ARTICLE

BETWEEN LEGALITY AND LEGITIMACY:

differences and reasoning behind the TSE's definition and blocking of "fake news"

IVAN PAGANOTTI
FIAM-FAAM – Centro Universitário, São Paulo – SP – Brazil
ORCID: 0000-0001-5662-4240

LEONARDO MORETTI SAKAMOTO
Pontifícia Universidade Católica de São Paulo, São Paulo – SP – Brazil
ORCID: 0000-0003-0739-093X

RODRIGO PELEGRINI RATIER
Faculdade Cásper Líbero, São Paulo – SP – Brazil
ORCID: 0000-0001-9733-7563

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ABSTRACT – This paper analyzes the legal basis on which the Brazilian Superior Electoral Court (TSE) identified and removed content which it considered to be "fake news". To accomplish this, we evaluate the argumentative strategy behind the first ruling which defined the jurisprudence, including allegations of corruption against then presidential candidate, Marina Silva (Rede party) in the 2018 presidential election. Analysis of this case shows that the legal system went to great efforts to legitimize this case in academic studies, but it appeared to be less concerned with the legal arguments as it only cited recent legal guidelines on the dissemination of fake news but did not provide further detail on them. Even though journalistic sources were included in the legal decision, the legal argument disregarded mainstream news reports.
Key words: Fake news. Journalism. TSE. Social networks. Censorship.

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ENTRE A LEGALIDADE E A LEGITIMIDADE: divergências e fundamentações na definição e bloqueio de "notícias falsas" pelo TSE

RESUMO – O artigo analisa a fundamentação legal apresentada pelo Tribunal Superior Eleitoral (TSE) para identificar e remover conteúdos considerados como "notícias falsas". Para isso, será avaliada a estratégia de argumentação ao redor do primeiro julgamento que definiu a jurisprudência nesse caso, envolvendo denúncias de corrupção contra a então pré-candidata a presidente, Marina Silva, do partido Rede, na eleição presidencial de 2018. A análise do caso revela um maior esforço dialógico do judiciário para reforçar a legitimidade do caso em estudos acadêmicos, o que contrasta com menor preocupação com a argumentação legal, visto que diretrizes de leis recentes que tratam da disseminação de notícias falsas são citadas sem aprofundamento. Entretanto, ainda que fontes jornalísticas constem em sua argumentação, foram ignoradas as notícias publicadas pela imprensa tradicional que tratavam das mesmas denúncias removidas.
Palavras-chave: Notícias falsas. Jornalismo. TSE. Redes sociais. Censura.

ENTRE LEGALIDAD Y LEGITIMIDAD: divergencias y razones en la definición y bloqueo de "noticias falsas" por parte del TSE

RESUMEN – El artículo analiza la fundamentación legal presentada por el Tribunal Superior Electoral (TSE) brasileño para la identificación y remoción de contenidos considerados como "noticias falsas". Será evaluada la estrategia de argumentación alrededor del primer juicio que definió la jurisprudencia en ese caso, involucrando denuncias de corrupción contra la entonces pre-candidata a presidenta, Marina Silva (partido Rede) en la elección presidencial de 2018. El análisis del caso revela gran esfuerzo dialógico por parte del poder judicial para reforzar la legitimidad del caso en los estudios académicos, lo que contrasta con menor preocupación por el argumento legal, ya que las directrices de las leyes recientes que se ocupan de la difusión de noticias falsas fueron citadas sin más elaboración. A pesar de que las fuentes periodísticas están incluidas en su argumento, fueron ignoradas las noticias publicadas por la prensa tradicional que se ocuparon de las mismas quejas eliminadas.
Palabras clave: Noticias falsas. Periodismo. TSE. Redes sociales. Censura.

1 Introduction

The spread of false content during voting in the United States, the United Kingdom and Colombia in 2016 was an example about the strength of these new media (McNair, 2018). Even though we are unable to determine the extent to which "false news" – or fake news – actually influenced the aforementioned votes (Allcott & Gentzkow, 2017), it did not go unnoticed by society, who in turn looked to legislators and to the platforms where this content circulated for answers (Funke, 2018). Leading up to the 2018 national and state elections in Brazil, this concern spread to the quality of the sources of information Brazilians were using to vote on their president, their governors, senators, and federal and state deputies.

