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The data holder as the subject of law in capitalism of surveillance and data commercialization in the General Data Protecion Act

O titular de dados como sujeito de direito no capitalismo de vigilância e mercantilização dos dados na Lei Geral de Proteção de Dados

Mateus de Oliveira Fornasier[1]

[1] Universidade Regional do Noroeste do Estado do Rio Grande do Sul, Ijuí, Rio Grande do Sul, Brasil. E-mail: mateus.fornasier@unijui.edu.br. ORCID: http://orcid.org/0000-0002-1617-4270

Norberto Milton Paiva Knebel[2]

[2] Universidade Regional do Noroeste do Estado do Rio Grande do Sul, Ijuí, Rio Grande do Sul, Brasil. E-mail: norberto.knebel@gmail.com. ORCID: https://orcid.org/0000-0003-0674-8872.

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Abstract

This article aims, in general, to characterize the legal regime of the General Data Protection Act (LGPD) under the concepts presented by surveillance capitalism, having as specific objectives: (I) describe the political economy of surveillance and the role of the data owner / user of digital services and (II) identify the insertion of LGPD in the context of the economic exploitation of personal data through the instrument of consent of the holder. Results: (I) LGPD can be considered a legal support for capitalist accumulation in the information age, enabling the condition of a data rights holder who can negotiate his data with companies capable of dealing with the Big Data context and extract from these data behaviors to be sold in a data market that sells forecasts of consumption and daily life; (II) The great economic mechanism identified with exploitation is the extraction of behavioral surplus value, which is the process that extracts relevant data from the users' daily life experiences that are transformed into merchandise; (III) In the same way that capitalist salaried workers are those who have part of their production extracted as more-value by the capitalist, in the digital age, users connected to being considered data holders have their daily lives transformed into profitable data, expanding the limits of capitalist accumulation. The method of procedure used is the dialectical-materialist, with a qualitative and technical approach of bibliographic research with literature review.

Keywords: General Data Protection Act; Surveillance capitalism; Behavioral added value.

Resumo

Este artigo objetiva, em geral, caracterizar o regime jurídico da Lei Geral de Proteção de Dados sob os conceitos apresentados pelo capitalismo de vigilância, tendo como objetivos específicos: (I) descrever a economia política da vigilância e o papel do titular de dados/ usuário de serviços digitais e (II) identificar a inserção da LGPD no contexto da exploração econômica dos dados pessoais por meio do instrumento do consentimento do titular. Resultados: (I) A LGPD pode ser considerada um suporte jurídico para a acumulação capitalista na era informacional, possibilitando a condição de um titular de direitos relativos aos dados que pode negociar os seus dados com as empresas capazes de lidar com o contexto do *Big Data* e extrair desses dados comportamentos a serem vendidos em um mercado de dados que vende previsões de consumo e de vida cotidiana; (II) O grande mecanismo econômico identificado com a exploração é a extração de mais-valia comportamental, que é o processo que extrai das experiências da vida cotidiana dos

usuários dados relevantes que são transformados em mercadoria; (III) Da mesma forma que o trabalhador assalariado do capitalismo é aquele que tem parte de sua produção extraída como mais-valor pelo capitalista, na era digital, os usuários conectados ao serem considerados titulares de dados tem sua vida cotidiana transformada em dados rentáveis, expandindo os limites da acumulação capitalista. O método de procedimento utilizado é o dialético-materialista, com abordagem qualitativa e técnica de pesquisa bibliográfica com revisão da literatura em um estudo exploratório.

Palavras-chave: Lei Geral de Proteção de Dados; Capitalismo de vigilância; Mais-valia comportamental.

Introduction

Capitalism of surveillance is a term coined and popularized by the North American author Shoshana Zuboff, when seeking to define the transformation in the order of political economy that constitutes and expands a new form of capitalism based on the exploration of people's behavior, that is, in all aspects of everyday life - beyond the labor paradigm. Vigilance under capitalism is paradigmatically striking, and it has been transformed throughout the accumulation processes, constituting an instrument of capitalist production; however, today all this structure created to monitor has a new purpose: the commercialization of the data obtained through it, as an end in itself.

Brazil data regulation is expressed in the recent approval of the General Data Production Law (LGPD), which, based on European regulations, constitutes a normative framework pertaining to the social and economic processes of digital data. Such law has as a distinctive mark the use of the user's consent to guarantee the defense of private and fundamental rights. However, an ambiguity in this protection is identifiable, as the text of the law recognizes a (hyper) vulnerability of users (data holders) while providing conditions for data delivery to occur. The condition of holder of personal data is defined by law in its article 5, V, as: "*natural person to whom the personal data that are the object of treatment refer*", i.e., it is the subject of right that transfer data to the controller and the operator - and this condition of availability is only possible through consent, defined in art. 5, XII, as "*free, informed and unequivocal manifestation in which the holder agrees with the treatment of his personal data for a specific purpose*".

The controversy over the legal figure of the holder in the LGPD raises his double position, or else contradictory, as a subject worthy of protection of his personal data, but as a free person to do business on the transfer of such data. In this theoretical scenario, there are researches [1] that identify the limits of the consent of the holder and the need for its complexification. However, the LGPD does not deal with specific forms, better or worse conditions of juridical effective consent, since it understands this issue comprehensively, on another scale, exposing historical and social limits to any form of

[1]There are several researches that deal with the topic of the consent of the holder about the transfer of their data dealing with the particularly legal problem, that is, the different legal forms of protected consent, such as that of Bioni (2019b), which identifies how it is necessary to understand consent "beyond a click" to accept the terms. Also Lima and Barreto Junior (2016) point to the need for expansion of protective mechanisms for the consent of the holder or legal guardians of vulnerable people (YANDRA; SILVA, Santos, 2020)

personal data transfer, regardless of its adjectives. [2] As much as the validity of this law will mean a legal framework for the protection of personal data in Brazil, it needs to be seen in the context of the political economy it belongs to, which is the commercialization of data in an economy of surveillance. From this controversy, the research problem of this article is expressed: what are the limits of the consent of the holder that are enshrined in the LGPD imposed by the political economy of surveillance?

