

Consumer Protection and Digitalization: Challenges to Overcome New Consumer Vulnerabilities in the Digital Age

Claudia Lima Marques

Abstract: This paper analyses how consumer laws are facing the challenges proposed by digitalization. The first part will focus on the exam of the new sources of consumer vulnerabilities on the digital scenario and the second part will analyse the new instruments developed by the praxis to overcome those vulnerabilities, and rethinking consumer protection in the digital economy. The second part analyses the legislative and regulatory challenges of the data and platform economy to protect consumers, calling for the revival of its constitutional bases and the need for a source dialogue between consumer law and data protection. To participate in this discussion about digital constitutionalism, the main hypothesis is that consumers are made more vulnerable by the very structure and architecture of choice of digital markets. The objective of this paper is to reflect how to overcome these new consumer vulnerabilities with new compensatory legal consumer law and data protection instruments. And call the attention to ILA's Consumer Global Compact in the Digital Economy.

A. Introduction

It is a pleasure to participate in this discussion about digital constitutionalism and the existence of fundamental rights for the internet users.¹ I will focus on the consumer protection on the digital scenario. Today, markets are becoming more globalized, and the consumption is highly digitalized

¹ Short version of the paper present at the Frankfurt University in March 2023. We thank Prof. Dr. Indra Spiecker (Frankfurt) and Prof. Dr. Laura Schertel Mendes (UnB and Frankfurt) for the kind invitation and Lorenzo Nicoletti, LL.M UFRGS-CDEA for the English correction of the first version.

and at distance.² But in this digital environment traditional consumer rights mechanisms no longer seem as effective as in the analogical world. At the 2015 Revision of the UN Guidelines on Consumer Protection (UNGCP)³ a new chapter on E-commerce (GL 63 to 65) was introduced, aiming to accommodate existing consumer policies to the 'special features of electronic commerce' to enhance 'consumer confidence' in the new digital marketplaces, also the collaboration between States in this matter. Specially, at the 2015 Revision of the UNGCP a new right to 'equal protection online and offline' was created for digital consumers. The UNGCP, Guideline 5, 'j' expresses this new 'principle of equal protection' as follow: "*A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce*"), but its efficacy remains a great challenge.

To achieve this equal level of protection we need to be aware of the special forms of consumer vulnerabilities at the digital and data-driven transactions. In my opinion the protection of digital consumers depends more and more on the respect of their fundamental rights in digital consumption. The 2015 Revision of the UNGCP also mention the need to protect consumer privacy⁴ and in this point consumer law meet the new digital constitutionalism.⁵

Digital Constitutionalism give light of the use of constitutional tools by big tech compagnies,⁶ but also for the need of an effective bill of rights

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- 2 MICKLITZ, Hans-W.; SAUMIER, Geneviève. *Enforcement and effectiveness of consumer Law*. Springer: Cham, 2018. p.3.
- 3 The UNGCP were first adopted by the General Assembly in Resolution 39/248 of 16 April 1985, expanded in 1999 and now revised by the General Assembly in Resolution 70/186 of 22 December 2015. Available in: General Assembly Resolution 70/186 on Consumer protection, Adopted on 22 December 2015 (unctad.org).
- 4 So UNGCP GL 5, 'k' ("The protection of consumer privacy and the global free flow of information") and GL 11, 'e' ("Protection of privacy. Businesses should protect consumers' privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of their personal data").
- 5 So MENDES, Gilmar Ferreira; FERNANDES, Victor Oliveira. Eficácia dos direitos fundamentais nas relações privadas da internet: o dilema da moderação de conteúdo em redes sociais na perspectiva comparada Brasil-Alemanha. *Revista de Direito Civil Contemporâneo*, vol. 31. ano 9. p. 33-68. São Paulo: Ed. RT, apr./jun. 2022.
- 6 CELESTE, Edoardo. Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges (July 25, 2018). *IIIG Discussion Paper Series* No. 2018-02, Available at: Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges by Edoardo Celeste :: SSRN.

on the internet.⁷ Mendes and Fernandes call for a methodological chance to achieve efficient protection of human rights at the internet.⁸ Indeed, new global governance tools should be looked for,⁹ because the todays new forms of digital consumption, its scale and the constant use of platforms by consumers presents methodological and practical challenges for consumer protection, consumer enforcement and consumer law.

As starting point I want to use the theory of a digital vulnerability ('architectural, relational, and data driven vulnerability') of Helberger, Sax, Strycharz and Hans Micklitz.¹⁰ The authors argue that the old concept of a 'well-informed, observant' or reasonably rational consumer has no use to face the new online targeted marketing and dark patterns strategies of the digital markets. The vulnerability concept is used to identify individuals, users, or group of persons, that require particular policy and legal attention "because of their lack of bargaining power, structural inequalities, and other market or social conditions that make them more susceptible to harm (e.g. in the form of discrimination or unequal treatment)."¹¹ Consumers are the weaker party vis-a-vis providers and traders.

My work hypothesis is that consumers are made more vulnerable by the very structure and architecture of choice of digital markets.¹² The objective

7 CELESTE, Edoardo. Internet Bill of Rights: Generalization and Re-Specification Towards a Digital Constitution, in *Indiana Journal of Global Legal Studies*, vol. 30#2 (summer 2023), p. 25-54.

