UNIVERSITY OF LAUSANNE, CENTRE DE DROIT PUBLIC
Conference: Misinformation in Referenda

Carlo FUSARO
UNIVERSITÀ DI FIRENZE

**Misinformation, an old issue in a new context.**
The state of the art in Italy

I. INTRODUCTORY REMARKS AND SOME STIPULATIONS

- This is a complex matter which requires a multidisciplinary approach: we are at a crossroads of many sciences (laws: constitutional law, criminal law, media law, commercial law, EU law, international law; engineering and network science as well as new technologies; IT; marketing; journalism and media; cognitive psychology; sociology; philosophy).
- How do I use the term "misinformation" in this presentation in relation to: content, purpose, effects and medium used [CONTENT: false, inaccurate, misleading information; PURPOSE: designed to interfere in democratic electoral/referenda processes; EFFECT: altering the level playing field and the equality of opportunities among parties, candidates, referenda committees; MEDIUM: new media, social media, platforms, etc.].
- I will use the term "misinformation" in a broad sense, like in some EU and CoE documents: misinformation as «any form of false, inaccurate, or misleading information designed, presented and promoted in order to interfere in the democratic decision making processes, by trying to distort the free formation of voters' opinions». There is also another kind of misinformation which may or may not overlap with the first: meant to directly slander opponents, in particular. This directly leads to defamation which already is a crime. The issue here is whether the use of the new media should suggest heavier penalties.
- I will mostly refer to "misinformation within the political sphere", especially in connection with an election or referendum campaign.
- Misinformation is not a new issue: however I assume that we must frame misinformation in an entirely new context compared to even a recent past.
- Coming to Italy, is there an Italian specificity in this matter? Most definitely so. Italy is a showcase of to which extent misinformation may impact politics.
- Coming to constitutional law, we are at a crossroads of more constitutionally protected interests, regulated through a variety of sources of law for different purposes (enhancement of the single internal market, freedom of enterprise, antitrust [protection of competition], freedom of speech, participation, genuine features of democratic processes [fair and free elections], protection of human dignity, protection of minors, nondiscrimination, etc.). In my view what is at stake here is whether or not and, if yes, how, to pursue an new balance in the protection of those rights.
- Finally, I want to say that although a radical liberal I have come to the conclusion that the case for regulating new media in order to limit the impact of misinformation has become compelling today: even more so after the proof of foreign interferences. I register that similar conclusions

*Traccia della relazione tenuta a Lausanna il 31 agosto 2018 in occasione della Conferenza "Misinformation in Referenda", organizzata dal Centre de droit public di UniLausanne. La relazione è volta ad informare sullo stato dell'arte della questione della disinformazione (anche ma non solo fake news) in Italia, sulle iniziative fin qui tentate per farvi fronte. L'Autore aggiunge poi le proprie proposte nel quadro di quelle in discussione in Europa.*
have been reached by many who share a liberal background: see the recent *Interim Report* by a Select Committee of the HoC; see the *Economist*, traditionally a staunch supporter of the freedom of speech...which has gone from expressing worries about "the muzzle growing tighter" - 4.6.2016 - to submitting a set of fairly invasive proposals, because «the world was trolled» and «social media threaten democracy» - 4.11.2017).