In order to seek an answer to such questioning, it is necessary to identify how this law manifests itself in the face of such political-economic form, in view of its ambiguous normative essence, which can be as much of legal resistance to data commercialization processes - related to "*protection*" of personal data, as the norm that provides legal conditions, from a regulatory point of view, for the constitution of a data market in Brazil - as well as as a normative mediator of these new commercial relations, tracing a legalized path for its expansion. Thus, as a hypothesis to such questioning, it is stated that the LGPD tends to allow the creation of greater conditions for the implementation of a data market in Brazil, with the consent of the holder being the instrument of regulation and legitimacy that the law provides to this new market, making data exploitation nothing more than a business deal.

The justification and importance of the research are given in the emergence of the LGPD (in 2020), [3] because its consequences will be important and faced immediately. As much as the large companies in the global data market already work with Brazilian data, precisely because they are regulated by rules that are outside the state legal order, national law can serve as a support for the expansion of this market and the creation of its own characteristics for expanding the exploitation scenario. The increasing of the requirements for the consent of users and the integration of values such as that of informational self-determination set the protection of personal data as a task of the Government and the responsibility of companies that practice data management.

[2] It is the theoretical elaboration about adjectives like "free, informed and unequivocal," as do Tepedino and Teffé (2019), or as Frazão (2018), to state the term "qualified" for example.

[3] Firstly set for December 28, 2018 for the articles dealing with the National Data Protection Authority and two years after publication for the rest, with its *vacatio legis* extended to May 3, 2021 by Provisional Measure no. 959/2020 of April 29, 2020, edited amid the uncertainties of the pandemic generated by *Covid-19* disease. This extension of the term for the purposes of the law put interests in conflict, on the one hand, entrepreneurs concerned with corporate suitability to LGPD - for this reason celebrated by companies (JORNAL DO COMÉRCIO, 2020) and on the other, consumers, still unprotected by the form of law (EXAME, 2020), an attack on rights and democracy itself, according to Ana Frazão (2020). However, the Provisional Measure was amended by the Senate on 05/19/2020, maintaining the effective date for August 2020, with the sanctions imposed by the law being postponed to 2021 - this is, therefore, the date for the effective date fixed at the end of production of this article.

However, the information asymmetry between citizens and *big tech* expands, consolidating data extraction at the structural level.

The general objective of this article is to characterize the legal regime of personal data holder in LGPD under the concepts presented by capitalism of surveillance, having as specific objectives: (I) describe the political economy of surveillance, that is, the transformation of capitalism to that point and the role of the data holder / user of digital services and (II) identify the insertion of LGPD in the context of the economic exploitation of personal data by the instrument of consent of the data holder. Due to these objectives, the structural organization of the text is developed as follows: in its first part, the definition of the Political Economy of Surveillance will be treated - that is, what surveillance capitalism is under the historical conditions of the capitalist mode of production and the rise of a new data-related market - such as exploiting human experiences and financial assets in the market; in the second part, the LGPD will be addressed under the context addressed in the first, that is, how the law identifies and expresses itself in the context of this new political economy.

The employed method of proceeding is of exploratory study, with a qualitative approach, and the research technique used is bibliographic research with review of the literature, adopting a dialectical-materialist logic when understanding the surveillance capitalism theory and LGPD as dynamics of a same context, seeking a theoretical synthesis that concludes by exposing the contradictions and the need for data regulation in Brazil. The theoretical framework adopted to define surveillance capitalism is the work of Shoshana Zuboff (2019) and texts by Christian Fuchs, at the same time with the contribution of other authors who will confront them, seeking to answer the research problem from the connection of these prominent authors, the LGPD's legislative framework as literature, together with the Brazilian legal doctrine related to the law in question. Also, to the point of connecting the political economy of labor capitalism to data capitalism, the Marxist theory of law is used as a criticism of the subject of Law and legality.

1. Political economy of surveillance

Shoshana Zuboff (2019) defines the term *"surveillance capitalism"* from: (I) the foundations of such a production system; (II) the advancing from the digital world to the

real world; and (III) its instrumentalization. In other words, it seeks to define and identify market dynamics of how capitalism is transformed into the determination that all human behavior can be translated into data. Thus, even if part of it is used to improve services, the large remaining portion is a "*surplus value*" of behaviors exploited by data proprietors. The consequence of this is the formation of "*future behavior markets"*, that is, the commercialization of data in order to predict and determine behaviors (ZUBOFF, 2019, p. 14-15).

The notion used to highlight this transformation in capitalism is that of political economy, [4] in the same sense that Karl Marx (2008, p. 47-48) did in the preface to the *Contribution to the Critique of Political Economy* (1859), by understanding the need to identify in the Political Economy the anatomy of bourgeois society - namely, the set of economic and social relations [5] that produce capitalism and the consequence of material transformations in the productive sphere for legal or political forms, considering that they do not manifest themselves of their own free will, but because they have roots rooted in the material conditions of existence in their totality. According to Fuchs (2011, p. 36-37), political economy focuses on the analysis of the internal and dynamic constitutions of an economic system. Such branch of knowledge is characterized as "*political"* because it realizes the interests and ideological bases that operate in the modern economy. In the critique of political economy, these interests are analysed in their contradictions, revealing the limitations and problems of the capitalist economy in its phenomena (commodity, exchange value, profit, money, capital and social division of labor) considered as universal and worthy of social relations and material transformations.

Such as the reference to Marxism as the means of social production that lives from exploring work, in this aspect there is a turning point, as the author defines:

[4] Political Economy is a science that studies the social relations of production, circulation and distribution of goods to meet human needs, in short, the relations that identify capitalism. Marx presented in "Capital: a critique of political economy", a critique of it, highlighting the political and ideological role of the formation of Economics, fleeing the notion of a pure Economy, analyzed solely by its methods. According to Leda Paulani (2000, p. 102): "That is why classical economics tends to take as ahistorics and as attributes of human nature a series of behaviors and phenomena that are only justified and explained in the social context that produced them. But this naturalization of the social, classical thought does not invent it, but reproduces it from the social reality itself. He is, therefore, a victim of fetishism, which Marx tried to unveil.

[5] There is no support in the argument that the critique of Political Economy understands society from a purely economic point of view, as Rivera-Lugo (2019, p. 23): "The political economy of capitalism is not reduced, in a strict sense , to the economic phenomenon. It is a systemic totality, it does not have its cracks and contradictions, but it aspires to subsume its entire life under its practices and logics of production, exchange and reproduction. Thus, it constitutes a set of social relations of domination and strength. ".