In response to this pressure to have greater control over the dissemination of incorrect information on social networks, the Superior Electoral Court (TSE) of Brazil introduced new rules to regulate the electoral campaign, including article 85 from resolution 23.551, of December 18, 2017, which criminalizes anyone who falsely "defines a fact as a crime", punishable by six months to two years of imprisonment and a fine for those "who knowingly propagate or disclose false information"

Months before the 2018 elections in October, there was great repercussion surrounding the first case of false news judged by the TSE (Balthazar, 2018). This case involved the national directory for the Rede Sustentabilidade political party – REDE (in English: The Sustainability Network party) against an anonymous *Facebook* page identified only as *Partido Anti-PT* (Anti-Leftist Party). Five texts were published on this page slandering then presidential candidate Marina Silva, who had left the *Partido dos Trabalhadores – PT* (in English: The Workers' Party) years earlier to launch her own political party, the aforementioned Network. Her party's lawyers denied the veracity of these criticisms and warned that this content could mislead the public and harm the candidate's image by associating her with allegations that she was involved in the country's biggest corruption scandal in recent history, Operation Car Wash (TSE, 2018a).

On June 7, 2018, TSE substitute minister Sérgio Silveira Banhos ordered the five posts to be removed from this *Facebook* page and that its authors and page administrators be identified. The decision received extensive press coverage after the court's press office claimed that "the first ruling that prevents false news on the internet" was applied by the Brazilian electoral court (TSE, 2018a). This specific case not only put the resolution from the previous year in practice, but it was the first to define jurisprudence on how the electoral justice would begin assessing complaints of fake news: in a retrospective evaluation at the end of the election, the TSE highlighted that this June case was the first in a series of 50 cases, 16 of which were successful in having the false content removed (TSE, 2018b).

However, questions arose around the TSE's June decision as the posts were "labelled as false, but they are all based on accurate news published by *Folha [de S. Paulo*, the largest daily newspaper in Brazil] and other communication media" (Balthazar, 2018):

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> In June 2016, when negotiating a successful plea bargain with the Attorney General's Office, contractor Léo Pinheiro said that OAS [construction company] used a slush fund to support Marina's 2010 presidential campaign. The news was published by the O Globo newspaper and confirmed by Folha. The contractor did in fact make a contribution to Marina's party, which was affiliated with PV in 2010. R$ 400,000 was paid to the Rio administration, this support was registered as required by law and confirmed by former deputy Alfredo Sirkis, who was head of the party in 2016. [...] As the contractor's negotiations with Operation Car Wash are currently ongoing and his complaint was not approved by the courts, it is impossible to shed any light on the conflict between him and Marina's allies. [...] The publications which were challenged by Marina and removed from Facebook then offered news links to another website. Although the titles of the publications can be misleading, as they describe donations as bribes and discredit Marina, the content of the news is very similar to what the newspapers published. (Balthazar, 2018, p.A9).

As detailed in the excerpt above, the case started from a dispute over different versions, which were not previously sanctioned or denied by the courts, which made conclusions about the falsity of information that had previously been published in traditional press organizations such as *O Globo* and *Folha de S. Paulo*, which was the recipient of Balthazar's criticism (2018). This case initiated the jurisprudence of that electoral court involving fake news (TSE, 2018b) and included information that had been published and verified by mainstream media agencies in Brazil – which could set a dangerous precedent for removing unofficial news content without the court's approval.

This concern is not just a remote possibility since countries like Malaysia have already taken advantage of collective hysteria against fake news to adopt authoritarian legal measures like prohibiting the publication of unofficial information or accusations, which ultimately limit the country's freedom of expression by discouraging those who publish criticisms with fines and imprisonment (Beech, 2018). In Brazil, press agencies such as the traditional newspaper *O Estado de S. Paulo* have already been legally prohibited from publishing information connected to criminal investigations, something its editors label as censorship (Mayrink, 2010). In an attempt to respond to the public outcry against false news in late 2017, Brazilian Congress approved an amendment that would allow for the removal of content promoting "the dissemination of false information or slander of a party or candidate". This measure was ultimately vetoed by President Michel Temer after complaints that it would fall under the flag of censorship (Betim, 2017).

Far from being a purely legal discussion, this quintessential case involving the removal of content from *Facebook* also raises a debate about the very stature of information and the validity of journalistic techniques for investigating and verifying facts and statements. Even if this judicial process left out any press publications that mirrored the perspectives presented – albeit with great exaggeration (Balthazar, 2018) – in the removed posts, this study seeks to deal precisely with the sources the judge used to support his decision.

In that regard, this study questions how legal arguments and public authority arguments (such as laws, resolutions and judicial decisions) are connected to other discursive spheres, in particular, academic studies and information disseminated by the media which is accessible by the general public. This article aims to explain the reasoning behind the identification and blocking of false news, and to understand the judge's ruling based on legal principles, on information released by the media, and on the scientific literature on the emergence of false news and the post-truth phenomenon. This case is particularly problematic when we consider that the term "false news" is poorly defined; its meanings and uses vary a great deal among academics and political actors – as we shall discuss below.