II. WHY THE ITALIAN CASE IS PARTICULARLY MEANINGFUL
AN ALREADY DISRUPTED DEMOCRACY?

- To this day, Italy is the only country where a high tech company has been able to generate a social movement from scratch using exclusively the net, and transform it into an electoral competitor successful enough to become in a few years Italy's most voted: primarily thanks to the canning application of the theory of networks to social media, blended with some expertise in cognitive psychology; this "movement" is now the largest component of the populist coalition which runs the country.
- The birth and coming of age of the M5S and it most peculiar features as a "non party", a totally opaque entity organized around an internet platform capable to finance itself and even financially reward the mother company (as any subsidiary would).
- A decisive instrument has been the shrewd use of misinformation in all its declinations culminating in successful *character assassinations* and vilification of the rivals (orchestrated slander using entirely fabricated "news" distributed virally employing trolls and bots): Boldrini, Boschi, Renzi, culminating with president Mattarella (attacks have been launched even against pope Francis on immigration issues); something similar to what happened to Hillary Clinton in the US in 2015.
- Although the massive use of misinformation via internet has become a largely acknowledged issue after Trump's election and after Brexit, the Italian "experiment" of M5S originates as far back as 2004/2005 and it had already gained visibility in 2012. In 2013 M5S won 25% of the votes.
- Indeed, Italy was a particularly fertile field for this "experiment in social engineering": because of its particularly high and long-standing distrust in the political institutions, periodical relentless campaigns against parties as such, appallingly low levels of literacy, education and digital competence, an very high propensity for erroneous perceptions (compared to all EU countries, *Perils of perception*, Ipsos-Mori 2017), the weakening of all intermediate institutions (parties, trade unions, the Catholic church); the "dramatic shift" in the "information diet" of Italian voters in last 5-10 years (Trevisan 2018).
- The populists movements, but in particular M5S, showed an extraordinary ability in setting the agenda; in imposing carefully selected and construed narratives; in indulging part of the voters sentiments of fear, insecurity related to issues as immigration, vaccines, construction of infrastructures. This has been possible thanks to the ample distribution of all sorts of fabricated news. The outcome has been a massive imbalance among competitors (the very opposite of a level playing field): not only for the different ability and competence in using the new media but for the quality of the messages conveyed and the brutal and unlimited use of hate speech, fakes, profiling, targeting, virality and so on. Also a dramatic worsening of the gap between perceptions and reality (*Perils of perceptions*, 2017; *Immigrazione in Italia tra realtà e percezione*, Istituto Cattaneo, 2018).
- Talking about referenda, see the case of the referendum against "vouchers" in 2017: a campaign demonizing "vouchers" to pay for temporary jobs was orchestrated, so deprived of merit that the same political parties which fought it, now in government, have already reintroduced them. Well, the previous Gentiloni Cabinet repealed the provisions establishing the "vouchers system" because all the polls were showing that there was no chance to
effectively defend them in a referendum which had been requested; the imbalance I am talking about was so strong to produce a preventive effect. No less was the impact of misinformation in relation to the outcome of the 2016 referendum on the constitutional reform approved by Parliament.

- Italy shows all the features of an already "Disrupted Democracy" (to quote the research Disrupting Democracy, by the BERTELSMANN FOUNDATION, 2018, which concerns also Germany, India, Israel and the US): all civility in political and even human relations has been lost, political correctness seems to have become something to repudiate, bipartisanship is similarly rejected, the most respected values as established in our liberal democracies after WWII are being humiliated day after day, with gusto and with applause by a large majority. To quote A. SILBERFELD (When Stars Align: The Digital Era and the Rise of Italy's Third Republic): «the story of populism in Italy isn't just about disillusionment with the political class... It's a story of how a confluence of people, technology and global events combined to turn Italian politics on its head... By analyzing the Italian elections through the lens of Disrupting Democracy macro-trends, we can begin to understand the positive and negative effects of technology on our democratic systems of government».