8 MENDES, Gilmar Ferreira; FERNANDES, Victor Oliveira. Eficácia dos direitos fundamentais nas relações privadas da internet: o dilema da moderação de conteúdo em redes sociais na perspectiva comparada Brasil-Alemanha. *Revista de Direito Civil Contemporâneo*, vol. 31, ano 9, p. 33-68. São Paulo: Ed. RT, apr./jun. 2022, specially part III about the horizontal effects of fundamental rights in private internet.

9 MARQUES, Claudia Lima; BAQUERO, Pablo M. Global Governance Strategies for Transnational Consumer Protection: New Perspectives to Empower Societal Actors, in *Revista de Direito do Consumidor*, vol. 143/2022, p. 167-188, sep./oct. 2022, p. 168ff.

10 HELBERGER, N.; SAX, M.; STRYCHARZ, J.; MICKLITZ, · H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy* (2022) 45:175–200, p. 175ff, accessible at: Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability (springer.com).

11 HELBERGER, N.; SAX, M.; STRYCHARZ, J.; MICKLITZ, · H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy* (2022) 45:175–200, p. 175.

12 RIEFA, Christine. Transforming consumer law enforcement with technology: from reactive to proactive? In *Journal of European Consumer and Market Law, EuCML* 3/2023, volume 12, p. 97.

of this paper is to reflect how to overcome these new consumer vulnerabilities.

B. The new consumer vulnerabilities on the Digital Economy: architectural, relational and data-driven vulnerability

Vulnerability (from Latin *vulnus*) is the status (e.g. because of their age, physical or mental disability) or situation (e.g. consumers) where a person can be harmed.¹³ A key element and particularity of Brazilian Law is the legal recognition that all consumers are vulnerable.¹⁴ Under Brazilian Consumer Defense Code – CDC (Law n. 8.078/1990), the recognition of a general ‘consumer vulnerability’ is a principle of the National Policy for Consumer Relations (Article 4, I). Brazilian scholars¹⁵ and also Helberger and Micklitz argue that in digital marketplaces “all consumers are potentially vulnerable.”¹⁶ In Europe, the very architecture of the internet and the choices given to the consumers are being considered sources of structural asymmetries and new vulnerabilities.¹⁷

13 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. 2. ed. rev., atual. e ampl. São Paulo: Revista dos Tribunais, 2014, p. 102.

14 See MARQUES, Claudia Lima. Algumas observações sobre a pessoa no mercado e a proteção dos vulneráveis no Direito Privado In: GRUNDMAN, Stefan, MENDES, Gilmar, MARQUES, Claudia Lima, BALDUS, Christian e MALHEIROS, Manuel. *Direito Privado, Constituição e Fronteiras*. Encontros da Associação Luso-Alemã de Juristas no Brasil. 2. Ed. São Paulo: RT, 2014. p. 287ss.

15 See for all the book, CANTO, Rodrigo Eidelwein do. *A vulnerabilidade dos consumidores no comércio eletrônico e a reconstrução da confiança na atualização do Código de Defesa do Consumidor*. São Paulo: Revista dos Tribunais, 2015.

16 HELBERGER, N.; SAX, M.; STRYCHARZ, J.; MICKLITZ, · H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy* (2022) 45:175–200, p. 177.

17 See BEUC. *EU consumer protection 2.0: structural asymmetries in digital consumer markets*. Bruxelas, 2021. Available at: <https://www.beuc.eu/publications/eu-consumer-protection-20-structural-asymmetries-digital-consumer-markets-0>. Accessed on August 20, 2021.

I. Choice architecture on online consumption and Dark Patterns: impacts on consumer vulnerability

Helberger and Micklitz argue, that in the digital and platform economy, consumer vulnerability is not a 'simply weakness', an individual 'lack of ability' or a 'vantage point' for providers, but describes, "a universal state of defencelessness and susceptibility to (the exploitation of) power imbalances that are the result of the increasing automation of commerce, datafied consumer-seller relations, and the very architecture of digital marketplaces."¹⁸

Indeed, in the data driven economy, the increasingly use of AI, of algorithmic profiling, of automated decision-making, of data driven commercial strategies, of predictive analytics, and of new digital marketing strategies that intensify and personalize the relationship between trader and consumer, can have a result 'new forms of unfair commercial practices'¹⁹ and 'new power imbalances'²⁰ against consumers.

About Dark Patterns, I have stated, there is not a unanimous definition on *dark commercial patterns*. The OECD roundtable on dark commercial patters online was based of the definition given by Mathur et al.²¹ as "user interfaces used by some online businesses to lead consumers into making decisions they would not have otherwise made if fully informed and capable of selecting alternatives."²² Also known as *deceptive design practices*, this practice is also described as "tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up

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- 18 HELBERGER, N.; SAX, M.; STRYCHARZ, J.; MICKLITZ, · H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy* (2022) 45:175–200, p. 186ff.
- 19 MARQUES, Claudia Lima; MENDES, Laura Schertel; BERGSTEIN, Laís. Dark Patterns e padrões comerciais escusos, in *Revista de Direito do Consumidor*, vol. 145/2023, p. 295-316, jan./feb. 2023.
- 20 HELBERGER, N; MICKLITZ, H-W. et al. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy*, vol. 45, p. 175-200, 2021, p. 175-176.
- 21 MATHUR, A., J. Mayer; KSHIRSAGAR, M. (2021), "What Makes a Dark Pattern... Dark? Design Attributes, Normative Considerations, and Measurement Methods". Available at: <<https://dl.acm.org/doi/10.1145/3411764.3445610>>. (<http://dx.doi.org/10.1145/3411764.3445610>).).
- 22 OECD. Roundtable on Dark Commercial Patterns Online. Summary of discussion. Available at: <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2020\)23/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2020)23/FINAL&docLanguage=En)>. Accessed on March 18, 2022.

