

PROFILING, STIGMATIZATION, AND CIVIL LIABILITY

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Abstract: In the novel 'Brave New World,' Aldous Huxley envisions a dystopian future marked by mass production of lab-grown individuals, each assigned to specific castes. In this article parallels are drawn between this dystopian scenario and the dangers posed by technology, particularly in the realm of personal data and digital identity. It explores the potential infringement on privacy and equality rights, emphasizing the need for legal protection amid the increasing use of Big Data. The discussion delves into the theoretical foundations of personal data, virtual identity, and stigmatization, examining the role of civil liability in addressing violations of digital rights. The article navigates through relevant legal frameworks, including the Brazilian Federal Constitution, Consumer Protection Code, Civil Code, General Data Protection Law, and the Law of Public Civil Action, to assess the responses that civil liability can provide in the context of virtual rights violations. It emphasizes the historical construction of law, highlighting the necessity for legal frameworks to adapt to technological and cultural advancements. Despite specific data protection legislation, the article underscores the challenges in enforcing existing rights and calls for a nuanced approach to legal interpretation in the evolving digital landscape.

Keywords: dystopian technology; personal data protection; civil liability; digital rights; legal frameworks.

INTRODUCTION

In the book "Brave New World," Aldous Huxley describes a dystopian future of a highly technological society marked by mass production of people in laboratories, duly divided into castes (some more intelligent, others destined exclusively for exhaustive work)¹. These individuals are educated by the government from childhood, and during sleep², to lack critical thinking³, to consume excessively⁴, and to love their social destinies without

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¹ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 14.

² Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 20.

³ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 36.

⁴ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans.,

questioning⁵. In this society, there are no moral rules, and individuals are expected to follow their instincts and live in an immediate manner⁶. In case of sadness, a happiness drug called "soma"⁷ is distributed.

The connection of such a catastrophic scenario with the theme to be addressed in this article relates to the dangerous way in which technology is always seen as progress⁸ and how humans are treated as just another number, due to being physically, chemically, and socially identical and replaceable within their castes⁹. Despite being fictional, the book brings important reflections to the society of the information age, a new form of social organization that relies on intensive use of information technology for the collection, production, processing, transmission, and storage of information, as seen in the use of computing and telecommunications technologies. Information consists of data or a set of data in any medium capable of producing knowledge¹⁰.

This is because, despite the numerous benefits marked by the use of technologies (faster communication, access to information, productivity, security, and quality of products and services, etc.), there is a risk that the way personal data is tracked by Big Data¹¹ may offend personality rights, notably privacy (by manipulating and using personal data without prior consent) and equality (by leaving people excluded from certain services, products, and news based on a stigmatized preconception of a digital profile). In this sense, technological advancement is not only marked by progress, especially if there is no corresponding protection of the human person against new forms of rights violations.

In this context, these violations of rights involve the use of personal data

5th ed., Globo 1979), 23.

⁵ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 16.

⁶ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 28.

⁷ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 35.

⁸ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 10.

⁹ Huxley, Aldous, *Admirável mundo novo* (Vidal de Oliveira & Lino Vallandro trans., 5th ed., Globo 1979), 47.

¹⁰ Vieira, Tatiana Malta, *O direito à privacidade na sociedade da informação: efetividade desse direito fundamental diante dos avanços da tecnologia da informação*, 2007 (M.A. thesis, Faculdade de Direito, Universidade de Brasília), 156.

¹¹ Big Data represents a set of data stored in enormous volume and from various sources, exceeding human capacity for capture and analysis. The value of these data depends on how they are chosen to be processed: "*O valor é o significado que pode ser atribuído ao dado por meio da sua análise*". Saraiva Neto, Pery, and Maiara Bonetti Fenili, *Novos marcos legais sobre proteção de dados pessoais e seus impactos na utilização e tratamento de dados para fins comerciais*, 1 *Rev. Est. Jur. e Soc.* 1 (Dec. 2018), 4.

that fuels Big Data and, for example, create profiles based on the individual's personality and behavior without their knowledge, or improperly manipulate such information to cause discrimination¹². Much like in the aforementioned novel, there is the potential for the human being to be treated as just another number and block of information in the digital field, losing sight of their individuality and corresponding dignity. Law is the proper field to reflect on the phenomenon of handling personal data, creating virtual identity, and consequent stigmatization in comparison with the protection offered by national legislation.

Thus, assuming that civil liability is a legal category that seeks to prevent and/or remedy damages, both the event-related damage (characterized by the violation of a duty in the legal order) and the damage-loss (based on the existential or moral harmful consequences generated by the event-related damage)¹³, this article will seek to present a theoretical basis on personal data, virtual identity, and stigmatization, and then engage in a dialogue between the Federal Constitution of 1988 (hereinafter CF/88), Consumer Protection Code - Federal Law No. 8,078/90 (hereinafter CDC), Brazilian Civil Code - Federal Law No. 10,406/2002 (hereinafter CC/2002), General Data Protection Law - Federal Law No. 13,709/2018 (hereinafter LGPD), and Public Civil Action Law - Federal Law No. 8,347/85 (hereinafter LACP), aiming to reflect on what responses civil liability can offer in the context of violations of personality rights in the virtual field.

Law is constructed historically¹⁴ and, for this reason, needs to keep up with the technological and cultural evolution of society. Although there is a specific law for the protection of personal data (LGPD) and, from a multilevel perspective of human rights¹⁵, the rights of personality potentially violated

¹² Freitas, Cinthia Obladen de Almendra, and Danielle Anne Pamplona, *Cooperação entre estados totalitários e corporações: o uso da segmentação de dados e profiling para violação de direitos humanos*, in *Privacidade e proteção de dados pessoais na sociedade digital* (Regina Linden Ruaro et al. eds., Editora Fi 2017), 126.

¹³ Bonna, Alexandre Pereira, *A crise ética da responsabilidade civil: desafios e perspectivas*, 11 *Quaestio Iuris* 365 (2018), 2.

¹⁴ Farias, Cristiano Chaves de, and Nelson Rosenvald, *Curso de direito civil* (Vol. 1, 13th ed., Atlas 2015), 141.

¹⁵ “*Esta perspectiva multinível, no caso brasileiro, implica na concepção dos tribunais pátrios como integrados dos sistemas transnacionais, já que os direitos e garantias presentes na Constituição não excluem outros decorrentes dos tratados internacionais ratificados pelo Brasil, assim como exigem que a interpretação dada pelos tribunais internacionais sirva como critério hermenêutico para a interpretação dos direitos reconhecidos na Constituição e nas leis em geral*”. Bonna, Alexandre Pereira, and Pastora do Socorro Teixeira Leal, *Proteção multinível de direitos humanos nas relações privadas por meio do reconhecimento dos novos danos*, in *Anais do V Encontro Internacional do Conselho de Pesquisa e Pós-Graduação em Direito - Grupo de Trabalho Direito Internacional dos Direitos Humanos III* (Montevidéu, Uruguai 2016), 100.

by the manipulation of personal data and stigmatization of virtual identity are protected domestically and internationally, it is worth noting that the law is marked by vagueness and imprecision¹⁶, and the greatest challenge is not to recognize rights but to effectively enforce the ones already existing¹⁷.

