Os contornos do Constitucionalismo Digital

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Resumo: Este trabalho sobre o Constitutionalismo Digital inaugura uma série de artigos explorando o controle democrático e a efetivação de direitos fundamentais no ambiente da internet. Este artigo introdutório analisa o Constitucionalismo Digital como um novo modelo e um novo momento do Direito Constitucional. Para bem desempenhar essa tarefa, o trabalho levará em consideração direitos, deveres e poderes no ambiente digital. Em uma sociedade em rede e fundada em algoritmos, as grandes empresas de tecnologia e suas plataformas sociais globais (ex. Facebook, Twitter, Tiktok, Amazon) ocupam espaço relevante exercendo poderes tradicionalmente atribuídos às autoridades públicas. É nessa interseção que o conceito de Constitucionalismo Digital pode ser visto como um caminho para trazer controle democrático e constitucional para o ambiente dos poderes digitais, sejam privados ou públicos.

Palavras-chave: Constitucionalismo Digital; Plataformas Digitais; Direitos Fundamentais; Controle Democrático; Big Techs.

Framing Digital Constitutionalism

Abstract: This paper exploring Digital Constitutionalism launches a series of articles on the topic of democratic control and enforcement of fundamental rights in the internet environment. This introductory paper analyzes Digital Constitutionalism as a new feature and moment of Constitutional Law. In order to accomplish this task, it shall take into consideration rights, duties and powers in the digital environment. In the network and algorithmic society, big techs and their global social platforms (*e.g*. Facebook, Twitter, Amazon, TikTok) occupy a relevant space that congregates traditional public authority powers in a private system. It is in this intersection that the concept of Digital Constitutionalism can be seen as a way of bringing democratic and constitutional control to the environment of public and private digital powers.

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Keywords: Digital Constitucionalism; Digital Platforms; Fundamental Rights; Democratic Control; Big Techs.

1 INTRODUÇÃO

This text aims to analyze Digital Constitutionalism as a new development and phase in Constitutional Law. To achieve this, it will consider the rights, duties, and powers within the digital environment. In our networked and algorithmic society, big tech companies and their global social platforms (e.g., Facebook, Twitter, Amazon, TikTok) have taken on a significant role, merging traditional public authority powers into private systems. It is within this intersection that the concept of Digital Constitutionalism emerges as a means of bringing democratic and constitutional oversight to the realm of both public and private digital powers.

Since the beginning of the 21st century, digital platforms, algorithms, and more recently, artificial intelligence (AI), have increasingly permeated people's lives, mobilizing vast amounts of capital and achieving unprecedented influence within societies. Consequently, there has been a shift of power from states to public enterprises—the so-called "big tech" companies. These enterprises operate digital commerce and social networks while simultaneously capturing data, shaping electoral systems, and ultimately influencing the minds and behaviors of individuals.

However, this expansion of public power has not always been paralleled by developments in the constitutional domain. The role of Constitutionalism in this context has been limited in its ability to protect fundamental rights and regulate the abuse of power in the digital environment. As a result, the internet has become a stage for unaccountable and unchecked power wielded by private enterprises.

The distinctive status that basic rights enjoy within legal systems that recognize them is due to the qualified consensus that originally established these rights. Therefore, any majority[2] that seeks to suppress or modify these rights should be a qualified one, not a mere parliamentary majority. In certain legal systems, such as Brazil's, the suppression or reduction of such rights can only occur through the establishment of a new constitutional order.

[2] ALEXY, Robert. **Theorie der Grundrechte**. Deutschland. 1994. Tradução livre de Luiz Henrique Diniz Araujo.

In this regard, fundamental rights serve as a form of "armor"[3] that resists even the pressures of the majority temporarily in power. They ensure that minorities retain "the same right that all have to freely and autonomously choose their life plans." [4]

Fundamental rights possess a "dual characteristic," encompassing both objective and subjective dimensions. The objective dimension manifests as institutional, involving constitutionally enshrined guarantees that uphold objective values within the constitutional order. The subjective dimension highlights the individual nature of these rights, providing citizens with a subjective public right that adheres to their personal sphere[5].

Following this principle, the Brazilian Constitution of 1988 adopted the precept of the immediate application of fundamental rights (Article 5, § 1.º). Consequently, the state is obligated to provide services aimed at fulfilling these rights, with an increasing likelihood of judicialization[6].

To initiate constitutional and statutory oversight of digital platforms, states have begun to regulate the operations of these so-called big tech companies. In Brazil, key examples include Constitutional Amendment No. 115/2022 (the fundamental right to data protection)[7], the General Data Protection Law (Lei Geral de Proteção de Dados – Lei n.º 13.709/2018)[8], the Civil Rights Framework for the Internet (Marco Civil da Internet – Lei n.º 12.965/14)[9], and the proposed Law on Freedom, Responsibility, and Transparency on the Internet (Projeto de Lei 2.630/2020)[10].

