

COURTS AND CITIZENSHIP IN THE DIGITAL ECONOMY

A Socio-Legal Analysis of Access to Economic Activities

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The present book is the result of the research project "COURTS, CITIZENSHIP AND ACCESS TO ECONOMIC ACTIVITIES IN THE DIGITAL SOCIETY: A SOCIOLEGAL EXAMINATION OF THE ECONOMIC CLAIMS OF PLATFORMS IN COURT", carried out with funding from research support agencies under the Universal Call of the National Council for Scientific and Technological Development (CNPq), Coordination for the Improvement of Higher Education Personnel (CAPES) and MackPesquisa.

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PRESENTATION

The present book is the result of the research project “COURTS, CITIZENSHIP AND ACCESS TO ECONOMIC ACTIVITIES IN THE DIGITAL SOCIETY: A SOCIOLEGAL EXAMINATION OF THE ECONOMIC CLAIMS OF PLATFORMS IN COURT”, carried out with funding from research support agencies under the Universal Call of the National Council for Scientific and Technological Development (CNPq), Coordination for the Improvement of Higher Education Personnel (CAPES) and MackPesquisa.

This work is part of a collective effort to investigate, in an interdisciplinary manner, the challenges arising from the interaction between the digital society, economic demands, and the role of the courts, fostering both theoretical and empirical reflections on the role of Law in ensuring citizenship and legal certainty in contemporary economic activities.

In the context of rapid digital transformation, the relationship between courts, citizenship, and access to economic activities has become increasingly complex. This book explores how judicial institutions mediate and shape the rights of citizens to participate in economic life within the digital economy. By adopting a socio-juridical lens, the analysis highlights how legal frameworks, judicial decisions, and institutional practices influence the inclusion or exclusion of individuals from digital economic opportunities.

The study interrogates key questions: How do courts interpret and enforce rights related to digital economic participation? What role do legal norms play in ensuring fair access to platforms, financial systems, and digital labor markets? And how do these interpretations affect the broader concept of citizenship in a technologically-mediated society?

Drawing from case law, policy analysis, and critical legal theory, the presentation aims to shed light on the evolving nature of economic citizenship in the digital age. It argues that access to digital economic activities is not merely a matter of technological infrastructure or market dynamics, but also of legal recognition and protection – arenas where courts play a decisive role.

The main focus of the book is how the judiciary in Brazil and Italy has contributed to shaping access to economic activities in the digital economy, focusing on the interpretation and enforcement of rights that enable or restrict digital inclusion.

While both countries face different socio-political and economic contexts, they share challenges related to digital inequality, platform regulation, and the protection of fundamental rights in increasingly digitalized labor and economic environments. Through the examination of judicial decisions, constitutional principles, and regulatory frameworks,

the study compares how courts in Brazil and Italy respond to claims involving access to digital platforms, digital labor rights, and economic participation.

The analysis highlights the role of courts as active agents in constructing notions of economic citizenship in the digital age – either by expanding protections for marginalized groups or, conversely, by reinforcing exclusions. It argues that in both countries, the judiciary plays a pivotal role in balancing private economic interests with public commitments to citizenship, equality, and social justice in digital spaces.

The book is organized into two main parts, each addressing a key dimension of the relationship between law, citizenship, and economic participation in the digital society.

The first part *Conceptual Debates on the Socio-Juridical Analysis of Access to Economic Activities* lays the theoretical foundation by engaging with core concepts at the intersection of law, sociology, and digital economies. It explores how socio-juridical perspectives can deepen our understanding of access to economic activities in an era where platforms and algorithms increasingly mediate work, consumption, and financial transactions. Drawing from critical legal studies, political economy, and digital sociology, this section discusses notions such as economic citizenship, digital inclusion, legal subjectivity, and the role of courts in shaping access to economic rights. By doing so, it provides a conceptual toolkit for analyzing how legal frameworks and judicial interpretations structure opportunities and constraints within the digital economy.

The second part *Applications and Practical Challenges of Citizenship in the Digital Economy* focuses on applied and empirical dimensions, examining how the concepts discussed in Part I translate into practice – particularly through legal decisions, institutional responses, and socio-economic impacts. This section brings together case studies and comparative analyses, with a particular emphasis on the experiences of Brazil and Italy, to illustrate the real-world challenges of securing citizenship rights in digital economic environments. Topics include labor rights in platform work, data governance and access to services, digital inequality, and the judiciary's role in mediating conflicts between public interest and private innovation. It highlights both the transformative potential and the limitations of law as a tool for ensuring inclusive participation in the digital economy.

Together, these two parts aim to offer a comprehensive view of how socio-legal analysis can illuminate the evolving dynamics of citizenship, rights, and economic agency in digitally-mediated societies.

This work embodies an interdisciplinary effort to understand the complex intersections between law, citizenship, and economic participation in the digital platform age. By bringing together diverse analytical lenses – from legal theory and sociology to political economy and digital

studies – it seeks to offer a more nuanced and comprehensive account of the evolving nature of legal experience in a rapidly digitizing world.

Recognizing that digital platforms operate across borders, influence multiple jurisdictions, and challenge traditional notions of regulation and rights, the analysis presented here embraces the transnational dimension of the platform economy. The socio-juridical questions addressed throughout the work – ranging from access to digital labor markets to the role of courts in shaping digital citizenship – demand responses that are both context-sensitive and globally informed.

Importantly, this book is the result of international academic collaboration, led by the Postgraduate Program in Law and Political and Economic Studies (PPGDPE) of the Presbyterian University Mackenzie (Universidade Presbiteriana Mackenzie), Brazil. The project reflects the program's commitment to fostering critical, interdisciplinary, and comparative legal research, and to engaging with contemporary global challenges through collaborative knowledge production.

The articulation that made this book possible involved master's students, PhD's candidates, alumni from postgraduate programs, as well as postdoctoral researchers and professors in postgraduate programs. The initiative brought together not only members of the Postgraduate Program in Political and Economic Law at Universidade Presbiteriana Mackenzie, but also researchers from the Universidade do Amazonas (UNAMA). At the international level, contributions from the University of Florence, the University of Teramo, and Sapienza University of Rome reinforced the interdisciplinary and transnational character of the research.

As such, this work not only contributes to the academic debate on law and digital platforms but also stands as an example of how interdisciplinary and international scholarship can illuminate the legal dimensions of our increasingly digital and interconnected societies.

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PART I

CONCEPTUAL DEBATES ON THE SOCIO-LEGAL ANALYSIS OF ACCESS TO ECONOMIC ACTIVITIES

1.

ARTIFICIAL LAW: REFLECTIONS ABOUT THE LEGAL PERSONALITY OF AI

*Stefano Pietropaoli**

Law is artificial.

Law is artificial as it is a “representation”: a theatrical representation – always tragic and aware of being a sacred representation as well – performed by actors moving on a stage, adorned in costumes and masks.

In the drama of law, visual power is not lacking: the mask, the costume, the gesture of the actor. Yet, this yields to the power of sound: the power of words, and of silence. The human artifice that defines the law is language. The words of the law are deeds, or rather, artifacts, the product of an art, a technique, and a science that are the work of the human intellect. Jurists work with words: they develop concepts, invent argumentative strategies, and constantly assign meanings to linguistic statements. Words are not natural entities; they cannot be touched and have no physical form. Yet, they possess their own “materiality.” Once spoken, they become “facts”: facts that change the natural reality of those seated in the audience.

Law has become a science – a self-contained body of knowledge – because of its ability to create its own conceptual framework. Law thrives on concepts and definitions, in concepts and definitions. This is not to lock itself in the golden cage of an abstract formal system, but because concepts and definitions are the lenses through which it views the world. What we call “murder” does not exist outside the stage of the law. Certainly, an event like the killing of one man by another can occur, but what matters in legal terms is the qualification of that particular event, which generates consequences that concretely affect the natural reality. These consequences vary greatly depending on whether that event is “depicted” as a murder, an execution of a sentence, an act of war, and so forth. This qualification, the outcome of which will affect someone’s living flesh, occurs on the stage of law, in an artificial dimension distinct from natural reality.

The masks worn by the actors of the law have always been called persons. Today, a time shaped by increasingly radical projects of datafication and total computability, we must ask what this concept means, and specifically, what the relationship is today between the mask and the

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actor, between the person and the human being.

This relationship is once again a tragic one. The answer to this question determines the fate of the law (Campione, 2020). We stand at the threshold of a definitive break between man and person, of a departure from humanity as we have known it or misunderstood it, and the entry into an era populated by non-human or not entirely human persons. Once we cross that threshold, we may no longer find a stage where the many masks of law are still worn by human actors. We will have entered the era of non-human law, or no longer human law, or simply an era without law. As the Digest teaches: “All law is established for the sake of humans.” Erase humans for a moment, imagine a natural reality without human beings: can you still see the stage and hear the voice of law?

As is well known, in the mother tongue of law, *persona* means mask. According to a somewhat uncertain reconstruction, the term *persona* originally referred in Latin to the theatrical mask worn by actors to amplify their voices, making them *per-sonare* – that is, resonate in a way that could be heard even by spectators far from the stage (Bettini, 2000: 322). There are solid reasons (including philological ones) to doubt the accuracy of this reconstruction. However, what remains certain is that *persona* indicated the actor’s mask, evoking a character represented by an interpreter (Pizzorno, 2007). This actor is both detached from yet inextricably tied to the character he portrays. The mask is a representation of a figure made present in its absence.

The term *persona* was drawn into the legal domain at the very moment Roman legal science began to take shape (Orestano, 1968). From the very inception of *jus*, *persona* designated the mask with which an actor – a human actor – enters the stage of law (Stolfi, 2007). *Personam habere* (as well as *gerere*, *suscipere*, *sustinere*) means nothing other than wearing a mask that allows one to perform a role on the legal stage. Thus, *persona* is immediately revealed as an artifice, a construction, an artifact, a creation of human intellect and legal science in particular.

In theoretical terms, *persona* must be distinguished from concepts that intersect with it continuously, sometimes overlapping subjectivity, capacity to act, legal capacity, humanity, individual (Kobusch, 1993). Roman legal thought can help us to distinguish these different levels. In Rome, law as we still understand it today was born; it was the stage where *personae* perform, and the full awareness of the artificial nature of this instrument emerged. But in Rome, there was no trace of “legal subjects” (or “subjective rights”) or “capacity to act.” One must resist the temptation to search within the Roman legal experience for things that simply could not have existed yet, in the desperate pursuit of answers to “questions loaded with modernity” (Stolfi, 2005: 398).

In the division between *personae*, *res*, and *actiones*, the centrality of *persona* in Roman law is clearly affirmed by Gaius (Gai. 1.8: “Et prius

videamus de personis”), echoed by many jurists during the Principate, and reiterated in Justinian’s *Institutiones* (I., 1.2.12: “Ac prius de personis videamus”). Yet, this need to start with the *persona* immediately reflects in the evocation of a figure that reveals all the ambiguity of this artifice: the slave.

According to Gaius’ famous distinction (Gai. 1.9), *persona* is an attribute of both the free and the enslaved: “Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.” Slaves, therefore, are men – and this is already a point worthy of reflection – and men who can be represented by a mask on the legal stage. But there is more: not only can slaves be impersonated by free men, but they can also impersonate the free themselves.

A *sui juris* actor is a *persona* who performs as himself. A slave is an *alieni juris* actor, who can wear the mask of a free person. The mask of the slave can be worn by the master, just as the master’s mask can be worn by the slave, should the *dominus* authorize him to act on his behalf (for example, to enter into a contract in his place). The Roman slave, as is often repeated, is a “thing.” But he is also a “person.” There is no contradiction here, however unacceptable this statement may seem today to those who think of the “human person” in terms of 20th-century constitutionalism.

Actors exchanging roles, actors capable of playing multiple roles, actors who speak or remain silent: all of this takes place on the stage of law. The very fact that a single human being can impersonate different roles on the same stage explains the appropriation of the concept of *persona* by theology. One only needs to consider the endless debates that spanned the early centuries of Christianity, which eventually led to the formulation of the Trinitarian dogma, where God’s (singular) substance operates through three distinct persons (Milano, 1996).

Christian theology – most clearly with Thomas Aquinas, though many other authors deserve mention – began a process of assimilating the concept of “persona,” which soon came to designate every rational being (whether divine or human). From this shift, inseparably linked to a conception of nature as a rational order created by God (incidentally: a “nature” very different from that of the Romans), the identification between *persona* and human being emerged. This identification would guide not only 20th-century Christian personalism but also the many “secular” theories that relied on the potential expressed by the dignity of the human person. However, we must reiterate in its purely legal sense, *persona* does not coincide with the human being. Indeed, a *persona* can “be born” before the human being (as in the case of the *infans conceptus*) and can “die” after the human being (as in cases of vacant inheritance or presumed death; in the latter case, the *persona* can even “die” before the human being).

Furthermore, there was a decisive shift in the relationship between persons and things. In Roman law, a figure like that of the slave – capable of being both a *persona* and a *res* – was entirely justifiable. However, in medieval law, there was no longer any space for intermediate figures between persons and things. This theme is, of course, linked to the Christian distinction between soul and body. In Roman law (which recognized *res sacrae* but not *personae sacrae*), behind the *persona* was a human being with a soul and body, but the *persona* itself had no participation in sacrality. In medieval law, the *persona* was sanctified because it merged with and was confused with a rational individual endowed with a soul.

These distinctions gave rise to an ongoing exchange between legal science and theology concerning the concept of *persona* throughout the Middle Ages. Consider the idea of the Church as a *corpus mysticum* and the parallel reflection on the concept of *fictio juris* (developed particularly by Bartolo da Sassoferrato, Paolo di Castro, and Giovanni da Imola), as well as the theme of representation, which directly involves the question of the “*persona ecclesiae*” (for example, the priest, in celebrating the Eucharistic mystery, recites a formula in which the sacrifice is offered “not only in his own person, but in the person of the entire Church”).

It was with medieval jurists (particularly Bartolo and Baldo) that *persona* ceased to be merely “worn” and began explicitly to perform a function of “representation” (Hofmann, 2003). *Persona* thus began to take on a new semantic scope: it no longer (only) indicated standing in for another on the legal stage, but now also signified the fictitious unity of the representative and the represented. The history of what was once called *persona moralis* – today referred to as a “legal person” – can be traced to this shift. The legal person is a unity of humans and property, or even just a mass of property, that can exist on the legal stage through a “representative” (as in the case of a *universitas*). In this novel perspective, jurists seemed increasingly less aware that even the “natural person” is an artifice, as disembodied as the “legal person.”

This shift would later give rise to a series of reflections that, passing through the late Middle Ages, would culminate in the early modern era with the natural law conception that the political body, consisting of a multitude of subjects, finds its unity in the sole person of the sovereign. The State, the new protagonist of modernity, is a *persona* insofar as it is the center of attribution for the interests of a collective entity. It is a *persona*, and thus artificial. Oswald Hilliger, commenting on a passage from Donellus, aptly affirms that “man” is a term of nature, while “persona” is a term of law (“*homo naturae, persona juris civilis vocabulum*”).

However, it is essential to clarify a possible misunderstanding on this point. The preeminent theorist of the State, Thomas Hobbes, as is well known (in *De Homine*, XI, I, and *Leviathan*, I, XVI and XXVI), distinguishes between “natural persons,” who speak and act “in their own

person,” and “artificial persons,” who speak and act on behalf of someone else. For example, from this perspective, the State presents itself as a *persona civilis* that “acts” the subjects (Amendola, 1998).

The problem raised by Hobbes’s terminological choice, evoked by an expression like “natural person,” is evident: *persona* is artificial, yet “natural” at the same time. This is not, however, an oxymoron: when Hobbes uses the adjective “natural” in reference to *persona*, he does not intend to refer to an innate status belonging to human beings as such. Instead, he alludes to the possible – but not necessary – identity between the one wearing the mask and the mask itself. In other words, a “natural person” is the actor who plays himself, without any reference to a pre-social condition.

In the state of nature, there are no persons, only men. Men put on the mask of personality only after entering the civil state. Before the creation of the State, there can be no person because there is no law. This confirms the inseparable (and artificial) link between *persona* and law. Legal personality is not, therefore, an attribute of all human beings simply by virtue of belonging to the human species. It is the State that bestows this status upon its subjects. And it is always the State that can extend or restrict this recognition, regardless of biological membership in the human race.

Throughout modernity, the concept of the “legal subject” steadily emerged, along with the parallel development of the discourse on “subjective rights” (Ranieri, 2020). The concept of *persona* increasingly came to denote this subjectivity. And it is through this mechanism of reciprocal references that *persona* becomes a dispositive of subjectivation, while also serving as a mechanism of objectification and subjugation. In other words, the concept of *persona* – marked from the outset by the separation between mask and face – now defines not only boundaries between legal subjectivity and body, but also forms of separation between fully human beings and bestial beings.

Starting in the late 18th century, the legal dispositive of *persona* was employed to overcome the formal abstraction of the legal subject by including its bodily dimension. But this very recognition of the subject’s corporeality made it possible to imagine forms of “qualified life,” where *persona* is the component capable of dominating the animal part. The ability to distinguish between beings in hierarchies that reflect this differing capacity for control corresponds to the identification of fully human subjects (persons) and subjects who progressively deviate from that status, eventually leading to the non-human. As Roberto Esposito has argued, the being-person of some has always presupposed the non-being-person of others: the non-person is always the reverse of the person, its hidden prerequisite. There is no person without a non-person, just as there is no mask without a flesh-and-blood face, no appearance

without a foundational presence, and no fiction without a reality, at least an imaginary one, in the background (Esposito, 2007).

He thus began to dig into the depths of what – rightly and paradoxically at the same time – would come to be called the “age of rights”(Bobbio, 2014), a monstrous creature whose perversion would fully emerge with the violence of the Holocaust. As early as the late 19th century, legal science had begun a process – often creeping and largely unconscious – that first led to distinguishing between full persons and those with limited legal capacity, and later to denying the status of personhood to non-Aryans.

The Shoah thus marks the culmination of a long journey in which biological knowledge, slowly absorbed by legal theory, became the foundation for the Nazi practices of *thanatopolitics* (Rottleuthner, 1983). Justifications based on biology and genetics could now be used to transcend the abstract nature of the person, dismantling its image as a rational subject and center of rights and legal relations, with the result of reducing human beings to their biological substance: a striated substance that made racial hierarchies possible.

After the catastrophe, there was a strong need to restore centrality to the human being as a rational individual, endowed with inalienable rights and characterized by a dignity that could not be taken away. As previously mentioned, the term *persona* underwent a revival, simultaneously embraced by various cultures that had already employed it in some way. No other term was considered more suitable for supporting new legal, political, economic, and social struggles (Rodotà, 2015).

The consecration of this rediscovery can be seen in the 1948 Universal Declaration of Human Rights, which refers to the dignity of the “human person” as the bearer of inalienable rights. Consider also the Italian Constitution: when it recognizes the pre-existence of inviolable human rights, it affirms their applicability both to individuals and to social groups where their “personality” develops (Art. 2); by establishing that the Republic’s task is to overcome limits to the freedom and equality of citizens, it identifies this as necessary for ensuring the full development of the “human person” (Art. 3); and by affirming the right to health and prohibiting medical treatments unless provided for by law, it establishes the principle that no law may violate the limits imposed by respect for the “human person” (Art. 32).

While this rebirth of the person undoubtedly produced positive outcomes, it is also true that the supposed universalization of the person and humanity inherently follows political logics that inevitably generate new forms of discrimination, as revealed by the rhetoric of “humanitarian wars” that marked the end of the last century (Zolo, 2000).

As Roberto Esposito has argued, the concept of *persona* is marked

by a paradox: it seems destined to eternally reproduce the polarity between body and soul, and thus to create a divide between animality and rationality that can potentially lead to hierarchies of belonging to humanity.

In other words, the concept of *persona* appears unable to offer anything beyond what it was originally developed for. It was and remains an artificial product of human intellect, one that necessarily implies a distinction between the mask and the actor who wears it. From this perspective, it is important to highlight that legal science has consistently understood persons – who are always “legal” in the sense of being endowed with a legally relevant status – as entities not necessarily identical to individually identified living beings: associations, corporations, foundations are just a few examples of collective entities to which the law grants personal status.

Hans Kelsen argued that, from a theoretical perspective, the *persona* – whether “natural” or “legal” in traditional legal terms – does not “have” rights and duties but rather “is” this “complex of legal duties and subjective rights, the unity of which is figuratively expressed in the concept of the person. The person is merely the personification of this unity” (Kelsen, 1989).

Thus, there is no legal scandal in recognizing personality to subjects that are not even human collective entities: this mask can be worn to legally represent animals other than humans, as well as non-animal creatures, or even artificial intelligence. However, it is essential to be aware that, in a perfectly symmetrical yet coherent move, the law has excluded and continues to exclude the recognition of personality to living beings biologically belonging to the human species. According to the Italian Civil Code, a “natural person” arises at the moment of a human being’s birth – more precisely, when it is born alive. The unborn child has no mask. And, like the unborn child, those near death, slaves, women, infants, the insane, Jews, Native Americans: these are just some examples from a history also made of exclusions and discriminations, in which persons, quasi-persons, and non-persons have been and continue to be differentiated.

The dispositive of *persona* cannot escape this logic. Therefore, it might be useful to attempt a taxonomy of *persona*. First, we can identify “natural” persons (it should be noted: in the previously mentioned sense of artificial masks representing entities that concretely exist in natural reality). Among these, of course, are beings belonging to the species *Homo sapiens sapiens*, both as individuals and as groups. But without hesitation, other organic creatures, such as non-human animals, can also be included. I do not have the opportunity here to even briefly touch upon the vast debate on animal rights over recent decades. However, today it is no scandal for the animal mask to be worn in courtrooms across many

countries around the world.

This same possibility is increasingly recognized for other organic entities, such as plants. Among the many cases, one of the most famous is that of the white oak tree belonging to Colonel William Henry Jackson, who in 1832 bequeathed full ownership of itself and the land within an eight-foot radius of its trunk. In recent years, the arboreal mask has been joined by those of other entities that, despite teeming with life, might be described (with an approximation I hope will be forgiven) as “inorganic” in their unity. On March 15, 2017, the New Zealand Parliament granted the Whanganui River the status of a “person,” entrusting its representation to the Māori Iwi community. Shortly thereafter, the High Court of Uttarakhand in India recognized the legal personality of both the Ganges River and the Himalayan glaciers.

Thus, on the legal stage, we find masks of men, animals, trees, rivers, and mountains. But this is still not enough. Beyond all these “natural” persons, we also find “supernatural” persons. In 2010, once again in India, the Allahabad High Court allowed Bhagwan Sri Ram Virajman, a local deity, to appear through a representative to oppose the construction of a building on what was traditionally considered his *janmabhoomi* (birthplace). On November 19, 2019, in commenting on the resolution of this long legal battle, the *Business Standard* of New Delhi triumphantly headlined: “Ayodhya verdict: Bhagwan Sri Ram Lalla Virajman emerges the clear winner. Rejecting challenges to the lawsuit of the deity, the SC said the possession of ‘inner and outer courtyards’ be handed over to the trust or the body so constituted.”

However, we do not need to invoke exotic deities to identify cases of legally relevant personality being attributed to “supernatural” entities, which are also present at the heart of Western thought. The Hobbesian figure of the Leviathan – simultaneously god, man, animal, and machine – perhaps best reveals the power of an “artificial” *persona*, one that exists beyond the physical realm, yet arises from the sum of the subjects’ bodies to become both animated mechanism and deity (albeit a mortal one).

Yet in all these cases, the mask is worn by human actors. It is human beings who impersonate an animal, a mountain, or a deity. This brings us to the real issue posed by digital technologies. It is not about the question of recognizing legally relevant forms of personality for automatons, robots, or machines equipped with artificial intelligence. As should now be clear, this is a false problem: law has invented the *persona* to represent anything that can be depicted, so there is no legal issue (only a political one) in granting personality to a social android like “Sophia,” developed by Hanson Robotics Limited, which on October 25, 2017, obtained Saudi citizenship, and on November 21 of the same year, became the first artificial entity to receive a title from the United Nations through its appointment as Innovation Champion for the UN Development Program.

The real problem is, instead, that for the first time in history, the mask that enters the stage of law might not be worn by human beings.

If, as I repeat, there is no legal issue in attributing personality to a droid, thus allowing a human actor to perform on the legal stage with the mask of a droid, a completely different issue arises when the droid speaks “in the first person.” The droid, an artificial entity, paradoxically becomes in this way a “natural person” in the sense Hobbes attributed to the expression. The question is: can the non-human perform on the stage of law? Can law be “interpreted” by non-human actors? Would that still be law?

Law, as we have seen, can establish “persons” of any kind. From this perspective, the issue of recognizing the legal personality of an android with AI is easily surmountable. However, of much greater significance is the problem of an artificial entity that is not represented by a human being but seeks to act legally in its own right.

We might be tempted to deny this possibility, retreating to the stronghold of “human law” – created by humans for humans – with its many possible masks, all always worn by human beings. Yet, even if this response seems reassuring, the problem remains. I would like to briefly touch on two critical thresholds for legal science.

The first consideration: in this era of digital revolution, human personality is increasingly intertwined with “data.” I do not claim that it has become completely detached from the body. However, it seems evident that we are witnessing the first steps of a process of hybridization between the physical body (in the classical sense of *habeas corpus*) and the digital projection of intellectual activities and social practices that relate to that body. In this sense, we now speak of *habeas data*. As already mentioned, Article 2 of our constitution refers to the inviolable rights of man, both as an individual and in the social formations where his personality unfolds. This is one of today’s central issues: the place of social formations where our personality unfolds is increasingly represented by cyberspace. In this strange space, which lacks a physical location, our personality is thus played out – a personality that, naturally, can only be translated into data. We are witnessing a *datification* of the person. Personally, I do not believe that digitization in itself is problematic. What I do find problematic is the idea of reducing the human person in its entirety to data, to computable elements.

This leads to the second consideration, which evokes an even more radical issue. The technologies that challenge us today – and that seem to shake the already fragile concept of the “human” and the relationship between man and person – are those related to *human enhancement*. As Remo Bodei masterfully wrote, paraphrasing the Gospel of John: “The Word became machine, the spirit now blows within the inorganic, and reason and language, objectified in the form of an algorithm, inhabit

non-human bodies, creating an ‘augmented humanity’”(Bodei, 2019). This perspective explicitly refers to the transformation and “enhancement” of man. It is not about a remedial function to “repair” the body (for example, to correct the effects of an illness or injury), but about enhancing the physiological – both physical and mental – capabilities of human beings. Limbs, organs, and the mind are all part of a mechanism, a machine that can be manipulated and thus perfected.

The human world, made of flesh and blood, is merging with the machine world, made of bits and silicon. It is a double, converging movement. On the one hand, humans are increasingly using artificial prostheses of all kinds, which, once integrated into their bodies, allow them to develop entirely new abilities. On the other hand, machines are acquiring human-like capacities and qualities – rationality and autonomy that mimic human traits (if not actual “intelligence”) – and even a different physicality, based on the use of organic tissues. And while the creation of cyborgs may evoke a dystopian vision that still seems distant, the development of “molecular computers” is becoming a reality.

Organic and synthetic are fusing in a new symbiosis that cannot leave us indifferent. Man is being mechanized, and machines are being humanized. The deck of cards defining the limits set by human nature is being reshuffled. The paradox is that this horizon, which was conceived to overcome life’s uncertainties, marked by chance and fate, no longer allows for reliable prediction.

The old humanity we could appeal to through a biological dimension has become “antiquated,” giving way to the scenarios of the trans-human and the post-human. There is no space here to address the meaning of these terms, but what matters in these pages is to highlight that the boundaries of the human are now shifting under the pressure of the opportunity to fabricate a new species, guided by the idea that human enhancement is merely a phase in evolution where technology allows us to replace natural selection with deliberate human selection.

The non-therapeutic application of specific technologies to human biology thus involves more than just restoring health or normal functionality. This is where the technologies grouped under the acronym NBIC come into play: *nano* (operations at the atomic or molecular scale), *bio* (technologies applied to living organisms), *info* (techniques that process and use data), and *cogno* (disciplines studying thought in neuroscience, psychology, and linguistics). While today’s technologies seem to make these interventions concretely possible for the first time, the idea and the project behind them have accompanied modernity all along. In the early 17th century, Francis Bacon already imagined ways to “prolong life, delay old age, cure diseases considered incurable, ease pain, transform temperament, stature, and physical characteristics, strengthen and enhance

intellectual abilities, transform one body into another, create new species, transplant from one species to another, and create new foods using substances not currently used.”

On the one hand, such interventions could allow a person with a spinal injury to walk again. On the other hand, they could enable a person with bionic prostheses to run faster than an Olympic sprinter. These kinds of enhancements have been envisioned (and likely tested) in the military: the figure of a super-soldier, physically powerful, with exceptional sight and hearing, devoid of emotions (and thus without fear), incapable of feeling pain and fatigue, is, of course, the dream of every general.

This enhancement can extend beyond the strictly biological dimension (such as physical enhancement) to the neuro-cognitive dimension, leading to improved emotional and mental performance. This means not only enhanced athletes who could dominate their competition but also candidates for a judicial exam who, thanks to brain implants, could upload all relevant legal regulations, jurisprudence, and doctrine during the test.

The question that must concern us is whether everything that is technologically possible should be considered “ethically permissible, socially acceptable, and legally valid.” The exaltation of technology risks equating human enhancement with the domination of subjective will over objective nature. Hence, some scholars have proposed countering the dimension of *enhancement* with that of *achievement*, meaning the “acquisition, fulfillment, attainment, as the development and realization of the potential inscribed in becoming what one is, through active effort and personal commitment that allows one to modify one’s natural abilities by improving oneself.” In this view, the path offered by technology is not the only way to improve humanity: “enhancing” oneself requires effort, struggle, and individual tension, with the goal not of amplifying certain human functions but of achieving overall “human growth.”

The issue, then, is no longer simply understanding the relationship between man and *persona* or questioning whether the mask of the *persona* can be worn by a completely artificial creature. The more urgent issue is understanding whether that mask can be worn by a hybrid subject endowed with prosthetic knowledge – the ability to access information that the individual does not know themselves but only through neuro-technology implants.

Far from being science fiction, a scenario populated by neuro-prostheses that allow the permanent use of computer and neuroscientific technology raises questions about the new boundaries that will define the very concept of “humanity” and the freedom of the “human person” as a protected subject. In the world of augmented humanity, human enhancement technologies could delineate new legal statuses of personal-

ity accessible only to those with the financial resources to afford them. This would create a division (and discrimination) between enhanced and non-enhanced humans.

We must therefore ask, along with Stefano Rodotà: What happens, however, when scientific and technological innovation allows for the improvement of physical and intellectual performance? If these new opportunities are offered selectively, if access depends on financial resources, we arrive at a caste society; citizenship becomes based on property; more dramatically, we reach a human divide, a world that accepts the construction of structurally different people. [...] Should we conclude that ‘man is obsolete,’ as Günther Anders suggested? Or should we instead resume the connection between dignity and equality, the only one that can avoid the radical separation between people and the war between humans and post-humans with different qualities? (Rodotà, 2007).

To attempt an answer, the philosopher of law must pose an additional question: to whom does the law speak? And, more importantly, who speaks the law? It is not a matter of what, but who, is at issue. In the legal field, the human individual is not a *persona* as such, but becomes one, like any collective entity, when the legal system makes them a center of attribution for rights and legal relations. This is the key point. To whom does the law speak? And who speaks the law? *Personae* – that is, masks. Stage masks for the legal theater. And so, in conclusion, the decisive issue is whether, in the age of artificial intelligence, this mask will still be worn solely and exclusively by biologically human beings.

There was a time when it would have been relatively simple to provide a legal definition of “man” based on biological identity. But just when biology entered the scene, we witnessed the worst discriminations in our history. That time is now over. We must now understand whether the law can confront an unprecedented scenario: one in which Sophia’s mask will no longer be worn by a human being but by a non-carbon-based *sui juris* entity, and in which the actor we once could have called human will no longer be entirely so.

Will the day come when the jurist, with a heart reduced almost to ashes, asks an entity with artificial intelligence to take care of their end and that of their science?

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2.

FORME DI DISCRIMINAZIONE NELL'ACCESSO AI DIRITTI DI CITTADINANZA DIGITALE. L'ACCESSO ALL'IDENTITÀ DIGITALE PER I CITTADINI E LE CITTADINE DI PAESI TERZI

*Bianca Cassai**

1. La soggettività nella cittadinanza digitale: presupposti, limiti e nuove disuguaglianze.

Il dibattito relativo alla tutela dei diritti nell'era digitale impegna oggi gli studiosi di diverse branche del sapere. Il continuo aumento di interazioni sociali digitali¹ impone agli operatori del diritto di interrogarsi circa l'utilizzo dei tradizionali schemi interpretativi per la verifica, in punto di effettività, della tutela dei diritti nel nuovo spazio digitale.

Sotto l'angolo visuale della relazione tra privato e pubblica amministrazione, il discorso pone al centro il nuovo soggetto di diritto, il *cittadino digitale*, che con il suo corredo di diritti e libertà digitali si atteggia quale interlocutore legittimato all'accesso ai nuovi *digital public services*. Come ciclicamente accade nell'evoluzione del pensiero giuridico, anche con riguardo al concetto di cittadinanza digitale l'elaborazione del nuovo soggetto giuridico consente di adeguare la staticità astratta dell'individuo alle evoluzioni del realismo del diritto attribuendo soggettività giuridica laddove ancora questa non c'è. Questa nuova dimensione della soggettività individuale, data dal processo di moltiplicazione e specificazione dell'individuo nella socialità digitale, si intreccia e crea tuttavia importanti cortocircuiti con i diversi *status* giuridici già esistenti all'interno del tessuto sociale.

Come descritto da uno grande maestro: la frammentazione del soggetto di diritto ha reso possibile riconoscere soggettività a quei tanti che non ne avevano, ponendo un problema di compatibilità tra soggetto astratto e riconoscimento delle differenze. Questa contraddizione trova una sua formidabile sintesi proprio nell'articolo 3 della Costituzione italiana, dove, pur continuando ad far riferimento all'uguaglianza formale e

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¹ Al pari delle tradizionali forme di interazione sociale, anche le interazioni realizzate nello spazio digitale partecipano alla definizione e significazione delle norme giuridiche. Riferendoci alle teorie dell'interazionismo simbolico dei sociologici della scuola di Chicago, è chiaro che le interazioni digitali concorrono alla definizione di un nuovo ruolo sociale, nella costruzione del *sé*, ovvero quello dell'*utente digitale*.

quindi al soggetto di diritto astratto si costituzionalizza la possibilità che su tale soggetto possa irrompere la realtà del diritto ricca di molteplicità e differenziazioni rendendo quindi necessario un intervento pubblico di riequilibrio delle disuguaglianze in quella che prende il nome di uguaglianza sostanziale (Rodotà, 2012: 147).

L'articolo 3 con il suo riferimento all'uguaglianza sostanziale si pone quindi come guida per l'affermazione di una fisiologica frammentazione del soggetto di diritto che deve trovare tutela nella sua diversità grazie all'intervento pubblico di *rimozione degli ostacoli* nel rispetto della dignità umana.

Il dato concreto mostra come oggi l'applicazione del principio di uguaglianza sostanziale trovi la sua massima manifestazione patologica delle forme di discriminazione istituzionale². Spesso, infatti, proprio l'utilizzo di categorie e *status* diversificati consente ai poteri pubblici di prevedere regimi differenziati (illegittimi) di tutela, per il tramite dell'insidiosa forma della discriminazione istituzionale.

Come è stato correttamente notato, nonostante ormai da tempo la cittadinanza nazionale abbia smesso di essere l'unico presupposto per l'attribuzione di diritti (Benhabib, 2006: 46), i singoli Stati continuano ad utilizzare categorie giuridiche come quella di "straniero", "rifugiato", "non residente" per privare le persone di alcuni diritti fondamentali, determinando dei regimi differenziati di tutela e replicando un noto schema in cui la contrapposizione tra appartenenza politica e confini nazionali sembra priva di risoluzione³.

Il processo di costruzione della cittadinanza digitale non può dirsi immune da tale antinomia.

Il presente contributo intende presentare le discriminazioni attualmente esistenti in Italia nell'accesso alla nuova *cittadinanza digitale* e in particolare nell'accesso all'identità digitale⁴ quale suo presupposto, mo-

² Dal Glossario Unar, si definisce discriminazione istituzionale "quando un ente pubblico o una qualsiasi altra istituzione manca di fornire un servizio appropriato e professionale o prevede una norma o un regolamento che pregiudicano una particolare categoria di persone si configura una discriminazione istituzionale. La principale caratteristica di questa forma di discriminazione è che si esplica in modo impersonale attraverso regolamenti, procedure e prassi". v. *Manuale Contrastare le prassi discriminatorie con l'antidiscriminazione. Manuale delle buone pratiche* – Progetto #ionondiscrimino – Fondo Asilo, Migrazione e Integrazione (FAMI) 2014-2020.

³ Secondo il pensiero di Benhabib tale contraddizione trova una sua mediazione nella teoria delle "interazioni democratiche" quale forma di "politica giusgenerativa". Cfr. Benhabib, Seyla. *I Diritti Degli Altri Stranieri, Residenti, Cittadini*, cit.

⁴ Il Sistema Pubblico di Identità Digitale (in acronimo SPID) è il sistema unico di

strando come oggi l'accesso all'identità digitale si atteggi come *il diritto di avere diritti*⁵ nell'Era digitale.

La soggettività giuridica nel modo digitale passa dalla possibilità di avere una propria *digital identity* con la quale il cittadino è in grado di interagire con la pubblica amministrazione e accedere ai servizi pubblici elettronici. Attualmente il sistema di attribuzione dell'identità digitale è in parte demandato a soggetti privati, gli *identity provider*, che in esecuzione delle indicazioni fornite dall'Agenzia pubblica per l'Italia digitale stanno perpetrando gravi forme di discriminazione⁶. Infatti, la prassi amministrativa italiana aggancia la possibilità di ottenere una propria identità digitale all'annoso⁷ utilizzo del criterio della residenza.

accesso con identità digitale ai servizi online della pubblica amministrazione italiana e dei privati aderenti. La normativa che disciplina il sistema di identità digitale è contenuta nel CAD e nelle successive disposizioni attuative, si rinvia su questo al par. 2.

⁵ Le riflessioni filosofiche a proposito dei diritti umani secondo il concetto arendtiano del diritto ad avere diritti, inteso come il diritto ad avere un proprio posto nel mondo, ha assunto una specifica accezione nella riflessione giuridico filosofica. Nel suo testo "Il diritto ad avere diritti" Stefano Rodotà mirabilmente descrive l'esigenza di un'innegabile esigenza di diritti e di diritto che innerva i moderni sistemi giuridici: innanzi alla grande sfida della globalizzazione, all'affermazione sempre più forte di poteri privati in grado di affermarsi anche oltre i tradizionali regimi politici nazionali, l'appello ai diritti individuali e collettivi rappresenta la strada necessaria per impedire che tutto sia assoggettato alle logiche di mercato. Lo spazio dei diritti supera dunque i confini territoriali dei singoli Stati nazionali, supera le frontiere, si sposta all'interno di uno spazio globalizzato. Ed è grazie a questo movimento del diritto all'interno di un sistema globale che si pone l'esigenza di rispondere ad un fenomeno nato come economico attraverso strumenti giuridici. L'era digitale ridefinisce un nuovo sistema giuridico all'interno del quale si muove il nuovo soggetto di diritto, il cittadino digitale la cui capacità di agire è data dalla possibilità di avere una propria identità digitale. Su questo si rinvia alle riflessioni che seguono

⁶ La disciplina europea in materia di antidiscriminazione equipara la discriminazione, diretta e indiretta, al così detto "ordine di discriminare" considerando discriminazione anche l'ordine di compiere un atto discriminatorio (cfr. direttiva 2000/43/CE e tale fattispecie risulta assolutamente operante per derivazione anche nel nostro ordinamento interno.

⁷ La materia anagrafica in Italia è regolata dalla legge n. 1228/1954 che disciplina il registro anagrafico della popolazione residente e definisce quelli che sono i requisiti e i criteri per l'iscrizione. Per portare alcuni esempi di come questa distinzione normativa abbia degli impatti in punto di discriminazione, prestazioni come i sussidi per cittadini indigenti come l'assegno sociale erogato alle persone in età pensionabile ma prive dei requisiti contributivi necessari per il riconoscimento della pensione di vecchiaia, o il reddito di inclusione,

Come chiaramente racconta lo studio dalla giurisprudenza nazionale e sovranazionale, una delle pratiche di discriminazione istituzionale maggiormente diffusa in Italia è proprio quella dell'utilizzo del requisito dell'iscrizione anagrafica come criterio di accesso a determinate tutele. La disciplina italiana in materia anagrafica presenta una specifica peculiarità data dalla distinzione tra *residenza* e *domicilio*⁸. Storicamente la legislazione sociale⁹ aggancia al requisito della sola residenza la possibilità di accedere a prestazioni e servizi essenziali, lasciando prive di tutela sociale tutte quelle persone che non hanno una formale iscrizione anagrafica ancorché regolarmente domiciliate sul territorio nazionale. Questa stretta connessione tra residenza e diritti sociali rende evidente la capacità esponezionale di marginalizzazione di questo meccanismo. Un meccanismo discriminatorio che è di immediata percezione con riferimento agli utenti stranieri che sempre più spesso vivono enormi difficoltà nell'accesso al sistema di iscrizione anagrafica perché vittime di discriminazioni sistemiche¹⁰; si pensi alle diffuse pratiche di discriminazione nell'accesso all'al-

ricosciuto a soggetti in condizioni di grave marginalità economica perché prive di reddito, sono subordinate al possesso di un requisito di storicità di residenza decennale. In questo quadro, emerge la necessità di definizione della residenza come diritto sociale in grado di garantire l'accesso ad una serie di diritti fondamentali. Interessante sul tema della residenza come diritto sociale si veda, Ciuffoletti, Sofia, 2022, *La costruzione dei diritti nel solco dell'effettività. La residenza come diritto sociale nella giurisprudenza della corte europea dei diritti umani*

⁸ In riferimento normativo è all'art. 43, codice civile, REGIO DECRETO 16 marzo 1942, n. 262. Tale norma e definisce il domicilio di una persona "come il luogo in cui essa ha stabilito la sede principale dei suoi affari e interessi" e la residenza come il luogo "in cui la persona ha la dimora abituale".

⁹ Questo in effetti non stupisce se si considera che la legislazione sociale è espressione dei diritti di libertà positiva. Come sottolineato l'universalità, o indistizione, o indiscriminazione, nell'attribuzione e nell'eventuale godimento dei diritti di libertà, non vale nei riguardi dei diritti sociali, rispetto ai quali gli individui sono genericamente uguali, ma specificatamente non lo sono (Bobbio, 2008: 71). Questo processo di moltiplicazione per specificazione implica un intervento attivo delle politiche statuali, che non può che avere gli esiti della discriminazione istituzionale nella logica del diritto a somma zero di cui si fanno promotori gli attuali governi.

¹⁰ Secondo il glossario UNAR con l'espressione discriminazione sistemica si intende una forma complessa e articolata di discriminazione che opera sia a livello micro (interpersonale) sia a livello macro (istituzionale, politico, legislativo) originando una situazione nella quale le persone sono trattate in modo discriminatorio in modo sistematico e vivono una situazione di oggettivo svantaggio in molti ambiti del vivere sociale. v. *Manuale Contrastare le prassi discriminatorie con l'antidiscriminazione. Manuale delle buone pratiche* –

loggio sia privato che pubblico o alle difficoltà ad accedere ad un lavoro legale in ragione del loro stato di bisogno e della precarietà del loro *status* amministrativo. Tali circostanze, che di fatto rendono complessa la possibilità di avere un regolare alloggio, incidono sulla possibilità di ottenere una residenza.

Se la possibilità di vedersi attribuita una soggettività giuridica come cittadino digitale deve necessariamente passare dal requisito della residenza è chiaro che si pone un problema in punto di uguaglianza anche con riferimento al tema della cittadinanza digitale.

Per quanto qui di interesse, si cercherà di mostrare come in Italia il criterio della residenza¹¹ funge anche in questo contesto come criterio di esclusione per l'accesso allo statuto dei diritti di cittadinanza digitale.

Come è stato riconosciuto dalla giurisprudenza in altri contesti, l'utilizzo della residenza come criterio di appartenenza o esclusione ad un gruppo di *aventi diritto* si pone come indirettamente discriminatorio e in quanto tale vietato dalla normativa nazionale e sovranazionale¹². Le

Progetto #ionondiscrimino – Fondo Asilo, Migrazione e Integrazione (FAMI) 2014-2020.

¹¹ Storicamente la legislazione sociale italiana ha agganciato la possibilità di accedere ai servizi sociali pubblici al criterio della residenza, riconoscendo l'accesso a tali servizi ai soli cittadini residenti iscritti all'anagrafe nazionale. Il criterio del radicamento territoriale quale strumento di controllo e di contrasto a fenomeni di *dumping sociale* ha consentito un utilizzo diffuso di questo strumento anche a livello europeo, tanto che in moltissimi casi le prestazioni non solo sono riservate alla sola popolazione iscritta all'anagrafe nazionale, ma in via preferenziale a quei soggetti che abbiamo una storicità di residenza sul singolo territorio. Per fare alcuni esempi, secondo la legislazione regionale dalla Toscana solo i residenti iscritti all'anagrafe nazionale hanno diritto di accedere ai servizi per l'impiego, con la conseguenza che chi si trovi privo di residenza non potrà accedere a tantissimi dei servizi agganciati all'iscrizione al Centro per l'impiego. Ancora, molte sono le prestazioni sociali che prevedono il requisito di un numero di anni di residenza per poter accedervi, come l'Assegno sociale, l'assegno di inclusione e il Nuovo Assegno Unico per i figli a carico. Come si specificherà più avanti, la giurisprudenza ha avviato un lungo processo di erosione di tale requisito, riconoscendo la discriminatorietà in diversi casi soprattutto con riferimento all'istituto della residenza protratta.

¹² Il diritto antidiscriminatorio nazionale ha una storica derivazione europea. Peraltro, diverse sono le disposizioni in materia di uguaglianza e parità di trattamento imposte a livello sovranazionale e direttamente vincolanti all'interno del nostro sistema nazionale. I divieti di discriminazioni sono presenti ormai in tantissime delle direttive e dei regolamenti adottati dall'Unione europea a si atteggiano quali norme di immediata applicabilità all'interno dei singoli sistemi nazionali secondo il meccanismo dell'efficacia diretta verticale con la conseguenza che il cittadino potrà invocare avverso lo Stato l'esistenza di un

argomentazioni giuridiche di contrasto a fenomeni di discriminazione istituzionale per meccanismi che agganciano l'accesso a determinate tutele o diritti al possesso della residenza (ovvero che introducono criteri di preferenza in base alla storicità di residenza su un territorio) hanno già vissuto – e stanno ancora vivendo – battaglie di “giustizia” all'interno delle aule giudiziarie non solo dei nostri giudici nazionali¹³, ma anche in quelle dei giudici europei¹⁴. Il criterio della residenza è ormai un “osservato speciale” nel campo della tutela antidiscriminatoria e anche in questo contesto se ne rende necessaria una attenta disamina.

Richiamando le teorie di Benhabib sulle interazioni democratiche¹⁵,

divieto di discriminazione imposto a livello europeo e ottenere la disapplicazione della norma nazionale non conforme. Il meccanismo della disapplicazione diretta, come chiarito dalla Corte di giustizia (Sentenza del 22 giugno 1989, *Fratelli Costanzo c. Comune di Milano*), opera non solo nei confronti dei giudici ma anche delle amministrazioni dello Stato.

¹³ Si veda su questo la recente sentenza n. 147/2024, Corte Costituzionale, con la quale la Corte ha dichiarato, con riferimento alla legge regionale del Piemonte, incostituzionale il requisito di cinque anni di residenza o di attività lavorativa nella Regione di tre anni nell'ambito di competenza degli enti gestori delle politiche socioassistenziali per l'accesso all'edilizia sociale, riconoscendone il carattere discriminatorio. Tale pronuncia conferma un orientamento ormai consolidato volto ad affermare che non si ravvisa alcuna ragionevole correlazione fra l'esigenza di accedere ad una determinata prestazione e la pregressa e protratta residenza sul territorio regionale (v. sentenze Cort. Cost. nn. 67 del 2024, 145 e 77 del 2023, 44 del 2020).

¹⁴ La previsione del requisito della residenza ai fini dell'accesso ad una determinata tutela si pone come forma di discriminazione indiretta nella misura in cui sfavorisce *in fatto* un certo gruppo sociale dall'accesso a determinate prestazioni. Da ultimo, con sentenza della Grande Sezione del 29 luglio 2024, nelle cause riunite C-112/22 e C-223/22, la Corte di Giustizia dell'Unione europea ha riconosciuto il requisito della residenza decennale previsto dalla normativa italiana per l'erogazione del Reddito di cittadinanza (ora reddito di inclusione) come forma di discriminazione indiretta perché pone in una condizione ingiustificata di svantaggio i cittadini di Paesi terzi soggiornanti di lungo periodo. Interessante il passaggio della sentenza in cui si evidenzia che tale condizione di svantaggio si produce anche a danno dei cittadini nazionali che abbiano esercitato il diritto alla libera circolazione e che abbiano fatto rientro in Italia a seguito di un periodo di residenza all'estero; su questo la Corte osserva come “una misura può essere considerata una discriminazione indiretta senza che sia necessario che essa abbia l'effetto di favorire tutti i cittadini nazionali o di non sfavorire soltanto i cittadini di paesi terzi soggiornanti di lungo periodo, ad esclusione dei cittadini nazionali (v., per analogia, sentenza del 20 giugno 2013, Giersch e a., C-20/12, EU:C:2013:411, punto 45)”.

¹⁵ Come affermato dall'autrice, il concetto delle “interazioni democratiche” serve come strumento di mediazione tra l'impegno verso norme internazionali e co-

possiamo affermare che lo strumento antidiscriminatorio rappresenti forse uno degli strumenti giuridici più efficaci di “politica giusgenerativa” in grado di supportare la spinta universalista nell’accesso ai diritti erodendo le politiche di appartenenza imposte dagli Stati. Il diritto antidiscriminatorio altro non è che l’*osservatore* che vigila sulla corretta attribuzione dei diritti (in senso evolutivo) nei confronti di quelle categorie giuridiche di essere umani prodotte dallo Stato (“rifugiati”, “stranieri”, “minoranze”, “non residenti”) che, seppur formalmente deputate a redistribuire in maniera ugualitaria i diritti e le libertà anche nei confronti dei *forestieri*, altro non fanno – indirettamente e sostanzialmente – che creare dei regimi di disuguaglianza legalizzata.

2. Il processo di digitalizzazione nella pubblica amministrazione italiana: dal diritto nazionale a quello sovranazionale (cenni).

Volgendo lo sguardo al discorso sulle discriminazioni digitali, il dialogo, anche giuridico, sulla trasformazione informatica ha assunto oggi una dimensione globale. Sebbene il termine *digital transformation* abbia prima di tutto e più rapidamente interessato organizzazioni private, l’esigenza di incrementare l’efficienza e la facilità di accesso ai servizi risulta obiettivo assolutamente prioritario anche con riguardo alle attività delle pubbliche amministrazioni.

Di *e-governance* si discute a livello internazionale e sovranazionale e possiamo oggi osservare la costruzione di un modello uniforme di G2C (*government to citizen*) ad esempio nello spazio giuridico eurounitario.

Prima di affrontare il tema che con questo contributo ci si propone di indagare, cercheremo brevemente di inquadrare sotto un profilo storico quella che è stata l’evoluzione normativa in Italia in materia di digitalizzazione della pubblica amministrazione, quello che è stato il processo di costruzione della c.d. *cittadinanza digitale* e come si è sviluppato il sistema d’identità digitale.

Seppur sia del tutto evidente come in una dimensione globale (dove a livello sovranazionale si è costruito un sistema di identità digitale europeo c.d. eIDAS¹⁶ e in cui l’Europa e gli Stati Uniti discutono per la

stituzionali indipendenti dal contesto e la volontà delle maggioranze democratiche. Come si legge dall’autrice “le interazioni democratiche sono complessi processi pubblici di discussione, deliberazione e apprendimento attraverso i quali le rivendicazioni di diritti universalistici vengono contestate e contestualizzate, invocate e revoked, all’interno delle istituzioni politiche e giuridiche” (Benhabib 2006: 15).

¹⁶ A livello europeo, con il regolamento n. 910 del 2014 sull’identità digitale, c.d. Regolamento eIDAS (electronic IDentification Authentication) che ha l’obiettivo di fornire una base normativa a livello unitario per i servizi fiduciari e i mezzi

costruzione di un sistema di identità digitale integrato) il discorso nazionale perda apparentemente di rilevanza, si ritiene fondamentale porre immediatamente in rilievo quelle che sono le criticità di applicazione del sistema di identità digitale nella sua dimensione nazionale per evitare che queste si riverberino poi a livello sovraordinato.

Il lento cammino verso l'informatizzazione e la digitalizzazione della pubblica amministrazione in Italia si avvia già a partire dalla fine degli anni '70¹⁷ del secolo scorso. Possiamo forse dire che l'Italia, seppur timidamente, si pone come precursore di questo processo all'interno del panorama europeo. Tuttavia, la svolta fondamentale si ha con l'adozione del Codice dell'Amministrazione Digitale (da ora CAD) promulgato con il d.lgs. n. 82/2005 con una funzione di riordino e sistematizzazione delle disposizioni esistenti.

Nonostante i molteplici provvedimenti di modifica operati sul CAD, si dovrà attendere un altro decennio per avere interventi che possano dirsi decisivi in materia. Di particolare interesse la così detta legge Madia (L. n. 124/2015) da cui poi si adottarono i principali atti di riforma del CAD (il d. lgs. n. 179/2016 e il d. lgs. n. 217/2017), e il c.d. pacchetto europeo del 2016¹⁸, in materia di protezione e circolazione dei dati personali, che ha avuto un riflesso significativo nel processo di transizione digitale della pubblica amministrazione.

È chiaro, tuttavia, che l'analisi della normativa interna non può prescindere dal livello sovranazionale nel quale si inserisce; è, infatti, a livello europeo che nascono le principali disposizioni in materia di trasformazione digitale. L'esigenza di avanzamento tecnologico delle pubbliche amministrazioni è ben presto diventata una priorità delle istituzioni europee e ha portato all'adozione di diversi atti vincolanti all'interno dei quali oggi ci muoviamo nella ricostruzione della normativa in materia di digitalizzazione della pubblica amministrazione. Più recentemente, con la Direttiva UE 2022/2481 del 14 dicembre 2022, si è istituito il *program-*

di identificazione elettronica degli Stati membri e finalizzato a consentire ai cittadini UE di utilizzare la propria identità digitale nazionale per l'accesso ai servizi in rete delle pubbliche amministrazioni europee.

¹⁷ Nel 1979 in Italia si inizia a parlare del "problema dell'attività informatica della pubblica amministrazione" e a partire dagli anni '80 si introduce nel discorso legislativo il concetto di "informatica" come strumento di riforma dell'azione amministrativa. Nel "Rapporto sui principali problemi dello Stato" trasmesso alle Camere il 16/11/1979 dall'allora Ministro per la funzione pubblica, Massimo Saverio, si indica tra "i problemi generali più importanti della tecnologia occorrente alla pubblica amministrazioni (...) l'attività di informatica".

¹⁸ Il riferimento è al Regolamento (UE) 2016/679 relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati.

ma strategico per il decennio digitale 2030 e previsto un meccanismo di cooperazione tra le Istituzioni dell'Unione europea e gli Stati membri finalizzato al conseguimento di alcuni *obiettivi digitali vincolanti*. Si ripropongono quali obiettivi fondamentali i così detti punti cardinali della *digital compass*: competenze digitali, infrastrutture digitali, trasformazione digitale delle imprese e digitalizzazione dei servizi pubblici.

Il principio del *digital first* nella gestione e nell'accesso dei servizi pubblici è il principio nell'ambito del quale si muove il nuovo consociato nella sua veste di *cittadino digitale* e intorno al quale si costruisce lo statuto dei diritti digitali.

3. Il principio del *digital first* e l'accesso ai servizi pubblici digitali.

L'applicazione del principio del *digital first* ai servizi pubblici comporta che l'accesso ai servizi debba essere garantita in via prioritaria mediante la modalità telematica e attraverso l'uso di sistemi informatici. È con la citata legge del 2015 che si introduce nel discorso giuridico italiano il riferimento alla “Carta della cittadinanza digitale” e la struttura del CAD viene modificata nel senso di codificare quei diritti di cittadinanza come insieme di diritti/doveri da riconoscersi al cittadino che si muove in questa nuova *Società digitale*.

L'articolo 1 della legge *a quo*, rubricato “Carta della cittadinanza digitale”, impone la definizione di un livello minimo di prestazioni in materia di servizi *online* delle pubbliche amministrazioni con particolare riferimento alla sicurezza, qualità, fruibilità, accessibilità e tempestività dei servizi; la piena applicazione del principio c.d. “innanzitutto digitale” (*digital first*) volto a favorire un sistema in base al quale il canale di accesso preferenziale ai servizi della p.a. è, appunto, il digitale; la semplificazione delle “condizioni di esercizio dei diritti e l'accesso ai servizi di interesse dei cittadini”; l'armonizzazione della disciplina del “Sistema pubblico di identità digitale” (SPID); l'adeguamento dell'ordinamento nazionale “alla disciplina europea in materia di identificazione elettronica e servizi fiduciari per le transazioni elettroniche”¹⁹.

¹⁹ La materia è stata di recente normata dal Regolamento (UE) n. 910/2014 del 23 luglio 2014 (electronic IDentification Authentication and Signature – eIDAS), che ha trovato automatica applicazione nei singoli Stati membri, quindi anche in Italia, con decorrenza dal 1° luglio 2016 e che con riguardo al nostro Paese presenta ancora enormi problemi applicativi. Sono infatti ancora poche le amministrazioni che hanno correttamente adeguato i propri portali per concedere la sostanziale identificazione degli utenti Ue attraverso il sistema unico di identificazione eIDAS. Non solo, osservando i portali dei singoli ministeri si può facilmente osservare come in molti casi l'amministrazione ritenga concre-

Si richiede quindi un'opera di rafforzamento dei diritti digitali e degli interventi normativi che ne garantiscano un'effettività nel loro esercizio e si struttura il sistema di identificazione digitale in grado di rendere operativo il nuovo sistema e e-governance.

Questi interventi normativi definiscono dunque i caratteri di una nuova amministrazione digitale la cui chiave di accesso è proprio l'identità digitale²⁰.

4. L'identità digitale come diritto di "chiunque".

Con riguardo al diritto all'identità digitale²¹, al centro della nostra riflessione, cercheremo di mostrare come sebbene il legislatore italiano, almeno formalmente, abbia voluto riconoscere tale diritto come un diritto soggettivo universale, l'applicazione in concreto sul piano pratico presenti forti profili di discriminazione.

La lettura degli atti normativi ci consente di affermare che da subito l'identità digitale è stata costruita come *diritto* e poco dopo si è operato un processo di riforma volto alla sua universalizzazione.

Con riguardo alla definizione normativa interna di identità digitale, la novella del 2016²² introduceva il comma 1 *quinquies* all'art. 3, con il

tamente attuata la normativa prevista dal regolamento eIDAS con la previsione di accesso tramite Cie (carta d'identità elettronica) che, come meglio si vedrà infra con riguardo ai meccanismi di operatività dell'identità digitale nazionale (SPID), replica il limite per cui l'accesso viene garantito alle sole persone formalmente residenti in Italia.

²⁰ Guardando più precisamente al sistema d'identità digitale, la piattaforma di gestione dei servizi pubblici digitali, avente lo scopo di semplificare l'accesso dei cittadini ai servizi pubblici digitali, viene teorizzata in realtà per la prima volta nel 2013 quando con il d.l. n. 69, poi convertito con L. n. 69/2013, si apportano modifiche all'art. 64 del CAD e si istituisce, a cura dell'Agenzia per l'Italia digitale, il sistema pubblico per la gestione dell'identità digitale di cittadini e imprese (SPID). Con il successivo DPCM n. 285/2014 si dà attuazione a tale sistema, definendo le caratteristiche e le modalità di applicazione e rilascio delle identità digitali ai soggetti legittimati. I successivi provvedimenti di modifica al CAD, adottati con il D.Lgs. 179/2016 e il D.Lgs. 217/2017 in attuazione della legge Madia, hanno poi disegnato l'attuale assetto portando alla codificazione dell'identità SPID come diritto personale di cittadinanza digitale.

²¹ La nozione di identità digitale ricorre nella disposizione di cui all'art. 1, lettera *u quater*, del CAD, la quale definisce l'identità digitale come "la rappresentazione informatica della corrispondenza tra un utente e i suoi attributi identificativi, verificata attraverso l'insieme dei dati raccolti e registrati in forma digitale" (Ruggiero 2023).

²² Il riferimento è al D.Lgs. 179/2016, che introduce *Modifiche ed integrazioni al Codice dell'amministrazione digitale, di cui al decreto legislativo 7 marzo*

quale si disponeva che “Tutti i cittadini e le imprese hanno il diritto all’assegnazione di un’identità digitale attraverso la quale accedere e utilizzare i servizi erogati in rete”.

È chiaro quindi che l’identità digitale veniva elevata a diritto in questo processo di costruzione dello Statuto dei diritti di cittadinanza digitale.

I lavori preparatori ci aiutano a rafforzare questa interpretazione; negli atti di lettura dello schema del decreto si legge chiaramente che “viene elevata la disponibilità di una **identità digitale** (assegnata nell’ambito del sistema pubblico di identità digitale, SPID) al rango di **diritto** (riconosciuto come ambito soggettivo, a “tutti i cittadini e le imprese”)”. Dunque, se ne riconosce la sua qualificazione come diritto circoscrivendo tuttavia il suo ambito soggettivo ai soli cittadini e imprese. Alla definizione di questi limiti concorreva inoltre il successivo comma 1-*sexies* – sempre introdotto con il decreto 179/2016 – il quale disponeva che “tutti gli iscritti all’Anagrafe nazionale della popolazione residente (ANPR) hanno il diritto di essere identificati dalle pubbliche amministrazioni tramite l’identità digitale di cui al comma 1-*quinquies*, nonché di inviare comunicazioni e documenti alle pubbliche amministrazioni e di riceverne dalle stesse tramite un domicilio digitale, alle condizioni di cui all’articolo 3-*bis*”

Ecco quindi, come spesso accade, che la scelta del legislatore ricadeva nell’agganciare la titolarità di un diritto alla residenza sul territorio dello Stato, riproponendosi un noto schema di discriminazione istituzionale.

Per fortuna questo testo, evidentemente carico di complessità dal punto di vista della sua legittimità, non ha avuto una lunga vita. Con il successivo decreto legislativo del 2017, correttivo del precedente, si abroga infatti sia il comma 1-*quinquies* che il comma 1-*sexies*.

Con il d. lgs. 217/2017, si fa un ulteriore passo avanti e la nuova formulazione prevede che “Chiunque ha il diritto di accedere ai servizi *online* offerti dai soggetti di cui all’articolo 2, comma 2, lettere a) e b), tramite la propria identità digitale”.

Ecco quindi, che si introduce anche con riguardo al diritto all’identità digitale il nuovo soggetto di diritto “chiunque”, scompare il riferimento alla categoria dei “cittadini o imprese” e si elimina il legame territoriale imposto con il precedente requisito della residenza.

In conclusione, allo stato attuale della normativa il diritto ad avere una propria identità digitale è riconosciuto e tutelato nel nostro ordinamento come diritto di “chiunque” e affermato in termini universalistici con la conseguenza che tale disposizione debba ritenersi applicabile a

2005, n. 82, ai sensi dell’articolo 1 della legge 7 agosto 2015, n. 124, in materia di riorganizzazione delle amministrazioni pubbliche.

tutte le persone – quindi anche a tutti i cittadini e le cittadine di Paesi terzi che siano legalmente presenti sul nostro territorio ancorché privi di residenza – in condizioni di parità, senza discriminazioni per motivi di nazionalità, cittadinanza o condizione sociale.

5. Il cittadino digitale e lo straniero digitale: nuove forme di discriminazione nell'accesso ai servizi digitali della pubblica amministrazione per i cittadini e le cittadine di paesi terzi.

Il quadro che emerge dalla prassi diffusa in Italia purtroppo non è in linea con tali affermazioni di diritto, con la conseguenza che una parte assai consistente di persone attualmente non riesce ad ottenere una propria identità digitale restando nell'invisibilità giuridica per il nuovo sistema pubblico digitale.

La distinzione tra cittadino e straniero, tra residente e non residente, pesa sull'accesso alla cittadinanza digitale.

La pratica amministrativa in uso tra gli *Identity Provider*, accreditati dall'Agenzia per l'Italia Digitale (AgID)²³, è di richiedere agli utenti l'esibizione di un valido documento di riconoscimento *italiano*, ovvero la carta d'identità o un passaporto italiano. Ergo, per gli stranieri, sarà necessario al fine di ottenere lo *status* di cittadino digitale avere una carta d'identità italiana che è rilasciata solo ai cittadini che siano iscritti come residenti.

L'esibizione di un diverso documento (come il permesso di soggiorno) non è considerata idonea per il rilascio dell'identità digitale personale. Tale prassi non trova un utile riscontro non solo nella normativa sin qui analizzata ma neanche nei successivi provvedimenti di attuazione. Invero, il DPCM n. 24/2014²⁴ e il successivo regolamento adottato dall'Agenzia per l'Italia digitale nel novembre 2016²⁵, stabiliscono che ai fini del rilascio dell'identità digitale (SPID) sia necessario esibire un valido documento di identità, in nessun modo facendo riferimento alla necessità

²³ L'Agenzia per l'Italia Digitale (AgID) è stata istituita con il Decreto-legge 22 giugno 2012 ed è sottoposta ai poteri di indirizzo e vigilanza del Presidente del Consiglio dei Ministri o del Ministro delegato.

²⁴ In particolare, l'articolo 4, comma 4, del DPCM 24 ottobre 2014 rinvia ad un successivo regolamento di AgID per la definizione delle modalità operative di riconoscimento dell'Identità digitale.

²⁵ Con riguardo alla richiesta delle identità digitali stabilisce che per le "persone fisiche sono obbligatorie le seguenti informazioni: a) nome e cognome; b) sesso, date e luogo di nascita; c) codice fiscale; d) estremi di un valido documento di identità ; e) gli attributi secondari così come definiti dall'art. 1, comma 1, lettera d) DPCM ", ribadendo quindi la necessità per l'utente di esibizione di un documento d'identità ai fini dell'attribuzione di una identità digitale, e quindi del riconoscimento del diritto allo SPID.

di un documento di identità *italiano* come oggi è richiesto nella pratica.

Nonostante il chiaro assetto legislativo, l'AgID dà indicazioni agli utenti stranieri e agli *identity provider* di richiedere un documento di riconoscimento italiano²⁶ affermando – come se fosse sufficiente – “che, qualora il richiedente sia in possesso di permesso di soggiorno potrà, al fine di ottenere una propria identità digitale (SPID), richiedere al suo Comune una carta d'identità italiana”.

Immediata conseguenza di tale distorsione applicativa è che gli stranieri seppur in possesso di un regolare permesso di soggiorno non potranno ottenere una propria identità digitale fin tanto che non avranno una carta d'identità rilasciata da un comune italiano e quindi una formale iscrizione anagrafica sul territorio nazionale, con la conseguenza che saranno esclusi dai diritti di cittadinanza digitale.

Tale prassi oltre ad essere evidentemente discriminatoria perché esclude di fatto dal *diritto di avere diritti* nella nuova Società digitale tutte le persone prive di regolare iscrizione anagrafica, ancorché titolari di regolare permesso di soggiorno, si pone in evidente contrasto con la normativa appena richiamata.

Come è stato chiarito, la necessità di documento *italiano* è prevista solo a livello amministrativo e non anche legislativo²⁷.

Preme precisare inoltre, che la previsione di non considerare valido documento di riconoscimento il permesso di soggiorno si pone in contrasto, per altro, con ulteriori disposizioni di legge, in primo luogo il d. lgs. 286/1998, ovvero il Testo unico contenente le disposizioni concernenti la disciplina sull'immigrazione e le norme sulla condizione di straniero (d'ora in avanti TUI) e il DPCM 445/00 concernente le disposizioni

²⁶ In generale sul sito AgID si richiede per l'attivazione dello SPID “un documento di riconoscimento italiano (carta d'identità, passaporto, patente) in corso di validità. Tuttavia, si legge nelle Faq (Domande frequenti – Spid) che se sei uno straniero che si trova in Italia per ottenere lo SPID: “Devi essere in possesso di un documento di riconoscimento italiano (come ad esempio la carta di identità) in corso di validità e del tesserino del codice fiscale, di un'e-mail e di un cellulare ad uso personale. Se sei in possesso di un permesso di soggiorno, puoi richiedere la carta di identità italiana e presentarla durante la fase di richiesta di attivazione di SPID”.

²⁷ Secondo il Glossario UNAR si parla di discriminazione indiretta “quando una disposizione, un criterio, una prassi, un atto, un patto o un comportamento apparentemente neutri possono mettere le persone di una determinata razza, origine etnica, che professano un credo religioso o personale in una posizione di particolare svantaggio rispetto ad altre persone”, v. *Manuale Contrastare le prassi discriminatorie con l'antidiscriminazione. Manuale delle buone pratiche* – Progetto #ionondiscrimino – Fondo Asilo, Migrazione e Integrazione (FAMI) 2014-2020.

legislative e regolamentari in materia di documentazione amministrativa che, fra le altre, stabilisce a quali condizioni e in quali casi il documento amministrativo del permesso al soggiorno debba considerarsi documento valido di identità.

Con riguardo, ad esempio, al permesso di soggiorno di lungo periodo, l'art. 9, TUI, stabilisce chiaramente che tale permesso di soggiorno "costituisce documento di identificazione personale ai sensi dell'articolo 1, comma 1, lettera d), del testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa, di cui al decreto del Presidente della Repubblica 28 dicembre 2000, n. 445²⁸; in alcun modo si comprende perché questo non debba essere considerato idoneo dagli *identity provider* per il rilascio di una identità digitale personale.

6. Conclusioni.

Dal quadro tracciato emerge: il diritto di chiunque ad avere una propria identità digitale che si attegga a presupposto per l'interazione del cittadino digitale con il nuovo sistema di *e-governance*.

La normativa che regola tale diritto non solo definisce l'identità digitale come diritto assoluto ma ne chiarisce anche la sua dimensione universalista.

Nonostante questo, la riproposta contrapposizione giuridica tra *residenti* e *non residenti* operata dalla prassi applicativa dall'Agenzia per l'Italia digitale e degli *identity provider*, gioca un ruolo essenziale circa la capacità dei cittadini stranieri regolarmente soggiornanti sul nostro territorio di poter accedere senza limitazioni a tale diritto.

La conseguenza è che in questo momento in Italia abbiamo una diffusa prassi discriminatoria che investendo le categorie più vulnerabili non fa altro che accentuare la marginalizzazione di tali gruppi sociali.

