

**THE CONSUMERIZED CITIZEN AND THE CITIZEN CONSUMER:
DIGNIFICATION, IN POST-MODERNITY, BY THE CONSUMER LAW**

**O CIDADÃO CONSUMEIRIZADO E O CONSUMIDOR CIDADÃO:
DIGNIFICAÇÃO, NA PÓS-MODERNIDADE, PELO DIREITO DO CONSUMIDOR**

**EL CIUDADANO CONSUMISTA Y EL CIUDADANO-CONSUMIDOR:
DIGNIFICACIÓN, EN LA POSMODERNIDAD, A TRAVÉS DEL DERECHO DEL
CONSUMIDOR**



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ABSTRACT

The understanding of citizenship departed from its notion strictly linked to nationality to designate a more complex phenomenon, linked to the full realization of fundamental rights (political, civil and social) which, to a large extent, always depended on state prerogatives and potentialities. On the other hand, contemporaneity has exposed the limitations of the State in a scenario of globalized economic competition. Post-modernity, by liquefying modernity, weakened the mortar that linked individuals to collective projects, launching them into a desperate search for identity, softened by the act of consuming goods and services. Although consumption is also vital to human dignity, when conducted in such a way as to fill this identity void, it is much more the result of a hollow will which, as such, is not even a will. In this way, the human condition is reduced to that of a consumer, loosening citizenship. In Brazil, the possibility of changing this trend has, to some extent, been made possible by the tools made available by the Consumer Defense Code, the Marco Civil da Internet and the General Data Protection Law, in order to even take advantage of the informationalism, making the consumer see himself as a citizen, or rather, a citizen who consumes, and not a mere consumerized citizen.

Keywords: Citizenship. Post-Modernity. Brazilian Consumer Protection Law.

RESUMO

A compreensão da cidadania despreendeu-se da sua noção estritamente ligada à nacionalidade para designar fenômeno mais complexo, ligado à concreção integral de direitos fundamentais (políticos, civis e sociais) o que, em grande medida, sempre dependeu das prerrogativas e potencialidades estatais. Por outro lado, a contemporaneidade desnudou as limitações do Estado num cenário de competição econômica globalizada. A pós-

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modernidade, ao liquefazer a modernidade, fragilizou a argamassa que ligava os indivíduos a projetos coletivos, lançando-os numa desesperada busca por identidade, amenizada pelo ato de consumir bens e serviços. Embora o consumo seja também vital à dignidade humana, quando conduzido de modo a suprir esse vazio identitário, é muito mais fruto de uma vontade oca que, por assim ser, chega a nem ser vontade. Reduz-se assim a condição humana à de consumidor, afrouxando-lhe a cidadania. No Brasil, a possibilidade de alteração dessa tendência tem, em alguma medida, sido possível pelas ferramentas disponibilizadas pelo Código de Defesa do Consumidor, pelo Marco Civil da Internet e pela Lei Geral de Proteção de Dados, de modo a, aproveitando-se mesmo do informacionalismo, fazer o consumidor se enxergar como cidadão, ou melhor, um cidadão que consume, e não um mero cidadão consumeirizado.

Palavras-chave: Cidadania. Pós-Modernidade. Código de Defesa do Consumidor.

