

**DESINFORMAÇÃO, LIBERDADE DE EXPRESSÃO E ABUSO DE PODER:
ANÁLISE DE CONTEÚDO DA JURISPRUDÊNCIA DO TRIBUNAL SUPERIOR
ELEITORAL****DISINFORMATION, FREEDOM OF EXPRESSION AND ABUSE OF POWER: CONTENT
ANALYSIS OF THE JURISPRUDENCE OF THE SUPERIOR ELECTORAL COURT**

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RESUMO

Esta pesquisa consiste em uma análise de conteúdo da jurisprudência do Tribunal Superior Eleitoral (TSE) relacionada à desinformação. Objetivou-se com o estudo analisar como o TSE está delimitando sua jurisprudência no que concerne à desinformação no processo eleitoral brasileiro, à liberdade de expressão e ao abuso de poder decorrente da utilização massificada dessa desinformação. Para a contextualização teórica, discutiu-se o fenômeno da desinformação e da liberdade de expressão, bem como o abuso de poder nas suas três formas: político, econômico e no uso indevido dos meios de comunicação social. No desenvolvimento do trabalho, observamos maior concentração de assuntos relativos à liberdade de expressão, seguidos dos temas abuso de poder econômico e abuso de poder no uso indevido dos meios de comunicação. Para o tema abuso de poder político houve um único caso, porém emblemático.

Palavras-Chave: Desinformação. Liberdade de Expressão. Abuso de Poder.

ABSTRACT

This research consists of a content analysis on the jurisprudence of the Superior Electoral Court (TSE) related to disinformation. The aim of the study was to analyze how the TSE is delimiting its jurisprudence regarding disinformation in the Brazilian electoral process, freedom of expression and the abuse of power resulting from the mass use of this disinformation. For theoretical contextualization, the phenomenon of disinformation and freedom of expression was discussed, as

well as the abuse of power in its three forms: political, economic and abuse in the use of the media. In the development of the work, we observed greater concentration for issues on freedom of expression followed by the themes of abuse of economic power and abuse of power by the misuse of the media. For the subject of abuse of political power, there was a single case, but emblematic.

KEYWORDS: Disinformation. Freedom of Expression. Abuse of Power.

I INTRODUCTION

Electoral justice emerged in a historical context after the 1930 movement. In 1932, this specialized area of the judiciary was created, along with the High Electoral Court, with the aim of taking care of the administration of elections and the disputes arising from them. The aim was to moralize and put an end to the widespread fraud that permeated the Brazilian electoral process, seeking fairness in the elections. These prerogatives are still in force today (VALE, 2011, p. 9; MACHADO, 2018, p. 87).

Considering the aspect of fairness in elections, there has been a challenge, especially in recent years, with the increase in the systematic spread of disinformation that appears to be real news, but they are false stories designed to cause damage and gain advantages of various kinds, especially political advantage. This increase in lies comes in conjunction with the democratization of new technologies (NOBRE, 2020, p. 12).¹

Misinformation can change the outcome of an election, especially when it is robotized and disseminated en masse through different media. This unbalances the electoral contest, as it has the power to exalt the image of a candidate of the situation or damage the image of a competing candidate, and it is profitable for one side (PEREIRA; BRAGA, 2018, p. 162-163).

Still on the subject of disinformation and its consequences, it is necessary to emphasize that its defense, by those who use it, has freedom of expression as its guiding principle. It should be emphasized that freedom of expression, an important fundamental right, is not absolute, making it one of the beacons for the issue in question (GOMES, 2020, p. 147). It is clear that no freedom can be used as a cloak to violate other rights, nor can it be used as an argument to disseminate misinformation that damages the electoral process (GOMES, 2018, p. 47).

Therefore, the big challenge is to find a balance between preserving freedom of expression and solutions that reduce the interference of disinformation. This balance prevents the internet and applications from becoming the target of censorship by the platforms themselves used to disseminate disinformation and their internal controls, and by public authorities (DOURADO, 2020, p. 109).

At the same time, in the context of the phenomenon of disinformation and its relationship with electoral justice, it is essential to discuss the abuse of power, emphasizing how the use of political, economic and media power unbalances the electoral process. It should be emphasized that the three types of power mentioned above are abused when their limits and attributions are exceeded, diverting them from their defined purposes. Abuse of power can also be seen in acts carried out that exceed the necessary competence, acts that do not comply with the law, or when

¹ Em 1932, o primeiro Código Eleitoral criou a Justiça Eleitoral para cuidar de todos os trabalhos eleitorais: alistamento, organização das mesas de votação, apuração dos votos, reconhecimento e proclamação dos eleitos, bem como o julgamento de questões que envolviam matéria eleitoral (Disponível em: <https://www.tse.jus.br/o-tse/museu-do-voto/temas/historia-da-justica-eleitoral-e-do-tse>).

they arrogate powers to themselves that have not been attributed to them (MACHADO, 2018, p. 243-244).

