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ARTIGO ORIGINAL

The collective dimensions of privacy and personal data: commons with restricted use

As dimensões coletivas da privacidade e dos dados pessoais: comuns de uso restrito

Lauricio Alves Carvalho Pedrosa[1 2]
[1]Universidade Estadual de Santa Cruz, Ilhéus, Brazil.
[2]Justus-Liebig Universität Giessen, Gießen, Germany.

Abstract: This article aims to highlight the existence of collective dimensions in the field of privacy and data protection, which are practically disregarded in the current legal discipline, based on the notion of informational self-determination. Due to the coexistence of this aspect with those of an individual and very personal nature, it is argued that there are multiple ownerships of these fundamental rights. In order to guide the construction of appropriate rules for the protection of transindividual interests, the criticisms of the patrimonialist logic that permeates the current legal framework are analyzed and it is proposed that privacy and data protection should not be classified on the basis of traditional categories of law, such as legal good, subjective right and legal situation. Finally, they should be categorized as common, whose use and availability should be very restricted, and the construction of a discipline should have broad popular participation.

Keywords: Privacy. Data protection. Collective dimension. Multiple ownership.

Resumo: O presente artigo almeja destacar a existência de dimensões coletivas no âmbito da privacidade e dos dados pessoais, praticamente desconsideradas na atual disciplina jurídica, fundada na noção de autodeterminação informativa. Em virtude da coexistência desse aspecto com aqueles de natureza individual e personalíssima, defende-se, portanto, haver múltiplas titularidades incidentes sobre tais direitos fundamentais. Para orientar a construção de normas adequadas à tutela dos interesses transindividuais, são analisadas as críticas a respeito da lógica patrimonialista que permeia o atual regramento jurídico e se propõe que a privacidade e os dados pessoais não sejam classificados com base nas categorias tradicionais do

direito, a exemplo de bem jurídico, de direito subjetivo e de situação jurídica. Por fim, defende-se categorizá-los como comuns, cujo uso e disponibilização devem ser bastante restritos, e a construção de uma disciplina deve contar com ampla participação popular.

Palavras-chave: Privacidade. Proteção de dados. Dimensão coletiva. Multititularidades.

1. INTRODUCTION

The discussion around the collective aspects of privacy and personal data is still in its early stages. The legal framework provided by both national and international legislation continues to rely on an individualistic approach, embodied in the right to informational self-determination. This approach proves inadequate for protecting not only these vital fundamental rights, but also key achievements of humanity, such as democracy, equality, respect for diversity, and freedom of choice.

Throughout the text, the aim is to show that, despite the extensive doctrinal and jurisprudential development surrounding privacy and personal data, there are collective dimensions whose legal protection cannot be guaranteed through individualized decisions. Therefore, they require a legal framework more suited to their characteristics.

The research problem lies in determining, given the content and unique characteristics of these dimensions, into which category this information can be placed to ensure regulations more aligned with their peculiarities. Despite the prevailing view of providing functional definitions for these fundamental rights, there is an argument for the importance of better categorization to try to distance them from a property-based approach.

Based on the concept of multiple rights holders, we show that the collective dimensions of privacy and personal data do not negate the highly personal sphere, although there is a close connection between the two. This allows for the development of a legal framework capable of ensuring harmonious coexistence between seemingly conflicting

interests. Subsequently, various doctrinal approaches aimed at removing privacy and personal data protection from a property-based approach are analyzed, and an interpretive proposal deemed more suitable for this purpose is formulated.

The goal is to conduct an extensive review of literature and documents to present argumentation and decision-making strategies, aiming to suggest ways to develop solutions for the lack of legal protection for the collective aspects of privacy and personal data and to contribute to the discussion on how to regulate the use of such content and information. Although this topic has become essential for ensuring the preservation of some of the most significant achievements in human history, clear gaps in existing norms have led to significant social setbacks in various countries worldwide.

Thus, based on the framework developed by Pierre Dardot and Christian Laval, who are key theoretical references in this research, we advocate for treating privacy and personal data as "commons". This term has been adapted to signify a political principle applicable to things that should be considered non-appropriable, whose use should be regulated through widespread public participation. Given the sensitive nature and potential harm of such information, it is concluded that there is a need for stringent access restrictions to uphold individual rights, fundamental freedoms, and democracy itself.