I. PERSONAL DATA, VIRTUAL IDENTITY, AND THE PRACTICE OF "PROFILING"

In order to pave the way for reflections on the applicable legislation regarding the topic and the projection of personality rights in the digital realm, it is necessary to present some fundamental concepts for understanding the theme, namely personal data, virtual identity, and the practice of "profiling." Following this introduction, the subsequent section of the research will delve into how this scenario can lead to the violation of personality rights, such as equality (through stigmatization) and privacy (through the invasion and manipulation of data without the user's consent), considering that the LGPD (art. 1 and 2, I and VII) itself states that its objectives and foundations include the protection of privacy, human rights, and the free development of personality (including the right to equality).

Thus, personal data refers to facts and/or representations about an individual or legal entity, capable of being collected, stored, and transferred to third parties¹⁸⁻¹⁹, such as phone number, address, bank account, full name, CPF (Brazilian ID), profession, online identifier (IP), preferences, habits, desires, recent searches and purchases, location, opinions, lifestyle, "racial or ethnic origin, religious belief, political opinion, membership in a union or organization of a religious, philosophical, or political nature, data related to health or sexual life, genetic or biometric data" (art. 5, II, LGPD), etc. In summary, everything that is capable of presenting the main characteristics

¹⁶ "Apesar das inúmeras tentativas de análise definitiva, a linguagem dos direitos permanece bastante ambígua, pouco rigorosa e frequentemente usada de modo retórico". Bobbio, Norberto, *A era dos direitos* (Carlos Nelson Coutinho trans., Elsevier 2004), 9.

¹⁷ "Mas uma coisa é proclamar esse direito, outra é desfrutá-lo efetivamente, A linguagem dos direitos tem indubitavelmente uma grande função prática, que é emprestar uma força particular às reivindicações dos movimentos que demandam para si e para os outros a satisfação de novos carecimentos materiais e morais; mas ela se toma enganadora se obscurecer ou ocultar a diferença entre o direito reivindicado e o direito reconhecido e protegido". Bobbio, Norberto, *A era dos direitos* (Carlos Nelson Coutinho trans., Elsevier 2004), 9.

¹⁸ Santos, Manoel J. Pereira dos, *Responsabilidade civil na Internet e demais meios de comunicação* (2nd ed., Saraiva 2014), 351.

¹⁹ In this sense, the LGPD (*Lei Geral de Proteção de Dados* or General Data Protection Law) stipulates: "Article 5: For the purposes of this Law, personal data is considered to be: I - personal data: information related to an identified or identifiable natural person." (freely translated)

that individualize that person.

It is important to assert that beyond the construction of physical identity, in the information age, individuals develop a virtual identity, considering that identity is formed by all qualities that represent oneself to others. Therefore, actions in the digital environment allow the dissemination of data that—different or identical to physical data—symbolize the individual to themselves and the rest of the community, as explained by Arthur Meucci and Arthur Matuck:

The identity construction of any individual, throughout their trajectory, results from all their actions. These, when observed, turn into messages that define them to others. Men, with greater or lesser awareness of this, concern themselves with maintaining or building a certain image that allows them to communicate who we are. Identity is the process by which others recognize the singularities of a person. Distinctive traits objectified in physical, emotional, intellectual, group, and community characteristics. Within this perspective, we define identity as a process of presentation and attribution of qualities to a subject, according to their culture, attitudes, appearance, and also the expression of their values²⁰.

Consequently, by using various platforms in the digital world, people leave traces of likes, preferences, desires, and other characteristics, which, through the practice of "profiling"—to be analyzed later—are cataloged and shape a certain digital profile of the user, often without the consumer's consent and for marketing purposes. In this line, identity becomes manipulated and ceases to be exclusively within the personal sphere of that individual who should be the sole protagonist of their private identity construction, especially because this can be constantly altered over time.

Furthermore, for mutual understanding and an exchange of relations to occur, it is necessary for people to build virtual identities. With the internet, the processes of identity construction have taken on a new form, as the network allows a greater number of people the opportunity to narrate

²⁰ Meucci, Arthur, and Arthur Matuck, A criação de identidades virtuais através das linguagens digitais, 2 *Rev. Comunicação, Mídia e Consumo da ESPM* 157 (2005), 158-159, freely translated. Original excerpt: “A construção identitária de qualquer indivíduo, ao longo da sua trajetória, decorre de todas suas ações. Estas, quando observadas, convertem-se em mensagens, que o definem perante os demais. Os homens, com maior ou menor consciência disso, preocupam-se em manter ou construir certa imagem que permita comunicar quem somos. Identidade é o processo pelo qual os outros reconhecem as singularidades de uma pessoa. Traços distintivos objetivados em características físicas, emocionais, intelectuais, grupais e comunitárias. Dentro desta perspectiva definimos identidade como um processo de apresentação e atribuição de qualidades a um sujeito, segundo sua cultura, atitudes, aparência, e também da expressão de seus valores”.

themselves and ensures greater freedom to show or build their own identity²¹. However, this freedom is in crisis with "profiling," which hinders relationships between people by immobilizing a profile based on personal data left in the cyber environment.

"Profiling" involves creating a digital profile of the user, with data that reflects their desires, preferences, and habits, assisting in the massification of consumption and advertising, facilitating the customization of products and services to reach the target audience²². Therefore, by desiring a profile for each person, they establish who we are for advertising and various products and services, decisively influencing what the individual will encounter in the virtual environment.

What enables the creation of "profiling" are the pieces of information traced by users when they use the internet or when they themselves feed systems with their data (to use applications or register on websites, for example)²³. In this vein, it is possible to turn privacy into commodities (when such information is sold to companies or advertisers), expose information that the individual would like to keep only for themselves or their family (illnesses, deformities, bank account, debts, etc.), as well as allow individuals to succumb to external pressures that influence their choices²⁴, such as a person addicted to gambling who constantly receives suggestions for apps of that genre. To get a preliminary idea of the repercussions caused by "profiling," it is worth highlighting a passage from the Federal Public Ministry's Action Script:

It is known that technology companies monitor consumer activities when connected to the internet – including the searches they have made, the pages they have visited, and the content consulted – with the purpose of providing advertising targeted to the individual interests of that consumer.

Large internet technology companies, such as Google, collect personal data from users of their services for commercial purposes, mainly. The data is processed with the aid of statistical methods and artificial

²¹ Meucci, Arthur, and Arthur Matuck, A criação de identidades virtuais através das linguagens digitais, 2 *Rev. Comunicação, Mídia e Consumo da ESPM* 157 (2005), 161-162.

