

# THE PREVENTIVE FUNCTION OF CIVIL LIABILITY IN LIGHT OF THE STATE'S DUTIES OF PROTECTION IN THE CONTEXT OF THE DIGITAL WORLD †

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**Abstract:** The study addresses the issue surrounding the theory of civil liability within the digital realm. The main question guiding the investigation is whether the inherent risks of the digital world warrant a shift in focus on the State's duty to protect, taking into account the theory of civil liability as a foundation. The significance of this topic is evidenced by the undeniable impact of the digital world on the legal system, including its sociological implications. The increasing number of social interactions facilitated by data transmission technologies gives rise to a growing number of social conflicts and poses a threat to numerous fundamental rights, which must not be overlooked. This analysis employs a deductive approach, utilizing a research technique based on bibliographic and jurisprudential review.

**Keywords:** civil liability; prevention; protection duties; digital; fundamental rights.

## INTRODUCTION

Along with the digital world comes innovations that, due to their complexity, cannot be uniformly understood by the average human being. The trend is that human interactions will soon experience more sophisticated processes, associated with increasingly surprising technologies. The technological wave comes in the wake of a process of disruption that draws attention to a debate surrounding the risks to society in view of numerous changes.

It is increasingly difficult to predict the consequences that such an accelerated framework of changes can bring to humanity. This scenario is what qualifies postmodern society as a true risky society, which justifies the

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question that guides this study: to what extent the risks inherent in the digital world raise the need for a change of focus in the state duties of protection, having the theory of civil liability as a starting point? Likewise, the question arises as to whether the reparatory function of civil liability could be insufficiently protected when understood in isolation.

In this study, the need to understand civil liability is established, not only in its repressive perspective, but, equally, in a preventive sense. This approach aims to stimulate the protection of personality rights, in consonance with the current constitutional order. It is based on the assumption that the more efficient the precautionary instruments designed to protect fundamental rights are, the more effective will be the protection of the free development of personality.

The research hypothesis is based on the assumption that technological innovation is a one-way street and that the only uncertainty is regarding the point that can be reached by the increasingly rapid changes. Private law has the important task of providing the means of integration for the fulfillment of state tasks, guided by the Constitution, setting safe guidelines for the actions of all those involved in the interactions promoted by the virtual world.

The theme's relevance comes from the understanding that the digital world is no longer an option, but rather the need for permanent coexistence and adaptation, in a scenario where the protection of fundamental rights and the free development of personality cannot be neglected.

The study uses the deductive method, starting from a general conception of uncertainties and threats to a model of protection duties based on prevention and control. It uses as a research technique the bibliographic and jurisprudential review.

## I. THE RISKY SOCIETY AND THE DISRUPTIVE DIGITAL SOCIETY

Nowadays, the world is faced with numerous technological phenomena related to the information<sup>1</sup> society, such as artificial intelligence, internet of things, block chain networks, the metaverse, among other technologies,

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<sup>1</sup> Yoneji Masuda in 1980 wrote: "the information society will be a new kind of human society, completely diferente from the current industrial society. Unlike the vague term 'post-industrial society', the term 'information society' as used here will describe, in concrete terms, the characteristics and structure of this future society. The basis of this statement is the fact that the production of informational values, and not material values, will be the driving force behind the development of this society. Every innovative technology of the past has always been related to the material productive power. However, the future information society will have to be built within an entirely new context, based on a complete analysis of telecommunications and information technology, as this will determine its fundamental nature". Masuda, Yoneji. *A sociedade da informação como sociedade pós-industrial*. Translated by Kival Charles Weber e Angela Melin. Rio de Janeiro: Ed. Rio, 1982, p. 45.

which deeply impact people's lives. It is undeniable the fascination caused by so many technological resources available to mankind, however, regulate and prevent damages arising from the use of the internet, and especially the use of artificial intelligence and the manipulation of personal data, is an unprecedented challenge for the science of law.

We live in a society of risk and mass contracting, in which it is necessary to observe constitutional principles and laws such as the Civil Code, the Consumer Protection Code, the Marco Civil da Internet and, more recently, the General Law of Data Protection (LGPD). Common to all protective instruments is their interpretation based on the principle of prevention, giving the need to avoid the occurrence of the damage instead of its mere compensation, which, in general, is insufficient. This perspective is confirmed by the instantaneousness of the flow of information that gravitates in the virtual world. In fact, due to the speed of content and personal data's spread, it will not always be possible to avoid the occurrence of the damage.

The German sociologist Ulrich Beck, when describing the risky society in which we live, considers issues related to knowledge, production, and market opportunities. In this context, he states that "the risky society is [...] also the society of science, media and information. In it, new oppositions between those who produce the definitions of risk and those who consume them become clearer"<sup>2</sup>. Beck, despite recognizing risk as an element that can be measured and calculated, according to laws of probability, evaluates this scenario as a world of manufactured uncertainties through technological innovations and more accelerated social responses, generating a new scenario of global risk, of non-quantifiable uncertainties. However, far from showing control, the risky society would symbolize, in a way, an era of lack of control because the civilizing risks escape perception.<sup>3</sup>

Law, as a social phenomenon, must keep up with technological evolution - even if in a slower manner. Always guided by the constitutional norms in force, it must maintain the assumptions for a safe coexistence in an increasingly complex society, on a global scale. The speed with which scientific, technological, economic, and environmental changes are taking place all over the world imposes on legal systems a challenge whose complexity cannot be underestimated. Nowadays, there is even a statement related to an era of digital constitutionalism, where relevant constitutional values must be preserved in the face of previously unknown threats.<sup>4</sup>

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<sup>2</sup> Beck, Ulrich. *Sociedade de risco: rumo a uma outra modernidade*. Translated by Sebastião Nascimento. São Paulo: Editor 34, 2010, p. 368.