2. CURRENT PERSPECTIVES ON PRIVACY AND PERSONAL DATA

The concept of privacy originated and evolved with a focus on protecting individual interests, particularly those pertaining to the most intimate and personal aspects of human life. Legal protection was designed to safeguard a right considered individual, part of the first generation/dimension of rights. Historically, privacy was initially understood as the "right to be let alone," as classically defined by Warren and Brandeis (2013, p. 10).

It is a concept characterized by extreme individualism, originally based on the notion of a complete absence of relationships (*zero relationship*)[1]. Over time, privacy has come to be seen as a fundamental aspect of human personality, such that its regulation aims to ensure the full realization and development of the individual.

The concept of privacy has evolved significantly over time. Initially, privacy was seen as a "privilege of the emerging bourgeois class" (Doneda, 2019, p. 118), being used as a means to maintain isolation, largely through the ownership of private property, which was considered a space where secrets could be kept safe.

However, since the Warren and Brandeis article, there has been an argument that the protection of privacy should not be based on private property, but rather on the inviolability of personality (inviolate personality) (2013, p. 10). Gradually, the property-based rationale has been set aside, leading to profound changes in the definition and substance of privacy.

The concept of the private sphere has been expanded to include actions, behaviors, opinions, personal preferences, and, most importantly, information over which individuals seek to maintain exclusive control. This contrasts with the previous focus on protection linked primarily to secrecy (Rodotá, 2008, p. 93).

In recent years, the digital age has brought about significant changes worldwide, driven by new technologies. These changes have even affected how people interact and, notably, the way they acquire goods. There is a growing emphasis on new forms of belonging and a sharing economy, where access rights have become more important than ownership (Guilhermino, 2018, p. 15).

[1] "Privacy is a "zero-relationship" between two persons or two groups or between a group and a person. It is a "zero-relationship" in the sense that it is constituted by the absence of interaction or communication or perception within contexts in which such interaction, communication, or perception is practicable-i.e., within a common ecological situation, such as that arising from spatial contiguity or membership in a single embracing collectivity such as a family, a working group, and ultimately a whole Society". (Shils, 1966, p. 281).

The sharing economy, while addressing privacy and personal data as legal goods, facilitated their commercialization. This approach is grounded in the traditional concept of subjective rights, which is designed to safeguard individual property from arbitrary state actions. Simultaneously, this phenomenon fits within the neoliberal perspective that privatizes all aspects of life, turning activities and values into commodities (Klein, 2001).

This treatment made it easier to trade personal data in the market. Personal data has become one of the most valuable goods today, as algorithms analyze and process them into economically useful information, creating consumption profiles of individuals (known as profiling) based on their habits and personal preferences, with the aim of influencing or even shaping their desire to acquire products and services (Zuboff, 2020, p.08).

In this context, Clarissa Véliz emphasizes the concept of privacy as a form of power, highlighting its connection to the deepest and most personal aspects of human beings. In this sense, sharing these intimate details with others exposes one to vulnerability, as it grants another person the power to potentially harm them by exploiting their privileged access to one's personal life (2020, p. 56).

Furthermore, the collection of information based on people's online searches, which reveal their desires, fears, and curiosities, has given rise to surveillance and targeted efforts in economic[2], political, and social realms on an international scale. This phenomenon, known as the data economy, is eroding principles of equality, justice, and democracy by using such data to manipulate citizens' choices and encourage discriminatory practices.

In light of the challenges in today's information society, legal literature tends to favor "functional definitions of privacy, which often refer to an individual's ability to know, control, direct, and

[2] Byung-Chul Han called this phenomenon of digital espionage an economic panopticon (HAN, 2017, p. 104).

interrupt the flow of information related to them" (Rodotá, 2008, p. 92). However, the discussion on how to categorize privacy, moving away from a property-based approach, remains significant.

In Brazil, the prevailing understanding is that privacy is a right tied to the broad principle of protecting human dignity. This view, which is heavily individualistic, is influenced by the theory advocating for a right to informational self-determination. This concept aims to strengthen individuals' control over their personal information and prevent loss of self-control. To achieve this, it is deemed necessary to establish mechanisms that can reduce or eliminate power asymmetries linked to cultural and economic factors, as well as distortions created by the market (Rodotá, 2008, p.127).