²² Freitas, Cinthia Obladen de Almendra, and Danielle Anne Pamplona, Cooperação entre estados totalitários e corporações: o uso da segmentação de dados e profiling para violação de direitos humanos, in *Privacidade e proteção de dados pessoais na sociedade digital* (Regina Linden Ruaro et al. eds., Editora Fi 2017), 121.

²³ Saraiva Neto, Pery, and Maiara Bonetti Fenili, Novos marcos legais sobre proteção de dados pessoais e seus impactos na utilização e tratamento de dados para fins comerciais, 1 *Rev. Est. Jur. e Soc.* 1 (Dec. 2018), 7.

²⁴ Van den Hoven, Jeroen, Information technology, privacy, and the protection of personal data, in *Information technology and moral philosophy* (Jeroen Van den Hoven & John Weckert eds., Cambridge Univ. Press 2008), 58.

intelligence techniques to synthesize habits, personal preferences, and other records. Profiles are created for each user (profiling), enabling the selective sending of advertising messages for a product to its potential buyers.

The possibilities offered to a person are closed (boxed in) around presumptions made by behavioral analysis tools, thus guiding their future choices. Specific advertising has the side effect of standardizing patterns of behavior, reducing the range of choices presented to a person. Profile development can lead to the denial of access to a certain good or service (denial of access to a website because the consumer accessed credit protection sites), as well as different prices for various consumers based on their profile (adaptive pricing)²⁵.

In this regard, it is pertinent to mention one of the most significant information collection tools, cookies, which are data stored on the user's computer about their searches, initially aimed at improving websites. However, some cookies can serve for businesses to know the user's tastes and preferences to send advertisements for a product they have recently viewed²⁶. Therefore, in the current scenario, when users innocently leave their personal information on social networks, applications, and search or purchase websites, as they seek sites and register, they are the ones increasingly

²⁵ Brazil, Ministério Público Federal, Câmara de Coordenação e Revisão, *Análise de dispositivos da lei de acesso à informação, da lei de Identificação Civil, da lei do Marco Civil da Internet e da Lei Nacional de Proteção de Dados* (Roteiro de Atuação, v. 3.) (MPF 2019), <http://www.mpf.mp.br/atuacao-tematica/ccr3/documentos-e-publicacoes/roteiros-de-atuacao/sistema-brasileiro-de-protacao-e-acesso-a-dados-pessoais-volume-3> (last visited Jan. 4, 2024), freely translated. Original excerpt: “*Sabe-se que empresas de tecnologia monitoram as atividades do consumidor quando conectado à internet – incluindo as pesquisas que ele fez, as páginas que ele visitou e o conteúdo consultado – com a finalidade de fornecer publicidade dirigida aos interesses individuais desse consumidor. Grandes empresas de tecnologia da internet, como o Google, coletam dados pessoais dos usuários de seus serviços, para fins comerciais, principalmente. Os dados são tratados com o auxílio de métodos estatísticos e técnicas de inteligência artificial, com o fim de sintetizar hábitos, preferências pessoais e outros registros. A partir disso são criados perfis para cada usuário (profiling) que possibilitam o envio seletivo de mensagens publicitárias de um produto a seus potenciais compradores. As possibilidades oferecidas a uma pessoa são fechadas (encaixotadas) em torno de presunções realizadas por ferramentas de análise comportamental, guiando dessa forma suas escolhas futuras. A publicidade específica tem o efeito colateral de uniformizar padrões de comportamento, diminuindo o rol de escolhas apresentadas a uma pessoa. A elaboração de perfis pode levar à negativa de acesso a determinado bem ou serviço (negativa de acesso a site porque o consumidor acessou sites de proteção ao crédito), bem como preços diferentes a consumidores diversos conforme o seu perfil (adaptive pricing)*”.

²⁶ Palmer, Daniel E., Pop-ups, cookies, and spam: toward a deeper analysis of the ethical significance of Internet marketing practices, 58 *J. Bus. Ethics* 271 (Berlin/Heidelberg 2008), 272.

providing more and more data, as information is one of the greatest assets of the current era.

II. PERSONALITY RIGHTS PROJECTED ONLINE AND ITS RISKS: STIGMATIZATION (VS. EQUALITY) AND DATA INVASION (VS. PRIVACY)

Personality rights – outlined exemplarily in articles 11 to 21 of the Brazilian Civil Code of 2002 – represent non-pecuniary assets that, if protected and enforced, allow for human flourishing and the consequent free development of personality. They are manifestations of what human beings possess at their most basic, enabling their flourishing in their individual purposes. Without peace, life, health, freedom, honor, image, intimacy, and privacy, for example, individuals cannot pursue their multiple life purposes without turmoil, as these constitute prerequisites for the achievement of individual goals²⁷.

In summary, personality rights are essential for a dignified life, which is why the dignity of the human person is the guiding thread of all personality rights, fundamental rights, and human rights, seeking to preserve the physical, intellectual, psychological, and moral integrity of the individual. In this sense, Statement 274 of the Civil Law Conference of the Federal Judiciary states: "Personality rights, regulated in a non-exhaustive manner by the Civil Code, are expressions of the general clause of protection of the human person, contained in Article 1, III, of the Federal Constitution."

Although in the digital realm various personality rights may be violated, such as image, psychological integrity, honor, among others, this article, due to the practice of "profiling," focuses on the rights to equality and privacy. This is because these rights are considered the most susceptible to abuse in this context of handling personal data for the creation of a profile subject to commercialization and the manipulation of goods and services. For this reason, the following will provide a conceptual exposition of equality and privacy, and then intertwine with the theme of "profiling."

In numerous ways, the violation of the right to equality (Art. 5, *caput*, Federal Constitution of 1988)²⁸ can occur, as the Constitution repudiates any form of discrimination, establishes racism as a non-bailable crime, and deems any conduct that denotes prejudice based on origin, race, political position, social condition, diseases, sex, color, age, and any other forms of

²⁷ Bonna, Alexandre Pereira, *Identificação e quantificação do dano moral: fundamentação da decisão judicial na perspectiva jurídica e ética da lei natural*, 448 f. (Ph.D. thesis, Instituto de Ciências Jurídicas, Universidade Federal do Pará 2018), 130-131.

²⁸ "Article 5: All are equal before the law, without distinction of any nature, guaranteeing to Brazilians and to foreigners residing in the country the inviolability of the right to life, freedom, equality, security, and property (...)." (freely translated)

discrimination intolerable. Therefore, in the realm of social practices, individuals and legal entities have the right to make preferences, distinctions, exclusions, or restrictions, but they cannot be based on race, sex, religion, ethnic origin, social condition, age, among others, unless properly justified, as in the case of legislation that determines that women should carry less weight than men and that establishes a minimum age for obtaining a driver's license²⁹.

Therefore, the respect required for equality to avoid liability is one that radically suppresses and eliminates any arbitrary discrimination among individuals, that is, when one person is placed by another in a situation of inferiority³⁰. Thus, it is permissible to prefer green over blue, beaches over farms, suspense films over science fiction, individuals with high academic performance over those negligent in relation to college disciplines, and those who demonstrate humility over those who claim not to like receiving orders. Beyond this exclusively private sphere, differences created are contrary to the equivalent right³¹.