> It revives Karl Marx's old image of capitalism as a vampire that feeds on labor, but with a unexpected turn. Instead of labor, surveillance capitalism feeds on every aspect of every human's experience (ZUBOFF, 2019, p. 15-16).

Thus, Nicole Cohen (2008, p. 18) pointed to this direction when verifying that the valorization of *Facebook* depended on free and immaterial labour when commercializing something that not even the users knew they were producing - the data. Surveillance capitalism introduces a new way of exploitation of life and of hyperexploitation of labour: in the same way that General Motors invented the managerial capitalism of Fordism, Google is a pioneer in surveillance capitalism - however, its methods are no longer restricted to competition among technology companies.

The relationship between political economy and surveillance, seen as a contradiction, a constituent part of the term surveillance capitalism, even before the rise of the exploitation of personal data, is explained by Christian Fuchs (2013, p. 683-685) as the need that capitalism had to separate the private from the public sphere due to the right to private property. However, in the antagonism between proprietary privacy and social inequality, the capitalist system has developed ways to keep proprietary structures secret, while exercising complete vigilance over labour and consumption - it is, therefore, the surveillance capitalism, the disclosure of a culture of surveillance in the scope of society, state and economy, both in the expansion of highly technological devices and in the mundane practices of everyday life, as David Lyon states (2018).

Big Data capitalism has in the processes of data collection, storage, control and analysis, the formation of a political economy context that seeks the economic and political control of individuals, while treating them as consumers or potential terrorists / criminals. According to Fuchs (2019, p. 58-59) the algorithmic power of surveillance capitalism can result in a world that is a large *shopping center,* with humans completely colonized by commercial logic, within the scope of their behavior. Therefore, there is the rise of a new commodity, which is not necessarily the result of industrial work: the data commodity, which is based on social networking platforms, on which users deliver their data in exchange for services advertised as free, but which are transformed into merchandise by the companies responsible for their offer on the market (FUCHS, 2009, p. 80-83).

The legacy of the historic moment of industrialization was the consecration of "*individualization"* in the notion of consumers, capable of exercising choices and deciding

the offer according to their demand. But then there is the difference between the two modernities: while the first modernity nourished elements of deep hierarchy in the ascension, cultivating forms of bureaucracy, concentration, centralization and standardization (supplying individual expressions through consumption and in the name of collective solutions), in the second the individuality achieved a central role shaped by self-determination in a neoliberal habitat. At this point, Zuboff (2019, p. 49) points to the great contradiction of the second modernity:"*we want to exercise control over our own lives, but everywhere that control is thwarted.",* and individualization makes the responsibility for providing livelihoods its own, but it is necessary to fight at all times against economic and political decisions against popular interests. There is an ideology that values individuality while making people invisible. This individualization necessary for the creation of behavioral data is a relation of detriment to the public sphere that Fuchs (2014, p. 97) identifies as being the purely particularistic character of both life and political opinions [6] in the sphere of social networks. Despite the communication capacity promoted by the internet, corporate interests end up taking politics to another side, [7] something that Morozov (2018) indicates as "*the end of politics"* . The digitalization of life promotes a continuous deprivation of possession of day-to-day activities, which end up transforming everyday life into merchandise, with a productive labor for these large companies in the simple act of being connected to networks (BELLER, 2013, p. 213-232).

Surveillance capitalism fills a vacuum of capitalist accumulation by formulating an unprecedented market, in which surveillance is a fundamental mechanism for providing profits. The ubiquity of the internet is a superficial and brief layer of freedom inextricably linked to a deep layer of damage (ZUBOFF, 2019, p. 56). There is nothing new about the importance of information for commercial transactions, such as strategic data; however, there is no precedent for the valorization and monetization of the data itself - no longer as a business assistant, but as a trading platform for personal data (connections, opinions,

[6] An example is the social movements articulated based on self-organization, which signify the crisis of representativeness of the unions, as one of the great representatives of importance, but it also has the potential if they are counter-hegemonic and organize themselves in networks. According to the research by Fuchs (2006).

[7] The internet as something "collective" was something privatized and commercialized, to the point that, in order to be able to return to it again, there must be a deep criticism of the structures, as stated by Fuchs (2013, p. 277): "The era of neoliberalism has been based on the privatization and commodification of the commons. Capital exploits the commons for free (without payment), whereas all humans produce the commons and are thereby exploited. To achieve a just society, one needs to strengthen the commons of society. A democratic communication infrastructure requires strengthening the communication commons. The task is to advance communist media and a communist Internet in a democratic and participatory communist society. "

preferences and consumption patterns that have value in themselves) (MAYER-SCHONENBERGER; CUKIER, 2013, p. 82-83). In this context, theorists like Srnicek (2017) and Pasquale (2018) also call this moment of capitalism "*platform capitalism"*, precisely because of the rise of these digital data platforms of technology companies as inevitable intermediaries of digital life. They point to a new mode of economic circulation, based on the profitable intermediation of the movement of digital data - with negative consequences in the scope of labor, giving rise to the intermittent "*gig economy*", and in the financial sphere, being directly linked to the directions of the cyclical financialization of the venture capital (LANGLEY; LEYSHON, 2016, p. 31).

The economic mechanisms to monetize the data are described by Ciuriak (2019, p. 3-5) as: (I) *the exploitation of informational asymmetry*: rise of global monopolies and the increasing submission of users; (II) *transferring innovation to the field of machines*: evident acceleration of innovation processes; (III) *creation of machine learning capital:* promoting automated decision making at almost zero cost; (IV) *optimization of processes*: reduction of operating costs, often delegated to users; (V) *extracting surplus value from consumers*; (VI) *monetization of open data*: exploitation of data that is public, but aggregating them, forging marketable products; (VII) *strategic value*: military advantage and business intelligence.

Informational asymmetry is the structural determinant of this data economy, precisely because of the profound inequality between the ability to manage and process data between users, the holder of personal data, and who controls them, the *big techs*. The "*digital mediation of everything"* (MOROZOV, 2018, p. 163) is only possible with technologies of private appropriation of informational corporations, in which the logic of data extraction occurs under a consensus algorithm forged in the offices of these companies, under principles that considered "*good for everyone"*. The holder of personal data is taken hostage by a social structure that leaves him to the restricted role of surrendering his data, masked by voluntariness, or the ostracism that makes work or leisure impossible.

