

A proteção de dados como interesse difuso no Direito Brasileiro ¹

Data protection as diffuse right in Brazilian Law

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Resumo

O artigo analisa a natureza jurídica da proteção de dados como um interesse coletivo, com base na Lei Geral de Proteção de Dados brasileira e na

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Emenda Constitucional nº 115 de 2022. Nesse contexto, também analisa a Lei da Ação Civil Pública e suas derrogações, sobretudo a determinada pelo Código de Defesa do Consumidor. O artigo adota o método qualitativo, a partir de uma abordagem hipotético-dedutiva, que parte da hipótese de existência de um direito difuso de proteção de dados no Brasil, considerando o conceito abstrato de interesses difusos como definido pelo direito. O trabalho fundamenta-se na legislação e na doutrina sobre os interesses difusos, levando em conta as características da Sociedade da Informação.

Palavras-chave: Interesses Difusos. Meio Ambiente Digital. Proteção de Dados. Sociedade de Informação.

Abstract

The article analyzes the legal nature of data protection as a collective interest, based on the Brazilian General Data Protection Law and Constitutional Amendment No. 115 of 2022. In this context, it also analyzes the Public Civil Action Law and its derogations, especially the one determined by the Consumer Defense Code. The article adopts a qualitative method, based on a hypothetical-deductive approach, based in the hypothesis of the existence of a diffuse right to data protection in Brazil, considering the abstract concept of diffuse interests as defined by law. The work is based on legislation and doctrine on diffuse interests, considering the characteristics of the Information Society.

Keywords: Data Protection. Diffuse rights. Digital Environment. Information Society.

Introduction

In this article, we propose to examine the diffuse character of the fundamental right to personal data protection. To this end, this article discusses what constitutes diffuse interests or rights and their basis on Brazilian legislation. It then demonstrates the existence of these characteristics through a brief discussion of Information Society and its economic, social, and legal implications.

In Information Society, socioeconomic relations are grounded on the processing of information, especially in its current format, within the realm of platform capitalism. This has made personal data, understood as information capable of identifying an individual, a highly valuable resource for a series of economic and political activities. We put forward here that this economic and political significance makes personal data a common resource, and its protection of interest to the entire population of a given community, in this case the Brazilian one. To this effect, the fundamental right to data protection, established by

Constitutional Amendment No. 115 of 2022⁵ to the Constitution of 1988, but which had already been recognized by precedent of the Supreme Federal Court, presents characteristics of a diffuse right, beyond the individual right of its holder to decide whether to pursue it.⁶

We base our discussion on a review of Brazilian academic literature on the protection of diffuse interests, using a historical perspective which highlights as a theoretical framework the definition of Barbosa Moreira.⁷ Through this analysis we demonstrate that diffuse interests do not fit into an exhaustive legal list, but can be identified whenever their characteristics are present, namely, the existence of a transindividual interest arising from a factual situation.

Drawing on Castells⁸ and Levy⁹, we seek to characterize Information Society, and draw on Langley and Leyshon¹⁰, to define platform capitalism, which has greatly enhanced the economic value of personal data. With Fiorillo and Waldman, we introduce the emerging concept of digital environment, situating data protection within the realm of diffuse interest protection, akin to similar constructs for the natural and cultural environment. We characterize the legal protection of personal data in Brazil based on Sarlet and Saavedra among others, to point out that it is necessary to take a broader view than that described by some legal scholars. Rather than data protection being an individual right, albeit with an objective character, there is a diffuse aspect to this right which should be

⁵ BRASIL. Senado Federal. **Emenda constitucional nº 115, de 10 de fevereiro de 2022**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm#:~:text=EMENDA%20CONSTITUCIONAL%20N%C2%BA%20115%2C%20DE,e%20tratamento%20de%20dados%20pessoais. Access in: 23 jan. 2023.

⁶ BRASIL. **Constituição da República Federativa do Brasil de 1988**. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access in 26 May 2021.

⁷ BARBOSA MOREIRA, José Carlos. *Tutela Jurisdicional dos Interesses Coletivos ou Difusos*. In: **Temas de Direito Processual-Terceira Série**, São Paulo: Saraiva, 1984.

⁸ CASTELLS, Manuel. **The rise of the network society: information age**. v.1. 2nd ed. with new pref. West Sussex: Willey-Blackwell, 2010.

⁹ LÉVY, Pierre. **A revolução contemporânea em matéria de comunicação**. Revista FAMECOS, Porto Alegre, v. 5, n. 9, p. 37-49, 10 abr. 2008. Available at <https://revistaseletronicas.pucrs.br/ojs/index.php/revistafamecos/article/view/3009/>. Access in 18 jan. 2023

¹⁰ LANGLEY, P. and LEYSHON, A. **Platform capitalism: the intermediation and capitalization of digital economic circulation**. Finance and society., Durhan, vol. 3, n.1. p. 11-31. Available at: <https://dro.dur.ac.uk/19828/>. Access in 08 dez. 2022.

recognized, in view of the role that data plays in the digital environment of platform capitalism.¹¹

The paper uses the hypothetico-deductive method, based in the hypothesis that there is a diffuse right to data protection in Brazil, derived from an abstract concept of diffuse interests as defined by law. This is examined not only through legal but also sociological perspectives.

1. The diffuse interests in Brazil: evolution of the definition and its characteristics

The Public Civil Action Act (Act No. 7347, 24.07.85), referred here as PCAA was amended before it was enacted.¹² The most significant amendment, and the one that drew the attention of the legal academic community, was one that opposed the expression "and other diffuse interests", contained in Article 1, clause IV.

The President at the time vetoed this expression because - and this situation unfortunately has not changed - the Union, States, the Federal District and municipalities habitually violated interests of this nature (diffuse) and thus, fatally, these legal entities of domestic public law would become habitual defendants. To highlight this point, it suffices to recall that transindividual interests related to urban planning were not explicitly contained in the original wording of the law. Major works carried out by legal entities of domestic public law frontally offended transindividual interests affected by urban impacts. A road, a bridge, a viaduct, public concessions, public health, social security, taxation etc. constitute public activities that can (and often do) impact on diffuse interests. Implicitly, all these interests were protected by the PCAA. In fact, all of them had the characteristics of diffuse interests, which we will present below.

¹¹ FIORILLO, Celso Antonio Pacheco; WALDMAN, Ricardo Libel. Fundamentos Constitucionais do Meio @mbiente Digit@l no Direito Brasileiro em Face da Sociedade da Informação e sua Relação com os Direitos Humanos Constitucionais. In: SOUZA, José Fernando Vidal de Souza; CAMPELLO, Livia Gaigher Bosio; RIZZO, Roxana Lilian Corbran. **Direito Ambiental e Socioambientalismo IV - Anais do V Encontro Internacional Do Conpedi** Montevideu – Uruguai. Florianópolis: Ed. CONPEDI, 2016

¹² BRASIL. **lei nº 7.347, de 24 de julho de 1985.** Available at: https://www.planalto.gov.br/ccivil_03/leis/l7347orig.htm. Access in: 23 jan. 2023.

A specific legislative technique was applied here. The lawmaker only referred to some diffuse interests in Article 1 of the PCAA. The Act mentioned explicitly the possibility of filing actions for liability only in the case of damages caused to the environment, to diffuse and collective consumer interests, and to goods and rights of artistic, aesthetic, historical, touristic and landscape value. In a clear demonstration that the list was illustrative, the provision ended with the expression "and other diffuse and collective interests", that is, with a closing rule that makes it evident that this list does not limit what the law encompasses.

The reasoning of whoever is going to bring a case under the PCAA cannot start from an exhaustive list. Indeed, a different path must be travelled. First, the characteristics of diffuse interests must be examined. Then, it is verified whether a certain interest is diffuse or not. One should not, for example, merely look for the environment in the PCAA's list. The analysis should rather answer the following question: what are the characteristics of the environment that allow us to state that it can be defended in its diffuse aspect?

Depending on the facts of the case, the consumer can be defended individually or collectively. And when it is concluded that its defense, in the case in point, should be collective, it is then necessary to examine whether the defense will be of diffuse interests, collective interests in the strict sense, or of individual homogeneous interests.