On the other hand, the right to privacy (Art. 5, X, Federal Constitution of 1988 and Article 21 of the Civil Code of 2002)³² implies protection that allows each individual to guide their life as they see fit without harming others, such as aspects related to the person's origin and identity; their health status; their financial situation; their image; their personal writings; their friendships and romantic relationships; their aesthetic preferences; their political and religious choices; everything that is not public, professional, or social³³.

In a broad sense, privacy protection refers to the inviolability of a person having a minimum space reserved only for themselves and those with whom they want to share, or, in the words of Américo Luís Martins da Silva, it is the "freedom to introvert oneself, to withdraw into private life."³⁴ It concerns

²⁹ Bonna, Alexandre Pereira, *Identificação e quantificação do dano moral: fundamentação da decisão judicial na perspectiva jurídica e ética da lei natural*, 448 f. (Ph.D. thesis, Instituto de Ciências Jurídicas, Universidade Federal do Pará 2018), 52.

³⁰ Santos, Manoel J. Pereira dos, *Responsabilidade civil na Internet e demais meios de comunicação* (2nd ed., Saraiva 2014), 429-430.

³¹ Bonna, Alexandre Pereira, *Identificação e quantificação do dano moral: fundamentação da decisão judicial na perspectiva jurídica e ética da lei natural*, 448 f. (Ph.D. thesis, Instituto de Ciências Jurídicas, Universidade Federal do Pará 2018), 53.

³² "Article 5, X: the intimacy, private life, honor, and image of individuals are inviolable, ensuring the right to compensation for material or moral damage resulting from their violation."; "Article 21: The private life of the natural person is inviolable, and the judge, at the request of the interested party, will take the necessary measures to prevent or cease acts contrary to this norm." (freely translated)

³³ Cordeiro, António Menezes, *Tratado de direito civil português. Parte Geral* (Almedina 2004), vol. 1, t. III, 205.

³⁴ Silva, Américo Luís Martins da, *O dano moral e a sua reparação civil* (3rd ed.,

an area where humans want to maintain behaviors and situations within the private spectrum, without disclosing to the knowledge of third parties, such as issues related to illnesses, sadness and frustrations, habits confined to the family sphere, physical deformities, daily life with ancestors, descendants, spouse, or partner, among others. In all these cases, one will be faced with information that has no significant relevance to anyone else, except the individual themselves and those with whom they choose to share³⁵.

It is important to highlight that the scope of intimacy protection is broader than it may seem. According to Ramon Daniel Pizarro, such a right is linked to a triple dimension: a) the right to be left in peace and tranquility; b) the right to autonomy regarding decisions about one's existence; c) the right to control personal information³⁶. Thus, the violation of correspondence, the disclosure of personal data (CPF, address, mobile number, etc.) to third parties, as well as any dissemination of information from the intimate aspects of a human being, are also within the protection of intimacy. Therefore, the protection of personal data enjoys the status of a fundamental right as it is derived from the following rights: dignity, privacy, inviolability of the secrecy of telephone and data correspondence, and habeas data, since "the rights and guarantees expressed in this Constitution do not exclude others deriving from the system and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party" (Article 5, paragraph 2, CF/88).

Given this spectrum of legally protected non-pecuniary assets, such as equality and privacy, there arises the potential for injury to these rights through the handling of personal data for the formation of "profiling." Firstly, the vilification of equality is identified, as some individuals will be deprived of access to and offerings of products and services due to the stigmatization created in the virtual environment of a certain user profile. For example, a person who only seeks country music, *forró*, and popular literature and films will never receive offers of courses or material on classical music, Greek literature, and cult films. In other words, although any human being could theoretically be interested in such qualitatively refined styles of music, literature, and films, market practices need to act intelligently and accurately in the face of their target audience. This is why the created stigma serves as a driving force for digital platforms when offering advertising to various suppliers of products and services.

Revista dos Tribunais 2005), 263.

³⁵ Bonna, Alexandre Pereira, *Identificação e quantificação do dano moral: fundamentação da decisão judicial na perspectiva jurídica e ética da lei natural*, 448 f. (Ph.D. thesis, Instituto de Ciências Jurídicas, Universidade Federal do Pará 2018), 70-72.

³⁶ Pizarro, Ramon Daniel, *Daño moral: el daño moral en las diversas ramas del derecho* (Hammurabi 1996), 501.

In this context, some notes on the concept of stigmatization from Erving Goffman's book "Stigma: Notes on the Management of Spoiled Identity" (in Portuguese, "*Estigma: notas sobre a manipulação da identidade deteriorada Estigmatização*") are essential. Although this work was written in 1975, without the reality of the cyber world, it is possible to demonstrate that in the context addressed in this article, there is also a new form of stigmatization. To understand stigmatization, a distinction must be made between real identity and virtual identity. The former is the set of characteristics that a person actually has, while the latter refers to the characteristics that people have towards others. Stigma arises precisely from the divergence between real and virtual identity³⁷. Thus, "profiling" categorizes people into shelves, tastes, and preferences that may not correspond to reality, stigmatizing them and locking them into certain characteristics.

Moreover, "profiling" fits into the notion of virtual identity (not real or not trustworthy), as it is based on a potential and not necessarily real characterization of the individual. And when providing products and services in the digital environment, practices take into account this stigma marked by virtual identity, distancing the individual from society, as Erving Goffman already warned in the 1970s: "the discrepancy between real and virtual identity separates the individual from society. Based on this, we make various types of discriminations, through which effectively, and often without thinking, we reduce their life chances."³⁸

Obviously, when Erving Goffman developed his concept of stigma, he cast his gaze on the three types of stigmas present at the time: firstly, the abominations of the body - various physical deformities; secondly, the guilt of individual character, perceived as weak will, tyrannical passions, false and rigid beliefs, dishonesty, inferred from known reports of, for example, mental disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicide attempts, and radical political behavior. Finally, tribal stigmas of race, nation, and religion³⁹.

However, with due proportion, the stigmas created by "profiling" "reduce life chances" and "distance the individual from society," as advocated above, as they narrow the range of relationships and contacts of the person with various types of paid or free goods and services, making the network less democratic and more discriminatory. Another example, an individual with a virtual identity as "poor/financially without resources," whether true or not,

³⁷ Goffman, Erving, *Estigma: notas sobre a manipulação da identidade deteriorada* (Mathias Lambert trans., 4th ed., LTC 2004), 5-6.

³⁸ Goffman, Erving, *Estigma: notas sobre a manipulação da identidade deteriorada* (Mathias Lambert trans., 4th ed., LTC 2004), 20.

