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À PROPOS DE NOUS

La **Revue Internationale de droit des données et du numérique (RIDDN)/ the International Journal of Digital and Data Law** est une revue universitaire créée et dirigée par Irène Bouhadana et William Gilles au sein de l'IMODEV, l'Institut du Monde et du Développement pour la Bonne Gouvernance publique.

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ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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NEW TECHNOLOGIES AND THE ATTEMPT TO CONTROL – FREE SPEECH IN THE SOCIAL MEDIA

by **Douglas GONZALES**, Federal Judge in São Paulo (Brazil), PhD Student in Law at the University of São Paulo-USP

This essay seeks to bring some light over the legal, political and social impact on the *modus operandi* of Digital Platforms and their role in the international scenario regarding the preservation of Human Rights, whether through the State's guarantee to preserve their horizontal effectiveness.

The focus on reflection will be the international scenario of digital platforms, whose dynamics interact with the processing of data from internet users, in the correction of the so-called Terms of Use of technology against the informational freedom of internet users in the expression of their rights.

The counterpoint of this discussion is compared with the International Conventions on Human Rights (Convention on Civil and Political Rights), as well as the jurisprudence of the International Courts of Human Rights, precisely to establish the limits of acting by Digital Plataforms.

The present essay offers to investigate, from the beginning, the identity of protection between human rights in the traditional environment in comparison with the virtual environment of the internet. Afterwards, process the next step of visualizing the liability of international actors in preserving fundamental digital rights in the borderless internet scene.

In this context, we will go through the legislation and behavioral standards of digital platforms in an attempt to find some *answers to the following questions: i) will digital platforms be able to contribute to ensuring respect for human rights, to what extent can an action be established on the ESG agenda affirmative per se to achieve goals that they deem relevant? ii) will digital platforms be able to determine for themselves wich speech they understand to be correct and, thus, block or censor speeches that they believe are outdated?*

§ 1 – DIGITAL PLATFORMS AND THE REFLECTION TO LAW

A) Initial reflections on the rise of digital platforms and Human Rights

A few words about the strength of the digital revolution deserve to be stressed. At first, the presence of new winds launched into the world in the last two decades is notorious, which have effectively altered several social, economic, and political relations.

These changes led in one way r another by the strength of digital platforms and the new interaction that the individual makes of them in all its extensions, from communication, to social, political and professional interaction.

Hence comes to the question: what are the main changes that these winds bring us?

From the Arab Spring and its multiplying effect through social networks to the new Chinese social control technologies (oversized in the Pandemic), a new world can now be seen, wich changes the way that society interacts, communicates, works, and even dates. Indeed, the "*debut"* of the 21st century has been shown to be an essay of transformation, rarely experienced in History, compared to the years of the Industrial Revolution, *whose milestone of rupture is the diffusion of digital technology on the different human interactions* of production, relationship, division of work, political control and consequently, legal-social regulation.

The same tone of change applies to the business sectors and to Capitalism itself, whose ingredients are the same, the technological interaction allowed by digital platforms, targeted advertising, artificial intelligence and price fluctuations, through data capture – such people´s preferences, weaknesses, and even people's will – so that the digital technology giants hold forces far beyond the economy, but structural to new modes of production, expression and political demands of society.

Such a change has intrigued the academic community around the world, so that there are several interdisciplinary studies in the academic world to better assess the interactions of digital platforms in society and institutions.

In the scope of International Law, the motto has been to share the commitment to defend human rights on equal terms and apply to the internet in its various applicability (expression of opinion, political diction, professional practice, freedom of religious worship), in order to bring together an isonomic treatment of protection, whether in the traditional scope (also called analogue) or in the digital scope; a kind of parity of treatment between the real world and the virtual world.

This commitment is clear from the perspective of Human Rights, so that academics seek to equalize the treatment of respect and compliance with Human Rights norms and guarantees in parity of force and application to non-digital cases.

Gabor Rona & Lauren Aarons[1] reports the UN pronouncements in this regard, through Observation Reports on the Protection and Guarantee of Human Rights, in parity of situations, whether online or offline:

> "The UN Human Rights Council, the UN General Assembly and States, acting both individually and collectively, regularly assert that individuals enjoy the same

[1] G. RONA, L. AARONS, "State responsibility to respect, protect and fulfill human rights obligations in cyberspace", *Journal of National Security Law and Policy*, pp. 503-530, 2016.

