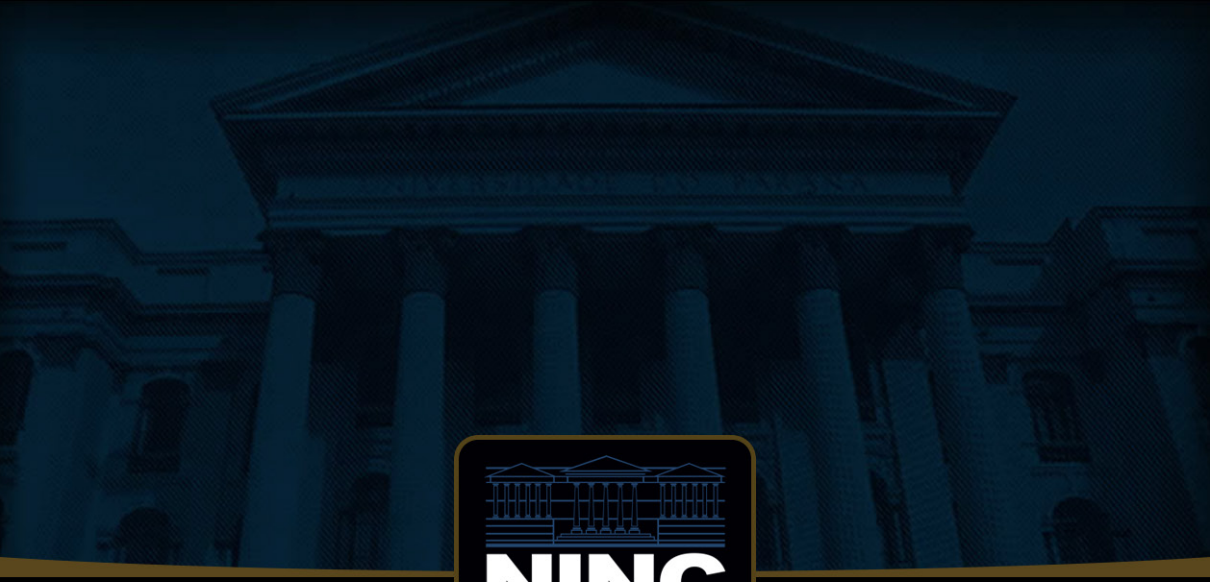

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Digital Constitutionalism: freedom of speech and platforms accountability*

Constitucionalismo Digital: liberdade de expressão e responsabilidade das plataformas

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Abstract

This paper exploring Freedom of Speech in the context of Digital Constitutionalism is the second of a series of articles on the topic of democratic control and enforcement of fundamental rights in the internet environment. In this context, the paper develops the idea that self-regulation is not enough to adequately guarantee freedom of expression in a responsible manner in the digital environment. Comparing the European Union and Brazilian initiatives, the paper considers that big techs and their

Resumo

Este artigo explorando a liberdade de expressão no Constitucionalismo Digital é o segundo de uma série sobre o tema do controle democrático e da efetivação dos direitos fundamentais no ambiente da internet. Assim, este trabalho analisa o Constitucionalismo Digital como meio de aplicação da liberdade de expressão (e seus limites) no âmbito das plataformas digitais. Nesse contexto, desenvolve a ideia de que a autorregulação não é suficiente para garantir adequadamente a liberdade de expressão responsável, em

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global social platforms occupy a relevant space that congregates traditional public authority powers in a private system. It is in this intersection that the concept of Digital Constitutionalism can be seen as a way of bringing democratic and constitutional control to the environment of public and private digital powers.

Keywords: digital constitutionalism; digital platforms; freedom of expression; democratic control; fundamental rights.

uma perspectiva comparada entre as iniciativas jurídicas da União Europeia e do Brasil.

Palavras-chave: *constitucionalismo digital; plataformas digitais; liberdade de expressão; controle democrático; direitos fundamentais.*

CONTENTS

1. INTRODUCTION

This text is part of a series launched to analyse Digital Constitutionalism as a new feature and moment of Constitutional Law. To accomplish this task, an introductory paper analized rights, duties and powers in the digital environment.

In the network and algorithmic society, big techs and their global social platforms (*e.g.*, Instagram, Facebook, Twitter, Whatsapp, Tik Tok, for instance) occupy a relevant space that congregates traditional public authority powers in a private system. It is in this intersection between public powers and private rights and duties that the concept of Digital Constitutionalism can be seen as a way of bringing democratic and constitutional control to the environment of public and private digital powers.

Since the beginning of the XXI Century, digital platforms, algorithms and more recently artificial intelligence (AI) have progressively gained much space in people's lives, mobilizing great amounts of capital and unprecedented capillarity in societies. Therefore, there has been a shift of power from the states towards public enterprises, the so-called "big techs". These are enterprises that operate digital commerce and social networks and simultaneously capture data, shape electoral systems and, ultimately, the minds and behavior of people and institutions.

In contrast, this growth of public power under control of the big techs has not been accompanied by developments in the constitutional field. The role of Constitutionalism in this context has been minor in protecting fundamental rights and controlling the abuse of power in the digital environment in parallel with the respect to the freedom of enterprise. Therefore, the internet has been the stage of unaccountable and unfettered power exercised by private enterprises.

To set in motion constitutional and statutory control over digital platforms states started to regulate the operation of those so-called big techs. In Brazil, Constitutional Amendment n. 115/2022[1] (fundamental right to data protection), the Data Protection General Act (Lei Geral de Proteção de Dados – Lei n.º 13.709/2018)[2], the Internet General Act (Marco Civil da Internet – Lei n.º 12.965/14)[3] and the proposal for the Liberty, Responsibility and Transparency in the Internet Act (Projeto que institui a Lei Brasileira da Liberdade, Responsabilidade e Transparência na Internet - Projeto de Lei 2.630/2020)[4] are central examples.

In the European context, there have also been important developments in this field. The Union departed from a liberal (or neoliberal) posture towards an increasingly democratic and constitutional control of the digital environment. Acting accordingly to the neoliberal conception, constitutional societies have expressly or not delegated control in the digital environment to private actors, in a self-regulatory model. This has helped to flourish and develop a model of governance that escapes public oversight and is endowed with public powers, but without the proper constitutional limits and constraints.

Then, the proposal of Digital Constitutionalism is to challenge self-governance by the market. Rather, Constitutional Law principles and rules should be applied and enforced in the digital world in order to ensure fundamental rights in an environment where they have progressively been forgotten or deliberately set aside.