III. REFERENDA WITHIN THE FRAME OF THE ITALIAN CONSTITUTION AND SOME REFERENCES TO ELECTION/REFERENDA CAMPAIGNS' RULES

- If we think about the specificities of referenda as binary or zero sum decision making systems, we might argue that by nature they are processes which leave little space to mediation and whose campaigns can easily see non-rational arguments and oversimplifications prevail (Italy's Constitutional court, sent. 502/2000).
- What kind of referenda are there in Italy: constitutional (on amendments to the Constitution passed by Parliament) (art. 138 Const.), on existing laws (art. 75 Const.). Popular initiatives are not foreseen.
- Referenda in Italy are limited in scope and are qualified by scholars as participatory instruments of representative democracy, rather than a form of direct democracy.
- Referenda on entire laws or on specific provisions of a law are strictly regulated: the Constitutional court filters them as the Constitution establishes a set of material limitations (to which the Court has added others concerning how the request is drafted); there also is a 50% participation validity threshold: if the turnout is lower, the referendum is declares null and void; Parliament may change the provisions on which the referendum has been requested until the last day (as long as the changes are along the lines of the request; otherwise the request is transferred to the new provisions by the Referenda Office at the Court of Cassation). Referenda on existing laws may be requested both by five regional councils and 500.000 voters while referenda on constitutional amendments may also be requested by 1/5 of the members of each Chamber. No referendum is mandatory.
- Data (1970-2018) show that Italy is second only to Switzerland in referenda: 159 requested, 77 not admitted = 48%, 82 admitted = 52%, 15 not held because the contested provisions have been suppressed = 10%. 67 have been held: 39 valid = 58%, 28 non valid = 42%; yes 23 = 34%, 16 no = 24%. Average requests per year: > 3; average referenda per year: 1.4. However only 4 passed the threshold in the last 23 years (in 2011).
- Referenda campaigns are meticulously regulated: the same rules apply as for election campaigns, with differentiations [Laws 212/1956; 515/1993; 28/2000]. Among the matters regulated by law: expenditure limits, transparency, subsequent controls and sanctions; the prohibition to publish polls within fifteen days prior to the vote; the regulation of specific means of propaganda (posters, advertising, traditional media); no public campaigning the day before the opening of the polls.
• These law provisions must be integrated by the principles stemming from ordinary and constitutional jurisprudence which balance potentially conflicting constitutional interests; in adjudicating the principle of reasonableness is regularly applied. What does stem out of our consolidated jurisprudence? (I) Freedom of expression in electoral campaigns may be regulated, but it must be regulated by law; (II) the law must pursue equal opportunities; (III) the voter is entitled the freedom (and up to a certain point the right) to receive objective information; (IV) the voter is also entitled the right no to subjected to "extreme" propaganda pressure: therefore the law may limit "excessively" invasive propaganda; (V) it is legitimate to regulate the press and mass-media differently; (VI) it is legitimate to extend the rules which apply to elections to referenda at least to a certain point.

• Traditional media in particular are heavily regulated: both during the campaigns (this we could call propaganda strictu sensu) and all year around (political communication): see Law 28/2000 (which is a collateral effect of the Berlusconi era), often regarded as intrusive. Public authorities are not charged with the task of informing voters about the content and the potential effects of a referendum's outcome; they are strictly limited in all their communication initiatives during campaigns.

• By the way it should be noted that there is no independent Electoral Commission in Italy; elections and referenda are managed by a mix of central and local authorities, ad hoc permanent and nonpermanent bodies, special electoral offices formed by members of the judiciary (established within the tribunals, citizen appointed to run the polling stations, representatives of parties as well as referenda organizing committees, an ad hoc Parliamentary select committee, the Communication Authority (AGCOM).

IV. THE STATE OF THE ART OF DEBATE
ON HOW TO DEAL WITH MISINFORMATION IN ITALY

• A few words about how information and new media are regulated in Italy at present: press, traditional mass media, new media; the constitution, the law, further regulations; the Parliamentary Committee on Public radio and TV; a set of codes (information, communication, data protection) prompted by EU directives (framework laws): on internet commerce regulations (D.lgs 70/2003: similarly to the US Communication Decency Act sect. 230, this expressly exempts internet service providers from controlling the data they transfer and states they are not responsible of information which does not originate from them; so called activity of mere conduit, caching and hosting: these are rules introduced when the net was not what it is today); on communication (D.lgs 259/2003); on data protection (D. lgs 196/2003); there are two Independent Regulatory Authorities (the PRIVACY Authority, the Communications Authority, AGCOM)