> rights online that they enjoy offline. Human Rights Council, The Promotion, Prot. and Enjoyment of Human Rights on the Internet, 1, U.N. Doc. A/HRC/20/L.13 (June 29, 2012) ('[T]he same rights that people have off-line must also be protected online'); Human Rights Council, Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 22, U.N. Doc. A/HRC/29/32 (May 22, 2015); G.A. Res. 68/167 (Jan. 21, 2014); Human Rights Council Res. 26/13 U.N. Doc. A/HRC/RES/26/13 (June 20 2014); Human Rights Council Res. 26/13 U.N. Doc. A/HRC/RES/ 26/13 (June 20 2014); Guide To Human Rights For Internet Users, CM/Rec (2014)6 (Council of Eur.); (...)"

It is noted, therefore, that the extent and depth of human rights protection in the digital sphere is extensive and on an equal footing with the traditional mode of protection (off-line), both before the Courts of Justice and the Administration of the country or before the International Courts of Human Rights.

In this framework, the protection of the rights of freedom of expression, right to political positioning and informational identity are interrelated to the concept of platforms, so that these must support the free expression of ideas and thoughts, whose limits of expression in theory must be those defined primarily and directly in the Constitutional scope and in Civil protection legislation. So much so that the Terms of Use of Digital Platforms must ensure primacy to the law of the country in which the communication is launched., which also establishes the national jurisdiction in the case, the content of art. 11 of the Marco Civil da Internet (Brasil).

The rule is, therefore, freedom of expression with responsibility, both offline and online, especially when the subject at hand refers to the citizen's participation or vision in the conduct of public policy, in its different Powers. Thus, the international community has prioritized open measures of communication and coverage of access to websites and information until the final Internet user*, so that it is illegitimate to restrict discussions on certain news or communication applications, whether or not they are political considerations, as they are hosted. as a right of expression* – protected, thus, in the American Convention on Civil and Political Rights of the Pacto San José, Costa Rica.

Therefore, the observations of Gabor Rona & Lauren Aarons[2] are relevant:

> "International human rights law protects the right to hold and express opinions, to seek, receive and impart information, as well as to peacefully assemble and associate. *Restricting or blocking specific online content may*

[2] *Ibidem*, p 9.

> *interfere with these rights. As a general rule, these rights require that there should be as little interference as possible by States to freedom of expression and the flow of information, and this holds true also for cyberspace.* Limitations, which should conform to criteria established under international human rights law, must be the exception."

In view of these juridical-evaluative assertions, digital platforms may in fact contribute to ensuring respect for human rights is legitimate, emphasizing a comprehensive interpretation of the right to freedom of expression and the political claim, from a universalist conception of these rights, to the content of the decisions of the Courts of Human Rights, by tolerating expressions and manifestations from across the political spectrum (from the radical left to the conservative right), including at the heart of its Terms of Use, with the necessary neutrality taken as principle in Brazilian Internet legislation, whose limit is direct hateful speech, faithful to the paradigms of the International Courts[3] themselves.

B) The ESG Agenda and the turn of digital platforms

One of the most current and challenging themes in the current framework of corporations, especially in digital platforms, is how companies can collaborate for a more inclusive, solidary and participatory society in dealing with issues of public importance. This gesture was even more intense with the participatory outpouring of social networks that so much clamor for an open social debate, with the effective participation of companies, not only as passive actors, but as protagonists of the results of entrepreneurial social transformation.

In this perspective, the ESG (Environmental, Social, Governance) agenda was born, which has transformed the traditionally selfish positioning of companies into true agents who carry responsibilities and goals in favor of a better world. It is not about any change, but about a true innovation in corporate paths and values, expressly defended in various extracts from the financial world and its colossal international funds that serve as arteries for business development around the world.