for something.”²³ Several examples of this practice that lure consumers are listed by organizations concerned with the safety of online environments.²⁴ Researches worldwide indicates that dark patterns are present in more than 10% of global shopping websites²⁵ and more than 95% of the 200 most popular apps²⁶. And “the combination of lack of awareness and lack of capability” makes dark patterns’ effects particularly dangerous²⁷ for consumers. The extensive use of personal data in marketing and consumer contracts is a fundamental aspect of the research on commercial dark patterns, because often web scraping or harvesting techniques are employed. In Brazil we need a dialogue between the Consumer Protection Code (in Portuguese *Código de Defesa do Consumidor*-CDC, Art. 1,4,6, 7 and 39) and the General Data Protection Act (in Portuguese *Lei Geral de Proteção de Dados Pessoais* - LGPD, Art. 7, § 4, 45 and 64), to reassure the legality and no leakage of the structured database. The Ministry of Justice from Brazil has enacted a Technical Note Safe online tourism environment personal data of the consumers and found a violation of articles 4, caput, clauses I and III; 6, clauses II, III and IV, and 39, clauses II, IX and X of the Consumer Defense Code. And punished a fly tickets and tourism platform with an administrative penalty of a fine “for using consumer location data to differentiate the price of accommodations and deny vacancies, when available.”²⁸

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- 23 Deceptive Design: formerly darkpatterns.org. Available at: <<https://www.deceptive.design/>>. Accessed on March 20, 2022.
- 24 See The Hall of shame of *Deceptive Design*. Available at: <<https://www.darkpatterns.org/hall-of-shame/all>>. Or the research of UX Design available at: <<https://darkpatterns.uxp2.com/>>. Both accessed on March 20, 2022.
- 25 MATHUR, Arunesh; ACAR, Gunes; FRIEDMAN, Michael J; LUCHERINI, Elena; MAYER, Jonathan; CHETTY, Marshini; NARAYANAN, Arvind. 2019. Dark patterns at scale: Findings from a crawl of 11K shopping websites. *Proceedings of the ACM on Human-Computer Interaction* 3, CSCW(2019), 1-32.
- 26 DI GERONIMO, Linda; BRAZ, Larissa; FREGNAN, Enrico; PALOMBA, Fabio; BACCHELLI, Alberto. 2020. UI dark patterns and where to find them: a study on mobile applications and user perception. In *Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems*. 1-14. Available at: UI Dark Patterns and Where to Find Them: A Study on Mobile Applications and User Perception (acm.org).
- 27 MARQUES, Claudia Lima; MENDES, Laura Schertel; BERGSTEIN, Laís. Dark Patterns e padrões comerciais escusos, in *Revista de Direito do Consumidor*, vol. 145/2023, p. 295 – 316, jan./feb. 2023.
- 28 BRASIL. Ministério da Justiça. Departamento de Proteção e Defesa do Consumidor – DPDC. Processo: 08012.002116/2016-21.

II. New Relational and Data driven consumer vulnerabilities

Helberger and Micklitz argue, that in the digital and platform economy, consumer vulnerability is more and more relational, not only to providers, but now also to the intermediaries and big tech companies that have the platforms.²⁹ The EU has called from a different liability and duties to these 'gatekeepers' of the consumption. One great challenge for consumer protection in the Digital and Service's Society is the raise of the powerful intermediaries, especially in the new form of digital business.³⁰ The former middleman is now in the global digital marketplaces as 'gatekeepers'³¹ of most of the consumer transactions. About the liability of these new 'intermediaries gatekeepers' I have already wrote: "They do not provide, they create the consumption opportunity, but they have the consumer data, they survey everything and they control it. They control also all practices and contracts; clauses, codes of conducts and policies of the legal relation... Sometimes they control also the payment, but always they control the consumer's data, the real 'money' in the digital world. Sometimes they also provide counting on private schemes to solve the conflict. These powerful intermediaries are the keepers of the B2C transactions, their labels, Trademarks and names are known worldwide. The result is an overconfidence of the consumer..."³²

The UNWTO International Code of the Protection of Tourists-ICPT has an entirely Part III of the chapter IV on e-tourism because the special vulnerability of consumers in these platforms.³³ The UNWTO ICPT recognize "*the important role of digital platforms and online services in the tourism industry, as well as the risks stemming from the use of digital tourism services by tourists, Part III comprises a set of Principles calling for a fairer,*

29 HELBERGER, N.; SAX, M.; STRYCHARZ, J.; MICKLITZ, · H.-W. Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability, in *Journal of Consumer Policy* (2022) 45:175-200, p. 188ff.

30 MELLER-HANNICH, Caroline, Share Economy and Consumer Protection. In: SCHULZE, Reiner; STAUDENMAYER, Dirk (Orgs.). *Digital Revolution: Challenges for Contract Law in Practice*. 1. ed. Baden-Baden: Nomos, 2016. p. 119ff.