³⁹ Goffman, Erving, *Estigma: notas sobre a manipulação da identidade deteriorada* (Mathias Lambert trans., 4th ed., LTC 2004), 8.

will not receive promotions for international tickets and trips and/or video lessons on financial investment. Seemingly predicting what would happen in the digital world, Erving Goffman already asserted that the more personal information became available, the greater the chances of stigmatization:

In any case, once an identity support has been prepared, materialized, and becomes available, we can cling to it; a dossier can be developed that normally stays contained and filed in a folder. It can be expected that the personal identification of citizens by the State will grow as the devices that make an individual's history more accessible are refined⁴⁰.

In this scenario, on the one hand, one might imagine that this situation represents benefits to users, as they would have greater ease in finding goods and services to their liking and preference, promoting well-being, human flourishing, and market efficiency⁴¹. However, what cannot be overlooked is that humans are not rocks but rivers and are constantly changing and improving, so this habitual remaking - which also serves as the basis for the right to be forgotten - makes the stigmatization created by "profiling" often outdated and prone to causing inequality. If everyone is equal before the law, and access to the internet is a human⁴² or social right⁴³, any practice that discriminates individuals based on personal data that stagnates a user profile and channels only certain types of goods and services becomes contrary to the law.

In the same vein of equality violation, it is known that the root of human dignity also involves the protection of this legal good. It is possible to infer from the practice of "profiling" a way of treating the human being as an individual or as an instrument to achieve an end (in this case, a commercial

⁴⁰ Goffman, Erving, *Estigma: notas sobre a manipulação da identidade deteriorada* (Mathias Lambert trans., 4th ed., LTC 2004), 52.

⁴¹ Regarding positive aspects of "profiling," read: Clarke, Roger A., Profiling: a hidden challenge to the regulation of data surveillance, 4 *J.L. Info. & Sci.* 403 (Dec. 1993), <https://www.austlii.edu.au/au/journals/JILawInfoSci/1993/26.html> (last visited Jan. 4, 2024).

⁴² Regarding this subject, please refer to the "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," prepared by the UN, in which it is asserted the following: "I would like to emphasize that access to the Internet has two dimensions: access to online content without restrictions, except in some limited cases allowed by international human rights law; and the availability of the necessary infrastructure and information communication technologies, such as cables, modems, computers, and software, to access the Internet" (freely translated). Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. (last visited on Jan. 4, 2024).

⁴³ On this topic, for instance, check out the Proposed Amendment to the Constitution No. 06 of 2011: amends Article 6 of the Federal Constitution to introduce, among the social rights, the right to access the World Wide Web (Internet).

purpose). As Daniel Sarmento asserts, "the 1988 Constitution (...) endorses the idea that Law and the State exist for the person, and not the other way around. The person, in this sense, has intrinsic value and cannot be instrumentalized."⁴⁴ Laws and social practices must, therefore, treat the human being as a concrete and unique person with all their potentialities and not as an abstract subject. This implies making access to goods and services open without preconceptions based on personal traces. The difference between an abstract individual and a person is enormous, as highlighted by Ruben de Freitas Cabral:

(...) the individual who was born as the matrix of society becomes a social-piece-individual, reproducible and replaceable (...) this launched him into a process of alienation, egocentrism, and powerlessness in the face of experiential isolation. The institutions that traditionally held him psychologically in the uncertainty of life, such as the village, the church, collectivism, and more recently, the family itself, have entered a process of weakening and almost irrelevance. While the individual was considered a viscerally autonomous being, free because separated from his peers, the person is defined as free by inheritance, capable by his universality, and subject, with all other people, to his social and political life. The person does not assert itself through its isolation but through its singularity. Each person is unique⁴⁵.

Therefore, manipulating personal data to boost commerce endorses the human being as an individual (massified, atomized, replaceable) and challenges the notion of a concrete and real person, endowed with changeable potentialities, gifts, and talents. Consequently, this way of classifying and segmenting users "based on Big Data, relying on the use of consumers' personal data (...) can imply the deprivation of certain individuals' access to goods and services."⁴⁶ Consequently, equality is presented as violated, as "surveillance carried out by private and state entities, based on information obtained from databases, can lead to the classification and discrimination of individuals, significantly affecting their social opportunities,"⁴⁷ which is why "the protection of equality constitutes an important mechanism to prevent individuals' life opportunities from being limited due to their personal

⁴⁴ Sarmento, Daniel, *Dignidade da pessoa humana* (Fórum 2016), 107.

⁴⁵ Cabral, Ruben de Freitas, *A noção de indivíduo e a dimensão da pessoa humana: percursos e caminhos* (APES 2013), 6-12.

⁴⁶ Saraiva Neto, Pery, and Maiara Bonetti Fenili, Novos marcos legais sobre proteção de dados pessoais e seus impactos na utilização e tratamento de dados para fins comerciais, 1 *Rev. Est. Jur. e Soc.* 1 (Dec. 2018), 11.

⁴⁷ Mendes, Laura Schertel, *Transparência e privacidade: violação e proteção da informação pessoal na sociedade de consumo* (M.A. thesis, Faculdade de Direito, Universidade de Brasília 2008), 58.

characteristics, portrayed in databases."⁴⁸

In this same scenario, it is plausible to bring reflections on the violation of the right to privacy, especially if the basic premise of the same is considered: the domain of one's data and the consequent freedom to determine the destinies of personal information. In other words, for privacy to be safeguarded, the individual must have exclusive control, with the consequent ability to set the agenda for the good and how it will be used, including allowing other people to use it. Therefore, to respect the right to privacy as an end in itself, one of the following paths would be unavoidable: a) the prohibition of the practice of "profiling"; b) the creation of maximum transparency and information, so that consumers knew all the ramifications when agreeing to terms to provide personal data to apps, websites, and other digital tools, a more challenging option considering the dimension of hyper-vulnerability of users.

Therefore, to the extent that personal information is used without the consumer choosing how it will be manipulated through the practice of "profiling," a violation of privacy is inferred. Privacy, in this context, consists of the right to prevent a third party's activity from coming to know, discover, or disclose the particulars of a person, as highlighted by Cristiano Chaves de Farias and Nelson Rosenvald: "It is noteworthy that Internet social networks (...) can violate others' privacy. This is because, apart from the interested party's spontaneous statements, the flow of personal information on the network contributes to the loss of privacy."⁴⁹

In this regard, social actors should become aware of the value of privacy not merely as a means to achieve another end, such as property, security, autonomy, democracy, freedom, dignity, or utility and economic value (reductionist view)⁵⁰. Instead, privacy should be recognized as a value in itself, and its importance is not derived from another end to be pursued (expansive view)⁵¹.

Thus, for the right to privacy to be respected as an end in itself, one of the following paths would be indispensable: a) the prohibition of the practice of "profiling"; b) the creation of maximum transparency and information, ensuring that consumers are aware of all the implications when agreeing to the terms of providing personal data to applications, websites, and other digital tools—an option made more challenging considering the hyper-

⁴⁸ Mendes, Laura Schertel, *Transparência e privacidade: violação e proteção da informação pessoal na sociedade de consumo* (M.A. thesis, Faculdade de Direito, Universidade de Brasília 2008), 61.