Danilo Doneda criticizes certain concepts of privacy, arguing that it encompasses values beyond the scope of subjective rights, thus viewing privacy as a complex subjective situation, involving a range of individual and collective interests and generating rights, duties, and burdens for those involved (2019, p. 130).

Doneda draws on the ideas of Pietro Peringieri, who posits that legal situations arise from the effects of a specific legal fact in relation to an interest center, impacting a target subject. Peringieri advocates moving beyond the individualistic focus based on the power of will, as well as the teleological or property-based approach that has even subjugated fundamental rights to an owner-based approach (2008, p. 668-669).

These subjective situations stem from a fact, either natural or human, with legal relevance. They are grounded in justifying interests that may be property-based, existential, or a combination of both. This category encompasses a variety of elements, including active and passive subjective situations, such as subjective rights, legal powers, legitimate interests, obligations, and burdens. This highlights the complexity of the concept.

Regarding personal data, it is generally understood as information that is in a latent state, awaiting interpretation/processing or

further development (Doneda, 2019, p. 136). In the contemporary context, all data is deemed significant. Legal frameworks often extend heightened safeguards to what is termed as "sensitive data." This category encompasses data types that, if revealed, could prompt discriminatory actions against, for example, one's political and religious convictions, sexual orientation, medical background, and genetic details.

However, even data deemed non-sensitive can, if subjected to certain types of processing, disclose sensitive information about a person. Therefore, the greater risk lies in the processing of this information, which does not reduce the need to restrict data collection itself, as will be demonstrated later on.

In 1981, the Council of Europe, through the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, recognized personal data as a human rights issue. The European Union's Charter of Fundamental Rights also includes provisions for the protection of personal data in Article 8. The most detailed regulations for data processing within the EU are found in the General Data Protection Regulation (GDPR).

In Brazil, similar regulations are outlined in the General Data Protection Law (LGPD). Article 1 of the LGPD highlights its primary goals: to protect fundamental rights of freedom and privacy and to promote the natural person's free development of personality. The law aims to regulate and limit data processing to ensure respect for privacy, informational self-determination, freedom of expression, information, communication, and opinion, as well as the inviolability of intimacy, honor, and image. It does so while considering economic development, technological innovation, free enterprise, competition, consumer protection, human rights, personal development, dignity, and the exercise of citizenship by natural persons.

These goals are highly challenging, especially in the era of surveillance capitalism, where some argue it is impossible to avoid digital tracking due to technological advancements, which has hindered users

from securing their privacy (Hoofnagle; Soltani, Good; Wambach; Ayenson, 2012, p. 273). However, considering the harmful consequences, both individually and collectively, caused by access to personal information, it is necessary to increase restrictions on gathering such content to ensure the free development of citizens' personalities, as well as the preservation of key collective ideals such as democracy, equality, respect for diversity, and freedom of choice.

Throughout the text, privacy and personal data will be discussed autonomously, agreeing with Danilo Doneda's view that deriving data protection directly from privacy "oversimplifies the foundations of personal data protection, which could potentially limit its scope" (2019, p. 261).

Despite the advancement in recognizing privacy and personal data as fundamental rights or subjective legal situations, the approach towards the collective dimensions of these rights has been quite limited and warrants deeper reflection by legal science.

3. THE COLLECTIVE DIMENSIONS OF PRIVACY AND PERSONAL DATA

With the advent of new technologies, the collective aspects of privacy and personal data have become as important as their individual dimensions and, in most cases, it is impossible to separate them. However, norms governing data collection and processing rely on the liberal and individualistic concept of informed consent. This approach overlooks the social existence of human beings, making these norms insufficient and ineffective.

Because people share intimate thoughts, feelings, and information with each other, it is not enough for someone to opt for maximum privacy protection. The exposure of their entire social network can be triggered if another user consents to or is negligent about data collection, even without the rest of their network's consent (Shaeffer; Keever, 2021, p. 294-295).

An example highlighting this issue is the exposure caused by granting certain apps access to a user's personal contact list, putting them at risk. Moreover, donating genetic material for testing can expose future generations to risks such as job discrimination based on the test results, even though these individuals did not participate in or consent to these procedures.

