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THE DONALD TRUMP CASE AND THE *BIG TECH*: THE PERMANENT DELETION OF ACCOUNTS ON SOCIAL NETWORKS ANALYZED FROM THE BRAZILIAN CONSTITUTIONAL PERSPECTIVE.

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INTRODUCTION

Technological development, more specifically, for the purpose of this work, those linked to information technology, have greatly impacted the social, political and economic field in recent decades. In the political and economic field, advances in the area of information technology have led to the emergence of so-called *Big Techs* (Technology Giants) which, in addition to being at the top of the ranking of the most valuable companies in the world, have come to occupy extremely important positions in the political arena due to the high degree of control over the flow of information available and the large scale on which they provide access to information. In the social field, accounts created on social networks have become an instrument for the legitimate exercise of various fundamental rights, among which the rights to freedom of expression and free enterprise stand out.

Due to this accumulation of power in the political, economic and social fields, it is necessary to analyze the legal relationship between individuals and *Big Techs,* in order to identify potential abuses and violations of the fundamental rights of users of these social networks and discover the extent to which such restrictions on these individual freedoms are accepted by the Brazilian legal system.

That said, the present work, an evaluation instrument for the New Trends in Constitutional Law module of the Postgraduate *Latu Sensu* in Public Advocacy from the Escola Superior de Advocacia Pública of the Attorney General's Office of the State of Rio de Janeiro, falls within axis (b) – General Theory of Fundamental Rights in the 21st Century – indicated by the module coordinator and aims to answer the following question: *Big Techs,* in light of the Brazilian legal system, more specifically the doctrinal and jurisprudential understanding regarding the horizontal effectiveness of fundamental rights, may exclude, permanently , your social media accounts, as recently observed with the then President of the United States, Donald Trump?

THE DONALD TRUMP CASE AND THE *BIG TECH*

The Donald Trump case *versus Big Techs* It is a – worrying – example of the power that these information conglomerates currently hold. The way in which Twitter, Facebook and Instagram managed to silence the then President of the United States, often considered the most powerful man in the world, under the allegation that he was inciting violence and promoting hate speech, was the subject of debate around of the world.

Twitter was the company that took the most radical measure, deleting DonaldTrump's account permanently[1].

Regarding the case, German Chancellor Angela Merkel considered the measure "*problematic*" for limiting "*the fundamental right* The *freedom of expression*". He also argued that no private company should have such great power, and that each country's legislation should be responsible for regulating the functioning of social networks.[two].

Having presented the scenario, let's move on to the analysis.

THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS IN PRIVATE RELATIONS[1]

Fundamental rights, in their origin, especially those called first generation,
tion, were conceived as subjective rights of citizens vis-à-vis the State, being legal instruments that limited state action, which could be called the vertical effectiveness of fundamental rights.

Over time, however, it came to be recognized that other social forces, such as

1 https://g1.globo.com/economia/tecnologia/noticia/2021/01/08/twitter-tira-conta-de-trump-do-ar.ghtml

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However, private organizations with great economic power could also violate fundamental rights of citizens. In view of this, the understanding regarding the State's actions regarding the fundamental rights of its citizens is reformulated, with abstention – respect for individual rights – no longer being sufficient, requiring the promotion and protection of these rights in social relations. as a whole.

In this sense, Daniel Sarmento:

> The contemporary theory of fundamental rights states that the State must not only refrain from violating such rights, but must also protect their holders from injuries and threats from third parties. This duty of protection involves the legislative, administrative and jurisdictional activity of the State, which must be guided by the promotion of human rights. This aspect constitutes one of the most important developments of the objective dimension of fundamental rights and is associated with the emerging perspective of the Welfare State, which sees the State not only as an "enemy" of human rights, which must therefore have its activities limited to the minimum possible. (minimum State), but an institution necessary to guarantee these rights in civil society. (Sarmento, 2004, p. 160 – 161).