The ESG agenda is increasingly present in the economic scenario and has already gained significant space even in national and international financial funds, whose significance effectively changes the business world and the stock market itself. Specialists

[3] See, among others, the Ferét X Belgium case judged by the European Court of Human Rights, where the Court recognizes the hateful speech in demeaning manifestations about the isonomy of people, in the face of races, origins or religious beliefs, when carried out in addition to a political speech. Requete no. 15615/07. https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Feret%20X%20Belgium%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-114399%22]} [acess on 10.12.2021].

who closely follow the theme point out that, in addition to building a fairer society, corporations that bring these themes into their businesses generate other differentials. With a direct impact on reputation, organizations that invest in ESG obtain competitive advantages in relation to investors, financial institutions and consumers.

So much so that the creation of new legal relationships and responsibilities are collated in the Stigler Report, as the so-called fiduciary duties in favor of society, endorsed by academics such as Hart and Zingales[4] (2017) when pointing out additional behavioral duties to companies, in a way that they call for authorities to impose collateral duties on digital platforms in favor of a more balanced, fair and solidary society.

In the original, Hart and Zingales (2017) conclude:

> "Milton Friedman, in his celebrated 1970 article, argued that there should be a clear separation between the goals of companies and the goals of individuals and the government. Public companies should focus on making money and leave ethical issues to individuals and government. In this paper we have argued that Friedman is right only if the profit-making and damage-generating activities of companies are separable or if government perfectly internalizes externalities through laws and regulations. Neither of these seems very plausible.
>
> In the absence of these conditions, we have argued that shareholder welfare and market value are not the same, and that companies should maximize the former not the latter. One way to facilitate this is to let shareholders vote on the broad outlines of corporate policy."

Digital platforms, in turn, aggregate vast metadata from the market and from most Internet users, whose stock of applications can be at the service of positive goals for society and the environment, attributes of the Behavioral Economy. Hence the relevance of engendering duties for digital platforms, in future orthodox regulation or even incentives for self-regulation in the sector meet these demands.

In this line of thought, only through the realignment of these burdens, responsibilities, power relations in the establishment of transparency of digital platforms will, in fact, legitimize the progress in terms of social and corporate development, suitable for the new winds of the XXI century.

Indeed, the role of corporations must be guided by ethical-legal parameters specific to Constitutional Law to justify positive discriminatory behavior, in favor of a social agenda, without racial discrimination or other forms of discrimination expressly prohibited by law or by Humans Rights Treaties, since the the effectiveness of Constitutional Law and

[4] O. HART, L. ZINGALES, "Companies Should Maximize Shareholder Welfare Not Market Value", *Journal of Law, Finance and Accounting,* 2017, pp. 247-274.

human rights themselves radiate horizontally to business and social relations, that is, relations between individuals.

Nevertheless, legal and justified practices in favor of employment, the vulnerable, students, the disabled and even in the face of developing nations have legal and historical support, as they are based on policies that leverage these social niches, such as government affirmative actions , so that digital platforms will be able to establish positive behaviors to their agendas, based on uses and customs, as long as they are not generally discriminatory – although there are clear limits for this designed into the International Treaties and in their practical implementation (international cases already tried by the Courts of Human Rights).

This is the reasoning that justifies any and all affirmative action, because whenever discrimination established by law, due to a factual situation that actually determines it, is faced with legitimate discrimination; on the other hand, if this comparison does not match the (normative) factor used and the actual factual circumstance, illegitimate discrimination is observed.

In this sense, it is the lesson of Bandeira de Mello[5] when pointing out that:

> "[...] discriminations are accepted as compatible with the egalitarian clause only and only when there is a link of logical correlation between the differential peculiarity accepted by resident in the object, and the inequality of treatment due to it, provided that such correlation is not incompatible with the interests recognized in the Constitution."

In this context, the promotion of sustainable development – from an economic, social and environmental perspective – is, without a doubt, the greatest challenge of our time. To this end, the Member States of the United Nations (UN) adopted the Sustainable Development Goals (SDGs) and "Agenda 2030", so that the digital platforms must cooperate with this new active scenario.