In the European context, there have also been significant developments in this field. The European Union has shifted from a liberal (or neoliberal) stance towards an increasingly democratic and constitutional approach to controlling the digital environment. Under the neoliberal conception, constitutional societies delegated—whether explicitly or not—control of the digital environment to private actors, following a self-regulatory model. This approach facilitated the growth of a governance

[3] NOVAIS, Jorge Reis**. Direitos fundamentais. Trunfos contra a maioria**. Coimbra: Coimbra Editora, 2006.
[4] NOVAIS, Jorge Reis**. Direitos fundamentais. Trunfos contra a maioria**. Coimbra: Coimbra Editora, 2006.

[5] NOVAIS, Jorge Reis. **Direitos sociais. Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais**. Coimbra. Coimbra Editora. 2010.
[6] BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo. Malheiros. 2007.

[7] BRAZIL. Emenda Constitucional n.º 115, de 10 de fevereiro de 2022. Available at https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm. Access on 27th July, 2023.
[8] BRAZIL. Lei n.º 13.709, de 14 de agosto de 2018. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on 27th July, 2023.
[9] BRAZIL. Lei n.º 12.965, de 23 de abril de 2014. Available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on 27th July, 2023.
[10] BRAZIL. Projeto de Lei n.º 2630/2020. Available at https://www.camara.leg.br/propostas-legislativas/2256735. Access on 27th July, 2023.

model that evaded public oversight while wielding public powers without the appropriate constitutional limits and constraints.

The proposal of Digital Constitutionalism challenges this model of market self-governance. Instead, principles and rules of Constitutional Law should be applied and enforced in the digital world to ensure the protection of fundamental rights, which have been increasingly neglected or deliberately set aside.

It is also crucial to understand that Digital Constitutionalism is not merely about transposing constitutional rules into the digital environment. Digital technologies, including AI, are not autonomous entities. Behind these technologies are people and transnational enterprises wielding immense power over societies. This is the intersection between Constitutionalism and the internet: to regulate these growing private powers that are increasingly impacting people's lives across various dimensions.

It is important to remember that Constitutionalism emerged as a legal and political system designed to constrain public power and protect the fundamental rights of citizens. Thus, the concept of Digital Constitutionalism represents a significant shift in this perspective, as it starts from the premise that some private multinational enterprises exercise public powers on a global scale. Consequently, the fundamental rights of individuals must also be safeguarded against these entities. This shift marks a constitutional transition from the vertical protection of fundamental rights (public powers versus citizens) to a horizontal one (among private actors).

The primary focus of Digital Constitutionalism is, therefore, to regulate a multicentric global society, not a unidirectional national one. In other words, the main objective is to regulate and limit abuses by governmental powers, businesses, and civil society organizations, all operating within a networked society.

As the first in a series, this paper aims to define the scope of Digital Constitutionalism. The term connects two core elements: (i) the concept of 18th-century Constitutionalism, which was a legal and political movement aimed at limiting national public powers for the benefit of citizens' fundamental rights; and (ii) the digital environment, which includes internet-based technologies, algorithms, big data, content moderation, and artificial intelligence.

In this initial paper, these two elements will be explored to identify the core themes of Digital Constitutionalism. Subsequent papers will address these themes and related challenges from a comparative perspective.

The problem under examination is to demonstrate that since the 18th century, Constitutionalism has been conceived as a legal-political movement aimed at controlling state power within a national context to safeguard fundamental rights. The first two chapters will explore this perspective. However, Digital Constitutionalism offers a different view: it seeks to regulate powerful private actors on a transnational scale.

The goal of this article, as the first in a series, is to lay the foundations of this new phase of Constitutional Law by identifying the fundamental rights that may be at risk due to the unchecked powers of digital platforms and exploring how they can be protected.

The series' hypothesis is that digital platforms are not neutral spaces for individuals to freely express their interests and ideas. Instead, they embody a business model representative of digital capitalism. As such, these enterprises exercise public powers, gathering and managing vast amounts of data, using algorithms that influence people's thoughts and behaviors, controlling what people can or cannot say, and shaping political and electoral choices. In this context, democratic oversight and the protection of fundamental rights are essential.

The methodology employed involves the consultation of references.

1. Classical Constitutionalism

Although the concept of a constitution existed in Ancient times, it did not carry the legal significance that it would come to have in the 20th century—a document with a superior legal status that governs an entire legal order within a national state. At that time, the term was either used by philosophers or had a purely political meaning, such as in the Constitution of Athens[11].