31 Expression used by Prof. Dr. Hans Micklitz in the SECOLA Conference in Oxford. See MARQUES, Claudia Lima. A nova noção de fornecedor no consumo compartilhado: um estudo sobre as correlações do pluralismo contratual e o acesso ao consumo, *Revista de Direito do Consumidor*, v. III, n. 26, p. 247-268, may/jun. 2017, p. 247.

32 MARQUES, Claudia Lima. Perspectives for Consumer Protection in the XXI Century, in *Macau Journal of Brazilian Studies*, Vol. 4, Issue 1, Apr. 2021, p. 73-86, p. 77-78.

33 UNWTO- INTERNATIONAL CODE FOR THE PROTECTION OF TOURISTS, available in: International Code for the Protection of Tourists (unwto.org).

safer, reliable, easily accessible, transparent and accountable online tourism environment which respects and protects the human rights, tourism ethics, fundamental freedoms and consumer rights of tourists and guarantees independent recourse to judicial redress.” And present 5 principles on tourists’ OR consumer’ protection in digital services, that can be universalized and new principles or Internet rights: 1. Safe online environment; 2. Equality and non-discrimination; 3. Transparency and fairness; 4. Protection from abuse; 5. Liability; 6. Risk prevention and management; 7. Data Protection. Coordination and cooperation; Dispute Resolution and redress.

The rise of these big tech gatekeepers-providers is a reality and consumer law must develop new instruments to deal with.

About the so called new ‘data-driven vulnerability’ is needed to stress that the data protection legislation is recent in Brazil. The General Data Protection Act (in Portuguese LGPD, Law n. 13.709) was promulgated in August 2018, but with a two year long *vacation legis*. The rights of consumers³⁴, holders of personal data, are among others at the LGPD: *I*) to know for what purpose your personal data will be processed and to know the specific purpose for which it will be processed; *ii*) to have free and easy access to your personal data, free of charge; *iii*) to be able to make corrections to personal data if they are wrong or outdated and even to demand that they be deleted, if necessary; *iv*) not have your personal data used for discriminatory, illicit or abusive purposes; and *v*) have security in the treatment of your personal data, so that they are not accessed by those who are not authorized. However, despite of the efforts of the personal data protection authority, the ‘Autoridade Nacional de Proteção de Dados-ANPD’, and the Consumer Protection System, the illegal collection and wrongful use of personal data, are a widespread reality in Brazil.³⁵

The challenges are so great that we can ask if consumer law is ready for the ongoing digital age. At this point I want to call the attention of the changes of expectation of the consumers vis-à-vis the products and services.

34 MENDES, Laura. Segurança da informação, proteção de dados pessoais e confiança. *Revista de Direito do Consumidor*, v. 90, p. 245-260, nov./dec. 2013.

35 See MARQUES, Claudia Lima; MENDES, Laura Schertel; BERGSTEIN, Laís. Dark Patterns e padrões comerciais escusos, in *Revista de Direito do Consumidor*, vol. 145/2023, p. 295-316, jan./feb. 2023, p. 295ff.

C. The task of overcoming legislative and regulatory challenges of the data and platform economy to protect consumers: the revival of the constitutional bases and the need for a source dialogue

The task of overcoming new consumer vulnerabilities in the digital era is not an easy one and should be guided by the constitutional values: the protection of consumers is anchored as fundamental right in Brazil.³⁶ Also the use of all laws or sources to achieve the constitutional value, the so called 'Source Dialogue' by Erik Jayme,³⁷ can be a value instrument to overcome these challenges proposed by the digital society.

I. The need to reinforce the constitutional roots of consumer protection at the digital society: a call for more digital fundamental rights and source dialogue

In my opinion there is a need to reinforce the constitutional roots of consumer protection. The 1988 Brazilian Federal Constitution assure fundamental rights to consumers,³⁸ in Art. 5, XXXII: *The State must provide consumer defense through the law*.³⁹ With this imperative, a fundamental protection duty⁴⁰ is imposed: the State shall provide, as set forth by law, for the protection of consumers in Brazil.⁴¹ Consumer protection becomes

36 SILVA, José Afonso. *Curso de direito constitucional positivo*. 19^a ed. São Paulo: Malheiros, 2001, p. 44ss.

37 JAYME, Erik. *Identité Culturelle et Intégration: Le droit international privé postmoderne. Cours général de droit international privé*. p. 9-268. In: Recueil des Cours: collected courses of the Hague Academy of International Law. Tomo 251. Haia: Martinus Nijhoff Publishers, 1996. p. 259.

38 BENJAMIN, Antônio Herman, O transporte aéreo e o Código de Defesa do Consumidor, in *Revista de Direito do Consumidor*, vol. 26, Apr. 1998, p. 33.

39 Official translation of the MINISTRY OF JUSTICE, *Consumer Defense in Latin America- Geopolitical Atlas*, English version, Editor Ideal, Brasília, 2005, 16. The full text of the provision is: "Article 5 is the list of individual and collective fundamental rights. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: [...] XXXII - *The State must provide consumer defense through the law*".

40 MENDES, Gilmar Ferreira. BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional*. 15. Ed. São Paulo: Saraiva Educação. 2020, p. 178.

