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REGIONAL ELECTORAL COURT OF SANTA CATARINA
DECISION N. 32086

ELECTORAL APPEAL Nº 141-28.2016.6.24.0019 - CLASS 30 - COMPLAINT - 19th ELECTORAL DISTRICT - JOINVILLE

Rapporteur: Judge **Antonio do Rêgo Monteiro Rocha**
Appellant: Facebook Serviços Online do Brasil Ltda.
Appellee: Coligação Juntos No Rumo Certo (PMDB-PV-PCDOB-PTDO B-PSC-PTC-PROS-PTB)

2016 ELECTIONS - ELECTORAL APPEAL - COMPLAINT - RIGHT TO REPLY - FACEBOOK PROFILE POST - PROVENANCE - APPEAL - PASSIVE ILLEGITIMACY PRELIMINARY - REJECTION - ANONYMOUS MESSAGE WITH OFFENSIVE CONTENT - ILLICIT CONDUCT - PROFILE EXCLUSION - DAILY FINE - POSSIBILITY - PROPORTIONAL AND REASONABLE VALUE - DISSEMINATION MADE BY USER - ENFORCEMENT OF FINE TO THE PROVIDER - IMPOSSIBILITY - SUSPENSION OF ACCESS TO THE WEBSITE FOR 24H - UNPROPORTIONATE REPRIMAND - PARTIAL PROVISION.

1. As the appellant has the guard of the connection and access logs to its website, as well as personal and communication content data of its users, everything should be identified to clarify illicit practices (Law n. 12.965/2014, article 10, caput and paragraph 1 and 2).
2. On the proposed complaint to counter an offensive message on a user's profile, the social network administrator with data on the Internet has passive legitimacy *ad causam* to respond for the removal of posts that contain aggressions or attacks to candidates in their website, including social networks (Law n. 9504/1997, article 57-D, paragraph 3).
3. As absolute rights and guarantees do not exist, any information capable of improperly affecting the image of applicants for an electoral position should be repressed.
4. An anonymous message that disseminates a depreciative concept surpasses the limits of political criticism, a space in which government projects should be proposed.
5. The content and multimedia service provider cannot be punished for illicit messages made by its users when measures to hinder its dissemination are adopted, even if belatedly.
6. The application of daily fines does not have a sanctionary character, having the exclusive purpose of complying with the judicial *decisum.*
7. The fine for noncompliance with the court order, even if elevated, should be proportionate and reasonable to the legal parameters, observing the economical situation of the agent and the respect to the unstimulating aspect of the illicit.
8. As the noncompliance with the court order by the social network of online data was not proven intentional -- with significative unbalancing in the electoral dispute --, the suspension of its activities is distanced.

The judges of the Regional Electoral Court of Santa Catarina unanimously A G R E E to recognize the appeal, reject the passive illegitimacy preliminary and give it partial provisioning, only for removing the granting of the right to reply, the fine of R$30.000,00, imposed with basis on the article 57-D, combined with article 57-F, *caput*, both of the Law 9.504/97, with the suspension of the social network Facebook for 24h, keeping the other penalties enforced by the appealed decision unaffected, in the terms of the Rapporteur vote, which is an integrating part of the decision.

Room of Sessions of the Regional Electoral Court

Florianópolis, November 3rd 2016.

JUDGE ANTONIO DO RÊGO MONTEIRO ROCHA
RAPPORTEUR

REPORT

This is about the appeal interposed by the company FACEBOOK SERVIÇOS ONLINE DO BRASIL LTDA. against the decision of the Judge of the 19th Electoral District that considered valid the claim proposed against the appellant by the COLIGAÇÃO JUNTOS NO RUMO CERTO (PMDB-PV-PCdoB-PTdoB-PSC-PTC-PROS-PTB), due to the dissemination on the Internet of the electronic page, of anonymous authorship, with content offensive to the image of Udo Döhler, candidate for Mayor of Joinville, in the following terms:

Before the exposed, I judge valid the requests formulated by Udo Döhler in this claim formulated against Facebook Serviços Online do Brasil Ltda to:

a) Confirming the decision the anticipated the effects of the injunction, to determine:
a.1) that the principal excludes and keep excluded during the period of this electoral dispute, that only finishes with the second round, the profile "Hudo Caduco", under the URL https://www.facebook.com/profile.php?id=100011469993870&fref=ts
a.2) that the principal provides the IP and/or any other element capable of revealing the identity of the profile owner;
a.3) the maintenance of the R$30.000,00 fine (thirty-thousand reais) per day of noncompliance of the order fixed in the respective judicial command, which, however, is limited to the equivalent number of days defined for the majoritary election in this district;
b) to condemn the principal to the payment of a R$30.000,00 (thirty-thousand reais) fine for transgression of article 57-D, combined with article 57-F, caput, both of the Law 9.504/97;
c) to order the suspension, for twenty-four hours, of the principal's website Facebook on the Internet in all national territory, in face of the transgression of article 57-I, caput, of Law 9.504/97, without damage of deadline duplication in case the conduct is repeated, according to the concepts of paragraph one of the referred provision, with the duty to inform all users of the website that it is inoperable on the suspension period due to disobedience of the electoral legislation, in the terms of paragraph 2 of the referred legal provision;
d) to assert to the agent the right of reply against the principal, in the frameworks of article 57-D combined with the caput of article 57-F, both of Law 9.504/97, and for the the act of the regiment of article 58, paragraph 3, item IV of the same law and its subdivisions to be observed on the execution of the act.