2 Theoretical reference

Despite its recent popularity, the term "post-truth" has a much longer past (Keyes, 2004). Before being chosen as the 2016 word of the year by Oxford dictionaries, this term, that means "circumstances in which objective facts are less influential in shaping public opinion than appeals to personal emotions or beliefs", had originally been coined by Serbian-American playwright Steve Tesich in a 1992 article in *The Nation* magazine about political scandals in the USA in previous decades (Kreitner, 2016). However, the supposed electoral influence of false content, propagated by social networks, led the term through a renaissance, now seen as a synthesis of the new times and the relationship of a major part of the public with the new media.

The concept of fake news has had a very controversial history. The term was used for a very different purpose in the late 20th century; it was a kind of satirical journalism where comedy programs

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would present absurd information and make parodies of language standards adopted by the press and recognized by the public, or they would make jokes about real facts (Borden & Tew, 2007). However, unlike those comedy skits, which only worked because the public were aware that a joke was being told, recent interpretation of the term fake news is associated with the proliferation of "viral publications of reports that are made to look like news reports" (Tandoc et al., 2017, p.2, authors' translation), initially mimicking aesthetic characteristics of online news publications. Allcott and Gentzkow (2017, p.213, authors' translation) talk about how the current concept of the term is different because of the intent to mislead the public through "news articles that are intentionally and verifiably false, and that can mislead their readers". Vosoughi et al. (2018) point out that false news can spread faster on social platforms like *Twitter*; they can reach larger audiences and have longer life spans than true news information.

In addition to the lies that false news has to instantly destroy reputations, Castells (2018) warns that its cumulative effect can be even more devastating in the long run due to a general feeling of uncertainty. If we cannot trust those who are denounced, or their whistleblowers, then this collective distrust erodes the foundations of political and media institutions in a controversial "crisis of legitimacy" (Castells, 2018, p.28).

Due to the growth of its popularity and its ability to attract public attention, concerns over the negative effects of these disinformation campaigns has led the term to also include "journalism that should not be taken seriously because it is either false, manipulated or indistinguishable from fiction" (McNair, 2018, p.6, authors' translation). For Ribeiro et al. (2017), defensible criticisms and information that has been verified and checked which is published by credible news media are also questioned or disregarded if they do not fit the preconceived ideas of the public. Political leaders who were accused of receiving an electoral advantage from the dissemination of false news, such as U.S. President Donald Trump, take advantage of this scenario to deflect criticisms, stating that accusations from the press or from their opponents should not be taken seriously because they are fake news (Ross & Rivers, 2018).

This does not mean that the press does not make mistakes or publish lies: one cannot ignore the problematic "information manipulation" (Christofoletti, 2018, p.58) in which economic and political interests, including inadequate forms of verifying information,

led to incorrect information being released to the public with very serious consequences. But it is important to "discern between the occasional dissemination of false news and the constant, systematic emission of false news done on bad faith" (Frias Filho, 2018, p.43). In other words, it is important to distinguish which professional media might knowingly publish without clear authorship on online platforms and social networks (Allcott & Gentzkow, 2017).

Considering how the definition of the term varies when adopted by different social actors, Wardle (2017) questions the validity in using this politically-based expression. Silva (2018) also highlights the inaccurate translation of the concept into the Portuguese language as the term "false news" does not convey the same idea in English, and does not differentiate between those who make mistakes and propagate false information and the more serious cases of purposeful fabrication of the facts which are intended to deceive the public.

This is precisely the issue addressed in TSE resolution number 23.551 from December 18, 2017 which punishes those "who knowingly propagate or disclose false information". As we shall discuss below, if having prior knowledge of this mistake is what defines intention, then that is important towards determining guilt or willful misconduct under the law, but this is very difficult to do in a world where rumors are propagated (Sunstein, 2010). This is because, as highlighted by Christofoletti (2018, p.62), fake news "goes viral on social networks, it is spread by unsuspecting or interested individuals and by automated systems, such as *bots* and algorithms", that is, by human and non-human actors who either intend to deceive or not, either way they all end up contributing to disinformation.

