite for the enjoyment of all human rights. When this freedom is suppressed, violations of other human rights follow".

Hence, due to its multiple facets, one of the most significant rights that a human being has, freedom of expression means having the right to express oneself in any way at any time and in any place, almost in an unrestricted way, without asking for authorisation to do so. In this sense, it also means having space to discover oneself as a human and to be respected as one. According to Meyer-Pflug (2009, p. 27), freedom of expression is "[...] a necessary

condition for the full development of human nature as well as the integrity and dignity of the individual”.

However, to hold the freedom to express oneself does not mean openly uttering any information or idea. The individual rights and guarantees of third parties must be taken into account. In other words, the right of one finds its limit when it collides with the rights of others, for instance the right to honour, image, and dignity. In fact, one can even express words that hurt another person or taint its honor; but this action entails a reaction so that the values proclaimed by society are not dispersed and corroborate to such a behaviour. Therefore, in this case, there are consequences for those who express themselves in that way.

This means that freedom of expression offers the possibility of interacting freely in the society in which one lives without censorship or requesting a license to do so, but with caution and with consequences for those who exceed the legally imposed social and individual limits. After all, according to Bulos (2014, p. 534), at an international level, the Universal Declaration of Human Rights prescribes that, in the exercise of their rights and the enjoyment of their freedoms, all people will be subject to the limitations established by law with the purpose of ensuring respect for rights and freedoms of others, and to satisfy the just demands of morality, public order and the well-being of a democratic society.

Therefore, the act of externalising thoughts that lead to disrespect for private life, intimacy, honor, and image, in addition to being characterised as a crime, generates liability. Freedom of expression does not serve to safeguard illegal acts, hence, any abuse that causes harm to another must be prohibited and punished by law.

Consequently, it must be emphasised that freedom of expression encompasses freedom of thought. In the Brazilian Constitution, article 5, item IV, states that the expression of thought is free, however it is observed that thought itself, in practice, there is no legal support in sight. In other words, according to Silva (2014, p. 50), freedom of thought represents the internal conviction of an individual which will only receive support by the legal system if it reaches society. That is, when externalising freedom of thought through freedom of expression, attitude, communication, etc., in a sense not desired by society, the power/duty of control and reprimand emerges. In this way, beyond an individual right, freedom of expression also concerns society as a whole.

In any event, among what it implies, restricts and counterbalances, freedom of expression needs to be well supported, given that it is fragile in the sense that, when it is in its contour of democratic and political views, if not monitored, it may also lead to tyranny, censorship, an instrument to prevent criticism, among others. In other words, freedom of speech, the right to hear and see the expression of others, the liberty to exchange information, data, news, etc., are of primary interest so as not to restrict the essence of man placed in a democratic society.

As stated above, it is the freedom of expression that gives rise to other rights, but all with limits. In Warburton's view,

[c]ommitting to free speech means protecting the speech you don't want to hear as well as the speech you do want to hear. This principle is at the heart of democracy, it is a basic human right, and its protection is a characteristic of a civilized and tolerant society (Warburton, 2020, *ebook*).

Because of its importance, freedom of expression is included in several constitutions around the world. In many legal systems, freedom of expression is included in the list of fundamental rights. In Brazil it is no different. Freedom of expression is found as a fundamental right in the Constitution (Brasil, 1988), within article 5, item IV, which deals with freedom of expression of thought; item IX, which refers to freedom of intellectual, artistic, scientific, and communication expression, independently of censorship and licensing; and item XIV, which ensures the right to access to information.

Furthermore, in the *chapeau* of article 220, Brazil guarantees the freedom of expression of thought, creation, and information in any form or process, expressed by in any media outlet (as per paragraph 1), prohibiting any and all censorship of a political, ideological, and artistic nature (as per paragraph 2).

Nevertheless, this is not a recent right. Dating back to Ancient Greece, freedom of expression came from an outdated social model as it was only guaranteed to a portion of society, that is, rich men, while the rest of the population had no voice. Despite being erected in such a way, from then to now, much has changed in terms of legal prescription. Nevertheless, one may question if it effectively changed, as there are examples of limitation, especially if not coming from a privileged portion of society (Oliveira, 2019).