In its appellative reasons, the appellant primarily raises the passive illegitimacy, as it is not responsible for the content posted by users. As for the merit, it pleads, in synthesis, that: **a)** "the order is extremely and unjustifiably broad, covering not only the electoral content that may be discussed and countered in this case, but also other posts of totally diverse nature, therefore being null of complete right"; **b)** "the fulfillment of the removal order is not being refused, but only and solely it is pleaded for it to be limited to the effectively illegal content under the electoral

standpoint, stopping it from being generic to the point of removing a whole page or debate group or even a profile and event in which manifestations of legal people are made"; **c)** "the pages in discussion basically use of comments and satyres to the City Hall, which is within the parameters of legality and freedom of expression"; **d)** "there is no anonymity on Facebook", since the administrators of pages and users are no anonymous, as they can be identified by the register data and the access IP, which were made available, "even if a few days delayed, before the volume of solicitations"; **e)** with the removal of the page, "the dissemination of the ordered right of reply is impracticable"; **f)** "the right to reply enforced against the appellant was imposed as a sanction for the noncompliance with a court order and not as the granting of an appealed right", for it deals with "an imposition that does not have any legal grounding and is not authorized by the current framework"; **g)** "Law n. 9054/97 and Resolution n. 23.475/2015 do not authorize the suspension of a whole website when only a minimal part of its contents was perceived as a violation to the Law 9.504/97"; **h)** "the order for the removal of the profile considered a violator of the electoral rules by the magistrate *a quo* was immediately complied with when the sentenced was announced"; **i)** "the Brazilian Internet Civil Rights Framework, aside from not providing the blocking of the activity of Internet companies on the determined manner, even repels them"; **j)** "the blocking of the Facebook website is an unproportionate measure, having in sight the importance of the Internet on the daily lives of all Brazilian population"; **l)** "there was no resistance from Facebook to comply with the determined order, on the contrary, only due to the short deadline and the difference with the Facebook operators that are in Ireland, able to fulfill the decisions and provide the data, which requested a supplementary deadline for the complete compliance and at the same time requested the restriction of the order to the illegal content"; **m)** "the arbitrated daily fines went up to an extremely high value, which mischaracterizes its coercitive purpose, turning them to an intense punishment"; **n)** "there is no reason to impose a penalty on Facebook Brasil"; **o)** the criteria for the fixation of the value of the comminatory fine were not observed. It is requested the reformation of the sentencing to: "I) accept the preliminary of illegitimacy for the content posted; II) remove the condemnation imposed to the appellant of complete removal of the profile and page, or for the appellee to point out the specific URLs of the posts that should have its content suspended; III) the inexistence of anonymity to justify the complete removal of the profile; IV) recognize the impossibility of compliance with the order for the posting of the right to reply appealed by Facebook, due to the removal of the page and the imposition to the offender; V) remove the request for the suspension of the platform of Facebook Brasil in respect to the principle of the cautionary general power and of reasonability, aside from the other enrolled motives; VI) remove the fine, [...] and in the remote hypothesis that this is not understood, for it to be reduced to reasonable parameters" (pages 211-236).

The appeal was responded (pages 251-262).

Reviewing the records, the Regional Electoral Prosecutor, in a report made by Dr. Marcelo da Mota, manifested for the denial of the preliminary and, in the merit, for the partial provisioning of the appeal, "so that only the 24h suspension of access to the

appellant social network is excluded, in the terms of article 57-I of the Elections Law, keeping the other assessed points by the appealed sentence" (pages 271-275).

VOTE

JUDGE ANTONIO DO RÊGO MONTEIRO ROCHA (Rapporteur): the appeal is timely and fulfills other requirements of admissibility, motive for which I know it for.

1. **Passive illegitimacy preliminary *ad causam.* Responsibility for securing the necessary information to identify the offender. Rejection.**

The allegation of the appellant that it could not be sued for posts made by users of its website Facebook does not proceed.

According to the law that guides the use of the Internet in Brazil, the appellant is responsible for keeping the connection and access logs to its website, as well as personal and content data of private communications made by its users, having the obligation to make these information available, before court order, whenever it can contribute for the identification of the user or of the terminal and, in this way, clarify the illicit practises (Law n. 12.965/2014, article 10, *caput* and paragraph 1 and 2).

The referred legal document also provides that the Internet application provider *"can only be subject to civil liability for damages resulting from content generated by third parties if, after an specific court order, it does not take any steps to, within the framework of their service and within the time stated in the order, make unavailable the content that was identified as being unlawful"* (Law n. 12.965/2014, article 19).

In the same way, *"the Electoral Justice may determine, by solicitation of the offended, the removal of publications that contain agressions or attacks to candidates on Internet websites, including social networks"* (Law n. 9504/97, article 57-D, paragraph 3).

Within this normative context, the legitimacy of the appellant company to compose the passive pole of the demand is unequivocal, with the examined plea aiming to derail the spreading of supposedly offensive messages on the website under their administration, as well as obtaining the register data of the profile owner responsible for the impugned posts.

The passive legitimacy *ad causam* of the appellant comes from the circumstance of being the responsible for the guard and implementation of the necessary technical measures to its eventual interruption.

The positioning firmed by the Superior Electoral Court is no other:

"**The electoral complaints that point to irregularities in the use of the Internet as a medium of publication for electoral propaganda can be proposed:** (i) against the person directly responsible for the publication considered irregular, whether it is of their own authorship or by previous selection of the published content; and (ii) - **against the content or host provider when shown that it, in relation to the material included by third parties, was previously notified of the pointed irregularity or, by other mean, it is possible to identify its previous knowledge.** (iii) From this last hypothesis, the storage of the propaganda made directly by candidates, parties and coalitions is excluded when the provider can only remove the propaganda after a previous judicial appreciation of the pointed irregularity, it being responsible only in the case of noncompliance with the court order" (TSE, AgR-AC n. 138443, de 29.06.2010, Min. Henrique Neves da Silva - I highlighted).

For this reason, I deny the passive illegitimacy preliminary *ad causam* formulated by the appellant.

2. Anonymous post with messages of electoral connotation. Offensive affirmations. Attack to the personal candidate of the image. Abuse of the free right of manifestation.

When disciplining the use of the Internet during the election campaign period, the electoral legislation assured, expressively, the free right of manifestation of thought.

However, it prohibited anonymity, assuring the right to reply to the candidate, party or coalition offended by concept, image or defamatory, harmful or knowingly untrue affirmation (Law n. 9.504/97, article 57-D and article 58).

On this matter, this Court fixed the understanding that the "*Electoral Justice should act with as little interference as possible on the democratic debate, as the right to the free manifestation of thought and political criticism should prevail, with reservation to the hypothesis of anonymity and of evident illegality*" (Enunciate n. 17 - 2016 Elections).

Effectively, there is no ignoring that the Republic Constitution elected as a fundamental right of all citizens the freedom of expression. However, according to Minister Celso de Mello, *"in the Brazilian constitutional system there are no rights or guarantees that are covered in an absolute character, even because reasons of relevant public interest ou demands derived from the principle of convivence of the freedoms legitimate, even if exceptionally, the adoption, by part of the state bodies, of restrictive measures of the individual or collective prerogatives, provided that the terms established by the Constitution itself are respected".*

And the Magistrate of the Supreme Court finishes, *"the constitutional statute of public freedoms, when outlining the juridical regime to which they are subjected -- and considering the ethical substrate that informs them -- allows limitations of juridical order to act upon them, destined, from one side, to secure the harmonious coexistence of the freedoms, since no right or guarantee can be exercised in detriment or the public order or with disrespect to the rights and guarantees of third parties"* (STF, MS n. 23.452).