⁴⁹ Farias, Cristiano Chaves de, and Nelson Rosenvald, *Curso de direito civil* (Vol. 1, 13th ed., Atlas 2015), 216.

⁵⁰ Thomson, Judith Jarvis, The right to privacy, 4 *Phil. & Pub. Aff.* 295 (Jun./Aug. 1975).

⁵¹ Rössler, Beate, *Privacies: philosophical evaluations* (Stanford Univ. Press 2004).

vulnerability of users.

III. CIVIL LIABILITY UNDER THE GENERAL DATA PROTECTION LAW, THE 1988 FEDERAL CONSTITUTION, THE CIVIL CODE, THE CONSUMER PROTECTION CODE, AND THE PUBLIC CIVIL ACTION LAW

The LGPD, enacted in August 2018, represents a legislative advancement in Brazil aimed at promoting greater stability, reliability, security, and respect for rights in the digital realm concerning personal data. It is not the first law seeking the protection of personal data, as the CDC already provided consumer protection against illegal databases and registrations (Articles 43 and 44); the CF/88 (Article 5, LXXII), and Law 9.507/97 established the citizen's right to request access, correction, and additions to information in public databases, and so forth.

Regarding the practice of "profiling," it is important to highlight the following normative vectors. Firstly, in Article 1 of the LGPD, the law makes it clear that its purpose is to regulate the processing of personal data to protect fundamental rights (among these are equality and privacy). Another crucial point concerns the definitions of processing and consent. In Article 5, Section X of the LGPD, processing includes every operation performed with personal data, including collection, production, reception, classification, use, access, reproduction, transmission, distribution, processing, filing, storage, elimination, evaluation, or control of information, modification, communication, transfer, dissemination, or extraction – verbs that fit perfectly with "profiling" (read storage, collection, use, control, and transfer of personal data). Consent, according to Section XII of the same article, is the free, informed, and unequivocal expression by which the data subject agrees to the processing of their personal data for a specific purpose. This free expression, according to Article 8 of the said law, must be in writing and prominently displayed among other clauses or by any other means that clearly demonstrates the agent's will⁵².

With this normative framework, coupled with Article 5, heading (equality) and Section X (privacy) of the CF/88, it would already be possible to infer the illegality of any conduct that could store and manipulate the data of the data subject without their consent or deviating from the given consent, such as using personal data to target advertising campaigns from various suppliers. But, as if that were not enough, Article 6 of the LGPD also states that the processing of personal data must observe purpose (legitimate, specific, and informed purposes communicated to the data subject, with no possibility of subsequent processing incompatible with these purposes),

⁵² Also: "Article 7: The processing of personal data can only be carried out in the following situations: I - with the provision of consent by the data subject." (freely translated)

necessity (limitation of processing to the minimum necessary for the accomplishment of its purposes), security (technical and administrative measures capable of protecting personal data from unauthorized access), and non-discrimination (impossibility of processing for illicit or abusive discriminatory purposes).

Furthermore, the LGPD requires the controller to have evidence that consent was obtained in accordance with the law (Article 8, §2), and any generic authorizations (without a previously specified purpose) will be null and void (Article 8, §4)⁵³, with the said consent revocable at any time in a simple and free manner (Article 8, §5). When the processing of personal data is a condition for the provision of a product or service or for the exercise of a right, the data subject will be prominently informed of this fact (Article 9, §3).

In a dialogue with the CDC, a harmony is observed involving the determination of prior and informed consent with the basic rights to adequate and clear information about services and products (Article 6, III) and freedom of choice (Article 6, II). Similarly, the requirement to highlight the clause that alerts the consumer about the storage and subsequent use of personal data, as well as the obligation to make explicit the purpose for which personal data will be used, aligns with Article 54, §4, which states that clauses limiting rights must be drafted prominently compared to others. Finally, the imposition that the supplier maintains proof that consent was obtained as provided for in the LGPD embraces the consumer's basic right to shift the burden of proof as a means of facilitating their procedural defense (Article 6, VIII).

Concerning the Civil Code of 2002, in addition to personality rights covering privacy and equality, there is a normative block dedicated to legal transactions that protect the party to the contract who did not express their will freely, being able to annul the transaction. This aligns with the nullity of generic authorizations for the use of personal data (as provided for in the LGPD). Thus, Article 112 stipulates that in statements of will, more attention will be paid to the intention embodied in them than to the literal meaning of the language, emphasizing that various general conditions of contracts on websites and apps are no more valuable than the real intention of the consumer. Moreover, legal transactions are voidable when declarations of will emanate from error (the consumer thinks they are making one deal and is concluding another) or fraud (the consumer submits to a deal they did not want because they were induced to error by the other party) (Articles 138, 145, and 171)⁵⁴. Both defects in the transaction can occur involving the use

⁵³ "Article 54, §4: Clauses that imply a limitation of consumer rights must be drafted prominently, allowing for their immediate and easy understanding." (freely translated)

⁵⁴ "Article 138. Legal transactions are voidable when declarations of will arise from

of personal data for "profiling," as the supplier may induce the user to believe they are only increasing the package of services or may have scant information that makes the consumer believe they are making a deal that does not involve their data.

Although there are no published empirical studies proving that the processing of personal data through "profiling" violates Brazilian legislation (especially equality and privacy), some indications of irregularities can be identified from the following news: a) Public Prosecutor's Office investigates exposure of data in the Positive Registry, which creates classifications of consumers based on their credit transactions⁵⁵; b) Public Prosecutor's Office proposed a Public Civil Action for the "Vivo" telecommunications company to present a report on the impact on the protection of personal data, given the need for clarification about the exact purposes for which the data collected by the company are used, including the use of personal and consumer location data⁵⁶; c) Public Prosecutor's Office initiated a Public Civil Investigation to determine responsibilities for the alleged leakage of personal data from Banco Pan customers⁵⁷; d) Public Prosecutor's Office opens an inquiry to investigate data leakage on Facebook⁵⁸; e) Public Prosecutor's Office opens an inquiry to investigate FIESP in the case of personal data leakage⁵⁹; f) Federal Public Prosecutor's Office files a lawsuit against Google for violating data protection regulations⁶⁰; g) Netshoes must pay R\$ 500,000 for the leakage of data from millions of customers⁶¹; h) Public Prosecutor's Office opens an inquiry after a report by "The Hack"⁶²; i) Public Prosecutor's Office investigates the use of personal data of children by YouTube⁶³; j) Public

error (...)." (freely translated); "Article 145. Legal transactions are voidable due to fraud (...)." (freely translated)

⁵⁵ Available at: <https://teletime.com.br/13/01/2020/mpdft-apura-vazamento-de-dados-no-cadastro-positivo/> (last visited on: Jan. 4, 2024).

⁵⁶ Available at: <http://www.azevedosette.com.br/noticias/pt/mpdft-propoe-acao-civil-publica-para-que-empresa-de-telefonica-apresente-relatorio-de-impacto-a-protecao-de-dados-pessoais/5407> (last visited on: Jan. 4, 2024).

