DIGITAL PRIVATE AUTONOMY: EXERCISING THE RIGHT TO FREEDOM IN AN ONLIFE WORLD

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Abstract: The research proposes, as its theme, the investigation and understanding of the legal nature of digital autonomy. Thus, the research problem is posed as follows: how does private autonomy materialize in the digital context? As a hypothesis, it is assumed that digital autonomy constitutes a branch of private autonomy with its own specific characteristics in the digital environment. The general objective of the research is, therefore, to investigate the limits and specifications of the principle of private autonomy in the electronic context. As a theoretical framework, the concept of mutable private autonomy in the conception of Pietro Perlingieri will be used. The reason why this study is done can be translated by the need to protect human beings in the digital environment.

Keywords: private autonomy; digital autonomy; legal nature; vulnerability; digital consumer.

INTRODUCTION

Just like any other field of knowledge, it is certain that Private Law remains supported by several principles. Among these principles, perhaps the most important is private autonomy, which has been chosen as the theme of this study, set against a society pressured by today's digital paradigm.

If it is true that social relations—including private relations—have been profoundly transformed by the digital context, especially over the last three decades, it becomes relevant to discuss how private autonomy materialises in the online environment. In other words: is it possible to envisage the existence of "digital private autonomy"? If so, what is its nature, and how does it differ from the concept traditionally employed to define this principle? Would this be yet another sub-species of the principle, alongside the well-established "contractual autonomy" and "existential autonomy"?

The reason this study is undertaken lies in the need to protect human beings in the digital environment. This appears to be one of the main

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challenges of the "onlife" universe: establishing limits on the exercise of freedom, both for users and for the companies that offer products and services in this context. Without limits to digital autonomy, uncertainties may arise—for instance, whether a certain user owns or merely possesses a digital asset; when it is legitimate to exclude or suspend a social-media profile; or what legal duties exist so that State control can be more transparent and less subject to the numerous criticisms currently levelled in Brazil and worldwide.

For the sake of consistency within the legal system, this important reality should not, in principle, produce outcomes detrimental to the digital consumer—manifested, for instance, in abusive clauses within terms of use. The absence of adequate regulation of digital autonomy ends up relegating online adhesion contracts to a relevance that clearly fails to satisfy the protective aims toward the human person embodied in the 1988 Federal Constitution.

Accordingly, the goal is to understand how private autonomy is perceived in the digital realm so that its limits may be outlined and respected. Thus, the conduct of internet users will be duly circumscribed by the civil-constitutional logic and not merely by a clause in an adhesion contract. This will afford greater legal certainty to internet users and greater protection to individuals. Tracing those limits therefore safeguards human dignity and ensures the effectiveness of the Brazilian legal order in the digital context.

To reach that end, the general objective is to determine the legal nature of digital autonomy. As specific objectives, the study seeks to define the legal nature of private autonomy and to delineate its salient particularities when exercised in the digital environment.

To achieve these aims, national legal scholarship on the theme will be surveyed, adopting as theoretical framework Pietro Perlingieri's notion of mutable private autonomy.

I. CONCEPTS

A. Private autonomy

A first pillar to be erected concerns the concept of private autonomy itself. To grasp this concept, one must first understand that private autonomy is a civil-constitutional principle underpinning private relations. Grasping this principle is crucial to apprehend the logic within which relations between private parties operate, for it is by virtue of private autonomy that one can conceive of legal acts in the broad sense (*atos jurídicos lato sensu*). Thus, a juridical act (*ato jurídico stricto sensu*) or a juridical transaction (*negócio jurídico*) is only conceivable because private autonomy lies at its base.

From a constitutional standpoint, private autonomy is the clearest

demonstration of the fundamental right to freedom. The legal order grants each subject the power to make choices in the private sphere, with respect for plurality and diversity, enshrined in the principle of the democratic rule of law. Hence, in the vast field of the private sphere, it is entirely legitimate to decide what individual model of the "good life" one wishes to pursue. The State, in principle, should not interfere in these choices except where they clash with interests equally important and worthy of state protection.

For the preservation of democracy and from an ideal perspective, the State should play the role of an observer of the private scene. Its intervention must be minimal so that the broadest range of colours and truly private interests can flourish under its aegis. For these reasons, enshrining individual private autonomy is essential, whether for the deliberation of patrimonial, existential, or mixed interests.

To comprehend the principle of private autonomy properly, one must first step back to recall what principles are in legal science. Marcos Bernardes de Mello explains that principles "constitute the expression of the values that inspire the law of a given legal community—the repository of those values. These values represent an essential axiological element in structuring the legal order of a community."[1] Mello[2] further notes that these values are general rather than specific; thus, principles are distinct from rules. Both are applicable, but principles do not appear in the closed, specific form of rules; they adapt to the concrete case, thereby allowing constitutional values to retain their effectiveness.

In the same vein, Zampier Lacerda points out that "when speaking of principles, one must bear in mind that their essential function is to prescribe ends to be attained, serving as the foundation for applying the constitutional order."[3] In this way, one can understand that private autonomy, as a principle, has among its functions ensuring that the Federal Constitution is effective. This instrument proves, in a certain sense, mutable depending on the concrete case, since its central purpose is to guarantee that constitutional values are respected and applied in each concrete situation.

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[1] Mello, Marcos Bernardes de. *Teoria do Fato Jurídico: Plano da Existência.* 23rd ed. São Paulo: Saraiva Jur, 2022, 27, freely translated. Originally: *"constituem a expressão dos valores que inspiram o direito de uma comunidade jurídica determinada, o repositório desses valores. Os valores representam dado axiológico essencial na estruturação do ordenamento jurídico de uma comunidade".*

[2] Mello, Marcos Bernardes de. *Teoria do Fato Jurídico: Plano da Existência.* 23rd ed. São Paulo: Saraiva Jur, 2022, 27.

[3] Lacerda, Bruno Torquato Zampier. *Estatuto jurídico da inteligência artificial: entre categorias e conceitos, a busca por marcos regulatórios.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2022, 104, freely translated. Originally: *"quando se fala em princípios, deve-se ter em mente que a função precípua desta espécie é prescrever fins a serem atingidos, servindo de fundamento à aplicação do ordenamento constitucional".*

Touching on the intersection of the principle with the digital realm, Zampier Lacerda states: "private autonomy in the field of AI will submit to the fluid limits of the current legal order, in particular to constitutional values and norms."[4]

It is therefore essential to understand that these principles may appear in the legal order via the technique of general clauses, for when employing this legislative technique "the legislator deliberately constructs the norm in vague terms so that, through systemic openings, the values enshrined in the Constitution may penetrate."[5] The objective is thus to guarantee the effectiveness of the Constitution in the civil domain and across the entire body of law.

With this general panorama traced, we proceed to the central purpose of this section, namely the proper conceptualisation of the principle, drawing on the work identified as the theoretical landmark.

