

## I – Introduction: Fake news, democracy and freedom of expression

This Supreme Court and its Justices have been targeted for quite a while now, by people, groups and militias, including digital ones. Institutional and personal attacks, threats, attempts to undermine the good repute of its members and to breach their personal security are elements of an effort to impact the Federal Supreme Court negatively and, as a consequence, to jeopardize the legal democratic state.

The era of social media, which includes fake news as one of its side effects, has raised a number of serious concerns in Brazil and in the world, especially when it comes to democracy and the threats it currently faces.

The massive dissemination, with malicious purposes, of socially damaging and false information has become part of the social and political landscape, either through human action or through robots.

A study conducted by researchers of the Massachusetts Institute of Technology (MIT) about news disseminated through Twitter between 2006 and 2017 showed that fake news have a 70% higher possibility to be retweeted than the truthful ones.

This practice is exacerbated by the rampant access and use of personal data of internet users, which is also a matter of concern for democratic governments worldwide.

The data collected feed the machine learning algorithms, leading advertising pieces and news to be tailor-made and directed to specific user profiles, based on the knowledge gathered by online platforms about their habits, preferences, interests and ideological orientations.

Fake news is part of this context. I prefer to define this kind of news as fraudulent, because it suits more accurately the concept of trickery applied to obtain undue and specific gains. The news, partly or entirely false, is crafted to trick the people by influencing their behavior and their worldview.

The European Commission also suggests the use of the word disinformation for the phenomenon, defined as “false, imprecise or misrepresented information crafted, presented and disseminated to achieve profit or to

cause intentional public damage” (European Commission, Tackling disinformation online: Expert group advocates for more transparency among online platforms. Press release, march 12, 2018).

Understanding the deceitful objective behind fake news is crucial in tackling the problem through adequate and efficient strategies.

In the context of the investigation initiated by the Federal Supreme Court, whose constitutionality is being addressed in this judgment, fraudulent news or disinformation are not critical views or disagreements over Court’s decisions, which are legitimate and protected by the freedom of expression. Fraudulent news, the issue at stake here, is an instrument to achieve undue gains, of political, economic or cultural natures.

It is important here not to lose sight of the fact that freedom of expression and access to truthful information are complementary, and not opposites.

The imperative of combatting misinformation is closely tied to the obligation of ensuring the right of access to information, knowledge and free thought, upon which the full exercise of freedom of expression is based on.

Freedom of expression, enshrined by our Constitution, however, does not provide for the willful promotion of hatred, intolerance and misinformation. These situations embody the abusive exercise of this right.

Misinformation muddles thoughts and conducts society to a vicious cycle of deceit. It kidnaps reason. In the words of Eugenio Bucci, it represents “freedom of opinion degraded into farce”, a concept developed in his recent and brilliant book “Existe democracia sem verdade factual?” (Is democracy possible without factual truth?)

As Hannah Arendt stated in an interview in 1974, “if everybody always lies to you, the consequence is not that you believe the lies, but rather that nobody believes anything any longer”.

The philosopher and political theorist studied the manipulation of people’s perception of reality as the basis of state-driven ideological propaganda that has led to the totalitarian experiences of the 20th century.

Her notable work “The Origins of Totalitarianism”, published in 1951, helps us to understand the authoritarian trends the world is dealing with nowadays. It offers a shocking vision of a time when “the masses had reached the point where, at the same time, they would believe everything and nothing, think that everything was possible and nothing was true”.

According to the author, these totalitarian elements lead to an environment in which

“One could make people believe the most fantastic statements one day, and trust that if the next day they were given irrefutable proof of their falsehood, they would take refuge in cynicism; instead of deserting the leaders who had lied to them, they would protest that they had known all along that the statement was a lie and would admire the leaders for their superior tactical cleverness”

In 2005, then cardinal Joseph Ratzinger, during the homily of the inaugural mass of the conclave that would elect him as Pope, warned against a “dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one’s own ego and desires”.