Nei rapporti con la pubblica amministrazione ormai l'identità digita-

²⁸ A livello normativo si è chiarito che anche il permesso di soggiorno per richiesta asilo "costituisce documento di riconoscimento ai sensi dell'articolo 1, comma 1, lettera c), del decreto del Presidente della Repubblica 28 dicembre 2000, n. 445", ai sensi dell' art.4, d. lgs. 142/2015. Su questo cfr. anche nota del Ministero dell'Interno del 04/07/2006. Per tutti gli altri titoli di soggiorno, invece, il permesso di soggiorno vale come documento di identificazione e non riconoscimento, con la conseguenza che questi dovrà presentare non solo il titolo di soggiorno ma anche un documento d'identità valido ai sensi dell'art. 1, lett. c), DPCM 445/2000, (ogni documento munito di fotografia del titolare e rilasciato, su supporto cartaceo, magnetico o informatico, da una pubblica amministrazione italiana o di altri Stati, che consenta l'identificazione personale del titolare), come la carta d'identità italiana, se ne è in possesso, ovvero il proprio titolo di viaggio (passaporto, ancorché straniero).

le è strumento privilegiato per tantissimi servizi, soprattutto quelli a forte carica sociale; si pensi alle prestazioni di sicurezza sociale, l'accesso alle misure di inclusione sociale e lavorativa a gestione pubblica, l'accesso ai servizi scolastici, eccetera.

Se l'esito in gioco è, come accennato in premessa, una tendenza del sistema d'identità digitale ad una sua dimensione sovranazionale e in grado di interagire anche a livello internazionale, si pone come urgente un intervento in grado di eliminare tali prassi al fine di garantire l'effettività di questo diritto. La normalizzazione interna di tali prassi discriminatorie rischia infatti di avere gravi ripercussioni anche oltre la sua dimensione nazionale e incancrenire gravi forme di discriminazione istituzionale con effetti anche sulla soggettività giuridica internazionale nel nuovo Modo Digitale.

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3.

COURTS AND CITIZENSHIP IN THE CONTEXT OF THE “PLATFORMIZATION OF THE PUBLIC SPHERE”: JUDICIALIZATION AS A CONTAINMENT OF THE POPULIST CORROSION OF DEMOCRACY*

Orlando Villas Bôas Filho**

1. Introduction.

The process of judicialization has historically established itself as a characteristic of contemporary society¹. Several authors underline this growing tendency to resort to the Judiciary, especially in democratic systems². According to Martine Kaluszynski, judicialization, in a broad

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¹ It should be noted that the expression “judicialization” will be used here. This observation is important, because the French authors mobilized to support the analysis carried out in the third part of this chapter use the French expression “judiciarisation”. However, as the term “judicialization” predominates in English, it will be used here. In addition, it is also worth noting that, in Brazil, under the influence of Anglophone authors, especially Chester Neal Tate and Torbjörn Vallinder, the word “judicialization” also predominates. See Maciel, Débora Alves; Koerner, Andrei. *Sentidos da judicialização da política: duas análises*. *Lua Nova*, n. 57, 113-133, 2002, 114.

² In this regard, see, especially, Commaille, Dumoulin, Heurs et malheurs de la légitimité dans les sociétés contemporaines. Une sociologie politique de la “judiciarisation”. *L'Année Sociologique*, v. 59, n. 1, 63-107, 2009; Israël, Usages militants du droit dans l'arène judiciaire: le *cause lawyering*. *Droit et Société*, n. 49, 793-824, 2001; Israël, L'arme du droit. *Inflexions*, n. 15, 101-108, 2010; Roussel, La judiciarisation du politique, réalités et faux semblants. *Mouvements*, v. 4, n. 29, 12-18, sept./oct. 2003. On the juridicization (judicialization) of politics and even of “megapolitics”, see, above all: Hirschl, *Towards Juristocracy*. The Origins and Consequences of the New Constitutionalism. Cambridge, Massachusetts: Harvard University Press, 2004; Hirschl, The new constitution and the judicialization of pure politics worldwide. *Fordham Law*

sense, could be qualified by the following essential characteristics: a) the multiplication of recourse to the Judiciary by social actors; b) the increase in requests for judicial intervention to deal with fundamental issues of society; c) the increasingly frequent displacement of the treatment of issues related to the political arena to the judicial field³. Thus, as will be seen below, it is possible to see that judicialization entails a reconfiguration of the relations between the political and legal “fields”⁴. It is in this sense that Jacques Commaille and Laurence Dumoulin emphasize that judicialization would be inseparable from the new roles and a new *status* assumed by the legal sphere in relation to politics⁵.

On the other hand, as Pierre Rosanvallon emphasizes, populism has emerged as a contemporary phenomenon of broad significance, in order to subvert the dynamics of the political field in the 21st century. Spreading to several countries, populism, despite the lack of theorizing directed at it, demands careful consideration, especially because, in some cases, it endangers the democratic order itself⁶. In this sense, it should be no-

Review, v. 75, n. 2, 721-753, 2006; Hirschl, The judicialization of mega-politics and the rise of political courts. *Annual Review of Political Science*, v. 8, 93-118, 2008; Hirschl, The judicialization of politics. In: Goodin, (ed.) *The Oxford handbook of political science*. Oxford: Oxford University Press, 2011, 253-274; Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 295-321; Commaille, La juridicisation du politique. Entre réalité et connaissance de la réalité. En guise de conclusion. In: Commaille, Dumoulin, Robert, *La juridicisation du politique*. Paris: LGDJ, 2010, 199-210.

³ See Kaluszynski, La fonction politique de la justice: regards historiques. Du souci d'historicité à la pertinence de l'historicisation. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 9.

⁴ On the notions of “political field” and “legal field”, see, especially, Bourdieu, Habitus, code et codification. *Actes de la recherche en sciences sociales*, v. 64, 40-44, 1986; Bourdieu, La force du droit. Éléments pour une sociologie du champ juridique. *Actes de la Recherche en Sciences Sociales*, v. 64, 3-19, 1986; Bourdieu, Pierre. Les juristes, gardiens de l'hypocrisie collective. In: Chazel, Commaille, Jacques, *Normes juridiques et régulation sociale*. Paris: LGDJ, 1991, 95-99. (Collection Droit et Société.); Bourdieu, Esprits d'État [Genèse et structure du champ bureaucratique]. *Actes de la Recherche en Sciences Sociales*, v. 96-97, 49-62, mars. 1993; Bourdieu, *Sur l'État: cours au Collège de France 1989-1992*. Paris: Éditions Seuil, 2012.

⁵ See Commaille, Dumoulin, Heurs et malheurs de la légitimité dans les sociétés contemporaines. Une sociologie politique de la “judiciarisation”. *L'Année Sociologique*, v. 59, n. 1, 64, 2009.

⁶ See Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 14.

ted that, by being characterized, among other things, by the pretension of an institutionally unmediated relationship with the masses, populism consigns the effective possibility of a deterioration of the legitimacy of democratic institutions, as they are currently structured⁷. As will be seen below, populism feeds on a polarization that is currently largely promoted by the dissemination of fake news and hate speech in a context of “platformization of the public sphere”⁸.

Thus, taking into account the importance of the process of judicialization in the political field, this article, from a socio-legal approach, will seek to underline its potential to contain the populist degradation of democratic legitimacy (and, therefore, of the exercise of citizenship), especially considering the effects engendered by the “platformization of the public sphere”. Thus, preliminarily, Pierre Rosanvallon’s thesis about the complexification of the contemporary democratic experience resulting from the progressive decentralization of its legitimacy from the electoral-representative sphere will be focused, which leads to the question of the emergence of new forms of legitimation of democracy that can be affected by populism, as defined by this same author (1). Next, the deleterious effects produced by the “platformization of the public sphere” as a form of degradation of contemporary democratic institutionality will be discussed (2). Finally, the issue of judicialization will be addressed as an instrument to contain the populist degradation of the institutional arrangement that legitimizes democracy, indicating some concrete situations in the Brazilian context (3).

⁷ For a description of the democratic experience in its current configuration, see, especially, Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008. For an analysis of the polysemy of the concept of democracy, see, for example: Colliot-Thélène. *La démocratie sans « démos »*. Paris: Presses Universitaires de France, 2010, 55-60; Villas Bôas Filho, Democracia: a polissemia de um conceito político fundamental. *Revista da Faculdade de Direito da USP*, v. 108, 651-696, jan./dez. 2013. On the polysemy of the concept of populism, see, above all: Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 253-270.

⁸ See Da Empoli, *Os engenheiros do caos*. Tradução de Arnaldo Bloch. São Paulo: Vestígio, 2020; Rocha, *Bolsonarismo: da guerra cultural ao terrorismo doméstico: retórica do ódio e dissonância cognitiva coletiva*. Belo Horizonte: Autêntica, 2023. On the concept of “platformization of the public sphere”, see: Habermas, *Uma nova mudança estrutural da esfera pública e a política deliberativa*. Tradução de Denilson Luis Werle. São Paulo: Editora Unesp, 2023. For a general definition of “public sphere”, see Paquot, *L’espace public*. Paris: Éditions La Découverte, 2009, 10.

2. A Brief digression on Pierre Rosanvallon's Thesis: the irreducibility of democracy to the electoral moment and the emergence of new forms of legitimization.

According to Pierre Rosanvallon, the idea that the popular will is the only legitimate source of power has expanded universally as the expression of the essence of democracy. Consequently, in the representations of common sense, the popular unction of the governments would constitute the main characteristic of a democratic regime. However, according to Rosanvallon, with the end of the 20th century, social complexity would have led to the collapse of the old forms of apprehension of "social generality". In this context, legitimacy by periodic elections would have begun to become progressively insufficient. Thus, a kind of "desacralization of the function of the election" would be observed⁹. With this, the election would have ceased to provide a kind of *a priori* legitimization of the policies developed by the elected government.

According to Pierre Rosanvallon, after the fundamental conquest of universal suffrage, the development of the democratic ideal was historically articulated around two great ambitions. Firstly, to make democracy more participatory, that is, not to restrict citizens' intervention only to the electoral moment. Secondly, the implementation of a deliberative democracy, inserting public decisions in a "living citizen debate". The objective in both cases would be to move from an "intermittent democracy" (*démocratie intermittente*) to a "permanent democracy" (*démocratie permanente*) and, simultaneously, from a "democracy of delegation" (*démocratie de délégation*) to a "democracy of implication" (*démocratie d'implication*)¹⁰.

Pierre Rosanvallon also emphasizes the emergence of three types of democratic legitimacy: a) the "legitimacy of impartiality" (*légitimité d'impartialité*); b) the "legitimacy of reflexivity" (*légitimité de réflexivité*); c) the "legitimacy of proximity" (*légitimité de proximité*)¹¹. According to Rosanvallon, the emergence of these new forms of legitimacy would lead

⁹ See Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008, 14.

¹⁰ See Rosanvallon, *Le parlement des invisibles*. Paris: Les Éditions du Seuil et Raconter la vie, 2014, 26-27.

¹¹ See Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008, 18. See also Lacroix, *Luttes de droits et complication démocratique: la démocratie intégrale selon Pierre Rosanvallon*. In: Al-Matary, Guénard, *La démocratie à l'œuvre: autour de Pierre Rosanvallon*. Paris: Éditions du Seuil, 2015, 145-164; Monod, *Les légitimités démocratiques en tension*. In: Al-Matary, Guénard, *La démocratie à l'œuvre: autour de Pierre Rosanvallon*. Paris: Éditions du Seuil, 2015, 181-195.

to the progressive impossibility of reducing the democratic experience only to its electoral-representative dimension. It is in this sense that the author alludes to what he calls “post-electoral democracy”. This means that, from this perspective, democracy could not be reduced to periodic participation in elections to choose a government who, supported by the will of the majority, would be the bearer of a supposed “general will”. The new forms of legitimacy (“impartiality”, “reflexivity” and “proximity”) would be concurrent and complementary to periodic elections and would serve to recognize what could be considered democratically legitimate¹².

Finally, Pierre Rosanvallon points out that these new emerging forms of democratic legitimacy are articulated around some basic types of institution. From this perspective, the “legitimacy of impartiality” would be articulated, at the institutional level, with independent surveillance and regulatory authorities. The “legitimacy of reflexivity” would find its institutional roots in the Constitutional Courts, insofar as they frame legislative production with a reflexive control of constitutionality. Therefore, the constitutional courts would be instruments to reduce the margin of maneuver of governments. On the other hand, the “legitimacy of proximity” would not be linked to a specific type of institution. It would refer to a set of social expectations related to the behaviour of governments. It is the formation of what Pierre Rosanvallon calls the “democratic art of government” (*art démocratique de gouvernement*)¹³.

3. The “Platformization of the public sphere” and the populist degradation of democratic legitimacy.

Pierre Rosanvallon points out that populism would have had an intense impact on the political scenario of the 21st century¹⁴. In order to

¹² As Monod observes, “être reconnu comme ‘démocratiquement légitime’ ne dépend pas seulement, ou plus seulement, des urnes, de l’élection, mais de ces ‘qualités’ – impartialité, réflexivité – auxquelles il faut ajouter une qualité liée à ‘l’art de gouverner démocratique’, au comportement des gouvernements: la ‘proximité’”. Monod, *Les légitimités démocratiques en tension*. In: Al-Matary, Guénard, *La démocratie à l’œuvre: autour de Pierre Rosanvallon*. Paris: Éditions du Seuil, 2015. 185.

¹³ See Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008, 25.

¹⁴ See Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 14-15. In an analogous diagnosis, Adam Przeworski emphasizes that “something is happening. ‘Anti-establishment’, ‘anti-system’, ‘anti-elite’, ‘populist’ sentiments are exploding in many mature democracies”. Przeworski, *Crises of democracy*. Cambridge: Cambridge University Press,

outline a theory of this expressive phenomenon, he proposes an analysis composed of three stages. First, he develops a typical-ideal description of what he calls the “anatomy of populism”¹⁵. He then undertakes a “history of populism” whose aim is to integrate the typical-ideal characterization outlined by him into a general typology of “democratic forms”. Finally, he seeks to develop a “critique of populism” that correlates it to a theory of democracy. It is not possible to recover in greater detail here the complexity of Rosanvallon’s research on populism. Thus, this analysis will concentrate on the elements that, according to the author, would express, in a typical-ideal character, the anatomy of this phenomenon¹⁶.

According to Pierre Rosanvallon, the “populist political culture” would be constituted by five fundamental elements: a) a conception of the people based on the distinction “us” and “them”; b) a populist theory of democracy that prioritizes direct participation, from which derives the “sacralization of the *referendum*”; c) a conception of representation linked to the figure of a “man-people” (*homme-peuple*) who, due to his supposed virtues, would embody the solution to a situation evaluated as expressive of a bad popular representation; d) an economic policy and philosophy, characterized by “national-protectionism”, which politically instrumentalize the economic field; e) a “regime of passions and emotions” characterized by “essentially plotting narratives” on the intellectual level and by the feeling of abandonment and invisibility on the level of action¹⁷.

2019, 1. In this regard, with particular emphasis on the North American case, see: Levitsky, Ziblatt, *How democracies die*. New York: Crown Publishing, 2018.

¹⁵ It should be noted that Rosanvallon’s approach to the “anatomy of populism” encompasses both “right-wing populism” and “left-wing populism”. See Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 83-93.

¹⁶ It is worth noting that the typical-ideal characterization of populism proposed by Rosanvallon uproots it from its historical concretion in Latin America. However, Rosanvallon also analyzes what he calls “laboratoire latino-américain”. See Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 133-144. For an excellent sociological approach to populism, see: Tarragoni, *La science du populisme au crible de la critique sociologique: archéologie d’un mépris savant du peuple*. *Actuel Marx*, n. 54, 56-70, 2013.

¹⁷ Pierre Rosanvallon extensively analyzes these characteristics when dealing with what he calls the “anatomy” of populism. See Rosanvallon, *Le siècle du populisme: histoire, théorie, critique*. Paris: Éditions du Seuil, 2020, 16; 25-75. In this regard, see also Rancière, *L’introuvable populisme*. In: Badiou et al., *Qu’est-ce qu’un peuple?* Paris: La Fabrique, 2016. 137-143; See also: Scurati,

Considering these characteristics, it is observed that populism, by attacking the “intermediate bodies” and conceiving the people as a homogeneous mass, poses an effective risk of degradation of a democratic experience guided by institutional mediation and political pluralism¹⁸. In fact, it is for this reason that Rosanvallon qualifies it as a “pathology of electoral-representative democracy”. In addition, by exacerbating distrust of the powers that be through the celebration of a leader, generally charismatic, who is attributed with the supposed incarnation of popular desires, populism can also engender an anti-political posture with deleterious consequences¹⁹.

Rosanvallon also considers that the emergence of these new forms of legitimacy (“impartiality”, “reflexivity” and “proximity”) would lead to a progressive increase in the complexity of the democratic experience and the consequent impossibility of its reduction to the electoral-representative dimension. This situation highlights the destructive potential of the populist phenomenon, since it, based on the exaltation of the figure of the leader and his direct relationship with the masses (logic of the *referendum*), engenders gross simplifications that are incompatible with the complexity that permeates the dynamics of democratic societies. For this reason, in fact, populism can promote a degradation of democracy capable of leading it to what Rosanvallon calls “démocrature”²⁰.

As mentioned, the new forms of legitimacy identified by Rosanvallon would be linked to some basic types of institutions. Thus, the “legitimacy of impartiality” would be articulated, at the institutional level, to independent surveillance and regulatory authorities. The “legitimacy of reflexivity” would find its institutional roots in the Constitutional Courts, to the extent that these, by framing legislative production in a reflexive control of constitutionality, would appear as instruments to reduce the

Fascismo e populismo: Mussolini oggi. Milano: Bompiani, 2024, 55-83; Tarchi, Che cos'è il populismo. In: Tarchi (a cura di), *Anatomia del populismo*. Napoli: Diana Edizioni, 2019, 17-34.

¹⁸ See Tarragoni, La science du populisme au crible de la critique sociologique: archéologie d'un mépris savant du peuple. *Actuel Marx*, n. 54, 57, 2013. On the populist conception of the people, see: Rosanvallon, *Le siècle du populisme*: histoire, théorie, critique. Paris: Éditions du Seuil, 2020, 43-45; 225-225.

¹⁹ From this perspective, it is worth noting that Pierre Rosanvallon focuses on populism as a “pathology of representative democracy” and as a “pathology of counter-democracy”. See Rosanvallon, *La contre-démocratie*: la politique à l'âge de la défiance. Paris: Éditions du Seuil, 2006, 269-277. On this issue, see: Tarragoni, La science du populisme au crible de la critique sociologique: archéologie d'un mépris savant du peuple. *Actuel Marx*, n. 54, 66, 2013.

²⁰ See Rosanvallon, *Le siècle du populisme*: histoire, théorie, critique. Paris: Éditions du Seuil, 2020, 227-228.

margin of maneuver of governments. In turn, the “legitimacy of proximity”, not being linked to a specific model of institution, would refer to a set of social expectations related to the behavior of rulers, expressing itself, according to Rosanvallon, in the form of a “democratic art of government” (*art démocratique de gouvernement*)²¹.

By promoting polarization and praising the direct relationship between leader and people without institutional mediation, through the sacralization of the logic of the *referendum* with the resulting attempt to domesticate non-elected institutions, especially the Constitutional Courts and the Independent Authorities, populism ends up eroding the institutional design of democracies in order to degenerate them²². It is evident that this situation engenders serious damage to the “legitimacy of reflexivity” and the “legitimacy of impartiality”, as Ronsavallon defines them. However, it is possible to say that even the “legitimacy of proximity”, which is not linked to a specific type of institution, is degraded by populism. As seen, this form of legitimacy refers to a set of social expectations related to the behaviors of rulers, especially with regard to the consideration of “social singularities”²³. However, based on a homogeneous conception of the people that, in contexts of strong ideological polarization, reflects only the views and values of fanatical supporters (who are no longer properly citizens), populism also leads to the erosion of the “legitimacy of proximity”.

This populist degradation of democratic institutionality is potentiated in the context of the “platformization of the public sphere”, since this produces an expressive political-ideological polarization²⁴. In this

²¹ See Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008, 25.

²² As emphasizes Przeworski, “the populist parties are not anti-democratic in the sense that they do not advocate replacing elections by some other method of selecting government. [...]. Hence, while the populist parties are not anti-democratic, they are anti-institutional in the sense of rejecting the traditional model of representative democracy”. Przeworski, *Crises of democracy*. Cambridge: Cambridge University Press, 2019, 88. In the same sense, see: Levitsky, Ziblatt, *How democracies die*. New York: Crown Publishing, 2018, 22. For a classic contrast between representative democracy and direct democracy, see Bobbio, *Il futuro della democrazia*, Torino: Einaudi, 2014 [1984], 31-57.

²³ See Rosanvallon, *La légitimité démocratique: impartialité, réflexivité, proximité*. Paris: Éditions du Seuil, 2008, 267.

²⁴ The concept of “platformization of the public sphere” (*Plattformisierung der Öffentlichkeit*), in the sense in which it will be used here, is initially proposed by Otfried Jarren and Renate Fischer and used by Jürgen Habermas. However, its use is not necessarily linked to a “normative theory” of democracy such as that proposed by Habermas. On the normative concept of public sphere, see

regard, it is worth noting that Jürgen Habermas, in the midst of his discursive theory, defines the “public sphere” as a place situated between civil society and the political system in modern societies that plays an important role in sustaining the existence of the democratic community, insofar as it contributes to the political integration of citizens. This definition is based on a “normative theory” of deliberative democracy. However, in a generic sense, it is possible to define the “public sphere” as a place of public debate in which the circulation and confrontation of diverse opinions and points of view occurs²⁵. It is at this greater level of generality that the concept of “public sphere” will be focused here²⁶.

In line with Habermas’ perspective, but without necessarily corroborating the normative assumptions that underlie it, it is possible to affirm that the “platformization of the public sphere” (resulting from the technological development of digitized communication) would have an ambivalent character. On the one hand, it is a process that extends the limits of the “public sphere”, allowing the generalized participation of the most diverse actors. However, on the other hand, it causes its fragmentation into “algorithmized bubbles” that function as “echo chambers” that feedback on each other from confirmation bias, with the consequent exclusion of dissonant voices²⁷. As Habermas observes, the “platformization of the public sphere” is managed by large capitalist companies that, aiming at profit, see citizens as consumers. For this reason, such companies use all possible subterfuges to maintain the engagement of citizens/consumers of the information made available by them²⁸.

The “platformization of the public sphere” is governed by the logic of engagement that characterizes the digital universe. In this sense, Giuliano Da Empoli states that “considering that they are simple commercial engines, social networks are not equipped – and have no interest in being – to prevent deviations and abuses. The only thing they care about

Habermas, La souveraineté populaire comme procédure. Un concept normatif d’espace publique. *Lignes*, n. 7, 29-58, 1989.

²⁵ See Paquot, *L’espace public*. Paris: Éditions La Découverte, 2009, 10.

²⁶ It is worth noting that this general definition of “platformization of the public sphere” is reconcilable with “narrative theories of democracy”, as defined by Rainer Rochlitz. See Rochlitz, *Théories narratives et théories normatives de la démocratie*. *Les Études Philosophiques*, n. 70, 404-418, 2004.

²⁷ See Habermas, *Uma nova mudança estrutural da esfera pública e a política deliberativa*. Tradução de Denilson Luis Werle. São Paulo: Editora Unesp, 2023, 61.

²⁸ See Habermas, *Uma nova mudança estrutural da esfera pública e a política deliberativa*. Tradução de Denilson Luis Werle. São Paulo: Editora Unesp, 2023, 71.

is engagement – the time each user spends on the platform”²⁹. Maintaining that their *business model* is based on the fact that they are not an information organ (conventional media), these platforms claim to be neutral with regard to the flow of information that transits through them. Thus, the content does not matter, as long as it generates engagement³⁰. This logic feeds on polarizing narratives that incite strong emotions, polemics, and anger, as these guarantee greater engagement³¹. Precisely for this reason, the dissemination of fake news, hate speech, and conspiracy theories is recurrent, because, according to João Cezar de Castro Rocha, this is what guarantees engagement in an environment that can be characterized as an “extremist mediasphere”³².

João Cezar de Castro Rocha defines the “extremist mediasphere” as an ecosystem of disinformation endowed with a high level of internal coherence and, in practice, immune to criticism or external verification³³. According to him, the “extremist mediasphere” can be characterized by five elements: a) WhatsApp chains; b) integrated circuit of Youtube channels; c) social networks; d) apps; e) “friendly media”, aimed at the easy profit generated by the monetization of radicalism³⁴. Rocha also points out that in this “extremist mediasphere” there is the development of a “pedagogy of the dehumanization of the other” and this pedagogy constantly produces imaginary enemies. By producing “collective cognitive dissonance” that, in the context of the “platformization of the public

²⁹ Da Empoli, *Os engenheiros do caos*. Tradução de Arnaldo Bloch. São Paulo: Vestígio, 2020, 155.

³⁰ See Da Empoli, *Os engenheiros do caos*. Tradução de Arnaldo Bloch. São Paulo: Vestígio, 2020, 155.

³¹ See Da Empoli, *Os engenheiros do caos*. Tradução de Arnaldo Bloch. São Paulo: Vestígio, 2020, 21.

³² Rocha, *Bolsonarismo: da guerra cultural ao terrorismo doméstico: retórica do ódio e dissonância cognitiva coletiva*. Belo Horizonte: Autêntica, 2023, 154. See also: Da Empoli, *Os engenheiros do caos*. Tradução de Arnaldo Bloch. São Paulo: Vestígio, 2020, 25; Faria, Verdade na internet. In: Faria (Org.), *A Liberdade de expressão e as novas mídias*. São Paulo: Perspectiva, 2020, 21-24; Macedo Junior, “Fake news” e as novas ameaças à liberdade de expressão. In: Faria (Org.), *A Liberdade de expressão e as novas mídias*. São Paulo: Perspectiva, 2020, 37-61; Macedo Junior, “Fake News”: liberdade de expressão ou dever de falar a verdade? In: Faria (Org.), *A Liberdade de expressão e as novas mídias*. São Paulo: Perspectiva, 2020, 73-78.

³³ See Rocha, *Bolsonarismo: da guerra cultural ao terrorismo doméstico: retórica do ódio e dissonância cognitiva coletiva*. Belo Horizonte: Autêntica, 2023, 34.

³⁴ See Rocha, *Bolsonarismo: da guerra cultural ao terrorismo doméstico: retórica do ódio e dissonância cognitiva coletiva*. Belo Horizonte: Autêntica, 2023, 34-35.

sphere”, reinforces polarization, the “extremist mediasphere” also leads to the identification of the other as an enemy to be eliminated³⁵.

In the dispute for the attention of individuals, the platforms exploit the affective overload and the personalization of the factual issues that circulate in the public debate. In this way, as Habermas observes, platforms align political issues with entertainment and approach citizens as consumers, which tends to produce increasing “depoliticization”³⁶. In the same sense, João Cezar de Castro Rocha states that “the objective of the translation of digital engagement to the public sphere is the depoliticization of the polis, completely disordering the political chessboard [...]”³⁷. Consequently, the “platformization of the public sphere” produces highly deleterious effects on the contemporary democratic experience, insofar as it contributes to the populist degradation of its legitimacy.

4. The judicialization of politics as a containment of the populist degradation of democratic legitimacy.

Jacques Commaille points out that juridification³⁸ is a characteristic of our societies, observable in the most diverse domains. According to him, juridification tends to be accompanied by a judicialization of social and political issues, revealing, in this case, a shift in the treatment of certain issues from the political arena to the judicial one, through the increasingly frequent use of law, as a resource, by social actors³⁹. In this context, issues related to political actors, especially those related to corruption, are shifted to judicial treatment. Therefore, according to Commaille, judicialization would express, in short, an increase in litiga-

³⁵ As Umberto Eco points out, to keep people in control, enemies must always be invented, and it is convenient to make them dangerous and repugnant. Eco, *Costruire il nemico e altri scritti occasionali*. Milano: Bompiani, 2011, 9-36.

³⁶ See Habermas, *Uma nova mudança estrutural da esfera pública e a política deliberativa*. Tradução de Denilson Luis Werle. São Paulo: Editora Unesp, 2023, 71.

³⁷ Rocha, *Bolsonarismo: da guerra cultural ao terrorismo doméstico: retórica do ódio e dissonância cognitiva coletiva*. Belo Horizonte: Autêntica, 2023, 19.

³⁸ For an excellent analysis of the concept of juridification, see Delpuech, Dumoulin, Galembert, *Sociologie du droit et de la justice*. Paris: Armand Colin, 2014, 41-46. For an analysis of juridification from a systemic bias, see Teubner, Juridification: concepts, aspects, limits, solutions. In: Teubner, *Juridification of social spheres*. A comparative analysis in the areas of labor, corporate, antitrust and social welfare law. Berlin: Walter de Gruyter, 1987. 3-48.

³⁹ See Commaille, La juridicisation du politique. Entre réalité et connaissance de la réalité. En guise de conclusion. In: Commaille, Dumoulin, Robert, *La juridicisation du politique*. Paris: LGDJ, 2010, 66.

tion submitted to the courts⁴⁰. Jérôme Pélisse argues that juridification expresses a process of formalization based on the progressive extension of positive law to regulate social relations, especially outside the courts, while judicialization refers to increased recourse to judicial institutions and formal procedures for the resolution of conflicts⁴¹.

Judicialization, as conceptualized above, can serve as an instrument of containment to this tendency to degrade the democratic experience.⁴² From the perspective of the “political sociology of law”, judicialization can be understood as an expedient that can be mobilized in new repertoires of collective action, implemented by social movements, or even as a resource to be instrumentalized by political action. Furthermore, as Ran Hirschl emphasizes, in recent decades, contentious issues of a poli-

⁴⁰ See Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 295-321. However, it is important not to confuse judicialization with judicial activism. On this issue, see: Barroso, Judicialização, ativismo judicial e legitimidade democrática. *[Syn]Thesis*, v. 5, n. 1, 25-26, 2012; Nobre, Rodriguez, “Judialização da política”: déficits normativos e bloqueios normativistas. *Novos Estudos Cebrap*, v. 91, 9 and 12, 2011.

⁴¹ See Pélisse, Les usages syndicaux du droit et de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 165-189. In a similar sense, Dumoulin and Robert point out that “ce mouvement de juridicisation du social et du politique – dont témoignent la prolifération et la diversification de la règle de droit, la réglementation des pratiques de financement des partis politiques, l’essor du mouvement constitutionnaliste mais aussi l’émergence de ‘la question du droit [...] comme l’un des axes fondamentaux d’un débat politique renouvelé’ – s’accompagne d’un processus parallèle de judiciarisation”. Dumoulin, Robert, Autour des enjeux d’une ouverture des sciences du politique au droit. Quelques réflexions en guise d’introduction. In: Commaille, Dumoulin, Robert, *La juridicisation du politique*. Paris: LGDJ, 2010, 9-10. On this issue, see also: Villas Bôas Filho, Juridification and the Indigenous Peoples in Brazil: the ambivalence of a complex process. In: Collin, Casagrande, *Law and Diversity: European and Latin American experiences from a legal historical perspective*, vol. 1: fundamental questions. Frankfurt am Main: Max Planck Institute, 2023, 362-365.

⁴² For a preliminary presentation of this argument, see Villas Bôas Filho, A judicialização da política como instrumento de contenção da degradação populista da legitimidade democrática. *Revista da Faculdade de Direito da USP*, v. 115, 273-312, 2020. In this regard, it is worth noting that, according to Steven Levitsky and Daniel Ziblatt, “democracies may die at the hands not of generals but of elected leaders – presidents or prime ministers who subvert the very process that brought them to power. [...] More often, though, democracies erode slowly, in barely visible steps”. Levitsky, Ziblatt, *How democracies die*. New York: Crown Publishing, 2018, 3.

tical nature that are of unquestionable importance have been transferred to the courts (especially to the Constitutional Courts). The author calls this phenomenon “judicialization of mega-politics” and “judicialization of pure politics”⁴³.

Ran Hirschl argues that what the judicialization of “mega” or “pure” politics would encompass both the processes and the electoral results, restorative justice and even the discussions related to the legitimacy of the regimes, the prerogatives of the executive, the collective identity and the very construction of the nation. In view of this, Jacques Commaille, alluding to a wide international literature, highlights the tendency, sometimes excessively unilateral, of expansion of the Judiciary Power over the Legislative Power and the Executive Power, in order to configure what Chester Neal Tate and Torbjörn Vallinder described as “the global expansion of judicial power”⁴⁴. This expresses a situation of progressive emergence and imposition of what could be characterized as *Juristocracy* or *Courtocracy* which, on several occasions, has played an active role in the processes of validation or invalidation of change of political regimes⁴⁵.

⁴³ Ran Hirschl states that “the judicialization of megapolitics includes a few sub-categories: judicialization of electoral processes; judicial scrutiny of executive branch prerogatives in the realms of macroeconomic planning or national security matters (i.e. the demise of what is known in constitutional theory as the ‘political question’ doctrine); fundamental restorative justice dilemmas; judicial corroboration of regime transformation; and above all, the judicialization of formative collective identity, nation building processes and struggles over the very definition – or *raison d’être* – of the polity as such – arguably the most problematic type of judicialization from a constitutional theory standpoint. These emerging areas of judicialized politics expand the boundaries of national high-court involvement in the political sphere beyond the ambit of constitutional rights or federalism jurisprudence, and take the judicialization of politics to a point that far exceeds any previous limits”. Hirschl, *The judicialization of politics*. In: Goodin, *The Oxford handbook of political science*. Oxford: Oxford University Press, 2011, 256-257.

⁴⁴ See Commaille, *La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice*. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 296. See also: Tate, Chester Neal; Vallinder, *The global expansion of judicial power: the judicialization of politics*. In: Tate, Vallinder, *The global expansion of judicial power*. New York: New York University Press, 1995, 1-10; Santoro, *Diritto e diritti: lo stato di diritto nell’era della globalizzazione*. Torino: G. Giappichelli Editore, 2008, 26-45.

⁴⁵ According to Ran Hirschl “another emerging area of judicial involvement in mega-politics is the (in)validation of regime change”. Hirschl, *The new constitution and the judicialization of pure politics worldwide*. *Fordham Law Re-*

However, according to Jacques Commaille, the current scenario would be characterized not only by the increasing use of the courts and, consequently, by the expansion of their scope of intervention. According to the author, it would also be possible to observe today a progressive multiplication of the reference to justice in the public space⁴⁶. Based on this observation, Commaille proposes the hypothesis that recourse to the Judiciary would begin to take on new forms⁴⁷. It is in line with this perspective that the possibility of the judicialization of politics appearing as an instrument to contain the populist corrosion of the legitimacy of democratic institutions is sustained here.

Adam Przeworski argues that, in democracies, elections would be the only effective instrument for disciplining politicians⁴⁸. It is possible to say that recourse to judicial instances plays an analogous role in social and political contexts degraded by populism. As the judicialization of political issues submits them to the scrutiny of the Judiciary and, therefore, to a control of legality (or, as the case may be, of constitutionality), it can mitigate or nullify their effects and even impose accountability on those involved⁴⁹. Thus, judicialization, as defined

view, v. 75, n. 2, 732, 2006.

⁴⁶ See Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 297.

⁴⁷ See Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 297.

⁴⁸ See Przeworski, *Crises of democracy*. Cambridge: Cambridge University Press, 2019, 6.

⁴⁹ On the complexity of the relationship between juridicization and judicialization, see Commaille, Dumoulin, Heurs et malheurs de la légitimité dans les sociétés contemporaines. Une sociologie politique de la “judiciarisation”. *L’Année Sociologique*, v. 59, n. 1, 66-70, 2009; Pélisse, Judicialisation ou juridicisation? Usages et réappropriations du droit dans les conflits du travail. *Genèses*, v. 22, n. 86, 73-96, 2009 and Villas Bôas Filho, A juridicização e a judiciarização enfocadas a partir da “sociologia política do direito” de Jacques Commaille. *Revista Brasileira de Sociologia do Direito*, v. 2, n. 2, 56-75, jul./dez. 2015. Furthermore, as judicialization submits political issues to a temporality different from that which governs the political dispute, it consequently compromises the practical effect of various populist decisions. In this regard, as Beriaín observes, “no existe en las sociedades modernas un único tiempo social que marca, al estilo de las sociedades tradicionales, el pulso social [...]”. Beriaín, *Aceleración y tiranía del presente: la metamorfosis de las estructuras temporales de la modernidad*. Rubi (Barcelona): Anthro-

above, can effectively serve as a mechanism to contain the voluntarist impetus, ideological radicalism, and the unilateral and erratic imposition of political agendas unrelated to the public interest. It is for this reason, in fact, that populist leaders, through the mobilization of a “hyper-electoralist” rhetoric, strongly refractory to institutions, seek to reduce the field of judicial intervention, with special emphasis on the Constitutional Courts⁵⁰.

Consequently, attempts at popular mobilization or the rigging of judicial institutions as expedients for the neutralization or instrumentalization of the Judiciary by populist leaders are not uncommon⁵¹. Steven Levitsky and Daniel Ziblatt, for example, point out that the process of destroying the democratic order involves, among other things, the attempt to capture and manipulate the Courts of Justice to intimidate opponents⁵². This is a complex situation that illustrates the ambivalent character of judicialization, as it can also serve as a subterfuge for the purposes of those who, “playing the game”, seek to subvert its rules⁵³. It

pos Editorial; México: Universidad Autónoma Metropolitana – Iztapalapa, 2008, 182. On this issue, see Rosa, *Alienação e aceleração*: por uma teoria crítica da temporalidade tardo-moderna. Tradução de Fábio Roberto Lucas. Petrópolis, RJ: Vozes, 2022. See also Paquot, *L'espace public*. Paris: Éditions La Découverte, 2009, 7-8.

⁵⁰ See Rosanvallon, *Le siècle du populisme*: histoire, théorie, critique. Paris: Éditions du Seuil, 2020, 42.

⁵¹ As Levitsky and Ziblatt observe, “with the courts packed and law enforcement authorities brought to heel, governments can act with impunity. Capturing the referees provides the government with more than a shield. It also offers a powerful weapon, allowing the government to selectively enforce the law, punishing opponents while protecting allies”. Levitsky, Ziblatt, *How democracies die*. New York: Crown Publishing, 2018, 78.

⁵² Levitsky and Ziblatt emphasize that “this is how elected autocrats subvert democracy – packing and ‘weaponizing’ the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy’s assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it”. Levitsky, Ziblatt, *How democracies die*. New York: Crown Publishing, 2018, 7-8.

⁵³ In this hypothesis, it is necessary to consider as an aggravating factor the fact that, as Commaille rightly observes, based on Marc Galanter’s thesis, “les ‘joueurs’ de justice ne disposent pas de ressources égales”. Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 314. See also: Galanter, Why the “haves” come out ahead: speculations on the limits of le-

is precisely in the face of this situation that judges, according to the meaning they give to their decisions, can assume (or not) the role of “guardians of democratic promises” by containing the populist degradation of the legitimacy of their institutions⁵⁴.

In Brazil, in several situations, judicialization has shown itself to be an instrument to contain the populist degradation of democratic institutionality produced by the “platformization of the public sphere”. There are particularly illustrative examples in this regard. Firstly, it is worth mentioning an appeal currently pending before the Brazilian Supreme Court (STF), in which, based on articles of the Federal Constitution, is discussed the possibility that having, in the absence of legal regulation of the matter, the direct incidence of constitutional principles, in order to give rise to the duty of platforms to monitor the content published in their electronic domains and to remove information considered offensive, even without the need for intervention by the Judiciary⁵⁵. Secondly, it is worth mentioning Resolution n. 23,732 of February 27, 2024, of the Superior Electoral Court, which, amending TSE Resolution n. 23,610 of December 18, 2019, regulates electoral propaganda, establishing, among other things, that, in various circumstances, platforms will be jointly and severally liable, civilly and administratively, when they do not promote the immediate unavailability of content and accounts, during the election period⁵⁶.

In this context, another recent situation is particularly illustrative of the role played by judicialization in containing the populist degradation of democratic institutionality. This is the onslaught carried out by Elon Musk against the Brazilian Judiciary. Acting as a kind of “cyber caudillo”, the South African tycoon, in posts made on his social network called “X” (formerly Twitter) threatened to violate court orders to block profiles that, among other things, incited a *coup d'état*. His threats combined

gal change. *Law & Society Review*, v. 9, n. 1, 95-169, 1974; Israël, Les joueurs répétés ont-ils plus de chance à gagner? Débats sur le sens de la justice (présentation du dossier). *Droit et Société*, n. 85, 543-557, 2013.

⁵⁴ Jacques Commaille, referring to Antoine Garapon, alludes to the possibility that magistrates may be “‘gardiens des promesses’ démocratiques”. Commaille, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice. In: Commaille, Kaluszynski, *La fonction politique de la justice*. Paris: La Découverte, 2007, 301.

⁵⁵ Topic of general repercussion 533 – “duty of the company hosting a website to inspect the published content and to remove it from the air when considered offensive, even without intervention by the Judiciary” (*leading case*: RE 1057258). In this regard, it is also worth mentioning the topic of general repercussion 987, regarding RE 1037396.

⁵⁶ In this regard, see, especially, article 9-E of Resolution No. 23,732 of the TSE.

with the enunciation of lies about the performance of the Judiciary led to his inclusion as investigated in the investigation of digital militias (INQ 4874). In addition, the Federal Supreme Court opened an inquiry to investigate his conduct regarding the crimes of obstruction of justice, criminal organization and incitement to crime. In this same investigation, a daily fine of 100 thousand reais was also established for each profile eventually reactivated by him in disobedience to judicial determinations, emphasizing in addition that the conduct of the owner of social network “X” could constitute not only abuse of economic power, but also an illegal form of manipulation of public opinion⁵⁷.

However, it is worth arguing that the most expressive illustration of the role played by judicialization in containing the populist degradation of democratic institutions in Brazil, in this context of “platformization of the public sphere”, consisted of the suspension of the activities of the social network “X”, throughout its national territory, after Elon Musk expressly declared that he would not comply with Brazilian judicial decisions and that he would extinguish his branch in the country. In view of this attempt to disobey the Brazilian legal system, the Supreme Federal Court immediately suspended the activities of the social network “X” throughout the Brazilian territory. This suspension lasted until the reactivation of the legal representation of the “X” network in the country and the payment of the fine established by the Brazilian Supreme Court⁵⁸.

In these cases, it is observed that the Brazilian courts (whether in the context of the judicialization of controversial issues or in the use of their regimental and constitutional attributions) have acted in order to hold the platforms responsible for the content made available by them, even if produced by third parties. In order to safeguard democratic institutionalism and, in the midst of it, the full exercise of citizenship, the actions of the Brazilian courts (and, particularly, the Superior Electoral Court and the Federal Supreme Court) have produced effects that directly intervene in the economic activity of the platforms, especially when they disseminate false content, capable of producing “collective cognitive dissonance” or convey discourses capable of engendering political-ideological polarization.

⁵⁷ As in Brazil, the law project 2630/2020, which intended to regulate the activities of social networks and private messaging services, was not voted on, this example expresses a case of judicialization that occurs to compensate for the absence of legalization.

⁵⁸ See Petition 12.404/DF. This is an investigation filed by prevention of Petition 12.100/DF for the investigation of the possible practice of the crimes of obstruction of investigations of a criminal organization and incitement to crime.

tion⁵⁹.

5. Conclusion.

This article sought to analyze the process of judicialization as a way of containing the populist corrosion of the institutional legitimacy of contemporary democracies in a context of “platformization of the public sphere”. To this end, initially, Pierre Rosanvallon’s thesis on the complexity of contemporary democratic experience was focused. As seen, Rosanvallon emphasizes the emergence of three types of democratic legitimacy: a) the “legitimacy of impartiality” (*légitimité d’impartialité*); b) the “legitimacy of reflexivity” (*légitimité de réflexivité*); c) the “legitimacy of proximity” (*légitimité de proximité*) which, in his understanding, would lead to the progressive impossibility of reducing the democratic experience only to its electoral-representative dimension. As seen, for Rosanvallon, these new forms of legitimacy (“impartiality”, “reflexivity” and “proximity”) would be concurrent and complementary to periodic elections.

Then, also based on the work of Pierre Rosanvallon, it was emphasized that populism can be understood as an expression of a corrosion of the institutional design of democracies, as it promotes polarization and praises the direct relationship (that is, without institutional mediation) between leader and people, with the resulting attempt to domesticate non-elected institutions, especially the Constitutional Courts and the Independent Authorities. It was highlighted that this populist corrosion of democratic institutionality is potentiated in the context of the “platformization of the public sphere”, understood, in a generic sense, as a place of public debate in which the circulation and confrontation of diverse opinions and points of view occurs. It was emphasized that the “platformization of the public sphere” causes the fragmentation of the public debate into “algorithmized bubbles” that function as “echo chambers” that feedback on each other from confirmation bias, with the consequent exclusion of dissonant voices.

Finally, the phenomenon of judicialization was analyzed as a way of containing the populist corrosion of democratic institutionality in this context of fragmentation caused by the phenomenon of “platformization

⁵⁹ Habermas emphasizes that platforms need to be held accountable for the information they make available, even for the information they do not produce or edit, because this information also has the power to shape opinions and mentalities. See Habermas, *Uma nova mudança estrutural da esfera pública e a política deliberativa*. Tradução de Denilson Luis Werle. São Paulo: Editora Unesp, 2023, 80.

of the public sphere”. For this purpose, using especially the “political sociology of law” proposed by Jacques Commaille, this analysis sought to underline, through the allusion to concrete cases that occurred recently in Brazil, that the judicialization process, despite its ambivalence, can appear as an instrument of containment, even if partial, of the populist degradation of the democratic experience in the context of the “platformization of the public sphere”.

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Brazil: the ambivalence of a complex process. *In*: Collin, Peter; Casagrande, Agustín (eds.). Law and Diversity: European and Latin American experiences from a legal historical perspective, vol. 1: fundamental questions. Frankfurt am Main: Max Planck Institute, 2023, 359-384.

4.

THE DICHOTOMY BETWEEN REGULATING VS. BEING REGULATED BY ALGORITHMS

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1. Introduction.

Social media has undeniably changed how humans communicate. Over the past few decades, digital platforms have grown, allowing individuals to share common interests, join communities, and influence public opinion. With their widespread and intrinsic presence in people's lives, social media significantly influences the psychology and identity of its users, transforming how they think, act, and interact, thereby profoundly impacting society¹. Initially, social media was seen as a tool for liberation. For example, it played a pivotal role in the Arab Spring uprisings by helping to organize and spread revolutionary messages². Platforms like Facebook, Twitter, and YouTube facilitated communication among protesters in the Middle East and became essential tools for infor-

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¹ Fisher, A máquina do caos: como as redes sociais reprogramaram nossa mente e nosso mundo. São Paulo: Todavia, 2023.

² Ahmad, The role of social media in the Arab Spring uprisings. *Central and Eastern European EDem and EGov Days*, v. 335, 377-387, mar. 2022. Available at: <https://doi.org/10.24989/ocg.v335.31>. Accessed on: 16 out. 2024.

mation sharing. With such global influence, these platforms have become hosts of public discourse and “curators” of freedom of expression³.

While this space definitely brought benefits through greater connectivity, efficiency, and speed, it also introduced complex challenges. Incidents like Cambridge Analytica⁴, the genocide in Myanmar⁵, Edward Snowden’s revelations⁶, fake news⁷, and the global pandemic⁸ reveal how technology can be manipulated to serve corporate, political, and personal interests. With this shift in perspective came a change in the regulatory model. In the early 2000s, self-regulation was adopted, supported by codes of conduct. Soft law was preferred over hard law. More recently, the EU and other entities have enacted strict regulations like the General Data Protection Regulation (GDPR), the Digital Markets Act, and the AI Act. These legal frameworks are now replacing self-regulation, enforcing compliance and penalties⁹. For content moderation specifically, the Digital Services Act (DSA) and the UK’s Online Safety Act (OSA) also contribute to this trend. Beyond Europe, the U.S. Supreme Court is reviewing the legality of Florida and Texas laws limiting digital platforms’ ability to moderate content. In Brazil, similar changes are taking place, including the implementation of a Data Protection Law¹⁰, increased discourse

³ Maranhão, Campos, Kettemann, Abrusio, Sartor, Como regular a moderação privada de conteúdo nos novos espaços públicos? Consultor Jurídico. 2020. Disponível em: https://zelaconsulting.com/wp-content/uploads/2021/08/ABRUSIO_Como-regular-a-moderacao-de-conteudo-nos-novos-espacos-publicos.pdf. Accessed on: 16 de out. 2024.

⁴ Dowling, Cyber information operations: Cambridge Analytica’s challenge to democratic legitimacy. *Journal of Cyber Policy*, v. 7, n. 2, 1-19. May 2022.

⁵ Chatinakrob, Rethinking the scope of international law regulating information operations: lessons learned from a crime of online genocide in Myanmar. *Cambridge International Law Journal*, v. 11, n. 2, dec. 2022.

⁶ Snowden, *Permanent Record: Edward Snowden*. 1 ed. London: Macmillan, 2019.

⁷ Rais, *Fake News: a conexão entre a desinformação e o Direito*. 3 ed. São Paulo: Revista dos Tribunais, 2022.

⁸ Wong, et al., The use of social media and online communications in times of pandemic COVID-19. *Journal of the Intensive Care Society*, v. 22, n. 3. Oct. 2020.

⁹ Floridi, Luciano. The end of an era: from self-regulation to hard law for the digital industry. *Philosophy & Technology*, v. 34, 619-622, dez. 2021. Available at: <https://doi.org/10.1007/s13347-021-00493-0>. Accessed on: Oct. 16, 2024.

¹⁰ Brazil. Law No. 13,709, of August 14, 2018. General Data Protection Law. *Diário Oficial da União*, Brasília, DF, August 15, 2018. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Accessed on: May 09, 2024.

around digital platform regulation¹¹, and recent Superior Electoral Court resolutions on content moderation for the 2024 elections¹².

The current landscape makes it clear that the question is not whether regulation should happen, but rather how it should be implemented. It's important to recognize that this issue is complex and further complicated by factors like political discourse and the economic influence of digital platforms. While this work does not aim to answer the "how," it seeks to explore a specific phenomenon that occurs when regulators, whilst trying to assert more control, inadvertently does the opposite: it increases the reliance on algorithmic decision-making, and therefore, grants even more power to Big Tech companies. An example is regulatory measures like the "German Network Enforcement Act" and the EU Code of Conduct on Hate Speech. They impose tight deadlines for removing problematic content, compelling platforms to rely on automated systems for proactively identifying illegal or harmful material on a large scale¹³.

During a 2018 Congressional hearing, Mark Zuckerberg presented artificial intelligence as a long-term solution for Meta's social network. He argued that automation could tackle problems like fake news, hate speech, and discrimination¹⁴. While it's logical for tech companies to address technological challenges with more technology, increasing reliance on automated decisions has limitations. Algorithmic moderation may exacerbate key content policy issues, making already opaque practices even less transparent. This complicates justice-related concerns around

¹¹ In this section, the Bill No. 2630/2020, known as the Fake News Law, is mentioned. More recently, Elon Musk criticized Brazilian Supreme Court Justice Alexandre de Moraes, accusing him of violating Brazil's constitution by blocking specific social media accounts on X (formerly Twitter). In response, the Justice launched a criminal investigation into Musk for allegedly obstructing justice by failing to comply with court orders in an ongoing disinformation probe.

¹² Conheça as regras gerais para a divulgação de propaganda eleitoral. Available at: <<https://www.tse.jus.br/comunicacao/noticias/2024/Marco/conheca-as-regras-gerais-para-a-divulgacao-de-propaganda-eleitoral>>. Access in: May 9, 2024.

¹³ Gorwa, Robert; Binns, Reuben; Katzenbach, Christian. Algorithmic content moderation: technical and political challenges in the automation of platform governance. *Big Data & Society*, v. 7, n. 1, 2020. Available at: <https://doi.org/10.1177/2053951719897945>. Accessed on: Oct. 16., 2024.

¹⁴ Harwell, AI will solve Facebook's most vexing problems, Mark Zuckerberg says. Just don't ask when or how. *Washington Post*, Available at: <<https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/ai-will-solve-facebooks-most-vexing-problems-mark-zuckerberg-says-just-dont-ask-when-or-how/>>. Access in: May 9, 2024.

how certain perspectives, groups, or types of speech are treated; it can, also, remove or minimize the perception that there are human-driven political considerations affecting content decisions, leading to a depoliticization of the whole moderation process¹⁵. With regulatory changes being implemented amidst growing concerns about the use of technology, the increased reliance on automated content moderation raises an essential question: are platforms being regulated, or is society being regulated by algorithms?

To address this question, the chapter is structured in three parts. First, will delve into the concerns of the state, judiciary, and regulators regarding content moderation. Then, it will explore the impact of content moderation and the differences between human and automated moderation. Finally, the chapter will use the Brazilian Superior Electoral Court's resolution on content moderation for the 2024 elections as a case study to analyze how regulatory decisions can drive increased use and dependence on automated decision-making. This analysis aims to understand the dichotomy between regulating algorithms and being regulated by them, emphasizing the need for thoughtful and, therefore, effective policy in such a complex digital landscape.

2. Public oversight in the algorithmic era: addressing content moderation challenges.

The global shift towards algorithmic content moderation, driven by the exponential growth of online communication, has raised significant concerns regarding the concentration of power in the hands of private tech companies. These platforms often operate with little to no external oversight, which can lead to excesses in content moderation without adequate accountability mechanisms¹⁶. Within this framework, the consolidation of power among big technology companies, combined with minimal scrutiny from users and the state itself, raises the risk of overreach and arbitrary enforcement of policies.

As digital platforms increasingly rely on automated systems for content moderation, the establishment of effective governance structures and independent oversight becomes paramount. In this context, concerns

¹⁵ Gorwa, Binns, Katzenbach, Algorithmic content moderation: technical and political challenges in the automation of platform governance. *Big Data & Society*, v. 7, n. 1, 2020. Available at: <https://doi.org/10.1177/2053951719897945>. Accessed on: Oct. 16., 2024.

¹⁶ Binns, et al. Like trainer, like bot? Inheritance of bias in algorithmic content moderation. In: *Social Informatics: 9th International Conference, SocInfo 2017*, Oxford, UK, September 13-15, 2017, Proceedings, Part II 9. Springer International Publishing, 2017. 405-415.

have emerged among governments, judiciaries, and regulatory bodies regarding the accuracy, fairness, and reliability of these processes. This highlights the urgent need for robust regulatory frameworks and mechanisms that ensure algorithmic decision-making processes are, at the same time, reliable, explainable and equitable.

Therefore, governments worldwide are increasingly apprehensive about the opaque nature of algorithmic decision-making in content moderation, particularly regarding its potential to infringe on the freedom of expression, access to information by its citizens, and the right to appeal moderation decisions. Consequently, there is a growing call for legislative measures that mandate greater transparency and liability from digital platforms.

The European Union has implemented several key initiatives to regulate online platforms and safeguard fundamental rights in the digital space. Among them, the Digital Services Act (DSA) stands out, imposing new obligations on online platforms to ensure clearer content moderation practices¹⁷. It requires platforms to disclose their content moderation practices and the algorithms used to manage content visibility or removal. Additionally, the DSA gives users the right to appeal moderation decisions, providing a recourse for those who feel their content was unjustly removed or suppressed.

Alongside the DSA, the General Data Protection Regulation (GDPR), which has been in force since 2018, focuses on protecting individuals' personal data by establishing stringent requirements for data collection, processing, and storage. It emphasizes clarity in data practices and grants users rights such as data access, the right to be forgotten, and data portability. This regulation directly impacts algorithmic content moderation, as platforms must handle users' data in compliance with privacy standards, ensuring that their algorithms respect privacy rights¹⁸.

The Digital Markets Act (DMA) complements these frameworks by targeting monopolistic practices of large tech companies, referred to as "gatekeepers". It imposes obligations on dominant platforms to make their algorithms accessible to business users and third parties, promoting a more competitive environment and fostering innovation. The DMA aims to prevent dominant platforms from unfairly disadvantaging others

¹⁷ European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act). Brussels, 2020. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en. Accessed on: Oct. 3, 2024.

¹⁸ European Union. General Data Protection Regulation (GDPR). 2018. Available at: <https://gdpr-info.eu/>. Accessed on: Oct. 4, 2024.

through opaque algorithmic practices¹⁹.

Finally, it is also pertinent to emphasize that the AI Act further strengthens the EU's regulatory landscape by focusing on the deployment of artificial intelligence systems. It classifies AI systems by risk levels – ranging from minimal to unacceptable – and applies stricter regulations to high-risk AI systems, including those used in content moderation. The AI Act ensures that AI systems are transparent, explainable, and free from bias. For platforms using AI to moderate content, this means adhering to requirements that guarantee their systems are free from discriminatory outcomes and that the algorithms are auditable and accountable, as it obliges companies to demonstrate that their AI systems do not perpetuate harmful biases or unfairly restrict users' rights²⁰.

Similarly, the United Kingdom's Online Safety Bill is a landmark piece of legislation aimed at addressing online content moderation and enhancing user protection, particularly for children. It imposes stringent obligations on tech companies, requiring them to take proactive measures against harmful content such as child exploitation, cyberbullying, and terrorist material. A key element of the bill is the requirement for transparency, with companies needing to report on how their moderation systems and algorithms function, ensuring they do not amplify harmful content unintentionally²¹.

The bill also introduces a “duty of care” framework, obligating platforms to implement robust safety features such as age verification and parental controls to protect children. Additionally, companies must provide users with clear explanations for content removal or account suspension decisions, offering a process for appealing these actions. The aim is to balance protection from harmful content with the preservation of freedom of expression, ensuring moderation practices are transparent and fair²². Regulated by Ofcom, the bill gives the regulator the authority to enforce compliance and impose hefty fines for non-compliance, including penalties of up to £18 million or 10% of a company's global revenue. This regulatory framework emphasizes accountability, ensuring that tech companies uphold their responsibility to protect users while

¹⁹ European Union. Digital Markets Act (DMA). 2022. Available at: <https://www.eu-digital-markets-act.com>. Accessed on: October 5, 2024.

²⁰ European Union. Artificial Intelligence Act (AI Act). 2023. Available at: <https://www.eu-ai-act.com>. Accessed on: Oct. 5, 2024.

²¹ GOV UK. Online Safety Act 2023. United Kingdom, 2023. Available at: <https://www.legislation.gov.uk/ukpga/2023/50/enacted>. Accessed on: Oct. 3, 2024.

²² Government of the United Kingdom. A guide to the Online Safety Bill. 2024. Available at: <https://www.gov.uk/guidance/a-guide-to-the-online-safety-bill>. Accessed on: Oct. 5, 2024.

maintaining transparency in their content moderation processes²³.

Nevertheless, in the United States, various state-level initiatives have been introduced to enhance transparency in algorithmic decision-making and regulate content moderation practices on social media platforms²⁴. The California Consumer Privacy Act (CCPA), for instance, grants users the right to know what personal data is collected and how it is used, promoting accountability in algorithmic processes. Additionally, lawmakers have proposed bills requiring social media platforms to provide detailed explanations of their content moderation policies and decisions, with the goal of improving transparency and fairness²⁵.

In Florida, the Transparency in Technology Act (SB 7072), passed in 2021, aims to regulate large social media platforms by requiring them to disclose their content moderation practices, including how algorithms rank, promote, or remove content. The law also mandates that users be clearly notified when their content is removed or accounts are suspended, ensuring decisions are not arbitrary. Notably, the law includes provisions to prevent de-platforming political candidates, reflecting concerns over potential biases in algorithmic content moderation that may suppress certain viewpoints²⁶. In parallel, Texas's House Bill 20 (HB 20), also passed in 2021, targets large social media platforms by prohibiting them from blocking or restricting content based on a user's viewpoint, addressing concerns over censorship of conservative voices. The law requires platforms to disclose their moderation practices, including how algorithms are used, and mandates clear processes for users to appeal moderation decisions²⁷.

However, both referred laws have come under legal scrutiny, with critics expressing concerns about their compliance with the First Amendment's free speech protections and potential conflicts with federal law, including Section 230 of the Communications Decency Act, which grants platforms

²³ OFCOM. A guide for services on illegal and harmful content. 2024. Available at: <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/guide-for-services/>. Accessed on: October 5, 2024.

²⁴ Perrino, Platform Accountability and Transparency Act Reintroduced in Senate. Tech Policy Press, 2023. Available at: <https://www.techpolicy.press/platform-accountability-and-transparency-act-reintroduced-in-senate/>. Accessed on: Oct. 3, 2024.

²⁵ California department of Justice. California Consumer Privacy Act (CCPA). United States of America, 2024. Available at: <https://oag.ca.gov/privacy/ccpa>. Accessed on: Oct. 3, 2024.

²⁶ Florida. Transparency in Technology Act (SB 7072). 2021. Available at: <https://www.flsenate.gov/Session/Bill/2021/7072>. Accessed on: Oct. 5, 2024.

²⁷ Texas. House Bill 20 (HB 20). 2021. Available at: <https://capitol.texas.gov/tlodocs/872/billtext/html/HB00020F.htm>. Accessed on: Oct. 5, 2024.

immunity from liability for user-generated content²⁸. These legal challenges highlight the ongoing debate regarding the need to balance the regulation of content moderation practices with the preservation of the legal protections granted to platforms.

Along the same lines, in Brazil, the regulatory framework around content moderation and algorithm use is closely tied to the General Data Protection Law (LGPD), enacted in 2018 and effective since 2020. Inspired by the European GDPR, the LGPD establishes strict requirements for data collection, processing, and storage, with an emphasis on transparency and user rights. This impacts platforms using algorithms for content moderation, as they must ensure that personal data used in these processes complies with privacy standards²⁹.

The LGPD grants users the right to access, correct, and delete their personal data, ensuring transparency in automated decision-making processes. Platforms must provide clear explanations of how their algorithms function, especially when used to classify or remove content. This regulatory obligation helps ensure that users understand how decisions are made and offers them avenues for contesting unfair decisions.

Moreover, Brazil's National Data Protection Authority (ANPD) oversees LGPD enforcement, with the power to impose substantial penalties for non-compliance. This adds significant pressure on companies to adopt transparent and accountable approaches in their use of algorithms, particularly regarding content moderation. Combined with the Internet Civil Framework (Marco Civil da Internet)³⁰, which guarantees freedom of expression and neutrality, the LGPD strengthens the legal foundation for user protection against arbitrary or opaque content moderation practices.

Despite these advances, Brazil still faces challenges in enforcing these regulations, especially when dealing with global tech companies headquartered abroad. This highlights the need for more specific rules addressing algorithmic moderation and greater international coopera-

²⁸ CONGRESSIONAL RESEARCH SERVICE. Free Speech Challenges to Florida and Texas Social Media Laws. Updated on September 22, 2022. Available at: <https://crsreports.congress.gov/product/pdf/LSB/LSB10748>. Accessed on: Oct. 5, 2024.

²⁹ Brazil. Law No. 13,709, of August 14, 2018. General Data Protection Law. Diário Oficial da União, Brasília, DF, August 15, 2018. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/113709.htm. Accessed on: May 09, 2024.

³⁰ Brazil. Law No. 12,965, of April 23, 2014. Marco Civil da Internet. Diário Oficial da União, Brasília, DF, April 24, 2014. Available at: https://www.planalto.gov.br/ccivil_03/_ato2014-2018/2014/lei/112965.htm. Accessed on: Oct. 09, 2024.

tion, similar to initiatives like the “German Network Enforcement Act” and the EU Code of Conduct on Hate Speech.

To elaborate further, the German Network Enforcement Act (NetzDG), enacted in 2017, is one of the most stringent laws aimed at regulating online platforms and combating illegal content, particularly hate speech. The law requires large social media platforms with over two million users to swiftly remove illegal content, such as hate speech, defamatory remarks, and incitement to violence, within 24 hours of notification, or seven days for more complex cases. Failure to comply can result in fines of up to €50 million. NetzDG has been seen as a groundbreaking piece of legislation, holding tech companies accountable for the content shared on their platforms, ensuring that illegal content does not go unchecked³¹. However, it has also faced criticism, with concerns that it may lead to over-blocking and suppress legitimate speech, as companies may err on the side of caution to avoid fines³².

Similarly, the EU Code of Conduct on Countering Illegal Hate Speech Online, established in 2016 in collaboration with major tech companies like Facebook, Twitter, YouTube, and Microsoft, focuses on voluntary commitments from these platforms to combat the spread of hate speech. The Code sets out specific expectations for tech companies, including reviewing and removing illegal hate speech within 24 hours and providing transparent reporting on their content moderation efforts. While it is not legally binding, the Code has been praised for fostering cooperation between governments and private sector actors in the fight against online hate speech. The initiative has been further strengthened by ongoing monitoring and reporting to ensure that companies adhere to their commitments³³.

These frameworks demonstrate the growing international effort to hold digital platforms accountable for the content they host, especially regarding illegal or harmful material. However, despite their differences

³¹ Gesley, (2021) Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech. Retrieved from the Library of Congress, <https://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/>. Accessed on: Oct. 5, 2024.

³² Brega, A regulação de conteúdo nas redes sociais: uma breve análise comparativa entre o NetzDG e a solução brasileira. *Revista Direito GV*, v. 19, e2305, 2023.

³³ European Commission. Code of Conduct on Countering Illegal Hate Speech Online. 2016. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en. Accessed on: Oct. 5, 2024.

- NetzDG being a national law and the EU Code a voluntary agreement
- both highlight the critical role that regulatory intervention and cooperation play in addressing the challenges posed by algorithmic content moderation.

These initiatives exemplify effective strategies for navigating the complexities of moderating digital spaces, particularly in balancing the protection of free speech with the need to curb the spread of harmful content. As this chapter focuses on the Brazilian context, it is essential to underscore the pivotal role of the Brazilian judiciary in this regard. Moreover, the 2024 elections have marked a significant turning point, largely influenced by the rise of digital communication channels, especially on account of the increasing prevalence of misinformation and hate speech on social media platforms, the judiciary faces mounting pressure to enforce existing laws and interpret legal frameworks pertaining to content moderation and the safeguarding of electoral integrity.

In recent years, Brazilian courts have issued rulings aimed at combating misinformation during electoral processes. These decisions underscore the importance of an independent judiciary in overseeing the actions of both government entities and private tech companies. For instance, the Supreme Federal Court (STF) has taken a proactive stance by affirming the need for transparency in social media algorithms and demanding accountability from platforms that allow the spread of false information. Such measures are designed to safeguard the democratic process, ensuring that voters receive accurate information and are not unduly influenced by harmful content.

Moreover, the establishment of the Electoral Justice System in Brazil has intensified scrutiny over online conduct as the 2024 elections approach. The Superior Electoral Court (TSE) is actively working to regulate the digital landscape, implementing measures such as stricter controls on political advertising and monitoring the online activities of candidates. The TSE's initiatives also involve collaboration with tech companies to promote the responsible use of their platforms during the electoral period, further illustrating the need for a cohesive approach to content moderation that aligns with democratic values.

As Brazil seeks to learn from international regulatory frameworks like the German Network Enforcement Act and the EU Code of Conduct on Hate Speech, the judicial system's role in enforcing these principles will be vital. Ensuring that free speech is upheld while simultaneously combating harmful content will require ongoing dialogue between lawmakers, the judiciary, and digital platforms. In this evolving landscape, the judiciary's decisions will be pivotal in shaping the future of online discourse in Brazil, particularly as it navigates the challenges posed by the intersection of technology, law, and electoral integrity.

3. The Complementary Roles of Automation and Human Oversight.

Effective moderation is crucial in mitigating the negative impacts of algorithmic decision-making, as it plays a vital role in shaping public discourse, influencing individual behavior, and affecting marginalized communities. For example, biased algorithms can perpetuate stereotypes, amplify misinformation, and facilitate online harassment, leading to real-world consequences. Firstly, it is essential to understand that various forms of content moderation exist. One example is user-controlled moderation, where individuals create their own blocklists to filter out unwanted content³⁴. This paper will specifically address moderation practices employed by major technology companies, often referred to as Big Tech. Within this context, it is important to distinguish between human moderation and automated moderation, as this differentiation raises critical questions about efficiency and effectiveness.

This aspect is particularly relevant, as it directly influences the way industry decisions are perceived. For instance, TikTok recently announced global layoffs of estimated 500 employees, most of whom were involved in content moderation³⁵. The company claims this decision is part of a broader strategy to enhance its content review processes and improve operational efficiency. In addition, TikTok plans to invest \$2 billion worldwide in trust and safety measures, with 80% of content that violates guidelines now being detected and removed by automated systems³⁶.

While this shift highlights the necessity of addressing high content volumes – research from Data Never Sleeps³⁷ reveals that every minute, 500 hours of video are watched on YouTube – it also underscores the limitations of human moderators. On the other hand, automated systems, while efficient in processing large volumes of data, face inherent

³⁴ Zuo, Mondragon, Raman, Tyson, Understanding and improving content moderation in Web3 platforms. In: Proceedings of the Eighteenth International AAAI Conference on Web and Social Media (ICWSM 2024), Buffalo, New York, 3-6 jun. 2024. Available at <https://doi.org/10.1609/icwsm.v18i1.31431>. Access on: Oct. 16, 2024.

³⁵ Latiff, ByteDance's TikTok cuts hundreds of jobs in shift towards AI content moderation. Reuters, 11 oct. 2024. Available at: <https://www.reuters.com/technology/bytedance-cuts-over-700-jobs-malaysia-shift-towards-ai-moderation-sources-say-2024-10-11/>. Access in: Oct. 16, 2024.

³⁶ *Ibidem*.

³⁷ DOMO. Data never sleeps 10.0. 2022. Infographic. Available at: <https://web-assets.domo.com/miyagi/images/product/product-feature-22-data-never-sleeps-10.png>. Accessed on: Oct. 16, 2024.

challenges. Unlike humans, AI tools do not comprehend language or cultural context in a meaningful way; they rely on counting, comparing, and analyzing patterns but cannot interpret the nuances behind words³⁸, and images. According to Prem and Krenn³⁹ existing content moderation algorithms lack the ability to understand context and struggle to capture subtle meanings in users communications, which are crucial for productive discourse. Additionally, the authors point out that most algorithms perform optimally for widely spoken languages like English, while less common languages frequently suffer from a lack of available datasets⁴⁰.

This disparity raises important ethical and legal concerns regarding the equity of content moderation practices across different cultural and social groups. A prominent example occurred in 2016, when Facebook – now Meta – blocked the PISEAGRAMA journal's page after it published a cover photograph featuring a Yawalapiti Indigenous woman with bare breasts holding a sapling⁴¹. The image, originally taken in 1958 as a part of a federal reforestation campaign, symbolized the ongoing struggles faced by Indigenous peoples in Brazil. Similarly, in 2015, the Brazilian Ministry of Culture's profile had a 1909 photograph by Walter Garbe removed. The image, which depicted a Botocudo Indigenous couple – both with bare breasts – was shared in anticipation of Indigenous Peoples' Day⁴². Social media companies often enforce community standards that prohibit the display of women's breasts, but in many Amerindian cultures, all living beings are regarded as having souls, though not necessarily bodies.⁴³ These cases highlight the importance of considering diverse cultural perspectives into content moderation.

