

Regulation of the Right to Oblivion in Cyberspace: Heterogeneity of Loyalties in the Public Space for Postulation of Legitimate Interests

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Abstract

This article aims to broaden the understanding of the diversification of public responsibilities present in the intention of legislators to regulate the right to privacy and oblivion in Bill 7881/2014 and PLS 181/2014. The text adopts deductive reasoning, descriptive methodology combined with discourse analysis and theoretical framework in the General Theory of the State to explain the course of intervention that flows into the Regulatory State. The study identifies the international and economic inspiration of legislative proposals that aim to meet the demands of technological communication in a new market of data and information appropriation by corporations. The article strengthens the thesis of the diversification of public responsibilities and points out difficulties for the effectiveness of the proposed regulation due to the technical complexity and the asymmetry between users and research providers regarding the access and use of contents stored in the virtual world. The article points out contractual risks of the intense flow of exchanges on the internet and warns of the absence of a transnational State that will protect the right to privacy and oblivion globally, in the face of the power of large corporations.

Keyword: communication, privacy, regulation, internet, technology.



A. INTRODUCTION

In cyberspace, everything that can be turned into bits becomes real and current. The virtual becomes real. Time does not pass and the geographic location is irrelevant. In this interconnection of computers with their memories, the information stored about past facts that concern people in a determined time and space are easily retrieved by any individual in internet search engines. This facility is an attribute of technology and a fact of modernity. However, the use made of information obtained from search engines is complex and concerns the private sphere – intimacy, privacy, image, personality – and the public sphere – information, transparency, public interest. The internet is a space for the flow of information, for a technological communication distinct from TV and radio. This space requires the establishment of standards as is the case with the civil framework (Law No. 12.965, of 04/23/2014), but this need for standards does not make the internet

compete with other norms that regulate life outside cyberspace, which, many times, already apply to relationships originated in redet. What happens is that information is a commodity in a technological market that creates and recreates new forms of sociability that, in turn, put rights in dispute, such as the right to privacy and freedom of expression whose international regulation reverberated in the Brazilian regulatory work. No one is forced to live forever with the past, according to the thesis of the right to be forgotten accepted by the Superior Court of Justice (STJ) in Statement 531. This right is not doctrinally new, but Bill 7881/2014 authored by Deputy Eduardo Cunha innovates by proposing the mandatory removal of internet search links that refer to irrelevant or outdated data on the initiative of any citizen or upon request of the person involved. Also, in the Federal Senate, Project PLS 181/2014, authored by Senator Vital do Rego, with regard to privacy, collection and indiscriminate processing of personal data, proposes the establishment of protection of a minimum sphere of intimacy with regard to new technologies.

Privacy is a fundamental constitutional right also provided for in infra-constitutional legislation (art. 11 of Law 10,406/2002, Civil Code), therefore, the right to be forgotten is already regulated outside cyberspace. The proposed bills were influenced by rule C-131/12 adopted by the European Commission¹ and by rules approved by other countries, which establish a heterogeneity of loyalties, as information is a commodity that can generate useful ideas and goods of significant value. If the right to privacy and oblivion is not new and if the legal and legal systems already ensure its protection, what is new in the proposals in the legal-regulatory regime of the right to oblivion and privacy?. It is suspected that it is not technically possible to cover all possibilities for searching, retrieving and removing data and links. Legislative proposals may not be implemented in practice due to the technical complexity and the users' ability to use technical protection mechanisms. This article analyzes the intention of legislative proposals from the theoretical perspective of the diversification of public responsibility (GONÇALVES, 2005). The article is divided into three sections. The first section provides a historical overview of the State's performance, taking intervention as the central point and situating the issue of post-privatization regulation. The second section indicates how the current legal system regulates privacy and the right to be forgotten and explains the transformation of information into merchandise. The third describes the legislative proposals, focusing on the difficulties of using the internet and implementing the proposed legal commands. Regulation, as a general term, is a form of state action that indicates the intention to direct a sector of activities (ARANHA, 2005). For this reason, understanding the rationality of legislative proposals that focus on rights already established in the legal system brings the need for a reference to the General Theory of the State, which means and reframes the State from the standpoint of intervention.