Different measures have been adopted in response to public concern over false news, including changes to how social networks and online search tools function, or the inclusion of new laws to punish those who create and share this unverified content (Paganotti, 2018). Haigh et al. (2017) argue that it would be more productive to invest in checking information and training the public to identify internet fraud. Ribeiro and Ortellado (2018) have reservations about technical solutions and proposals for legal intervention which they believe can have negative side effects, limiting or punishing the expression of online criticism. Initiatives of greater control over freedom of expression can have a very harmful effect on individual rights and democracy. However, as Lima (2011, p.16) points out, "the limits or difficulties to freedom of expression is the right to self-

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image and privacy, as well as the presumption of innocence", which is particularly relevant in cases that deal with complaints, investigations or legal proceedings preceding the trial.

3 Methodology

This study is based on the methodology originally presented by Gomes and Paganotti (2012) in an analogous study discussing the gap between academic studies on audience reception and the film classifications adopted by the Ministry of Justice and the Brazilian courts prohibiting the screening of films (later reversed). This kind of film censorship and film rating was clearly based primarily on laws, constitutional principles and ministerial regulations – as one might expect from a decision made in the legal world – but with a tenuous connection to studies on reception that were empirically based on the rating system (Gomes & Paganotti, 2012, p.293). For this, the authors assessed the judicial decisions and the rules on which they were based, and also analyzed media circulation of these decisions and looked at what kind of support or public questioning they received considering their support or public questioning.

> Legal decisions depend on laws to provide sufficient legitimacy because these norms are expected to just consolidate and shape moral values and practices into a typified code of conduct. [...] On the other hand, appropriate studies on reception (properly cited, with their results discussed and based on Brazilian realities) may point more precisely to effects from the supposed inadequacy of some controversial forms of expression [...]. But perhaps that is precisely why the legal system ignores them: they can point to more complex and less degrading effects of inappropriate images - and can therefore threaten the power of lawmakers and lawyers [...]. Without proper studies - and without properly citing their results - it is impossible to hold democratic debates on these rules and their results. When based on judicial and moral principles, these decisions are just followed but they are not discussed or debated since their evidence is also hidden or silenced. This censorship imposes silence not only for the censored expressions; it also disables and blinds its followers, who are unable to discuss other points of view on these issues other than legal or moral ones. (Gomes & Paganotti, 2012, pp. 293-294).

This methodology of analyzing the legal-academic basis in cases about controlling freedom of expression originally applied to film censorship, but was later extended to the broader field of communication, evaluating the Federal Supreme Court's decisions on and arguments for eighteen contemporary cases of controlling

freedom of expression which involved demonstrations in public spaces, television stations, electoral propaganda, news vehicles and social network posts (Paganotti, 2015). Thus, this methodology highlights "the main lines of argument adopted by the ministers and parties involved in the trials, which reveal *the motives or reasons for censorship or for freedom of expression*" (Paganotti, 2015, p.133, original emphasis).

Along these same lines, this study evaluates the judicial documents requesting to remove content from the "Anti-Left Party" *Facebook* page, the legal basis for this decision, and the academic definitions of the controversial term "false news". Information was collected on a document called Representation 060054670.2018.6.00.0000, from the national directory of the Sustainability Network on behalf of presidential candidate Marina Silva, in a decision reported by TSE Minister Sérgio Banhos. This document was found through a search conducted on the TSE's search engine www.tse.jus.br/jurisprudencia/@@monocraticas-search by using the number (060054670). It can also be found on the Document Process Consultation platform, in the TSE Electronic Judicial Process (PJe) system on page https://pje.tse.jus.br:8443/pje-web/Processo/ConsultaDocumento/listView.seam?x=18060711464748800000000263193 which publicizes this decision and also allows the validation of its electronic signature.

It was also necessary to analyze the intertextual connection of this specific decision with the previous legal documents that underlie it, in particular, Resolution No. 23,551 of December 18, 2017, which "concerns election advertising, the use and generation of free time, and illegal conduct in election campaigns". This resolution had been amended in the previous year to include new rules applicable in the 2018 election. It is worth highlighting article 85 of this resolution which defines that "slandering someone in electoral propaganda or for propaganda purposes, and falsely accusing them of a crime is a felony punishable by 6 (six) months to 2 (two) years imprisonment and payment of a 10 (ten) to 40 (forty) days' fine". The first paragraph of this article states that "the same penalties apply to those who knowingly propagate or promote false accusations". This document can substantiate the punishment for spreading false news during the Brazilian electoral process and was mentioned in the decision analyzed in this study. It can be found at http://www.tse.jus.br/legislacao/compilada/res/2017/resolucao-no-23-551-de-18-de-dezembro-de-2017.

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In addition to prior reasoning, the repercussion of this case was also considered, using texts produced by the TSE on its official website. This webpage displays the document from the agency's press office to show the public what the court's first response was to their demand for greater control over the spread of false news during the Brazilian electoral process (TSE, 2018a).