In this context, Clarissa Véliz emphasizes the toxic nature of personal data, comparing it to a slow-acting poison as access to such information can harm not only the individual to whom it belongs, but also those closely associated with them. They can also be transformed into political, economic, or other forms of power through the use of private content to manipulate people, influencing their choices and the content they access (Véliz, 2020, p.49, 62, 63 e 87).

Conversely, it is important to highlight the role of Big Data in exploiting "homophily" – the principle that people tend to interact with others who are like themselves. This principle allows for the identification of a person's ethnicity, gender, income, age, political opinions, and other details based on their communication networks and contacts (Shaeffer; Keever, 2021, p. 290).

Besides the interdependent nature of privacy protection, which primarily aims to ensure the free development of personality, Danilo Doneda points out other significant issues related to the collective dimension of privacy: the political connotations of control over individuals and the imperative to avoid discrimination against minorities (2019, p. 46).

In this context, Clarissa Véliz draws a parallel between privacy violations and ecological issues, noting that both require collective action and depend on enough people moving in the same direction to effect change (2020, p. 89).

The culture of exposure harms society because it damages social cohesion, threatens national security, allows for discrimination, and endangers democracy. Social construction relies on the ability for individuals to express their opinions openly, as this tests

the quality of their thoughts by exposing them to opposition and new perspectives.

The pervasive nature of exposure has led to a pressure to never make mistakes, driven by the fear that anything one does or says could become public knowledge. Consequently, information is often weaponized, making people feel perpetually threatened. This gives rise to what is known as the spiral of silence, where individuals only express their opinions when they are confident that these views are widely accepted, fearing social isolation or discriminatory actions (Véliz, 2020, p. 94).

The spiral of silence plays a role in upholding the status quo by hindering the expression and dissemination of dissenting opinions critical of the current social condition, which obstructs social progress and the development of new consensuses. With privacy becoming scarce, both personal relationships and opinions are inclined to become superficial, as the majority seeks to sidestep the adverse effects of ideas that go against the mainstream.

Another significant aspect to highlight regarding the collective dimension of privacy and personal data is the use of such information to create targeted advertisements and personalized fake news. Data analysis enables the identification of the most sensitive topics for each social group, leading to the creation of fake news based on these topics, which could influence electoral contests. It has been observed that the machinery designed to shape consumer choices could also be used as a political weapon (Empoli, 2022, p. 155).

Fake news is crafted to capture the attention of specific groups by targeting topics that are particularly sensitive to those communities, evoking stronger emotions and thoughts, leading to increased engagement, but also greater societal polarization[3]. The lines between often

[3] In this context, Giulano da Empoli describes: "For the new political Wizards of Odd, the game is no longer about bringing people together around a common denominator. Instead, it is about igniting the passions of as many small groups as possible and then,

false news and political advertisements become blurred. Both are no longer tools for seeking consensus but instead serve to fuel extremism.

At first, everyone is susceptible to manipulation by fake news, since almost nobody has immediate access to the information they consume. In this scenario of customized false content, parallel realities are created, making it impossible to engage in debate or dialogue about the issues that require collective actions/decisions[4]. Conversely, such actions demand time for the development of compromises, which frustrates consumers who are increasingly accustomed to having their demands met instantly with just a click (Empoli, 2022, p. 167).

According to Clarisa Véliz, personal data are dangerous because they touch on aspects fundamental to every human being's identity. They are highly vulnerable to misuse, challenging to secure, and desired by criminals, insurance companies, and intelligence agencies (2020, p. 108). Therefore, once a breach occurs, the leaked content can devastate the lives of those involved and there is no reliable method to retrieve and completely remove the improperly disseminated content from the internet.

Therefore, decisions seemingly made on the grounds of informational self-determination impact others who did not partake in them, such as conducting genetic tests or accessing a phone's contact list. Thus, it becomes essential to consider limiting or forbidding access to information that could jeopardize the fundamental rights of third parties.

Conversely, it is crucial to establish mechanisms to counteract the so-called spiral of silence and to ensure that democratic opinions, though minority and divergent from the status quo, are expressed without subjecting individuals to discrimination or social isolation.