It is also important to remember that Constitutionalism has arisen as a legal and political system to constrain state power, thus protecting fundamental rights of the citizenry. Thus, the idea of Digital Constitutionalism represents an important shift in this perspective, because it adopts as a starting point that some private multinational enterprises exercise public powers in a global scale and, therefore, people's fundamental rights have also to be protected before them. This shift means a constitutional turn from the vertical (public powers towards citizens) to the horizontal (among private actors) protection of fundamental rights.

This means that the focus of Digital Constitutionalism is to regulate a multicenter global society, not a one-center national society. In other words, the main aim is to regulate and limit the abuses of power coming from governmental powers, businesses and civil society organizations, all of them acting in a networked society.

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1 BRASIL. **Emenda Constitucional n.º 115, de 10 de fevereiro de 2022**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm. Access on: July 27th, 2023.

2 BRASIL. **Lei n.º 13.709, de 14 de agosto de 2018.** Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on: July 27th, 2023.

3 BRASIL. **Lei n.º 12.965, de 23 de abril de 2014.** Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on: July 27th, 2023.

4 BRASIL. **Projeto de Lei n.º 2630/2020.** Available at: https://www.camara.leg.br/propostas-legislativas/2256735. Access on: July 27th, 2023.

Second in a row about Digital Constitutionalism, this paper intends to analyse freedom of expression in the digital context, approaching its range and limits imposed by the constitutional order in Europe and Brazil.

The *problem* under scrutiny is initially to demonstrate that freedom of speech, in spite of being a fundamental right, is subject to limits. This is also true for the digital world. However, this control cannot be left exclusively to self-regulation by platforms, but, rather, be subject to constitutional and democratic control by Law.

The *aim* of the article is to identify the features of a Digital Constitutional Law in the European Union and Brazilian Systems, in a comparative perspective, to scrutinize how digital platforms can be subject to constitutional and democratic controls regarding freedom of speech.

The *hypothesis* of the series is that digital platforms are not neutral means for people to freely express their interests and ideas. Rather, they are a business model that incarnates digital capitalism. As such, these enterprises exercise public powers, compiling and handling huge amounts of data, using algorithms that influence people's minds and habits, controlling what people can or cannot say and influencing political and electoral choices. In this context, democratic control and protection of freedom of speech are perspectives that demand attention of legal research and literature.

The *methodology* used is consultation of references.

2. FREEDOM OF SPEECH IN CLASSICAL CONSTITUTIONALISM

The study of Constitutionalism, from its origins through the development of the Social State to the emergence of New Constitutionalism, reveals an evolutionary process of protection of fundamental rights.

Classical Constitutionalism was initially centered on the liberal revolutions of the late 18th century, later incorporating a larger list of fundamental rights, including social and economic rights.

Freedom of speech as one of the first fundamental rights derived from Classical Constitutionalism is strongly based on the marketplace of ideas. According to it, the more speech is free, the more ideas can appear and circulate with evident gains to society.

However, the marketplace approach may be too narrow because it attends only to instrumental effects of free speech. Another doctrine contends that freedom of speech has an independent value linked to dignity and development of individuals as such. Free participation in public discourse, in accordance with this doctrine, potentially values every person's speech and idea.[5]

[5] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. 5. ed. New York. Oxford University Press, 2018.

Free speech can also be seen as essential as a check on government power, because it sheds light on possible abuses of state power and its eventual occupants. Besides, free speech, allowing the free flow of ideas and opinions, is a means of preventing a government from entrenching itself. It can be also conceived as a prevention from violence in political dissent, allowing it to be manifested rather by words.[6]

On the other hand, it is also broadly accepted that if government is in many situations not allowed to regulate content of speech, it can regulate time, place and manner of speeches. For instance, is a person allowed to turn on her loudspeaker at midnight in a residential neighborhood to express her views on whatever issue? Can a group parade in the middle of street during rush time to protest traffic policies? [7] There seems to be a broad consensus that government may sometimes limit the freedom of speech to prevent disturbance of others, violence or other grave harm.[8]

Every major technological change in the most recent two centuries in telecommunication, such as the telegraph, radio, telephone and television has seen a concern that freedom of speech was under threat. All those concerns have been proved wrong by history. However, the digital revolution seems to be different because the internet is unique regarding enormous data storage, processing power and algorithmic sophistication[9].

Indeed, while those technologies of the past helped to make information circulate more permanently, widely or quickly, digital technology assigns individuated control to the intermediary (digital platforms). That is why those intermediaries are so powerful these days and this power should be subject to constitutional filters.[10]

By the end of the twentieth century and through the twenty-first century, human life has progressively been inserted in an online environment. Consequently, social relations have increasingly been developed in the online dimension. This has transposed to the online dimension our rights, duties, powers and moral values.

In this online dimension, social systems, such as law, technology, moral, economy have progressively produced internal norms in a process of mutual influence. Certainly, Law is formed not only by its own logic, but also results from social, technological,

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6 REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. **California Law Review**, Berkeley, n. 82, p. 341-388, 2009.

7 FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. 5. ed. New York. Oxford University Press, 2018.

8 DORF, Michael C.; MORRISON, Trevor W. **The Oxford Introductions to U.S. Law. Constitutional Law**. New York: Oxford University Press, 2010.

9 TUTT, Andrew. The New Speech. **Hastings Constitutional Law Quarterly**, San Francisco, v. 41, n. 2, p. 235-298, 2013.

10 TUTT, Andrew. The New Speech. **Hastings Constitutional Law Quarterly**, San Francisco, v. 41, n. 2, p. 235-298, 2013.

economic and other forces that interact in the digital world. In the contrary sense, law influences the other social subsystems and their own internal rules[11].

Thus, there has been a normative order of the internet, also involving Constitutional Law. Consequently, the internet has been a field involving several Constitutional Law issues, such as freedom of expression, freedom of commerce, freedom of entrepreneurship, freedom to assemble, right to privacy, right to be forgotten and corresponding powers deriving from the national jurisdictions or from private actors, such as digital platforms.

In its initial moment regarding Constitutional Law, the digital revolution ignited an optimism (almost euphoria) involving freedom and self-regulation. From that moment on, people could freely express themselves, buy products from all over the world, engage in any global or international political movement without being bothered by public authorities.