This study will analyze the abuse of power in its three forms, as well as freedom of expression, since the use of disinformation in elections increases the importance of discussing the electoral process as a whole, the legal assets protected and the mechanisms to guarantee a fraud-free and fair election.

In this way, this paper seeks to answer: How is the Superior Electoral Court (TSE) delimiting its jurisprudence with regard to disinformation in the Brazilian electoral process, freedom of expression and the abuse of power resulting from the mass use of this phenomenon? The hypothesis is that the TSE is delimiting its jurisprudence by considering, above all, freedom of expression and, with regard to the abuse of power, economic power and the use of the media to the detriment of the abuse of political power.

To this end, the general objective is to analyze how the TSE is delimiting its jurisprudence regarding disinformation in the Brazilian electoral process, freedom of expression and the abuse of power resulting from the mass use of this disinformation. This objective is divided into studying disinformation and freedom of expression; understanding the abuse of power; and researching the case law of the court on disinformation related to the mentioned themes.

Consequently, in the quest to answer the problem question and test the proposed hypothesis, this project uses the procedure of content analysis, which aims to identify the most frequent subjects, i.e. to find out which were the most relevant themes addressed in the selected corpus and to position them. According to Bardin (1977, p. 31), content analysis methodology consists of "a set of techniques for analyzing communications. It is not one instrument, but a range of tools; or, more strictly, it will be a single instrument, but marked by a great disparity of forms and adaptable [...]".

That said, this study uses categorical content analysis, as specified by Bardin for categorization and subsequent analysis. The corpus of the study is the content of the case law of TSE searched on the website of the Court and which contains one of the key terms: disinformation, fake news and false news (singular and plural). It should be noted that, in order to carry out the analysis, each case law selected will be considered a unit of analysis and, after the categories have been drawn up, each unit will be read for categorization and subsequent analysis of the results.

In addition, this research is classified as an inductive method and has the nature of applied research, since it "aims to generate knowledge for practical application aimed at solving specific problems and involves local truths and interests (GERHARDT; SIVEIRA, 2009, p. 35)". As for the approach, the research presents quantitative data, but with qualitative analysis. The research will be presented in a descriptive and documentary manner, using analysis through categorization in order to explore the selected content.

2 THE PHENOMENON OF DISINFORMATION AND FREEDOM OF EXPRESSION

Journalism has undergone different transformations since it emerged in the mid-17th century, and among the most current is the transformation through computers, telecommunications and the internet, which combine with sound, moving images and written text, transforming information into an even more admirable and efficient product (BRIGGS AND BURKE, 2006). With the new ecosystem made possible by the internet, journalism has become more interactive

and it has more participation from the general public, who previously had no voice or space. In this new model, the audience interacts with the news with dynamism, speed and instantaneity. In this context, they become users and editors rather than mere readers and viewers (ANDERSON et al., 2013).

Against this backdrop of transformations, we have seen a considerable increase in disinformation (fake news) and growing concern about this phenomenon, especially after the 2016 US election. Sequentially, in 2017, fake news was voted word of the year by the Oxford Dictionary, which reports that the term and the phenomenon were nothing new; however, with the US election of 2016, they entered the international agenda (OXFORD DICTIONARIES, 2018, electronic text).

In the context of elections, disinformation has been a recurring theme in Brazilian history with the aim of misleading voters. Since the Old Republic, the New State and the Military Dictatorship, this phenomenon has influenced Brazilians' daily lives and marked the electoral process. However, with the communication revolution, there has been an acceleration in disinformation and the circulation of lies, as seen in the 2016, 2018 and 2020 elections (JARDIM E ZAIDAN, 2018, p.3). Dourado (2020, p. 95) corroborates this when he states that "in addition to individual and technological factors, the political context can be seen as an element in the balance of causes and consequences that promote the production and dissemination of fake news on social media platforms and in social life".