As a comment to a text of Saint Paul read during the homily, cardinal Ratzinger stated that “every day new sects spring up, and what St Paul says about human deception and the trickery that strives to entice people into error (cf. Eph 4: 14) comes true”.

Maybe cardinal Ratzinger did not have in mind then the magnitude of the extreme relativism of current times. The same can be said of his successor, Pope Francis, who referred to truth as a means to bring about peace during his inauguration ceremony, in 2013.

Unfortunately, what we have today is a sort of tyranny of relativism, which has pushed aside the truth of faith and the truth of science’s reason. By doing so, this tyranny imposes an ideology of misinformation, the ideology of force, the ideology of chaos. And why chaos? Because relativism leads to the disruption of hierarchy and to a disrespectful attitude towards the institutions and the truths consolidated by rationalism.

In this context, in which a radical outcome is the destruction of a shared understanding of reality, an atmosphere of fear is created. Fears grow

amidst contexts of social fracture, and the biggest fear of all is the fear of the other, seen as an enemy, an opponent, a threat. Fear feeds prejudice and hatred, and is fed by them, in a classic vicious cycle.

Jurists, philosophers, historians and journalists all over the world have been warning about the risks to the democratic processes and values brought about by fake news. Those risks, according to them, have an increasing presence in today's society.

The final goal of these misinformation campaigns is to create chaos by fostering a permanent state of unrest within society, and by stimulating divisions, along with social and institutional conflicts.

Let us not fool ourselves: a very solid logic lies behind the apparently absurdity of fake news and conspiracy theories we currently deal with.

As remarkably explained by Giuliano Da Empoli in his work "Engineers of Chaos", the logic of the great platforms of social media, based on engagement, has been incorporated by politics:

"Uniting people around a common denominator is no longer the objective. To the contrary, the goal is to gather the largest possible number of small groups and incorporate them, regardless of their consent, by inflaming passions. In order to build a majority, they will not converge into the mainstream, but rather join the extremes".

The north-american professor Lawrence Lessig, who has been studying the threats to democracy brought about by technology and the social media business models, defines the current stage in history as the "post-broadcasting era".

With a few exceptions, families no longer gather in front of a TV set to be informed about current events worldwide, because information is now fed into cell phones and computers every minute. According to Lessig, the previous era of traditional media had the benefit to frame and focus public debate on the priorities of every given moment, limiting the attention to be given to extremist views. In today's landscape, however, business models and decisions fueled by algorithms do not hesitate to resort to conflict and division on the public arena as a means to maximize profits and to boost numbers of followers, scattered in virtual ghettos.

The victims of this trend are democracy and factual truth.

Jason Stanley, in his 2018 work “How Fascism Works”, put emphasis on the current trend of backtracking into previous political practices that stimulate social division based on the discourse that highlights and antagonizes the groups “us” and “them”, as a means to debilitate and then challenge the very existence of democratic institutions.

Those facts require of all of us an attitude of constant vigilance and strict defense of constitutional and democratic values.

Paraphrasing Hannah Arendt and her lesson about “the terrible banality of evil”, we can neither banalize threats and attacks to democratic institutions nor downplay the risks associated with the role of advocates for the dictatorship of relativism in democratic societies.

Banalizing the hatred disseminated by fake news is like ignoring a fungus, which grows and spreads from itself. The goal is to multiply chaos.

It follows the logic described by Giuliano Da Empoli, since “if, at a given moment, the platform identifies the users’ demand for more aggressive, stronger content, and the content that generates more engagement is known, in order to achieve it the platform directs the users to the content required”.

Not by coincidence, we are now witnessing tactics based on contempt, threats and attacks against the institutions; extremist rhetoric that advocates for the disruption of democratic order; political discourse that promotes hatred and violence; extreme hostility; demands that democratic institutions, such as the Federal Supreme Court and Congress, be closed; statements in favor of a return to failed authoritarian experiences of our history.

What is at stake here is a slow and gradual process of destabilization of the institutions, promoted by methods whose ultimate goal is to undermine democracy.

That is all authoritarian voices and the build-up to totalitarianism want...  
And both authoritarianism and totalitarianism must remain in the past!