All this with the passive regard and almost inexistent mediation of digital enterprises, that would self-regulate the digital environment in a bottom-up constitutionalization movement. Thus, Google, Facebook, Instagram, Whatsapp, Tik Tok, X (former Twitter) among others are digital forces exercising powers in competition with public authorities.[12]

In this context, digital platforms govern much of digital speech, performing legislative, executive, and judicial roles: (i) they create rules for allowed content; (ii) their moderators or algorithms enforce these rules; and (iii) internal teams review appeals. The lack of transparency in applying terms of use hinders public oversight. These platforms can influence users' freedom of expression[13].

It is also worth mentioning that many issues commonly found in the operation of large digital platforms — such as features designed to engage users, the spread of sensationalist content, and anti-competitive practices — stem from private interests tied to the current digital market business model. It would be unrealistic and counterproductive to think that self-regulation initiatives alone could address all these issues[14].

On the other hand, Constitutionalism has not yet developed a proportionate role in the debate on internet regulation and governance. As it has been noted above, in the beginning there has been a strong liberalism and a trust in self-regulation by private actors.

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11 GREGORIO, Giovanni de. **Digital Constitutionalism in Europe.** Reframing Rights and Powers in the Algorithmic Society. Cambridge, Cambridge University Press: 2022. p. 7.

12 GREGORIO, Giovanni de. **Digital Constitutionalism in Europe.** Reframing Rights and Powers in the Algorithmic Society. Cambridge, Cambridge University Press: 2022. p. 26.

13 BARROSO, Luna Van Brussel. **Liberdade de expressão e democracia na era digital**: o impacto das mídias sociais no mundo contemporâneo. Belo Horizonte: Fórum, 2022.

14 ARCHEGAS, João Victor. **Constitucionalismo Digital**. Belo Horizonte: Fórum, 2024.

However, by the end of the XX and the beginning of the XXI Century, there was a movement and claims towards constitutionalizing the digital environment and opposing the liberalist approach.

This is the phase that can be called Digital Constitutionalism. It will be approached regarding freedom of speech in the next topic.

3. FREEDOM OF SPEECH IN DIGITAL CONSTITUTIONALISM

If freedom of speech was once exercised in live speech, letters, radio, T.V. or the press, in the last twenty years, the internet has become one of the primary means to exercise rights and freedoms. Digital tools and platforms have allowed billions of people to express ideas and opinions on a worldwide scale.

However, in this digital platforms' environment, as we have already demonstrated in the first paper of this series, speech has not been subject to public regulation only, but also to private actor's powers. Indeed, platforms like Facebook, YouTube, Instagram, Tik Tok, Kwai or Twitter have implemented artificial intelligence systems that can moderate content based on criteria that are quite opaque and known exclusively by some internal departments of these private organisms[15]. In such a context, the access to information in the digital environment is strongly moderated or even restricted and biased by online platforms themselves.

As a consequence, this fabulous and enormous expansion of the reach and range of speech has developed side by side with the evolution of the algorithmic society, *i.e.*, an environment where big techs and their global social platforms (*e.g.*, Facebook, Twitter, Amazon, Tik Tok) occupy a relevant space that congregates traditional public authority powers in a private system.

In this world, online platforms govern online information and its diffusion. Therefore, the so-called "big techs" shape the boundaries of freedom of expression in a very important manner. In 2023, almost 3 billion users are subject to Facebook's community guidelines and about 2,5 billion people are subject to YouTube governance on content and distribution of billions of hours of videos[16].

These huge numbers only display part of the reality. Indeed, speech in the age of internet is deeply organized by private big techs, or transnational enterprises that use algorithms in this for-profit activity. This can be done by content moderation of information displayed on the news feeds of social platforms or by the results given by search engines, for instance. These are not neutral activities, but, rather, results of the

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[15] GREGORIO, Giovanni de. **Digital Constitutionalism in Europe.** Reframing Rights and Powers in the Algorithmic Society. Cambridge, Cambridge University Press: 2022.

[16] STATISTA. **Most popular social networks worldwide as of January 2023, ranked by number of monthly active users**. Available at https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/. Access on: Oct. 7, 2023.

intense and fundamental action of algorithms, that determine the content of the feeds or the results of the online searches.

Besides that, digital platforms can also ban people or online posts. Some examples are the ban on several high-profile journalists from the U.S.'s top organizations[17], or the ban of Twitter and Facebook on Donald Trump, in the aftermath of the Jan. 6 attack on the Capitol by his supporters[18].

This small picture shows how the goals and values of big techs can determine the content of speech in the digital environment. This is done mostly by algorithms without democratic control or participation, transposing to private transnational enterprises an effective regulation of speech that was once developed in the democratic public sphere[19].

In such a picture and considering the purpose of Digital Constitutionalism, it is a core goal to promote public values in the digital world. This means that fundamental rights in general and specially freedom of expression should be subject to democratic values and pluralism rather than to the opaque procedures and interests of private enterprises. This constitutional goal imposes on platforms the responsibility to respect freedom of expression and on the public authority the duty to protect public values and ultimately democracy.

For that goal, it is important to overcome a vertical and negative nature of freedom of expression characterized by the abstention of public authority in order to protect that fundamental right. In the digital environment, rather, it is a core duty of the public authority to act in a positive way to protect freedom of expression.

In fact, society and the state cannot protect freedom of expression (free marketplace of ideas) merely by refraining from prior censorship. Beyond this duty of neutrality, it is necessary and legitimate to ensure equal access and participation in public debate, in any processes or social communication environments, whether physical or virtual[20].

In an international perspective there are two examples of proposal to create a procedure of content moderation in a self-governance model: the Manila Principles

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17 NEW YORK TIMES. **Elon Musk bans several prominent journalists from Twitter, calling into question his commitment to free speech**. Available at https://edition.cnn.com/2022/12/15/media/twitter-musk-journalists-hnk-intl/index.html. Access on: Oct. 9th, 2023.

18 NEW YORK TIMES. **Trump's banishment from Facebook and Twitter: A timeline.** Available at https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html. Access on: Oct. 9th, 2023.

19 DIJCK, José van; POELL, Thomas. Understanding Social Media Logic. **Media and Communication**, Lisbon, v. 1, n. 1, p. 2-14, 2013.

20 MORAES, Alexandre de. **O direito eleitoral e o novo populismo digital extremista:** liberdade de escolha do eleitor e a promoção da democracia. 2024. Tese (Professor Titular) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2024. Available at: https://www.academia.edu/117454117/Alexandre_Moraes_O_Direito_Eleitoral_e_o_novo_populismo_digital_extremista_Tese_na_USP. Access on: Oct. 24th, 2024.

on Intermediary Liability[21] and the Internet Governance Forum Dynamic Coalition on Platform Responsibility[22].