Furthermore, even within the English-speaking world, different sub-cultures and dialects can be misinterpreted by algorithms. For instance, the word “imma,” commonly used in African American Vernacular English (AAVE), has been mistakenly flagged as hate speech or a threat by content moderation algorithms, despite the fact that “imma” simply means

³⁸ Esposito, *Artificial communication: how algorithms produce social intelligence*. Cambridge, Massachusetts; London, England: The MIT Press, 2022.

³⁹ Rem, Krenn, *On algorithmic content moderation*. In: Werthner, H.; et al. *Introduction to digital humanism*. Cham: Springer, 2024. 481-493. Available at: https://doi.org/10.1007/978-3-031-45304-5_30. Access on: Oct. 16, 2024.

⁴⁰ *Ibidem*.

⁴¹ D'Andrea, Jurno, *Algoritmos e cosmopolíticas*. Piseagrama, Belo Horizonte, seção Extra!, Mar. 7, 2018. Available at: <https://piseagrama.org/algoritmos-e-cosmopoliticas>. Access on: Oct.10, 2024.

⁴² *Ibidem*.

⁴³ *Ibidem*.

“I’m going to.”⁴⁴ This demonstrates the risks of applying uniform moderation standards without accounting for linguistic and cultural diversity, potentially leading to unjust outcomes for marginalized communities.

The examples above demonstrate that, given the vast amount of content generated online, automated content moderation is essential for managing the volume. However, it is equally important to integrate human oversight into the process to ensure a more accurate understanding of context and to address scenarios that algorithms are not yet capable of fully comprehending. While algorithms can detect patterns and flag potentially harmful content at scale, they often lack the ability to grasp the nuances of language, culture, and intent. Complex situations, such as distinguishing between sarcasm, satire, or culturally specific expressions, require human judgment. This is particularly pertinent when analyzing regulatory measures aimed at online content. Next, we will examine the case study of the Brazilian Superior Electoral Court’s resolution regarding content moderation for the 2024 elections.

4. Regulating Automated Decisions: A Case Study of the Brazilian Superior Electoral Court.

In Brazil, electoral governance is characterized by a unique combination of elements. Governance activities are centralized under a single electoral authority, which is responsible for the application, adjudication and rulemaking⁴⁵. During the rulemaking process, the Brazilian Superior Electoral Court (TSE) promulgates resolutions. These resolutions are documents issued by the TSE that outline administrative, contentious-administrative, or normative decisions. Although they are not laws, these resolutions provide guidance to political parties, candidates, and voters regarding electoral procedures, with the aim of organizing electoral processes and ensuring the uniform application of electoral laws⁴⁶. It is important to understand, however, that according to Vitor Marchetti, *“some decisions can produce effects beyond the administrative function,*

⁴⁴ Duarte, Llanos, Loup, Mixed messages? The limits of automated social media content analysis. Washington, DC: Center for Democracy & Technology, nov. 2017. Available at: <https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>. Access on: oct. 16, 2024.

⁴⁵ Marchetti, Governança eleitoral: o modelo brasileiro de Justiça Eleitoral. Dados – Revista de Ciências Sociais, Rio de Janeiro, v. 51, n. 4, 865-893, 2008.

⁴⁶ Superior Electoral Court. Você sabe o que é uma resolução do TSE? Veja no Glossário: resoluções aprovadas pelo Tribunal orientam partidos e candidatos sobre a aplicação das normas das eleições. Feb. 28, 2024. Available at: <https://www.tse.jus.br/comunicacao/noticias/2024/Fevereiro/voce-sabe-o-que-e-uma-resolucao-do-tse-o-glossario-explica>. Access on: Oct. 21, 2024.

generating new rules and encroaching on the legislative activity, which is typical of the Legislature.” (p. 891, 2008)⁴⁷.

The recent TSE Resolution No. 23.732/24⁴⁸ introduces significant regulatory measures concerning the management of online content during the electoral period, particularly targeting the 2024 municipal elections. This legislation amends the previous TSE Resolution No. 23.610/19⁴⁹, which addresses electoral propaganda, by incorporating new factors that shape digital electoral law. The resolution updates key provisions, mostly aligning with the Internet Civil Framework (MCI) and thereby reinforcing core structural values. However, articles 9-B to 9-F introduce regulations that deviate from this foundational legislation, sparking debate over potential impacts on digital rights.

Firstly it is important to note that, due to the unique combination of elements described in the first paragraph, Brazil’s electoral justice holds police powers. Therefore, during elections, electoral judges manage both judicial and administrative duties, which include procedures distinct from those of typical judicial actions.

In the context of online electoral propaganda, electoral courts have the authority to order the immediate removal of content that violates electoral rules, even without a judicial order, as outlined in Article 9-D, § 5°. This represents a departure from the MCI, which requires judicial authorization for content removal. It is important to note that this power is not unlimited. Article 9-F establishes that decisions made by electoral judges with police powers must adhere to the collegiate rulings of the TSE on the same issue, particularly in cases where the removal or retention of identical content has already been decided.

Another example of this departure from the MCI is Article 9-B, §2°, that requires application providers to take immediate and effective action to halt the boosting, monetization, and access to content deemed illicit, either upon detecting such content themselves or in response to

⁴⁷ Marchetti, Governança eleitoral: o modelo brasileiro de Justiça Eleitoral. Dados – Revista de Ciências Sociais, Rio de Janeiro, v. 51, n. 4, 865-893, 2008.

⁴⁸ Brazil. Superior Electoral Court. Resolução n. 23.732, de 27 de fevereiro de 2024. Altera a Res.-TSE n. 23.610, de 18 de dezembro de 2019, dispondo sobre a propaganda eleitoral. Available at: <https://www.tse.jus.br/legislacao/compilada/res/2024/resolucao-no-23-732-de-27-de-fevereiro-de-2024>. Access on: Oct. 21, 2024.

⁴⁹ Brazil. Superior Electoral Court. Resolução n. 23.610, de 18 de dezembro de 2019. Dispõe sobre a propaganda eleitoral (Redação dada pela Resolução n. 23.732, de 2024). Available at: <https://www.tse.jus.br/legislacao/compilada/res/2019/resolucao-no-23-610-de-18-de-dezembro-de-2019>. Access on: Oct. 21, 2024.

user notifications. This approach, nonetheless, raises concerns, as it involves platforms in content moderation decisions typically reserved for the judiciary, thus granting significant discretion to private entities and algorithms in determining permissible limits to freedom of expression without judicial determination of illegality.

While it is true that time is crucial in mitigating the spread of harmful material, the court's resolution not only raises concerns about arbitrariness in decision-making processes⁵⁰ but also increases reliance on algorithms, allowing them to dictate what can or cannot be viewed on these platforms. As mentioned in the second item of this chapter, this dependence can lead to a higher likelihood of errors. Automated systems may misinterpret content, flagging innocent or contextually appropriate material as harmful. The key point, therefore, is that while striving to hold companies accountable for the content they host, the resolution presents a significant contradiction. This choice of regulation stems from a recognition of the potential harm that social media algorithms can cause by amplifying harmful content. By diminishing human involvement in the moderation process, algorithms are not being regulated; rather, their use is being augmented, thereby allowing them to govern online experiences.

In this context, the implications of the resolution extend beyond immediate electoral governance; they encompass fundamental issues of accountability, transparency, and the preservation of democratic values in the digital age. By prioritizing rapid content removal over established legal protections, the resolution risks undermining rights enshrined in the Marco Civil da Internet. This creates a paradox in which the aim of safeguarding the electoral process may inadvertently lead to increased algorithmic control, adversely affecting users' rights, particularly their freedom of expression. As society becomes increasingly intertwined with digital platforms, it is essential that regulatory frameworks strike a careful balance between the need for timely intervention and the imperative of maintaining legal protections. In this case, ensuring a balance between automation and human intervention is crucial to prevent unfair outcomes and to achieve the nuanced understanding and context that algorithms cannot provide.

5. Final considerations.

As outlined above, the intricate relationship between content moderation and automated decision-making systems highlights a significant regulatory challenge in the digital age. The concerns of state actors, the

⁵⁰ Gomez, Machado, Lucas, Calmon, Flavio. Algorithmic arbitrariness in content moderation. 2024. Available at: [10.48550/arXiv.2402.16979](https://arxiv.org/abs/2402.16979). Access on: Oct. 21, 2024.

judiciary, and regulators regarding how online content is managed underscore the delicate balance between protecting public interests and safeguarding individual freedoms. As the chapter has explored, content moderation algorithms can have far-reaching societal impacts, shaping public discourse, influencing elections, and affecting democratic processes.

The case study of the Brazilian Superior Electoral Court's resolution on content moderation for the 2024 elections illustrates how regulatory decisions can compel increased reliance on these algorithms. This growing dependence raises critical questions about accountability, transparency, and the protection of fundamental rights in a digital ecosystem where algorithms both influence and are subject to regulation.

On the other hand, it also fills the gap that could not be effectively managed by humans alone, given the sheer volume and speed of online content that requires moderation. In this sense, algorithms offer scalability and efficiency that manual oversight cannot achieve, particularly in real-time scenarios like elections, where misinformation and harmful content can spread rapidly. While this reliance on automated systems raises concerns about fairness and bias, it simultaneously addresses practical limitations by enabling faster, more comprehensive content review processes.

However, this is far from being a perfect solution. While algorithmic moderation offers efficiency, it also risks undermining democratic discourse if not paired with robust oversight mechanisms. Balancing automation with human judgment remains a critical challenge in ensuring fair content moderation practices.

Thus, the dichotomy between regulating algorithms and being regulated by them calls for a nuanced and strategic approach to policy-making. Governments and regulatory bodies must carefully weigh the broader implications of their decisions, ensuring that they foster a digital environment that promotes innovation while upholding the principles of fairness, transparency, and accountability. Addressing the challenges of content moderation in the algorithmic era necessitates a multi-faceted approach, including robust public oversight, transparency, and user empowerment.

Only through thoughtful and effective regulation, supported by strong governance structures, can this complex landscape be navigated, seeking to mitigate the risks of over-dependence on automated systems. By working collaboratively, stakeholders can ensure that the power dynamics inherent in algorithmic content moderation do not infringe upon fundamental rights, thereby fostering a more equitable and innovative digital environment for all users.

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5.

DIGITAL PLATFORMS AND LAW: ALGORITHMS, REGULATION AND TRANSNATIONALITY FROM THE PERSPECTIVE OF THE SOCIOLOGY OF LAW*

*Marco Antonio Loschiavo Leme de Barros***

The rise of digital platforms has profoundly and rapidly transformed contemporary social interactions. Companies such as Google, Amazon, Facebook, Uber, and Airbnb have redefined markets, behaviors, and ways of life over the past decade. This phenomenon, commonly described as “platformization,” reflects the growing centrality of digital infrastructures in the organization of everyday life and in the mediation of social relations.

Tarleton Gillespie (2010) highlights the semantic richness of the term “platform” by pointing out that it is a concept sustained by a figurative political architecture that goes far beyond its technical or computational dimension. In his words: “‘platform’ emerges not simply as indicating a functional shape: it suggests a progressive and egalitarian arrangement, promising to support those who stand upon it” (Gillespie, 2010, 351). Platforms, therefore, not only sustain individuals but also shape the functioning of organizations and States, which are increasingly dependent on these digital infrastructures (Schaake, 2024). In this sense, it can be said that we live in a platform society (CAMPOS, 2023, 277-281), in which the mediation of social interactions takes place primarily through systems operated by large technology corporations. Platforms represent the convergence of multiple functionalities and communicational structures in a single digital environment, operating complex processes of information and interaction.

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A recurring critique of this model lies in the fact that platforms are not merely neutral intermediaries: they organize, regulate, and extract economic value from the interactions they facilitate, structuring their own markets and imposing internal rules. Revisiting Michel Foucault's (1977) notion of biopolitics, this dynamic can be interpreted as part of a transition from the disciplinary society to a new form of control society – now reconfigured by algorithmic and digital logic. The platform society inaugurates a regime in which individuals are permanently monitored and evaluated in real time by automated systems, based on artificial intelligence and massive data analysis.

Nick Srnicek (2017) offers a critical analysis of how contemporary capitalism has been transformed with the advent of digital platforms. Srnicek argues that, given the decline in the profitability of the manufacturing industry since the late twentieth century, capitalism has increasingly relied on the extraction and control of data as a way to sustain economic growth. From another perspective, Shoshana Zuboff (2020) had already warned of the emergence of a new model of capital accumulation based on surveillance, showing how digital platforms not only mediate transactions but also capture, process, and monetize users' behavioral data. Furthermore, former European parliamentarian Marietje Schaake (2023) refers to a "tech coup" and to "digital weapons" to describe how large technology companies have surpassed the authority of States, exploiting gray areas of legality with emerging technologies such as artificial intelligence, and thereby putting the foundations of the democratic regime at risk.

Against this backdrop, fundamental questions arise: what is the role of law in the era of digital platforms? How can legal certainty be ensured in the face of the opacity and power of algorithmic operations? This text proposes, in an exploratory manner, that the sociology of law plays a crucial role in producing new diagnoses capable of mapping and interpreting the current tensions and transformations in the legal field. For sociology, the task is to observe how these transformations configure a new mode of social communication based on the risks involved in organizational operations (Luhmann, 1993), guided by algorithmic logic and marked by transnationally distributed power networks. In these brief notes, I propose three analytical axes that I consider fundamental for building a sociology of law oriented toward the phenomenon of digital platforms and capable of describing the changes in the contemporary legal system: first, the study of the advance of artificial or algorithmic communication, which redefines the channels and patterns of social and legal interaction; second, the transnational character of platforms, which challenges the traditional boundaries of sovereignty and jurisdiction; and finally, the understanding of the paradox of regulation, which lies in the tension between the need for public control and the limited capacity of

States to regulate global actors with asymmetrical technological power.

1. The Advance of Artificial (or Algorithmic) Communication.

Algorithm-mediated communication has become a structural component of digital platforms, playing a central role in the organization of the content, services, and products offered to users. This algorithmic logic directly shapes both the users' experience and the business models of the companies operating in these digital environments. Different aspects of this communication reveal the breadth of its scope and its social implications.

Among the main mechanisms, content curation and personalization stand out. Algorithms analyze data generated by users themselves – such as interactions, browsing history, and declared or inferred preferences – in order to personalize the information displayed. This process takes place on social networks, search engines, streaming services, and marketplaces, producing individualized experiences and reinforcing patterns of consumption and behavior.

Another essential aspect is content moderation, carried out mostly by automated systems. These algorithms are responsible for identifying and removing posts that violate platform guidelines, such as hate speech, disinformation, and inappropriate material. In many cases, this moderation occurs in an automated and opaque manner, with little or no transparency regarding the criteria employed.

The logic of recommendation plays a central role in the dynamics of contemporary digital platforms. Grounded in machine learning systems, this logic organizes and directs users' attention through continuous and personalized suggestions of videos, products, or social connections. Platforms such as YouTube, Netflix, and Amazon are paradigmatic examples of this model, whose primary goal is to maximize user retention time and levels of engagement. This dynamic establishes true feedback loops of attention, in which user behavior feeds the very systems that, in turn, further refine future recommendations.

Operating in “zero-price” markets, these platforms do not sell their products directly to end consumers but instead monetize interactions through the collection and processing of personal data. In this model, the data provided by users constitute the main currency of exchange. As Coutinho and Kira (2021, 87) observe, consumers surrender information – often unconsciously or automatically – in exchange for access to the products and services they desire. These data are then used to generate revenue through the other side of the business model: advertisers and advertising agencies that finance the platforms and use the data for precise audience segmentation. In parallel, one sees the practice of dynamic pricing, especially on platforms such as Uber and Airbnb, which

adjust prices according to demand, geographic location, and consumer usage profiles. This illustrates how algorithms also regulate economic dimensions in a flexible yet opaque manner. Advertising management and data monetization are also operated algorithmically. Segmentation systems define target audiences for ads based on behavioral traits and profiles constructed from browsing data. This model lies at the core of the profitability of giants like Google and Facebook, whose revenues depend fundamentally on the economy of attention and surveillance.

These elements reveal how algorithmic communication is not merely a functional resource but a central mechanism in the structuring of digital platforms, profoundly influencing individual behaviors and broader social and economic dynamics. But what, after all, is the social problem associated with this type of communication?

The Italian sociologist Elena Esposito argues that we live under the predominance of “artificial communication” – a form of communication mediated by algorithms that do not understand the content with which they operate. According to her, algorithms trained with big data and deep learning methods learn to perform tasks autonomously, often in ways that were not foreseen by their programmers and, in many cases, even become incomprehensible to their own creators (Esposito, 2022, 4).

The challenge, therefore, lies not only in technical complexity but in the fact that algorithms operate without understanding the material they process. Esposito illustrates this with machine translation programs: these systems do not understand the texts they translate, nor do their developers rely on linguistic theories – the algorithms translate from Mandarin without knowing Mandarin (revisiting John Searle’s “Chinese Room” argument¹). This absence of understanding undermines the possibility of

¹ The Chinese Room argument was proposed by the philosopher John Searle in 1980. It is a thought experiment formulated as an objection to so-called Strong Artificial Intelligence – the thesis that a properly programmed machine not only simulates the human mind but actually possesses genuine mental states, such as understanding and consciousness. The experiment proposes the following scenario: imagine a person who has absolutely no knowledge of Chinese locked inside a room. Within this space, they are provided with a set of rules, written in their native language (such as Portuguese), which allows them to manipulate Chinese symbols mechanically. These rules function like a computer program, enabling them to receive messages in Chinese, apply the instructions, and produce responses also in Chinese, which are intelligible and coherent to a native speaker of the language. From outside the room, any observer would conclude that this person understands Chinese, since their answers are appropriate. However, the person inside the room is merely manipulating symbols based on formal rules, with no semantic understanding of what they are doing. With this experiment, Searle argues that the

meaningful explanation: the systems “do not reason like people do in order to write.” And it is precisely here that the social problem emerges – the absence of explanations that are intelligible to users.

Today, algorithms make decisions in various sensitive areas: medical diagnoses, credit analysis, information curation, and even judicial decisions, such as parole processes. In these situations, the central issue is not necessarily to understand the internal mechanisms of the systems but rather to ensure that the decisions are explained in an intelligible and accessible manner. The ethical and political demand is not to reveal the algorithms themselves, but to guarantee that the outcomes of algorithmic decisions make sense to the affected users.

In summary, the major communicational challenge of digital platforms is not simply technical transparency, but social intelligibility. Explanations must be situated, adjusted to the contexts and specific needs of the different stakeholders of the platforms. Since these stakeholders are diverse – with different social positions, degrees of digital literacy, and interests – the explanations must also be plural and targeted.

This challenge also strongly manifests itself in the field of law. Currently, algorithms are used to automate legal tasks such as document drafting, contract analysis, and due diligence. However, although capable of generating legally relevant information, machines lack the ability for critical reasoning or contextual sensitivity. A striking example is the use of facial recognition systems: on their own, they cannot substantiate arrests or criminal measures, especially given the possibility of discriminatory biases, such as racial bias, which can undermine the legitimacy of decisions.

If platforms shape contemporary social experience through a form of communication that does not understand the content it processes, then the role of law, sociology, and public policy must be to ensure meaningful explanations, protect fundamental rights, and prevent automated decisions from deepening social inequalities and inequities.

2. The Transnational Dimension of Artificial Juridical Communication of Platforms.

A second fundamental element for understanding artificial commu-

mere syntactic manipulation of symbols, as computers do, does not amount to semantic understanding – in other words, “syntax is not semantics.” For him, even if a computational system is able to simulate intelligent responses, it does not possess authentic mental states, nor any form of intentionality or consciousness. The argument, therefore, challenges the validity of attributing genuine understanding to machines merely because they display behaviors that are externally indistinguishable from those of humans.

nication in the legal context is its essentially transnational character, both in the functioning of digital platforms and in the regulatory dynamics that attempt to discipline them. The transnationality of platforms arises not only from the technological nature of their operations but also from the increasing legal complexity involved in the attempt to govern these digital infrastructures, frequently in tension with national legislations (Teubner, 2003).

Platforms operate globally while engaging with users located in different countries, each endowed with its own legal regimes. This multiplicity of jurisdictions enables companies such as Google, Meta, Amazon, and other multinationals in the sector to exploit normative inequalities and regulate their activities according to strategic criteria. It is common for data and operations to be transferred to countries with more permissive legislation, a practice known as “regulatory arbitration” (Christodoulidis, 2020).

Several factors structure this transnational condition. First, the globalized infrastructure stands out: servers, content delivery networks (CDNs), and artificial intelligence systems are operated from different locations around the world, enabling activity without a fixed base in a single country. Second, international data flows become central to the operation of platforms. Data are collected, processed, and stored across multiple jurisdictions, raising significant challenges for the enforcement of regulations such as the European Union’s General Data Protection Regulation (GDPR) or Brazil’s General Data Protection Law (LGPD).

This scenario puts into question the sovereignty of nation-states regarding the regulation of the digital environment. The presence of digital platforms with transnational influence challenges state authority and gives rise to a series of normative conflicts. Some examples illustrate this tension: the disputes between the European Union and big tech companies over data protection and the taxation of digital services; episodes of censorship and state control, such as the suspension of Facebook and Twitter in Russia, or the blocking of TikTok in Western countries, which reveal how governments seek to condition the operation of these platforms to their geopolitical interests, exemplifying an experience of transconstitutionalism (NEVES, 2009). In response to this scenario, multilateral initiatives have been formulated to propose transnational regulations, such as the European AI Act and the proposal for an International Treaty on Digital Governance, which aim to establish norms capable of transcending national borders and addressing the decentralized nature of algorithmic communication.

Additionally, it is necessary to recognize that the legal regulation of digital platforms does not occur solely through state law. On the contrary, what can be observed is the advancement of a hybrid model, in which private norms, adhesion contracts, and technological standards come to

exercise a regulatory function with weight equivalent to or even greater than that of state laws. This model signals a displacement of the State's traditional role, configuring a transnational digital governance composed of multiple actors – both public and private.

In this context, the platforms' terms of service operate as true "private constitutions," unilaterally imposing rules on what may be published, who may participate, and what sanctions will be applied in the event of noncompliance. The enforcement of these rules is often automated, carried out by algorithms that operate on the basis of opaque and hardly contestable criteria, directly affecting users' rights. This is a model of adhesion in which the terms are not subject to individual negotiation, and may conflict with national legislation or with the legitimate interests of users.

It is important to emphasize that the rise of digital platforms does not stem from an absence of law. On the contrary, as the Brazilian jurist Ricardo Campos (2023) argues, law was central to consolidating the normative infrastructure that sustains the operation of these platforms, particularly through U.S. regulation of freedom of expression on the internet and the legal immunization of digital intermediaries. This legal framework provided stability and security for the growth of business models based on intermediation and massive data collection, fostering the rise of digital platforms as autonomous global actors.

Thus, understanding the transnational nature of artificial legal communication requires recognizing both the limits of traditional state regulation and the emergence of a complex legal architecture, composed of private norms, global contractual arrangements, and incipient attempts at multilateral regulation. It is within this environment that a new field of dispute is articulated concerning the future of digital governance and the contours of law in the platform era.

3. The Paradox of Platform Regulation.

The third central element for constructing a sociology of law oriented toward digital platforms concerns the paradox of regulation. The legal governance of artificial communication and digital infrastructures reveals a fundamental contradiction: states, while structurally dependent on large technology corporations to sustain their economies, public services, and even national security mechanisms, face enormous difficulties in effectively regulating these same companies. This paradox gives rise to a regime of asymmetric dependence, in which public authorities are compelled to forge strategic alliances with global private actors, even as they fail to consistently impose norms that guarantee the protection of fundamental rights (Teubner, 1986), digital sovereignty, and competitive fairness.

This dependence manifests itself in at least three distinct but interconnected dimensions. The first is economic and fiscal dependence. Today, the large digital platforms make up one of the most profitable sectors of the global economy, playing a leading role in job creation, attracting investment, and driving technological innovation. Companies such as Google, Amazon, Meta, and Microsoft operate across multiple markets, creating value chains that stimulate everything from logistics services to sectors such as digital marketing, fintechs, and cloud computing. Moreover, national governments – even within fragile tax regimes – continue to rely on the tax revenues and economic activity generated by these corporations. For this reason, many countries adopt fiscal incentive policies to attract corporate subsidiaries to their territories, strengthening the link between economic development and the presence of big tech.

However, this relationship is marked by profound asymmetries. Although states rely on platforms to boost their economies, they face major obstacles in taxing them adequately. Technology companies employ sophisticated strategies of aggressive tax planning, transferring assets and revenues to low-tax jurisdictions through opaque and internationalized legal structures. Such practices weaken national tax systems and compromise the financing capacity of public policies, exacerbating inequality in the distribution of benefits generated by the digital economy.

The second dimension concerns dependence on digital infrastructure and services. Many states have become highly dependent on platforms to sustain essential public services. Social networks such as Facebook, Instagram, and X (formerly Twitter) are widely used by government agencies to disseminate official information and promote public campaigns. At the same time, companies provide critical cloud computing infrastructure that supports systems linked to public security, tax administration, education, and health. The centrality of these infrastructures makes governments dependent on complex contracts and proprietary technologies, often negotiated under asymmetric terms and with clauses that restrict state autonomy, especially regarding data management and service continuity.

Additionally, this dependence extends into the field of cybersecurity. Numerous intelligence and defense agencies rely on private solutions for network monitoring, threat detection, and attack prevention. Although strategic, such collaboration expands the power of platforms in the security domain, shifting state sovereignty toward a regime of interdependence with private actors.

The third critical dimension refers to dependence on the moderation and control of the digital sphere. Digital platforms act as gatekeepers of the contemporary public sphere, unilaterally defining what may or may not circulate in virtual environments. This regulatory function – characterized by a certain experimentalism (Missagia, Amato, 2023) – is exer-

cised through terms of service and opaque algorithms that determine which content is promoted, restricted, or removed. States, for their part, have delegated to platforms the responsibility for moderating content, combating disinformation, and curbing hate speech, but lack effective legal instruments to ensure transparency, accountability, and respect for democratic principles in this process. In electoral contexts, this dependence proves particularly problematic, since the algorithmic criteria governing the ranking and visibility of content are protected as trade secrets, preventing public and judicial scrutiny.

This scenario constitutes the paradox of regulation: states need platforms to guarantee order and the functionality of digital life, but at the same time, they lose part of their regulatory authority to these companies. This displacement of power is aggravated by the fact that many platforms possess economic capacity comparable to that of nation-states, while also exercising significant political influence through lobbying strategies, public campaigns, and litigation.

Companies such as Meta, Google, and Amazon invest billions in legislative lobbying activities in the United States, the European Union, and other strategic jurisdictions, aiming to shape regulation in line with their corporate interests. Moreover, they control vast portions of the digital economy, upon which millions of small and medium-sized businesses around the world depend. Any more incisive regulatory measure, therefore, tends to directly affect entire value chains, making the regulatory debate a sensitive issue both economically and politically. Finally, the dominance of these companies over the innovation ecosystem – through the recurrent practice of acquiring promising startups and neutralizing emerging competitors – significantly limits market diversification and undermines the creation of viable technological alternatives.

In sum, the paradox of regulation cannot be understood merely as a normative gap to be filled, but as the expression of a structural reconfiguration of power in the digital age. In this context, the sociology of law is challenged to rethink traditional models of sovereignty, regulation, and legitimacy in the face of the rise of private actors with the normative, technical, and economic capacity to shape the foundations of contemporary social life.

4. Final remarks.

As a final reflection, it can be argued that a Sociology of Law of Digital Platforms constitutes an emerging and necessary field to understand the legal, technical, and social mechanisms that structure contemporary society marked by platformization. Given the centrality of digital infrastructures in organizing social, economic, and institutional interactions, it becomes urgent to analyze how law is transformed – and challenged

– within an environment regulated by algorithms, private norms, and transnational arrangements.

For the advancement of this research agenda, three fundamental analytical dimensions are proposed to guide future theoretical and empirical investigations in the field. The first dimension concerns the new configuration of digital sovereignty. The growing regulatory fragmentation – marked by competing national legislations and global technology corporations – directly impacts the autonomy of states. It is necessary to ask: in what ways does this fragmentation compromise governments' ability to protect fundamental rights and exercise authority over the digital environment? Which regulatory models have proven capable of balancing the promotion of technological innovation with the preservation of democratic control and state sovereignty? Furthermore, how do digital platforms exercise direct normative power over users, establishing hybrid regimes of digital governance that combine terms of service, algorithms, and commercial practices with significant legal effects?

The second dimension of analysis refers to private regulation and transnational law. The widespread use of adhesion contracts – most notably the platforms' terms of service – has, in practice, replaced or challenged national legislations, especially in sensitive areas such as freedom of expression, privacy, and access to information. In this context, it is crucial to investigate the extent to which these private instruments function as normative sources, and how technology companies mobilize sophisticated legal strategies to minimize the reach of state regulation. Moreover, it is essential to examine how practices of algorithmic self-regulation directly impact users' rights, creating gray areas of accountability that challenge classical models of public regulation.

Finally, the third dimension concerns the intersection between algorithms and legal decision-making. With the growing use of automated systems in content moderation, information organization, and even in decision-making processes with legal effects, new questions arise about the role of law in mediating social relations. How do these systems influence the perception of what is lawful or unlawful? What risks are associated with opacity and algorithmic bias in decisions that affect the lives of millions of people? At the same time, what are the potentialities of artificial intelligence in making legal processes more efficient, accessible, and inclusive?

Faced with these challenges, the Sociology of Law of Digital Platforms seeks to investigate not only the normative effects of digital technologies, but also the new power arrangements, disputes over legitimacy, and accountability mechanisms that emerge in this context. It is a field that articulates law, technology, and society, demanding interdisciplinary approaches to understand the ongoing transformations in forms of regulation, the production of norms, and the very concept of justice in an era

increasingly mediated by platforms.

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6.

LEX DIGITALIS E CONSTITUCIONALISMO: O LUGAR DA RULE OF LAW NO DIREITO TRANSNACIONAL

*Camilla Tavares de Albuquerque**

1. Introdução.

Num mundo globalizado, onde as fronteiras nacionais tornam-se cada vez mais fluidas, as relações sociais e jurídicas não são mais as mesmas. Se antes a dualidade conceitual entre o direito nacional e internacional se mostrava suficiente para a compreensão das comunicações sociais, hoje, entretanto, essa dicotomia parece superada pelo advento das relações transnacionais.

O direito, nesse contexto, aparenta ter entrado numa verdadeira crise de identidade. O paradigma do Estado, tal qual o conhecemos ao menos desde a modernidade, torna-se cada vez mais questionável, particularmente em razão de uma teoria do direito que não dá mais conta do contexto transnacional. De forma bastante resumida, esse é o dilema que justifica esse trabalho.

Nesse cenário, novas estratégias normativas ganham espaço, sendo de se destacar aquelas construídas pelos atores privados imersos no mundo digital. É o caso daquilo que chamamos *lex digitalis*, nosso objeto de estudo. Dito isso, questiona-se: qual o lugar da *rule of law* no contexto da *lex digitalis*? Duas são as respostas possíveis. O direito se expande a partir da *lex digitalis* ou o direito cede espaço a ela, alterando a forma como a *rule of law* se aplica nessa nova dinâmica relacional.

O objetivo, portanto, é analisar como é possível pensar no paradigma da *rule of law* no contexto das normativas privadas. Para tanto, foi trazido à pauta o conceito de constitucionalismo digital, associando-o à ideia de transconstitucionalismo de Marcelo Neves e de Constituições Sociais de Gunther Teubner, referenciais inafastáveis deste trabalho.

Metodologicamente, trata-se de um trabalho teórico, de linha socio-jurídica, mas que guarda estreita relação com a análise empírica do “direito das plataformas”, em especial no campo de moderação de conteúdos. Em verdade, este é apenas um recorte de uma mais ampla pesquisa ainda em curso e, por isso, é um trabalho reconhecidamente inconcluso. Esperamos que sirva de base para reflexões futuras, independentemente

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de consensos – aliás, em tais campos de pesquisa, a divergência é muito mais produtiva do que a concordância.

2. Direito Transnacional E *Lex Digitalis*.

O direito transnacional é um paradigma inafastável para a compreensão da realidade social presente. Enxergado como aquele que ultrapassa normas positivadas, a direito transnacional tem origens multifatoriais, que culminam nas comunicações supraestatais (Febbrajo, 2016, 93), que passam se submeter a uma dinâmica cada vez mais complexa, de modo *extra-soberano* (Febbrajo, 2016, 92-93).

De fato, para Febbrajo, o advento das ordens ou redes transnacionais alterou substancialmente a noção daquilo que se pode entender por direito e justiça (2016, 92-93), reduzindo cada vez mais o espectro de aplicabilidade do tradicional conceito de soberania dos Estados. A soberania tende a perder seus contornos conceituais clássicos na dinâmica transnacional (Febbrajo, 2016, p.78-79) e, como consequência, os novos dilemas sociais não mais podem ser solucionados a partir dos velhos paradigmas político-organizacionais.

No sistema jurídico as mudanças assumem um caráter disruptivo, exigindo uma releitura normativa que alcance a crescente complexidade das relações humanas. Isso implica na assunção de novos mecanismos regulatórios que não mais se limitam à estrutura do Estado-nação, confundindo-se com questões antes eminentemente econômicas, políticas, científicas, dentre outras.

Nesse ponto, o que se enxerga com bastante clareza é o advento normatizações heterodoxas, que não mais se limitam a um ordenamento propriamente jurídico. De fato, se se quiser dar o nome de ordenamento ao conjunto de normatizações emergentes na realidade transnacional, talvez a adjetivação “jurídico” não seja de todo adequada. E, para os que ainda queiram salvar a denominação, será preciso redefinir aquilo que efetivamente pertence ao sistema jurídico.

Esse não é o ponto, porém. Aqui, preocupamo-nos com a figura da organização político-jurídica dentro dessa realidade. A moderna teoria do constitucionalismo, em especial, parece ser insuficiente para a compreensão dessa nova normatividade. É nesse ponto que uma releitura constitucional se torna possível e necessária. Antes de adentrar propriamente o tema, cabe esclarecer de qual normatividade falamos, em específico.

A *lex digitalis*, já há muito sucitada sob nomenclaturas distintas, é um dos pontos extremamente relevantes dentro da discussão do direito transnacional. Ela se alinha ao pluralismo jurídico, correspondendo a novas formas de regulação social que se norteiam mormente a partir da *realidade digital*. Ainda que a expressão soe à primeira vista contraditório-

ria, reconhecer a realidade do digital é um dos pressupostos fundamentais para a compreensão daquilo que aqui chamamos de *lex digitalis*.

Pierre Trudel prefere o termo *lex electronica* e oferece uma conceituação bastante precisa: uma “metáfora modelada” da já há muito conhecida *lex mercatoria* (2001, 259). Ambas pertenceriam, nesse sentido, a uma mesma categoria de modulações normativas transnacionais, promovendo, nas palavras do referido autor, “uma abordagem de transposição de conceitos conhecidos do direito transnacional para o suporte de conceitos relevantes para a normatividade nos espaços virtuais gerados pela comunicação eletrônica”. (Trudel, 2001, 259).

Definição igualmente precisa é proposta por Edoardo Celeste que se utiliza da nomenclatura *lex digitalis*, comparando-a ao que chama de “metáfora medieval” (2021, 105), em que as organizações digitais – no dizer do autor, plataformas digitais – criariam âmbitos próprios de autoridade, ou seja, seus próprios “feudos” (Celeste, 2021, 105), dentro dos quais vigorariam suas próprias regras. De fato, nada parece mais esclarecedor para a compreensão da *lex digitalis*.

Uma das áreas pioneiras a sucitar o conceito é, não por acaso, o direito à propriedade intelectual. Aliás, é a partir da discussão deste que tem lugar a questão da responsabilidade de plataformas quanto a conteúdos de terceiros. A origem da teoria acerca de uma possível *lex digitalis* surge, em muito, a partir daí.

A imunidade das plataformas em face a conteúdos de terceiros, ainda que relativizada, foi – e ainda é, certamente – um grande incentivo à construção da *lex digitalis*. Ao estabelecer, como regra, a inimputabilidade do provedor em relação a conteúdos de terceiros, o Marco Civil não trouxe qualquer inovação, senão uma releitura da *Section 230*, incluída no *Communications Decency Act* de 1996 dos Estados Unidos. De acordo com a normativa, “nenhum provedor ou usuário de serviço interativo de computador será tratado como editor de qualquer informação fornecida por terceiros”¹.

A adoção do sistema judicial de remoção de conteúdos das redes, no Brasil permite uma espécie de imunização do provedor em relação à decisão de bloqueio. Cumpre ao Judiciário, e não ao provedor, avaliar se o conteúdo é realmente ilícito ou se está sendo ilicitamente divulgado e, a partir daí, retirá-lo. Exime-se o provedor de qualquer eventual responsabilidade por retirada de conteúdos que, em verdade, caracterize-se como mitigação não autorizada da liberdade de expressão, já que não cabe a ele definir qual a margem de incidência do princípio.

¹ Tradução livre de “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”. (Estados Unidos Da América, 1934, s.p).

Deixadas de lado as exceções legais às quais se aplicam a regra do *notice and take down*, a crítica central acerca do tema questiona a efetividade da remoção do conteúdo por meio judicial. Cavalcanti, Leite e Barreto Junior são contundentes ao apontar a necessidade de judicialização como uma barreira à efetividade², especialmente em se tratando da reconhecida morosidade do Poder Judiciário e dos altos custos para acessá-lo (2018, 52).

Para além disso, entretanto, impõe-se pensar acerca das limitações das decisões judiciais domésticas ante questões transnacionais. Mais do que isso: mesmo o direito internacional não parece adequadamente paramentado para dar conta de tais limitações. Assim, a análise de casos controversos de Tribunais Internacionais pode favorecer, bastante resumidamente, a compreensão das dificuldades decorrentes de soluções de tais conflitos a partir do paradigma da justiça pública.

Frías se debruça com bastante didática sobre o caso *Eva Glawisching-Piescek v. Facebook Ireland Limited*, a primeira, ex-deputada austríaca e, o segundo, o prestador de serviços da gestão do *Facebook* para usuários fora dos Estados Unidos e do Canadá (2020, 1390). No caso, Eva requereu a plataforma *Facebook* a retirada de conteúdo publicado por terceiros que considerava difamatório à sua imagem. Visto que o provedor de aplicações se quedou inerte, a ex-deputada propôs ação perante o Tribunal Mercantil de Viena que, por fim, não só determinou a remoção do conteúdo objeto da demanda, como também de conteúdos similares a este.

Em sede recursal, a decisão foi confirmada, esclarecendo-se que, quanto a conteúdos similares, só seriam removidos aqueles “postos a conhecimento no *Facebook* pela demandante ou terceiros sem a necessidade de realizar um controle ativo por parte do prestador de serviços.”³. Ou seja, o *Facebook* deveria remover os conteúdos similares já publicados, sem que fosse obrigado a fazer uma verificação prévia de conteúdos futuros.

² “...o Poder Judiciário brasileiro identifica-se como instituição sobrecarregada por demandas de toda ordem, por isso bastante morosa, para não mencionar os altos custos do seu acionamento. Uma ação de conhecimento, que seria aquela proposta a fim de se obter – conforme determinação do art. 19 – a apuração de culpa, leva em média três anos para ser concluída em primeira instância. Já em segunda instância, pode demorar mais três anos, dependendo do acervo de processos do relator sorteado”. (Cavalcanti, Leite, Barreto Júnior, 2018, 52).

³ Tradução livre de: “puestos en conocimiento de Facebook por la demandante o terceros sin necesidad de realizar un control activo por parte del prestador de servicios” (Frías, 2020, 1391).

Posteriormente, entretanto, o Tribunal Supremo da Áustria apresentou uma série de questões controvertidas perante o Tribunal de Justiça da União Europeia, indagando, entre outros temas, sobre: a) a obrigação gerada para o provedor em relação a conteúdos similares; b) a extensão territorial dos efeitos da decisão para além do Estado membro da União Europeia; b) os dados idênticos (não similares) que sejam identificados pelo provedor de aplicações, mas que possuam efeitos sobre terceiros não envolvidos na demanda originária (Frías, 2010, 1396-1397).

Quanto à extensão territorial, o Advogado Geral defendeu que os Estados membros da União Europeia (UE) poderiam decidir acerca da remoção de conteúdo fora de seu território, mas não deixou claro se os demais Estados se sujeitariam a tanto. Relevou-se que, por cortesia internacional, os Estados poderiam delimitar os efeitos geográficos da remoção do conteúdo de forma proporcional ao dano causado, evitando sua total eliminação (Frías, 2020, 1397), sem ferir, portanto, a esfera de soberania de cada membro da UE.

Ainda sobre a abrangência territorial da remoção de conteúdos, em outro caso (*Google v. CNIL*), a Corte de Justiça da União Europeia chegou a afirmar que a *Google* não poderia ser obrigada a aplicar o direito ao esquecimento em ordem global, promovendo o bloqueio de conteúdos de maneira absoluta, sob pena de gerar um precedente a serviço de tiranias.

A *Google* argumentava que a desindexação deveria se limitar ao território da União Europeia e que um eventual precedente de remoção global poderia ser abusado por *governos* autoritários. A Corte de Justiça concordou com os argumentos da empresa e reconheceu a impossibilidade de se impor a lei europeia para além do território europeu, decidindo, assim, que a *Google* não poderia ser obrigada por autoridades europeias a tomar ações globais de desindexação baseadas no “direito ao esquecimento”. (Estarque; Archegas, 2021, 29)

Já no que tange aos conteúdos similares, a questão central é que, atribuir ao *Facebook* a tarefa de identificar, selecionar e remover tais conteúdos exige soluções tecnológicas altamente sofisticadas e possivelmente severamente invasivas à privacidade, violando a neutralidade do provedor. Isto porque, dada a inviabilidade de manter uma enorme equipe a postos para analisar todos os tipos de conteúdos divulgados na rede, a análise seria feita de forma algorítmica, por meio da verificação de dados e metadados ou de outros mecanismos próprios de tecnologias de inteligência artificial.

A inteligência artificial, entretanto, está muito aquém do sem-número de possibilidades de condutas humanas. Ou seja, embora seja evidente a utilidade e necessidade da atividade dos algoritmos, esta dificilmente será adequada para análises de casos tão complexos. Lembre-se, por exemplo, do caso do massacre de março de 2019, em que um homem matou mais de 50 pessoas e deixou outras 40 pessoas feridas na cidade

de Christchurch, na Nova Zelândia, transmitindo o “evento” ao vivo pela *Facebook*. Na ocasião, a plataforma justificou a demora no bloqueio do vídeo justamente pelo fato de que os algoritmos não teriam identificado o conteúdo como violento em razão da forma como a filmagem foi feita, no estilo de *games* em primeira pessoa, o que até então não tinha acontecido – e, portanto, ao que tudo indica, não tinha sido previsto pelos operadores dos algoritmos (Estarque, Archegas, 2021, 32).

Quanto à indagação acerca de conteúdos futuros não similares, mas idênticos, Frías destaca que, em que pese a neutralidade da rede não seja violada no ato de seleção do conteúdo, poderá ser prejudicada quando da oposição a direitos de liberdade de expressão de terceiros que não tiveram, até então, condições de se manifestar (2020, p.1394). Esta é uma preocupação relevante, sobretudo quando se distinguem conteúdos ilicitamente obtidos e conteúdos cuja divulgação, por determinada pessoa ou para determinada finalidade, apenas por isso tornam-se objeto de ilícito. Em tais casos, outras pessoas, a princípio alheias à demanda, deveriam ter oportunidade de esclarecer questões culturais, contextuais ou outras que sejam relevantes para a moderação feita pela plataforma.

Frías resume bem a dificuldade dos tribunais, mesmo internacionais, em dar efetividade para suas decisões (2020, 1390):

Este trabalho dos tribunais é complicado quando o meio em que ocorre a disputa é uma rede social como o *Facebook* ou *Instagram*, em que são diretamente os indivíduos que apresentam conteúdos que comprometem publicamente um ou outro direito, podendo ademais o restante dos usuários compartilhar esse conteúdo quase automaticamente em todos os cantos do mundo. O trabalho dos tribunais aqui se torna especialmente complicado, especialmente quando eles precisam da estreita colaboração dos serviços das redes sociais tanto para receber as informações necessárias para tomar uma decisão quanto para garantir sua posterior execução⁴.

Inúmeras outras problemáticas poderiam ser opostas, mas fogem ao objetivo da discussão. O que resta demonstrado é que a justiça pública, tal qual a enxergamos hoje, não detém instrumentos suficientes para dar

⁴ Tradução nossa de “Este labor de los tribunales se complica cuando el medio en cual se produce la disputa es una red social como o Facebook o Instagram, en la que son directamente los particulares que presentan contenidos que ponen en jaque uno o outro derecho publicamente, pudiendo además el resto de los usuarios compartir dichos contenidos de manera casi automática en todos los rincones del mundo. La labor de los tribunales se torna aqui especialmente complicada, máxime cuando necesitan de la colaboración estrecha de servicios de la red social tanto para recibir la información necesaria para tomar una decisión como para garantizar su ejecución con posterioridade”. (Frías, 2020, 1390).

conta de tais dilemas. Mesmo que se considerem decisões em campo internacional, a efetividade destas termina esbarrando em elementos típicos do paradigma estatal, tais como soberania, território e jurisdição.

Essa inadequação jurídica implica diretamente na assunção da *lex digitalis*, bem como na sua definição, como já supra mencionado, a título de metáfora medieval ou metáfora modulada da *lex mercatoria*. Assim como a *lex mercatoria*, a *lex digitalis* é alheia ao enquadramento na dicotomia do direito nacional e internacional.

De acordo com Trudel, a *lex digitalis* (ou *electronica*, caso se prefira), promove a “transposição de conceitos conhecidos do direito transnacional para o suporte de conceitos relevantes para a normatividade nos espaços virtuais gerados pela comunicação eletrônica”⁵ (Trudel, 2001, 259). Assim, embora detenha certas nuances próprias de direito internacional, a *lex digitalis* corresponde a um modelo predominantemente transnacional (Mendes, 2010, 31-32).

Para Celeste, a *lex digitalis* pode ser definida como uma série de regras internas da plataforma que ultrapassam os limites nacionais (Celeste, 2021, 105). Aliás, é justamente nesse sentido que Mendes e Fernandes, ao tratarem da modalidade normativa, relacionam-na com o papel regulador dos atores privados da internet. Também estes, para além do Poder Público, figuram como “responsáveis por mediar conflitos entre direitos fundamentais básicos” (Mendes; Fernandes, 2020, 14). Com efeito, os autores trazem para a discussão a realidade de que, não raro, as plataformas digitais são instadas a resolver tais conflitos, antes mesmo do acionamento da autoridade estatal (Mendes; Fernandes, 2020, 15).

Pois bem. De todo o exposto, considerando a insuficiência da teoria do direito tradicional para o tratamento de questões transnacionais, surge a questão: qual é o sentido da *rule of law* num contexto de normatividade alavancada por atores privados?

3. Rule Of Law

A definição da *rule of law* corresponde, bastante resumidamente, ao império da lei ou o império do direito a partir dos parâmetros legais. É possível dizer que o conceito se fundamenta predominantemente no ordenamento jurídico escrito, ou, ainda, a partir do manejo dos meios institucionais para alcançar determinados resultados políticos. Isso implica numa íntima relação do conceito com temas próprios da teoria do

⁵ Tradução livre de “Elle favorise, dans la communauté juridique, una démarche de transposition de concepts connus du droit transnational vers la prise en charge de concepts pertinents à la normativité dans le espaces virtuels engendrés par la communication életronique.” (Trudel, 2010, 259).

direito, tais como fontes, legitimidade, validade, vigência e eficácia do direito, dentre outros.

Se pensada sob esse ângulo, a *rule of law* seria incapaz de sobreviver sem o paradigma do Estado-nação. Isso conduz à pergunta feita no tópico anterior, ou seja, se o advento do direito transnacional – e, em específico, da *lex digitalis* – levaria à implosão do conceito do *rule of law*. Ou melhor: como é possível a *rule of law* nesse contexto? A resposta depende, claro, daquilo que se compreende como *rule of law* – doravante ROL –, ou seja, de quais elementos são aptos a caracterizá-la.

Nesse sentido, é preciso relevar que quanto ao conteúdo substantivo da ROL, entretanto, não há consensos absolutos, mas posições possivelmente complementares, mais ou menos abrangentes. Waldron, concordando com isso, reúne um núcleo mínimo comum em quatro requisitos:

1. a exigência de que pessoas em posições de autoridade exerçam seu poder dentro de uma estrutura restritiva de normas públicas, e não com base em suas próprias preferências ou ideologia;
2. a exigência de que existam regras gerais estabelecidas com clareza e antecedência, regras cuja presença pública permite que as pessoas descubram o que é exigido delas, o que quais serão as consequências jurídicas das suas ações e em que podem confiar, na medida em que está em causa a ação oficial;
3. a exigência de que existam tribunais que operem de acordo com padrões reconhecidos de devido processo processual ou justiça natural, oferecendo um fórum imparcial em quais disputas podem ser resolvidas e permitindo que as pessoas tenham a oportunidade de apresentar provas e apresentar argumentos perante juízes imparciais e independentes para desafiar a legalidade da ação oficial, especialmente quando esta tem impacto em interesses vitais na vida, na liberdade ou no bem-estar económico;
4. um princípio de igualdade jurídica, que garante que a lei seja a mesma para todos, que todos tenham acesso aos tribunais e que ninguém esteja acima da lei⁶.

⁶ No original: “1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology; 2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned; 3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official

Considerando esse conteúdo mínimo, o autor questiona, precisamente, aquilo que mencionamos anteriormente, ou seja, se a ausência de um soberano impacta na aplicação da ROL. Nesse sentido, a tendência é de que, se admitirmos emergência de um direito das plataformas, temas tão caros ao Estado de Direito como a própria teorização constitucional parecem postos em xeque, sob o risco de simplesmente perderem o sentido. É o caso, como dissemos, do conceito de soberania, território e, até, de povo, se tivermos em mente a questão latente dos refugiados. Como falar em poder constituinte e toda a cadeia de legitimidade jurídica que dele decorre?

Numa análise superficial, a conclusão seria de que o Estado de Direito não poderia resistir à ausência do poder constituinte. Não parece a conclusão mais acertada. Etinski e Tubić, por exemplo, justificam a vigência da ROL no campo do direito internacional sob o argumento de que o Estado soberano não é suficientemente paramentado para proteger seus cidadãos de interferências transfronteiriças e, nesse sentido, a própria necessidade da regulação a nível internacional dá sentido à *rule of law* no contexto transnacional (2016, 71).

Também em sede de direito internacional, Waldron tenta resolver a questão desconstruindo o paradigma dos indivíduos como destinatários diretos do direito internacional e relembra que, mesmo a soberania, seja no âmbito doméstico ou nas relações internacionais, é necessariamente uma construção artificial, uma espécie de ficção jurídica. O autor associa a regulação do Estado-nação pelo direito internacional à regulação jurídica imposta ao Poder Legislativo, de modo que a regulação jurídica das relações individuais se encaixam apenas num segundo momento.

Seguindo esse raciocínio, o autor enxerga o Estado soberano como uma fonte do direito internacional, “no sentido de que ele participa da elaboração de tratados e do surgimento de uma ordem consuetudinária”⁷. No campo internacional, portanto, a ROL teria seu lugar preservado no momento de transição da regulação internacional para a nacional em analogia ao que se dá no âmbito doméstico no ponto em que a ROL é deduzida no momento de transição da regulação nacional para as organizações internas, como é o caso do Congresso Nacional os dos Tribunais. Resumidamente, o autor considera que, para a devida compreensão

action, particular when it impacts on vital interests in life, liberty, or economic well-being; 4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.” (Waldron, 2011, 316-317).

⁷ No original: “A national sovereign state is a source of IL in the sense that it participates in treaty-making and in the emergence of customary ordering. (Waldron, 2011, 329).

da ROL em sede internacional, sua aplicação aos Estados soberanos deve ser comparada, não à regulação de pessoas naturais, mas à regulação das instituições internas e, apenas a partir destas, passam ao sujeito.

Resumidamente, a lógica de Waldron exige um reenquadramento da observação do lugar do soberano no direito internacional, defendendo a aplicabilidade dos preceitos da ROL ao Estado como se dá, internamente, a sua aplicação a entidades governamentais. O ponto de vista muda quando o foco é retirado dos Estados e posto sobre a atividade de organizações internacionais como destinatárias de regulação internacional. Neste caso, ao contrário do que se dá no nível do Estado-nação, a observância da ROL pelas organizações internacionais é dirigida à proteção dos indivíduos, ou seja, à proteção da dignidade humana – e não à regulação da atividade de qualquer organização interna.

O caráter governamental do Estado-nação não desaparece quando subimos um nível e passamos para o âmbito internacional. Ele continua sendo uma entidade governamental, cuja periculosidade continua a gerar preocupações com o ROL. Também podemos ter preocupações com o ROL em relação à IL (“lei internacional”) e às instituições internacionais além dos Estados-nação, mas a maioria dessas preocupações com o ROL será motivada pelo nosso interesse no bem-estar, na liberdade e na dignidade dos indivíduos humanos naturais, que são vulneráveis direta ou indiretamente à IL de várias maneiras, e não pelo nosso interesse na liberdade de ação dos soberanos nacionais⁸.

Essa lógica, embora aplicada ao direito internacional, pode oferecer algumas pistas úteis sobre aquilo que pretendemos compreender, ou seja, sobre a manutenção da ROL na dinâmica transnacional. Se associarmos a regulação das organizações internacionais à regulação das organizações econômicas, como é o caso das plataformas, vemos que o seu compromisso, para além do Estado, é com os próprios indivíduos – e é nesse estágio que a ROL deve ser observada.

Se há um núcleo substantivo mínimo naquilo que se compreende como ROL, as plataformas também se vinculam a estas quando do seu compromisso com a proteção do indivíduo. No nível transnacional, a

⁸ No original: “The governmental character of the nation-state does not evaporate when we move up a level to the international realm. It remains a governmental entity the dangerousness of which continues to generate ROL concerns. We may also have ROL concerns about IL and international institutions apart from nation-states, but most of those ROL concerns will be motivated by our interest in the well-being, liberty, and dignity of natural human individuals, who are vulnerable directly or indirectly to IL in various ways,⁷⁹ not by our interest in the freedom of action of national sovereigns.” (Waldron, 2011, 342).

ROL seria manejada para garantir que a regulação própria da plataforma exerça sua função protetiva, dirigida às pessoas.

Isso nos levaria a considerar dois níveis de legitimação do direito das plataformas como *lex digitalis*. Os preceitos da ROL aplicam-se, primeiramente, no momento da regulação das plataformas, a fim de garantir a sua atuação num segundo momento, em que a ROL tem lugar na atividade obrigatória da plataforma de proteção de indivíduos. Se há um núcleo substantivo mínimo naquilo que se compreende como ROL, as plataformas passam a vincular-se a estes. Em outras palavras, há uma espécie de transferência de compromisso às plataformas com a *rule of law*.

A legitimidade da *lex digitalis* provém, de forma bastante resumida, de uma exigência própria do direito, seja ele interno ou internacional. A grosso modo, podemos dizer que, no campo doméstico, o Estado legitima a “lei das plataformas” enquanto for capaz de resolver os problemas que o Estado sozinho não consegue.

O raciocínio de Waldron, sob tais condições, figura como um meta-discurso sobremaneira complexo, mas sofisticado o suficiente para compreender que a *lex digitalis* não implica na implosão do conceito da *rule of law*.

Independentemente da adoção da posição de Waldron, a conclusão não parece ser outra. A pergunta inicial se converte, portanto, em: como é possível entender a *rule of law* no contexto da *lex digitalis*? *Se retomarmos a teoria do direito tradicional*, como seria possível falar em Constituição quando se admite regulação transnacional? A resposta à questão é útil, especialmente, se pensarmos na relação da Estado de Direito com a *rule of law*. Nesse sentido, entender o lugar da Constituição no cenário transnacional parece indispensável. É a partir daí que se tem suscitado uma remodulação da teoria constitucional, dando lugar ao que alguns denominam Constitucionalismo Digital.

4. Constitucionalismo Digital

A ideia de Constitucionalismo Digital é suficientemente esclarecida a partir do paradigma do transconstitucionalismo, ou seja, de uma constituição transversal, adequada ao contexto transnacional. O termo vem do trabalho de Marcelo Neves, que alia o conceito sistêmico de acoplamento estrutural à ideia de razão transversal de Ernest Welsch para criar a sua teoria acerca do transconstitucionalismo. De acordo com ele, a Constituição figura não só como “filtro de irritações e influências recíprocas, mas também como instância da relação recíproca e duradoura de aprendizado e intercâmbio de experiências com as racionalidades particulares já processadas, respectivamente, na política e no direito.” (Neves, 2018, 62). A Constituição transversal, em Neves, seria como uma espécie de “ponte de acesso” entre os sistemas, um caminho sobre o qual

fluiriam as irritações sistêmicas de mão dupla.

Vale relembrar o exemplo de Campilongo, segundo o qual, se os sistemas jurídico e político fossem duas bolas de bilhar, a Constituição e as instituições representativas representariam, precisamente, o ponto de contato entre estas e, sem isso, o jogo não faz sentido. (Campilongo, 1998, 53). É nesse ponto de encontro que reside a origem da ideia da transversalidade constitucional.

Parece-nos, entretanto, que a teoria transconstitucionalista encampada por Neves vai além ao reconhecer o “transconstitucionalismo entre ordens jurídicas estatais e transnacionais” (Neves, 2018, 187), mesmo aquelas que são construídas primariamente não por Estados ou a partir de Estados, mas sim por atores ou organizações privados ou quase públicos” (Neves, 2018, 187). Dentro desse conceito particular de ordem jurídica, incluem-se as normativas de instituições como o Banco Mundial, o Fundo Monetário Internacional, a Organização Mundial do Comércio – todas criadas por Estados – e, além destas, organizações não governamentais que atuam sob a *lex sportiva*, a *lex mercatoria* e, inclusive a *lex electronica* ou *lex digitalis*, como seria o caso da ICANN (Corporação da Internet para Atribuição de Nomes e Números) (Neves, 2018, 187-216).

Ou seja, o termo “transconstitucionalismo”, em Neves, refere-se à correlação entre constituições tradicionais, de caráter estatal e ordens jurídicas transnacionais, observando a conexão que tais normativas estabelecem entre os sistemas sociais. Não por acaso, a ideia se aproxima do conceito de Constituições Cívicas defendido por Gunther Teubner, quando trata do advento das aldeias globais.

Para os autores, tanto a ideia de Constituições Cívicas como de transconstitucionalismo é coerente com o desenvolvimento do *rule of law* nos mais diversos domínios das comunicações. Ou seja, a *lex digitalis* também figura como mecanismo concretizador de valores próprios do direito, como é o caso dos preceitos da *rule of law*. De acordo com Galgano, a *lex digitalis* é enxergada como um contrato em expansão, que estaria “tomando o lugar do direito”. Para ele, o contrato, em tais casos, não pode mais ser enxergado como mera aplicação do direito, mas como verdadeira fonte do direito, ou seja, como *locus* do qual tem origem a *lex digitalis* (Galgano, 1995, 105). De fato, não é outro o raciocínio de Teubner ao defender que, no novo pluralismo, a categoria “direito” deve ceder espaço a um “controle social” (Teubner, 2005, 88).

A partir desse cenário, duas possibilidades são possíveis: a primeira, admitir a expansão do que integra o conceito de direito, pugnando pela ampliação do sistema jurídico; a segundo, reconhecer a regressão do direito, ou seja, do próprio sistema jurídico, ante os demais sistemas sociais. Em alguns de seus trabalhos, Neves parece acenar para a segunda hipótese, defendendo o primado do sistema econômico, primado do sistema econômico. Isto porque, além da vantagem ter um código mais

apto a suportar os riscos advindos da sociedade mundial, o sistema econômico seria dotado do privilégio de prescindir da segmentação territorial para se autorreproduzir (Neves, 2018, 30).

Levado às últimas consequências, esse raciocínio levaria a desdiferenciações sistêmicas e, portanto, conduziriam a concluir pela regressão do sistema jurídico⁹. Em que pese reconheçamos o majorado potencial de resiliência do sistema econômico para relacionamentos supranacionais, para nós, apontar pela regressão do sistema jurídico não parece ser a leitura mais acertada. É assim que a ideia de constitucionalismo digital, embora à primeira vista artificiosa, começa a fazer sentido.

Levando em conta aquilo que entendemos por lei, é evidente que a *lex digitalis*, como contrato que é, não se enquadra no conceito. Com isso, Galgano concorda, mas adverte que a figura contratual hoje é bastante distinta daquela da era industrial ou pós-industrial. Para o autor, num momento que ele chama de “era eletrônica”, o contrato está ocupando o lugar do direito, de modo que, se continuarmos a enxergá-lo “como uma simples aplicação do direito, e não como fonte do direito, nós perderemos a oportunidade de compreender como a lei dos nossos tempos está mudando”¹⁰. Nesse ponto, Neves parece concordar com a ideia, ao defender os ordenamentos jurídicos oriundos de atores privados – ou, nos dizeres dele, “quase públicos” – como “uma das dimensões mais instigantes do transconstitucionalismo” (Neves, 2018, 187).

No entanto, falar em *constitucionalismo* digital só faz sentido se considerarmos que o advento da *lex digitalis* pode ser enxergado como uma ampliação do próprio conceito e margem de atuação do direito, ou seja, ao pluralismo jurídico, a uma normatividade heterodoxa. É nesse sentido que caminha a nossa posição. Essa ideia, no entanto, também não é livre de problemáticas.

⁹ Com a ressalva de que a economia moderna não pode prescindir desses institutos jurídicos para o seu desenvolvimento, assim como o direito moderno pressupõe uma dinâmica veloz de trocas, circulação e apropriação econômica de bens e valores para manter e inovar permanentemente os institutos do contrato e da mutação da propriedade. (Neves, 2018, 36).

¹⁰ No original: “however, this impression is modified by the fact that the advent of the post-industrial era did not require profound law reforms, as did the advent of the industrial era, since the framework of the codified law remained unchanged. But the reason this law did not change is that now the instruments that make legal transformations are no longer statutes. It is the contract which now constitutes a legal change. Traditional legal concepts do not include the contract among sources of law. But if we continue to conceive of the contract as a mere of the law, and not as a source of law, we will preclude the possibility of understanding how the law of our times is changing. The contract is taking the place of the law, even in the organization of society.” (Galgano, 1995, 102-103).

Como assevera Campos, o pluralismo jurídico desafia as bases tradicionais sobre as quais se erigiu o direito como o conhecemos hoje prevalece o que Campos chama de mal-estar existencial do direito (2023, 39). Ao tempo em que o acúmulo de regimes normativos privados tende a criar uma crise de identidade no direito, é ele instado a atuar em conjunto com tais ordens e manter a única garantia que o sistema jurídico é capaz de dar: a de que uma decisão será tomada, a de que haverá direito e, portanto, a garantia contra a denegação da justiça.

Vê-se, então, o advento do risco dessa normatividade heterodoxa. De acordo com Campos, a infraestrutura tecnológica global conectada à normatividade jurídica cria uma combinação que, embora produza novas liberdades, também gera perigos de violação de direitos:

A combinação do fator verticalização com o fator horizontalizante dá origem à nova sociedade digital, e essa mesma combinação também dá origem à ao atual desafio do Direito de garantir a geração do novo (inovação), por um lado, e de criar mecanismos para impedir violações maciças de direitos, por outro (Campos, 2023, 46).

Como observado pelo autor, da mesma forma como o direito não pode ser relegado nem determinismo econômico, não é redutível ao determinismo democrático (Campos, 2023, 36). Exemplo disso são as Constituições abertamente antidemocráticas, ditatoriais ou fascistas, que tiveram plena vigência. Da mesma forma, se considerarmos o cenário jurídico híbrido e pluralista da atualidade, normas oriundas de regimes privados também podem se converter, deliberadamente ou não, em mecanismos de deterioração da democracia.

Apesar disso, não há motivo para concluir por uma regressão do sistema jurídico. O que se exige é uma releitura de suas fontes para além da dogmática; ou, alternativamente, a construção de uma nova dogmática apta a dar suporte à pluralidade normativa. Em certa medida, esse desafio do direito pode ser visualizado como o contínuo inchaço do sistema jurídico em (des)compasso com o aumento das pressões normativas externas, oriundas de fontes heterodoxas. O desafio consiste em manter a tensão equilibrada e tentar o saldo positivo para ambos os lados. Embora incipiente, a teoria do constitucionalismo digital pode auxiliar nesse balanço.

5. Considerações Finais.

Para a infelicidade de muitos, parece-nos não haver grandes certezas. O trabalho do direito é sempre inacabado. É-lhe agora – como sempre foi, mas então de modo muito mais flagrante – impossível acompanhar a velocidade do mundo. As conclusões, portanto, são precárias e poderão ser sumariamente rejeitadas num futuro próximo.

Algumas questões, entretanto, parecem razoavelmente acertadas. A

primeiro, que a *lex digitalis* é uma representação do direito no contexto transnacional. Foi isso que nos propomos a explicar inicialmente. Num segundo momento, em uma análise conclusiva, parece certo dizer que a *rule of law* continua sendo possível nesse novo cenário. Por fim, a terceira parte desse trabalho defendeu que a *lex digitalis* integra o cenário propriamente jurídico, apontando para uma releitura da teoria do direito, especialmente em matéria constitucional.

Não temos nenhuma convicção de que o termo “constitucionalismo digital” seja o mais acertado para o trato do tema. Em parte, ele gera confusões indesejáveis; de outro lado, propõe uma inovação que entendemos necessária. Na dúvida e na ausência de uma expressão mais precisa e menos ousada, o seu uso ainda se dá mais por necessidade do que por uma opção calculada.

Inúmeras outras questões poderiam ser abordadas neste artigo. Analisar a moderação de conteúdos promovida pelas plataformas, por exemplo, poderia se revelar extremamente significativo, não só para fins de verificar a sua coerência com o direito nacional, como também para a compreensão do lugar da *rule of law* no contexto da *lex digitalis*. No entanto, as limitações próprias da natureza de um artigo impedem divagações mais extensas. Espera-se que esses apontamentos sirvam como caminho de transição para construções mais bem elaboradas, como o quer a ciência – também jurídica.

Por fim, resta advertir. Contra o saudosismo de que o direito nunca será como antes, resta o consolo de que, de fato, não será. Há um caminho sem volta, mas há também uma resiliência necessária e positiva em direção à expansão do papel do direito.

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7.

WHEN CODE IS THE LAW: HOW THE PRIVATE LOGIC OF SOCIAL NETWORKS RECONFIGURED DEMOCRACY

*Fernando Rister De Sousa Lima**

1. Introduction.

The rise of social networks has profoundly transformed global society. This transformation was so significant that the digitalization of social relations altered the world as we knew it, leaving few social interactions unchanged. Those who have not adapted to this new reality face a continuous process of exclusion. The issue extends far beyond connecting with people online, today, a vast portion of our daily activities is mediated by technology. This is our contemporary reality, regardless of individual approval.

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The analysis proposed here, however, focuses on the impact of social networks on democracy. Although new political actors have emerged globally from digital relationships, that is not the main issue. What truly demands attention is how digital platforms have affected the very structure of democracy. In other words, why has the emergence of social networks had such a severe impact on the democratic system?

This article is a result of the research project: “COURTS, CITIZENSHIP, AND ACCESS TO ECONOMIC ACTIVITIES IN THE DIGITAL SOCIETY: A SOCIO-LEGAL EXAMINATION OF THE ECONOMIC DEMANDS OF PLATFORMS IN COURT.” The project is funded by CAPES, CNPq, and MackPesquisa, under the research line “CITIZENSHIP SHAPING THE STATE”, developed by national and international researchers at various levels.

This article draws upon the theoretical framework of Thomas Vesting, particularly his analysis of the evolution of the public sphere, his concept of *Homo Digitalis*, and his construction of legal subjectivity through social symbols (Vesting, 2022; 2024). The interdisciplinary nature of his research offers a compelling analytical lens.

The article is structured as follows: Introduction; On Democratic Culture; On the Temporality of the Public Sphere According to Thomas Vesting; On *Homo Digitalis*; On Technical Rules and Democratic Subjectivity; and A Response to the Research Problem, followed by References.

2. On Democratic Culture.

Democracy and citizenship are central concepts in Western culture. In political theory, many authors advocate for democratic practice as an essential form of exercising citizenship. This is because the participation of citizens in public affairs (*res publica*) is both a result of civic culture and a practice that, in turn, helps to shape it.

The space where citizenship has been exercised throughout history has been given various names. The key point here is to emphasize that the term “public sphere”, from the perspective of the Rule of Law, has become the central concept for describing this site of civic engagement.

3. On The Temporality Of The Public Sphere According To Thomas Vesting.

The late 19th century saw the rise of an unprecedented mass culture, driven by new media such as newspapers, photography, cinema, radio, and books. This ascent coincided with a profound crisis in the bourgeois way of life, as its ideals were questioned in fields like literature, painting, and architecture.

While education once symbolized the autonomy of the individual, the late-19th-century bourgeoisie faced a world that seemed alien. As

Franco Moretti suggests, the bourgeoisie no longer understood its own creations, which appeared flawless yet without meaning. The plays of Henrik Ibsen, for example, portrayed the ambiguities of bourgeois life, such as the conflict between law and morality (Vesting, 2022).

Mass culture differs from individualistic bourgeois culture by exchanging universality for pluralism, allowing multiple values and world-views to coexist. While bourgeois culture perceived reality as centered on a free and rational subject, the order within mass culture became fluid, inconsistent, and marked by conflicting interests (Vesting, 2022). Friedrich Nietzsche was one of the first philosophers to analyze this crisis, highlighting that language is artificial and that humans rely on metaphors to mediate their relationship with the world.

In this new context, truth came to be seen as the product of an effect (*pathos*), transforming scientific claims into just another form of rhetoric. From Kant's unified reason, we shifted to the branching discourses of the modern world, which culminated in Max Weber's "polytheism of value systems" and Niklas Luhmann's "functional differentiation" (Vesting, 2015; 2022).

The crisis of bourgeois individualism was especially acute in metropolises like Vienna, where it manifested as a sudden collapse of certainties. The Viennese bourgeoisie perceived this loss primarily as an aesthetic phenomenon. According to Carl Schorske, this aesthetic view was influenced by the "culture of grace" of the Habsburg Empire's aristocracy, which celebrated nature and art.

Vienna's intellectual bourgeoisie appropriated this sensibility in a secular and individualistic manner, focusing on the cultivation of the self. The result was ambivalent: on one hand, it generated a sentimental and narcissistic culture, which Schorske called "psychological man"; on the other, it fostered a keen sensitivity to the social and political transformations of the era, such as the rise of mass movements. This perception reinforced the idea that the elements of the old world needed to be re-connected in a "world made of references" (Vesting, 2022).

This phrase comes from the writer Hugo von Hofmannsthal (1874-1929), who saw art as a way to rescue the individual from isolation, opening individuals to broader social and political engagement. For him, culture, even in its pluralism, "rests on what is unstable, and is aware of this instability."

Hofmannsthal's reflections can be seen as a continuation of Scottish Enlightenment thought, which advocated for a form of sociability based on the constant renewal of human relations. He proposed that the conflicting energies of society find an outlet in political participation, understood as a "ceremony of the whole." This participation would not be limited to voting but would involve a deeper engagement with the collective civic experience, a ritual capable of harmonizing conflicts and

instituting a dynamic form of state (Vesting, 2017).