41 So the official translation by the Supremo Tribunal Federal: "XXXII – the State shall provide for consumer protection, as set forth by law", accessible in: brazil_federal_constitution.pdf (stf.jus.br).

in Brazil a new hierarchy.⁴² The Constitutionalization of Private Law stems from the idea of a social function to private law⁴³ that goes above the interest of individuals,⁴⁴ and is thus guided by the constitutional public order.⁴⁵ As a consequence all consumer protection rules of the Brazilian Consumer Code (CDC) are 'ordre publique' (Art. 1).⁴⁶

The 1988 Brazilian Constitution is a fruit of the process of democratization after more than 20 years long military regime.⁴⁷ The 1988 Brazilian Constitution is the "most comprehensive and detailed document on human rights ever adopted in Brazil"⁴⁸ and include social-economic fundamental rights, as it of Art.5, XXXII.⁴⁹ This inclusion of private rights at the list of individual and collective fundamental rights is not a mere narrative or programmatic rule, but it has concrete consequences: "at least, establishing them as preferential over other infra-constitutional matrix rights. At most, determining concrete measures for its achievement."⁵⁰ This is especially important on the Internet,⁵¹ where digital transactions are linked with data

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- 42 See commentaries in MARQUES, Claudia Lima; MIRAGEM, Bruno; LIXINSKI, Lucas. *Desenvolvimento e Consumo- Bases para uma análise da proteção do consumidor como direito humano*, in PIOVESAN, Flávia and SOARES, Inês V. P., *Direito ao Desenvolvimento*, Belo Horizonte: Editora Forum, 2010, p. 201ss.
- 43 GIERKE, Otto von. *Die soziale Aufgabe des Privatrechts* (1889), republ. by Erik Wolf, Frankfurt am Main: Vittorio Klostermann, 1940, p. 2.
- 44 See SARLET, Ingo W. *Direitos Fundamentais e Direito Privado: algumas considerações em torno da vinculação dos particulares aos direitos fundamentais*, in *Revista de Direito do Consumidor*, vol. 36 (2000), p. 54-102.
- 45 See MELI, Marisa. Social Justice, Constitutional Principles and Protection of the Weaker contractual party, in *European Review of Contract Law*, vol. 2 (2006), nr. 2, p. 159-166.
- 46 See MENDES, L. S.; MARQUES, C. L.; BERGSTEIN, L. Social Diversity in Private Law and Special Law in Brazil, MPI Hamburg, 2023, not yet published, original text, p. 2.
- 47 SILVA, José Afonso. *Curso de direito constitucional positivo*. 19^a ed. São Paulo: Malheiros, 2001, p. 44ss.
- 48 PIOVESAN, Flávia. *Direitos humanos e o Direito Constitucional Internacional*. 11. ed. São Paulo: Saraiva, 2010, p. 21.
- 49 See SARLET, Ingo Wolfgang. *A Eficácia dos Direitos Fundamentais*. 2.ed. Porto Alegre: Livraria do Advogado, 2001, p. 48ss. And BENJAMIN, Antônio Herman, A proteção do meio ambiente nos países menos desenvolvidos: o caso da América Latina, in *Revista de Direito Ambiental*, vol. 0, Jan. 1996, p. 83ss.
- 50 MIRAGEM, Bruno Nubens Barbosa. O direito do consumidor como direito fundamental: consequências jurídicas de um conceito. São Paulo, *Revista de Direito do Consumidor*, v. 43, p. 111-132, jul./sep., 2002.
- 51 Accordingly to Luiz Edson Fachin, the Constitution presents a triple dimension: *formal*, consistent in the apprehension of rules and principles expressed in its text;

drive activities of intermediaries, platforms, and providers. The protection of the human rights and the freedom of choice of the consumers are one of the most challenges issue nowadays. Brazil knows the protection of the fundamental rights to privacy (Art. 5, X)⁵² and to the protection of personal data (Art. 5, LXXIX).⁵³

Because of this triangle,⁵⁴ of consumer protection laws, data protection laws and laws protecting the freedom of choice and other fundamental rights of consumers, in my opinion, this is a mandate to the so called 'source dialogue' ('dialogue des sources', expression of Erik Jayme). The idea is not a 'mono'-logue', but the simultaneous application of two or more laws or sources in cooperative and coherent manner to achieve the fundamental imperative to protect the users, data-owners and consumers in the Digital Economy. Article 7 of the Brazilian Consumer Code and Article 64 of the Data Law-LGPD are clear, that the rights and principles that can be used to protect consumers-data-owners can be in more than one law. A Dialogue between Consumer Code and Data Law-LGPD is given, but also new legislations like the General Framework Law on the Internet (Marco Civil da Internet) and the future AI-Bill (Bill 2338/2023-'*Marco Legal da Inteligência Artificial*').⁵⁵

Art. 7 of the Brazilian Consumer Codes states:

"Art. 7. The rights set forth in this Code do not exclude any others that may come as a result of international treaties or conventions ratified by Brazil, of internal legislation, regulations set forth by administrative authorities

substantial, apprehended of its effectiveness by the pronouncements of the Constitutional Court and by the incidence of the implicit principles derived from the explicit ones and; *prospective*, which links the actions through an open, porous and plural legal system. (FACHIN, Luiz Edson. *Questões do Direito Civil Contemporâneo*. Rio de Janeiro: Renovar, 2008. p. 6.).