The analysis of the judicial decision, its previous legal basis and its dissemination in official bodies and by the press office was performed according to the method for evaluating the validity of legal decisions based on argumentative strategies that underlie them before the public debate, as Habermas (2010) discussed as a way of sharing the weight of the legal decision, which should not be monopolized by judges, but shared among their peers. Following this method of analysis, we are able to assess how the judge bases his decisions, switching between a "monological" side (p.276) rooted in the judge's rationality (meaning it is focused more on the legality of the decision, one that is based on laws and the consolidation of the legal system without avoiding the jargon of this closed language), and a more "dialogical" side, which expands the argument to include other agents and knowledge (meaning it is more concerned with the legitimacy of the decision, consciously aware of the public and academic debate, and therefore adopting a more open attitude toward more accessible arguments with greater social resonance). Habermas (2010) critiques the limits and risks of this monological approach in societies that demand greater transparency from judicial decisions, which need to avoid an airtight discourse that excludes citizens in the name of those who apply the laws. It is precisely this support of the legal argument "for public communication" (p.278) that needs to be assessed, whether the judge considers the public debate on the different meanings for "false news" between academics, politicians, journalists and the general public.

4 Analysis

The monocratic decision of TSE Minister Sérgio Silveira Banhos begins with a summary of the arguments presented in the injunction requested by representatives of the Sustainability Network against the five "Anti-Left Party" *Facebook* posts slandering the image of presidential candidate Marina Silva:

> The first post, published on 12/20/2017 reads: "Marina Silva, Lula, and [the Minister of the Supreme Federal Court] Dias Toffoli were reported by Léo Pinheiro. The OAS executive still has a lot to answer for". The second post, on 10/31/2017 reads: "Marina finances herself with slush funds - Marina does not fit. Brazil does not need someone who avoids important issues and finances herself slush money". The third post on April 17, 2017 reads: "[musician] Caetano Veloso called [former president] Lula illiterate. What are you going to say about Marina Silva who received a bribe". The post on the previous day (April 16, 2017 read: "Marina Silva also received a bribe of R$ 1.25 million from [construction company] Odebrecht, confirms group's executive". The last post on March 29, 2017 read: "Marina Silva also benefited from Odebrecht's kickbacks and is still upset when they call her ex-PT". (Rep 0600546-70/2018/TSE, p.1).

This excerpt is already contradictory in that it maintains the titles of the posts in these documents that were to be removed by that same decision. By the time the case was over, this content could no longer be found on *Facebook*, and the message "this page is not available" appeared when clicking the URLs in the document. But the title of these posts is still available online. This is a frequent problem with processes that remove online content but, by upholding the principle of making legal decisions public, end up being available in the documentation itself, which needs to include said content in order to exemplify and justify exactly what was inappropriate in these pages (Paganotti , 2019).

Then, representatives of the political party argue that "there is no evidence that Marina Silva is associated with acts of corruption; moreover, she has not been charged nor is she under investigation for any connection to Operation Car Wash" (Rep. 0600546-70/2018/TSE, p.1). They point out that Marina was already "slandered by the disclosure of fake news in the 2014 [presidential] election, where automation and anonymity on social networks attempted to destroy her political image". As a result, a preliminary injunction was requested to remove these five posts, to identify the creator of the page, its administrator, who published the specific posts, to gain access to records, shares and instant messages of the people involved, in addition to the possibility of deactivating the profile and administering a fine.

The minister made his decision after this initial summary, so it is important to analyze his line of reasoning and the sources he adopted to support his position. The text cites two news sources, one academic work, and eleven legal texts which we will present below in the order they appeared in the original text. The minister starts his argument by

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claiming that although "the practice of fake news is not new [...], due to social networks, the spread of this malicious information has become faster, easier, cheaper, and occurs on an exponential scale" (idem, p.2). His sources come from two books: one dealing with the phenomenon of post-truth, written by English journalist Matthew D'Anconna (2017); and the other dealing with the acceleration of modern times, written by Polish sociologist Zygmunt Bauman (2007):