Examining the contents of the messages posted on the profile "Hudo Caduco" of the Facebook website, it is evident that the constitutional prerogative of freedom of expression was used in an abusive manner.

As if the lack of data that allows the identification of the responsible for its creation and maintenance were not enough, the page spreads offenses when affirming, in a jesting tone, that the candidate Udo Döhler "*Studied Military Dictatorship in the learning institution Gestapo SS*".

In this sense, it is explicitly unequivocal that attributing, even indirectly, the names of "dictator" and "nazist", degrading expressions to the image of any candidate, surpass the tolerable of the political criticism, which should be used for the discussion of actions and government projects and never for personal offenses.

In the case, the anonymity and the existence of offensive messages to a candidate postulant of an elective position are circumstances that show, when collectively examined, the practice of harmful conducts to the electoral confrontation, reclaiming the intervention of this Specialized Justice and, consequently, the exclusion of the profile as a way to avoid the posting of new messages with similar content.

To this end, the Superior Electoral Court settled the understanding that the *"voter who creates an anonymous page on Facebook to foster criticisms to the current municipal administration and to the situation candidates responds for its content, not being possible to invoke the constitutional guarantee related to the free manifestation of thought, due to the undertaken anonymity. Beyond that, the right to criticism is not absolute and, therefore, does not hinder the characterization of the crimes against the honor when the agent does personal offenses"* (REespe n.186819, of 06.10.2015, Min. Henrique Neves da Silva).

By the exposed reasons, the *decisum* does not deserve repair on the part in which it determines the exclusion of the profile until the ending of the second round of elections, as well as the disponibility of the register data of its owner.

3. Sentencing of the appellant to the payment of fine. Penalty imposed to the author of the anonymous message.

Aside from determining the provisions to exclude the offense from the Internet and identify its author, the sentence imposed to the appellant the penalty of a R$30.000,00 fine, based on the following provisions 57-D and 57-F of Law n. 9504/1997, disciplined by the Resolution n. 23.457/2015 of the Superior Electoral Court:

Art. 24 The manifestation of thought is free, excluding anonymity during the electoral campaign, through the World Wide Web -- Internet, securing the right to reply, in the terms of articles 58, paragraph 3, item IV, subsections a, b and c, and 58-A of Law nº 9.504/1997, and by other means of interpersonal communication before an electronic message (Law nº 9.504/1997, article 57-D, caput).

§ 1º The violation of the provisions in this article will subject the responsible for the dissemination of propaganda and, when proven its previous knowledge, the beneficiary to the fine of R$5.000,00 (five-thousand reais) to R$30.000,00 (thirty-thousand reais) (Law nº 9.504/1997, article 57-D, paragraph 2).

2º Without prejudice of the civil and criminal sanction applicable to the responsible, the Electoral Justice may determine, by solicitation of the offended, the removal of publications that have aggressions or attacks to candidates in sites on the Internet, including social networks (Law nº 9.504/1997, article 57-D, paragraph 3).

[...]

Art. 26 The penalties provisioned in this resolution apply to the content and multimedia service provider that hosts the publishing of electoral propaganda of a candidate, party or coalition if, on the period determined by the Electoral Justice, counting from the notification of the decision on the existence of irregular propaganda, it does not take the measures needed for the ceasing of this release (Law nº 9.504/1997, article 57-F, caput).

§ 1º The content or multimedia service provider will only be considered responsible for the release of propaganda if the publishing of the material is provenly of its previous knowledge (Law nº 9.504/1997, article 57-F, unique paragraph).

§ 2º The previous knowledge dealt with in § 1º may, without prejudice of the other means of evidence, be shown through a copy of notification, directly forwarded and delivered by the interested to the Internet provider, on which there should be, in a clear and detailed manner, the place and the content of the propaganda consider irregular by them.

In these, the content and multimedia service provider cannot be penalized by an illicit manifestation posted by its user on the Internet, above all because the legal order secures to all the right to privacy and freedom of manifestation, prohibiting acts that cause previous censorship.

For this reason, the penalties by infraction can only be imposed to the referred company in cases in which the author of the conduct or its previous knowledge are proven, with the notification of existence of the illicit and aiming measures for its interruption.

However, the anonymous and offensive message was not published on the appellant company's institutional website, but in a personal page of an user of the social network administered by it.

On the concrete case, the appellant company, even if belatedly, excluded the user's profile -- making impossible to access its posts --, and provided the necessary data to the personal identification of the user.

I do not see, on the assessed case, the willful misconduct of deceiving the Electoral Justice and, with that, harming the candidate of the appellee colligation, which would justify the enforcement of the fine.

In an analogous case, this Court removed the fine imposed to the appellant by publishing of anonymous post from a Facebook user, applied with grounds on the same legal provision:

"2016 ELECTIONS - ELECTORAL APPEAL - COMPLAINT - ELECTORAL PROPAGANDA - INTERNET - FACEBOOK - PASSIVE ILLEGITIMACY PRELIMINARY "AD CAUSAM" REMOVED - NONCOMPLIANCE WITH PRELIMINARY COURT ORDER THAT DETERMINED THE IMMEDIATE REMOVAL OF THE ANONYMOUS POST CONTAINING VIDEO WITH OFFENSIVE CHARACTER - **CONDEMNATORY SENTENCE TO THE PAYMENT OF FINE PROVISIONED IN ARTICLE 24, PARAGRAPH 1 OF THE RESOLUTION TSE N. 23.457/2015 - IMPOSSIBILITY - LACK OF SPECIFIC REQUEST ON THE INITIAL REQUEST, WHICH IS LIMITED TO THE REMOVAL OF THE OFFENSIVE MATERIAL FROM THE INTERNET DOMAINS AND TO THE PROVIDING OF THE DATA OF THE PROFILE OWNER RESPONSIBLE FOR RESPECTIVE POST -** EXCLUSION - COERCIVITY OF THE LEGAL PROVISION SECURED BY DAILY FINE FIXED ON THE SENTENCING - POSSIBILITY - VALUE COMPATIBLE TO THE PECULIARITIES OF THE CONCRETE CASE - PARTIAL GRANTING" (TRESC, Ac. n. 31941, of 30/09/2016, Judge Davidson Jahn Mello - I highlighted).