The technological development necessary for surveillance capitalism was the discovery of the surplus value of behavior. Google was a pioneer in these processes by constituting what Zuboff (2019, p. 72) claims to be the "*behavioral value reinvestment cycle"*, which took place in the following phases: users, rendered behavior, data analytics and improvement of services. In this process, the surplus value occurs when the

information produced by the users is transformed into profitable data, returning to the user only as more services - which, even, improve in the sense of collecting more data, constituting a cycle of dispossession. The user is alienated from the goods produced, only the production of data being his responsibility, the dominant paradigm being that of imperative data extraction. The general patterns of this process of extracting surplus value can be summarized as follows (ZUBOFF, 2019, p. 93-96): (a) *the logic:* translate people's behavior into profitable data, reinvesting part of the profits in larger extraction mechanisms, constituting surveillance assets and profits; (b) *the means of production*: machine intelligence is essential to identify the surplus value of behavior, and it is constantly improved through its own practices; (c) *the products:* predictions are made about what people will buy, feel, think or do; (d) *the market: it* is the future market for behavior, selling forecasting and risk mitigation systems.

The advance of surveillance capitalism (II), second term of the concept for Zuboff (2019, p. 222-241), depends on the transformation of human experiences into data, and afterwards, in the return of this reality as reinvestment, profit and new services . In this scenario, the reality is that data is delivered by the user, in a formally consented manner, in view of the need for services and the idea that the more data available to companies, the better the services. There is a prevalent notion in digital services that is the "*intelligence"* apparatus , while services that are unable to extract data are considered "*ignorant"*. Therefore, "*surrender"* from people to surveillance capitalism is an imperative, above any discussion of whether or not to "opt for" it. There is a surrender of the bodies to the surveillance regime of this new stage of political economy, that is, individuals do not surrender their experiences by choice or obligation, but by ignorance and the tyranny of the non-alternative. The ubiquitous apparatus operates in the form of coercion and secrecy, making surrender an inescapable fact, under a division of knowledge never seen before, in which users do not know who makes decisions about the data (ZUBOFF, 2019, p. 241) . It is necessary to confront the so-called "*neutral"* theories on surveillance, which relativize these processes with the definitions that: (a) there are positive aspects to surveillance; (b) surveillance has two aspects, one liberating and the other restrictive; (c) surveillance is essential for all societies; (d) surveillance is necessary for organization; and (e) any type of information systematization is surveillance (FUCHS, 2010, p. 2).

Those definitions can be criticized from the points exposed by Fuchs (2010, p. 13-15): (I) *etymology:* since its origin in the French *surveiller*, which means to see from above,

the term presents a notion of hierarchy, a situation that has watchman and watched; [8] (II) *theoretical* conflationism*:* theoretical confusion of using different terms as if they were one - and, in the case of surveillance, it is a question of confusing it with the notion used in other sciences (which for many is only analytical, not normative and critical tradition); (III) *difference between information gathering and surveillance:* surveillance studies are not synonymous with information studies, with the latter tending to understand the possibilities of participation and cooperation available due to the variety of information, whereas in the former, the opposite occurs; (IV) *normalization of surveillance: there are* more and more justifications for surveillance, be it the security of financial operations, urban violence or terrorism, [9] and it is necessary to reinforce the critical role of the ideologies that support the expansion of surveillance limits.

The great product of the market resulting from surveillance is the sale of certainties, consolidating behaviors according to the needs of the market, making a utopia of market certainties. Instead of a total control of the political condition of individuals, as totalitarianism sought, in the scenario of instrumentalization of surveillance capitalism the idea is to allow a certain freedom of behavior, but concomitant to complete domination over the markets - forming a sense of freedom of ignorant consumption of the fact that the behaviors correspond exactly to the expectations of the market (ZUBOFF, 2019, p. 374-389). Constant vigilance is the state of affairs that allows the transformation of experiences into industry, that is, in the commercialization of data, data mining being a relevant commodity for the world economy in a dynamic of complex activities and little transparency, with data brokers representing the measurers of this new lucrative form of capitalism (WEST, 2019, p. 12).

The use of the raw material of human behavior is what Couldry and Mejias (2018, p. 2-10) call "*data colonialism"*, as the commercialization of data combines the predatory behavior of colonialism - by expropriating direct information from the lives of people with abstract methods of quantifying computing - with transnational effects - with the citizens of the global south remaining in greater dependence according to higher rates of extraction of more value, while the return is even lower in relation to the citizens of the centers production of *big tech*. This colonialism occurs, therefore, with (I) naturalization

[8] Worthy of a disciplinary society that Foucault (1999, p. 195-218) points out as part of the resources for good training, together with the normalizing sanction and the examination.

[9] The work of David Lyon (2003) exposes how the terrorist attacks promoted on 11/09/2001 opened the doors globally for digital surveillance.

of data extraction and (II) the assertion of the form of extraction, being a reciprocal process in which the extraction of behavioral surplus value is justified by the technical improvement of the same mechanism that performs this process.

The commodification of behavior under surveillance capitalism imposes a division of knowledge protected by secrecy, it is indecipherable and technocratic, being forged from personal data and returning to the user as a false participation in the production of systems, as there is, in parallel, a wide system of surplus value of behavior - that is, people produce the raw material from which this surplus value derives, which is manipulated in a scenario without any social control, therefore, without people having any access to what is derived their own experiences. As stated by Zuboff (2019, p. 309): knowledge, authority and power are on the side of surveillance capital, while people are only “human raw material”. Also as stated by Morozov (2018, p. 102-103), when stating that people become “desinformed guinea pigs”, living under principles of market governance and large companies, as if the surveillance dividends were worthwhile, appearing to be their benefits greater than their losses.

Surveillance plays a vital role in the capital accumulation cycle, and can be carried out politically, when individuals become threats by the force of organized and legitimate violence (by the Law) if they come to behave in an undesired way, or of economic surveillance, in which individuals are threatened by market violence to buy or produce certain goods, expanding the reproduction of capitalist relations by using the information extracted from them in the management of economic behavior. And in both forms of surveillance, violence and heteronomy are the last reason (FUCHS, 2012, p. 677). Then, a triad of surveillance capitalism mechanisms is formed: extraction, commodification and control (ZUBOFF, 2015, p. 75). The deepening of this scenario is the capitalism of surveillance, because not only does surveillance become an instrument for the purposes of capitalist accumulation, but it also becomes an end in itself, as the collection and commercialization of data itself becomes a relevant financial asset for the exploitation of people. Therefore, the standards of surveillance instituted by society gave the needed material conditions for the economic exploitation of the data. The commodification of data by surveillance means the emergence of new social inequalities and expands the exploratory trends of the internet (FUCHS, 2019, p. 59).