The concept of private autonomy itself has been shaped by various authors. As Perlingieri[6] teaches, this concept is moulded both by the historical moment and by the legal order of each country. It is therefore easy to perceive that the construction of this concept was modified, above all, by the transition from the 1916 Civil Code to the 1988 Constitution and the 2002 Civil Code. If the legal order and historical context of the twentieth century allowed for the perception of "freedom of will" (autonomia da vontade), the context of the early twenty-first century allows for the visualisation of "private autonomy." On this point, the authors teach:

> "Along this path toward a humanised—if not civilised—private law, the sacredness of freedom of will collapses, replaced by a renewed notion of private autonomy, tied to the principles of Human Dignity (art. 1, III, CF) and Economic Order (art. 170, CF). Private autonomy is forged in the human freedom to build one's own life, exercising consent in existential choices and in the development of patrimonial relations."[7]

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[4] Lacerda, Bruno Torquato Zampier. *Estatuto jurídico da inteligência artificial: entre categorias e conceitos, a busca por marcos regulatórios.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2022, 114, freely translated. Originally: *"a autonomia privada no campo da IA se submeterá aos limites fluídos do ordenamento jurídico vigente, em especial dos valores e normas constitucionais".*

[5] Lacerda, Bruno Torquato Zampier. *Estatuto jurídico da inteligência artificial: entre categorias e conceitos, a busca por marcos regulatórios.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2022, 117, freely translated. Originally: *"o legislador constrói a norma de forma propositalmente vaga, para que por meio das aberturas sistêmicas, possam penetrar os valores consagrados na Constituição".*

[6] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002.

[7] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 136,

Thus, freedom of will had its limits chiefly drawn by the 1916 Civil Code, notably individualistic and patrimonial:

> "Freedom of will, offspring of nineteenth-century voluntarism, conceived the contractual bond as the simple fusion of declarations of will. The autonomy of willing was the sole foundation of binding force."[8]

A question may arise: why was this idea—subjecting autonomy exclusively to willing—modified, or, in other words, superseded? The answer lies in the fact that will alone is insufficient genuinely to protect human beings. When speaking of legal relations between subjects of law, we often speak of two poles: a stronger and a weaker one.

On this point, Zampier Lacerda explains:

> "Freedom of will was the product of the liberal ideology so in vogue in nineteenth-century law, bringing a notion of limitless autonomy, devoid of state brakes. Such a milieu turned this individual freedom into arbitrariness, with the strong dominating the weak." [9]

For this reason, when thinking of private autonomy, one also thinks of the entire legislative framework surrounding it, whose purpose is to protect human beings. Farias and Rosenvald emphasise that:

> "Constitutional solidarism added three other principles to private autonomy: objective good faith, the social function of the contract, and contractual justice (or balance). These three principles do not restrict private autonomy; on the contrary, they enhance it, redressing what raw reality has unbalanced—for the force of some wills is greater than that of others." [10]

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freely translated. Originally: *"Neste percurso rumo a um direito privado humanizado e, por que não dizer, civilizado, desaba a sacralidade da autonomia da vontade, substituída por uma noção renovada de autonomia privada, atada aos Princípios da Dignidade Humana (art. 1, III, CF) e da Ordem Econômica (art. 170, CF). A autonomia privada é forjada na liberdade do ser humano de edificar a sua própria vida, exercendo o seu consentimento em suas escolhas existenciais e no desenvolvimento das relações patrimoniais".*

[8] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 138, freely translated. Originally: *"A autonomia da vontade, fruto do voluntarismo dos oitocentos, concebia o vínculo contratual como resultado de simples fusão entre manifestações de vontade. A autonomia do querer era o único fundamento da vinculatividade".*

[9] Lacerda, Bruno Torquato Zampier. *Bens digitais: cybercultura, redes sociais, e-mails, músicas, livros, milhas aéreas, moedas virtuais.* 2nd ed. Indaiatuba: Editora Foco, 2021. E-book, freely translated. Originally: *"A autonomia da vontade era fruto da ideologia liberal, tão em voga no direito oitocentista, trazendo uma noção de autonomia ilimitada, sem freios estatais. Tal conjuntura fez com que essa liberdade individual se convertesse em arbítrio, com o domínio do fraco pelo forte".*

[10] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 137,

Private autonomy today must be read through the lens of the 2002 Civil Code and, chiefly, of the 1988 Constitution. Patrimonial and individual interests remain protected by the legal order, augmented by the interests of the entire collectivity. As Rosenvald[11] teaches, this relationship between private and collective interests enables the identification of "counter-rights." The aim is to achieve both individual and collective outcomes simultaneously. There are thus reciprocal rights and duties between individuals and the collectivity, both safeguarded by law. In this regard, Zampier Lacerda states:

> "Within private autonomy, beyond will, one must seek the interests at stake. Will is the starting point, but it cannot define the end point. To every will one must add legal regulation, as a means of accommodating protectable interests. The interest pursued by the parties must be fully consonant with the ends sought by the legal order. […] And in a Constitutional State, every 'want' will be circumscribed by what can be drawn from the Constitution—its values and norms. […] The Constitution, and the legal order as a whole, create mechanisms to control the legitimacy of exercising autonomy." [12]

This is the lens that will likewise be applied to comprehend digital autonomy in the next topic.

Pietro Perlingieri defines private autonomy as "the power, recognised or granted by the state legal order to an individual or group, to determine legal vicissitudes […] as a consequence of behaviours—freely assumed to some extent." [13]

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freely translated. Originally: *"O solidarismo constitucional adicionou à autonomia privada a companhia de outros três princípios: A boa-fé objetiva, a função social do contrato e a justiça (ou equilíbrio) contratual. Estes três princípios não restringem a autonomia privada, pelo contrário: valorizam-na, equilibrando aquilo que a realidade crua tratou de desequilibrar, afinal o poder da vontade de uns é maior do que o de outros".*

[11] Rosenvald, Nelson. "A tridimensionalidade constitucional da propriedade." *Revista da Faculdade Pan-Americana de Administração e Direito* 1, no. 2 (2021): 1–24. https://periodicosfapad.emnuvens.com.br/gtp/article/view/53/26. Accessed March 17, 2025.

