

# PUBLIC POLICIES AND DIGITAL REGULATION IN COMBATING ABUSE OF POWER AND THE MISUSE OF DIGITAL MEDIA IN BRAZILIAN ELECTIONS

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## Abstract

*Technological advancements in the Brazilian electoral context challenge the traditional legal framework based on the principle of legality. This study examines the effectiveness of soft law instruments, such as TSE Resolution No. 23,735/2024, combined with digital education policies and international cooperation, to address disinformation, algorithm manipulation, and abuse of economic power. The Resolution exemplifies an agile normative response that safeguards electoral integrity without creating criminal offenses. However, legislative gaps highlight the need to update criminal norms to encompass digital conduct while respecting fundamental rights. Digital education emerges as a strategic tool to develop critical and resilient citizens against disinformation, while international cooperation strengthens global responses to transnational abuses. The integration of soft law, updated legislation, and public policies is presented as a balanced solution to strengthen democracy and adapt the Democratic Rule of Law to the demands of the digital age.*

**Keywords:** *Soft law; disinformation; digital regulation; democracy; digital education*

## 1. Introduction

Technological transformations over the past decades have undeniably and significantly impacted contemporary democracies, particularly in the electoral process. The emergence of digital platforms as preferred spaces for the dissemination of political information, the spread of disinformation, algorithmic manipulation, and the exploitation of economic resources to influence public opinion constitute an unprecedented and highly complex scenario, fluid enough to challenge the effectiveness of traditional normative frameworks. Thus, the central problem of this

study lies in examining the capacity and limitations of digital regulation in the Brazilian electoral process, considering the need to reconcile the constitutional principle of legality with institutional responsiveness to new abusive practices.

The primary hypothesis guiding this research is that a more flexible regulatory framework, supported by soft law instruments, digital education public policies, international cooperation, and administrative containment mechanisms, can respect and complement the principle of legality, enhancing the protection of electoral integrity. The use of flexible regulatory models, such as regulations and resolutions, has real potential to bridge the gaps left by legislative delays and rigid legal frameworks, without compromising the fundamental values of the Democratic Rule of Law.

The general objective is to critically analyze digital regulation in the electoral context, addressing the function of norms, the relevance of the principle of legality, the limitations imposed by normative lag in the face of rapid technological evolution, and the soft law initiatives adopted by the Brazilian Superior Electoral Court (TSE). Specifically, the study seeks to: (i) understand the restrictions imposed by legality on the creation of new criminal types for digital conduct; (ii) explore the capacity of TSE Resolution No. 23,735/2024 to act as a soft law instrument; (iii) delimit the notions of abuse of economic power and misuse of digital platforms; and (iv) evaluate the role of digital education public policies and international cooperation in strengthening the integrity of the electoral process.

To achieve its results, the research adopts a qualitative and exploratory-analytical approach, relying on a literature review and documentary analysis of norms, jurisprudence, and resolutions. The use of an interdisciplinary approach, integrating elements of constitutional theory, electoral law, criminal law, and public policies, aims to construct a multifaceted framework of the problem. Moreover, the perspective adopted, albeit punctually, situates the Brazilian case in an international context, identifying normative and institutional convergences and divergences.

To present this framework systematically, the article is organized into thematic sections: initially, the principle of legality is discussed, with an emphasis on the restrictions on creating criminal norms in a scenario of constant technological innovation (Section 2). Subsequently, digital regulation in the Brazilian electoral context is examined, analyzing TSE Resolution No. 23,735/2024 as a soft law instrument (Section 3) and defining abuses of economic power and the misuse of digital platforms (Section 3.2). Next, the challenges and limitations of applying these regulations are addressed, discussing the restrictions imposed by the principle of legality (Section 4.1) and the role of public policies in digital education and international cooperation in addressing transnational problems (Section 4.2). Finally, concluding remarks are presented, suggesting possible paths for improving the regulatory framework and consolidating a resilient democracy in the face of the complexities of the digital world.