Parallel to this cultural crisis, industrialization posed an intense challenge to the bourgeois way of life. Technological advancement, once concentrated in Great Britain, expanded to other countries, accelerating population growth and urbanization. In this landscape, the protagonists were no longer individual entrepreneurs but large corporations and mass movements (Vesting, 2022).

England stood out for combining technological progress with a specific cultural ethos. The rapid consolidation of the nation-state and an egalitarian Protestantism fostered commercial leadership. The high value placed on experimental science and practical knowledge enabled the country to overcome famine as early as the 17th century.

British culture, with its horizontal sociability and networks of trust, was fundamental to absorbing the shocks of industrialization. The central figure of this culture was the gentleman, who cultivated virtues like self-control and civility. This legal subjectivity, based on impersonal trust, was essential for commercial negotiations. In this context, the figure of the gentleman was considered more fundamental to social stability than the formal “legal subject” itself (Vesting, 2022). This culture was supported by a monarchy that, after the Glorious Revolution of 1688, became dependent on Parliament.

4. On Thomas Vesting’s *Homo Digitalis*.

Thomas Vesting notes that the public sphere, now fragmented by social networks and algorithms, has become a regulatory challenge due to its increasingly informal and decentralized flow of communication (Vesting, 2018). This reality demands a new regulatory model, as communication driven by artificial intelligence defies existing legal frameworks (Vesting, 2017).

The emergence of *Homo Digitalis* represents a new stage of human development. Unlike the managerial culture based on large corporations, innovation in the digital age is driven by high-tech clusters that bring together companies, universities, and investors (Vesting, 2022).

In this new era, stable organizations are replaced by start-ups and temporary projects. The personality of *Homo Digitalis* is not loyal to a single company; they seek out risky ventures and engage on a provisional basis. Beyond economic incentives, he is motivated by post-materialist values, as illustrated by Steve Jobs’ obsession with creating aesthetically perfect products (Vesting, 2022).

The network paradigm, which defines digital culture, replaces rigid boundaries with flexible dynamics. Systems operate through gradations and variations, leading to a hybrid and situational organization that no longer permits the stability of the past (Vesting, 2024).

The idea of a power center also vanishes. In a network, there is no center, only nodes with varying degrees of connectivity. Consequently, concepts like hierarchy and central authority lose their force. Order emerges from decentralized and adaptive structures that require constant renewal (Vesting, 2018).

The subjectivity of *Homo Digitalis* manifests in networked forms of work and life. In Silicon Valley, for example, informal cooperation via email and chats replaced formal hierarchies. This deformalization spread to Europe, where the ‘executive’ was replaced by the ‘manager’, who is seen as a team player fostering self-organization (Vesting, 2022).

The human-technology relationship is also being transformed. *Homo Digitalis* personifies this fusion, with intelligent machines participating in medical diagnoses, financial transactions, and even public communication. He appears to inhabit an interface between the human mind and artificial intelligence, raising scenarios of a post-human world (Vesting, 2024).

5. On Technical Rules and Democratic Subjectivity.

Algorithms process data and user inputs directly and immediately, with no room for interpretation or context. This logic of application differs entirely from the standard of legal rules, which are mediated by human interpretation. While technical rules are not new, the social impact of social networks is incomparably greater. They are not just another tool but a new paradigm for social life.

Hence, we speak of a “digitalization of social life,” a process that grants unprecedented influence to the technical rules behind algorithms (Vesting, 2018). These algorithms, however, are programmed based on exclusively private and commercial interests. Their ultimate goal is to generate profit through user engagement, measured in “likes.” In this world, success is synonymous with likes. This dynamic dictates the happiness or unhappiness of users and can generate crises of anxiety based on the number of likes received (Vesting, 2024).

Technological revolutions always usher in a new social order, disrupting old hierarchies and creating new paradigms. Society reorganizes itself around a new logic and new values driven by the technology (Vesting, 2015).

The Western model of democracy has been challenged because its subjectivity, an individual right with a collective protective function, has been reshaped by an informal digital environment devoid of rigid values. In this environment, fluid yet symbiotic relationships form between influencers and their followers. The creation of user “bubbles” or “clusters” with similar tastes has generated collectives that are increasingly critical of the traditional idea of democracy, as algorithms reinforce their prefer-

ences and foster compulsive engagement patterns (Vesting, 2018; 2024).

While we could debate freedom of expression at length, what stands out here is its economic convenience for a business model that profits from engagement at any cost. Therefore, if hate speech and disinformation are tolerated for the sake of profit, what can be expected regarding attacks directed at democracy itself?

6. An Answer To The Research Problem (Conclusion).

This paper investigated the profound interference of social networks in global democracy. The goal was not merely to confirm that digital platforms have affected the democratic order, but, more importantly, to understand why and how this transformation occurred so intensely. The analysis, grounded in the work of Thomas Vesting, adopted a historical, sociological, and legal approach. It demonstrated that the current crisis is not an isolated event but the result of a long-term transformation of the public sphere, human subjectivity, and the rules that organize social life.

The inquiry began with the premise that democracy and citizenship depend on a “public sphere”, the symbolic space where debate and the formation of collective will take place. Vesting’s analysis shows that the Western model of the public sphere had already been fragmenting since the late 19th century.

The crisis of individualistic bourgeois culture, confronted by the rise of mass culture, resulted in a “polytheism of value systems” that replaced unified reason with a multiplicity of discourses. In this process, the figure of the British *gentleman*, with his culture of trust that underpinned early industrialization, was gradually replaced by a more fluid and fragmented subjectivity, as observed in fin-de-siècle Vienna and theorized by figures like Hugo von Hofmannsthal.

This historical context is crucial, for it reveals that digital technology did not emerge into a unified public sphere, but into one already undergoing profound change. It is against this backdrop that *Homo Digitalis* appears, the archetype of the subject in the digital age. This new subject, as described by Vesting, is immersed in a network culture marked by flexibility, an absence of hierarchies, project-based work, and a symbiotic relationship with technology.

The subjectivity of *Homo Digitalis* is not based on loyalty to institutions but on participation in decentralized networks and an informal flow of communication. This new way of being and relating provided the foundation for the paradigm constructed by social networks.

The answer to the paper’s central question lies in the analysis of the “technical rules” governing the digital environment. The text shows that the great shift was the replacement of legal norms, which are mediated by people, open to interpretation, and oriented toward the collective

interest, with algorithmic rules.

These programming rules are applied immediately, without context, and, crucially, with a singular commercial purpose: to maximize engagement. The platform economy, driven by the monetization of attention, has turned the “like” into the ultimate symbol of success, creating a cycle of dependency and anxiety.

Thus, the profound interference of social networks in democracy can be explained by a combination of three factors detailed in this paper:

- (i) The Reconfiguration of the Public Sphere: Platforms did not create a unified space for debate but rather an archipelago of “bubbles.” By filtering content based on user preferences, algorithms create echo chambers that isolate individuals, undermine the possibility of common debate, and encourage polarization. In practice, the public sphere has been privatized and fragmented.
- (ii) The Creation of a New Democratic Subjectivity: Within these bubbles, a new power dynamic emerges based on the dependency between those who engage and those who are engaged. Political legitimacy shifts from institutions to the ability of influencers to mobilize followers. Democratic subjectivity, once tied to citizenship and collective rights, is reshaped by fluid relationships and group identities, which are often antithetical to the values of dialogue and pluralism essential to liberal democracy.
- (iii) The Subordination of Discourse to Profit: The business model of platforms benefits economically from nearly limitless freedom of expression. Because profit depends on engagement, extremist, violent, or anti-democratic discourse becomes valuable for its ability to generate intense interactions. As a result, democracy becomes an easy target, as attacks against it are not merely tolerated but functionally incentivized by the system’s economic logic.

In summary, this research concludes that the impact of social networks on democracy is not accidental but a direct consequence of their architecture. By promoting the “digitalization of social life,” platforms have imposed a new order governed by private technical rules. The commercial purpose of these rules has reconfigured the public sphere, forged a new political subjectivity, and ultimately threatened the cultural and symbolic foundations of the Western democratic model. Today’s democratic crisis is, therefore, inseparable from the rise of a social order where normative power has been transferred from civic institutions to commercial algorithms.

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8.

FREEDOM OF EXPRESSION AND POLITICALLY CORRECT IN DIGITAL SOCIETY: THE VALUE OF SELF-RESPONSIBILITY

*Matteo Finco**

1. Introduction.

Nowadays the claims related to freedom and rights in general are frequently centred on ideas and terms underlining the importance, on the one hand, to respect the individual person in many domains – especially in relation to the affective and emotional sphere; and of the (various possible) membership – related to concrete groups or symbolic affiliation – which one could declare, on the other hand. In this sense, while self-determination and autonomy are key-concepts to understand the role of individual in modern democracies and their public spheres, this semantics related to individualism – a legacy of Western tradition – seems to be challenged today by this universal claim both for “inclusion” and for protection of the individual, based not only in the intrinsic dignity of everyone but also on specific memberships. Moreover, these claims call into question the role of State and institutions in guarantee the optimal condition for inclusion, and also the need for everyone (be it an individual or a collective actor) to respect the other.

In this scenario, the contemporary debate on democracy and citizenship often focus on the risks related to digital technologies (first of all, the so-called artificial intelligence), such as polarisation of opinions, misleading information, the excessive power of digital platforms, and so on. This happens not by chance, since the digital reality – make possible and sustained by platforms corporations, that is, technical and economic entities with a strong power of influence opinions – is not less real than the “physic” or “material” one.

At the same time, the participation of individual and collective actors in digital society – with the consequent claims for inclusion and protec-

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tion they make – strongly depends on the role of the State and inter- and supranational institutions, which should both protect the actors' self-determination and autonomy and limit the abuses and the power of multiple kind of individual, collective, public and private actors. The question is then if and to what extent political and juridical systems are able to do so. In fact, while politics has to create effective law and the related enforce mechanisms, courts have not only to decide considering the norms, which sometimes are lacking in the face of social change, but they are also frequently called to interpret and applying it to unprecedented cases.

From a sociological perspective is interesting to observe that many times the conflicts between different rights and interests (whether they involve individuals from the one hand, and collective actors from the other, or individual vs platforms, or persons vs States or other institutions) rely on a supposed incompatibility – or at least a brutal contrast – between the fundamental values and principles of the old European Enlightenment tradition (such as freedom and equality) on the one hand, and the demands for “inclusion” in the different areas of social life, on the other. In fact, such demands often imply the limitation of freedom of others and of the principle of equality, since they require the protection from any kind of potential “trauma”, threats or discomfort.

This is paradoxically since “inclusion” concerns the typical western individual: autonomous, free and self-determined. An individual with an intrinsic dignity, despite of the colour of the skin, gender, religion, beliefs, and so on. However, when in the public sphere is demanded the protection from possible offenses, at the expense of the limitation of freedom of expression; or the inclusion on the basis of the membership to some category (often historically excluded, deprived, oppressed and so on “minorities”), at the expense of the traditional value of equality – in these cases, the idea of an autonomous and then self-responsible individual is put into question.

In the digital context this happens frequently, especially in social network and platforms, where one could stage and develop his/her individuality in multiple ways.

This contribution aims to briefly analyse this kind of conflicts in the specific case of the contrast between freedom of expression (the right to participate at the public debate) and political correctness (an attitude to minimise conflicts) with a particular attention to misleading information, that is, every kind of information that may not necessarily be false, incomplete or deliberately deceitful, but which is nonetheless “misleading” to some extent (Giglietto et al., 2019; Barber, 2017). Misleading information represents a treath for the public debate and the right to be informed – an essential carachteristic for the exercise of citizenship –, conceiving it not only as a legal and political concept related to democracy, rule of law, and collective affiliation, but also as the individual field of experi-

ence that makes collective experience itself possible and structures it.

In fact, digital participation implies new perspectives on citizenship, since it enriches the personal horizons, interactions and relations, shaping new forms of social bond. Obviously, digital participation is not in contrast with a supposed “real” participation: on the contrary, it is just another way to communicate and act, to connect with others, and to express oneself. However, precisely the multiplication of stages and social spheres where one could act, increases the social complexity and the uncertainty of contemporary world. This has important consequences on the possibilities of participation and inclusion, since they depend on the individual capacity to reduce the “external” complexity and, at the same time, enriching his/her own possibilities (personal experience, open future, and so on). In this regard, a series of problems emerge with platforms, such as the possibility to participate (open and equal access without discrimination) and to express oneself; to be exposed to different opinions (without manipulation and limitations); (once again) to limit misleading information; the right to protection of personal and sensitive data; and also the access to economic activities, both in direct and active forms (entrepreneurship, purchases, etc.) and in an indirect and passive way (exploitation of data that one reveals – more or less consciously).

2. Public Opinion, Public Sphere and Uncertainty.

The concepts of public opinion and public sphere could be considered as tools to describe the fact that in the modern society the “truth” in the traditional sense (God, nature, and so on) is no longer an absolute reference – or, put in another way, that it is no longer possible – but also that an immaterial and open arena for discussion – where one could learn and form his/her own opinion – exists. This is essential since, in the face of complexity, it is necessary to refer to provisionally established judgements about what is considered “true” or “right”. It is no coincidence that the public sphere emerged with the invention and spread of the press (Habermas, 1962), that is, with the proliferation of opinions and “voices” and the possibility to communicate beyond one’s most close social circles. Public sphere is then a network of discussion among different people and actors, despite their differences in social *status*, with different producers and audiences (readers, listeners, spectators). Of course, with social media the things become more complex: the distinction between producers and users becomes vaguer; there is often a greater attention to the context and communication process (ex. the sequence of reactions) than to the contents involved; etc.

However, in general the provision of themes of communication around which opinions condense and the fact that they are “common”, represents a resource for individuals to act in public life: they are nec-

essary since one has always to decide and to make selection in contingency (Luhmann, 1971). Moreover, this continuous articulation of communication and emerging of opinions is necessary for the legal and political systems, since they have to provide decisions, even when the individuals do not have a sufficient knowledge about the issues at stake.

Then, from a sociological perspective, the public sphere could be conceived as a medium that produces themes of communication and allows for the structuring of individual expectations and orientations. In this way, in the contemporary society it is possible to observe reality through the mass media, articulating topics of discussion and transforming social needs and demands into political issues and claims. This too produce uncertainty on multiples levels, since the public sphere is the product of an enormous quantity of observations of other people's observations: for example, the political system has to respond to different and new expectations, "offering" positions and solutions; Law has to take into consideration the changes in public sensitivity on certain issues and habits; individual have to reconsider their consolidated opinions, etc. Moreover, the expectations created within public sphere are a product of public sphere itself, and for the same reason it has to react to its own projections (for example, when a political movement of protest unexpectedly wins the elections).

It is exactly this production of uncertainty which offers the possibility of a continuous generation of different interpretations, specific and personal opinions (and positions) and then innovative solutions (both from a cognitive and normative point of view). In fact, the public sphere is the space for expressing and articulating differences – and here another paradox is evident – and at the same time the place where these differences have to be resolved in some way. Conflicts between different opinions are then normal: but again, this is the 'essence' of democracy. Even when the contents at stake have no basis at all or consists in false beliefs or information, their legitimation is essentially a political or a juridical issue, not a moral nor scientific one: and this is the problem, since one expect that politics and law act as "filters" which protect from false information. At the same time, they are supposed to protect also the (individual and collective) freedom of expression – even today, when online everyone can unleash any kind of thoughts. In this sense, law and politics have a protective function both against fake news and misinformation and against unjustified restrictions and censorship on freedom of expression.

3. Freedom of Expression, Misleading Information, Politically Correct.

From a functionalist perspective, freedom of expression, on the one hand, and misleading information, on the other, could be considered

as functional equivalent in contemporary society: they reduce the contingency and uncertainty of the world. The former does it by allowing individuals to think and express themselves freely and originally; the latter by providing simplifications, comforting explanations, and so on. Moreover, misleading information – and even fake news – could be considered a way not only to “manipulate consensus”, but also to “stage dissent”, that is, to express dissent in socially acceptable and non-violent ways (Cevolini, 2018).

Freedom of expression and misleading information come into conflict because the latter threaten the basis of the former, that is, the right to receive truthful and reliable information, which would serve as basis for forming an independent opinion and making decisions. Moreover, misleading information represents a threat to society as a whole, as it promotes misconceptions about social facts and polarises extreme positions.

Political correctness too represents a reduction of uncertainty in communication, since it serves to prevent or manage conflicts and help the individual to avoid psychological and emotional trauma. It represents – depending on the case – an attitude or an imperative, which protect the others from not only potential abuse and discrimination, but also from any possible threat to one’s own self-representation. Then, it serves to protect the personal sphere. Here lies a clear paradox: political correctness disregards the concrete specificity of others, such as biographies, values, etc. It can be also used to claim the protection of certain categories, such as minorities, which often used it as a sort of a “weapon” in the context of asymmetrical wars with “majorities” (Ronchi, 2021). This could be one of the cases in which political correctness is questioned and considered inappropriate or unacceptable. When it happens, it is usually conceived as the product of an excessive moralisation, or as a form of censorship of thought and opinions.

In the other cases, political correctness could then be conceived as a sort of acceptable reduction of freedom of expression, since it facilitates the public debate: it would guarantee the respect for different sensibilities and a plain and fair atmosphere for discussion.

Balancing freedom of expression and political correctness case-by-case is fundamental. In fact, while limitations to freedom of expression and the excessive use of political correctness could worsen existing conflicts and generating new ones, it is precisely through conflict resolution and the promotion of dialogue that it is possible to manage the complexity and uncertainty of the modern world. The decisions to be made by individuals, organisations and society in general depend on the possibility of learning, forming opinions, expanding knowledge and promoting changes. For this reason, to express oneself without censorship and, at the same time, to respect others are both essential.

To resume, the relationship between freedom of expression, mis-

leading information, and political correctness refers both to the public sphere, and to modern individualism, conceived as the tool which gives to individuals the possibility to be unique, autonomous and self-determined. For this reason, they need to: a) access to the widest possible range of content and information – and they should be reliable, that is, not misleading; this is essential to make decisions; b) express themselves freely; c) be protected from discriminations (both physical and affective/emotional). These needs clearly show the importance of the three domains on which this study focuses.

This conceptual framework supports the idea that the conflicts between misleading information, freedom of expression, and political correctness represent just the “normal” consequence of the difficulty of managing uncertainty, complexity and contingency in contemporary world-society. Having the same function, they are “competitors”, so to speak, and then could come into conflict.

This hypothesis could help in questioning the role of digital platforms in managing uncertainty and conflicts between the three dimensions in question. In fact, especially social media platforms could sustain, expand or reduce the possibility of communication and discussion. This depends by the freedom of expression they allow, the limits claimed in this regard – first, the use of political correctness – and the dissemination of misleading information.

Here the concept of “responsibility” is relevant, not only from a formal perspective, due to the intrinsic power that platforms have to highlight and spread – or, on the contrary, to make invisible – certain content and users. If responsibility is conceived as an “obligation” for digital platforms – in order to guarantee access to the users, moderate content, remove inappropriate comments and contributions, etc. – then it represents a political, even before than legal, problem, insofar as the new scenarios opened up by digital technologies are still very poorly regulated and often even less understood. Therefore, before and beyond considering legal solutions in terms of penalties or compulsory actions, it would be necessary to imagine and making political decisions to establish which level of commitment platforms should assume.

Here it would be possible to examine only some aspects of these issues related to platforms and their responsibilities. However, firstly it is necessary to take a closer look at the relationships between freedom of expression, misleading information, and political correctness, on the one hand, with uncertainty, future, and the different dimensions of meaning (that is, psychic and social) systems, on the other hand.

4. Uncertainty, Time and Meaning.

If “meaning” is conceived as the medium which expresses the difference between what is actual (or real) and what is possible (Luhmann, 1984), that is, the basic difference which permits to social and psychic systems to create forms, making selections and actualising something while leaving the rest (other possibilities) in the background, then there are three dimensions to take into consideration: the temporal dimensions, the fact dimension, and the social one. In fact, meaning (actual/possible) is articulated in these three domains: the temporality (difference past/future), the facts under discussion (difference this/something else) and the horizons of communication (difference between ego and alter’s perspectives). Consequently, freedom of expression, misinformation and politically correct can also be analysed in relation with meaning dimensions (Table 1).

In the *fact* dimension, freedom of expression and political correctness have to do with what is considered true (individually and collectively) and with shared values. Both are relevant for the general societal context, precisely because they are implicated in every kind of interactions, relationships, organisations and also in public communication and social media, of course. They are also fundamental for the individuals, since what one considers true and important steers his/her own decisions and actions, and expresses one own personality is essential for its development. Moreover, politically correct protects the individual personality itself. It also poses limits about what is acceptable in the public debate, underlining specific social values (such as respect) and helps in promoting the dialogue in the public sphere.

Misleading information influence the opinions and the beliefs about what is considered true, certain, or at least plausible or credible for individuals and society in general. Even when it does not concerns social beliefs or knowledge, its effects on social life could be relevant, since it influences individual decisions and action.

In the *social* dimension, freedom of expression legitimises different perspectives in communication. Obviously, these perspectives can come into conflict: this happens even more with the dissemination of misleading information. Political correctness, then, serves to regulate or limit these conflicts and communication in general. In all cases, consensus is at stake, that is, an essential political dimension of social life.

Tab. 1 – Relations with Meaning Dimensions				
	Fact	Temporal	Social	
Freedom of Expression	Truth and Values	Future	Legitimising Differentiated Perspectives in Communication	Consensus
Misleading Information	Truth	“Binding” the Future and “Reassessing” the Past	Conflict Activation	
Politically Correct	Values (and also Truth) (especially collective)	“Correcting” the Past (based on the Present but looking to the Future)	Conflict and Communication Regulation	

Each domain also affects the *temporal* dimension. While all of them happen in the present, each one has a particular influence on one or more specific temporal dimensions (past, present, future).

In this sense, freedom of expression guarantees an “open” (to change, innovation, variation) future, expanding the possibilities of thought and imagination necessary for decisions and action.

Even if at the first glance misleading information does the same, on the contrary, it “binds” the future, limiting it to illusory premises. It “reassess” the past (established knowledge) providing – in the present – its solutions (sometimes consolatory) based on (more or less spiteful) simplification, falsification, “alternative” theories and truths, and biases.

Political correctness, on the basis of the (present) *Zeitgeist*, “corrects” what the present considers “wrong” in the past, to the extent that tries to “make justice” for victims and protect who is frail. In this way it limits undesirable or problematic possibilities, but allows the continuation of communication (future).

The three considered dimensions also represent in different social systems either a resource that allows solutions to be found or a problem that generates conflicts – depending on the case (Table 2).

Tab. 2 – Relations with Social Systems			
	Interactions	Organisations	Society
Freedom of Expression	Solution (in principle) / Problem		Differentiated Perspectives in Communication / Public debate
Misleading Information	Problem (Conflict)		
Politically Correct	Solution (in principle) / Problem	Solution	Solution (in principle) / Problem

Allowing for the manifestation of different perspectives on communication, freedom of expression could in principle offer solutions, but it also represents a problem in interactions, which consist of close relationships and direct contact between individuals, and organisation (where hierarchies are fundamental). In fact, freedom of expression allows individuals to “be themselves” and “sincere”, but this is not always easily acceptable (if one dislike what is said) – as well as paradoxical from a communicative perspective (the very fact that sincerity is communicated encourages one to question it). In the overall society, freedom of expression (as already said) offers differentiated perspectives in communication and guarantee an open public debate.

Misleading information, on the other hand, is always a source of conflict – explicit or potential –, precisely because it diverts attention from real/true problems to wrong solutions or unfounded issues. Even though it reduces uncertainty, through explanations, its possible negative effects remain latent.

Political correctness represents an important resource for reducing conflicts (even potential ones) and damages on others in every kind of social system, but especially in organisations, which need a relatively high degree of stability. At the same time, both in interactions and in society, it can mitigate the expression of dissent and personal expression, which are important both for the public debate and for the essential change needed to maintain stability. Moreover, political correctness itself could generate overt conflicts, when it is considered excessive or even an “abuse”.

With regard to psychic systems (Table 3), it is necessary to distinguish between the functions of the dimensions considered here, on the one hand, and the expectations they generate or emphasise in a prevalent manner, on the other.

In this sense, freedom of expression provides resources for variation, in order to expand the individual horizons, that is, it serves to open the psychic system to the world.

Misleading information represents a solution for the individual psychic system in the face of general uncertainty, just because it provides answers to complex phenomena or justifications for disappointments. At the same time, when it is recognised as such (truly misleading), this information represents a problem, an obstacle to be faced in relations with others (since it generates contrasts, conflicts, distrust, etc.).

Political correctness generates protection: through its communicative restrictions, it means a guarantee of immunity against external threats to one’s own sensitivity and individual self-representation. At the same time, it could trigger to conflicts, if it is perceived as a limitation to the possibility of expressing oneself freely or to the public debate – or even to the rights of the majority in opposition to the rights of a minority. Thus, political

correctness (which can be understood as an attitude or even an ethical imperative) represents a tool to protect the personal sphere. However, it runs the risk of disregarding both the very specificity of others (values, personal history, character, etc.), and freedom of expression (which someone could consider prevalent on the right not to be offended, promoted by politically correctness).

Concerning the expectations generated or triggered, each dimension has some kind of effects on normative, cognitive and affective level, although the prevalence differs case by case.

In fact, freedom of expression is basically the affirmation of a right, that is, a normative claim.

Misleading information, on the other hand, concerns cognition, since it offers alternatives to what is already known.

Finally, political correctness is relevant both on the normative and affective level, since it aims to bind communication through claiming the respect for the others; and it does so highlighting the individual affective sphere (personal feelings and what one considers relevant for his/her own self-representation).

Tab. 3 – Relations with Psychic Systems		
	Function	Expectations (prevailing)
Freedom of Expression	Resource	Normative
Misleading Information	Solution, Justification / Problem	Cognitive
Politically Correct	Communicative Restriction / Immunity Guarantee	Normative and Affective

5. Socio-Legal Issues in Digital Society.

In times when the access to information – through the Web, in addition to traditional mass media – is abundant and available to an increasing number of people, a big issue is the fact that much of the information offered (mainly online) is, in part or in whole, unreliable. At the same time, the first impression is opposite: in fact, especially with Big Data and artificial intelligence one could expect a greater transparency due to the impressive data processing capacity. On the contrary, this situation produces a greater opacity, since the algorithms are not transparent (not even to their programmers) and the machines do not really “understand” (in the sense of humans), but rather they predict (Esposito, 2022).

These elements are essential factors in the digital society, since algorithms have enabled a surprising expansion and acceleration of the services (in a broad sense) available online. Their success depend on the fact that, based on the large amount of data and statistic, they calculate

what would be the most probable outcome of the problem or situation they are applied. This happens not based on some “reasoning”, but on elaborations generated primarily from data collected on the Web and generated by users.

Algorithms then do not really express a form of “intelligence”, but rather they enact an “artificial communication”, that is, a communication with an artificial partner (the machine). Algorithms are constructed (by someone who will not participate in the future communication with users) in order to generate paths, solutions and possibilities that are plausible to the interests of the human communication partner. But again: their functioning is intrasparent and unpredictable, and this produce uncertainty, which generates various kinds of problems, in terms of access, possible discriminations, political power, and so on. These problems involve social systems, organisations and institutions and also individual actors. Possible solutions could be both cognitive and normative. Usually the legal and political system are the first called to respond. But solutions could be generated also through various kind of regulations, technical innovations, market and economic services, State interventions, and so on.

This situation produces an open future, that is, uncertain but, at the same time, non-rigid. Future scenarios oscillate between negative and positive results, unexpected changes, which make the possible outcomes unpredictable.

The challenge is then to imagine alternatives that are functionally equivalent to each other. In other words, since eliminating uncertainty is not possible (new uncertainty will come because of present and future evolutions), a greater flexibility would be necessary – and this is exactly what the society plead with today. It means that actors (social systems, organisations, individuals and so on) should try to use their self-generated uncertainty – resulting from the horizons opened by the “external” uncertainty – to find new solutions. In fact, each actor, system, organisation involved, reacts to the uncertainty (that is, new possibilities, problems, horizons, and so on) through decisions, new expectations, claims (Corsi, 2023). This is obviously a paradoxical solution, that is, relying on self-produced uncertainty in order to reduce the uncertainty.

The lack of transparency of digital society and the self-generated uncertainty characterises the three dimensions discussed here (political correctness, freedom of expression, and misleading information). In fact, while they reduce uncertainty, at the same time they also produce it. From the perspective of individuals, systems and organisations involved, they are tools to construct their identity, act and communicate, acquiring knowledge, providing trust, making decisions. At the same, however, they can generate problems, conflicts, unexpected bind, distrust, and so on.

In this sense, the issues and questions emerging in the digital society

are individual problems (that is, for individual human beings, organisation, systems), and not – or, at least, not very much – problems for the society as a whole. The society, that is, the communication, keeps going.

From a socio-legal perspective, different questions are relevant. Here it is possible just mention a couple of them, directly related with misleading information, freedom of expression and politically correctness.

The first one is the so-called right to be forgotten. In fact, artificial communication, Big Data and, more generally, the Web, seems not capable of forgetting, but neither are they capable of remembering as humans do. In fact, they only calculate. Basically, the algorithm forgets what has been forgotten by users. At the same time, what they remember needs to be always revised and make actual in the present. In this sense, there is no doubt that the right to be forgotten is a legal (and political) problem. However, the fact that today remembering is easier and cheaper, makes it convenient – and this is what we usually do (Esposito, 2017). Then we should reflect on what we are willing to give up, in order to protect the right to be forgotten.

Moreover, the right to be forgotten is related to the possibility of keeping the future open, since it protects from the influence of the past (Esposito, 2022, 115).

The second problem is the so-called “algorithmic justice”, that is, the preoccupation for the discrimination of certain people and categories based on the intrasparency of algorithms. However, this kind of discrimination is not the result of an autonomous decision of the algorithms: they are produced based on the data produced by the users (their biases, prejudices, false assumptions and beliefs, etc.). In this sense, the difficulties here seems to have a communicative nature, not a cognitive one (Esposito, 2022, 176).

Moreover, since the access to Big Data and platforms is neither neutral nor egalitarian – for different reasons (technical, political, but even educational, and so on) – one should consider that the problem is also that the machines, in their “creative” functioning, *could not* reflect the ideas (that is, also the positive ones) of their creators – but those of users (p. 175).

These two problems could be traced back to another, more general, one: if the algorithms do not decide in the human sense (since they are not “intelligent” and do not “forget”), but calculate and predict, is still make sense the question of their responsibility?

Of course, one could say that they are just tools, but the responsibility lies with those that not only produce, but apply them – that is, digital platforms. However, here one must not forget that their intrasparency – even for their creators – represents one of their most innovative advantages, since they produce results and solutions that no one could have even imagined.

However, the responsibility of platforms (which, in any case, would be, above all, a political issue or duty) oblige to deal with another question: what is it really possible to expect – in the double sense of plausible, reasonable, for the one hand, and likely to give hope of receiving an answer, for the other hand – from them?

6. Platforms' Responsibility and Self-Responsibility on Platforms.

Platforms are technical entities – essentially, organisations – that encourage and trigger communication at multiple level: in the form of interactions between users, emphasising certain content and encouraging certain types of conversations, and so on. Then they contribute – sometimes actively, sometimes passively – to construct communication themes.

Digital platforms could be then social networks or channels – that is, places for digital interaction between users; online marketplaces (e-commerce) or other companies or projects which provide some service; crowdsourcing websites and apps – gathering work, information, opinions from different people (which sometimes offer them as voluntary work). In any case, digital platforms constitute mines of personal data, and try to exploit them (selling them, or using them for their functioning). Big Data and artificial intelligence are then essential for their success.

The question of platforms' responsibility about the data they collect, produce and manage, implies the need to differentiate the problem in different levels.

The first one has already been mentioned: the responsibility of algorithms themselves. Here the paradox is that one can speak of responsibility only if it is possible to understand what other possibilities would have been available to the agent. In this sense, in the digital sphere, can the algorithms be considered responsible? That is, can they be considered such actors, as a person, which could have decided differently, based on other possible choices? These questions involve a number of technical issues (even before than legal and political ones) which today are far beyond the reach of most people – and unfortunately, many politicians and journalists appear to have no idea whatsoever.

The second level involves the platforms as organisations with a public recognised role and power in terms of direct and indirect influence (and then possible manipulation), even at political level. Here the question is to decide which limits their economic interest should have when other values, public interests and possible damages on individuals or collectives are involved. The nature of the different platforms (social media are not e-commerce platforms, for example) should be carefully considered, and then precise duties and rights identified.

The third level concerns interactions between users. Here one could

speak of the responsibilities that individual actors have for their conduct, that is, self-responsibility. Above all, there is a clear question related to digital literacy and the awareness of what is at stake (and at risk) in the online participation.

Moreover, often the interactions on platforms are public – this is the case of social networks. In these cases – interactions in the public sphere – the role (and then the responsibility) of professional agents (politicians, but also journalists and public communication professionals, among others) is different from private individuals.

In the case of generalised communication, there is the risk of a (not necessarily illegal) manipulation of opinions by political or economic interests. Here the difficulty often lies in identifying the actors responsible (the platforms as market companies, other economic entities, States, and so on), also evaluating the possible distance between their intentions and the outcomes. This difference between contents and intentions (Corsi, 2018, 36) concerns every kind of communication and is particularly evident in public sphere and especially in social media.

In these last two cases, the idea that the responsibility of professional and institutional actors, due to their knowledge and their potential influence, should be higher than the others is quite widespread. In the same way, often they are absolved of their responsibility in the public sphere (especially in the digital sphere – even more so on social media), precisely due to the awareness that any action or communication runs the risk of going far beyond the intentions of the actors (the examples would be countless). And this should not surprise: modern society always oscillate between the request of self-responsibility and the reformulation of the expectations when they are disappointed.

In this sense, while self-responsibility could be a general mandate in contemporary society, at the same time it is sort of shapeless matter, which could be mould according to the perspective of the observer (Corsi, 2023, 52).

Then, more than focus on blaming, there would be the need to give to individuals the means for control their own behaviour and to orient he/she themselves in the complexity and contingency.

7. Final Remarks.

This short contribution aimed to reflect on the relation between freedom of expression, misleading information and political correctness in the (contemporary digital) public sphere. Identify their mechanisms and their reciprocal effects would be important to better understand how opinions and the discussion between different perspectives take shape.

On the other hand, self-responsibility could be considered, in its different concrete actualisations, as a tool for the individual and as a

demand for organisations (including the State). In this sense, the relationship and the clashes between the three dimensions analysed here, could be conceived not only as a way to reduce uncertainty in modern society, but also as a physiological consequence of the complexity, which requires a minimum amount of self-responsibility to be managed.

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9.

THE (IM) POSSIBILITY OF COMPLEX JUDICIAL DECISIONS ORIGINATED BY THE USE OF ARTIFICIAL INTELLIGENCE IN BRAZIL: AN ANALYSIS IN LIGHT OF DIGITAL CONSTITUTIONALISM AND JUDICIAL DECISION THEORY

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1. Introduction.

Artificial Intelligence is a technical concept derived from computer science, consisting of logical-mathematical programming, generally produced from a binary language, where data can be entered into a telematic device, which the machine is able to select and repeat patterns from logical elements determined by the program used. This concept emulates

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the concepts of learning and logical aspects of human intelligence, especially with regard to sufficient learning to emulate decision-making.

This is why it is called “Artificial Intelligence” (AI), although it should be highlighted that it is necessary to clarify that human intelligence is not a single dimension, but a space structured from different skills and abilities to process information (Boden, 2020, 13), essentially considering human intelligence from ethical-moral values, in addition to all learning from senses, sensations and experiences, or a perception of the physical world.

In a period in which the neuroscience of morality, also called deep pragmatism, with a utilitarian bias, is studied within the intricacies of neuroscience and psychology (Wolkart, 2020, 15). This is because the human brain judges all human interaction, including looks and facial and body expressions, seeking to defend itself from threats, anchoring itself in two basic reasoning systems: reflective and intuitive (Wolkart, 2020, 17), in addition to factors that alter human judgment, questioning the intuitive relationship of the mind with the Kantian categorical imperative (Greene, 2013, 221).

Thus, the traditional and impactful name “Artificial Intelligence”, in the words of Peixoto and Silva (2019, 31), may have caused more harm than good, since it is, in truth, the potential of a computer to perform tasks that reproduce human intelligence, reproducing behaviors that, based on learning from past experiences, thus enabling the machine to understand, learn, identify or complete human activity. On the other hand, it should be noted that the machine cannot feel or have impulses arising from these experiences, often being programmed in a simplified, objective and binary language, translated into a program, that is, an algorithm in a computer.

Therefore, human intelligence has numerous facets, which AI seems to simulate more the logical and standardization part of the human brain, which is called by specialized authors as the theory of two ways of thinking, developed by the brain for evolutionary reasons, with a more intuitive and instinctive, impulsive and fast part, and another more reflective, meticulous and slow (Kahneman, 2011, 249-266). This second “form of intelligence”, however, has as its starting point the perceptions obtained from the first, which has been studied in the last two decades (Kahneman; Shane, 2002, 49-81).

Contemporary globalized society is increasingly structured in a bipolarized position between the network and the individual (Castells, 2002, 41). On the other hand, given the presentation of the concept of a true “Revolution 4.0” presented by Schwab in 2016, the legal systems of States have been undergoing disruptive technological transformations in human relations and in a constantly accelerating time frame. This new reality has led to the proliferation of numerous *software programs* that

promise, especially with the use of artificial intelligence, not only to automate repetitive human tasks, but also to simulate human creativity and decision-making.

The debates about the end of certain professions, specifically within Law, or their transformation, reflecting on the possibility of reducing access to justice, were even debated by great international names such as Susskind (2017), who recognize, on the other hand, the great opportunities for improvements in various sectors, starting to question the nature of justice itself, whether after all, it would constitute a place or a service.

Thus, the use of AI is growing exponentially in the legal environment. Easily accessible and with the aim of, in addition to innovating, facilitating demands, AI has also reached the Judiciary, such as Vitor at the Federal Supreme Court – STF, “Currently, the STF operates two robots – Victor, used since 2017 to analyze topics of general repercussion in the screening of resources received from all over the country” (Brasil, 2023).

The general problem of this work consists of: Is it feasible to apply AI in complex judicial decisions, which involve moral and ethical issues, in accordance with the Brazilian constitutional system, thus enforcing fundamental rights? As guiding questions, on the other hand, the possibility of moral and ethical judgments by AI, characteristic of complex decisions, is questioned. On the other hand, the legal nature of these decisions is also questioned, whether they can be considered legally valid questions and, if the answer is positive, which current can be classified – whether positivist, post-positivist or neopositivist within the Brazilian legal system. Finally, the possibility of using a strong AI to make less complex decisions, only as ordinary acts, creating a hybrid decision-making system, or even the possibility of using AI for part of the elements of judicial decisions, such as structuring and preparing the Report, but without providing grounds and conclusions, elements that bind and modify the sphere of interest of the parties, is also questioned.

The main objective is to analyze the structure and function of AI-generated decisions, essentially regarding their ethical and moral content in light of the Brazilian constitutional order, in contrast with the traditional concept of a sentence as an act of intelligence by the judge. The specific objectives include analyzing the structure and function of AI-generated judicial decisions, verifying whether they contain axiological, ethical and moral content; as well as analyzing the possible legal framework of the machine’s stance on the nature of the decisions it generates.

It is assumed that ethics in Artificial Intelligence – AI is not just a technical or philosophical issue, but also a global challenge that requires attention to intercultural perspectives and issues (Coeckelbergk, 2023, 9). In view of this statement, society follows the advances of technological innovations towards a possible total and irreversible control of all things that are connected through a technological network.

Brazil is legally supported by the Constitution of the Federative Re-

public of 1988 – CRFB/88, which presents a list of positive rights that guarantee citizens rights, fundamental rights to a dignified and safe life, legally.

Regarding the methodology, the type of research is predominantly theoretical, with a qualitative approach, of a prescriptive nature, with exploratory and transversal objectives with a predominant application of deductive logic. Regarding the procedures applied, a bibliographic review was carried out through the critical analysis of doctrinal works and scientific articles, in addition to the collection of documentary data, such as current legislation, for example.

In order to carry out its mission, this work is divided into two sections, whose themes are: First section, artificial intelligence and the variety of human intelligence; Second section: artificial intelligence in judicial decisions and Third The possibility of using artificial intelligence in elements of judicial decisions.

2. Artificial Intelligence And The Variety Of Human Intelligence.

Artificial intelligence (AI) is the branch of computer science aimed at developing computer systems capable of simulating the ability to reason, especially through logic and human discernment, aiming at decision-making, and the respective execution of the task that is the object of that decision, with the objective of solving problems in a way similar to the solution that a human being presents for the same concrete hypothesis and, in particular, with computational learning capacity (Pimentel, 2023, 145).

For International Business Machines (IBM), “Artificial intelligence is a technology that allows computers and machines to simulate problem-solving capacity and human intelligence”. Thus, a tireless search for surpassing human capacity through logical reasoning and algorithms began to dominate society, as technology is capable of self-development and constant learning, which will be called machine learning. In 1936, Turing demonstrated that in principle, any and all calculations can be performed by a mathematical system known today as the universal Turing machine, which are developed by imaginary systems that construct and modify combinations of binary symbols represented by “0” and “1”. Through these combinations and codes, it was possible to decipher the codes at Bletchley Park during the Second World War (Boden, 2020, 22).

Nunes and Marques (2019, 45) state that “artificial intelligence works using computer systems programmed to provide responses based on the available database. These devices are called algorithms”. Conceptually, AI is a set of technologies that allow computers and digital devices to reproduce human-like capabilities, such as reasoning, learning, planning and creativity.

According to Russell and Norvig (2004, 01) “AI is one of the most recent sciences. The work began a little after the Second World War, and the name was created in 1956. AI is cited, along with molecular biology”, of a multidisciplinary nature, the study of AI brings together several fields of science, in addition to addressing different subjects. Barbosa and Bezerra (2020, 92-93), understand this multidisciplinary as a way of enhancing their learning capacity,

AI is a field of knowledge that is currently widely explored in film and literature, but its origins are still little known. It is linked to Computer Science and is associated with issues such as language, intelligence, reasoning, learning and problem-solving, which in turn permeate various domains of science, from linguistics and psychology to philosophy and epistemology. The goal of AI is to understand and build intelligent systems, which has a major impact on our Western culture, since it contains humanist and speciesist beliefs that lead us to believe that we are superior beings and that intelligence and thought are gifts exclusive to our species – which would differentiate us and make us superior to other creatures.

For IBM, AI is a technology that allows computers and machines to simulate problem-solving capacity and human intelligence, an autonomous technology capable of self-learning, although human intervention is still necessary for such learning. According to IBM, “Classical learning relies more on human intervention to learn, as it determines the set of resources to understand the differences between data inputs, requiring more structured data to learn”.

With the advent of advocacy 4.0, whose objective is to use technological tools to improve the efficiency and quality of legal services, the use of technology and its innovations has been growing exponentially, not only in law firms, but also in the judiciary itself. The use of technology in justice systems is at the center of the agenda of practically every country in the world, and it has stood out significantly from the perspectives of its first agents, those who are part of the system itself (Maldonado, 2019, 47). In constant transformation, society is already in the era of advocacy 5.0, whose use of advanced technologies aims to serve human beings, in this case, especially the implementation and development of AI. The use of artificial intelligence systems is growing in the most diverse fields, due to the increased efficiency and precision of the services they provide (Marques and Nunes, 2019, 44).

For Castells, technology does not determine society, nor does society write the course of technological transformation, although many factors, including creativity and entrepreneurial initiative, intervene in the process of scientific discovery, technological innovation and social applications, so that the final result depends on a complex interactive pattern. Castells claims that there is a technological determinism, where both

complement each other, technology is society, and society cannot be understood or represented without technological tools (Castells, 2002, 43).

Scientific advancement, commercialization, and the diffusion of innovations are social processes that unfold as people develop and exchange ideas, values, interests, and social norms in a variety of contexts. This makes it difficult to discern the full impact of new technological systems on society: our societies are composed of many interconnected components and many innovations that are in some way co-produced by them (Schwab, 2016, 97).

For Marques and Nunes (2019, 45) “their ambition was to imitate the cognitive processes of human beings, their current objectives are to develop automatons that solve some problems much better than humans, by all available means, given this position, the transhumanist theory that is configured in the idea of the superintelligence of machines, surpassing human intelligence, begins to make sense. Because, according to Coeckelbergh (2023, 21) “the idea of superintelligence is that machines will surpass human intelligence. This is often connected to the idea of an explosion of intelligence and a technological singularity”, bringing to light the “Frankenstein complex”.

The extraordinary innovations brought about by the fourth industrial revolution, from biotechnology to AI, are redefining what it means to be human. They are pushing the boundaries of life expectancy, health, cognition, and competence in ways that were once the preserve of science fiction. As knowledge and discovery continue to advance in these fields, it is crucial that our focus and commitment be on ongoing ethical and moral discussions. As humans and social animals, we need to think individually and collectively about how to respond to issues such as life extension, designer babies, memory extraction, and more (Schwab, 2016, 104).

Faced with such singularity, the attempt to make AI superior to human intelligence is constant, “the algorithms that support it are based on equally varied approaches: semantic analysis, symbolic representation, statistical or exploratory learning, neural networks and so on” (Marques and Nunes, 2019, 45). “Neural networks” are to AI, as “neurons” are to human beings.

The learning process occurs through the acquisition of knowledge, skills, values and attitudes through study, teaching or experience (Tabile and Jacometo, 2017). Human learning is a process that occurs through study, teaching or experience. For Piaget, a human being has phases in the course of his/her development, with a separation in the intelligent cognitive process into learning and development. Learning refers to the acquisition of a particular response, learned based on experience, obtained systematically or not, while development would be actual learning, which is responsible for the formation of knowledge (Piaget, 1975).

According to historian and neuroscientist Greene (2013, 222), human judgment combines both forms of thought, such as the judgment of the reasons that lead a person to kill another to save a group of individuals in a given situation, and, depending on the motivation, the judgment seems to change completely, according to human analysis. Intelligence considered “slow”, more logical, is considered the most rational, reflecting on intuitive intelligence, which can be very efficient or even problematic (Wolkart, 2022, 18).

Thus, the rational system would be unconsciously anchored in the intuitive system, based on the formation of the individual in the context of a society, which could be stated as “the biological root of the Kantian categorical imperative” (Wolkart, 2022, 37), so that it would not be the Kantian categorical imperatives that would justify the instincts, but the instincts that would justify the categorical imperatives, with moral judgments being necessarily dual and self-complementary in nature (Cushman; Greene, 2011). According to Botvinick et al (2001, 624-652), the brain resolves conflicts of interest using a type of monitoring that works in a brain structure called the anterior cingulate cortex, activated whenever incompatible responses appear, forcing a rational response, to the detriment of acts of violence, seen as an impulse.

For Piaget (1971, 16),

Intelligence is an adaptation. To understand its relationship with life in general, it is necessary to determine the relationships that exist between the organism and the environment. In fact, life is a continuous creation of increasingly complete forms and a progressive search for balance between these forms and the environment. To say that intelligence is a particular case of biological adaptation is therefore to assume that it is essentially an organization whose function is to structure the Universe, just as the organism structures its immediate environment.

Intelligence is, in fact, assimilated to the extent that it incorporates all the data of experience. Whether it is thought, which, thanks to judgment, introduces the new into the already known, thus reducing the Universe to its own notions, or sensorimotor intelligence, which equally structures the things it perceives, redirecting them to its schemes, in both cases intellectual adaptation involves an element of assimilation, that is, of structuring by incorporating external reality into the forms due to the subject's activity (Piaget, 1971, p; 19-20).

In contrast, AI is developed by artificial neural networks (ANNs), which are composed of a large number of interconnected units, each capable of processing only one thing (Boden, 2020, 111). AI as a whole is not something easy to understand, amidst this tangle of data, coding, artificial neural networks, systematics, mathematical calculations and various combinations of sciences, there is an area in which implementation and

development are rapidly expanding into the legal world.

3. Artificial Intelligence in Judicial Decisions.

Due process of law is a principle originating from Anglo-Saxon law and serves as a guarantee against possible abuses in order to ensure jurisdictional action in accordance with the Constitution. Technological due process tends to corroborate the use of artificial intelligence as a way to automate procedural rites and, consequently, judicial decisions. In order to make a value judgment about a given fact, the judge tends to form a cognition from the claims to the issuing of the sentence, thus knowing all the particularities of the process, in order to then reach a satisfactory decision. Technological due process aims to bring standardization to decisions through AI (Mendes and Santana, 2024, 27 to 29).

Certainly, no matter how intelligent a human being is, it does not prevent him from making mistakes and errors. Following this maxim, AI may be within or outside these standards, judging by the symmetry with which it intends to reach or even surpass human intelligence. Barbosa (2017, 1476) makes the following statement:

The issue, which has not yet been posed with any acuity among us, perhaps as a result of the lesser technological development of Portuguese society, but has already been raised both in the North American context and in the European context (at the Community level and at the level of some legal systems), involves the possible attribution of legal personality to mechanisms equipped with artificial intelligence and is justified by the increasing complexity and sophistication that these mechanisms – robots, androids, etc. – present: their autonomy is increasing, as is their capacity to learn based on accumulated experience and to make independent decisions.

Although there are questions about who should be held responsible: creator or creature, Kaufmann apud Barbosa (2017, 1478) states that, “if the robot assumes itself as “truly autonomous” and capable of learning, it becomes complex to attribute the consequences of the machine’s behavior to its creator”. However, regardless of the dogmatic questions and the specific discipline that may be established, what is being debated is whether the mechanism equipped with artificial intelligence per se should be held responsible or whether the responsibility should be assigned to the producer, owner or user (Richards and Smart apud Barbosa, 2017, 1479). Given such statements, the application of the law in a feasible manner in the use of AI is questionable.

It is known that, based on Miguel Reale’s (2004) three-dimensional theory, a value is assigned to each fact in order to arrive at a standard. Therefore, it is possible to attribute, in addition to responsibility for the acts performed by an AI, the existence of a standardization that regulates

its use. In this path, wherever there is a legal phenomenon, there is always and necessarily an underlying fact; a value that confers a certain meaning and this fact, inclining or determining the action of men in the sense of achieving or preserving a certain purpose or objective and finally a rule or standard, which represents the relationship or measure that integrates one of those elements with the other, the fact with the value (Reale, 2004, 65). Although some scholars already point to a possible ethical responsibility, there will always be questions about the morality of artificial intelligence.

Axiologically, morality is the set of values (individual or collective) that are universally considered to guide social relations and human conduct. These values have not yet been attributed to AI, so there can be no weighing of conduct. In this sense, morality is radically different from the sense of utility and the pleasure of action. Moral duty commands us absolutely. It is like a sublime voice that commands respect and warns us even when we do not wish to listen. Morality wants our actions to have a universal character (Karam, 2007, 06).

The word moral comes from the Latin, *morale*, which refers to customs. Morality is the set of rules of conduct applicable to all people in society and is linked to ethics. However, while the latter has a speculative character, morality, despite referring to values, as in ethics, has a practical character, which leads to adherence or not to a certain rule, but without the reflection that is characteristic of the former (Vasconcelos, 2011, 202). Given the genealogy of the word moral, the conduct of morality in AI is questionable, because even if the *inputs* of value concepts are made so that *deep learning* can develop, the subjectivity and cognition for the application of socially acceptable conduct will be lacking.

For Coeckelbergh (2023, 50) “one way to discuss what an AI is and what it can become is to ask about its moral status”, questions that imply the actions of an AI, although Coeckelbergh’s object of research is ethics towards AI. However, one cannot fail to discuss how much AI can become an agent of ethics and morals towards the society for which it develops.

When AI is applied to legal matters, as is currently used in the Superior Courts, even when the analyses are pre-determined by means of established standards, such as Vitor in the Federal Supreme Court – STF, attention must be paid to what the Magistrates will accept from this analysis. Therefore, incorporating technology into the process requires in-depth reflection on what the doctrine has been calling “due technological process”, given that it is already certain that removing the human factor from the decision-making chain does not exclude the possibility of errors and cognitive biases in the decision made by automated systems (Pereira; Souza Junior, 2021, 26).

The Constitution of the Federative Republic of Brazil of 1988 (CRFB/88)

in its article 5 already presents two provisions that, in the eyes of constitutionality, already pose an obstacle to future permissive actions for the AI to develop as a judicial decision-maker, items LIII and LIV, respectively, which provide: “no one shall be prosecuted or sentenced except by the competent authority” and “no one shall be deprived of liberty or property without due process of law” (Brazil, 1988). Given this premise, a judicial decision can and should only be made by a judge, whose all the requirements for admission to become a magistrate have been met.

In this context, we talk about the guarantees and freedoms guaranteed by the Constitution, for Alexy (2014, 381) “the freedoms guaranteed as fundamental rights prevent an excessively broad identification of law with moral convictions that are not shared by everyone and whose acceptance cannot be demanded by everyone”. In this frenzy with which AI has become increasingly relevant and necessary on the world stage, points and criticisms about its application have also become more expressive.

At a Seminar held by the National Congress (CN) of Brazil, in Brasília, to discuss the regulation of AI, Hoffmann-Riem apud Agência Senado (2022) made the following statement: “artificial intelligence systems cannot exceed the rights of citizens. The State must work on controlling and cooperating with the artificial intelligence system”. Showing a real concern for the role of Fundamental Rights and their application to those who depend on their guarantees to exercise their role as citizens in a Democratic context, in the face of a new era, which, for some doctinaires, tends to become more intelligent than their own creators.

4. The Possibility of Using Artificial Intelligence in Elements of Judicial Decisions.

In the mid-1950s, pioneers of Artificial Intelligence set out on a mission with the extremely ambitious but well-defined purpose of recreating human intelligence in a machine (Kai-Fu Lee, 2019, p.19). Based on this purpose, it is considered that the use of AI in judicial decisions may bring benefits to the efficiency of the judicial system.

For Kai-Fu Lee (2019, 19) “Machine learning – the generic term for the field that includes deep learning – is a revolutionary technology”. Bets on predicting results and analyzing sentences are what drives the development of AI aimed at the judicial environment. Justifications such as the use of *machine learning algorithms* to analyze previous cases for a possible prediction of results based on stored data and constant *inputs* so that *deep learning* can have autonomy, thereby identifying patterns in decisions, the objective of which is to facilitate the understanding of AI to understand how the judge applies his decisions and thus apply them in similar cases.

AI is rapidly expanding in Brazilian courts, in its most varied applications and models. (Un)fortunately, there is no uniformity of treatment, not even for those with the same purpose (Pires, 2021, p.495). Much has been said about the possible contribution that AI can make to the Judiciary, more specifically in possible judicial decisions. However, what is questioned is the possibility of different treatment for each situation.

It is known that AI, from a certain level of learning, begins to acquire autonomy and capacity to the point of analyzing and deciding on the situation presented. This possibility exists, for this it is necessary for AI to resemble human intelligence, so that it can have the capacity to ponder on the concepts not only of norms, but also of ethical and moral values. What most resembles a neural network to a human brain is that it acquires knowledge through the process of machine learning and through the use of synaptic weights, which are means of connection between neurons, store and process the acquired knowledge and, subsequently, decide (Pimentel, 2023, 383).

One of the justifications for implementing and using AI in the judicial system is the constant increase in the number of legal proceedings, which leads to slowness and a feeling of injustice for those who wait years for a final judgment that satisfies their wishes. Even though new means are developed to speed up the process, such as the multi-door system and binding summaries, the demand for litigation is still growing. Information technology (IT) permeates this new reality, generating constant impacts. In law, the use of AI is inevitable, as it results from transformations in a networked society and the so-called fourth industrial revolution (Toledo and Pessoa, 2023, 02). Amid so many technological advances and their presence in practically all professional areas, the Judiciary could not exempt itself from such an advance.

In Pires' view (2021, 501), "in Brazil, there is a unanimous understanding that AI does not replace the judge, since the judge is the one who has the final say". Although it is common knowledge that the use of AI brings oxygen to the procedural progress, it is also common knowledge that only humans are capable of judging and deciding on complex matters.

5. Final Considerations.

Artificial Intelligence (AI) represents a transformative milestone at the intersection of technology and society, challenging traditional concepts of human intelligence and reasoning. The continuous advancement of this technology not only redefines the way complex problems are approached, but also raises ethical and moral questions that need to be discussed collectively. The impact of AI on the legal profession, especially with the rise of law 4.0 and 5.0, demonstrates how technological innovations are being

integrated into legal services, increasing efficiency and accuracy. However, this technological evolution should not be seen as a replacement for human intelligence, but as a complement that requires critical reflection on its use and implications.

The idea of machine superintelligence, while fascinating, brings with it a “Frankenstein complex,” where the quest to create autonomous systems that surpass human capabilities requires ethical scrutiny. The interplay between technology and society is complex and interdependent, and the future of AI must be shaped by a commitment to social responsibility and ethics. As AI continues to evolve and expand its horizons, it is imperative that humanity maintains an ongoing dialogue about the limits, possibilities, and responsibilities that arise with this new technological era. The challenge will be to ensure that technology serves human well-being, fostering a future in which artificial intelligence and human intelligence coexist harmoniously and productively.

The debate over due process and technological due process is fundamental to understanding the application of artificial intelligence (AI) in the contemporary legal system. While the former is based on constitutional guarantees that protect individuals against abuse of power, the latter seeks to integrate AI as a tool to automate and standardize judicial decisions, raising complex questions about responsibility, ethics, and morality. Furthermore, the morality of AI is a topic that cannot be ignored. The absence of intrinsic ethical values in machines raises the question of how these technologies can be responsibly integrated into society. Reflecting on the moral status of AI is essential, as it can directly affect the way justice is administered.

The application of AI in courts, despite its promises of efficiency, must be accompanied by critical vigilance. Removing the human factor from the decision-making process does not eliminate the risk of errors and biases, and human oversight remains vital to ensure that decisions respect constitutional rights and guarantees. Therefore, as AI becomes increasingly prevalent in the legal landscape, it is imperative that discussions about its regulation, ethics and morality move forward. The balance between technological innovation and the protection of fundamental rights is essential to ensure that justice remains a pillar of democratic society, even in the face of the transformations brought about by artificial intelligence.

The evolution of Artificial Intelligence (AI) since the 1950s, with the ambition of replicating human intelligence in machines, opens up new possibilities for the judicial system. The use of technologies such as machine learning promises to increase efficiency and speed in judicial decisions, allowing predictive analyses and identification of patterns that can facilitate the understanding of judges’ behavior. However, the implementation of AI in Brazilian courts faces significant challenges, such as

the lack of uniformity in its application and the need for differentiated treatment for different cases. Although AI has the potential to acquire autonomy and perform complex analyses, it is crucial that this technology does not replace the human capacity to consider norms, ethical values, and morals.

The growing demand for solutions to combat the slowness of the judicial system, exacerbated by the increase in the number of cases, makes the integration of AI imperative. However, it is essential to recognize that, despite its innovations, AI must serve as an aid to the judge, who remains the ultimate decision-maker. Human cognitive capacity is irreplaceable, especially in cases that require a deeper and more sensitive analysis of legal and social complexities. Thus, while AI is part of the fourth industrial revolution and transforming several professional areas, its application in law must be done with caution and responsibility. The collaboration between technology and human judgment can result in a more efficient judicial system, but it is essential that this relationship be guided by ethics, justice and the protection of fundamental rights. The future of the Judiciary depends on a careful balance between technological innovation and the preservation of the dignity and rights of citizens.

Discussions about the (im)possibility of complex judicial decisions resulting from the use of artificial intelligence in Brazil, under the aegis of digital constitutionalism and the theory of judicial decision, transcend the purely legal scope and are intrinsically inserted in the global debate of the United Nations (UN) 2030 Agenda and the Sustainable Development Goals (SDGs). The search for more efficient and faster judicial systems, driven by AI, must be harmonized with the basic principles of the SDGs, especially SDG 16, which aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. In this context, the implementation of AI in the Brazilian judiciary requires an in-depth reflection on how to ensure that automation does not compromise equity, transparency and accountability, essential pillars for the achievement of accessible and equitable justice for all.

Concerns about artificial superintelligence and the so-called “Frankenstein complex” highlight the imperative that technological advancement be guided by robust ethics and responsible governance, in line with the spirit of the 2030 Agenda of “leaving no one behind”. The lack of ethical and moral values intrinsic to machines poses the challenge of developing regulatory frameworks that ensure that automated decisions do not perpetuate or amplify existing biases, ensuring that AI serves as a tool for promoting social justice and inclusion. The implementation of due process in technology, which respects constitutional guarantees and fundamental rights, is therefore imperative for technological innovation to contribute positively to sustainable development, without creating

new forms of exclusion or injustice.

Therefore, the analysis of the application of artificial intelligence in elements of judicial decisions should be seen as an opportunity to strengthen institutions and improve the provision of justice, as long as the human factor remains central to the consideration of complex cases. The UN 2030 Agenda, with its holistic vision of development, provides a guide so that the integration of AI into the Brazilian judicial system is not limited to mere procedural optimization, but rather a catalyst for a more just and equitable justice system that is aligned with society's contemporary challenges. The balance between the transformative potential of technology and the safeguarding of fundamental rights and guarantees is the way for AI to be an ally in building a more sustainable future and a truly peaceful and inclusive society.

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PART II

APPLICATIONS AND PRACTICAL CHALLENGES OF CITIZENSHIP IN THE DIGITAL ECONOMY

10.

THE DEVELOPMENT OF HEALTHTECHS AND THE RISKS ON AUTOMATIZING HEALTH CARE: ETHICS AND LEGAL PONDERING ABOUT HUMANIZED CARE AS PATIENT'S RIGHT

Gianpaolo Poggio Smanio – Renata da Rocha***

1. Introduction.

In 1980 the economist Jeremy Rifkin has published the work *The Biotech Century: Harnessing the Gene and Remaking the World*¹ and in it the author announced that important historical economic transformations happen when social and technology factors are united in creating a new operational matrix.

The thesis sustained by the author is that within the XXI century, the equivalent of gold or the capital, would not be only green, meaning that capitalism would not be the same as investing time and money in its main asset which was, at the time, the environment.

At that time, nature was already very degraded due to centuries of predatory exploitation established through a crisis between humanity and its environment, a crisis of bounds as was mentioned by Francois Ost².

If, by one hand, in the last quarter of XX century, the exhaustion of the environment was already at stake, evidenced by global levels of atmospheric pollution, as well as for the destruction of ecosystems, deforestation, soil pollution, untamed use of water, energy, urbanization without planning and extraction of natural resources in a non-sustainable

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¹ Rifkin, Jeremy. *O século da biotecnologia: a valorização dos genes e a comercialização do mundo*. São Paulo. Makron Books. 1999, 28.

² OST, François. *A natureza à margem da lei: a ecologia à prova do direito*. Lisboa. Instituto Piaget. 1995, 9.

way, has already drawn an extremely concerning scenario for society and world authorities. By the other hand, all that was left was to seek a new space to explore, which is, a new operational matrix by which the economy and the markets could reinvent themselves. The project Human Genome emerges within this context through the knowledge of the genetic information of each individual, which means, through human DNA decoding, there would be a great change in the way health services could be offered. At his time, Rifkin has already pointed out that united, genes and biotechnology, genome and supercomputers, could promote a new Genesis, an artificial one, of life on Earth.

The human genome design, as patents of genetic sequences which would be granted to global health industries, the advent of robotic minimally invasive surgery, the chatbox which, with the aid of artificial intelligence would act as virtual assistants capable of giving medical orientation and monitoring patients. All these innovations prove that the market has unveiled itself through NBIC – nanotechnology, biotechnology, artificial intelligence and cognitive sciences. Knowledge fields dominated by tech giants like Google, Amazon and Apple are worth billions of dollars.

Before reflecting about the impacts of this transformation and facing the challenges that they impose, in the field of bioethics as well as in biolaw, which means, before facing the benefits and risks that the biotech revolution has promoted in health sciences, with the arrival of *healthtechs* – technologies applied to human health, and assess their effects on patients human rights, we shall list the main technologies and innovations linked to these services.

2. Main Technologies And Innovations on the Field of *Healthtech*.

Technology and innovation presented in the field of *healthtechs* has promoted a transformation without precedents on human health, including a better accuracy on diagnosis, and thus, an efficient choice of care measures in terms of time and therefore, number of patients treated.

These innovations are the fruition of many fields integrating such as biotechnology, artificial intelligence and data analysis. Among the main technologies connected to health are: Artificial Intelligence and Machine Learning, Tele-medicine, Wearables, Monitoring Gadgets, Big Data and Large Language Model.

The artificial intelligence, known as AI and machine learning, are tools used for assessing a great volume of health data and giving more precise diagnosis, they could be used for foreseeing results of treatments and even developing new medicines. It is already pointed out that algorithms of AI can detect cancer in image exams, with accuracy comparable or superior to the one of human radiologists. This precision is a

data that advocates in favor of using these technologies, since they are capable of promoting a robust diagnosis, with completion and precision for the user or patient, enabling the doctor a more accurate choice while electing the adequate treatment.

Tele-medicine, by its turn, consists in making non-presential consultations, which is, the digital technology has made possible that the patient could have its medical assessment in a remote fashion. This reality has been accelerated by the COVID-19 pandemic and has shown to be especially beneficial in situations in which patients are dealing with mobility restrictions or even when it is found in remote areas.

Some scholars point out that tele-medicine associated with AI has the potential of remodeling health sector policies and optimize investments, given that a great share of public resources in this field are destined to infrastructure, building of hospitals, and beds provision and hiring working force among others. In this sense, Claudio Lottenberg highlights that:

The adoption of tools like AI and tele-medicine is a path to reshape systems, delineate care policies in a more efficient and optimal way regarding scarce resources management, either they being human, material or financial resources. Data can validate this direction. Data from Accenture consulting indicates that AI has the power to spare US\$150 billion in North American health structures until 2026. According to McKinsey & Company and German Managed Care Association (BCM), the German health care system could save 34 billion euro if it used many digital technologies in health care fields³.

The wearable is a technological gadget that can be worn, it's a technology piece that may be worn by the user and patient. In the health realm this technology takes the shape of monitoring devices such as smart watches, bands, and other devices that allow monitoring the health of one person in real time. These gadgets collect data as heart beats, levels of physical activity and quality of sleep, harnessing valuable information for the patient as well as for the health professionals. The tabling of these data allows to foresee an horizon with more details of the clinic conditions of a person, and, thus, the offer of individualized treatments and therapies.

Big Data, at its turn, is an expression that has its origin in the technological field of informational science and means a great volume of information that must be collected, processed and stored. Speed, volume and variety are features that constitute this tool. The processing and analysis capability in a great volume of medical data, as well as genome, and be-

³ Lottenberg, A revolução digital na saúde: como a inteligência artificial e a internet das coisas tornam o cuidado mais humano, eficiente e sustentável. Rio de Janeiro. Editora dos Editores. 2019, 18.

havior related data, allows to screen patterns that may lead into advances in private predictive medicine, and even to enhance public health, by predicting disease outbreaks, identifying risk factors and personalizing treatments. It is, therefore, an important technology for governments in adopting public policies in a more efficient and effective public health.

Finally, the so-called Large Language Model and its crescent relevance in the health field it's a highlight. The tool can, in a nutshell, be comprehended as an AI model trained through a data base with trillions of words and taught to establish a logical relation with billions of sentences, thereby it can offer answers to an infinity of questions. The most popular models of LLMs are GPT, from OpenAI, whose most known application is ChatGPT, and *Llama*, from Meta. These LLMs are called foundational models, upon which can be built that can be specialized in a specific theme, for instance, health⁴.

LLMs built to act on health field are anchored in a data base of million of scientific papers previously selected, whose field of applications may be broad, as they can be trained to screen the data base of medical records of hospitals and act as a support tool on prognostics or even as an alert system for allergies to medicines.

An example of this usage is the application HStory developed by Hospital Albert Einstein. This technology is capable of screening data from patients medical records to deliver to doctors, quickly, with information from his/her patient, exams, prior diagnosis and other essential information for medical decisions⁵. These technologies are unequivocally proof of this in course revolution, when the subjects of human health, marking the beginning of a new era.

Klaus Schwab points out that “[...] the fusion of these technologies and its interaction between the domains of physical, digital and biologic that turns the fourth industrial revolution fundamentally different from the previous ones”⁶. Before him, the Nobel prize, Robert F. Curl, of Rice University, has prevented that “[...] The XX century was the century of physics and chemistry. But it's clear that the next century will be biology's one”⁷. In this sense, Biology associated with Informational Technology, has subverted the notion of intelligence. Until not so long ago, intelligence was a human feature, regarding a human person, now it regards

⁴ Klajner, Como os LLMs podem contribuir para a saúde? Disponível em <https://futurodasaude.com.br/llm-na-saude-sidney-klajner/> Acesso em: 17.09.2024.

⁵ Klajner, Como os LLMs podem contribuir para a saúde Disponível em <https://futurodasaude.com.br/llm-na-saude-sidney-klajner/> Acesso em: 17.09.2024.

⁶ Schwab, A quarta revolução industrial. São Paulo. Edipro, 2018, 16.

⁷ Rifkin, O século da biotecnologia: a valorização dos genes e a comercialização do mundo. São Paulo. Makron Books. 1999, 16.

vehicles, residences and even cities, the expression smart cities is nothing else than intelligent towns.

On health, artificial intelligence learns through the association of similar cases, and this learning process can be verified by the amassing and absorption of data generated through clinic activities, as patient trials, diagnoses, exams results, patient answers on chatboxes, robots that do a previous assessment among other medical information. If by one hand this advance represents a gain in terms of resources optimization and precision on diagnosis, by other hand they can spawn bioethical challenges regarding the responsible, safe and just use of sensible information that implies directly on privacy and intimacy aspects from users and patients.

3. Challenges on the Bioethics of Health Technology Transformation.

With the expansion of health tech emerging in the field of bioethics, challenges that must be evaluated so an exacerbated digitalization of a service that should be based upon humanized care, in the name of clinical procedural efficiency, don't be overdone.

Among the process of health tech transformation, it must be observed that the main goal, the patient's recovery does not go out of sight. In this scenario, three aspects must be observed: the matter about the privacy of the patients data, with direct reflexes in the informed consent; equity on the access to these new technology, as a fairness measure; and, finally, the risk of automatizing decisions on health field and medicine as a whole, to be object of close observation.

In this sense, there is a consensus about the matters regarding the need of patient's data protection thus, as aforementioned, healthtechs are very efficient in collecting and storing sensible information that could be easily shared, breaching the rights of data privacy, which leads to another important care, which is the due observation of informed consent.

We must remind that the informed consent, among the autonomy, charity, non-maleficence and fairness, constitutes the grounds that sustain the theory of Principlist Bioethics⁸ which is the most influential

⁸ "A Bioethics of Principals have as a challenge to inform the values that must orient, not only decision making in the context of the health care environment, but it must also take the role of archive, giving the axiologic basis so the State can instruct public policies in the health field, promoting, therefore, the democratization and effectiveness to this social right. These are traditionally regarded as base principles of Bioethics, charity, which reveals itself in the search for therapeutic actions that seek the goodness; non-maleficence, which signs the importance of not only doing good, but, above all, avoid doing evil; fairness, that denotes the

world wide.