[12] Lacerda, Bruno Torquato Zampier. *Estatuto jurídico da inteligência artificial: entre categorias e conceitos, a busca por marcos regulatórios.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2022, 112, freely translated. Originally: *"No âmbito da autonomia privada, para além da vontade deve se buscar os interesses em jogo. A vontade seria o ponto de partida, mas não pode definir o ponto de chegada. A toda vontade deve-se acrescer a regulamentação legal, como meio de se permitir o atendimento de interesses tuteláveis. O interesse buscado pelas partes há de estar em total consonância aos fins pretendidos pelo ordenamento jurídico. [...] E num Estado Constitucional, todo querer ficará circunscrito ao que se extrai da Constituição, seus valores e normas. [...] A Constituição e o ordenamento jurídico como um todo, criam mecanismos de controle da legitimidade do exercício da autonomia".*

[13] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.*

In a similar intellectual line, Brazilian authors define private autonomy as "the power granted to the subject to create an individual norm within the boundaries conferred by the legal order." [14]

We are thus speaking of two main nuclei: the individual's power to create his or her own norms and an external factor limiting that power. In this sense, the Italian master teaches: "An act intended to obtain a result may find its own regulation in heteronomous sources: in the law, in the powers of the Public Administration, in collective bargaining, etc." [15]

Pompeu explains that it is only possible to speak of autonomy if one also speaks of heteronomies:

> "What is meant, contrary to an absolute notion of freedom, is the exercise of this faculty in the face of the heteronomies that comprise and resist it. This means that it is impossible to realise freedom—and here, private autonomy—without the influence of duties, needs, and existing limitations. […] What is expected, then, of the Democratic Rule of Law is the recognition of autonomy amid heteronomies." [16]

Autonomy and heteronomy are antagonistic concepts, yet they complete one another, composing the reality in which juridical transactions are embedded. On these concepts, Zampier Lacerda explains that:

> autonomy would mean something like "one's own norm," the antonym, therefore, of heteronomy, meaning "norm by another." Hence, when autonomy is exercised, the norm will emanate from the subject him- or herself, who sets rules of conduct. By contrast, with

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2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002, 17, freely translated. Originally: *"o poder, reconhecido ou concedido pelo ordenamento estatal a um indivíduo ou a um grupo, de determinar vicissitudes jurídicas [...] como conseqüência de comportamentos – em qualquer medida – livremente assumidos".*

[14] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 138, freely translated. Originally: *"o poder concedido ao sujeito para criar a norma individual nos limites deferidos pelo ordenamento jurídico".*

[15] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002, 18, freely translated. Originally: *"O ato que se propõe a obter um resultado pode encontrar o próprio regulamento em fontes heterônomas: na lei, nas competências da Administração Pública, na contratação coletiva etc.".*

[16] Pompeu, Renata Guimarães. *O exercício dialógico da autonomia privada como expressão da concidadania: por uma visão crítico-reconstrutiva da relação jurídica contratual.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2012, 74, freely translated. Originally: *"O que se entende, ao contrário da noção absoluta de liberdade, é o exercício dessa faculdade diante das heteronomias que a compõem e lhe fazem resistência. Isso significa dizer que não é possível a realização da liberdade, e aqui, da autonomia privada, sem a influência dos deveres, das necessidades e das limitações existentes. [...] O que se espera então do Estado Democrático de Direito é o reconhecimento da autonomia em meio às heteronomias".*

> heteronomy, the norm originates from an external entity and reaches the subject. [17]

It follows that speaking of private autonomy—or of the subject creating his or her own norms—also means speaking, in parallel, of limits imposed by the legal order. Those limits address two areas: one in which the individual is free to act, if desired; and another in which the individual's will to choose is suppressed. As Pompeu notes, "To think about freedom it is necessary not to overlook that it always occurs amid countless limitations, duties, obligations, impositions."[18] This freedom to act is therefore limited and restricted.

Thus far, the concept outlined refers to a genus: private autonomy. This genus certainly comprises several species, which may possess economic or existential content: "Identifying [private autonomy] as a genus, we can situate three species as 'contractual autonomy,' 'unilateral negocial autonomy,' and 'existential autonomy.'"[19] Specifying and exemplifying it in one of its economic guises, an individual has the faculty of choosing to enter into a contract of sale, provided that it falls within the limits established by Brazilian law. Those limits relate to various aspects, such as the validity of the juridical transaction, enshrined in article 104 of the Civil Code[20], or the Social Function present both in the Constitution (art. 5, XXIII—granting the Social Function of Property the status of a fundamental right)[21] and in article

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[17] Lacerda, Bruno Torquato Zampier. *Bens digitais: cybercultura, redes sociais, e-mails, músicas, livros, milhas aéreas, moedas virtuais.* 2nd ed. Indaiatuba: Editora Foco, 2021. E-book, 173, freely translated. Originally: *"autonomia significaria algo como "norma própria"; antônimo, portanto, da expressão heteronomia, que teria como significado "norma por outro". Donde se conclui que: quando se tem exercício de autonomia, a norma partirá do próprio sujeito, que definirá para si regras de conduta. Ao revés, quando se tem heteronomia, a norma partirá de um ente externo, alcançando o sujeito".*

[18] Pompeu, Renata Guimarães. *O exercício dialógico da autonomia privada como expressão da concidadania: por uma visão crítico-reconstrutiva da relação jurídica contratual.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2012, 73, freely translated. Originally: *"Para pensar a liberdade é necessário não negligenciar que ela sempre se realiza em meio a inúmeras limitações, deveres, obrigações, imposições".*

[19] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 143, freely translated. Originally: *"Identificada esta [autonomia privada] como um gênero, podemos situar as suas três espécies como 'autonomia contratual', 'autonomia negocial unilateral' e 'autonomia existencial'".*

[20] Brazil. *Civil Code (Law No. 10.406 of January 10, 2002).* Brasília: Presidency of the Republic, 2024. http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed March 17, 2025.

[21] Brazil. *Constitution of the Federative Republic of Brazil of 1988.* Brasília: Presidency of the Republic, 2024. https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed March 17, 2025.

421 of the Civil Code[22], which establishes that contractual freedom shall be exercised within the limits of the Social Function of the Contract.

There is also the possibility for an individual to make choices concerning essential, innate, lifelong attributes that do not have economic ends. After all, as noted, the concept of private autonomy is intrinsically linked to the power to make decisions—choices limited by the normative-legal values of society. Those choices may aim at fulfilling patrimonial interests, existential interests, or both combined. Regarding the existential dimension of private autonomy, Farias and Rosenvald teach:

> "Unlike contractual autonomy, existential freedoms are not mere instruments for promoting collective objectives, however valuable they may be. Rather, it is up to the legal order to safeguard the citizen's sphere of private autonomy in its most significant dimension: the human person's power to self-govern, to make existential choices and live according to them, provided that they do not harm third-party rights."[23]

They further exemplify the matter by noting:

> "Consent to the removal of organs while alive for transplantation purposes is a juridical transaction devoid of patrimoniality (sole paragraph, art. 13, Civil Code, together with § 4 of art. 199, CF), characterising an act of existential autonomy over one's own body."[24]

Hence, the legislative boundary limiting the field of human choice in matters of existential private autonomy can be perceived, for instance, in Chapter II ("Rights of Personality") of Title I ("Natural Persons") of Book I ("Persons") in the General Part of the Civil Code.[25]

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[22] Brazil. *Civil Code (Law No. 10.406 of January 10, 2002)*. Brasília: Presidency of the Republic, 2024. http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed March 17, 2025.

