

ONTOLOGY OF PRIVACY

ONTOLOGIA DA PRIVACIDADE

STHÉFANO BRUNO SANTOS DIVINO¹

ABSTRACT

The research problem of this article is the following question: What is the ontology of privacy? Two proposals will be analyzed. The first proposal classifies privacy as personality right. The second proposal understands privacy as a property. Both will be analyzed comparatively from the perspective of personality rights and data protection laws. The contemporary understanding of privacy is also compatible with its historical and cultural aspects. Thus, the first section deals historically and briefly with the development and origin of privacy. The second section verifies the adequacy of the results obtained in the first section and their adequacy to the legal characteristics attributed to personality rights, especially privacy. In the end, it is verified that the identifying elements of a personality right are incompatible and unchangeable when compared with the ontology of privacy since it is constituted and shaped according to the cultural and social precepts in force at the time of its exercise. The deductive method and the technique of *bibliographical research* are used.

KEYWORDS: Privacy. Ontology. Personality. Personal data.

RESUMO

O problema de pesquisa deste artigo é o seguinte questionamento: qual é a ontologia da privacidade? Duas propostas serão analisadas. A primeira proposta classifica a privacidade como direito da personalidade. A segunda proposta entende a privacidade como bem disponível, passível de economicidade. Ambas serão analisadas de forma comparativa à luz dos direitos da personalidade e de legislações de proteção de dados. Verifica-se, também, a compatibilidade do entendimento contemporâneo de privacidade com seus aspectos históricos e culturais que a constituíram. Assim, a primeira seção aborda histórica e brevemente o desenvolvimento e origem da privacidade. A segunda seção verifica a adequação dos resultados obtidos na primeira seção e sua adequação às características jurídicas atribuídas aos direitos da personalidade, em especial a privacidade. Ao final, verifica-se que os elementos identificadores de um direito da personalidade são incompatíveis e inverificáveis quando se comparados com a ontologia da privacidade, já que constituída e moldada conforme os preceitos culturais e sociais vigentes à época de seu exercício. Para a construção desse raciocínio, utiliza-se o método dedutivo e a técnica de pesquisa bibliográfica.

PALAVRAS-CHAVE: Privacidade. Ontologia. Personalidade. Dados pessoais.

¹ PhD student (Capes scholarship holder) and Master in Private Law from the Pontifical Catholic University of Minas Gerais (2019) - PUC-MG. Bachelor of Laws from the University Center of Lavras - Unilavras (2017). Substitute Professor of Private Law at the Federal University of Lavras. Lawyer. <http://orcid.org/0000-0002-9037-0405>. sthefanodivino@ufla.br.

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1 INTRODUCTION

The diversity of contemporary society demonstrates dynamics that can be identified in Information and Communication Technologies (ICTs) and are capable of raising questions about adequate guarantees for the protection of privacy. Points of convergence between market forces and the unity of the person find a place for discussion in the abstractions of cyberspace.

The question that arises as a research problem is: what is the ontology of privacy? The objective is to demonstrate the compatibility between the various legislative and doctrinal experiments underway, advocating certain functions and precepts to privacy with the resistance found in market, political and bureaucratic apparatus.

A brief historical analysis is carried out in the first section. An analysis is made to understand privacy, covering from the tribal period (between 200.000 BC and 6.000 BC) until its modern conception coined in 1890. It's emphasized that such analysis is incomplete. There is a limitation of time and space to make the detailing of the historicity of this institute effective. One of the criteria of distinction and importance to be highlighted is the proprietary basis of privacy. It's understood that, in its origin, privacy is characterized as property, with its due justifications evidenced throughout the text.

In the second section, the correlation between protection of privacy and the subject's private life in the surveillance society is questioned under the focus of socially relevant relationships and information, whether public or private, through a new generation of laws on the protection of this right.

In the third and final section, the characteristics and functions of personality rights (without a broad sense) are compared with the characteristics of privacy. It's intended to question the own coherence of the legal formulas adopted in the data protection doctrine and legislation, regarding the personalism of privacy under the historical approach carried out to date. This, moreover, is a reflection that must be carried out to verify the ontology of privacy, which as proposed is directed to the property.

On the one hand, the defense of this institute as a personality right is known and adopted by the Brazilian legislator in arts. 11 and 21 of the Civil Code of 2002. On the other hand, the proposal evidenced in apparent compatibility with its ontological aspects directs privacy not only as a right, but as a good available within the autonomous existential sphere of his/her owner.

In the end, it is assumed that the characterization of privacy as an integral part of personality rights, as well as its reproduction in data protection laws and in the legislative frameworks corresponding to its principles and functions, hinders its effective protection due to the incompatibility between ontology, dogmatic, pragmatic and legal. This reason authorizes the insertion of a new reframing of this right. For the construction of this reasoning, the deductive method and the bibliographic research technique are used.

2 “PRIVACY MAY BE AN ANOMALY”²

Privacy as it appears in contemporary times is a relatively new conception, dating from 1890, with the essay *The Right to Privacy*, by Warren and Brandeis (1890).³ This direction was shaped by the majority of humans who lived throughout history and contributed little by little to the construction and conceptualization of privacy in their small communities.

What stands out is that in 3.000 years of history, the privacy has been delegated to the background. Humans choose money, prestige or convenience when in conflict with privacy, or the desire to be alone.

During the tribal period (between 200.000 BC and 6.000 BC), the anthropologist Jered Diamond points out that children of hunters slept with their parents in the same bed or hut. There was no privacy. The minors witnessed sexual relations with their parents. In the Trobriand Islands, Malinowski showed that parents didn't take special precautions to prevent their children from watching them having sex: they just scolded the child and asked her to cover her head with a cloth.⁴

In antiquity (between 600 BC and 400 BC), the Greeks showed some taste for privacy. Unlike what happened in the tribal period, the application of an evolved engineering allowed the people of that time to act on it to contemplate their desires. According to Samantha Burke, Greek geometry made possible to create houses with a mathematically minimal exposure to public exposure, while maximizing the available light input on the space in question (BURKE, 2000).