To accept, condescend and naturalize fake news as an inevitable phenomenon is to give free rein to the politics of hatred, violence and intolerance. A condescending attitude translates into not holding extremist actions and voices accountable; it means, in practice, surrendering to a conclusion that nothing can be changed, nothing can be done.

Facts required this inquiry to be instituted, and that was not a matter of choice. Threats and attacks against this Federal Supreme Court, guardian of the Constitution of the Republic, must not be naturalized.

The Court has the prerogative and the institutional responsibility to conduct the necessary reaction to an escalation in aggressions against it, its Justices and family members. It cannot refrain from doing so, especially in a context of inaction or complacency of the bodies that should adopt measures to contain the increase in the number and level of intensity of the attacks.

The offenses and attacks aimed at undermining the institutional credibility of the Supreme Court have not just started, they stretch back a while.

Sustained by a wide network of programmers, robots and false accounts, fake news have been successful in social media. They resort to hidden identities and even reach into the so-called deep web, where actions of a truly terrorist nature against democracy and the rule of law are planned and orchestrated.

Ordinance GP 69, object of this action of non-compliance with a fundamental precept of the Constitution, was issued on March 14, 2019, and, based on article 43 of the Court's internal regulation, determined the opening of an investigation procedure, with objective parameters. The inquiry was established to investigate the existence of fake news, slanderous complaints, threats and other infractions moved by *animus calumniandi, diffamandi and injuriandi* that target the good repute and the safety of the Federal Supreme Court, its members and family members.

On the same date, the plenary of the Federal Supreme Court had concluded the judgment of the appeal against its regulations on inquiry 4.435, which had Justice Marco Aurélio as rapporteur. By a majority vote, the Court ratified jurisprudence related to the competence of the Electoral Justice to prosecute and judge ordinary crimes connected to electoral crimes.

Prior to the judgment, and after the decision, the Court, its Justices and also the Electoral Justice have been targeted by a series of attacks on social media, which included even stakeholders in the Justice system. The goal was clear: antagonizing the Court and the Electoral Justice with part of the news media and part of the public opinion.

Similar situations with the same purpose were routinely informed by the media: illegal and non-existent inquiries against Justices; offenses and threats to Justices and their family members; attacks to the personal honor of Justices, harassment in commercial flights, conferences and on the streets; vandalizing of public and private property, and dissemination of videos on social media that advocated the Supreme Court be closed and their Justices be imprisoned.

During the 2018 election campaign, a substantial increase in attacks and threats to the Judiciary branch, the Electoral Justice and the Supreme Court was detected. Fake news about the electronic ballot boxes attempted to discredit and to disturb the electoral process.

In February, 2019, the Supreme Court started judging ADO 26 and MI 4.733, related to the criminalization of homophobia. The regular exercise of the Supreme Court's jurisdictional activities, every time the interests of certain groups were not contemplated, was met by offensive comments and public attacks and threats against the Court, its Justices and family members.

At the point the inquiry was established, in March, 2019, it had become clear that it was essential to address, through an investigative effort, elements available that pointed to criminal groups responsible for financing and disseminating attacks massively on social media, with the objective of disrupting and destroying institutions of the Republic, the Judiciary branch and the Federal Supreme Court. Not facing those attacks with the necessary strength would mean a serious omission and a failure in dealing with authoritarian tactics.

The need of the Supreme Court to take action, as it did, is undeniable. And action was taken accordingly through an investigative administrative procedure as an instrument of self-defense, contemplated by article 43 of its internal regulation. It is important to note that, prior to it, there was no notice of any developments or investigative steps taken by the prosecution

bodies in response to official requests made, between 2018 and the beginning of 2019, by the Presidency of the Court, its Justices or its Secretary of Security.

The above mentioned requests informed about serious attacks against the Court, its Justices and family members, and even conduct that could be characterized as crimes against national security, since the law related to them, as the late jurist Heleno Cláudio Fragoso once taught us, aims at protecting the security of the State, by preserving the safety of its supreme bodies and the inviolability of the current legal framework.