RESUMEN

La comprensión de la ciudadanía se ha desvinculado de su noción estrictamente ligada a la nacionalidad para designar un fenómeno más complejo, conectado con la realización integral de los derechos fundamentales (políticos, civiles y sociales), que, en gran medida, siempre ha dependido de las prerrogativas y el potencial del Estado. Por otro lado, los tiempos contemporáneos han puesto de manifiesto las limitaciones del Estado en un escenario de competencia económica globalizada. La posmodernidad, al diluir la modernidad, ha debilitado el vínculo que unía a los individuos con los proyectos colectivos, sumiéndolos en una búsqueda desesperada de identidad, mitigada por el acto de consumir bienes y servicios. Si bien el consumo también es vital para la dignidad humana, cuando se lleva a cabo de manera que llena este vacío de identidad, es mucho más fruto de una voluntad vacía que, por ser así, ni siquiera es voluntad en absoluto. De este modo, la condición humana se reduce a la de consumidor, debilitando la ciudadanía. En Brasil, la posibilidad de modificar esta tendencia se ha hecho posible, en cierta medida, gracias a las herramientas que ofrecen el Código de Protección al Consumidor, el Marco Civil da Internet (Carta de Derechos de Internet de Brasil) y la Ley General de Protección de Datos. De esta forma, se ha aprovechado el informacionalismo para que los consumidores se perciban a sí mismos como ciudadanos, o mejor dicho, como ciudadanos que consumen, y no simplemente como ciudadanos consumeirizados.

Palabras clave: Ciudadanía. Posmodernidad. Código de Protección al Consumidor.

1 INTRODUCTION

The historical nature of the conformation of the idea of citizenship allowed the overcoming of its understanding restricted to the synonymy of nationality, although it (citizenship) still depends a lot on the state's potentialities, flowing into a broader perception, which sees it as a condition of great complexity and of perennial and daily construction and reconstruction, tending to the integral realization of fundamental rights and solidarity.

Concomitantly with the semantic broadening of citizenship, one can perceive a corrosion of the powers of the State by the characteristics of the so-called post-modern condition, described by Lyotard, who, in Bauman's metaphor, liquefies modernity, having, as one of its main reflections, the reduction of the individual, already devoid of collective identity, to the condition of mere consumer.

Consumption becomes the palliative to the incessant discomfort of the individual without parameters or collective projects. People recognize themselves in the products or services they consume, no longer because of other people. The act of consuming comes to be felt as a major sign of freedom, when deep down it seems to be just the opposite. The citizen, compelled by the need to find an identity, ends up becoming a compulsive consumer who, in this condition, has his own will eclipsed. The will, the basis of the construction of private law, is less and less conscious, it is misunderstood even by the individual who thinks he has it and, therefore, it does not appear as a full will, but as a lunar one, which, in the final analysis, reduces the citizen to a mere condition of consumer.

On the other hand, the recognition of this condition has led to the creation of legal and juridical shields in order to, if not curb, at least mitigate the effects of this phenomenon. In this sense, Brazil, where, by the way, citizenship has historically depended much more on state concessions than on organic and spontaneous conquests by pressure groups, has been relying on the Federal Constitution, the Consumer Protection Code, the Civil Rights Framework for the Internet and more recently the General Data Protection Law.

To address these issues, this article was structured in two items. In the first, it will be examined, based on Bauman's theoretical framework, how the liquefaction of modernity led to the false sensation of emancipation through the act of consuming, which, in the end, represents the very obfuscation of the free and conscious will, in order to allow the conclusion that the consumerization of the individual reduced his condition as a citizen. In the second item, it will be addressed how the legal protection of the consumer, raised to the condition of a fundamental right by the Federal Constitution of 1988, and operationalized by the consumer protection system, topped by the Consumer Defense Code and animated by the Magna Carta, allows this figure of the consumer, quite fragile in these post-modern times, to be

repositioned on the social stage as a human person, deserving of dignity and citizenship, in order to elevate this consumer to the *status* of citizen in its most contemporary sense, even taking advantage of informationalism in the development of this task.

This work was prepared by the deductive method and predominantly based on research in bibliographic and primary sources, such as legislation and judgments.

2 THE CONSUMEIRIZED CITIZEN

When we use the noun "citizen" here, we refer to the individual who is in a position to invoke and exercise "citizenship". To put it differently, it is the condition of citizenship that confers on the individual his *status* as a citizen. To nickname someone as a citizen without assuring him citizenship is to confer a hollow title, with little or no value.