In Rome, the restrooms were public. Angela (2016, p. 236-240) points to evidence that people talked while relieving themselves in open rooms with several bathrooms.⁵ This argument gains strength when the Romans, despite having the economic conditions to build houses with internal walls, chose to show their private lives. In addition, most Romans chose to live in crowded apartments, with walls thin enough to hear all the noise. Overt displays of wealth, at that time, for others present in society were a status symbol (FERESTEIN, 2013).

In the middle ages (400 AC - 1200 AC), holy practitioners of Christianity inaugurated the modern concept of privacy when they opted for seclusion. The popularization of the biblical conception that morality wasn't only the result of bad action, but the intention to cause harm, led its most devoted followers to recoil from society and to obsessively focus on fighting against their inner demons, freeing themselves of the worldly distractions (FERESTEIN, 2015).

Just as fish die if they stay too long out of water, so the monks who loiter outside their cells or pass their time with men of the world lose the intensity of inner peace. So, like a fish going towards the sea, we must hurry to reach our cell, for fear that if we delay outside, we will lose our interior watchfulness (KELLER, 2005, p. 51).⁶

2 Expression used by Cerf (2013): “privacy may be an anomaly”.

3 The authors conceptualized privacy as: “the right to be alone”.

4 Original: “Because hunter-gatherer children sleep with their parents, either in the same bed or in the same hut, there is no privacy. Children see their parents having sex. In the Trobriand Islands, Malinowski was told that parents took no special precautions to prevent their children from watching them having sex: they just scolded the child and told it to cover its head with a mat” (DIAMOND, 2013).

5 “Think of Ancient Rome as a giant campground” (ÂNGELA, 2016, p. 240).

6 Prescription of St. Abba Antony, father of all monks. (KELLER, 2005, p. 51).

At that time there was no word of Latin or medieval origin equivalent to *privacy*. *Privatio* meant to *take out* (DUBY, 1993). In fact, according to Duby (1993), the building plans of the buildings at that time showed that humans and animals slept under the same roof, in the same place, since there was only one room in the residence.

At the end of the medieval period and at the beginning of the Renaissance period (1.300 AC - 1.600 AC), it was possible to witness the creation of the pillars of privacy. For Smith (1975, p. 234), privacy is the main achievement of this period. At the beginning of the 13th century, the commandments of the Catholic Church postulated the obligation of mass confessions, reformulating the paradigm of morality to something essentially private, displaced from society, causing a great upheaval in much of Europe.

Subsequently, technological advances were favorable to the theological guidelines present at that historic moment. A new technology allowed the dissemination of ideals in a quiet and much cheaper way: the Guttenberg printer. The individualistic aspect, that was already consecrated in the creators and thinkers of that time, was reinforced and overburdened the European population through individual reading. Poets, artists and theologians had their ideals of abandoning worldly distractions fixed for the purpose of transforming the individualistic heart with a greater relation with God. Moreover, until the mid-18th century, although public readings were present as a tradition, the silent and recluse study was an elite luxury for many years (FERESTEIN, 2015).

Another construction that made possible to elaborate the concept of privacy was the invention of sleeping beds. The single beds created in modern times were seen as one of the most expensive items in the residence. It became a place for social gatherings, where those present were invited to rest with the whole family and employees of that residence (FERESTEIN, 2015).

This scenario remained until the outbreak and peak of the Black Death (Bubonic plague) (AC 1.343 - AC 1.353). Until then, European life without hygienic care has caused infectious diseases to destroy large cities and newly populated conglomerates. This radical situation forced the community to deeply reform its health and hygiene habits, both at home and in hospitals, where it was common for patients to sleep close to each other (FERESTEIN, 2015).

Although this scenario led to a change in the sense of privacy, it didn't mean that more intimate situations such as sex still continued in the private sense, as we understand today. It was common, justified on spiritual and logistical grounds, to witness the consummation of the marriage. Bride and groom went to bed before the eyes of family and friends, and the next day they displayed the sheets as proof that the marriage was consummated (DUBY, 1993).

In this period, there was no such plausible justification for demanding and imposing privacy. Although there were separate beds, most houses had only one bedroom. According to Sierlo, an Italian architect, the creation of internal walls was not intended to guarantee privacy, but to meet the desire to keep warm, since in this scenario there was only a fireplace in the center of the room so that people could circulate it, see each other, and have fun telling stories (FERESTEIN, 2015).

The personal and legal conception of privacy began to change in the period of the Industrial Revolution (1600 AC - 1840 AC). The population began to demand the monitoring of the law in relation to the growing social demands directed to the secret. On August 20, 1770,

Adams, the future president of the United States, expressing his support for privacy, wrote the following note: "I am under no moral or other Obligation...to publish to the World how much my Expences or my Incomes amount to yearly" (FERESTEIN, 2015).⁷ The desire to maintain the private in relation to the public sphere is able to become evident and to date its growth in later centuries.

In the golden years (1840 AC - 1950 AC), the privacy came to be understood as a "distinctly modern product, one of the luxuries of civilization" (GODKIN, 1980, p. 12). The concentration of wealth in the hands of the bourgeoisie served as a basis for the authorities to recognize privacy as a basic precept of *property* of human life.⁸ In this sense, this new need for intimacy made the process in which multiple factors intervened, from new housing construction techniques to the separation between places to live and to work (RODOTÀ, 2008, p. 26). "What is private as opposed to what is public is no longer identified by a political approach to gain strength in the opposition between the social and the intimate" (CACHAPUZ, 2006, p. 68).