This new way of acting is based on the so-called horizontal effectiveness of fundamental rights which, understand, is nothing more than the understanding that these fundamental rights also apply to legal relationships between individuals.

About this, Virgílio Afonso da Silva[3]:

> There are few publicists who still restrict the application of fundamental rights only to relationships between individuals and the State (vertical relationship). The vast majority of them accept the existence of a production of effects of these rights also in so-called horizontal relationships, that is, in those in which the State does not participate. The central problem that the theme poses is, therefore, not the problem of "if" rights produce effects in these relationships, but of "how" these effects are produced.

In addition, Daniel Sarmento:

> The central point of the issue consists of the search for a formula for compatibility between, on the one hand, an effective protection of fundamental rights, in this scenario in which aggressions and threats to them come from all sides, and, on the other, the safeguarding of private autonomy of the human person. Positions that prioritize the first aspect will tend to defend a broader effectiveness of fundamental rights among individuals, while those that give greater weight to the second aspect will align with the theses which mitigate this incidence in a more marked way. (Sarmento, 2004, p. 224).

Even though, as seen above in the words of Virgílio Afonso da Silva, few still restrict the application of fundamental rights to relations between individuals and the State, there are still democratic countries that deny the application of fundamental rights in relations between individuals. Among these countries, the United States of America stands out, where all the controversy discussed above occurred, so that, before exploring the understanding of the Brazilian legal system regarding the horizontal effectiveness of fundamental rights, we will briefly summarize the treatment given by North American law on the matter.

North American Law and the Theory of *state action*.

As seen, the United States, even due to its history of defending individual freedoms and citizens' private autonomy, adopts a stance that fundamental rights protect private individuals only of abuses committed by the State (*state actions*), and, given the prestige of the literalness of its Constitution, it cannot be applied to individuals in their private relationships.

It is called the doctrine of *State Action*, explained below by Daniel Sarmento:

> It is in North American law that the thesis that individuals are not bound by fundamental rights established in the constitution has had greater dissemination. It is practically an axiom of North American Constitutional Law, almost universally accepted by both doctrine and jurisprudence, the idea that fundamental rights, provided for in *Bill of Rights* of the American Charter imposes limitations only

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> for Public Powers and do not give individuals rights over other individuals, with the sole exception of the 13th Amendment, which prohibited slavery. To justify this position, the doctrine relies on the literalness of the constitutional text, which refers only to Public Powers in most of its clauses enshrining rights. fundamental. (Sarmento, 2004, p. 227/228).

Therefore, it can be seen that the American legal system, through the interpretation of its Supreme Court of the fundamental rights clauses provided for in its Constitution, does not recognize the so-called horizontal effectiveness of fundamental rights, tolerating, in the name of the private autonomy of individuals, violations of human rights. fundamental in the legal relations between them.

Because of this, there is no way to defend, at least based on the theory of horizontal effectiveness of fundamental rights, that there is, in the North American legal system, a legal unfeasibility of permanent exclusion, due to*Big Techs*, from the accounts of individuals because we are faced with a violation of fundamental rights, most notably, in the case under analysis, the fundamental right to freedom of expression.

Having overcome the analysis of the conduct of*Big Techs*In light of North American law, it is necessary to verify the constitutionality of these measures from the perspective of Brazilian constitutionalism.

BRAZILIAN LAW AND THE THEORY OF DIRECT (IMMEDIATE) APPLICATION OF FUNDAMENTAL RIGHTS.

The Brazilian Constitution of 1988, in addition to providing for the immediate applicability of the norms defining fundamental rights in its art. 5th, § 2nd, unlike the North American Constitution, at no point does it state that these fundamental rights could only be invoked against the State.

Because of this, and influenced by historical social and economic reasons, doctrine and jurisprudence, in Brazil, recognize the so-called horizontal effectiveness of fundamental rights.