Paulo Bonavides (2001, p. 77) uses the word citizenship as a synonymy for nationality, warning that "in the terminology of Brazilian constitutional law, instead of the word citizenship, which has a more restricted meaning, the word nationality is used with the same meaning". For this author, citizenship (or nationality) is the bond between the individual and the State, through which a person becomes part of a people, one of the three essential elements of the Modern State – territory and people and sovereignty – pointed out by Dalmo de Abreu Dallari (2003, p. 71).

However, this limiting concept of citizenship, which reduces it to nationality, a mere⁴ legal link between an individual and a State, has for some time been overcome in intellectual circles since the acceptance of its historical nature. José Murilo de Carvalho (2008, p. 12) recalls that this important aspect stems from the fact that citizenship developed within the nation-state, an equally historical phenomenon, which dates back to the French Revolution of 1789. As the struggle for rights has always taken place within the geographical and political boundaries of the State, the political struggle was national and the citizen emerged from it was equally national, so as to denote that citizenship has to do with the relationship of people with the State, but also with the nation. Hence here we adopt the concept of citizenship that is revealed to us by Gianpaolo Poggio Smanio (2013, p. 12) when he states that:

⁴ We speak here of "mere bond" from the perspective invoked in this work, because, even if citizenship is understood strictly as such a bond between the individual and the State, such a bond is the foundation of all other rights, which becomes clear when one remembers the drama of statelessness. On the subject, by the way, it is recommended to read FRIEDRICH, T. S.; REIS, M. **Conception and Characterization of Statelessness: an analysis based on the theoretical-evaluative assumptions of its confrontation**. In: Geziela Iensue; Luciani Coimbra de Carvalho. (Org.). *The International Order in the XXI Century: Human Rights, Migration and Legal Cooperation*. 1ed. Rio de Janeiro: Lumen Juris, 2017, v. 1.

Citizenship is no longer related only to nationality, it is no longer considered only a status of recognition by the State, to be a broad concept, compatible with a new dimension of citizenship, as an expression of fundamental rights and solidarity

In a similar sense, José Murilo de Carvalho (2008, pp. 8-9) records that:

[...] The phenomenon of citizenship is complex and historically defined. [...] The exercise of certain rights, such as freedom of thought and voting, does not automatically generate the enjoyment of others, such as security and employment. The exercise of the vote does not guarantee the existence of governments attentive to the basic problems of the population. In other words, freedom and participation do not automatically or quickly lead to the resolution of social problems. This means that citizenship includes several dimensions and that some can be present without the others. A full citizenship, which combines freedom, participation and equality for all, is an ideal developed in the West and perhaps unattainable, but it has served as a parameter for judging the quality of citizenship in each country and in each historical moment.

Citizenship is, therefore, in short, a historical condition of great complexity and, precisely for this reason, of perennial and daily construction and reconstruction, involving the possibility of exercising political, civil and social rights, or rather, fundamental in their fullness.

In the Brazilian case, the aforementioned José Murilo de Carvalho (2008, p. 12) gives a rich account of how he sees the historical formation of citizenship in our country, which occurred in a non-sequential way, as described in the pyramidal logical-chronological order of T. A. Marshall, in which civil liberties would initially be consolidated in order to, based on them, if it makes the right to vote possible, which, in turn, would allow the claim of social rights. According to the author, the inversion of this logic in the formation of Brazilian citizenship, where social rights preceded the others, also ended up affecting the nature of our citizenship (generating *statehood*),⁵⁵ because, according to the experiences he collected, Brazil witnessed the greatest expansion of social rights precisely in historical moments of political exception, such as the Estado Novo and the Military Dictatorship of 1964, in which political and civil rights were severely undermined.