The PCAA has been amended many times to include "new" diffuse interests. Even after the "relief" provided by the closing rule – of which we speak later – other diffuse interests were added to Article 1 of the PCAA. The lawmaker 'found' that other interests could be added, even at the expense of sound legislative technique, by including other interests after the closing rule that already defended them all implicitly.

So, for example, Act No. 12.529, 30.11.11 was responsible for adding the expression "for infringement of the economic order¹³"; Act No. 12.966, 24.04.14 added the expression "to the honor and dignity of racial, ethnic or religious

¹³ BRASIL. Lei nº 12.529, de 30 de novembro de 2011.

groups¹⁴"; Act No. 13.004, 24.06.14 added the expression "to public and social heritage".¹⁵

Just for the record, provisions for the defense of public and social heritage existed long before the PCAA. It is enough to mention here the Popular Action Act (Act No. 4717, 29.06.65) ¹⁶and the Administrative Improbability Act (Act No. 8429, 02.06.92),¹⁷ recently greatly modified by Act No. 14230, 25.10.21.¹⁸

Despite this enormous and unnecessary legislative production, it is worth recognizing that the PCAA, despite that crucial partial veto, took a big step in the right direction because it made possible, at that time, the defense of very important transindividual interests. Who would doubt the importance of protecting the environment?

If today there are still clear instances of environmental harm, it is not difficult to imagine what it would be like if there was no protection since 1985. The same can be said of transindividual interests and rights of consumers, who would have been harmed, for example, through the adulteration of the very products they consumed, in the volume and net weight of these products, in their validity for safe consumption etc. without any mechanism of jurisdictional protection to the collectivity of consumers of the same product or service.

It is worth transcribing here the veto that, because it was so unusual, it was reproduced in all books of the series coordinated by Édis Milaré, which now has reached its 7th edition (*Public Civil Action after 35 years*):

¹⁴ BRASIL. Lei nº 12.966, de 24 de abril de 2014.

15 BRASIL. Lei nº 13.004, de 24 de junho de 2014. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l13004.htm#:~:text=LEI%20N%C2%BA%2013.004%2C%20DE%2024%20DE%20JUNHO%20DE%202014.&text=Altera%20os%20arts.,do%20patrim%C3%B4nio%20p%C3%BAblico%20e%20social. Access in: 24 Feb. 2023.

¹⁶ BRASIL. Lei nº 4.717, de 29 de junho de 1965. Available at: https://www.planalto.gov.br/ccivil_03/leis/l4717.htm. Access in: 22 Feb. 2023.

¹⁷ BRASIL. Lei nº 8.429, de 2 de junho de 1992. Available at: https://www.planalto.gov.br/ccivil_03/leis/l8429.htm#:~:text=LEI%20N%C2%BA%208.429%2C%20DE%20JUNHO%201992&text=Disp%C3%B5e%20sobre%20as%20san%C3%A7%C3%B5es%20aplic%C3%A1veis,fundacional%20e%20d%C3%A1%20outras%20provid%C3%AAsncias. Access in: 25 Feb. 2023.

¹⁸ BRASIL. **Lei nº 14.230, de 25 de outubro de 2021**. Available at: https://www.planalto.gov.br/ccivil_03/_ato_2022/2021/lei/l14230.htm#:~:text=LEI%20N%C2%BA%2014.230%2C%20DE%2025,Art. Access in: 21 Feb. 2023.

The veto applies to the expressions contained in the following provisions: Comment: "as to any other diffuse interest"; Article 1, clause IV: "or to any other diffuse interest"; Article 4: "or to any other diffuse interest"; and Article 5, clause II: "or to any other diffuse interest". Reasons of public interest relate primarily to legal uncertainty, to the detriment of the common good, which stems from the very broad and imprecise scope of the expression "any other diffuse interest."¹⁹ (Our translation)

Therefore, in the President's view, the veto was due to lack of knowledge of the limits of the very broad and imprecise scope contained in the expression "any other diffuse interest". As already mentioned, there were other reasons for the veto, and legal professionals had a good grasp of which characteristics would identify diffuse interests, as discussed below.

Jose Marcelo Menezes Vigliar²⁰ and other academics who have written about collective actions and collective civil procedure have turned to the topic of collective jurisdictional guardianship and, considering the PCAA one of the most significant legislative innovations of the second half of the 1980s, demanded a careful analysis of its text, as well as reflections on legislative policy regarding the real reasons for the vetoes.

Fortunately, some of the legal experts who prepared the Public Civil Action Bill also drafted the Consumers' Defense Rights Code (Act No. 8078, 11.09.90)²¹, which we will refer to here as the CDC). This presented the opportunity to amend the PCAA for all diffuse interests, as expressly provided in Article 110 of the CDC that the "following clause IV be added to Article 1 of Act No. 7347, 24.07.85: IV - to any other diffuse or collective interest".²²

Considering that the flaw of the PCAA, in the President's eyes, was the lack of a precise meaning to the expression "diffuse interests", Article 81, clause

¹⁹ MILARÉ, Édís. **Ação Civil Pública após 35 anos**. Revista dos Tribunais: Nova Edição, 2020. p. 1349.

²⁰ For bibliographical references on collective actions, see VIGLIAR, Jose Marcelo Menezes. Tutela jurisdicional coletiva. 3rd ed. São Paulo: Atlas, 2001, mainly pp. 187 to 197. Also, DIDIER JR., Fredie; ZANETI JR., Hermes. *Curso de Direito Processual Civil*. Salvador: Podium, 2007, v. 4, pages 377-398. GIDI, Antonio. A 'class action' como instrumento de tutela coletiva de direitos. São Paulo: Revista dos Tribunais, 2007, pages 417-464.

²¹ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990**.

²² BRASIL. **Lei nº 7.347, de 24 de julho de 1985**.

I of the CDC corrected this by providing a definition, spelling out in the text of the law the most important characteristics of these interests.²³

In fact, the CDC did much more: as well as the already mentioned definition, it also defined collective interests in the strict sense (Article 81, clause II), and innovated the Brazilian legal system by providing for the defense of individual homogeneous interests (Article 81, clause III).²⁴²⁵

Other important innovations were introduced by the CDC. For example, the interaction created between the PCAA and the CDC. We refer to Article 90 of the CDC, which established that the provisions of the Civil Procedure Code and of the PCAA applied to derivative actions for the defense of transindividual interests (diffuse, collective and individual homogeneous), insofar as those did not contradict its provisions.²⁶

To conclude the reciprocity between the CDC and the PCAA, Article 117 of the CDC established: "The following provision shall be added to Act No. 7.347, 24.07.85, renumbering the following: Article 21. The provisions of Title III of the Act that established the Consumers' Defense Rights Code apply to the defense of diffuse, collective and individual rights and interests, where applicable."²⁷

Therefore, after the CDC, it was no longer possible to plead ignorance regarding the scope of diffuse interests as a concept. Logically it follows that it is hard or impossible to imagine the existence of an exhaustive list of all these interests.²⁸

²³ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.**

²⁴ Given the importance of art. 81 and its subsections in the CDC, we have chosen to transcribe them in this footnote:

"Art. 81 The defense of the interests and rights of consumers and victims may be exercised in court individually or collectively.

Sole Paragraph. Collective standing will be exercised when dealing with

I - diffuse interests or rights, understood, for the purposes of this Code, to be transindividual, indivisible in nature, held by indeterminate persons who are bound by factual circumstances

II - collective interests or rights, thus understood, for the purposes of this Code, as transindividuals of an indivisible nature held by a group, category or class of persons linked among themselves or to the opposing party by a basic legal relationship;

III - individual homogeneous interests or rights, understood as those arising from a common origin. (Our translation)

²⁵ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.**

²⁶ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.**

²⁷ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.** BRASIL. **Lei nº 7.347, de 24 de julho de 1985.**

²⁸ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.**

As mentioned, several authors have studied the subject and sought a conceptualization of indivisible interests, in which the holders cannot and will not be identified and that the union of all these same and countless interested parties occurs by the simple offense to the diffuse interests of which they are indivisibly holders.

We highlight one of the most instructive definitions presented by legal scholars, authored by Jose Carlos Barbosa Moreira. The simplicity, depth and delimitation that his concept has provided to the conceptualization of diffuse interests is admirable and is deeply associated with the most striking aspect of diffuse interests: indivisibility for the purposes of exploitation and defense in court. The indivisibility of such interests concerns their object, which cannot be quantified or attributed to the members of the collectivity.