In this sense, Daniel Sarmento:

> At least in the Brazilian legal system, which has a Constitution strongly focused on the social at its core, it is not possible to conceive of such rights as mere limits to the power of the State in favor of individual freedom. The Constitution and the fundamental rights it enshrines are not only aimed at governments, but at everyone, who must conform their behavior to the dictates of the Greater Law. (Sar-ment, 2004, p. 277).

Regarding precedents on the matter, there are several cases in which the Federal Supreme Court recognizes the horizontal effectiveness of fundamental rights. I will, however, highlight Extraordinary Appeal No. 201.819/RJ, reported by Minister Ellen Gracie, listed below:

> SUMMARY: NON-PROFIT CIVIL SOCIETY. BRAZILIAN UNION OF COMPOSITORS. EXCLUSION OF MEMBER WITHOUT WARRANTY OF COMPLETE DEFENSE AND CONTRADICTORS. EFFECTIVENESS OF FUNDAMENTAL RIGHTS IN RELATIONS PRIVATE SHARES. APPEAL DISAPPOINTED.
> **I. EFFECTIVENESS OF FUNDAMENTAL RIGHTS IN PRIVATE RELATIONS. Violations of fundamental rights do not only occur in the context of relations between citizens and the State, but also in relations between individuals and legal entities governed by private law. Thus, the fundamental rights guaranteed by the Constitution directly bind not only public powers, but are also directed**to the protection of**individuals in the face of private powers.**
> **II.** CONSTITUTIONAL PRINCIPLES AS LIMITS TO AUTONOMY PRIVATE OF ASSOCIATIONS. The Brazilian legal-constitutional order did not give any civil association the possibility of acting in disregard of the principles inscribed in the laws and, in particular, of the postulates that are directly based on the text of the Constitution of the Republic itself, notably in the area of protection of freedoms. and fundamental guarantees. The space of private autonomy guaranteed by the Constitution to associations is not immune to the impact of constitutional principles that ensure respect for the fundamental rights of its members. Private autonomy, which has clear legal limitations, cannot be exercised to the detriment or disrespect of the rights and guarantees of third parties, especially those established by the Constitution, as the autonomy of the will does not confer on individuals, in the domain of their incidence and performance, the power to transgress

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> or ignoring the restrictions placed and defined by the Constitution itself, whose effectiveness and normative force are also imposed on individuals, within the scope of their private relationships, in terms of fundamental freedoms.
> **III.** NON-PROFIT CIVIL SOCIETY. ENTITY CLAIMING PUBLIC SPACE, EVEN IF NON-STATE. ACTIVITY OF A PUBLIC CHARACTER. EXCLUSION OF MEMBER WITHOUT GUARANTEE OF DUE LEGAL PROCESS. DIRECT APPLICATION OF FUNDAMENTAL RIGHTS TO FULL DEFENSE AND CONTRADICTORS. Private associations that play a predominant role in a given economic and/or social context, maintaining their members in relationships of economic and/or social dependence, are part of what can be called public space, even if non-state. The Brazilian Union of Composers - UBC, a non-profit civil society, is part of the ECAD structure and, therefore, assumes a privileged position to determine the extent of enjoyment and enjoyment of the copyright of its members. The exclusion of a member from UBC's membership, without any guarantee of full defense, contradictory proceedings, or due constitutional process, considerably burdens the defendant, who is unable to realize the copyrights relating to the execution of his works. The prohibition of constitutional guarantees of due legal process ends up restricting the partner's own freedom of professional practice. The public nature of the activity carried out by the company and the dependence on the association for the professional exercise of its members legitimize, in this specific case, the direct application of fundamental rights concerning due legal process, contradictory proceedings and broad defense (art. 5, LIV and LV, CF/88). IV. EXTRAORDINARY APPEAL DISMISSED. (RE 201819, Rapporteur: ELLEN GRACIE, Rapporteur for Judgment: GILMAR MENDES, Second Panel, judged on 11/10/2005, DJ 27-10-2006 PP-00064EMENT VOL-02253-04 PP-
> 00577 RTJ VOL-00209-02 PP-00821)

The Supreme Court, in the judgment of the Regimental Appeal in Extraordinary Appeal nº 1.008.625/SP, reported by Minister Luiz Fux, recently reaffirmed its jurisprudence by deciding that "*It is clear that the norms defining fundamental rights and guarantees have a field of impact in any legal relationship, whether public, mixed or private, whereby the fundamental rights guaranteed by the Political Charter bind not only public authorities, but also reach private relationships*".