Inside of this context, as those are similar factual situations which happened in the same electoral dispute, the same adopted solution is explicitly impositive, in respect to the principle of legal security and to the previsibility of the legal decisions.

Although the exclusion of the personal page made the release of the right to reply impossible, there is no way to impose to the appellant the obligation of conceding space for the exercise of the right to reply, notedly as it was not responsible for the offensive post against the personal image of the candidate Udo Döhler.

Consequently, I vote to remove the fines imposed with basis on article 57-D, along with article 57-F, *caput,* of Law 9.504/97, as well as the right to reply.

4. Fixation of fines for the noncompliance with the preliminary decision. Possibility. Inobservance of the judicial order. Value of the reasonable and proportional daily fine.

From what I gather from the records, on September 12th 2016 (page 30), the appellant was notified of the preliminary injunction decision issued by the Judge of the 19th Electoral District, with the following content:

"Analysing the request for reconsideration of the previously issued decision, I consider that the claimant has the reason when aiming that the content is extirpated from the communication platform.

With effect, in spite of not identifying the constituted evidence with the complaint that has the effectively offensive act to the person of the agent, but, I say at first, those are only acts turned to humor, that, I note, involve great part of the candidates to the position of mayor of this municipality, I observe that the profile in which the referred publications happened is covered by the cloak of anonymity, once the identification "Udo Caduco" does not lead to anyone with a recognized personality.

Facing that, and considering that anonymity is prohibited, it is impositive that that profile has its publication suspended, since although both the constitution and the special legislation reassure the freedom of thought, the respective legal provisions are adamant in the sense that anonymity is prohibited.

Read the provisions contained in articles 5, item IV, of the Federal Constitution and article 57-D, of Law 9.504/97.

It is enough!

Before the exposed, I review the previously issued decision and grant the preliminary injunction, determining that Facebook is summoned to, in the deadline of 6 hours, proceed with the suspension of the publications posted by the profile "Udo Caduco", including and notably under the URL https://wwwiacebook.com//profile.php?id=100011469993870&fref=ts, as well as to inform this electoral court of every and any data capable of leading to the identification of the author or the authors of the profile, in the deadline of 24 hours, under penalty of daily fine of R$ 30.000,00 (thirty-thousand reais).

When presented the identification, summon the claimant to what if lawful, in the deadline of 24 hours (pages 27-28)."

On the following day, the appellant opposed embargoes to the declaration against the preliminary injunction, requesting, solely and exclusively, "rectify the omission pointed in a way that the URL of the content to which the removal is ordered is indicated, under penalty of nullness of order, in the terms of article 19, paragraph 1 of the Brazilian Internet Civil Rights Framework" (pages 37-42).

Simultaneously, they offered a contestation requiring the inappropriateness of the complaint -- to the purpose of complying with the cautionary provisions --, and the nomination of the specific URLs of the contents considered illegal by the agent, besides the supplementary deadline of 48h.

Then, on September 14th 2016, the decision rejecting the explanatories was issued, in which is consigned:

"URL, abbreviation on the English language for Uniform Resource Locator, translates to the address of a resource available on a network.

In the hypothesis of the records, when Facebook is a social network used by third parties, the address of the profile object of the action can be reached both through the title given by the user who created it (Hudo Caduco), and the URL specifically linked to the referred profile, that, like the title used by the user, are part of the objurgated decision.

Thus, there are no vices in the decision against which the embargoes were interposed" (pages 108-109).

The fulfilling of the exclusion of the impugned profile was only brought to the records on October 7th 2016, after the publishing of the sentence.

Within this context, the appellant company did not timely comply with the judicial order issued in cautionary character and, subsequently, confirmed in the sentence, being subjected to the payment of punitive fine, according to what article 537 of the Code of Civil Procedure authorizes.

The imposition of fines is an important instrument for the execution of judicial decisions, in accordance with the following judgement of the Superior Electoral Court:

"2010 ELECTIONS. REGIMENTAL APPEAL. INTERLOCUTORY APPEAL. COMPLAINT. IRREGULAR ELECTORAL PROPAGANDA. INTERNET. FINE. MAINTENANCE OF THE APPEALED DECISION.

1. **According to case law from the SEC, the fixation of coercive fines in case of noncompliance with the judicial decision that determined the removal of the video is appropriate. Precedents.**
2. Appealed decision kept by its own groundings. Regimental appeal unprovided" (SEC, AgR-AI nº 36849, of 25/02/2016, Min. Gilmar Ferreira Mendes).

Incidentally, the allegation that there was not a noncompliance with the preliminary injunction decision, due to the existence of reasonable doubt about its command by lack of identification of the URLs related to each of the effectively illegal messages under the electoral standpoint.

The character of the decisions issued by the Electoral Court allows to infer, in a clear manner, that the judicial order determined the removal of the page "Udo Caduco" of the Facebook social network, b y the fact that it posted messages of electoral character under the cloak of anonymity, including making and express mention to its electronic address (URL).

Proof of that is that the address of the personal page pointed in the preliminary decision is identical to the one pointed on the sentencing, subsequently excluded by the appellant.

The fact that the appellant agrees or not with the complete exclusion of the whole page is not enough to not comply with the judicial command. When being summoned on the preliminary decision, it would be the role of the appellant to remove the page from the air and, only after, discuss the extension of the *decisum* on the records itself or before an appeal to the higher courts.

It is worth emphasizing that the appellant did not manifest any doubt or difficulty about the judicial order, forwarding information capable of identifying the author of the profile, corroborating to the nonexistence of motives for the noncompliance with the judicial command on the fixed deadline.

There is also no way of dismissing the appellant of the payment of the fines due to the lack of time to comply with the court order, nor due to the 08 hour difference of time between Brazil and the countries where the teams responsible for the administration of Facebook data are located (USA and Ireland).

The justification is manifestly unreasonable, above all by the fact that the appellant requested on the contestation the supplementary deadline of 48h for the fulfilling of the preliminary decision, but only taking the measures determined by the Electoral Court several days after the presentation of the referred request.