The political economy of surveillance capitalism is not restricted to the terms defined by Zuboff; [10] however, it is possible to mobilize their concepts and add them to the terms elaborated by other authors to analyze the role of the holder of personal data, confined to a social structure of digital mediation through the *big tech* infrastructure, in which citizen participation is restricted to the role of user / consumer, submitted to the process of individualization of the economy, with the only real possibility being the transfer of data, a surrender linked to the habits of everyday life. The characteristic of the technologies in this context is of informational asymmetry, that is, the wide distance between data owners and data controllers with regard to the technical capacity to manage, interpret and sell data (by controlling the most complex algorithms and artificial intelligences), remaining the user and their day-to-day technologies the ability to produce them.

2. Commodification of data in LGPD and the subject of law in the digital age

The Brazilian General Data Protecion Act (LGPD) was instituted by Law n.º 13.709, of August 2018, and is expected to be in force for the year 2020, providing for the "*[...] treatment of personal data, in digital media included[...], with the objective of protecting the fundamental rights of freedom and privacy and the free development of the personality of the natural person"* (article 1). Its foundations [11] are based on the informational expansion promoted by the digitization of data, on the immensity called *big data*, in which the law needs to guarantee rights related to private autonomy, such as privacy and informational self-determination (SILVA; MELO, 2019, p. 374) in relation to the conduct of companies that use or negotiate data related to information security (PIURCOSKY et al., 2019, p. 91-92).

[10] Evgeny Morozov (2019), for example and theoretical importance, is deeply critical of the author's decisions in the work *Surveillance Capitalism*, precisely because she believes that it adopts the centrality of the consumer / user and the need for her emancipation from surveillance capitalism, instead collective and technopolitical alternatives - for effective re-appropriation of technologies. The author reinforces the point that the adjective "surveillance" is no more important than the general condition of capitalism.

[11] The foundations of the law are, according to its art. 2: privacy; informative self-determination; freedom of expression, information, communication and opinion; the inviolability of intimacy, honor and image; economic and technological development and innovation; free enterprise, free competition and consumer protection; human rights, the free development of the personality; dignity and the exercise of citizenship by natural persons.

The formation of a national legal framework aims to conretize fundamental rights related to privacy with the protection of personal data, being fundamental, for the exercise of citizenship, self-determination on the data and the protection of the dignity of the human person, in view of the current stage of evident expansion of the means of communication, making the amount of reported data massive (MENDES; DONEDA, 2016, p. 36). Meanwhile, it also seeks to improve the principles of free competition, by proposing a regulatory nature of data whose purpose seems to be to forge a culture for organizations to protect personal data, promoting important concepts such as reputation and reliability (BIONI) , 2019, p. 32-33).

The great potential of LGPD identified by Bioni and Monteiro (2019, p. 234) is to promote the economy, in view of the emergence of a data-driven economy that needs uniform regulation, capable of providing legal certainty for these financial processes : *"[The LGPD] is capable of bringing a horizon of legal certainty for all sectors of the economy that have their activities permeated, in some way, by the processing of personal data"*. Therefore, it qualifies and provides conditions for the establishment, in Brazil, of a production chain based on data and automated decision processes. The subject of law that she protects as a data producer is the holder of personal data.

The main vector of the LGPD is private autonomy in the act of consent (art. 5, XII): "*free, informed and unequivocal pronouncement by means of which the data subjects agree to the processing of their personal data for a specific purpose*", in the same way that the Marco Civil da Internet (Brazil civil fremeworik of the internet - Law n.º 12.965 / 2014) ensures consent as an essential element for the exercise of rights related to the internet and the exercise of citizenship, in the form of an "*express and unequivocal consent"*. 12 According to Bioni and Monteiro (2019, p. 237), consent is the "*cornerstone"* of the processing of personal data according to the law, being the model for the establishment of these businesses. And, as explained by Teixeira and Armelin (2019, p. 43),

The consent of the data subject is the best known form of legal processing of data and must be free and as conscious as possible, that is, the subject must have full

[12] In its art. 7, VII, the law prohibits the provision of personal data to third parties, except with consent; in its art. 7, IX, points to the need for express consent in the case of contracts that deal with the collection, use, storage and treatment of personal data; in art. 16, I, defines that it is forbidden to keep access records in applications, without consent; and, also, in art. 16, II, that data storage is prohibited for purposes beyond the consent of the holder (BRASIL, 2014).

knowledge of what data is being captured and exactly for what purpose it will be used, which makes the unmistakability of consent.

When analyzing the normative path of the concept of consent, Bioni (2019b, p. 345) points out that there is an ambivalence in the view of the citizen protagonist of consent, deepening the notion of consent for the Law, as there is a purely normative view, which affirms the relevance of citizen self-determination to control their data, while claiming that there is a (hyper) vulnerability that needs to be protected, given the intensity of the informational expansion and its influence on behaviors. This is, therefore, the duality of data protection: on the one hand, it exposes the importance of private autonomy, while, on the other, it understands that consumers / users are in an extremely fragile position in their relations with the *big techs*. The imposition of the political economy of surveillance restricts this private autonomy to the act of disposing of your personal data to be controlled by other and inaccessible machines, in this way.

Consent as an assertion of rights related to digital data has a controversial nature, precisely because it attempts to consecrate freedom and private autonomy in a scenario of profound inequality in data management - in view of the asymmetry of infrastructure and knowledge about data science and interpretation of massive data in the era of *big data* - especially with regard to the latest machine learning and artificial intelligence. Thus, with regard to this central role of individual freedom and the formal possibility that the LGPD suggests is materially possible in the field of consent, it is raised the problem of consent over forms of analysis and use of data that human beings cannot even conceive (MAYER- SCHONENBERGER; CUKIER, 2013, p. 124-128).