## 2. Brazilian Constitutionalism and the Principle of Legality

### 2.1. Normative Force of the 1988 Federal Constitution

When analyzing the use of soft law within a legal system characterized by the supremacy of a Federal Constitution endowed with binding force, it becomes essential to understand the meaning and scope of this phenomenon in the Brazilian context. The 1988 Constitution, drafted during a period of re-democratization following a long authoritarian regime, emerges as a complex normative instrument. Its extensive and analytical nature is not merely a historical remnant but reflects a deliberate effort to articulate a new socio-political pact aimed at overcoming a context of material scarcity of rights and fundamental guarantees. This situation should not be seen as static or merely descriptive; it is necessary to assess to what extent these constitutional provisions, though legally binding, are sufficiently resilient to withstand circumstantial pressures, restrictive interpretations, or attempts at regulatory capture (Vieira, 2018, pp. 35-36).

In this perspective, the 1988 Constitution is not confined to being the "cornerstone" of the national legal order in a merely symbolic sense. Instead, it asserts itself as the fundamental norm guiding the very process of normative production. Indeed, the clear delineation of legislative competencies among the Union, the States, and Municipalities, as well as the explicit recognition of the Rule of Law and the principle of legality in Article 5, II ("No one shall be required to do or refrain from doing anything except by virtue of law"), are not mere adornments; they represent the intention to grant constitutional provisions a structuring force capable of subordinating all other normative sources.

A critical analysis could question to what extent this constitutional supremacy, while formally uncontested, effectively prevents the emergence of normative gray areas or the spread of legal practices that, in effect, bypass the scope of constitutional guarantees.

In this context, the concept of the normative force of the Constitution, as outlined by Konrad Hesse (1991), becomes particularly relevant. This concept is not exhausted in the mere positivity of the text; it presupposes a constant and profound interaction between constitutional norms, the concrete conditions of society, and the will of political and social actors. This view serves as a fertile starting point for critique: even accepting that the Constitution aims to have direct and concrete efficacy, we must inquire to what extent such efficacy is ensured in the face of circumstantial pressures, cultural resistance, economic interests, and, above all, technological innovations. Far from being a collection of normative utopias, the Federal Constitution claims to possess binding force, but this force ultimately depends on the continuous willingness of interpreters and enforcers to update its provisions and subject them to rigorous tests of coherence and relevance in light of these new challenges. Without

effectiveness and contemporaneity, it becomes, paraphrasing Ferdinand Lassalle, a mere piece of paper.

This problem becomes particularly acute in the case of the 1988 Constitution, whose declared objective is to structure a Democratic Rule of Law and to materialize fundamental rights. This contrasts with emerging demands from the digital environment that challenge these objectives. The principle of legality, as noted by Benjamin Constant (1985), underpins the well-known Rule of Law, shaping freedom as “the right of every individual to be subject only to laws, to not be arrested, detained, condemned, or mistreated in any way by the arbitrary will of one or several individuals”. For Mendes and Gonet Branco (2017, p. 755), it represents the primary instrument opposing authoritarian power and attempts to hijack the state through personal will: “In the Rule of Law, the government of laws prevails, not the government of men”.

It is clear, therefore, that the existence of legality and its respect is both a constitutional imperative and a safeguard for individuals against potential abuses of their rights. Criticizing the rule of law and its flexibilization through infralegal instruments is challenging.

Thus, the coexistence of the Constitution, in its condition as supreme law, with soft law instruments demands a critical examination: Is it possible to harmonize flexible norms, which are more "advisory" or inductive in nature, with the solidity of the constitutional order? The provisional answer suggests that this coexistence is not incompatible, provided such instruments are tested and evaluated against the values and principles of the Federal Constitution, so as not to dilute or bypass the rigid normative mechanisms that ensure institutional stability.

Kelsen's principle of imputation (1999) provides a valuable pathway: infralegal norms (soft law) must be grounded in and authorized by formally enacted laws following the constitutional legislative process or must directly derive from constitutional authorization, always respecting the principle of legality. This means they cannot encroach upon matters reserved for statutory law. According to Kelsen (1999, p. 55), the rationale behind this imputation diverges from an independent causality principle motivated, for instance, by natural law, as “the connection in the legal proposition is established through a norm set by legal authority – thus, through an act of will”.

Regarding the force of the Brazilian Constitution as the superior norm and source of attribution for all other norms within the legal system (and as a direct creator of norms due to its inherent normative force), three characteristics are crucial for this normative centrality to exist: its supremacy as the supreme norm, its rigidity, and its immediate applicability. While these characteristics appear immutable and resistant to flexibilization for the sake of harmony and preservation of the legal order, it is appropriate to recognize that, even so, there are cases where, to attribute or protect fundamental rights, this immutability may be revised.