Note that in addition to recognizing the horizontal effectiveness of fundamental rights, the Brazilian legal system adopts the theory of direct (immediate) application of fundamental rights, meaning that, contrary to what occurs in the direct (mediate) theory, which we will not As we extend in this work, fundamental rights affect relationships between individuals independently of any legislative intermediation.

However, the recognition of the direct application of fundamental rights in relationships between individuals does not deny the existence of certain specificities in this application, as well as the need to balance fundamental rights with individual autonomy, as Daniel Sarmento well presents:

> It should be noted, however, that supporters of the theory of the immediate effectiveness of fundamental rights in private relationships do not deny the existence of specificities in this incidence, nor the need to consider the fundamental right at stake with the private autonomy of the individuals involved in the case. It is not, therefore, a radical doctrine that can lead to liberticidal results, contrary to what its opponents maintain, as it does not preach the disregard of individual freedom.
> in legal-private trafficking. (Sarmento, 2004, p. 246).

Therefore, what can be seen is that even if the theory of direct application of fundamental rights in private relationships is adopted, this supposed violated right will not always prevail in the specific case, and there must always be a consideration between the autonomy of the will and the right at stake.

Like any consideration, the basic parameter is the principle of proportionality – the known "proportionality test" – which involves the application of its three sub-principles in a successive manner, namely: (i) adequacy/suitability; (ii) necessity and; (iii) proportionality in the strict sense.

However, Daniel Sarmento (2004, p. 301/313) adds two other parameters –*standards*– to be observed when considering the fundamental right at stake and the autonomy of the will: (i) asymmetry of power; (ii) nature of the right at stake.

In relation to the asymmetry of power, the central question to verify the relevance of the direct application of fundamental rights is to verify whether there is an unequal relationship of power. The greater the asymmetry of power, the greater the "weight" of the fundamental right in the consideration.

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Regarding the parameter of the nature of the activity, it must be verified whether the right allegedly violated is it deals with existential or patrimonial freedom. When it comes to existential rights, the "weight" of the fundamental right is also greater in the consideration.

Finally, the Federal Supreme Court, in the judgment of Extraordinary Appeal nº 201.819/RJ (mention above), used another parameter in its consideration, namely: the public nature of the activity carried out by the private individual violating the fundamental right.

With what has been exposed so far, we are now able to answer the object of inquiry of this work, which is:*Big Techs,*In light of the Brazilian legal system, more specifically the doctrinal and jurisprudential understanding regarding the horizontal effectiveness of fundamental rights, can they permanently exclude accounts from their social networks, as recently observed with the then President of the United States, Donald Trump?

Preliminarily, it is worth highlighting that the permanent deletion of Donald Trump's account from Twitter finds support in North American Law, considering that by adopting the theory of*state action*, the US Supreme Court does not recognize the so-called horizontal effectiveness of fundamental rights, tolerating, in the name of the private autonomy of individuals, violations of fundamental rights in legal relations between them, including the right to freedom of expression.

However, when analyzing the same issue from the perspective of Brazilian constitutionalism we can reach a different conclusion.

This is because, as mentioned above, the Federal Supreme Court and doctrine recognize the horizontal effectiveness of fundamental rights and adopt the theory of direct (immediate) applicability of these rights in private relationships.

As we have seen, despite the applicability of fundamental rights arising directly from the Federal Constitution, the supposedly violated fundamental right will not always prevail in the specific case, and must be considered in light of the principle of private autonomy, with observance of the following parameters: (i) asymmetry of power; (ii) nature of the right at stake;

(iii) public nature of the activity carried out.