The so-called digital citizenship also implies a digitized subject of law, that is, with rights related to digital data. The condition of subject of law is a paradigm that derives and conditions capitalist accumulation, that is, it is a legal form that mediates the exchange of goods under the assumption of entirely voluntary relations - under free expression of people's will - and, without this form, there is no capitalism. However, this purely formal characteristic, of social relations seen in a pure way, ignoring the concrete diversity between human beings and the concrete diversity of social relations;

> it overlaps with the concrete diversity of men, equates them and frees them no more than formally, it does not say more about the man who appears in the exchange of goods but appears in it as an abstract owner of rights (KASHIURA JR., 2012, p 120).

This idea incorporates a legacy of Marxist thought and, in the field of Law, of the work of Pachukanis (2017, p. 113), in stating that Law should be seen as an objective social phenomenon, which cannot be limited by what its written or unwritten rules say, as they are derived from existing social relations, contrary to what dogmatic jurists support. Thus, the Law needs to be seen from its historical specificity, [13] in a specific society in a universalized commodity form - which transforms social relations into a reified expression among things, and mediated by contracts. [14] Therefore, the subject of law is born from the exchange of goods, and there are only exchanges in capitalism in this condition:"*It is from it that the figure of the universal bearer of rights and duties originates, abstracted from the figure of the owner of goods"* (KASHIURA JR., 2009, p. 129).

There is a major problem in this juridical form of the subject of law that has come to be seen in a non-historical way, as the fetish of the commodity form, with which such subject mediates exchanges. [15] This form was consolidated in the legal technique and in the supposed universality of the laws as neutral forms. However, as stated by Naves (2000, p. 57-58), the legal form has its genesis only in a society in which the division of labor needs a general equivalent for the universalization of the labor commodity - that is, the subject of law, converting the private work in social work, so that abstract work can be measured within the commodity form. The data holder in the LGPD also means the symbol of legal equality in the data economy, as the aforementioned law treats personal data as universal goods, available to everyone on the market - this being one of the great specificities of this historical period.

[13] It is the normative materialism of the real, according to Rivera-Lugo (2019, p. 24): "Law in particular or normativity in general are expressions of a constitutive order and social process: a normative materialism of the real. Basically, what constitutes law is not a theoretical matter, which refers to the positive norms of the State or its interpretation, but a practical matter, determined by the scope of social factuality. In this sense, the law is essentially the expression of the official recognition of the fact, particularly the economic-political one and the real balance of forces that are manifested mainly through the social relations of production and exchange that characterize it."

[14] According to Mascaro (2014, p. 287): "The logic of exploiting capitalism is different from that of feudalism or slavery. It is not by force that the worker submits to capital. It is because of the impossibility of direct domination of the means of production that workers are driven to sell their labor, their bodies, their intelligence and their energies, as a commodity, to capitalists, who hoard the surplus value of this effort of multitudes of people. Work is not constituted by a social need, but by an end, the process of valorization, of wealth production. "

[15] Pachukanis (2017, p. 138-139) points to the difference between Marxist materialism, with regard to his analysis of the subject of law, in relation to idealistic theories, which develop the concept from some general idea, in an abstract way. In Marxist theory, any social form is historical and depends on general conditions that made it real, and the premise of the legal relationship is that of mediating a society of possessors of goods. Still: "the legal subject is the abstract possessor of goods in the clouds. His will, understood in a legal sense, has its real basis in the desire to alienate by acquiring and acquiring by alienating. For this desire to be fulfilled, it is necessary that the desires of the commodity holders meet each other. Legally, this relationship is expressed as a contract or agreement of independent wills "(PACHUKANIS, 2017, p. 150).

Abstract labor is wage labor, as it only manifests itself as an exchange value, in which a price called wages is assigned - below the value actually produced, an excess amount that is the property of capitalism and has the name of surplus value of labor verified in Marx's *Capital*. [16] The main structuring element of modernity in the State and Law is the essential role of guaranteeing and protecting these general conditions for extracting the surplus value of the excess of labor, in view of its fundamental role in the reproduction of capitalism (MESZAROS, 2011, p. 121), the employment contract being the representation of a merely formal right of equality, and which gives conditions for work under capitalism, thus locating the struggle for legal equality always within the bourgeois horizon (EDELMAN, 2016, pp. 67-81).

The juridical form of the subject of law as a aggregation between labor and capital is, under the concrete analysis of capitalism, a necessary form, not something created by accident, because it performs the necessary mediation of capitalist production, because only under this legal form the worker can submit freely to capital - in the abstraction of labor as a commodity -, thus constituting the constituent of the labor contract. In other words, the subject of law category has a direct relationship with the value of labour (KASHIURA JR., 2012, p. 147). Therefore, the abstraction of labour turns it into a commodity, which can be negotiated due to the mediation carried out by Law. In other words, the subject of law is the subject capable of selling his workforce to capital: an exchange of his workforce for wages, on a formal, equal basis (NAVES, 2000, p. 68-69)[17] - in the same way that the subject of law has the legal capacities to dispose of his workforce

[16] According to Marx (2011, p. 706): "On the other hand, the concept of productive work narrows. Capitalist production is not just the production of commodities, but essentially the production of more value. The worker produces not for himself, but for capital. Therefore, it is not enough that he produces in general. It has to produce more value. Only the worker who produces more value for the capitalist or serves the self-worth of capital is productive ".

[17] According to Naves (2000, p. 68-69): "The constitution of the subject subject of law is, therefore, linked to the emergence of certain social relations of production in which the exchange of goods is generalized to such an extent that it passes also embracing the human workforce. For capitalist production relations to take shape, it is necessary to have, on the market, that special commodity that allows capital appreciation, the labor force. Now, the labor force can only be offered on the market and, thus, penetrate the sphere of circulation, transformed into a legal element, that is, in the form of law, through the legal categories - subject of law, contract, etc. - finally, in the form of legal subjectivity. That is how the individual offers the attributes of his personality in the market: he is free - because he is not constrained to sell himself (that is, to sell the goods he has, his labor force); on the contrary, the decision to sell is the result of an act of his own will; he sells himself on an equal footing with the buyer - both are related as owners who exchange equivalents: the workforce for wages; and finally, he appears on the market as an owner who has what is his. he sells himself on an equal footing with the buyer - both are related as owners who exchange equivalents: the workforce for wages; and finally, he appears on the market as an owner who has what is his. he sells himself on an equal footing with the buyer - both are related as owners who exchange equivalents: the workforce for wages; and finally, he appears on the market as an owner who has what is his.

through the contract, the data holder does so for personal data, according to the postulates of the LGPD, therefore.