- 52 See SUPREMO TRIBUNAL FEDERAL translation: "X – personal intimacy, private life, honor and reputation are inviolable; the right to compensation for pecuniary loss or emotional distress due to their breach is ensured". Accessible in: [brazil_federal_constitution.pdf](#) (stf.jus.br).
- 53 See SUPREMO TRIBUNAL FEDERAL translation: "LXXIX - under the terms of the law, the right to protection of personal data is ensured, including in digital media." And also the original text included by the Constitutional Amendment 115 of 2022: "LXXIX - é assegurado, nos termos da lei, o direito à proteção dos dados pessoais, inclusive nos meios digitais." Accessible in: [brazil_federal_constitution.pdf](#) (stf.jus.br).
- 54 See also HACKER, Phillip. Manipulation by algorithms. Exploring the triangle of unfair commercial practice, data protection, and privacy law, *Eur Law J.* 2021;1-34.
- 55 See the text at: PL 2338/2023 - Senado Federal.

with jurisdiction, as well as any other rights that stem from the general principles of Law, analogy, traditions and fairness.”⁵⁶

Also Art.5, § 2º of the 1988 Brazilian Constitution states the same idea of coherent application of laws to protect fundamental rights: “Paragraph 2. The rights and guarantees established in this Constitution do not exclude others deriving from the regime and principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party.”⁵⁷ This rule secures that rights and guarantees, not expressly listed in the Constitution, emerge “from the regime and principles adopted by it.” The central idea of the proposal is the coexistence of laws that have divergent fields of application and coordination among them, which would no longer be mutually exclusive, but would be incorporated into the system and would start dialoguing with each other to achieve their purposes.⁵⁸

Here we are inspired by the work of Erik Jayme⁵⁹, which presupposes the simultaneous application⁶⁰ of the rules in conflict, the solution of the dialogue of the sources⁶¹ “under the light of the Constitution”. The *dialogue of the sources* is an expression created by this German Professor from Hei-

56 See Translation of PROCONRJ, available in: CDC 2014 - (Novembro 2014) -Inglês - Teste.pmd (procon.rj.gov.br).

57 SUPREMO TRIBUNAL FEDERAL, Translation. Accessible in: brazil_federal_constitution.pdf (stf.jus.br).

58 MARQUES, Claudia Lima; BENJAMIN, Antônio Herman de Vasconcellos e; MIRAGEM, Bruno. *Comentários ao Código de Defesa do Consumidor*. 3. ed. rev., ampl. e atual. São Paulo: Revista dos Tribunais, 2010. p. 31-32.

59 “Dès lors que l'on évoque la communication en droit international privé, le phénomène le plus important est le fait que la solution des conflits de lois émerge comme résultat d'un dialogue entre les sources les plus hétérogènes. Les droits de l'homme, les constitutions, les conventions internationales, les systèmes nationaux: toutes ces sources ne s'excluent pas mutuellement; elles parlent l'une à l'autre. Les juges sont tenus de coordonner ces sources en écoutant ce qu'elles disent.” JAYME, Erik. *Identité Culturelle et Intégration: Le droit international privé postmoderne. Cours général de droit international privé*. p. 9-268. In: Recueil des Cours: collected courses of the Hague Academy of International Law. Tomo 251. Haia: Martinus Nijhoff Publishers, 1996. p. 259.

60 MARQUES, Claudia Lima. Diálogo entre o Código de Defesa do Consumidor e o novo Código Civil: o “Diálogo das Fontes”. In: MARQUES, Claudia Lima; BENJAMIN, Antonio Herman V.; MIRAGEM, Bruno. *Comentários ao Código de Defesa do Consumidor*. 3. ed. rev., ampl. e atual. São Paulo: Revista dos Tribunais, 2010.

61 JAYME, Erik. *Identité Culturelle et Intégration: Le droit international privé postmoderne. Cours général de droit international privé*. p. 9-268. In: Recueil des Cours: collected courses of the Hague Academy of International Law. Tomo 251. Haia: Martinus Nijhoff Publishers, 1996. p. 249.

delberg to indicate the simultaneous and coherent application of more than one legal source in time, that no longer 'exclude', on the contrary, 'dialogues' under the guidance of the Constitution. "Dialogue of laws/sources" (di + a = two or more; logos = thinking or logic), meaning the current simultaneous, coherent and coordinated application of plural legislative sources, special laws (such as the CDC) and General (as the CC/2002), with converging fields of application, but not more equal, so that there is no 'conflict of laws' and any apparent conflicts are resolved by the dialogue between the constitutional values and present in these standards.

II. Symbiotic products and services, Artificial intelligence, and the new digital consumer expectations: The crisis of consumer law effectiveness and the need of new safeguards

Symbiotic products and services are the denomination of goods with services connected or apps (immaterial goods of digital content) or services connected with objects, that only have a function together: the expectation is the interoperability, the many digital functions they serve together and durability that they will have at the market, for example, the consumer market of cell phones that can be used as TV, computers, messengers etc... and also make a call or a visual call. Miragem and I⁶² use the idea of a symbiotic quality that define these services and good, and not the quality of been 'smart' (or with AI), but the fact that they have a joint and symbiotic use of the hard and soft ware, of the material and immaterial goods and services at same time, together!

In all digital goods the obligation of data protection by design and by default is relevant, but here is particularly due to the significant risks to the fundamental rights and freedoms of the consumers/persons concerned. But also, the consumer law is significantly affected by these changes.