Another issue that arises in these times with regard to citizenship, also pointed out by José Murilo de Carvalho (2008, pp. 12-13), is the issue of the crisis of the State in the face of the internationalization of capitalism, accelerated by recent technological advances and the creation of economic blocs, causing a [qualitative] reduction of state powers [which is even more problematic in a country like Brazil, in which citizenship was historically "granted"

⁵⁵ José Murilo de Carvalho (2008, p. 61) coins the concept as follows: "[...] In neither case was political citizenship forged. The tradition of greatest persistence ended up being the one that sought improvements through alliance with the State, through direct contact with the public rotten. Such an attitude would be better characterized as 'estadanic.'"

by the State and more dependent on it and a change in national identities, affecting mainly political and social rights. With the reduction of the power of the State, the relevance of participation also decreases, to which is added the expansion of international competition, all of which puts the issue of citizenship back in an urgent and unavoidable debate.

In other words, the exercise of citizenship, or its search, has become even more complex than in the past, because, in addition to depending on a project that implies the imbrication and convergence of collective and individual interests, to conceive a great collective project, and to which a democratic State greatly contributes, this same State is today weakened and inserted in a globalized dynamic driven by logics typical of economic competition. Thus, in these current times, identified as *postmodern* (LYOTARD, 2009) or *liquid* (BAUMAN, 2001), projects of this kind seem to have less and less spontaneous appeal among the people.

The process of individualization of yesteryear (of previous modernity) is different from the individualization of reflexive modernity. Zygmunt Bauman (2001, pp. 43-46), based on Norbert Elias' thesis, describes individualization as a trademark of modernity, through which human identity was transformed from a given into a task, attributing the responsibility for its realization to various actors to whom the consequences and collateral effects of its realization were equally imputed, or not. An autonomy *de jure was thus established*, regardless of whether autonomy was *de facto*, although it had also been established. Therefore, human beings were no longer born into their identities, but needed to live them, or even, needed to become what they already were. This need for self-affirmation and its effectiveness generated, in previous modernity, social classes, so that the task of the individual in those times was to behave in such a way as to fit into the class.

This individualization, also according to Bauman (2001, pp. 46-50), is what has been transformed into *post-modernity* (which he calls *liquid modernity*), because in it classes no longer exist, that is, there are no *longer* places for accommodation or reaccommodation; therefore, such places, previously firm, have become fragile and generally vanish before the work of adapting the individual to the class is completed. This characteristic of postmodern individualization makes people constantly moving and does not offer the reward of 'arriving' at any final destination, so that, in contemporary times, individualization takes on the contours of fatality, no longer of choice. Social risks and contradictions continue to exist, but their confrontation has been individualized. In this context, the fatality of being an individual prevents any joint action, so that the afflictions of each one, although identical to those of the others, become non-additive and, thus, do not rise to a whole greater than the parts. They can, at most, be profiled. Thus, Tocqueville's maxim that the individual is the citizen's worst

enemy is reinforced, since the citizen does not tend to seek his well-being from the well-being of the city.

Irene Patrícia Nohara (2012, pp. 109-110) reinforces this perception by asserting that today, *postmodernity* gives rise to the growth of a differentiated type of individualism that does not come close to the prototype idealized by Erich Fromm (of the authentic individual, oriented to life and averse to the mechanical), but of an individual imbued with the logic of social Darwinism, where the best wins, and where each one acts exclusively for himself, reflecting the mitigation of the solidarity mission of the State, whose power, as we have already seen, is to some extent compromised.

In this order of things, Bauman (2001, p. 105) also tells us that the act of buying is the only way to remove, even if temporarily, uncertainties and insecurities. The 'virtues' of objects seem to carry the promise of a security [read identity] that can no longer be found in any other social niche. Identity is now in the things we wear, not in the people we follow or associate with. Today, if such associations occur, it is because of the objects, not the objectives.