⁵⁷ Available at: <https://www.convergenciadigital.com.br/cgi/cgilua.exe/sys/start.htm> (last visited on: Jan. 4, 2024).

⁵⁸ Available at: <https://forbes.com.br/last/2018/10/mp-abre-inquerito-para-apurar-vazamento-de-dados-no-facebook/> (last visited on: Jan. 4, 2024).

⁵⁹ Available at: https://olhardigital.com.br/fique_seguro/noticia/mp-abre-inquerito-para-investigar-fiesp-em-caso-de-vazamento-de-dados-pessoais/80111 (last visited on: Jan. 4, 2024).

⁶⁰ Available at: <http://pgt.prp.usp.br/mpf-pi-ajuiza-acao-contra-google-por-violar-normas-de-protecao-de-dados/> (last visited on: Jan. 4, 2024).

⁶¹ Available at: <https://thehack.com.br/ministerio-publico-abre-inquerito-apos-reportagem-da-the-hack> (last visited on: Jan. 4, 2024).

⁶² Available at: <https://thehack.com.br/ministerio-publico-abre-inquerito-apos-reportagem-da-the-hack> (last visited on: Jan. 4, 2024).

⁶³ Available at: <https://link.estadao.com.br/noticias/empresas,mp-investiga-uso-de>

Prosecutor's Office investigates 3 companies for selling facial recognition data⁶⁴; k) Entities fight against subway cameras that read passengers' emotions to facilitate subsequent advertising, classifying them as "happy adult," "sad young person," "angry woman"⁶⁵; l) Public Prosecutor's Office files a lawsuit due to the practice of "profiling," seeking Google to be condemned in an obligation to obtain prior, express, and highlighted consent from Gmail users across the national territory⁶⁶.

Having made these observations, attention must be turned to the institute of civil liability, which, as previously stated, not only deals with damages repair but also with prevention (in this regard, Article 6, VI, of the CDC⁶⁷, Article 12 of the Civil Code (CC/2002)⁶⁸, and Article 6 of the LGPD). However, before delving into the chapter on civil liability of the LGPD⁶⁹ (Articles 42 to 45), it is essential to bring some main pillars of this institute from the CC and the CDC, which will shed light on the analysis of the right to damages in the field of digital law, specifically concerning the practice of "profiling."

It is known that anyone who violates a right and causes harm to another is obliged to repair it (Articles 186 and 927 of the CC)⁷⁰. Even if they develop a lawful activity but exceed the limits for which the right was created (Article 187 of the CC)⁷¹, or if such damages fall within the spectrum of risks that must be borne by the activity (Article 927, sole paragraph)⁷², they must bear

dados-pessoais-de-criancas-pelo-youtube,70002406221 (last visited on: Jan. 4, 2024).

⁶⁴ Available at: <https://canaltech.com.br/seguranca/mp-investiga-3-empresas-por-vendas-de-dados-de-reconhecimento-facial-120542/> (last visited on: Jan. 4, 2024).

⁶⁵ Available at: <https://theintercept.com/2018/08/31/metro-cameras-acao-civil/> (last visited on: Jan. 4, 2024).

⁶⁶ Available at: <http://www.mpf.mp.br/pi/sala-de-imprensa/docs/acp-google> (last visited on: Jan. 4, 2024).

⁶⁷ "Article 6, VI: effective prevention and repair of individual, collective, and diffuse material and moral damages" (freely translated).

⁶⁸ "Article 12: The threat or injury to the right of personality may be demanded to cease, and damages may be claimed, without prejudice to other sanctions provided for by law" (freely translated).

⁶⁹ "Article 6: Personal data processing activities must observe good faith and the following principles: VIII - prevention: adoption of measures to prevent the occurrence of damages due to the processing of personal data" (freely translated).

⁷⁰ "Article 186: Anyone who, by voluntary action or omission, negligence, or imprudence, violates a right and causes harm to others, even exclusively moral, commits an unlawful act" (freely translated).

⁷¹ "Article 187: The owner of a right who, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, good faith, or good customs, also commits an unlawful act" (freely translated).

⁷² "Article 927, Sole paragraph: There is an obligation to repair damage, regardless of fault, in cases specified by law, or when the activity normally developed by the author of the damage implies, by its nature, a risk to the rights of others" (freely translated).

proportional compensation for the magnitude of the damage caused. Applying this to what has been discussed in this article, if the creation of "profiling" violates the LGPD, the wrongful act (contrary to the law) will be configured, and immediately after, the damage-event (violation of the legal order concerning LGPD and the rights to equality and privacy) and prejudice (harmful consequences generated by violations of rights)⁷³. Consequently, in the case of consumer relations, whether due to the defect (service does not have the expected quality for the consumer regarding their personal data) or the flaw/fact (service lacks security regarding data protection), the duty to indemnify does not require the demonstration of a breach of duty of care or intention (*culpa lato sensu*), since liability is objective⁷⁴.

In this context, moral damage will be primarily configured, as it is characterized as the violation of a legally protected non-material interest, which is the case for privacy and equality, considering that when these are violated, they do not immediately result in economic losses but mainly pose obstacles in the existential plane (happiness, dignity, life projects, etc.)⁷⁵. However, taking into account the main criteria for quantifying moral damage (degree of injury, importance of legal interests, intensity, impact on the inner and outer worlds, quantity of affected interests, loss of life projects, etc.), individual compensations would be of small amounts. Thus, collective protection is more suitable when rights of little economic relevance - but of great significance in terms of reprehensibility - can obtain judicial protection, whether compensatory or punitive through a higher indemnity amount than necessary for reparative purposes (punitive damages). In other words, it allows minor injuries to be collectively considered significant⁷⁶.

Moreover, it is emphasized that in addition to the Public Civil Action (collective protection par excellence) allowing condemnation for individual moral damages (homogeneous individual rights) or collective moral damages (diffuse or collective rights), it can have as its object the request for an obligation to do (Article 3 of the LACP)⁷⁷ to condemn individuals and legal entities dealing with personal data illegally to comply, under penalty of

⁷³ Bonna, Alexandre Pereira, and Pastora do Socorro Teixeira Leal, A quantificação do dano moral compensatório: em busca de critérios para os incisos V e X do art. 5º da CF/88, 21 *Rev. Jur. da Presidência* 124 (Feb./May 2019).

⁷⁴ "Article 14: The service provider is liable, regardless of fault, for repairing damages caused to consumers due to defects in the provision of services (...)" (freely translated).

⁷⁵ Bonna, Alexandre Pereira, and Pastora do Socorro Teixeira Leal, A quantificação do dano moral compensatório: em busca de critérios para os incisos V e X do art. 5º da CF/88, 21 *Rev. Jur. da Presidência* 124 (Feb./May 2019).

⁷⁶ Bonna, Alexandre Pereira, *Punitive damages (indenização punitiva) e os danos em massa* (Lumen Juris 2015), 51.