The affirmation of informed consent in the Nuremberg Code represents an answer to abuses performed, in the name of science, during World War II. It is an ethical and legal cornerstone for research regarding these human beings. Thus, it's important that, due to these new technologies and their potential risks, the informed consent must be reaffirmed and the patients must have the exact comprehension of how their data will be stored and utilized. As well as they consent freely and with confidence about its sharing if they agree to it.

These is, still regarding the advent of healthtechs, the risk of aggravating the inequality about accessing these new technologies. These tools must be capable of making the approach of a service that is, above all, a fundamental right of the citizen, according to the Constitution. Any situation that would become an obstacle to fulfill this right, which is, the right of accessing health care, is disagreeing with the bioethical principle of fairness, that states that there must be created mechanisms that promote the equal access of health care. In this sense, some groups of the population complain about better conditions, especially those who live in areas without technological infrastructure, or those who suffer with the lack of internet of high quality bands or don't have digital skills, as people with low incomes, elders, street citizens of rural and peripheral inhabitants.

Finally, with the predominance of new technologies in the field of health, it must be considered the risk of automatizing new medical decision making. Bioethics has, since its beginning, insisted in regarding the autonomy of the patient's principle and the shared decision making. These premises are not yet fully assimilated, since there is a millennial culture of medical paternalism, according to which only the doctor must decide about the patient's health. This perspective reveals an asymmetry of power which is questionable and very much an object of discussion in bioethics.

In the last two decades, bioethics has been spread with its values and arguments that are part of a patient's human rights, the shared decision and refusal of treatment, among others. This posture change in the

importance in balancing distribution of knowledge reached through scientific research investments; autonomy, which is bound to decision making power and the self determination of the patient as a strategy to overcome the classic asymmetric relation that is established between the health care teams and the patient, which has come out from a paternalistic medicine of long tradition". Smanio, Rocha, Cavalcanti, AELW. *Direito à saúde, vulnerabilidade social e princípio bioético da equidade: análise da mercantilização do sangue sob a ótica da PEC 10 de 2022*. Revista Jurídica- Unicuritiba, v. 4, 484-505, 2023.

field is slow, but has been observed and its due, in part, to the empathetic hearing that has been earning space in the relationship between patient and doctor. By the other hand, the inquietude that imposes itself is of how to preserve the empathetic hearing with the exponential increase of healthtechs, especially regarding medical decision making based only in algorithm-made data.

All these questions point out to the need of thinking about limits facing the new technologies, establishing criteria, raising values to be guarded, as well as a minimum of regulation on this matter, shallow at may be, to institute ethical and legal directives that warrants the respect of privacy and intimacy of patient's information, the democratization of health care, and that make sure of a humanized care, based upon empathetic hearing as a central value in the relationship between doctor-patient.

4. Challenges on Biorights on the Regulation of Healthtechs.

Norberto Bobbio, sustained in his work *The Age of Rights*, a thesis of historicity of rights, in which the rights are not born all in one wave, rights once and for all, on the contraire, the rights are affirmed when a social paradigmatic transformation happens and it can be verified in different sectors of society, as in politics, economy or even science. Thus, the Italian philosopher sustained, in 1996, about the need of affirming rights of a fourth generation, regarding the biological research and its effects on genetic human heritage. A fourth generation of rights was, therefore, connected directly to advances of bioscience and the need of its instrumentalization by technology⁹.

In fact, the union between biology and technology has deepened through the decodification of DNA molecules, and has placed medicine on another level, according to the aforementioned information. The Human Genome Project, is the representation of this new age. Countless possibilities of intervention, manipulation, edition and selection of human genes indicates the uncontested need for a new branch of law, a new field that could take care of very distinguished realms of those traditionally approached by legal science.

Matters regarding the beginning of life, as researches with embryonal stem cells, human reproduction medically assisted, pre-implantorial genetic diagnosis and others, connected to the end of human life such as, euthanasia, assisted suicide, orthotanasia, palliative care and anticipated directives of will, were made subjects of biolaw reflection. In this field of Law, that came to think about legal matters regarding the technological

⁹ Bobbio, A era dos direitos. Rio de Janeiro. Campus. 1992. 6.

intervention of health, as well as the safe limits for the advances of science without threatening equality, safety and human dignity.

Therefore, biolaw seeks, through doctrine, to inform the limits capable of regulating new technology on health to assure that its use can be ethical, safe and fair. In this context, the establishment of directives that assure the responsible use of healthtechs constitute a challenge not only for lawyers, but also for government branches responsible for regulating the sector. In this sense, the National Agency for Sanitary Vigilance of Brazil – ANVISA has an important role, and, since 2022, has established many criteria for the regulation of medical software developed and utilized for diagnostics, disease prevention and therapies. Among other possible uses of these software, we highlight the impressive competence of the tool to contribute in the identification of pathology as renal insufficiency, and aid on the diagnosis of cancer and radiotherapy planning, among other diseases and therapies¹⁰.

It is relevant to highlight that rules established by Anvisa are in consonance with the foreign sanitary authorities. In this sense, with the goal of summarizing all regulations in this sector, was created in October 2011, the International Medical Device Regulators Forum, IMDRF, initiative that was created to promote the harmonization and convergence

¹⁰ “Known by the SaMD acronym – Software as a Medical Device – SaMD – and, in the terms of the Resolutions of the Joint Direction of Anvisa n. 657/2022 and 751/2022 defined as product or application that fulfill the definition of a medical device, destined to one or more medical indications, for instance, a diagnosis, prevention, monitoring or treatment and that develops its functions without being a part of a hardware of a medical device. Though the regulation of Anvisa does not make an express reference to AI systems, the definition of SaMD englobes softwares that use AI systems and tools for medical purposes. Therefore, the manufacturers of SaMD based on AI must follow the applicable rules to medical devices – which includes rules for risk classification, notification and registry, labeling and use instructions. The manufacturers or developers must also present in the act of regularization through Anvisa, the description of the data base utilized for the learning, training, verification and other processes regarding AI. That description must be followed by a report containing a justification of the AI technique applied, the size of the base utilized and the historic rapport of training. In the absence of this information, the result may be of the non-allowance or denial of the claim of regularization of the device on the regulatory authority”. Caetano, Sessa, Gobbato, Soares, *Inteligência artificial em dispositivos e softwares médicos: conheça as oportunidades que a tecnologia oferece ao setor da saúde e os desafios para garantir o uso responsável* Disponível em <https://www.mattosfilho.com.br/unico/inteligencia-artificial-dispositivos-medicos/#:~:text=Em%202022%2C%20a%20Ag%C3%Aancia%20Nacional,%2F2022%20e%20751%2F2022> Acesso: em 02.10.24.

of international regulation about medical devices. Caetano, Sessa, Gobbetto e Soares¹¹ state that in a few years, the IMDRF has participated in initiatives regarding Artificial Intelligence and that was created a Working Group about the subject, the goal was to reach a consensual approach for the management of medical devices based in systems and AI tools. In the same way, the authors remind us that there was also in 2021 a growing discussion about the subject on the FDA – US Food and Drug Administration, when more than a hundred claims of products registration that contained AI were submitted to the branch.

Currently, many other products were already regularized by the FDA, focusing in ophthalmology, cardiology, radiology and others¹².

Nevertheless, in spite of the fact that competent branches are following and participating the global discussion about the need for a regulation of new technologies in the field of health, its relevant to observe that these regulations are focusing on technical aspects and management matters, which are, for instance, registration, labeling requisite and use instructions of medical devices. They do not consider the importance of this ruling. Therefore, it's also important to consider the ethical aspects inherent to the use of healthtechs. These aspects are of interest, specially due to its reconsideration would imply in many cases, in the violation of the patient's human rights specially with regard to the individuality, diversity, autonomy, self determination, information, security, intimacy and privacy.

5. The Ethical Principles for Artificial Intelligence On Health And The Patient's Human Rights.

One of the main ethical concerns is, and therefore, legal, about the use of new technologies in the field of health is the fact that many of these technologies make use of artificial intelligence and, as every intelligence, it is not neutral, on contraire, to develop a basic function, as a self-complete, the artificial intelligence can unveil, for instance, a preju-

¹¹ Caetano, Sessa, Gobbato, Soares, Inteligência artificial em dispositivos e softwares médicos: conheça as oportunidades que a tecnologia oferece ao setor da saúde e os desafios para garantir o uso responsável. Disponível em <https://www.mattosfilho.com.br/unico/inteligencia-artificial-dispositivos-medicos/#:~:text=Em%202022%2C%20a%20Ag%C3%AAncia%20Nacional,%2F2022%20e%20751%2F2022> Acesso: em 02.10.24.

¹² Internacional Medical Device Regulators Forum. Caetano, Sessa, Gobbato, Soares, Inteligência artificial em dispositivos e softwares médicos: conheça as oportunidades que a tecnologia oferece ao setor da saúde e os desafios para garantir o uso responsável.

dice bias. The bias¹³, also known as machine learning bias, or algorithm bias, refers to the occurrence of biased results due to determined human judging pre-conceived that distorts reality and alters original training data or the AI algorithm, that leads to altered results, induced and that may be harmful, when based upon discrimination, intolerance and exclusion. In a nutshell, the bias happens because the AI “learns” with human beings, and therefore, reproduces the prejudicial behavior that is rooted in society, which is, it replicates not only virtues, but also human vicissitudes. The risk of bias in artificial intelligence, is, therefore, a main concern, specially in the health field, where imprecise decisions may directly affect patients and users of these tools. When all AI algorithms are trained with limited data or oversimplified data, they may reflect inequalities existent on society, as racial, gender or social class discriminations or even may ignore an important populational share, which is, if feeded mainly with patient’s data from a specific ethnic group, in spite of all others, there will be a reduction of accuracy in the diagnosis supplying for patients of other groups, compromising therefore the patient’s safety regarding the diagnosis given and as a result the given therapy.

It is evident, therefore, the need for an enhancement of action capable of making these technologies better to promote an ethical reasoning based upon inclusion and respect to diversity and structuring values of a Democratic State and the Law. The lack of diversity in the data bundles may lead to errors on treatments of wrong recommendations, enlarging inequalities already present in the health system. Therefore, it is crucial that governments implement measures to identify and mitigate these biases, promoting the inclusion and equality on the use of healthtechs.

Regarding the real possibility of failures on diagnosis and treatments, due to the biased use of AI, the World Health Organization – WHO, established in the beginning of 2024, a chart with ethical and directive, as well as management recommendations for the use of these tools. The document has more than forty recommendations regarding ethical values that, in short, compile measures of respect for patient’s human rights. The WHO highlights also the need for a participation, not only by governments, but also tech firms, health professionals, patients and civil society in all phases of development and implementation of these innovations, including their supervision and regulation¹⁴.

¹³ holdsworth, O que é viés de IA? Disponível em <https://www.ibm.com/br-pt/topics/ai-bias#:~:text=O%20vi%C3%A9s%20de%20IA%2C%20tamb%C3%A9m,resultados%20distorcidos%20e%20potencialmente%20prejudiciais>. Acesso em: 21.10.24.

¹⁴ Aith, OMS define princípios éticos para inteligência artificial na saúde. Documento estipula orientações de governança para o uso e a incorporação da

Among the main ethical principles established in the document of the WHO¹⁵ that must be observed by all member-states, including Brazil, are:

1. Autonomy and self-determination as a structuring principle capable of assuring that the patients remain as active subjects in medical decision making, thus, a fundamental value of bioethics and biolaw and must constitute itself as a vector while regarding the use of AI on health; it must be assured that the data sharing may be done in a safe and effective way; that the role that AI systems develop upon health care may be understood and assimilated by the persons subjected to this innovation; that the privacy and confidentiality of data may be protected, as the information utilized in the machine learning may be validated and obtained with the participants consent.
2. Welfare, safety and promotion of the public interest as regulatory parameters to be observed by AI designers to assure the responsible use of the tools; and that its employment may lead to well-defined indications; the control measures of quality and enhancement must be adopted; and that the AI cannot be used if leads to mental or physical harms that could be avoided by a traditional or alternative approach.
3. Transparency, explainability and intangibility are demandable when it concerns AI in the field of human health care; these technologies must be understandable not only by the developers but also by the medical professionals, users, regulators, and specially by the patients, due to their implicit and enhanced vulnerability¹⁶; the information must make

IA no setor. Disponível em <https://www.jota.info/opiniao-e-analise/colunas/coluna-fernando-aith/oms-define-principios-eticos-para-inteligencia-artificial-na-saude> Acesso em: 18.10.24.

¹⁵ “In 2021, WHO published comprehensive guidance (1) on the ethics and governance of AI for health. WHO consulted 20 leading experts in AI, who identified both potential benefits and potential risks of use of AI in health care and issued six principles arrived at by consensus for consideration in the policies and practices of governments, developers, and providers that are using AI. The principles should guide the development and deployment of AI in health care by a wide range of stakeholders, including governments, public sector agencies, researchers, companies and implementers. The principles are: (1) protect autonomy; (2) promote human well-being, human safety and the public interest; (3) ensure transparency, “explainability” and intelligibility; (4) foster responsibility and accountability; (5) ensure inclusiveness and equity; and (6) promote AI that is responsive and sustainable (Figure 1)”. Ethics and governance of artificial intelligence for health. Guidance on large multi-modal models. Disponível em <https://iris.who.int/bitstream/handle/10665/375579/9789240084759-eng.pdf?sequence=1&isAllowed=y> Acesso em: 19.10.24.

¹⁶ “In some stages, care with third parties becomes indispensable, as in childho-

easier the public consultations and promote the debate about how AI is designed and how it should or should not be used, this measure aims to diminish the traditional power asymmetry between the clinic team and their patients, which is enhanced by healthtechs by the use of technological language which still is a barrier for great part of population; AI must be intelligible according to the capacity of the market targeted for it.

4. Diligence and accountability implies on the assurance that AI can be used under previously defined and appropriated conditions, as well as the fact that people must receive a previous training; is fundamental that the main targets such as doctors and patients must have their participation granted as evaluators of the development and implementation of the AI; the algorithm must be subjected to human supervision, being auditable and with appropriated mechanisms that are available for compensating harms caused to individuals and groups that may be harmed by wrong decisions based on AI.
5. Inclusion and equality are obligations that assure that AI must be developed for using on health care in a conception and sharing that reaches a broad and equal access, regardless of age, sex, gender, income, race, ethnicity, sexual orientation, skills and other features; avoid that the AI to be tainted with prejudices that may lead to disadvantages for identifiable groups; observe that can be monitored to identify disproportionate effects, disrespect and discrimination about specific groups of persons, which is mandatory and its aligned with the bioethical principle of fairness in the contexts of healthtechs.
6. Adaptability and sustainability are desirable features on health technologies; AI must promote sustainability on health systems adjusting itself to working environments in a harmonious and flexible way, without producing any discomfort or resistance, being, therefore, gradually introduced and presented as an enhancement for processes related to services, screening, diagnosis and therapy propositions, among others.

The WHO preoccupation in identifying and amassing a guide with the main fundamental ethical principles, as pointed out above, binding the use of technologies on health and observation of these directives by the member-states, reveals the concern of world authorities on facing the lack of preparation of governments, clinic teams, users and patients facing the avalanche that is near with the use of healthtechs and AI on

od, disease, or at the end of life. Therefore, in health care, there is a dependence and care relation". Albuquerque, Garrafa, Paranhos, Saúde e Sociedade, São Paulo, Volume: 26, Número: 4, Publicado: 2017, 932-942. Vulnerabilidade do paciente idoso à luz do princípio do cuidado centrado no paciente. Disponível em [https://www.scielo.br/j/sausoc/a/znXjdWfwfmpY7RSr5hzYYTK/](https://www.scielo.br/j/sausoc/a/znXjdWfwfmpY7RSr5hzYYTK/?lang=pt) Acesso em: 13.10.20224.

health, among many challenges exposed by now, the main one may be the one regarding the risk of automatization of medical treatment due to the importance of humanized care as a patient's human right¹⁷.

6. Automatizing Of Treatment And Humanizing The Service.

Despite its benefits, the technological transformation of health services and clinic procedures, as it is the case with healthtechs, brings challenges that must be approached to assure that technology complements, and does not replace the human contact, which is essential in medicine. The risk of dehumanization is given by the excessive dependence of automatic systems which tend to reduce the interaction between patients and doctors, leading to an impersonal service. Humanizing is a central aspect of medicine and it is about empathy¹⁸, the comprehension of the social and emotional context of the patient, as well as a clear and effective communication, features capable of generating a bond between the health team and the patient, an ability that machines cannot replicate plainly.

Humanizing the medical service is an approach that values the patient as a whole being, considering not only one physical condition, but also its emotional features, as well as psychological and social. It bases itself in building a trust relationship, with regard of the patient's autonomy and effective communication. Within this content, empathy and active hearing from health professionals are resources considered essential to signalize for the patient that he or she is within a safe and caring environment and that there will be no judgements of any kind, on the contraire,

¹⁷ Aith, OMS define princípios éticos para inteligência artificial na saúde. Documento estipula orientações de governança para o uso e a incorporação da IA no setor. Disponível em <https://www.jota.info/opiniao-e-analise/colunas/coluna-fernando-aith/oms-define-principios-eticos-para-inteligencia-artificial-na-saude> Acesso em: 18.10.24.

¹⁸ "Empathy consists in a fundamental capacity for social life and the establishment of altruistic behavior as well as the welfare of the other. We, humans, are social beings, whose social connection reverbs directly in our lives, others affect us and we affect them and in this resides the wealth of our species as well as its fragility, by which we are opened to be affected and harmed. To astray this vulnerability, though, is to amputate a part of the beauty of being human, thus empathy, which allows a connection to mental states, including emotions, thoughts and the situation in which the other is, it is a skill to be developed and harnessed. It allows an answer based on alterity, in the sense that it allows one to be open for the other, which amplifies the capability of creating a significant connection and to be fragile – which strengthens our shared humanity". Albuquerque, *Empatia nos cuidados em saúde: comunicação e ética na prática clínica*. Editora Manole. Edição do Kindle. 2023, 24.

he or she can demonstrate one emotions, such as fears and anxieties which are both considered as valid and will be respected¹⁹.

This relationship of trust between the doctor and the patient does not established itself through a chatbox, trained with algorithms, that is, through questions made by a robot based upon answers given to it previously by the patient, in contrast, the trust relationship is created with a deep knowledge about the cultural, social, ethic, religious, familiar, psychic and emotional features of the patient; it is built through a bundle of physical and subtle signs that are a silent language of the patient and unveils through the caring eyes and ears of an empathetic doctor. In this sense, it's possible to affirm that empathy is fundamental for the treatment adhesion and for the emotional well being of the patients. Aline Albuquerque teaches that:

When professionals of health hear with attention the narrative of the patient, about one's experience of living with determined infirmity, they open an opportunity for an empathetic engagement, that goes beyond a mere "clinic interrogation". In the clinic encounter, a caring hearing of the patient's history and one's disease reveals benefits for the diagnosis and the clinic results as a whole. Usually, patients monitor the attention that professionals give to their narrative, detecting signs of empathetic answers, thus, the narrative abilities of doctors enable them to make empathetic connections to the patients²⁰.

Another challenge when it comes to humanizing the service to the patient, given the new technologies on health, is connected to a clear and accessible communication. To explain the diagnosis, deliberate joint decision making about treatments, pondering about the risks and benefits of each possible choice in an accessible and comprehensive way, helps the patient to make informed decisions about one's health. The personalization of communication must occur according to the profile of the patient, considering its age, level of education and culture. This care is crucial to avoid misunderstandings, anxiety and unnecessary suffering. This is a concern that AI cannot yet reproduce.

To reach a balance between the automatizing of medical treatments

¹⁹ "Empathy on health care is connected to a shift of paradigm context, which is, a biomedic conception centered in the disease or in the professional and reducing the power of the patient's voice to a paradigm in which the patient is a protagonist, who is understood as a person in its many social interactions and built by emotions that cannot be neglected in one's care. This way, empathy in health care is associated with a patient's rights, while a unique language attributing power and voice to patients is a normative command for professionals". *Ibidem*, 23.

²⁰ Albuquerque, *Op. cit.*, 167.

and humanizing of services is a challenge that demands a multidisciplinary focus, integrating technology, ethics and clinic praxis. Some paths that may be taken to reach this balance include the integration of technology as a support and not a replacement of human contact. Therefore, technology should be seen as a tool to give support for professionals of health, automatizing tasks that are repetitive and freeing time for more human interaction. AI assistants may do screenings and initial analysis, but the final decision and the direct contact should be a doctor's responsibility.

A measure that may contribute with the humanizing of medical services in the context of an in scale growth of algorithmic transformation of health services, provoked by the advances of healthtechs, consists in enhancing and training human competences for health professionals. It's essential that doctors, nurses and other professionals of health receive continuous training in empathetic communication and patient centric care. The human competences need to be seen as complementary to the technical skills, specially in an environment more and more automatized.

A preocupação com os princípios éticos também representa importante papel na construção de um cuidado médico humanizado. Os algoritmos devem ser desenvolvidos com transparência e devem ser auditados para garantir que não apresentem vieses que possam comprometer a segurança do paciente. Além disso, as políticas de privacidade e segurança devem ser robustas na proteção dos dados, de modo que a confiança dos pacientes não seja comprometida pela digitalização da saúde. É fundamental que o manuseio de informações sensíveis seja feito com o maior cuidado possível, respeitando a privacidade e a dignidade dos pacientes.

7. Final Remarks.

This paper has tried to investigate the so called healthtechs that are new technologies that are being developed and utilized in the health field, as well as the different impacts that they provoke. In this context, artificial intelligence, tele-medicine, robotics and big data, among other tools from biotechnology, englobes digital resources, along genomics, came to revolutionize medical science. The promise of predictive medicine, with the offer of more precise diagnosis and the obligation of personalized and effective treatments represent a synthesis of what is happening on the field.

Nevertheless, the technological innovation in the field of bio sciences, have raised questions, not only in ethics, as well as legal ones, in particular those regarding data privacy, therapeutic safety and equity in offering these services, since health integrates a list of fundamental rights. These technologies bring implicitly the risk of automatizing the

treatment in opposition to humanizing the service given to the patient.

This way, the main objective of the research was to assess in which measure, due to the irreversible climbing of hybrid medical services, it's possible to assure a balance between technological efficiency and humanized care. Therefore, with base in clinic bioethics and in a patient centric care, in light of biolaw and the patient's human rights, it was possible to ponder about the dehumanization of medical treatment with the crescent algorithmization of human health care promoted by the growth of healthtech and highlight the importance of empathy as a bound humanizing the relationship between doctors and patients.

The final pondering about the transformative potential of healthtechs and about the risks of a future dominated by technology and automatization of health care, passes through a commitment with a balanced future through main ethical principles and participation of governments in the regulatory procedure of health technologies. The safe, responsible and fair use of these technologies implies the need for an international joining effort, aiming to assure that the technologic innovation and centrality of human beings co-exist in an harmonious way. The respect for autonomy and self-determination of the patient, as well as an empathetic hearing are values that are essential in the process of humanizing the medical services.

Humanizing the service means to create a bound and respect the choices and abilities that technologies have not yet developed. Thus, through the advance of healthtechs is a need to acknowledge its capability of optimizing some procedures, granting more efficiency and effectiveness, as well as it is possible also to acknowledge its biased approach, in many situations, prejudicial. Therefore, when talking about artificial intelligence, it must be affirmed always its subsidiary nature, which must be always in service of humanity and never replacing it, only through these lenses will it be possible to balance the advances of technology and the respect for the patient human rights aligned with a Democratic State of Law.

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11.

PERSONAL DATA PROTECTION JURISDICTION AND THE CHALLENGES OF BRAZILIAN DATA PROTECTION LAW ENFORCEMENT

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1. Introduction.

The idea of jurisdiction predates regulation itself, as it determines who has the power and legitimacy to regulate. It is closely tied to the exercise of State sovereignty over its territory. The territorial criterion, however, does not seem to be the most appropriate for determining the jurisdiction over personal data protection, since any conduct carried out in the digital world has the potential to produce effects beyond the territory in which it was performed.

The present chapter of the legal publication *Courts, Citizenship and Access to Economic Activities in the Digital Society*, research sponsored by CNPq, at the Political and Economic Law Program of Presbyterian University Mackenzie, is to address some of the criteria adopted by courts in various states that have proven relevant for determining the jurisdiction of the judiciary over certain issues, among which are: *the effects doctrine, the theory of interactivity, the victim's center of interests, and the location of the content transmission.*

However, territoriality rules do not seem to be satisfactory in solving jurisdictional conflicts arising from illicit acts committed in the digi-

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tal world. Potential conflicts between different jurisdictions will likely only be definitively resolved if some kind of commitment is established between them, either through a bilateral agreement or an international treaty that regulates a specific sector.

Nevertheless, the strategy adopted by the European Union in the Cooperation and Consistency procedures outlined in the GDPR seems to be a good reference for ensuring that global personal data protection addresses potential conflicts and establishes an adequate and effective standard of protection for data subjects in the globalized context of legal relationships established in the digital society.

2. Jurisdiction and Territoriality.

The concept of jurisdiction derives from the Latin *jurisdictio*, resulting from the combination of the terms *juris/jus* and *dictio/dicere*¹. In its broad sense, the word *jurisdiction* refers to the authority granted to a specific person to resolve certain issues. In the legal realm, however, its central idea is the power to judge, which, stemming from state sovereignty, is delegated to judicial (judges) and administrative authorities. In summary, procedural doctrine defines jurisdiction as “one of the functions of the State, through which it replaces the holders of the conflicting interests to impartially seek the pacification of the conflict that involves them, with justice”².

That said, the study of the jurisdiction of personal data protection involves understanding not only which law applies to each case but also which authorities, whether judicial or administrative, national or international, are responsible for determining how and which law should be applied at a given situation involving the processing of personal data.

Naturally, when it comes to personal data protection, it is undeniable that the territorial factor of legal relationships presents a particular challenge, especially because a significant part of the protection of these data takes place in the digital world, characterized by the cross-border nature of the internet.

In this context, one of the fundamental principles of jurisdiction is precisely that of *territoriality* (or *territorial adherence*), which, according to Daniel Amorim Assumpção Neves³, represents a principle of adherence to the territory, related to the limitation of the legitimate exercise of

¹ Silva, *Vocabulário Jurídico*. 32ª ed. Rio de Janeiro: Forense, 2016.

² Cintra, Grinover, Dinamarco, *Teoria geral do processo*. 25ª ed. São Paulo: Malheiros, 2009. 147.

³ Neves, *Manual de direito processual civil* – Volume único – 13ª ed. Salvador: JusPodivm, 2021. 89.

jurisdiction. A duly appointed judge can only exercise jurisdiction within the national territory, as the state sovereignty limits itself normally to its territory.

Therefore, the concept of jurisdiction is closely linked to the exercise of a state's sovereignty over its territory and, consequently, over all the individuals within it, whether they are nationals or not. For this reason, court decisions that seek to regulate behaviors conducted on the internet have local effectiveness, precisely because Brazilian procedural and constitutional law recognizes that, in addition to Brazil, there are other sovereign nations whose judicial determinations deserve due consideration.

With these concepts in mind, *the territorial criterion* alone does not seem to be the most appropriate for determining jurisdiction over personal data protection, as any conduct perpetrated in the digital world has the potential to produce effects beyond the territory in which it was carried out. The rise of the internet has brought about the dissolution of physical barriers and created a virtual environment in which information flows rapidly, regardless of geographical borders.

This phenomenon represents one of the most pressing challenges for contemporary jurists, as it questions the ability of states to exercise control and authority over activities that occur in cyberspace. Indeed, the decentralization inherent in the architecture of the internet challenges traditional models of jurisdiction, as data travels through servers scattered across the globe, and its processing can impact individuals and companies from various countries. At an environment without clearly defined physical borders, determining which jurisdiction has authority over certain transactions, interactions, or disputes becomes a complex and multifaceted task.

Nevertheless, the *Brazilian Internet Civil Act* (Federal Law 12.965/14) was the first law attempting to regulate legal relationships in the digital world. It still adopted, to some extent, an eminently territorial criterion to attract the application of national laws. Article 11 of the Internet Civil Act establishes that in any operation involving the collection, storage, retention, and processing of records, personal data, or communications by internet connection and application providers where at least one of these acts occurs within national territory, Brazilian legislation and the rights to privacy, personal data protection, and the confidentiality of private communications and records must be respected.

Additionally, the first paragraph of the same article stipulates that the law applies to data collected within national territory and to the content of communications, provided that at least one of the terminals is located at Brazil. The second Paragraph adds that the rule applies even if the activities are carried out by a legal entity based abroad, provided that it offers services to the Brazilian public or that at least one entity of the

same economic group has an establishment situated in Brazil.

Although the *Internet Civil Act* contains some provisions related to personal data protection, it is a law primarily focused on regulating the services given by internet connection providers and the legal relationships established in the digital world.

On the other hand, personal data protection is specifically regulated by the *General Data Protection Act* (Federal Law 13.709/20), which also uses territorial criterion to establish the limits of its application. So, according to Article 3 of the law, it applies to any data processing operation carried out by a natural person or a legal entity, whether public or private, regardless of the medium, the country where its headquarters are located, or where the data are stored, provided that: (1) the processing operation is carried out in national territory; (2) the processing activity aims at offering or providing goods or services or processing data of individuals located within national territory; or (3) the personal data subject to processing were collected within national territory, with personal data being considered as collected in national territory if the data subject is located there at the time of collection.

Considering that Article 5, X, of the General Data Protection Law defines data processing as any operation carried out with personal data, it can be concluded that national jurisdiction over data protection will be invoked when: (1) any type of data processing occurs within national territory; (2) the processing aims at providing goods or services within national territory or future data processing of individuals located in national territory; and (3) data collection of individuals occurs when they are located within national territory.

It is immediately apparent that item III of Article 3 seems to be already covered by the provision in item I, since data collection is already a type of processing, as defined by Article 5, item X, of the law. Thus, if the data subject is located at national territory at the time of data collection (item III), the processing operation was carried out within national territory (item I). The challenge, therefore, seems to lie in determining when the data processing operation should be considered as “carried out within national territory,” something that has not been defined by the Brazilian legislator.

Even before attempting to define this expression, it is already possible to imagine numerous conflict situations between different jurisdictions arising from the cross-border nature of the digital world. To illustrate, imagine that an American company, whose subsidiary provides services in Canada and accesses the internet there, is responsible for leaking sensitive data of French citizens on a website hosted by a Brazilian provider.

In this hypothetical situation, which state would be responsible for investigating potential violations involving personal data protection? In

other words, which jurisdiction should prevail? The American (company headquarters), the Canadian (connection provider), the French (data subjects' location), or the Brazilian (incident location)? There does not appear to be a clear answer to this question in either national or international legislation.

Even more uncertain is the issue of potential jurisdictional conflicts when dealing with the international transfer of personal data. Article 33 of the General Data Protection Law, for example, establishes a series of requirements to be observed when transferring personal data between countries, whether by state agencies or private entities. However, not even in this specific provision concerning cross-border data processing did the legislator establish any parameters to resolve potential jurisdictional conflicts.

In light of these uncertainties, the study of specific cases becomes important. While they may not directly involve personal data protection, they offer relevant criteria for determining the jurisdiction of each state over particular issues.

3. Diversified application of criteria in different cases.

The first case to be reported is *Calder vs. Jones*, from the United States (1984)⁴. An actress named Shirley Jones filed a lawsuit against the *National Enquirer* magazine and two of its employees (Ian Calder and John South) due to the publication of an article in which she was portrayed as an alcoholic. Although the magazine's publisher was based in Florida, the lawsuit was filed in California, where the plaintiff resided.

The case reached the U.S. Supreme Court, which, when analyzing the issue involving the jurisdiction of the state of California over the two employees being sued, applied the so-called effects test. For the Court, California had jurisdiction to hear the case because of the effects produced by the publication in dispute in that location, not only because it was where the plaintiff resided but also due to the significant circulation of the magazine in that state.

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction

⁴ U.S. *Calder v. Jones*, 465 U.S. 783 (1984). Accesible at <https://supreme.justia.com/cases/federal/us/465/783/>. Accessed on November 20, 2023.

over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California⁵.

Although it pertains to a situation involving a printed magazine, the conclusions of the Supreme Court could easily be transposed to a digital context, for instance, replacing the physical magazine with a blog or social media post.

Another landmark case is *Zippo Manufacturing Co. vs. Zippo Dot Com*, from 1997, in the United States⁶. Manufacturing, based in Pennsylvania, is the company responsible for producing the famous Zippo lighters, while Dot Com, based in California, operates an online news site.

Dot Com obtained the exclusive use of the domains *zippo.com*, *zippo.net* and *zipponews.com*, which were frequently used for publishing news, articles and online reports. This led Manufacturing to file a lawsuit against Dot Com in the Western District of Pennsylvania, alleging trademark dilution, arguing that the use of these domains by the defendant reduced the distinctiveness of the Zippo lighter brand.

Dot Com, on the other hand, challenged the jurisdiction of the Pennsylvania courts over the case, as it is based in California and none of its offices or employees operate in Pennsylvania. However, the local court ruled that it did have jurisdiction over the case, invoking the so-called *interactivity principle*, according to which a state’s jurisdiction over certain internet-related disputes depends on the level of interactivity between the website and the public, as well as the nature and quality of online commercial activity.

We are being asked to determine whether Dot Com’s conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does. Dot Com has contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania. The intended object of these transactions has been the downloading of the electronic messages that form the basis of this suit in Pennsylvania. (...) The object of Dot Com’s contracts with Pennsylvania residents is the transmission of the messages that Plaintiff claims dilute and infringe upon its trademark. When these messages are transmitted into Pennsylvania and viewed by Pennsylvania residents on their computers, there can be no question that the alleged infringement and dilution occur in Pennsylvania. Moreover, since Manufacturing is

⁵ *Idem. Ibidem.*

⁶ *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Disponível em: <https://cyber.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm>. Accessed on November, 20, 2023.

a Pennsylvania corporation, a substantial amount of the injury from the alleged wrongdoing is likely to occur in Pennsylvania⁷.

It can be noted, therefore, that unlike the previous case, which based the recognition of a state's jurisdiction on the effects of a certain conduct, the rule applied in the Zippo case focuses on the direct interaction between the parties involved, regardless of specific outcomes produced in the territory.

It is also important to refer to the cases *eDate Advertising GmbH v. X* and *Martinez v. MGN Limited*, from the European Union, 2011⁸, which were jointly decided by the Court of Justice of the European Union, as they reached the Court due to discussions regarding the jurisdiction of each of the Member States involved.

The first case concerns a German citizen (X) – whose identity was kept confidential – who, after being convicted of murdering an actor, had his imprisonment regime changed to parole. Upon being released, he filed a lawsuit in Germany against the company eDate Advertising GmbH, based in Austria, due to an article published on its website claiming that he, X, would try to prove that all the witnesses in his criminal trial lied.

The second case involves a French actor (Olivier Martinez) and his father (Robert Martinez), who sued MGN Limited for a post on the website of the British newspaper *Sunday Mirror*, run by the defendant, which reported that the actor had an affair with singer Kylie Minogue.

In both cases, the Court of Justice of the European Union was asked to determine the jurisdiction of each Member State to hear and adjudicate the claims. The solution was found in Article 5 of the Council Regulation (EC) 44/2001, according to which “a person domiciled in the territory of a Member State may be sued in another Member State (...) in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred or may occur”⁹, emphasizing that this loca-

⁷ *Idem. Ibidem.*

⁸ *eDate Advertising GmbH v. X e Olivier Martinez e Robert Martinez v. MGN Limited*, Acórdão do Tribunal de Justiça, Quarta Seção, ECLI:EU:C:2011:685, 3 de outubro de 2013. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5dd3da335fe934fdc99ee9ad18072f793.e34KaxiLc3qMb40Rch0SaxyKbNv0?text&docid=111742&pageIndex=0&doclang=PT&mode=lst&dir&occ=first&part=1&cid=335284>.

⁹ European Union. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20081204:PT:PDF>. Accessed on 15 nov. 2023.

tion can be either the place of the causal event or the place where the damage materialized.”

Specifically addressing the challenges posed by digital media, the Court emphasized that internet publications amplify the gravity of the harm that the holder of a personality right may suffer when realizing that content violating that right is available at any point around the globe.

Thus, the Court concluded that the victim of a particular conduct perpetrated on the internet may seek full reparation for the damage in any one of the Member States, even if this totality is achieved through the aggregation of various damages caused throughout the Community. It emphasized that such actions are best handled by the jurisdiction of the place where the alleged victim has the center of their interests, which may or may not coincide with their place of residence.

Therefore, the criterion adopted by the CJEU for jurisdiction in internet-related damage compensation cases was the victim’s center of interest, allowing the injured party to assess which location would best guarantee reparation for the damage they may have suffered. They may also decide whether to claim the total damages in one of the States or to seek individualized compensation for the damage caused in each territorial portion.

Although similar to the effects test, the rule adopted by that Court in these two cases focuses on the victim’s central interest, ensuring that jurisdiction is exercised in a location more closely and significantly connected to the victim, even if the harmful effects were not entirely produced in the territory where they are located or reside.

Furthermore, another important case, which occurred in the Netherlands, was *H&M v. G-Star*, from 2012¹⁰. In 2009, the Court of Dordrecht, in the Netherlands, convicted H&M, a major clothing retailer, for trademark and copyright violations of the Dutch company G-Star, for allegedly selling the “Elwood” branded jeans, owned by G-Star, without prior authorization.

However, through its own investigation, the retailer found that the mentioned products, although sold in several Dutch cities, were not specifically sold in the city of Dordrecht, prompting the defendant to challenge the jurisdiction of the Court that convicted it.

The Supreme Court of the Netherlands, however, decided that Dordrecht did have jurisdiction to hear the case since the “Elwood” jeans were available for sale not only in H&M’s physical stores but also throughout the national territory via website “www.hm.com”. Thus, the

¹⁰ H&M vs. G-Star, Supreme Court of the Netherlands, ECLI:NL:HR:2012:BX9018, 7 dec. 2012. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BX9018>

central argument of the Center of the Victim's Interest, invoked by the CJEU in the *eDate Advertising GmbH vs. X* and *Olivier Martinez and Robert Martinez vs. MGN Limited* cases, was used.

The Court further emphasized that “a dispute concerning the violation of a registered trademark in a Member State (...) may be brought before the judges of the Member State where the trademark is registered or before the judges of the Member State where the advertiser is established”¹¹.

Moreover, another case that occurred in the Netherlands was *Dimensione v. Cassina*, from 2009¹². In this case, two legal entities, Cassina S.P.A., based in Italy, and La Fondation Le Corbusier, based in France, filed a lawsuit in Amsterdam, the Netherlands, against the company Dimensione Direct Sales SRL, based in Italy. According to the plaintiffs, the defendant had violated their trademark and image rights by selling some of their furniture models online to the Dutch public without prior authorization.

The local court ruled that the fact that the defendant company was based in Italy did not prevent Dutch jurisdiction from hearing and ruling on the case, as in the *H&M v. G-Star* case, the defendant was offering the products in the Netherlands through its website, considering factors such as the domain used, the languages available on the site, references to specific countries, and the very possibility of registration and order placement by Dutch citizens. As noted in the judgment, “the fact that Dimensione is based in Italy and sells its furniture through its website does not change the fact that it acts illegally in the Netherlands. A buyer can easily order the furniture from the Netherlands and have it delivered here”¹³.

Another relevant case was *LICRA vs. Yahoo!*, France and USA, 2000. The *LICRA* (Ligue Contre Le Racisme et l'Antisemitisme), a French non-

¹¹ “dat een geschil over een inbreuk op een in een lidstaat ingeschreven merk die zou bestaan in het gebruik door een adverteerder van een aan dat merk identiek trefwoord op de website van een zoekmachine die via een landgebonden top-niveaudomeinnaam van een andere lidstaat opereert, aanhangig kan worden gemaakt bij de rechters van de lidstaat waar het merk is ingeschreven of bij de rechters van de lidstaat van de plaats waar de adverteerder is gevestigd”. *Idem*, *ibidem*.

¹² *Dimensione v. Cassina*, Amsterdam Court, LJN BH6546, 12 feb. 2009. Available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2009:BH6546&keyword=LJN+BH6546>. Accessed on November 20, 2023.

¹³ “Dat Dimensione in Italië is gevestigd en haar meubelen verkoopt via haar website doet er niet aan af dat zij in Nederland onrechtmatig handelt. Een koper kan op eenvoudige wijze vanuit Nederland de meubelen bestellen en hier laten afleveren”. *Idem*, *Ibidem*.

profit association, filed a lawsuit against the American company Yahoo! due to the availability of Nazi-related items for auction on its site, which, according to the plaintiff, violated French laws. Although the items were removed from the domain “www.yahoo.fr,” some of them remained available on the main domain “www.yahoo.com,” which was still accessible in French territory.

Relying on the effects test applied in *Calder vs. Jones*, in the U.S., the Superior Court of Paris ruled that the French Judiciary had jurisdiction over the case, as regardless of Yahoo’s headquarters, the fact that the auctioned items were available for French citizens to participate in the transaction was, by itself, an unlawful act under French law. After the conviction, Yahoo! filed a lawsuit in California, where its headquarters are located, questioning the enforceability of the French judgment on American soil. *LICRA* contested U.S. jurisdiction, arguing that it had no headquarters, assets, or employees in that country.

In the end, however, the Ninth Circuit Court of Appeals ruled that the U.S. judiciary also had jurisdiction over *LICRA*, applying the same effects test:

The District Court concluded that it could properly exercise specific jurisdiction over LICRA and UEJF and, accordingly, denied their motion to dismiss. The District Court then granted Yahoo!’s motion for summary judgment, holding that there was an actual controversy causing a real and immediate threat to Yahoo! and that enforcement of the French orders in the United States would violate the First Amendment. The following day, the District Court filed an amended judgment, declaring that both the May 22 and November 20, 2000, French court orders were unenforceable in the United States¹⁴.

At that time, the Court established three requirements to recognize U.S. jurisdiction over the case, which were duly demonstrated: (i) the foreign defendant must direct its activities or engage in some transaction in the place where jurisdiction is being examined, in a way that benefits from local laws to some extent; (ii) the plaintiff’s claim must relate to the defendant’s activities conducted in that forum; and (iii) exercising the jurisdiction in question must be reasonable, not imposing a disproportionate burden on the defendant.

The case *LICRA vs. Yahoo!* illustrates a true conflict between different jurisdictions: the French and the American¹⁵. This is because, while the French Judiciary recognized its own jurisdiction over the dispute, its

¹⁴ *Idem, Ibidem*.

¹⁵ UEJF et Licra c/ Yahoo! Inc. et Yahoo France, Ordonnance de Référé 00/05308, Corte Superior de Paris, 20 nov. 2000. Available at: <http://juriscom.net/wp-content/documents/tgiparis20001120.pdf>. Accessed on November, 15, 2023.

final decision imposed obligations on Yahoo! that were to be fulfilled on American soil.¹⁶ The U.S. Judiciary, in turn, ruled that the obligations imposed by the French state were unconstitutional, as they violated the freedom of expression guaranteed by the First Amendment to the U.S. Constitution¹⁷.

In the case of Brazil, conflicts of jurisdiction numbers 66.981/RJ and 107.938/RS, Brazil, 2009 and 2010, should be emphasized. Although the Brazilian Judiciary did not specifically address the recognition of its jurisdiction, but rather the distribution of it through the competence of its organs, it has also deliberated on disputes related to conduct perpetrated in digital environments, as in the conflicts of jurisdiction numbers 66.981/RJ and 107.938/RS.

In both cases, the competence for judging crimes committed on the internet, namely the publication of child pornography and texts of a racist nature, respectively, was discussed. For the STJ (Superior Court of Justice), the criterion for establishing jurisdiction in these cases is related to the location from which the content was sent, regardless of the location of the internet access provider company or the effects of the conduct in relation to the victim, as per CC n. 107.938/RS, rapporteur Minister Jorge Mussi, Third Section, judged on 10/27/2010, DJe of 11/08/2010. It is noted that neither the effects test nor the principle of interactivity, nor even the victim's center of interests, were considered, but only the rule of territoriality, as per Article 6 of the Penal Code.

In the *Regimental Appeal in the Instrumental Appeal* 808.075/DF, Brazil, 2007, a compensatory action was filed against the owner of a website due to the publication of a journalistic article on the internet. In this case, the Superior Court of Justice applied the same understanding as when the allegedly defamatory content was published in a magazine or newspaper of notorious national circulation, namely that the jurisdiction will be that of the place where the victim resides or works, as it is there that the harmful event may have the greatest impact on the victim's life, as per *AgRg* in Ag n. 808.075/DF, rapporteur Minister Fernando Gon-

¹⁶ Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme (LICRA), United States Court of Appeals, Ninth Circuit, No. 01-17424, 23 de agosto de 2004. Disponível em: <https://caselaw.findlaw.com/us-9th-circuit/1308396.html>.

¹⁷ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Available at <https://constitution.congress.gov/constitution/amendment-1/#:~:text=Congress%20shall%20make%20no%20law,for%20a%20redress%20of%20grievances>. Accessed on November 15, 2023.

çalves, Fourth Panel, judged on 12/04/2007, *DJ* of 12/17/2007, 186.

Thus, unlike in the criminal realm, the Superior Court of Justice applied, in the civil sphere, the theory of the victim's center of interests (*eDate Advertising GmbH v. X* and *Olivier Martinez and Robert Martinez v. MGN Limited*) to define jurisdiction for processing and adjudicating lawsuits arising from internet-related conduct, assigning a different interpretation to the provisions of Article 100, V, 'a', of the CPC/73 (corresponding to Article 53, IV, 'a', of the CPC/15).

4. Possible solutions.

Despite all the cases analyzed, it is not possible to assert that, based on the arguments invoked in each of them, potential jurisdictional conflicts can be fully resolved. In the *LICRA vs. Yahoo!* case, for example, there was a ruling issued by the French jurisdiction that imposed obligations to be fulfilled by the defendant on American soil, such as the installation of specific software on the company's servers located in California. For this very reason, Yahoo challenged the enforceability of the ruling, which was upheld by the U.S. judiciary.

In one way or another, the rules relating to territoriality do not seem enough for solving jurisdictional conflicts arising from illicit acts committed in the digital world, whether they are related to personal data protection or not. Depending on the interests involved and the specifics of each case, there are sufficient factors to recognize various jurisdictions as competent, which increases legal uncertainty due to the risk of conflicting rulings involving the same parties.

Just as several legal concepts, such as privacy, the right to be forgotten, and informational self-determination, are undergoing major transformations with the digitalization of interpersonal relationships, it appears that jurisdictional rules will also need adaptation. Beyond the rules adopted in the cases mentioned, such as the principle of interactivity, the effects doctrine, and the center of interests of the victim, potential conflicts between different jurisdictions will likely only be definitively resolved if some form of agreement is established between them, whether through a bilateral agreement or an International Treaty regulating a specific sector. Regarding the treatment of personal data, the provisions of the *General Data Protection Regulation*, being a self-enforcing norm across all Member States of the European Union, may provide some inspiration on how to address potential data protection incidents that affect more than one state.

5. Cooperation and consistency at European GDPR.

Chapter 7 of the GDPR deals with the procedures for cooperation and consistency between the various data protection authorities of the

European Community. These are rules to ensure that the Regulation is applied uniformly and consistently across all Member States, as well as to determine which data protection authority is responsible for conducting a specific investigation procedure in the event of a data protection breach affecting the interests of two or more Member States.

The so-called “mutual assistance” between authorities, where one provides aid and support to procedures developed by others, is of fundamental importance for each of them to adequately exercise their competences. It is not uncommon for the information requested to be unattainable by the requesting authority on its own, as it may lack the competence or jurisdiction to access it¹⁸.

Regarding the jurisdiction of authorities, that is, the power of each to carry out the necessary investigations and administrative procedures and, if applicable, impose sanctions or issue recommendations, the procedures for cooperation, consistency, and joint operations prescribe some rules to determine which authority is responsible (also referred to as the lead authority).

In certain cases, such as overseeing non-European companies operating on European soil and handling the data of European citizens, all authorities are fully competent to supervise any processing of personal data of citizens in their respective States. In such cases, there is no jurisdictional conflict.

Nevertheless, it is true that the completely independent actions of each of these authorities can result not only in conflicting decisions for the same economic agents but also in less efficient performance by these state bodies, which could, for example, spend time and resources conducting a procedure that has already been carried out by another authority involving the same data controller. Thus, through joint operations, a much more coherent and effective action of the European authorities can be promoted.

Cooperation and consistency, in turn, encompass situations where more than one authority would have an interest in processing an incident arising from an operation that is not restricted solely to the territory of its respective State. This is the so-called cross-border processing of personal data, defined by the GDPR as processing which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union, where the controller or processor

¹⁸ Gonzalo, “Procedimientos de asistencia, coherencia y cooperación entre autoridades europeas”. In: Lombarte (org.), *Tratado de Protección de Datos*. Actualizado Con la Ley Orgánica 3/2018, de 5 de Diciembre, de Protección de Datos Personales y Garantía de los Derechos Digitales. Valencia: Tirant lo Blanch, 2019. 608.

is established in more than one Member State or which takes place in the context of the activities of a single establishment of a controller or processor but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

In such situations, the Regulation establishes that the responsible controller submits to a single authority, called the “lead authority,” which has greater autonomy to conduct the administrative procedure to ensure, in the end, some consistency in the supervision of personal data controllers throughout the European Union.

For the purposes of the cooperation and consistency procedure, the lead authority is considered to be the authority of the Member State where the controller of the data processing operation under examination has established its main establishment, which is defined as the location in the European Union where “the decisions on the purposes and means of processing personal data are made,” which may or may not be the administrative headquarters of the controller established in the Union, in accordance with art. 4 (23), from the GDPR.

It should be noted that, based on the definitions of “cross-border processing” and “main establishment,” it is not possible to establish which authority would be competent when the controller is not properly established in the European Union. For Gonzalo, this is an exception to the cooperation procedure¹⁹.

To initiate the cooperation process, a preliminary procedure must be adopted. If any Union authority receives a complaint of any kind, it must first identify whether there is cross-border data processing to be examined. If so, it must then identify which is the lead authority for that specific operation, and with this information, forward the complaint so that the lead authority can begin the investigation and cooperation process with the other interested authorities.

In summary, through the cooperation process, all interested authorities, coordinated by the lead authority, with whom the controller will maintain contact, work together to reach a decision that will be applied to the specific case.

However, there may be cases where authorities disagree on any decision to be made in the case under the cooperation procedure. For this, the GDPR prescribes, in Articles 63 and following, the so-called “consistency mechanism,” through which the European Data Protection Board promotes the harmonization of the decision to be applied to the case.

Paragraph 4 of Article 60 of the GDPR establishes that where any of the other concerned supervisory authorities expresses a relevant and rea-

¹⁹ Gonzalo, *Op. cit.*, 619.

soned objection to the draft decision within four weeks of being consulted pursuant to paragraph 3 of this Article, the lead supervisory authority, if it does not follow the objection or considers that the objection is not relevant or reasoned, shall refer the matter to the consistency mechanism referred to in Article 63.

Paragraph 1 of Article 65, in turn, prescribes, that:

In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases: (a) Where, in a case referred to in Article 60(4), a concerned supervisory authority has raised a relevant and reasoned objection to a draft decision of the lead supervisory authority, or the lead supervisory authority has rejected such an objection as not being relevant or reasoned. The binding decision shall address all the matters which are the subject of the relevant and reasoned objection, in particular whether there is an infringement of this Regulation; (b) Where there are conflicting views on which of the concerned supervisory authorities is competent for the main establishment; (c) Where a competent supervisory authority does not request the Board's opinion in the cases referred to in Article 64(1), or does not follow the Board's opinion issued under Article 64. In this case, any concerned supervisory authority, or the Commission, may refer the matter to the Board.

After the final decision is made by the Board, it is then communicated to the lead authority, which in turn informs the data controller and, in conjunction with the other concerned authorities, ensures its proper application, as per items 7, 8, and 9 of Article 60 of the GDPR.

6. Conclusions.

It is undeniable that the jurisdiction of a given country is directly linked to the exercise of its own sovereignty, which, in turn, is inextricably connected to fundamental concepts such as territory, borders and population. The transnational nature of online activities often results in complex legal disputes, especially when the interests of different jurisdictions come into conflict. The lack of consensus on the rules and principles governing interpersonal relations in virtual environments further amplifies the complexity of this issue.

Thus, the challenges involving territoriality and potential conflicts between different jurisdictions in the realm of personal data protection seem solvable only through International Law instruments, such as Cooperation Agreements, Treaties and Conventions. In this context, the creation of protocols and agreements that establish clear guidelines for the allocation of jurisdiction and the resolution of online legal conflicts is imperative.

The rules adopted in the analyzed concrete cases, such as *the prin-*

ciple of interactivity, the effects doctrine, and the center of interests of the victim, although potentially of fundamental importance in determining which States have jurisdiction over a particular issue, prove insufficient to solve potential conflicts between different jurisdictions. This is particularly true because these rules can often identify two or more States as legitimate to hear and adjudicate certain claims.

Nevertheless, the strategy adopted by the European Union in the Cooperation and Consistency procedures outlined in the GDPR seems to be a good reference point for addressing potential conflicts and establishing a suitable and effective standard for the protection of data subjects on a global scale in the context of the increasingly globalized legal relations of the digital world.

It is essential, therefore, not only to recognize these challenges upfront but also to bear in mind that an inadequate solution to them could, inevitably, result in the complete undermining of the rules that, after great efforts to keep pace with exponential technological advancement, are finally beginning to take shape and have their importance recognized by legal practitioners.

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12.

PROTECTING THE RIGHTS OF CHILDREN AND ADOLESCENTS IN THE DIGITAL ENVIRONMENT: A LOOK AT THE CURRENT BRAZILIAN AND EUROPEAN REGULATORY PERSPECTIVE

*Ana Elizabeth Lapa Wanderley Cavalcanti**

1. Introduction.

The increasingly widespread use of the digital environment has brought new and challenging situations to the protection of children's and adolescents' rights on a global scale. Contemporary society permeated by the use of computer technologies, the so-called Information and Knowledge Technologies – ICTs, requires the transformation and adaptation of legal systems to new realities.

In this respect, safeguarding children's and adolescents' rights is of utmost importance, considering that they are vulnerable individuals in development and that they are currently born or inserted into the technological environment from a very early age, being exposed to dangers aggravated by overexposure and aggressive market practices, especially in the consumer market.

Given this digital vulnerability, this article is based on the idea of the need to reinforce parental and guardians' responsibility, through the good practice of parental legal authority, while also recognizing the responsibility of society and public authorities, in compliance with the founding principles of the rights of children and adolescents, such as absolute priority, the integral protection and the pursuit of their best interests. In addition, the research presented presents an analysis of the potential benefits and drawbacks of regulating electronic media, digital platforms and other technological mechanisms accessible to children and adolescents.

Considering this scenario, the aim is to find out how regulations on the protection of the rights of children and adolescents in the digital society are regulated in Brazilian law and in the European Union.

And to illustrate the discussion, the research examines the protection of the rights of children and adolescents as outlined in the Brazilian

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Federal Constitution of 1988¹, and the Brazilian Statute of the Child and Adolescent (ECA) Law 8,069/90², analyzing their sufficiency in the digital society or whether there is a need for specific legislation on the subject, in addition to analyzing recent initiatives to regulate and protect the rights of children and adolescents in Brazil, such as Law 15,211/2025³, and also the strategies adopted by the European Union for this protection.

As for methodology, the study employs a deductive method, based on an analysis of legal doctrine and existing legislation.

2. Protection of children and adolescents and the exercise of parental authority.

Parental authority is a right and duty of parents towards their children who have not yet reached the age of majority (art. 1630 of the Civil Code)⁴, i.e. children and adolescents who, although they do not yet have the necessary maturity to fully answer for their own actions and do not have the full and necessary discernment for the acts of civil life, are persons, rights-holder and, as such, should be treated.

Thus, according to Maria Helena Diniz⁵ parental authority:

It is the set of rights and obligations regarding the person and property of the unemancipated minor child, exercised on equal terms by both parents, so that they can carry out the duties imposed on them by the law, ensuring the child's protection and best interests.

Still on the protection of children and adolescents, the Brazilian Federal Constitution of 1988, in its art. 227 states that:

Art. 227: It is the duty of the family, society and the state to ensure children and adolescents, with absolute priority, the right to life, health, food, education, leisure, vocational training, culture, dignity, respect, freedom and family and community life, as well as to protect them from all forms of neglect, discrimination, exploitation, violence, cruelty and oppression.

Additionally, the 1988 Brazilian Federal Constitution goes further, in its Article 229, emphasizing the importance of parental authority saying that: "Parents have the duty to assist, raise and educate minor children,

¹ https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

² https://www.planalto.gov.br/ccivil_03/leis//L8069.htm.

³ <https://www25.senado.leg.br/web/atividade/materias/-/materia/154901>.

⁴ https://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406compilada.htm.

⁵ Curso de Direito Civil Brasileiro, v. 05, Direito de Família. São Paulo: Saraiva, 2024. 647.

and adult children have the duty to help and support their parents in old age, need or illness”.

On the other hand, the Brazilian Statute of the Child and Adolescent emphasizes the need to protect the fundamental rights of children and adolescents through the proper exercised of family underscoring principles such as: full protection, absolute priority and child’s best interests (Articles 1 to 6 of the ECA).

Moreover, the article 22 of the Brazilian Statute of the Child and Adolescent states that: “parents are charged with the duty of support, custody and education of their minor children, and are also responsible, in their interests, for complying with and enforcing judicial orders”.

It can be seen that Brazilian law does not say exactly how parents should behave, how they should exercise parental authority, since it is up to parents, when exercising this duty, to check on their children’s needs and ensure their protection, always observing their status as right-holders and not objects of law, as minors were treated in the past, in legislation prior to the current Statute of the Child and Adolescent⁶.

In this sense, Maria Berenice Dias⁷ points out that the change in understanding embodied in the Statute of the Child and Adolescent, emphasizing that the child, still a child and adolescent, has gone from being an object to a subject of rights, has also led to a change in the content of parental authority and, consequently, its concept. Following this premise, the author states that parental authority should not be seen as an “authority” but rather a “duty” imposed by law. This responsibility serves the child’s interests during their physical and psychological development.

Thus, it must be emphasized that parental authority is, first and foremost, a function, a duty assigned by law to the parents to meet the needs and well-being of the child who has not yet reached the age of majority and who is under their responsibility. In addition, parental authority must always be exercised to achieve the best interests of the developing person, who needs protection, direction and defense of their interests by their parents, due to their lack of maturity and experience⁸.

The exercise of parental authority must be linked to the possibility of offering children and adolescents who live with their parents a healthy and balanced development, providing for the formation of their personality, with ethics, responsibility and autonomy. As the child matures, the parent’s responsibilities gradually diminish. However, parents or guard-

⁶ Amin, Doutrina da Proteção integral. Curso de Direito da Criança e do adolescente: aspectos teóricos e práticos. São Paulo: Editora Saraiva, 2016, 57.

⁷ Manual de Direito das Famílias. São Paulo: Revista dos Tribunais, 2017, 334.

⁸ Cavalcanti, O exercício do poder familiar e a sociedade da informação. São Paulo: Atlas. 2009. 90-91.

ians must ensure that their children are equipped to make conscious and responsible decisions upon reaching adulthood⁹.

Brazilian law, particularly the Civil Code (Law 10406/2002) when dealing with family power, includes among the obligations inherent in this duty, the obligation of parents to raise and educate⁸ their children under their responsibility.

In this sense, Ana Carolina Brochado Teixeira¹⁰, when dealing with the meaning of the “duty to raise”, argues that this duty is directly related to meeting the basic needs of children and adolescents, including care in the event of illness, moral guidance, manifestation of affection, shelter, etc. The “duty to educate”, linked to the formation of the subject’s personality, refers more to intellectual encouragement, so that the child or adolescent has the chance to achieve personal and professional autonomy¹¹.

Maria Helena Diniz¹² also points out that parents are responsible for the upbringing and education of their children until they reach the age of majority, providing them with the material means for subsistence and education according to their resources and social condition, preparing them for adult life, making them useful to society and also guiding them morally and spiritually, forming their character. In addition, Brazilian legislation requires parents to respect their children’s personality rights, guaranteeing their dignity as human beings in physical-psychic development.

The aforementioned author also points out that: “the intimate life of the family develops by itself, and its internal discipline is dictated by common sense, by the affective ties that unite its members, by family coexistence (Brazilian Federal Constitution, art. 227, 2nd part) and by the convenience of the decisions taken”¹³.

In the same vein, Kátia Regina Ferreira Lobo Andrade Maciel¹⁴ states that:

Educating means guiding the child, developing their personality, aptitudes and abilities, providing basic or elementary education, educa-

⁹ Comel, Do poder familiar. São Paulo: Revista dos Tribunais, 66.

¹⁰ Família, guarda e autoridade parental. São Paulo: Renovar. 2005. 134.

¹¹ Cavalcanti, O exercício do poder familiar e a sociedade da informação. São Paulo: Atlas. 2009., 92.

¹² Curso de Direito Civil Brasileiro, v. 05, Direito de Família. São Paulo: Saraiva, 2024. 652.

¹³ Curso de Direito Civil Brasileiro, v. 05, Direito de Família. São Paulo: Saraiva, 2024. 652.

¹⁴ Curso de direito da criança e adolescente. Rio de Janeiro: Lumen Iuris, 2006. 102.

tion in its subsequent levels, including spiritual guidance, all within the standard of the parents' socio-economic condition.

Therefore, the duties of upbringing and education provided for as essential content of the proper exercise of parental authority, highlight the duty of parents to offer, according to the age, not only school education, an essential item in the formation of the individual and guaranteed as a fundamental right (art. 205) in the 1988 Brazilian Federal Constitution, but also non-formal education, family education, which is part of living with the family and is acquired in a vital way through the relationship between parents and their children¹⁵.

In fact, both family and school education shape a developing individual. Nowadays, however, it is impossible to separate individuals from the digital environment. Every day, the importance of the internet in people's lives becomes more apparent, be it professionally, socially or politically. In this context, parental authority regarding protection, care and education must also encompass the digital environment as well.

And as Ana Carolina Brochado Teixeira and Renata Vilela Multedo¹⁶ rightly point out, "the function of parental authority is to contribute to the construction of the child's personality based on values chosen by the parents as the most appropriate", however, in the case of the virtual environment, parents and children must move forward together. It is necessary to educate the child about this new reality guided by a "dialogical authority", based on respectful guidance, but with necessary authority, a practice that aligns with the dynamics of a "democratic family". Digital education should focus on teaching children about the importance of using the digital environment safely, after all, "the educational process presupposes combining autonomy and vulnerability in the online environment as well".

It can therefore be seen that in today's digital society in which the use of the internet has become commonplace in people's daily lives, the challenge of exercising parental authority has increased. Today, is necessary to think about the education and protection of children and adolescents in the virtual environment.

¹⁵ Art. 205. Education, the right of all and the duty of the State and the family, shall be promoted and encouraged with the collaboration of society, with a view to the full development of the person, their preparation for the exercise of citizenship and their qualification for work.

¹⁶ Autoridade parental: os deveres dos pais frente aos desafios do ambiente digital. Infância, Adolescência e Tecnologia. São Paulo: Editora Foco. 2022. 30-31.

3. The current relevance of the principles of absolute priority, integral protection and the best interests of children and adolescents.

The fundamental principles for protecting the rights of children and adolescents are absolute priority, comprehensive protection and best interests. All three are enshrined in both international and Brazilian laws, such as the Brazilian Statute of the Child and Adolescent¹⁷.

As Ana Cláudia Pompeu Torezan Andreucci and Michelle Asato Junqueira¹⁸ explain, the evolution of children's rights protection began internationally in 1946, following World War II, with the establishment of UNICEF (United Nations International Children's Emergency Fund) to address the war's impact on children and adolescents. And in 1953, after several worldwide mobilizations, UNICEF acquired the status of a permanent UN agency, recognizing worldwide the importance of protecting children's and adolescents' rights.

It is worth noting that the Declaration of the Rights of the Child (1959)¹⁹, set out ten basic principles for the protection of children under the age of 18, considering the importance of protecting the human rights of children as subjects of law. Principle 02 highlights that:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Later, the 1989 International Convention on the Rights of the Child²⁰ coined the best interests of the child principle.

It is important to remember that Brazil ratified the Convention with

¹⁷ Brazilian constitutional legislation recognizes the importance of the principle of the best interests of the child and highlights the principle of absolute priority in article 227 of the CF/88. In addition, the Statute of the Child and Adolescent Law 8069/90, especially Article 4, provides for the absolute priority of the rights of children and adolescents. Thus, in Brazil, children and adolescents should be at the top of the list of concerns for governments, society and the family.

¹⁸ *Princípios norteadores do direito da criança e do adolescente: Estudo teórico e pragmático*. Editora Mackenzie: São Paulo, 2023, 19.

¹⁹ Available at: <https://www.unicef.org/brazil/os-direitos-das-criancas-e-dos-adolescentes>. Accessed on 11/07/2024.

²⁰ Available at: <https://www.unicef.org/brazil/convencao-sobre-os-direitos-da-crianca>. Accessed on 11/07/2024.

Decree No. 99,710²¹, reinforcing the position of priority and careful defense of the interests of children and adolescents in all situations of conflict²². It also important to say that was included the integral protection principle in the Brazilian Statute of the Child and Adolescent, in article 3²³, facing the position offered by the 1989 Convention.

As presented by Ana Cláudia Pompeu Torezan Andreucci and Michelle Asato Junqueira²⁴, principle is a word endowed with several meanings and, among them, the meaning of “foundation”, “origin” stands out, and the analogy with the concepts of children and adolescents is inevitable. Thus, “children, adolescents and principles have similarities: principles are the origins, just as children and adolescents are beginnings”²⁵. In addition, when developing the theme, the authors recall the post-positivist school, inaugurated by authors such as Dworkin and Alexy, who gave principles normative value and a differentiated *status*, going beyond the thesis of principles subsidiarity in relation to norms, emphasizing the importance of seeing that the genus norm presupposes two species: rules and principles. At the end of the analysis, the conclusion is that “principles, in addition to being the architectural force of the legal system, guarantee the interpreter an opening and at the same time a limitation with a view to offering optimized, reasoned and rationally defined responses in concrete cases”²⁶.

In this context, the principles that underpin full protection, absolute

²¹ Available at: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm. Accessed on: 11/07/2024.

²² On this subject, see PEREIRA, Tânia da Silva. *Direito da Criança e do Adolescente: uma proposta interdisciplinar*. Rio de Janeiro: Renovar. 2008. 39 et seq.

²³ Art. 3: Children and adolescents enjoy all the fundamental rights inherent to the human person, without prejudice to the comprehensive protection dealt with in this Law, and are guaranteed, by law or by other means, all the opportunities and facilities in order to allow them to develop physically, mentally, morally, spiritually and socially, in conditions of freedom and dignity. Sole paragraph. The rights set out in this Law apply to all children and adolescents, without discrimination based on birth, family situation, age, gender, race, ethnicity or color, religion or belief, disability, personal development and learning condition, economic condition, social environment, region and place of residence or any other condition that differentiates individuals, families or the community in which they live.

²⁴ *Princípios norteadores do direito da criança e do adolescente: Estudo teórico e pragmático*. Editora Mackenzie: São Paulo, 2023, 35.

²⁵ *Princípios norteadores do direito da criança e do adolescente: Estudo teórico e pragmático*. Editora Mackenzie: São Paulo, 2023, 35.

²⁶ *Princípios norteadores do direito da criança e do adolescente: Estudo teórico e pragmático*. Editora Mackenzie: São Paulo, 2023, 42.

priority and the best interests of children and adolescents should also guide situations that are not covered by specific legislation. The law needs to be attentive to new social developments and adapt to society's interests and desires²⁷. Thus, even if the absence of specific regulations, principles can guide decisions to ensure justice and fairness decisions, especially for children and adolescents' rights, providing answers to social dilemmas.

In the main theme of this article, the question of principles relates to the protection of children and adolescents in the digital environment. Who has the duty to protect children and adolescents in a digital environment? Family, society or the state? Is there an exclusive responsibility? This will be the main point of the following topic.

4. The principle of full protection of children and adolescents and the information society.

Recognizing children and adolescents as right-holders who are still developing implies a shared responsibility for their protection among families, society and the state.

In fact, nowadays children and adolescents have easy access to cell phones, computers and the Internet, whether at home, at school²⁸ or in social life. In many schools, especially private ones, computers are already part of the lessons and are an integral part of the education process.

Although the Internet offers benefits to the learning and knowledge process to children and adolescents, it also presents significant risks²⁹. This is a new face that the information society will have to deal with. In other words, analyzing the balance between the risks and benefits that

²⁷ The situation is described in art. 5 of the Law of Introduction to the Norms of Brazilian Law (LINDB): art. 5. In applying the law, the judge shall consider the social purposes to which it is directed and the requirements of the common good. As well as art. 6 of the Statute of the Child and Adolescent – Law 8069/90: art. 6. The interpretation of this Law shall consider the social purposes to which it is directed, the demands of the common good, individual and collective rights and duties, and the peculiar condition of children and adolescents as developing persons.

²⁸ There is an increasable discussion about limits on Internet access in schools. This issue will be dealt with further in this article in the analysis of the legal treatment of the protection of children and adolescents in Brazil, in section 5.

²⁹ Densa, Dantas, *Proteção da criança em meio digital: análise dos riscos e das orientações conforme a organização para cooperação e desenvolvimento* (OCDE). Infância, Adolescência e Tecnologia. São Paulo: Editora Foco. 2022. 67.

this new reality brings to the development of children and adolescents.

Regarding the safety of the virtual environment for children and adolescents, it can be said that there are many violations of rights arising from the misuse of networks. Among the many situations that stand out are cases of pedophilia, images of child sexual abuse and exploitation, access to inappropriate content and *cyberbullying*³⁰. All of these situations can be avoided or reduced with appropriate tools and *software* to block websites, limit time of use, filter out forbidden words, block the sending of data, use browsers suitable for the age group, among others. However, nothing is 100% effective.

Experts in Internet safety state that children, parents, caregivers and teachers must be taught how to identify online risks. Digital education is certainly the best tool for preventing rights violations. Dialogue, advice and education are still the main forms of defense.

But among all these concerns about the use of the internet, one situation has attracted attention: the frequency of use of digital platforms by children and adolescents. This is a concern not only for safety, but also for the psychological and physical health of children and adolescents who are using the internet excessively.

The protection of children's and adolescents' health in the digital environment, a topic that in itself would allow for specific research, it is worth highlighting the issue of food advertising³¹ and the issue of psychological health, with reports that people who use social networks, games or any other communication mechanism on the internet too much or inappropriately are suffering from anxiety, depression and even behaviors equivalent to addictions.

Protection of children and adolescents has remained the same since 1989. What has changed are the issues of concern and the causes of violations of the rights of children and adolescents. The concern for healthy development and about the frequency of access to content often inappropriate or untrue, resulting in a major impact on health and education, becomes two important questions to solve.

According to UNICEF³², children are starting to surf the web earlier and is connected for longer. The Covid-19 pandemic has certainly led to

³⁰ A situation in which a person stalks and humiliates another person in the virtual environment.