The emergence of the constitution in a legal sense can be traced back to England in the latter half of the Middle Ages. It likely arose when, in an effort to resolve their conflicts, the barony advocated for the enactment of documents—among them the 1215 Magna Carta[12]—which were intended to counter the notion that old customs could

[11] DALLARI, Dalmo de Abreu. A Constituição na vida dos povos. Da Idade Média ao século XXI. São Paulo, Saraiva, 2010, P. 28.

[12] On the content of the Magna Carta: http://www.bl.uk/magna-carta/articles/magna-carta-english-translation. Access on June, 13, 2022.

obstruct contrary decisions[13]. Of course, these early constitutions bore little resemblance to those in contemporary constitutional states. They were more declarations of principles without the normative force we attribute to modern constitutions.

In the 16th century, normative rules establishing basic principles of government and citizens' lives began to appear. This marked the embryonic stage of what would become the written constitutions of the 18th century. By the end of the 18th century, the American and French Revolutions stood as milestones of the Constitutionalist Movement's success, giving rise to the concepts of the Liberal State of Law, the Social State of Law, and the Democratic State of Law[14].

Despite the advent of constitutions in the late 18th century, such as the United States Constitution, the first French Constitution, and the first Brazilian Constitution in the early 19th century, that century is primarily known as the century of the "Rule of Law" (Rechtstaat, in the German expression), rather than of the Constitutional State as we understand it today. In this framework, the rule of law is distinguished from the State of Force (Machtstaat—the Absolute State of the 17th century) and the Police State (Polizeistaat of the 18th century—the regime of Enlightenment Absolutism) [15]. It was not yet appropriate to speak of the Constitutional State in the modern legal-political sense.

The formation of the rule of law began to take shape in England in the late 17th century; in France and the United States in the late 18th century; and in Germany and other European countries during the 19th century.

The study of Constitutionalism, from its origins through the development of the Social State to the emergence of New Constitutionalism, reveals an evolutionary process. Constitutionalism initially centered on the revolutions of the late 18th century, evolving into constitutions that guarantee the Democratic and Social State of Law. However, there was a period of regression when conservative positivist ideals prevailed, spanning the late 18th century, the 19th century, and the first two decades of the 20th

[13] DALLARI, Dalmo de Abreu. A Constituição na vida dos povos. Da Idade Média ao século XXI. São Paulo, Saraiva, 2010, p. 29/30.

[14] DALLARI, Dalmo de Abreu. A Constituição na vida dos povos. Da Idade Média ao século XXI. São Paulo, Saraiva, 2010, p. 32.

[15] ZAGREBELSKY, Gustavo; MARCENÓ, Valeria. *Giustizia costituzionale*. Il Mulino Strumenti. Bologna. 2012, p. 20.

century. During this time, the idea of the Rule of Law was prominent, but the concept of the Constitutional State was not yet fully developed[16].

The concept of law appropriate to the Rule of Law, along with the principle of legality, was epistemologically linked to Legal Positivism as a science of positive legislation. This conception presupposed a historical and concrete condition: the concentration of law-making authority within a single constitutional body, the legislative branch.[5]

Thus, everything within the realm of law was necessarily what the legislative branch decreed. This simplification led to the jurist's role being reduced to simple legal exegesis, or the search for the legislator's intent[17]. In this 19th-century conception, which still has residual effects today, values not expressed in legislation were not recognized.

However, reducing the rule of law to a state that merely acts in accordance with the law creates the risk of enabling theoretical compatibility with any type of state, including autocratic regimes, such as those that existed in the 20th century.

The Second World War was a historical event that challenged the liberal optimism of believing in a natural justice inherent to economic and social relations. This period also marked the crisis of an idealized view of a radical separation between the State and Society[18].

The new nature of the State, now concerned with creating conditions that allow each individual to develop their personality, led to shifts in the understanding of fundamental rights and the legal techniques designed to protect them. It is at this historical juncture that the emergence of the Constitutional State in its fullest sense can be discussed, characterized by its opposition to positivist ideas and its conception of law as an essentially value-based experience.

The novelty of the Constitutional State lies in its elevation of law's status. For the first time in modern history, law is subordinated to a higher layer of law established by the Constitution. This innovation might appear, and indeed does appear, as a mere

[16] PASTOR, Roberto Viciano; DALMAU, Rubén Martínez. *? Se Puede Hablar de un Nuevo Constitucionalismo Latinoamericano Como Corriente Doctrinal Sistematizada?*. Disponível em http://www.juridicas.unam.mx/wccl/ponencias/13/245.pdf. Acesso em 25/03/2015.