According to Nobre (2020, p. 12), the term can be defined as "false stories, which look like real news or jokes, spread on the internet or other new media, usually created to influence political opinions". Its meaning also includes:

Trata-se de uma notícia inverídica, falsa, inventada, falaciosa, manipulada, que tem a intenção de propagar e viralizar uma mentira ou induzir em erro os receptores da mensagem, atraindo-os com um pretense verniz jornalístico, seja ela parcial ou total, buscando algum retorno financeiro ou não, muitas vezes com viés político. As notícias falsas têm um formato que busca ludibriar o leitor, já que dá contornos de seriedade, por vezes misturando um dado real com um dado fictício, por exemplo (GOMES, 2018, p. 36).

At the same time, it is necessary to delimit what disinformation is, as well as why we prefer to use this term and not the entry studied so far. According to the European Commission (2018, s/p), disinformation "is understood as demonstrably false or deceived information that is created, presented and disseminated to gain economic advantage or to deliberately deceive the public". It should be noted that in 2018, the mentioned Commission presented a report with recommendations for combating false content, including abandoning the use of the term fake news and using disinformation instead, for two fundamental reasons (TOFFOLI, 2019, p.11):

Primeiramente, porque a desinformação é fenômeno muito mais abrangente e complexo, o qual precisa ser assim compreendido para a elaboração de estratégias adequadas de enfrentamento. [...]. Em segundo lugar, porque a expressão fake news tem sido utilizada frequentemente de forma maliciosa por grupos poderosos com o objetivo de retirar a credibilidade de conteúdos jornalísticos que contradigam seus próprios interesses (TOFFOLI, 2019, p. 11-12).

It is important to note that there is no provision in Law 4.737 of 1965 (Electoral Code) that defines disinformation; however, article 323 regulates the dissemination of facts that are known to be untrue in relation to parties or candidates, facts that have the capacity to influence the

electorate. This article carries a penalty of imprisonment from two months to one year, or payment of a fine of 120 to 150 days. The first paragraph of this article also states that "the same penalties apply to anyone who produces, offers or sells videos with untruthful content about parties or candidates". In its second paragraph, there are two causes for increasing the penalty by one third to one half if the crime is committed by the media or with live transmission or if it involves discrimination on the grounds of being a woman or color, race and ethnicity.

Sequentially, on disinformation, Resolution No. 23,610 of the Superior Electoral Court of 2019, which provides for electoral propaganda, emphasizes the use and generation of free time and illicit conduct in an electoral campaign, and in its article 9-A brings the dissemination or sharing of disinformation:

É vedada a divulgação ou compartilhamento de fatos sabidamente inverídicos ou gravemente descontextualizados que atinjam a integridade do processo eleitoral, inclusive os processos de votação, apuração e totalização de votos, devendo o juízo eleitoral, a requerimento do Ministério Público, determinar a cessação do ilícito, sem prejuízo da apuração de responsabilidade penal, abuso de poder e uso indevido dos meios de comunicação.

Therefore, the mentioned article determines that the court, at the request of the Public Prosecutor's Office, must order that the illicit disinformation cease, and that this act does not prejudice, for example, the investigation of abuse of power. With regard to disinformation, it should be noted that article 38 of the same Resolution deals with the removal of content from the internet, which should have the least possible interference from the courts in order, among other things, to preserve freedom of expression.

When it comes to studying the phenomenon of disinformation and its practical consequences in electoral law, it is necessary to elucidate what freedom of expression is in order to understand the limits to such freedom, especially when disinformation is proliferating. In this context, Rabelo (2016, p. 40) points out that freedom of expression "is an extremely important fundamental right and is one of the unquestionable characteristics of democratic societies of today, as it guarantees citizens free participation in the formation of popular will".

Corroborating this, Mendes and Branco (2018, p.389) teach that "freedom of expression is one of the most relevant and precious fundamental rights, corresponding to one of the oldest demands of men of all times". It should also be noted that freedom of expression encompasses multiple freedoms, such as ideas, thoughts and their communication, criticism, information, in the most diverse manifestations by the most diverse means (MENDES and BRANCO, 2018, p. 389).

According to Moraes (2020, p. 148), "freedom of expression and expression of thought cannot be subject to any kind of prior limitation with regard to censorship of a political, ideological and artistic nature". However, the author explains that freedom of expression has limits when, for example, ordinary law regulates entertainment and shows, when the law establishes means of defense, when programs in the media fail to comply with the principles of article 221, I to IV, of the Federal Constitution, when it vetoes reaching the intimacy, private life, honor and image of people and hate speech (MORAES, 2020, p. 148).

Then, it should be emphasized that the constitutional provisions for freedom of expression are set out in some sections of Article 5 of the Magna Carta. Subsection IV of this article teaches that "the expression of thought is free, anonymity being forbidden"; subsection IX of the same article complements the protection of the text when it states that "the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license". In addition, item

XIV states that "everyone is guaranteed access to information and the confidentiality of the source is protected when necessary for professional practice".