State intervention is the central point of an evolutionary spiral that flows into the Regulatory State. The expression spiral is here inspired by the Theory of the Spiral of Silence (HOHFELDT, 2001, p. 220). The measure of intervention is a concern that historically operates in defining the way in which the State acts. The idea of minimal intervention gave shape to the liberal state, but with the end of the First World War, the decline of liberalism threw to the ground the bourgeois ideology of the isolated valorization of freedom and the individual that ensured privileges to the economically stronger. This ideology, which had prevented State interference in meeting social demands, gave ground to an interventionist State, examples of which are the Russian socialist state, the nationalist policy of the Third Reich, the emphasis on the social issue in the Constitution of Weimar and Mexico and Roosevelt's New Deal interventionist policy (DALLARI, 1993, p. 235). Justen Filho explains that the Regulatory State is a new political-organizational paradigm that can be understood in light of the evolution of the European Union, which assumed binding normative functions for the associated national States in a governing structure endowed with regulatory powers from which the conception of a State that is present in a normative intervention and not in the direct execution of activities and services that can be organized according to standards of strict economic rationality. (JUSTEN FILHO, 2002),

Marques Neto deals with the question of intervention when he deals with the republished State, which would be a radical indirect intervenor and a subsidiary and exceptional direct intervenor in the economic game. In indirect interventionism, the State must have the maximum capacity to regulate, via regulation, inspection, monitoring, application of sanctions in the various fields of economic and social activity, always acting to protect under-sufficient interests, not exercising direct interventionism, that is, refraining from carrying out activities that could be developed by private actors. (MARQUES NETO, 2002, p. 183). The legislative proposals for the protection of personal data and the right to be forgotten, in this approach, do not come from the Regulatory Agency, but deal with issues related to the market. This is due to the paradigm shift, where the private actor acts more or less freely under the influence of limited and generic public regulation, which in practice is limited to creating conditions for the exercise of rights and freedoms and establishing specific restrictions. Law and democracy are actors of regulation. One, because democracy favors a diversity of points of view. The free competition and expression of these within society and their denial led the century XX to nefarious and totalitarian experiences of exercising power. Another reason for understanding law and democracy as regulatory actors lies in the fact that social regulation cannot, in effect, free itself from the fundamental legal provisions that define the public character of the action, the division of institutional roles, the legality of actions, the legitimacy of decision and control authorities (ARNAUD, 1999, p. 160).

The function of law is problematic and complex. On the one hand, the law serves to maintain or defend dominant interests and values while, on the other hand, it can promote or facilitate social change, support, encourage and even force new social habits and behaviors. The range of functions of the law is open, encompassing more than simply prohibiting or limiting. There is also a promotional function, with positive sanctions and techniques to encourage and remove obstacles to the adoption of certain behaviors (CALERA, 2001). The functions of law are, then, the theme and the problem of what are the ends that the law pursues and achieves or that the law should pursue and achieve in its perception of reality. In the specific case of the protection of personal data and the right to be forgotten, the parliament acts based on a demand arising from society, technology and the international global reality. The right to be forgotten thus derives from the rights of personality: it is the right not to be remembered against one's will. The decision is constitutive of the right to be forgotten. The person can decide at any given time to keep their privacy under their sole control, or communicate, deciding to whom, when, where and under what conditions this can occur. The focus is on decision-making ability. (KEYS, 1978). In a complex society, in which there are multiple spaces for public demonstrations and exhibitions, the right to be forgotten competes with the right to inform the media. Newspapers and media have been around for a long time, but technology has reconfigured the spaces for expression and expression, creating cyberspace, the internet, a cybernetic street, to paraphrase Lyra Filho. The public sphere is currently a technological street and the people, keeping due proportions in relation to the difficulties of digital inclusion, interact on the internet and manifest themselves in this public sphere. This new form of interaction and communication can give rise to new rights or new forms of protection of rights already established in the legal system, as authorized by art. 5, § 2, of the Brazilian Federal Constitution of 1988.