[17] ZAGREBELSKY, Gustavo; MARCENÓ, Valeria. *Giustizia costituzionale*. Il Mulino Strumenti. Bologna. 2012, p. 38.
[18] HILBINK, Lisa. *Beyond manycheanism: assessing the New Constitutionalism*. 65 Maryland Law Review, p. 15 e ss. 2006.

integration of the principles of the Rule of Law, which subjects the entire ordinary function of the State —including legislation (with the sole exception of the constituent function) — to the law.

2. New Constitutionalism

Historically spotted after WWII, New Constitutionalism, as a theory of law, conceives a model of an "invading" constitution, in which three phenomena stand out: a) the positivization of fundamental rights; b) the ubiquity of principles and rules in the constitution; c) particularities in the interpretation and enforcement of the constitution in relation to the interpretation and enforcement of legislative acts. Thus, it points to the overcoming of state-ism, legicentrism and interpretive formalism[19].

New Constitutionalism aimed to move away from the conceptions of Theoretical Positivism and towards the shift of the Rule of Law into the Constitutional State of Law, being its main weapon of attack on Positivism the presence of principles as criteria of interpretation[20].

As a consequence, there are some phenomena that deserve to be highlighted:

a) dilution of boundaries between the areas of the legislative and the executive branches;

b) strengthening of the separation, independence and relevance of the judiciary branch;

c) revaluation of the relations between politics and jurisdiction, with the attribution to the judiciary of the control on public administration and of some political acts in confrontation with the constitution;

[19] COMANDUCCI, Paolo. Formas de (Neo)Constitucionalismo: Un Análisis Metateórico. *Isonomía: Revista de Teoria e Filosofía del Derecho*, Alicante, n. 16, abril 2002, p. 90-112. (P. 97)

[20] PASTOR, Roberto Viciano; DALMAU, Rubén Martínez. *?Se Puede Hablar de un Nuevo Constitucionalismo Latinoamericano Como Corriente Doctrinal Sistematizada?*. Disponível em http://www.juridicas.unam.mx/wccl/ponencias/13/245.pdf. Acesso em 25/03/2015.

d) development of new mechanisms for the effective limitation of power, such as the encouragement of pluralism and the recognition of the rights of the opposition and political minorities, as well as the right of political alternation.

To assert that constitutional rules have normative force is to recognize that the constitution is not only a letter of political intent, but that it is endowed with an imperative legal character. The recognition of the normative force of the constitution marks a break with the classical Constitutional Law, under which programmatic constitutional norms were visualized, which would be simple political statements.

José Joaquim Gomes CANOTILHO[21] sums up this idea quite well, drinking from Garcia de Enterría's source, when he asserts that "by virtue of the binding effectiveness recognized to the 'programmatic norms', the opposition established by some doctrine between the effective 'legal norm' and the 'programmatic norm' (aktuelle Rechtsnorm-Programmsatz) must be considered outdated: all norms are effective".

The study of constitutional jurisdiction as a feature of New Constitutionalism has never been more present at the constitutional agenda. The myth of the judiciary branch as a negative legislator is revised. According to that conception, the judge can, in the mold of Enlightenment thought, only declare the concrete will of law or, at most, act as a negative legislator, declare the unconstitutionality of legislation, with no freedom for the enforcement of rights. However, this myth has already undergone frank deconstruction.

Another feature of New Constitutionalism is the normative force of principles, thus expanding the effectiveness of constitution. The principles cease to have merely secondary application as a way of bridging gaps to act as protagonists in legal interpretation, in order to overcome the theories that still supported a concept law formed only by written rules, seen as the only precepts endowed with legal force. The constitutional text appears as the foundation of any hermeneutic activity.

In order to limit the prevalence of the interpreter's will, many constitutionalists, as it is the case of Cristina QUEIROZ[22], have argued that it is necessary to build a

[21] CANOTILHO, José Joaquim Gomes. *Direito constitucional e teoria da constituição*. 7.ª ed. Coimbra, Almedina, 2003.
[22] QUEIROZ, CRISTINA. *Interpretação constitucional e poder judicial. Sobre a epistemologia da construção constitucional*. Coimbra, Coimbra Editora, 2000, p. 19.

Theory of the Constitution, a "discourse on the method" (“juristische Metodik”), a joint concept that "comprises a legal dogmatics, a methodology". Thus, interpretation aims not at any end, but at a correct, just, and proper end.

In the current moment of Constitutionalism, it can be said that constitutions basically perform four functions[23]: firstly, they separate the powers through the creation of an internal structure of authority that serves as a reference for disputes; secondly, they identify or create classes of citizens and public authorities who should govern themselves according to it; thirdly, they embrace a purpose or mission that guides citizens and their rulers in the conduct of their business, whether internal to the group or toward the outside world; fourth, they embody values.