The first set of principles has been proposed by civil society groups from around the world in the year 2015. Its declared goals are to protect freedom of expression and innovation balancing the needs of governments and other stakeholders. According to those principles, intermediaries (platforms) should be protected from liability for third-party content (first principle). Besides, the restriction of content cannot be inflicted unless by a judicial injunction.

The IGF Dynamic Coalition on Platform Responsibility aims to foster a multistakeholder effort to elaborate concrete and interoperable solutions to protect human rights of users. The way of operation is to assess the Terms of Use (ToS) in the context of intermediary liability in order to delineate a set of model contractual-provisions defined as Platform-User Protections (PUP's).

In the same track of private actors' initiatives relating to content moderation, in 2018, alongside the content Moderation at Scale Conferences in the United States, a group of human rights organizations, advocates and academic experts have launched three principles regarding the goals of transparency and accountability on internet platforms, known as the Santa Clara Principles (named after the initial meeting place, Santa Clara, California)[23].

These principles recommend that companies engaged in content moderation should use due process to impacted users and that the enforcement of their guidelines should be fair, unbiased, proportional and respectful of user's rights. Since 2018, twelve major companies (among them Apple, Facebook/Meta, Google, Reddit, Twitter/X and GitHub) have endorsed the Santa Clara Principles.

Though important, these rules and principles are not enough to guarantee that democratic values and human rights are being adequately enforced by digital platforms. Firstly, platforms have the discretion to adhere or not to those principles launched by private actors, as they do not have binding force. Besides that, the fact to adhere does not necessarily imply that those principles will be enforced by platforms. They may simply comply with those rules and principles while maintaining their own internal practices.

In order to ensure that fundamental rights and democratic control will be enforced in the digital environment, self-regulation is not enough. That is why it has

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21 MANILA Principles on Intermediary Liability. Available at https://manilaprinciples.org. Access on: Oct. 16th, 2023.

22 IGF Dynamic Coaliton on Platform Responsibility (DCPR). Available at https://intgovforum.org/en/content/dynamic-coalition-on-platform-responsibility-dcpr. Access on: Oct. 16th, 2023.

23 SANTA CLARA Principles on Transparency and Accountability in Content Moderation. Available at https://santaclaraprinciples.org. Access on: Oct. 16th, 2023.

been of core importance to achieve these goals the development of Digital Constitutionalism. It means a set of rules and principles that are being developed by public powers to enforce democratic control and respect to fundamental rights in the digital environment.

In the next two chapters will be approaching Digital Constitutionalism in Europe and in Brazil, in a comparative perspective regarding regulation on freedom of speech in the digital environment. The questions to be answered basically are: (i) do digital platforms have the duty to control speech? (ii) if so, in which terms? (iii) should they be liable for third-part illegal content?

4. FREEDOM OF SPEECH AND DIGITAL CONSTITUTIONALISM IN EUROPE

The European Union has in recent years set in motion new regulation to allow democratic control on content moderation by digital platforms, thus updating the framework created by the e-Commerce Directive (2000), the foundational legal framework for online services in the E.U.[24]. Regarding liability of intermediaries, the Directive exempts platforms from liability if content is about services who play a neutral, merely technical and passive role towards the hosted content.

In fact, the Directive on copyright in the DSM (Copyright Directive),[25] the amendments to the audiovisual media services Directive (AVMS Directive)[26], the regulation to address online terrorist content (TERREG)[27], or the adoption of the GDPR[28] are just some examples demonstrating how the Digital Single Market strategy has constituted a change of paradigm to face the consolidation of powers in the algorithmic society.

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[24] EUROPEAN UNION. **E-Commerce Directive**. Available at https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive. Access on: Oct. 16th, 2023.

[25] EUROPEAN UNION. **Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.** Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0790**.** Access on: Dec. 21st, 2023.

[26] EUROPEAN UNION. **Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version**). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218. Access on: Aug. 2nd, 2023.

[27] EUROPEAN UNION. **Regulation 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.** Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0784. Access on: Aug. 2nd, 2023.

[28] EUROPEAN UNION. **Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).** Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679**.** Access on: Aug. 2nd, 2023.

More recently (2022), the Digital Services Act[29] is another milestone in this path, as it regulates the behavior of providers of digital services in a fundamental rights perspective:

> *(3) Responsible and diligent behavior by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union (the 'Charter'), in particular the freedom of expression and of information, the freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection.*

The EU Code of Conduct on Countering Illegal hate Speech Online[30] was launched in May 2016 to prevent and counter the spread of illegal hate speech online.[31] This was a result of an agreement between the Commission and Facebook, Microsoft, Twitter and YouTube. In the course of 2018, Instagram, Snapchat and Dailymotion took part to the Code of Conduct, Jeuxvideo.com in January 2019, Tik Tok in 2020 and LinkedIn in 2021. In May and June 2022, respectively, Rakuten Viber and Twitch announced their participation to the Code of Conduct. The implementation of the Code of Conduct is assessed regularly in collaboration with a network of organizations located in different European countries using a common methodology.

It also must be cited the 2022 Code of Practice on Disinformation[32], a deliverance of major online platforms, emerging and specialized platforms, players in the advertising industry, fact-checkers, research and civil society organizations. This deliverance followed the Commission's Guidance of May 2021.

It has been signed and presented by 34 signatories that have joined the revision process of the 2018 code. It is not endorsed by the Commission, but the Commission exposes its expectations in the Guidance and considers that, as a whole, the Code fulfils those expectations. Signatories are expected to set in motion measures in

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29 EUROPEAN UNION. **Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).** Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R2065. Access on: Aug. 3rd, 2023.

30 EUROPEAN UNION. **The EU Code of Conduct on Countering Illegal Hate Speech Online**. Available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#:~:text=The%20EU%20Code%20of%20conduct%20on%20countering%20illegal,of%20conduct%20on%20countering%20illegal%20hate%20speech%20online". Access on: Oct. 16th, 2023.

31 On hate speech in digital platforms: VALLE, Vivian Cristina Lima López; ANTIK, Analía; LIMA, Eduardo Magno Cassitas Cavalcante de. O enfrentamento da desinformação e do discurso de ódio: um novo modelo regulatório para as redes sociais. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 10, n. 1, e239, ene./jun. 2023.