B. RESULT AND DISCUSSION

According to Dantas (2003), for information to occur, there will always be a need for interaction or communication between a subject and an object, or subject to subject. The subject extracts a meaning from the object. Whatever its form, it always results from interaction and only takes place in interaction. Information is not immaterial. It will not be an attribute of the object, nor of the agent, but it will always be a relationship between them. In the case of the appropriation of information by capital, the worker's ability to perceive and understand the signs and give them new meanings results in actions to transform the raw material. This aptitude is precisely what Marx defined as the use value of labor. In the work process, this "subjectivity" is introduced into the "dead" matter, turning it over, modifying it, transforming it into something new and necessary for human consumption or enjoyment. Therefore, this "subjectivity" by itself creates

value. The internet is a product of technology supported by knowledge of the other, knowledge about the other, the knowledge that is produced by the other, information, the continuous manufacturing process, human beings in constant formatting, the flows that recombine and operate on each other, the bit as the basic substrate for the formation of the current world. According to Carvalho (2005), knowledge of the history of a technology it is a fundamental factor for its full mastery, because a technology cannot be thought of in strictly technical terms. Networks, like the internet, are not just computer networks, but they are also socio-technical networks. (CARVALHO, 2005). The old technical objects, teaches Marilena Chauí in a lecture given in 2010 at CPFL Cultura, increased human physical strength: the steam engine. The new technical objects expand intellectual forces and the knowledge produced becomes the target of monopolistic action by large corporations. In the philosophy of technology, the essence of an artifact is conventional in the sense that the meaning of artifacts is something you create, not discover. Salter (2004) reports that much of the discourse on the internet's democratic potential tends to simplify the issue of technology. Democratic interests are referred to as capable of influencing the internet and this discussion underlies the proposal of the philosopher of technology, Andrew Feenberg, as the concept of forms of use is related to the idea that technologies are developed for a specific purpose, but are often also used in unplanned ways.

Feenberg brings an important approach to the relationship between technology and exclusion, resuming a discussion that had been stagnant in the 1970s, reformulating Marcuse. Marcuse sought to understand the problem of illusion generated by technology. He has written several articles that directly or indirectly address the social implications of modern technology, exposing the thesis that, by incorporating technology as part of our reality, we can also enable ways to release instrumental reason for other purposes that alter the repression of class society, based on the industry of mass consumption. Feenberg seeks to reformulate the technological rationality defended by Marcuse, proposing the reinsertion of human values in technology, through the democratic debate as a concrete project of resistance to technocratic power. (PISANI, 2010 and NEDER, 2013). The modern alternatives for debates on technology encompass an axis of technology seen as a lock-in chain where the strands of instrumentalism and determinism are located, and another axis, which sees technology as a carrier of values in which the strands of substantivism and of critical theory. In short, instrumentalism sees technology as a tool for fulfilling needs; determinism understands that technology is the driving force of history, that is, that technical progress is unilinear; substantivism understands that means and ends are determined by the system and that technology is not instrumental, but embodies substantive value; and the critical theory of technology, operating under sociological constructivism, oscillates between engagement, ambivalence and resignation, but sees degrees of freedom and focuses on choosing the

values that govern the systems. (NEDER, 2013, p. 8-11). As one of the modern alternatives for debate, critical theory of technology seeks to reconcile apparently conflicting points about technology and part of the view that, wherever social relations are mediated by modern technology, it would be possible to introduce more democratic controls and reformulate technology. Feenberg believes that unless democracy can be extended beyond its traditional boundaries into the technically mediated domains of social life, its use-value will continue to decline, its participation will fade, and the institutions we identify as being part of a free society. will gradually disappear (ACHTERNHUIS, 2001). The technically mediated domains of social life have brought the issue of personal data protection and the right to be forgotten to the center of debate and regulatory initiatives at national and international levels. If, on the one hand, as mentioned by Salter, technologies are developed for a specific purpose, on the other hand, they are also used in unplanned ways. Big data is the current example on which eyes are fixed. Schonberger and Cukier (2013) define big data as the ability of a society to obtain information in new ways in order to generate useful ideas and goods and services of significant value. Not only have data storage technologies evolved, but the mindset about how data can be used has also changed.

Big data is, therefore, a way of thinking on a large scale, of creating new ways of using information that change markets. It is about using mathematics to make predictions, to expand, for example, the capacity to innovate. There are also dark aspects of this deliberate accumulation of data concerning people and the limitations related to the use of technologies and the difficult answer regarding the preservation of privacy and the right to inform. In the interactive reality of cyberspace, privacy and the right to be forgotten have acquired greater visibility and have started to require specific protection, which is an example of Statement 531 of the Superior Court of Justice, which establishes that the protection of human dignity in the information society includes the right to oblivion. By accepting, for the first time, the thesis of law In addition, the Superior Court of Justice upheld the complaint filed by Google regarding the removal of illegal content, deciding that it cannot, under the pretext of hindering the propagation of illicit or offensive content on the web, repress the collective's right to information and that, considering that the victim had identified the perpetrator of the offense via URL, there would be no reason to sue against the one who only facilitated access to the illicit act that, until then, is publicly available on the network for dissemination (Complaint No. 5.072 - AC (2010/0218306-6). Rel. Min. Nancy Andrichi. DJe: 06/04/2014). It can be seen that the proposal is clearly inspired by Rule C-131/12 of the European Commission, which establishes that the individual has the right, under certain circumstances, to request that search engines remove links that contain personal information about him. . It is the right of the person to obtain the deletion of personal data that they are told by the person responsible or third parties. respect and refrain from further disclosure of