Barbosa Moreira, mentions the existence of an indivisible communion between all possible interested parties, being impossible, even ideally, to delimit what would be the quota of each of these same interested parties. The author refers to the existence of a firm union between the stakeholders, with the satisfaction of only one of them implying the satisfaction of all. In the same sense, the injury provided to one of them will imply the injury to the entire collectivity.²⁹

The fruition or enjoyment of these goods can only occur collectively. One does not take advantage individually of a river, a beach, a building listed for its historical value, or the removal from the market of a product that is harmful to human health.

Using Barbosa Moreira's definition, one concludes that it would be impossible for the wording of Article 103, clause I of the CDC to be different. The device, which is applied to all diffuse interests (remember the reciprocity between the PCAA and the CDC, mentioned above) states that in the "collective actions covered by this code, the sentence will be *res judicata*: I - *erga omnes*, except if the claim is dismissed for insufficient evidence, in which case any plaintiff may

²⁹ BARBOSA MOREIRA, José Carlos. Tutela Jurisdicional dos Interesses Coletivos ou Difusos. In: **Temas de Direito Processual-Terceira Série**, São Paulo: Saraiva, 1984. p. 195-196.

bring another action, with identical grounds, using new evidence, in the case of clause I of the sole paragraph of Article 81".³⁰

Hence, if the injury of an interested party implies injury to all interested parties, the efficacy of the *res judicata* of the final decision on a conflict of indivisible interests would also extend to all (*erga omnes* efficacy), except if a dismissal is based on insufficient evidence. As we shall see further on, this relativization is justified considering that, in court, it is the proper representatives who file the suits and make statements about facts, who must discharge the burden of proof. Were it not for the relativization of the occurrence of the phenomenon of *res judicata*, we could be faced with a situation in which the proof was intentionally not produced and, fatally, the action would be dismissed. By relativizing the advent of *res judicata*, the lawmaker protects the interested parties: if the collective action is settled on merit based on the evidence produced by those who would have the burden of producing it, there is *res judicata*. If it is judged unfounded, due to insufficient evidence, the claim may be reopposed.

Let us reflect on one of the diffuse interests expressly mentioned by the PCAA: the environment. The environment belongs indivisibly to all human beings. It is impossible, even in abstract terms, to divide it up to allocate the share that each one would have of the environment. Thus, the atmospheric pollution provided by an industry in North America is of interest to the people living in Asia, Africa, Eastern Europe and Oceania. Obviously, individuals living in the vicinity of the polluting industry will suffer the consequences of pollution first and most intensely.

However, by releasing pollutants into the atmosphere, we will all suffer the consequences. Life on Earth will be ultimately harmed. Therefore, actions that harm one of the interested parties, harm all, simultaneously and indivisibly, regardless of whether or not all know of the polluting action and regardless of whether or not all agree with the cessation of pollution. When the polluting action

³⁰ BARBOSA MOREIRA, José Carlos. Tutela Jurisdicional dos Interesses Coletivos ou Difusos. In: **Temas de Direito Processual-Terceira Série**, São Paulo: Saraiva, 1984. BRASIL. **Lei nº 8.078, de 11 de setembro de 1990**.

occurs, all are immediately united and the defense of the environment can be carried out by the appropriate representatives of society.

Rodolfo de Camargo Mancuso, reproduced a question made by Mauro Cappelletti that, freely translated from the Italian language, allows one to conclude that the environment represents an authentic example of diffuse interests: who owns the air I breathe? (*"a chi appartiene l'aria che respiro?"*).³¹

Other definitions are equally important and deserve mention, considering that they were synthesized by jurists who were pioneers in the conceptualization of diffuse interests. For Hugo Nigro Mazzilli, diffuse rights are "indivisible interests of less determinable groups of persons between whom there is no very precise legal or factual link" (Our translation).³²

For us, diffuse interests are the interests of indeterminate and indeterminable groups of people, between whom there is no legal or precise factual link. In the happy expression of Hugo Nigro Mazzilli, used in the same work mentioned above, "they are like a bundle of individual interests, with points in common". It is not feasible to identify how much of the whole belongs to each of the interested parties, even because, by definition (CDC, article 81, sole paragraph, clause I), they are indivisible.³³

Although it cannot be said that the intensity of the interest of each individual that integrates this group (neither determined nor determinable) is the same, due to the lack of a legal bond or, as it occurs in some cases, the lack of a precise factual bond that unites them, one cannot ignore that such interests coincide in some points.

However, there are other characteristics to identify them. As mentioned above, a classic example of diffuse interests, from which all the components that characterize them can be clearly seen, can be found in the environment can itself.

In effect, although Hugo Nigro Mazzil, states that diffuse interests belong to "less determinate groups of people", in the case of the environment it is clear

³¹ MANCUSO, Rodolfo de Camargo. **Conceito de interesses difusos**. São Paulo: Revista dos Tribunais, 1994. p. 68.

³² MAZZILLI, Hugo Nigro. **A defesa dos interesses difusos em juízo**. São Paulo: Saraiva, 1997. p.7.

³³ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990..**

that it is impossible to identify and thus pin down who are the members of the community who have an interest in the maintenance, for example, of clean air, of fauna and flora, or of natural oxygen production³⁴.

As mentioned by Jose Marcelo Menezes Vigliar:

Everyone, individually, even if the intensity is not the same, has an interest in maintaining a balanced environment. By the way - and this seems extremely important - any individual manifestations of thought to the contrary do not have the power to invalidate the presumption that the lawmaker creates for the defense of these diffuse interests. Thus, it matters little if someone somehow seeks to "waive part" of "their right" to a balanced environment. The legal presumption itself (of indivisibility and, consequently, of the impossibility of exclusive individual use) and the nature of these interests will render such a manifestation devoid of any efficacy. The defense of the environment (as of any other indivisible interests), when carried out, will benefit even those who, as in the hypothetical and absurd example, "renounce" the "share" that "belongs to them" (since this "share", in the example given, is unquestionably and logically incommensurable.³⁵ (Our translation)

In relation to the environment there is no legal relationship linking the stakeholders. There is no need to inquire about the existence of an adhesion of each one of the interested parties, because it would not be possible. They are united by certain factual circumstances, such as, for example, the deforestation of a certain permanent ecological preservation reserve or the supply of a product that is harmful to health.

In relation to the environment can also be recognized in relation to historical/cultural/artistic heritage. The offence, or even the simple threat, directed at an item that should be protected because it reveals historic/cultural/artistic qualities that should be preserved, makes everyone join forces, regardless of their knowledge of this harmful activity, so that this piece of cultural heritage is defended, including in court.

The presumption is that diffuse interests should be defended. When this point is reached - the defense of diffuse interests in court - it is observed that two of the most important procedural precepts must be considered and require an approach different from that which is traditionally taken when the defense of

³⁴ MAZZILLI, Hugo Nigro. **A defesa dos interesses difusos em juízo**. São Paulo: Saraiva, 1997. p.7.

³⁵ VIGLIAR, José Marcelo Menezes. **Tutela jurisdicional coletiva**. 2. ed. São Paulo: Atlas, 1999. p.22.

purely individual interests is in play. We refer to a condition of the action called "*legitimatio ad causam*" and to the subjective limits of *res judicata*.

This alternative approach to active legitimacy and the subjective limits of *res judicata* (subject to relativization, depending on the decision on the claims made, as mentioned above) is due to the indivisibility of the interest.

When defending transindividual interests, and particularly when defending diffuse interests, active legitimacy is entrusted to an entity endowed with adequate representation, whose limits have been studied by Jose Marcelo Menezes Vigliar.³⁶ The law confers this extraordinary legitimacy by presumption, or because the representative meets certain requirements demanded by law. In general, in order to acquire the condition of adequate representative of the injured collectivity, the lawmaker chose those who are related to the conflict brought to court. It is important to note that the judge must examine the specific case and then verify whether the one who filed the public civil action is related to the interest they intend to defend. Take for example civil associations. The lawmaker requires that they be duly registered for at least one year and that their statutes expressly state that their purpose is focused on the good they are specifically defending. There are civil associations which are exceptionally committed to the cause they defend, as is the case with the Brazilian Green Peace and the Brazilian Consumer Defense Institute. Their commitment to the defense of the environment and the consumer respectively will be explicit in the statutes of these associations.