32 EUROPEAN UNION. **The 2022 Code of Practice on Disinformation**. Available at https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation. Access on: Oct. 16th, 2023.

several domains, such as: demonetizing the dissemination of disinformation; ensuring the transparency of political advertising; empowering users; enhancing the cooperation with fact-checkers; and providing researchers with better access to data.

In the meantime, on 3 October 2019, in Eva Glawischnig-Piesczek v. Facebook Ireland Limited[33], the Third Chamber of the European Court of Justice, interpreting the Directive 2000/31/EC ruled for the possibility of requiring a service provider to terminate or prevent an infringement; in the specific case, message containing statements that the Court valued as harmful to Ms. Glawischnig-Piesczek's reputation.

The ECJ also considered that the benefit from limitation of liability is applicable only if the provider acts expeditiously to remove or disable access to the harmful information, also stating that these measures must pay respect to the principle of freedom of expression and to procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

However, to advance Digital Constitutionalism in Europe, some steps are important, such as the horizontal effect of fundamental rights and the positive aspect of freedom of expression.

As for the first (horizontal effect of fundamental rights), the doctrine's proposal is to extend constitutional rules to the relationships between private acts (platform-user, for instance). This is a shift of conception comparing to the liberal vertical approach, that contends that constitutional norms apply exclusively in a vertical fashion to public actors, in order to block them from interfering on the liberty of private actors. The horizontal effect can impose constitutional obligations to respect fundamental rights directly on private parties; also, by their enforcement through judicial decisions (indirect effect) or by positive obligations on states to protect human rights[34].

To accomplish those goals, the classical purely National Constitutionalism falls short, in a context of globalization, privatization and digitalization. In Classical Constitutionalism the mais focus has been to constrain the nation state's political energies. In the world of global digital Constitutionalism, constitutionalization should focus on constraining entirely different social energies, be from public or private actors, in the fields of economy, technology, medicine, media and so forth (p 44)[35].

However, it is still a question to be answered if transnational regimes can be constitutional subjects, *i.e.*, if they are social institutions able to have their own constitution.

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[33] EUROPEAN UNION. European Court of Justice. **Case C18/18, Eva Glawischnig-Piesczek v. Facebook Ireland Limited (2019)**. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX-:62018CJ0018. Access on: Oct. 18th, 2023.

[34] GREGORIO, Giovanni de. **Digital Constitutionalism in Europe.** Reframing Rights and Powers in the Algorithmic Society. Cambridge, Cambridge University Press: 2022. p. 194.

[35] TEUBNER, Gunther. The Project of Constitutional Sociology: Irritating Nation State Constitutionalism. **Transnational Legal Theory**, London, v. 4, p. 44-58, 2013.

Or, if only national states can be constitutional subjects, but not international organizations or transnational regulatory regimes. The issue at stake is if these social institutions are able to regulate and mediate the different areas of public opinion and binding decision-making processes.

According to TEUBNER, this is possible from the legal sociology angle, asserting that transnational constitutions establish a distinct legal authority that structures a societal process and not simply a political process, as in nation state constitutions and is legitimized through this legal-political process (p 52)[36].

In recent years, the horizontal position of fundamental constitutional rights, asserting that constitutional norms also apply to private actors, has been adopted to varying degrees, and after systematic scholarly and judicial debate, in Ireland, Canada, Germany, South Africa, and the European Union.

This issue has also been subject to debate in the United Kingdom following the enactment of the Human Rights Act of 1998. In that jurisdiction, it is still an open question if and to what extent the rights involved will have horizontal as well as vertical effect. In the United States, the matter is ruled by a constitutional axiom, the state action doctrine, according to which (except for the Thirteenth Amendment) the constitution is binding only regarding governmental actors[37] (P. 395).

In the European Union, its primary law is understood to be applicable in a horizontal fashion. The ECJ has endorsed this rationale. In the Van Gend En Loos case, the ECJ stated that regardless of member states' legislation community law imposes obligations and confer rights upon individuals, as well as upon the member states and the institutions of the community[38].

In Walrave[39], the ECJ stated that the rule of non-discrimination applies to the action of public authorities as well as to rules that regulate in a collective manner gainful employment and the provision of services.

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[36] TEUBNER, Gunther. The Project of Constitutional Sociology: Irritating Nation State Constitutionalism. **Transnational Legal Theory**, London, v. 4, p. 44-58, 2013.

[37] GARDBAUM, Stephen. The "horizontal effect" of constitutional rights. **Michigan Law Review**, Ann Arbor, v. 102, p. 387-459, dec. 2003.

[38] EUROPEAN UNION. European Court of Justice. **Judgment of the Court of 5 February 1963. - NV Algemeine Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.** https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0026. Access on: Dec. 5th, 2023.

[39] EUROPEAN UNION. European Court of Justice. **Judgment of the Court of 12 December 1974. B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo**. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61974CJ0036. Access on: Dec. 5th, 2023.

In Bosman[40], the ECJ, regarding transfer of players between football clubs stated that business relationships between employers in a sector of activity fall within the scope of the Community provisions relating to freedom of movement for workers.

In Deliege[41], the ECJ asserted that the Community provisions on freedom of movement for persons and freedom services applies to the action of public authorities and to rules regulating gainful employment and the provision of services in a collective manner.

In Dink v. Turkey[42], the Strasbourg Court addressed a case concerning the protection of journalists' expressions clarifying that states have the positive duty to protect freedom of speech against private actors. The case regarded protection of journalists victims of a violence and intimidation campaign.

More recently, in Khadija Ismayilova v. Azerbaijan[43], the Strasbourg Court recognized that states are responsible for protecting investigative journalists.

As it can be seen from this progression, EU law has made relevant movements towards an actual Digital Constitutional System, including the constitutionalization in order to protect freedom of speech in the digital environment. This involves several pieces of legislation as well as decisions of the European Court of Justice and of the European Court of Humans Rights.

In the next chapter we will analyse how these steps have been taken in Brazilian legal system.

5. FREEDOM OF SPEECH AND DIGITAL CONSTITUTIONALISM IN BRAZIL

Although there have been developments in the field of regulation of the digital environment in Brazil,[44] some gaps remain, such as the accountability of digital plat-

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40 EUROPEAN UNION. European Court of Justice. **Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman. Available at** https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415**.** Access on: Dec. 5th, 2023.

41 EUROPEAN UNION. European Court of Justice. **Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)**. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0051. Access on: Dec. 5th, 2023.

