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**"TERMS OF USE", THE
ADHESION CONTRACT
THAT OFFENDS
FUNDAMENTAL LAWS
AND ITS FIT TO THE
BRAZILIAN LEGAL
SYSTEM**

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Abstract: The objective of this work is to verify that the Terms of Use, as a dedication contract, are framed to the effectiveness of Fundamental Laws. Firstly, we sought to find out if companies of social internet platforms such as Facebook, impose limitations on the fundamental rights of users. Finally, the research carried out an analysis of the legal relationship between platforms and users through two Terms of Use, verifying, therefore, their validity in the Brazilian legal system and the problems related to obtaining the user's consent.

Keywords: Fundamental Laws, Admission Contracts, Digital Law, Terms of Use.

INTRODUCTION

Indefinitely, the Internet is embedded in everyone's life today, both to exercise or work, as well as to have fun, even, it is very difficult to imagine what it would be or type of human social relationship that was not impacted in any way by the Internet and technology. At the speed at which the technologies we are advancing have obviously awakened an economic interest that has led to the emergence of online digital relationship platforms, which occupy the highest positions in the rankings of the most valuable companies in the world, especially on Facebook or LinkedIn, which will be matter of analysis desse labor.

The more power these companies concentrate, the more they are capable of inducing and leading behaviors. Therefore, it is extremely important to analyze how the legal relationship between these companies and their users is given in order to verify if any of their fundamental rights is being offended, such as privacy and intellectual property rights.

This work, although succinctly, has as its objective to identify the potential violations of the rights and guarantees of two users of online platforms and how they become legitimate in

the Terms of Use, which are signed contracts of acceptance, via electronic oil, by users who wish to participate. of a certain social network and that ends up establishing some legal contours of the relationship between the users and the company. The identification of potential violations will be listed in the following way: Firstly, we will demonstrate that large platforms such as: *facebook and linkedin* are agents capable of limiting some fundamental rights.

Once demonstrated, I will show how these rights are applied in the private relationship between users and Internet platforms. Next, I will treat two Terms of Use themselves, as a tool capable of materializing the legal relationship of two users with the online platforms.

I will seek to list and check the validity, not in our legal system, of these contracts of acceptance, classifying them within the General Theory of Contracts and aiming and tracing a brief analysis of two problems that do not say respect to the manifestation of the consent of the user confronted with the disposition in Federal Constitution, Consumer Protection Code and the General Data Protection Law (LGPD).

METHODOLOGY

To deal with the contract of acceptance of these Terms of Use, it is possible to use the legal provisions of the civil code, federal constitution, of the Brazilian legal system, also referring to the doctrine in the form of the General Theory of Contracts and the General Law of Data Protection. Complementing with data collected in newspaper channels regarding the platforms of socialization on the internet. Cumulatively, it is worth examining directed articles, current theses of instructors and operators of the Law, and in spite of this perspective, an analysis of the agreement of adecision in a broader way is necessary.

RESULTS

If a person is willing, or sometimes necessary, to be part of a social network or obtain their services, they will have to expressly accept two Terms of Use through an oil by selecting the common phrase: “Li e Aceit”. In digital ceara are the Terms of Use that support the legal relationship between the Internet user and the provider of two digital services. These terms are nothing more than standardized documents and unilaterally determined by the provider, being presented to all users, where or their oil is necessary, otherwise the user will not have access to the platform.

Once users cannot choose which clauses they want to accept and which they do not, they do not need to provide changes to existing clauses, these Terms of Use fall under a category of contracts known as contracts of adequacy, which are defined by the Consumer Protection Code In seu artigo 54, caput, which also relates *Art. 54. Adhesion contract is those whose clauses have been approved by the competent authority or unilaterally established by the supplier of products or services, unless the consumer can discuss or substantially modify its content. (Consumer Defense Code. Presidential Decree No. 2,181, of March 20, 1997, Brasília, DF, 1997).*