<sup>3</sup> Beck, Ulrich. *Sociedade de risco: rumo a uma outra modernidade*. Translated by Sebastião Nascimento. São Paulo: Editor 34, 2010, p. 368.

<sup>4</sup> Mendes, Gilmar Ferreira; Oliveira Fernandes, Victor. Constitucionalismo digital e jurisdição constitucional: uma agenda de pesquisa para o caso brasileiro. *Revista Brasileira*

It is becoming increasingly difficult to predict the harmful consequences that such an accelerated framework of change can bring to humanity. New attitudes are required at every moment in order to avoid collective damage. It is exactly at this point that the question of the role of law in the search for adequate instruments to protect all those who face risks arises. To evaluate the law implies, necessarily, verifying to what extent it succeeds in protecting its subjects within a scenario of security of relations. Stability, in an environment of reliability, is a fundamental element to any legal system, considering that excesses and omissions are undesirable.

Thus, in the midst of the uncertainty that arises from the current technological society, where fears and doubts about the occurrence of damage prevail, the principle of prevention emerges as a tool for law operators, aiming at maintaining security and avoiding the occurrence of the damage. It is important to understand the preventive thought considering a sociological crisis as a starting point, which in post-modern times constitutes a real challenge to the law, which can even justify a skepticism as to the capacity of legal science to deal with its challenges.<sup>5</sup>

Inspired by the works of Eugen Erlich and Manfred Rehbinder, it can be said that the principle of prevention has a sociological nature. This is because it emerges from an ordered cycle of factors, which begins with facts, initially ignored, that at some point start to provoke inquiries in the society. This is the moment from which the organized political power makes an appraisal judgment on these facts in order to eventually give them legal significance, thus emerging the creation of norms, which fits into a concept of state law.<sup>6</sup>

The prevention principle is based on the assumption that threats, until they are effectively known to the point of being protected by the State, require a minimum understanding not only of their existence, but also of their potential damage. This is why, within the sociological flow of law, the so-called jurists' law is of fundamental importance. It is not only encompassed by the courts' rules, through their precedents. It is part of a whole, to which are added the contributions of lawyers, professors, members of state careers, and scientists, who, in a truly collaborative activity, alert the Judiciary about aspects that are decisive for healthy social coexistence within an environment of security.<sup>7</sup>

Thus, within a sociological perspective, the following picture can be described: just as in a work of art, law needs the action of the individual to become effective. In the same way, as artists can give form to what society

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*de Direito*, Passo Fundo, v. 16, n. 1, 2020, p. 1ss.

<sup>5</sup> Marques, Cláudia Lima. *Contratos no Código de Defesa do Consumidor*. O novo regime das relações contratuais. 8th. edition. São Paulo: Revista dos Tribunais, 2016, p. 168.

<sup>6</sup> Ehrlich, Eugen. *Fundamentos da Sociologia do Direito*. Brasília: UnB, 1986, p. 281ss.

<sup>7</sup> Rehbinder, Manfred. *Sociología del Derecho*. Madrid: Pirâmide, 1981, p. 64.

or nature offers them, justice, to become effective, needs the action of the social body. The parallel is that just as works of art receive from the artist the imprint of his personality, justice only owes to society its raw content, since the individual constitution is due to the legal body that polished it, in the framework of the legal operators involved in the process.<sup>8</sup>

Thus, within the state power, through the action of the constituted powers, a raw, spontaneous law, with no clear outline in society, is getting assimilated by an institutionalized policy, shaping a formal state law that is able to guide society, as well as the public administration itself.<sup>9</sup> And society, suffering the impact of this state law, assimilates it, experiencing it in its own way, giving rise to what is usually called living law, which dominates life and derives not only from official legal documents, but also from day-to-day observations.<sup>10</sup>

From all of the above, it is possible to conclude that the principle of prevention cannot be understood, nor the requirements it places on the basis of State's protection duties<sup>11</sup>, without keeping in mind that the protection of the human being derives from a constant process of assimilation, involving various actors, whose omissions can cost a lot. The picture of the State as a primary threat to freedom, typical of the liberalism and of the enlightenment thought, recedes in the face of the dangers and risks that exist in modern society, especially those arising from the activities of private entities.<sup>12</sup>

Porto Soares<sup>13</sup> affirms that new technologies should not only be valued for their benefits, but also for the damages they may cause. However, they cannot be seen solely from the perspective of individual usefulness, and it is necessary to have a political approach that understands their impact on collective life. To what extent can the freedom or dignity of human beings be mitigated from the operation of new digital systems, which are increasingly integrated into public and private lives? It is a question to which the precise answer has not yet been provided.

Disruptive innovations prevent consensus from being easily reached, even so because of the lack of clarity regarding the potential risks. Increasingly, the free development of personality is put to the test through

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<sup>8</sup> Ehrlich, Eugen. *Fundamentos da Sociologia do Direito*. Brasília: UnB, 1986, p. 162s.

<sup>9</sup> Souza Junior, Cezar Saldanha. *A Supremacia do Direito no Estado Democrático de Direito e seus Modelos Básicos*. Porto Alegre [s.ed]: 2002, 73.

<sup>10</sup> Ehrlich, Eugen. *Fundamentos da Sociologia do Direito*. Brasília: UnB, 1986, p. 378.

<sup>11</sup> Klein, Hans H. *Die grundrechtliche Schutzpflicht*. DVBl. Köln: Heymanns, 1994, p. 1.636.

<sup>12</sup> Ruffert, Matthias. *Vorrang der Verfassung und Eigenständigkeit des Privatrechts. Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes*. Tübingen: Mohr, 2001, p. 20.