Thus, the answer to the question object of this work will be given after carrying out, in the specific case, the consideration between the fundamental right to freedom of expression and the principle of private autonomy, which regulates the relationship between Donald Trump and Twitter, observing the parameters set out above .

We will start with the parameters suggested by doctrine and jurisprudence.

Regarding the asymmetry of power, as paradoxical as it may be considering that the President of the United States is often considered the most powerful man in the world, I understand that the*Big Tech* In general, due to the high degree of control over the flow of available information that they have, they exercise a power of social communication, with regard to the dissemination of information, that is unlikely to be achieved by a single isolated citizen.

From this high control over the flow of information we can also extract a public nature from the activity carried out, as it is a service of access to information and communication on a large scale, especially when faced with a politician who needs to interact with millions of voters in real time. .

Finally, regarding the nature of the right at stake, the right to freedom of expression, without a doubt, is classified as an existential right, and not a patrimonial one.

Therefore, we can observe that the parameters established by doctrine and jurisprudence indicate that there must be greater intensity in the protection of the former American president's fundamental right to freedom of expression.

However, even though this is the direction taken from the analysis of these*standards*, it cannot be said that in all cases, especially depending on what is being said, the right to freedom of expression will prevail over private autonomy, or even over other fundamental rights that would be being violated by statements from the then President.

That is to say, the*Big Techs*–and in this specific case Twitter – can restrict the freedom of expression of Donald Trump – and any other user – in several possible ways, be it temporarily suspending the account, restricting the reach of published content or even direct alerts to message recipients – it is recommended in all these cases that the fundamental rights to contradiction and full defense are met – if abuse of the right to freedom of expression is identified by the user, with speeches that can be identified as hateful and/or inciting violence. Such a stance would perfectly find its place in the Brazilian constitutional order.

As an example, Minister Alexandre de Moraes, in the files of Inquiry No. 4,781 (Inquiry of

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"*fake news*"), ordered the blocking of the accounts of some of those investigated as a way of interrupting the "*speeches with hateful content, subversion of order and encouragement to break institutional and democratic normality*".

However, without the temporality and reversibility inherent to the decision, it is difficult to envisage a scenario in which autonomy of will, even if based on the abuse of freedom of expression, emerges victorious in a consideration in cases in which Donald Trump's freedom of expression - or any other user - be permanently closed on social media.

This "perpetual punishment" would not even pass the test of proportionality, more specifically the sub-principle of necessity, considering that other measures, some already mentioned above, such as temporary blocking, would be capable of containing possible speeches inciting violence in certain contexts, of way in which we can conclude that, in response to the question object of the present work, analyzed from the perspective of the Brazilian legal system, the *Big Techs* could not promote the permanent closure of Donald Trump's accounts, under penalty of, by acting without observing the principle of proportionality, violating his fundamental right to freedom of expression, given that, in Brazil, the effectiveness and direct applicability of fundamental rights in relationships between individuals.

CONCLUSION

Based on what has been exposed throughout the work, it is concluded that, contrary to what occurs in the North American legal system, Brazilian constitutionalism requires that fundamental rights be observed in private relationships. This way, calls *Big Techs*, more specifically, in this case, Twitter, if it were under Brazilian jurisdiction, could not permanently close the account of then President Donald Trump, as it would be, by not observing the principle of proportionality, violating his fundamental right to freedom of expression.

It is worth noting that companies are not prohibited from applying restrictions on the exercise of freedom of expression, especially if the user is using this right abusively, by inciting violence and promoting hate speech. However, such restriction must be considered in the specific case and, within this consideration, this "perpetual punishment" would not pass the test of proportionality, more specifically the sub-principle of necessity, considering that other measures, such as temporary blocking, would be capable of containing possible speeches inciters of violence in certain contexts.

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