Once framed in such a category of contracts, we now go on to analyze the Terms of Use as a legal instrument developed by the platforms, which seeks to offer services on a large scale, giving rise to legal certainty in order to try to shield itself from an imensidão of legal limitations, among them to responsibility for service in the product or service or into a multiplicity of competent jurisdictions and applicable laws for the judgment of eventual litigations. In the shadow of dúvidas, the terms of use offer various advantages for the providers, more like MARQUES (2002) bem disbelieved:

(...)vulnerability literally means to be unprotected, to be a more failed party, more susceptible to attacks, therefore saying that someone, some thing or a group of people is vulnerable, implies saying that no other side of the relationship finds someone stronger and more powerful. (MARQUES, Cláudia Lima. Contracts in the Consumer Protection Code. 4th ed. São Paulo: RT, 2002.).

There are no remaining questions as to what is possible more forcibly in the legal relationship that is established through the consent to an accession contract, this being what redirects and imposes its clauses.

The user, by clicking on the “I AGREE” button, expresses his consent, however it is understood as a confirmation of his consent, does not carry the existence of a full consent. This is because obviously it is not expected that a common Internet user read all the clauses of the Terms of Use of all the services and products that they wish to use online and, even less, that these terms are widely understood by them, when most of the time, they do not possuem legal knowledge. The main barriers to an informed and informed consent on the Terms of Use are the following: extremely long text, unintelligible language and difficulty in finding and accessing the Terms of Use.

Various studies confirm that reading two Terms of Use is quite delayed. A study by Carnegie Mellon University, in the United States, in 2008, showed that a user would need to reserve eight hours per day and 76 days to read only the privacy policies of a medium with 1,462 pages visited in a year (McDonald & Cranor, 2008). In 2007, a study monitored more than 48,000 individuals who visited a service page and the results showed that Terms of Use were accessed by less than 0.2% two visitors and, among those who visited, the average time spent viewing or 30-second foi contract (Bakos, Marotta-Wurgler, & Trossen, 2014). In a virtual environment marked by the

rapid exchange of information, when reading two Terms of Use it becomes increasingly and sometimes considered useless, consuming or productive time for two users who end up, finally, not as slow.

Studies with other objectives suggest that the Terms of Use of the main providers of online services, despite varying significantly in content and length, present many similarities and follow a certain pattern. Contractual provisions with a high degree of incidence include those related to (1) competent jurisdiction and legislation applicable to the contract; (2) use of the products and services, their prohibitions and content control; (3) contractual alterations; and (4) privacy, monitoring, treatment, sharing and disclosure of personal data; (5) Limitation of Liability.

Facebook's privacy policy states that it can collect information about location, contacts, facial recognition, devices, actions and communications from two users "in order to analyze the context and content included in these items", recognizing, again, that the social network "Automatically processes or contains the communications that you and other people provide". Another thing that Facebook also has is about intellectual property, as this distance: "[...] *in order to provide our services, we require that you grant us certain legal permissions (known as "licensees") to use this content. Isso é only for purposes of supplying and improving our Products and Services as described in Section 1 above*", or if you wish, you may hold or directly own intellectual property on something, allow it to be shared and used by Facebook, offering a license to use it.

DISCUSSION

The continuous tracking and monitoring of e-mails and messages is also worrying, once communication by messages on the Internet is equated to exchange of correspondence, whose secrecy is protected by art. 5th, XII,

of the Federal Constitution, which requires a prior court order for bankruptcy. It can be affirmed, therefore, that a clause that allows messages to be analyzed and access to audio and video to be made available to the provider, directly addresses the inviolability of communications, guaranteed by art. 5th, XII, of the Federal Constitution, being that there are null and void provisions of full rights in accordance with art. 8th, sole paragraph, item I, of the Civil Framework of the Internet.

The Terms of Service of the LinkedIn network, for example, establish that "in the event of a judicial litigation, or LinkedIn and you agree that the courts of California will be competent, in accordance with the legislation of California or the courts of Dublin, Ireland, in accordance with Irish law." The adoption of this type of clause is particularly worrying because, in theory, it substantially limits the reduced capacity of the user to understand the risks of the contract. It is not reasonable to demand that the common user has knowledge about the legislative peculiarities of each place where the sites of the accessed platforms operate.