It is in this way that the act of consuming gains new *status* in the *liquid society*. Hence Bauman (2001, p. 107) states that:

In view of the intrinsic volatility and instability of all or almost all identities, it is the ability to 'go shopping' in the supermarket of identities, the degree of genuine or supposedly genuine freedom to select one's identity. With this ability, we are free to make and unmake identity at will. Or so it seems. (emphasis added)

And he concludes: "In a consumer society, sharing consumer dependence – the universal dependence on purchases – is the *sine qua non* of all individual freedom; above all the freedom to be different, to 'have an identity'" (BAUMAN, 2001, p. 108).

Jeremy Seabrook, quoted by Bauman (2001, p. 110), recalls that:

Capitalism did not hand over goods to people; people were increasingly given over to goods; which is to say that the very character and sensibility of people has been re-elaborated, re-formulated, in such a way that they are grouped together approximately... with the goods, experiences and sensations ... whose sale is what gives shape and meaning to their lives.

Returning to Herbert Marcuse, Irene Patrícia Nohara (2012, p. 105) reminds us that:

The stimulus to consumption and its production of false needs, through the advertising industry, involves the human being in an apparent atmosphere of freedom of choice, transforming him, in reality, into an automaton.

And he continues:

[...] The individual ends up being unable to oppose the system, because, in order to be successful, he is guided to adapt to the logic of organizations. This mechanics of conformism ends up stifling individual manifestations, in the face of the predominance of institutional rationalities and the proliferation of artificialities.

The system reproduces itself, because its dynamics transform human instincts, desires and thoughts into feedback channels for the technological apparatus, and therefore, in the author's view, the so-called progress, with its mercantilist and quantifying mentality, is largely responsible for human domination instead of its emancipation. From this we also extract a relevant critique of bureaucracy, whether public or private, to the extent that, if dehumanized, it has the potential to 'turn to itself' [...] (NOHARA, 2012, pp. 105-106)

The citizen, disconnected from collective identity projects, is less of a citizen and more of a consumer. This *citizen-consumer*, or *citizen-customer*, becomes one more anguished buyer in the search for a definition and/or redefinition of his incessantly changing identity.

This is what Carlos Alberto Menezes Direito (1999, pp. 404-405) records:

Man is born free for social life, by his equal nature. This nature demands, as a sign of perfection, social coexistence. And it is in social coexistence that inequality appears. This inequality is basically economic in nature. It is of an economic nature because its hallmark is the acquisition of the knowledge and goods necessary for a dignified life. Some have the privilege of disposing of knowledge and goods; others do not. Those who are in the first stratum attain a higher standard of discernment of the things of life than those who are in the second stratum. This differentiated pattern has repercussions on social coexistence because it allows those in the first stratum much greater access to what happens in social life. In this sense, it expands the freedom to choose, as it increases the availability of supply and the ability to obtain what is offered.

It is no wonder that studies that question the primacy of classical economics of man's rational action are increasingly deepening, as Richard Thaler, winner of the Nobel Prize in economics, has pointed out.

This phenomenon was further enhanced by the technological revolution described by Castells (1999) who, although critical of the fatalistic view of the postmodernists, so well described that information and knowledge are, in the *Network Society*, the very raw material for the creation of more technology and knowledge:

What characterizes the technological revolution is not the centrality of knowledge and information, but the application of this knowledge and information to the generation of knowledge and information processing/communication devices, in a cumulative feedback loop between innovation and its use. [...] it was based on learning by using, according to Rosenberg's terminology. In the third stage, users learned the technology by doing, which eventually resulted in the reconfiguration of networks and the

discovery of new applications. The feedback loop between the introduction of a new technology, its uses, and its development into new domains becomes much faster in the new technological paradigm. Consequently, the diffusion of technology amplifies its power infinitely, as users appropriate and redefine it. [...] Users and creators can become the same thing. (CASTELLS, 1999, p. 69).

This cycle generates even more possibilities of consumption and greater speed of depletion of identities that the products and services placed on the market can guarantee, feeding back, in an even more frenetic way, the compulsion to consume, all confirming the fluidity described by Bauman (2001) and corroborating the impotence of the state.