According to Silva (2014, p. 51), freedom of expression is two-fold. On the one hand, it prevents the State from intervening in individuals' freedom of expression and, on the other hand, it allows the exchange of information and ideas, contributing to the existence of

democracy. Besides, an objective and a subjective dimension can also be considered to exist. The objective dimension acts on the functionality of the democratic regime, which in turn allows the subjective conception of the individual and the development of the human personality and vice versa.

Hence, in a process of social evolution, freedom of expression is understood as a fundamental right of human beings within society, as it encompasses the right to express one's opinions, to be informed and to participate in a democracy.

At international level, among others, this right is prescribed in the 1948 Universal Declaration of Human Rights; in the 1966 International Covenant on Civil and Political Rights; and in the Inter-American System, encompassing both the 1948 American Declaration of Human Rights and the 1969 American Convention on Human Rights. The latter shall be highlighted as it has an important role in overcoming obstacles and protecting human rights, not to mention that Brazil is a State Party to both meaning that it may be monitored and even be penalized in case of violation.

After all, by being in a democracy, States are expected to protect individuals so that they can freely express their opinions and do not suffer from any retaliation by the State, as it may be observed in the *Canese v. Paraguay* case, judged by the Inter-American Court of Human Rights (IACtHR), regarding freedom of expression in times of election.

But before we explore the abovementioned case, one may see by now that the freedom of expression 'from before', is a right that shall be preserved by the States not only because of their international commitments, but also because it is prescribed under their national laws as fundamental rights of human beings that are imperative to a democratic society.

Even though it may be restricted sometimes, whenever trespassing the limits of the other person (in terms of private life, intimacy, honour, and image) and as prescribed by law (to guarantee morality and public order), freedom of expression is a pillar to democracy. Hence, other limitations are seen as a serious violation that impairs the functioning of society as a whole, as it may be corroborating for the weakening of democracy itself.

The health of democracy around the world is worrying, as The Economist Intelligence Unit's 2020 Democracy Index shows. Recording the lowest score since 2006, global democracies have suffered significant setbacks, driven primarily by the coronavirus pandemic and the measures governments have taken to address it. While Sub-Saharan Africa, the

Middle East, and North Africa are the regions with the most notable setbacks, Latin America also underperformed. The region's average fell 0.04 points, marking an average decline for the fifth consecutive year, its lowest score in the index's history (average of 6.09 out of 10 points).

[...] The above-mentioned report classified only three countries in Latin America and the Caribbean as “full democracies” (Chile, Costa Rica and Uruguay). In the region, there are 13 “incomplete democracies”, five “hybrid regimes” and three “authoritarian regimes” (Nicaragua, Cuba and Venezuela) (Open Democracy, 2021, s.p.).

## **2. The Ricardo Canense vs Paraguay Case**

The most significant way that freedom of expression and democracy are demonstrated in a State is through elections, and it is during this period that freedom of expression opens up the possibility of debating the future that is expected of a democratic society. At this time, problems are also raised, solutions are proposed, and the possible rulers of a country are better known. It turns out that because freedom of expression is a broad and multifaceted figure, this scope sometimes also corroborates a feeling of permissiveness and boldness that can go beyond what it is considered reasonable. For Canotilho (1992),

[f]reedom, in the sense of the right to freedom, means the right to physical freedom, freedom of movement, [...] it is personal freedom. Freedoms [...] are usually characterized as fundamental positions of a defensive nature. In this sense, freedoms are identified with rights to negative actions [...]. [Its] specific feature is that of alternative behaviors, that is, the possibility of choosing a behavior. (Canotilho, 1992, p. 549-550).

As previously mentioned, having the freedom to express oneself covers several points where it does not mean unlimitedly saying or doing what one wants. Therefore, even though one has the right to freedom of expression, he/she must be careful not to harm the core rights of others, especially during elections. It is true that, in election time, there is a greater exchange of opinions, but sometimes limiting those who express themselves may support a democratic society and even improve it – never when the truth can get ill-intentioned people elected. After all, as a network of interconnected rights, freedom of expression stands alongside the dignity of the human person and the duty of respect.

In Brazil, for instance, on one hand, when elected, congressional representatives have the inviolability of any word, vote, or opinion as a constitutional prerogative. Still, they can be prosecuted if they exceed the acceptable threshold and go against expected decorum.