[23] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 145, freely translated. Originally: *"Identificada esta [autonomia privada] como um gênero, podemos situar as suas três Diversamente da autonomia contratual, as liberdades existenciais não são meros instrumentos para a promoção de objetivos coletivos, por mais valiosos que o sejam, afinal cabe ao ordenamento tutelar a esfera de autonomia privada do cidadão na sua dimensão mais relevante: o poder da pessoa humana de se autogovernar; de fazer escolhas existenciais e viver de acordo com elas, desde que não lese direitos de terceiros".*

[24] Farias, Cristiano Chaves de, and Nelson Rosenvald. *Curso de Direito Civil – Contratos, Teoria Geral e Contratos em Espécie.* 4th ed. Salvador: Juspodivm, 2014, 144, freely translated. Originally: *"o consentimento para remoção de órgãos em vida, para fins de transplante, é um negócio jurídico despido de patrimonialidade (§ único, art. 13, Código Civil, c/c § 4., art. 199, CF), caracterizando ato de autonomia existencial de disponibilidade sobre o próprio corpo".*

[25] Brazil. *Civil Code (Law No. 10.406 of January 10, 2002)*. Brasília: Presidency of the Republic, 2024. http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm.

Summarising the concept of private autonomy, Pompeu explains that "The notion of autonomy is fragmented so that one may perceive the various contexts in which it develops and their particularities, as well as to visualise more consistently its cultural changes over different eras."[26]

Given all the above, one asks: does the electronic context, with its peculiarities, allow the perception of a new notion of private autonomy? Would this new notion appear as a genus alongside private autonomy, or would it fit better as one of its species? These questions will be addressed in the next topic.

B. Digital autonomy

Private autonomy in the electronic environment is a phenomenon that exists in factual reality before being perceived within the legal context, whether through legislation or doctrinal work. The aim of this section, and of the work as a whole, is to name, understand, and categorise an already-existing phenomenon, with a view to safeguarding and protecting individuals in the electronic context. After all, facts precede Law.

With that objective in mind, it is possible to perceive that the concept of digital autonomy is linked to private autonomy, being understood as one of its unfolding manifestations. This can be observed from the fact that, as shown in the previous section, private autonomy adapts to its historical context. Since the online universe has expanded over recent decades, it becomes natural that the exercise of freedom of choice increasingly occurs in this virtual environment.

In this regard, Pietro Perlingieri writes: "Private autonomy cannot be determined in the abstract but only with reference to the specific legal order in which it is studied and to the historical experience that, in various ways, raises its demand."[27]

It is thus valid to pursue the following intellectual line, as Martoni[28] sets

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Accessed March 17, 2025.

[26] Pompeu, Renata Guimarães. *O exercício dialógico da autonomia privada como expressão da concidadania: por uma visão crítico-reconstrutiva da relação jurídica contratual.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2012, 72, freely translated. Originally: *"A noção de autonomia é fracionada para que se percebam diversos contextos em que ela se desenvolve e suas particularidades, além de se poder visualizar de forma mais consistente suas alterações culturais em épocas diversas".*

[27] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002, 17, freely translated. Originally: *"A autonomia privada pode ser determinada não em abstrato, mas em relação ao específico ordenamento jurídico no qual é estudada e à experiência histórica que, de várias formas, coloca a sua exigência".*

[28] Martoni, Mariana Costa. *Transmissão de bens digitais inter vivos: um estudo acerca da possibilidade jurídica e da lacuna legislativa brasileira.* Master's diss., Pontifícia

out:

> "The nineteenth-century context, marked by a strong patrimonialist bias, gave rise to freedom of will; the principled context of the 1988 Constitution created room for the applicability of private autonomy; and the digital context in which twenty-first-century society is immersed allows for studying a derivation of private autonomy: digital autonomy."

Thus, since the internet and the digital context provide new experiences and ways of living for all humanity, it is understood that private autonomy will also undergo mutation and transformation. The question then becomes whether there is truly a new genus—digital autonomy—or whether it is merely a new species of private autonomy.

To resolve this, one must determine the legal nature of digital autonomy and, to that end, understand what "legal nature" entails. Zampier Lacerda explains:

> "Seeking the legal nature means, essentially, investigating the fundamental elements that comprise a given phenomenon relevant to Law. From there, one should classify that phenomenon within existing legal categories, outlining the common characteristics, its governing principles, and the applicable legal framework. Failing an existing category, it may be necessary to create a new one, given the dynamic character of society and, consequently, of Law as a science."[29]

Given the dynamic and peculiar character of twenty-first-century digital society, as well as Perlingieri's[30] adaptable concept of private autonomy, it is understood that digital autonomy is a new species of the genus private autonomy. Accordingly, digital autonomy is private autonomy applied to the

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Universidade Católica de Minas Gerais, 2023, 50, freely translated. Originally: *"O então contexto oitocentista, marcado pelo forte viés patrimonialista fez resplandecer a autonomia da vontade; o contexto principiológico da Constituição da República de 1988 deu espaço à aplicabilidade da autonomia privada; e o contexto digital em que a sociedade do século XXI está inserida permite o estudo de um desdobramento da autonomia privada: a autonomia digital".*

[29] Lacerda, Bruno Torquato Zampier. *Estatuto jurídico da inteligência artificial: entre categorias e conceitos, a busca por marcos regulatórios.* PhD diss., Pontifícia Universidade Católica de Minas Gerais, 2022, 66, freely translated. Originally: *"Buscar a natureza jurídica é, essencialmente, investigar sobre os elementos fundamentais que integram um determinado fenômeno relevante para o Direito. A partir daí, deve se proceder à classificação desse fenômeno dentre as categorias jurídicas já existentes, traçando as características comuns, os princípios que a regem e o estatuto jurídico aplicável. Não havendo categoria, é possível que se passe à criação de uma nova, ante ao caráter dinâmico da sociedade e consequentemente do Direito enquanto ciência".*

[30] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002.

virtual context—with its particularities and specificities—rather than a new legal category.

This understanding is reflected in the Final Report presented by the committee of jurists responsible for revising and updating the Civil Code, in April 2024, to the Federal Senate[31] plenary. That report underpins Bill PL 04/2025[32], currently before the Senate. The committee presents private autonomy as a principle applicable to Digital Contract Law and defines it as "the recognition of the parties' freedom to create digital transactions, provided that they do not contravene current legislation, especially mandatory rules and public-order norms."[33] Thus, private autonomy is recognised as a principle present both in analogue and digital contexts.

Building on the proposal of this study, it is deemed convenient and necessary to include the designation "Digital Autonomy," whether in PL 04/2025 or in academic texts. When considering the myriad possibilities of action that an individual might possess in the electronic context, one should refer to digital autonomy.

The reasons for proposing this new legal term are tied to the digital universe's context, which possesses particularities diverging from the analogue. Transferring the ownership of a digital asset—such as an e-book or powers in an electronic game—presents distinct specificities from transferring a movable good such as a vehicle. It is worth noting that, regarding the legal nature of patrimonial digital goods, the committee of jurists classifies them as movable property.[34]

Naming new institutes emerging in factual reality creates greater legal certainty and a favourable legal environment for preserving and safeguarding human dignity and fundamental rights—especially the right to digital property and the realisation of existential situations in the virtual world.

