REFLECTIONS ON THE SHIFT IN DECISION-MAKING PARADIGMS IN THE AI ERA

REFLEXÕES SOBRE A MUDANÇA NOS PARADIGMAS DE TOMADA DE DECISÃO NA ERA DA IA

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ABSTRACT

This article stems from an investigation into the complexities associated with employing artificial intelligence ("AI") for making informed judgments on the legality of user-generated content, with a specific focus on potential shifts in the paradigm of the safe harbor principle. The relevance of the study lies in the tension between the commission of illicit acts and the need for rapid and legally sound responses. The methodology employed is hypothetical-deductive, incorporating documentary, bibliographic, and case law analysis techniques. The theoretical framework encompasses legal positivism and the discourse theory of law, providing the foundation for the thesis that, in cases of conflicting principles, the legitimacy of a decision depends on the integration of pragmatic, ethical, and moral considerations within legal discourse, while its validity relies on meeting the conditions of rational argumentation. The article concludes that AI systems must navigate the tension between factual elements and the validity of legal decisions by ensuring consistent decision-making and rational justifiability for decision weighting criteria and factors, facilitating both user and judicial review. In situations where AI decisions restrict the fundamental right to freedom of communication, careful consideration of the consequences becomes crucial. Humans are placed in an *ex post facto* position within the decision-making process, highlighting the importance of moral dimensions in the private sector. Balancing these dimensions in public discourse is essential to prevent the influence of individual interests from undermining democratic principles. By carefully addressing the complexities of AI's impact on freedom of communication, we can ensure the preservation of a democratic and inclusive society.

KEYWORDS

Artificial intelligence (AI) – Legal decision-making – User-generated content – Safe harbor principle.

RESUMO

Este artigo resulta de uma investigação sobre as complexidades associadas ao uso da inteligência artificial ("IA") para realizar julgamentos informados sobre a licitude de conteúdos gerados por usuários, com enfoque específico nas potenciais mudanças no paradigma do princípio do safe harbor. *A relevância do estudo reside na tensão entre a prática de atos ilícitos e a necessidade de respostas rápidas e juridicamente corretas. A metodologia adotada é hipotético-dedutiva, com a incorporação de técnicas de pesquisa de análise documental, bibliográfica e jurisprudencial. O marco teórico abrange o positivismo jurídico e a teoria discursiva do direito, fornecendo a base para a tese de que, em casos de conflito entre princípios, a legitimidade de uma decisão depende da integração de considerações pragmáticas, éticas e morais no discurso jurídico, enquanto sua validade depende do cumprimento das condições de argumentação racional. O artigo conclui que os sistemas de IA devem navegar a tensão entre os elementos factuais e a validade das decisões jurídicas, garantindo a consistência nas decisões e a justificabilidade racional dos critérios e dos fatores de ponderação das decisões, facilitando tanto a revisão por usuários quanto por órgãos judiciais. Em situações em que decisões de IA restringem o direito fundamental à liberdade de comunicação, a consideração cuidadosa das consequências se torna essencial. Os seres humanos são colocados em uma posição* ex post facto *no processo decisório, ressaltando a importância das dimensões morais no setor privado. Equilibrar essas dimensões no discurso público é essencial para evitar que interesses individuais prejudiquem os princípios democráticos. Abordando cuidadosamente as complexidades do impacto da IA na liberdade de comunicação, é possível assegurar a preservação de uma sociedade democrática e inclusiva.*

PALAVRAS-CHAVE

Inteligência artificial (IA) – Tomada de decisões jurídicas – Conteúdo gerado por usuários – Princípio do safe harbor.

SUMÁRIO

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INTRODUCTION

Birth renews the world of human relations, as it brings forth a being who, not yet anything defined, enters the public sphere of discourse with the capacity to introduce the new, the as-yet-unknown, to their peers through action and speech (Arendt, 1998, p. 8). Action, once exercised in the political sphere, becomes the human condition reliant on plurality, by which the human being appears before others (Arendt, 1998, p. 176) as a person endowed with reason (Habermas, 2003, p. 35). Alongside the enrichment of the private sphere and individual autonomy, modernity casts a shadow: creativity and decision-making gradually fall to machines, shifting human responsibility from action to mechanization (Arendt, 1998, p. 47 and p. 132). Consequently, individuals have started to feel less accountable for the shared world of relations they inhabit. This sense of modern detachment intensifies as legal frameworks increasingly embed themselves within the algorithms and decision-making processes of computer programs. Thus, a fundamental tension arises: can machines adjudicate rights? And, if they can, should they?

This question has become increasingly critical as digital platforms have created new spaces where users may engage in unlawful activities. Recent cases such as Gonzalez v. Google before the Supreme Court of the United States, C-682/18 (YouTube) and C-683/18 (Cyando) before the European Court of Justice, along with Themes 533 and 987 before the Supreme Federal Court of Brazil, have put forth the question: should platforms assume the responsibility of determining what constitutes unlawful acts? And, if so, should they take the necessary measures to remove the illicit and restore the legal spheres of the parties?

On November 13, 2015, a terrorist attack in Paris resulted in the death of Nohemi Gonzalez and many others (Garrity; Shanshan; Choo, 2015). Following her death, her family filed a lawsuit against Google, specifically targeting YouTube, for allegedly failing to *prevent* the Islamic State of Iraq and Syria ("ISIS") from posting content on its platform. The plaintiffs argued that YouTube's recommendation *algorithms* contributed to the dissemination of ISIS-related videos. Google has argued, as defense, that Section 230 of the Communications Decency Act ("CDA") shields it from liability regarding algorithm-based recommendations, because the *safe harbor principle* protects online intermediaries, like itself, who host or transmit content from third parties. On May 18, 2023, the Supreme Court did not address the argument regarding the applicability of this principle, which could have led to either the *overruling* or *distinguishing* of previous legal precedents. Instead, the court decided that the case Gonzalez v. Google should be evaluated in terms of criminal liability, drawing from the precedent set by the case Twitter, Inc. v. Taamneh.

In relation to the application of the safe harbor principle in the realm of copyright, the European Court of Justice ("CJEU") made a ruling, in joined cases C-682/18 (YouTube) and C-683/18 (Cyando), stating that video-sharing or file-hosting platforms do not qualify as making a communication to the public solely by providing the platform infrastructure. However, it should be noted that they are not entirely exempt from the provisions set forth in Directive 2001/29/EC and Directive 2000/31/EC. Instead, national courts must assess on a *case-by-case* basis whether platform operators *intentionally* intervene in the sharing of illegal content, thereby triggering direct liability under the Directives. The Court emphasizes the importance of *balancing* the interests and *fundamental rights* of copyright holders, users, and the general public, including freedom of expression and information. The CJEU provides a non-exhaustive list of factors that national courts can consider when determining whether the platform operator acted deliberately, such as (1) *knowledge* of illegal content, (2) failure to implement appropriate *technical measures*, (3) *participation* in the selection of illegally communicated content, (4) provision of *tools* for illegal sharing, and (5) deliberate *promotion* of such sharing. The Court did not provide specific guidance on how to apply the criteria in individual cases. However, it determined that abstract knowledge of illegal content and the profit motive of a platform are insufficient to establish deliberate intervention. Consequently, the CJEU concluded that both YouTube and Cyando did not engage in *acts of communication* to the public in the main proceedings. Even though, as a *horizontal rule*, the interpretation of the safe harbor principle has implications far beyond the realm of copyright law (Reda; Selinger, 2021) - such as subjective rights like image, private life, and honor.

In Brazil, the issue of civil liability for application providers remains unresolved by the Supreme Federal Court concerning Themes 533 (*leading case* Extraordinary Appeal 1057258-MG) and 987 (*leading case* Extraordinary Appeal 1037396-SP). The primary distinction between these cases pertains to the enactment of Law No. 12,965/2014, also known as the Marco Civil da Internet in Brazil ("MCI"). The Legislative codified the safe harbor principle in Article 19 of this legal instrument, thereby conditioning the civil liability of application providers for third-party content on the failure to comply with a specific judicial removal order. The first theme addresses whether there was a duty to monitor the legality of content published prior to the enactment of this normative framework. The second theme discusses the constitutionality of Article 19 of the MCI considering the fundamental right to consumer protection guaranteed under Article 5, item XXXII, of the Constitution of the Federative Republic of Brazil ("CF").

Despite covering distinct domains of rights, these cases share crucial common ground. First, they ask whether platforms have a legal duty to monitor the legality of user-generated content. Second, they acknowledge that such monitoring may be facilitated through AI, given the sheer volume of content. For instance, YouTube's extensive global user base and vast content uploads — up to 500 hours per minute — highlight a growing reliance on automated systems to make swift and complex decisions. Based on these cases, let us consider a general scenario to illustrate this abstract conflict of fundamental rights: User (A) posts content on Platform (C) that involves User (B), who believes it violates one of their rights and requests its removal. User (A), in turn, defends their action as an exercise of their own rights. The AI system of Platform (C) must then determine whether User (B)'s rights have been infringed, justifying removal, or whether User (A)'s rights prevail, allowing the content to remain. Amid this intricate landscape, pressing questions arise: how can AI responsibly arbitrate conflicts over fundamental rights, engaging before the public in an act that resembles human action and speech? And, perhaps more critically, what lasting effects will these algorithmic judgments have on our shared world of human relations?

1 METHODOLOGY AND JUSTIFICATION

This article results from an investigation into the normative complexities of automated monitoring concerning the legality of actions undertaken by users on digital platforms. It examines the challenges associated with using AI to assess the legality of user-generated content, focusing particularly on the evolving boundaries of the safe harbor principle. The study's relevance lies in addressing the complex tension between illicit activities on digital platforms and the need for prompt, legally sound responses.