For the poor, however, life still remained public. Sartre (1998, p. 4) gives a detailed account of the streets of Naples demonstrating:

The ground floor of every building contains a host of tiny rooms that open directly onto the street and each of these tiny rooms contains a family...they drag tables and chairs out into the street or leave them on the threshold, half outside, half inside...outside is organically linked to inside...yesterday I saw a mother and a father dining outdoors, while their baby slept in a crib next to the parents' bed and an older daughter did her homework at another table by the light of a kerosene lantern...if a woman falls ill and stays in bed all day, it's open knowledge and everyone can see her.⁹

It was in 1890 that the right to privacy was born as a legal product of a historical reformulation. The Right to Privacy, a seminal essay by Warren and Brandeis (1890) is curiously based on the protection of intimate life and private life against the invasion of technology in the personal sphere.

The precepts of the industrial revolution, still rooted in Warren and Brandeis (1890, p. 1) can be observed in the first sentence of their text: "That the individual shall have full protection in person and in property is a principle as old as the common law [...]".¹⁰ Not only the person, but also the property come into focus on protecting privacy. And this is an interesting

7 FERESTEIN, Gregory. Google's Cerf Says "Privacy May Be An Anomaly". Historically, He's Right. Techcrunch. 2013. Available in: <https://techcrunch.com/2013/11/20/googles-cerf-says-privacy-may-be-an-anomaly-historically-hes-right/>. Accessed on: January 4, 2020.

8 Arendt (2010, p. 72 and 87) reinforces: "We owe the full development of home life and in the family as an interior and private space to the extraordinary political sense of the Roman people, who, unlike the Greeks, never sacrificed the private to the public, but, on the contrary, understood that these domains could only exist in the form of coexistence" (...) "is that the four walls of a person's private property offer the only safe haven against the ordinary public world - not only against everything that occurs in it, but also against its own publicity, against the fact of being seen and heard. An existence lived entirely in public, in the presence of others, becomes, as they say, superficial. Retains its visibility, but loses the quality resulting from coming to light from a darker terrain, which must remain hidden in order not to lose its depth in a very real, non-subjective sense. The only effective way to guarantee the darkness of what should be hidden from the light of advertising is the private property, a privately owned place to hide". (Our translation into english)

9 SARTRE, J. P. in PROST, Antony; VINCENT, G. A History of Private Life: Riddles of Identity in Modern Times. Vol. 5. Cambridge: Harvard University Press, 1998.

10 WARREN, Samuel D.; BRANDEIS, Louis D. The Right to Privacy, Harvard Law Review, 1890.

point, since when the debate or speech of this current right, only its first spectrum (person) is taken into account¹¹.

It so happens that, at this historic moment, privacy was not yet characterized as a positive norm. It was only in 1903, at the request of US President Grover Cleveland, that the New York legislature established a penalty of up to U\$1.000 (one thousand dollars) for the use of someone's unauthorized image for commercial purposes. This didn't happen automatically and because of The Right to Privacy, but because Cleveland married a wife considered beautiful by the media. The Frances Cleveland's image was featured in numerous television commercials, causing the president to put pressure on the legislative chamber (FERESTEIN, 2015).

The complexity and intensity of everyday life required a withdrawal of the subject from the public world. At least a moment of solitude and intimacy has become essential for the individual. This fact is difficult to achieve with modern technological inventions that subject its users to situations of extreme visibility that can make pain and moral distress much greater than those inflicted by bodily damage.

Postcards were one of the first instruments to be used as a reserve for private life. Lane's reports (2009, p. 47) in *The Atlantic Monthly* explain:

There is a lady who conducts her entire correspondence through this channel. She reveals secrets supposed to be the most profound, relates misdemeanors and indiscretions with a reckless disregard of the consequences. Her confidence is unbounded in the integrity of postmen and bell-boys, while the latter may be seen any morning, sitting on the doorsteps of apartment houses, making merry over the post-card correspondence.¹²

In this sequence, another successful creation of ICT's was the telephone. Although the initial value of the individual lines was extremely disproportionate to current standards, the existence of shared lines made it possible for neighbors and closer entities to use and enjoy this function.

Party lines could destroy relationships...if you were dating someone on the party line and got a call from another girl, well, the jig was up. Five minutes after you hung up, everybody in the neighborhood – including your girlfriend – knew about the call. In fact, there were times when the girlfriend butted in and chewed both the caller and the callee out. Watch what you say (LANE, 2009, p. 47).¹³

From this period onwards, there was a strong disproportion between the extraordinary effects of new technologies and the paradigmatic changes marked by the emergence of privacy as an essential resource for the organization of being. Aspiring such a right and seeing it impassive to exercise with such a transformation of scientific and legal institutions puts the material and immaterial protection of the subject in check.

The highlighted intention of this section turns to the beginning of the comparison between the historical and legal aspects of privacy. This set of elements shows how a new frontier of

11 "The American understanding of privacy stems especially from the right to property, imposing limits on the state's power to invade, control or dispose of it. However, jurisprudence has developed and today has a much more complex meaning than the original" (GARCIA, 2018, p. 6). (Our translation into english)

12 LANE, Frederic S. *American Privacy: The 400-Year History of Our Most Contested Right*. Boston: Beacon Press, 2009.

13 LANE, Frederic S. *American Privacy: The 400-Year History of Our Most Contested Right*. Boston: Beacon Press, 2009.

this apparent right is being delineated. In its primary aspect, dating back to antiquity, privacy was seen as non-existent. Apparently, there are no historical reports that place privacy as a natural right. One of the most recent redefinitions of intimate life is that enshrined in the industrial revolution, which characterized it as a property, a luxury, an asset available of the bourgeois classes.