If digital autonomy is a species deriving from the genus private

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[31] Brazil. Federal Senate. Commission of Jurists Responsible for the Revision and Update of the Civil Code. *Final Report of the Commission of Jurists Responsible for the Revision and Update of the Civil Code.* Brasília: Federal Senate, April 19, 2024.

[32] Brazil. Federal Senate. *Bill No. 4 of 2025: Updates Law No. 10.406 of January 10, 2002 (Civil Code) and Related Legislation.* Brasília: Federal Senate, 2025. https://www25.senado.leg.br/web/atividade/materias/-/materia/166998. Accessed March 17, 2025.

[33] Brazil. Federal Senate. *Bill No. 4 of 2025: Updates Law No. 10.406 of January 10, 2002 (Civil Code) and Related Legislation.* Brasília: Federal Senate, 2025. https://www25.senado.leg.br/web/atividade/materias/-/materia/166998. Accessed March 17, 2025, 215, freely translated. Originally: *"o reconhecimento da liberdade das partes na criação de negócios digitais, desde que não contrariem a legislação vigente, sobretudo as normas cogentes e de ordem pública".*

[34] Brazil. Federal Senate. Commission of Jurists Responsible for the Revision and Update of the Civil Code. *Final Report of the Commission of Jurists Responsible for the Revision and Update of the Civil Code.* Brasília: Federal Senate, April 19, 2024, 278.

autonomy, it can likewise be argued that this species subdivides into patrimonial and extra-patrimonial digital autonomy.

Thus, regarding digital autonomy in its patrimonial character, it would be valid to consider the possibility of a patrimonial digital good forming the object of an obligation. One could have a digital asset as the object of a sale contract (airline miles, a YouTube channel, a blog, etc.); a social-media profile with a large audience as the object of a loan for use (*commodatum*); or even the donation of an NFT (non-fungible token).

Digital existential autonomy, meanwhile, might be observed in heirs' ability to access a deceased person's email inbox, or in a person's uploading photos and videos to a social-media network whose audience is largely composed of close acquaintances.

A final point to be raised concerns the principle of human dignity. To speak of private autonomy is to speak of human dignity. It is the pillar supporting the legal order and, consequently, the institute of digital autonomy.

> "Acts of autonomy thus have diverse foundations; yet they share a common denominator in the need to be directed toward interests and functions that merit protection and are socially useful. And in social utility there is always the requirement that acts and activities not clash with safety, freedom, and human dignity."[35]

Hence, digital autonomy is not confined to the contractual aspect. Zampier Lacerda[36] explains that, in private autonomy, one can speak of contractual private autonomy, unilateral negocial autonomy, and existential autonomy. Since the concept of digital autonomy derives from private autonomy, beyond contractual digital autonomy, one can likewise conceive of unilateral negocial digital autonomy and existential digital autonomy.

In addition to outlining the first contours of digital autonomy, it should be borne in mind that it manifests in different degrees and variations "depending on factors such as current legislation and the electronic contracts present in relationships between consumers and suppliers."[37] Therefore, it is

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[35] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002, 9, freely translated. Originally: *"Os atos de autonomia têm, portanto, fundamentos diversificados; porém encontram um denominador comum na necessidade de serem dirigidos à realização de interesses e de funções que merecem tutela e que são socialmente úteis. E na utilidade social existe sempre a exigência de que atos e atividades não contrastem com a segurança, a liberdade e a dignidade humana".*

[36] Lacerda, Bruno Torquato Zampier. *Bens digitais: cybercultura, redes sociais, e-mails, músicas, livros, milhas aéreas, moedas virtuais.* 2nd ed. Indaiatuba: Editora Foco, 2021. E-book.

[37] Martoni, Mariana Costa. *Transmissão de bens digitais inter vivos: um estudo acerca da possibilidade jurídica e da lacuna legislativa brasileira.* Master's diss., Pontifícia

necessary to study some adhesion contracts that permeate legal relationships in the digital context.

II. DISCREPANCY BETWEEN THE ANALOGUE AND DIGITAL REALITIES

In the previous chapter, the concept of private and digital autonomy was studied. This chapter aims to understand how such institutes are perceived in factual reality and in the digital context so as to trace the particularities arising from this second context.

To understand how internet users' digital autonomy is exercised, one must study electronic terms of use—adhesion contracts commonly entered into by people of all ages who use the World Wide Web.

In the absence of specific legislation regulating the topic, these terms seek to outline the limits of individual and platform conduct in the electronic environment. It is therefore first necessary to understand what terms of use are.

As Almeida[38] explains, what differentiates them from other adhesion contracts is merely the medium in which they are concluded. Thus, like contracts concluded in analogue media, electronic adhesion contracts are those whose clauses are drawn up solely by one of the contractual poles. The internet user's manifestation of will is seen only in whether he or she chooses to adhere to all stipulated content.

In this regard, Claudia Marques[39] explains:

> "Thus, the consumer is limited to accepting all clauses wholesale (often without even reading them fully), which have been unilaterally and uniformly pre-drafted by the company, thereby assuming the role of mere adherent to the company's declared will in the massified contractual instrument."

One noteworthy issue is that, in many cases, users are unaware of what

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Universidade Católica de Minas Gerais, 2023, 51, freely translated. Originally: *"a depender de fatores como a legislação vigente e os contratos eletrônicos que estão presentes na relação entre consumidores e fornecedores".*

[38] Almeida, Daniel Evangelista Vasconcelos. "A validade do termo de adesão digital." In *Direito Civil na contemporaneidade*, edited by Fernanda Moraes de São José, Leonardo Macedo Poli, and Renata Montovani de Lima, 75–96. Belo Horizonte: D'Plácido, 2017, 75-96.

[39] Marques, Claudia Lima. *Contratos no Código de Defesa do Consumidor: o novo regime das relações contratuais.* 5th ed. São Paulo: Editora Revista dos Tribunais, 2005, 71, freely translated. Originally: *"Desta maneira, limita-se o consumidor a aceitar em bloco (muitas vezes sem sequer ler completamente) as cláusulas, que foram unilateral e uniformemente pré-elaboradas pela empresa, assumindo, assim, um papel de simples aderente à vontade manifestada pela empresa no instrumento contratual massificado".*

has been stipulated in these contracts and therefore do not reflect on the contractual content. There is a clear legal vulnerability of this consumer.

Moreover, this scenario raises the question of contractual validity, since the consumer's manifestation of will is compromised. Almeida presents as a solution the use of techniques similar to those employed in the Italian context:

> "In Italy, there is an obligation on the supplier of goods or services, when it comes to a restrictive clause, to prove that the consumer has read it, doing so through a specific signature for that clause. The same should apply to adhesion terms in digital media. If there is a clause restricting the consumer's right, the consumer must assent to it via a pop-up, for instance. In this way, the supplier would be fulfilling its duty to inform, and the consumer would clearly know the conditions to which he or she is subjected."[40]

Thus, following the Italian model, the user would need to prove having read the contractual clauses—something scarcely credible nowadays.