Adopting theoretical frameworks from positivist legal theory and discourse theory of law, this study adopts a hypothetical-deductive methodology and employs research techniques including documentary analysis of public sources, bibliographic review of legal scholarship, and case law analysis of landmark decisions involving the liability of application providers for user-conducted actions. The central thesis is formulated as follows: determining the illegality of digital actions may require a principled, case-by-case balancing, within the dimension of weight, when valid principles conflict. Consequently, (1) legal discourse should incorporate pragmatic, ethical, and moral factors to enhance legitimacy, and (2) the validity of legal decisions should be evaluated based on how well the decision-making process fulfills the communicative conditions of argumentation.

The research unfolds in three stages. First, it explores AI's role as a consciousness-free tool, as described in Article 3(1) of the proposed Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts. Here, AI is identified as a mechanism that decentralizes human decision-making, positioning humans primarily as supervisors rather than direct arbiters of legality.

Second, within the framework of a constitutional state, the study examines both positivist and non-positivist theories of decision-making rationality. It engages with the perspectives of Hans Kelsen and H. L. A. Hart to explore the positivist view, contrasting this with the discourse theory of law as advanced by Ronald Dworkin, Jürgen Habermas, and Robert Alexy to represent the non-positivist perspective. This analysis highlights situations where conflicting principles require a balancing approach rather than a strict application of pre-established rules.

Finally, applying a hypothetical-deductive approach, the paper presents and critically analyzes hypotheses through empirical, analytical, and dogmatic arguments. This exploration underscores the thesis that, in certain complex cases, the adjudication of digital actions may require balancing norms of equal hierarchical levels rather than straightforward rule subsumption through syllogism, with results that may vary according to the specific circumstances of each case.

2 THE RATIONALITY PROBLEM OF THE DECISION-MAKING

Scientific research is influenced by the prevailing beliefs and values of the scientific community, which create *paradigms* that shape how scientists approach their research and interpret their results (Kuhn, 1996, p.10-11). With the rise of modernity, the universe is no longer thought as a harmonious and closed whole as it was for the ancient philosophers, so that it no longer indicates an absolute point of view for the orientation of human action (Arendt, 1998, p. 278-280). The disoriented humans started to find thus new points of reference in themselves (Ferry, 2009, p. 21-22).

Like the history of science, the institutional history of a legal system can be examined from both *internal* and *external* perspectives (Habermas, 1996, p. 209-210). Internally, critical analysis of past arguments is conducted, distinguishing unconvincing approaches from productive ones, and identifying learning processes and temporary solutions amidst dead ends and mistakes. Retrospectively, different lines of reconstruction emerge based on the underlying paradigm. However, the choice of paradigms is constrained by hermeneutical starting points *external* to our control. Nonetheless, the paradigmatic understanding can be corrected and refined throughout the process of interpretation. Even at the end, the guiding conception of the reconstruction carries a certain bias and lacks neutrality. Thus, the chosen paradigm must be justified as the model that best captures the subject matter of science or law.

The *safe harbor principle*, functioning as a *paradigm*, provides protection to internet service providers, shielding them from civil liability concerning third-party content. United States law provides significant immunity to providers and users of interactive computer services by distinguishing them from publishers or speakers of content created by third parties. Specifically, Section 230(c)(1) of the Communications Act of 1934 exempts these entities from liability for user-generated content. Moreover, the "Good Samaritan" provisions under Section 230(c)(2)(A)(B) offer protection to platforms against civil liability when they act in *good faith* to remove or moderate third-party material. Nevertheless, this immunity is not absolute. Section 230(d) stipulates that such protections do not extend to companies that contravene federal criminal law, generate illegal or harmful content, or infringe upon intellectual property rights.

In September 2022, the Council of the European Union approved the Digital Services Act (“DSA”), marking the first significant update to online intermediary liability rules since the adoption of the Electronic Commerce Directive (Directive 2000/31/EC). The original directive provided conditional liability exemptions for intermediary service providers, focusing on the technical and neutral provision of services. The DSA, however, shifts this paradigm by emphasizing the importance of responsible conduct by these providers to foster a secure and trustworthy online environment. This framework enables European Union citizens and others to exercise their fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union, including freedom of expression, business activity, non-discrimination, and consumer protection (preamble, section 3).

The DSA, akin to U.S. legislative frameworks, differentiates between the mere technical provision of services and cases where intermediaries assume an active role by acquiring knowledge or exerting control over the content (preamble, section 18). This delineation is crucial for defining the liability regime applicable to intermediaries. The DSA asserts that intermediaries should not be subject to broad obligations to monitor the information they transmit or store or to actively search for illegal activity (Article 8), as it maintains liability exemptions for *mere conduit* (Article 4), *caching* (Article 5), and *hosting* (Article 6) services, provided these intermediaries do not play an active role in content management and act promptly to remove unlawful content.

To further encourage proactive measures, the DSA includes a “Good Samaritan” clause, ensuring that intermediaries do not forfeit their liability exemptions when they voluntarily investigate or remove illegal content in *good faith* (Article 7). However, judicial or administrative orders may still require providers to take targeted actions to prevent or cease infringements (Articles 4(3), 5(2), 6(4)). Providers must promptly notify authorities when complying with such orders (Article 9(1)), which must detail the legal basis, explain the illegality, identify the issuing authority, and precisely reference the content, such as URLs (Article 9(2)(i-vi)).

Despite the absence of a general monitoring duty, the DSA mandates that hosting providers implement mechanisms that allow users to report specific illegal content. These mechanisms must be user-friendly, fully electronic, and designed to handle well-substantiated notices (Article 16(1-2)). Notices should include a declaration asserting the notifier’s *bona fide* belief in the accuracy and completeness of the information provided (Article 16(2)(d)). Such notices, when enabling a diligent hosting service provider to identify illegal activity or content without extensive legal analysis, are deemed to establish actual knowledge or awareness for the purposes of Article 6 (Article 16(3)). Providers must process these notifications swiftly and transparently, disclosing any use of *automated tools* where relevant (Article 16(6)).

The DSA also obliges platforms to suspend services for users who persistently share manifestly illegal content after a warning, for a reasonable period (Article 23(1)), and to suspend processing of repeated, manifestly unfounded notices or complaints (Article 23(2)). These suspensions must be executed on a case-by-case basis and in a timely, diligent, and impartial manner, considering the frequency, proportion, severity, and intent behind the misuse (Article 23(3)). Policies addressing misuse should be explicitly stated in the provider's *terms and conditions*, complete with relevant examples (Article 23(4)). Providers are further mandated to alert authorities if they suspect a criminal act involving threats to life or safety (Article 18(1)).

In alignment with ensuring fair treatment for users, the DSA requires providers to establish internal complaint-handling systems that remain accessible for at least six months, allowing users to challenge decisions related to content removal or service suspension at no cost (Article 20(1)). Complaints may pertain to content removal or restriction, service suspension or termination, or the loss of monetization capabilities.

As an additional illustration, Article 19 of the MCI stipulates that service providers can only be held liable if they fail to take appropriate action, within the technical capabilities of their services and within a specified timeframe, to remove infringing content after receiving a court order. This provision aims to preserve freedom of expression and prevent censorship. Nonetheless, Article 21 stipulates that internet application providers hosting third-party content can be held indirectly responsible for privacy violations if they fail to promptly remove unauthorized disclosures of explicit private content (such as images or videos containing nudity or sexual acts) after receiving notification from the affected individual or their legal representative. The notification must include specific details to identify the violating material and establish the legitimacy of the request; otherwise, it may be considered invalid.

A *utilitarian argument* suggests that a reinterpretation of the safe harbor principle leading to heightened liability for content dissemination could potentially result in platforms being motivated to remove any third-party content that challenges the mainstream perspective. The aim would be to ensure efficiency and mitigate its liability. On the other hand, from the perspective of the *discourse theory of law*, which is grounded in *deontological rights*, such reinterpretation would have a detrimental effect on freedom of expression, because it could potentially stifle important speech and impede robust debates. However, both perspectives raise concerns about the role of platforms in adjudication, as this reinterpretation would shift the responsibility of judging the legality of user-generated content from the Judiciary to the private sector.[2] It would effectively grant platforms the authority to remove unlawful content and prevent unlawful acts. Given the substantial volume of content and the operational dynamics of these platforms, such determinations would be carried out by software solutions, such as AI.

AI, as a *paradigm*, is not a single programming technique, but a *genre* encompassing various development *methods* with different *purposes* and *perspectives*. In the light of this, the "European Parliament Resolution of 16 February 2017, with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)", initiated discussions on regulating AI products. It emphasized the need to define a common concept of AI and robot without hindering innovation (*paragraph C*), to link technological development to the protection of fundamental rights (*paragraph O*), and to ensure human control in automated decision-making processes (*paragraph Q*). The European Parliament acknowledged thus the importance of regulating the expanding environment that encompasses both real and virtual spaces for sharing *freedoms* and the entities that exist within them (Cachapuz, 2019, p. 63-85).