<sup>13</sup> Porto Soares, Marcos José. Impacto da evolução tecnológica no reconhecimento de novos direitos: proteção dos dados pessoais e uso adequado da inteligência artificial. *Revista de Direito e as Novas Tecnologias*, vol. 15/2022, April-June/2022, p. 03.

objects (Internet of Things), thoughts (Neurolink project), the body (e-health applications), purchasing decisions (neuromarketing), automated protocols (driven by machine learning algorithms) for granting credit, insurance approving, or through the selection of job resume.

If, on the one hand, there are fears related to data arising from new technologies, on the other, there is a legislative reaction that, although not able to cover all sorts of threats, demonstrates the maturity of the legislature in the face of an extremely sensitive topic, such as the protection of personality in the digital world. Examples in this direction are the Marco Civil da Internet (Law 12.965/2014), and the LGPD (Law 13.709/2018), inspired by the European General Data Protection Regulation. Similarly, the different initiatives within the Judiciary concerning the use of artificial intelligence mechanisms in courts.<sup>14</sup> Legislative debates on the topic remain active, with emphasis on the study of the Legal Framework for Artificial Intelligence.<sup>15</sup>

In common, all these initiatives aim to protect the free development of the personality. There is a vigorous dialogue between the different levels of the legal system, through systemic integration between the Constitution and a set of infra-constitutional norms, to which different regulations are added. The uphold of the protection of personal data as an autonomous fundamental right, formalized by EC 115/2022, represents an important conquest in the path of understanding the essence of the values at stake.

The more one realizes that the Brazilian regulatory framework on data protection is based on fundamental values of the legal system, the greater the intensity of its protection will be. The path to be followed is the one that honors technological innovations, without, however, disregarding the risks. The notion that the human personality is an asset to be protected with constitutional status represents a strong argument for the imposition of limits in the digital world. It is from this point that concepts such as freedom, nondiscrimination, informational self-determination, transparency, accountability, and justice can be harmonized, in a true effort of practical agreement.

This means that in the solution of possible conflicts, legal values worthy of constitutional protection should be reciprocally coordinated, so that each one of them achieves effectiveness in reality.<sup>16</sup> Private law has the important task of providing the means of integration for the fulfillment of state tasks,

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<sup>14</sup> See Resolution n. 332/2020 from the National Justice Council, about the use of artificial intelligence in the justice systems.

<sup>15</sup> Available in: [<https://www.camara.leg.br/propostas-legislativas/2236340>]. Accessed in 16.09.2022.

<sup>16</sup> Hesse, Konrad. *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*. Neudruck der 20. Auf. Heidelberg: Müller, 1999, Rdn. 72.

establishing secure guidelines for private actors to act. The protection of personality, to be effective, cannot disregard a set of consistent infra-constitutional rules.

In fact, the safe exercise of personality rights is not possible without the existence of a series of actors, most of who are private actors, who act as intermediaries in the provision of services, promoting access and interconnection. Internet service providers, website hosting providers, social networking platforms, instant messaging applications and search engines<sup>17</sup> are inseparable elements of the digital world, and they have an enormous responsibility in the process of protecting the rights of personality.

In the search for a healthy environment in the virtual world all agents, whether public or private, must be involved. It is up to the legal system to define the rights and obligations of each one, guided by rational criteria, so that the duties of care, typical of the risky society, do not lose their importance. Considering the influence it receives from the Constitution, the private law acquires decisive importance in this context.

## II. THE RELEVANCE OF PRIVATE LAW IN THE PROTECTION OF PERSONALITY RIGHTS IN THE FACE OF ILLEGAL PRACTICES IN THE DIGITAL ENVIRONMENT

For reasons based on the guarantee of pluralism, a legislative policy on fundamental rights should not be excluded, since these rights, despite being guaranteed by the Constitution, are so only in terms of their essential content and not in terms of the complete and detailed regime of the exercise of each right, which is left to infra-constitutional legislation.<sup>18</sup> In fact, understanding and interpreting means knowing and recognizing a current meaning<sup>19</sup>, so that if we do not understand the meaning of the ordinary law, recognizing its importance in the fulfilment of constitutional principles, it will not be possible to interpret and apply the Constitution, since the interpreter-applicator will lack these core elements for the practice of legal mediation between the levels of the legal system.

This is why the correct interpretation of private law takes on a fundamental role in the defense of the personality in the digital world. The main norms on the subject incorporate constitutional values of the highest hierarchy. The Marco Civil da Internet and the LGPD, together, take as

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<sup>17</sup> Ribeiro, Ronetna Klaryssa Pryscilla Vieira Laviola. Responsabilidade civil objetiva dos provedores de aplicação por conteúdo postado por terceiros à luz e sob a vigência do Marco Civil da Internet e da Lei Geral de Proteção de Dados. *Revista de Direito e as Novas Tecnologias*, vol. 14, year 5. São Paulo: RT, January-March 2022, p. 3.

<sup>18</sup> Reyes, Manuel Aragón. *El Juez Ordinario entre Legalidad y Constitucionalidad*. Bogotá: Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, 1997, p. 33.

<sup>19</sup> Gadamer, Hans-Georg. *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*. 6. durchgesehene Auflage. Tübingen: Mohr, 1990, Band I, p. 333.

vectors human rights, the development of personality, the exercise of citizenship, free enterprise, free competition and consumer protection, the protection of privacy and personal data, the inviolability of privacy and private life, among others.

It is undeniable that the infra-constitutional legislation has brought considerable advances in the protection and promotion of the rights of personality, including the provision of compensation for moral or material damage as a result of the vectors mentioned above, in cases of unlawful conduct. The legislative movement is complemented by the courts' rules, which, when interpreting the rules in force, promote specific contours to the institutes involved.