As shown earlier, many actions in the electronic environment demonstrate how internet users' digital autonomy is exercised: creating a profile on a social network; purchasing digital goods; or even taking out loans of such digital assets. Hence, some clauses from existing terms of use offered by well-known platforms will be analysed to understand the autonomy afforded to individuals in this context.

The first contract to be analysed is that of the social network TikTok. On this platform, users may upload short videos on myriad topics. One first point of discussion is that the platform forbids lending the account without its own authorisation, as seen in the clause: "You may not: […] use or attempt to use another person's account, service or system without TikTok's authorisation, or create a false identity on the Services."[41]

When considering legal science and its permissions and prohibitions, one must keep in mind the benefit and protection of the individual and of the

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[40] Almeida, Daniel Evangelista Vasconcelos. "A validade do termo de adesão digital." In *Direito Civil na contemporaneidade*, edited by Fernanda Moraes de São José, Leonardo Macedo Poli, and Renata Montovani de Lima, 75–96. Belo Horizonte: D'Plácido, 2017, 82, freely translated. Originally: *"Na Itália, existe uma obrigação de o fornecedor de bens ou serviços, tratando-se de cláusula restritiva, provar que o consumidor a leu, fazendo isso através de urna assinatura específica para aquela cláusula. Assim também deveria ser para os termos de adesão em meio digital. Caso tenha-se uma cláusula que restrinja o direito do consumidor, este deve anuí-la através de uma pop-up, por exemplo. Desse modo o fornecedor estaria cumprindo o seu dever de informar e o consumidor saberia, de forma clara, quais são as condições a que se sujeita".*

[41] TikTok. "Terms of Service." 2020. https://www.tiktok.com/legal/page/row/terms-of-service/pt-BR. Accessed February 1, 2024, freely translated. Originally: *"Você não pode: [...] usar ou tentar usar a conta, serviço ou sistema de outra pessoa sem a autorização do TikTok, ou criar identidade falsa nos Serviços".*

entire collectivity. As Perlingieri[42] teaches, the protection of the human person is the central point of the legal order. With that premise, Zampier Lacerda discusses lending social-media accounts and notes:

> "The holder of a digital good, in the full exercise of the faculties that flow from ownership—such as use, enjoyment, and disposal—may freely grant another the use of that title, as a corollary of exercising their subjective right. The borrower of the digital good, besides the duty to return the good according to agreement, must use it for the strict social purposes that motivated its concession. By so acting, they attend not only to the parties' interests but fundamentally to the interests of the whole community, helping build a free, egalitarian, and above all, solidaristic society."[43]

Therefore, regarding the cited clause, it is understood that the user's room for manoeuvre is more restricted than it should be. On the one hand, limiting and prohibiting the creation of false identities is appropriate. Nonetheless, forbidding a user from lending their account exceeds the bounds of good sense and violates their freedom and autonomy.

One reaches this conclusion when considering the collectivity reached by a given profile. It is common for digital influencers to have millions of followers. As Zampier Lacerda[44] teaches, a social-media profile with a large audience may be temporarily lent to someone who will clarify a particular subject to that influencer's audience. Thus, lending such a digital good would benefit the entire collectivity. By way of example, one might think of an account lent to a healthcare professional who explains to the influencer's audience how to contain and prevent a dengue epidemic. In this scenario, even non-users of that social network would benefit from the loan.

The community's interests are protected by the civil-constitutional system and cannot be eliminated by a contractual clause. This applies both to contracts concluded in analogue media and to those in the digital context,

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[42] Perlingieri, Pietro. *Perfis do Direito Civil: introdução ao Direito Civil Constitucional.* 2nd ed. Transl. By Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2002.

[43] Lacerda, Bruno Torquato Zampier. *Bens digitais: cybercultura, redes sociais, e-mails, músicas, livros, milhas aéreas, moedas virtuais.* 2nd ed. Indaiatuba: Editora Foco, 2021. E-book, 101, freely translated. Originally: *"O titular de um bem digital, no pleno exercício das faculdades que emanam de seu domínio, tais como o uso, gozo e disposição, pode livremente ceder a outrem o uso desta titularidade, como consectário do exercício do seu direito subjetivo. O comodatário do bem digital, além do dever de restituir o bem conforme a convenção, deve utilizá-lo nos estritos fins sociais que motivaram a cessão. E ao assim agir, irá atender não apenas aos interesses das partes contratantes, mas fundamentalmente os interesses de toda a coletividade, auxiliando na construção de uma sociedade livre, igualitária e principalmente solidária".*

[44] Lacerda, Bruno Torquato Zampier. *Bens digitais: cybercultura, redes sociais, e-mails, músicas, livros, milhas aéreas, moedas virtuais.* 2nd ed. Indaiatuba: Editora Foco, 2021. E-book.

given the understanding that human protection must occur regardless of the medium. In this sense, the committee of jurists drafting the Civil Code reform proposed that:

> "The same rules governing contracts concluded by private or public instruments also apply to contracting carried out in a digital environment, taking into account its specificities and respecting the treatment provided in this Code and in special legislation."[45]

Therefore, juridically, it would be possible to equate the factual digital reality with the analogue when dealing with contracts such as lending for use. There is no legal impediment to recognising the ownership of an immaterial good.

The committee of jurists (CJCODCIVIL) holds that, in a Digital Law contractual relationship, the object of obligation must be lawful, possible, determined or determinable[46], making no mention of any need for materiality. Hence, one can conceivably have a digital good constitute the object of an obligation.

Another highlight in the TikTok contract analysis is that the user cannot profit from the content produced and posted, as stated:

> "You (i) will have no right to earn income or other consideration from any User Content (as defined below) or from your use of any musical work, sound recording or audiovisual clip made available to you or through the Services, including any User Content created by you, and (ii) are prohibited from exercising any right to monetise or seek consideration for any User Content on the Services or on any third-party service (for example, you may not claim any User Content uploaded on a social-media platform, such as YouTube, for monetisation purposes)."[47]

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[45] Brazil. *Civil Code (Law No. 10.406 of January 10, 2002).* Brasília: Presidency of the Republic, 2024. http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed March 17, 2025, freely translated. Originally: *"As mesmas regras que regem os contratos celebrados por instrumentos particulares ou públicos também se aplicam à regência da contratação feita em ambiente digital, atendidas suas especificidades e observado o tratamento previsto neste Código e na legislação especial".*

[46] Brazil. Federal Senate. Commission of Jurists Responsible for the Revision and Update of the Civil Code. *Final Report of the Commission of Jurists Responsible for the Revision and Update of the Civil Code.* Brasília: Federal Senate, April 19, 2024.