As I argued before,⁶³ consumer law is facing a crisis, in a context of a new digital 'Revolution', which is transforming our mass consumer society

⁶² MARQUES, Claudia Lima; MIRAGEM, Bruno. Serviços simbióticos do consumo digital e o PL 3514,2015 de Atualização do CDC: primeiras reflexões, in MARQUES, C. L.; LORENZETTI, R. L.; CARVALHO, D.F. de; MIRAGEM, B. *Contratos de Serviços em tempos digitais*, São Paulo: RT, 2021, p. 391 e seg.

⁶³ See MARQUES, Claudia Lima. Perspectives for Consumer Protection in the XXI Century, in *Macau Journal of Brazilian Studies*, Vol. 4, Issue 1, Apr. 2021, p. 73-86.

into a digital and ‘services society’. which create problems for enforcement agencies and the jurisprudence. The traditional consumer law, with the division between goods and services, built in ‘sales’ of tangibles goods, is not enough. Especially the traditional division between gratuitous and onerous purchases, between financial services and the main performance – they are been challenged. There is a new emphasis on consumer’s services (traditional services, digital services and former ‘public utilities’) and intelligent (or connected) goods, goods with digital or immaterial content.⁶⁴ Because of the increasing convergence/compatibility/interoperability in merging goods with services in intelligent goods, the new variety of goods with digital contents and services that needs a product in order to work (for example, a mobile phone), to be provided, the synergies between goods and services and these two consumer relationship are defying the traditional regulatory and enforcement efforts.

Dogmatically speaking, Consumer Law was built in the XX Century. 14 The first element was the choice to assure freedom and party autonomy for the weaker party, so good faith was the proper principle, allowing re-personalizing the consumers transactions, assuring more information on the market. The focus was to assure freedom, freedom of consumers on the market despite the mass and adhesion contracts. The second element were the fair treatment and the assurance of faire commercial practices and combat fraudulent and misleading practices, so confidence (trust) was the proper principle, allowing the protection of consumers with more contractual cooperation and forbidding to treat different or unfairly any party. The focus here was equality and fairness to all consumers. The third element was the quality of goods and services, which created new legal and implied warranties and the principle of strict liability of the fabricants and the solidarity of the chain of professionals involved gave the response. The focus here was the fight against ‘risk society’ and to assure a fraternal distributive effect of the consumer protection laws. These legal elements were in all consumer laws on the globe. My last element of this traditional consumer protection is the local enforcement. We built very efficient national enforcement systems to protect consumers, sometimes regional or supranational, like in the EU and now in the Mercosur, but we do not have

64 See the new European Directives, Directive (EU) 2019/770 and 771 ‘on certain aspects concerning contracts for supply of digital content and digital services.

a truly international binding instrument to consumer protection and this soft system is not working anymore.⁶⁵

In the digital world the consumers have more choice and information than never, but they never know who is controlling the consumer transaction. We spoke about 'framed' autonomy (Norbert Reich)⁶⁶ from the professionals; today we should speak about 'framed' information – we have all information, but not those we need... and no control at all about it. And what about fairness? The conformity of services was always a challenge for consumer law and now with goods of digital content the challenge is renewed. Fairness in contract and in commercial (and data) practices in the digital marketplace is also a hot topic. It is necessary to point out that, here, we have old/new contracts, old like 'sale contracts', but with new elements like the digital content. And we have very old contracts, like the roman 'locatio conductio' with new approaches in services contracts of the digital Era. The facilities to identify and to 'profile' the consumer is now allowing new kinds of discrimination, like the geo-blocking and the geo-pricing. With the possibilities of the Big Data, the Internet of Things, the algorithms, the AI, the robot-toys and the intelligent products, these kinds of storage (and treatment) of great number of consumers' data can also be a used to discriminate in the future.⁶⁷

Safeguards are needed to protect the rights of individuals or consumers. As we stated before, the challenges linked to the articulation or dialogue of the current consumer laws and the new legislative framework on data protection is particularly important to give consumers meaningful protection, granting consumers using electronic commerce and new technology applications a level of protection that is no less that afforded in other forms of commerce, avoiding all kind of consumer discrimination and giving some control and information over how their data generated through the use of connected objects and symbiotic services and goods.

⁶⁵ So, I argued in MARQUES, Claudia Lima. Perspectives for Consumer Protection in the XXI Century, in *Macau Journal of Brazilian Studies*, Vol. 4, Issue 1, Apr. 2021, p. 73-86 p. 76.

⁶⁶ REICH, Norbert; MICKLITZ, Hans-W; ROTT, Peter; TONNER, Klaus. *European Consumer Law*, Intersentia, Cambridge, 2014.

⁶⁷ MARQUES, Claudia Lima. Perspectives for Consumer Protection in the XXI Century, in *Macau Journal of Brazilian Studies*, Vol. 4, Issue 1, Apr. 2021, p. 77.

D. Final Observations

The special vulnerability of consumers in the digital economy is a reality. The 7th World Conference on Consumer Law, organized by the IAACL-International Association for Consumer Law in Helsinki in 1999 have already mentioned that the Internet have “starts a new era for the consumer” and consumer law.⁶⁸ An conclude that consumer law should not accept the lowering of the present level of protection because of these new technologies.