If it is true that there is still a long way to go, it can also be said that the experience of the last few years has added bases for the increase of legal security in judicial decisions involving the virtual world. The existence of doubts regarding the limits of specific legal provisions application is not enough to eliminate the protection they confer. It is part of the process of integration of norms, within an institutional vision.

One of the biggest questions yet to be answered concerns the civil liability of internet application providers for damages arising from content generated by third parties.<sup>20</sup> An anguish that, strictly speaking, is shared by several legal systems, that have different proposals for regulation.<sup>21</sup> The starting point is the realization that, for the purpose of suppressing any attempt at liability, internet application providers do not act as mere intermediaries. They are effective actors of the social interactions in the virtual world, their significant profits come from these interactions, so that their identification in the liability chain is an unequivocal fact. It is up to the legislation to understand this reality as a direction for its interpretation.

This is the reason why the recognition of legislation as an original and not derived function depends on the Constitution being conceived as an open enchainment of elements, whose historical-concrete determination, within the limits of elasticity allowed by that reality, is left to the ordinary legislator.<sup>22</sup> In other words, the Constitution defines the direction to be taken

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<sup>20</sup> Article 19 from the Law n. 12.965/2014: "Aiming at ensuring freedom of expression and curb censorship, the internet applications provider can only be held liable for damages derived from content created by third parties if, after specific judicial order, does not take action to, within the scope and the technical limits of its service and within the specified deadline, make unavailable the content pointed as breaking the law, subject to legal provisions to the contrary".

<sup>21</sup> Harff, Graziela; Duque, Marcelo Schenk. Discurso de ódio nos contextos alemão e brasileiro. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, year 21, n. 84, April/June 2021, p. 199ss.

<sup>22</sup> Harff, Graziela; Duque, Marcelo Schenk. Discurso de ódio nos contextos alemão e brasileiro. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, year

and the legislator makes it happen. The consequence is the emergence, at times, of a tense relationship between jurisdiction and legislation. The STJ,<sup>23</sup> by the way, has already been taking a position on issues related to the disclosure of content on networks, providing contours to the interpretation of the normative content of Article 21 of the Marco Civil da Internet.<sup>24</sup>

In the scope of the Civil Code of 2002,<sup>25</sup> under the influence of the modifications that took place in the field of civil liability, there was a search for restructuring, aiming at adopting the open model and the protection of the person, as well as the adoption of principles.<sup>26</sup> However, the conditions for the characterization of illegality remained concentrated in the General Part of

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21, n. 84, April/June 2021, p. 199ss.

<sup>23</sup> REsp n. 1.930.256/SP, relator Minister Nancy Andrighi, relator to the ruling Minister Marco Aurélio Bellizze, Third Class, judged in 7/12/2021, DJe from 17/12/2021. According to the court, "article 21 from the *Marco Civil da Internet* "brings an exception to the rule of jurisdiction reserve established in article 19 of the same legal diploma, in order to impose on the provider, immediately, the exclusion, on its platform, of the so-called "revenge pornography" - which, by definition, displays content produced privately -, as well as any reproduction of nudity or private sexual act, disclosed without the consent of the person reproduced. (...) It is not, however, the unauthorized disclosure of any and all material of nudity or sexual content that attracts the rule of article 21, but only and necessarily the one that presents, intrinsically, a private nature, leaving the interpreter, in the most varied hypotheses that modern life presents, to determine its exact scope. (...). Intimate images produced and transferred for commercial purposes - completely emptying their private and reserved nature - do not conform to the normative (and protective) spectrum of article 21 of the *Marco Civil da Internet*, which makes an exception to the jurisdiction reserve rule. Its disclosure, on the world wide web, without the authorization of the reproduced person, evidently constitutes an unlawful act subject to legal protection, but does not have the power to exempt the jurisdiction reserve (which is presumed constitutional, until otherwise declared by the Federal Supreme Court Federal)".

<sup>24</sup> Article 21 from the Law 12.965/2014: "Article 21. The internet application provider that makes content generated by third parties available will be held liable for the violation of privacy resulting from the disclosure, without the authorization of its participants, of images, videos or other materials containing scenes of nudity or private sexual acts when , after receiving notification from the participant or its legal representative, fail to diligently promote, within the scope and technical limits of its service, the unavailability of that content".

<sup>25</sup> Available in: [[http://www.planalto.gov.br/ccivil\\_03/leis/2002/110406compilada.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm)]. Accessed in: 17.09.2022.

<sup>26</sup> Fernando Rodrigues Martins, in his work states the importance of principles: "there is no doubt, ipso facto, that the rise of principles grants concreteness to several constitutional and infra constitutional norms, overcoming the existing gaps, maintaining the unity and possibilities of correction of the system (including in the relationship with the rules), further allowing an interdisciplinary strategy increasingly explored nowadays". Martins, Fernando Rodrigues. Os deveres fundamentais como causa subjacente-valorativa da tutela da pessoa consumidora: contributo transversal e suplementar à hermenêutica consumerista da afirmação. *Direito Privado e Policontextualidade: fontes, fundamentos e emancipação* / Fernando Rodrigues Martins. Rio de Janeiro: Lumen Juris, 2018, p. 275.

the Civil Code, specifically in articles 186 and 187, whereas the obligation to compensate was specified from article 927 to article 943, and the issue to the compensation was encompassed from article 944 to article 954. These alterations demonstrate a change in the civil liability system, with the coexistence of the foundation of guilt as justification for the obligation to compensate, and the foundation of risk, which has as its primary objective the protection of the victim.