42 EUROPEAN UNION. European Court of Human Rights. Second Chamber. **Affaire Dink c. Turquie** (Requêtes nos 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09).

43 EUROPEAN UNION. European Court of Human Rights. Fifth section. **Case of Khadija Ismayilova v. Azerbaijan**. (Applications nos. 65286/13 and 57270/14).

44 BÜTTNER, Marcielly; RODRIGUES, Roberto Tessis. Regulações sustentáveis para as redes sociais. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 11, n. 2, e267, jul./dez. 2024; VALLE, Vanice Regina Lírio do. Regulação de plataformas digitais: uma agenda propositiva a luz dos leading cases de judicial review no Brasil e nos EUA. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 23, n. 94, p. 139-164, out./dez. 2023.

forms in the proper control of fake news and disinformation.[45] In addition to that, Brazilian legal order still needs a systemic treatment regarding the digital environment.

In Brazil, developments in the field of Digital Constitutionalism have had a slower pace than in Europe. In 2014 the Internet General Civil Act (Marco Civil da Internet – Lei n. 12.965/14)[46] was enacted establishing principles, guarantees, rights and duties in the internet (art. 1). According to this legislative act, the use of internet in Brazil has adopted as a basis the freedom of expression, human rights, diversity, collaboration, consumer protection, social purpose, freedom of enterprise, among other values (art. 2).

It also states as principles of the internet in Brazil the privacy protection, data protection, internet neutrality, accountability of agents, freedom of business models as long as they do not conflict with other principles of law. Those principles do not exclude other principles of Brazilian Law or those deriving from international treaties to which Brazil is a party (art. 3).

More recently, regarding third-party accountability for content there has been the proposal for the Liberty, Responsibility and Transparency in the Internet Act (Projeto que institui a Lei Brasileira da Liberdade, Responsabilidade e Transparência na Internet — Projeto de Lei 2.630/2020)[47], still in the House of Representatives awaiting deliberation. The passage of this project into law is expected to fill a national legal gap to regulate information in social networks, especially the implementation of legal instruments that empower authorities to crack down on fake news and disinformation.

According to the proposed text, social network providers and private messaging services are entitled to require from users evidence of authenticity if there is reasonable doubt on the authenticity of an account or if an automated account is not identified as such. They also must develop technical measures in order to detect fraud of registration or account use in disaccordance to the rule of law. These measures must be part of the terms of use (art. 7).

Regarding moderation procedures (Section IV – art. 12), internet service providers must ensure users' right to access information and freedom of expression in the creation and enforcement of their terms of use, providing mechanisms for appeal and due process. In the event of a complaint or action taken based on the terms of use

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[45] VALLE, Vivian Cristina Lima López; RUIZ, Maria Guadalupe Fernandes; BÜTTNER, Marcielly. Fake news, influência na formação da opinião pública e impactos sobre a legitimidade da decisão pública. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 24, n. 95, p. 73-97, jan./mar. 2024; GREGORI, Isabel Christine Silva de; FINGER, Otávio Martins. Democracia algorítmica e poder de polícia estatal: a regulação de fake news no Brasil sob o prisma do direito administrativo ordenador. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 23, n. 92, p. 221-249, abr./jun. 2023.

[46] BRASIL. **Lei n.º 12.965, de 23 de abril de 2014.** Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on: July 27th, 2023.

[47] BRASIL. **Projeto de Lei n.º 2630/2020.** Available at: https://www.camara.leg.br/propostas-legislativas/2256735. Access on: July 27th, 2023.

regarding content or active accounts, the user must be notified about the reasoning, the review process, and the applied measure, as well as the deadlines and procedures for contesting it.

Providers may waive notification to users if they detect a risk of immediate harm that is difficult to remedy; harm to information security or user safety; violation of the rights of children and adolescents; severe impairment of the application's usability, integrity, or stability. The decision in the moderation process must ensure the right of response to the offended party in the same proportion and reach as the content deemed inappropriate.

As for transparency (Section V, art. 13), social media providers must publish quarterly transparency reports on their websites, in Portuguese, detailing content moderation actions in Brazil and measures taken to comply with this Law. These reports must include total number of users accessing the platform from Brazil and active Brazilian users; total number of content and account moderation actions based on private terms of use, including reasons, detection methods, and actions taken, among other detailed information.

According to the proposed text, in addition to other civil, criminal, or administrative penalties, social media and private messaging service providers are subject to (Art. 31): I – A warning, with a deadline to adopt corrective measures; or II – A fine of up to 10% of the economic group's revenue in Brazil for the previous fiscal year.

The text also imposes on social media and private messaging service providers the obligation to keep a headquarters and appoint legal representatives in Brazil. They must also maintain remote access from Brazil to their databases, which will store information related to Brazilian users and be used to preserve content in cases outlined by law, especially to comply with orders from Brazilian judicial authorities **(Art. 32.)**

In the judicial field, there are some landmark cases that deserve to be stressed.

In the Supreme Court there are two themes with grant of certiorari ("repercussão geral").

The first one is theme n. 987[48], under which the Supreme Court is demanded to decide on the constitutionality of article 19 of Bill n. 12/965/2014 (Marco Civil da Internet), that requires disregard of previous and specific judicial command for the accountability of the internet provider that does not remove inappropriate content.

The second one is theme 533[49] under which the Supreme Court is called upon to resolve on the constitutionality of the duty of the host internet provider to

[48] BRASIL. Supremo Tribunal Federal. **Recurso Extraordinário n.º 1.037.396**. Relator: Ministro Dias Toffoli. Repercussão geral reconhecida. Brasília, DF: Diário da Justiça Eletrônico, 4 abr. 2018.

[49] BRASIL. Supremo Tribunal Federal. **Recurso Extraordinário n.º 1.057.258.** Relator: Ministro Luiz Fux. Brasília, DF: Diário da Justiça Eletrônico, 28 jun. 2017.

scrutinize and, when considered inappropriate, to ban published content without judicial intervention.

In the ADI 7261, the Supreme Court ruled provisionally that Resolução 23.714/2022 do TSE (Resolution of the Superior Electoral Court) — which provides for measures against disinformation that threatens the integrity of the electoral process — does not exceed the scope of its normative competence and does not impose censorship or restriction on the media or editorial line of the printed and electronic media[50].

Regarding specially freedom of speech developments, the Superior Electoral Court signed Memoranda of Understanding with Whatsapp[51], Twitter[52], TikTok[53], Kwai[54], Google[55] and Facebook[56], establishing partnership with those platforms in order to tackle disinformation in the 2020 elections.