In a digital world, this spectrum of Constitutionalism must be widened. This is the scope of Digital Constitutionalism, which will be approached in the next chapter.

3. The online dimension and Constitutional Law. The evolution of digital regulation in Europe and Brazil

By the end of the 20th and through the twenty-first century, human life has progressively been inserted in an online environment. As a consequence, social relations have increasingly been developed in the online dimension. This has transposed to the online dimension our rights, duties, powers and moral values.

In this online dimension, social systems, such as law, technology, moral, economy, among others, have progressively produced internal norms in a process of mutual influence. Certainly, law is formed not only by its own logic, but also results from social, technological, economic and other forces that interact in the digital world. In the contrary sense, law influences the other social subsystems and their own internal rules[24].

Thus, there has been a normative order of the internet, also involving Constitutional Law. As a consequence, the internet has been a field involving several Constitutional Law issues, such as freedom of expression, freedom of commerce, freedom of entrepreneurship, freedom to assemble, right to privacy, right to be forgotten

[23] ALBERT, Richard. The Cult of Constitucionalism. *Florida State University Law Review*, v. 39, number 3, 2012.

[24] GREGORIO, Giovanni de. Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society. Cambridge University Press. Cambridge, 2022, p. 7.

and corresponding powers deriving from the national jurisdictions or from private actors, such as digital platforms.

In its initial moment regarding Constitutional Law, the digital revolution ignited an optimism (almost euphoria) involving freedom and self-regulation. From that moment on, people could freely express themselves, buy products from all over the world, engage in any global or international political movement without being bothered by public authorities. And all this with the passive regard and almost inexistent mediation of digital enterprises, that would self-regulate the digital environment in a bottom-up constitutionalization movement. Thus, Google, Facebook, Amazon, Apple, Tiktok, Twitter among others became digital forces exercising powers in competition with public authorities.[25]

On the other hand, Constitutionalism has not developed a key role in the debate on internet regulation and governance. As it has been noted above, in the beginning there has been a strong liberalism and a trust in self-regulation by private actors. However, by the end of the 20th and the beginning of the 21st century, there was a movement towards constitutionalizing the digital environment and opposing the liberalist approach. Consequently, there has been a progressive state regulation over the digital environment.

In can be easily noticed that states are not the only powers operating over the internet. In fact, there are private actors operating in the digital environment that are also sources of powers and legal rules. So, as part of the picture, business actors have an important share of authority and their powers are not only economic anymore, but also political.

In this environment, for instance, speech in digital platforms has not been subject to public regulation only, but also to private actor's powers. Indeed, platforms like Facebook or YouTube have implemented artificial intelligence systems that can moderate content based on criteria that are quite opaque and known exclusively by some internal departments of these private organisms[26]. In such a context, the access of

[25] GREGORIO, Giovanni de. Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society. Cambridge University Press. Cambridge, 2022, p. 26.
[26] GREGORIO, Giovanni de. Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society. Cambridge University Press. Cambridge, 2022.

information in the digital environment is strongly moderated or even restricted and biased by online platforms themselves.

Actually, power exercised by a digital platform is not subject to democratic scrutiny, what is *per se* quite problematic. This is a deep contrast in relation to public actors because these actors must ensure constitutional safeguards and due process of law when controlling freedom of expression online. Digital platforms have been exercising these powers with short democratic or constitutional control if any.

In this topic we will draw a parallel between the European Union and the Brazilian regulations on digital environment focusing on fundamental rights and democratic control and, by this comparison, we will try to identify some features that compose the core of Digital Constitutionalism.

3.1. The evolution of digital regulation in Europe

The European Union departed from a liberal to a constitutional democratic approach that considers protection of fundamental rights and democratic values in the digital world. This has been a relatively long and incremental process that started by the end of the 20th Century. By then, the European conception was similar to the one prevailing in the United States.

Online platforms were understood as neutral service providers that did not create content, but only stored and organized data. Therefore, online platforms were seen as only means for the users to share information and services. In the context of such a neutral conception, it was enough to guarantee the free flow of information and services and, also, to protect the user's data.[27]

However, the development of digital platforms has allowed a deep empowerment of these technological tools, culminating so far in the algorithmic and artificial intelligence society. In this state of things, platforms have not only challenged fundamental rights, for instance, freedom of expression, data protection and the right to access a trustworthy content. But, also, they have exercised quasi-public powers, such as content moderation, the use of data to influence opinions by means of algorithms, the capture of data, among other activities, all permeated by colossal profits.