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even against their will, amalgamating them. To secure a majority, they do not move towards the center; they align with the extremes." (Empoli, 2022, p. 21).

[4] According to Clarissa Véliz: "When each of us is trapped in an echo chamber, or an information ghetto, there is no way to interact constructively". (2020, p. 95-96).

The use of personal information to generate fake and personalized content, by fostering extremism and radicalization, poses a threat to democracy and human rights.

Therefore, there is an evident need for regulation that encompasses the important collective dimension of privacy and personal data, which does not diminish the importance of their individual aspect but leads to an analysis regarding the multiple ownership of rights.

4. MULTIPLE OWNERSHIP OF PRIVACY AND PERSONAL DATA

The traditional system of ownership rights was based on the principle of exclusivity, granting one or more individuals control over a legal good, regardless of whether it was tangible or intangible. This concept adhered to the singular property model that emerged with the rise of the Modern State, marked by a strong ideological emphasis (Grossi, 2021, p. 62), as it rejected collective forms of good appropriation. The individualistic model, characterized by exclusivity and perpetuity, expanded to include various types of legal goods, incorporating even those of an intangible nature, such as privacy, which was incorporated in a first moment.

With the emergence of new technologies and the subsequent dematerialization of goods, the ownership model outlined in the Civil Code has become inadequate for encompassing all the existing wealth goods in society. Conversely, the establishment of constitutional principles has led to significant transformations and breaks in the traditional model of property.

Among these changes, the recognition of common goods stands out. These are typically associated with resources that should be freely accessible and not owned exclusively by anyone, such as water, food, and open-source software, requiring regulatory oversight for their use. These resources are considered to belong to everyone and, simultaneously, to no one in particular. The community is acknowledged as

having the authority to manage and protect them. This categorization is not based on the goods' inherent nature, but on their ability to meet collective needs and facilitate the exercise of fundamental rights.

Recognizing this kind of goods is seen as the rise of a new kind of logic – based on the link between individuals and their needs –, rather than just reevaluating old categories (Tepedino, 2019, p. 19). In Italy, Ugo Mattei describes it as a kind of 'next-generation' fundamental right, breaking away from the traditional ownership (individualistic) and authoritative (social welfare) paradigms. This category has its own legal and structural independence, offering a distinct alternative to both private and public ownership (2011, p. VII).

The Rodotá Commission, established to revise the Italian Civil Code to incorporate common goods, defined them as:

> items that provide functional utility for the exercise of fundamental rights and the free development of the individual. Common goods should be protected and preserved by the legal system, including for the benefit of future generations. Holders of common goods can be public entities or private individuals. In any case, their collective use must be ensured, within the boundaries and according to the procedures established by law[5].

Brazilian legal literature similarly defines it as an essential good for the exercise of fundamental rights, ensuring that access is guaranteed for everyone, which helps overcome the ownership approach. In Brazil, there is no explicit mention in the laws regarding this classification, although there are references to the unavailability of certain goods in decisions made by Brazilian courts (Tepedino, 2019, pp. 28-29).

[5] Translated by the author from the original: "cose che esprimono utilità funzionali all' esercizio dei diritti fondamentali nonché al libero sviluppo della persona. I beni comuni devono essere tutelati e salvaguardati dall' ordinamento giuridico, anche a beneficio delle generazioni future. Titolari di beni comuni possono essere persone giuridiche pubbliche o privati. In ogni caso deve essere garantita la loro fruizione collettiva, nei limiti e secondo le modalità fissati dalla legge" (Comissione..., 2007).

The concept of the common good introduces a significant shift from the traditional view of property rights, which are typically associated with exclusive ownership (Rodotá, 2013, p. 45). This shift aims to ensure everyone has free access to these goods, regardless of property rights, provided that social and ecological interests are observed. To achieve this, establishing guidelines is crucial to ensure the population uses these resources wisely (Vianna; Ehrhardt Jr, 2022, p. 176-177). Under this approach, access and ownership are seen as independent categories.