> This is the time of Post-Truth – the Oxford Dictionaries word of the year – in which, journalist Matthew D'Ancona (D'ANCONA, Matthew. Post Truth - the new war on truth and how to fight back. London: Ebury Press, 2017), author of the book *Post-Truth*, states that "certainty predominates over facts, the visceral over the rational, the deceptively simple over the honestly complex". [...] This is because the deepest human truth is emotional, subjective and does not need facts. Distorted news with a strong ideological bias published on social media more often than not gains greater attention than reports made by the traditional press. False, sensationalist stories tend to bring results easily; they go viral and become trend topics more quickly than reports from committed journalists who check their facts. It is the strength of lies over real events which stimulates excessive political polarization and produces fertile ground to feed voter misinformation. We are living in liquid times. According to Polish philosopher Zygmunt Bauman (BAUMAN, Zygmunt. Liquid Times. São Paulo: Zahar Editora, 2007), our world is full of uncertainties: everything around us is precarious; everything is changing at an increasingly faster rate. Our reality is, therefore, liquid. Nothing is made to last, to be solid. It is a world of uncertainty. And all this, all this reality, tends to manipulate the political debate on social networks. (Rep 0600546-70/2018/TSE, p.2).

Central elements in academic studies on false news are listed in this excerpt: in a world of "post-truth" and "uncertainties", a text that captures emotions and "is detached from the facts" and distorts "with a strong ideological bias" succeeds to "go viral" on "social networks" more effectively than verifiable news content.

Based on journalism and sociology books, the decision highlights an academic background that underlies the social problems that will later be solved by legal texts. This argumentative hierarchy can represent an attempt to organize the world based on broad reflections of general problems, both in its thematic scope and in its target audience, and later arrive at the specificity of the legal resolution, based on the constitution, laws and resolutions – also presented in the same order, from general to specific. Although much more frequent in the text, legal sources share space, are introduced, and are based on the more abstract concepts presented by research and journalistic and academic reflections.

Even in this broader first moment, the text makes reference to the Constitution, a legal text that contains general principles and knowledge disseminated in society:

> Although freedom of expression is a fundamental constitutional right, its protection does not extend to anonymous manifestation (Article 5, item IV of the Constitution). The lack of identification of authorship of the news, therefore, indicates the need to remove publications from the public profile. Even if that were not the case, I note that the information has no proof and claims facts without any source or reference, with the sole purpose of slandering the presidential candidate (Rep 0600546-70/2018/TSE, p.3).

In addition to revealing the end decision, this excerpt points to anonymity as the main issue with the analyzed content, but withdraws the full citation of the constitutional item which guarantees that "the expression of thought is free when anonymity is prevented". This theory is a controversial one: would anonymity be sufficient evidence to remove publications? Without dwelling on this issue, the document simply accepts the arguments of the candidate's representatives about the risk of publishing information without proof or sources and appeals to emotional reactions. When it states that the information has no "proof", it ignores the fact that the posts are based on information disseminated by the press (albeit in a sensational way), as mentioned earlier in Balthazar (2018). So, it seems to ignore the daily press as a legitimate source of information for the public, who could in turn re-publish its information on social platforms. This disregard of the local press as a source of legitimate information for posting on social networks is in direct contrast with a legal quote the English journalist, D'Anconna included in his book, mentioned in the previous excerpt.

With this contrast in mind, the following excerpt is of the minister citing a new journalistic source – an online one – to explain that this sensationalist exhibition is one of the traits which has already been identified in research on fake news, highlighting its sensationalist, subjective, inaccurate and appealing nature:

> Incidentally, the stylistic shape of the posts can also point out, symbolically, the existence of false content. Although it cannot be said that all *fake news* are written in the same way, recent research already indicates the existence of a relatively common pattern in this type of publication, which can even be identified by artificial intelligence. Common features of this type of publication are: sensationalist headlines, the prevalence of the first person in the text, grammar and cohesion errors, and the use of extremist and judgmental words (https://medium.com/data-science-brigade/a-ci%C3%AAncia-da-detec%C3%A7%C3%A3o-de-fake-news-d4faef2281aa. Access on: 6.6.2018). It is also undeniable

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> that these posts can cause serious damage in the specific case. The "Anti-Left Party" profile has more than 1.7 million followers, which strengthens the aforementioned spread of fake news (Rep 0600546-70/2018/TSE, p.3).

This "stylistic" discussion once again focuses on the journalistic format imitated by false news, an element that also appears in some of the theoretical foundation discussed (Tandoc et al., 2017; Allcott & Gentzkow, 2017), although it does not deal with intentionality, an important element for these authors and one that is strangely absent in legal discussion about deliberate intent. Surprisingly, information about the characteristic style of false news has a link to its source, but the *Medium* platform does not explicitly identify the author (Irio Musskopf – 2017), the title of the article ("The science of detecting fake news"), or the vehicle that published it (the *Data Science Brigade* page). This news article, a scientific text, presents studies by American psychologists and research centers on the subject. An excerpt from this report (which was not cited in the TSE minister's argument, but fits perfectly in his line of argument against anonymity) highlights that "farces usually originate from websites that encourage anonymity" (Musskopf, 2017).