[2] "The societal basis for the legal and political differentiation of the public sphere from the private sphere of economic, civil society and familial activity has not undergone any structural change during the period under consideration; for the capitalist economic system is itself based on this separation. In constitutional democracies, this structure has also found a reflection in the consciousness of citizens. And their perception is the crucial issue. Citizens are expected to make their political decisions in the field of tension between self-interest and the orientation towards the common good. As we have seen, this tension is played out in the communicative space of a political public sphere that as a matter of principle includes all citizens as a potential audience. The very fact that public flows of communication pass through editorial sluices sets them apart from all private and business contacts. Different standards apply to the composition of print products addressed to an anonymous reading public than to private correspondence, which for a long time was still written by hand. What is constitutive for the public sphere is not the disparity between active and passive participation in discourse, but rather the topics that deserve shared interest, as well as the professional processing and rationality of the contributions that promote mutual understanding about shared and diverse interests. We should not overstrain the spatial metaphorics of the distinction between private and public 'spaces'; what is decisive is the perception of the (politically contested) threshold between private matters and the public issues discussed in the political public sphere. This perception is also shared by the social movements that create counterpublics to combat the narrowing of vision of the media public. Apart from the substantive reference to the central political authority with the power to act, it is the form and relevance of the selected editorial contributions that attract the attention of the audience. And this expectation concerning the reliability, quality and general relevance of public contributions is also constitutive for perceptions of the inclusive character of a public sphere that is supposed to direct the attention of all citizens to the same topics, in order to stimulate each of them to make their own judgements in accordance with the recognized standards about the issues of relevance for political decision-making. It is true that, since the emergence of 'media societies', the societal basis for such a separation of the public sphere from the private spheres of life has not undergone any essential changes. Nonetheless, the more or less exclusive use of social media may have led in parts of the population to a change in the perception of the public sphere that has blurred the distinction between 'public' and 'private', and thus the inclusive meaning of the public sphere." (Habermas, 2023, *E-book*).

Rather than imposing restrictions on technological advancement, the Parliament recognized the need to establish regulations that ensure the responsible development and use of technology in this evolving landscape.

The European Parliament's Legislative Resolution of 13 March 2024 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)) defines an AI system as a machine-based system designed to operate autonomously and exhibit adaptiveness post-deployment, generating outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments (Article 1(1)).

The proposal further delineates transparency obligations for AI system providers and deployers. Providers are required to ensure users are informed when interacting with AI, unless it is apparent (Article 50(1)). AI-generated content must be distinctly marked as such, with exceptions for assistive functions and lawful use in criminal detection (Article 50(2)). Deployers are mandated to disclose the artificial origin of public interest texts unless they have been human-reviewed or are legally authorized (Article 50(3)). These transparency obligations underscore the necessity of informing users about AI interaction rather than focusing on the decision-making process itself.

In this context, Article 86 codifies the right to an explanation in individual decision-making involving AI systems. It stipulates that any individual affected by a decision made by a deployer, based on the output of a high-risk AI system listed in Annex III (such as those used in the administration of justice and democratic processes, excluding those under point 2), which produces legal effects or significantly impacts their health, safety, or fundamental rights, is entitled to obtain clear and meaningful explanations from the deployer regarding the AI system's role in the decision-making process and the main elements of the decision taken (Article 86(1)). This obligation does not apply to AI systems for which exceptions or restrictions are provided by Union or national law, in compliance with Union law (Article 86(2)). The provisions of this Article apply only to the extent that the right to an explanation is not otherwise provided for under Union law (Article 86(3)). Essentially, Article 86 mandates that individuals significantly affected by high-risk AI systems have the right to a clear and meaningful explanation of the AI's role and the decision-making process, with specific exceptions as outlined by relevant laws.

Annex III, No. 8, specifies that high-risk AI systems include those used in the administration of justice and democratic processes. Specifically, this includes (1) AI systems intended for judicial authorities to assist in legal research, interpretation, and application, including alternative dispute resolution, and (2) AI systems designed to influence election or referendum outcomes or voting behavior. This does not apply to AI systems used for administrative or logistical purposes in political campaigns where individuals are not directly exposed to the AI outputs.

Therefore, in the paradigm shift of the safe harbor principle and the proposed legislation of AI in Europe, there is a recognition that the solution to balancing technological development with the protection of fundamental guarantees involves redefining the role of humans in the decision-making process. Despite acknowledging the importance of humans in guiding these systems, there is a tendency to decentralize them from direct decision-making and position them as supervisors instead. This shift aims to ensure that humans oversee the decision-making process rather than being the sole agents making decisions. Additionally, there is a focus on analyzing the conformity of actions with fundamental rights after they have been taken.

However, the capability of AI to assess the legality of content and make legal decisions poses a complex challenge. It raises concerns about the rationality of judicial decision-making within constitutional states, as it involves finding a balance between legal certainty and the legitimate application of the law. Courts strive to find a middle ground between *consistent decision-making* and *rational acceptability*, as they play a vital role in societal integration (Habermas, 1996, p. 194). The problem of AI-based legal decision-making can be approached thus by considering the perspectives of positivist and non-positivist theories of law (Alexy, 2004, p. 3).

2.1 Positivist approach

Legal positivism seeks to elucidate the role of stabilizing expectations without relying on disputed authority derived from customary ethical traditions (Habermas, 1996, p. 201). The two defining elements of the paradigm discussed are as follows: (1) the issuance in accordance with the system, and (2) the social efficacy. That is, the correctness of the law content holds no significance (Alexy, 2004, p. 3). Hans Kelsen and H. L. A. Hart have developed the internal normative nature of legal rules and the systematic construction of a rule-based system (Habermas, 1996, p. 201-202). A *basic norm*, in the case of Hans Kelsen (Kelsen, 1967, p. 94), or a *rule of recognition*, in the case of H. L. A. Hart (Hart, 1994, p. 103), is used to determine unambiguously which norms are valid at a given time. Linking the validity of law to its genesis results however in an asymmetrical solution to the *rationality problem*.

According to this approach, legal certainty is prioritized over the correctness of decisions. This characteristic, above all, is evidenced in treatment of *hard cases*. The hermeneutical problem of justifying selective decisions is downplayed, and any effects are attributed to the inherent vagueness of ordinary language (Habermas, 1996, p. 202-203). On one hand, the Pure Theory of Law does not assign a role to Jurisprudence in filling perceived gaps in the law, as it considers such a function as outside the realm of interpreting law within the framework of norms (Kelsen, 1967, p. 355). The positive-legal correctness of the legal decision is based therefore on the statute itself (Kelsen, 1967, p. 351). On the other hand, Hart acknowledges the need for interpretation due to the *open structure* of natural languages (Hart, 1994, p. 128). Judges must exercise thus *discretion* when existing norms do not precisely specify cases, relying on extralegal preferences and, if necessary, moral standards that are no longer strictly governed by the authority of law (Habermas, 1996, p. 202-203).

Ordinally, AI is viewed as a tool that can efficiently and consistently apply existing rules. These AI systems are designed to interpret and apply the law objectively, without personal biases, moral considerations, or subjective interpretations (Harari, 2018, p. 62-63). The goal in relying on *strict rules* is to achieve consistent outcomes and minimize arbitrary or subjective decision-making. This approach aims to reduce the *noise*, that is, the variation and inconsistency in judgments, ensuring that similar cases are treated similarly and promoting a more objective application of the law (Kahneman, 2022, p. 133-136). The use of AI in this context is seen to enhance the efficiency and accuracy of legal decisions, reducing human error and promoting a standardized approach. Thus, from this perspective, the adjudication applied by AI is compatible with the positivist approach regarding the role of the judge, because AI ought to solve the cases applying previously stablished strict rules through syllogistic method.

However, it is important to acknowledge the limitations of positivist perspectives. In cases where existing norms do not precisely address specific situations due to the inherent flexibility of natural languages or in cases where norms of equal validity and hierarchical level conflict, judges are required to exercise discretion. In the context of AI, granting legal discretion to the private sector in the social sphere may be seen as problematic since it could potentially violate the democratic principle and prioritize the interests of platforms over public interests. Moreover, a decision solely based on the previously stablished strict rules through syllogistic method would be insufficient to prevent instances of extreme injustice where the ability to *distinguish* and *overturn* precedents becomes essential. However, these issues can potentially be resolved by expecting AI to make rational decisions based on a *claim of correctness* and aligning their judgments with established legal principles.

2.2 Non-positivist approach: the discourse theory of law

Non-positivist considerations in decision-making emphasizes the need for legal reasoning to be responsive to broader societal concerns and values beyond strict adherence to established norms. The *discourse theory of law* is a theory of adjudication, it draws its data from established law, and it privileges the judge's perspective (Habermas, 1996, p. 195-196). The immanent tension in law between facticity and validity manifests itself as a tension between (1) the *principle of legal certainty*, which demands decisions that can be consistently rendered within the framework of the existing legal order, and (2) the *claim to a legitimate application of law*, which requires decisions that are not only consistent with the treatment of similar cases in the past and in accord with the existing legal system, but also supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions. That is, to render *correct decisions*, court rulings must harmonize the conditions of *consistent decision making* and *rational acceptability* within that sphere of adjudication in order to fulfill the socially integrative function (Habermas, 1996, p. 198).

AI-based legal decision-making can therefore aim for a more rational and universally accepted approach. This entails integrating principles within AI systems, conducting contextual analyses to account for specific circumstances and consequences, and promoting transparency through explanations of AI decisions. This chapter explores Ronald Dworkin's critique of positivism, which serves as the foundation for the discourse theory of law. It also examines Jürgen Habermas' discursive theory and Robert Alexy's conception of legal argumentation as a specific case of practical discourse. Furthermore, it serves as the foundation for the subsequent chapter, in which these theories are applied to hypothetical cases that involve conflicts of fundamental rights.