Continuing the analysis of the Federal Constitution, article 220 prohibits freedom of expression from being restricted, provided that the constitutional provisions are observed. Paragraphs 1 and 2 of this article also state, respectively: "no law shall contain any provision that may constitute an obstacle to the full freedom of journalistic information in any media outlet, subject to the provisions of article 5, IV, V, X, XIII and XIV", and "any and all censorship of a political, ideological and artistic nature is prohibited".

Concluding with a brief analysis of the Constitutional Charter on freedom of expression, it should be noted that manifestations that cause material, moral or image damage generate the right of reply proportional to the damage, as taught in Article 5, item V of the aforementioned text: "the right of reply is guaranteed, proportional to the damage, in addition to compensation for material, moral or image damage".

Having studied freedom of expression, it is now necessary to move on to the study of the abuse of power in the context of disinformation.

3 ABUSE OF POWER

A brief history of the abuse of power shows that the exercise of power, which is of great importance to social organization and the achievement of goals, can often lead to exaggerations, deviations, omissions, arbitrariness and excesses. This reality has led to a divided organization of state functions due to the gradual overcoming of models such as absolutist monarchies and theocratic regimes (GONÇALVES, 2021, p. 157). Having said that, it can be seen that abuse of power occurs when the authority, even if competent, exceeds the limits of the powers entrusted to it, thus deviating from the administrative purposes.

Gomes (2020, p. 394) corroborates the above when he teaches that abuse of power "comprises the electoral illicit act embodied in the misuse or use in bad faith or with deviation from the purpose of the right, situation or legal positions, whether or not there is a denaturation of the legal institutes involved". Agra (2013, p. 88) teaches that "the abuse of power, a tainted species of the use of power, is the action of imposing one's will on others, misusing the legal imperatives in force. Abuse is that which extrapolates, which exorbitates, which exceeds".

It is important to note that the Federal Constitution makes abuse of power an antagonist to the fairness of elections when it allows a complementary law to establish ineligibility, according to paragraph 9 of article 14:

§ 9º Lei complementar estabelecerá outros casos de inelegibilidade e os prazos de sua cessação a fim de proteger a probidade administrativa, a moralidade para exercício de mandato considerada vida pregressa do candidato, e a normalidade e legitimidade das eleições contra a influência do poder econômico ou o abuso do exercício de função, cargo ou emprego na administração direta ou indireta.

In addition to the provisions of the Federal Constitution, it is also necessary to study the provisions of the Electoral Code on the subject, such as Article 222: "Voting is also void when it is vitiated by falsehood, fraud, coercion, the use of means referred to in Article 237, or the use of a propaganda process or the collection of suffrage prohibited by law." In other words, this article says that a vote is invalid when it is tainted by falsehood, fraud, coercion, the interference of economic power or the power of authority, or the use of means of propaganda or canvassing

prohibited by law, i.e. the use of practices that violate the normality of the electoral process, as well as the autonomy of the voter.

With regard to abuse of power, Complementary Law No. 64 of 1990 establishes cases of ineligibility, time limits for cessation and determines other measures in compliance with paragraph 9 of article 14 of the Magna Carta. Article 1, I, h, of this law punishes abuse of political power with ineligibility for a period of eight years.

Consequently, in order to make this abuse of power more difficult, Complementary Law No. 64 of 1990 provides, in its article 22, for a legal action that can generate ineligibility - an electoral judicial investigation action. This action serves to "[...] investigate the improper use, misuse or abuse of economic power or the power of authority, or the improper use of vehicles or means of social communication, for the benefit of a candidate or political party [...]."

Having initially looked at some aspects of abuse of power, it is necessary to comment separately on each of its types, i.e. abuse of political power, economic abuse and abuse of the use of the media.

As for the abuse of political power, Gonçalves (2021, p. 161) teaches that such abuse "has as its locus the public administration or, in the case of political parties, entities directly involved in the exercise of state-type competences". Thus, the abuse of political power, also known as abuse of authority, consists of the use of public positions or functions for the benefit of parties and coalitions, and mainly to favor one's own candidacy or that of a third party (GONÇALVES, 2021, p. 162).

Therefore, abuse of political power is any action or omission carried out by a public official, within an electoral context, disrespecting the legal norm; offending, due to its seriousness, the legitimacy of the elections and benefiting a specific candidacy (ALVIM, 2017, p.147).