The Superior Electoral Court also enacted the RESOLUÇÃO Nº 23.714, DE 20 DE OUTUBRO DE 2022[57], stating that in case of sharing or dissemination of facts known to be untrue, the Superior Electoral Court, in a reasoned decision, will order the platforms to immediately remove the URL, URI or URN, under penalty of a fine of R$ 100,000.00 (one hundred thousand reais) to R$ 150,000.00 (one hundred and fifty thousand reais)

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50 BRASIL. Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade n.º 7261 MC/DF.** Relator: Ministro Edson Fachin. Brasília, DF: Julgamento virtual finalizado em 25 out. 2022.

51 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE nº 04/2022 — WhatsApp.** Brasília, DF: TSE, 2022. Available at: https://www.tse.jus.br/comunicacao/noticias/arquivos/assinatura-de-acordos-plataformas-digitais/memorando-tse-e-whatsapp/%40%40download/file/MoU%20TSE_WA.pdf. Access on: Nov. 29th, 2023.

52 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE nº 23/2021 — Twitter**. Brasília, DF: TSE, 2021. Available at: https://www.tse.jus.br/comunicacao/noticias/arquivos/assinatura-de-acordos-plataformas-digitais/memorando-tse-e-twitter/%40%40download/file/MoUTSE_Twitter.pdf. Access on: Nov. 29th, 2023.

53 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE nº 2/2022 — TikTok.** Brasília, DF: TSE, 2022. Available at: https://www.tse.jus.br/comunicacao/noticias/arquivos/memorando-tse-e-tiktok/%40%40download/file/MoU%20TSE_TikTok.pdf. Access on: Nov. 29th, 2023.

54 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE nº 2/2022 — TikTok.** Brasília, DF: TSE, 2022. Available at: https://www.tse.jus.br/comunicacao/noticias/arquivos/memorando-tse-e-tiktok/%40%40download/file/MoU%20TSE_TikTok.pdf. Access on: Nov. 29th, 2023.

55 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE — Google**. Brasília, DF: TSE, 2022. Available at: https://www.tse.jus.br/comunicacao/noticias/arquivos/assinatura-de-acordos-plataformas-digitais/memorando-tse-e-google/%40%40download/file/MoU%20TSE_Google%20%281%29.pdf. Access on: Nov. 29th, 2023.

56 BRASIL. Tribunal Superior Eleitoral. **Memorando de entendimento-TSE nº 29/2024 — Facebook**. Brasília, DF: TSE, 2024. Available at: https://www.tse.jus.br/comunicacao/arquivos/memorando-de-entendimento-tse-facebook-desinformacao-eleicoes-2024/%40%40download/file/TSE-memorando-entendimento-desinformacao-facebook-2024.pdf. Access on: Nov. 29th, 2023.

57 BRASIL. Tribunal Superior Eleitoral. **Resolução nº 23.714, de 20 de outubro de 2022**: dispõe sobre o enfrentamento à desinformação que atinja a integridade do processo eleitoral. Brasília, DF: TSE, 2022. Available at: https://www.tse.jus.br/legislacao/compilada/res/2022/resolucao-no-23-714-de-20-de-outubro-de-2022. Access on: Nov. 29th, 2023.

per hour of non-compliance, from the end of the second hour after receipt of the notification (art. 2, § 1.º).

In August, 2024 the TSE signed agreements with digital platforms to guide efforts in tackling disinformation during the 2024 Elections. These agreements are valid until December 31 of this year and can be extended by mutual agreement, with no financial obligations or resource transfers between the parties.[58]

In the agreements, companies such as Facebook Brasil (responsible for Facebook, Instagram, Threads, and WhatsApp), TikTok, LinkedIn, Kwai, X (formerly Twitter), Google, and Telegram commited to taking swift action to curb fake news and cooperate with the TSE in the Integrated Center for Combating Disinformation and Defending Democracy (CIEDDE). This center, inaugurated in March, centralizes efforts to combat false information spread online during the election period.

According to Article 9-D of TSE Resolution n. 23.610/2019, internet service providers that allow political-electoral advertising must adopt and publicize measures to prevent or reduce the circulation of blatantly false or severely miscontextualized information that could harm the integrity of the electoral process. The regulation also requires providers, upon detecting or being notified of such content, to take immediate and effective action to halt its promotion, monetization, and access. Additionally, providers must conduct an internal investigation of the facts, profiles, and accounts involved to prevent further dissemination of the material and inhibit illegal behavior, including disabling promotion or monetization services.

It is also worth commenting on the decision of Justice Alexandre de Moraes, in Petition 12.404, endorsed by the majority of the First Panel of the Supreme Federal Court[59]. The case revealed organized criminal activity perpetrated by several individuals threatening and coercing federal officers involved in investigating digital militias and attempts of a coup. Social media, especially "X" (formerly Twitter), has been used to expose personal data, photos, and threats against these officers and their families.

According to the decision, on August, 12, 2024, Elon Musk, the majority shareholder and international head of "X", explicitly stated his intent to continue disregarding Brazilian court rulings. He also announced plans to dissolve the Brazilian subsidiary, X BRASIL, clearly aiming to evade Brazilian legal obligations and court decisions.

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[58] BRASIL. Tribunal Superior Eleitoral. **Acesse a íntegra dos acordos com plataformas digitais para combater mentiras nas Eleições 2024**. 07 ago. 2024. Available at: https://www.tse.jus.br/comunicacao/noticias/2024/Agosto/confira-a-integra-dos-acordos-com-plataformas-digitais-para-combater-mentiras-nas-eleicoes-2024-1#:~:text=O%20Tribunal%20Superior%20Eleitoral%20(TSE)%20firmou,%20neste%20m%C3%AA. Access on: Oct. 3rd, 2024.

[59] BRASIL. Supremo Tribunal Federal (Primeira Turma). **Petição n.º 12404.** Relator: Ministro Alexandre de Moraes. Brasília, DF: Julgado em 3 set. 2024. Publicado em 4 set. 2024. Available at: https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22Pet%2012404%22&base=acordaos&sinonimo=true&plural=-true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true. Access on: Oct. 27th, 2024.

On August 18, 2024, in response to this ongoing defiance and Elon Musk's declaration of intent not to comply with Brazilian law and judiciary rulings, immediate orders were issued to block the bank accounts and financial assets of Twitter International Unlimited Company, T.I. Brazil Holdings LLC and X Brasil Internet Ltda.