Contemporary society is undergoing many changes, with relationships becoming more and more massive, and an extraordinary increase in damage caused to the community is a consequence of these changes, configuring what the doctrine affirms to be the "right of damages" or "liability for damages".<sup>27</sup> The central idea is that when the State creates the conditions for the maintenance of freedom,<sup>28</sup> it thereby assumes the obligation to maintain and ensure this freedom. Therefore, the State cannot be exempted from its responsibilities, from its duty to protect, on behalf of the community.

When understood as the primary function of civil liability, reparation is centered on the idea of rebalancing social relations, based on the violation of rights and the generation of damages. At first, it was based on the need for a response in face of damage that affected a person's individual and patrimonial sphere. This suggests that the reparatory structure of civil liability was built primarily under a patrimonialist vision. However, the view of the patrimoniality of the damage and the monetary equivalent as compensation have gradually been relativized.<sup>29</sup> This is due to the fact that the very conception of damage has been changing, especially in light of the need to protect the values that are important to the legal system, a trait of the rise of

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<sup>27</sup> Anderson Schreiber, when talking about the new damages, teaches that "scientific and industrial evolution led to a substantial increase in the harmful potential of private autonomy. Exploring new energy sources; mass production techniques; the widespread commercialization of drugs and therapies that reflect relatively recent discoveries in medical science; the disconcerting development of land, air and maritime transport; the media explosion; everything that characterizes contemporary society hides behind it an enormous potential for damage". Schreiber, Anderson. *Novos paradigmas da responsabilidade civil: da erosão dos filtros da reparação à diluição dos danos*. 2nd. ed. São Paulo: Atlas, 2009, p. 84 ss.

<sup>28</sup> Erichsen, Hans-Uwe. Allgemeine Handlungsfreiheit. In: Isensee, Josef; Kirchhof, Paul. (Hrsg.). *HStR. Zweite, durchgesehene Auf.* Heidelberg: Müller, B. VI, § 152, 2001, Rdn. 6.

<sup>29</sup> Geneviève Viney points out that, traditionally, civil liability has as its main function, if not its only function, to ensure the reparation of damages. However, this view has been the target of criticism by the doctrine, which has understood that responsibility along these lines is solely focused on the past and that it seeks guidance focused on the future, coupling other functions such as dissuasion of incorrect and harmful behavior, as well as as the preventive function. Viney, Geneviève. *As Tendências Atuais do Direito da Responsabilidade Civil*. In: Tepedino, Gustavo (org.). *Direito Civil Contemporâneo: Novos problemas à luz da legalidade constitucional*. São Paulo: Atlas, 2008. p. 54-55.

fundamental rights, which inevitably oblige the State to act to protect them.<sup>30</sup>

This picture suggests that it is possible to speak of a paradigm shift in the institute of civil liability, guided by the Constitution. It is not a matter of abandoning classical conceptions, founded by different generations of scholars, but rather of adapting institutes to a current reality, with a focus on the theory of State's protection duties. Therefore, the idea that the basis of reparation for damages takes into account a state of affairs that has suffered alterations and that, therefore, must be brought back to its original state with patrimonial repercussions, is maintained.

However, a constitutionally oriented reading suggests that the reparatory function of civil liability should be expanded from its compensation function, without excluding it, in order to encompass the complexity of modern social relations. It is in this context that the combination of functions, the preventive and the punitive, arising from the classical doctrine of punitive damages in American law, takes place. In addition to enabling the compensation of damages, which derive from illegal acts, the legal system must be able to discourage not only the practice of damage, but also its reoccurrence.

Considering this double perspective, it is possible to state that there is a need to broaden the notion of civil liability to the prevention of possible, serious and irreversible damages, since the core of the civil liability system is the prohibition of causing damage to others, based on the principle of "alterum no laedere" (do no harm to others). This principle is the matrix of a series of duties of respect that subjective law projects transform into a parameter of conduct for any other person.<sup>31</sup>

About the reparatory function, Tereza Ancona Lopes<sup>32</sup> considers that massification is a remarkable trace of today's society, from manufacturing to mass consumption. Therefore, alongside individual damages, "serial or collective damages" arise, harming a certain category of people, who may not have participated in any type of contract, but who suffer the damages that take place in the consumer society, despite the difficulty of demonstrating it. Consequently, civil liability is insufficient in fixing a compensation amount when only extra patrimonial damages are considered, since there are damages that are not able to be compensated due to their irreversibility, as in the case of damages experienced as a result of illicit acts committed in the digital environment. In this sense, Anderson Schreiber points out that "the

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<sup>30</sup> Duque, Marcelo Schenk. *Eficácia Horizontal dos Direitos Fundamentais e Jurisdição Constitucional*. 2nd. Edition, revised and amplified. São Paulo: Editor dos Editores, 2019, p. 304ss.

<sup>31</sup> Castronovo, Carlo. *La nuova responsabilità civile*. 3rd. edition. Milano: Dott. A. Giuffrè Editore, 2006, p. 451-452.

<sup>32</sup> Lopez, Teresa Ancona. *Princípio da Precaução e Evolução da Responsabilidade Civil*. São Paulo: Quartier Latin, 2010, p. 137 ss.

maintenance of an exclusively pecuniary remedy for extra patrimonial damages leads to the conclusion that the injury to existential interests is authorized to all, provided one is willing to pay the corresponding price".<sup>33</sup>

In civil law countries, extra patrimonial damages are established in cases of violations of personality rights, understood in a broad sense, as values linked to the human being. Ricardo Dal Pizzol explains that the Italian Court of Cassation has stated that the category of extra patrimonial damages comprises "*ogni ipotesi in cui sia lesa un valore inerente alla persona*".<sup>34</sup> This is the reason why the strictly restorative function of civil liability is not sufficient to protect extra patrimonial damages, that is, it does not effectively protect essential rights, understood as the basis for democratic societies.<sup>35</sup>

It is also important to emphasize that, with the advent of the Constitution of 1988, the reparative function of civil liability has been expanded with the emergence of new paradigms in civil liability, considering that scholars of civil liability law have conceived that compensation must go beyond the reparatory functions, aiming to reach the complexity of contemporary social relations.<sup>36</sup> Thus, among the new functions are the preventive<sup>37</sup> one and the punitive one, originated from the punitive damages theory of the North American law, related to a penalty beyond what is due for the damage caused, in order to discourage the offender to repeat the action that caused the damage, and the application of this function is already part of the Brazilian

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<sup>33</sup> Schreiber, Anderson. *Novos paradigmas da responsabilidade civil: da erosão dos filtros da reparação à diluição dos danos*. 2nd. edition, São Paulo: Atlas, 2009, p. 191-192.