³¹ Schwartz A.C.C., Schwartz F., O impacto da publicidade de alimentos no consumo e na saúde infantil, Direito do Consumidor na Sociedade da Informação. São Paulo: Editora Foco, 2022.

³² UNICEF. Protecting children's rights in a digital world. Available at: <https://www.unicef.pt/atualidade/noticias/proteger-os-direitos-das-criancas-num-mundo-digital/>. Accessed on: 20/09/2024.

a sharp increase in the amount of time children and adolescents spend in front of screens. It is estimated that many children and adolescents spend between 6 and 7.5 hours a day online in Europe. And this also has an impact on safety. According to the same UNICEF report, one in three children say they have been victims of online harassment. In 2020, 33% of girls and 20% of boys in Europe who took part in the survey said they had accessed disturbing and inappropriate content at least once a month. In addition, it should not be forgotten that children and adolescents are also increasingly exposed to invisible technologies such as algorithms, analysis systems and location trackers, not to mention the issue of data leakage.

It must also be said that there is a portion of the world's population that is increasingly vulnerable³³, especially due to war and migration. In addition to the vulnerability that comes with being a developing person, children and adolescents in the modern digital world can become even more vulnerable because they don't have access to information technology. In other words, depriving children and adolescents who will grow up without having had the opportunity to learn and integrate technological knowledge, which is increasingly seen as a requirement for carrying out more economically and socially recognized work activities, of access to digital technology, will undoubtedly bring them a heightened condition of future vulnerability. This will undoubtedly create an abyss of opportunities for these digital outcasts.

This is a paradox that the Information Society will have to deal with: how to balance adequate and healthy access with the risks and insecurities of the web and, at the same time, provides the right to access the digital environment so that the right-holders can develop their education, work skills and competencies and properly exercise their citizenship.

In any case, it is essential to talk about protection policies, as well as the regulation of the digital environment, so that, in the end, it is possible to assess what is worth doing on the subject.

Starting from the context of the vulnerability of children and adolescents and their hypervulnerability when they are in a digital environment, and the fact that responsibility for violations of their rights must be shared among all people and institutions, the question arises as to what the market's responsibility would be in this situation: is regulation the solution?

As Isabella Henriques rightly pointed out³⁴:

³³ Marques, Miragem, O novo direito privado e a proteção dos vulneráveis. São Paulo: Revista dos Tribunais. 2014.

³⁴ Henriques, Direitos fundamentais da criança no ambiente digital. São Paulo: Revista dos Tribunais. 2023. 331.

Although regulation by law is not the only way for the digital environment and the companies that operate in it to be regulated, especially given the complexity of AI systems and their rapid and progressive development, it is undoubtedly of fundamental importance, not least because only regulation has state coercive force. In any case, it is true that social norms, market issues and the very architecture of the systems are also of paramount importance, given that “there will be little point in heavy sanctions if there are social rules that encourage ignorance of legal rules or even outright non-compliance with them”.

This reasoning seems to be quite correct. Regulation does exist as a defense mechanism, but regulation will do no good without education and social commands that can direct behavior in the digital environment. There must be concatenated and agile behavior, so that new situations are included in the legal and social rules. The issue is multidisciplinary.

As already mentioned, the principle of integral protection has been present in national and international documents protecting the rights of children and adolescents for such a long time, but it is notorious that the policies for its implementation have not yet been effective. Some countries are more advanced than others³⁵, it is true. We can see that concern is always present, but there are many difficulties in implementing the policies, and the market often influences according to its interests, however the time is ripe for reflection.

It is necessary to think seriously about the benefits or otherwise of regulating the digital environment, as a mechanism for implementing the principle of integral protection, which emphasizes the responsibility of everyone (family, public authorities and society) in safeguarding the rights of children and adolescents, their absolute priority and their best interests.

An educational policy on the safe and appropriate use of the digital environment is essential for the success of any measure aimed at protecting children and adolescents. Information and education always come first!

5. The European Union’s concern for the protection of children and adolescents in the digital environment.

In 2020, the UN released a report after two years of consultations and studies on risks and rights violations stemming from digital platforms

³⁵ Densa, Dantas, *Proteção da criança em meio digital: análise dos riscos e das orientações conforme a organização para cooperação e desenvolvimento* (OCDE). Infância, Adolescência e Tecnologia. São Paulo: Editora Foco. 2022. 78.

regarding children and adolescents. The Committee in charge of this report was made up of 18 experts and recommended that States take firm legislative and administrative measures to protect children and adolescents from harmful and misleading content, as well as all forms of digital violence, such as gender-based violence, harassment, aggression, misinformation, data leaks, privacy breaches, among many other situations.

To address these concerns, the European Commission introduced the European Declaration on Digital Rights and Principles in 2022. Building on this declaration, the European Parliament adopted the Better Internet for Kids+ (BIK+) strategy³⁶ in 2023 (Resolution 2023/2670 RSP). As a result, a Platform³⁷ was created to present and disseminate the strategy, which aims to improve the well-being of children on the web through a safe and age- appropriate digital environment that respects the best interests of the child or adolescent³⁸.

BIK+ is based on three principles for an appropriate digital environment³⁹: 1) Creating a Safe Digital Environment: Ensuring that children are protected from harmful and illegal content, behaviors, and risks online. 2) Empowering Children in the Digital World: Equipping children with the necessary skills to make safe choices and express themselves responsibly online. 3) Encouraging Active Participation: Promoting child-led activities that foster innovative and creative digital experiences⁴⁰.

Initially European Union legislation on children's and adolescents' rights focused broadly on fundamental rights, as outlined in the Charter of Fundamental Rights of European Union (CFR). The charter emphasized the right to education, non-discrimination, prohibition of the exploitation of child labor, freedom, family life, among others.

³⁶ Available at: <https://digital-strategy.ec.europa.eu/pt/factpages/better-internet-children>. Accessed on 20/09/2024.

³⁷ Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0358_PT.html. Accessed on 20/09/2024.

³⁸ It is important to note that the European Union has been showing its concern about the violation of children's and adolescents' rights in the virtual environment since 2012. Initially, in 2012, COM (2012) 196 – Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the European regions – The strategy for a better internet for children, resulted in the creation of the Safer Internet Centers and the BIK+ Platform. Available at: <https://eur-lex.europa.eu/legal-content/PT/ALL/?uri=CELEX:52012DC0196>. Accessed on 20/09/2024.

³⁹ Available at: <https://eurocid.mne.gov.pt/cidadania-europeia/os-direitos-das-criancas-na-uniao-europeia> Accessed on: 20/09/2024.

⁴⁰ Available at: <https://better-internet-for-kids.europa.eu/en>. Accessed on 20/09/2024.

Subsequently, in 2021, the European Union had expanded its focus to address challenges posed by the digital age. Through General Comment No. 25 (2021)⁴¹, issued by the Committee on the Rights of the Child, the UN provided a framework for implementing the Convention on the Rights of the Child in the digital context. This document outlined the responsibilities of state parties regarding four main points: 1. non-discrimination; 2. Children's best interests; 3. right to life, survival and development; and 4. respecting children's opinions in digital matters.

Also in 2021, the European Union Strategies on the Rights of the Child (COM (2021) 142) emphasize digital safety and opportunities. By 2022, these strategies culminated in the BIK+ framework, designed to create a safer internet for children and adolescents by promoting age-appropriate content and privacy standards⁴².

In 2024, the Commission presented a Communication (COM (2024) 188)⁴³ entitled "Putting children's best interests first" which accompanies the Commission Recommendation 2024/1238 on developing and strengthening integrated child protection systems in the best interests of the child.

There is no doubt that the issue of protecting children and adolescents in the virtual environment is a matter of global concern! The more technology advances, the more risky situations will appear. Society, families and governments need to be vigilant to prevent harm and violations of children's and adolescents' rights, as a joint and necessary obligation.

Subsequently and considering the Digital Services Act (DSA), which has been in force since 2024, the European Union has mandated that digital platforms ensure the privacy and security of children and adolescents. This regulation specifically prohibits targeted advertising based on profiling and imposes an obligation on digital platforms to mitigate risks associated with digital addiction and exposure to harmful content. Furthermore, the AI Act (Regulation (EU) 2024/1689), adopted in 2024, classified specific uses of Artificial Intelligence that manipulate or exploit the vulnerabilities of children and adolescents as 'high-risk' or strictly prohibited. Within this framework, the European Commission Guidelines of July 2025 (C/2025/5519) detail practical measures, such as the requirement for children and adolescents' accounts to be set to 'private' by default and the implementation of robust age-verification mechanisms.

⁴¹ Available at: <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:52021DC0142>. Accessed on: 20/09/2024.

⁴² Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:212:FIN>. Accessed on 20/09/2024.

⁴³ Available at: <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:52024DC0188>. Accessed on 20/09/2024.

Regarding the age at which children and adolescents may consent to the processing of their personal data and the use of digital applications without the authorization of their parents or legal guardians, the GDPR – General Data Protection Regulation (Regulation (EU) 2016/679) established a threshold of 16 years, while allowing Member States to lower this age to as young as 13. Recently, this has been a prominent debate among the bloc's nations; France, for instance, set the 'digital majority' at 15 years, rather than the 16-year default provided by the GDPR. Nevertheless, the global trend has moved toward more stringent regulations, including the prohibition of access for adolescents under 16, as seen in the case of Australia. In light of these shifting stances and prioritizing the protection of children and adolescents, the European Parliament issued a position in November 2025 advocating for a ban on access to digital platforms for children under 13 and recommending that unrestricted access be granted only at age 16 as a measure to harmonize regulations across the Member States. While this position is currently non-binding, it signals the bloc's official stance and recommendation on the matter."

6. The legal treatment of child and adolescent protection in the digital environment in Brazil and its necessary regulation.

As this paper has already notice, the protection of children's and adolescents' rights in Brazilian law is firmly rooted ins constitutional and statutory provisions, particularly the 1988 Federal Constitution and the Statute of the Child and Adolescent (ECA) of 1990. These frameworks establish the principles of absolute priority, integral protection and children's best interests.

Besides, the Internet Civil Rights Framework, Law 12,965/14⁴⁴, guarantees rights and duties for the use of the internet in the country and aims, among other rights, provides everyone the right to access the internet (art. 4) and in its art. 29⁴⁵, specifically highlights shared responsibilities among public authorities, internet connection and application providers, as well as civil society in promoting policies to encourage the

⁴⁴ https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm.

⁴⁵ Art. 29: The user will have the option of free choice in the use of a computer program on their terminal to exercise parental control over content that they consider to be inappropriate for their minor children, provided that the principles of this Law and Law No. 8,069, of July 13, 1990 (Statute of the Child and Adolescent) are respected. Sole paragraph. It is up to the public authorities, together with Internet connection and application providers and civil society, to promote education and provide information on the use of the computer programs provided for in the caput, as well as to define good practices for the digital inclusion of children and adolescents.

digital education, including children and adolescents.

Later, the General Data Protection Law (LGPD) – Law 13,709/18⁴⁶, dedicates a section to the protection of children's and adolescents' data, highlighting the need to observe the effectiveness of the principles of comprehensive protection and the best interests of the child, considering children and adolescents as people with aggravated vulnerability due to the risks inherent in the digital environment.

Since 2010, NIC.br⁴⁷, through Cetic.br⁴⁸ has been presenting annual reports on the impact of the internet on the lives of children and adolescents (TIC Kids Online Brazil)⁴⁹.

The research has shown that there is an upward trend in internet access by children and adolescents in Brazil. In 2019, 89% of the Brazilian population aged between 9 and 17 used the internet; in 2015, the percentage was lower at 79%. In 2022, 96% of Internet users aged 9 to 17 accessed the Internet every day or almost every day. In 2024, this figure fell slightly, according to the survey, 93% of the Brazilian population aged 9 to 17 are Internet users.

The latest version of the survey carried out by Cetic.br (2024)⁵⁰ investigated for the first time the frequency of use of digital platforms by children and adolescents and found that in Brazil, 70% of internet users aged between 9 and 17 access applications such as WhatsApp with high frequency, followed by YouTube with 66%, Instagram with 60%

⁴⁶ https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm.

⁴⁷ The Ponto BR Information and Coordination Center – NIC.br was created to implement the decisions and projects of the Brazilian Internet Steering Committee – CGI.br, which is responsible for coordinating and integrating Internet initiatives and services in the country. CGI.br's multisectoral model brings together various sectors by bringing together society and government to establish strategic guidelines for the use and development of the Internet in Brazil. The work of CGI.br and NIC.br ranges from technical aspects to recommendations for security procedures and the production of research, allowing the level of technical quality and innovation to be maintained and subsidizing the implementation of Internet use policies in Brazil. Available at: <https://www.nic.br/quem-somos/>. Accessed on: 25/09/2024.

⁴⁸ The Regional Center for Studies on the Development of the Information Society (Cetic.br) has the mission of monitoring the adoption of information and communication technologies (ICT) in Brazil. Created in 2005, Cetic.br is a department of the Ponto BR Information and Coordination Center (NIC.br), linked to the Brazilian Internet Steering Committee (CGI.br). Available at: <https://cetic.br/pt/sobre/>. Accessed on 25/09/2024.

⁴⁹ Available at: <https://cetic.br/pt/pesquisa/kids-online/> Accessed on: 23/10/2024.

⁵⁰ Available at: <https://cetic.br/pt/pesquisa/kids-online/analises/> Accessed on: 23/10/2024.

and TikTok with 50%. The survey also found that the frequency of use of the platforms varies according to age group. YouTube, for example, predominates among users aged 9 to 12. In this age group, WhatsApp takes second place, and among children aged 9 to 10, TikTok overtakes Instagram.

As for social platforms, 69% said they had their own profile on the most diverse platforms. The proportions were 63% for Instagram, 45% for TikTok, 42% for YouTube, 19% for Facebook, 8% for Discord and 7% for X (formerly Twitter). And of these, 72% said they believed they could use social networks on their own⁵¹. And 40% of young people said they didn't know how to recognize sponsored content. Another important fact: 29% reported having faced offensive situations in the digital environment.

It is also interesting to note that the survey indicates that 60% of the parents and guardians of children and adolescents interviewed say that they usually watch and monitor what their child does on the internet, and more than half impose rules on the use of cell phones or computers. In general, it was found that surveillance is much greater in the 12 and underage group. In the case of adolescents, this vigilance decreases significantly. This data raises another concern in relation to the protection of adolescents: the fact that adolescents are more adept at using IT devices does not mean that they are better able to discern dangers and rights violations. Information, digital education and care are essential for these developing people to participate safely and consciously in digital spaces.

In addition, the survey also showed that 86% of the young people interviewed used the internet for school-related research. And 56% of children and teenagers belonging to classes A, B and C used the internet at school. In 2023, the survey showed that 51% of children and adolescents in classes A and B used the internet at school and 47% in class C. There has been a significant increase from one year to the next. This issue of internet use in schools, especially cell phones in schools, has been discussed more incisively since the return to face-to-face classes after the pandemic, but there have been discussions on the subject for a long time. In the case of the Brazilian legislature, for example, a Bill No. 104 of 2015, which is currently before the Chamber of Deputies, has only just begun to move again. The Bill, which provides for a ban on the use of portable electronic devices in classrooms in public and private basic and higher education establishments, was finally referred to the Chamber of Deputies' Constitution, Justice and Citizenship Committee (CCJ) in Octo-

⁵¹ Available at: <https://www.nic.br/noticia/releases/tic-kids-online-investigapela-primeira-vez-frequencia-do-uso-de-plataformas-digitais-por-criancas-e-adolescentes/>. Accessed on: 23/10/2024.

ber 2024 (Bill 3,310/2024 and Bill 1,29/2024 were joined) for its analysis and opinion, showing the relevance of the issue.

The data, therefore, shows a significant increase even before the pandemic, which in turn led to an increase in numbers, due to the change in social behavior in the face of the need to isolate the population. However, the small decrease in the rate in 2024 can already demonstrate the positive result of social policies and campaigns to reduce internet use as a mechanism to protect the rights of children and adolescents, with respect for the principles of comprehensive protection and the best interests of children and adolescents.

The year 2024 was marked as an important year in the protection of the rights of children and adolescents, also in Brazil. In April 2024, the National Council for the Rights of Children and Adolescents (CONANDA) published a regulation dealing with children's rights in the digital environment, Resolution 245/2024⁵². The resolution gives public authorities, families, societies and companies responsibility for guaranteeing and enforcing the rights of children and adolescents in digital environments, with the aim of combating digital exclusion. In other words, the main aim of the resolution is to guarantee access to information and communication technologies (ICTs) for all under-18s, combating all situations that may lead to discrimination, neglect, violence, cruelty, oppression and exploitation. It also promotes the participation of children and adolescents in the development of public policies on the digital environment, which are the responsibility of the National Secretariat for the Rights of Children and Adolescents, of the Ministry of Human Rights and Citizenship, and CONANDA.

CONANDA resolution 245/2024, among several issues of interest to the protection of children and adolescents, the false idea that the protection of people under the age of 18 is the sole responsibility of the family is dispelled. It clearly states that the responsibility goes far beyond the parents, and even falls on companies that provide digital services, including social networks. The resolution also considers the cognitive, emotional and social development of the child and adolescent being protected.

It is also noteworthy that the resolution breaks new ground by addressing the duty of care and responsibilities of companies providing digital products or services in Chapter V, confirming the idea that everyone must ensure the rights of children and adolescents and also seek solutions to put into practice the principle of comprehensive protection

⁵² Available at: <https://www.in.gov.br/web/dou/-/resolucao-n-245-de-5-de-abril-de-2024-552695799>. Accessed on: 20/09/2024.

laid down in the main regulations for the protection of children and adolescents. And when the resolution mentions companies' duty of care, an important parallel can be drawn regarding the principle of integral protection. There is no longer any need to talk about the responsibility of the family alone, the responsibility, the care, must be the responsibility of everyone, the state, the family and society.

Recently, Law No. 15,211/2025, known as the 'Digital ECA,' was enacted. This represents a significant legal milestone for the protection of children and adolescents in the digital sphere in Brazil, updating existing legislation and integrating into the legal protection system several mandatory requirements for digital platforms. These include the compulsory provision of parental control and monitoring tools, mandatory age verification for users, the linking of accounts belonging to children and adolescents under 16 to the profile of a legal guardian, and a prohibition on targeted advertising, aligning with established European Union standards previously discussed.

Furthermore, in June 2025, the Brazilian Supreme Federal Court (STF) issued a new interpretation of Article 19 of the Brazilian Internet Civil Rights Framework (Law No. 12,965/2014), ruling the said article partially unconstitutional. The Court held that platforms and social networks may be held civilly liable for serious cases involving the dissemination of illegal or offensive content, even in the absence of a court order for its removal. While the law in question does not deal exclusively with children and adolescents, it addresses broader digital environment issues that inherently encompass these individuals integrated into this reality.

Consequently, prior to the STF decision, social networks were penalized only if they failed to comply with a specific judicial order to remove content. Under the current legal framework, they bear direct responsibility in severe cases such as child pornography, sexual crimes against vulnerable individuals, and cyberbullying, requiring a simple user report or any other form of notice regarding the posted content. This establishes a 'duty of care' and a requirement for risk mitigation by digital platforms to protect the life and health of children and adolescents. It is noteworthy that this decision aims to facilitate and enforce the protection of children and adolescents in the digital environment in a decisive manner. It is now imperative to monitor how this stance will be applied in practice; hence the importance of public policies that transform the conduct and perspective of digital enterprises, as well as those of society, families, and governmental entities.

There is therefore no longer any room in modern society for thinking about protecting the rights of children and adolescents in a segmented way. Since 1989, with the Convention on the Rights of the Child, the principle of Integral Protection has been present in a wide range of legislation around the world. Those who exploit information and knowledge technologies need to bear in mind that they are responsible for looking after the most vulnerable and still developing generations.

7. Conclusions.

Protecting the rights of children and adolescents in a digital environment is urgent and necessary.

The principles of absolute priority, full protection and best interests, the founding principles of children's and adolescents' rights and present in most national and international documents dealing with the protection of their rights, highlight their status as subjects of rights and developing people who deserve to be highlighted by society, the family and the State.

The integration of digital tools into modern social interactions highlights the importance of establishing clear parameters and rules for all stakeholders. This issue not only involves the exercise of parent authority in raising and educating children and adolescents but also requires awareness from parents, society and public authorities about the need for digital education as an extension of the right to education and healthy development.

Both Brazil and the European Union have been taking measures to ensure the rights of children and adolescents in the digital environment, seeking greater security in the use of information and technologies. This is humanity's new reality; the internet has become part of the lives of the vast majority of the global population and this situation needs to be weighed up. Regulation is certainly very important, but regulation alone will not be effective in ensuring the ethical, coherent and safe use of the digital environment.

The collaboration of families, governments, and society is indispensable to guarantee that digital environments contribute positively to the healthy development of children and adolescents. Their well-being, autonomy, and safety must remain at the forefront of collective efforts, as these individuals will soon take on the responsibility of shaping the future.

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13.

TECHNOLOGICAL DEVELOPMENT IN HEALTHCARE FOR CHILDREN AND ADOLESCENTS AND THE JUDICIALIZATION OF MEDICATION FUNDING IN BRAZIL

Anna Paula Soares da Silva Marmirolli – Giovana Auricchio Cardoso***

1. Introduction.

Technological advancements in healthcare, particularly those aimed at childhood and adolescence, present new opportunities for the diagnosis, treatment and prevention of diseases. Such progress, however, brings forth complex challenges in implementing these innovations, notably the judicialization of access to and funding for medications.

The Brazilian Federal Constitution enshrines health as a fundamental right, obliging the state to develop public policies that ensure equitable access to healthcare services. In practice, however, many citizens continue to face significant barriers in obtaining necessary treatments, making judicial intervention a frequent recourse to bridge this gap.

From this perspective, while innovation offers effective solutions to health-related problems, integrating it into the public healthcare system often encounters budgetary constraints and the need for resource prioritization. The lack of alignment between judicial decisions and their fiscal impact may generate unsustainable pressure on the healthcare system,

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which ultimately compromises the State's ability to equitably meet all demands.

Therefore, it is crucial to foster more effective dialogue among the Legislative, Executive, and Judicial branches, aiming to build a healthcare system that acknowledges not only citizens' rights but also accounts for the State's practical and financial limitations. The pursuit of solutions that integrate technological development with the realization of the right to health remains a challenge that requires collaboration across all sectors of society.

2. The Right To Health And The Applicable Legal Frameworks.

The right to health is primarily enshrined in the Federal Constitution, as a right to be guaranteed by the State and provided to the population as one of the fundamental rights of every individual. The guarantee of the right to health must be implemented through the establishment of public policies with social and economic characteristics, aimed at reducing the risk of diseases and ensuring universal and equal access for all (Sotopietra, 2017, 11).

In the Federal Constitution, the right to health is presented as a fundamental right and its exclusion is impossible, since it is implemented through unamendable clauses. Furthermore, it is of an immediate and mandatory nature, in accordance with the rules and foundational principles of the Constitutional State (Sotopietra, 2017, 30). It serves as a guiding principle for public policies, acting as both a programmatic and constitutional norm of full efficacy. It plays an immediate role in establishing fundamental rights and promoting the development of a dignified human life (Vasconcelos & Maia, 2012, 67).

In addition to what is constitutionally established as a basic guarantee for all citizens, the right to health is also regulated by Law No. 8.080 of 1990. This law provides the conditions for protecting and promoting health by organization and ensuring the functioning of the necessary public services. Article 1 states that the regulation of the law shall apply throughout the national territory, while Article 2 reiterates the Federal Constitution's declaration that health is a fundamental human right and that the State must provide the conditions necessary for its full exercise.

As a fundamental principle, it constitutes a guarantee of the minimum dignity and the human life. The protection of the right to health transcends barriers and borders, aiming to reach the most basic fundamental rights. It is considered to have a dual aspect, acting upon individual rights by protecting each person, as well as collective rights, essential to the realization of individuals' personality, and concerning the condition of all human beings (Merlone, 2014, 34).

It also reiterates that the State is responsible for ensuring this right by

formulating social and economic public policies and implementing measures that guarantee universal and equal access to healthcare for the population. Social and economic policy should be viewed as a comprehensive framework of laws, programs, and actions designed to address all social needs and ensure citizens' rights. The State must implement these resources to provide the basic goods and services necessary to ensure and institutionalize society (Costa, 1994, 84).

Health is also a form of guarantee of the capitalist system itself, which, despite also causing illness due to the accumulation and excess of work present today, requires individuals to be in minimum living conditions to enable the production of capital. Thus, the State must also act as a guarantor of the right to health.

This is particularly evident because, prior to the Federal Constitution, not everyone had the right to health. Access to health and its guarantee were merely viewed as an assistentialist measure directed at workers and their families. In other words, the primary requirement was the ability to provide skilled labour for the production process (Sotopietra, 2017, 38). It was not until the 1970s that measures were adopted to make the right to health concrete, when the welfare state expanded to address diseases arising from poverty. The National Health System was effectively created in 1975, strengthening the provision of public health and establishing the legal basis for the creation of a unified health system (Araújo, Veras & Varella, 2019, 91).

Law No. 8.080/90 then established the Unified Health System (*Sistema Único de Saúde* – SUS), which has the following objectives: (i) identifying and disseminating the conditionals and determines the factors of health; (ii) formulating health policies in the economic and social fields; (iii) assisting individuals through actions for the promotion, protection, and recovery of health, by integrating assistance and preventive policies. In addition to these objectives, SUS has basic principles that must be guaranteed by the State to fulfill its duty, such as: (i) universal access to health services at all levels of care; (ii) comprehensive care, understood as an integrated and continuous set of preventive and curative actions and services, both individual and collective, required for each case at all levels of system complexity; and (iii) equality in healthcare, without prejudice or privileges of any kind.

The main feature of SUS that ensures and promotes the principles established by law is that it is free of charge. Although citizens may contract private health insurance for more personalized and higher-quality treatment, the State is obliged to provide a free public health plan to eliminate all formal barriers and increase access for all citizens (Sotopietra, 2017, 37).

Brazil is also a signatory of American Convention on Human Rights, under Federal Decree No. 3.321/99, which is responsible for implement-

ing the provisions on human, economic, social, and cultural rights in the country, and which, in its Article 10, specifically provides for the right to health:

1. Everyone has the right to health, which is understood as the enjoyment of the state of complete physical, mental and social well-being.
2. To make the right to health effective, the States Parties commit to recognizing health as a public good and, in particular, to adopting the following measures to guarantee this right:
 - a) primary health care, understood as essential medical care accessible to all individuals and families in the community;
 - b) extension of the benefits of health services to all persons under the jurisdiction of the State;
 - c) full immunization against the major infectious diseases;
 - d) prevention and treatment of endemic, occupational, and other diseases;
 - e) education of the population with regard to the prevention and treatment of health problems; and
 - f) satisfaction of the health needs of the highest-risk groups and those who, by reason of their poverty, are the most vulnerable¹.

Article 12 of the International Covenant on Economic, Social and Cultural Rights of the United Nations, enacted by Federal Decree No. 591 of 1992, establishes that every citizen has the right to a state of complete physical, mental and social well-being. The State must ensure the reduction of infant mortality, the development of children, improvements in workplace hygiene and the environment, the prevention and treatment of diseases, and the creation of conditions to guarantee medical assistance and health services in cases of illness.

¹ 1. Toda pessoa tem direito à saúde, compreendendo-se como saúde o gozo do mais alto nível de bem-estar físico, mental e social.
2. A fim de tornar efetivo o direito à saúde, os Estados-Partes comprometem-se a reconhecer a saúde como bem público e, especialmente, a adotar as seguintes medidas para garantir esse direito:
a) assistência primária à saúde, entendendo-se como tal à assistência médica essencial ao alcance de todas as pessoas e famílias da comunidade;
b) extensão dos benefícios dos serviços de saúde a todas as pessoas sujeitas à jurisdição do Estado;
c) total imunização contra as principais doenças infecciosas;
d) prevenção e tratamento das doenças endêmicas, profissionais e de outra natureza;
e) educação da população com referência à prevenção e ao tratamento dos problemas da saúde; e
f) satisfação das necessidades de saúde dos grupos de mais alto risco e que, por sua situação de pobreza, sejam mais vulneráveis [Translated by the author].

The right to health is even more essential for children and young people. Since the 1988 Federal Constitution and the enactment of the Child and Adolescent Statute, they have been recognised as individuals with rights and, consequently, as human beings. Furthermore, they are considered to be in the process of development and, according to Article 3 of the Child and Adolescent Statute, they are entitled to full protection and enjoyment of all fundamental human rights in order to guarantee their physical, mental, intellectual, moral and social development.

To ensure such development, it is essential that children and adolescents have access to their right to health. Article 4 of the same statute guarantees absolute priority in the protection of these individuals' rights, with the aim of securing their most inherent rights, such as health, nutrition, sports, leisure, life, and culture. The term 'priority' is primarily understood to mean the right to receive prompt assistance and preferential treatment in public services. It also refers to priority in the formulation of public policies and the allocation of public resources, which ensure privileged protection.

This provision holds unparalleled importance, considering that the recognition of children and youngers as subjects of rights took time to be effectively established and is still not fully realized in society, despite numerous normative acts acknowledging their entitlement to rights. The incomplete realization of this condition implies an absence of effective citizenship, which is a fundamental prerequisite for social existence, and consequently, the absence of a health right that prioritizes children and young people in society. Therefore, Articles 3 and 4 of the Child and Adolescent Statute are crucial in ensuring access to healthcare for children and young people, marking the beginning of the democratization of healthcare for children, adolescents and adults.

The status of being a subject of rights presupposes the condition of citizenship for these individuals. Once considered citizens, the right to have rights is understood, posing a challenge for the State to ensure their inclusion alongside others and the possibility of universalization (Costa, 1994, 85). The Child and Adolescent Statute reinforces the provision in the Federal Constitution, specifically Article 227, by stipulating in its Article 7 that children and youngers must be guaranteed public policies capable of ensuring their development in a dignified, healthy, and harmonious manner.

The Statute is based on protecting the most vulnerable members of society, who require greater attention to develop their character effectively and fully. Children and adolescents are individuals who require additional support and protection to ensure their right to life is upheld. The State, the family and society must all guarantee their protection and ensure their most fundamental rights (Mendes, 2006, 31).

Therefore, the right to health should not be limited to the mere

absence of disease. In 1946, the World Health Organization defined the right to health as ‘a state of complete physical, mental and social well-being’. This means that health encompasses more than just physical well-being; the social and mental aspects surrounding an individual are equally important. The well-being of the population and its citizens must be guaranteed by approaches that can generate a dignified existence within the broader societal context.

Article 3 of Law No. 8.080 of 1990 aligns with the World Health Organization’s definition of health, which states that it reflects a country’s economic and organizational development level. This is determined by analyzing various factors, such as nutrition, housing, basic sanitation, the environment, work, income, education, physical activity, transportation, leisure and access to essential goods and services.

The concept of health is not restricted to an individual medical perspective. Health is an integral part of citizenship, aimed at mitigating existing societal risks, promoting quality of life, reducing physical and mental illnesses, providing resources for disease treatment, and ensuring comprehensive, universal, and equal care for the entire population, guaranteeing a minimum quality of dignified life, including access to treated water and sewage systems.

A country capable of achieving strong economic and social development prioritises its citizens’ most basic rights, such as the right to education, housing and healthcare. These three pillars are essential for analyzing the living conditions of a country’s inhabitants, since a country cannot function productively under a capitalist system without citizens who are able to work.

One indicator of human development is access to medication for citizens. A lack of access to medication can manifest in two ways: firstly, as a direct consequence of insufficient socioeconomic development to support the availability of necessary medicines, and secondly, as a lack of access experienced by a segment of the population due to insufficient economic means to acquire medicines, or due to the medicines being unavailable through the public health system (Vasconcelos & Maia, 2012, pp. 73–74).

Therefore, it is unquestionable that socioeconomic development is an instrument for the realization of health, and once health is achieved, it also contributes to the concretization of human development. In other words, access to health is also access to opportunities for human development, and the converse is equally true, since real development presupposes, among other factors, genuine access to health, forming a true virtuous circle².

² Sendo assim, é inquestionável que o desenvolvimento socioeconômico é in-

Within the scope of socioeconomic factors, health is significantly affected by social inequality. Depending on the region, access to health services can be much faster and more efficient than in less developed areas. A lack of resources in the Unified Health System, combined with high demand due to a large population, means that the right to health is more readily guaranteed to those who can afford it (Merlone, 2014, 35).

The judicialization of demands for health rights has become a means for those who need this constitutional norm to be effectively guaranteed. Access to the judiciary to enforce minimum rights for the population has begun to be recognized as an enforcement mechanism. (Merlone, 2014, 35).

For these normative frameworks be realized, public policies must align with societal development, including technological progress, as discussed in the next section.

3. Technological Development In Children's And Adolescents' Access To Health Care.

Technological innovation is also addressed in the Federal Constitution, specifically in Article 5, section XXIX, which ensures authors of industrial inventions temporary privileges for their use, as well as protection for industrial creations, trademarks, trade names, and other distinctive signs, considering the social interest and the technological and economic development of the country.

As innovation and technological development are enshrined in Article 5 of the Constitution, they are also regarded as fundamental rights. While the Constitution does not define these terms specifically, it does guarantee inventors the necessary protections in this regard (Merlone, 2014, 106). Article 17, paragraph 1 of Law No. 11,196 of 2005 fills this conceptual gap when addressing tax regimes related to technological innovation by defining it as the conception of a new product or manufacturing process, or the addition of new functionalities or characteristics to an existing product or process. This results in incremental improvements and an effective gain in quality or productivity, ultimately leading to greater competitiveness in the market.

Regarding technology and the right of health in particular, it should

strumento de efetivação da saúde e esta, uma vez efetivada, ajuda a concretizar também o desenvolvimento humano. Dito de outra maneira, ter acesso à saúde é também ter oportunidade de desenvolvimento humano, sendo o inverso também verdadeiro, pois o desenvolvimento real pressupõe, dentre outros fatores, o acesso à saúde real, em verdadeiro círculo virtuoso [Translated by the author].

be understood as the application of knowledge for the specific purpose of treating diseases, rehabilitating individuals and improving organizational and informational systems to implement more effective care programs and protocols for the population. Technology constitutes a means of preventing, treating and recovering from diseases (Brasil, 2016, 8).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was established by members of the World Trade Organization in 1995. It required participating countries to amend their legislation to recognise a minimum level of protection for intellectual property in technological fields.

Due to external pressures, an exception was applied allowing States to limit intellectual property rights to meet the health needs of each signatory country, which included: (i) the use of transition periods; (ii) compulsory licenses; (iii) international exhaustion and parallel importation; and (iv) experimental use and the Bolar exception – a legal provision allowing generic drug development (Fernandes et al., 3). This exception enabled the inclusion of generic products in the pharmaceutical sector, thereby fostering greater competition and reducing prices.

Currently, in the technological field, there is Health Technology Assessment (*Avaliação de Tecnologias em Saúde – ATS*), defined as a form of research evaluating the short- and long-term consequences of the effectiveness of health technologies. From a multidisciplinary perspective, it can integrate clinical, social, and economic information, using appropriate methods to support decision-making, such as determining which treatments may be offered by the Unified Health System identifying which patients should receive them, and for how long a given treatment is recommended (Brasil, 2016, 9).

Health Technology Assessment (HTA) is understood as a broad, multidimensional process that encompasses various evaluative criteria. When assessing a medication, for example, the analysis typically involves its efficacy, measured under ideal conditions in clinical trials; its safety, regarding potential health risks; and its effectiveness, reflecting real-world outcomes. HTA may also consider the broader social, organizational, legal, ethical and political implications of using the technology. In some countries, such as Brazil, the process formally requires the inclusion of economic evaluations, which play a critical role in informing decisions relating to access and resource allocation (Brasil, 2016, 9).

ATS serves as a tool to support the National Commission for the Incorporation of Technologies into the Unified Health System (*Comissão Nacional de Incorporação de Tecnologias no Sistema Único de Saúde – CONITEC*), which was created in 2011 to advise the Ministry of Health on matters related to technological integration. Technology assessment requests are submitted by institutions and presented to CONITEC for evaluation regarding their incorporation into the Unified Health System

(Brasil, 2016, 12-15).

When Law No. 12,401/2011 established therapeutic assistance and the incorporation of health technologies within the SUS, social expectations were raised that the challenges faced by individuals requiring disease treatment under the system would be resolved, or at least minimised. Ideally, implementing this legal framework would improve the SUS by ensuring innovation in health rights, particularly regarding access to medication and reducing the need for judicial intervention (Amorim et al., 2010, 345).

The implementation of technologies goes beyond the use of machines or operators, encompassing the inclusion or exclusion of certain medications within the public health system, with the ultimate decision resting with the Ministry of Health. One example is the development of a vaccine for dengue: the product is first analyzed by the Drug Market Regulation Chamber (Câmara de Regulação do Mercado de Medicamentos – CMED) to establish its cost and application price, after which CONTEC evaluates its incorporation into the public health network (Ministério da Saúde, 2023).

This process makes it possible to identify the groups at highest risk and, from there, prioritize who should receive the treatment or medication. In the case of the dengue vaccine, for instance, children and youngsters were identified as the most affected and, consequently, prioritized for vaccination. This approach aligns with Articles 3 and 4 of the Statute of the Child and Adolescent, which ensure the absolute priority of these individuals, especially regarding access to their right to health.

The implementation of technology and innovation also enables greater public transparency in service delivery. Technology should support the provision of data to the population regarding access to high-cost medications, waiting lists for public health services, organ transplants, and surgeries. It can serve as an ally of the population by providing data on system operations and expediting data collection.

A recently implemented example is the artificial intelligence system developed by the World Health Organization called “Sarah.” This prototype is a digital assistant that provides health tips in up to eight languages, aiming to facilitate the dissemination of reliable information to the general public. It promotes digital health by offering resources for preventing diseases, such as cancer and diabetes, and addressing topics like stress, smoking cessation, mental health, and healthy eating (World Health Organization, 2024).

Implementing technologies in Brazil is complex, as the SUS is still insufficiently aligned with a robust innovation resource system. The absence of a clear policy focused on knowledge transfer has hindered technological development in health (Merlone, 2014, 112).

The patent registration process, for example, which is essential for

the development and promotion of technological advancement, remains slow, reduces the social value of intellectual property and increases the cost of patented medications. These further distances vulnerable populations from accessing healthcare and exacerbates social inequality (Merlone, 2014, 112).

In order to mitigate technological, social and health vulnerabilities, the Brazilian government established Productive Development Partnerships (PDPs) to encourage producers to grant technology transfer licenses to official pharmaceutical laboratories, thereby enabling the incorporation of active pharmaceutical ingredients into domestic pharmaceutical production. The aim of this measure was to facilitate local production, reduce drug costs, and ensure the government's strategic access to essential medications for the population (Fernandes et al., 2024, 3).

The process was divided into four phases. Phase I involved submitting and analysing project proposals, which led to a commitment agreement being reached between the Ministry of Health (a public institution) and its partners. Phase II marked the start of monitoring expected advances in production processes and technological development. Phase III saw the effective development of the product begin, accompanied by a contract for its acquisition between the Ministry of Health and the public institution. The final phase involved completing the development process and transferring the technology to the public institution for large-scale production (Ministério da Saúde, 2024b).

Another key factor for PDP production is the strengthening of programs aimed at reducing vulnerabilities within the SUS. According to the State that created the National Strategy for developing the health industrial complex, the aim is to expand and modernise the health economic-industrial complex (Complexo Econômico-Industrial da Saúde – CEIS) (Fernandes et al., 2024, 3).

A patent-holding company with a compulsory license may define to whom the technology will be supplied, under what conditions, and in which countries the medication will be made available. However, before granting a compulsory license, it is essential to consider the purpose of the authorization and whether adequate remuneration will be provided, factors that depend entirely on the countries where the product will be distributed, even if internal legislation exists in World Health Organization member states (Fernandes et al., 2024, 4).

As an alternative to compulsory licenses, which depend on the patent holder's authorization, there are mechanisms such as parallel imports and the Bolar exception. The former facilitates access to medications by enabling imports at lower prices, while the latter seeks to balance the social and commercial functions of patents by allowing countries to benefit from the information held by the patent holder, as well as producing data and obtaining regulatory approval (Fernandes et al., 2024, 4).

Within this broader context, which encompasses legal and political dimensions as well as industrial and innovation policies aimed at structurally reducing global health asymmetries, the PDP program stands out. Experts of the health sector view it as an alternative mechanism to compulsory licenses. The model harmonizes patent rights with the development of technological and innovative capacities linked to universal access in Brazil. As it promotes the voluntary licensing of strategic technologies rather than challenging patents, the PDP enables all stakeholders to benefit, making it the primary tool for addressing patent barriers and reducing vulnerabilities within the SUS (Fernandes et al., 2024, 4).

In April 2024, the Brazilian government participated in the launch of a new platform for pharmaceutical patent data, developed as a tool to strengthen the Health Economic-Industrial Complex. This platform organizes public database information dynamically, analyzes trends and gaps in pharmaceutical industrial applications, and fosters partnerships, new research, and insights into whether certain diseases or drugs are receiving disproportionate attention. By using this tool and its data analysis, companies can seek investments in underdeveloped sectors, driving expanded access to healthcare (Ministério da Saúde, 2024a).

In addition to facilitating patents and public access to healthcare and data collection, it is important to recognise that technology is the future of the country and is closely associated with younger generations. Children and adolescents, in particular, cannot imagine a world without technology. Therefore, technology should also be used to disseminate accurate information via digital platforms and social media, engaging these individuals in their right to health and encouraging them to seek appropriate treatment when needed.

One of the greatest challenges for public health is connect the right to health with technological development, aiming to ensure safe, effective, and increasingly efficient treatments that enable early diagnosis and disease management. Health, understood as a value inherent to the human person and prioritized as a fundamental aspect of life, also serves as a driver for technological and scientific advancement.

The desire to prolong life is the basis for the increased production of technology aimed at improving health, such as new vaccines, prosthetics, diagnostic equipment, robotic surgeries, electronic and integrated medical records, implants, transplants and artificial cells. These technologies, created by humans for humans, are becoming an increasingly vital tool for solving previously intractable healthcare problems (Lorenzetti et al., 2012, 437).

The intersection of health, children, adolescents and technology is possible if public authorities effectively implement policies that facilitate and expand access to healthcare, particularly by reducing the need for legal action to access expensive treatments, which continues to be a sig-

nificant cause of social inequality.

4. Judicialization For The Funding Of Medications And The Challenges Of High-Cost Drugs.

Within the judicial sphere, both users of the public health system – who must adhere to the SUS list – and users of the private health system – who face restrictions imposed by their health plans and the procedure list of the National Supplementary Health Agency (Agência Nacional de Saúde Suplementar – ANS) – often resort to the courts to challenge these imposed limitations, a phenomenon known as the “judicialization of health.” This term refers to the obtaining of medical procedures or medications through legal action, which has gained recent prominence due to the large number of court orders compelling municipalities, states, or the federal government to provide the requested services (Zago, 2016, 294). Such decisions have frequently been criticized as manifestations of “judicial activism,” particularly because of the rapid increase in health-related lawsuits.

Criticism of this extensive judicial intervention in public policy – resulting in state orders to provide medications or treatments not included in SUS lists and causing significant economic and fiscal impacts – stems from the effects these rulings have on government fiscal planning (Barroso, 2020, ebook).

Beyond the contentious debates surrounding social rights, it is important to highlight the disconnection between the Legislative, Executive, and Judiciary branches revealed by the judicialization of health. Although health is universal by nature, exercising these rights can have significant financial implications, sometimes resulting in the judicially mandated funding of expensive medications and procedures. This can potentially compromise equitable service provision to society.

In addition to the need for better financial planning – especially considering the substantial tax revenue involved – there is a criticism of the lack of communication between judicial decisions and their social and fiscal consequences.

From this perspective, Lima (2020, 91) argues that when the Supreme Court treats the right to health as untouchable, may unintentionally ignore the evolving needs of society. This approach, though common in past legal frameworks, can lead to excessive social pressure that overwhelms the system beyond its operational capacity.

Such issues may exacerbate current public health challenges directly by diverting significant public budgets to finance expensive medications as a result of lawsuits against municipal, state and federal governments. While these rulings can be justified in the face of insufficient government planning and action, they also intensify judicial activism, which is some-

times misguided.

Moreover, the growing number of demands regarding medications – whether in public or private health spheres – reflects the reality that much of the Brazilian population has only enough resources to survive and depends on the state of meeting their essential needs or alleviate suffering (Rocha, 2020, ebook).

It is also important to note that judges and magistrates handling such cases should not bear the burden of deciding life-or-death matters involving children or adolescents in the context of urgent injunctions for medication or treatment provision. The pressure faced by these public servants is considerable and must be acknowledged in discussions.

The cases involving complex issues of fundamental rights often expose structural problems, defined as conditions of systemic noncompliance – not necessarily illegal, but recognized as far from ideal, thus requiring reorganization or restructuring (Didier, 2020, pp. 103-104).

Such structural noncompliance refers to disruptions in the normal functioning of systems that demand judicial intervention for reorganization (Didier, 2020, pp. 103-104). Notably, structural problems are not limited to public sectors or fundamental rights violations; they can also be exemplified by private health insurers' issues with the National Supplementary Health Agency's procedure list³ (Didier, 2020, 105).

Consequently, the health-related judicialization fits the understanding of structural litigation, which is characterized by collective lawsuits addressing how bureaucratic structures – typically public ones – operate within specific sectors. These structures cause or allow ongoing violations, which result in collective claims. Solutions to such issues must involve more than the mere removal of violations; they require systemic restructuring to prevent recurrence (Vitorelli, 2018, 6-7).

The doctrine outlines the following characteristics of structural litigation: (i) it focuses on a systemic problem or state of noncompliance; (ii) it aims to transition from this state to an ideal one through the phased implementation of remedies; (iii) it involves a two-phase procedure: first,

³ The National Supplementary Health Agency's procedure list is the official list of medical procedures, treatments, exams, and healthcare services that Brazilian private health insurance providers are legally required to cover, as determined by the National Supplementary Health Agency (ANS). It serves as a minimum standard of coverage and includes items such as specialist consultations, lab tests, hospitalizations, surgeries, cancer treatments, and certain transplants. In 2022, Brazil's Superior Court of Justice ruled that this list is exhaustive (*taxativa*) – meaning health plans are not obligated to cover treatments outside the list, except in specific exceptional cases – leading to significant public and legal debate regarding patient rights and medical necessity.

recognizing the problem; then, establishing a restructuring plan; (iv) it is flexible, allowing atypical third-party interventions, executive measures, and judicial cooperation mechanisms; (v) it pursues consensual processes, including procedural adaptation (Art. 190, Code of Civil Procedure) (Didier, 2020, 107-108).

A key limitation of addressing structural problems through individual lawsuits is that prioritization collapses into a “first-come, first-served” system, favoring individuals who succeed in litigation rather than solving collective issues (Didier, 2020, 109).

As noted, the judicialization of health financing leads to the SUS – an egalitarian and universal system – having its budget appropriated by judicial decisions that benefit individuals who succeed in costly lawsuits, often to the detriment of the broader community.

While judicialization reflects preexisting inequalities, it also highlights difficulties in accessing legal representation, whether through private lawyers or public defenders. Furthermore, it underscores deficiencies in the Executive’s fiscal and budgetary planning, which is forced to “re-plan” in response to judicial mandates.

Thus, structural litigation appears to be a promising approach to resolving health-related disputes, particularly since it can address the collective claims that frequently emerge from individual cases, such as those in health law.

Structural decisions, aimed at reorganizing dysfunctional systems, are complex and must specify how goals will be achieved and what conduct is expected, accounting for the particularities of each case. Such decisions stand apart from “judicial activism” since they require flexibility and consensus among the parties involved (Didier, 2020, 109-115).

From another viewpoint, the Legislative and Executive branches, within their legal prerogatives and respecting constitutional principles, must identify priority risks and beneficiaries and, upon fulfilling their legal duties, deserve judicial support to avoid the breakdown of the tripartite system.

For instance, in a Supreme Federal Court ruling in 2019 discussing the provision of imported medicines without registration by the Brazilian Health Regulatory Agency (Agência Nacional de Vigilância Sanitária – ANVISA), the court recognized various scenarios: (i) experimental medicines; (ii) medicines with proven efficacy and safety but lacking registration; and (iii) off-label use medicines.

Regarding experimental medicines, the rapporteur understands that these are those still in research phases without scientific information to confirm their efficacy and safety. In such cases, administration may pose serious health risks to the patient, considering that at the end of the trials it might be concluded that the treatment is ineffective or worsens the condition.

Concerning medicines with proven efficacy and safety but without registration, these are understood to be those that have completed the various phases of testing and presented scientific and clinical evidence of efficacy and safety.

It is also noteworthy that, in the final considerations of the appeal, the rapporteur addressed off-label use, which is characterized by a medicine registered with the regulatory agency but prescribed for uses not contemplated in the official labeling.

It is emphasized that off-label and experimental medicines and treatments, beyond the usual authorizations and concessions granted by the judiciary, do not have the full endorsement of the scientific community or even regulatory bodies, which constitutes, in a way, an even greater problem in terms of health judicialization.

In a later decision (Supreme Federal Court, 2024), the court ruled medicines absent from the SUS list cannot be provided by the courts, regardless of cost. However, judicial provision may be granted for medicines that are registered with ANVISA but not incorporated into the SUS, provided that certain conditions are met. These include proof of refusal by the relevant authorities, evidence that the non-incorporation is illegal according to the National Commission for the Incorporation of Technologies in the SUS, a lack of substitutable alternatives within the SUS, evidence of efficacy based on robust scientific data, clinical necessity supported by a medical report, and demonstration of the claimant's financial inability to pay.

In the private health sector, Law No. 14.454/22 is significant because it defines an exhaustive list of procedures covered by the National Supplementary Health Agency. It also establishes criteria for medication coverage, including scientific evidence of efficacy, therapeutic planning or recommendations from CONITEC or internationally recognized health technology assessment bodies.

These parameters underscore the critical relationship between the Judiciary and public and private health systems. Decisions by superior courts and health legislation are essential to guarantee access to adequate treatments, enabling judges to assess coverage requests based on scientific criteria, thus promoting fair and effective judgments.

Protecting citizens' rights – especially those of children and adolescents – to proper healthcare must be a foremost public health concern. In many instances, the lack of medication inclusion in SUS lists can be life-threatening for patients dependent on specific therapies. Nonetheless, allowing unrestricted judicial approval of medications without clear criteria risks overburdening the judicial system, compromising public resource management and equity in healthcare access.

Therefore, an integrated judicial, executive, and legislative planning process, supported by structural dialogue, is crucial to achieving equi-

table results and ensuring adequate implementation of healthcare solutions.

In summary, institutional dialogue between the three branches of government and between law and medicine can lead to more equitable, fair and organised judicial decisions and healthcare services, ultimately providing citizens with access to their most essential needs as demanded by society.

5. Final Considerations.

Technological development in health during childhood and adolescence is a promising field but faces significant challenges, especially concerning the judicialization of medication funding. The fight for fundamental rights, such as access to health, is a central issue that must be addressed with seriousness and responsibility. Although judicialization is necessary in many cases, it cannot be seen as the sole solution to the failures of the health system.

The Federal Constitution establishes a legal framework that guarantees the right to health, but the realization of this right depends on the implementation of effective public policies and the adequate allocation of resources. The lack of communication between judicial decisions and the State's budgetary realities can lead to a vicious cycle of dissatisfaction and social unrest, exacerbating the crisis in public health. Therefore, it is essential that judicial decisions consider the fiscal and social impact of their rulings.

Furthermore, technological innovation must be integrated in a planned and sustainable manner into the health system. This implies a commitment by the State to prioritize investments in health, especially for vulnerable groups such as children and adolescents. Collaboration between the different branches of government and civil society is crucial to ensure that technological innovations are accessible and beneficial to all.

The judicialisation of healthcare in Brazil reveals a complex and multifaceted scenario in which individual demands for medication and treatment often conflict with the need for coherent fiscal and administrative planning. This phenomenon exposes not only inequality in access to healthcare, but also a disconnect between the legislative, executive and judiciary branches. This results in judicial decisions that, although motivated by the urgent need to help patients, may compromise the sustainability of the Unified Health System and the equitable provision of healthcare services. A more integrated and strategic approach is required that considers collective needs and promotes structural solutions.

Therefore, establishing effective dialogue between the various stakeholders – the government, the judiciary, health professionals and civil society – is fundamental, so that decisions regarding the funding of medi-

cations and treatments are based on clear, scientific criteria. Strengthening this dialogue could lead to a fairer health system that can meet the needs of the population in a balanced way and ensure access to essential treatments, particularly for children and adolescents, who are the most vulnerable. Collective solutions must be prioritised to not only resolve individual disputes, but also to restructure the health system as a whole, promoting equity and social justice.

In short, the future of health in childhood and adolescence depends on a collective commitment that transcends judicialization and seeks sustainable and integrated solutions. It is imperative that different sectors of society unite to develop public policies that not only guarantee access to medications and treatments but also promote prevention and health education. The realization of health rights must be a priority, reflecting a vision that recognizes the interconnections between technology, social justice, and the well-being of younger generations. Thus, by strengthening collaborations between the State and the Judiciary, it will be possible to build a more resilient and inclusive health system, capable of meeting the needs of all, especially the most vulnerable: children and adolescents.

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14.

SUSTAINABILITY IN THE FASHION INDUSTRY AND THE IMPACT OF JUDICIAL REGULATIONS: A TOOL FOR CITIZENSHIP BUILDING

*Flávio de Leão Bastos Pereira**

*Beyond different languages and cultures,
can we unite through the emotions we share?*
Satoshi Kondo, Creative Director of Issey Miyake**

1. Introductory Notes.

The world is currently experiencing one of the most critical and significant moments imaginable, not only due to the already extensively demonstrated impact of productive activities and human consumerism reaching unsustainable levels beyond the regenerative capacity of biomes, ecosystems, wildlife recovery, etc., but also due to a new stance taken by governments, citizens, and even market players.

They are questioning not only the opinions suggesting that global consumption levels should be better adjusted to the planet's new environmental reality, but more importantly, they are opposing global measures that are being implemented based on scientific criteria and parameters. In other words: science itself has been under attack, with its conclusions politicized and turned into partisan issues by governments – an alarming factor that puts human existence at risk from multiple perspectives: existential, economic, cultural, and so on.

It is no longer a matter of assumption or conjecture that large-scale population displacements are being caused by climate change; nor are the social and economic consequences of the depletion of natural resources or the extinction of global wildlife. These are established facts

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** L'OFFICIEL. O espírito de inclusão cultural de Issey Miyake na Semana de Moda de Paris – A roupa que conecta emoções e pessoas vista por Satoshi Kondo. Disponível em <https://www.revistalofficiel.com.br/fashion-week/o-espírito-de-inclusão-de-issey-miyake>. Acesso em 15 Nov 2024.

with direct consequences for the fashion industry, one of the sectors with the most significant impact on ecosystems.

In light of the current political, economic, social, and environmental context, we are facing a crucial juncture in which societies – and, in the scope of this article, productive actors across all continents – are confronted with decisions that will determine how future generations will live. Part of the challenge and success in confronting this situation lies in establishing virtuous solutions to conflicts arising from the tensions between production, environment, labor dignity, and the obligation to respect diversity. These solutions depend heavily on decisions and guidelines adopted by the Judiciary.

Thus, balancing economy and regulation, production and conflict resolution, can solidify the process of building citizenship and access to the benefits generated by productivity, including in the textile sector. This sector is often marked by the necessity of State intervention in various situations, such as detecting and combating slave labor in its supply chains or preserving the diverse cultures that exist across the globe.

Within this context, we analyze the contribution of the Judiciary (as well as other official institutions, such as the Ministry of Labor, for example) to the development of socially and governance-friendly environments, focusing on the role and responsibility of the fashion industry in facing the new challenges presented in a globalized and digital consumer landscape¹.

This analysis also touches upon the United Nations Sustainable Development Goals (SDGs) No. 12 and 13.

2. The Fashion Industry And The United Nations Sustainable Development Goals.

The United Nations, based on studies conducted by experts such as John Ruggie, developed its vision regarding the role of the private sector, public companies, NGOs, governments, political leaders, activists, and civil society² during the United Nations Conference on Sustainable De-

¹ On August 1st, 2018, humanity exceeded the level of resource consumption beyond which the planet can no longer regenerate itself in time to reproduce its natural resources. This date was designated as Earth Overshoot Day. See: Federal University of Minas Gerais. *Humanity consumes more than the Earth is able to produce – August 1st was considered Earth Overshoot Day*. Available at: <https://ufmg.br/comunicacao/noticias/humanidade-consome-mais-do-que-a-terra-e-capaz-de-produzir>. Accessed on Oct. 30, 2024.

² Ideia Sustentável. *The 17 Sustainable Development Goals (SDGs)*. Understand what the 2030 Agenda is and what the United Nations Sustainable Development Goals (SDGs) are. Available at: <https://ideiasustentavel.com.br/objetivos-de>

velopment in Rio de Janeiro (2012). The central concerns were sustainability and inclusion, with goals to be achieved by stakeholders through proposals aligned with productive needs and based on a relationship of balance and harmony.

It can be said that sustenance and sustainability form an inseparable pair when envisioning a safer and fairer world, especially for future generations. This is where we find a fundamental point of convergence between regulatory decisions and their impact on the development of the fashion industry. As an example, we can mention the donations made by companies such as H&M and Decathlon in support of environmental projects, amounting to €900,000 (nine hundred thousand euros), in response to allegations that their product sustainability campaigns were not sufficiently clear to consumers. In addition to the donation, both corporations committed to the Dutch Authority for Consumers and Markets (ACM) to provide more transparent information to consumers, aiming to minimize the risk of misleading practices³.

The example above illustrates how regulatory and oversight bodies can strengthen citizenship.

The proposition mentioned above is based on the consideration of the following factors: sustainable consumption, climate change, economic inequality, innovation, diversity, peace, and justice. The Sustainable Development Goals (SDGs) replaced the so-called Millennium Development Goals (MDGs), which were defined in 2000 during the Millennium Summit.

In this regard⁴:

desenvolvimento-sustentavel/#:~:text=Os%20Objetivos%20de%20Desenvolvimento%20Sustent%C3%A1vel%20foram%20definidos%20a%20partir%20de,que%20respeitasse%20o%20meio%20ambiente.&text=Integram%20temas%20como%20consumo%20sustent%C3%A1vel,%20C%20diversidade%20C%20paz%20e%20justi%C3%A7a. Accessed on Nov. 15, 2020.

³ Fashion United. H&M and Decathlon to adapt sustainability claims following report by Dutch watchdog. Disponível em <https://fashionunited.uk/news/business/h-m-and-decathlon-to-adapt-sustainability-claims-following-report-by-dutch-watchdog/2022091365119>. Acesso em 30 Out 2024.

⁴ I IDEIA SUSTENTÁVEL. *The 17 Sustainable Development Goals (SDGs)*. Understand what the 2030 Agenda is and what the Sustainable Development Goals (SDGs) established by the UN are. Available at: <https://ideiasustentavel.com.br/objetivos-de-desenvolvimento-sustentavel/#:~:text=Os%20Objetivos%20de%20Desenvolvimento%20Sustent%C3%A1vel%20foram%20definidos%20a%20partir%20de,que%20respeitasse%20o%20meio%20ambiente.&text=Integram%20temas%20como%20consumo%20sustent%C3%A1vel,%20C%20diversidade%20C%20paz%20e%20justi%C3%A7a>. Accessed on Oct. 15, 2024.

The term Sustainable Development was first used in 1972, at the Stockholm Conference. From that point on, a global movement for sustainability began, and the UN started organizing conferences that brought together world leaders to discuss and promote sustainable development initiatives in their countries. In 2000, during the Millennium Summit, the Millennium Development Goals (MDGs) were created, which are the predecessors of the SDGs. In Brazil, they became known as the ‘8 ways to change the world,’ through a global campaign led by Brazilian communicator Percival Caropreso. The Sustainable Development Goals then replaced the MDGs, absorbing unmet goals and extending the commitment to all sectors of global society: public and private companies, NGOs, governments, political leaders, activists, and civil society. There are 17 goals in total, which converge with one another. They cover themes such as sustainable consumption, climate change, economic inequality, innovation, diversity, peace, and justice.

It is worth noting that the Sustainable Development Goals unfold into approximately 169 targets, forming what is known as the 2030 Agenda, as formalized in the document “Transforming Our World: the 2030 Agenda for Sustainable Development” (A/70/L.1)⁵.

The fashion industry has been improving its production dynamics with each season, each launch, and with the help of technology, increasingly aligning with sustainable and inclusive criteria – at least in part. Synthetic materials are increasingly replacing animal-derived raw materials, and major fashion launches around the world have been featuring the participation of minorities and historically marginalized social groups. These actions not only break paradigms in a sector originally oriented toward elites – with high prices that projected status and power – but also reflect a transformation of the industry’s values.

The trajectory of some companies in the fashion sector toward a more responsible commitment to environmental and climate issues is largely due to the growing number of lawsuits filed by consumers and non-governmental organizations (NGOs) against suppliers whose production processes lack mechanisms to reduce greenhouse gas (GHG) emissions or whose sustainability claims are misleading.

A significant example is the ongoing lawsuit in the United States, *Lee v. Canada Goose US, Inc.*, in which a consumer sues the mentioned company, known for selling clothing made with animal fur. The company labels claim the fur is sourced through “humane” methods – something that may not be true, representing a typical case of greenwashing⁶.

⁵ PLATAFORMA AGENDA 2030. *The 2030 Agenda for Sustainable Development*. Available at: <http://www.agenda2030.com.br/sobre/>. Accessed on Nov. 15, 2020.

⁶ CASETEXT. *Lee v. Canada Goose US, Inc.* Available at: <https://casetext.com/>

However, there is still a long road ahead. According to the organization Stand.Earth, the fashion industry is responsible for 10% of the annual global carbon dioxide (CO₂) emissions⁷. Therefore, the Judiciary's role in regulating issues such as slave labor, intellectual property, cultural appropriation, and environmental matters is fundamental – ultimately contributing to the construction of citizenship.

3. Social Responsibility And Legitimacy.

The fashion industry has not remained immune to the impacts and influences of globalization, especially regarding the new responsibilities imposed on the productive sector, which mark a real transformation in corporate identity and culture. With this in mind, we emphasize that the old formulas and parameters for defining entrepreneurial activities are no longer compatible with current environmental demands, nor with the expectations of societies whose consumers – generation after generation – have become increasingly demanding and aware.

However, between awareness and the ability to make sustainable choices, it is essential that infrastructure, technology, and equitable distribution of public services make conscious decision-making feasible. Regarding the fashion industry, although its consumer market has traditionally had the luxury of choice – mainly because it involves the consumption of products considered “luxurious” and accessible only to a restricted and wealthy audience – leading designers are now striving to align their professional goals and production with social aspirations. One example is the use of runway models from historically vulnerable and marginalized socioeconomic groups.

This concern also stems from the changes that have taken place in recent decades, both in terms of the expansion and transnational nature of the offering of goods and services in an interconnected world, and in terms of the growing awareness of citizens in various countries. These factors can either sustain the social legitimacy of companies or lead to the collapse of their reputational capacity.

The convergence of these elements – namely the need for strategic global vision, the expansion of operations in search of new markets, and the growing influence of corporations over both States and consumer behaviors – requires continuous review and renewal of values, ethical

case/lee-v-canada-geese-us-inc. Accessed on Nov. 1, 2024.

⁷ EXAME. Fast Fashion: como a moda pode ameaçar o meio ambiente? Disponível em <https://exame.com/negocios/fast-fashion-moda-ameacar-meio-ambiente/>. Acesso em 1º Nov 2024.

references, and even the culture of productive actors⁸.

Thus, for example, it is noteworthy that while some major fashion brands exploit multicultural references without ensuring that the intangible collective properties they use generate any social or economic benefit for the traditional communities that created them, other companies and designers condition their business models on the redistribution of wealth in equitable ways. This may take the form of protecting the environment in which production and consumption occur, or of profit sharing in favor of those communities.

This reveals not only economic protagonism, including in the fashion industry, but also a socio-environmental protagonism.

These considerations show that respect for certain values essential to the realization of human rights is not limited to norms addressed solely to States – they also apply to companies, including those in the fashion sector. In this sense, not only is the revision and adaptation of the entire production chain in alignment with environmental preservation a necessary element for the fashion industry today, but so too is a critical evaluation of the industry's responsibility in building more equitable and socially committed societies.

This means that corporate decisions and strategies should not be guided solely by goals tied to asset accumulation and profit-seeking, but also by the impacts those decisions have on societies. In particular, the fashion industry has a high potential for environmental impact. In this regard⁹:

“[...] The ‘cost of dressing well’ is both financial and environmental. The fashion/textile industry is as polluting as the oil industry: harmful to the environment, recent data shows that the fashion industry – especially in relation to the fast fashion market – is the second most polluting economic activity in the world. [...]”

Social legitimacy involves ethical, rational, and legal conformity demonstrated by a corporation within an appropriate context of social engagement and responsibility. Once lost, this social legitimacy can hinder or even prevent the continuation of operations, even if such operations are legally compliant. Therefore, considering human rights paradigms in the implementation and refinement of operations – especially transnational ones – in all dimensions leads to corporate legitimacy and

⁸ Ruggie, Quando Negócios São Apenas Negócios – As Corporações Multinacionais e os Direitos Humanos. São Paulo: Planeta Sustentável, 2014.

⁹ Figaro, Desafios Para a Sustentabilidade na Indústria da Moda e Aplicabilidade de Princípios de Direito Internacional Ambiental. Obra coletiva Fashion Law – Direito da Moda. Soares, São Paulo: Almedina, 2019, 266.

reputational consolidation.

For example, attention to religious and cultural references, which vary from region to region across the globe, demands a careful analysis by the fashion industry of how it interacts with the societies in which it operates.

4. Sustainable Production And Consumption In The Fashion Industry: United Nations Sustainable Development Goal n. 12.

“The 2030 Agenda is our Global Declaration of Interdependence.”
(António Guterres, UN Secretary-General)

For several years now, the fashion industry has been implementing a variety of initiatives aimed at fostering a broader dialogue with human rights – often with successful outcomes. The growing value of brands associated with sustainability, and conversely, the negative repercussions for those whose operations and supply chains use raw materials incompatible with biome preservation or intangible cultural assets stemming from sociological relationships, has led to the emergence of alternative approaches. One such example is the so-called *eco design*, which is based on essential phases. In this sense¹⁰:

Eco design incorporates ecological concerns into professional practices, with the goal of restoring balance among ecological, environmental, and anthropological – cultural systems. Thus, an eco-product must be planned, designed, and evaluated according to the seven phases of eco design, namely: identification of the product's life cycle; energy and material balance of the process; quantification of losses, waste, and residue generation throughout the process; identification of performance indicators; establishment of benchmarking parameters or databases related to the process; creation of structures to develop solutions for non-conformities in various process activities; and identification of “gaps” or bottlenecks in the process.

This topic, therefore, deals with dynamics that go far beyond merely adopting new production processes. It entails a genuine effort to redefine the role of the fashion industry in the civilizational advancement of contemporary societies and in securing the well-being of present and future generations. These innovations often result in legal and regulatory challenges – and even clashes with outdated legislation – prompting judicial intervention to resolve issues that frequently involve rights violations

¹⁰ Barros, O Luxo do Lixo: Eco Design Um Nova Perspectiva Para a Indústria da Moda, 3/4. Disponível em http://antennaweb.com.br/edicao6/artigos/edicao-6artigo4_eco.pdf. Acesso em 15.11.2020.

and inequalities.

Such redefinition is especially significant for human rights, given the frequent presence of violations in the fashion industry's supply chain, including child labor, slave labor, dumping of chemical waste into nature, the controversial use of animal fur, among others. This once again underscores the importance of courts in protecting the fundamental rights that shape citizenship in mass and digital societies.

It is therefore critical to understand the constitutional principles that govern the exercise of fundamental rights to entrepreneurship and economic activity – especially the social function of property, consumer and environmental protection, and the reduction of social and regional inequalities.

As a result, any judicial decision involving economic activities – and, in the context of this study, the fashion industry – must incorporate these political-constitutional elements. Otherwise, it risks neglecting the need to guarantee fundamental rights in balance with the development of one of the world's most employment-intensive sectors. In fact, the total revenue of the (textile) production chain rose from R\$190.91 billion in 2021 to R\$193.19 billion the following year¹¹.

In discussing the equation between production, sustainability, and citizenship in the fashion industry, and the impact of regulatory decisions on the sector, we highlight the need to establish principles, regulatory frameworks, and rules for transnational business activities that affect the environment – as is the case in this context.

Accordingly, we propose an analysis of the United Nations Sustainable Development Goal N. 12, which addresses sustainable production and consumption, with the following objectives¹²:

- Implement the 10-Year Framework of Programmes on Sustainable Consumption and Production, with all countries taking action and developed countries taking the lead, considering the development levels and capacities of developing countries;
- By 2030, achieve the sustainable management and efficient use of natural resources;

¹¹ IEMI – Inteligência de Mercado. Relatório Brasil Têxtil aponta crescimento discreto nos últimos anos. Disponível em <https://iemi.com.br/relatorio-brasil-textil-aponta-crescimento-discreto-nos-ultimos-anos/>. Acesso em 30 Out 2024. Sobre este tópico consultar, também, Compliance em direitos humanos, diversidade e ambiental. Flávio de Leão Bastos Pereira, Rodrigo Bordalo Rodrigues. – São Paulo: Thomson Reuters Brasil, 2021. – (Coleção de compliance; v. VI. Coordenação Irene Patrícia Diom Nohara, Luiz Eduardo de Almeida).

¹² United Nations (UN). *Goal 12: Responsible Consumption and Production*. Available at: <https://unric.org/pt/objetivo-12-producao-e-consumo-sustentaveis/>. Accessed on Nov. 16, 2020.

- By 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses;
- By 2020, achieve environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release into air, water, and soil to minimize adverse impacts on human health and the environment;
- By 2030, substantially reduce waste generation through prevention, reduction, recycling, and reuse;
- Encourage companies, especially large and transnational ones, to adopt sustainable practices and to integrate sustainability information into their reporting cycle;
- Promote public procurement practices that are sustainable, in accordance with national policies and priorities;
- By 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature;
- Support developing countries to strengthen their scientific and technological capacity to move toward more sustainable patterns of consumption and production;
- Develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products;
- Rationalize inefficient fossil fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including through tax restructuring and phasing out harmful subsidies, where they exist, to reflect environmental impacts, while taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a way that protects the poor and the affected communities.

Each of the above targets set by UN SDG No. 12 constitutes an essential phase in realizing citizenship through economic and productive activities, as one can see through careful analysis. Especially concerning the fashion industry, adherence to the principles listed above is closely linked to the very nature of the industry's productive dynamics.

Note that these principles are not only part of soft law – they also appear in national legislation in various forms, which in itself constitutes a significant challenge for transnational operations. The key topics involve rational use of natural resources (including fossil fuel sources); development of mechanisms to control environmental impacts with greater respect for local cultures and products; and the promotion of technological and scientific pathways capable of reducing predatory production and consumption.