⁷⁷ "Article 3: Civil action may have as its object the condemnation in money or the obligation to do or not do" (freely translated).

periodic fines (*astreintes*) (Article 11 of the LACP)⁷⁸. On the other hand, following alternative forms of conflict resolution and the dematerialization of civil liability, it is also prudent to enter into a Conduct Adjustment Term (TAC) before proposing any collective action, as allowed by Article 5, §6, of the LACP: "legitimate public bodies may take commitments from interested parties to adjust their conduct to legal requirements, through penalties, which will have the effectiveness of an extrajudicial executive title."

Well then, the LGPD deals with civil liability and damages repair between its Articles 42 and 45, and, endorsing everything previously exposed about the theory of civil liability, it asserts in its Article 42 that the controller or operator who, due to the exercise of personal data processing activity, causes another person patrimonial, moral, individual, or collective harm in violation of personal data protection legislation is obliged to repair it. In the same vein, it supports the aforementioned about the applicability of collective and consumer protection, making reference to specific legislation⁷⁹.

Finally, the most important point of analysis concerns the exclusions of the duty to indemnify provided for in Article 43, items II (compliance with personal data protection legislation) and III (third-party fault). Regarding the exclusion of the processing agent having faithfully complied with the legislation, the greatest concern arises in a scenario of hyper-vulnerability of a mass of consumers with difficulties reading or understanding the digital environment, raising an alert to common supplier techniques that insert authorization clauses into adhesion contracts, without the consumer actually understanding the consequences of granting access to their data for a specific purpose. Therefore, the judiciary and supervisory authorities⁸⁰ must carefully analyze whether information about the apprehension and use of personal data was conveyed clearly and transparently to the consumer considering their cognitive reality.

As for the exclusion called third-party fault, it is essential that, at the time the judge analyzes it, they bear in mind that the general clause of the risk of activity (Article 927, sole paragraph) has, as one of its functions, to set aside certain exclusions by considering that they are within the circle of risks inherent to the activity. In this regard, thunderstorms and gales do not exempt

⁷⁸ "Article 11: In the action aimed at enforcing the obligation to do or not do, the judge will determine compliance with the provision of the due activity or the cessation of the harmful activity, under penalty of specific enforcement, or imposition of a daily fine, if this is sufficient or compatible, regardless of the plaintiff's request" (freely translated).

⁷⁹ "Article 42, §3: Actions for compensation for collective damages that have as their object the liability as provided in the caput of this article may be exercised collectively in court, observing the provisions of the relevant legislation" (freely translated).

⁸⁰ In Article 52, the LGPD authorizes the application of administrative sanctions by the national authority, such as fines, warnings, and suspension of activities in case of a violation of the law.

airlines from the duty to indemnify, nor do assaults in a bank agency break the causal link between the damage and the bank's activity. For this reason, caution must be exercised in the practice of "profiling" to evaluate that, although the leakage or manipulation of data was carried out by a third party with whom the consumer has no contractual relationship, it is possible that the actions of this third party (other websites, apps, and digital platforms) are linked to the activity of the service provider towards the consumer. For example, it is possible that the Mercado Livre website has all the data of a person X; however, by allowing company Y to audit its database, it takes advantage of selling them or manipulating them in some way. Here, the duty to indemnify will be configured even if there is abstractly third-party fault, in light of the risk of activity, just as a restaurant P will have the obligation to indemnify customer Z who became ill because the purchased meat came spoiled from supplier B.

CONCLUSION

In light of the above, it is concluded that the right to the protection of personal data at the level of human, fundamental, and personality rights proves that the general clause of the protection of the human person is open, unlimited, and porous in the face of cultural, social, and technological advances. Thus, with equality and privacy at its core, in this context, the tentacles of human dignity reach the need for individuals to have control over information about themselves and that such data do not stigmatize them.

It is also deduced, from the combined reading of the CF/88, CC/2002, LACP, LGPD, and the CDC, that the right to the protection of personal data in Brazil does not lack appropriate legislation. In other words, personal data in Brazil are not ownerless pieces of information that can be appropriated and manipulated on the internet because there is a solid normative framework that provides legal protection to individuals against the violation of their privacy and/or equality.

In this scenario, the major concern with the violation of personal data does not relate to the insufficiency of legislative material but rather to the practical difficulty of oversight and compliance with the rule requiring consumer consent in a context of hyper-vulnerability in the digital field. As highlighted by Daniel J. Solove⁸¹, the pitfalls for substantial consent involve the following aspects: a) consumers rarely read privacy policies when downloading an app or signing up on a website; b) when they do read, many do not understand the consequences and implications of sharing personal data; c) when they understand, there is not enough information basis for

⁸¹ Solove, Daniel J., Privacy self-management and the consent dilemma, 126 *Harv. L. Rev.* 1880 (2013).

making secure decisions about personal data; d) finally, even when the consumer's decision is solid, such as sharing their location with Uber, email and address with Mercado Livre, or CPF and phone number with a pharmacy for discounts, often there is no freedom of choice. In other words, without a residential address, Mercado Livre cannot deliver the product; without the location, the app driver may get lost, and without the CPF and phone number, the pharmacy will not provide the discount.

Furthermore, the point of greatest vulnerability is not obtaining the consumer's acceptance consciously but rather the necessary transparency so that if these data are used for purposes other than those expected by the consumer (address for delivering goods, location for the driver to find, CPF and phone number for the pharmacy's discount), such usage is didactically explained, with solar clarity and appropriateness to the mass of vulnerable consumers in the context of digital media.

Consequently, beyond the administrative sanctions provided for in the LGPD and the CDC, civil protection in the judicial sphere may be necessary, with importance given to those authorized to bring collective actions because, from an individual perspective, the compensatory value of moral damages (for the violation of non-material interests such as equality and privacy) is generally small, but from a collective perspective, they gain strength. However, this strength is not necessarily linked to compensatory or punitive indemnity values but also and mainly to preventive measures linked to conduct adjustment terms or collective actions for the obligation to do and not do in order to compel, under penalty of fines, digital field agents to faithfully comply with legal provisions related to the protection of personal data.

Finally, it is emphasized that future research on the topic should weigh the value of economic freedom and the importance that consumer information has acquired for the success of businesses, especially because, according to the CDC, consumer rights must be harmonized "with the need for economic and technological development" (Article 4, III). However, as a projection of personality, human, and fundamental rights, the protection of personal data should not lose sight of preventing discriminations that lack constitutional foundation, such as those that may hinder access to credit or jobs for certain groups. Additionally, it discourages practices that may reduce the freedom and autonomy of individuals, such as decisions based on uninformed data analysis and non-transparent criteria⁸².

⁸² Teffé, Chiara Spadaccini de, and Gustavo Tepedino, Consentimento e proteção de dados pessoais na LGPD, in *Lei Geral de Proteção de Dados Pessoais e suas repercussões no direito brasileiro* (Gustavo Tepedino et al. eds., Revista dos Tribunais 2019), 288.

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