• Jurisprudence. I will offer a couple of examples which show why new rules my be needed: (A) Tribunale di Roma, sez. diritti della persona (22.06.2018), which dealt with a case where the difference between information and opinion was reasserted: (i) truth matters in relation to facts not to evaluation of facts; (ii) opinionated criticism does not need to be balanced or restrained. But the court also affirmed that in the present Italian legal system: (A) hosting providers have no duty to monitor what they concur to spread; (B) hosting providers have no duty to remove a content even when requested; they only have a duty to check afterwards, and then they can do as they consider appropriate. The tribunal quoted artt. 16.1b) and 17.1-2a) of D.lgs. 70/2003 on internet commerce see (contra Tribunale di Napoli, II sez. civile, 3.11.2016); (B) the Court of cassation (in sent. 3981 - 29.01.2016): while defamation on the social media is to be regarded as "aggravated defamation" via traditional media, it is not defamation to share a defamatory post when no additional offensive content is added.
• Relevant parliamentary initiatives or accomplishments: a) XVII legislature (2013-2018): (i) L. 71/2017 to fight cyberbullying against minors [it offers a definition of "internet provider" as the service provider which manages content; it dictates the rules for removal of certain contents]; L. 115/2016 to outlaw Holocaust denial; (ii) proposals initiated by members of the Chambers [AS 2688 Gambaro, 7.2.2017: new art. 656-bis CP, a new felony with financial penalty for those who publish or spread via internet false, exaggerated or tendentious news; new art. 265-bis and 265-ter, two new felonies punished with detention and a financial penalty + a fine, for he/she who spreads false, exaggerated or tendentious news which my create alarm, or in any way acts so to damage public interests or misleads sections of the public opinion + those who carry out hate campaigns against single persons or campaigns meant to undermine democratic procedures, also with political intent; responsibilities of those who manage platforms; new tasks for CPIV; digital education] [AS 3001 Zanda, 14.12.2017: clearly inspired by the German NetxDG based on new stringent responsibilities of ISP for the diffusion of illegal contents, which can be partially devolved to independent Self-regulatory Authorities; the proposal contains a detailed list of illegal contents which are already such (threats, stalking, defamation, pornography, pedophilia, data protection infringement, terrorism, blasphemy, incitement to commit a crime, advocacy of fascism, racial discrimination); (iii) the 2015 Declaration of Internet Rights by a special Committee summoned by Chamber chair Boldrini [it advocates: right to internet; right to digital education; neutrality of the network; data protection; right to self-determination concerning one's own data; inviolability of internet communications; no judicial profiling; right to one's own identity and to refuse profiling; anonymity protection and limitations: limitations may be established by law only if justified by the necessity to protect relevant public interests and may be needed, proportional, and respectful of a democratic society; right to be forgotten; general obligation to fairness of those who manage digital platforms; net security; limitations to the freedom of expression shall not be allowed. However... Human dignity must be protected against abuses connected to incitement to hatred, discrimination and violence; transparency of the network; the establishment of national and supranational authorities to ensure the respect of the criteria included in the Declaration]; b) XVIII legislature (2018): (i) a citizen petition to ban false internet profiles; (ii) proposals initiated by members of the Chambers [AC 21 Brambilla 23.3.2018: to introduce aggravating circumstance if acts of cruelty (a crime) against animals are spread via internet: if he who perpetrates acts of cruelty spreads related images via internet; AC 220 Bergamini 23.3.2018: to establish an Investigating Committee on the use of big data, infringement of data protection rules, manipulation of data for the purpose of creating virtual social networks; AC 1056 Fiano 1.08.2018: to establish of an Investigating Committee on the intentional and massive spread of false information via internet, and the right to information and free opinion making; AS 532 Moronese 27.06.2018: new provisions to reduce the digital divide.

• Where the Government stands: the recent hearing of the new Minister for Parliamentary affairs (12 July 2018), Mr Fraccaro. Plenty of additional referenda proposed (including initiatives Swiss style), but not a word about the perils of misinformation or the new media in general (no surprise because the parliamentary majority doesn't show any intention to do anything about the issue, in line with its program). The previous Minister of interiors supported an initiative against fake news, although with little avail [www.commissariatodips.it].