2.2.1 Ronald dworkin's response to the positivist theory

Ronald Dworkin's theory of law aims to reconcile *legal certainty* and *rational acceptability* on decision-making by relying on a deontological concept of rights. According to this approach, the judge's responsibility, even in hard cases, is to determine the existing rights of the involved parties rather than creating new rights after the fact (Dworkin, 1977, p. 81). In contrast to positivism, Dworkin addresses the need for post-traditional justification in positive law by examining the roles of arguments based on principles and policies in legal discourse. Contrary to legal positivism's assumption, modern law possesses a layer of higher-level norms within the legal system itself and is not solely subject to political policies.

While acknowledging the hermeneutical role of preunderstanding shaped by principles, Dworkin argues that courts determine individuals' entitlement to political rights, that is, rights with positive validity and whose recognition is based on standards of justice (Habermas, 1996, p. 203). The existence of such rights depends on a historically embodied *practical reason*, that is, on the faculty of mind that operates through principles which are objective due to the universal character of their applicability and bindingness for all rational beings (Kant, 2015, p. 17). It finds expression in the *principle of equal concern* and *respect for each person*, which enjoys the status of a *natural right* possessed by all individuals (Dworkin, 1986, p. 290), in other words, a law that rests upon pure rational principles *a priori* (Kant, 1887, p. 55) that are binding even in the absence of external legislation (Alexy. 2004, p. 116). Dworkin conceptualizes then rights as *trumps* in a game where individuals defend their justified claims against collective policies (Dworkin, 1986, p. 381). In this view, rights cannot be overridden by societal goals and place constraints on cost-benefit analysis when pursuing collective objectives. This is because rights possess a *deontological* character, which grants individual legal claims an unconditional nature, making them immune to compromise or trade-offs in the pursuit of broader societal interests (Habermas, 1996, p. 203-204).

Adopting a deontological perspective, rights contain an element of inviolability rooted in *rationality*, encouraging the search for *definitive answers* based on principles, which are not simply historical *topoi* derived from an ethical community's tradition (Ludwig, 2014, p. 102), as legal hermeneutics may suggest. On the contrary: interpretation requires a reference point *beyond* established legal traditions. Dworkin methodologically explains this standard of *practical reason* through *constructive interpretation* (Habermas, 1996, p. 209-210). Dworkin's *Empire of Law* argues for a legal system that combines rules and principles and emphasizes the importance of *discursive adjudication*.

Through *discursive adjudication*, this system ensures the integrity of relationships, mutual recognition, and equal concern for all citizens. Dworkin argues that moral arguments have a role in adjudication because positive law inherently incorporates a moral dimension. However, the presence of overlapping content does not blur the line between law and morality, as they are fundamentally different at a higher level of justification. When discussing *external justifications* for judicial decisions, legal principles, derived from the application of the discourse principle to the legal code, are primarily considered. The system of rights and constitutional principles is influenced by *practical reason*, particularly shaped by the principle of democracy. The moral aspects of constitutional rights and principles can be attributed to the fact that both law and morality share a *foundation* in the *discourse principle* and have *substantive intersections* (Habermas, 1996, p. 206-207).

In this context, Dworkin introduces the distinction between *rule* and *principle* to challenge Hart's autonomy thesis and the conception of law it is based on (Ludwig, 2014, p. 102). According to this approach, rules and principles serve as arguments in justifying decisions, but they differ in their status in the *logic* of argumentation: *rules* have specific conditions of application outlined in an *if* clause, while *principles* have either unspecified validity claims or applicability restricted by general interpretive conditions. That is, rules are specific norms applicable in all-or-nothing fashion: either they are valid and must be accepted if the specified facts are present, or they are not valid and provide no contribution to the decision. The application of rules, therefore, takes the form of subsumption, where conflicts between rules are resolved in the dimension of validity—either by invalidating one rule or establishing an exception (Alexy, 2015, p. 164). In contrast, principles have dimension of weight or importance which is ought to be determinate in a concrete case (Dworkin, 1977, p. 24-27). Collisions between principles are not resolved in terms of validity, as principles remain valid even in conflict; rather, these conflicts are addressed within the dimension of weight. Since only valid principles can conflict within the legal system, resolving such conflicts requires weighing the principles against each other based on their relative significance in the particular case (Alexy, 2015, p. 164-166). Contrary to the implications often suggested by legal methodologies when referencing the weighing of values, principles should not be construed as *optimizing* prescriptions rooted in *utilitarian* ethics, as doing so would undermine their inherent deontological character. The distinction between these types of norms, therefore, shall not be confused with that between norms and policies, because neither rules nor principles have a *teleological* structure. By acknowledging principles as essential elements of legal discourse and justifying the application of rules considering principles, it becomes possible to overcome the closed nature of the rule system and the inherent inability to resolve conflicts between norms (Habermas, 1996, p. 208-209).

Dworkin thus challenges the notion that the legitimacy of law is solely based on the legality of the legislative process. He argues that *legal discourse* is not separate from morality and politics, but rather involves the translation of moral and political principles into the language of law and its connection to the legal code. While the legal code appears unified, legitimate law encompasses a complex understanding of validity. Dworkin illustrates this through landmark decisions and precedents that consider *pragmatic*, *ethical*, and *moral* factors, alongside *legal reasoning*. Judges navigate ambiguous legal situations by drawing upon the background of political policies and moral principles, enabling them to arrive at well-founded decisions through careful analysis of policy and principle-based arguments. These external justifications are made possible since existing law already incorporates teleological and moral principles, including the underlying reasons behind legislative decisions. In the face of hard cases, higher courts can reaffirm these reasons. Therefore, adjudication primarily revolves around the application of legal norms, with the goal of ensuring consistency and predictability. This process involves examining legislative policies and objectives through the prism of principles (Habermas, 1996, p. 207-208).

Dworkin introduces a critical hermeneutical procedure known as *constructive interpretation*, aimed at attributing a purpose to objects or practices and optimizing their value according to contextual standards (Habermas, 1996, p. 210-211). Judges can use thus constructive interpretation to reach valid individual decisions by justifying their coherence with a rationally reconstructed history of existing law, addressing the challenge of satisfying both the *principle of legal certainty* and the *principle of legitimacy claim of law*. Consequently, legal discourse incorporates normative arguments that justify the selection of appropriate norms when conflicts between rules arise. These arguments are guided by principles that possess deontological content, enabling one to surpass internal justifications and provide a foundation for the premises themselves.

Coherence, serving as a criterion for validity, is established through compelling arguments that lead to a rational consensus. It relies on reasons that possess the pragmatic quality of generating a rationally motivated agreement among participants engaged in argumentation (Habermas, 1996, p. 212). According to Dworkin, legal principles and political policies compatible with those principles provide the means for reconstructing existing law and justifying normatively its essential elements. The task is to discover valid principles and policies that can justify a concrete legal order and integrate individual decisions into a coherent whole. Dworkin envisions a judge with comprehensive knowledge who can navigate the complexities of legal arguments, ranking principles and policies and critically evaluating positive law to uncover the coherent set of principles that would justify the institutional history of a legal system.

However, Dworkin recognizes that only a just legal system, resulting from an ongoing process of learning, can be fully justified retrospectively. The judge must expand their theory to incorporate the notion that certain aspects of institutional history may be considered erroneous. Different components of the legal order possess varying degrees of evaluative and corrective capacity, with precedents and legal sources allowing for greater flexibility in reinterpretation. Dworkin argues for a selective reconstructive legal theory that enables the determination of objectively entitled rights within the existing legal framework. This theory reconciles the rationally reconstructed decisions of the past with the pursuit of rational acceptability in the present, thereby harmonizing history with justice. It resolves the tension between judicial originality and institutional history by acknowledging that political rights expressed in current judgments reflect past political decisions rather than an opposition to them (Habermas, 1996, p. 212-213).

Therefore, Dworkin's theory provides a comprehensive framework for understanding the role of rights, rules, principles, and policies in legal decision-making. By considering the deontological nature of rights, the importance of constructive interpretation, and the integration of moral and political principles into legal discourse, Dworkin offers a nuanced approach that addresses the complexities and challenges of hard cases in law. His theory encourages judges to strive for coherence, consistency, and the protection of individual rights within the broader legal system.

2.2.2 Jürgen Habermas' discursive theory

According to Jürgen Habermas, the standpoint of integrity should liberate the judge from the solitude of monological theory construction, because law serves as a means of social integration and sustains the self-understanding of a cohesive community. The relations of reciprocal recognition established in concrete forms of life require law to be generalized in complex societies. This expansion of mutual recognition among natural persons into the abstract juridical relationship is facilitated by reflexive communicative action, such as the practice of argumentation where participants adopt the perspective of others (Habermas, 1996, p. 223). Dworkin acknowledges the procedural core of legally secured integrity when he associates the *equal right to liberty* with *equal communicative freedom*. This suggests that, rather than relying solely on the ideal personality of a judge with virtue and privileged access to truth, the ideal demands on legal theory should be anchored in the political ideal according to which constitutional legal interpretation translates the plurality of the public sphere and the needs and possibilities of the community, which precede constitutional texts or underlie them (Hesse, 1991, p. 14-15). Thus, society becomes open and free, because all public pluralistic forces are potentially *interpreters* of the Constitution (Härbele, 2022, p. 41-43).

The monological approach becomes even less viable when considering the need for legal paradigms that simplify complexity. The paradigmatic understanding of law, if shared by all citizens and representing the self-understanding of the legal community, can reduce the indeterminacy of decision making and ensure an adequate level of legal certainty. This also applies to a proceduralist understanding of law, which involves a regulated competition among different paradigms. To address the suspicion of ideology associated with such background understanding, a cooperative effort is required, involving public communication among citizens to support the judge's constructive interpretation as a collective endeavor (Habermas, 1996, p. 223-224).