these data, as well as their copying or duplication. The right to be forgotten is not absolute and it will always be necessary to exercise a balanced judgment between this right and other fundamental rights such as freedom of expression. This weighing judgment, considering the type of information, induces the need for a case-by-case assessment that should cover the role that the person plays in public life.

The proposition, Rule C-131/12, was motivated by a decision of the Court of Justice of the European Union, when it resolved an issue presented by Spain, in 2010, about a claim of violation of privacy made by a citizen when faced with outdated information about you in Google search results. Supported by the 1995 Directive, the Court decided that: (i) the rules of the European Union are applicable even if the server of the company that processes the data is located outside Europe, if the company has a branch or subsidiary in a member state that promotes the sale of advertising space; (ii) the operator of search engines that control information and companies, such as Google, cannot exempt themselves from liability under European law when dealing with personal data; rules on data protection and the right to be forgotten apply; and (iii) individuals have the right, under certain conditions, to request the removal of links that contain personal information. The case-by-case assessment will balance the right to privacy and the right to inform. This balance will depend on the nature of the information in question, its sensitivity to private life and the public interest in having the information. It will also depend on the personality in question, as it is not a question of reducing the importance of the public figure or of transforming or relativizing the judgment on the person of the criminal. The rule empowers individuals to manage their personal information, while also protecting freedom of expression. For the Court, however, the violation of the right to data protection is not justifiable merely by the economic interest. The idea that Rule C-131/12 is new content, therefore, is not correct because the right to be forgotten is part of the set of data protection regulations already in force in Europe, which covers a variety of other rights, such as, for example, data portability. This is Rule C-131/12, a modernization of data protection rules, which creates a data market in the European Union and rational cooperation between member states. The PLS justification alludes to the tendency to increase the degree of data collection and sharing resulting from the rapid technological development as motivators to guarantee the proper treatment of personal data, especially with regard to sensitive data, defined as those that can give rise to social discrimination, such as those relating to religious, political or sexual orientation. Vital do Rêgo says in his justification for PLS 181 that the relevance of protecting these data is evident, above all, in the context of consumer relations. The consumers' lack of confidence in maintaining the confidentiality of their data generates hesitation when purchasing goods and services, especially in the online environment, thus compromising the country's economic development.

The CCJ Opinion, reported by Senator Aníbal Diniz, emphasizes that the initiative is timely since the rapid technological development has increased the level of collection and sharing of personal data, a fact that would put its protection at risk. To reinforce the correctness of PLS 181/2014, the CCJ's opinion seeks support in the following international initiatives, considering the recent revelation of serious violations committed by both public and private entities through the collection and indiscriminate treatment of personal information: (i) the UN General Assembly approved a resolution entitled "The Right to Privacy in the Digital Age", in which it recommends that States must take measures to protect the private sphere of individuals against the interception, collection and mass processing of data; (ii) Canada regulated the matter in April 2000 in the "Personal Information Protection and Electronic Documents Act"; (iii) the European Union, in turn, approved Directive 95/46/EC, of October 1995, which is currently under review; (iv) in Brazil, although the Marco Civil da Internet (Law No. 12.965, of April 23, 2014) regulates specific issues related to data processing, there is no broad and systematic regulation that provides legal certainty for companies that carry out such activity and that solidly guarantees the fundamental right of individuals to intimacy and privacy.