Even though the Brazilian legal framework does not specifically mention common goods, it has acknowledged and established legal guidelines for collective rights, which are owned by society as a whole. This led to the development of a previously unknown type of ownership in the eyes of liberal modernity—a non-exclusive kind—that required legal reforms to properly protect these rights (Guilhermino, 2018, p. 80). With this development, it became possible for multiple forms of ownership to exist simultaneously over a single good, such as a property designated as part of the national historic heritage, where the private ownership of the good's owner and the collective ownership of the general public coexist.

The recognition of multiple ownership of diffuse rights arose from constitutional acknowledgment of a new type of goods not encompassed by the concept of property outlined in the Civil Code, such as the environment, historical heritage, quilombos, and the collective use right of traditional communities.

Regarding privacy, it has been shown that there are both individual and collective ownership rights, requiring legal regulation that is appropriate for their various aspects. As for personal data, the Brazilian General Data Protection Law explicitly mentions the possibility of defending the interests and rights of data subjects either individually or collectively (Article 22). Furthermore, in addressing liability and compensation for damages, this legal act allows for the possibility that data processing activities may cause individual and

collective harm, allowing the filing of collective lawsuits to seek appropriate compensation.

There is no question that databases, along with their storage and processing operations, handle information about groups of people, whose confidentiality breaching can lead to shared liability. This collective aspect is not analyzed in this text because it is obvious.

The transindividual aspect, which is scarcely addressed in legal literature, concerns third-party data and information obtained through the processing of highly personal content owned by a specific individual or a particular group of people. In this context, numerous personal details and data go beyond the individual level, affecting others who have not given their consent for such access by the data controller.

The existence of collective interests that warrant protection, both in terms of privacy and personal data, necessitates an examination of the appropriate legal framework for safeguarding these fundamental rights. This includes questioning whether they should be classified as goods or individual rights, as will be explored further.

5. THE LEGAL APPROACH TO PRIVACY AND PERSONAL DATA CONSIDERING COLLECTIVE ASPECTS

The multiple ownership of privacy and personal data, particularly their collective aspects, poses a challenge for 21st-century jurists to develop suitable legal mechanisms for safeguarding individual rights.

According to José Pilati and Mikhail de Olivo, privacy should be viewed as a collective good, aiming to move beyond the modernity paradigm, which is rooted in the public-private dichotomy, where goods could only be owned by either individuals or the State. In such scenarios, ownership would be attributed to society, which needs to be re-personalized, so that only the community would have control over these goods. This idea suggests "elevating communal interests to

the same level as individualistic private interests, thereby redefining – in a specific domain, as mentioned, the process, the parties involved, and the collective substantive law" (2014, p. 88).

To achieve this, the mentioned authors suggest going back to the origins of Roman Law, which featured a "collective civil judicial system not governed by the state", to uncover the frameworks of the post-modern paradigm. They then suggest treating privacy as a kind of jointly owned condominium, where each citizen is recognized as a holder of this right (Pilati; Olivo, 2014, p. 86).

Clarissa Véliz argues that our interconnectedness in terms of privacy means no one has the moral right to sell their personal data and that personal data cannot be treated similarly to property because this information often involves other individuals, not just the person it ostensibly belongs to. She criticizes data collection practices and views privacy as a public good that must be protected as a civic responsibility. However, she recognizes the necessity of using data when essential for delivering valuable services and suggests implementing expiration dates for certain data, in order to ensure forgetfulness in the digital world as a way of filtering out what is important, as happens with human beings (2020, pp. 93, 96, 158, 174, and 176).

Similarly, John Shaeffer and Charlie Nelson Keever argue that privacy should be recognized as both contextual and relational, and treated as a public good. According to them, it should be regulated by a governmental body, which would be tasked with determining how information should be used, always with public interest, convenience, or need in mind (Shaeffer; Keever, 2021, p. 303).

Nevertheless, it is essential to emphasize, firstly, that categorizing privacy and personal data as legal goods aids in considering them as components of individuals' goods, thereby allowing their commercialization (Tepedino; Silva, 2020, p. 134). Similarly, as Danilo Doneda points out, treating privacy as a subjective right—a concept designed to validate the principle of ownership of goods—would have the same effect (2019, p. 129).