In this connection, Owen Fiss proposes the establishment of procedural principles and maxims of interpretation to ensure impartial adjudication. These principles aim to uphold the independence of the judiciary, limit individual discretion, respect the integrity of the disputing parties, require written justification and official signing of judgments, and maintain neutrality. These professionally established standards are meant to guarantee the objectivity of judgments and their openness to intersubjective review (Habermas, 1996, p. 224).

Jürgen Habermas highlights the challenges surrounding the status of these principles (Habermas, 1996, p. 225). On one hand, they serve to justify judicial decisions and contribute, at least in part, to the validity of legal judgments. On the other hand, the validity of procedural principles and interpretive maxims relies on established practices and traditions within the legal expert community. Within this community, different subcultures may hold conflicting views regarding the selection of appropriate standards. Consequently, relying solely on the self-legitimization of a professional class is insufficient to demonstrate the validity of procedural principles that ensure fair decision-making practices within the legal system, because these principles require internal justification. Similarly, relying exclusively on enacted procedural regulations is inadequate, as the objective interpretation of these provisions is not self-evident and subject to scrutiny. To break free from this circular reasoning, it is necessary to reconstruct the practice of interpretation through legal theory, incorporating a broad range of perspectives.

A discourse theory of law, which considers the rational acceptability of judicial decisions not only in terms of argument quality but also the structure of the argumentative process, acknowledges the importance of this issue. Such a theory relies on a robust concept of procedural rationality that identifies the essential properties for the validity of a decision, not only within the *logic-semantic* dimension of constructing and connecting arguments and statements, but also within the *pragmatic dimension* of the justification process itself. According to this approach, arguments in legal discourse serve to rationally motivate participants to accept corresponding descriptive or normative statements as valid, thereby modifying the institutional reality and establishing rights and obligations (Alexy; Figueroa, 2007, p. 64). A theory of argumentation that solely focuses on the construction and analysis of individual arguments within the argumentation game provides only an internal justification for legal judgments. Considering this, Dworkin suggests the necessity of a comprehensive theory to externally justify the premises of a decision, which poses challenges for an individual judge working in isolation. This raises the question of whether the ideal requirements imposed on the theory can be translated into ideal requirements on a cooperative process of theory formation — an ideal legal discourse that acknowledges both the regulatory ideal of arriving at the single correct decision and the fallibility of actual decision-making (Habermas, 1996, p. 225-226).

According to Jürgen Habermas, the explanation of normative judgments cannot be based on a correspondence theory of truth because rights are socially constructed and should not be regarded as objective facts. Instead, the notion of rightness pertains to rational acceptability based on good reasons. The validity of a judgment is determined by satisfying its validity conditions, and it can only be clarified through discursive justification using arguments. Substantial reasons do not compel in the manner of logical inference or conclusive evidence. Merely explaining the content of premises is insufficient for justification, and conclusive evidence is seldom available, except for singular perceptual judgments, which are still subject to doubt. The chain of possible substantial reasons has no natural endpoint since new information and better reasons can always arise. Under favorable conditions, argumentation reaches a *de facto* conclusion when the reasons converge into a coherent whole that leads to an uncoerced agreement on the acceptability of the contested validity claim. The concept of rationally motivated agreement recognizes this remaining element of facticity by attributing to reasons the capacity to influence participants, in a non-psychological sense, to adopt affirmative positions (Habermas, 2013, p. 15-16). To eliminate even this last trace of facticity, the chain of reasons would need to be brought to a more than *de facto* conclusion. Internal closure can only be achieved through idealization, either through a totalizing theory where reasons systematically interconnect and mutually reinforce one another in a closed circle, or through the chain of arguments approximating an ideal limit like a straight line, which Charles Peirce referred to as the final opinion (Habermas, 1996, p. 226-227). In the context of postmetaphysical thinking, the justification for the ideal of a closed and absolute theory is unconvincing. Therefore, a strong theory cannot fully explain the regulative ideal of achieving a *single right* decision.

On the other hand, the notion of an ongoing process of argumentation aiming towards a limit necessitates defining the conditions that give this process a direction and allow for long-term progress in cumulative learning. These *pragmatic process* conditions ensure that all relevant reasons and information pertaining to a particular issue at a given time are not suppressed and can exert their inherent force for rational motivation. The concept of an argument is inherently pragmatic, as the determination of what constitutes a *good reason* depends on its role in an argumentation game. The rules of this game govern the process of deciding whether a contested validity claim should be accepted or not. By extending the concept of procedural rationality to the pragmatic dimension of regulated argumentation, one can *complement* the semantic properties of reasons with properties that indirectly establish validity (Habermas, 1996, p. 227-228). This refers to the arrangement in which the potential for rational motivation inherent in good reasons is actualized. The argumentative process of cooperative truth-seeking aims to bridge the rationality gap between individual substantial reasons presented in fundamentally incomplete sequences of argument, which are at best plausible, and the unconditional aspiration for a *single right* decision (Habermas, 2013, p. 15-16).

In our attempts to persuade one another, we rely on a practice that assumes the approximation of ideal conditions for a speech situation that is free from repression and inequality. In this speech situation, individuals engage in a regulated contest of arguments, adopting a hypothetical attitude to test the validity of a claim solely based on reasons. The core intuition associated with this practice of argumentation is the intention to gain the agreement of a universal audience through non-coercive means, by presenting the better arguments supported by the best information and reasons. The *discourse principle* requires this type of practice to justify norms and value decisions, as the rational assent of all those affected can only be assessed from an *intersubjectively enlarged perspective* that integrates the worldviews and self-understandings of each participant. This perspective avoids coercion and distortion. The practice of argumentation is recommended for achieving this universalized ideal role-taking, practiced collectively. Argumentation, as the reflexive form of *communicative action*, distinguishes itself by allowing for a complete reversibility of participant perspectives, unleashing a higher-level intersubjectivity within the deliberating community. In this way, according to Habermas, Hegel's concept of the concrete universal is purified into a communicative structure devoid of substantive elements (Habermas, 1996, p. 227-228).

Questions regarding the application of norms involve participants' self-understanding and their understanding of the world in a different manner compared to *discourses of justification*. In application discourses, norms that are tacitly accepted as valid still consider the interests of all potentially affected parties. However, the focus shifts to determining the appropriate norm for a specific case, where the interests of the immediately involved parties become more prominent. Contextual interpretations of the situation become crucial, considering the diverse *self-understandings* and worldviews of the participants (Habermas, 2013, p. 13). In application discourses, participants need to reconcile their different interpretations of the same situation into a normatively comprehensive description of the circumstances, without disregarding the existing differences in perception. Once again, it is essential to achieve a sensitive and non-coercive coordination of diverse interpretive perspectives. These perspectives must simultaneously maintain a connection with the universal-perspective structure that underlies presumed valid norms in justification discourses. Thus, interpretations of individual cases, shaped within the framework of a coherent system of norms, rely on the communicative nature of a discourse that allows for the transformation of perspectives between participants and uninvolved members of the community, such as an impartial judge. This also explains why the concept of coherence, as employed in constructive interpretation, resists purely semantic explanations and relates to the pragmatic presuppositions of the argumentative process (Habermas, 1996, p. 229).

Therefore, if one agrees with Dworkin's deontological perspective on law and considers argumentation theory, two theses can be endorsed: first, legal discourse cannot exist independently within a closed system of existing norms but it should be open to pragmatic, ethical, and moral reasons that are incorporated into the legitimacy claim of legal norms during the legislative process; and second, the validity of legal decisions is ultimately evaluated based on the extent to which the decision-making process fulfills the communicative conditions of argumentation, enabling impartial judgment to take place (Habermas, 1996, p. 230).

2.2.3 Robert Alexy's theory of legal argumentation

According to Robert Alexy, *legal discourse* is a linguistic activity (*discourse*), that deals with the correctness of normative statements about what ought, may or can be done or omitted (*practical*) and that is under specific conditions of the general practical discourse (*special case*). It is, thus, *a special case of general practical discourse* (Alexy, 2007, p. 295). Jurisdiction is different from legislation no longer, hence, because it shall apply the norm created by the latter, but because it *collaborates* with the realization of the law through the *justification* of its *interpretative* decisions in each concrete case. The core of the special case thesis is therefore to argue that the *claim of correctness* also arises in legal discourse; but this claim, unlike what happens in general practical discourse, does not refer to the normative propositions in question being simply rational, but only to they being rationally grounded within the framework of the legal system in force (Alexy, 2007, p. 305). That justification shall present certain characteristics in order to be considered adequate in the Constitutional State:[3] interpretive activity is rational only if it is justified *internally* and *externally.*

First, the problems related to internal justification in legal reasoning have been extensively discussed under the concept of legal syllogism. Legal syllogism fulfills the requirement of justification by universal rules, which is necessary for the principle of universality and forms the basis of formal justice. Formal justice necessitates adherence to a rule that states the duty to treat all individuals within the same category equally. In a legal context, following a rule in a decision means that the decision logically stems from that rule. If the decision does not logically follow from the rule, while the rule may be cited during the justification, any conclusion could still be affirmed. Robert Alexy formulates, thus, the following rules as a concretization of the *principle of universality*: (1) for the substantiation of a legal decision at least one universal rule must be adduced; (2) the legal decision must follow logically from at least one universal rule, together with other propositions; (3) just like the principle of universality, they must not be overvalued; (4) development steps are necessary that make it possible to formulate expressions whose application to the case in question is no longer debatable; (5) the greatest possible number of development steps must be articulated (Alexy, 2007, p. 307-318). These rules therefore undoubtedly ensure a certain measure of rationality of the premises. Still, the judgment on the rationality of a decision belongs, then, to the field of external justification.