For example, while the supremacy of the Constitution ensures coherence and unity within the system, it must be continuously reaffirmed through constitutional review. The rigidity of the constitutional amendment process, provided for in Article 60, is not merely formal; it is designed to prevent opportunistic changes that could weaken essential rights. However, this rigidity, though fundamental to safeguarding against arbitrary alterations, might also hinder the Constitution's adaptation to accelerated social changes, particularly technological ones.

The immediate applicability of constitutional norms ensures that they can be directly invoked without legislative intermediation, thereby dispensing with infra-constitutional legislation.

The robustness of constitutional force thus reveals itself as a field open to critique and empirical testing, especially considering the tensions posed by the growing use of digital technologies in electoral processes. In this new reality, we can affirm that (i) constitutional supremacy aims to prevent fragmented regulations or flexible norms from compromising the system's coherence; (ii) constitutional rigidity acts as a barrier against hasty reforms potentially harmful to the democratic core; and (iii) the immediate applicability of constitutional norms provides social actors with a direct instrument to claim rights, independently of legal mediations.

Nonetheless, the success of these three pillars depends on the institutions' ability to interpret, apply, and adapt the Constitution to align with and conform to the emerging realities. The reference to TSE Resolution No. 23,735/2024 exemplifies an infralegal normative effort to engage with the new digital world, evaluating the boundaries of strict legality on this topic.

It is therefore essential to recognize that the Brazilian Federal Constitution serves as a clear example of a constitution with extreme rigidity concerning fundamental rights and guarantees. However, this rigidity can and should be flexibly applied when addressing the creation, development, and enhancement of new rights. In other words, the Constitution must keep pace with social and technological advances to fulfill its role in guiding, sanctioning, and protecting individuals' basic rights. Whether through its own normative force or by the imputation of legislative or infra-legislative creation, the Constitution must provide sufficiently robust criteria for digital regulation to align with the principles of the Democratic Rule of Law, avoiding sterile inflexibility or inconsequential plasticity – both of which are pernicious and destructive to the democratic environment. When adequately addressed, this tension can strengthen the critical dimension of the debate and contribute to the continuous refinement of Brazilian democratic institutions.

## **2.2. The Principle of Legality and Its Limits in the Creation of Criminal Norms**

The enshrinement of the principle of penal legality (*nullum crimen, nulla poena sine praevia lege*), as articulated in Article 5, XXXIX of the Federal Constitution, which

states that “there is no crime without a previous law that defines it, nor punishment without prior legal imposition,” reflects a genuine effort to protect individuals against state arbitrariness and ensure a predictable legal order: *nullum crimen nulla poena sine lege stricta* (Greco, 2017). This provision must be understood as a fundamental structural component of the Democratic Rule of Law, establishing rigid parameters for attributing criminal conduct and representing “an achievement of modern criminal law, oriented towards the idea that freedom is the rule, and imprisonment or restriction of rights is the exception” (Nucci, 2019, p. 207).

In criminal law, legality demands that the creation of criminal offenses and penalties arise exclusively from legislative activity, through formal laws approved according to rigorous constitutional procedures. This requirement aims to maintain institutional balance among the branches of government, preventing administrative regulations or resolutions from overstepping their normative competencies, while also protecting individuals against abrupt changes driven by interests divergent from the constitutionally enshrined public interest. However, while this safeguard upholds systemic coherence, it can also hinder swift responses to new forms of criminality emerging in technological contexts. As Gomes (2017) observes, “there is no doubt that political-economic power structures can subtly exploit this formidable power for their benefit, influencing citizens’ mental frameworks or perceptions”.

The proliferation of large-scale disinformation and the manipulation of electorates through digital platforms expose the limitations of the principle of legality when faced with complex, fluid, and rapidly evolving behaviors that traditional criminal legislation was not originally designed to address. The normative gap created by the legislative inability to promptly respond to digital innovations results in a factual scenario where socially harmful practices remain outside the scope of criminal typification, compromising the legitimacy of the electoral process and, by extension, the integrity of democracy itself.