<sup>34</sup> Author's translation: "*any case in which a value inherent to the person is injured*".

<sup>35</sup> Dal Pizzol, Ricardo. *Responsabilidade civil: funções punitiva e preventiva*. Indaiatuba, SP: Foco, 2020, p. 160.

<sup>36</sup> Commenting the articles of the Civil Code, Fernando Martins, among other considerations regarding article 12 from the Civil Code, has highlighted that "accompanying the need for protection of fundamental rights and personality rights, the procedural law enables the inhibition or removal of the offense through specific protection of the obligation to do or not to do (article 497, single paragraph from CPC), as well as prevention from the danger of damage through urgent, early or precautionary protection (articles 300, 303 e 305 from CPC). While the inhibition of the offense corresponds to the avoidability of the rule's violation, in the removal of the offense the violation has already occurred, and it is up to the holder to curb the effects of the offense. As for the danger of damage, it is assumed that there is a wide possibility of damage to a protectable legal interest, in which case the procedural law allows the exercise of urgent protection to safeguard the integrity of the person or thing at risk. Therefore, it is imperative to separate illicit from damage". Martins, Fernando Rodrigues. *Comentários ao Código Civil: direito privado contemporâneo*. Alexandre Dartanhan de Melo Guerra [et al.]; Coordination Giovanni Ettore Nanni. São Paulo: Saraiva Educação: 2018, p. 95.

<sup>37</sup> Versiani, Rodrigo Luiz da Silva. *O Controle da Publicidade Infantil de Alimentos: Hermenêutica à luz do Direito Fundamental de Proteção à Criança com Absoluta Prioridade*. São Paulo: Dialética, 2021, p. 260-261.

jurisprudence.<sup>38</sup>

Regarding civil liability for the use of sensitive personal data and content generated by third parties, it is noted that the compensation is essentially linked to damages of a non-pecuniary nature which, due to their abstraction and subjectivity, do not allow a repair in the sense of restoration to the status quo ante, as if the damage had never existed. However, the reparatory function seeks to satisfy, in some way, those subjects that had their existential interests offended in their extra patrimonial sphere.

Hence, it is notorious the insufficiency of the reparatory function of civil liability, especially with regard to the fixing of an amount of compensation in the event of extra patrimonial damage, which has been leading more and more to the development of the preventive and punitive functions, the latter having a pedagogical scope. As for the preventive function, it involves valuing the function of protecting fundamental rights, which leads state agencies to act not only in a repressive way when protecting personality rights.

The application of the punitive function, in addition to punishing the causer of the damage, would have a function of dissuade the perpetration of harmful conducts, also providing an effect of prevention as to repeated unlawful conducts, consequently, discouraging to the extent that it aims at the deterrence of unlawful conducts through the punishment of the offender. Nevertheless, the punitive function also aims to reward and prevent the conduct of the offender who has acted by fault, as in the case of the Internet service provider.<sup>39</sup> This, in fact, is one of the aims of the LGPD when incorporating the principle of prevention as one of the criteria able to justify

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<sup>38</sup> (...) INTERRUPTION OF ELECTRIC POWER SUPPLY. DELAY IN RESTORING THE SERVICE. CIVIL LIABILITY. MORAL DAMAGES. DISPUTE RESOLVED BY THE COURT OF ORIGIN IN THE LIGHT OF THE EVIDENCE IN THE FILES. IMPOSSIBILITY OF REVISION, THROUGH SPECIAL APPEAL. SUMMARY 7/STJ. INTERNAL APPEAL DISMISSED. (...) V. In the case, the Court of origin, based on the examination of the factual elements of the file, upheld the judgment of origin, stating that "there was a fact of the service, exteriorized through the defect in the supply of electric energy, interrupted and not reestablished in an effective way - a maximum period of 48 hours, as provided for in article 176, I, of ANEEL Resolution 414/2010 -, causing the moral damages reported in the complaint. (...) moral damages are incontrovertible and result from the fact itself. The situation experienced (approximately 5/6 days without electricity) goes beyond mere annoyance or everyday discomfort to life in society, showing absolute disregard for the consumer's personality. Therefore, it is recommended the application of compensation with a dissuasive function, that is, with a pedagogical-punitive purpose in order to avoid repeated events, which is done in due time". (AgInt in REsp n. 1.806.393/RS, relator Minister Assusete Magalhães, Second Class, judged in 3/10/2019, DJe from 11/10/2019.) (g.n.).

<sup>39</sup> Versiani, Rodrigo Luiz da Silva. *O Controle da Publicidade Infantil de Alimentos: Hermenêutica à luz do Direito Fundamental de Proteção à Criança com Absoluta Prioridade*. São Paulo: Dialética, 2021. p. 226.

measures aimed at preventing the occurrence of damages due to the processing of personal data.<sup>40</sup> As Claudia Lima Marques reminds us, new phenomena, which are made visible by technological innovation, are usually marked by fluidity, complexity, distance, simultaneity, deterritoriality and autonomy, which always deserve diverse care.<sup>41</sup>

These arguments aim to demonstrate the difficulty of applying the principle of *restitutio in integrum* (full compensation) to extra patrimonial damages. They suggest that the path of prevention is usually safer than that of mere compensation of damages. It is not a matter of abandoning the repressive character of law, but rather of investing in a preventive system, as a way to functionalize civil liability with the primary objective of making viable the concretization of a new guarantee of respect for the integrity of rights, especially regarding the protection of personality rights.