Second, the purpose of external justification is to provide evidence and support for the premises underlying internal justification. These premises can take various forms, including: (1) rules of positive law, (2) empirical statements, and (3) premises that do not fall into the category of empirical statements or rules of positive law. *Legal argumentation* serves to provide reasoning and support for premises of the latter (Alexy, 2007, p. 319).

According to Robert Alexy, the various *forms* of arguments and *rules* for external justification can be categorized into six groups: (1) interpretation, (2) dogmatic

[3] For example: Brazil (Article 489, §1, Code of Civil Procedure); Germany (Article 30, §1, BVerfGG); Portugal (Article 607, §3 and §4, Code of Civil Procedure).

argumentation, (3) use of precedents, (4) general practical argumentation, (5) empirical argumentation, and (6) special forms of legal arguments (Alexy, 2007, p. 320). The primary task of a theory of external justification is to logically analyze these forms of argumentation within these groups. This analysis helps in understanding the necessity and feasibility of linking these different forms of arguments. Exploring the connections between arguments of different forms is essential to determine the roles played by empirical argumentation and general practical argumentation in legal discourse.

These rules and forms serve as criteria for determining the correctness of legal decisions. Legal discourse, as a special case of general practical discourse, incorporates the rules and forms of general practical discourse. However, since general practical discourse theory relies on hypothetical criteria, the theory of rational legal discourse also faces uncertainties and limitations. These uncertainties do not render discourse theory useless as a criterion of correctness, but they imply that judgments about the correctness of a decision are provisional and subject to potential refutation (Alexy, 2007, p. 401).

Furthermore, the rules and forms of legal discourse have value beyond explaining the concept of legal argumentation. They serve as a measure against which the necessary limitations in the search for correctness can be assessed, particularly in legal decision-making processes such as court proceedings. These rules and forms provide criteria for evaluating the rationality of decision processes and the resulting decisions in specific situations. Additionally, the theory of rational legal discourse functions as an ideal, pointing to the broader goal of reason and justice in society. Jurists alone cannot achieve this goal in isolation, as it requires a rational and just social order (Alexy, 2007, p. 402).

Therefore, Robert Alexy identifies a set of *rules of reason* that incorporate idealizations across temporal, social, and substantive dimensions. These idealizations encompass assumptions of endless time, unlimited participation, and freedom from coercion. Within rational discourse, it is presupposed that the conditions of communication prevent arbitrary termination of argumentation, ensure freedom in selecting topics and accessing information and reasons, and exclude any form of coercion except that of the better argument. Alexy introduces a version of Kant's universalization principle as the rule of justification for moral and practical discourses, grounded in the idealizing presuppositions of argumentation in general. Engaging in the practice of argumentation necessitates relying on pragmatic presuppositions that involve adopting ideal roles. This entails interpreting and evaluating all contributions from the perspective of every potential participant.

Discourse ethics, in line with Dworkin's principle of equal concern and respect, encapsulates the fundamental concept of equal treatment within the realm of argumentation. The legal argumentation that takes place within the broader context of general practical discourse serves to rationalize the process outlined in Habermas' discursive theory. This process, therefore, entails interpreting individual cases within a coherent system of norms. It relies on the communicative nature of discourse to enable the transformation of perspectives among participants, including those who are not directly involved, such as an impartial judge. The outcome is a coherence achieved through constructive interpretation and the attainment of a pragmatic dimension within the argumentative process.

3 REFLECTIONS ON THE CHALLENGES OF AI DECISION-MAKING FROM A DISCOURSE THEORY OF LAW PERSPECTIVE

In the paradigm shift of the safe harbor principle and the proposed legislation of AI in Europe, there is a trend to decentralize humans from direct decision-making roles and position them as supervisors. If one rejects a positivist perspective that raises concerns about *discretion* in decision-making, two theses can be supported. First, legal discourse should not exist in isolation but should be open to pragmatic, ethical, and moral considerations that contribute to the legitimacy. Second, the validity of legal decisions should be evaluated based on the extent to which the decision-making process fulfills the communicative conditions of argumentation, specifically the *claim of correctness*. This chapter will explore the scenario where AI is tasked with resolving a case involving conflicting fundamental rights that cannot be resolved through simple syllogistic reasoning. In such situations, an external justification needs to be considered. To address this, legal discourse theory, grounded in fundamental rights theory, will be employed.

The General Theory of Fundamental Rights encompasses three main characteristics. First, it focuses on the valid and positive fundamental rights enshrined in the Constitution. Second, it is a dogmatic theory that serves as a basis for determining concrete judgments of what ought to be. To ensure rationality, it combines three dimensions: *analytical* (exploring the conceptual and systematic aspects of valid law), *empirical* (identifying judicial practices and the open interpretation of the law), and *normative* (seeking the correct decision based on the analysis of the specific case and the foundation of valid positive law). Thus, one can consider the science of law as a rational and practical discipline because it is a theory that is connected to the mentioned dimensions and aims to facilitate the practical task of evaluating concrete judgments. Third, it is a general theory, meaning that it addresses the shared aspects of fundamental rights (Alexy, 2012, p. 12-13). When examining the Theory of Fundamental Rights within a legal system from a dogmatic perspective, as an integrative theory with analytical nature, it must be linked to the Structural Theory, which investigates the structures and the impact of fundamental rights on the legal system, substantiating them as practical tasks. This integration gives rise to two characteristics: an empirical-analytical nature, as it relies on jurisprudence as its primary material, and an analytical-normative nature, guided by the rational justification of correct decisions (Alexy, 2012, p. 22). As a result of this, hypotheses will be formulated and then tested pragmatically within the context of the Brazilian legal system.

The general example outlined in the introduction illustrates the conflict between fundamental rights as follows: User (A) shares content on Platform (C) that involves User (B). User (B) claims that the content infringes upon one of their fundamental rights and requests its removal from the platform. Conversely, User (A) asserts that sharing the content is protected by their own fundamental rights. The AI system employed by Platform (C) must then determine whether the content indeed violates (B)'s rights, justifying removal, or if (A)'s rights were lawfully exercised, warranting retention. This balancing act is critical: an incorrect decision by the AI system could unjustly restrict either (A)'s or (B)'s rights, resulting in a potentially unlawful outcome and exposing Platform (C) to liability.

The connection between the constitutional and infraconstitutional spheres, in which private law is situated, is made possible through a clause of fundamental legal subsidiarity, which links fundamental rights to private-subjective rights (Schwabe, 2012, p. 125). Innovatively, both nationally and internationally, Article 187 of the Brazilian Civil Code ("CC") established, as a norm of fundamental legal subsidiarity, that the holder of a right commits an unlawful act if it is exercised in a manner that manifestly exceeds the limits imposed by its economic or social purpose, good faith, or good morals. Thus, this constitutes a general clause of unlawfulness, complementary to subjective fundamental rights, which provides the rationale that doctrinally guides the balancing required in the *prima facie* examination of a principle of full autonomy exercise, as well as the configuration of legal positions in the concrete domain (Cachapuz, 2017, p. 115). The norm formulated from the provisions of Article 187 of the CC imposes on the interpret, in this case the AI system of Platform (C), in the exercise of their integrative function, the duty to analyze the concrete case and identify any potential civil unlawfulness in the exercise of a right — that is, to assess whether a *prima facie* freedom is being abused. The lawfulness of the action, therefore, corresponds to the balance of positions within the fundamental legal relationship, in accordance with the *principle of proportionality*, which requires an analysis of both factual and legal possibilities. A precise determination demands a deep dive into the specifics of the case, as circumstances can vary greatly. Thus, specific examples must be considered to illustrate and clarify the concept further.

In the first example, individual (A), a journalist, disseminates a news article on platform (C) concerning individual (B), a person of local renown. (B) contends that the shared content infringes upon their right to the inviolability of private life, as enshrined in Article 5, item X, of the CF, Article 7, item I, of the MCI, and Articles 17 and 21 of the CC, and requests that (C) remove the content based on Article 7, item I, of the MCI, and Article 12 of the CC. In turn, (A) asserts that their actions are justified by their rights to freedom of communication and profession, as established in Article 5, items IV, IX, XIII, and XIV, as well as Article 220 of the CF, Article 3, item I, of the MCI, and Articles 1 and 2, item III, of the Decree No. 83,284/1979, arguing that their exercise did not exceed the limits imposed by Article 187 of the CC.

In the second example, (A), a journalist, shares a news article on platform (C) about (B), who holds the position of president. (B) asserts that the shared content violates their right to the inviolability of private life, as enshrined in Article 5, item X, of the CF, Article 7, item I, of the MCI, and Articles 17 and 21 of the CC, and requests that (C) remove it, based on Article 7, item I, of the MCI, and Article 12 of the CC. (A) argues that their action is justified by their rights to freedom of communication and profession, as enshrined in Article 5, items IV, IX, XIII, and XIV, as well as Article 220 of the CF, Article 3, item I, of the MCI, and Articles 1 and 2, item III, of the Decree No. 83,284/1979, arguing that their exercise did not exceed the limits imposed by Article 187 of the CC.