The Brazilian Supreme Federal Court, through Justice Edson Fachin, has analyzed the use of new technologies, such as artificial intelligence, to create environments of disinformation and attacks on democratic institutions. Justice Fachin affirmed that the use of resolutions by the Superior Electoral Court – thus categorized as soft law – is constitutionally legitimate and capable of “confronting disinformation that affects the integrity of the electoral process” (Zingales et al., 2024).

In this context, instruments like TSE Resolution No. 23,735/2024 prove significant not by circumventing the principle of legality but by complementing it in areas where the normative void is evident and its regulation constitutionally necessary and desirable. Although such resolutions cannot create crimes or penalties – and thus do not invalidate the requirement of prior law – they function as soft law mechanisms, providing interpretative parameters and provisional solutions (Gersen; Posner, 2008) to mitigate digital electoral abuses. This reliance on administrative norms suggests an

intermediate path: the necessity of reserving formal law for criminalizing conduct and applying penalties is respected, while the judiciary is not rendered inert in the face of emerging phenomena whose immediate consequences require institutional intervention. Additionally, it is worth noting that this resolution is grounded in the jurisprudence of the Superior Electoral Court itself, reflecting judicial interpretations of the matters at hand.

However, this approach is not immune to criticism. By limiting itself to essentially administrative sanctions – such as fines, content removal, or account suspension – these resolutions lack the punitive force characteristic of criminal legislation. This creates a disparity between the swift and adaptive response that administrative norms can offer and the need for deeper, more enduring legislative reforms capable of fully incorporating the digital dimension into the criminalization of socially harmful conduct. Nonetheless, this does not detract from the concrete effectiveness of resolutions that can set expectations, impose administrative sanctions, and create conditions for law enforcement or public debate on future legislation. As Guzman and Meyer (2010) assert, “Resolutions that do not purport to define binding legal obligations and cannot plausibly be thought to shape states’ expectations about such obligations are purely political. But for those resolutions that do speak to the content of binding obligations, they are not deprived of their ability to shape expectations – and thus to effect legal consequences – merely because they are nonbinding”.

Thus, while soft law instruments are a reality and hold importance, the challenge remains to harmonize the rigidity of the principle of legality with the pressing demands of the digital society. This harmonization requires the legislative branch to revise and update criminal law with greater agility and awareness, supported by broad and well-founded debates, and the judiciary to interpret existing legislation coherently with constitutional values and feasible legal and infralegal possibilities. Dialogue between these branches, as well as international cooperation, becomes crucial – indeed, imperative – for developing normative frameworks capable of addressing technological advancements and the risks posed by threats to democracy, such as fake news, disinformation, and other emerging strategies of electoral manipulation.

Therefore, as observed in the broader context of the Constitution’s regulatory capacity, legislative modernization is essential to maintain the principle of legality not as a hindrance to regulatory innovation but as a guiding criterion for legitimacy and legal certainty. Administrative measures like TSE Resolution No. 23,735/2024 can offer transitional and complementary solutions but do not replace the need to renew the legal foundation that supports criminal law in a scenario increasingly shaped by technological dynamics and digital innovations. Only through this normative evolution can the principle of legality align with the integrity of the electoral process, preserving the foundations of the Democratic Rule of Law without sacrificing the capacity to respond to contemporary complexities.

### 3. Digital Regulation in the Brazilian Electoral Context

#### 3.1. Analysis of TSE Resolution No. 23,735/2024 as a Soft Law Instrument

The publication of TSE Resolution No. 23,735/2024 represents an effort to equip the electoral judiciary with a normative repertoire capable of effectively addressing the emerging challenges of the digital sphere in line with the court's jurisprudence. This resolution serves as a soft law instrument that does not create criminal offenses or prescribe criminal sanctions but seeks to harmonize concrete jurisprudential practices with constitutional logic and the principle of legality. Unlike strict criminal laws, it was not created to replace formal legislation but as a complement or flexible normative layer intended to ensure that the formal structure of the electoral process does not become obsolete in the face of the increasing complexity of digital dynamics.

A resolution, it should be noted, has the nature of a "regulatory act" as it "creates general, abstract, and impersonal situations, modifiable by the authority that issued it." While a resolution issued by the court carries the force of law, it is important to distinguish that having the force of law is not synonymous with being law: "The 'force' in this context means enjoying the same prestige, holding the same general and abstract effectiveness attributed to laws. However, these [laws] remain hierarchically superior to judicial resolutions" (Gomes, 2017).