On the other hand, systematic censorship activities of some digital platforms are out of step with the pacifist and solidary posture postulated by the International Treaties and the inherent attributes of a pluralist society (Brazilian Constitutional, art 1, V), especially if there is abusive behavior in the face of certain groups of activists who, in their eagerness to postulate global or national changes, end up running over guarantees or pluralist postures or divergent opinions, then "labelled" at the convenience of certain groups as excessive, without realizing that they preach an attitude of digital abusive militancy digital in violation of the principles of ethics and pluralistic conduct in our Federal Constitution.

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[5] C. BANDEIRA DE MELLO, *Conteúdo jurídico do princípio da igualdade*, 3. ed. São Paulo: Malheiros Editores, 1993, p. 17.

In this area, it must be made clear that the legal canons of human behavior and business conduct must be primarily designed by legislation, through the legislative representatives of the Nation who implement Democracy, so that it is not up to this or that digital platform to impose its vision of the world about society – albeit in the form of its Terms of Use, since it is trivial that these guidelines must comply with the provisions of the country's laws.
Strictly speaking, the so-called Terms of Use of Platforms must faithfully and systematically respect the fundamental rights expressed in the Federal Constitution and in the Human Rights Treaties, whose interaction must always maintain a reasonable posture without the outbreak of abusive behavior, a premise cataloged in the art. 17/18 in the European Convention on Human Rights.

§ 2 – Recognition of Violations of International Treaties

A) The international liability to the State

In International Law, either in view of the institutional legal field or in view of the international jurisprudence of Human Rights Courts, the current stage of legal development establishes the international responsibility of the State as a general principle.
Indeed, the accountability of the sovereign State that tolerates or fails to repress human rights violations is the essential legal consequence of an international legal system for the protection of human rights; or rather, it is a systematic condition of its functionality to impose the general responsibility of the State for direct or omissive infractions relevant to the protection and guarantee of protection of the human rights cataloged in the International Conventions to which the State is a signatory.
As already pointed out, regarding the horizontal effectiveness of fundamental rights, that is, their application even among individuals, given the indivisible character of human rights, it is relevant to clarify some observations.
The first observation refers to the responsibility of the State itself, a sovereign entity that is jointly responsible for the respect and fulfillment of human rights, whether it is a direct relationship (public services) or an indirect relationship - the one mediated by a private person, such as expression to be exercised through a digital platform – an omissive act is also compassionate to the violations of human rights practiced by private individuals/digital platforms.
However, as the State has direct jurisdiction over platforms headquartered in its territory or when the data was collected or processed in Brazil, the State will have jurisdiction over the case, and, as such, subject to the obligations inherent to the human rights. Hence the reason when speaking of horizontal application of fundamental rights to individuals, whose semantics impose two

consequences: i) individuals should also have direct respect for fundamental rights, either in view of their indivisible dimension inherent to human rights, or in view of international rules; ii) the State must compel individuals to respect human rights in their relationship between individuals (horizontal), not least because it is responsible for this non-compliance before the international order.

According to the vote of Judge Cançado Trindade[6], "any act or omission of the State, on the part of any of the Powers – Executive, Legislative or Judicial – the agents of the State, regardless of their hierarchy, in violation of a treaty on human rights, generates international responsibility of the State Party in question."

Strictly speaking, much of the doctrine has held that the State is only responsible if it fails to fulfill two duties: that of preventing crime and that of repressing it, as occurs in other fields of civil liability.

This is what the Inter-American Court of Human Rights decided in the Godinez Cruz case. For the Court[7], then, "In fact, a fact is not initially directly attributable to a State, for example, because it is the work of a private person..., it may entail the State's international responsibility, not for this fact in itself, but for lack of due diligence to prevent the violation...".

Cançado Trindade observes that the historical development of international human rights protection has overcome the idea of barriers of a single defense, as evidenced by the historical experiences of Wars, and it was understood that the protection of basic human rights is not exhausted, nor is it can be exhausted, in the single action of the State (TRINDADE, 1991). Along the same lines, Comparato points out that the evolution of society is precisely the measurement of the civilizational advance in the protection and guarantee of human rights, which ultimately promotes the evolution of society in its historical-sociological context.

This explains the autonomous nature of the application of international mechanisms in the determination of State responsibility, such as the independent application of any previous bias of local Law.