With regard to the abuse of power, according to the judgment of Justice Tarcísio Vieira de Carvalho Neto, reporting on an Ordinary Electoral Appeal (RO-El), the Electoral Court has ruled as follows: "[...] it is necessary that the public official, taking advantage of his functional condition and in a manifest deviation of purpose, acts in such a way as to compromise the legitimacy of the election and the parity of arms between candidates.] it is necessary that the public agent, taking advantage of his functional condition and in a manifest deviation of purpose, acts for his own electoral benefit or that of a candidate, in such a way as to compromise the legitimacy of the election and the parity of arms between candidates" (RO-El nº 060038425, Judgment, Rel. Min. Tarcísio Vieira De Carvalho Neto, Dje de 26.05.2021).

With regard to the abuse of economic power, Gonçalves (2021, p. 161) explains that "it is characteristic of individuals who have great financial capacity or of legal entities that intervene in the way goods, services and utilities are produced, distributed, bought and sold and traded".

Thus, this abuse is the irregular use of a person's economic power to favor their own candidacy or that of another person. These two requirements must exist together, i.e. the illegality and the financial amount, which can manifest itself in kind or in goods or services (GONGALVES, 2021, p. 174). Similar to the postulate, Agra (2013, p.89) says that such abuse "refers to the excessive use, before or during the electoral campaign, of material or human resources that represent economic value, seeking to benefit a candidate, party or coalition, affecting the normality, isonomy and legitimacy of the elections".

Alvim (2017, p. 149) adds to what was previously conceptualized when he points out that this "is configured whenever political actors employ the economic factor not as a means of making the campaign viable, but as a direct source for obtaining popular support". In addition, in a judgment on an ordinary electoral appeal, Justice Mauro Campbell Marques conceptualized the abuse of economic power as:

O abuso de poder econômico, por sua vez, segundo a remansosa jurisprudência desta Corte, se configura pelo uso desmedido de aportes patrimoniais que, por sua vultuosidade, é capaz de viciar a vontade do eleitor, desequilibrando, em consequência, o desfecho do pleito e sua lisura (RO-EI nº 060303755, Rel. Min. Mauro Campbell Marques, Dje de 23.03.2022).

Once the abuse of economic power has been verified, we move on to examine the abuse in the use of the media which, according to Gonçalves (2021, p. 161), "can reach both the activities of the administration and those of private individuals, bringing elements of abuse of political or economic power". Also, with regard to the concept of abuse of media power, we have:

O abuso do poder midiático traduz-se na utilização da imensa capacidade de influência que os órgãos de produção de informação possuem como fator de quebra da equidade eleitoral. Refere-se ao uso incisivo dos veículos de imprensa como instrumentos de manipulação do eleitorado para promoção ou descredenciamento de ofertas políticas, em medida suficiente a comprometer a legitimidade eleitoral. (ALVIM, 2017, p. 151)

In addition, Justice Dias Toffoli, in a Special Appeal judgment, teaches about the abuse of power in the media that "[...] the TSE's jurisprudential understanding advocates that the characterization of the illicit act stems from the massive exposure of one candidate in the media to the detriment of others, affecting the legitimacy and normality of the elections" (Special Electoral Appeal (REspEI) No. 34915, Rel. Min. José Antônio Dias Toffoli, Dje of 27.03.2014). In a Special Appeal judgment, Justice Jorge Mussi adds:

4. O uso indevido dos meios de comunicação social caracteriza-se por se expor desproporcionalmente um candidato em detrimento dos demais, ocasionando desequilíbrio na disputa. [...] a condenação por uso indevido dos meios de comunicação social não requeira prova da potencialidade de a conduta influir no resultado do pleito, mas apenas sua gravidade [...]. (REspEI nº 176, Acórdão, Rel. Min. Jorge Mussi, Publicação, Dje de 15.08.2019).

When it comes to this kind of abuse of power, it is necessary to talk about the internet, because it democratizes the production and dissemination of information. However, it is controlled by a small number of companies that defend their own worldviews (GONÇALVES, 2021, p. 177). As a result, the internet has proved to be the main means of disseminating false, slanderous, insulting or defamatory information against political opponents, because it is an environment conducive to communication abuses (GONÇALVES, 2021, p. 179).

It remains to be seen that in the abuse of power with the use of the internet, there is a bias towards two abuses of power: the abuse of the means of communication and the economic abuse, as Gonçalves (2021, p. 181) teaches: "once again the internet proves to be a fertile environment for illicit acts that bring together, at the same time, characteristics of abuse of economic power and in the use of means of communication".