On the other hand, in the electoral periods, there is a culture of overthrowing the opponent by imputing words and accusations, and, ultimately, demoralising the opponent.

These attitudes certainly exceeds the limits of the right, culminating in a triple violation of the right to freedom of expression, but also human dignity and the duty of respect, unless such facts are true and that, once proven, their clarification is important to ensure that the State and democracy itself remains assured.

A debate in this sense is found under the *Canese case*. In 2002, the Inter-American Commission on Human Rights presented to the IACtHR the case of Ricardo Nicolás Canese Krivoshein against Paraguay for, among other reasons, a violation of article 13 of the American Convention on Human Rights, to which the country is a State Party and recognises the Court's contentious competence. Article 13 refers to freedom of thought and expression and states that it is necessary to safeguard the expression of opinions for the consolidation and development of democracy. In fact, according to article 11 of the same Convention, the right to freedom of expression must be respected, as it is about respecting the individual and fundamental rights of human beings.

In this regard, according to the facts, Ricardo Canese, presidential candidate, was convicted of defamation for stating in a debate during the presidential race that Juan Carlos Wasmosy, also a presidential candidate, would be the chair of the Stroessner Family in the Consortium of Paraguayan Construction Companies (CONEMPA) – a company that participated in the construction of the Itaipu binational hydroelectric complex.

According to Ricardo Canese, Juan Carlos Wasmosy would have enriched himself by being president of CONEMPA: “This company paid, at the time of the construction of the hydroelectric plant, considerable dividends to Alfredo Stroessner and, in return, received the monopoly of the main civil works in Itaipu” (Silva, 2014, p. 63).

For this manifestation, in addition to prison and fine, Mr. Canese was also subject to a permanent restriction on leaving the country – a restriction that impaired years of his personal and professional life. The decision given was being made by a democratic State that, in theory, should guarantee the right to freedom of expression.

At the end of the suit at the IACtHR, between arguments and counter-arguments, it was clear that Paraguay abused its role and, due to partisan influences – from the government – persecuted Mr. Canese, restricting some rights and preventing others from being realised. In the Commission's allegation, it was considered that

[...] b) “Free speech and political debate are an essential part of consolidating the democratic life of societies”. Given the imperative social



interest “in these types of debates”, the justifications permissible for the State to restrict freedom of expression in this context are much narrower and more limited, since the right to freedom of expression and information is one of society's main mechanisms for exercise democratic control over people responsible for matters of public interest. c) “The right to freedom of expression is, precisely, “the right of the individual and the entire community to participate in active, firm and challenging debates regarding all aspects linked to the normal and harmonious functioning of society”. These debates can often be critical and even offensive to those who hold public positions or are linked to the formulation of public policy; d) freedom of expression is one of the most effective ways to denounce corruption. Furthermore, the rule must be the publicity of alleged acts of corruption (Inter-American Court of Human Rights, 2004, p. 45, para. 72).

This way, at any time and especially in electoral times, the right to express thoughts and information should be guaranteed, and not the other way around whenever highlighting the truth. Freedom is too expensive not to protect or end up restricting it. Even if it is not beneficial to attack the supposedly offended person, considering the electoral period, one could even say there is “a relaxation” of the right to freedom of expression, notably for candidates, differentiating them from ordinary citizens. In this sense that, for them, speech can become a weapon in the race for governability, particularly in the fight against corruption and other factors that may weaken democracy as a whole.

Even though there are limits between what to say and what should be said, with prescriptions, such as crimes against honor, it is during election period that “[...] the realisation of the Democracy presupposes an open, plural, and dynamic public space, where there is a free confrontation of ideas” (Sarmiento, 2013, p. 62). However, an inevitable question from this emerges: “what would be the limit so that this flexibility of freedom of expression is not exceeded amounting to a crime, and what is the appropriate type of punishment to apply?”