• IRAs (AGCOM, PRIVACY) have been fairly active. In particular on 1 February 2018, AGCOM published the Guidelines for equal access on online platforms: a self-regulatory set of rules, prepared by a Committee promoted by the Authority among stakeholders. The Guide attempts to extend the principles of L. 28/2000 to the digital platforms (equal access; transparency of ads; illegal contents: here the reference is to D.lgs 70/2003; prohibition to publish polls; limits to public authorities' communications via social media; electoral silence). The document encourages the fact-checking programs announced by Google and Facebook.
The debate among academics: several authors continue to share the American theory of the free trade [market] in/of ideas (Holmes 1919)(Frosini TE 2017; Zanon 2018); some also because they evaluate that «the debate is biased as a result of an inherent overestimation of the evils and perils of the internet» (Bassini & Vigevari 2017); however, a majority of authors, more or less cautiously, advocate an interventionist approach, in line with what is happening elsewhere (Mannoni 2016; Pollicino 2017, 2018; Fumo 2018; Razzante 2018; Visco Comandini 2018); some even seem to lean towards the recognition of a new "right to truth" (D’Agostini, 2018: in line with some philosophers and German authors, see Brunner & Stahl, Recht auf Wahrheit. Zur Genese eines neuen Menschenrecht, 2016)). Many share the idea that information should be regarded as a "public good"; some reasonably believe that the issue can only be tackled at the international level (De Minico, 2017). Some believe to establish an Authority could be useful (Pitruzzella 2017).

V. WHAT COULD BE DONE TO CURTAIL MISINFORMATION:
PREMISES, AIMS, GENERAL PRINCIPLES AND CRITERIA

I believe it should be acknowledged that the new media have impacted how content is distributed and received to the point of transforming the very nature of the freedom of expression. Technology has been used to crush the balance between the protection of the sacred freedom of expression and other constitutionally protected interest and rights (privacy, human dignity, right to be informed, right not to be harassed, copyright, fair and free vote).

Internet technologies and social media have made misinformation infinitely more pervasive, more dangerous and at the same time less costly in many ways (not only financially, it has made accountability occasional, uncertain if not unlikely and in all cases late): the speed by which information is distributed makes the traditional legal remedies against misuses of the freedom of expression ineffective.

Therefore it is necessary to drop the free market of ideas approach; the market of ideas is not really free, like all markets; the digital one also needs to be regulated in order to be somewhat "free" (antitrust, internet, see the OTPs!).

Although precipitation should be avoided, the Italian and other cases show it is necessary to act swiftly because liberal democracy is truly endangered [see Collins, 2018; Economist 2018; Mounk, 2018; Bartlett, 2018].

After all, since the invention of print, all major technological developments impacting the freedom of expression have prompted some kind of regulation: why should it be different with the new media?

General aims which deserve to be pursued could be: (A) for misinformation in general: a more effective protection of human dignity which now is often de facto sacrificed in the name of freedom of expression because of the instrument used to jeopardize it; in other words, the balance in protecting the right to inform and other rights should be reviewed; (B) for misinformation in politics and in referenda, in particular: (a) balance in political campaigning should be re-established (the level playing field should be restored); (b) transparency should be ensured and anonymity banned or limited; (c) timely remedies made available; (d) rational over emotional public debate, and civility promoted as well as citizens' awareness, education and digital competence.

To pursue these ends, regulators should primarily refer to European common constitutional law traditions and to the supra national and national legal framework: EU legislation, ECHR conventional rules, ECJ and ECHR jurisprudence as well as to internal law, in order to build upon established principles.

Hyper regulation should be avoided or limited; a sustainable regulatory framework should be pursued. Pragmatism is a must to this end: a mix of rigid and flexible rules should be
considered also because technology evolves every day; enhanced self-regulation could be relied upon (with the intervention of the judiciary as a back up if self-regulatory procedures fail: these should not be final).