Secondly, the proposal by José Pilati and Mikhail de Olivo seeks to move beyond the modern legal paradigm but falls short of achieving this goal, as it aims to handle collective goods in a manner akin to the protection provided under private law, treating privacy as if it were a jointly owned condominium. Consequently, it perpetuates the property-based approach that typifies modern law.

These authors highlighted several key features of privacy's collective dimension, such as its universal applicability (erga omnes), non-prescriptibility, permanence, and essential nature (Pilati; Olivo, 2014, p. 87). However, contrary to the authors' claims, this paper argues that privacy and personal data, when considered from a collective standpoint, are subject to only limited and strictly defined conditions of availability.

In line with the views of Roxana Borges, relative availability implies the active and positive exercise of personality rights. Strictly speaking, personality rights are not inherently transferable (2005, p.119), yet they allow for the transfer of certain aspects, such as the provision of personal data necessary for contract formation, particularly in the context of electronic contracting.

Danilo Doneda argues that privacy is a complex and subjective situation, which is not expressed through the arbitrary exercise of power by its holder. Instead, it involves a set of interests, both of individual and the community, potentially leading to powers, duties, obligations, and burdens for those involved (2019, p. 130).

Similarly, Eduardo Nunes de Souza states that the concept of subjective legal status, seen as an amalgamation of rights and duties, has replaced the structuralist approach previously embraced by doctrine. This notion encompasses subjective rights, potestative rights, legal powers, burdens, and expectations of rights (2023, pp. 6 and 11).

However, these propositions only emphasize the broader scope and complexity of the legal situation category, but they do not negate the applicability of the concept of subjective rights. After all, as the authors themselves assert, the legal situation comprises

subjective right(s). Therefore, shifting the definition of privacy to a more comprehensive category does not eliminate the risk, pointed out by Danilo Doneda, that such content might be interpreted through a property-based approach.

Conversely, the current era, marked by what is known as cosmocapitalism, is characterized by reorienting institutions, activities, and life rhythms to meet the goals of capital accumulation (Dardot; Laval, 2017, p. 12). It tends to transform all spheres of life into properties[6], and consequently, privacy and personal data are at increased risk of being categorized as subjective rights or legal goods.

In fact, there are attempts to classify new situations using old and insufficient categories. Therefore, a new category is proposed for the collective dimensions of privacy and personal data. Drawing on the work of Pierre Dardot and Christian Laval, collective dimensions are suggested to be classified as "*commons*," in order to oppose the ownership and commercial approaches that characterizes the current neoliberalism. This category refers both to the *commons* – to alert society about the new wave of enclosures affecting water, ecological parks, DNA, other natural resources, and creations of the human spirit – and to the Latin concept of *commune*, linked to the idea of *munus*, that is, an obligation of reciprocity tied to the exercise of public responsibilities.

According to these authors:

> "in reality, the appeal to the 'common good' reinstates a number of perfectly antidemocratic postulates that assign to the

[6] According to Naomi Klein: "what might broadly be described as the privatization of every aspect of life, and the transformation of every activity and value into a commodity. We often speak of the privatization of education, of healthcare, of natural resources. But the process is much vaster. It includes the way powerful ideas are turned into advertising slogans and public streets into shopping malls; new generations being target-marketed at birth; schools being invaded by ads; basic human necessities like water being sold as commodities; basic labour rights being rolled back; genes are patented and designer babies loom; seeds are genetically altered and bought; politicians are bought and altered". (Klein, 2001, p. 82).

> State, to 'wise men', to 'ethics experts', or even to the church, the responsibility of defining what the 'common good' is." (...) "In summary, although there may be common goods, the common is not a good – at least not in the sense of something that can be acquired and disposed of as one wishes, for instance, by trading it" (2017, p. 17 e 25).

In order to distance themselves from property and anti-democratic principles, the authors define commons as a political principle that acknowledges the shared obligation of all those engaged in an activity. The commons arise from the collective action of human beings and are characterized by being inalienable, meaning they cannot become the object of property rights (Dardot; Laval, 2017, p. 28 e 250).

Thus, the state is no longer considered the sole holder of the collective will. Conversely, the term "common good" is avoided, as the word *res* implies the notion of litigation, property, or goods. Since the law requires every good to have an owner, humanity would be the 'holder' of the common goods. However, humanity is an entity without legal personality, which, according to the authors, casts doubt on the legal coherence of this classification (Dardot; Laval, 2017, p. 43 e 44).