This statement led Thais Venturi to suggest a change in the nomenclature for *manutentio in integrum* (complete maintenance) of fundamental rights (individual and trans individual), especially those of extra patrimonial nature<sup>42</sup> and essential to the protection of human dignity.<sup>43</sup> As the digital world presumes connections, the fact that dignity, as a major foundation of the state order, is linked to the human condition of each person, which prevents it from being treated as a mere object,<sup>44</sup> does not rule out a necessary social dimension of the foundation, since society presumes coexistence in communities or groups.<sup>45</sup>

For those who suffer damages, late action, that is, after the practice of the injury, can no longer be undone, but only repaired, tarnishing the objective of guaranteeing the protection of fundamental rights. Therefore, the adoption of instruments such as preventive civil liability,<sup>46</sup> conciliated with other

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<sup>40</sup> Article 6º, VIII, an 11, II, “g” of the Law 13.709/2018.

<sup>41</sup> Marques, Claudia Lima. *Contratos no Código de Defesa do Consumidor*. O novo regime das relações contratuais. 8th. edition. São Paulo: Revista dos Tribunais, 2016, p. 125.

<sup>42</sup> Anderson Schreiber states that "the maintenance of an exclusively pecuniary remedy for extrapatrimonial damages leads to the conclusion that damage to existential interests is authorized for everyone, as long as they are willing to pay the corresponding price". Schreiber, Anderson. *Novos paradigmas da responsabilidade civil: da erosão dos filtros da reparação à diluição dos danos*. 2nd Edition. São Paulo: Atlas, 2009, p. 191-192.

<sup>43</sup> Venturi, Thais Goveia Pascoaloto. *Responsabilidade Civil Preventiva: A Proteção contra a Violação de Direitos e a Tutela Inibitória Material*. São Paulo: Malheiros, 2014, p. 83 ss.

<sup>44</sup> Dürig, Günter. *Der Grundsatz der Menschenwürde*. Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1. Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes. AöR, B. 81. Tübingen: Mohr, 1956, p. 127ss.

<sup>45</sup> Sarlet, Ingo Wolfgang. *Dignidade da Pessoa Humana e Direitos Fundamentais*. Na Constituição Federal de 1988. 2nd. edition. Porto Alegre: Livraria do Advogado, 2002, p. 53.

<sup>46</sup> Keila Pacheco has brought important consideration about the perception of risks and

inhibitory instruments by the Judiciary or the use of the essential functions of Justice emerges as a solution so that the agents that cause damage with illegal or anti-social behavior can be dissuaded and punished, seeking to curb such conducts and serve as an example so that the damage to fundamental rights does not continue to be perpetuated.

The objective of implementing an effective protection of the person is one of the pillars of the legal system, not limited to the guarantee of reparation for damages caused by injuries, but, above all, in the sense of a responsibility in favor of the human being, considering that the intangibility of dignity is one of the foundations of the Republic, a moral value that must be absorbed by all, whether in the course of relations with state agencies or in the course of private relations.

The protection of dignity, therefore, does not contain only a formal value, since it has a guiding value of knowledge, which takes into consideration, as a whole, the rights of different people, the preservation of the common good and the need to perform duties of protection, disregarding a monothematic conditional valuation.<sup>47</sup> In addition, various international normative instruments can be added,<sup>48</sup> forming a true and effective international constitutional block, which cannot be disregarded in the interpretation of each country's domestic law. Increasingly, the notion that international norms for the protection of human rights are considered to be immediately effective within the Brazilian internal sphere must be taken into account.

Finally, any preventive perspective must take into account a solid theory, which adds foundation to it. In this respect, the theory of the State's protection

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the modification of institutes such as preventive civil liability: "The perception of global risks and the recognition of the condition of global vulnerability, in turn, changes the look on society and gives rise to a reconstruction in social, political and legal terms, as well as originating an ethical sense connected with the present and future relationship and the preservation of life and humanity [...] This verifiability regarding the transformation of risk is also projected as an efficient cause for the alteration of several institutes, for the intrusive management, mitigation and prevention, among them the civil liability, which from a individual and individual interests centered view, becomes part of a system that must be able to deal with polycontextual conflicts, integrating economic, political, legal, social, technological, scientific, teleological aspects, among others, thus inaugurating a systemic dimension of civil liability, whose guideline is provided by the principles of precaution and prevention. Ferreira, Keila Pacheco. *Responsabilidade Civil Preventiva: Função, Pressupostos e Aplicabilidade*. Thesis (PhD in Law) – School of Law, University of São Paulo, São Paulo: 2014, p. 28-29.

<sup>47</sup> Di Fabio, Udo. Zur Theorie eines grundrechtlichen Wertesystems. In: Merten, Detlef; Papier, Hans-Jürgen (Hrsg.) *HDG. B. II*. Heidelberg: Müller, 2006, Rdn. 35.