- Let me add that Italy criminal offences need to be determined by law and the law must define them in respect of the principle of legal certainty (in French: selon le principe de précision et de détermination): this makes the identification of the elements of a criminal offence a task which demands competence and accuracy.

VI. WHAT COULD BE DONE AGAINST MISINFORMATION,
BUILDING UPON THE PRESENT LEGAL FRAMEWORK

- The present legal framework is determined by: (a) the constitutional traditions common to the EU member States as well as more broadly by the provisions of the European Charter for the protection of human rights, its interpretation primarily through the jurisprudence of its Court; the established principles stemming from these traditions and conventional law; (b) EU regulations (which at present regulate new media primarily in the perspective of the digital market development) and other initiatives; (c) the Italian Constitution and the jurisprudence of the Constitutional and the other courts in relation to information, communication and election campaigns.

- I would recap these main principles as follows: (i) the freedom of expression is not an absolute right (art. 10 of the ECPHR); (ii) there is a right to be informed along the right to inform; (iii) "genuine" (meaning: free and fair) elections are also a fundamental right.

- The Council of Europe and the ECPHR jurisprudence. They concur to define the legal framework for coping with misinformation in elections and referenda, thanks to the general principles they have established: freedom of expression is not an absolute right; equal opportunity and balance in information. Useful documents are: (a) the Code of good practice on referendums (although it includes no reference to digital campaigning as it was published in 2007, this is soft law); (b) the Guide to HR for internet users, a recommendation adopted on 16.04.2014; it includes an explanatory memorandum. Here we find a summary of the ECPHR jurisprudence until then (the need to balance artt. 8 (privacy) and 10 (freedom of expression) which affirm rights which «deserve equal respect»; also a very broad definition of hate speech; as well as the need to balance artt. 10 and 1 (general) as well; as well as 17 (abuse of rights). Freedom of expression is not an absolute right; it can be subjected to restrictions; these restrictions must be prescribed by law; they must be enforced under judicial control (not necessarily by the judiciary directly, NdF). The issues of remedies and of the risks determined by anonymity are also raised. (d) Art. 3 of the 1952 Additional Protocol (right to elections) and its interpretations. (d) The leading case: Delfi AS v Estonia in which the Court ruled that holding the news site liable for anonymous defamatory comments posted online from its readers was not a violation of art. 10 ECHR (guarantees of freedom of speech): even when those comments had been remove upon request. (e) Resolution 2143 adopted by the Assembly on 25.01.2017 concerning Online media and journalism: challenges and accountability. Recommendations included: inquire on the risks of misinformation; same standards for online and offline media; right to rectification and correction; traceability; media literacy; journalistic training; cooperate with online media (self regulation) with reference to the EC code of conduct; clearer rules on liability of internet site owners for content posted by third parties based on Delfi v Estonia.

- The EU and new media. Regulation and recent initiatives by the Commission and Parliament: (i) the Code of conduct countering illegal hate speech online (EC-ISPs, 2016); (ii) president Juncker's mission letter to the commissioner for digital economy and society Gabriel [xthe C. needs to look into the challenges the online platforms create for our democracies as regards
the spreading of fake information and initiate a reflection on what would be needed at EU level to protect our citizens», 16.05.2017]; (c) EU Parliament call to the EC to analyze in depth the current situation and legal framework with regard to fake news...; (d) the report of High Level Group on fake news summoned this year (26.4.2018). The report proposes: involvement of stakeholders; multi-dimensional approach based on five pillars: transparency; promotion of media and information literacy; empowering users and journalists; safeguard of diversity and sustainability of the media ecosystem; continued research; (e) the following Communication from the Commission... Tackling online disinformation: a European approach [COM(2018) 236]. It mostly follows the advice of the HLG and reinforces it, proposing: (i) an EU-wide Code of Practice in Disinformation (now entrusted to a group of five experts led by Prof. Ravi Vatrapu), announced for July 2018; (ii) support to the creation of an independent European Network of fact-checkers; (iii) launch an European online platform on disinformation; (iv) promote IP vs IPv6 (in order that only one single user may use an IP address); (v) support member States in the management of risks to democratic processes from cyber-attacks and disinformation; (vi) commits to directly countering disinformation threats through a strategic communication (by the External Action Service, EEAS).