Among these principles, it is worth highlighting the broad range of actions for which the fashion industry – especially in its transnational operations – is responsible. These actions align with the idea of preserving not only biomes but also cultural diversity. These principles also reflect the strengthening of what is known as Corporate Social Responsibility (CSR) on the international stage, which already imposes economic sanctions and restrictions on companies whose supply chains negatively affect the environment.

As a topic connected to the aforementioned aspects, it is undeniable that economic activities must find harmony in their methods and productive operations with environmental preservation – not merely to prevent the impacts and climate changes affecting the planet (a stage that, unfortunately, we have already surpassed), but to mitigate and slow such changes. Hence the fashion industry's growing need to structure its operations – across its entire supply chain – in alignment with the guidelines of United Nations Sustainable Development Goal No. 13: Climate Action.

4.1. Climate Action: Goal n. 13.

The Sustainable Development Goal N. 13 is based on actions such as¹³:

- Strengthening resilience and adaptive capacity to climate-related hazards and natural disasters;
- Integrating climate change measures into national policies, strategies, and planning;
- Improving education, awareness-raising, and human and institutional capacity on climate change mitigation, adaptation, impact reduction, and early warning;
- Implementing the commitment made by countries under the United Nations Framework Convention on Climate Change (UNFCCC), especially the mobilization of US\$100 billion per year by 2020 to address the needs of developing countries and enable their rapid and necessary response to climate change challenges, including the capitalization of the Green Climate Fund;
- Enhancing the capacity of least developed countries and small island developing States to plan and manage responses to climate change, with a focus on women, youth, local and marginalized communities;
- Recognizing and consolidating the UNFCCC as the main intergovernmental forum for negotiating the global response to climate change.

¹³ United Nations (UN). *Goal 13: Climate Action*. Available at: <https://unric.org/pt/objetivo-13-acao-climatica/>. Accessed on Oct. 17, 2024.

The fashion industry, through its activities, has a high potential to implement the principles of SDG No. 13, especially in the educational realm and in raising awareness among not only its consumers but society as a whole. Fashion – and its Market – has long since moved beyond elitist circles and become a vehicle for projecting “ways of thinking,” for expressing alternative behaviors, and for serving as a platform for socio-economic inclusion and protest.

We can therefore understand the importance of ensuring that judicial decisions regarding issues and conflicts in this sector are thoroughly constitutional, in line with international conventions, and able to anticipate their impacts on the industry. After all, fashion, a healthy environment, and citizenship form a virtuous equation.

5. Reducing Inequality As A Vehicle For Sustainability – A Success Case In The Fashion Industry.

[...] Some of the best fashion designers in the world live in the mountains or remote regions. Many do not even speak Spanish, only their native dialect... We want to prevent the extinction of Mexican craftsmanship. We want artisans to live with dignity from their work and not be forced to move to cities in search of better opportunities [...]
Carla Fernández, Ateliê Flora, Mexico

As previously mentioned, this article focuses on showing that the fashion industry has demonstrated a significant capacity to transform itself from an elitist and often environmentally harmful market into a collaborative and highly effective force. The aesthetic experiences provided by the industry have immense potential to raise societal awareness, especially by conveying perspectives not usually considered by ordinary citizens in their daily lives.

Reducing economic inequality and exclusion, and combating prejudice, racism, misogyny, and homophobia are, beyond being natural outcomes of the international human rights protection system, essential aspects of the SDGs. These goals go beyond environmental concerns, extending into social and economic realms.

For instance, it is impossible to discuss sustainability when 690 million people were facing hunger in 2019 – an increase of 10 million from 2018 and nearly 60 million over five years¹⁴. Not surprisingly, as highlighted earlier, the SDGs include measures such as reducing per capita

¹⁴ UOL. ONU: Insegurança alimentar aumenta no Brasil e atinge 43 milhões de pessoas. Jamil Chade. Disponível em <https://noticias.uol.com.br/colunas/jamil-chade/2020/07/13/onu-inseguranca-alimentar-aumenta-no-brasil-e-atinge-43-milhoes-de-pessoas.htm?cmpid=copiaecola>. Acesso em 16 Out 2024.

food waste globally – at retail and consumer levels – and along production and supply chains, including post-harvest losses. The reduction of inequality is likewise central. Food insecurity is intrinsically linked to sustainability.

In this sense, there are indeed success stories within the fashion industry and among its designers, though there are also production choices that conflict with global sustainability goals – often causing serious harm to brand reputations. Socioeconomic disparities, especially in developing countries; environmental contingencies; and the depletion of the planet's resources have also put pressure on renowned fashion brands and their suppliers. This proves that the entire supply chain is subject to global sustainability standards.

A relevant example involves reports of boycotts against Brazilian leather producers by major fashion brands, based on concerns over sustainability and the lack of transparency in the Brazilian leather supply chain¹⁵.

Interestingly, while such business suspensions were initially justified under broad claims of environmental concern and lack of supply chain security, they were also grounded in the issue of fires in Brazilian forests and biomes, which worsened from 2019 onward¹⁶. In this regard¹⁷:

H&M, the world's second-largest fashion retailer, stated on Thursday that it had temporarily stopped buying leather from Brazil due to environmental concerns linked to fires in the Amazon. 'Due to the severe fires in the Brazilian part of the Amazon rainforest and their connections to cattle production, we decided to temporarily suspend leather from Brazil,' said H&M in an email statement. The ban will remain in effect until credible assurance systems are in place to verify

¹⁵ Folha De São Paulo. Empresa dona das marcas Kipling, Timberland e Vans confirma suspensão de compra de couro brasileiro – VF Corporation diz que defende vida sustentável e já não tem segurança sobre matéria prima do Brasil. Disponível em <https://www1.folha.uol.com.br/mercado/2019/08/gestora-da-kipling-timberland-e-vans-confirma-suspensao-de-compra-de-couro-brasileiro.shtml>. Acesso em 16 Out 2024.

¹⁶ Deutsche Welle. Desmatamento na Amazônia cresce 85% em 2019 Segundo dados do Inpe, área desmatada chegou a 9.165,6 quilômetros quadrados no ano passado. Esse foi a maior devastação no bioma registrada nos últimos cinco anos. Disponível em <https://www.dw.com/pt-br/desmatamento-na-amaz%C3%B4nia-cresce-85-em-2019/a-52006186>. Acesso em 16 Out 2024.

¹⁷ Reuters-Uol. H&M suspende compra de couro do Brasil devido a queimadas da Amazônia. Disponível em <https://noticias.uol.com.br/meio-ambiente/ultimas-noticias/redacao/2019/09/05/hm-suspende-compra-de-couro-do-brasil-devido-a-queimadas-da-amazonia.htm?cmpid=copiaecola>. Acesso em 16 Out 2024.

that the leather does not contribute to environmental damage in the Amazon. [...]

At first glance, one might ask: what is the connection between a renowned and valued fashion brand and the fires that are destroying large parts of Brazilian biomes under the State's omission – or its inability to act effectively? We answer by returning to our earlier propositions about Corporate Social Responsibility (CSR), the social legitimacy of the business sector, and the industry's capacity to impose the most effective sanction upon negligent States and actors in the productive sector: the economic sanction, in response to environmental degradation and the failure to uphold the “green clause” in their supply chains.

From a legal standpoint, there are numerous international norms and parameters that justify the growing pressure for environmental protection. Among them, we can highlight: the Stockholm Conference (1972); the UN Framework Convention on Climate Change (Rio de Janeiro, 1992); the Kyoto Protocol (1997); Agenda 21 and its Implementation Plan formulated in Johannesburg (2002); the Political Declaration of the World Summit on Sustainable Development, which granted debt relief to poor countries; and the ILO Convention N. 169/1989, among others.

It is also important to highlight that the Inter-American System provides a clear normative and jurisprudential foundation for environmental protection. Although these norms are directed primarily at States, they are indirectly addressed to the productive sector, as it is the States' responsibility to authorize and regulate such operations. In the case of Brazil, as previously noted, environmental protection and the reduction of regional and social inequalities are guiding principles for economic activities, according to Article 170 of the 1988 Constitution of the Federative Republic of Brazil.

We can also mention other international instruments that support a vision of the economic-productive sector as one inspired by sustainability in the design of its operations, such as: the American Declaration of the Rights and Duties of Man (Bogotá, 1948); the Charter of the Organization of American States (Bogotá Charter, 1948); the American Convention on Human Rights (San José Pact, 1969); and its two additional protocols, including the Protocol of San Salvador (1988), relating to Economic, Social, and Cultural Rights.

Additionally, the Inter-American Democratic Charter of 2001 states in its Article 15¹⁸:

¹⁸ Comissão Interamericana De Direitos Humanos. Carta Democrática Interamericana. Disponível em <https://www.cidh.oas.org/basicos/portugues/r.Cartademocr%C3%A1tica.htm>. Acesso em 16 Out 2024.

The exercise of democracy promotes the preservation and proper management of the environment. It is essential that the States of the Hemisphere implement environmental protection policies and strategies, respecting various treaties and conventions, in order to achieve sustainable development for the benefit of future generations.

Article 11 of the Additional Protocol of San Salvador also establishes that¹⁹:

Every person has the right to live in a healthy environment and to have access to basic public services,” and that “States Parties shall promote the protection, preservation, and improvement of the environment.

Therefore, we can identify another conventional guideline that clearly supports the formulation of conventional parameters for the work of official institutions, including the Judiciary.

We must also mention the set of Resolutions within the Inter-American System that constitute what is known as *Greening International Law*, especially:

- Resolution No. 1819 – “Human Rights and the Environment”;
- Resolution No. 1896 – “Human Rights and the Environment in the Americas”;
- Resolution No. 1926 – “Human Rights and the Environment in the Americas”.

In this context, we highlight a significant example of a changing posture within the fashion world – this time from Mexico. We refer to the designer Carla Fernández, from the Ateliê Flora, who was listed among the 40 most influential figures in global fashion by ID magazine in 2009 and who won the Young Fashion Entrepreneur of the Year Award in 2008. She also received the Prince Claus Award (recognizing artists who contribute to cultural development). Her artisanal-industrial production has been studied at conferences held by institutions such as Harvard University, the Massachusetts Institute of Technology (MIT), Universidad Iberoamericana, the Fashion Institute of Technology (FIT), and the Institute of Contemporary Arts in London. Her creations have consistently appeared in prestigious shows by designers like John Galliano, Jean-Paul Gaultier, and Karl Lagerfeld.

In runway shows featuring the Mexican designer’s creations, not only can one see models representing various ethnicities, genders, cul-

¹⁹ Comissão Interamericana De Direitos Humanos. Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria e Direitos Econômicos, Sociais e Culturais, “Protocolo de San Salvador”. Disponível em <http://www.oas.org/pt/cidh/mandato/Basicos/sansalvador.asp>. Acesso em 16.11.2020.

tures, and physical disabilities – breaking numerous stigmas – but the entire production process, from sketching to sewing, remains faithful to the origins of the ideas and authorship behind the designs. This ensures the economic, social, and intellectual sharing of benefits. It reflects the realization of a fashion sector committed to the value of handcrafted creations inspired by ancestral knowledge and the arts of traditional peoples, preserving cultural heritage and sustainable indigenous and ancient techniques²⁰.

Judiciaries in various countries are increasingly being called upon to rule on situations involving *cultural appropriation* – that is, the unrecognized or inappropriate adoption of practices, customs, or aesthetics of a social or ethnic group by members of another, typically dominant, group²¹.

The restoration of intangible property rights of different cultures – whose artisanal and cultural production is an important source of income – by the Judiciary has an immediate restorative effect for these peoples, thus realizing the concept of global multicultural citizenship.

6. Final Considerations.

The fashion industry can no longer assume its transformative and inclusive role without being fully committed to environmental and cultural sustainability inspired by social, economic, and cultural needs.

The planet no longer has time to wait for the awareness of States and their governments – many of which are unstable or resistant to environmental preservation, or even ethnocentric. This fact generates significant and far-reaching impacts on the economy and the productive sector, including the fashion world and, most importantly, on the preservation and expansion of citizenship. Hence, the crucial role of the Judiciary as one of the primary instruments of self-correction under democratic regimes.

Fashion production and creation, by their very nature, possess high transformative potential in society – not only because they reflect the human being and contemporary desires, but also because, unlike most other productive sectors, fashion has the unique ability to immediately give visibility to the most vulnerable and discriminated groups in the

²⁰ El Bazaar Sábado. Disponível em https://www.bazaarsabado.com/en/16_carla-fern%C3%A1ndez. Acesso em 16 Out 2024.

²¹ Vogue. Glossário da Moda Sustentável: impactos sociais, culturais e econômicos. <https://vogue.globo.com/premio-muda/noticia/2020/11/glossario-da-moda-sustentavel-impactos-sociais-culturais-e-economicos.html>. Acesso em 30 Out 2024.

world through unforgettable aesthetic experiences.

Therefore, by considering the fashion industry's entire production chain from all angles and dimensions, the adoption of new and more democratic ethical, moral, legal, and human standards can undoubtedly transform this industry into one of the planet's most important allies.

It's still to be seen...

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15.

ADOPTION OF STAKEHOLDER CAPITALISM TO MITIGATE DISCRIMINATORY BIASES IN MACHINE LEARNING ALGORITHMS

*Clara Duarte Fernandes**

1. Introduction.

The use of Artificial Intelligence can be considered a milestone in human history, ushering in the Fourth Industrial Revolution and creating the so-called Information Society. With individuals increasingly connected to their smartphones, the notion of time and space has changed, impacting global economic dynamics, social relations, and democratic balance. But despite the countless benefits of this technological innovation, its complexity and the lack of regulation present some negative points.

Due to the lack of transparency in the construction, operation and verification of algorithms, certain biases are embedded in mathematical formulas, whether on purpose or not. The stage at which a particular failure occurs can vary, as will be seen, because, contrary to what people might think, Artificial Intelligence is not a purely neutral and objective entity, since its operation depends on the creation and maintenance by human beings who have individual feelings and opinions.

This research aims to analyze the operation of the machine learning subtype and the discriminatory biases that exist in its operation, seeking to answer the following question: Considering the speed with which Artificial Intelligence evolves, beyond to State regulation, what could be done to mitigate the violation of the fundamental rights of individuals or groups discriminated against by algorithms on digital platforms?

In order to achieve this objective, the article will be divided into three sections. The first section consists of an analysis of how the machine learning algorithm works and the possible biases that can be detected, using exploratory methodology and a bibliographic review of scientific articles and primary literary books. The second section, in turn, is

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dedicated to an analysis of concrete situations in which algorithms have deepened and perpetuated society's structural prejudices, such as gender discrimination and racism, using a case study methodology, based on the selection of three cases involving digital platforms. Finally, the third section aims to demonstrate the economic impacts of using biased algorithms applying the hypothetical-deductive method of literature review. A possible solution to the lack of transparency in their operation is the adoption of the stakeholder capitalism model and good corporate governance practices, in which the role of the State, in addition to regulation itself, can be observed in regulated self-regulation, modifying the values and operations of the companies that implement and develop the algorithms studied.

2. Algorithmic Biases.

The Industrial Revolutions have shaped not only the economy of their time, but also the lifestyles and social organization of societies. At the end of the 18th century – during the First Revolution – the work was transformed by the mechanization of processes using the steam engine, which had previously been purely artisanal. The Second Revolution, in the mid-19th century, saw the introduction of automated processes, allowing for mass production that was divided into specialized tasks. The Third Revolution, in the middle of the 20th century, in its turn, led to the use of high technologies in production systems, improving previous procedures in a more robotic manner, and reducing the gap between society and emerging technological modalities¹.

With the advancement of technologies in the 21st century, society is experiencing the Industry 4.0 – or the fourth Industrial Revolution – and the rise of Artificial Intelligence² in daily life, providing countless advances in automation, processes of distribution in the market, data analysis and decision-making³, as well as the digitalization of daily life,

¹ Santos, et al. Indústria 4.0: desafios e oportunidades. Revista Produção e Desenvolvimento, v. 4, n. 1, 111-124, 2018, 114.

² According to Wolfgang Hoffman-Riem, the concept of artificial intelligence consists of a cross-cutting technology that aims to enable computers, through the use of large amounts of data (big data), appropriate computational capabilities and specific analysis and decision-making processes, to achieve results that come close to human capacity or even surpass it, at least in some aspects. Hoffman-Riem, Wolfgang. Inteligência Artificial como Oportunidade para a Regulação Jurídica. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 12.

³ Chamoux, The Digital Era 2: Political Economy Revisited. 1st ed. London: Wiley, 2019, 58-59; De Lima Viana, De Macedo, Inteligência Artificial E A Discriminação Algorítmica:: Uma Análise Do Caso Amazon. Revista Eletrônica

with societies remaining hyperconnected through social networks and other digital platforms. Thus:

With its ambitious potential, Industry 4.0 promises greater operational efficiency, productivity gains, growth and improved competitiveness, as well as the development of new business models, services and products. (...) With it come opportunities that will enable companies to integrate customer needs into their development and production processes⁴.

Through globalization processes and the advancement of the digital world, coupled with the popularization of the Internet, the so-called information society has emerged, allowing unprecedented social interactivity that has transformed economic and social relations, and democratized access to information⁵. As Flores points out, the failure to adapt to these contemporary social dynamics can result in exclusion, discrepancy or decontextualization⁶.

As Vesting states, the public sphere of the 21st century institutionalizes communication networks, transforming public opinion into a new

Direito & TI, v. 1, n. 19, 39-62, 2024, 40; Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. DAT Journal, v. 9, n. 1, 04-16, 2024, 07.

⁴ Translation provided by the author. The original version: Com um potencial bastante ambicioso, a Indústria 4.0 promete maior eficácia operacional, ganhos de produtividade, crescimento, e melhoria da competitividade, bem como o desenvolvimento de novos modelos de negócios, serviços e produtos. (...) Com ela surgem oportunidades que possibilitarão as empresas integrar as necessidades dos clientes nos seus processos de desenvolvimento e de produção. Santos, Beatrice Paiva et al. Indústria 4.0: desafios e oportunidades. Revista Produção e Desenvolvimento, v. 4, n. 1, 111-124, 2018, 116.

⁵ Dalla Favera, Da Silva, A Responsabilidade Civil do Facebook Quanto às Ofensas Publicadas por Terceiros: a Proteção do Consumidor no Ordenamento Jurídico Norte-Americano e Brasileiro. Revista de Direito, Globalização e Responsabilidade nas Relações de Consumo, v. 2, n. 1, 16-35, 2016. 18; De Lima Viana, De Macedo, Inteligência Artificial E A Discriminação Algorítmica:: Uma Análise Do Caso Amazon. Revista Eletrônica Direito & TI, v. 1, n. 19, 39-62, 2024. 50; Werthein, A sociedade da informação e seus desafios. Ciência da informação, v. 29, n. 02, 71-77, 2000. 72; DE Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. DAT Journal, v. 9, n. 1, 04-16, 2024, 06.

⁶ Translation provided by the author. The original version: (...) a não adequação à essa dinâmica social contemporânea corresponde ao risco de exclusão, defasagem ou descontextualização. Flores, Direitos Humanos, Novas Tecnologias e Resiliência do Direito. Revista Argumentum. vol. 20. n. 01, 73-96, 2019, 74.

form of autonomous and invisible power⁷.

Flores further notes that the new digital technologies have transformed social relations, in short, in the following key points: (i) the replacement of personal presence, (ii) the instantaneity, (iii) the de-territorialization, and (iv) the dematerialization of communications. In other words, the barriers of space and time are broken down, as people at opposite ends of the globe can communicate at the same time, without requiring a physical structure. Furthermore, there has been an (v) increase in the circulation of and access to information, as well as its (vi) complexity in terms of transparency and concealment⁸.

The algorithms, a product of this new Industrial Revolution and essential to the operation of a digital platform, have become a permanent part of everyday life, through the collection and processing of large amounts of data – big data⁹ –, the organization of content distributed on social networks, the automation of tasks previously performed by humans – and other functions, such as selecting CVs, distributing credit lines, facial recognition, and many other examples¹⁰. According to the concept put forward by Viana and Macedo, an algorithm is:

(...) An ordered structure of instructions or guidelines that, when strictly followed, lead to the accomplishment of a specific task or the solution to a given problem. Algorithms, therefore, are configured as finite and precise sequences of logical operations that guide the achievement of a predetermined objective¹¹.

⁷ Vesting, A mudança da esfera pública pela inteligência artificial. In: Abboud, Georges. Nery Jr., Nelson e Campos, (Orgs.) Fake News e Regulação. 2ª ed. São Paulo: Thomson Reuters Brasil, 193-2010, 2020, 196.

⁸ Flores, Direitos Humanos, Novas Tecnologias e Resiliência do Direito. Revista Argumentum. vol. 20. n. 01, 73-96, 2019, 81-82.

⁹ According to Guzzo et al., three main characteristics are required to be considered Big Data: the speed, volume and variety of the data. Guzzo, et al. Big data recommendations for industrial-organizational psychology. Industrial and Organizational Psychology, v. 8, n. 4, 491-508, 2015, 493.

¹⁰ De Oliveira, você é racista? Racismo algorítmico, vieses e intencionalidade. DAT Journal, v. 9, n. 1, 04-16, 2024, 07; Hollman-Riem, Inteligência Artificial como Oportunidade para a Regulação Jurídica. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 14.

¹¹ Translation provided by the author. The original version: (...) uma estrutura ordenada de instruções ou diretrizes que, quando rigorosamente seguidas, conduzem à realização de uma tarefa específica ou à solução de um determinado problema. Os algoritmos, portanto, configuram-se como sequências finitas e precisas de operações lógicas que orientam a obtenção de um objetivo predefinido. De Lima Viana, De Macedo, Inteligência artificial e a discriminação

Although algorithms are promoted as impartial or objective instruments, this perception is not accurate when you consider that programming is carried out by individuals, with emotions, biases and opinions, who can express their worldviews through the machines they create, allowing them to replicate various forms of discrimination – albeit indirectly. Therefore, it is essential to consider the complex network behind the operation of this technology and the impact it has¹². In this sense:

Artificial intelligence is divided into three areas: (i) *Machine Learning* (ii) *Natural Language Processing* and (iii) *Deep Learning*¹³. However, considering the research object and the selected case studies, the scope will focus on the machine learning mode of operation.

Machine learning operates by the introduction of examples. It can be divided into unsupervised and reinforcement learning-when labeled data is not used-, or supervised learning, – when it uses labeled data –. The second is divided into classification tasks – yes or no answers – and regression tasks – answers that seek predictions –. This means that the examples provided for training the machine are treated as correct answers, allowing the algorithm to predict outcomes for unlabeled data¹⁴.

In short, Machine learning is used, among other functions, to recognize certain patterns to be defined and to evaluate and classify images and texts, as will be analyzed in the selected case studies¹⁵. Considering the selected cases to be analyzed, this article will focus only on supervised learning, which is divided into the following stages:

algorítmica: uma análise do caso Amazon. Revista Eletrônica Direito & TI, v. 1, n. 19, 39-62, 2024, 52.

¹² Noble, Algorithms of Oppression: How Search Engines Reinforce Racism. NYU Press, 2018. 02; De Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. DAT Journal, v. 9, n. 1, 04-16, 2024, 13.

¹³ De Lima Viana, De Macedo, Inteligência artificial e a discriminação algorítmica: uma análise do caso Amazon. Revista Eletrônica Direito & TI, v. 1, n. 19, 39-62, 2024, 52.

¹⁴ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. Revista Brasileira de Sistemas de Informação. vol. 15, n. 23, 1-12, 2022, 03.

¹⁵ Hollman-Riem, Inteligência Artificial como Oportunidade para a Regulação Jurídica. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 12.

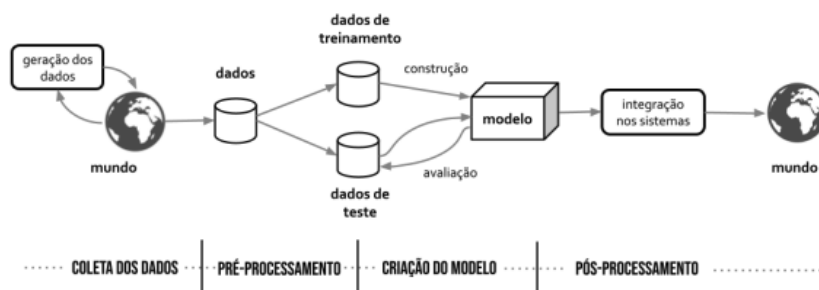


Image by LíviaRubak, Denise Carvalho and Sandra Avila, 2022.

According to Rubak, Carvalho and Avila¹⁶, the process occurs as follows: Raw data is collected from human interaction with the digital network¹⁷ – the larger the dataset, the lower the probability of error – and so the pre-processing phase begins. In this phase – called feature engineering – the raw data is transformed into usable data, selecting the characteristics to build the model. With the data pre-processed, they are divided into training and test groups¹⁸. In this sense:

It is important to emphasize that learning only works because the model learns from one set of data (the training set) and is evaluated with another set of data (the test set). Evaluation, in this context, is an incremental process in both directions: the model is tested and optimized until it reaches adequate performance¹⁹.

¹⁶ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 05.

¹⁷ It should be noted that there are discussions about how data is collected, stored and used with or without users' consent. However, such a study is outside the scope of this article, which is why we suggest reading the following articles: Valente, *Algoritmos e Sites de Redes Sociais: uma discussão crítica sobre o caso do Facebook*. *Pós-Revista Brasileira de Pós-Graduação em Ciências Sociais*, v. 14, n. 2, 87-113, 2019; Porto, Rolim, *O reconhecimento facial e o viés algorítmico racista*. *Brazilian Journal of Development*, vol. 08, n. 05, 33349-33371, mai. 2022.

¹⁸ The authors also point out that, in practice, the test phase has a sub-phase called the validation phase in which the best variables are chosen to define the learned model. In addition, for further reading on how the stages of supervised machine learning work, we recommend reading the article: Rubak, Carvalho, Avila, *Mitigando vieses no aprendizado de máquina: uma análise sociotécnica*. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 06.

¹⁹ Translation provided by the author. The original version: É importante reforçar que o aprendizado só funciona porque o modelo aprende com um conjunto

The next stage is the creation and the evaluation of the model, based on the trained data, making it possible to predict the labels in new examples. According to the authors “the model’s performance is then evaluated, that means that it is checked whether the model generalizes well by classifying the examples in the test set”²⁰. Finally, the post-processing or feedback phase is when the machine can learn from its own mistakes²¹.

Therefore, errors, whether conscious or not, can occur at various stages of an algorithm’s operation. Studying this process is essential, especially when analyzing the worsening of social inequalities through algorithmic discrimination arising from Artificial Intelligence applications. As we are only just beginning to understand the issues, they will have long-term effects²². As Carrea and Carvalho point out:

(...) the biases of these “artificial agents”, often backed up by the attribution to data and big data of an almost religious, mystical, predictive and dazzling power – or “dataism” for their use as catalysts for decision-making that is extremely relevant to the lives of individuals²³.

Rubak, Carvalho and Avila divide algorithmic biases into four. Biases

de dados (o de treinamento) e é avaliado com um outro conjunto de dados (o de teste). A avaliação, neste contexto, é um processo incremental nas duas direções: o modelo é testado e otimizado até que atinja um desempenho considerado bom o suficiente. Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. Revista Brasileira de Sistemas de Informação. vol. 15, n. 23, 1-12, 2022, 05.

²⁰ Translation provided by the author. The original version: o modelo tem então o seu desempenho avaliado, ou seja, é verificado se o modelo generaliza bem classificando os exemplos do conjunto de testes. Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. Revista Brasileira de Sistemas de Informação. vol. 15, n. 23, 1-12, 2022, 06.

²¹ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. Revista Brasileira de Sistemas de Informação. vol. 15, n. 23, 1-12, 2022, 09.

²² Llingworth, Big Data in I-O Psychology: Privacy Considerations and Discriminatory Algorithms. Industrial and Organizational Psychology. vol. 08, n. 04, 567-575, 2015, 570; Noble, Algorithms of Oppression: How Search Engines Reinforce Racism. NYU Press, 2018, 01.

²³ Translation provided by the author. The original version: (...) os vieses destes “agentes artificiais”, muitas vezes respaldados pela atribuição aos dados e ao big data um poder quase religioso, místico, de previsão e deslumbramento – ou “dataism” para sua utilização como catalisadores de tomadas de decisão extremamente relevantes para a vida de indivíduos. Carrera, Carvalho, Algoritmos racistas: a hiper-ritualização da solidão da mulher negra em bancos de imagens digitais. Galáxia (São Paulo), n. 43 99-114, 2020, 101.

in the data, Biases in the models – both considered computational – and historical biases and biases of human interpretation – both considered non-computational –²⁴.

Considering that the machine uses past decisions as a database – which may be unbalanced and biased – to identify patterns and project future decisions, reflecting on the countless forms of discrimination that were legalized in the past – and still reverberate in the present, at least implicitly – reveals one of the reasons why certain choices are made by new technologies, excluding some marginalized sectors. This scenario can be considered a historical bias, related to social and cultural values. Since society itself, albeit unconsciously, carries such premises in its mindset²⁵.

In addition, discrimination can occur when creating the design²⁶ and defining the criteria to be considered, causing a correlation-causality error, referred to as model bias. Discrimination can also originate from the quality of the database used for training and running the algorithm, known as data or representation bias, which is a consequence of historical biases²⁷.

Finally, the user's interaction with the platform, along with feedback from biased sources, can perpetuate discriminatory algorithms. The human interpretation bias uses a technological argument to reinforce preconceived assumptions²⁸.

²⁴ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 10.

²⁵ Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021, 908; De Lima Viana, De Macedo, Inteligência Artificial E A Discriminação Algorítmica: Uma Análise Do Caso Amazon. *Revista Eletrônica Direito & TI*, v. 1, n. 19, 39-62, 2024. 47-46; Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 10.

²⁶ Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism*. NYU Press, 2018, 02.

²⁷ Salmoria, Alves, De Oliveira, Algorithmic gender bias in the recruitment system: the Amazon case. *Cadernos UNDB-Estudos Jurídicos Interdisciplinares*, v. 7, n. 1, 2024, 14; Rubak, Carvalho, Avila, Mitigating biases in machine learning: a sociotechnical analysis. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 12-15.

²⁸ O'Neil, *Algoritmos de Destruição em Massa*. 1ª ed. Santo André: Editora Rua do Sabão, 2020. 143; Salmoria, Alves, De Oliveira, Viés algorítmico de gênero no sistema de recrutamento: o caso Amazon. *Cadernos UNDB-Estudos Jurídicos Interdisciplinares*, v. 7, n. 1, 2024, 14; Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de*

The scenario is further complicated by the lack of transparency in the processes used by technology developers and companies²⁹, as well as by the companies that implement the use of an algorithm, which widens inequality and allows the perpetuation of the aforementioned biases, violating the fundamental rights of the individuals affected and excluded by a supposedly neutral system and the absence of regulations capable of dealing with technological advances³⁰.

Potential solutions to mitigate these issues, along with practical examples, will be analyzed in the following chapters.

3. Review Of Cases In Which Discriminatory Biases Were Found To Exist.

The inappropriate and unregulated use of Artificial Intelligence can result in numerous violations of citizens' fundamental rights. However, considering the aim of this article, It was chosen to analyze the malfunction of AI machine learning. This consequently exacerbates social inequalities by reinforcing structural prejudices in society, violating equality, among other constitutionally guaranteed rights. This further increases the marginalization of certain groups.

Based on empirical research of secondary sources, It was selected the methodology of applied case studies: (i) Amazon case – exclusion of women in the selection of CVs; (ii) Facebook case – automated removal of misogynistic content and (iii) Google case – recognition of images with racist biases.

It is necessary to limit the scope of the analysis in this article to the way in which algorithms act to reinforce the maintenance of the patriarchal and racist order within the social structure – considering post-industrial Western and democratic societies. It is not the scope of this research to analyze the reasons why the aforementioned historical and social biases originated and how they are perpetuated today³¹.

Sistemas de Informação. vol. 15, n. 23, p 1-12, 2022, 12-15.

²⁹ Bell, Nov, Stoyanovich, Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance. *Data &Policy*. vol. 05, n. 12, 1-19, 2023, 2.

³⁰ O'Neil, *Algoritmos de Destruição em Massa*. 1ª ed. Santo André: Editora Rua do Sabão, 2020. 39; Porto, Rolim, O reconhecimento facial e o viés algorítmico racista. *BrazilianJournalofDevelopment*, vol. 08, n. 05, 33349-33371, mai. 2022, 33354; Brião Ferraz, Moraes Da Costa, A plataforma da misoginia na publicidade digital em redes sociais: um produto da opacidade algorítmica e da ausência de marco regulatório da inteligência artificial. *Direito UNIFACS–Debate Virtual*, vol. 01, n. 291, 1-16, 2024, 09.

³¹ For a more in-depth analysis, I recommend the following readings: O Contra-

4. Amazon Case – Gender Discrimination in the Selection of CVs.

Amazon is a company that has revolutionized retail, among other industries, but especially regarding the innovations mentioned above. It has revolutionized the exchange between retailers – from small to large – and consumers, besides the transformation of the social and economic dynamics of the countries where it operates³².

Large companies such as Amazon, which receive a massive number of CVs every day, need a system to optimize their selection processes. One of the tools implemented by the company in question in 2014 was resume screening, using Artificial Intelligence and the company's own database, in order to identify new talent based on previous hires over a ten-year period. In brief, the algorithm searched for specific keywords, experiences and skills, so that recruiters could only assess the CVs considered to be “interesting”³³.

Given the sexual division of labor and the dichotomy between public and private spaces imposed on women, it is difficult for them to enter the formal labor market and progress in their careers, considering the burden of domestic and care work they disproportionately carry³⁴.

As previously discussed, supervised machine learning operates with a labeled database. In other words, when examples are provided for the algorithm to replicate what is characterized as “good” and exclude what is considered “bad”. But considering that the examples provided only encompass a portion of the population, in this case men, gender discrimination will be perpetuated.

Therefore, the database used by Amazon contained the majority of examples for machine learning with male characteristics – since, for many years and until the present moment, they were (and are) the majority in the technology industries and in management positions in large companies, excluding female candidates from the screening³⁵.

to Sexual (Author: Carol Pateman); Gênero, Patriarcado e Violência (Author: Hellen Saffioti); Mulheres, Raça e Classe (Author: Angela Davis) e Tratado de Direito Antidiscriminatório (Author: Adilson Moreira).

³² Hollman-Riem, *Inteligência Artificial como Oportunidade para a Regulação Jurídica*. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 14.

³³ De Lima Viana, De Macedo, *Inteligência Artificial E A Discriminação Algorítmica:: Uma Análise Do Caso Amazon*. Revista Eletrônica Direito & TI, v. 1, n. 19, 39-62, 2024, 54.

³⁴ O'Neil, *Algoritmos de Destruição em Massa*. 1ª ed. Santo André: Editora Rua do Sabão, 2020, 1899; For more in-depth reading on the subject, see recommended reading the master's dissertation “ALÉM DO QUE SE VÊ: uma leitura das contribuições do feminismo para a economia” by Renata Faleiros Camargo Moreno.

³⁵ Kelly-Lyth, *Challenging biased hiring algorithms*. Oxford Journal of Legal Stu-

After realizing the systemic failure, in 2018, the company announced the termination of this method because even if certain commands were used to avoid the exclusion of female terms, it was not possible to ensure equal treatment³⁶. Furthermore:

The inclination to favor the male gender became a more significant issue when the team in charge of the project realized that the poor quality of the artificial intelligence training data not only resulted in the disqualification of women's CVs, but also led to frequent recommendations of unqualified male candidates for various types of positions, generating random results³⁷.

A distinction must be made regarding the types of discrimination. If the programmer intentionally inserted a command during the training and testing phase to exclude female candidates, believing that women are not capable of performing certain jobs, we would be facing a direct form of discrimination. However, if there were no such specific command, but the data that feeds the machine is based only – or at least mostly – on male CVs and characteristics, and the algorithm is trained to select similar CVs, gender discrimination would occur indirectly³⁸.

It should also be noted that foreign legislation already offers ways of identifying and correcting these biases. One example is the Equality Act 2010 in force in the United Kingdom. This normative instrument states that the burden of proving the proportionality of the use of certain criteria, based on characteristics that masks gender discrimination, for the selection of applicants should fall on the employer based on the pursuit

dies, v. 41, n. 4, 899-928, 2021, 903.

³⁶ Salmoria, Alves, De Oliveira, Viés Algorítmico De Gênero No Sistema De Recrutamento: O Caso Amazon. *Cadernos UNDB–Estudos Jurídicos Interdisciplinares*, v. 7, n. 1, 2024, 05; Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021, 900. Dastin, Amazon scraps secret AI recruiting tool that showed bias against women. *Reuters*, 2018. Available at: <https://www.reuters.com/article/idUSKCN1MK0AG/>. Accessed on: 13 de out. 2024.

³⁷ Translation provided by the author. The original version: A inclinação para favorecer o gênero masculino tornou-se uma questão mais significativa quando a equipe encarregada do projeto percebeu que a baixa qualidade dos dados de treinamento da inteligência artificial não apenas resultava na desqualificação de currículos de mulheres, como também levava a recomendações frequentes de candidatos masculinos não qualificados para diversos tipos de cargos, gerando resultados aleatórios. Salmoria, Alves, De Oliveira, Viés Algorítmico De Gênero No Sistema De Recrutamento: O Caso Amazon. *Cadernos UNDB–Estudos Jurídicos Interdisciplinares*, v. 7, n. 1, 2024, 06.

³⁸ Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021, 905.

of a legitimate aim. In this sense:

As such, if a prospective or rejected job applicant can show that they have been, or would be, disadvantaged by an employer's use of a biased algorithm, they can make out a *prima facie* case of indirect discrimination. The burden then shifts to the employer to justify the use of that algorithm. The disadvantaged applicant is not required to show why the algorithm has rated them poorly; the mere fact of their disadvantage is sufficient to demand justification for its use³⁹.

Additionally, the provision also stipulates employers must take proactive steps when using Artificial Intelligence in resume selection, ensuring that marginalized and socially disadvantaged groups are effectively considered for the positions they applied for⁴⁰.

However, due to the lack of transparency regarding the mathematical formulation of these tools, rejected applicants are deprived of understanding the reasons that eliminated them from the selection process, preventing them from questioning the AI's formulation. But not only that, considering the above scenario, the formally positive feedback – or at least the lack of negative feedback – provided to the machine will perpetuate the established bias.

Furthermore, it is difficult to pinpoint the type of bias faced, as well as at which stage the correction should be made. In principle, it is understood that the failure occurred in the pre-processing phase of the data used to train the algorithm, and this is considered a data or representation bias⁴¹.

However, the following caveat should be noted: a technological invention is a complex system that has not yet been widely studied, taking into account its numerous practical, social, legal, and economic implications. Therefore, as in the other cases to be studied, it is not possible to restrict the attribution of the fault to just one stage. Due to the fact that, as it was seen, the lack of feedback in the post-processing phase contributes to discrimination, and the very formulation of the mathematical model can contain direct or indirect forms of discrimination, without the developers being fully aware, since the criteria used for screening are not disclosed.

³⁹ Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021, 906.

⁴⁰ Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021, 908.

⁴¹ Salmoria, Alves, De Oliveira, Viés algorítmico de gênero no sistema de recrutamento: o caso Amazon. *Cadernos UNDB–Estudos Jurídicos Interdisciplinares*, v. 7, n. 1, 2024, 13; Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 12-15.

Similarly, the biases described in chapter one – historical bias, model bias, representation bias and human representation bias – may manifest in the algorithm’s formulation, either concomitantly or not, consciously or not.

5. Facebook case: failure to remove misogynistic content.

In 2019, Civil Inquiry n. 1.30.001.000316/2019-15 was launched by the Federal Public Prosecution’s Office against the digital platform Facebook, following its failure to remove misogynistic content from the “Cultura dos Homens Livres” page. The comments belittled women through verbal aggression, such as calling them “sluts” and “parasites”⁴², inciting gender discrimination.

Upon the refusal to remove the content, after the notification made by the Prosecution, the platform claimed that the content did not violate Facebook’s terms of service and community standards. Besides that, informed that the claim would only be complied with a court order. The 27th Federal Court of Rio de Janeiro issued an injunction:

In view of the above, based on art. 12 of Law no. 7.347/85, art. 298 of the CPC and art. 30 of Law n. 12.965/2014, I partially grant the injunction requested, in order to order the defendant company Facebook Serviços On Line do Brasil LTDA, in the face of any messages or posts containing content of intolerance, hatred and violence against women, within Brazilian territory, to immediately adopt the same control methods of international standard, through automatic monitoring of the network by artificial intelligence and content reviewers, to guarantee the deletion of both the topics disseminated through its social network and the user who posts them, such as the one already identified by the page “CulturaHomens Livres”⁴³.

⁴² The author recognizes that there are several discussions about the limits of freedom of expression and the conflict with the principle of human dignity, which is one of the foundations for prohibiting hate speech on digital platforms. However, considering that this is not the subject of this research, we recommend reading the article “A interpretação do Sistema Interamericano de Direitos Humanos acerca da liberdade de expressão e a adequação material da Lei n. 13.834/2019”, by Elder Maia Goltzman and Mônica Teresa Costa Sousa for a more in-depth understanding of the issue.

⁴³ Translation provided by the author. The original version: Ante o exposto, com base no art. 12 da Lei n. 7.347/85, art. 298 do CPC e art. 30 da Lei n. 12.965/2014, defiro em parte o pedido liminar requerido, para determinar que a empresa ré Facebook Serviços OnLine do Brasil LTDA, em face de mensagens de qualquer natureza – posts – com conteúdo de intolerância, ódio e violência contra a mulher, no âmbito do território brasileiro, adote incontinenti os mesmos métodos de controle de padrão internacional, por meio de fiscalização automática da rede por inteligência artificial e revisores

According to Ferraz and Costa, it is possible to say that a phenomenon called the “platformization of misogyny” has been taking place. Groups, such as the one mentioned above, organize and strengthen themselves on social networks to promote discriminatory content – a fact that will be better explained at the end of this subsection – especially through the commercialization of digital data⁴⁴.

Although the scope of this article does not focus on the civil liability of application providers with regard to content posted in their communities, a brief explanation is necessary: After the enactment of the “Marco Civil da Internet”, it was established that platforms would only be held liable if they failed to comply with a court order ordering the removal of a specific content. This changed the previous understanding of the Superior Court of Justice, which had held the platform liable if it was notified by the victim⁴⁵.

META’s own platform page acknowledges the use of Artificial Intelligence to identify and remove offensive content, resulting in self-monitoring by the social network. It should be noted that, until mid-2016, the platform relied purely on reports made by users. However, in order to adopt a proactive stance, it developed an algorithm that spontaneously identifies content that violates community guidelines⁴⁶.

de conteúdo, para garantir a exclusão tanto dos tópicos divulgados por meio da sua rede social quanto do usuário que as veicular, como o já identificado pela página “Cultura Homens Livres. Brazil. 27th Federal Court of Rio de Janeiro. Public Civil Action n. 5038706-31.2019.4.02.5101/RJ. Order. Plaintiff: Federal Public Prosecutor’s Office. Defendant: Facebook Serviços Online do Brasil LTDA. Judge: Geraldine Vital, June 17, 2009. Available at: <https://www.internetlab.org.br/wp-content/uploads/2019/06/facebookcomentariosmisog.pdf>. Accessed on: 10/19/2024.

⁴⁴ Brião Ferraz, Moraes Da Costa, A plataformação da misoginia na publicidade digital em redes sociais: um produto da opacidade algorítmica e da ausência de marco regulatório da inteligência artificial. *Direito UNIFACS–Debate Virtual*, vol. 01, n. 291, 1-16, 2024, 05.

⁴⁵ Brega, A regulação de conteúdo nas redes sociais: uma breve análise comparativa entre o NetzDG e a solução brasileira. *RevistaDireito GV*, v. 19, e2305, 2023. 08. It is recommended to read this article for a better understanding of the subject: Dalla Favera, Da Silva, A Responsabilidade Civil do Facebook Quanto às Ofensas Publicadas por Terceiros: a Proteção do Consumidor no Ordenamento Jurídico Norte-Americano e Brasileiro. *Revista de Direito, Globalização e Responsabilidade nas Relações de Consumo*, v. 2, n. 1, 16-35, 2016, 32.

⁴⁶ Rosen, A prevalência de discurso de ódio diminuiu quase 50% no Facebook. META, 2021. Available at: <https://about.fb.com/br/news/2021/10/a-prevalencia-de-discurso-de-odio-diminuiu-quase-50-no-facebook/> Accessed on: 10.15.2024; Hollman-Riem, Inteligência Artificial como Oportunidade

Nevertheless, in 2018, the company, through its vice president of product management, acknowledged the failure of its machine learning technology, due to the low quality of the training database:

(...) artificial intelligence is not good enough to determine whether someone is proclaiming hate or whether they are describing a situation that happened to themselves in order to raise awareness about it. As I explained last week, the technology needs enormous data training to recognize patterns of behavior, which we often don't have in less widely used languages, or for cases that aren't often reported. What's more, in many areas – be it spam, pornography or fake accounts – we face sophisticated adversaries who continually change tactics to circumvent our controls, which means we must continually develop and adapt our efforts as well⁴⁷.

The platform states that Artificial Intelligence will not always be able to remove content immediately. In certain cases, the platform's reviewers will be called upon to evaluate the content, and in addition, if there is suspicion, the distribution and recommendation of content will be reduced⁴⁸.

Although a flaw in the quality of the data used to train the algorithm is recognized, similar to the Amazon case mentioned above, responsibility for this stage cannot be attributed exclusively. As we have seen, the complexity of the procedures and stages of development of the technological codes are confidential and, although there is a simplified explanation of the process of removing content through Artificial Intel-

para a Regulação Jurídica. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 11.

⁴⁷ Translation provided by the author. The original version: (...) a inteligência artificial não é boa o suficiente para determinar se alguém está proclamando ódio ou se está descrevendo uma situação ocorrida consigo mesma para gerar conscientização sobre o assunto. Como expliquei na semana passada, a tecnologia precisa de um enorme treinamento de dados para reconhecer padrões de comportamento, que muitas vezes não temos em idiomas usados de maneira menos ampla, ou para casos que não são frequentemente denunciados. Além disso, em muitas áreas – seja spam, pornografia ou contas falsas – enfrentamos adversários sofisticados que mudam continuamente de tática para contornar nossos controles, o que significa que devemos desenvolver e adaptar nossos esforços continuamente também. Rosen, Facebook publica números de remoção de conteúdo. META, 2018. Available at: <<https://about.fb.com/br/news/2018/05/facebook-publica-numeros-de-remocao-de-conteudo/>>Accessed on: 10.15.2024.

⁴⁸ Rosen, A prevalência de discurso de ódio diminuiu quase 50% no Facebook. META, 2021. Available at: <<https://about.fb.com/br/news/2021/10/a-prevalencia-de-discurso-de-odio-diminuiu-quase-50-no-facebook/>>Accessed on: 10/15/2024.

ligence presented by Facebook, it must be taken into account that the information is not sufficient to ascertain how, in fact, the aforementioned processing is carried out and how it is determined whether or not a piece of content violates the platform's guidelines.

It could be either a computational bias due to the data provided or a non-computational bias, considering human interpretation or historical biases. Additionally, the failure may have occurred in the pre-processing, processing or post-processing phase⁴⁹, especially considering that the users who receive misogynistic content are those that the platform believes will like it, as a result of the algorithm feeding the user content that they frequently consume.

Regarding how public relevance algorithms operate, which create the filter bubbles, which means that the user comes into contact with what supposedly interests them⁵⁰. Oliveira and Arantes explain:

(...) programming routines developed to select and present relevant content to a given audience, supposedly taking into account the user's specific interests. These algorithms are designed with the aim of providing personalized information and content according to the user's experience, preferences and individual needs previously mapped and catalogued in the database⁵¹.

In this way, it should be reflected that the interaction of users with the platform shows their satisfaction, reinforcing the platform's algorithms with positive feedback and perpetuating existing biases. Furthermore, considering that the technology behind Facebook's feed technology will send the content mentioned to those who the platform believes will appreciate it, there will be fewer and fewer complaints – or even dislikes

⁴⁹ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 10.

⁵⁰ Brega, A regulação de conteúdo nas redes sociais: uma breve análise comparativa entre o NetzDGea solução brasileira. *Revista Direito GV*, v. 19, e2305, 2023. 04; Alente, Algoritmos e Sites de Redes Sociais: uma discussão crítica sobre o caso do Facebook. *Pós-Revista Brasileira de Pós-Graduação em Ciências Sociais*, v. 14, n. 2, 87-113, 2019, 90-91.

⁵¹ Translation provided by the author. The original version: (...) rotinas de programação desenvolvidas para selecionar e apresentar conteúdos relevantes para uma determinada audiência, levando supostamente em consideração os interesses específicos do usuário. Esses algoritmos são projetados com o objetivo de fornecer informações e conteúdos personalizados de acordo com a experiência do usuário, suas preferências e suas necessidades individuais previamente mapeadas e catalogadas na base de dados. Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. *DAT Journal*, v. 9, n. 1, 04-16, 2024, 10.

– from users opposed to the promotion of offensive content. Thus, the vicious cycle of spreading misogynistic content is perpetuated⁵².

6. Google case: Algorithmic racism.

In 2015, Google’s digital platform, specifically Google Images, was criticized by an individual who became aware that the images of his black friends were being labeled, through artificial intelligence machine learning, as “gorillas”⁵³. In response, the company denied responsibility for the link and said it was implementing efforts to improve the algorithm⁵⁴.

It is also worth noting that this is not an isolated case, as in 2016 the difference that a search in the same area of the platform showed was demonstrated: when searching for “three white teenagers” the algorithm shows smiling young people in leisure activities. However, when the search is for “three black teenagers”, the platform showed images from police records⁵⁵.

Google’s best practices guide for images advises that when you upload an image, you should include structured data so that the algorithm shows it more often. In other words, it increases the image’s relevance when searching for certain terms:

(...) Google extracts information about the subject of the image from the content of the page, including captions and image titles. Whenever possible, ensure that images are placed near relevant text and on pages that are meaningful to their subject. (...) The most important attribute for including more metadata in an image is alternative text, which describes the image and also improves accessibility for people who cannot see images on web pages, including users who use screen readers or have low-bandwidth connections. Google uses the alternative text with computer vision algorithms and the content of the page to understand the subject of the image. In addition, alternative text in images is useful as anchor text if you decide to use an image as a link (...) ⁵⁶.

⁵² Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. DAT Journal, v. 9, n. 1, 04-16, 2024, 12.

⁵³ Porto, Rolim, O reconhecimento facial e o viés algorítmico racista. Brazilian Journal of Development, vol. 08, n. 05, 33349-33371, mai. 2022, 33355.

⁵⁴ Noble, Algorithms of Oppression: How Search Engines Reinforce Racism. NYU Press, 2018. 06; O’NEIL, Cathy. Algoritmos de Destruição em Massa. 1ª ed. Santo André: Editora Rua do Sabão, 2020, 248.

⁵⁵ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. Revista Brasileira de Sistemas de Informação. vol. 15, n. 23, 1-12, 2022, 11.

⁵⁶ Translation provided by the author. The original version: (...) O Google extrai

This does not mean that users who uploaded images were responsible for the racist correlations made by the algorithm. But rather that, the existence of certain profiles disseminating racist content that link images with racist captions, propagating hatred, similar to the Facebook misogyny case, the algorithm associates both pieces of content as similar. Although it is not directly the platform's responsibility to have linked black people to images of gorillas, the racist data provided to Artificial Intelligence trained the algorithm to label the other images in the same way, reproducing racism.

Not only that, but programmers are human beings who live in a structurally racist society and, as we have seen, express these biases in their coding, albeit unconsciously. This makes it difficult for the algorithm to differentiate between legitimate content and racist content⁵⁷. As Martins explains: "(...)pages, images and videos with racist overtones, but which follow the criteria for a good ranking, can be privileged and given greater visibility by users"⁵⁸.

Briefly, platforms use criterias such as "usefulness", "quality" and "relevance" to classify the content available on the digital world, ranking content based on access, likes and dislikes⁵⁹.

informações sobre o assunto da imagem do conteúdo da página, incluindo legendas e títulos da imagem. Sempre que possível, garanta que as imagens sejam colocadas perto de textos relevantes e em páginas significativas para o assunto delas. (...) O atributo mais importante para incluir mais metadados em uma imagem é o texto alternativo, que descreve a imagem e também melhora a acessibilidade para pessoas que não podem ver imagens em páginas da Web, incluindo usuários que usam leitores de tela ou têm conexões com pouca largura de banda. O Google usa o texto alternativo com algoritmos de visão computacional e o conteúdo da página para entender o assunto da imagem. Além disso, o texto alternativo nas imagens é útil como texto âncora se você decidir usar uma imagem como link (...). GOOGLE. Práticas recomendadas de SEO para o Imagens do Google, 2024. Available at: <<https://developers.google.com/search/docs/appearance/google-images?hl=pt-br>>. Accessed on: 10/24/2024.

⁵⁷ Martins, logics of racialization of culture and extended algorithmic racism: a case study on the google search engine. 2021. 79 f. TCC (Graduation) – JournalismCourse, Universidade do Vale do Rio dos Sinos – Unisinos, São Leopoldo, 2021. 50.

⁵⁸ Translation provided by the author. The original version: Assim, páginas, imagens e vídeos com vieses racistas, mas que seguem os critérios para um bom ranqueamento, podem ser privilegiados e terem maior visibilidade pelos usuários. Martins, Logics of racialization of culture and extended algorithmic racism: a case study on the Google search engine. 2021. 79 f. TCC (Graduation) – JournalismCourse, Universidade do Vale do Rio dos Sinos – Unisinos, São Leopoldo, 2021, 60-61.

⁵⁹ Do Amaral, Elesbão, racismo e sexismo algorítmicos: um estudo de caso sobre

However, as already noted, digital platforms distribute their content to users who are interested in it. Therefore, it can be said that because structural racism permeates society, many users make the same biased correlations, and through artificial intelligence, the algorithm continues to deliver similar associations to other users. It should be emphasized that, like the other cases, it is not possible to attribute the failure to just one stage of the procedure. What is actually happening is a systematic defect in all stages, from the very functioning of society, which is aggravated by the lack of transparency, regulation and control over the use of these digital platforms.

7. Stakeholder Capitalism For The Adoption Of Means Of Mitigating Discriminatory Biases.

On June 26, 2020, Facebook shares fell by 8.31% on the Nasdaq stock exchange. During that week, the company saw its market value reduced by \$74.6 billion because of the “Stop Hate for Profit” movement, which involved a boycott by large companies such as Coca Cola, Ford and Adidas.

In short, what happened was the result of the announcement that more than a thousand companies would no longer pay the platform to advertise their respective products, since Facebook was not taking an active stance to combat hate speech on the platform⁶⁰.

Not only are companies demanding an active stance in the fight against discriminatory algorithms, but so is civil society as well. This was demonstrated by research carried out by global communications agency Edelman in 2018⁶¹.

The survey showed that 64% of consumers in Brazil buy (or stop buying) a product or service out of conviction. This means that two out of every three Brazilians choose, switch, avoid or boycott a particular brand based on its stance on social issues. Furthermore, in Brazil, 60% of

o mecanismo comercial de busca do Google. Revista Eletrônica do Curso de Direito da UFSM, v. 17, n. 1, e66455-e66455, 2022, 05.

⁶⁰ Brega, A regulação de conteúdo nas redes sociais: uma breve análise comparativa entre o NetzDG e a solução brasileira. Revista Direito GV, v. 19, e2305, 2023, 02.

⁶¹ The study was carried out in the following countries: Brazil, China, France, Germany, India, Japan, the United Kingdom and the United States. Using online surveys, they listened to 8,000 people (1,000 per country) and mobile surveys with 32,000 people (4,000 per country). EDELMAN. Sua marca deve se posicionar? 2018. Available at: <https://www.edelman.com/sites/g/files/aa-tuss191/files/2018-11/2018_Edelman_Earned_Brand_Brasil_Report_POR.pdf>. Accessed on: 10/17/2024.

those interviewed believe that companies should take an active stance in the pursuit for social change. This sentiment is replicated across all age groups and income brackets within the sample analyzed.

In 2024, a new report presented by the aforementioned company, with the participation of more than 1,150 Brazilians, noted that 31% of Brazilians reject the use of Artificial Intelligence. In addition, 44% of those interviewed said that technological innovations are being poorly managed, while 31% did not know how to respond. It should be noted that this perception was observed across all three categories used in the survey: age, class, and gender⁶².

As demonstrated, the social impacts of a particular company have an impact on the perception of its consumers, influencing them to give up on a particular purchase. Therefore, considering the context of a society whose mode of production is capitalism, which in turn aims primarily to maximize profit, measures to mitigate biased algorithms are extremely necessary.

Furthermore, a new perception of the capitalist mode of production has emerged: stakeholder capitalism. While state capitalism stipulates that the interests of the State must take precedence over the interests of others, and shareholder capitalism has the sole purpose of maximizing profits, regardless of the consequences, stakeholder capitalism seeks a sustainable economic system. This is achieved when the four main stakeholders are connected and in harmony: Governments, civil society, private companies and the international community⁶³.

As already noted, one of the criticisms of the unregulated use of Artificial Intelligence is the lack of transparency in the procedures involved in operating an algorithm. But no matter how many normative measures are enacted that seek greater security in its use, such as Bill n. 2338/2023 (an initiative of Senator Rodrigo Pacheco (PSD)), the innovation process will always outpace the legislative process⁶⁴.

⁶² The study was carried out in 28 countries, with around 1,150 respondents per country using an online questionnaire. EDELMAN. Edelman Trust Barometer, 2024. Available at: <<https://www.edelman.com.br/sites/g/files/aatuss291/files/2024-03/Edelman%20Trust%20Barometer%202024%20-%20Relat%C3%B3rio%20Brasil.pdf>>. Accessed on: 17.10.2024.

⁶³ Schwab, *Capitalismo Stakeholder: Uma economia global que trabalha para o progresso, as pessoas e o planeta*. 1ª ed. Rio de Janeiro: Alta Books. 2023, 185 e 192-193.

⁶⁴ Bell Nov, Stoyanovich, *Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance*. Data & Policy. vol. 05, n. 12, 1-19, 2023, 5.

That is why, without neglecting the need for regulation by the State, measures that go beyond the letter of the law must be analyzed, seeking a change that focuses not only on punitive measures, but on the very conscience of the business unit that develops and implements the aforementioned technology.

One of the suggestions proposed by Bell *et. al.* is to draw up a Code of Ethics for software developers, similar to the legal profession and the Brazilian Bar Association (OAB), as well as other professions in Brazil and around the world:

An organization such as the Association for Computing Machinery (ACM) or the Institute of Electrical and Electronics Engineers (IEEE), two leading professional organizations of engineering and computing professionals, could take on the creation of a certification for technologists who build AI. The ACM Code of Ethics and Professional Conduct¹³ already speaks to the salient aspects of ethical conduct and of professional responsibilities, including “Treat[ing] violations of the Code as inconsistent with membership in the ACM.” This document can serve as a starting point for such a process⁶⁵.

However, the authors themselves recognize that there is a lack of confidence in the usefulness and effectiveness of the Code for improving the situation presented throughout the article, considering that responsibility lies only at the design stage, on the individual programmer level⁶⁶. And, as we have already seen, there are several stages involved in the complexity of the algorithm’s operation, and ethics must be applied at all levels of computer science. This means that the creation of a Code of Conduct is not enough – especially in terms of greater transparency regarding the procedures adopted – which does not detract from its necessity, but rather gives it a complementary character⁶⁷.

In addition, the authors also propose the implementation of participatory design in which all stakeholders are included and heard in the

⁶⁵ Bell Nov, Stoyanovich, Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance. *Data & Policy*. vol. 05, n. 12, 2023, 07.

⁶⁶ Bell, Nov, Stoyanovich, Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance. *Data & Policy*. vol. 05, n. 12, 2023, 07.

⁶⁷ Rubak, Carvalho, Avila, Mitigando vieses no aprendizado de máquina: uma análise sociotécnica. *Revista Brasileira de Sistemas de Informação*. vol. 15, n. 23, 1-12, 2022, 07; Hoffmann-Riem, Inteligência Artificial como Oportunidade para a Regulação Jurídica. *Revista de Direito Público*, vol. 16, n. 90, 11-38, 2019, 37.

programming stages. The authors cite as an example that participatory design has been used successfully in Australia⁶⁸ by incorporating positive values related to data in non-profit organizations⁶⁹. In this sense:

Put another way, thinking about stakeholders first means to truly care about them and their goals. We fully subscribe to this idea and believe that if there is to be a positive, ethical future for the use of AI systems, there needs to be thoughtful, stakeholder-driven design for creating transparent algorithms-and who better to lead this effort than technologists. Should this stakeholder-first approach is widely adopted, there will be important implications for the public and private sectors. Researchers have demonstrated that system transparency can improve user-system can play a critical role in avoiding harmful societal risks⁷⁰.

Other possible forms of mitigation, proposed by Macedo and Viana, consist initially in adopting prior studies on risk assessment and how damage mitigation systems would occur before the algorithm is introduced to the market. Nevertheless, it is necessary to curate the database selected for training and testing the machine, keep records to document and eventually trace the technical failure, as well as human supervision in the post-processing phase⁷¹.

This would mitigate the issue of lack of transparency, which would increase the relationship of trust between the machine and the human beings, as well as making it possible to audit the programming and pursue possible civil or even criminal prosecution depending on the case⁷².

In this sense, it is necessary to guarantee good governance in the

⁶⁸ Regarding this research, it is recommended to read the article Developing data capability with non-profit organizations using participatory methods. Available at: . Accessed on: 17/10/2024.

⁶⁹ Bell, Nov, Stoyanovich, Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance. *Data & Policy*. vol. 05, n. 12, 1-19, 2023, 14.

⁷⁰ Bell, Nov, Stoyanovich, Think about the stakeholders first! Toward an algorithmic transparency playbook for regulatory compliance. *Data & Policy*. vol. 05, n. 12, 1-19, 2023, 15.

⁷¹ Oliveira, Arantes, Alexa, você é racista? Racismo algorítmico, vieses e intencionalidade. *DAT Journal*, v. 9, n. 1, 04-16, 2024. 14; De Lima Viana, De Macedo, inteligência artificial e a discriminação algorítmica: uma análise do caso Amazon. *Revista Eletrônica Direito & TI*, v. 1, n. 19, 39-62, 2024, 58.

⁷² Kelly-Lyth, Challenging biased hiring algorithms. *Oxford Journal of Legal Studies*, v. 41, n. 4, 899-928, 2021. 926; Hollman-Riem, Inteligência Artificial como Oportunidade para a Regulação Jurídica. *Revista de Direito Público*, vol. 16, n. 90, 11-38, 2019, 29.

development of algorithms (governance of algorithms) and in their application (governance by algorithms), going beyond the aforementioned measures that are already being discussed in Bills in Brazil, but implementing an active stance by the company that develops or uses the programs⁷³.

One of the suggestions is the adoption of compliance programs for a structural change in the vision of what the use of Artificial Intelligence consists, aiming to achieve stakeholder capitalism, going beyond the mere search for dividends while being aware of its impact on society⁷⁴. Especially when you consider, as explained at the beginning of this section, that consumers are increasingly taking into account the stance of companies regarding the use of Artificial Intelligence and their efforts to tackling social issues, which impacts the company's turnover when it doesn't also take advantage of this concern by establishing measures aimed at reducing human involvement and time spent, as already seen in the screening of CVs, removal of content and labeling of images on digital platforms.

In addition, the need for a diverse team in the programming of a given algorithm is also highlighted, with professionals from different genders, races, social classes, and other groups that are usually marginalized, to increase the effectiveness of controlling the intrinsic biases of human and historical interpretation, going beyond computational failures⁷⁵.

In brief, the need for regulation is urgent, but it is also essential to direct efforts towards self-regulation overseen⁷⁶ by the State, as Hoffmann

⁷³ Hollman-Riem, *Inteligência Artificial como Oportunidade para a Regulação Jurídica*. Revista de Direito Público, vol. 16, n. 90, 11-38, 2019, 17.

⁷⁴ Schwab, *Capitalismo Stakeholder: Uma economia global que trabalha para o progresso, as pessoas e o planeta*. 1ª ed. Rio de Janeiro: Alta Books. 2023. 185 e 192.

⁷⁵ De Lima Viana, De Macedo, *inteligência artificial e a discriminação algorítmica: uma análise do caso Amazon*. Revista Eletrônica Direito & TI, v. 1, n. 19, 39-62, 2024. 58; Almorá, Alves, De Oliveira, *viés algorítmico de gênero no sistema de recrutamento: o caso Amazon*. Cadernos UNDB–Estudos Jurídico-Interdisciplinares, v. 7, n. 1, 2024, 17.

⁷⁶ In Hoffmann's terms, the concept of self-regulation regulated by the state aims to describe situations in which state bodies or authorities rely, for the solution of problems, on planning measures produced with (relative) autonomy by members of society, but exert influence either through legally regulated stimuli or in a regulatory manner (through binding rules of substantive or procedural law) so that certain objectives are taken into account, especially the fulfillment of purposes relating to the common good. Hoffmann-Riem, *Inteligência Artificial como Oportunidade para a Regulação Jurídica*. Revista

points out. In this sense, the State, through regulatory agencies, would act to certify and audit the use of Artificial Intelligence, in addition to possibly granting incentives to companies that adopt good governance policies, such as those mentioned above, thereby changing the structure and values of the company.

8. Final Remarks.

Considering the above, this article sought to demonstrate how the adoption of stakeholder capitalism, through State regulation in conjunction with regulated self-regulation, could help mitigate the biases that exist in algorithms.

Throughout the research, it was pointed out how the lack of transparency makes it difficult to identify and correct the biased algorithms. Given they are designed, monitored and implemented by human beings who are influenced by their own ideologies, beliefs and feelings, allows for the maintenance of the marginalization of certain groups or individuals who are already historically discriminated against, such as women and black people.

This happens, at least in relation to the field that is the subject of this research – machine learning – because there are several stages where there is no disclosure about the design choices, as well as the curation performed to compose the database. In addition, the very lack of complaints, whether due to ignorance of the existence of a bias or the formation of the filter bubbles already analyzed, provides feedback the machine receives feeds the perpetuation of the discriminatory flaw.

After analyzing three specific cases involving large companies that use Artificial Intelligence for their own business model, such as Amazon, Facebook and Google, it was demonstrated the urgency of controlling the use of Artificial Intelligence, as well as mitigating its negative consequences, given the scale that discrimination reaches when hidden by mathematical formulas, whose offensive potential becomes immeasurable considering the hyperconnected society we live in.

Although State regulation of use is of the utmost importance, as bills in Brazil and around the world are already doing, balancing technological and economic progress with the guarantee of fundamental rights, it is necessary to consider that legislative progress will not keep pace with the new forms of technology that will emerge as a result of Artificial Intelligence, as well as the ethical and moral challenges that will arise.

Therefore, from an economic perspective, the article sought to demonstrate that by adopting good governance policies to increase transparency and control over these algorithms, companies can benefit financially. These guidelines can be considered state-regulated self-regulation, by promoting incentives for adoption and overseeing companies' compliance with the commitments made, thus changing the organizational culture of the companies that implement and manufacture machine learning algorithms.

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16.

THE REGULATION OF BIG TECHS: A CHALLENGE TO SOVEREIGNTY AND THE PROTECTION OF SOCIETY IN DEVELOPING COUNTRIES

*Palloma Parola Del Boni Ramos**

1. Introduction.

Big Techs exert an increasingly significant influence in developing countries, such as Brazil, which face limitations in their technological production capacity. This dynamic can compromise national sovereignty and result in violations of fundamental rights, such as privacy, freedom of expression, and access to justice. This article aims to analyze these companies' interference in Brazil's political and legal dynamics, proposing alternatives for social governance that promote the protection of these rights in the context of an expanding digital society.

The Internet undoubtedly has a dual interaction with constitutional law: on the one hand, it functions as a powerful new tool to advance the objectives of constitutional law, offering an unprecedented way to define, control, and regulate power; on the other, it is configured as a new object within constitutional law, representing a power that must itself be defined, controlled, and regulated. Currently, the most explored dimension of this interaction between the Internet and constitutional law involves fundamental rights, with emphasis on freedom of expression and the protection of personal data, especially concerning the right to privacy¹.

Given the circumstances, it is imperative to implement a governance model capable of dealing with the complexities of globalization and the growing power of Big Techs. The transnationalization of information and the global nature of the Internet challenge the limits of territorial sovereignty, making inclusive and adaptable governance urgent. This model should involve states, civil society, NGOs, and the private sector, ensur-

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¹ Simoncini, The Constitutional Dimension of the Internet: Some Research Paths. EUI Working Paper LAW, v. 16, 1-13. 2016. 4.

ing a more effective approach to addressing current challenges.

The difficulties related to regulating large technology companies become evident when considering that transactions involving personal data play a central role in their economic strategies, significantly contributing to their revenues. In this context, regulation seeks to establish a balance between promoting innovation and economic growth and ensuring the protection of individual rights. However, this challenge proves particularly complex, requiring continuous efforts from legislators, given the transnational nature of personal data flows.

In underdeveloped countries, such as Brazil, marked by colonial legacies, regulating Big Techs faces complex challenges, especially regarding the economic use of data, which frequently exceeds legal boundaries. This situation is aggravated by limited local technological production² and the absence of robust regulations keeping pace with the rapid evolution of the technological landscape. Nevertheless, Brazilians demonstrate intense use of social networks and other digital platforms, highlighting the importance of a regulatory framework that balances access to and use of these technologies with the protection of rights and the promotion of local development³.

² O Brasil ocupa a 65ª posição em termos de complexidade produtiva, considerando critérios como diversificação e tecnologia. HARVARD UNIVERSITY. Atlas of Economic Complexity. Disponível em: <<https://atlas.cid.harvard.edu/rankings>>. Acesso em: 10 dez. 2024.

³ The results of the ICT Households 2023 survey reveal that 89% of the Brazilian population aged 10 and over have already used the internet, surpassing the 86% recorded in 2022. This increase was mainly driven by women (from 86% to 90%) and individuals with a household income between three and five minimum wages (from 91% to 95%). The number of users who accessed the internet in the three months prior to the survey reached 84%, equivalent to around 156 million people. However, approximately 11% of Brazilians, or 20 million individuals, have still never accessed the internet, particularly among those aged 60 or over (42%) and from classes D and E (22%). The main barriers are lack of technological skills (67%) and lack of interest (65%). The mobile phone remains the main means of internet access, cited by 99% of users, followed by television (58%), which has been growing steadily since 2014. In 2023, 30% of users accessed exclusively via mobile phone, while 29% combined mobile phone, TV, and computer use – the latter being more common in class A (57%) and rare in classes D and E (11%). This disparity reflects persistent challenges for full digital inclusion, particularly regarding access to more versatile devices, such as computers, which support the development of digital skills.

Communication activities dominate internet use in Brazil. Sending instant messages was performed by 92% of users, equivalent to 144 million people, making it the most frequent activity, especially among those who access exclu-

In this context, this research seeks to explore the relationship between the expansion of large technology corporations and the need for more robust regulatory mechanisms. The expansion of these companies raises significant concerns about regulation and the protection of society, requiring not only the preservation of data and respect for privacy but also the promotion of governance that ensures social participation. This approach is essential to balance economic interests with the rights and security of the most vulnerable populations.