According to the Inter-American Commission's report on the *Canese case*, the non-criminal punishment for slander, defamation, and insult “[...] should be established in the case of demonstrations carried out in the context of issues of public interest, such as electoral disputes. In these cases, civil actions may be taken whenever the standard of actual malice is met” (Inter-American Court of Human Rights, 2004, p. 45). The Court, inspired by the thoughts of the European Court of Human Rights (ECHR), also asserted that:

The limits of acceptable criticism are therefore wider with respect to a politician than in the case of a private individual. Unlike the latter, the former inevitably and consciously opens itself up to rigorous scrutiny of all its words and facts by journalists and public opinion and, as a result, must demonstrate a greater degree of tolerance. Without a doubt, article 10, item 2

(art. 10.2) allows the protection of the reputation of others – that is, of all people – and this protection also includes politicians, even though they are not acting in a private capacity, but in these cases the requirements for this protection must be weighed against the interests of an open debate on political matters (ECHR, 2002 *apud* Inter-American Court of Human Rights, 2004, p. 54).

Hence, what is recognised from the Canese case is that, although freedom of expression shall be protected under election periods, the punishment for situations in which the right is exceeded by a conduct of a candidate shall be duly analysed so that it does not harm democracy itself. In this way, Mr. Canese not only disseminated information he had about “[...] another candidate, exercising his right to express himself, but also promoted an exchange of this information with other voters, helping them to have access to more elements that would help them form their opinion when voting” (Silva, 2014, p. 64).

However, if it is proved that the freedom of expression was abused, damaging the honour of others, the punishment applied by the State cannot be carried out by restricting freedom of movement to such an extent that it permanently prevents an individual from leaving and entering its own country. Even if one considers the possibility of criminal proceedings, this type of penalty shall be considered the most severe means of liability, and there are other civil and monetary means to do so. If there is a measure that restricts the right to movement, this may be only applied to prevent complaints against the government and private/third parties.

The criminal prosecution of people who criticize generates drastic consequences, comparable to censorship or self-censorship, for people who could report or question public figures or State officials. This creates a great risk of violating freedom of expression, comparable to prior censorship. The imposition of restrictions on leaving the country may become a limitation on freedom of movement, if in this case it is not demonstrated that such a measure is necessary given the risk of damaging other rights and guarantees (Inter-American Court of Human Rights, 2004, p. 12).

Consequently, the right to freedom of expression encompasses the delivery of information to the population during electoral periods, hence, there must be some flexibility in the name of freedom of information. Care must be taken to ensure that there are no restrictions that hinder democracy and/or the freedom to speak. In addition, although violations of the right to expression occur in some countries, despite of the fact they are considered democratic, the IACtHR can act to restore rights and the damage suffered.

### **3. The Freedom of Expression from today**

Respect is fundamental to living in society. It governs business contracts, professional relationships, and family connections. Respect is the cornerstone of social harmony and individual peace and should be cultivated as a global cultural tradition. Respect is inherent to legal systems, acting as a balancing duty in personal relationships and condemning aggressions against others' moral integrity.

The duty of respect is one of the guidelines of the general legal system, finding rest in natural law and in the balance of human relationships. Imposes condemnation of any aggression against the morals of others, and the insult may be carried out by any means possible, including by letter, email, social media, telephone, etc. (Bittar, 2015, p. 211)

From respect, a concept of moral basis, the dignity of the human person is also found, as it, in turn, imposes basic rules of coexistence and order to protect the most basic rights to the human person. Due to these, one should abstain from its right to freedom of expression whenever it may harm others and/or generate conflict. Respect protects the person; the individual self; and recognises the other as an individual of consideration. Therefore, respect shapes the person and forms conditions for the prosperity of human dignity as well as the construction of a fair, harmonious, and democratic society.

Nevertheless, one may see today a difference when it comes to freedom of expression found in the legal orders of states and in the practice of human beings. After all, technologies have been presenting other possibilities of expression – one that, although being bound by the very duty of respect mentioned above, seems easier to violate, creating spaces where one “feels safe” to violate the limits of others and also to say everything one wants, even if it is not true.

In other words, freedom of expression and new technologies have provided an environment that allows for a greater exchange of information, but they also contribute to greater disinformation, retaliation, and attacks in society. “Some characteristics of the Information Society are worth noting to better understand it. The first nuance of this social molding is that information is its raw material, and technologies evolve to facilitate the appropriation and use of information by human beings”. (Ghisi & Pezzella, 2014 – emphasis added).

Therefore, Law has new “responsibilities”, precisely one of ensuring freedom of expression is not violated before such a new perspective in terms of an open environment for

exchanging information and where people are able to express opinions through information technology. It is important to explore this notion a bit further.