Furthermore, a company of the size of Facebook, of world wide range, with a market value close to US$ 300 billion -- responsible for the development of advanced technology for the spreading of information --, cannot plea technical difficulties and lack of personnel structure to comply with the judicial decisions.

In what refers to the value of the fine, the daily amount of R$30.000,00 (thirty-thousand reais) fixed by the Electoral Court is not unproportionate, not unreasonable, when pondered the need to preserve the health of the judicial decisions and the economical capacity of the appellant.

Beyond that, it is necessary to pay attention to the fact that, in other processes going through this Court referring to the 2016 elections, the same appellant company was already convicted to the payment of fine by noncompliance with court orders of the same nature, which configures the reiteration of the conduct and reveals the lack of zeal with the authorities on the decisions issued by the Electoral Justice (TRESC, Ac. n. 31.941, of 30.09.2016; n. 32.060, of 24.10.2016).

Appropriately, the understanding of the Superior Electoral Court in the sense that "*the monetary value imposed by fines is reasonable and proportionate, even as a high amount, considering the economical power of the debtor entrepreneurial company and the scope of this institute to fulfill the judicial decisions, securing the effectiveness of the jurisdictional tutelage*" (AgR-RMS n.101987, of 31/05/2016, Min. Luiz Fux).

In the case of the records, the daily value of R$30.000,00 (thirty-thousand reais) is equal to the highest level of the monetary penalties applicable to the cases in which there is noncompliance with the disciplinary rules of the electoral propaganda on the Internet (Law n. 9.504/1997, art. 57-C, § 2o ; art. 57-D, § 2o ; art. 57-E, § 2o ; art. 57-H).

This parameter -- daily R$30.000,00 --, was considered reasonable and proportionate in a ruling from the SEP related to the charging of fines of the company Google Brasil Internet Ltds. for the delay of 30 days in the execution of a court order, according to this excerpt of the summary of the referred decision:

"Due to the injunction nature of the fines, which have a coercive and punitive character, the established quantum should be compatible with the patrimonial capacity of the passive subject and the consecution of its means, considering the circumstances of the concrete case. The resistance of the appellant to obey to the judicial command for the removal of irregular propaganda is evident, which was extended for the period of 30 (thirty) days and considering the arbitrated values by the electoral justice, as well as the reasonability of the parameters adopted by the conducting vote of the regional decision, that was based in values provisioned in in the legal text itself, the punitive fine fixed by the Court a quo is maintained" (RMS n. 160370, of 02/02/2016, designated Rapporteur Min. José Antônio Dias Toffoli).

I highlight, by relevance, the alert of the Minister Herman Benjamin, issued during the referred judgement:

"We have to preserve the Brazilian Justice and its decisions. The new Code of Civil Procedure advances in this sense. Other countries have the contempt of court and we also have to follow this line.

I make the reservation: it is not the company Google, these comments are made in relation to big companies that are leaders in terms of image and that should be the first ones to give the good example in the sense of immediately complying -- and not thirty days later -- with the decision of an Electoral Court.

Furthermore, it is not from one judge, which is called ordinary judge, it is from a democratic process in which the judicial decisions should be fulfilled immediately".

As the appellant possess an equivalent economical size to Google and the decision took more time to be complied with in a similar period, the solution to be adopted on the present case should be the same, with the maintenance of the value of the fines established by the Electoral Judge.

The argument that the arbitrated fines "*amounted to an elevated value that deprives them from their coercive character, transforming them into an intense punishment*", constituting an "*evident excess of execution*" also does not help the appellant.

The value of the fine continues to be R$30.000,00 and its payment is more due to the lack of zeal and care of the appellant itself, who unjustifiably procrastinated the provisions imposed by the judicial order, denying the reduction of the fine, above all because no one can use of its own turpitude to earn an advantage, as asserts the case law:

"There is no offense to the principle of proportionality when the fixation of fines takes into consideration the circumstances of the case, as well as the economical capacity of the company, **being certain that the amount of the penalty became elevated due to the deafness of the party to comply with the judicial order**" (AgR-RMS nº 1208-72/TO, Minister Luciano Lóssio, DJe of 2.10.2015 - I highlighted).

For this, the Superior Electoral Court, when examining the cases on the removal of propaganda by part of the company Google Brasil Internet Ltda., concluded to be legitimate the charging of punitive fines totaling R$2.2000,00 (two million and two-hundred thousand reais), R$1.8000.000,00 (one million and eighty-thousand reais) and R$900.000,00 (nine hundred thousand reais).

For these reasons, the decision that imposed the payment of daily fine of R$30.000,00 (thirty-thousand reais) for the unjustifiable and belated compliance with the court order does not deserve a reform, emphasizing that the appellant was notified of the preliminary injunction decision on September 12th 2016 (page 32), it should have complied with the judicial provisions on September 13th 2016, with prorogation to September 16th 2016, which was extended until October 10th 2016, a data previous to the protocolization of the petition comprovating the removal of the profile and the providing of data for the identification of the user (pages 195-209).

Therefore, there was the noncompliance with the preliminary judicial decision for the period of 20 days, importing on the obligation of the appellant to pay the value of R$600.000,00 (six hundred thousand reais) as fines.

4. Suspension of the social network Facebook by the period of 24h in all national territory. Inadequate and unproportionate reprimand.

Notwithstanding with the negligent conduct of the appellant on the compliance with the court order, it is forceful to recognize that the suspension, for twenty four hours, of the access to the website Facebook, in all national territory, constitutes an inadequate and unproportionate reprimand to the factual hypothesis analysed.

In face of its severity, the suspension of the activities of the administrative companies of sites on the Internet should respect the appropriate gradation with the disprovability and the severity of the perpetrated illicit conduct, reserving such penalty for when the felonious intent of not complying with the judicial *decisum* is proven, with transparent unbalance of forces on the electoral dispute.

This is not the case of the proceedings, since the profile administrated by the appellant, although posting content offensive to the image of the postulant to an elective position, was not accessed by an expressive number of users, according to what reveals the minimal amount of comments and sharings registred on the page.

Aside from this, it is unreasonable to subject Facebook users from all over the country to bare this restriction which originated in a political fact of merely local repercussion, above all when pondered the constitutional right of free expression and communication.