It is necessary to distinguish misinformation in general vs misinformation meant to interfere with political decision making processes (elections, referenda). All EU jurisdictions regulate information and communication, with special provisions concerning electoral campaigns. In the Italian legal context most violations of the provisions which regulate elections already are criminal offences.

Furthermore Italian law already qualifies as a crime: (a) defamation (art. 595 CP), (b) the spreading of false and biased or tendentious information (as long as they disturb the public order or breach national security, art. 656 CP), (c) criminal solicitation (art. 414 CP) etcetera; some also (d) hate speech (D.l. 112/1993); (e) Holocaust denial (L. 115/2016); (f) racial discrimination (L. 654/1975); (g) advocation of fascism (L. 645/1952).

Therefore the use of internet could be considered an aggravating circumstance in relation one or more of these offences: for instance L. 47/1948 already dictates heavier penalties when defamation is committed via the press or traditional media. In relation to political misinformation, the most relevant constitutional principle is equal opportunities among competitors: the level playing field must be ensured (par condicio: to this end, advertising on mass media during election campaigns can and often is banned or strictly limited in many countries). Here is where the regulator should start from.

In Italy, in particular, new regulations meant to pursue par condicio would stand on very firm constitutional ground. In Italy criminal offences need to be determined by law and the law must define them in respect of the principle of legal certainty (in French: selon le principe de précision et de détermination): this makes the identification of the elements of a criminal offence a task which demands competence and accuracy.

VII. WHAT COULD BE DONE AGAINST MISINFORMATION,
SPECIFIC MEANS

First of all, the regulator should take into consideration relevant comparative experiences. For example: ([A] the German Netzordnungsgesetz (NetzDG): platforms > 2.000.000 members - non journalistic services - duty to establish remedies - duty of reporting and keeping documentation - remove 'obviously illegal' contents - keep deleted content 10 weeks - administrative violations and fines up to 5 millions - six monthly reports - changes to the Telemediengesetz: duty to publish date non only for the protection of copyright but also for the protection of other fundamental rights: «the most extreme example of efforts by
governments and regulators to rein in social media firms...» (according to the BBC News, 1.1.2018). - [B] the HoC Select Committee Interim Report on Disinformation and 'fake news' and its bold proposals (the clearest statement on the risk of a democratic crisis «based on the systematic manipulation of data to support the relentless targeting of citizens, without their consent, by campaign of disinformation and messages of hate...» Damian COLLINS 29.07.2018): i) tech companies must be made responsible and liable; (ii) non financial aspects of their business operation must be audited (algorithms verifications); (iii) a levy on tech companies should be imposed to fund digital education; (iv) new rules on political campaigning should be introduced; ban on micro-targeting; ban on FB lookalike audiences; (v) rules on advertising already present for traditional media should be extended; (vi) enforce transparency requirements; (vii) audit of the operation of the advertising market on social media by the Uk Competition and Market Authority: as an indirect way of fighting bots); (viii) combat so called 'malign actors'. - [C] The Ferrand proposal in France, construed as a set of coherent rules to integrate existing election campaign regulations (disclosure of identity of those who order sponsored contents; disclosure of invoices; remedies against fake news capable of altering the incoming elections: in the French legal system the concept of "fake news" already exists - fausses nouvelles - apt to disrupt public order, la paix publique, art. 27 L. 29.07.1881; the crime of confusing or misleading voters or inducing them to abstain à l'aide de fausses nouvelles, bruits calomnieux ou autres manœuvres frauduleuses» is already a felony punished with imprisonment and a fine of 15.000 euros).