As a human right, in the information society freedom of expression plays a decisive role in the access and dissemination of information and with it also the politicisation of public opinion (Bobbio, 1996, p. 1040). Of course, there has always been greater openness in the political sense in the available media. Nevertheless technology has now changed several fields of society and, with regard to freedom of expression; it has expanded the form and quality of communication for everyone, providing an environment with more manifestation.

On the quantitative side, freedom of expression – speech, writing, and image – was expanded through the internet, incorporating the traditional means of radio, television and newspapers. Communications supports also underwent improvement processes through optical fiber and satellites, which, on the qualitative side, optimised the expression (Rodríguez, 2021).

Due to the internet, currently there is multi-direction system between the receiver who captures the message and who at the same time can interact with the sender, often causing the figures of sender and receiver to be confused (Rodríguez, 2021). This way, reality can also prove to be difficult to build, given that technology may also offer the personalisation of the message or information. Technology has also brought some difficulty in distinguishing expressing from informing, as the internet merges these institutes. Public opinion, as it is heterogeneous, has increased the supply of receivers and senders of information in the digital space.

And since the internet space is a field with a certain sense of freedom (of rules), it becomes necessary to take a cautious look so that this environment does not cooperate with the dissemination of unethical and irresponsible content, sometimes coming from the States themselves, from elected officials, and from private agents (Rodríguez, 2021). According to Moreira,

[t]he network allows access to diverse information easily and at a low cost, also becoming an essential platform for expression, but not constituting a zone of legal void, but a place of legal boiling or agitation, a delocalized field that creates rules own legal rules or that adapts traditional rules to these new technologies. (Moreira, 2010, p. 665)

In the information society, knowledge becomes the main source of society. Therefore, the freedom to express an opinion within technological systems corroborates to a “crisis” of such

a right. Never before has there been such freedom and rapid communication, so in the same way that freedom of expression may help build a democratic society, it may also distort and overturn this system. However, as for Sarlet and Molinaro (2012, p. 42), there is not a single topic that should hamper any debate. After all, the prohibition of expressing opinions generates totalitarian regimes that are incompatible with the more democratic path of society. What differentiates one regime from another is the relativity of concepts – such as freedom of expression – when defining criteria for what should and should not be done (Binenbojm, 2020, p. 26).

Hence, in the information society, there is a great flow of communication and the loss of the information monopoly. It means that, with technological platforms being available to everyone with the rapid possibility of transmitting news, it started to make sense that more data would circulate, and that it could (or even would) be the source of information of the current society.

It was believed that a free and open world for dialogue was being created. However, what can be seen from the freedom offered today by social media is that it reveals what society is: if hostile and full of hatred, the speeches found over the net will also be hostile and full of prejudice, but in a wide and global context. In the opinion of Umberto Eco (2016, n.p.):

Social media gave the right to speak to legions of imbeciles who previously only spoke at the bar, after a glass of wine, without causing harm to the community. They were immediately told to shut up, whereas now they have the same right to speech as a Nobel Prize winner. The drama of the internet is that it promoted the village idiot to the bearer of truth.

The contours of freedom of expression reached the point of unrestricted manifestation today – the very opposite of what one demanded before from freedom of expression. It turns out that the right to give an opinion and express thoughts is tainted by the technology system today.

This information technology that gave space for freedom of expression today provided tools to manipulate the will and opinion of others, what indeed may affect public morals and, therefore, be limited, although nations find it very hard to sometimes get ahold of such situations due to the uncontrolled area where internet is.

In a kind of domino effect, based on a manipulated will, as the dissemination of content does not depend on approval, various opinions are shaped. In this regard, there is the Cambridge Analytica (CA) case, in which the company read users' personal data left on social networks and, based on the profiles created, sent out content that shaped or reinforced

opinions, which were sometimes erroneous, of each voter. It means interference in freedom of choice and opinion of each one through the freedom of expression to deliver information that is considered powerful. Cambridge Analytica