[47] TikTok. "Terms of Service." 2020. https://www.tiktok.com/legal/page/row/terms-of-service/pt-BR. Accessed February 1, 2024, freely translated. Originally: *"você (i) não terá qualquer direito de auferir rendimentos ou outra contraprestação de qualquer Conteúdo do Usuário (conforme definido adiante) ou da sua utilização de qualquer obra musical, gravação sonora ou clipe audiovisual disponibilizado a você ou através dos Serviços, inclusive qualquer Conteúdo do Usuário criado por você, e (ii) fica proibido de exercer qualquer direito de monetizar ou auferir contraprestação por qualquer Conteúdo do Usuário contido nos Serviços ou em qualquer serviço de terceiros (por exemplo, você não*

Thus, the user cannot enter into a contract with a company whereby they advertise a product in exchange for consideration—something that seems contrary to what is seen daily on social networks. Is this kind of restriction legitimate, or does it transgress the digital autonomy of the profile holder?

Moreover, the platform claims rights over the posted content—even though the intellectual and operational efforts in creating the content were solely those of the user. This point is visible in the clause:

> "You grant us an irrevocable, perpetual and unrestricted licence to reproduce, distribute, create derivative works from, modify, publicly perform (including direct-to-public basis), publicly communicate, make available, publicly display, and otherwise use and exploit the Feedback and products derived therefrom, for any purpose and without restriction, free of charge and without attribution, including by creating, using, selling, offering for sale, importing and promoting commercial products and services including or incorporating the Feedback, in whole or in part, and as submitted or modified."[48]

Various issues arise from this clause: Is it an abuse for the platform to appropriate content posted by a user? The twenty-first-century economy revolves not only around tangible goods; increasingly, intangible goods will compose people's patrimony. Hence, the legality or abusiveness of such a unilaterally-crafted clause merits scrutiny.

Further, the terminology used in the clause contravenes other principles, such as objective good faith, rendering it null and void. The principle of objective good faith concerns ethical conduct and the behaviour of both parties. On this point, Maia reflects:

> "Thus, one challenge for holders of digital assets is the lack of legislative clarity regarding the consequences of purchases made in the virtual environment. Regarding the right of access to acquired digital content, purchase and sale must ensure purchasers the same economic and legal reality as their counterparts in the physical medium, under penalty of deeming illegal and contrary to good faith

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pode reivindicar qualquer Conteúdo do Usuário que tenha sido carregado na plataforma de uma rede social, tal como o YouTube, para fins de monetização)".

[48] TikTok. "Terms of Service." 2020. https://www.tiktok.com/legal/page/row/terms-of-service/pt-BR. Accessed February 1, 2024, freely translated. Originally: *"Você nos confere, irrevogavelmente, autorização perpétua e irrestrita para reproduzir, distribuir, criar obras derivadas de, modificar, executar em público (inclusive na base direto-ao-público), comunicar publicamente, disponibilizar, exibir publicamente e por qualquer outro meio usar e explorar o Feedback e produtos dele derivados, para qualquer finalidade e sem restrições, a título gratuito e sem qualquer atribuição, inclusive criando, usando, vendendo, oferecendo para venda, importando e promovendo produtos e serviços comerciais incluindo ou incorporando o Feedback, no todo ou em parte, e conforme apresentado ou modificado".*

the use of the term 'buy' by such content providers."[49]

In dealing with consumers—the weaker link in the contractual relationship—the need to delimit digital autonomy and protect them intensifies, as Maia stresses: "It is important, therefore, to delineate clearly in which circumstances the consumer merely uses a digital good and in which circumstances they become its effective owner."[50]

There is thus a need for contractual clauses that are clear, objective, and ensure rights to consumers. Both consumers and suppliers, as subjects of the legal relationship, must have their rights safeguarded by the contractual instrument. Yet an imbalance has been observed wherein the stronger link is becoming stronger still through abusive contractual clauses.

The waiver present in this contract is not confined to patrimonial digital autonomy but also to existential digital autonomy: "By posting User Content on or through the Services, you […] waive all and any rights to privacy, publicity, or other similar rights associated with your User Content, or any part thereof."[51]

Thus, the clause, by restricting the right to privacy, violates the Constitution (art. 5, X), limiting the TikTok user's sphere of action beyond the constitutional benchmark.[52] It also disrespects the Rights of Personality protected by articles 11 to 21 of the Civil Code.[53]

Given this, many users have their autonomy suppressed in the digital

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[49] Maia, Roberta Mauro Medina. "Posse e propriedade na era do metaverso." *Revista Brasileira de Direito Civil* 32, no. 2 (April–June 2023): 301–27, 313, freely translated. Originally: *"Desse modo, um dos desafios impostos aos titulares de bens digitais é a falta de clareza legislativa acerca das consequências de compras feitas em ambiente virtual. Relativamente ao direito de acesso aos conteúdos digitais adquiridos, a compra e venda deve assegurar aos adquirentes a mesma realidade econômica e jurídica de seus equivalentes no meio físico, sob pena de considerar-se ilegal e contrário à boa-fé o emprego da expressão "comprar" por tais provedores de conteúdo".*

[50] Maia, Roberta Mauro Medina. "Posse e propriedade na era do metaverso." *Revista Brasileira de Direito Civil* 32, no. 2 (April–June 2023): 301–27, 314, freely translated. Originally: *"É importante que se delimite com clareza, portanto, em que circunstâncias o consumidor se torna mero utente de um bem digital e em quais circunstâncias se tornará seu efetivo proprietário".*

[51] TikTok. "Terms of Service." 2020. https://www.tiktok.com/legal/page/row/terms-of-service/pt-BR. Accessed February 1, 2024, freely translated. Originally: *"Ao publicar Conteúdo do Usuário nos Serviços ou através dos Serviços, você [...] abre mão de todos e quaisquer direitos à privacidade, publicidade ou outros direitos afins, associados ao seu Conteúdo do Usuário, ou qualquer parte dele".*

[52] Brazil. *Constitution of the Federative Republic of Brazil of 1988.* Brasília: Presidency of the Republic, 2024. https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed March 17, 2025.

[53] Brazil. *Civil Code (Law No. 10.406 of January 10, 2002).* Brasília: Presidency of the Republic, 2024. http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm. Accessed March 17, 2025.

context and are often unaware of it, making such agreements all the more concerning.

In contracts offered by other well-known platforms, clauses violating digital autonomy are likewise found. Analysing Instagram's contract (from U.S. company META), restrictive clauses appear. One such clause likewise prohibits the transfer of the profile, whether *inter vivos* or *mortis causa*: "You may not sell, license or buy any account or data obtained from us or our Service, irrespective of whether such data were obtained via logging into an Instagram account."[54]

And also: "This includes attempting to buy, sell or transfer any aspect of your account (including your username), requesting, collecting or using login credentials or badges from other users, requesting or collecting Instagram usernames and passwords, or misappropriating access tokens."[55]

As already noted, no legal justification supports this discrepancy between a material good and a digital good. Moreover, for contracts concluded in Brazil, such a clause appears to contravene the principle of objective good faith. Accordingly, in the proposed amendment to the Civil Code (PL 04/2025) there is an article deeming null any clause that prevents a user from disposing of their digital asset: "Any contractual clauses intended to restrict the account holder's powers to dispose of their own data and information are null and void, under article 166 of this Code."[56]

Beyond all the above, note that there exists a type of digital good in which its holder enjoys greater digital autonomy: NFTs. The "non-fungible token" is a digital asset that may correspond to substantial economic values, depending on how people value its content.