Many years passed, the challenge seems greater with the scale and innovation brought by the Artificial intelligence, smart contracts, the platform society and servicization of consumer goods.⁶⁹ The protection of personal data is also a challenge in this digital economy. As Danilo Doneda stated protection of data is in reality protection of an individual.⁷⁰ Regulate online platforms and gatekeepers are now an objective of both consumer and constitutional law.

And because Digital Constitutionalism is about methodological innovation, I call the attention of an ILA Resolution 7/2022⁷¹ aiming to raise awareness among responsible business of the digital marketplaces and e-commerce. In the trend of self-compliance and co-regulation this so called “CONSUMER GLOBAL COMPACT IN THE DIGITAL ECONOMY” brings a set of voluntary standards, that can support digital companies to align their activities with fundamental responsibilities in the areas of consumer rights, data protection, new marketing, redress and enforcement of consumer rights:

68 WILHELMSSON, Thomas. Foreword in WILHELMSSON, Thomas; TUOMINEN, Salla; TUOMOLA, Heli. *Consumer Law in the Information Society*, The Hague: Kluwer Law International, 1999, p. XXI.

69 WEI, Dan; NEHF, James P.; MARQUES, Claudia Lima (Org.). *Innovation and the Transformation of Consumer Law*. 1. ed. Singapore: Springer Singapore, 2020.

70 DONEDA, Danilo. *Um Código para a proteção de dados pessoais na Itália*. Disponível em:
<<http://egov.ufsc.br/portal/sites/default/files/anexos/29727-29743-1-PB.pdf>>. Accessed on July 30, 2019: “A própria expressão "proteção de dados" não reflete fielmente o seu âmago, pois é resultado de um processo de desenvolvimento do qual participaram diversos interesses em jogo – não são os dados que são protegidos, porém a pessoa a qual tais dados se referem.”.

71 See ccpb_IGECON_Resolution_LisbonILA_en.pdf (unctad.org).

“Principles of the ILA’s Consumer Global Compact in the digital economy

The Principles are:

Consumer Rights

1. *Business should support and respect consumer rights, especially in compliance with the UNGCP (UN-Guidelines on Consumer Protection, 2015) and grant consumers using electronic commerce and new technology applications a level of protection that is no less than afforded in other forms of commerce, avoiding all kind of consumer discrimination.*
2. *Business should uphold freedom of choice and provide the consumer with complete and useful information on time and in an understandable manner.*
3. *Business should develop a unified standard to deal with cross-border consumer transactions and not deprive consumers using e-commerce in cross-border transaction from the most protective provisions afforded to them by the mandatory applicable laws.*
4. *Business should make sure that they are not complicit of frauds or violations of human rights and environmental rights in the marketplace or supply chains.*

Data Protection and New Marketing

5. *Business should control and share responsibility of the behavior of intermediaries, employees, influencers, and the addressable marketing personnel.*
6. *Business should ensure by design, data protection and AI fairness. The processing of the consumers’ personal data should be done lawfully, fairly and in a transparent manner, respecting the principles of purpose limitation, data minimization, data accuracy, storage limitation, integrity and confidentiality and accountability, and guaranteeing data subject rights.*
7. *Business should undertake initiatives to promote greater data protection and consumer privacy. It should be assured a fair algorithmic treatment, that does not make unfair discriminations; algorithmic transparency; and the right of the consumer to contest an algorithmic decision.*
8. *Business should consider children and adolescents’ weakness, aged persons and other vulnerable consumers and not impose to them burdens or constraints.*

Redress and Enforcement Rights

9. *Business and other stakeholders should work together with national enforcement agencies and seek for consensual and amicable consumer dispute resolution. Business should engage in multiple-stakeholders' discussions and supports international cooperation for cross-border dispute resolution. The introduction of due diligence frameworks would increase the levels of responsible business conduct and international cooperation, enhance information and transparency, increase sustainable development, and enhance confidence amongst consumers.*
10. *Business should encourage accessible consumer ODR platforms and channels for consumer redress including cross-borders disputes.*
11. *Business should ensure the compliance of international standards by the ADR/ODR and other services and platforms for amicable resolution of consumer disputes they use or recommend, fostering the development of fair, transparent, accessible, informed, impartial, free of charge or inexpensive for consumer and expeditious solutions for cross border cases.*
12. *Business should ensure that consumers are free to access voluntarily dispute resolution and redress mechanisms, as well as judicial or administrative redress mechanism for consumers acting individually or collectively, and to benefit from the positive outcomes of such procedures. The ADR/ODR mechanism should be mandatory for business and voluntary for consumers and the decision, if not consensual, should be binding only for business.⁷²*

Indeed, considering the expansion of the digital economy and the new global organization of digital big techs and digital global corporations, sharing platforms and chains of providers, organizing marketplaces to reach consumers, reproducing technologies and practices worldwide it is possible to ask these responsible businesses to voluntarily join this principles-based approach to doing business globally. The original ten principles of the UN Global Compact cover human rights, labour, environment, and anti-corruption. These new Principles aim to make up for the 'new vulnerabilities' that global consumers are experiencing in the digital economy and create a voluntary common ground to the worldwide activities in consumer e-com-

72 See https://unctad.org/system/files/non-official-document/ccpb_IGECON_Resolution_Lisbon.

merce, platforms and data driven companies, helping the compliance and enforceability of consumers rights worldwide.