After presenting this sample of academic and journalistic research, and reflections on the risk of false news, the minister then presents the solutions and legal bases for this scenario, and how they can be applied in this specific case. In addition to the two constitutional citations mentioned above, it presents two references to the Civil Procedure Code, five references to Law 12,965, of April 23, 2014 (known as Marco Civil da Internet, which regulates the rights and duties of different actors in accessing the digital network), one reference to an appeal requesting the limits of a fine, and a single quote, on the last page of TSE resolution 23.547 on the elections, cited above and disclosed by the TSE press office (2018a):

> I also grant the preliminary injunction to determine to the represented [...], the availability of the personal data of the creator and profile administrators, under the terms of Art. 10, § 1, of Law 12.965/2014. In case of non-compliance, a daily fine may be applied under the terms of Arts. 536 and 537 of the Civil Procedure Code. The defendant is summoned to present a defense within two days, pursuant to Art. 8 of Res.-TSE nº 23.547/2017. (Rep 0600546-70/2018/TSE, pp.4-5).

The above excerpt shows a difference in style when compared to the other excerpts citing academic and journalistic texts. Due to

the fact that it deals with legal procedures, the text sometimes comes close to the hermetic formulas that make it difficult for novices to access and understand. At the conclusion of the text, besides ruling in favor of removing the content and identifying its authors, the minister also seems to distance himself from his initial appeal to further support his text (in academic and journalistic works) and make it more accessible (with language and arguments that could be understood by an audience outside the field of law), limiting it to a very restricted number of people interested in the legal world.

When this case was presented in the TSE press release (2018a), its pioneering spirit was evident in its title: "TSE applies the first ruling that prevents false news on the internet". However, at the end of the article, the process code was cited but with no link. Considering that it was a case about the foundation of information and its sources, this can also make access difficult for anyone wishing to check the original text containing the decision, since the TSE search engine does not have a friendly interface and can be a barrier to anyone looking to check the information for themselves – which, after all, is recommended when dealing with content which is broadcast online.

5 Final considerations

The excerpts of the decision we analyzed show a clear effort, on the part of the informer, to connect the legal discourse specific to his field with the foundation of academic sources and mediation of the press. This initiative demonstrates that the legal precepts – and this decision in particular – are not isolated from the social environment which they are meant to influence. On one hand, it seeks arguments beyond legal works and legal texts, signaling with this argumentative ordering that laws arise after collective reflection in the academic debate and in the press, basing its guidelines on reflections of practices that you want to preserve or avoid. This line of argument differs from the study on film censorship, which is based more on legal rather than scientific arguments (Gomes & Paganotti, 2012, p.293), reinforcing the need to research this case for studies on media regulations and, in particular, the fight against false news. After all, if disinformation grows out of a disregard for sources of quality information and the scientific principle of proof, then the fight against it must involve the careful use of sources and methods.

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By adopting this intertextuality and favoring arguments from academics and journalists whose books and websites are published internationally, we can see a kind of dialogical judgment, as per Habermas' classification (2010, p.276); one that is concerned with the "legitimacy" and social basis of his judgment, and not just the "legality" of texts specific to the world of law. In other words, while explaining his criteria and fundamentals (an attempt to reinforce the "legality") does diminish the impression of arbitrariness in a controversial case, he tries to reinforce an arbitrary role by mediating different contrasting interests, creating a balance of sources from academic, journalistic and legal fields (strategies used to increase the "legitimacy" of his decision). Considering that this is a case that would initiate the jurisprudence of TSE decisions on fake news, a topic of great popular interest, it is interesting to note that the double focus on the legitimacy and legality of the decision is not only based on previous texts, whether law, decisions and decrees (legality), or books, reports and academic and scientific research (legitimacy), but it also considers how they will affect new decisions that might use this case as a legal starting point; in other words, this decision could also serve as a basis for the legality of other cases and its effect on the court's press office and the national press – who could use it to reinforce or contest its legitimacy, as discussed in this article.

Even though it presents many elements of the academic definition of false news, the minister's decision does not address the intention to mislead as a major element for this classification, as some academic works do (Allcott & Gentzkow, 2017; Tandoc et al., 2017). This may lead to an approach in line with that of researchers who do not consider this element central to the definition of the term, but the absence of the discussion about intent in a legal text is in itself quite revealing. It also does not take into account the fact that the accusations dismissed as unfounded had been presented by the press before, and here is the most problematic element of the case discussed: among academic studies, scientific articles, and books published by journalists, ignoring the source in the local press that would support the posts under trial seems to echo a deafening silence.