The second procedural precept that was adapted for the defense of transindividual interests is the extension of the judgement to all interested parties.

The extension of the judgement to all (*erga omnes* efficacy) and mitigation of its effects should be examined in light of the indivisibility of the protected interest. To some extent, quantitative factors can also be considered in the identification of diffuse interests, differentiating them from other categories of transindividual interests: diffuse interests can, as in the examples presented above, concern "even the whole of humanity", as Rodolfo de Camargo Mancuso

³⁶ VIGLIAR, José Marcelo Menezes. **Ações coletivas: provas e concursos**. Salvador: Edições Podium, 2007. p. 61-68.

mentions ³⁷.

Moreover, qualitative factors will also help identify diffuse interests, because they consider people exclusively in their dimension as a human being. By contrast, other trans-individual interests (such as collective interests in the strict sense) consider people in their corporate dimension, that is, as beings that can (or need to) unite with others for the pursuit of their interests (the synthesis of the interests of all members irradiates to the group and becomes the essence of maintaining group membership).

In addition to the characteristics contained in the definition proposed by Hugo Nigro Mazzilli, we could cite the essential definitions adopted by other scholars on the subject. This is how they are defined by Rodolfo de Camargo Mancuso, an author who was also a pioneer in the study of these interests:

They are collective interests that, not having reached the level of aggregation and organization necessary for their institutional allocation to certain entities or bodies representing interests already socially defined, remain in a fluid state, dispersed throughout civil society as a whole (e.g. the interest in the purity of atmospheric air) and may sometimes concern certain collectivities of undefined numerical content (e.g. consumers). They are characterized by: the indetermination of the subjects, the indivisibility of the object, their intense internal litigiousness and their tendency towards transition or mutation in time and space. (Our translation)³⁸

To better understand Rodolfo de Camargo Mancuso's concept, we should look for the meaning of "intense internal litigation" and "a tendency towards transition or mutation in time and space".³⁹ (Our translation)

By "intense internal litigation" the author means the existence of conflicts between groups related to the diffuse interest that one seeks to preserve, because they are loose, fluid, disaggregated and disseminated amongst the most diverse social segments, and not based on a legal link. The said author cites the example of the natural confrontation between those who extract trees and

³⁷ MANCUSO, Rodolfo de Camargo. **Conceito de interesses difusos**. São Paulo: Revista dos Tribunais, 1994. p.68.

³⁸ MANCUSO, Rodolfo de Camargo. **Conceito de interesses difusos**. São Paulo: Revista dos Tribunais, 1994. p. 114-115.

³⁹ MANCUSO, Rodolfo de Camargo. **Conceito de interesses difusos**. São Paulo: Revista dos Tribunais, 1994. p. 114-115.

ecological entities that seek the prohibition of tree felling. The conflict of interests of one group and the other is evident: the former in the felling of trees for the subsistence of the group and the latter in the preservation of the environment⁴⁰.

As regards the aspect of mutation, the author reminds us that, given the fact that there is no legal relationship underpinning these interests, they can change much more quickly than relationships that are governed by law, which creates a basic legal bond. Thus, such interests are as changeable as are the factual situations, all depending on the dominant value at the time of consideration of the injured diffuse interests.

This opinion was also shared by José Celso de Mello Filho a former Justice of the Supreme Federal Court:

In reality, the complexity of these multiple interests does not allow them to be discriminated and identified in the law. The list of diffuse interests is not exhaustive. At each moment and due to new demands imposed by modern post-industrial society, new values pertaining to every social group become evident, whose protection is imposed as necessary. The diffuse interests, for this very reason, are unnamed, although there are some, more evident, such as those related to consumer rights or concerning the environmental, historical, artistic, aesthetic, and cultural heritage.⁴¹ (Our translation)

It is worth noting that also Antonio Augusto Mello de Camargo Ferraz, Nelson Nery Junior and Édis Milaré present two examples that well demonstrate the debates and the conflict that the defense of diffuse interests generates: "the obligation of companies to, for example, employ aseptic packaging of better quality is immediately reflected in product costs and price; the banning of a polluting industry will generate unemployment".⁴² (Our translation)

The lawmaker of the CDC (Article 81, sole paragraph, clause I) used some of these characteristics to designate this type of transindividual interests, as seen above.⁴³

⁴⁰ MANCUSO, Rodolfo de Camargo. **Conceito de interesses difusos**. São Paulo: Revista dos Tribunais, 1994. p. 79.

⁴¹ MELLO FILHO, José Celso. **Constituição Federal anotada**. 2. ed. São Paulo: Saraiva, 1986. p. 133-134.

⁴² FERRAZ, Antonio Augusto Mello de Camargo; MILARÉ, Édis; NERY JUNIOR, Nelson. **Ação civil pública e a tutela jurisdicional dos interesses difusos**. São Paulo: Saraiva, 1984.

⁴³ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990**.

What calls our attention, considering the central theme of the present article, is the following excerpt from José Celso de Mello Filho transcribed above: "The list of diffuse interests is not exhaustive. At each moment and due to new demands imposed by modern post-industrial society, new values pertaining to every social group become evident, whose protection is imposed as necessary".⁴⁴ (Our translation)

The emphasis on this passage is due to our choice for the central theme of the present article.

The protection of data, imposed by the General Data Protection Act (Act No. 13.709, 14.08.18 referred here as GDPR) on those who process data, would be a diffuse interest. Obviously, we are not referring to the data of a particular individual. We reflect, here, on the act of protecting data itself⁴⁵.

It seemed impossible for us to discuss this issue without going through this whole retrospective, which culminates with the conclusion, which is also ours, that "new demands imposed by modern and post-industrial society" referred to by Celso de Mello, highlight "new values belonging to the entire social group, whose protection is necessary".⁴⁶

The society to which the author refers is the information society.

This model required that the PCAA's list of diffuse interests be confronted, once again, with the reality of the impossibility of claiming that it is exhaustive. There is no need to modify the PCAA in future to include "data protection".

In fact, Article 22 of the GDPR itself provided for the possibility of collective judicial protection of data. In the same sense, Article 42, clause 3. Note that the content of Article 52, clause 5, which directs to the fund created by the PCAA the value of the fines imposed according to the provisions of the GDPR.

It is in this context that we need to understand the characteristics present in our information society (post-industrial) and why exactly they make the

⁴⁴ MELLO FILHO, José Celso. **Constituição Federal anotada**. 2. ed. São Paulo: Saraiva, 1986. p. 133-134.

⁴⁵ BRASIL. **Lei nº 13.709, de 14 de agosto de 2018**.

⁴⁶ MELLO FILHO, José Celso. **Constituição Federal anotada**. 2. ed. São Paulo: Saraiva, 1986. p. 133-134.

protection of personal data a fundamental right of a character that goes beyond the individual. This is proposed in the next section.

2. Information society and the need to protect personal data as a diffuse good

Information society has its origins in the post-World War II period, when economic development and social relations became no longer based on industrial activity, but on the production of information, which, in turn, is the result of data analysis. This is why this new form of social organization has also been called post-industrial society. In this way, Internet does not create the information society but is the result of a process of its development.

Castells stresses that this society is networked, a network empowered by digital media. Such networks enable relationships at the global level in a way that was not possible in the past. However, this same author points to the fact that inclusion in this new model, whose existence affects everyone, does not happen in the same way for all.⁴⁷ On the relevance of the internet, Pierre Levy points to the fact that in an information society we live the network, which he calls cyberspace, "the communication space opened up by the global interconnection of computers - [and which] brings about a new large-scale configuration of communication 'many to many'⁴⁸ (Our translation). "Economic circulation, in this digital world occurs in networks, is generally seen as non-hierarchical, intermediary-free, collaborative, and in a sense democratic".⁴⁹ (Our translation)

However, the development of this market did generate a form of intermediation qualified as platform capitalism. The platform is a socio-technical arrangement that structures the forms of interaction in the cyberspace

⁴⁷ CASTELLS, Manuel. **The rise of the network society: information age**. v.1. 2nd ed. with new pref. West Sussex: Willey-Blackwell, 2010. p. 16-17.

⁴⁸ LÉVY, Pierre. A revolução contemporânea em matéria de comunicação. **Revista FAMECOS**, Porto Alegre, v. 5, n. 9, p. 37-49, 10 abr. 2008. Available at <https://revistaseletronicas.pucrs.br/ojs/index.php/revistafamecos/article/view/3009/>. Access in 18 jan. 2023.p. 64.