The Supreme Court stated that Brazilian law requires that companies offering internet services in the country must have a local presence and comply with court orders to remove illegal third-party content. Failure to do so results in personal liability. In light of this reasoning, the Court ordered (among other obligations) the immediate, complete, and total suspension of the operations of X Brasil Internet Ltda. in Brazilian territory until all court orders in the case are complied with.

In another lawsuit, the Superior Court of Justice ruled that[60] it is legitimate for an internet application provider, without a court order and on its own initiative, to remove content from its platform when it violates the law or its terms of use. The Court reasoned that platforms are incentivized to comply with the law and their own terms to avoid legal disputes. This practice is seen as regulated self-regulation, with judicial oversight for abuses.

The Court also stated that article 19 of Law n. 12.965/2014 (the Internet Civil Framework) does not prevent providers from removing content that violates the law or terms of use and that a restrictive interpretation of Article 19 would hinder efforts to maintain an internet free of disinformation and illegal practices, promoting freedom, human rights, and privacy.

Although not in the same pace as European Law, Brazilian Law has made important steps towards the guarantee of freedom of speech in digital platforms, especially in the judicial field, where platforms should respect freedom of speech, as well as have responsibility on published content known to be untrue or harmful.

The ideal is to reach a real internet bill of rights providing for a full range of substantive rights, principles and themes proposed in order to connect a constellation of initiatives that can articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet[61]. The developments above, although more timid in Brazil than in Europe, point towards an expansion and strengthening of these rights.

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[60] BRASIL. Superior Tribunal de Justiça (Terceira Turma). **Recurso Especial n.º 2.139.749 – SP.** Relator: Ministro Ricardo Villas Bôas Cueva. Julgado em 27 ago. 2024. Brasília, DF: Diário da Justiça Eletrônico, 30 ago. 2024.

[61] GILL, Lex; REDEKER, Dennis; GASSER, Urs. Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights. **The Kerman Center for Internet and Society at Harvard University**, Research Publication n. 2015-15, November 9, 2015.

6. CONCLUSION

This paper analysed Digital Constitutionalism as a new moment of Constitutional Law. In order to accomplish this task, it considered rights, duties and powers in the digital environment. In the network and algorithmic society, big techs and their global social platforms (*e.g.*, Facebook, Twitter, Amazon, TikTok) occupy a relevant space that congregates traditional public authority powers in a private system. It is in this intersection that the concept of Digital Constitutionalism can be seen as a form of bringing democratic and constitutional control to the environment of digital powers.

Since the beginning of the XXI Century, digital platforms, algorithms and more recently artificial intelligence (AI) have progressively gained much space in people's lives, mobilizing great amounts of capital and unprecedented capillarity in societies. Consequently, there has been a shift of power from the states towards public enterprises, the so-called "big techs". These are enterprises that operate digital commerce and social networks and simultaneously capture data, shape the electoral system and, ultimately, the minds and behavior of people.

In contrast, this growth of public power has not always been accompanied by developments in the constitutional field. The role of Constitutionalism in this context has been minor in protecting fundamental rights and controlling the abuse of power in the digital environment. As a consequence, the internet has been the stage of unaccountable and unfettered power exercised by private enterprises.

In the European context, there have also been important developments in this field. The Union departed from a liberal (or neoliberal) posture towards an increasingly democratic and constitutional control of the digital environment. Acting accordingly to the neoliberal conception, constitutional societies have delegated expressly or not control in the digital environment to private actors, in a self-regulatory model. This has helped to flourish and develop a model of governance that escapes public oversight and is endowed with public powers, but without the proper constitutional limits and constraints.

Then, the proposal of Digital Constitutionalism is to challenge self-governance by the market. Rather, Constitutional Law principles and rules should be applied and enforced in the digital world to ensure fundamental rights in an environment where they have progressively been forgotten or deliberately set aside.

As it has been clarified elsewhere, this second paper on the topic Digital Constitutionalism focuses specially on freedom of speech and accountability of digital platforms. As it can be seen from this progression, EU law has made relevant movements towards an actual Digital Constitutional System, including the constitutionalization to protect freedom of speech in the digital environment. This involves several pieces of

legislation as well as decisions of the European Court of Justice and of the European Court of Humans Rights.

In order to set in motion constitutional and statutory control over digital platforms states started to regulate the operation of those so-called big techs. In Brazil, the Constitutional Amendment n. 115/2022[62] (fundamental right to data protection), the Data Protection General Act (Lei Geral de Proteção de Dados – Lei n.º 13.709/2018)[63], the Internet General Civil Act (Marco Civil da Internet – Lei n.º 12.965/14)[64] and the proposal for the Liberty, Responsibility and Transparency in the Internet Act (Projeto que institui a Lei Brasileira da Liberdade, Responsabilidade e Transparência na Internet - Projeto de Lei 2.630/2020)[65] are central examples, as well as a set of judicial provisions by the Federal Supreme Court, the Superior Court of Justice and the Superior Electoral Court.

Although not in the same pace as European Law, Brazilian Law has made important steps towards the guarantee of freedom of speech in digital platforms, especially in the judicial field, where platforms should respect freedom of speech, as well as be considered accountable for published content known to be untrue or harmful.

However, this has been made mostly by judicial provisions rather than by legislative measures. This state of affairs is not the best way to regulate the rights and duties of platforms in the country. Therefore, it is important to have a general and abstract legislative act that clarifies this legal framework, with broad democratic debate and greater security for users, companies operating in the area, and society in general.

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62 BRASIL. **Emenda Constitucional n.º 115, de 10 de fevereiro de 2022**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm. Access on: July 27th, 2023.

63 BRASIL. **Lei n.º 13.709, de 14 de agosto de 2018.** Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on: July 27th, 2023.

64 BRASIL. **Lei n.º 12.965, de 23 de abril de 2014.** Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on: July 27th, 2023.

65 BRASIL. **Projeto de Lei n.º 2630/2020.** Available at: https://www.camara.leg.br/propostas-legislativas/2256735. Access on: July 27th, 2023.

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BRASIL. Superior Tribunal de Justiça (Terceira Turma). **Recurso Especial n.º 2.139.749 – SP.** Relator: Ministro Ricardo Villas Bôas Cueva. Julgado em 27 ago. 2024. Brasília, DF: Diário da Justiça Eletrônico, 30 ago. 2024.

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No datasets were generated or used in this study; it is based solely on bibliographic and documentary research.