In the third example, (A), a journalist, posts a news article on platform (C) about (B), who is the president. The article includes allegations made by (A) that (B) received money to approve an amendment. (B) contends that the shared content violates their right to the inviolability of honor and image, as enshrined in Article 5, item X, of the CF and Articles 17 and 20 of the CC, and requests that (C) remove it, based on Article 12 of the CC. (A) maintains that their action is justified by their rights to freedom of communication and profession, as established in Article 5, items IV, IX, XIII, and XIV, as well as Article 220 of the CF, Article 3, item I, of the MCI, and Articles 1 and 2, item III, of Decree No. 83,284/1979, arguing that their exercise did not exceed the limits imposed by Article 187 of the CC.

In the fourth example, (A), a senator, shares a news article on platform (C) about (B), the president. The article reports allegations made by (A) that (B) received money to approve an amendment. (B) asserts that the shared content violates their right to the inviolability of honor and image, as enshrined in Article 5, item X, of the CF, and Articles 17 and 20 of the CC, and requests that (C) remove it, based on Article 12 of the CC. (A) contends that their action is justified by their rights to freedom of expression and parliamentary immunity, as enshrined in Article 5, items IV, IX, XIII, and XIV, as well as Article 53 of the CF, and Article 3, item I, of the MCI, arguing that their exercise of the constitutional prerogatives granted to the members of the National Congress did not manifestly exceed the limits imposed by Article 5, item I, of Resolution No. 20/1993 and Article 187 of the CC.

In all these cases, both parties assert positive and valid rights that carry equal hierarchical significance. These rights thus are considered principles. Thus, the use of a simple syllogism within the internal justification is insufficient to determine which claim should prevail, especially when discretion is dismissed and the requirement for correctness is acknowledged. This is particularly relevant considering the deontological nature of fundamental rights, which act as trumps against the majority and possess an inherent general reserve of weighting (Novais, 2021, p. 193). (C) must develop an external justification by employing legal argumentation as a specific case of the general practical discourse to establish the norm. Therefore, (C) must be capable of interpreting the case and ruling based on practical reason, which demands reconciling the conflicting principles in universal terms.

While these cases share a common structure, each possesses unique aspects that require specific analysis and decision-making. (C) must assess the weight of each principle based on the circumstances of each case, such as public interest and individual privacy, through the principles of necessity, adequacy, and proportionality in the strict sense, all of which fall under the broader principle of proportionality, to determine whether the exercise of rights by (A) manifestly exceeds the limits imposed by its economic or social purpose, good faith, or good morals as established by Article 187 of the CC. For instance, considering the Spheres Theory[4] and the arguments presented in the Direct Action of Unconstitutionality No. 4815 as adjudicated by the Supreme Federal Court, the fundamental right to the inviolability of private life of individual (B) holds greater weight in the first example than in the second. This distinction arises from the diminished private sphere of the president due to the performance of their official duties. Conversely, the fundamental right to honor and image of individual (B) should carry greater weight in the third example than in the fourth, as senators enjoy extensive freedom of speech in the exercise of their functions.

Considering an obligation such as the imposed by No. 8 of Annex III, as referenced in Article 86 of the Artificial Intelligence Act, which applies to alternative dispute resolution and, consequently, to private agents in the social sphere, it is crucial for AI systems to uphold the principle of legal certainty and ensure the legitimate application of the law during norm application. This involves reconciling different interpretations of a situation to create a comprehensive description and considering the interests of the directly involved parties.

[4] "The importance of such a philosophical construction for understanding the spaces designated for public and private within the legal order becomes essential as the 2002 Civil Code inaugurated a chapter dedicated solely to personality rights. Therefore, the strict relationship between a theory of spheres and a general right to freedom. The spheres assist in legal comprehension by predisposing abstract spaces for the public and private, both assigning equal value to freedom. These are spaces that encompass distinct experiences and manifestations and require equally distinct types of protection. The theory of spheres contributes to the rationalization of the problem by enabling the organization of an argument sufficient for the decision to be adopted. A priori, therefore, it is not possible to state what is public and what is private, but only to assert that it is the duty of the Law to protect both (formal relation). The content of what is public or private will only be defined in light of the concrete case at hand (material relation – the situated subject) and through the discourse presented concerning the conflict of liberties. Thus, it can be affirmed, abstractly, that the field of action of an equality principle is always the public field, where there is an individual's 'desire to appear' (Arendt, 1959 and 1993). In the public sphere, the rule is equality, whether legal (the role of normativity, of ideal discourse) or factual (the role of concreteness, of real discourse). The private sphere, on the other hand, is informed by a relationship of difference and exclusivity (principle of exclusivity). For the interpreter, the legal question in conflict is how to confine potential societal discrimination – resolved, concretely, by the application of a principle of factual equality – so that it does not contaminate the private sphere (exclusivity). The spheres of the public (political and social) and the private (Arendt, 1959), therefore, systematize for the interpreter the very distinction between the world of essence (the intimate) and the world of appearance (the visible), to rationalize the problem of conflict between liberties proposed in concrete. Hence Alexy's assertion that the theory of spheres holds a very close relationship with the study of personality rights, even stating that 'the general right of personality is a part of the theory of spheres elevated to the level of rights' (Alexy, 2001, p. 356). The justification of applying such a theory in legal terms is the fact of identifying the connection that must be promoted, at the moment of constructing a rational argument, between the a priori absorbed knowledge (formal) and the knowledge gained from experience (material). This is the central point worth discussing concerning the conflict of freedoms and relates to the openness of the legal order to a critical genesis through the adoption of a theory of spheres. This, of course, can only be promoted in a discussion proposed based on legal principles." (Cachapuz, 2017, p. 41-43, translated by the author).

The discourse principle thus requires (C) to justify norms and value decisions by reaching a rational consensus that considers the perspectives of both (A) and (B). The primary objective of this principle is to prevent coercion and distortion by integrating diverse worldviews and self-understandings. Consequently, (C) must employ argumentation as a collective practice to achieve this goal. Engaging in argumentation enables the attainment of an ideal state of role-taking and higher-level intersubjectivity, as interpretations rely on discourse that can transform perspectives while maintaining a connection with valid norms.

It is essential to recognize that coherence in constructive interpretation extends beyond mere semantics to include the pragmatic presuppositions of the argumentative process. Therefore, (C) must be capable of justifying its decision through various forms of arguments and rules, including: (1) interpretation, (2) dogmatic argumentation, (3) use of precedents, (4) general practical argumentation, (5) empirical argumentation, and (6) special forms of legal arguments.

Finally, to enable revision by natural persons, (C) is required to provide justification for the object and the overall criteria used in the weighting process. This justification should include reasons that validate deviations from the established rule, such as distinguishing and overruling techniques, and factual premises that support the resulting conclusion. The aim is to ensure that the operations carried out by (C) are transparent enough for both (A) and (B) to interpret the system's output and appeal its decisions if necessary. Additionally, this transparency should facilitate judicial review of the process.

Therefore, AI must be capable of interpreting cases and making decisions by weighing principles in each instance. Despite conflicts between fundamental rights having a similar configuration, the concrete circumstances shall determine which principle should have greater weight in a particular case. Consequently, the mere prescription of rules in the abstract dimension is insufficient to rule effectively. The specific circumstances of cases may demand that AI distinguish or overturn precedents when adhering to established rules leads to severe injustice, requiring decisions that draw upon reference points beyond conventional legal traditions. Hence, the deontological nature of fundamental rights imposes on AI systems the necessity to base their decisions on universal terms, necessitating an *enlarged thought*.[5] This

[5] Enlarged thought is “the result of first "abstracting from the limitations which contingently attach to our own judgment," of disregarding its "subjective private conditions..., by which so many are limited," that is, disregarding what we usually call self-interest, which, according to Kant, is not enlightened or capable of enlightenment but is in fact limiting. The greater the reach—the larger the realm in which the enlightened

involves contemplating *justice* and *what ought to be* in light of the claim of correctness, based on the categorical imperative, through practical discourse rather than merely calculating outcomes.

CONCLUSIONS

The paradigm shift in the safe harbor principle and AI legislation in Europe signifies a transition from human-centric decision-making to a supervisory role for humans, raising concerns about finding a balance between consistent decision-making and rational acceptability, both crucial for societal integration. Addressing the problem of AI-based legal decision-making necessitates considering the perspectives of both positivist and non-positivist theories of law.

From a positivist perspective, AI systems offer the potential benefits of objectively and consistently applying existing rules. However, it is important to acknowledge the limitations of a purely positivist approach, especially in hard cases. Rejecting positivist arguments about discretion, two theses are supported: (1) legal discourse should incorporate pragmatic, ethical, and moral factors to enhance legitimacy, and (2) the validity of legal decisions should be evaluated based on how well the decision-making process fulfills the communicative conditions of argumentation, particularly the claim of correctness, interpreting individual cases within a coherent system of norms and in universal terms.

To fulfill its socially integrative function and ensure accurate decisions, AI systems must navigate the tension between factual elements and the validity of legal decisions by maintaining consistency and rational justifiability. Additionally, AI systems should provide justification for decision weighting criteria and factors, including explanations for deviations from established rules, to facilitate human oversight and revision. Therefore, transparency in AI operations allows users to interpret outputs and challenge decisions, while also enabling judicial review.

individual is able to move from standpoint to standpoint—the more "general" will be his thinking. This generality, however, is not the generality of the concept— for example, the concept "house," under which one can then subsume various kinds of individual buildings. It is, on the contrary, closely connected with particulars, with the particular conditions of the standpoints one has to go through in order to arrive at one's own "general standpoint." This general standpoint we spoke of earlier as impartiality; it is a viewpoint from which to look upon, to watch, to form judgments, or, as Kant himself says, to reflect upon human affairs." (Arendt, 1992, p. 43-44).