In the evolution of the economy towards surveillance capitalism, there is a change in the commodity offered by individuals - which is no longer (only) the labor force: there is an abstraction of human behavior, transformed into a commodity of data related to behavior. Just as the subject of law provides the necessary legal conditions for the expropriation of surplus value from labour, by analogy, the same juridical form serves to mediate the data delivery relationship that enables the extraction of behavioral surplus identified as a fundamental process of new economy of surveillance capitalism. These transformations are as expected, therefore, at the heart of the capitalist social reproduction process, once "e*ach of its major phases is based on its own way of extracting surplus value and obtaining profit"* (MASCARO, 2013, p. 123-124). In this sense, the extraction of a new form of surplus produced by people is characteristic of the dynamics of capital.

In the same way that the subject of law mediates and carries the ideology of legal equality to the capitalist labor relationship, as a subsumption of capital made of free will expressed in a contract, the process of extracting behavioral surplus value makes use of the same mediation in the LGPD scenario, by establishing the consent institute, at the same time, as a protection mechanism and as a general condition for the social reproduction of the new data market - which is only profitable due to the process of extracting surplus value exposed by Zuboff (2019, p. 97): the user delivers his data via consent, and thus, it starts to be rendered and analyzed by the companies (who monetize it in the behavior prediction market), which return value to the user in the form of improvement in services provided.

This new market is characterized by the emergence of new economic activities and professions. This new industry, of commercial data manipulation, is operated by data brokers that view user information and mine and negotiate it according to the interests of corporations, doing so when working with data collected by both companies and governments (CRAIN, 2018, p. 90-91), thus revealing the nature of merchandise that the behavioral data assume and the asymmetry of this relationship - considering that the user can only deliver his data, while those who manage them have a wide technical apparatus (human and non-human) of management. Informational asymmetry is fundamental to the profitability of this business, as it is necessary to remove from the user / holder the power to process data in a complex way, thus restricting their domains to the acceptance of the

terms of service (consent), which, when free and duly informed , does not solve the structural question of stratification, characterized, on the one hand, for the ability to manage complex artificial intelligence in real time, in addition to the human contingent employed; and on the other, a consumer of end-use products (such as cell phones and personal computers). Therefore, these data have no relevant value when they are in the exclusive possession of their owners, becoming really profitable only after being processed by complex private systems.

At LGPD, in its art. 5, the persons and structures of the data business are listed, such as the holder (subject of law who produces data), the controller (who makes the decisions related to data operations), the operator (who carries out the data processing) and the person in charge (who makes the communication between controller and operator). This device also recognizes the international transfer of data and the shared use of data. Thus, there is a legal recognition of the social relations of this new market in the legal system - therefore, it is necessary to understand LGPD as a law that exists in a specific context, not formulated from ideal types. Still, due to the evidence of informational asymmetry, the same law also recognizes the vulnerability of data holdersby also relying on consumer law (MIRAGEM, 2019, p. 27-28). However, no matter how much this makes protective practices possible, LGPD recognizes the role of the user in this data economy, of the consumer, protected as to what he buys, not participating in the complex relationships that drive data management in the context of *big data*.

That asymmetry between users and corporations is the foundation of the new data-driven economy, in which data is the reason for the expansion of large technology companies (*big techs*) that have a low cost of expanding their services while profiting en masse from data assets (CIURIAK, 2018, p. 14-15). The digital mediation of everything, as stated by Morozov (2018, p. 160-166), presupposes the extraction of data promoted by the big technology companies, having the notion that users are stocks of valuable information, conceiving then complex ways of doing them to relinquish exclusive control over their personal behavioral data and to share it voluntarily - mainly through the use of artificial intelligence with deep learning, capable of managing the millions of data producing users in the context of *big data*. The management of massive data presupposes the administration of all information, in real time, being done by *big techs*, assuming the holder of personal data the role not of an administrator, but of a productive set of

managed data - and informative self-determination, in this scenario, is a legal principle applicable to specific conflicts, not sustainable from the point of view of political economy.

In a scenario of data colonialism, of behavioral empire of data extraction and influence on future individual behaviors, the invasion of this political economy on existence is evident, interfering in decisions about consumption and politics (COULDRY; MEJIAS, 2018, p. 9-10). The context of *big data* is the formation of behavioral boosting strategies (*nudges*) highly powerful according to their broad networks, constant updating, dynamics and high persuasive capacity - something that cannot be regulated via consent (YEUNG, 2017, p. 124-126), therefore. The LGPD seeks to regulate this condition of the user in disposing his data with legally appropriate consent, an essential condition for the universalization of data extraction and the commodity of behavioral data. In the technological sphere, the mechanism of exploitation of people is essential, regardless of the predominance of the rule of law or algorithmic regulation (*code is law*), [18] given that this division is tenuous and does not attack the fundamentals of social reproduction from which these legal or technological forms derive.

The regulation around data protection recognizes the problem of data extraction, but provides the legal security of contractual freedom under the availability of that data. In Brazil, the LGPD is a milestone in the creation of this figure, the holder of personal data, subject to rights capable of providing his personal behavioral data through a consent process. Informative self-determination is one of the foundations of this law; but as with private autonomy under the cloak of legal equality, this subject lacks material conditions to exercise full freedom over personal data, because the choice is only in the form of consent in which the data will be submited to digital service providers.

[18] Eduardo Magrani (2019, p. 261) suggests that the Law must admit a role of metatechnology, which guides technological development based on constitutionally guaranteed precepts, believing that it is possible to build legal forms alien to the forms conceived by the political economy of surveillance capitalism : "That is why Law, as a metatechnology, must promote and regulate technical artifacts sensitive to values. A technical artifact endowed with unpredictability and significant agency power must be guided by constitutionally guaranteed values (deliberated in the public sphere) to be considered a responsible artifact and aligned with the Democratic Rule of Law. "

Conclusion

The limit of the consent of the holder which is enshrined in the LGPD in the context of the political economy of surveillance, according to the conclusion of this research, is the structural information asymmetry that the holder is in, identifying the figure of the holder of personal data, the subject of law of General Data Protecion Act (LGPD), as a legal support for capitalist accumulation in the information age, enabling the abstract creation of the condition of a holder of data rights capable of negotiating his or her data with companies that can deal with complex social and technical data processes in the *big data* context and extract from these data behaviors to be sold in a data market that sells forecasts of consumption and daily life - and the mechanism used to collect this data is constant surveillance. This ritual, in the form of a contract, takes place through the legal instrument of consent, in the context of an informational asymmetry in which the companies that receive the data are able to process it in real time and in a massive way, while the users / owners produce it ubiquitously, without even knowing in detail what they are producing.