The resolution primarily focuses on measures aimed at preventing and mitigating harmful practices affecting the electoral process, such as the massive dissemination of disinformation, the misuse of digital platforms, and the abuse of economic power online. These inherently mutable phenomena challenge the conventional legal system's ability to respond swiftly. In the electoral context, time is a crucial factor: electoral violations like the spread of misleading and false content constitute antidemocratic acts that can irreversibly influence the electorate's political will, compromising fairness among candidates and, consequently, the legitimacy of the electoral outcome and democratic stability.

In this regard, the Brazilian Supreme Federal Court "has consolidated an interpretation of what constitutes 'anti-democratic acts,' encompassing the dissemination of fake news and explicit attempts at institutional destabilization against the constituted government" (Zingales et al., 2024).

By equipping the Superior Electoral Court with infralegal administrative tools (soft law) for the rapid removal of irregular content, the imposition of fines, and other non-criminal sanctions, TSE Resolution No. 23,735/2024 demonstrates sensitivity to the specificities of digital phenomena. While legislative processes typically require extensive debates and prolonged proceedings, administrative responses can be delivered promptly, imposing immediate costs on abusive practices and thereby mitigating the harmful impact of disinformation.

The use of a resolution to complement laws and impose non-criminal sanctions aligns partially with the understanding of Guzman and Meyer (2010), who define “soft law as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that, in turn, create expectations about future conduct.” The aim is not to replace the legislative debate or normative production by the legislature – avoiding any usurpation of legislative competence by the judiciary – but to ensure provisional and swift normative provision, preventing complete inertia in the face of harmful practices.

Such a resolution mitigates the risk of legislative rigidity and delays leaving the issue unregulated, a space where technological abuses capable of undermining the electoral process could flourish unchecked. Furthermore, the independence and constitutional role of the Superior Electoral Court, not only as a decision-making body but also as an administrative and regulatory entity, makes the use of soft law a legitimate tool for defending democracy. As Heller (2009) notes, “a forceful constitution and a sovereign judiciary are solidly grounded and have functioned as effective and significant counterweights to excesses of political power”.

The flexible nature of soft law is, therefore, not a regulatory anomaly but an attempt to complement the existing legal framework. Unlike criminal norms, which are more rigid and have longer-lasting impacts, such instruments offer high flexibility and adaptability, enabling swift and proportionate normative responses to technological innovations and the fluid nature of manipulation strategies. However, this flexibility is not rooted in a normative void: it must respect the constitutional and legal limits of the legal system.

Moreover, the resolution's effectiveness depends on fine-tuned institutional articulation among regulatory agencies and state administrative bodies, as well as on the ability to enforce its guidelines with digital platforms. Should these platforms resist complying with TSE directives or fail to engage in self-regulatory processes, the instrument's transformative potential would be significantly diminished, opening room for questions about its real effectiveness.

The fact that the resolution does not create crimes or prescribe custodial sentences serves as a warning: in the long term, relying solely on soft law and administrative sanctions may convey an impression of insufficient response to concrete threats against democracy. Nonetheless, TSE Resolution No. 23,735/2024 represents undeniable progress, as it establishes immediate behavioral parameters and stimulates reflection on the need for regularly updating the legal foundations of criminal and electoral law in response to technological transformations.

In this sense, the resolution serves both as a precursor to future legislative debates and as a pedagogical instrument, highlighting the importance of fostering a digital culture based on responsibility and the protection of the public informational space. Indeed, “this is mainly due to the lack of adequate regulation in the Brazilian scenario

on platform regulation, in confrontation with the growing challenges of platform use and the use of artificial intelligence (AI) in electoral processes” (Zingales et al., 2024).

In summary, TSE Resolution No. 23,735/2024 is not merely a temporary remedy against disinformation and digital manipulation in the electoral context. It symbolizes an institutional line of action that acknowledges the urgency of addressing the misuse of new informational and communication technologies against democratic institutions, without abandoning the pursuit of more stable legislative responses. Thus, it demonstrates that harmonizing the flexible tools of soft law with the need for more robust legal structures is feasible, at least in the short term, to prevent the integrity of the electoral process from succumbing to the speed and sophistication of digital abuses.