We can see from this brief history that, for more than 3.000 years, privacy wasn't understood as a right. If this is the global picture to be observed, contemporary privacy can be a historic anomaly. And how important is this? This finding tends to favor the concrete regulation of privacy, according to its ontological aspect. At first, it seems to us that its ontology is geared to the cultural and socio-political aspect of the time when its exercise is carried out. Warren and Brandeis only designated it as a right because their personal spheres were affected. Until then, it was seen as an asset, a property (and this continues to be shaped).

At the same time, we live in a society where an intense surveillance of the ICT's affects the subject, reinforcing privacy as a right. And, what about its nature? If we consider privacy a cultural fruit, is there compatibility with this proposition and its exercise? If the meaning is cultural, are the unavailability and inalienability of this institute¹⁴ capable (or at least efficient) of removing obstacles of an economic nature to guarantee a more extensive protection? The next section will give us elements to discuss these questions.

3 PRIVACY UNDER ATTACK IN THE SURVEILLANCE SOCIETY

Along this line, as much as we assume the ontology of privacy as a cultural product, a concept has not yet been presented, it can be said, representative of its capacity to be legally protected. A seminal elaboration was carried out by Alan Westin (2015, p. 12), for which "privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".¹⁵

Some authors differentiate privacy from intimacy. For Nery (2015, p. 63),

intimacy is considered the most private sphere of the individual. There, his personal information is protected so as not to reach the knowledge of others, becoming an inviolable field, protected infra and constitutionally, also referring to the own image before the mass media. (Our translation into english)

The privacy "is situated in the legal field, it's human acts external to intimacy, reserved by the own person or by its nature" (MACEIRA, 2015, p. 64). In this way, "it would be the externalization of a part of intimacy to the detriment of a certain group, location, or any activity, be it of interaction or not, as a title of will of the individual who decides to carry it out and demonstrate that that area constitutes his privacy" (DIVINO; SIQUEIRA, 2017, p. 227-228). (Our translations into english)

¹⁴ "Art. 11. With the exception of cases provided for by law, personality rights are non-transferable and cannot be renounced, and their exercise cannot be voluntarily limited". (BRASIL 2002) (Our translation into english)

¹⁵ WESTIN, Alan F. Privacy and Freedom. Nova York: IG Publishing, 2015.

For Silva (2008, p. 100) "the set of information about the individual that he can decide to keep under his exclusive control, or communicate, deciding to whom, when, where and under what conditions, without being legally subject to it", would be the ideal concept of privacy.

Although this differentiation exists, there is no practical use in its defense. Just the opposite. This bipartition tends only to hinder the effective protection of the private sphere of citizens, considering that they are precisely the ones with the greatest share of control power over the apparatus that violate their autonomy. Telling whether privacy or intimacy has been violated, in an essentially subjective aspect, opens a two-way street for the offender's negative claim about his role in the private sphere.¹⁶

One of the most objective concepts we find in Rodotà. For the author, privacy is understood "as the right to maintain control over one's own information" (RODOTÀ, 2008, p. 92). In this sense, there is not only control over what comes out, but also what comes in. And as much as Rodotà's formulation is linked to fundamental rights and personality rights, his position leads us to a certain property under privacy, "a new property right over personal data, which has become an indispensable asset and of great value in the age of direct marketing" (RODOTÀ, 2008, p. 153). This is quite questionable, since when approached about data commodification the author basically denies any kind of possibility because it's the result of the *person's* subjective sphere.

The proposal to consider the data¹⁷ as a "property" of the interested party reveals insufficient protection precisely under the profile of the fundamental right to privacy, because the possibility of negotiating an economic counterpart presents itself as the only instrument capable of attributing to the interested party a real power of control over the own data that could, otherwise, be collected without his consent or even without his knowledge.

Here we find perhaps the paradox of this article. How to effectively protect privacy without considering it how something available, malleable, in the sphere of its owner? Studies demonstrate the possibility of user acceptance in the sale of his data if a consideration/ counterpart is granted. One of these studies was carried out at the University of Pennsylvania, which resulted in the following questioning: "please think about the supermarket you go to most often. Let's say this supermarket says it will give you discounts in exchange for its collecting information about all your grocery purchases. Would you accept the offer or not?"

16 Cancelier (2017, p. 221), in the same sense: "For us, despite the importance of differentiating between the terms privacy and intimacy, there are no impediments in the use of the expression right to privacy to deal with the right to intimacy, after all this is inserted in that". (Our translation into english)

17 A question may arise about the difference between privacy rights and data protection. In principle, the divergence between them is apparently terminological. However, an attempt is made to delimit the scope of coverage of both. While the right to privacy is constituted as an autonomous institute of its owner's personality, allowing him to control what enters and leaves his private sphere through his informative self-determination, data protection can be considered as a species of the privacy genre. It can be said that are two sides of the same coin. The exercise of data protection is based not only on informational self-determination, but also on privacy, as that is included in this. It appears that, although data protection is restricted to only one aspect of privacy, if viewed as a whole, we believed that both are complementary. From this perspective, it doesn't seem logical to stipulate a dichotomy and stratify, on the one hand, the right to privacy, and on the other, data protection. Ontologically they are unified. But, in order to delimit and meet didactic aspects, data protection is consecrated as a kind of privacy for attention and delimitation of informational acts that are removed from the private sphere of its owner, while the right to privacy addresses something broader, not restricting itself only to this information collected and processed in a virtual environment.

(TUROW, 2015, p. 12).¹⁸ Interestingly, a percentage of 43% of the people interviewed agreed with the practice¹⁹.