4 ANALYSIS AND DISCUSSION ON THE RESULTS

The aim of this chapter is to present the analysis and discussion of how the TSE has delimited its jurisprudence on disinformation, freedom of expression and abuse of power in the Brazilian electoral process using the data resulting from the categorical content analysis research. This type of analysis was the methodological procedure adopted in this study. The cut-off date for this research was October 1st, 2022 - the day before the first round of the 2022 election was held.

After selecting the case law on the TSE's website, we began to read through it to define the content categories and then analyze the entire corpus. The following steps were taken to carry out the research:

- Drawing up a spreadsheet to record the units of analysis and categories with the following columns (unit of analysis - with coding in cardinal numbers; description - with the type of action and its coding in the TSE; date - with the date of the decision; rapporteur - with the name of the rapporteur of the action; and content analysis - with the layout of each category drawn up with the respective coding).
- Once all the units of analysis had been arranged, floating reading was carried out to draw up the categories, i.e. reading one unit and skipping three units until the total number of units of analysis constituting floating reading was reached, i.e. 25% of the total corpus.
- During the floating reading, possible categories for content analysis were noted.
- Once the floating reading had been completed and the notes had been taken, these 25% were re-read according to the dynamics explained for the final preparation of the content analysis categories.
- Once the content analysis categories had been created, they were coded and named with a code alluding to each category created.
- At the end, a text was drawn up with the explanatory parameter for each category of content analysis.

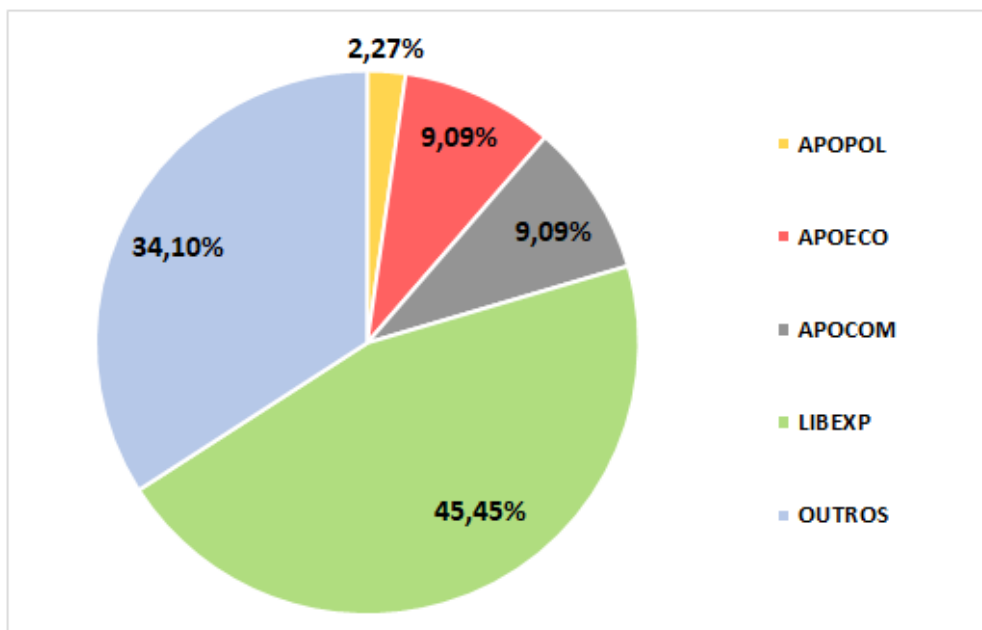
Chart I: Categories of Content Analysis

Code	Category	Explanation of the Category
APOPOL	Abuse of political power	This category includes judgments whose legal basis is predominantly based on the theme of abuse of political power.
APOECO	Abuse of economic power	This category includes judgments whose legal basis is predominantly based on the theme of abuse of economic power.
APOCOM	Abuse of power in the use of the media	This category includes judgments whose legal basis is predominantly based on the theme of abuse of power in the use of the media.
LIBEXP	Freedom of Expression	This category includes judgments whose legal basis is predominantly based on the theme of freedom of expression, which can also appear as free expression of thought.
OTHERS	Others	This category includes judgments that do not include in their legal reasoning the themes of the previous categories and also deal with political party consultations on non-contentious measures to prevent disinformation and judgments that include the key term/keyword, but in a different context to the one studied here.

Source: The authors, 2022.

Once the categories had been created according to the Chart I, all the units of analysis were read to classify their content. After reading all the units of analysis and classifying them by category, the results were analyzed as shown in Graph I.

Graph I: Distribution by content analysis categories.



Source: The authors, 2022.