### ***3.2. Defining Abuses of Economic Power and Misuse of Digital Platforms***

A proper understanding of electoral offenses, such as abuse of economic power and misuse of digital platforms, is vital to maintaining a level playing field among candidates and preserving the integrity of the democratic order. These practices, ranging from the coordinated dissemination of false information to the manipulation of algorithms aimed at amplifying certain voices or silencing dissent, constitute a normative deviation that undermines the genuine meaning of the electoral process by stripping the electorate of its ability to make informed and autonomous decisions. Particularly concerning, these practices, through the instrumentalization of financial resources and technological tools, can distort public debate, mislead voters, or disproportionately influence the shaping of political will (Gomes, 2017).

TSE Resolution No. 23,735/2024 establishes concrete criteria for identifying such conduct. Abuse of economic power encompasses massive and unbalanced campaign financing marked by disinformation and the use of corporate resources to steer the electoral outcome toward specific interests. Indeed, “The abuse of economic power is characterised in Brazilian electoral law in cases where the excessive use of economic resources in a campaign impacts on voters’ freedom of choice” (Zingales et al., 2024). Consequently, the state’s response must be swift and decisive, lest it become ineffective and untimely. By delineating such conduct, the infralegal norm clearly identifies these practices and provides a sanctioning framework that, while limited to the administrative sphere, prevents resource imbalances from resulting in undue influence over the electorate, thereby strengthening the exercise of citizenship: “If citizens can’t practice democracy, what happens to citizenship?” (Heller, 2009).

In the case of the misuse of digital platforms, the issue may be even more complex due to the inherently fluid and technological nature of these infractions. Algorithmic manipulation, large-scale dissemination of disinformation, and the use of fake profiles constitute frequently concealed strategies whose detection and containment require a regulatory response that is agile and based on continuous monitoring. TSE

Resolution No. 23,735/2024 addresses these challenges by providing for the swift removal of fraudulent content, the identification of anomalous information flows, and effective cooperation between technology providers and public authorities. By doing so, it points to a regulatory dynamic that seeks to be epistemic (Gersen; Posner, 2008), flexible, and responsive, avoiding the crystallization of a legal framework that lags behind the speed of technological innovations.

However, the effectiveness of this approach does not depend solely on the actions of the judiciary or electoral oversight bodies. The resolution acknowledges that curbing abusive conduct also requires close collaboration with technological platforms, which may sometimes be reluctant or indecisive about their regulatory roles. At the same time, this partnership should not be seen as a mere delegation of tasks but as a step toward the maturation of a more transparent digital ecosystem, in which both the public and private sectors take responsibility for the integrity of the informational environment.

Finally, the materialization of effective protection against economic abuses and misuse of digital platforms also relies on citizen participation. Laws such as the Access to Information Law (LAI) No. 12,527 align with the intentions of TSE Resolution No. 23,735/2024, which, by establishing parameters and containment mechanisms, creates conditions for a more lucid and direct public debate. This allows the electorate to move beyond the role of passive spectators to assume an active role in denouncing abusive practices and valuing ethical and truthful behavior (Zingales et al., 2024).

In this way, addressing these forms of electoral process distortion transcends mere regulation. It becomes a collective task, consolidating the legitimacy of electoral contests and the country's democratic resilience in a global context increasingly characterized by informational volatility.

## 4. Challenges and Limitations in the Application of Digital Regulation

### 4.1. Restrictions Imposed by the Principle of Legality

The principle of legality, enshrined in Article 5, XXXIX of the Federal Constitution, is not merely a rhetorical guarantee but a structural mechanism that shapes the very conception of the Democratic Rule of Law. By requiring that only formal law, enacted by the Legislative Branch through a regular legislative process, can create criminal offenses and impose sanctions, it ensures a minimum standard of predictability, transparency, and legitimacy in the exercise of the state's punitive power (Greco, 2017).

However, this rigidity is not immune to external pressures. As the digital environment reconfigures the public sphere – introducing unprecedented speed, complexity, and opacity – the strict requirement for conformity to formal law may create a regulatory lag. While digital technologies evolve at an accelerated and unpredictable pace,