⁴⁹ LANGLEY, P. and LEYSHON, A. **Platform capitalism: the intermediation and capitalization of digital economic circulation**. Finance and society. Durhan, vol. 3, n.1. p. 5. Available at: <https://dro.dur.ac.uk/19828/>. Access in 08 dez. 2022.

marketplace).⁵⁰ Through information technology, platforms currently take advantage of the effects generated by the networks they themselves create through the meetings they promote between the various sides of the market relationship.⁵¹

Perhaps the main platforms are the social networks, which take advantage of the opportunity for meetings, expression of ideas and production of content, to collect the personal data of their users which are used to sell advertising to their customers.⁵²

The decentralization potential resulting from the low costs of access to information and coordination of activities in a networked society end up being, to a certain extent, contingent on the role played by large platforms. These are able to process huge amounts of data through big data technology, achieving an efficiency that only those who have access to these gigantic databases can achieve. This leads to a centralization in a few companies that earn large profits through the processing of personal data, since everyone is interested, or so it seems to them, in the results arising from the processing of these stratospheric amounts of data.⁵³ In this sense, it is recognized that the most important companies of our time basically trade on personal data, in particular Google, Amazon, Facebook, but also Apple and Microsoft.

We can understand, then, that life today takes place, in an important way, in cyberspace, whose existence affects in one way or another the lives of all members of society, which develops economically and socially through the circulation of personal data to such an extent that the world's largest companies are those dedicated to processing them.

In this context, the Internet is a fundamental dimension for present and future generations, a space occupied by more than 4 billion people (. It is a world

⁵⁰ LANGLEY, P. and LEYSHON, A. **Platform capitalism: the intermediation and capitalization of digital economic circulation.**

⁵¹ LANGLEY, P. and LEYSHON, A. **Platform capitalism: the intermediation and capitalization of digital economic circulation.**

⁵² LANGLEY, P. and LEYSHON, A. **Platform capitalism: the intermediation and capitalization of digital economic circulation.** p. 12.

⁵³ MARCIANO, Alain, NICITA Antônio, RAMELLO, Giovanni Battista. **Big data and big techs: understanding the value of information in platform capitalismo.** European Journal of Law and Economics, vol. 50, 2020. p. 345–346.

without borders and in which space and time are less relevant. People can communicate, sell, buy, work, participate politically in practically everywhere, any time.⁵⁴

However, this new technological environment, among other issues, calls fundamental freedoms into question. This is because not all people can enjoy cyberspace to the same extent. Users of information society services do not have the same power as the platforms that make them available.⁵⁵

Our legal system in fact already regulates cyberspace at the constitutional level to the extent that it treats it as part of the cultural environment, which is an aspect of the 'diffuse good' environment that is protected in the Constitution".⁵⁶

Our Magna Carta states:

Article 216. Brazilian cultural heritage is constituted by goods of a tangible and intangible nature, taken individually or together, which bear reference to the identity, action and memory of the different groups that make up Brazilian society, including:

I - the forms of expression;

II - the ways of creating, doing and living;

(...).⁵⁷ (Our translation)

The digital environment fits into the concept of cultural environment provided in Article 216 of the Federal Constitution, subsuming itself in the hypotheses of the forms of expression; the ways of creating, doing and living of our people, provided therein.⁵⁸ Thus, the digital environment is constitutionally protected in Brazil. According to Fiorillo, and legal scholars of Brazilian

⁵⁴ MAESTRI, Enrico. *Lex Informatica Diritto, Persone E Potere Nell'età Del Cyberspazio*. Napoli: Edizioni Scientifiche Italiane, 2014. p. 117-121.

⁵⁵ MAESTRI, Enrico. *Lex Informatica Diritto*. p. 118.

⁵⁶ FIORILLO, Celso Antonio Pacheco; WALDMAN, Ricardo Libel. *Fundamentos Constitucionais do Meio @mbiente Digit@l no Direito Brasileiro em Face da Sociedade da Informação e sua Relação com os Direitos Humanos Constitucionais*. In: SOUZA, José Fernando Vidal de Souza; CAMPELLO, Livia Gaigher Bosio; RIZZO, Roxana Lilian Corbran. **Direito Ambiental e Socioambientalismo IV - Anais do V Encontro Internacional Do Conpedi** Montevideu – Uruguai. Florianópolis: Ed. CONPEDI, 2016. p. 129.

⁵⁷ BRASIL. **Constituição da República Federativa do Brasil de 1988**.

⁵⁸ FIORILLO, Celso Antonio Pacheco; WALDMAN, Ricardo Libel. *Fundamentos Constitucionais do Meio @mbiente Digit@l no Direito Brasileiro em Face da Sociedade da Informação e sua Relação com os Direitos Humanos Constitucionais*. In: SOUZA, José Fernando Vidal de Souza; CAMPELLO, Livia Gaigher Bosio; RIZZO, Roxana Lilian Corbran. **Direito Ambiental e Socioambientalismo IV - Anais do V Encontro Internacional Do Conpedi** Montevideu – Uruguai. Florianópolis: Ed. CONPEDI, 2016. p. 133.

environmental law in general, the environment is a unitary concept and is a common good protected as a fundamental right in Article 225 of the Federal Constitution:

Article 225. Everyone has the right to an ecologically balanced environment, a good for common use by the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.⁵⁹ (Our translation)

This implies that the legal regime mentioned in that article can be applied to the cultural environment as recognized by Brazilian case law which establishes strict liability for environmental damage, damage to cultural heritage.⁶⁰

The right to an ecologically balanced environment differs from traditionally understood subjective rights in that it does not have specific holders, so that it cannot even be individualized. No one is the holder of a specific part of environmental systems separate from the rest. Everyone has the right to the whole, and that clearly includes the right to the digital environment. In this sense, it is a diffuse right, as provided in our Consumers' Defense Rights Code - CDC.

Our positive law, as already mentioned, contains a definition of diffuse interest in Article 81, sole paragraph of the CDC⁶¹:

I - diffuse interests or rights, understood for the purposes of this code as transindividual rights of an indivisible nature, held by indeterminate persons bound by factual circumstances;⁶² (Our translation)

The interest we have in cyberspace comes from the fact that our lives for better or worse are lived in this space. Our basic rights depend on the correct balance of the system. There is another important consequence for the legal

⁵⁹ BRASIL. **Constituição da República Federativa do Brasil de 1988.**

⁶⁰ FIORILLO, Celso Antonio Pacheco; WALDMAN, Ricardo Libel. Fundamentos Constitucionais do Meio @mbiente Digit@l no Direito Brasileiro em Face da Sociedade da Informação e sua Relação com os Direitos Humanos Constitucionais. In: SOUZA, José Fernando Vidal de Souza; CAMPELLO, Livia Gaigher Bosio; RIZZO, Roxana Lilian Corbran. **Direito Ambiental e Socioambientalismo IV - Anais do V Encontro Iinternacional Do Conpedi** Montevideu – Uruguai. Florianópolis: Ed. CONPEDI, 2016. p. 129.

⁶¹ FIORILLO, Celso Antonio Pacheco; WALDMAN, Ricardo Libel. Fundamentos Constitucionais do Meio @mbiente Digit@l no Direito Brasileiro em Face da Sociedade da Informação e sua Relação com os Direitos Humanos Constitucionais. In: SOUZA, José Fernando Vidal de Souza; CAMPELLO, Livia Gaigher Bosio; RIZZO, Roxana Lilian Corbran. **Direito Ambiental e Socioambientalismo IV - Anais do V Encontro Iinternacional Do Conpedi** Montevideu – Uruguai. Florianópolis: Ed. CONPEDI, 2016. p. 129.

⁶² BRASIL. **Lei nº 8.078, de 11 de setembro de 1990.**

regime of cyberspace in Brazil: cyberspace, taken as a whole, is a "common good", or as our constitutions define "a good for common use by the people".