[27] GREGORIO, Giovanni de. Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society. Cambridge University Press. Cambridge, 2022, p. 38

The Cambridge Analytica scandal displays how digital capitalism not only affects the individual, but also the collective sphere of societies. In this case,

> The Federal Trade Commission filed an administrative complaint against data analytics company Cambridge Analytica and filed settlements for public comment with Cambridge Analytica's former chief executive and an app developer who worked with the company, alleging they employed deceptive tactics to harvest personal information from tens of millions of Facebook users for voter profiling and targeting.[28]

In those liberal times, the European approach was based on an economic structure. But the adoption of the Nice Charter in 2000 and the recognition of its binding effects in 2009 have been landmarks of a shift in this perspective. Until then, there was a heterogeneous system of data protection in Europe mixing different domestic traditions and a share of discretion left by the Data Protection Directive to Member States.

In the second phase of the European approach, the Charter of Nice (2000)[29] was recognized by the Lisbon Treaty (2007, effective in 2009)[30] as a bill of rights within the range of the Union. It was also a time of growing concern with the empowerment of private actors in the digital world. Digital platforms were no more seen as mere hosting platforms.

Until then, the protection of fundamental rights such as freedom of expression, privacy and data protection were based in domestic law and on the European Convention. Within this legal framework, the Charter has become the parameter of legal validity of the European Court of Justice through the lens of fundamental rights. At that stage, the European Court of Justice played a relevant role in the development of regulation of internet.

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[28] UNITED STATES OF AMERICA. Federal Trade Comission. FTC Matter/File Number 182 3107 Docket Number 9383. Available at https://www.ftc.gov/legal-library/browse/cases-proceedings/182-3107-cambridge-analytica-llc-matter#:~:text=The%20Federal%20Trade%20Commission%20filed%20an%20administrative%20complaint,of%20Facebook%20users%20for%20voter%20profiling%20and%20targeting. Access on 3 August 2023.

[29] EUROPEAN UNION. **Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001. Available at** https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12001C/TXT**. Access on 3 August, 2023.**

[30] EUROPEAN UNION. **TREATY OF LISBON AMENDING THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY** (2007/C 306/01). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12007L/TXT. Access on 3 August 2023.

In Google France, the ECJ stressed that (…)[31] if an internet referencing service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored, it cannot be held liable for the data that it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of that data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

The ECJ made a step forward in L'Oréal[32], considering that the operator of the online marketplace cannot be conceived as neutral if it offers assistance, including the optimization, presentation or promotion of the offers for sale. In this case, it can be held liable in a case which may result in an order to pay damages.

In Scarlet[33] and Netlog[34], the ECJ reasoned on the Charter to deal with the necessary balance between user's fundamental rights and the need to ban illicit content. On the one hand, the Court took into account the need to protect the right to privacy and freedom of expression and, on the other hand, the interest of platforms in not being overcharged with complex monitoring engines.

In an even further step, the moment that European Law lives today is based on fundamental rights and democratic enforcement in a constitutional perspective. In this context, public powers as well as transnational private actors are primary sources of concern. The inclination is to make these public and private powers accountable in the digital world.[35]

In this context, the Union codified some of the ECJ's reasoning and, also, edited new rules in order to limit private powers by means of instruments that increased

[31] European Union. European Court of Justice. Cases C-236/08, C-237/08 and C-238/08, Google France v. Louis Vuitton Malletier SA, Google France SARL v. Viaticum SA and Luteciel SARL, and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and others (2010). Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=83961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6111800. Access on August 1st, 2023.

[32] EUROPEAN UNION. EUROPEAN COURT OF JUSTICE. Case 324/09, L'Ore´al SA and Others v. eBay International AG and Others (2011). Available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=99B20D0B99533A032F96F99F70C348F3?text=&docid=107261&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6087700. Access on August 1st, 2023.

[33] EUROPEAN UNION. EUROPEAN COURT OF JUSTICE. Case C-70/10, Scarlet Extended SA v. Socie´te´ belge des auteurs, compositeurs et e´diteurs SCRL (SABAM) (2011) ECR I-11959. Available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=A45D5415FFA99FCB93206E536989BBE2?text=&docid=81776&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6104766. Access on August 1st, 2023.

[34] EUROPEAN UNION. EUROPEAN COURT OF JUSTICE. Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV (2012)

[35] GREGORIO, Giovanni de. Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society. Cambridge University Press. Cambridge, 2022, p. 64/5

transparency and accountability in content moderation and data processing. Both characteristics can be found in the Digital Single Market strategy.[36]:

> A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where citizens, individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy helping European companies to grow globally. A fully functioning DSM will present European businesses, particularly small and medium-sized enterprises (SMEs), with a potential customer base of more than 500 million people, enabling companies to make full use of ICT to scale up for productivity gains, creating growth along the way.
> It offers opportunities also for citizens, beyond their economic activity, provided they are equipped with sufficient digital skills. Enhanced use of digital technologies can improve citizens' access to information and culture, and can promote open government, equality and non-discrimination. It can create new opportunities for citizens' engagement in society at large, including democratic participation, and for better public services, information exchange and national and cross-border cooperation.