C. METHOD

If, on the one hand, there is no gap in the law in the direction of protecting the right to be forgotten, on the other hand, there is a detachment between the urgencies and needs of access and use of the internet, the extension of the commitments arising from adherence to use contracts public or private websites and portals and the education, training or knowledge of people to employ protection tools. The misuse of private information has been associated with public discussion about the cultural impact of technology, since personal data in capitalist society is a commodity. We are temporal and spatial beings, but in the virtual world these categories do not exist and, if we do not have the reference of space and time, we navigate a cybernetic street where disorganization and the exercise of power operate. Being left alone and having exclusive control of your privacy in the exchanges established via the Internet turns out to be an undertaking for specialists and not for the common citizen. The contract, which should protect the law, becomes a closed technical code that is difficult to articulate. Citizens are poorly in control of information about themselves. There would hardly be a level of knowledge for use that would allow the adoption of more equitable contractual clauses for the user of internet services. The user would need to learn what safe browsing is and how to use the tools to protect their privacy. It so happens that, even if it knew this, it would not have the power to define the contents of contractual clauses or even to prevent network holders from storing data. What was already threatening, with radio

and television networks that crossed national borders, became exponentially more intrusive and difficult for governments to control, with information technology, the internet and the convergence of media (SATHLER, 2005, p. 1).

With regard to privacy in contracts, the Brazilian experience is more present in the minds of most citizens, as noted by Rodríguez (2012) in the preparation and approval of the first signature taking contract in the privatized telecommunications environment in Brazil in 1997 , were the telecommunications secrecy provisions presented to them in the contracts signed with telecommunications service providers, in an environment of contractual stability within the scope of the Telebrás System. In cyberspace, however, the hiring itself gained a dangerous fluidity. It is contracted via the web, the contract is received via the web, but when seeking compensation or liability for damage to privacy, the fluidity disappears and the virtual contractual relationship acquires a concreteness, so to speak, an analogical aspect that requires physical presence in judicial or extrajudicial mediating instances. Privacy dispute resolutions are rarely resolved in customer service departments, and redress rarely takes place with the fluidity with which the contracting took place. It would be up to the citizen not to hire, that is, not to use the services, which, on the internet, is similar to the prisoner's dilemma.

The prisoner's dilemma has to do with communication and trust, as stated by Epstein (2004). It is a non-zero sum game. If both players choose their optimal strategies, one of them wins less than if both players had chosen a non-optimal strategy. Optimal strategy means maximizing the utility of each participant. When communication is impossible, the structure of the game called prisoner's dilemma leads to a paradox, as selfish rationality, when exercised by each of the participants, leads to disaster for both. That is, cooperative strategies result in greater survival capacity than predatory strategies.

D.CONCLUSION

Privacy and the right to be forgotten are already regulated in the Brazilian legal system, but the legislative proposals PL 7881/2014 and PLS 181/2014 make the necessary adaptation of the rights already positive to the reality of a virtual world, in which information and data they are merchandise that create values and meanings whose usefulness is still a field to be explored in what has been called big data. The legislative proposals have a legal basis in a regulatory environment of diversification of public responsibilities, sharing execution tasks with the private actor. This relationship, however, installs what is called, in the article, the heterogeneity of loyalties. The private actor is interested in the information and stored data, but it is also the executor of the public interest when it comes to complying with the proposed legal commands. Traffic

in cyberspace poses risks to the user. The cyber street is full of decision points where the user has made his privacy available to large corporations. The concern with the mass of information that has been stored is present – stored communication is a latent threat to privacy. It is not just about the great public figures, but about the formation and use of a mass of information and data stored with contractual authorization from the people and which serves or will serve political, ideological and commercial interests. In practice, nothing on the internet is deleted, everything there remains depending on the ability to browse, use search tools. Being left alone and having exclusive control of your privacy in the exchanges established via the internet ends up becoming an undertaking for specialists and not for the common citizen, imposing an improvement in the level of socio-technical interactionism. The proposed regulation would be accentuating the difference between those who know where the information is and can look for it directly and those who need a research tool. For this reason, it is suspected that it is not technically possible to cover all possibilities for searching, retrieving and removing data and links. The system is bigger than the person. There is not, on the one hand, a large transnational State that protects the right to privacy globally, but on the other hand, there are large global corporations that appropriate the mass of information and the subjectivity of people, legally using the consent of the people themselves via contractual. The right, by itself, does not make information disappear from the internet. In fact, nothing disappears in the digital world and there is an asymmetry of information between those who know how to search and those who need the search tool. The regulation of the right to be forgotten does not mean, therefore, oblivion per se. It is expected, as soon as the law fulfills its function of stabilizing the past and attributing predictability to the future.

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