According to Moreira, three essential elements characterise NFTs:

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[54] Meta. "Terms of Use." 2025. https://help.instagram.com/581066165581870/?cms_id=581066165581870. Accessed January 11, 2025, freely translated. Originally: *"Você não pode vender, licenciar ou comprar nenhuma conta ou nenhum dado obtido de nós ou do nosso Serviço, independentemente desses dados terem sido obtidos durante um login em uma conta do Instagram"*.

[55] Meta. "Terms of Use." 2025. https://help.instagram.com/581066165581870/?cms_id=581066165581870. Accessed January 11, 2025, freely translated. Originally: *"Isso inclui tentativas de comprar, vender ou transferir qualquer elemento da sua conta (incluindo seu nome de usuário), solicitar, coletar ou usar credenciais de login ou selos de outros usuários, solicitar ou coletar nomes de usuário e senhas do Instagram ou apropriar-se indevidamente de tokens de acesso"*.

[56] Brazil. Federal Senate. *Bill No. 4 of 2025: Updates Law No. 10.406 of January 10, 2002 (Civil Code) and Related Legislation.* Brasília: Federal Senate, 2025. https://www25.senado.leg.br/web/atividade/materias/-/materia/166998. Accessed March 17, 2025, 212, freely translated. Originally: *"São nulas de pleno direito, na forma do art. 166 deste Código, quaisquer cláusulas contratuais voltadas a restringir os poderes da pessoa, titular da conta, de dispor sobre os próprios dados e informações"*.

exclusivity, indivisibility, and non-fungibility.[57] Regarding concept, Moreira explains that the NFT "includes a set of information recorded on the blockchain that represents the asset linked to the token (traditional or digital works)."[58] Moreira clarifies that, by virtue of these assets' characteristics, they may serve as a sort of representation of copyright ownership of artworks (whether physical or digital).[59]

In short, an NFT can be defined as a representation, in an electronic context, created via a blockchain platform. The object of representation may be an artwork or even a social-media post. Concerning the value of these representations, Moreira notes that from mid-2020 there was growth in these digital assets as the indirect object of obligations. In economic terms, Moreira states that in March 2021 these digital assets were responsible for the circulation of millions of dollars through their negotiation.[60]

By way of example, Moreira notes that "Twitter founder and CEO Jack Dorsey sold his first tweet—simply saying 'just setting up my twttr'—for US $ 2.9 million on 23 March 2021."[61]

One question arises: why, when the digital goods are of low economic

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[57] Moreira, Arthur Salles de Paula. "Non-fungible token (NFT): lições preliminares sobre sua natureza jurídica." In *Direito, tecnologia e inovação* – vol. 4: *estudo de casos*, coordinated by Leonardo Parentoni, edited by Giovanni Carlo Batista Ferrari, José Luiz de Moura Faleiros Júnior, and Tárik César Oliveira e Alves, 165–92. Belo Horizonte: Centro DTIBR, 2022.

[58] Moreira, Arthur Salles de Paula. "Non-fungible token (NFT): lições preliminares sobre sua natureza jurídica." In *Direito, tecnologia e inovação* – vol. 4: *estudo de casos*, coordinated by Leonardo Parentoni, edited by Giovanni Carlo Batista Ferrari, José Luiz de Moura Faleiros Júnior, and Tárik César Oliveira e Alves, 165–92. Belo Horizonte: Centro DTIBR, 2022, 168, freely translated. Originally: *"inclui um conjunto de informações registradas no blockchain que representa o ativo vinculado ao token (obras tradicionais ou digitais)"*.

[59] Moreira, Arthur Salles de Paula. "Non-fungible token (NFT): lições preliminares sobre sua natureza jurídica." In *Direito, tecnologia e inovação* – vol. 4: *estudo de casos*, coordinated by Leonardo Parentoni, edited by Giovanni Carlo Batista Ferrari, José Luiz de Moura Faleiros Júnior, and Tárik César Oliveira e Alves, 165–92. Belo Horizonte: Centro DTIBR, 2022.

[60] Moreira, Arthur Salles de Paula. "Non-fungible token (NFT): lições preliminares sobre sua natureza jurídica." In *Direito, tecnologia e inovação* – vol. 4: *estudo de casos*, coordinated by Leonardo Parentoni, edited by Giovanni Carlo Batista Ferrari, José Luiz de Moura Faleiros Júnior, and Tárik César Oliveira e Alves, 165–92. Belo Horizonte: Centro DTIBR, 2022.

[61] Moreira, Arthur Salles de Paula. "Non-fungible token (NFT): lições preliminares sobre sua natureza jurídica." In *Direito, tecnologia e inovação* – vol. 4: *estudo de casos*, coordinated by Leonardo Parentoni, edited by Giovanni Carlo Batista Ferrari, José Luiz de Moura Faleiros Júnior, and Tárik César Oliveira e Alves, 165–92. Belo Horizonte: Centro DTIBR, 2022, 171, freely translated. Originally: *"o fundador e CEO do Twitter, Jack Dorsey, vendeu seu primeiro "tweet", que simplesmente dizia "apenas configurando meu Twitter" por US $ 2,9 milhões em 23 de março de 2021"*.

value, is negocial digital autonomy curtailed, whereas with high-value digital goods it is expanded? Should not digital autonomy in the same type of legal act be the same? This reality may lead to legal uncertainty. The way to reverse this scenario is to delimit digital autonomy and keep its limits clear and consistent with the entire legal system.

III. CONCLUSION

Law exists to protect human beings and the relationships in which they are engaged. Every legal institute converges toward this aim. Thus, Digital Law must harmonise with the entire legal order. Hence the urgency of categorising digital autonomy. Is it a new principle, alongside private autonomy, or merely its unfolding in the digital environment?

Two paths were followed to answer this. The first sought to understand the concept of autonomy in theoretical terms. Thus, a concept of digital autonomy was elaborated based on that of private autonomy, revealing that it fits better as a species—that is, an unfolding—of private autonomy.

The second path focused on digital contractual relations. In practical terms, how can digital autonomy be perceived and exercised? To answer, certain electronic adhesion contracts from popular digital platforms, such as TikTok and Meta, were analysed.

The protection of digital autonomy is reinforced by PL 04/2025, pending in the Federal Senate, which addresses updating the Civil Code.

The study has shown that understanding digital autonomy—whether in its patrimonial or existential character—is fundamental to guiding the proper resolution of problems in the online universe.

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