Now, personal data, at least in Brazil, is part of the legally protected environment, as it is a good that is part of cyberspace, a digital environment inserted in our cultural heritage (Article 216 of the Federal Constitution), an aspect of the environment that is a good of common use of the people, a macro-good (Article 225 of the Federal Constitution). As such, and given all the facts outlined in this paper, although data is not State property, it is of public interest and deserves adequate protection.⁶³

Considering the role that personal data has in this digital environment, one must examine how it is protected in the Brazilian legal system and confirming how best to interpret it given the context referred here. Firstly, it is necessary to consider how data protection has gained legal relevance. The United States, in view of the growth of computerized databases as early as the 1960s, began to discuss this issue in view of concerns arising from an ever-increasing collection of data for tax and political control purposes.⁶⁴ A significant occurrence in that country was the frustrated attempt to create the National Data Center),⁶⁵ an initiative that aimed to centralize data that the government had on citizens.⁶⁶

In this context, although the right to privacy thesis has its origins in the late nineteenth century, only in 1967 in the case *Katz v. United States* the right to privacy was recognized as a protection against government intrusion, thanks to an interpretation of the Fourth Amendment.⁶⁷ In the United States the norms are not centralized,⁶⁸ but there are two strands: protection against state action, and in matters between private parties. Regarding the former, state actions are limited

⁶³ BRASIL. **Constituição da República Federativa do Brasil de 1988.**

⁶⁴ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale.** Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 30.

⁶⁵ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental. *Espaço Jurídico Joaçaba*, v. 12, n. 2, p. 99, jul./dez. 2011.

⁶⁶ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental.

⁶⁷ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile: dati – persona – mercato: un'analisi comparata. **Comparazione e Diritto Civile** v. 44. Torino: G. Giappichelli Editore, 2020. p. 156.

⁶⁸ TEROLLI, Edioli. Privacy e protezione dei dati personali UE vs. USA: evoluzioni di diritto comparato e il trasferimento dei dati dopo la sentenza "Schrems II". **Diritto dell'Informazione e dell'Informatica** (II), fasc.1, 1 Fevereiro, 2021, p. 56.

by the Fourth Amendment, protecting a reasonable expectation of privacy for citizens. From a statutory point of view, the *Privacy Act 1974* establishes rules on privacy protection, although with many exceptions for reasons of security⁶⁹. In matters between private individuals, a key issue affecting information privacy is the fact that a person gives up their privacy when giving up their data, the so-called third-party doctrine⁷⁰, according to which:

an individual does not enjoy a legitimate expectation of privacy with respect to information disclosed to third parties by him or her voluntarily. The NSA databases, belonging to this category of 'non-content information', do not fall within the scope of the Fourth Amendment.⁷¹
(Our translation)

In any case, there are rules to protect a range of data (e.g. judicial or health data that could clearly harm the privacy of the private individual - Freedom of Information Act 1966).⁷²

The modern notion of the right to privacy, understood as freedom against interference in one's personal sphere, gained international relevance in Article 12 of the Universal Declaration of Human Rights (1948) and in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).⁷³

It is important to remember that, within the scope of the European Union, privacy and data protection are autonomous rights, with the former being provided for in Article 7 of the Charter of Fundamental Rights of the European Union (2000) and the latter in Article 8 of the same. The first is a negative freedom, of not suffering undue interference in one's private life, and the second, a positive freedom to control the treatment and circulation of information about oneself⁷⁴.

Still in the international sphere we can speak of the recommendations of

⁶⁹ TEROLLI, Edioli. Privacy e protezione dei dati personali UE vs. USA p. 56-57.

⁷⁰ TEROLLI, Edioli. Privacy e protezione dei dati personali UE vs. USA p. 57.

⁷¹ TEROLLI, Edioli. Privacy e protezione dei dati personali UE vs. USA. p. 58.

⁷² CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile: dati – persona – mercato: un'analisi comparata. **Comparazione e Diritto Civile** v. 44. Torino: G. Giappichelli Editore, 2020. p.156.

⁷³ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile: dati – persona – mercato: un'analisi comparata. **Comparazione e Diritto Civile** v. 44. Torino: G. Giappichelli Editore, 2020. p.122.

⁷⁴ TEROLLI, Edioli. Privacy e protezione dei dati personali UE vs. USA. p. 51.

the Organization for Economic Cooperation and Development in 1980 and the Strasbourg Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data of 1981⁷⁵.

These documents indicate the emergence of a new dimension of privacy, no longer focused on the protection against undue intrusion, but on creating an economic system in which the automated processing of data is aimed at reducing the risk of unlawful or non-compliant handling.⁷⁶ In addition to prevention, there is now the recognition of a right 'to know activities regarding the processing of one's own personal data, with the ability to, in certain cases, allow or prohibit their use, unless revoked'⁷⁷. Information self-determination as an autonomous right was recognized by the Constitutional Court of Germany in 1983⁷⁸ This is a positive freedom to which is connected the need to assess, in advance, the risks arising from this activity for such right. The right to the protection of personal data is a development of the right to privacy that gained autonomy, being recognized in Article 8 of the Charter of Fundamental Rights of the European Union.⁷⁹

In addition, the European Union adopted Directive 95/46/EC in 1995, which was replaced by the General Data Protection Regulation in 2016, which came into force in 2018, and was very influential in shaping our General Data Protection Act.

According to what has been briefly examined here, the right to data protection is the right of the data holder to control whether and how data is processed and circulated, especially through information and communication technologies. This is an individual right which, however, needed to be protected by limiting the freedom of individuals whose vulnerability in the face of the constant demand for their data by companies is already well recognized.

In this sense Doneda, on the so-called 'fourth generation' of data protection legislations states:

⁷⁵ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile: dati – persona – mercato: un'analisi comparata. **Comparazione e Diritto Civile** v. 44. Torino: G. Giappichelli Editore, 2020. p. 123-124.

⁷⁶ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile. p.124.

⁷⁷ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile. p.124.

⁷⁸ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile. p.124-125.

⁷⁹ CODIGLONE, Giorgio Giannone. Internet e tutele di diritto civile. p.125.

Data protection is seen, by these laws, as a more complex process that involves the individual's own participation in society and considers the context in which they are asked to disclose their data, establishing means of protection for the occasions in which their freedom to decide freely is curtailed by possible conditions - providing for the effective exercise of information self-determination.⁸⁰ (Our translation)

This is because, as Solove states, when making decisions about their data individuals have no way of predicting the consequences of their choice, and such consequences accumulate over time so that they become even more unpredictable when the subject decides in each case.⁸¹ In the same sense, Nissenbaum (points out the limitations of consent on similar grounds, recalling that individuals do not receive the relevant information for their choice and that even if they did, they would lack the time and knowledge to do so⁸².

Still, Rodotà points out that the functioning of information and communications technologies (ICTs) is characterized by data capture. This is charged as part of the price for accessing certain goods. The individual surrenders themselves, it is as if they were under the permanent possession of the person about whom the data was collected⁸³.

Surveillance is carried out by companies and not by a totalitarian state, its aim is not exactly to prevent unwanted behavior, but to make consumption permanent. "The goal is to classify. The surveillance society is defined as a classification society".⁸⁴ (Our translation)

In this context, subjects who behave differently from the majority, who do not represent a relevant share of the consumer market, may be excluded from access to goods and services necessary for personal development and political

⁸⁰ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental. Espaço Jurídico Joaçaba, v. 12, n. 2, p. 97, jul./dez. 2011

⁸¹ SOLOVE, Daniel J. **Introduction: privacy self-management and the consent dilemma.** Symposium. Harvard Law Review, Cambridge, vol. 126, 2013. p. 1891..

⁸² NISSENBAUM, Helen. A Contextual Approach to Privacy Online Dædalus, the Journal of the American Academy of Arts & Sciences 140 (4) Fall 2011.p. 36.

PRADE, Péricles. **Conceito de interesses difusos.** 2. ed. São Paulo: Revista dos Tribunais, 1987.

⁸³ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale.** Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 135-136.

⁸⁴ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale.** p. 136-137.

participation⁸⁵. The loss of information autonomy can end up leading to the loss of other rights. Often, giving away data is required to obtain access to services necessary for daily life such as work, health, political participation, etc.⁸⁶

In this context, the protection of personal data was guaranteed recently as a fundamental right in Brazil by Article 5, clause LXXIX of Constitutional Amendment no. 115 of 2022. Such a right, in fact, was already provided for, although not as a fundamental right in the formal sense, in the General Data Protection Act (Act No. 13709, 14.08.18), referred here as GDPR).