It is noted, therefore, that the State is also responsible for its omission before acts of private individuals, as a kind of guarantor of safeguarding a dignified treatment of human rights, capable of being exercised, defended and respected through State institutions or supported by it.

This implies that the State may be held responsible for omissions or actions triggered in the context of the internet by digital platforms that abuse human rights, so that the preservation of

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[6] Vote of Judge Cançado Trindade, Inter-American Court of Human Rights, La Ultima Tentación de Cristo, judgment of 02.05.2001, paragraph 40. n.d.

[7] IACHR, Report n° 54/01, case n° 12051.
Available at: https://www.cidh.oas.org/annualrep/2000port/12051.htm.

this state responsibility is imperative to design a normative framework of respect in the virtual space of these rights.

B) The Attempt of Control – Free Speech in Social Media

In this context, an interesting question arises regarding respect for the right to freedom of expression in the context of digital platforms: its preservation in view of the Terms of Use of the platforms, whose restriction should only be carried out in cases of effective affront or abuse of other fundamental rights, when ostensibly present, *ictu oculli*, is the hate speech – and not when the speech involves only criticisms[8], however blunt, of the policy of state action. In view of this controversy, the question remains: *will digital platforms be able to choose the controversial speeches*[9] *to be tolerated (a situation different from hate speeches*)?

We believe that, faithful to the normative design built in the International Treaties regarding freedom of expression and the iterative jurisprudence of the International Courts of Human Rights, this decision is not up to the Digital Platforms, as these must also strictly safeguard this international archetype of human rights. This is precisely the precept of the American Convention on Human Rights, whose art. 13 spells out:

> "Article 13. Freedom of Thought and Expression
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
> a. respect for the rights or reputations of others; or
> b. the protection of national security, public order, or public health or morals.
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the

[8] The ECHR considers that civil servants acting in an official capacity are subject to wider limits of acceptable criticism than ordinary individuals (*Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], § 98; *Morice v. France* [GC], § 131) – note 390 about its comments.

[9] It is important to distinguish here, blunt critical considerations are not confused with hate speeches, and thus cannot be cataloged as such. Nevertheless, there is an attempt to confuse the public in the journalistic milieu, but they are different situations – since hate speech refers to the approach of degrading the isonomy of races, genders and social origins, while criticism turns to to the reflection of the adopted Government policy, among others.

> dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

Now, given the clarity and systematic strength of the American Convention on Human Rights, whose semantics are very similar to the European one[10], especially regarding the orientation that freedom of expression does not require ratification or scrutiny of public or private authority to be recognized as such (item 13.2). This is precisely the essence of freedom of expression, its practical realization, without prejudice to possible indemnity consequences, in case they harm rights, *a posteriori* – but not censorship.

As for digital platforms and their interference with the so-called Terms of Use, we understand that they must follow this understanding, as they are in line with the international archetype of the right to freedom of information, expressed in various judgments of the International Courts of Human Rights.

However, given the abuses registered in Brazil, either by promoting fake news or in the face of aggressive speeches, it would be good to have a normative diploma[11] to better protect the right tof freedom of expression in the context of digital platforms, which in the final analysis builds its own right of self-determination.

Of the doctrines and philosophical positions regarding freedom of expression, the so-called Counterspeech doctrine stands out, already sheltered by the American Supreme Court regarding the old episode of fake news, based on the teachings of Justice Louis D Brandeis who invoked the notion of called "More speech (counterspeech), not enforced silence", in the case Whitney v. California (1927)[12].

It is imperative to note that this thesis is based on a democratic vector, precisely because it represents the rise of reason in the choice of contexts, by admitting pluralist ideas and underlining the debate of a persuasive nature to different currents of ideas and perspectives, even in nod to considerations taken as radical – but that can question archaic positions.

Historically, this ideal has been defended since the XVII century, mainly due to the debates of John Milton that broke out in England regarding the freedom of press to edit books, rather than burning books "not tolerated in the XVII century, whose

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[10] The ECHR has emphasised on several occasions the importance of this Article, which is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Handyside v. the United Kingdom*, § 49; *Observer and Guardian v. the United Kingdom*, § 59).