The assumption of multiple functionalities brought by technology is part of the development of the various moments of a journey in a person's life. Its dimension, not only diachronic, but also synchronized with the subject's identity, breaks down barriers and assumes a continuous interactive position between humans and machines. At each moment, the context in which the person constructs his path and his significant subjective and objective reference is radically modified. In a legal dimension, this is no different (SANTOS DIVINO, 2019).

Especially in the area of consumption, the discussion on consumer protection in e-commerce isn't relatively new, but neither is it old. The legislative reference in foreign law responsible for the recognition of electronic contracts as a legal business was given in the Uncitral Model Law on Electronic Commerce (*Lei Modelo da Uncitral sobre o Comércio Eletrônico de 1997*), 1997, in its arts. 5 and 1120. In Brazil, the discussion takes place in the early 2000s, mainly with Marques (2004). At that time, the author was already visualizing the possibility of the existence and expansion of a space brought by the internet, expressed in electronic and mass communication networks, to gain trust and elaborate practical mechanisms for consumers, "as well as reconstruct the deconstructed dogmatics" of the contract (SANTOS DIVINO, 2019).

The reflections on this theme are apparently broad. The innovative character of technology shows changes in the relations between the citizen and the consumer market. This description common to the characteristic of a society succumbed to the informational criterion denotes an astonishing growth in the participation of these subjects in the virtual world. The electronic contracts operate the consumer experience in the network society. In order to verify the role and position of the consumer in electronic contractual relations, called e-commerce, it would be a mistake to analyze them exclusively from the theoretical point of view. Some practical considerations must be pointed out as a general character to support the present argument.

Considering the concrete experiences and experiments of e-commerce, we identified the influence of a plurality of instruments used for effective consumer satisfaction. The organization of private structures in the formation of contractual networks enables access to information and the provision of online services through structured and differentiated tools and procedures in new perspectives.

The relevance assumed by electronic commerce and, in general, the economic dimension, induces the transformation of the internet into an aseptic place, where the very consumer, whether adult or child, can enter as if it were a huge shopping center, a commercial center without borders, without running the risk of having your attention diverted from anything

18 TUROW, Joseph; HENESSY, Michael; DRAPER, Nora. The tradeoff fallacy: how marketers are misrepresenting and opening them up to exploitation. Available in: https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf. Accessed on: January 6, 2020.

19 Denominated exchange rate (trade-off). More about that in (IAB, 2010).

20 "Article 5. Legal recognition of data messages. Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message

Article 11. Formation and validity of contracts (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose". (UNITED NATIONS, 1999, p. 5)

other than the consumer activity (RODOTÀ, 2008, p. 179). We are, however, faced with a complex situation: from the moment when commercial use transcends all other modalities of contractual use, due to its practicality and convenience, the format of the internet and its own nature are deeply transformed and emerge new demands and proposals to regulate this scenario. For the supplier of products or services in e-commerce, it is essential to 'accept the consumer' in order to collect and process data for the finalization of that consumer relationship. If the consumer denies, that one will not be able to finish it (SANTOS DIVINO, 2019).

In this same sense, there is a concept of false gratuity in the provision of services. The fundamental point certainly concerns the economic possibility over the consumer privacy. Social networks are examples that use unpaid electronic contracts directly to provide networked products and services. It happens that there is a certain onerous cost of access to social networks, as privacy and personal data have economic value for obtaining patrimonial advantages.

By the way, a 2012 study on the topic revealed that, if social media were supported by users, rather than advertisers, Facebook would be the most expensive, costing 5.04 dollars per year or 42 cents of dollars per month. The Twitter would cost 2.29 dollars per year; the LinkedIn, 1.50 dollars per year; and, the YouTube, 1.17 dollars. (CORDEIRO; KONDER, 2019, p. 197) (Our translation into english)

When using Facebook services (2020), for example, the user in question provides data on content sharing; sending messages; communication with other users, which may include information present in the content or about it/him. After collecting this information, which has already been processed using data initially captured, Facebook will be able to use it to, among other purposes: send marketing communications; improve advertising and measurement systems, being able to show ads that the company considers relevant to the person concerned, both inside and outside the services offered, in addition to measuring the effectiveness and reach of ads and services containing data on how many people viewed the ads or installed an app after seeing an ad; or provide demographic information to help your partners (Facebook partners) understand your audience or customers.

There is not, or there is no way a service that is really free, even if it's worldwide in scope and with numerous participants, to achieve this monetary correspondence. The combined techniques of information technology factors and the collection and processing of personal data enable interactive media to earn advertising income. The discipline brought up in terms of services and in the privacy policy isn't merely protective. The heart of the possibilities offered and the increased distinctions in these contractual instruments extract indications in two directions (DIVINO, 2018).

The defense of privacy, therefore, requires an expansion of the institutional ontological perspective, overcoming its purely subjectivist conception, as a seemingly unavailable and non-delegable right, as well as its purely proprietary conception. A set of disciplines must exist and switch according to the functions for which they are intended to protect privacy. There are, however, challenges to be faced against the contemporary legal concept of privacy.

4 ONTOLOGY OF PRIVACY: BETWEEN PERSONALITY LAW AND AVAILABLE GOOD

When there is an alternation of society for individuals, from the collective to the singular, the polarities are accentuated and become more perspective in the eyes of regular participants. In order to delimit the scheme of the new reality arising from past experiences and analyzes, conceptual attribution is essential to perceive the context in which relations between people, between individuals and social organizations are constituted. Based on this observation, three concepts are essential: personality, personality right and person.