Furthermore, the authors advocate for the need to move beyond spontaneous actions and establish a "framework of regulatory measures and democratic institutions that organize reciprocity". In this context, law can play a significant role in managing commos, provided that there is active societal involvement in the formulation of its norms. These norms should be developed by and for the society, thus marking a departure from the Roman tradition where the law emerges from the legislator (Dardot; Laval, 2017, p. 160 e 394).

Based on this classification, it is argued that privacy and personal data are "commons", but do not allow unrestricted access to their content, as this could jeopardize the freedom, privacy, and well-being of current and future generations. Consequently, there is a need for developing a regulatory framework that imposes stricter access

controls to such information and withstands commercial strategies and an ownership-based approach.

Information related to privacy and personal data cannot be obtained by third parties or transferred through exchanges in the same manner as goods subjected to a property-based approach. In this context, there is a need to expand collective participation in the co-creation of legal norms that regulate access to information protected by privacy laws and personal data.

Pierre Dardot and Christian Laval argue for the need of a collective practice focusing on the use of what is unavailable, shifting from the concept of ownership to usage as a collective practice. It will be the responsibility of the founding praxis to establish common usage rules and to regularly review them. The community of people will be accountable for jointly deciding on these rules and for fulfilling the resulting co-obligations (2017, pp. 160, 297, and 504).

According to Brazilian law, which extends beyond codified norms (Tepedino, 2019, p. 32), it is arguable that privacy and personal data should be treated as restricted-access commons. Given that all legal interpretation is systematic (Grau, 2009, p. 44), and the Federal Constitution serves to ensure coherence within the system, it can be stated that, recognizing privacy and personal data as fundamental rights and thus as indispensable elements of the Brazilian legal system (Häberle, 2002, p. 103), the application of a property-based approach in the regulation of such content and information should be avoided.

6. FINAL REMARKS

The use of new technologies has exponentially increased the potential harm caused by certain forms of access to privacy and personal data, not only for those who have consented to provide such information but also for third parties who had no chance to object.

This can lead to harm for many individuals and even future generations, as demonstrated throughout the text.

Thus, it is evident that there are multiple ownerships of privacy and personal data, such that the protection of individual aspects, based on the principle of informational self-determination, has become inadequate due to the presence of a collective aspect that is as important, or more so, than the individual one. After all, its violation threatens not only the fundamental individual rights of the data subject and others but also the core principles of democracy, such as justice, equality, respect for diversity, and freedom of choice.

In seeking to move away from this property-based protection, legal scholarship has suggested that privacy and personal data should be treated as collective goods, public goods, subjective rights, and legal situations. However, despite these proposals representing significant progress, they fail to detach from the ownership-based approach, since the categories of legal good and subjective right are founded on the notion of property. The same applies to the categorization as a legal situation, which encompasses the notion of a subjective right, and thus, does not overcome the critique aimed at the latter.

The systematic interpretation of the Federal Constitution and the recognition of privacy and personal data as fundamental rights allowed us to conclude that these should be treated as "commons" with restricted access, denying them the status of property, thus moving away from a property-based approach and the possibility of appropriation. However, it is acknowledged that the restricted use of such information can be regulated through norms that are developed with extensive social participation.

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LAURICIO ALVES CARVALHO PEDROSA

Full Professor of Civil Law at UESC (State University of Santa Cruz/Ilhéus). Currently conducting postdoctoral studies at Justus-Liebig University Giessen (Germany), with a CNPq scholarship. PhD in Law from the Federal University of Bahia, with a doctoral research internship at Justus-Liebig University Giessen. Master's in Private and Economic Law from the Federal University of Bahia. Specialist in Civil Law from the Bahia Law School Foundation. Lawyer and Leader of the Research Group on Democracy, Justice, Otherness, and Vulnerabilities (DeJAVu-UESC).

Address professional: Soane Nazaré de Andrade Campus, Rodovia Jorge Amado, Km 16 - Salobrinho, Ilhéus, Bahia, 45662-900, Brazil.

ORCID ID: https://orcid.org/0000-0001-8401-7405

E-MAIL: lacpedrosa@uesc.br

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