Before the GDPR, Doneda stated that such right was implicitly provided for in our Constitution as an autonomous fundamental right arising from the risks brought about by information and communication technologies that are increasingly used to handle personal data, a right for the "protection of identity in light of the constitutional guarantees of substantial equality, freedom and dignity of the human person, together with the protection of intimacy and privacy."⁸⁷

In this sense, we can speak of the Santa Cruz de la Sierra Declaration of the Ibero-American Summit of Heads of State and Government, of which Brazil is a signatory in 2003⁸⁸. The right to privacy is constitutionally recognized in Article 5, clause X, and telephone, telegraphic and data communications are protected in Article 5, clause XII. The constitution adopted *habeas data* as a remedy to access and rectify personal data contained in government or public databases. The Consumers' Defense Rights Code, the Positive Registration Act, the Access to Information Act and the Internet Civil Rights Framework are statutes related to the theme as well.⁸⁹

Already after the GDPR, the Supreme Federal Court, in the decision of ADI No. 6387, reported by Justice Rosa Weber, recognized the right to data protection as a fundamental right to the protection of personal information, linking this to information self-determination and privacy, positivized by the mentioned

⁸⁵ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale**. Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 137.

⁸⁶ DE TULLIO, Maria Francesca. La privacy e i big data verso una dimensione costituzionale collettiva. **Politica del diritto** 4/2016, a. XLVII. p. 657.

⁸⁷ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental. **Espaço Jurídico** Joaçaba, v. 12, n. 2, p. 103, jul./dez. 2011

⁸⁸ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental.

⁸⁹ DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental.

statute, as a result of personal rights.⁹⁰

Note that the GDPR has privacy as its first pillar provided in Article 2, and as a second, information self-determination. The lawmaker, based in the European Union's General Data Protection Regulation, has paid attention to the aforementioned fact that the right to privacy has long since ceased to be merely the right to be left alone. The idea that there would be a sphere of an individual's life that cannot be touched without his or her permission and the subsequent search for these limits have become if not outdated, obsolete. It has been realized for some time now that: a) a lot of data about people has already been made available by them voluntarily and b) based on this data, with existing technology such as big data and artificial intelligence, it is possible to extrapolate conclusions even about the most intimate aspects of an individual's life.

In this sense, one speaks of a right to information self-determination as the most current dimension of privacy. Therefore, privacy is characterized, in an important way, as control by the holder of personal data of the treatment that is done by the controllers of the same, since the question is not so much what the nature is, intimate or not, sensitive or not, of the information, as what is going to be done with it.⁹¹

Sarlet and Saavedra point out that there is a right to data protection linked to identity and free self-determination (2020, p. 39). According to these authors this is the character of protection both within the European Union and the United States of America.⁹²

With this context, the GDPR identifies an individual's right to have their data handled in principle only with their consent (Article 7, clause I of the GDPR). Other assumptions foreseen in Article 7 include the protection of legal interests

⁹⁰ BRASIL. Supremo Tribunal Federal. **Ação direta de inconstitucionalidade** nº 6387. Available at: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5895165>. Access in: 23 mar. 2023.

⁹¹ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale**. Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 113.

⁹² SARLET, Ingo Wolfgang; SIQUEIRA, Andressa de Bittencourt. LIBERDADE DE EXPRESSÃO E SEUS LIMITES NUMA DEMOCRACIA: o caso das assim chamadas "fake news" nas redes sociais em período eleitoral no Brasil. **REI - Revista Estudos Institucionais**, [S.l.], v. 6, n. 2, p. 534-578, set. 2020. ISSN 2447-5467. Available at: <https://www.estudosinstitucionais.com/REI/article/view/522>. Access in: 14 jan. 2023. doi: <https://doi.org/10.21783/rei.v6i2.522>.

that somehow oppose the protection of the holder's personal data, such as the fulfilment of a legal duty, implementation of public policies, protection of health, of credit, of the legitimate interest of the controller. In these cases, the data handling will realize other legal interests that the lawmaker deemed more relevant than personal data protection. Even so, data handling must take place within the strict limits necessary to achieve such objectives and must respect general legal requirements and the particular rights of the individual data holder, according to clause 6 of the same article.

Therefore, the issue is that data protection is understood as an interest of the holder, albeit an interest that receives the status of a fundamental right given its importance for the fulfilment of human dignity, which is the goal and the foundation of democracy and the rule of law⁹³. Thus, the holder has a fundamental individual right of subjective character to control the treatment that will be carried out with regard to their personal data, although there is also an objective dimension, meaning that it requires regulation and state action to ensure the enjoyment of this right.⁹⁴

Notwithstanding, nowadays personal data has an economic and social importance never seen before. We speak of an information society in which data in general, and personal data in particular, serve as an engine for carrying out social and economic activities. Privacy is lost, but the watched is the group⁹⁵ ICTs, according to Floridi (2014, p. 10), target groups rather than individuals: those who go to a certain kind of restaurant, live in a certain place, etc. Thus, as Zanatta reminds us, the effects of such data processing are felt by individuals who are analyzed from abstractions defined according to the purpose of that decision and of which they are often not even aware. This reduces the possibility

⁹³ SARLET, Ingo Wolfgang; SIQUEIRA, Andressa de Bittencourt. Liberdade de expressão e seus limites numa democracia: o caso das assim chamadas “fake news” nas redes sociais em período eleitoral no Brasil. **Rei - revista estudos institucionais**, [S.l.], v. 6, n. 2, p. 534-578, set. 2020. ISSN 2447-5467. Available at: <<https://www.estudosinstitucionais.com/REI/article/view/522>>. Access in: 14 May 2023. doi:<https://doi.org/10.21783/rei.v6i2.522>.

⁹⁴ SALGADO, Eneida Desiree; SAITO, Vitoria Hiromi. **Privacidade e proteção de dados: por uma compreensão ampla do direito fundamental em face da sua multifuncionalidade**. International Journal of Digital Law, Belo Horizonte, ano 1, n. 3., set./dez. 2020. p. 123.

⁹⁵ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale**. Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 136.

of controlling how their identity is defined and revealed to others⁹⁶.

Furthermore, the political use of these platforms is also documented, and the personal data they directly or indirectly make available to affect the outcome of elections in an honest or not very republican way.⁹⁷ A study carried out by the Getulio Vargas Foundation's Public Policy Analysis Directorate, for example, identifies that the use of bots to create visibility by interaction on social media was significant in the 2018 elections, reaching, at one point, more than 12% of interactions on the Twitter platform (DIAPP-FGV, 2019, p. 5 and 8). It is no wonder that the Brazilian electoral legislation regulates the use of the internet, social networks and messaging applications for the purposes of election campaign advertising.

Sarlet states that the right to the protection of personal data is found in the context of information self-determination, which consists of an individual right which also has a meta-individual or collective dimension, in the sense of being a prerequisite for "a free and democratic communicational order".⁹⁸

This is the reading that underlies the GDPR which, in Article 22, speaks of the judicial protection of the rights of the holders of personal data. Now the holder of personal data is the natural person, the individual, to whom the data concern (Article 5, clause I, GDPR). This is *prima facie* an individual right, which can be collectively protected according to Article 22. Therefore, the Act is speaking here of homogeneous individual rights in the sense of the Consumers' Defense Rights Code: III - homogeneous individual interests or rights, understood as those arising from a common origin. On the other hand, Article 42 clause 3 recognizes the possibility of collective damages occurring, consisting in the

⁹⁶ ZANATTA, Rafael A. F.; SOUZA, Michel R. O. **A tutela coletiva na proteção de dados pessoais: tendências e desafios**, in: DE LUCCA, Newton; ROSA, Cíntia. *Direito & Internet IV: Proteção de Dados Pessoais*. São Paulo: Quartier Latin, 2019.

⁹⁷ FURTADO, Gabriel Rocha. BEZERRA, Daniel Teixeira. **Privacidade, Consentimento Informado e Proteção de Dados do Consumidor na Internet**. Revista dos Tribunais on line. Thomson Reuters. 2020. p. 7.