Solid on these arguments, the Supreme Federal Court decided, in injunction character, to deny the effects of the decision that determined the suspension of the messaging service application WhatsApp by supposed noncompliance with a judicial order, as Minister Ricardo Lewandowski highlighting "*that it is not reasonable to allow the impugned act to prosper, as it generates juridical insecurity among the users of the service when leaving millions of Brazilians without communication among themselves*" (STF, ADPF n. 403, decision from 19.07.2016).

5. Before the exposed, I give partial provisioning to the appeal, only to remove the granting of the right to reply, the fine of R$30.000,00, imposed with legal grounds on article 57-D, along with article 57-F, caput, both from Law 9.504/97, as well as the suspension of the social network Facebook for 24h, keeping the other penalties enforced by the appealed decision unaffected.

DISSENTING VOTE

I understand, with all due respect, to dissent from the noble Rapporteur as to the interstice in relation to which the fines are enforced, because I do not conceive that if a party of the process directs itself to the Magistrate by the manners which the procedural law imposes to beat the contradiction, whichever are the explanations, is condemned to (daily) fine while it has no condition of complying with the decision object of this appeal, situating it in relation to the context that it should act comissionaly, if it must.

Simple as that. With no condition of compliance, that clarifies what the Magistrate wants to say with his decision, which rests fulfilled.

Therefore he would not understand, evidently, if by any chance he had interest to just move forward with the compliance of the decision, procrastinating; which I do not see *in casu.*

In this sense, attentive to the details, I see that the appellant FACEBOOK SERVIÇOS ONLINE DO BRASIL LTDA. did well when opposing declaratory embargoes, since although the injunction decision had determined, in the period of 6 hours, to proceed to the "suspension of the publications posted on the profile 'Udo Caduco', including and notedly under such URL", this URL did correspond to the very own Facebook page, in which the publicity fought by the plaintiff was posted.

And, it is to register, to suspend the post is one thing, to delete the page or profile is another totally different.

But even if the URL quoted by the Magistrate on his injunction decision was the one from the page, and even if there was the understanding that it was determining the deleting of the page and not of the publications, the fact is that the determination of suspension of publications consisted expressingly on the embargoed decision, in a way that the explanatories did not have a purpose other than beating this contradiction, above all on the

"Impossibility of compliance with the decision without the clear, specific and unequivocal indication of the content" (Interlocutory Appeal n.° 2008800-61.2015.8.26.0000, Appeals Court Judge Rap. Carlos Alberto de Salles, 3rd. Chamber of Private Law - TJ/SP, decided on 11/03/2015).

In observance to the disposed on article 19, paragraph 1, of the Brazilian Internet Civil Rights Framework, according to which,

§ 1. The referred court order must include, under penalty of being null, clear identification of the specific content identified as infringing, allowing the unquestionable location of the material.

Therefore, as the appellant acted within the limits of the law, the honorable Magistrate only needed to expunge the obscurity or contradiction, clarifying his decision and granting conditions of realizing the injunctions and removing the illicit.

Nothing painful, which could avoid the obstacles that followed, allowing the compliance with the decision from then -- above all when opposed the explanatories on a day, to find the ready answer of the Magistrate on the other.

And the contents of article 1.026 of the current Code of Civil Procedure are not unknown, which determines the inexistence of suspensive effect of the explanatories, applicable by the conjunct reading of articles 15 and 995 of the same procedural law. However, we see that the case is about granting conditions to balance the decision, because it inserts, in this context, the prohibition to previous censorship of the already referred Brazilian Internet Civil Rights Framework -- that is, if from one side the appellant could not refrain from inhibiting the reiteration and comply with the removal of the illicit, and on the other it could not exceed the objective limits of what was determined to be suspended -- that is, to remove what was illicit --, under penalty of offense to freedom of expression, a fundamental right that extends to the Internet.

Furthermore, a parenthesis on the current Adjective Civil Law is crucial, for its article 1067, when giving a new writing to article 275 of the Electoral Code, in the sense that "Embargoes do declaration are fit on the hypothesis provisioned on Code of Civil Procedure", it does not provide on the non suspension from article 1026 on its subsequent paragraphs and items, removing this rule in face of the express provision, on the Electoral Code, of the hypothesis of reasonability and the very own procedure of the explanatories, to which would remove the disposed on article 15 of the Procedural Digest, for the purpose of subsidiary application of the quoted provision.

Not only, the cooperation on its article 6 arises as a fundamental norm of the process, as it links all subjects, including the honorable Magistrate. In a way that the explanation, without imposition of sanction of noncompliance with the judicial command, would not be more than the expression of cooperation, before the distinction of the object of the injunction and removal of the illicit.

On the merit analysis of the context that permeates the content of the injunction decision, or of the one that rejects the embargoes, I could not refrain from minimally revolving it to understand that the appellant does not deserve the imputation of the fine other than counting on the intimation if the rejection decision of the this appeal, or we will see.

I initially highlight that the injunction decision imposes obscurity and or contradiction -- "figures that in every manner, as it has been understood, cover the hypothesis of doubt", (STRECK, NUNES and CUNHA, p. 1427) the one now removed from the hypothesis of reasonability in article 274 of the Electoral Code; the addendum "including and notedly under such URL" is not helpful, since the Magistrate could be referring to one of the publication, and not properly the profile, once that, although he said that the "the profile in which the referred publications happened is covered by the cloak of anonymity, once the identification "Udo Caduco" does not lead to anyone with a recognized personality", suggesting the need of suspending the profile, also said that "the appellant also has the reason when aiming that the content is removed from the communication platform" -- and the content is what is inside of the profile.

Aside from this, the first decision that denies the injunction request, asserts that the "limiting of manifestation is only possible of happening when the act involves offense to honor, considering that, on the hypothesis, I do not see on the pre constituted evidence the existence of any publicity linked to the person of the plaintiff that has a negative character, that offends the honor, from which I do not identify support on the request for the immediate suspension of the publicity", or even, "that the publicity brought on the body of the claim as being the one that is part of the profile on the social network involves several candidates and does not enter in offensive acts, but on the existence of a humoristic purpose, and even then without strict linking to any determined person"; in a way that, not removing from the profile any attack on the person of the claim, and as the Magistrate did not alter his understanding, that is, whether the present offense is or not on a merely humoristic profile, basing his decision of reformation exclusively on the prohibition of anonymity, that it would not be only about publications to be suspended, inside a profile that was doing no harm other than making people laugh.