Preliminary to the analysis and discussion of the data compiled in Graph I, it can be seen that, despite the recommendation to use the term disinformation, the majority of the judgments prior to 2022 have the words fake news and false news in their amendments, the latter being the preferred one. The use of the term disinformation in the judgments of 2022 is therefore standardized.

Having looked at the use of the term disinformation, we move on to analyze the category with the greatest presence in the sample, namely LIBEXP. According to Graph I, it makes up 45.45% of the total number of judgments surveyed. This category includes judgments whose legal basis is predominantly based on the theme of freedom of expression, which may also appear as free expression of thought. This shows that the jurisprudential basis for the issue of disinformation (fake news) is largely based on freedom of expression, especially to explain that this freedom is not absolute and that there are constitutional limits.

It should also be noted that when it comes to freedom of expression, the phrase "free expression of thought, enshrined in the constitution, must be exercised within the binomial FREEDOM with RESPONSIBILITY" is recurrent in the judgments, as seen, for example, in the Interlocutory Appeal in the Special Electoral Appeal (AREspE) No. 060039674, by Justice Alexandre de Moraes, published on March 10th, 2022.

Before starting the analysis by category, it is pertinent to make a general comment on the abuse of power. Accusations of abuse usually come under the umbrella of topics such as the improper use of fake profiles for electoral propaganda, the use of user databases provided by digital strategy companies, the irregular purchase of user registrations, donations from legal entities, the irregular purchase of votes, abuse of authority, etc. Even with well-defined themes, the need for a consistent evidentiary framework, and not just unsubstantiated allegations, is

frequently mentioned. Insistently, the rapporteurs emphasize that it is not possible to decide by mere conjecture or illusion.

It is therefore necessary to discuss abuse of power separately. The APOECO category makes up 9.09% of the sample, as shown in Graph 1. It was observed through this sample that the judgments contained the same grounds, as if a particular sentence was the basis of the decision.

It was also noted from the judgments belonging to the APOECO category that abuse of economic power often leads to abuse in the use of the media. It should be emphasized that for the judgments in this category, the abuse of economic power is the main content, and the other abuses exist if they derive from it. In this sense, AIJE No. 060177128 and AIJE No. 060196880, both reported by the eminent minister Luis Felipe Salomão, approved the thesis proposed by the rapporteur with the following content:

O uso de aplicações digitais de mensagens instantâneas visando promover disparos em massa, contendo desinformação e inverdades, em prejuízo de adversário e em benefício de candidato, pode configurar abuso de poder econômico e o uso indevido dos meios de comunicação social para os fins do artigo 22, caput e inciso XIV, da Lei Complementar nº 64/90 (Lei das Inelegibilidades)". (Ação de Investigação Judicial Eleitoral (AIJE) nº 060177128, Rel. Min. Luis Felipe Salomão, Dje de 21.10.2021 e AIJE nº 060196880, Rel. Min. Luis Felipe Salomão, Dje de 28.10.2022).

As for the APOCOM category, it makes up 9.09% of the sample. It can be seen from the judgments that abuse of power in the use of the media occurs when forces are unbalanced by the exposure of one candidate to the detriment of another in the most diverse media. For this to happen, the exposure must compromise the election, i.e. really unbalance the election in favor of a particular candidate. In the analysis of the jurisprudential formation of this type of abuse, it is interesting to point out that "the misuse of the media cannot be presumed and requires the concrete seriousness of the conduct to be demonstrated, with a detriment to the fairness of the election" (REspEI nº 225-04, Rel. Min. Jorge Mussi, Dje de 26.06.2018).

Also, regarding the APOCOM category, it should be noted that, as far as the written press is concerned, the case law of the TSE has established that media outlets can take a side in an electoral dispute, they can campaign, but they cannot commit excesses (which must be punished by the Electoral Court), without this characterizing improper use of the media, and any excesses must be punished by the Electoral Court (REspEI 0601823-24/DF, Rel. Min. Jorge Mussi, Dje de 26.09.2019).

Graph 1 shows that the APOPOL category makes up 2.27% of the sample. It can be seen that abuse of political power is often referred to as abuse of authority. This category has only one judgment, and the emphasis in the analysis is on Electoral Ordinary Appeal No. 060397598, from Curitiba/PR, by Justice Luis Felipe Salomão. This appeal has become known in the legal world because it deals with the trial of a state deputy elected in Paraná in the 2018 general elections. According to the facts, the defendant, who at the time was a federal deputy, broadcast live on social media reporting fraud in electronic ballot boxes and other alleged facts about the electronic voting system. In the specific case, it was found that the abuse was characterized when the aforementioned candidate, in his broadcast, emphasized that he could speak because he enjoyed parliamentary immunity until January 2019, regardless of the outcome of the election, as described in the judgment: "I use my parliamentary immunity here, which still goes until January, regardless of this election, to bring this complaint" (RO-EI nº 060397598, Rel. Min. Luis Felipe Salomão, Dje de 28.10.2021). It is noteworthy that this case was the first to have a politician removed from office

for disinformation, becoming a milestone in this area, and the decision brought as a penalty, in addition to the removal from office, ineligibility for eight years, starting from the 2018 election.