Precisely, the Directive on copyright in the DSM (Copyright Directive),[37] the amendments to the audiovisual media services Directive (AVMS Directive)[38], the regulation to address online terrorist content (TERREG)[39], or the adoption of the GDPR[40] are just some examples demonstrating how the Digital Single Market strategy has constituted a change of paradigm to face the consolidation of powers in the algorithmic society.

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[36] EUROPEAN UNION. EUROPEAN COMISSION. **A Digital Single Market Strategyfor Europe** {COM(2015) 192 final}. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015SC0100. Access on 2 August 2023. Access on 2 August 2023.

[37] EUROPEAN UNION. THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION. **DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0790.**

[38] EUROPEAN UNION. THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION. **DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010**

on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218. Access on August 2, 2023.

[39] EUROPEAN UNION. THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION. **REGULATION (EU) 2021/784 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2021 on addressing the dissemination of terrorist content online. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0784. Access on 2 August 2023.**

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

More recently (2022), the Digital Services Act[41] is another milestone in this path, as it regulates the behavior of providers of digital services in a fundamental rights perspective:

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

More recently, as part of its digital strategy, the European Union start to adopt measures in order to regulate artificial intelligence (AI). These measures assume that many benefits can come from AI in many fields, for instance healthcare, transport, manufacturing, energy, among others.

In April 2021, the European Commission proposed the first EU regulatory framework for AI. According to it, AI systems are analysed and classified according to the risk they pose to users. According to different risk levels there must be more or less regulation[42].

In March 2024 the Parliament adopted the Artificial Intelligence Act and the Council granted its approval in May 2024[43]. The text will be fully aplicable 24 months after entry into force, but some parts will be applicable sooner.

It general terms, it was demonstrated how the European Union departed from a liberal towards a constitutional democratic approach that considers protection of fundamental rights and democratic values in the digital world. This has been a relatively long and incremental process that started by the end of the XX Century. In the next topic, the text will analyze the evolution of digital regulation in Brazil.

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[41] EUROPEAN UNION. **REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R2065. Access on 3 August, 2023.**

[42] EUROPEAN UNION. **EU AI Act: first regulation on artificial intelligence**. Available at https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence. Access on 26 August, 2024.

[43] EUROPEAN UNION. **Proposal for a Regulation of the European Parliament ando f the Council**. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0206. Access on 26 August, 2024.

3.2. **The evolution of digital regulation in Brazil**

In Brazil, there have been some developments in the field of digital constitutionalism. In 2014 the Internet General Civil Act (Marco Civil da Internet – Lei n.º 12.965/14)[44] was enacted establishing principles, guarantees, rights and duties in the internet (art. 1.º). According to this legislative act, the use of internet in Brazil has adopted as a basis the freedom of expression, human rights, diversity, collaboration, consumer protection, social purpose, freedom of enterprise, among other values (art. 2).

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

In 2018, the Data Protection General Act (Lei Geral de Proteção de Dados – Lei n.º 13.709/2018)[45] was enacted regulating personal data of natural person or legal entity, public or private, in order to guarantee their right to liberty, privacy and the free development of the natural person.

According to this legislative act, the protection of personal data is based on the respect to privacy, informational self-determination, freedom of expression, inviolability of image and honor, economic and technological development and innovation, free enterprise, free competition and consumer protection, human rights, the free development of personality, dignity and the exercise of citizenship by natural persons (art. 2).

In 2022, the Constitutional Amendment n. 115/2022[46] (fundamental right to data protection) was enacted, thus entrenching in the constitutional level the explicit protection to personal data. Rigorously, this Amendment was not necessary, because the

[44] BRAZIL. Lei n.º 12.965, de 23 de abril de 2014. Available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on 27th July, 2023.
[45] BRAZIL. Lei n.º 13.709, de 14 de agosto de 2018. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on 27th July, 2023.
[46] BRAZIL. Emenda Constitucional n.º 115, de 10 de fevereiro de 2022. Available at https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm. Access on 27th July, 2023.

fundamental right to data protection could be inferred from the constitutional protection to privacy, honor and image of people (CF, art. 5, X)[47].

More recently, there has been the proposal for the Liberty, Responsibility and Transparency in the Internet Act (Projeto que institui a Lei Brasileira da Liberdade, Responsabilidade e Transparência na Internet - Projeto de Lei 2.630/2020)[48], still in the House of Representatives awaiting deliberation. The passage of this project into law is expected to fill a national legal gap to regulate information in social networks, especially the creation of legal instruments that empower authorities to crack down on fake news and disinformation.