Furthermore, the decision that rejects the embargoes could, in a certain way, potentialize the claudicant state with which the embargoing is faced when pretending to take a certain path, or right path, when, for example, the honorable Judge asserts that Facebook can "reached both through the title given by the user who created it (Hudo Caduco), and the

URL specifically linked to the referred profile, that, like the title used by the user, are part of the objurgated decision", since this same embargoes decision, as seen above, lacks of consistent contradiction, with no evident difficulty for the Magistrate to clear the state of uncertainty in an objective way, pointing such path to the embargoing, so it could advance on the compliance of the decision.

In any way, in the end, the decision that rejects the embargoes asserts that the "profile assessed in this process, that, as it was said, is hidden under anonymity, is still online and its purpose if to offend candidates on the electoral dispute, as the previously judged decision ordered the removal of its content from the social network".

Thus, if of humoristic or offensive content, if nonexistent the explicit decision on the necessity of removing the profile, above all when the deletion of its content is ordered -- and, forgive the redundancy, the content is what is inside of the profile --, whose lack of intelligence would justify, in thesis, a second appeal of declaratory embargoes, the fact is that, of the alert of the Magistrate that "the daily fine fixed on the injunction decision is current", it would be the role of the appellant to adopt a broader measure, of suspending the whole content, which would imply on the removal of the whole profile, even because there would not be the choice of picking this or that post, which notedly would lead to discussion, from the offended standpoint, if it continued.

While the appellant did not comply with the decision from its first summoning, I understand that the fine will not be enforced on the current uncertainty state, with no conditions of balance on the judicial command; the fines will only be valid from the first summoning of the decision that rejected the embargoes, that, for arguing, established the objective limits of the decision and removed, then, the potential offense to the freedom of users established on the Brazilian Internet Civil Rights Framework, by eventual excess on the interpretation of the judicial order.

Add to this the fact that, even summoned on the decision that solver the embargoes and even if the situation was viewed as dubious, continued inert from this instant, whose omission even on an eventual new appeal cannot be considered other than in its disfavor.

Therefore, on the contrary from the decision, which enforces the fines from 12.09.2016, when summoned the appellant of the decision that revokes the injunction measure, in a decision of reconsideration, I understand that the deadline would be the one of the summoning of the decision that rejects the explanations, in 16.09.2016, according to pages 142/143.

Additionally, I emphasize that the initial term would not even begin on 12.09, but on 13.09, since the warrant on page 29 which determined the immediate suspension of publication in the deadline of 6 (six) hours, combined with the subpoena on page 30, were not compiled with in the terms of the certification on pages 33 and 34-v, as the appellant attended the proceedings spontaneously to suppress the lack of summoning and, consequently, gain knowledge of the injunction decision on day 13.09, when opposed the enlightenments (p. 37), and presented the defense (p. 62).

On the other hand, I understand the daily fine of R$30.000,00 as exorbitant, and I am not convinced with the argument that the appellant is a company of stature and it should subject to such expression, since, even not complying with the court order, it does not seem to me that it was made in an recalcitrant or reluctant manner, as I expressed on the occasion of the trial, as it was not imposed in a proportion enough to compel it to the fulfillment of the decision.

The fines characterize a state coercion based on periodical fine, not having any relation with any kind of damage to be compensated, and, therefore, sanctionary character. Which rests really clear, furthermore, on article 500 of the current Code of Civil Procedure, in which the punitive precept is differentiated from the specific obligation, object of the action.

In accordance with the lesson of Marinoni, Arenhart and Mitidiero (2016, p. 597), on the interpretation of the referred provision of the CCP:

"The fine has as a purpose to force the accused to adhere (articles 500 and 537, CCP), while the compensation is about damage (article 499, CCP). It is evident that the fine does not have any relation with damage, even so, as it happens in injunctions, there may not be a damage to be compensated. What is meant to say when affirming that 'the indemnity for losses and damages will be granted without the prejudice of the fine' (article 500, CCP), is that the fine will be owned regardless of eventually owned the indemnity for damage".

Due to this, as the appellant is not sentenced to compensate the appellant, above all when, as it is seen on the records, it did not pose in a manner to not value the jurisdictional activity, as the fines comply with their inhibiting function and of removal of the illicit, given the obedience, with little delay, of the judicial decision, I see that the fixation of the fine in what would supposedly be a higher level predicted for the sanction of the conducts provisioned in articles 57-D and 57-F, of Law n. 9504/1997 (R$30 thousand), enforced for 25 days (12.09 to 07.10), which would result in an amount of R$750.000,00, which is extremely onerous.

I understand, in this aspect, that if applied, these provisions (or even if analogically the articles 57-C, 57-E and 57-H), the fine should be limited to the legal minimum (R$5 thousand), foremost when, even before the news, by the appellant, on 07.10, as for the identification of the maintenance of the profile "Hudo Caduco", there is nothing on the records that a manner of responsibilization remained, such as arose the appealed on the petition for amendment on page 25 would do -- from what is removed not being worried with the mitigation of the offense and compensation of the damage, in monetary terms, which is not strange when dealing with a person well established financially.

But, I note that there even isn't in the legal order (Law 9.504/97 and TSE Resolution 23.457/2015) the stipulation of the value of the fine -- which is daily -- for cases of noncompliance with a court decision which grants an injunction and illicit removal. The hypothesis provisioned on articles 57-C, paragraph 2, 57-D, paragraph 2, 57-E, paragraph 2 and 57-H, which establish values between R$5.000,00 and R$50.000,00, all from Law n. 9.504/1997; all of these analogically applied provisions refer to the fine by violation of a certain conduct; fixated, therefore, to each the transgressor commits.

In synthesis, there is not a manner to understand as applicable these provisions with parameters for the enforcement of fines; one, because these are fines provisioned for the sanction of the respective conducts, which is not about the case of injunction and removal of illicit analysed; two, because the enforced fine is absolutely unproportionate for the period of incidence that uses them as parameter.

In an analogous case, Google -- company of similar size, if not bigger -- obtained a significative reduction of the coercive fine that reached the amount of R$900 thousand;

INTERLOCUTORY APPEAL - FINE - DECISION THAT FIXED THE TOTAL AMOUNT TO BE PAYED FOR DAILY FINES IN NINE HUNDRED THOUSAND REAIS - POSSIBILITY OF REVIEW OF DECISION AND OF THE VALUE OF THE FINES AT ANY TIME - INEXISTENCE OF MATERIAL OBJECT OF JUDGEMENT - APPLICABILITY OF THE PRINCIPLES OF PROPORTIONALITY AND OF REASONABILITY - REDUCTION OF THE FINE TO ONE HUNDRED AND EIGHTY THOUSAND REAIS - APPEAL GRANTED.