[...] (i) maintained a continuous policy of illicit collection of personal data; (ii) some employees categorize individuals, voters, using their own *O.C.E.A.N. software*; (iii) other senior officials allocated most of the CA's resources to undecided voters who could, for example, change their minds between voting in favor of the Republican Party or the Democratic Party. CA has *labeled* these user profiles as *the persuadables* (the persuadable). The company also used the social network Facebook to practice *targeted-attacks* (*microtargeting*, in English) of its users, often using – intentionally – fake news (Fake News) to manipulate political tendencies of voters, resulting in a *rupture* of democracy and deliberately generating a polarized society. (Fornasier & Beck, 2020 – emphasis added)

This way, it is clear that information technology has transformed the concept of freedom of expression in recent times. The right to voice and the exchange of opinions and information have given way to an unfriendly environment – a space in which the freedom of expression of one person interferes and manipulates the freedom of thought of others.

Due to it, the State that should protect people and safeguard this right, ends up acting exactly the opposite. It acts by distributing content, sometimes with untruths, manipulating the masses at its pleasure, contributing to polarisation in society, and disseminating hate speech to remain in power – a maneuver that is very undemocratic and that breaches with the very core of the freedom of expression from before.

#### **4. Democracy, freedom of expression, and disinformation at election time**

In the political race, the opposing sides are competitors, but offending the other and using untrue news in the search for the electoral seat cannot be done at any cost. In the book 'How Democracies Die', the authors bring the North American example where there is a culture of respect for the opponent in the electoral race, or, at least, there was. In this case, there are two bars that support democracy: mutual tolerance and institutional reserve. These are webs of support that are not positive in the legal system, but that impose a certain respectability in the electoral context. Often, it is norms in this sense that establish the entire society.

As they are not written rules, they are often difficult to see, especially if they are working well. This can mislead us into believing that they are not necessary. However, nothing could be further from the truth. Like oxygen or clean water, the importance of a standard is quickly revealed by its absence. [...] Unwritten rules are everywhere in American politics, from the operations of the Senate and the Electoral College to the format of presidential press conferences. (Levitsky & Ziblatt, 2018, p. 103)

Even if one has the right of freedom of expression, for Levitsky and Ziblatt (2018, p. 103-108), being tolerant involves treating parties as rivals (and not enemies); it consists of patient self-control; to restraint when using prerogatives even if one has the right to have them, in respect of law and society. Ultimately, it is all about moving through power instead of destroying their rivals. For the democratic game, players do not need to incapacitate the competitor. They must play in a way that does not make them give up the game, away from dirty tricks to eliminate the competitor.

However, there is wide literature demonstrating the exhaustion of democracies, with them no longer using classic *coups* through the use of force, but rather through continuous erosion of the pillars that support society, such as during elections and through disinformation manifested through freedom of expression. After all,

[...] in the context of an electoral campaign, freedom of thought and expression in its two dimensions constitutes a fundamental bastion for debate during the electoral process, due to which it becomes an essential tool for the formation of public opinion of voters, strengthens the political dispute between the various candidates and parties participating in the elections and becomes an authentic instrument for analyzing the political platforms proposed by the different candidates, which allows for greater transparency and supervision of future authorities and their management (Inter-American Court of Human Rights, 2004, p. 55).

Nevertheless, freedom of expression carried out as disinformation does not deserve the protection offered by Law, particularly when used to form public opinion and shape election results.

According to Gomes (2018, p. 40), the 2018 elections in Brazil were guided by fake news, misinformation, and disinformation<sup>3</sup>, image manipulation, dissemination of hate, ideological polarisation, attacks on artists who exposed their political positions, in other words, a true political-cultural war imposed. According to her, countless people voted based on distorted stories and information with the aim of disrupting the electoral process and this could generate consequences of unpredictable intensity, especially for the country, given that poorly informed people certainly make bad decisions.

It is the information that supports decision-making. Therefore, at election time, it is possible to see that, due to information technology, respect for others seems to be no longer available. Disinformation and manipulation of individuals are increasingly present and

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<sup>3</sup> Misinformation is simply to provide false information, whereas disinformation is to pass forward false and misleading information with the intention to deceive another (UN, s/d).

corroding democracy. In fact, disinformation cannot be confused with “[...] the right and freedom to seek, receive and disseminate information and ideas of *all kinds*. This is why freedom of expression has an individual dimension and a social dimension [...]” (Inter-American Court of Human Rights, 2004, p. 52 – emphasis added).