On the other hand, the presentation of academic and journalistic sources, coupled with the adoption of an accessible language in the arguments signals an attempt to increase publicity of legal decisions, which was reinforced by the disclosure of this case by the TSE's advisory on its website, and later disclosed by

Brazilian press. It is worth mentioning that the case occurred a few months before the start of the electoral campaign, when a response was already being demanded for the latent threat of the spread of false news, and its disclosure could create an intention of deterrence, signaling legal punishments for those disseminating false content in the election – which apparently did not prevent the spread of misinformation during said electoral period.

Even so, it is quite surprising that this decision explicitly deals with the propagation of incorrect, defamatory, unsigned and anonymous information, but only cites a specific TSE resolution 23.551 which it is based on. By not discussing the TSE criteria for punishing those who propagate information that "slanders someone, in electoral propaganda or for propaganda purposes" or "knowingly propagates or disseminates a false fact" in the preliminary injunction may be an indicator as to how difficult it is to determine whether the propagator knew this information to be false at the time it was disclosed, since it could be argued that the mainstream newspapers published similar reports, which could lend credibility to these accusations. It cannot be forgotten that cases like this present an even more basic initial difficulty in identifying the authorship of the posts – which could prove whether these authors knew if the information disclosed was false or not. This signals an inherent weakness in the TSE resolution, which can be confirmed in future research that follows other legal cases involving false news. Further studies could, for example, evaluate the 50 cases mentioned by the court's press release (TSE, 2018b), expanding on the analysis in this study on this first quintessential process – an effort that would not be possible due to the limitations of this study, which only seeks to point out criteria of analysis and a difficulty in the origin of this chain of judgments and its approximation or distancing from journalistic and academic sources.

Another surprising absence in this decision is item IX, Article 5 of the Constitution. Despite determining the removal of content, the judge does not make reference to whether this means that "the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license". It would be interesting to assess the strategy adopted by the informer in this case to differentiate the removal of texts from this *Facebook* page and the practice of censorship, which is prohibited under the constitution. But it is possible to imagine that the minister could support this

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distinction in item IV of this same article, quoted and analyzed in the previous section ("the expression of thought is free when anonymity is prevented"), which can be interpreted as a protection against censorship only in cases where authorship is identified, which is not the case in this specific ruling.

Lastly, we cannot ignore Balthazar's (2018) warning, presented in the introduction to this article, about the risk of removing content with information that was echoed and confirmed by the press. There is an evident risk in the legal approach to controlling false news, as enforcing more restrictive laws on the freedom of expression online can intimidate critics and censor complaints, as already evidenced by the case of Malaysia.

It is worth remembering that the term censorship has a double meaning: it may be a simple formal criticism of conduct that is intended to disapprove (but not restrict), or it may involve removing content considered to be inappropriate. It is a double meaning similar to that of another term in the legal and critical fields: the verb *to* condemn.

Despite demanding the posts be removed (the censorship that removes), the process maintains, in its documentation, part of the content that was intended to be deleted, in order to explain the criteria adopted for its condemnation (the censorship that it disapproves). In this second sense, the published legal decision becomes the subject of new debates by those who criticize it, who may or may not agree with the arguments or the final result of the process. It is precisely this criticism that does not erase its target, but dissects it (which was the objective of this paper); a necessary task, particularly in the case of dubious content that so many fear and that seem to threaten our democracy.

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IVAN PAGANOTTI. Professor and coordinator of the Professional Master's in Journalism at FIAM-FAAM – University Center. PhD in Communication Sciences from USP, with a doctoral internship at the University of Minho (Braga/Portugal), with a Capes scholarship (2014). A researcher at Midiato/ECA-USP. E-mail: ivan.paganotti@fiamfaam.br
Collaboration in the article: research design concept; development of theoretical discussion; data collection and analysis; manuscript editing; proofreading support.

LEONARDO MORETTI SAKAMOTO. Professor at the Journalism Department, PUC-SP. PhD in political science from USP (2007). He is general coordinator of the NGO Repórter Brasil and a visiting scholar at the Department of Political Science at the New School for Social Research, New York (2015-2016). E-mail: lmsakamoto@pucsp.br
Collaboration in the article: development of theoretical discussion; proofreading support.

RODRIGO PELEGRINI RATIER. Professor of journalism course at Cásper Líbero College. PhD in Education from USP (2016), with a doctoral internship at Université Lumière Lyon 2 (France), with a Capes scholarship (2015). E-mail: rpratier@casperlibero.edu.br
Collaboration in the article: development of theoretical discussion; proofreading support.

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