[11] Nonetheless the Brazilian Congress strangely has not accepted the legislation wich took place as Medida Provisória through the President of Brasil, under the awckward justification of Electoral norms.

[12] https://supreme.justia.com/cases/federal/us/274/357/ (access on 11 October 2021).

beginnings of press freedom must be remembered by History and the evolution of Law.

The lesson is clear and repeats the past, where after much censorship and distortion of rights, it was finally concluded that it is not up to the State or one of its caricatures to say what is true or legitimate; since it is up to the individual to make this decision or make this value judgment.

Under this guideline, it is also necessary to analyze various restrictions perpetrated by private organizations, often dressed up in popular puppets to the public to prevent certain points of view (both in right and left political spectrum), to undermine their opponents in the name of certain "purposes". Such actions are considered negative or abusive and some legal episodes deserve more attention.

Among these, there is a recent decision by the Amazonas Court of Justice[13], which recognized abusiveness in the action of the so-called Sleeping Giants Brasil platform, which sought to "seal" (the removal of the newspaper's sponsors) all media advertisers.

Indeed, the rule of law points out that any abuse of the journalist must be checked, through due criminal process, if applicable. And such assertion does not credit an organization or society with carrying out moral punishment, such as propagating business demoralizing campaigns, as such behavior implies systematic use of the means of communication in favor of abusive conduct.

The Judiciary understood that the systematic and organized use of a digital platform to abusively disseminate animosity against the journalist, through its sponsors, characterizes an authentic abuse of rights, prohibited in all Western legal systems.

In this perspective, the Judiciary and the International Courts of Human Rights must assess with fine social and cultural tact the attacks on fundamental rights, even in the name or covered by democratic coverage, to impartially assess whether the conduct carried out by the digital platform is episodic or systematic, if its intent is in fact excessive – which in the latter case characterizes a negative/abusive action.

The abuse of rights is so important that this institute has been regulated since the Romans. It is even positively reflected in the European Convention on Human Rights, whose importance requires its reading:

> *"Article 17 - Prohibition of abuse of rights.*
>
> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[13]Agravo de Instrumento n° 4006712-18.2021.8.04.0000, Rel. Des. Airton Correa Gentil, TJ/AM, e Embargos de Declaração n° 0005470-92.2021.8.04.000 decision took on 09.29.2021, still sub judice.

It is noted, therefore, that the legal interpretation (still *sub judice*) conferred by the Court of Justice of Amazonas embraces this hermeneutical guideline of devising natural and reasonable enjoyment of the right on the one hand and the abuse of rights on the other - by recognizing in the last case, a systematic persecution of the digital platform to morally harm the journalist, which proves disrespectful to a conciliatory and peaceful posture required by political pluralism.

A different interpretation would imply undermining the indelible treatment of human rights and even holding the State responsible for the disrespect for freedom of expression or its guarantee, through the prevention of abuses by third parties.

As for the evaluative and hermeneutic assessment of possible debasement of human rights, it is worth assessing a new approach that points to an analysis of awareness, through its social and political impact on both its own right and its impact on minorities (*disparate impact).*

This pioneering approach to analysis came from studies on algorithmic discrimination, through research on the results of the choices of decision processes established by algorithms to determine non-discriminatory treatments - through auditing of their results, faithful to a scrutiny of bias and metrics and its repercussion of the so-called *disparate treatment* and the *disparate impact* (innovative study).

Given its innovative character, I would like to pay tribute to the original approach of the American essay nominated *Discrimination in the age of Algorithms*[14]*:*

> " [...] Discrimination law has long been focused on two different problems. The first is disparate treatment; the second is disparate impact. The Equal Protection Clause of the Constitution (Vasquez v. Hillery, 474 US 254 (1986)), and all civil rights laws, forbid disparate treatment The Equal Protection Clause of the Constitution does not concern itself with disparate impact (Washington v. Davis, 426 US 229 (1976); McCleskey v. Kemp, 481 US 279 (1987)), but some civil rights statutes do. [...]
>
> 2.2 Disparate Impact
>
> The prohibition on disparate impact means, in brief, that if some requirement or practice has a disproportionate adverse effect on members of protected groups (such as women and African-Americans), the defendant must show that the requirement or practice is adequately justified. Suppose, for example, that an employer requires members of its sales force to take some kind of written examination, or that the head of a police department institutes a rule requiring new employees to be able to run

[14]KLEINBERG et al. February, 2019, p. 128: https://academic.oup.com/jla/article/doi/10.1093/jla/laz001/5476086 (access on 10 Décember 2021).