Personality refers to "a susceptibility to be the holder of legal rights and obligations" (DE CUPIS, 2008, p. 19). The rights attributed to it are "legal faculties whose object is the different aspects of the subject's own person, as well as their extensions and projections" (FRANCE, 1983, p. 37). The person, in turn, apparently would be the entity endowed with freedom of the will, the will to meaning and the meaning of life, capable of exercising what is appropriate and what is attributed to him (FRANKL, 1994, p. 16).

It's observed that the differentiation between the above propositions is visible. It's decided to use only the term 'personality right' to avoid ambiguities, allowing the reader to identify what is intended in this present work. The other terms will not be worked on because there is no intrinsic relation with this section.

When analyzing the concept of personality law, realizes the importance of including certain functions in its scope. If we are in the order of personality and subjectivity, such functions and limitations can only be considered legitimate in cases of compatibility with the private autonomy of the holder, which is also based on the free exercise of life.

This particular intersection shows that the characteristics - as well as the functions - of personality rights are the result of an exemplary description. Don't get the fee due to its immeasurable scope and origin. For Schreiber (2014, p. 228),

Its legal functions are different, such as: (I) highlighting the different threats that each of these attributes may suffer, facilitating damage prevention (preventive function); (II) allow, through the development of specific instruments, the fullest repair of injuries that may affect them (reparative function); (III) assist in the formulation of specific parameters for weighing up the hypotheses of collision between the personality rights themselves or between them and other fundamental rights (peacemaking function); and (IV) encourage the development of these attributes through public policies and appropriate social initiatives (promotional function). (Our translation into english)

The dissertation through these functions leads both the legislator²¹ and part of the jurists to assign characteristics consistent with the human condition of such rights. According to Bittar (2015, p. 43),

²¹ "Art. 11. With the exception of cases provided for by law, personality rights are non-transferable and cannot be renounced, and their exercise may not be voluntarily limited."

"Art. 20. Unless authorized, or if necessary for the administration of justice or the maintenance of public order, the disclosure of writings, the transmission of the word, or the publication, display or use of a person's image may be prohibited, at her request and without prejudice to the indemnity that may apply, if its achieve honor, good fame or respectability, or if it is intended for commercial purposes." (BRASIL, 2020) (Our translations into english)

In effect, these rights are endowed with special characters, for an effective protection for the human person, in function of possessing, as object, the highest assets of the human person. That is why the legal system cannot allow that the holder to strip of its, lending its an essential character. Hence, they are, at first, non-transferable and indispensable rights, being restricted to the person of the holder and manifesting from birth (2002 Civil Code, art. 2°).

In their general and principiological characteristics, they are innate rights (original), absolute, off-balance sheet, non-transferable, imprescriptible, unenforceable, lifelong, necessary and opposable *erga omnes*, as the best doctrine has been established, as art. 11 of the new Code.²² (Our translation into english)

The recognition of privacy as a personality right is considered to be of great importance in Brazilian doctrine. In addition to Schreiber (2014) and Bittar (2015), a brief survey demonstrates the articulation between the postulated premise and its empirical relation.²³

It's understood that the sense of privacy in the surveillance society must transcend its dogmatic aspect, relating to the realization of the values of humanity in each society and culture in force at the time of its exercise (NASCIMENTO, 2017). The violation of this right in the virtual network proposed the creation of new legislative mechanisms to protect, repair and compensate the damages arising from this conduct. A common thread required the release of external factors in the formation of the individual's privacy and personality. In this scenario, data protection legislation emerged with the function of marking the fact of belonging to a privileged group of rules aimed at the extensive regulation of the subjectivity of the holder of this right.

This reality is more complex and progressively affects all subjective tutelage. We explain. Both in Regulation 2016/679 of the European Union and in Brazilian Law nº 13.709/2019, both responsible for the establishment of a General Data Protection Regime, the focus of consent is the heart of the discussion.

Firstly, the conceptual aspect of this term must be delimited, but such a task isn't an easy one. It starts from the assumption that a subject of law has autonomy to decide and choose on aspects of his life. The exercise of this discernment as a unique tool develops self-determination as the capacity to practice or not a certain act that is put to him. Specifically in the legal field, the application of consent occurs as a constitutive element of the negotiating sphere. The psychic externalization of this consent, this will, this desire, this belief to accomplish something and this intentional phenomenon is what is intended for the constitution of a contract. A subject X only sells a movable or immovable asset because him intends to do so. Based on rational criteria plus discernment, the subject develops a mental capacity for exercise to choose what he wants for his life. This aspect is even extended to rights considered very personal, such as the economic effectiveness of the image right. A renowned subject who intends, wishes or intends the economic exercise of his image, wants it to be so through the psychological externalization of his will in the practical aspect that may or may not be registered in a contractual instrument.

22 BITTAR, Carlos Alberto. *Personality rights (Os direitos da personalidade)*. 8. Ed. São Paulo: Saraiva, 2015, p. 43.

23 See more in: (NASCIMENTO, 2017, p. 265-288); (SARTORI, 2016, p. 49-104) and (TEIXEIRA, 2018, p. 75-104).

Therefore, consent is considered the master key and an indispensable element in the constitution of a legal business. No one, in principle, can be a part to a contract that he/she don't want. The content of the contractual clauses must be compatible with the psychological guidelines envisaged by the contractor, under penalty of violation of his autonomy and objective good faith. Thus, consent acquires an important role for the exercise of the holder as a person. Its realization as a greater good rest in the satisfaction and realization of the objectified object by its consent, abstracted from its discernment and rational criteria.

Roughly speaking, therefore, consent is more than the externalization of the individual's intentionality through speech acts for the exercise and practice of an act that he aims at. Thus, consent for data processing will only be granted if the holder understands and intends with such an attitude (SANTOS DIVINO, 2019).