(...) With effect, although the fixed value of the fines should be enough to coerce the party to comply with the imposed judicial order, it is true, in counterpoint, that the amount cannot be overly onerous, under penalty of the magistrate not observing the criteria of equality and justice, distancing from the notion of equity.

(TRE-SP, Petition n, 9-42.2014.6.26.0000, UNCLASSIFIED DOINGS n° 942, Decision from 29/04/2014, Rapporteur MÁRIO DEVIENNE FERRAZ, Publication: DJESP - Electronic Gazette of Justice of TRE-SP, Date 8/5/2014)

Furthermore, aside from the value of the imposed coercive fine of R$750.000,00 being extremely onerous, as it was said, it would import on the causeless enriching of the representative, which is sealed on the legal order and equally discussed on the assessment exposed above.

I emphasize that not only there is no obligation as for the imputation of fine between R$5.000,00 and R$30.000,00, for absence of legal provision that regulates it on this parameter, as I see that the aforementioned amount extrapolates by far what is usually seen as values of condemnation for purposes of reparation of moral damages established by the common Justice for the most sensitive hypotheses, like the loss of a loved one -- whose dichotomy between the sanctionary character of this and the merely inhibitory of that are evidently not escaping me, nor the comprehension when dealing with attributions of payment in cash, in respect to the guiding balance of the law and equity.

Lastly, it is worth accenting that the page in question did not have a repercussion that affected the integrity of the electoral dispute in which the appellee was reelected without further problems; this with no prejudice to the contrary understanding, embodied in an offense to the honor and the good name yelds, to all evidence, to the competente action of compensation for the damage caused, in face of the responsible for the posts in question.

Thus, I vote in the sense of granting partial provisioning to the electoral appeal, to reduce the daily fine to R$5 thousand, incident on the period of 13.09 to 07.10, which would reduce the total amount to R$120 thousand.

This is how I vote.

ELECTORAL APPEAL Nº141-28.2016.6.24.0019 - ELECTORAL APPEAL - CLAIM-RIGHT TO REPLY - POLITICAL PROPAGANDA - ELECTORAL PROPAGANDA - INTERNET - *FACEBOOK* - 19th ELECTORAL DISTRICT - JOINVILLE

RAPPORTEUR: JUDGE ANTONIO DO RÊGO MONTEIRO ROCHA

APPELLANT: FACEBOOK SERVIÇOS ONLINE DO BRASIL LTDA.

LAWYERS: CELSO DE FARIA MONTEIRO; RODRIGO MIRANDA MELO DA CUNHA; MILA DE AVILA VIO; RICARDO TADEU DALMASO MARQUES; JANAÍNA CASTRO FÉLIX NUNES; CARINA BABETO; NATÁLIA TEIXEIRA MENDES; RENAN GALLINARI; PRISCILA ANDRADE; TAMMY PARAS IN PEREIRA; CAMILA DE ARAÚJO GUIMARÃES; PRISCILA PEREIRA SANTOS; PAULA SERRA LEAL; VÍVIAN LEITE BARCELOS; RAFAEL INOCÊNCIO FINETTO; RAFAEL DE MILITE LUIZ; VÍTOR ANDRÉ PEREIRA SARUBO; WILLIAM LUCAS LANG; LUIZ VIRGÍLIO PIMENTA PENTEADO MANENTE; PATRÍCIA HELENA MARTA MARTINS; DANIELA TOSETTO GAUCHER; JULIO GONZAGA ANDRADE NEVES; ANNA CAROLINA RIBAS VIEIRA KASTRUP; BRUNA BORGHI TOMÉ; BRUNO ALEXANDRE GOZZI; WALTER ALVES DE SOUZA NETO; MARIANA ALVES PEREIRA DE ASSUMPÇÃO; DIEGO COSTA SPÍNOLA; LEONARDO COSTA DA FONSECA; DANIELLE DE MARCO; RODRIGO GUEDES MELLO; RENATA CAVASSANA MAYER; SOFIA GAVIÃO KILMAR; EVA LETÍCIA RICCIARDI DE PAULA; GUSTAVO CESAR MAZUTTI; IVO BEDINI WERNECKE; MARIANA OLIVO DE CERQUEIRA; MARIANA DE MORAES TORGGLER; ANA LÚCIA MOYA TASCA; BRUNO AYUB PRATA; GUILHERME INOMATA LIMA MENEZES; LUIZ MAGNO PINTO BASTOS JÚNIOR; AMAURI DOS SANTOS MAIA; EDUARDO CORRÊA

APPELLEE: COLIGAÇÃO JUNTOS NO RUMO CERTO (PMDB-PV-PCdoB-PTdoB-PSC-PTC-PROS-PTB)
LAWYERS: KATHERINE SCHREINER; LIS CAROLINE BEDIN; KARINY BONATTO DOS SANTOS; KLEBER FERNANDO DEGRACIA

PRESIDENT OF THE SESSION: JUDGE CESAR AUGUSTO MIMOSO RUIZ ABREU
REGIONAL ELECTORAL ATTORNEY: MARCELO DA MOTA

DECISION: unanimously, to recognize the appeal and reject the passive illegitimacy preliminary *ad causam;* in the merit, by majority - Judge Rodrigo Brandeburgo Curi won in part --, to give partial provisioning to the appeal, in the terms of the vote of the Rapporteur. Lawyers Luiz Magno Pinto Bastos Júnior and Katherine Schreiner presented the oral defenses. Judge Rodrigo Brandeburgo Curi will make a vote declaration. Judges Cesar Augusto Mimoso Ruiz Abreu, Antonio do Rêgo Monteiro Rocha, Alcides Vettorazzi, Hélio David Vieira Figueira dos Santos, Ana Cristina Ferro Blasi, Davidson Jahn Mello and Rodrigo Brandeburgo Curi were part of the trial.

PROCESS JUDGED ON THE SESSION OF 26.10.2016.
DECISION N. 32086 SIGNED AND PUBLISHED ON THE SESSION OF 03.11.2016, AT 18H16MIN, WITH THE PERSONAL SUMMONING OF THE REGIONAL ELECTORAL ATTORNEY.