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

In 2020, the Supreme Court of Brazil (Supremo Tribunal Federal) ruled in the ADI n.º 6393/DF[49] for the unconstitutionality of the Executive Order n.º 954/2020 (Medida Provisória), that stated that during the COVID-21 pandemic telecommunication companies should release to the Federal Statistics Institute (IBGE) the names, telephone numbers and addresses of their consumers. The Court stated that by not properly specifying how and what the data would be collected and used for, the MP n. 954/2020 disregards the substantive due process clause (art. 5, LIV, Federal Constitution).

In the Supreme Court there are also two themes with grant of certiorari ("repercussão geral") awaiting deliberation of the Court on their merit.

The first one is theme n. 987[50], under which the Supreme Court is demanded to decide on the constitutionality of article 19 of Bill n. 12/965/2014 (Marco Civil da Internet) that requires disregard of previous and specific judicial command for the accountability of the internet provider that does not remove inappropriate content.

The second one is theme 533[51] under which the Supreme Court is called upon to resolve on the constitutionality of the duty of the host internet provider to scrutinize and when considered inappropriate to ban published content without judicial intervention.

Although there have been developments in the field of regulation of the digital environment in Brazil, some gaps still remain, such as the accountability of digital

[47] BRAZIL. CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. Available at https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access on August 8, 2023.
[48] BRAZIL. Projeto de Lei n.º 2630/2020. Available at https://www.camara.leg.br/propostas-legislativas/2256735. Access on 26 August 2024.
[49] BRAZIL. Supremo Tribunal Federal. ADI n.º 6.393/DF. Tribunal Pleno. Ac. Por maioria. Rel. Min. Rosa Weber. J. 7/5/2020. DJe. 12/11/2020.
[50] BRAZIL. Supremo Tribunal Federal. RE n.º 1037396. Rel. Min. Dias Toffoli. Repercussão Geral reconhecida (DJe 4/4/2018).
[51] BRAZIL. Supremo Tribunal Federal. RE n.º 1057258. Rel. Min. Luiz Fux. Repercussão geral reconhecida (DJe 28/06/2017).

platforms in the proper control of fake news and disinformation. In addition to that, Brazilian legal order still needs a systemic treatment regarding the digital environment. Although there are some diffuse legal instruments, this reality still demands some development to be considered a digital constitutionalism system.

Conclusion

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

Since the beginning of the 21st Century, digital platforms, algorithms and more recently artificial intelligence (AI) have progressively gained much space in people's lives, mobilizing great amounts of capital and unprecedented capillarity in societies. As a consequence, there has been a shift of power from the states towards public enterprises, the so-called "big techs". These are enterprises that operate digital commerce and social networks and simultaneously capture data, shape the electoral system and, ultimately, minds and behavior of people.

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

In order to set in motion constitutional and statutory control over digital platforms states started to regulate the operation of those so-called big techs. In Brazil, the Constitutional Amendment n. 115/2022[52] (fundamental right to data protection), the Data Protection General Act (Lei Geral de Proteção de Dados – Lei n.º 13.709/2018)[53], the Internet General Civil Act (Marco Civil da Internet – Lei n.º 12.965/14)[54] and the

[52] BRAZIL. Emenda Constitucional n.º 115, de 10 de fevereiro de 2022. Available at https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm. Access on 27th July, 2023.
[53] BRAZIL. Lei n.º 13.709, de 14 de agosto de 2018. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Access on 27th July 2023.
[54] BRAZIL. Lei n.º 12.965, de 23 de abril de 2014. Available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Access on 27th July, 2023.

proposal for the Liberty, Responsibility and Transparency in the Internet Act (Projeto que institui a Lei Brasileira da Liberdade, Responsabilidade e Transparência na Internet - Projeto de Lei 2.630/2020)[55] are central examples.

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

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

As it has been clarified elsewhere, this first paper on the topic Digital Constitutionalism has a more general and fundamental feature. Its core aim is to explore what can be understood as Digital Constitutionalism as an evolution of Constitutional Law. Once this task has been accomplished, further analysis must be developed in upcoming papers, that should scrutinize specific topics under the "umbrella" expression Digital Constitutionalism, in a Brazilian-European comparative perspective.

Some specific topics can be already pointed out. Others will appear as digital life and Digital Constitutionalism develop. As topics already identified as demanding further scrutiny, we can point out: (i) accountability of digital platforms in a constitutional democracy; (ii) data protection in the digital environment; (iii) hate and prejudiced speech on the internet; (iv) human dignity and minimum existential in a context of job losses for artificial intelligence; (v) artificial intelligence regulation.

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

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