⁹⁸ SARLET, Ingo Wolfgang; SIQUEIRA, Andressa de Bittencourt. *Liberdade de expressão e seus limites numa democracia: o caso das assim chamadas "fake news" nas redes sociais em período eleitoral no Brasil*. **Rei - revista estudos institucionais**, [S.l.], v. 6, n. 2, p. 534-578, set. 2020. ISSN 2447-5467. Available at: <<https://www.estudosinstitucionais.com/REI/article/view/522>>. Access in: 14 May 2023. doi:<https://doi.org/10.21783/rei.v6i2.522>.

violation of metaindividual interests, belonging to a collectivity.⁹⁹

Therefore, here one can speak of a diffuse right to the protection of personal data, which is embodied not in the information self-determination that can only be of the individual with respect to their own data, but a right to a sustainable use of personal data, in a joint reading of Article 5, clause LXXIX, Article 225 and Article 216 of the Federal Constitution. According to the World Commission on Environment and Development, sustainable development is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs"¹⁰⁰

After 1992 there were two other world summits dealing with the issue of environmental protection and development, in Johannesburg in 2002 and again in Rio in 2012. They did not have the same impact as ECO-92.

Today, sustainable development is a central issue for the United Nations. Thus, the Sustainable Development Goals (SDGs) were established by them in September 2015 to guide the next 15 years (2016-2030) after the Millennium Development Goals reached their deadline in 2015. That the new goals should be about sustainable development was defined at the United Nations Conference on Sustainable Development - Rio+20, 2012.

As the SDGs intend: "We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination" (A/RES/70/1 – Transforming our world: the 2030 Agenda for Sustainable Development, paragraph 8). Thus, sustainable use of personal data avoids discrimination and therefore is essential for an equal society; guarantees the right to political participation, despite opinions and membership of parties and trade unions, being a condition of participative societies; and protects the electronic body understood as personal data necessary to guarantee freedom, being a necessary instrument for a free society. Finally, sustainable use of data preserves

⁹⁹ SCHREIBER, Anderson. Responsabilidade civil na lei geral de proteção de dados pessoais. BIONI, Bruno. Tratado de Proteção de Dados Pessoais. Rio de Janeiro: Grupo GEN, 2020. 9788530992200. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788530992200/>. Access in: 14 jul. 2022.p. 347.

¹⁰⁰ BRASIL. **Constituição da República Federativa do Brasil de 1988**. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access in 26 May 2023.

people against totalitarianism, and therefore can never be absent from a decent society¹⁰¹

In addition to everything mentioned in items 1 and 2, it is worth highlighting an example of recognition of data protection as a diffuse right. It has been seen that the political use of social media platforms, and the personal data they directly or indirectly make available, can affect the outcome of elections in dishonest or unrepugnant ways¹⁰². Thus Brazilian electoral legislation regulates the use of the internet, social networks and messaging applications for the purposes of election campaign advertising.

For example, Resolution No. 23,610/2019 of the High Electoral Court (TSE), prohibits the use of mass sending of content for this purpose¹⁰³.

Article 28. Election campaign advertising on the Internet may be carried out as follows (Act Nº. 9.504/1997, Article 57-B, clauses I to IV) (...)

IV - through blogs, social networks, instant messaging sites and similar internet applications, among which instant messaging applications, whose content is generated or edited by (Redrafted by Resolution no. 23,671/2021)

a) candidates, political parties, federations or coalitions, provided that they do not hire mass sending of content under the terms of article 34 of this Resolution (Act No. 9.504/1997, Article 57-J); or (Redrafted by Resolution no. 23,671/2021)

b) any natural person, forbidden to hire boosting and mass content sending under the terms of Article 34 of this resolution Act No. 9.504/1997, Article 57-J). (Redrafted by Resolution no. 23,671/2021).¹⁰⁴ (Our translation)

Article 34 in turn establishes that:

Article 34. It is forbidden to carry out advertising: (Redrafted by Resolution nº 23.671/2021)

I - via telemarketing at any time of day (STF, ADI no 5.122/DF, Dje of 20.2.2020); (Included by Resolution no 23,671/2021)

¹⁰¹ RODOTÀ, Stefano. **Elaboratori elettronici e controllo sociale**. Ristampa anastatica a cura de Guido Alpa. Nápoles: Jovene Editore, 2018. p. 136.

¹⁰² FURTADO, Gabriel Rocha. BEZERRA, Daniel Teixeira. **Privacidade, Consentimento Informado e Proteção de Dados do Consumidor na Internet**. Revista dos Tribunais on line. Thomson Reuters. 2020. p. 7.

¹⁰³ BRASIL. Tribunal Superior Eleitoral. **Resolução nº 23.610, de 18 de dezembro de 2019**. Available at: <https://www.tse.jus.br/legislacao/compilada/res/2019/resolucao-no-23-610-de-18-de-dezembro-de-2019>. Access in: 22 Feb. 2023.

¹⁰⁴ BRASIL. **Lei nº 9.504, de 30 de setembro de 1997**. Available at: https://www.planalto.gov.br/ccivil_03/leis/l9504.htm. Access in: 22 de Feb. 2023. BRASIL. Tribunal Superior Eleitoral. **Resolução nº 23.671, de 14 de dezembro de 2021**. Available at: <https://www.tse.jus.br/legislacao/compilada/res/2021/resolucao-no-23-671-de-14-de-dezembro-de-2021>. Access in: 21 Feb. 2023.

II - through the mass sending of instant messages without the consent of the person who receives them or through the contracting of expedients, technologies or services not supplied by the application provider and in disagreement with its terms of use. (Federal Constitution, Article 5, clauses X and XI; Electoral Code, Article 243, clause VI; Act No. 9.504/1997, Article 57-J) (Included by Resolution No. 23.671/2021).¹⁰⁵ (Our translation)

Here we can see that the contracting of mass sent without the consent of the recipient is forbidden for the purposes of election campaign advertising. The main objective of this regulation is to reduce the dissemination of disinformation without controversial removal of content¹⁰⁶. The individual right to privacy here is secondary and related to the right to information. So, what the legislation requires is sustainable, responsible use by those who process personal data.

Thus, privacy, as data protection, is part of the necessary conditions to achieve the SDGs and comply with the Brazilian Constitution. As part of the environment understood as a macro good, there is the collective - diffuse right of all Brazilians and residents in Brazil to balanced protection of personal data, which enforces human rights and the just and healthy development of the human being.

Final considerations

We conclude that data protection belongs amongst diffuse interests, thus defined as interests that simultaneously are indivisible, their holders are not identifiable and are united by factual circumstances related to the injury or threat of injury to these interests, according to Article 81, clause I, of Act No. 8078, 11.09.90, a definition coined by legal scholars¹⁰⁷.

¹⁰⁵ BRASIL. Tribunal Superior Eleitoral. **Resolução nº 23.671, de 14 de dezembro de 2021**. Available at: <https://www.tse.jus.br/legislacao/compilada/res/2021/resolucao-no-23-671-de-14-de-dezembro-de-2021>. Access in: 21 Feb. 2023. BRASIL. **Lei nº 9.504, de 30 de setembro de 1997**. Available at: https://www.planalto.gov.br/ccivil_03/leis/l9504.htm. Access in: 22 de Feb. 2023.

¹⁰⁶ SARLET, Ingo Wolfgang; SIQUEIRA, Andressa de Bittencourt. Liberdade de expressão e seus limites numa democracia: o caso das assim chamadas “fake news” nas redes sociais em período eleitoral no Brasil. **Rei - revista estudos institucionais**, [S.l.], v. 6, n. 2, p. 559, set. 2020. ISSN 2447-5467. Available at: <https://www.estudosinstitucionais.com/REI/article/view/522>. Access in: 14 May 2023. doi:<https://doi.org/10.21783/rei.v6i2.522>.

¹⁰⁷ BRASIL. **Lei nº 8.078, de 11 de setembro de 1990**. Available at: https://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm. Access in: 22 Feb. 2023.

This conclusion stems from our living in Information Society, inserted in a digital environment which affects everyone, albeit in different ways. In this environment, we are subject to a series of injuries to goods of which we are all holders, for example, the democratic regime, as evidenced by the need for protections within electoral legislation on the subject.

This article supports the recognition of data protection as a facet of the fundamental right to a balanced and sustainable digital environment and, for the purpose of data protection, the use of forms of collective protection against data leaks and other forms of use that attempt against the economic, social, and political systems, including compensation for collective moral damages. This protection is broader than information self-determination and requires sustainable use of personal data in a way that guarantees a free, fair and egalitarian society, respectful of human dignity.

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