In dealing with consumer contracts, the national jurisprudence has consolidated the meaning of the latent abusiveness of the clauses that, whether due to the choice of a special forum for the consumer contract, whether due to the importance of private arbitration or of bodies linked to suppliers, end up for hindering (or itself making it unfeasible) or access to justice, facing fundamental rights of the consumer.

The choice of a different forum of the consumer's domicile, also does not make it infeasible or impossible, hinders his defense and offends art. 6th, VIII, of the CDC, which claims to be a basic consumer right to facilitate their defense in court (Grinover et al., 2019). Logo, such a clause offends the consumer defense "system", being, plus a

clause that must be null.

Together with the clauses that determine a foreign legislation to govern the contract, these provisions violate the guarantee of effective judicial protection, provided for in art. 5th, XXXV, gives CF88. This is the position of the Superior Court of Justice, which considers the forum selection clauses in the consumer contract to be invalid when a). at the time of the celebration, apart from not having sufficient intelligence to understand or sense the consequences of the contractual stipulation; b). the prevalence of such stipulation will result in the infeasibility or special difficulty of access to the Judiciary; c). it is a binding contract, as well understood or that has as its object a product or service provided exclusively by a certain company.

Another relevant point is the adoption of an arbitration clause. Not rarely, online platforms include arbitration clauses in their Terms of Use, such as the license concession that were previously mentioned in this work. With regard to the adoption of this type of clause in contracts of adaptation, there is a consolidated position in Brazilian jurisprudence.

The Superior Court of Justice has precedents recognizing the effectiveness of the arbitration clause in this type of contract only when or “adherently comes to take the initiative to institute arbitration, or agrees, expressly, with its institution”. The Court also understands that the arbitration clause does not prevail when the consumer seeks legal action to resolve disputes.

CONCLUSION

The objective of this work was to elect and draw an analysis not regarding the limits of the Terms of Use of social networks and online platforms, as an agreement of use, offer some type of shielding of rights to privacy, freedom of expression and right to intellectual property of your users.

Firstly, it was revealed that the digital platform companies currently possess enormous economic and mainly social power. Because of this power, we will end up being able to significantly limit, not regarding the Fundamental Rights, two users of their products on the Internet. Therefore, they are obliged to respect the minimum parameters of the Fundamental Laws in their relationship with the Internet user who seeks their service. The Terms of Use, as a material object of the existing legal bond in this relationship must have clauses that offer protection to the rights of two users and no clauses that abuse or offend such rights.

It was possible to conclude, also, that the Terms of Use, are contracts of adesão and govern a consumer relationship, according to national doctrine and jurisprudence, just as there is no monetary consideration. The consent of the user/consumer is required to be bound by these contracts, only so that they can use the two services offered, be obtained through a simple opening of a key indicating their consent, it is demonstrated that, via regra, or consent It is not fully, nor expressly demonstrated. Obtaining a totally clear consent is widely compromised due to the long redactions, technical language and difficult access for users, contrary to the provisions of the Civil Framework of the Internet, the Consumer Defense Code and the General Data Protection Law.

The structures that are generally used in the terms of use follow a certain standard replicated by the companies. The clauses that deal with the choice of forum and the choice of legislation, the permissions to monitor content and private messages, are limiting the freedom of expression and end up excluding the civil liability of companies.

It was concluded, therefore, that the Terms of Use do not offer guarantees or enough for the users. On the contrary, these contracts

are revealed as legal instruments that seek to minimize the responsibility of online platform companies, instead of reinforcing their responsibility to protect privacy, or access to justice and the freedom of expression of users.

The objective of minimizing the risks of the companies that is attributed by the Terms of Use is evidence not only of a lack of transparency not addressed to contracts, as well as a lack of sufficient information, contrary to minimum criteria for the effectiveness of fundamental rights, especially privacy, freedom of expression and intellectual property.

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