Therefore:

- At the Eu level: a) attempts should be made to limit oligopolies, starting from the over the top platforms and search engines b) it should be established that platforms (the companies which run them) are media companies and therefore could be submitted to similar limitations and regulations as media companies
- Anonymity should be banned or strictly regulated (traceability should always be possible: every profile or site should be re-traced to a person who might be held accountable); opacity of intermediaries (hosting and security services) should be limited;
- Some practices should be limited or banned (possibly in general; certainly if performed for the purpose of interfering with democratic processes: profiling, viral marketing, microtargeting (targeting specific voters), use of automated message generators (bots); virality should be curbed.
- Identity theft should become a specific crime.
- The already regulated criminal offence of spreading of false and biased or tendentious information apt to disturb the public order could be integrated, adding the words: or apt to interfere with the free opinion-forming of the voters. The use of new media should be considered an aggravating circumstance.
- Some degree of self-regulation should be fostered, but in the end a court should be able to ensure that it is effective and that it doesn't go beyond the strict need to protect rights and interests previously identified by law. This is what I refer to with the term enhanced regulation.
- All IT and new media costs should be included among the costs to be documented and considered in the frame of the expenditure limits established by law during election and referenda campaigns.
- The establishment of a specific Independent Regulatory Authority would have to be evaluated, with the task to ensure (i) timely remedies against the illegal use of new media; (ii) to foster the prevention of misuse of the new media through algorithms policing; (iii) to adopt secondary regulation. An already existing IRA could be empowered of the same tasks.
• Long term policies should also be pursued to improve the ability to critically cope with misinformation in order: (a) to foster media and digital literacy of the population at large; (b) to promote the use of psychology to design technology in a way that minimizes the impact of misinformation (Lewandosky, Ecker & Cook, 2017); (c) to support "quality journalism" and find ways to develop a business model other than "go viral or die" (at least in the area of information); (d) to foster activism in fact-checking and debunking (via a bottom up approach).

VIII. Final Words

Time and time again all of us have repeated the truism according to which misinformation is nothing new in human history and in politics: one of the most famous and infamous examples of fabricated misinformation I can think of is The Protocol of the Elders of Sion. Made public around the beginning of the XXth century it was proven a forgery in 1921. In the meantime it had spread world wide: no one else than Henry Ford, who was a staunch anti-Semite, ensured its distribution in many hundred thousand copies in the U.S. Let me recall the Bern trial against the distributors of The Protocols at a National Front rally in Bern in 1934 (main speaker was former General Emil Sonderegger). The defendants where convicted for violating the Bern law prohibiting "immoral, obscene and brutalizing" texts; few years later, in 1937, the Obergericht acquitted them because The Protocols were a political and not an immoral publication. The judge (in line with his predecessor of the Amstgericht) publicly regretted that the law did not provide adequate protection for Jews from this sort of literature.

We have to find a way to reach a new balance to save our liberal democracies, even if we have to make some compromises with some sacred cow. Yes, this has to do with more general and controversial issue of defensive (or protected) democracy. And may call in question the connection of all this with referenda and their sustainability. At the moment, for instance, in my opinion they have become hardly sustainable in Italy. The pre-conditions are at risk, if present at all (which I doubt). More referenda as the new majority and the Government intend to propose? No validity quorum (as the Council of Europe reasonably suggested ten years ago)? No, thanks! There is a need to restore the level playing field, first. Setting aside the Swiss case (but are we really sure about that? I hope so) decision making by referenda is endangered when fair and free campaigns and the formation of the public opinion based on facts seem to have become a mere aspiration.

We have seen enough, I believe, to leave behind understandable hesitations for firmly embedded in our liberal culture that they may be. Let me quote Jamie Bartlett: «In the coming few years either tech will destroy democracy and the social order as we know it, or politics will stamp its authority over the digital world...» (Bartlett J. 2018, 2). I believe we should try to do what we can: after all this is what has been done time and time again in relation to other more traditional media (press, radio, tv).

APPUNTI BIBLIOGRAFICI

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