This surveillance is no longer carried out from a totalitarian point of view, which is why Shoshana Zuboff indicates the transfer of the big brother paradigm *(the "big brother"* to the *"big other"*), since intense political control is no longer needed, but an indecipherable technological abstraction that makes users deliver personal behavioral data as a condition for better use of the increasingly necessary services for daily life. The instrumentalization of informational power is based on the immense structural inequality in the scope of technological capacity - that is, there is an informational asymmetry, since users only have the ability to deliver their data, while companies are able to interpret them due to the technological contribution of deep learning and artificial intelligences.

In the first part, the reasons that led to the emergence of an updated political economy of capitalism, *"surveillance capitalism"*, were exposed. The use of political economy is important to identify capitalism beyond a formal determination, or purely of economic technique, making it the consequence of intense and complex social relations of production, circulation and distribution, constituting practices and structures with wide influence on society. For this reason, verifying the configuration of surveillance capitalism also means pointing out its influences and foundations on the spheres of labor, economics, technology and everyday life. When mobilizing the concepts of surveillance capitalism and

information asymmetry, the contradictory role of the subject of informational rights in the LGPD - the holder of personal data - is characterized: at the same time that this law identifies the need to protect personal data, it regularizes the juridical form of the disposition of personal data, exposing the direct relationship between capitalist accumulation and legality.

The great economic mechanism identified is the extraction of behavioral surplus value, which is the process that extracts the users' daily life experiences relevant data and turns them into merchandise: the user delivers the data produced by him in his or her daily life, the companies mine and manipulate this data, and the extraction / transformation of such data returns to the user as improvements in the services provided by the companies. It is a cycle in which users are not paid, having only a small fraction of the profit produced returned to them. The political economy of surveillance is the social context in which the delivery of these data is normalized, and its exploitation becomes something necessary for the proper running of services and the economy. This process supports a new lucrative market that moves companies and new professions, like data brokers, and aims to expand more and more the mechanisms of data extraction and mining, with the social conditions for this exploitation already present, in view of the rise of large technological companies (the so-called big techs) and, from the point of view of surveillance, privacy violations are considered to be fundamental and legally permitted. In a manner analogous to what already occurred in the relationship between the owner of private means (who owns the production technology) and the worker (who only has the strength of his work to dispose of), in the digital age, *big techs* have the means of commodification of data (the complex machines capable of understanding massive data and interpreting it by means of artificial intelligence), and the holders, only the ability to produce data about their daily life - leaving a relevant surplus.

In the second part, Brazil's General Data Protecion Act was analysed under the context of surveillance capitalism, being necessary, for this, the theoretical framework of the Marxist theory of Law to apprehend a critical notion of the subject of law, in order to conceive an analogy from the transformation of this subject from the exploitation of labor to the exploitation of behavioral surplus value, just as Zuboff did to explain the mechanism for extracting surplus value from labor to behavioral data. The LGPD asserts a central position in the consent of the data holder as the possibility of handing over the data to their manipulation and commercialization. There is no gap or legal problem in the

consolidation of the holder figure, so there is no deductive conclusion about the term "*holder"* to be correct or not; however, the dialectic allows pointing out how this term is contradictory, since it denotes, in the same instance, the protected figure, within the scope of LGPD and consumer rights, and the guarantor figure of this form of capitalist data accumulation - allowing thus, a contractual legal regime for data transfer appropriate to the needs of this new economy.

The Marxist theory of Law establishes a view based on the historical materialism of the legal phenomenon when it sees the subject of law only under the normativity of the real, that is, it identifies it as a concept that does not arise by chance, existing only within the scope of a specific society - that is, the subject of law is the subject *under capitalism law*. In this way, the political economy of capitalism imposes the universalization of commodity and the need for universalized labor, being transformed into a quantitative element - that is, it is the labor commodity that is sold by the worker in supposed equality, it is the ideology of equality legal. Therefore, the emancipatory capacity of consent is opposed as an instrument of "*informative self-determination"* at the legal level, as it is not feasible in contemporary concrete society, in the face of the reality of surveillance capitalism. The figure of the holder of personal data in the LGPD appears in the dynamics of global capitalism, lending itself to the universalization of the personal data commodity, as a result of a specific society and economy, running away from the conceptual / juridical abstraction that necessarily includes data protection in an abstract and preconditioning way.

At the same time that the LGPD announces a digital citizenship that includes the protection of personal behavioral data, it provides legal conditions for the data to be converted into merchandise. And this is the ambiguous and contradictory relationship of the subject of law under capitalism that, while placing him or her in formal equality and allowing him or herto be an owner like all others, gives conditions for the abstraction of work and the alienation promoted by wages in relation to what is produced. Therefore, in the same way that capitalist salaried workers are those who have part of their production extracted as surplus value by the capitalist, in the digital era, connected users, when considered data holders, have their daily life transformed into profitable data , expanding the limits of capitalist accumulation.

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About the authors

Mateus de Oliveira Fornasier
Professor do Programa de Pós-Graduação Stricto Sensu (Mestrado e Doutorado) em Direitos Humanos da Universidade Regional do Noroeste do Estado do Rio Grande do Sul (UNIJUÍ). Doutor em Direito Público pela Universidade do Vale do Rio dos Sinos (UNISINOS), com Pós-Doutorado pela University of Westminster (Reino Unido). ORCID: http://orcid.org/0000-0002-1617-4270. E-mail: mateus.fornasier@unijui.edu.br

Norberto Milton Paiva Knebel
Doutorando em Direitos Humanos pela Universidade Regional do Noroeste do Estado do Rio Grande do Sul (UNIJUÍ). Mestre em Direito pela Universidade Lasalle (UNILASALLE). ORCID: https://orcid.org/0000-0003-0674-8872. E-mail: norberto.knebel@gmail.com

The authors contributed equally for the writing of this article.