So, having presented the results of the categories for freedom of expression and abuse of power, we will now comment on the OTHER category, which includes judgments that do not have legal grounds related to the other categories. According to Graph 1, this category makes up 34.10% of the sample, comprising 15 judgments. Of the total, 14 judgments dealt with electronic addresses not previously informed to the Electoral Court, as well as proof of the absence of false information. It should be noted that these judgments have identical content in their decision because they have different aggravating parties who use the services of the same lawyer against the same aggravated party, making up a large number of lawsuits with the same subject matter, with only the aggravating party changing. Still in the OTHER category, there is 1 judgment dealing with a consultation carried out by the New Party on non-contentious measures to prevent disinformation, among other demands. The word disinformation was included in the amendment, but the content of the judgment is not directly related to what this research proposes.

Therefore, the sample studied was more focused on freedom of expression, followed by abuse of economic power and abuse of power through improper use of the media. There was also only one judgment on abuse of political power, but it was of great importance for the Court's jurisprudence, as it led to the annulment of an elective mandate for abuse of political power through the use of disinformation.

5 FINAL CONSIDERATIONS

This paper reflects on the TSE's jurisprudence on the subject of disinformation, freedom of expression and abuse of power. To this end, we used the methodology of content analysis of the judgments researched on the website of the TSE, using as criteria the keywords and key terms: disinformation, fake news and false news (singular and plural).

This research sought to answer how the TSE is delimiting its jurisprudence with regard to disinformation in the Brazilian electoral process, freedom of expression and the abuse of power resulting from the mass use of this phenomenon. To this end, it was hypothesized that the TSE is delimiting its jurisprudence considering, above all, freedom of expression and, with regard to the abuse of power, economic power and the use of the media to the detriment of the abuse of political power.

Thus, with regard to the hypothesis, there was an argument focused on the issue of freedom of expression, as raised in the hypothesis, because 45.45% of the research sample is situated in the LIBEXP category. With regard to freedom of expression, most of the judgments treat this constitutional precept as not absolute. It should be noted that freedom of expression also appears in the judgments as free expression of thought. It can therefore be seen that the jurisprudential basis for the issue of disinformation (fake news) is largely based on freedom of expression, bringing its nuances and constitutional limits.

Still with regard to the hypothesis and the abuse of power, it was found that the APOECO and APOCOM categories have the same percentage in the sample and most of the time they are jointly configured in the judgments, and on some occasions the abuse of economic power is the main content, and on others the abuse of power in the use of the media is the main content. For both abuses, the thesis that appears most often in the judgments is that the use of mass blasts, through instant messaging applications with the intention of promoting a particular candidate to the detriment of others, "may constitute abuse of economic power and improper use of the media for the purposes of article 22, caput and item XIV, of Complementary Law No. 64/90 (Ineligibility

Law)" (AIJE No. 060177128, Rel. Min. Luis Felipe Salomão, Dje de 21.10.2021 and AIJE nº 060196880, Rel. Min. Luis Felipe Salomão, Dje de 28.10.2022).

In the APOPOL category, there was only one judgment on abuse of political power. It can be concluded that the Court laid the foundations for the punishability of abuse of economic power through disinformation with the judgment in RO-EI nº 060397598, from Curitiba/PR, by Justice Luis Felipe Salomão, in which it was found that parliamentary immunity is not absolute, since the judgment concluded that the elective mandate of a state deputy should be revoked, together with ineligibility for eight years.

It also concludes that it is extremely important to form a consistent evidentiary framework, and not just allegations without evidentiary support. Thus, mere conjecture or illusion is not enough to tackle the problem of disinformation. Strong evidence is needed.

We recommend continuing this study, considering judgments after the cut-off date of the research, which is October 1, 2022, and especially those from the second round of the 2022 elections. We also recommend research into the case law of the Regional Electoral Courts (TRE) to see how these courts deal with the issue locally. Finally, a more in-depth study on the subject of freedom of expression and disinformation is recommended to verify the specific nuances that this work did not set out to do.

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