As an example, on January 11, 2019, the Supreme Court sent an official letter to the Director-General of the Federal Police requesting an investigation into a bomb threat against the Court received by e-mail, but no feedback as to possible developments was ever received.

Dear Justices, I ask you to bring about a historical episode which, as a sad coincidence, I consider entirely appropriate to the action being judged here.

In Hans Kelsen's autobiography, whose Brazilian edition's translation and publishing I had the privilege to coordinate, as part of the Paulo Benavides Collection of Forense Publishing House, there is a passage related to the "case of matrimonial licenses". The Austrian Constitutional Court took a conservative approach to the issue, going along with the guidelines of the Civil Code.

The ruling, based on Kelsen's leading opinion, displeased religious groups, part of the media and the Government at the time. An austrian paper headlined "Open path to bigamy. The erroneous and unsustainable ruling of the Constitutional Court and its absurd consequences" (Reich Courier, January 19, 1928).

The consequences of the ruling are described by Kelsen itself, and I quote him:

"Since my role in the Court's decisions had become well known, I became a target of attacks that were at times absolutely vicious. I was accused of favoring bigamy, and so on. Among other things, I remember that my little daughters told me, after returning from school, and visibly shaken, that at the front door of our apartment a sort of poster in which horrible things

about me were written. (...) The Social-Christian Party under the presidency of Seipel was clearly determined to suppress the Constitutional Court at the first opportunity. It came about with the 1929 Constitutional Reform”.

Kelsen decided to leave the Constitutional Court after this episode. All of us know what happened to the Austrian democracy in the following years. Nobody stood up for the Constitutional Court. Nobody defended democracy. And then the dark night of totalitarianism came and destroyed civilization and its values.

It is important to note that even when attacks on the honor are directed on an individual basis, attacks against judges are not personal: they target the Judiciary branch itself and democracy as a whole.

Those authoritarian ploys, whose purpose is to debilitate democracy and intimidate a free and independent Judiciary branch, can no longer be accepted or tolerated, there is no room for them in a civilized society.

A tolerant attitude towards those kinds of behaviors only serve as an incentive to new orchestrated outbursts of hatred and calls for violent action. It is needless to say that the legitimate freedom of expression has nothing to do with those behaviors.

While the alarms sound, this Supreme Court remains vigilant and conscious of its high mission to stand up for the 1988 Constitution and all the achievements enshrined by it, and especially the solid and pluralistic democracy in place, based on institutions equally strong and democratic.

Once more, I stress that the efforts to establish institutional dialogue are essential and must be permanent. It is not a matter of choice, it is not a mere option available to the authorities. It is a mandatory requirement established by the Constitution of the Republic and its clause related to harmony and mutual respect among the Executive, Legislative and Judiciary branches.

But make no mistake about it: dialogue and harmony go hand in hand with the independence and the resolute commitment to the defense of the institutions, of democracy and of this Federal Supreme Court.

The Court works permanently towards building bridges, bringing about solutions and reaching consensus, even when among the Justices there may be dissenting opinions, as they should in a collegiate body. But the ones who want to destroy, attack, threaten or confront this country's democratic institutions will have against them the strength of the law and the 1988 Constitution, of which this Court is the utmost guardian.

Dear Justices,

Some have tried to portray institutions as unnecessary and useless.  
Have tried to banalize the roles of politics and democracy.  
They have tried to banalize freedom of press and freedom of expression.  
Even attempts to banalize evil were made.  
Fear was sown to create hatred.  
Hatred was sown to generate fear.  
Counting casualties does not impress them.  
They seek confrontation as a stage to reach domination,  
Misinformation as a new religion,  
And chaos as a new "God".  
Authoritarian rule is not enough as the desired goal,  
Totalitarianism is.  
We have already been through moments of authoritarianism,  
It will never come back  
And *a fortiori*  
It will never be tolerated!  
Democracy itself stands up for democracy!  
The Brazilian people, body and soul of our Nation!

My opinion follows the rapporteur's in declaring the legality and constitutionality of the inquiry.