The art. 7º of the General Law for the Protection of Personal Data (Law nº 13.709/2018) (*Lei Geral de Proteção de Dados Pessoais - LGPD*) (BRASIL, 2018) states some alternative hypotheses in which data processing would be legitimate. It's understood that at this moment, how the legislator used the disjunctive conjunction or at the end of item IX, if configured any of the hypotheses present in the other items, data processing would be authorized, regardless of having or not *consent*. See: in a hermeneutic reading, if the legislator had decided for the full application of consent in the other hypotheses prescribed in the regulation in question, he would have created subheading in item I, instead of making other items (or better, included such requirement in the caput of article). In addition, the disjunctive conjunction is used or, at the time when he could have limited the hypotheses to the making of the first. For this reason, even if there is no consent from the holder, if any of the hypotheses present in items II to X is configured, the processing of data will be legitimate, as long as the other legislative principles are respected (SANTOS DIVINO, 2019).

As a rule, the legislation takes a protective stance and lists two situations in which it's possible to process this data. The first requires, specifically and prominently, the consent of the data subject to perform the data processing, provided that the purpose is defined (art. 11, *caput*, I, of LGPD). The second (art. 11, II, a-g, of LGPD), dispenses the consent, but will only occur in exceptional cases. All of these situations are exhaustive enumerations and don't allow for broad interpretation. Any other situation that isn't listed here or that the consent of the holder is absent or unverifiable will prevent the treatment agent from acting.

It's true that there are strategies that oppose such logics and legal organizational structures, such as contemporary electronic contractual molds. These, considered clickwrap²⁴ or point-and-click, hinder a more precise analysis to verify the requirements mentioned above.

24 "As a particular modality of adhesion contracts, in the field of electronic contracting, it's important to highlight the so-called *clickwrap* licenses ("*clickwrap agreements*" or "*point-and-click agreements*"), usually submitted to the agreement of the user of the product or service, containing clauses about of its performance, being so named, since its validity is based on the act of pressing the acceptance button (often by means of the mouse), keeping great similarity with the *shrinkwrap* licenses used in the commercialization of software, in which acceptance occurs in the act opening the package containing the physical supports where the program is located" (MARTINS, 2016, p. 131). (Our translation into english)

In addition, the term "*clickwrap*" comes from the term "*shrinkwrap*", used to designate software purchases made in high demand. Its intrinsic relationship with intellectual property acquired great relevance in 1996, with the judgment ProCD, Inc. v. Zeidenberg. "In ProCD, a manufacturer of computer software (ProCD), compiled information from over 3,000 directories into a telephone book database containing approximately 95 million telephone listings (at considerable expense) and developed a search engine to be used in conjunction with the database. In order to effectively market the software, ProCD licensed the database at different prices-higher prices for commercial users and lower prices for private users. A problem arose, however, when Zeidenberg bought a private user package, but ignored the license, extracted the listings, and made the database commercially available over the Internet through his own proprietary search engine. ProCD sued Zeidenberg, claiming Copyright infringement and breach of the shrinkwrap license agreement" (COVOTTA; SERGEEFF, 1998, p. 35-54). (1998).

However, the strength of the new technologies and their synergy with the legislation must take a stance to facilitate this fact, as well as the creation of specific contractual models for the optional assignment of personal data by the holder when using a certain service. What should be borne in mind, in the first place, is that the design of consent as the locus of data processing outlines some trends, mainly principiological, which have not been forgotten by the law. On the contrary, they were listed in a specific list.

The problem is what to do in order to collect this consent. Current electronic contractual models don't favor this practice. The simple attitude of clicking on a dialog box and accepting the Terms of Service and the Privacy Policy obviously isn't something that can be affirmed by granting consent. Because, the reading of this type of contract, for it contains numerous technical traits, impairs the understanding of lay people. That's when they do the reading. Because, most of the time, according to the first authors, 74% of people ignore such terms and policies (OBAR; OELDORF-HIRSCH, 2018).

With these considerations, we return to the ontological dynamics that are typical of private life. Technological incompatibility with data protection laws and also with social development under intense surveillance, makes impossible to effectively protect this right under the terms intended by its owner. Privacy and personal data, today, have a high economic value capable of limiting or excluding other forms of legal protection under the virtual dimension.

This more complex reality progressively affects the entire social organization. It's necessary to consider it when drawing the new parameters for rights and social organization, to directly interfere in this dimension and guarantee the freedom of the subject. A reframing of privacy is necessary to favor its development as something controllable in the intimate sphere of its owner.

Initial actions already highlight reformulated dimensions for the reinterpretation of this right. The first one is called "*decisional*": "[...] it's the type of protection that is given to the individual's way of life, including his/her choices, tastes, projects, characteristics" (PEIXOTO, EHRHARDT JR, 2018, p. 48). The second, informational, derived from Solove (2008), understands that privacy must be seen in a "contextualized perspective in its particulars, and not just as something abstract". Finally, the third dimension, called spatial, "[...] turns to that which is the most traditional dimension of privacy of all, that original dimension, from which every subject related to privacy developed. It's the privacy of the home, the privacy of a room in the house, of a specific physical place" (PEIXOTO, EHRHARDT JR, 2018, p. 54). (Our translations into english)

Although the description of the last dimension is questionable, considering that the development of privacy between walls was to take place only after the industrial revolution, the central idea is a proposal to reformulate privacy to meet legitimate contemporary interests, that is, its protection.