[...] the first dimension of freedom of expression “is not limited to the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to disseminate thought and make it reach the greatest number of recipients”. In this sense, the expression and dissemination of thoughts and ideas are indivisible, so that a restriction on the possibilities of dissemination represents directly, and to the same extent, a limit to the right to express oneself freely. Regarding the second dimension [...] it is necessary to indicate that freedom of expression is a means for the exchange of ideas and information between people; includes your right to communicate your views to others, but it also implies everyone's right to know opinions, reports and news made by third parties. For ordinary citizens, knowledge of other people's opinions or the information that others have is as important as the right to disseminate one's own. (Inter-American Court of Human Rights, 2004, p. 53).

In this sense, political parties, that use technological means to capture attention through disinformation, cannot be protected by the right to freedom of expression. This freedom to transmit any type of news interferes with electoral paths and becomes, nowadays, important because, modulating how others think, may turn into the power to control one's own future and society itself.

Freedom of expression, a precious right to everyone, is particularly important for political parties and their active members [...]. They represent their electorate, draw attention to their concerns and defend their interests. Therefore, interference with the freedom of expression of a politician who is a member of an opposition party, such as the applicant, must be carefully examined by the Court. (Inter-American Court of Human Rights, 2004, p. 55).

According to Snyder (2018), one of the main intentions of fake news lies on the fact that it makes individuals more skeptical, meaning that fake news promotes news portals that are not legitimate or trustworthy, only their news.

The fake news tool can be understood as “[t]he dissemination, through any means of communication, of knowingly false news with the aim of attracting attention in order to misinform or obtain political or economic advantage. If a lie repeated a thousand times becomes true, with the advent of the internet a lie can be repeated, sung, recited, filmed and photographed a million times, attracting the attention of a countless group of users who search for information on the internet” (Braga, 2018, p. 205). Disguising the reality of the facts,



people are given a false sense of loyalty, belonging and fighting for their agendas and complaints. These disseminators of false information place the trust of part of the electorate and validate the support of their own group, thus creating a historic moment of post-truth, as well as a “war of (dis)information”.

Therefore, fake news has been a tool widely used in electoral campaigns. In fact, they attract more attention than true news, and the impact they generate on society and democracy makes it impossible for a portion of society to know what is true and, on the other hand, tiring since there seems to be a need to check all the time what is true or not.

In any case, this electoral game, even if for a portion of society that is in a position to verify the veracity of the facts, the simple fact of having to look for such information or talk to others about the untruths voiced through social media affects the subconscious. This is why Mello (2014, p. 32) affirms that “[t]oday, authoritarian governments governed by voting are diverse and, in fact, exist as a new form of authoritarianism and a new political tool”.

In this sense, measures are being taken to prevent this situation. For example, in Brazil, Resolution 23,610 of 2019 of the Brazilian Superior Electoral Court provides that the candidate, party and/or coalition investigates the information in electoral advertisements, even those broadcasted to third parties. Therefore, if an error is made, the candidate may have the right to reply (Mello, 2014, p. 34). This responsibility is in line with what, more generally, the IACtHR stated in the case already mentioned:

[...] the right to freedom of expression is not an absolute right [...] the American Convention, in paragraph 2 of the aforementioned article 13 of the Convention, provides for the possibility of establishing restrictions on freedom of expression, which are manifested through the application of subsequent responsibilities for the abusive exercise of this right, which must not, in any way, limit, beyond what is strictly necessary, the full scope of freedom of expression and become a direct or indirect mechanism of prior censorship. (Inter-American Court of Human Rights, 2004, p. 56-57).

Hence, measures against disinformation are important to strengthen constitutional democracy. For Popper and Schumpeter, as interpreted by Oliveira and Marques (2015), freedom of expression should be treated as a means to an end, that is, democracy is actually a process (instrument for obtaining a peaceful government) that is culminated by an honest and virtuous debate among interested citizens to convince their peers. Both democracy and freedom of expression should be supported by society, which includes private peers as well.

Facebook, for example, presented a package of tools to reduce the circulation of disinformation messages and check the veracity of publications (Valente, 2018). In Brazil, the partnership is with the agencies *Lupa*, *Aos Fatos* and *France Press*. According to Facebook, “[t]his mechanism made it possible to cut by up to 80% the organic distribution of news considered false by partner verification agencies in the United States, where the tool has been working for some time” (Valente, 2018). From 2018 onwards, the sharing of information will have consequences as the reach of messages considered false will be reduced and users will receive a notification.