> at a specified speed. If these practices have disproportionate adverse effects on members of protected groups, they will be invalidated unless the employers can show a strong connection to the actual requirements of the job (Griggs v. Duke Power Co., 401 U.S. 424, 1971).

Returning to the example given of persecution of digital platforms in face of their sponsors, it remains to be determined whether or not there was a treatment that was inconsistent with the others (i); and whether there was an impact on society or the case for the right to freedom of expression (ii).

In the case of the journalist, we glimpse the presence of both paradigms of discrimination above: given the systematic embarrassment of advertisers related to the journalist and the persecution of this journalist in different contexts outside the episode in focus.

It is interesting to add in this result measurement impact discourse whether it is unfavorable to minorities (disparate impact) to assess whether the conduct *per se* is abusive to the reasonable use of the right (freedom of expression). *Mutatis mutandis,* in our view, this measurement can also focus on the right itself: if the practice of the act under censorship undermines the right in focus, in the eyes of society, this right will be under damage.

It is imperative, therefore, to analyze whether the treatment that matters in terms of image impact or social notion, if this reused will entail maltreatment of the law and minorities, then it will be considered illegitimate or illegal - such as a writing practice that disapproves of yet another minority group in a public contest, for example.

It will therefore be up to the State to act directly and immediately, before its own mechanisms of guarantee and safeguarding of human rights, in order to protect human rights and at the same time comply with International Treaties, under penalty of being held liable before the International Courts of Human Rights, in the face of negative actions that undermine human rights.

It is worth remembering the classic lesson of Rona & Arons[15]:

> "The law of human rights, which extends to cyber, requires States to respect, protect and fulfill human rights. States are required to take "judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations," including to protect individual rights from arbitrary interference by third parties through legislation, and to take measures to ensure that individuals can realize their rights, including through availability of remedies, for violations".

[15] G. RONA, L. AARONS, "State responsibility to respect, protect and fulfill human rights obligations in cyberspace", *Journal of National Security Law and Policy*, 2016, pp. 503-530.

Such assertions are still valid and absolutely necessary in the digital sphere, since the repercussions here are highly sensitive to the society of the XXI century.

*

As final considerations, digital platforms represent an important global role in the development of a Behavioral Economy, given the colossal capture of data from internet users. There is a significant concern regarding the protection of human rights in the digital sphere.

It is already a consensus that the State responds with the same legal treatment of responsibility both in the real world and in the digital sphere.

In this scenario, digital platforms can effectively contribute to innovation of social objectives in line with the requirements of Human Rights expressed in International Treaties.

The horizontal application of fundamental rights to individuals impose two consequences: i) individuals should also have direct respect for fundamental rights; ii) the State must compel individuals to respect human rights in their relationship between individuals (horizontal).

Thus, digital platforms can in fact contribute to ensuring respect for human rights, through an inclusive, supportive and proactive agenda by emphasizing a comprehensive and universal interpretation of human rights, within the ethical-legal parameters of Constitutional Law to justify positive discriminatory behavior, in favor of a social agenda, without racial discrimination or other forms of discrimination expressly prohibited by law or Human Rights Treaties, since the projection of the effectiveness of human rights radiate horizontally to business and social relations.

The Terms of Use of digital platforms must faithfully and systematically respect the fundamental rights expressed in the Constitution and in the Human Rights Treaties, whose interaction must always maintain a reasonable posture without the outbreak of abusive behavior for censorship, given the full distinction of hate speech (which manifest against racial, equality, etc.) from the critique of political and social thought. Digital platforms cannot, simply based on their Terms of Use, bar or choose speeches to be posted by internet users, but only bar strict hate speech; as well as requesting suspicious information checking (fake news).

Thus, the State may be held responsible for omissions or actions triggered in the context of the internet by digital platforms that abuse human rights rights and guarantees.