<sup>48</sup> See, for example, the UN Charter from 1945, that states, in its preamble: "the faith in the fundamental rights of men, in the dignity and in the value of the human being". The reference is reproduced in the UN's Universal Declaration of Human Rights from 1948, and in the Vienna Declaration from 1993, prepared during the World Conference on Human Rights.

duties greatly contributes to the cause, due to the fact that it sustains that the State has the function of protecting the fundamental rights of individuals against harm from other private subjects, through legislative interventions and the courts' jurisprudence.<sup>49</sup>

The rationale around the need for a constitutional protection duty in favor of virtual media users arises from the fact that the State has the function of protecting the fundamental rights of individuals against harm from other private subjects through the action of public agencies.<sup>50</sup> When the protection of users of virtual environments encompasses the guarantee of free development of personality, it prevents the person from being seen as a mere automaton, in the sense of subject to manipulation. That is to say, protection is given to the personality itself, as the driving force behind the external development of a person, in order to ensure its development, which builds an individual identity.<sup>51</sup>

The prognoses that should be taken into consideration by the legislator when configuring the ideal standard of protection should take into account a gradation between the threats and the protective effectiveness to be achieved. The higher the hierarchy of the fundamental rights affected and the more severe the intervention, the more intense the dangers and, consequently, the lesser the possibilities for their holder to exercise efficient self-protection. It is in this sense that a legal-constitutional duty of protection is based.<sup>52</sup>

Special attention must be given to any attempt of manipulation by third parties in virtual environments, as well as its use for free incitement of manifestations that end in extremist positions.<sup>53</sup> After all, there is no getting away from the notion that one of the fundamental concerns of the institute of personal data protection is that the individual should not be manipulated by information that third parties have about him or her.<sup>54</sup> In other words,

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<sup>49</sup> Duque, Marcelo Schenk. *Eficácia Horizontal dos Direitos Fundamentais e Jurisdição Constitucional*. 2nd. Edition, revised and amplified. São Paulo: Editor dos Editores, 2019, p. 304ss.

<sup>50</sup> Canaris, Claus-Wilhelm. *Grundrechte und Privatrecht. AcP, B. 184*. Tübingen: Mohr, 1984, p. 225ss.

<sup>51</sup> Britz, Gabriele. *Freie Entfaltung der Persönlichkeit (Article 2 I 1 GG) - Verfassungsversprechen zwischen Naivität und Hybris?* NVwZ. München: Beck, 2019, p. 672.

<sup>52</sup> Canaris, Claus-Wilhelm. *Grundrechte und Privatrecht. Eine Zwischenbilanz*. Berlin: Gruyter, 1999, p. 80.

<sup>53</sup> Britz, Gabriele. *Freie Entfaltung der Persönlichkeit (Art. 2 I 1 GG) - Verfassungsversprechen zwischen Naivität und Hybris?* NVwZ. München: Beck, 2019, p. 676.

<sup>54</sup> Menke, Fabiano. A proteção de dados e o novo direito fundamental à garantia de confidencialidade e da integridade dos sistemas técnico-informacionais no direito alemão. In: Mendes, Gilmar Ferreira; Sarlet, Ingo Wolfgang; Zavaglia, Alexandre P. Coelho (Coord.). *Direito, Inovação e Tecnologia*. Vol. I. São Paulo: Saraiva, 2015, p. 211.

preserving the human being is essential against all the tendencies, which are increasingly present, to transform network users into mere objects for obtaining information.<sup>55</sup>

For this reason, protection against manipulation should be the main concern of an effective personal data protection regime. The courts have the task of ensuring the observance and effectiveness of this protection commandment, applying the provisions of the *Marco Civil da Internet*, the *LGPD* and other normative sources in the sense intended by the Constitution, which is to guarantee the free development of the personality of network applications users. The constitutional court in particular has the ongoing task of pointing out the unconstitutionality of any measure that aims to weaken this protection, based on the prohibition of insufficiency, and to emphasize, on the other hand, the constitutionality of protective measures.

The connection between fundamental rights, protection of personality and the need for protection is thus evident. This is most evident in the case of the recognition by the courts of the preventive function of liability in the face of the possibility of damages to fundamental rights related to the protection in the digital environment.

### III. FINAL CONSIDERATIONS

The risks inherent to the digital world justify the need for a change of focus in the State's protection duties, considering the theory of civil liability as a starting point. This change in perspective involves considering civil liability from a preventive approach, which should be reconciled alongside its repressive function. The nature of fundamental rights, giving their primary scope of protecting human dignity and the free development of personality, suggests that no legal protection system can be successful if it fails to take into consideration the way in which the State's duties of protection are fulfilled.

It is impossible to think of an environment of freedom without the presence of solid postulates for its exercise. The State, therefore, cannot be exempt from its responsibilities, which imposes on it a continuous and unceasing duty of protection on behalf of the community. This duty includes the obligation to build an effective protection network, which cannot center its effectiveness only on the repressive approach.

The more efficient the legal system is in making effective precautionary measures available to citizens and institutions, with the objective of stopping and undoing threats to fundamental rights, the more effective the existing constitutional guarantees will be. In particular, the guarantee of the

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<sup>55</sup> Simitis, Spiros. *Die informationelle Selbstbestimmung - Grundbedingung einer verfassungskonformen Informationsordnung*. NJW. München: Beck, 1984, p. 399.

inafastability of the Judiciary (art. 5º XXXV CF) should be interpreted in the sense of visualizing threats as the right to an effective jurisdiction. Civil liability, in its preventive modality, conciliated with other instruments that inhibit the practice of illicit behavior, tends to be more effective in curbing such conducts, contributing to the full effectiveness of fundamental rights.

Giving the risks and abuses committed in the digital environment, it is necessary to seek legal instruments that can prevent all kinds of damage, which is an attribute of the information society, especially by undue intervention in the rights of personality. This quest will be more effective, the more we apply the theories of civil liability in conjunction with the State's protection duties. This thought implies the enhancement of the preventive function of law, aiming to fulfill its social function as a pacifying element of social relations. Avoiding and deterring the occurrence of unlawful acts and the resulting damage is the focus of a functional legal system, which places people at the center of its considerations.

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