This measure stands out for two reasons. Spreading untruths can be harmful to society, but the right to freedom of expression still exists. This means that, for some, cutting off people’s voices, even if they are uttering mis/disinformation, could be seen as censorship. This is the example of the influencer Bruno Aiub, better known as Monark. He was fined in R\$300,000 and had its social media accounts, in Instagram, Rumble, Telegram, Twitter, and Youtube, blocked for spreading fake news in Brazil, regarding the transparency of the ‘ballot machines’ and for questioning whether the Brazilian Superior Electoral Court would be interested in ‘manipulating’ the elections. He claimed that his right of freedom of expression was being violated (Estadão, 2023).

The biggest obstacle when dealing with fake news is that it does not prevent the expression of thought, but also does not leave the act without consequences. Although an open environment with vigorous and uninhibited debate is necessary for a fully democratic society, to safeguard democracy it is also necessary to create limits, so that there is no infinite power in the actions and words put down.

In a final word, freedom of expression does not mean permission to incite moral conflicts and attack the dignity of others. Respect is necessary in social interactions, even more so in an electoral race where there is a fierce dispute for power. Therefore, currently, because technology is able to shape thoughts and opinions through freedom of expression, it certainly is different from what we had in society about 20-30 years ago. If before the Law safeguarded the free expression of thoughts, today it is not only private parties, but States that use the triggering of fake news as a solution to the electoral race, having the weakening of democracy as a consequence.

## Final remarks

When talking about freedom of expression in all its modulations, the authors realise that no matter how much one tries to ensure it, there is always a process of trying to mitigate or manipulate it. During electoral races such conduct is most noticeable, given that the governability of a country and, consequently, power are at stake. This entire movement ends up highlighting freedom of expression in a negative sense, as it is used to diminish the image of others due to electoral culture or to prevent people from speaking, which could even destabilise what is meant by democracy.

Therefore, with the resolution of the *Canese case*, it is clear that during electoral periods the practices of expressing thoughts are less rigorous in its consequences than at other times, since during this period the candidates get to know each other and there is greater openness to an electoral debate.

Nevertheless, limiting what one can or cannot say, in terms of truth (as acts of corruption), does not support democracy. However, considering that the such a right is almost unrestricted, limits shall be indeed imposed when what is expressed is not situated on such bases, so that the State has an important role not only in predicting some punishment, but in knowing how to apply it correctly, not crossing the barrier of what is considered reasonable.

In these cases, the actions of international organisations that protect freedom of expression gain prominence. The Inter-American Court of Human Rights has been seen as a relevant forum in the support of this right, which corresponds to the recognition of individuals with a voice in society and the possibility of reviewing state conduct when it appears abusive. But, understanding freedom of expression as the power of speech in society, being only limited by the State in terms of protecting morals or the private rights of other, it is “the right from before”, as the authors put it.

After all, freedom of expression currently is seen in new contours. With information technology, freedom of expression has reached quantitative and qualitative levels far beyond anything ever dreamed of. Nowadays, giving a voice to several people, freedom of expression also causes others to shape their own thoughts, as what was seen in the Cambridge Analytica case.

As a result, the State, which should maintain an open dialogue and a considerable debate, ends up being the subjects who hold elected office themselves who disseminate mis/

disinformation in the search and maintenance of power and controlling society, leading to the weakening of democracy.

Hence, freedom of expression during election time places a certain difference between other social moments and generates even more debates about what it was, what it is and what it will be in view of the constant “shocks” it suffers over time. After all, since there is no legitimate alternative to democracy, and freedom of expression plays an important role in its (dis)assembly, it is important to ponder over it.

The evolution of the right to freedom of expression is not linear and currently it is the State that possesses the power to express, yet being it an instrument of mass manipulation. It is especially when it comes to silencing its own errors and modulating other people’s thoughts. Even in this situation there should be limits – the big question is how to sanction, requiring the improvement of the relevant legislation and always paying attention to the barrier of the insurmountable, which is human dignity and the duty to respect.

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