The importance of this jurisprudence is to consider the possibility of the binding force of *clickwrap* and *shrinkwrap* licenses. The terms described therein, according to the decision of the North American court, have a contractual character and are equivalent to the principle of *pacta sunt servanda*. That is, what has been agreed, must be fulfilled. This position raises serious considerations. First, it must be understood that there is no theoretical reduction in consent to this type of contractual modality. While consent is an intentionality factor, something of an essentially subjective character that is linked to the autonomy and self-determination of its holder, both *clickwrap* and *shrinkwrap* are electronic contractual modalities in which the holder will use it as a possible form of expression of his consent. While one has a subjective meaning, the other acquires a legal and formal notion.

What is proposed, at this moment, is to place the problem of the defense of privacy in a dimension in which it's precisely the information and communication technologies that enable its defense and exercise. Its ontology is taken into account. We initially say that, because it's a cultural fruit, the privatistic aspect is shaped by social customs. In the contemporary surveillance society, privacy is nothing more than an economic resource used for the development of large companies. And how does the titular subject stand in front of this?

Although the general data regulation was recently enacted, in the European Union there was the Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and the free movement of such data. This, however, didn't prevent the emblematic Cambridge Analytica Case (DAVIES, 2015), despite the fact that the Regulation 679/2016 has a lot of textual content in common with its revoked rule.

What we hope to deduce from this reasoning is that the market and society will not be hampered by the imposition of the necessary consent for the collection and processing of personal data, as well as by the impossibility of entrenching a kind of social profile of technologies, in the sense of the necessary creation of risks to the private sphere. This means that programs will be used on a network for the ongoing contemporary practice of breaching privacy. First of all: because the legislation usually finds territorial limits for its effective application. Whereas the internet is something transcendental of sovereign boundaries. On the other hand, it's basically unfeasible, from an economic perspective, to collect any and all types of consent in a network so that the contract that is being drafted is actually implemented.

This, however, doesn't only affect virtual relations, although it focuses on them especially. It's postulated that the characteristics of unavailability, inaccessibility and inalienability cease and enable the holder of privacy to obtain proportional gains and profits to those that the company responsible for the violation of his privacy (*lato sensu* - also covering data collection and treatment). It can be seen that, according to the privacy ontology, aimed at a culturally shaped element, legal development ignored historical development and started from the premises of Warren and Brandeis as if it were a supreme and immediate result of society.

The view of this right as a good seems to be more viable than just an ineligible, inessential, unavailable and inalienable personality right. The support of the existential autonomy of the being allows him to concentrate in his acts of private autonomy what is intended to enter and leave his intimate sphere. In this same sense, elementary provisions that don't contradict their human significance are subject to economic effectiveness. What is private matters only to its owner. If it's intended to be made public, it isn't for the judiciary to take action to prohibit such conduct. In addition, if it's intended to obtain economic gains from such a practice, provided that as stated above it doesn't contradict or modify its position or reduce the human condition to an extremely decadent level, impassive in the exercise of its own dignity, only the results must be authorized and regulated. The prohibition of this type of object only tends to hinder and transform into hypocrisy something that would allow a more balanced social connection between subject and individual.

Thus, the imposition on everyone of the characteristics of personality rights for privacy seems to be disconnected from its historical context. Must analyze its feature as a property and, in the first place, allow its holder to be freely available. It would no longer be fair for the

individual to participate in the economic aspect of something that is already exclusively his. In difficult times, despite the undeniable legislative delays and the planning of legal systems to promote such protection.

5 CONCLUSION

Putting into question the current system of personality law that covers privacy, it was necessary to reflect on the role that both reveal to and before institutional subjects. The marketing and political aspects use this modified social circuit to earn income and to establish particular rules between the former and the holders of the right to privacy.

In this conception, norms and legislation directed to the protection of intimate life appear. In fact, even though deontological codes and good conduct direct the interested categories, in this case the rights holders, the established rules tend to discipline an apparently utopian relation. In the contract drafting phase, as seen, the reference on the collection of consent, if elaborated along the lines established in the standard, tends to challenge and hinder electronic contracting. And, from a certain point of view, there are territorial limits that must be observed for the correct jurisdictional application of a given country.

In this perspective, the first section was responsible for demonstrating the ontology of privacy. In its historical aspect, privacy was characterized as property. Its essence, thus directed, should be used as a template for future legal and socioeconomic constructions, a fact that cannot be detected.

In the second section it became evident, under an empirical analysis, that the legislative, normative and legal precepts currently advocated by the legal community are apparently incompatible with the very personal characteristics attributed to this right. According to research raised and pointed out by Turow, Henessy and Draper, people would switch personal data at discounts at supermarkets. This means that the tendency to dispose of this asset, or at least the temporary assignment carried out under the economic approach, is already practical and accepted by the community that holds this right.

What was intended with the observation in the second section was to demonstrate the existence of a reformulation or resignification of privacy in the information context. Apparently, advocating it as a personality right would only hinder its full exercise and protection. On the one hand, it prevents its holders from being able to freely assign it or dispose of it in the consumer market, if they so wish. On the other hand, data protection laws apparently become an ineffective utopia due to: if the precepts listed there are followed, all economic marketing contracts tend to stop to collect the subject's consent.

Thus, as a solution to this problem, in contrast to a new protective trend: it's claimed that privacy is seen not only as a right of the personality, but as a well-available component of the person's existential autonomous sphere. What is private is of interest only to the person who has the secrecy. If the holder wants to make it available, the State cannot do anything to prevent such conduct. And if this can be done free of charge, why not costly, in order to allow

proportional or fractional gains to the holders who exercise it? It's necessary to take this into account.

Considering the current experiences in a framework of democratic balance, we know the central role of the internet. Its growth is significant for all areas of science, including law. It would be a mistake to extract from this scenario the survival of a movement that cannot be based only on its legal roots. The electronic relations have given rise to a paradigm that, until now, even in the presence of revolutionary innovations, there is a complex legal and social reorganization. In this sense, we are walking a few steps, but in the wrong direction.

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