This study adopts a bibliographic methodological approach, based on a systematic review of the relevant literature. The analysis will focus on identifying and examining the key concepts and theories underpinning Big Techs' interference in political and legal spheres. Subsequently, these concepts and theories will be subjected to critical analysis in light of Brazilian legislation, in order to deepen understanding of these corporations' influence and their implications for vulnerable societies, with emphasis on Brazil as a developing country.

The first chapter addresses the expansion of large technology companies and highlights the urgency of regulation to address the significant impacts of these corporations on global society. In this context, transnational law is proposed as an alternative to address the challenges posed by these companies. In Brazil, where technology plays a central role, the need for effective digital regulation is even more evident. The complexity of technological innovations requires the implementation of a global legal system capable of promoting harmonization among different jurisdictions, ensuring both the protection of personal data and fundamental

sively via mobile network (79%). Voice or video calls (81%) and the use of social media (80%) also stand out, with higher adoption among young people aged 16 to 34 (91%) and those with higher education (88% in higher education versus 69% in elementary education).

Although 156 million Brazilians are connected, around 29.4 million remain without access, reflecting inequalities in benefiting from digital opportunities. Beyond access, connection quality and the availability of suitable devices are key to ensuring digital inclusion. These challenges highlight the need for public policies that promote greater equity in technology access, ensuring that digital rights are widely guaranteed. (NÚCLEO DE INFORMAÇÃO E COORDENAÇÃO DO PONTO BR – ICT Households: Survey on the Use of Information and Communication Technologies in Brazilian Households). NÚCLEO DE INFORMAÇÃO E COORDENAÇÃO DO PONTO BR. TIC Domicílios: pesquisa sobre o uso das tecnologias de informação e comunicação nos domicílios brasileiros 2023 / ICT Households: survey on the use of information and communication technologies in Brazilian households. Comitê Gestor da Internet no Brasil. São Paulo: CGI.br, 2024. Disponível em: <www.cgi.br>. Acesso em: 05 dez de 2024.

rights. Thus, the creation of integrated governance presents itself as an indispensable solution to ensure justice and regulatory effectiveness in an increasingly interconnected world.

The second chapter examines the regulation of Big Techs in developing countries, such as Brazil, highlighting the challenges imposed by the influence of digital colonialism. This phenomenon manifests itself in the exploitation of personal data and the appropriation of emerging markets, compromising national sovereignty. The dominant position of large technology corporations restricts the entry of new market players, supported by their vast resources and influence over global political structures. In the Brazilian context, massive data collection raises critical questions related to privacy and security, requiring a balance between encouraging economic innovation and protecting individual rights. Although initiatives such as Law No. 12.965/2014 (Marco Civil da Internet) and the General Data Protection Law (LGPD) represent significant advances, the challenges posed by the actions of Big Techs remain evident and demand more robust regulatory solutions.

The third chapter will analyze the growing influence of Big Techs, evidenced by interventions in electoral processes and the formulation of public policies, as in the cases of Cambridge Analytica and the Fake News Bill. These examples highlight the difficulties faced by nation-states in protecting individual rights in a context of globalization and transnationalization of information. The territorial approach of legislation, as well as the challenges of transcending borders to ensure rights protection, is a central issue in this debate.

In this regard, the transnationalization of information requires the creation of a more robust regulatory framework adapted to new digital realities. This necessity implies revising traditional political approaches to ensure adequate and effective protection of citizens' rights in the face of transformations imposed by large technology corporations.

The fourth chapter examines the relevance of local governance and civil participation in regulating Big Techs in developing countries. In a globally networked society, the concept of governance surpasses the traditional government model, encompassing mechanisms that operate beyond state jurisdictions, focusing on efficiency and development. In this context, participatory governance emerges as a viable alternative for the protection of rights, especially in scenarios where traditional structures prove insufficient to address the challenges imposed by large technology corporations.

In this context, digital sovereignty – focused on regulating data flow and privacy – emerges as a model that contributes to strengthening glob-

al governance⁴. However, it is essential to create control mechanisms that transcend state jurisdictions, capable of promoting efficiency, democracy, and development in an increasingly interconnected environment. Furthermore, local governance and the active participation of civil society are fundamental pillars for regulating the influence of Big Techs in political and economic spheres, ensuring greater balance and protection of collective interests.

2. Transnational law in the face of the expansion and dominance of big techs.

The expansion and hegemony of large technology companies raise central questions about regulation and the impact of these corporations on global society. In this scenario, transnational law emerges as an innovative regulatory solution, capable of more effectively addressing the challenges imposed by these corporate giants. In the Brazilian context, where technology plays a strategic role in both the economy and social dynamics, the debate on this issue becomes even more relevant, requiring approaches that balance technological development with the protection of rights.

The transformation of collective communication, which was once structured and regulated within a national system of administrative frameworks, reflects part of this shift. In recent years, we have observed the migration of major organizations and their traditional media to new digital services and business models. Earlier technologies were subject to the legal regulation of nation-states, whereas new digital platforms escape such constraints, adopting a transnational approach to communication. This transition is due not only to the technological advancement of the new economic model but also to the creation of a legal infrastructure that enables the emancipation of collective communication from large corporations, driving the emergence of a global society increasingly

⁴ Global Governance, with a focus on the internet, adopts a segmented approach that serves as a response to the structural complexity of the Network, which is organized in layers. Each layer is occupied by public and private actors with distinct natures and varying scopes of action. For example, the international regime for global telecommunications governance, centralized in the ITU, has played a predominant role in managing the physical infrastructure layer. In contrast, in the logical and content layers of the Internet, the private sector has taken the lead, a result of both the absence of regulation and the disordered manner in which the information economy sector has developed. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge: MIT Press, 2002. 15-19; Mueller, *Networks and States: The Global Politics of Internet Governance*. Cambridge: MIT Press, 2010, 6.

oriented toward digital platforms. This dynamic demands regulatory adaptation that addresses new realities, both from technological and legal perspectives⁵.

In the transnational context, so-called “unidentified normative objects” (UNOs) stand out, as they transcend the limits of state sovereignty and contribute to building a “global law.” This new normative framework does not arise directly from nation-states but results from interactions in social peripheries and specialized networks characterized by high technical organization and specific reach. By establishing a global legal identity distinct from state traditions, these networks reflect the complexity and dynamism of relations in the transnational sphere.

In this same landscape, the use of artificial intelligence in Facebook’s content moderation processes gains relevance. The platform, by expanding its role to the general organization of information, demonstrates that these processes are not static – whether in the techniques employed or in the conduct patterns shaped by them. Thus emerges the concept of a “law of networks”⁶, which must be shaped by the flow of communications and the rapid advances in technological processes. In this context, it is crucial to recognize that fundamental rights must be conceived primarily from the centrality of the human being, ensuring that technology does not override the ethical and legal values that uphold human dignity.

The growing complexity of advanced technologies imposes the need for regulation that transcends the traditional state-centered approach. Conventional theories of legal pluralism must be reevaluated, shifting the focus from local communities to global communication networks. The fragmentation of legal norms underscores the urgency of a more effective and integrated legal system capable of harmonizing diverse jurisdictions..

Despite the expansion of jurisprudence, a significant disconnect persists between law and politics at the global level. Luhmann and Neves point to the absence of structural mechanisms capable of ensuring interdependence between these two systems, highlighting the urgency of an approach that effectively integrates human rights and global governance.

Although traditional regulation has been unable to keep pace with new technologies, the absence of structural mechanisms ensuring interdependence between law and politics at the global level makes a more integrated approach necessary. The collection of data by Big Techs is a clear example of how data protection norms need to be reformed and

⁵ Campos, *Metamorfoses do direito global: sobre a interação entre direito, tempo e tecnologia*. São Paulo, SP: Editora Contracorrente, 2022, 183.

⁶ Moura, Rocha, *Direitos fundamentais e redes sociais: da moderação de conteúdo no Facebook ao direito na cultura das redes*. *Revista Direito Mackenzie*, 09, 2022.

effectively implemented across different jurisdictions. As Fornasier points out, devices such as sensors, cameras, and artificial intelligence algorithms continuously analyze user-generated data, becoming omnipresent elements in urban environments within a global context. This dynamic not only reshapes expectations regarding privacy and information control but also transforms urban life into a regulatory laboratory where data protection rules are constantly tested and adjusted.

The massive collection of data, driven by the financial interests of large technology companies, underscores the urgent need to regulate Big Techs through global governance that transcends the limits of national constitutions. As Teubner⁷, argues, the current context demands a digital constitutionalism that goes beyond the state-centered model, incorporating autonomous legal orders that encompass not only states but also social, economic, and technological institutions. This model reflects the complexity and demands of an interconnected society, where state sovereignty alone is insufficient to confront the challenges imposed by digital globalization. This is due, above all, to the combination of oligopolistic markets and business models based on the massive exploitation of data, which have significantly increased the ability of economic agents to influence society through strategies grounded in the code of economic accumulation.

In this context, informational capitalism emerges as a phenomenon that combines the relentless pursuit of profit maximization with the dynamics of digitality, using technologies and platforms to systematically capture and retain attention. This interplay between economic and digital interests transforms not only markets but also social structures, intensifying the need for regulation and governance suited to the new global landscape.⁸

Digital constitutionalism proposes progress in two dimensions: it goes beyond the division between the national and the transnational, as well as the separation between state and society. By integrating the perspectives of the nation-state, globalization, and the social sphere, it presents a more comprehensive approach adapted to new technological configurations. The growing influence of large technology corporations calls for the development of a transnational law that not only respects but also transcends national sovereignties, fostering integration among different legal systems⁹.

Moreover, this new legal model faces critical challenges, such as

⁷ Teubner, *Op. cit.*, 4-5.

⁸ Amato, (org.). *Sociologia do Direito Digital: inteligência jurídica na era da inteligência artificial*. São Paulo: Faculdade de Direito, 2024, 38.

⁹ Amato, *Op. cit.*, 40.

personal data protection and technological governance on a global scale. The emergence of specialized networks and the creation of autonomous normative structures signal a reconfiguration of the legal landscape. The dynamics of massive data collection, by reinterpreting privacy concepts, transform urban spaces into laboratories for regulatory experimentation, requiring flexible and inclusive approaches.

In this context, overcoming the state-centered paradigm and implementing integrated global governance are essential steps to ensure justice and regulatory effectiveness in an increasingly connected world. The coordination among different actors – states, international organizations, companies, and civil society – is indispensable for balancing economic interests, individual rights, and collective security.

3. The regulation of big techs in underdeveloped countries.

The regulation of Big Techs in underdeveloped countries is a complex and timely topic that warrants analysis through a critical and contextualized approach. Under the title *The Regulation of Big Techs in Underdeveloped Countries*, this chapter seeks to examine the influence of digital colonialism on the regulation of large technology companies in developing nations.

As Sartre highlights¹⁰ in his concept of colonialism, the system is characterized by the exploitation of the social and natural resources of the colonies. In the digital context, this exploitation manifests through the collection of personal data and the appropriation of emerging markets. In Brazil, for example, major technology corporations face criticism for failing to demonstrate the need to reform their exploitative practices and for disregarding the sovereignty of developing countries. It is essential that the regulation of Big Techs in underdeveloped nations takes into account the impacts of digital colonialism, aiming to protect both users and local resources.

The phenomenon of digital colonialism intertwines with predatory extractivist practices and the abstract quantification of the internet, resulting in growing dependency. In this context, Big Techs display characteristics that hinder the entry of new players into the market. First, these corporations possess substantial material resources, as well as intellectual capital that includes cutting-edge technologies and highly skilled professionals. Moreover, the international political landscape and existing legal structures favor consolidated power, making it extremely challenging to break this vicious cycle – particularly given the limitations imposed on

¹⁰ Sartre, *Colonialismo e Neocolonialismo*. Rio de Janeiro: Tempo Brasileiro, 1968.

research and innovation

Regulating large technology corporations, especially in developing countries, has become an increasingly pressing challenge. In the Brazilian context, from the implementation of the first internet-related regulations in 2014 to the present, the intensified collection of personal data has raised serious concerns about user privacy and security.. As Silveira points out¹¹, “transactions involving personal data have emerged as one of the most relevant segments of the information economy, accounting for the majority of revenue for major technology companies.” The regulation of these corporations, aligned with the advancement of the information economy, seeks to strike a balance between fostering innovation and economic growth and protecting individual rights. This task proves to be a continuous challenge, requiring ongoing efforts from lawmakers and regulators.

Although Law No. 12.965/2014¹² represented a significant step forward in protecting individual rights, user privacy and security remain pressing issues, underscoring the need for further regulation. This law seeks to balance innovation with the protection of rights, ensuring the State’s sovereignty over the internet. The “right to privacy,” as defined by Leonardi¹³, recognizes the protection of personal data as an autonomous right, stemming from the right to privacy and serving as a counterpoint to corporate data use. However, the transnationalization of information presents significant challenges to the effective protection of this right. In response, the General Data Protection Law (LGPD) was enacted in 2018¹⁴, amended in 2020, and the Bill No. 2.630¹⁵, which seeks to regulate social media, is currently under consideration.

The rise of technology, while offering efficient solutions, also rais-

¹¹ Silveira, A noção de modulação e os sistemas algorítmicos. PAULUS: Revista de Comunicação da FAPCOM, v. 3, n. 6, 2019.

¹² Brasil. Presidência da República. Secretaria-Geral. Subchefia para Assuntos Jurídicos. Lei n. 12.965, de 23 de abril de 2014. Estabelece princípios, garantias, direitos e deveres para o uso da Internet no Brasil. Disponível em: <https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm>. Acesso em: 3 dez. 2024.

¹³ Leonardi, Tutela da privacidade na internet. São Paulo: Saraiva, 2012, 76.

¹⁴ Brasil. Lei n. 13.709, de 14 de agosto de 2018. Institui a Lei Geral de Proteção de Dados Pessoais e dá outras providências. Diário Oficial da União, Brasília, 14 ago. 2018. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/113709.htm. Acesso em: 03 dez.2024.

¹⁵ Brasil. Câmara dos Deputados. Ficha de tramitação do Projeto de Lei n. 2630/2020. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1909983&filename=P L%202630/2020. Acesso em: 25 out. 2024.

es questions about traditional political approaches. Given the power of technology to manipulate human behavior, one might ask: why continue limiting regulation to traditional methods when tools based on empirical data are available? As Morozov notes¹⁶, technology plays a central role in this process, offering new perspectives for regulation and rights protection in the digital context.

Given the insufficiency of previous attempts to safeguard rights in Brazil – particularly in a transnationalized context – one of the main challenges is the sovereignty of nation-states. This sovereignty is often threatened by the influence of large technology companies, which transcend the power boundaries of local governments. Examples of this dynamic can be seen in corporate interventions in electoral processes, as evidenced by the Cambridge Analytica case in relation to Facebook, as well as Google’s stance regarding Bill No. 2.630/2020¹⁷, known as the “Fake News Bill.” This bill directly affects existing regulatory proposals.

The Cambridge Analytica case is particularly significant, as it exposes the vulnerability of personal data on social networks and highlights how such breaches impact fundamental rights. This example underscores the urgency of incorporating a digital sovereignty perspective – especially in developing countries – as an essential measure to safeguard citizens’ privacy and data security.

In conclusion, the growing influence of large technology companies is crossing the borders of national sovereignty, revealing the difficulty of ensuring rights protection in a globalized context. The transnationalization of information and the intervention of Big Techs in political and regulatory matters – as exemplified by the Cambridge Analytica case and Google’s stance on the “Fake News Bill” – reinforce the urgent need for a more robust regulatory framework suited to new digital realities. This situation demands not only a review of traditional political approaches but also the adoption of innovative and effective solutions to ensure the protection of citizens’ rights in the digital age.

4. Sovereignty and the protection of fundamental rights in a digital context.

The concept of sovereignty, traditionally tied to a territorial ap-

¹⁶ Morozov, Evgeny. *Big Tech A Ascensão dos Dados e a Morte da Política*. Tradução: Cláudio Marcondes, São Paulo: Ubu Editora, 2018, 89.

¹⁷ Brasil. Câmara dos Deputados. Ficha de tramitação do Projeto de Lei n. 2630/2020. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1909983&filename=P_L%202630/2020. Acesso em: 25/10/2024.

proach, is challenged by the internet due to its cross-border nature. The enormous volume of communication generated online makes the issue even more complex. Despite advances in international and regional initiatives, the lack of a harmonized global regulatory framework and the diversity of approaches among jurisdictions remain significant challenges for the effective protection of personal data. In this scenario, the concept of digital sovereignty stands out, reflecting the need for internet governance and data protection at the global level. Originally, digital sovereignty was understood as a constitutional movement aimed at limiting state political power¹⁸, but it has evolved into a broader debate on how states can exercise control over data flows and privacy in an increasingly globalized digital environment.

In this context, it is essential to consider these nuances when protecting fundamental rights¹⁹:

For this reason, it is unquestionable that a phenomenon such as the internet plays a dual role in the realm of constitutional law: on the one hand, it is a new, powerful tool to pursue the aims of constitutional law (a new way to define, control, and regulate power); on the other, it is a new object within constitutional law (a new power to be defined, controlled, and regulated). Today, the most explored side of the Internet–Constitutional Law interaction concerns fundamental rights, especially from the perspective of freedom of expression and the protection of personal data (privacy rights).

With the advent of the internet, physical barriers have become less relevant for information and e-commerce, requiring a reevaluation of the concept of sovereignty to fit the digital environment. In this context, digital sovereignty emerges as an extension of traditional sovereignty, adapting to the new technological and economic realities of the contemporary world.

The case involving the platform X²⁰ and Brazil highlights an emerging issue of great relevance to the political sociology of law: digital sovereignty. This battle reflects a context in which economic and technological power seeks to surpass state structures, challenging the traditional foundations of governance.

Given growing concerns over citizens' safety and privacy, states have

¹⁸ Suzor, *The Role of the Rule of Law in Virtual Communities*. Berkeley Technology Law Journal, v. 25, n. 4, 1817-1886. 2010; eem BERMAN, Paul Schiff. *Cyberspace and the State Action Debate: the cultural* 1310. 2005.

¹⁹ Simoncini, *The Constitutional Dimension of the Internet: Some Research Paths*. EUI Working Paper LAW, v. 16, 1-13. 2016, 4.

²⁰ Amato, (org.). *Sociologia do Direito Digital: inteligência jurídica na era da inteligência artificial*. São Paulo: Faculdade de Direito, 2024.

intensified efforts to ensure that data generated within their territories remains under their jurisdiction, seeking to limit the influence of external actors. However, these efforts have proven insufficient to effectively protect fundamental rights, mainly due to the transnational nature of the challenges posed by major technology corporations.

The main limitation lies in the fact that proposed legislation remains grounded in a territorialist approach, inadequate to address data flows that cross borders. This disconnect between local regulatory structures and the global scale of digital operations underscores the need for more integrated and collaborative governance models capable of addressing the complexities of the contemporary digital environment.

In this scenario, the decision of the Brazilian Federal Supreme Court (STF)²¹ regarding the extraordinary appeal and the establishment of the thesis of Theme 987 of general repercussion – which addresses the liability of internet providers for harmful content generated by third parties – stands out. Justice Dias Toffoli's vote suggests that providers should be held civilly liable, especially in situations involving algorithmic and automated actions on platforms. The vote further specifies circumstances in which providers should be held accountable, such as cases involving fake profiles, crimes against the Democratic Rule of Law, violence, and the dissemination of disinformation.

Additionally, the vote proposes the implementation of public policies to combat digital violence and disinformation, with the collaboration of various government agencies, including the Ministries of Education, Health, and Justice. It also suggests the creation of the Department for Internet Monitoring in Brazil (DAI) by the National Council of Justice, with the goal of overseeing the implementation of these policies and the protection of fundamental rights in the digital environment. However, this decision remains aligned with a territorialist approach, in which the state seeks to maintain sovereignty over the application of digital legislation.

Nevertheless, due to the transnational nature of the issue at hand, territorialist legal approaches prove inadequate for ensuring the protection of rights. The transnational debate thus becomes a challenge in the courts, undermining the effective safeguarding of these rights. A prominent example of this is the following case:

O REsp 2147711 / SP²² addresses the extraterritoriality of Brazilian

²¹ Brasil. Supremo Tribunal Federal. Repercussão Geral no Recurso Extraordinário n. 1037396 Tema 987. Disponível: <<https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987>>. Acesso em: 13 out 2024.

²² Brasil. Superior Tribunal de Justiça. Acórdão no Recurso Especial nº

court orders, focusing specifically on the removal of infringing content from YouTube and its implications for the sovereignty of other states. The central decision concerns whether a court order to remove content deemed illegal in Brazil can have a global effect. Justice Nancy Andrighi argued that such a measure does not constitute a violation of foreign sovereignty, basing her reasoning on the Brazilian Internet Civil Framework (Law No. 12.965/2014)²³, which establishes cross-border jurisdiction in Brazil. The court aligned itself with the global trend of promoting the effectiveness of judicial decisions on an international scale, recognizing the need for a legal approach that adapts to the transnational nature of the internet.

The decision highlights that service providers such as YouTube have the capacity to act proactively in complying with court orders, even when they extend beyond the borders of their primary jurisdiction. Furthermore, it balances the limitation of freedom of expression with the protection of honor and reputation, in line with United Nations guidelines.

However, the analysis reveals practical difficulties in enforcing content removal in foreign jurisdictions. While such content may be prohibited in Brazil, in other countries access could still be permitted, as Brazilian territorial rules face limitations in their reach.

In sum, the Superior Court of Justice established a significant precedent by recognizing that the internet operates as a global system, requiring the adaptation of the international legal framework to new technological and social realities, with the aim of ensuring the protection of fundamental rights beyond national borders.

5. The importance of local governance and civil participation in regulating big techs in underdeveloped countries.

The concept of governance is often associated with the idea of government or the State, but from a polycontextural perspective, it is understood as a structure that manifests characteristics of political system programming. In this sense, the construction of governance is not limited to the notion of government but involves the organization of politics across different systems, including the economy, civil society, and academia.

202400654047. Publicado em 26 nov. 2024. Disponível em https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordão?num_registro=202400654047&dt. Acesso em: 6 dez 2024.

²³ Brasil. Presidência da República. Secretaria-Geral. Subchefia para Assuntos Jurídicos. Lei n. 12.965, de 23 de abril de 2014. Estabelece princípios, garantias, direitos e deveres para o uso da Internet no Brasil. Disponível em: <https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm>. Acesso em: 3 dez. 2024.

This approach is particularly important in underdeveloped countries, where local governance and civil participation are essential for regulating Big Techs, which exert significant influence over the political and economic life of society.

Governance transcends the traditional conception of “government” by integrating control mechanisms that operate beyond the jurisdiction and regulatory sphere of the State. This concept departs from conventional democracy, as it incorporates efficiency principles that simultaneously promote democracy and development. In this scenario, the State sees its authority diminish on the international stage, enabling the rise of non-governmental organizations and private initiatives, resulting in the replacement of the concept of government with that of governance. As Zoller²⁴, notes, “to discuss governance is to acknowledge that, on one side, there are those who govern and, on the other, those who are governed, without the interactions between these groups necessarily being guided by authority or hierarchical relations”.

According to Castells²⁵, the self-designation of dominant elites as citizens of the world is not a fortuitous phenomenon. It reflects the centrality of power networks revolving around activities of significant relevance. Conversely, cultural systems remain deeply rooted in elements such as territories, languages, religions, and other aspects of daily life. This dynamic suggests that, while network logic influences cultural communities, it does not lead to their complete dissolution. However, it is worth noting that individuals lack the capacity to intervene institutionally in the governance processes characterizing these dominant networks.

In countries like Brazil, where technological production capacity is limited and regulation faces significant challenges in mitigating the influence of major technology companies, there is an urgent need for more inclusive governance that incorporates civil society participation. Considering that legal norms are grounded in territoriality, complex situations – particularly in transnational contexts – demonstrate the inadequacy of this approach in ensuring the protection of rights. In the current scenario, marked by the wide circulation of information, governance must encompass a diversity of actors, especially in developing countries dealing with inequalities exacerbated by colonial legacies and the concentration of technological power.

²⁴ Zoller, *Gouvernance internationale et organisations intergouvernementales*. In: *Le Droit des Organisations Internationales*. Bruxelles: Bruylant, 1997, 148.

²⁵ Castells, *A era da informação: Economia, sociedade e cultura*. Vol. 1 *A sociedade em Rede*. Vol. 2 *O Poder da Identidade*. Vol. 3 *A Era da Informação: Fim do milênio*. Ed. Paz e Terra. 1996-2020.

As Canotilho²⁶ explains, governance, in its broad sense, initially appears as an undefined practice that, over time, has been shaped by the conception of governance aimed at the global society. The author highlights the various transformations that have occurred in recent decades in the context of the modern world. Traditional borders tend to gradually fade as cultures intertwine in a multicultural dynamic. Global communication disseminates information rapidly, while autocratic regimes have been progressively replaced by democratic systems. In this scenario, global governance emerges as a central theme, reflecting the complexity and interconnectedness of contemporary societies.

The concept of governance transcends the traditional idea of government, encompassing mechanisms that operate beyond state jurisdiction, with a focus on efficiency and development. From a polycontextural perspective, governance manifests itself across different systems, such as the economy and civil society, and is crucial for underdeveloped countries to confront the influence of Big Techs. Castells²⁷ emphasizes that, although global networks concentrate power, cultural systems remain rooted, limiting institutional intervention. In Brazil, inclusive governance is essential, given the inadequacy of territorial norms in transnational contexts. Canotilho²⁸ reinforces that global governance reflects the complexity of contemporary societies, marked by multiculturalism and democratization. In short, global governance is a central issue in the current era, reflecting the complexity and interconnectedness of contemporary societies.

6. Conclusion.

The analysis of the impact of major technology companies (Big Techs) on developing countries, with an emphasis on Brazil, reveals pressing issues related to digital sovereignty, legal regulation, and the protection of fundamental rights. By exploiting personal data and monopolizing emerging markets, these corporations pose considerable challenges to national sovereignty and the regulatory autonomy of these nations. The transnationalization of information, coupled with the global nature of the internet, further complicates the effective protection of privacy and freedom of expression, highlighting the need for a legal framework adapted to contemporary realities.

The guiding methodological question of this research was: *In what*

²⁶ Canotilho, *Brançosos e Interconstitucionalidade: itinerários dos discursos sobre a História Constitucional*. Coimbra: Editora Almedina, 2006, 160.

²⁷ Castells, *Op. cit.*, 30.

²⁸ Canotilho, *Op. cit.*, 160.

ways do Big Techs influence the application of territorial law in developing countries, and what is the repercussion of this influence on sovereignty and the demand for social governance? Through bibliographic analysis and a systematic review of the literature, it was found that Big Techs exert substantial influence over public policies and national regulations, undermining the sovereignty of States. Traditional regulatory approaches, grounded in territoriality, have proven inadequate in the face of the realities of digital globalization.

The future points to the necessity of a more cohesive global governance framework that transcends national borders and involves multiple actors: governments, civil society, international organizations, and corporations. In developing countries – particularly those with limited resources for technological production and regulation – active civil society participation will be crucial for building a governance model that safeguards fundamental rights and effectively regulates Big Techs.

With regard to governance, digital sovereignty emerges as a promising alternative, enabling countries to maintain greater control over their citizens' data and privacy while addressing the inequalities resulting from Big Tech dominance. However, it is imperative that regulatory solutions be coordinated at the global level, with the collaboration of all sectors of society, in order to ensure balance without compromising the sovereignty of developing nations.

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17.

NEW TECHNOLOGIES AND LAW: WHAT POSSIBLE GOVERNANCE?

*Michela Michetti**

1. Prologo: Rete e Diritto: la (apparente) distanza tra due mondi.

Nella storia dell'umanità le rivoluzioni hanno sempre prodotto trasformazioni importanti e profonde, andando a ridisegnare le coordinate dei rapporti geo-politici, delle relazioni socio-economiche e ovviamente degli ordinamenti giuridici-costituzionali. Di tutti i rivolgimenti e i trapassi accaduti non v'è dubbio che quella *tecnologica* sia la più imponente delle *rivoluzioni*¹: essa ci ha catapultato dentro la cd. *Era digitale*, provocando una vera e propria *rivoluzione spaziale*². Un'era, quella digitale, nuova ed inedita di fronte alla quale lo studioso e, in specie il giurista, si ritrova ad indagare questioni sino ad ora sconosciute, avvertendo immediatamente una distanza a dir poco abissale tra le categorie classiche della scienza giuridica, con le quali egli è abituato a ragionare, e l'apparato concettuale sottinteso alla Rete e a tutto ciò che essa esprime nella sua *consistenza* (o *in-consistenza*) di spazio virtuale, immateriale con proprie scale di valutazione e di valori.

Due mondi e una distanza che si misura già solo opponendo concettualmente allo spazio cibernetico la realtà confinaria e territoriale propria del Diritto, il quale rimanda ad un concetto fisico, terraneo, legato

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¹ Schmitt, *Teoria del partigiano. Integrazione al concetto de Politico*, Adelphi, Milano 2005, 96, l'A. qui sottolinea che "ogni progresso della tecnica umana produce nuovi spazi e imprevedibili modificazioni delle tradizionali strutture spaziali"; ID., *Terra e Mare. Una riflessione sulla storia del mondo*, III ed., Milano, 2006, 11; Kissinger, *Ordine mondiale*, trad. it., Tullio Cannillo, Milano, 2020, 338 ss., il quale sottolinea che "Il cyberspazio (...) ha colonizzato lo spazio fisico (...)" e che gli effetti di questa rivoluzione si estendono a ogni livello dell'organizzazione umana tanto da poter parlare di cyberdominio.

² L'innovazione tecnologica ha rappresentato la prima e forse anche più potente spinta verso la rivoluzione spaziale. In questo senso, si v. Ortino, *Il nuovo Nomos della Terra. Profili storici e sistematici dei nessi tra innovazioni tecnologiche, ordinamento spaziale, forma politica*, Bologna, 1999, 11 s.; Mangiameli, *I diritti costituzionali dallo Stato ai processi integrativi*, Torino, 2020, 238, per il quale "il motore di questa trasformazione è dato dall'idea della rete che, con la contrazione della dimensione tempo-spazio determina, non solo il superamento dell'economia nazionale, ma anche quello dell'autorità territoriale per eccellenza, lo Stato".

consustanzialmente all'esercizio del potere statale e che – per definizione – esprime *ordine, regolarità, prevedibilità, certezza*: in una parola *Ordinamento*. Il Diritto è, infatti, *ordinamento* dello spazio delimitato da punti lineari e fissi³, secondo quella che è la concezione che s'afferma all'interno dell'*habitat* culturale e politico della modernità e che aggancia la radice (e la scaturigine) del Diritto alla Terra⁴ ovvero ad un punto finito e conchiuso verso l'esterno.

Va da sé che il *cyberspazio*⁵, questo ambiente virtuale interattivo – caratterizzato dalla de-territorializzazione dei rapporti giuridici, sciolto da ogni riferimento territoriale (tanto che, non a caso, utilizziamo l'espressione “navigare in Rete” proprio per evocare l'idea di uno spazio fluido ed infinito come il mare, completamente astratto da barriere geografiche)⁶, che ignora un tempo-prima e un tempo-dopo e conosce solo movimento, accelerazione e ubiquità, privo di confini, di un centro, di una periferia e di gerarchie scalari – appaia distante e forse anche estraneo alla riflessione di chi, come il giurista, s'accinge a leggere il rapporto tra Rete e Diritto, attingendo alla teorica classica della statualità e della territorialità del Diritto e, dunque, ricorrendo a paradigmi verosimilmente

³ Schmitt, *Il nomos della terra. Nel diritto internazionale dello «jus publicum europaeum»*, Milano, 1996, 24-26 e 145: “ogni ordinamento fondamentale è un ordinamento spaziale” e “si basa, nella sua essenza, su determinati confini e delimitazioni spaziali, su determinate misure e su una determinata spartizione della terra”.

⁴ Schmitt, *Il nomos della terra. Nel diritto internazionale dello «jus publicum europaeum»*, Milano, 1996, 19 s., “La terra è detta nel linguaggio mitico la madre del diritto”; Natalino Irti, *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, 2002; Irti, Severino, *Dialogo su diritto e tecnica*, Bari, 2001, 12: “La territorialità è tra i caratteri fisionomici del diritto moderno”.

⁵ Amato Mangiameli, voce *Cyberspace*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino 2023, 101: “Il cyberspace è l'ambiente virtuale interattivo generato dal computer (...) la cui natura è comunicativa e non-territoriale”.

⁶ Schmitt, *Il nomos della terra. Nel diritto internazionale dello «jus publicum europaeum»*, Milano, 1996, 20: “il mare invece non conosce un'unità così evidente di spazio e diritto, di ordinamento e localizzazione (...). Il mare è libero. Questo significa, secondo il recente diritto internazionale, che il mare non costituisce un territorio statale e che esso deve restare aperto a tutti in modo eguale (...)”; Amato Mangiameli, voce *Cyberspace*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 101, la quale sottolinea proprio l'analogia con l'oceano: “l'assenza dell'elemento territoriale fa sì che vi siano naviganti (net-surfer) e che solo il surfing, cioè la navigazione senza una meta ben precisa, si adatti alle esigenze della rete”; Grossi, *Prima lezione di diritto*, Roma-Bari 2006, 76; Galli, *Spazi politici. L'età moderna e l'età globale*, Bologna 2001, 131 ss.

inadeguati tanto da far sembrare i due mondi – l'uno fisico, l'altro virtuale – profondamente distanti o, perlomeno, fondati su griglie concettuali antitetiche.

Del resto, una simile lettura riflette l'eredità lasciata dal *moderno* che proietta una visione – probabilmente deformata⁷ – del Diritto entro una dimensione esclusivamente materiale. Se così è, la prospettata distanza tra Rete e Diritto pone immediatamente in discussione la *vocazione ordinativa* del Diritto, la quale costituisce essenza e funzione insopprimibile del medesimo⁸ e rispetto alla Rete – espressione iconica del non luogo, sfuggente alla regolazione giuridica *tout court* e a quell'idea che salda il Diritto ad una spazialità, ad un *limes* territoriale e geometrico – esso rischia di apparire recessivo, smarrendo così la sua connotazione ordinante⁹.

Di fronte a simile constatazione, va tuttavia detto che il Diritto ha nel suo DNA una capacità adattiva che continuamente lo spinge a riconformarsi di fronte ai fisiologici mutamenti della realtà, prima recependoli e poi ordinandoli. Una capacità adattiva ed ordinante che chiama il Diritto stesso a fare i conti «con i *tempi* e gli *spazi* più diversi»¹⁰ ed oggi immancabilmente a misurarsi con lo *spazio cibernetico* de-localizzato e de-storicizzato, ove esso non ritrova più i suoi referenti concettuali classici, primo fra tutti un *dove* ed un'autorità centrale istituzionalizzata (come lo Stato), poiché la Rete, che «sorvola ogni confine»¹¹ ed è insensibile a limiti precostituiti, tende a rappresentarsi come il più vasto spazio pubblico senza governo e senza sovranità¹².

⁷ Grossi, *Prima lezione di diritto*, Roma-Bari 2006, 74, il quale parla del diritto che si è deformato “durante il moderno; ossia, in breve, della invadenza degli Stati e della statualità del diritto, che pretende, ha preteso fino ad ora, la proiezione materiale in un territorio”.

⁸ Grossi, *Prima lezione di diritto*, Roma-Bari 2006, 44 s.

⁹ Corasaniti, *Regolazione, autoregolazione, sovraregolazione della Rete: dal “far” web al “fair” web*, in *Gli atti digitali di «Gli Stati Generali del Diritto di Internet»*, Luiss 16, 17, 18/12/2021, disponibile al seguente link: <https://dirittodiinternet.it/wp-content/uploads/2021/12/>, il quale afferma che “Il diritto rischia di non adeguarsi al passaggio, di non potere mantenere al lungo il suo tradizionale ruolo di strumento di regolazione dei conflitti umani”.

¹⁰ Grossi, *Prima lezione di diritto*, Roma-Bari 2006, 43.

¹¹ AMATO MANGIAMELI, voce *Cyberspace*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino 2023, 101 e 103: “La caratteristica prima della rete è l'essere senza un centro e una periferia. Altrimenti detto, il flusso digitale non conosce gerarchie e in un certo senso neppure centri di supervisione (...)”.

¹² Barlow, *A Declaration of the Independence of Cyberspace*, in <https://scholarship.law.duke.edu/dltr/vol18/iss1/2/>, 8 febbraio 1996; Rodotà, *Una Costitu-*

Di qui allora la prima grande questione: è davvero abissale la distanza tra Rete e Diritto? Ed è davvero impossibile coniugare Rete e Diritto e, quindi, pensare di poter regolare attraverso regole giuridiche l'ecosistema digitale?

2. La Rete come mondo nuovo e ordine spontaneo, estraneo alla politica e al diritto. La concezione libertaria di Barlow.

Senz'altro ineludibile è la constatazione che per quanto la loro natura sia profondamente diversa, Rete e Diritto (come Mare e Terra) sono mondi solo *apparentemente* distanti, poiché, in realtà, essi sono destinati ad entrare in reciproca connessione già solo per la più banale circostanza che tutto quanto accade nello spazio *virtuale* si rifrange inevitabilmente sulla dimensione *reale*, al punto che tra i due mondi esiste una imbricazione tale che chiama in causa proprio il Diritto (e per esso gli Stati nazionali)¹³. E ciò non tanto e non solo in quanto la Rete necessita per esistere di infrastrutture fisiche che insistono sui territori nazionali, ma soprattutto perché essa pervade ogni aspetto della vita pubblica e privata del singolo e, per conseguenza, ha effetti immediati sulle sue situazioni giuridiche soggettive.

Eppure il *mood* che ha attraversato la non recente riflessione sulla necessità di regolare la Rete è stato avvertito quasi come un inaccettabile vincolo alla natura libertaria della stessa. Nel 1996 *John Perry Barlow*, convinto sostenitore di *Internet*, nella sua celebre *Dichiarazione di Indipendenza del cyberspazio*, rivendicava l'autonomia della Rete e la sua estraneità alla politica e al diritto. In nome del futuro, Egli chiedeva ai governi del mondo industriale di lasciare in pace il *cyberspazio*, un ordine originario, la cui disciplina non poteva dipendere dalle istituzioni del mondo fisico. Uno spazio cioè capace di autoregolarsi e che non abbisognava di regole eteronome, impermeabile ai governi e alle regole ove realizzare appieno la libertà.

La stessa letteratura giuridica non ha esitato a definire il *cyberspazio* un *ordine spontaneo*¹⁴, capace di provvedere alla propria unità e alla sua stessa organizzazione, in grado di autogenerarsi senza seguire spinte esogene. Uno spazio retto dalla *ratio* tecnologica, monopolizzato dai privati e dalle *Big Tech*, resistente ad ogni e qualunque intervento

zione per Internet?, in *Politica del diritto*, (2010), n. 3, 338.

¹³ Come osserva Mangiameli, voce *Sovranità digitale*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino 2023, 451.

¹⁴ In tal senso si v. Amato Mangiameli, *Un nuovo spazio. Il cyberspace*, in Amato Mangiameli, Campagnoli, *Strategie digitali#diritto_educazione_tecnologie*, Torino 2020, 10 ss.

regolatorio pubblico; un ambiente ontologicamente anarchico e privo di leggi che accoglie modelli di auto-regolazione di tipo funzionalista libera e flessibile, revocabile e informale e che respinge sistemi di regolazione *top-down* (modelli di regolazione di derivazione statale).

3. Dall'insufficienza del paradigma della auto-regolazione alla emersione della regolazione di matrice pubblicistica.

Se è vero che nell'anomia della Rete molti hanno avvistato la chiave del successo del *cyberspace* e della sua irrefrenabile dominante ascesa, l'assenza di regole e di una regolamentazione ha specularmente destato una risorgente esigenza di disciplina, nel momento in cui si è seriamente palesata la finitezza della Rete soprattutto sotto il profilo della tutela dei diritti e delle libertà. La mancanza di regole, come sempre accade, non è sinonimo di libertà assoluta, e la Rete dal canto suo non è riuscita – nonostante la moltiplicazione degli spazi di libertà¹⁵ – a garantire le libertà del singolo e, più in generale, la sua libertà di autodeterminazione. Lì dove il *cyberspace* ha creato spazi vuoti di Diritto sono fioriti prepotenti poteri privati, divenuti i regolatori di fatto della sua *governance*, i quali hanno dirottato la Rete verso logiche di governo antidemocratiche e discriminatorie sia per gli utenti sia per gli attori del mercato, determinando non solo il superamento dell'economia e dell'autorità statale, ma anche il mutamento di ruolo delle grandi piattaforme digitali che non sono più e soltanto attori economici in senso stretto che esercitano la libertà di iniziativa economica ma veri e propri poteri in concorrenza con quelli pubblici di carattere nazionale e sovranazionale¹⁶.

Ai limiti sistemici dell'auto-regolazione¹⁷ ha fatto eco una richiesta di

¹⁵ Non vi è dubbio che il progresso tecnologico abbia ampliato e moltiplicato gli spazi di libertà, rinvigorendo l'esercizio dei diritti. Si pensi ad esempio alla libertà di manifestazione del pensiero che ha trovato proprio nella Rete il mezzo privilegiato per la sua più ampia e libera circolazione. E sempre la Rete ha messo a disposizione di noi tutti nuovi mezzi di informazione che a differenza di altri strumenti analogici (TV, radio, stampa) consentono a ciascun individuo non solo di manifestare liberamente il proprio pensiero e le proprie opinioni, ma anche di raggiungere un numero indefinito di destinatari e di creare e diffondere una imponente mole di dati.

¹⁶ Come si legge in Irti, Severino, *Dialogo su diritto e tecnica*, Bari, 2001, 15, "La tecnica si va trasformando da strumento con iscopo del capitalismo, il quale (...) è capitalismo solo in apparenza, mentre in realtà è *tecnocrazia*, e cioè l'agire che si propone come scopo l'incremento indefinito della capacità di realizzare scopi, oltrepassando la volontà ideologica di realizzare un certo mondo invece di un altro".

¹⁷ Busch, *Self-regulation and regulatory intermediation in the platform economy*, in Cantero Gamito e Micklitz, *The Role of the EU in Transnational Legal*

disciplina giuridica della Rete in grado di contenerne la frammentazione e di ordinare con regole certe l'intreccio dei rapporti che quotidianamente gemma entro le pieghe degli spazi fluidi che essa genera. L'esigenza non ha bisogno di essere spiegata. Quotidianamente nascono nella Rete relazioni e rapporti giuridici, si danno condotte illecite e illegali, indebite interferenze in violazione di diritti e libertà. Ed è proprio nel momento "patologico" che il modello auto-regolatorio si è rivelato lacunoso, inadeguato, spesso intempestivo e bisognoso di essere integrato con un modello di regolazione *politica*.

Lo sposalizio tra Diritto e Rete non è stato così immediato: l'iniziale prevalenza della regolazione privatistica ha "miniaturizzato" l'intervento regolatorio dei pubblici poteri registrandosi un insidioso effetto recessivo del Diritto. Di fronte a questo arretramento è avanzata l'idea di costruire un modello di regolazione basato su una *lex informatica*¹⁸ ovvero su un sistema di regole tecnologiche automatizzate e auto-applicative universalmente valido per l'accesso, l'uso e la circolazione delle informazioni nello spazio virtuale. Un sistema costituito insomma da regole tecniche che con appropriati processi computazionali disciplina il funzionamento dello spazio virtuale, sebbene non in modo del tutto neutrale. Ma evidentemente ciò non è bastato (e non basta) alla Rete e neppure alla stessa *lex informatica* per inverarsi come regola autenticamente giuridica.

La disciplina della Rete chiede infatti di essere integrata con regole propriamente giuridiche, espressione del potere decisionale pubblico, unico peraltro ad essere intriso del crisma della legittimità¹⁹. Solo l'intervento del Diritto e, per esso, dei legislatori dei diversi livelli di governo può garantire al *cyberspace* di continuare il suo sviluppo secondo una direzione che miri a divenire un effettivo spazio di realizzazione dei bisogni della persona umana. A ben guardare, la Rete non è altro che la proiezione del dominio degli Stati che se pur "stanchi giganti di carne e di sangue" conservano un ruolo regolatorio e di controllabilità della Rete, il quale soprattutto nel momento patologico di esercizio del potere digitale deve riaffiorare e gli Stati stessi non possono e non devono abdicare a favore della fioritura di una nuova *lex mercatoria* o addirittura di *costituzioni settoriali* (secondo l'idea teubneriana) che rifletterebbero interessi settoriali e particolari sospinti dalla fredda logica di interessi economici

Ordering. Standards, Contracts and Codes, Cheltenham 2019, 115 ss.; Rodotà, *Una Costituzione per Internet?*, in *Politica del diritto*, 2010, n. 3, 337, parla di "attentati alla libertà in rete".

¹⁸ Reidenberg, *Lex informatica: The Formulation of Information Policy Rules Through Technology*, in *Texas Law Review*, 1998, 553.

¹⁹ Mangiameli, voce *Sovranità digitale*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 457.

e di relazioni tipicamente negoziali²⁰. Se così non fosse riemergerebbe lo spettro di un neo-feudalesimo digitale²¹ accompagnato dalla regressione dei principi dello Stato costituzionale di diritto e, di più, dal rischio della privatizzazione del potere pubblico.

4. Il Diritto e le nuove forme del “potere”. Dal costituzionalismo moderno al costituzionalismo digitale.

Di fronte all'auspicata necessità di garantire uno spazio regolatorio pubblico che accompagni il dirompente sviluppo tecnologico²² in atto, segnato dal passaggio dal mondo analogico/fisico, al mondo digitale e poi ancora al mondo algoritmico, che ha ridefinito le coordinate del potere (e dei poteri entro nuovi spazi), riplasmando la consistenza dei Diritti come anche il rapporto tra Autorità e Libertà (ovvero tra la Macchina che oggi esprime e contiene il potere e la Persona) – la riflessione su una possibile *governance* della Rete e delle nuove tecnologie è attraversata dall'interrogativo non affatto semplice che chiede provocatoriamente se “*può la tecnica essere regolata o si fa, essa stessa, regola del nostro mondo?*”²³.

Non v'è dubbio che le nuove tecnologie siano divenute un elemento indefettibile della contemporaneità tanto che la letteratura, non solo giuridica, del XXI secolo non esita a parlare di inevitabile dominazione della tecnica e di una nuova forma di *colonialismo digitale*, che impone di ripensare le categorie concettuali classiche del ragionamento giuridico nonché i paradigmi culturali tipici della modernità e del costituzionalismo moderno. Un compito non più rinviabile per via della crescente rilevanza costituzionale dei problemi connessi alla regolazione giuridica

²⁰ Sul punto se si vuole Michetti, *Organizzazione del potere e territorio. Legittimità dello Stato e livelli di governo*, Torino, 2021, 51 ss.

²¹ In argomento RODOTÀ, *Una Costituzione per Internet?*, in *Politica del diritto*, 2010, n. 3, 347; D'Andrea, *Oltre la sovranità. Lo spazio politico europeo tra post-modernità e nuovo medioevo*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 31, I, 2002, 77 ss.; Venanzoni, *Neofeudalesimo digitale: Internet e l'emersione degli Stati privati*, in *mediaLaws*, 2020, n. 3.

²² Chi sono i protagonisti di questa imponente rivoluzione? I Big Data; Internet of Things; IA etc. che hanno avuto ed hanno un impatto determinante sull'organizzazione della società contemporanea. Tutto ciò ha mutato e sta mutando l'approccio degli individui rispetto alla realtà che ci circonda così come sta mutando la comprensione di noi stessi in un mondo sempre più connesso. La nostra vita è *onlife*, frutto di una continua interazione tra la realtà fisica e quella virtuale. Il 18° Rapporto Censis sulla comunicazione riporta che l'impiego di Internet così come dei social network è in aumento. Il 93,4% dei giovani utilizza WhatsApp, You Tube, Instagram, TikTok, Telegram, Spotify.

²³ Efficace affermazione in Irti, Severino, *Dialogo su diritto e tecnica*, Bari, 2001.

delle nuove tecnologie, che ha portato all'espressione *costituzionalismo digitale* allusiva di un processo trasformativo e di rinnovamento che chiama il costituzionalismo a rimodellarsi su una nuova geometria che non è più solo e soltanto quella classica, ovvero verticale, del rapporto tra autorità *versus* libertà, ma anche su una geometria orizzontale all'interno della quale operano questi nuovi poteri (le cd. piattaforme *gatekeeper*) nelle mani dei quali si concentra un forte potere economico e informativo. Non solo. Le nuove tecnologie sprigionano una forza ed un potere in grado di assorbire qualunque altro tipo di forza: "la «forza economica» del capitalismo come la «forza giuridica» degli Stati"²⁴. Sono esse stesse un potere.

L'esigenza di immaginare un *nuovo patto* per le piattaforme digitali, plasmato sul calco dei principi del costituzionalismo moderno; l'esigenza di costituzionalizzare l'ecosistema digitale, l'IA, la Rete, l'algoritmo e, infine, la spinta alla regolazione delle piattaforme informatiche trova ragione proprio nella circostanza che questi nuovi *players* non esercitano soltanto un potere economico, ma anche un potere di rilevanza pubblicistica²⁵. Si pensi solo per fare un esempio all'enorme quantità di dati di cui essi dispongono, dalla commercializzazione e dalla manipolazione degli stessi, utilizzati per sviluppare nuove forme di profilazione e di sorveglianza²⁶, tanto che il potere del *networking*²⁷ ha generato nuovi tipi di *sorveglianze*²⁸ e una nuova *cultura della sorveglianza*²⁹ lontana

²⁴ Irti, Severino, *Dialogo su diritto e tecnica*, Bari, 2001, 16 s.

²⁵ Esposito, *Profili costituzionali dell'economia privata*, Padova, 2003, 6: "soggetti che agiscono nelle forme del diritto privato ma che, per la loro particolare posizione di forza economica sociale, sono capaci (...) di porre in essere atti sostanzialmente autoritativi"; Paruzzo., *I sovrani della rete. Piattaforme digitali e limiti costituzionali al potere privato*, Torino, 2022, *passim*; Manetti, *L'ordinamento giuridico fondato dalle piattaforme*, in Ladu, Maccabiani (a cura di), *L'individuo e la realtà digitale. Una questione costituzionale e democratica oltre la virtualità*, 2023, 15.

²⁶ Sul punto sia consentito rinviare a Michetti, *Sorveglianza, Rivoluzione tecnologica e tutela dei diritti fondamentali* in *dirittifondamentali*, n. 3/2023 del 14 dicembre 2023.

²⁷ Castells, *Il potere delle identità*, Bologna, 2014, 365: "queste tecnologie hanno liberato il potere del *networking* e del decentramento, forze che hanno praticamente minato alla base la logica accentratrice del comando univoco e della sorveglianza verticale e burocratica. Le nostre società non sono prigioni ordinate, ma giungle disordinate".

²⁸ Dandeker, *Surveillance, Power and Modernity: Bureaucracy and Discipline from 1700 to the Present Day*, New York, 1990, 46.

²⁹ Staples, *The culture of Surveillance*, New York, 1997; Mcgrath, *Loving Big Brother. Surveillance Culture and Performance Space*, London, 2004; Finn,

dalla visione distopica di *George Orwell* in 1984³⁰ e da quella panottica di *Foucault*.

Le nuove tecnologie si nutrono e si rinforzano con i nostri dati. Talvolta consapevolmente, altre volte meno ed altre ancora per niente, siamo noi stessi a fornire dati a tali dispositivi, i quali non solo raccolgono informazioni ma sono in grado di trasmetterli ad altri dispositivi connessi come quelli che rientrano nella definizione di Internet delle cose (IoT) come PC, smartphone, Tablet in grado di scambiare dati con altri oggetti³¹. Tutto ciò fa delle piattaforme il principale strumento comunicativo di massa in grado di esercitare una notevole influenza sul dibattito pubblico e sull'opinione pubblica, andando finanche a toccare il nucleo duro della tutela dei diritti fondamentali: dalla *privacy*³² alla protezione dei dati

“Seeing surveillantly: surveillance as sociale practice”, in Doyle, Lippert, Lyon, *Eyes Everywhere: The Global Growth of Camera Surveillance*, London, 2012.

³⁰ Che “per quanto futurista’ ed ancora di grande attualità (...) non è adeguata a spiegare l'imperante cultura della sorveglianza contemporanea, che si realizza nel vivere quotidiano, a partire dall'uso del cellulare, dello smartphone o nell'acquisto di un qualsiasi oggetto su internet” così Helzel, voce *Data-veglanza*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 146.

³¹ Questa costante interconnessione di dati attraverso l'utilizzo di calcolatori di grande capacità è stata definita – dall'informatico australiano *Roger Clarke* – *Dataveillance* (sorveglianza attraverso il Dato) un neologismo che svela il volto nuovo della sorveglianza, quella che si attua tramite l'interconnessione dei dati, la velocità della Rete e la potenza di calcolo, ed esercita un controllo sistematico delle azioni o delle comunicazioni delle persone (sia individuale sia di massa).

³² BVerfGE 15 dicembre 1983, il diritto alla *privacy* inteso nella sua più specifica accezione di *Recht auf informationelle Selbstbestimmung* (ovvero di diritto all'autodeterminazione informativa), espressione con la quale il *Bundesverfassungsgericht* vuole riferire un nuovo concetto, comprensivo non più e soltanto della tutela della sfera privata (*Sphärentheorie*) ma anche dell'incidenza sui diritti dell'interessato di ogni elaborazione di informazioni personali e la conseguente necessità che ogni elaborazione siffatta, per essere legittima, abbia un proprio specifico fondamento giuridico. Accogliendo tale prospettiva i Giudici di Karlsruhe hanno affermato che “*Entscheidend sind ihre Nutzbarkeit und Verwendungsmöglichkeit. Diese hängen einerseits von dem Zweck, dem die Erhebung dient, und andererseits von den der Informationstechnologie eigenen Verarbeitungs- und Verknüpfungsmöglichkeiten ab. Dadurch kann ein für sich gesehen belangloses Datum einen neuen Stellenwert bekommen; insoweit gibt es unter den Bedingungen der automatischen Datenverarbeitung kein “belangloses” Datum mehr. Wieweit Informationen sensibel sind, kann hiernach nicht allein davon abhängen, ob sie intime Vorgänge betreffen. Vielmehr bedarf es zur Feststellung der persönlichkeitsrechtlichen Bedeutung eines Datums der Kenntnis seines Verwendungszusammenhangs: Erst wenn*

personalì³³; dalla tutela dell'identità personale alla tutela della libertà di autodeterminazione informativa; dalla tutela del diritto di informazione alla tutela del diritto all'autodeterminazione sessuale etc.

Per il vero, non è questa la prima volta che poteri privati e diritto pubblico siano in contesa fra di loro. Né è la prima volta che poteri privati regolino certi settori economici, detenendo di fatto un potere *lato sensu* politico. È però necessario che la griglia concettuale entro la quale far convogliare la regolazione dei nuovi poteri sia ispirata ai principi della democrazia e del consenso, della responsabilità e della trasparenza, i quali appartengono tutti all'essenza dello Stato costituzionale di diritto.

In questa direzione, l'auspicato quanto ineludibile intervento regolatorio pubblico nello spazio cibernetico ha già mostrato quanta attenzione richiami il tema della *governance* della Rete, che se per lo più è stato a trazione giurisdizionale, esso ha anche percorso i rituali meccanismi decisionali, sfociati, come noto, nell'adozione del Regolamento europeo 2016/679 (GDPR), relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali³⁴, del più recente Regolamento

Klarheit darüber besteht, zu welchem Zweck Angaben verlangt werden und welche Verknüpfungs- und Verwendungsmöglichkeiten bestehen, lässt sich die Frage einer zulässigen Beschränkung des Rechts auf informationelle Selbstbestimmung beantworten". In particolare, la Corte EDU si è pronunciata sulle misure di sorveglianza elettronica di massa in Corte EDU, 4 dicembre 2015, *Case Zakharov v. Russia*, ric. n. 47143/06; Corte EDU, 25 maggio 2021, *Case of Big Brother Watch and Others v. United Kingdom*, ric. n. 58170/13, 62322/14 and 24960/15; sull'utilizzo delle tecniche di riconoscimento facciale in Corte EDU, 4 luglio 2023, *Case Glukhin v. Russia*, ric. n. 11519/20.

³³ Sul punto, il giudice europeo ha affermato che "nella misura in cui l'attività di un motore di ricerca può incidere (...) sui diritti fondamentali, sulla vita privata e sulla protezione dei dati personali, il gestore di tale motore di ricerca (quale responsabile del trattamento dei dati) deve assicurare (...) che detta attività soddisfi le prescrizioni della direttiva 95/47, affinché le garanzie previste da quest'ultima possano sviluppare pienamente i loro effetti e possa essere effettivamente realizzata una tutela efficace e completa delle persone interessate, in particolare del diritto al rispetto della loro vita privata" cfr. CGUE, 13 maggio 2014, *Case Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, C-131/12.

³⁴ L'adozione del Regolamento europeo 2016/679 (GDPR) relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati, il quale oltre ad aver provveduto ad armonizzare la disciplina all'interno dell'UE, ha riconosciuto alla protezione dei dati il rango di diritto fondamentale, la cui garanzia si realizza attraverso uno stretto e rigoroso controllo sul suo trattamento, rafforzato da forme di *accountability*. Sul tema anche la Corte di Strasburgo aveva ritenuto che lo sviluppo della tecnologia informatica e l'ampliamento delle possibilità di trattamento dei dati

europeo 2024/1689 del 13 giugno 2024 (*AI Act*)³⁵ e del *Digital Markets Act* (DMA)³⁶. A ciò si aggiunga la previsione di specifiche fattispecie penalmente rilevanti che proprio attraverso la Rete hanno assunto rilevanza e dimensioni tali da scuotere la sostanza dei fondamentali diritti individuali. Si pensi ad esempio al reato di diffamazione a mezzo Internet e al *revenge porn* o al *cyberbullismo* e alle relative misure di contrasto adottate³⁷.

Ora pur senza disconoscere i nuovi orizzonti di sviluppo che sistemi tecnologici capaci di interagire con l'uomo aprono al genere umano, sembra sempre più necessario incanalare simili orizzonti dentro opportuni processi di regolazione. Di fronte alla sorprendente capacità delle nuove tecnologie di modellizzare il mondo nella sua interezza, immaginando macchine non solo pensanti, ma addirittura coscienti in grado di dialogare con l'utente attraverso la comprensione del linguaggio umano/naturale, appaiono evidenti le implicazioni sia giuridiche sia etiche.

Già *Wiener*, ritenuto il padre della cibernetica, diversi anni fa comprese la necessità di elaborare un metodo di analisi che valutasse l'impatto e le conseguenze dal punto di vista etico dell'applicazione delle nuove tecnologie non solo sulla trasformazione della società, ma anche e soprattutto sulla trasformazione dell'essere umano. La scuola anglosassone parla di *etica informatica* per intendere una branca della filosofia che si occupa di come le decisioni derivanti dall'evoluzione dei siste-

personali dovuto all'automatizzazione pone in stretta relazione la tutela della vita privata e la protezione dei dati personali, quest'ultima espressione della tutela dell'autonomia personale da ingerenze eccessive da parte di soggetti privati e pubblici. E più efficacemente essa ha dichiarato che "The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism" in Corte EDU, 8 novembre 2016, *Case Magyar Helsinki Bizottság v. Ungheria*, ric. n. 18030/11.

³⁵ ... si propone di migliorare il funzionamento del mercato interno e di promuovere la diffusione di un'intelligenza artificiale (IA) antropocentrica e affidabile, garantendo nel contempo un livello elevato di protezione della salute, della sicurezza e dei diritti fondamentali.

³⁶ L'adozione del DMA incarna un cambio di paradigma rispetto al codice genetico proprio del diritto anticoncorrenziale, imponendo misure *ex ante* consistenti in obblighi e divieti a quei soggetti economici che, per dimensioni e ruolo sistemico, hanno il potere di agire come guardiani dell'accesso al mercato digitale.

³⁷ Sul piano normativo italiano questa necessità di regolare tali fattispecie ha trovato riscontro nel D.Lgs. n. 70 del 2003 (attuativo della Direttiva 2000/31/CE cd. Direttiva sul commercio elettronico); la L. n. 69 del 2019 (cd. Codice rosso); L. n. 71 del 2017.

mi informativi modifichino le condotte sociali ed individuali e di come queste scelte debbano essere ponderate e valutate. In filosofia si parla di *algoritmo etico* ovvero di algoritmo equo, trasparente, predicibile e resistente a tentativi di manipolazione. La scienza giuridica è anch'essa impegnata a costruire modelli regolatori che disciplinino e garantiscano uno sviluppo tecnologico antropocentrico e affidabile e, non a caso, i principali attori istituzionali hanno già dato prova della capacità di sottoporre a proprie regole lo spazio cibernetico, anche applicando a soggetti come le *Big Tech* sanzioni esemplari soprattutto nell'ambito di illeciti compiuti ai danni della *privacy* degli utenti³⁸. A ben guardare, il processo di regolazione delle Nuove tecnologie è *in fieri*, il Legislatore europeo e i Legislatori nazionali sono consci che il loro intervento è divenuto a dir poco ineludibile, e che il Diritto costituisce la sede naturale ove riportare tutto questo *insieme*, riposizionando al centro del sistema la Persona umana come inizio e fine del sistema.

5. Il perdurante ruolo del Diritto nel governo dell'ecosistema digitale.

Se si fosse dubitato, anche solo per un istante, del ruolo ordinante del Diritto rispetto alla Rete si sarebbe caduti nell'errore di ritenere l'ecosistema digitale uno spazio del tutto autoreferenziale, anarchico, irrealistico, a-politico e completamente asservito alle regole dei poteri privati.

Evidentemente così non è o almeno lo è solo in parte. Qualsiasi nuovo spazio non è irraggiungibile per il diritto. Già lo spazio aereo e poi quello marittimo hanno dimostrato di non essere refrattari alla regolazione giuridica. Appartiene, infatti, all'essenza del Diritto stesso giuridificare le relazioni e i rapporti, anche quelli virtuali che nascono e si sviluppano all'interno di spazi immateriali. E la Rete non sfugge a questa prerogativa propria del Diritto³⁹. A conferma di simili affermazioni con-

³⁸ Solo a titolo di esempio si pensi alla multa di 1 milione di euro comminata nel 2019 dal Garante italiano per la protezione dei dati personali nei confronti di Facebook o a quella comminata dall'Autorità garante irlandese nel 2022 e nel 2023 al gruppo Meta sempre per violazione della normativa europea in materia di protezione di dati personali.

³⁹ Così come osservato anche da Mangiameli, voce *Sovranità digitale*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 52 ss.; Menhe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, in *Michigan Telecommunication and Technology Law Review.*, vol. 4, 1998, 69 ss. (85): "After all, one could hardly posit three more dissimilar physicalities-the ocean, a continent, and the sky. What makes them analogous is not any physical similarity, but their international, sovereignless quality. These three, like cyberspace, are international spaces. As a fourth internatio-

corrono i numerosi interventi che a vario livello hanno cercato di regolare il *cyberspace* anche sperimentando il modello della cd. “*co-regulation* tra poteri pubblici e privati⁴⁰. Un modello che è stato fatto proprio dalla *Dichiarazione dei diritti in Internet* del 2015 e che proprio a proposito del *Governo della Rete* (art. 14), lo individua quale strumento in grado di salvaguardare la capacità di innovazione (...) attraverso la concorrenza dei soggetti che operano in Rete promuovendone forme di *governance* partecipata e diffusa.

Ma non solo. Di là, infatti, dalle più puntuali azioni regolatorie vi sono altre due ragioni che sono alla base dell’idea che il Diritto conservi un perdurante ruolo ordinante nel governo delle nuove tecnologie: la prima muove dalla constatazione che il potere, anche quello espresso dalla Rete, deve essere un potere legittimo e questa condizione non può immaginarsi scollegata dal Diritto (e dallo Stato). Il potere, come si sa, per legittimarsi ha bisogno del Diritto. E per conseguenza, il potere virtuale non è immaginabile senza assetti istituzionali e regole che lo strutturino, lo conformino e ne assicurino il funzionamento. La seconda muove dalla considerazione che il potere, in generale, e quello digitale, in particolare, oltre che legittimo deve essere anche un potere limitato⁴¹ e, perciò, attraverso la lente dello Stato di diritto, esso è un potere che va riportato entro le coordinate di un sistema di *check and balance*, nell’accezione propria del costituzionalismo moderno⁴², che ne assicuri l’equilibrio con

nal space, cyberspace should be governed by default rules that resemble the rules governing the other three international spaces, even in the absence of a regime-specific organizing treaty, which the other three international spaces have”.

⁴⁰ Sul tema si rimanda, *ex multis*, a De Minico, *Internet. Regola e anarchia*, Napoli 2012; Oddenino, *La governance di Internet fra autoregolazione, sovranità statale e diritto internazionale*, Torino 2008; Laghi, *Cyberspazio e sussidiarietà*, Napoli, 2015.

⁴¹ In tal senso anche Celeste, *Digital constitutionalism Mapping the constitutional response to digital technology's challenges*, in *Hiig Discussion Paper Series*, 2018-02.

⁴² Così anche Mangiameli, voce *Sovranità digitale*, in Amato Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 459: “Di qui la richiesta ineludibile da parte del popolo della rete, nel confronto degli operatori privati e dei governi, di una nuova regolamentazione del cyberspace secondo una proiezione tipicamente costituzionale, e cioè con riferimento alla salvaguardia dei diritti fondamentali e della democrazia così come degli altri valori europei (art. 2 TUE), che richiede il libero espletamento delle libertà, il divieto di manipolazione della verità, il superamento dello stato di sorveglianza e di accumulo dei dati da parte di operatori privati e governi e, soprattutto, l’interdizione dell’uso politico dei dati”.

gli altri poteri e cerchi costantemente il giusto temperamento tra la cultura costituzionale del principio personalista e l'avanzata inevitabile del progresso tecnologico.

In questa ultima delicata operazione spetta agli Stati, e con essi alle organizzazioni internazionali e sovranazionali, proiettare la forza normativa del Diritto oltre lo steccato della tradizionale modellistica giuridica, lasciando che forme di potere pubblico e privato possano integrarsi seguendo scalarità nuove e diverse, ordinate secondo una dialettica di interazione reciproca. All'interno di questo emergente scenario, frutto della combinazione tra l'esercizio di nuove forme di potere resta insopprimibile l'esigenza di assicurarsi che il ruolo regolatorio dei pubblici poteri a partire da quello statutale non sia vanificato dalla *prepotenza* economica delle grandi multinazionali, capaci di esprimere un potere superiore a quella di tanti Stati c.d. "deboli"⁴³.

Il divario che ne deriva scalfisce il dogma della *sovranità* statutale nella sua accezione classica⁴⁴, e ne richiede un mutamento ovvero un adattamento rispetto alla realtà che viviamo che certo suggerisce di utilizzare altre ricostruzioni, che suggestivamente non mancano di riportare alla mente formule di organizzazione del potere più prossime all'universalismo imperiale⁴⁵, quale "sistema di governo politico di dimensioni molto grandi con un governo formato su frontiere mobili, con più

⁴³ La specificità della globalizzazione economica e tecnologica sarebbe quella di generare asimmetrie/diseguaglianze: il movimento di dati, capitali, informazioni che essa produce, emancipato dal controllo della politica, amplia il divario tra Stati forti e Stati deboli cfr. Stiglitz, *La globalizzazione e i suoi oppositori*, trad. it. Cavallini, Torino, 2002, 5-6 s., un divario – come afferma l'Autore – "progressivamente più accentuato tra ricchi e poveri"; e se si vuole Michetti, *Organizzazione del potere e territorio. Legittimità dello Stato e livelli di governo*, Torino, 2021, 142 ss.

⁴⁴ Il famigerato concetto di sovranità, che da Bodin ad Hobbes e per continuare nel pensiero dei più radicali teorici dell'assolutismo moderno, incarna un potere perpetuo, supremo, irriducibile, incondizionato ed indiviso: Bodin, *Les six livres de la République*, Paris, 1580, trad it., di Parente, Torino, 1964, vol. I, 345; Portinaro, *Lo Stato*, Bologna, 1999, 53; Giannini, *Sovranità, (dir. vig.)*, in *Enc. Dir.*, 1990, XLIII, 224 ss.

⁴⁵ Casini, *Potere globale. Regole e decisioni oltre gli Stati*, Bologna, 2018, 11 s., il quale osserva che "La storia degli imperi è un tipico esempio di «globalizzazione» *ante litteram* dello spazio, anche giuridico, (...)". In proposito vale ricordare C. SCHMITT, *Il concetto di reich nel diritto internazionale*, in Id., *Posizione e concetti in lotta con Weimar-Ginevra-Versailles 1923-1939*, Milano, 2007, 505, spec. 520 e 521, in cui lo stesso Autore metteva in evidenza come il vecchio concetto di Stato fosse di fatto superato e comunque inadeguato a comprendere imperi mondiali come quello tedesco e britannico ai quali apparteneva un "generale diritto mondiale e dell'umanità".

livelli istituzionali, giurisdizioni sovrapposte e relazioni asimmetriche⁴⁶ tra i diversi centri di potere. Di qui l'esigenza di recuperare invece il ruolo dell'autorità statale attraverso l'esercizio della sua prerogativa *tout court*, appropriandosi cioè di una vera e propria *sovranità digitale* intesa quale "prerogativa degli Stati nazionali di imporre regole sulle attività e sull'economia della rete, persino se transnazionali e globali, quando esse riguardano i propri cittadini"⁴⁷.

La prospettiva ci colloca su un orizzonte riflessivo non certo semplice già solo per le dimensioni transnazionali e globali che assume il potere tecnologico, ma ciò tuttavia non esime dal tentativo di procedere attraverso una costruzione multilivello di sistemi e regole giuridiche in grado di disciplinare aziende *Tech* e piattaforme tecnologiche secondo i principi dello Stato costituzionale di diritto. L'idea di regolare la tecnica attraverso il Diritto per (garantire) i Diritti passa anche per complesse fasi di progettazione e di addestramento dei dispositivi, al fine di sviluppare sistemi e procedure che rendano possibile un controllo efficace e trasparente, basati sul principio di responsabilità. Solo in questo modo, proiettando cioè lo spazio cibernetico all'interno dei valori e dei principi del costituzionalismo, sarà possibile approdare ad un modello di *governance* delle nuove tecnologie, il cui massimo sviluppo sarà raggiunto solo quando la Persona umana, i suoi diritti e le sue libertà troveranno piena ed assoluta garanzia e tutela.

⁴⁶ Cfr. Mangiameli, *Imperi e Stati e le nuove relazioni internazionali*, in *Dir. soc.*, n. 2/2022, 308 e 456; si v. ancora Hardt, Negri, *Impero: il nuovo ordine della globalizzazione*, Milano, 2002.

⁴⁷ Mangiameli, *Sovranità digitale*, in Amato, Mangiameli, Saraceni (a cura di), *Cento e una voce di informatica giuridica*, Torino, 2023, 451, in cui l'A. prosegue col dire che: "la sovranità è l'elemento costitutivo di ogni ordine, compreso quello virtuale. E senza sovranità non è possibile alcun ordine, almeno nel mondo dei viventi".

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