The primary concern lies not merely in AI's adherence to rules, but in its capacity to interpret cases and make decisions by weighing principles in each instance, considering the deontological nature of the fundamental rights. Specific cases may demand that AI distinguish or overturn precedents in instances of severe injustice, requiring decisions that diverge from established norms and draw upon reference points beyond conventional legal traditions. This necessitates AI systems to base their decisions on universal terms. This involves contemplating justice and what ought to be in light of the claim of correctness, based on the categorical imperative, trough practical discourse rather than merely calculating outcomes.

Significant concern is placed on the influence of moral considerations from the private agents on public discourse. The paradigm shift in the safe harbor principle and AI legislation in Europe signifies a transition from human-centric decision-making to a supervisory role for humans. When humans react only after decisions are made, AI-imposed constraints on freedom of speech can result in irreversible consequences, especially in time-sensitive scenarios like elections. The Romans used the phrases "to live" and "to be among men" (*inter homines esse*) or "to die" and "to cease to be among men" (*inter homines esse desinere*) as synonyms (Arendt, 1998, p. 3). A life without speech and action is literally dead to the world because it is no longer lived among men (Arendt, 1998, p. 176). Consequently, with its power to shape public debate, AI has the potential to undermine democratic principles. In essence, AI possesses the power to restrict human plurality and thereby shape life itself.

REFERENCES

ALEXY, Robert. *Direito, Razão, Discurso*: estudos para a filosofia do direito. 2. ed. rev. Porto Alegre: Livraria do Advogado Editora, 2015.

ALEXY, Robert. *Teoría de La Argumentación Jurídica*: la teoría del discurso racional como teoria de la fundamentación jurídica. Lima: Palestra Editores, 2007.

ALEXY, Robert. *Teoría de Los Derechos Fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2012.

ALEXY, Robert. *The Argument from Injustice*: a reply to legal positivism. Oxford: Oxford University Press, 2004.

ALEXY, Robert; FIGUEROA, Alfonso García. *Star Trek y los Derechos Humanos*. Valencia: Tirant lo Blanch, 2007.

ARENDT, Hannah. *The Human Condition*. Chicago: The University of Chicago Press, 1998.

ARENDT, Hannah. *Lectures on Kant's Political Philosophy*. Chicago: The University of Chicago Press, 1992.

BRAZIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília: Presidency of the Republic, 2020. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on July 10, 2024.

BRAZIL. *Decree No. 83,284, March 13, 1979*. Gives new regulations to Decree-Law No. 972, of October 17, 1969, which provides for the exercise of the journalism profession, as a result of the amendments introduced by Law No. 6,612, of December 7, 1978. Brasília: Presidency of the Republic. Available at: https://www.planalto.gov.br/ccivil_03/decreto/antigos/d83284.htm. Accessed on November 7, 2024.

BRAZIL. *Law No. 10,406, January 10, 2002*. Institutes the Civil Code. Brasília: Presidency of the Republic. Available at: https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed on November 7, 2024.

BRAZIL. *Law 12,965, April 23, 2014*. Establishes principles, guarantees, rights, and duties for the use of the Internet in Brazil. Brasília: Presidency of the Republic. Available at: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on July 10, 2024.

BRAZIL. *Resolution No. 20, March 18, 1993*. Institutes the Code of Ethics and Parliamentary Decorum. Brasília: Federal Senate. Available at: https://www25.senado.leg.br/web/atividade/conselhos/-/conselho/cedp/legislacao. Accessed on November 7, 2024.

BRAZIL. Supreme Court of Justice. *Judgment of the Direct Action of Unconstitutionality No. 4815*. June 10, 2015. Available at: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10162709. Accessed on July 10, 2024.

CACHAPUZ, Maria Cláudia Mércio. *A Obrigação pelo Discurso Jurídico*: a argumentação em temas de Direito Privado. Porto Alegre: Sergio Antonio Fabris Editor, 2017.

CACHAPUZ, Maria Cláudia. *O conceito de pessoa e a autonomia data: ou sobre a medida da humanidade em tempos de inteligência artificial*. Revista de Direito Civil Contemporâneo, São Paulo, v. 20, p. 63-85, Jul.-Sep. 2019.

DWORKIN, Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1986.

DWORKIN, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

EUROPEAN UNION. European Court of Justice. *Judgment of the Court (Grand Chamber)*. In Joined Cases C‑682/18 and C‑683/18. June 22, 2021. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1310384. Accessed on July 10, 2024.

EUROPEAN UNION. European Parliament. 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). *Official Journal of the European Union*, October 27, 2022. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065. Accessed on November 7, 2024.

EUROPEAN UNION. European Parliament. European Parliament Resolution of 16 February 2017, with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL). *Official Journal of the European Union,* February 17, 2017. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&rid=9#:~:text=C%20252%2F241-,Thursday%2016%20February%202017,conflict%20with%20the%20First%20Law. Accessed on July 10, 2024.

EUROPEAN UNION. European Parliament. European Parliament Legislative Resolution of 13 March 2024 on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)). *Official Journal of the European Union,* March 13, 2024. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.html. Accessed on July 10, 2023.

FERRY, Luc. *Kant*: Uma leitura das três "Críticas". Rio de Janeiro: DIFEL, 2009.

GARRITY, Patrick; DONG, Shanshan; CHOO, Gene. *American Student Nohemi Gonzalez Identified as Victim in Paris Massacre*. NBC News, November 14, 2015. Available at: https://www.nbcnews.com/storyline/paris-terror-attacks/american-student-nohemi-gonzalez-idd-victim-paris-massacre-n463566. Accessed on July 10, 2024.

HABERMAS, Jürgen. *A Ética da Discussão e a Questão da Verdade*. 3a edição. São Paulo: WMF Martins Fontes, 2013.

HABERMAS, Jürgen. *A New Structural Transformation of the Public Sphere and Deliberative Politics*. Cambridge: Polity Press, 2023. *E-book*.

HABERMAS, Jürgen. *Between Facts and Norms*: contributions to a discourse theory of law and democracy. Cambridge: The MIT Press, 1996.

HABERMAS, Jürgen. *The Future of Human Nature*. Cambridge: Polity Press, 2003.

HARARI, Yuval Noah. *21 Lessons for the 21st Century*. London: Vintage, 2018.

HÄRBELE, Peter. *Hermenêutica Constitucional*: a sociedade aberta dos intérpretes da constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição. Porto Alegre: Sergio Antonio Fabris Editor, 2022.

HART, H. L. A. *The Concept of Law*. 2nd Edition. Oxford: Oxford University Press, 1994.

HESSE, Konrad. *A Força Normativa da Constituição*. Porto Alegre: Sergio Antonio Fabris Editor, 1991.

KAHNEMAN, Daniel; SIBONY, Oliver; SUNSTEIN, Cass R. *Noise*: a flaw in human judgment. London: William Collins, 2022.

KANT, Immanuel. *Critique of Practical Reason*. Cambridge: Cambridge University Press, 2015.

KANT, Immanuel. *The Philosophy of Law*: an exposition of the fundamental principles of jurisprudence as the science of right. Edinburg: T. & T. Clark, 1887.

KELSEN, Hans. *Pure Theory of Law*. Berkeley: University of California Press, 1967.

KUHN, Thomas S. *The Structure of Scientific Revolutions*. Chicago: The University of Chicago Press, 1996.

LUDWIG, Roberto José. *A Norma de Direito Fundamental Associada*: direito, moral, política e razão em Robert Alexy. Porto Alegre: Sergio Antonio Fabris Editor, 2014.

NOVAIS, Jorge Reis. *Limites dos Direitos Fundamentais*: fundamento, justificação e controle. Coimbra: Edições Almedina, S.A., 2021.

REDA, Felix; SELINGER, Joschka. *YouTube/Cyando*: an important ruling for platform liability – part 1. Kluwer Copyright Blog, July 1, 2021. Available at: https://copyrightblog.kluweriplaw.com/2021/07/01/youtube-cyando-an-important-ruling-for-platform-liability-part-1/. Accessed on July 10, 2024.

SCHWABE, Jürgen. O chamado efeito perante terceiros dos direitos fundamentais para a influência dos direitos fundamentais no tráfego do direito privado. In: DÜRIG, Günter; NIPPERDEY, Hans Carl; SCHWABE, Jürgen. *Direitos Fundamentais e Direito Privado*: textos clássicos. Porto Alegre: Sergio Antonio Fabris Editor, 2011. p. 91-134.

UNITED STATES OF AMERICA. Appellate Court. *Appeal from the United States District Court for the Northern District of California Laurel D. Beeler, Magistrate Judge, Presiding*. Gonzalez v. Google. Available at: https://cases.justia.com/federal/appellate-courts/ca9/18-16700/18-16700-2021-06-22.pdf?ts=1624381382. Accessed on July 10, 2024.

UNITED STATES OF AMERICA. *Communications Act of 1934*. Available at: https://transition.fcc.gov/Reports/1934new.pdf. Accessed on July 10, 2024.

UNITED STATES OF AMERICA. Supreme Court. *Brief for Respondent*. Gonzalez v. Google. January 12, 2023. Available at: https://www.supremecourt.gov/DocketPDF/21/21-1333/252127/20230112144706745_Gonzalez%20v.%20Google%20Brief%20for%20Respondent%20-%20FINAL.pdf. Accessed on July 10, 2024.

UNITED STATES OF AMERICA. Supreme Court. *On Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit*. May 18, 2023. Available at: https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf. Accessed on July 10, 2024.

YOUTUBE. *Pesquisa do YouTube*. Available at: https://www.youtube.com/intl/ALL_br/howyoutubeworks/product-features/search/. Accessed on July 10, 2024.