In this square, the will itself and its manifestation, the multimillennial basis on which the construction of Private Law was based, ends up being eroded, because, in very dramatic conditions, the act of buying flows more from a compulsion (perhaps an unconscious need), than from a free choice of the consumer, and even less of the citizen.

It so happens that these greater options of choices that the consumer market offers do not matter in an emancipation, but in a fog of one's own will, as Carlos Alberto Menezes Direito (1999, p. 405) points out:

[...] Social behavior is not conditioned by the acquisition or use of goods and services. On the contrary, a utopian egalitarian society does not reach the intimacy of human reason, which dictates the behavior of man in society. It promotes equality in access to goods and services, but it does not necessarily free the human person from the influence of his environment, and therefore from what is disseminated by his environment. Thus, although the human person may have access to the same goods and services, which, whatever it may be, can still manipulate social behavior by creating models, or types, or circumstances that stimulate a certain social reaction. What vigorously interferes with the freedom to choose is the capacity for discernment, that is, the ability to dominate one's will, despite one's environment. The man who is able to exert his will is able to free himself from the influence of his environment and therefore to manage his own destiny. But, of course, for this to occur, even if there is the availability of knowledge and the mastery of the will, it is imperative to have permanent vigilance and, also, life in a society that does not multiply the desire to acquire more and more goods and services, as many as society can offer.

To illustrate what has been exposed so far, we resort to the curious example cited by José Murilo de Carvalho (2008, p. 228) of the peaceful invasion of a *middle-class shopping mall* in Rio de Janeiro by a group of homeless people:

The invasion had the merit of dramatically denouncing the two Brazils, that of the rich and that of the poor. The rich mingled with foreign tourists, but they were leagues away from their poor countrymen. But she also revealed the perversity of consumerism. The homeless claimed the right to consume. They did not want to be citizens but consumers. Or rather, the citizenship they claimed was the right to consume, it was the citizenship preached by the new liberals. If the right to buy a cell phone, a sneaker,

a fashionable watch manages to silence or prevent political militancy, the traditional political right, among the excluded, the prospects for democratic advancement are diminished.

And he concludes:

Both experiences favor, the culture of consumption makes it difficult to untie the knot that slows down the march of citizenship among us, that is, the inability of the representative system to produce results that imply the reduction of inequality and the end of the division of Brazilians into castes separated by education, income, color [...] (CARVALHO, 2008, pp. 228-229).

It is on this path that we now affirm that there has been a consumerization of the citizen. From this perspective, the reduction of the citizen to the consumer represents a corrosion of citizenship itself, a phenomenon that must be rebalanced by the Law.

We glimpse, in summary, from these notes that, if on the one hand it is true that the power of the State has been suffering from the onslaught of economic and financial globalization and the growth of the power of other social actors such as multi and transnational private companies, international and non-governmental organizations and even criminal organizations; on the other hand, the Law, when not distorted by political interests converging with the corrosive forces of state authority, which sometimes occurs even with constitutional norms, in the phenomenon known as that of *inverted governing constitutions*⁶, as, to a certain extent, in some passages, our Federal Constitution seems to have become after successive amendments, it is still a viable containment of this advance, and, thus, he must be attentive to this movement in order to correct it or soften its effects. The Consumer Protection Code and the consumer protection system, which it vaulted, seem to prove this and every day it has become a system of indisputable relevance in the coining of the very

⁶ Regarding the inverted governing constitution, Gilberto Bercovici (2014, p. 12) notes that: "The critic made to the directive constitution by the conservative authors corresponds, amongst other aspects, to the fact that the directive constitution "ties up" the politics, substituting the political decision process for the constitutional impositions. A greater responsibility was ascribed to the directive constitution for ungovernability²¹. The curious thing is that only the constitutional devices that are relative to public policies and social rights that "cover" politics, taking away the legislator's freedom to act. And the same critics of the directive constitution are the greater defenders of establishing policies of economic stabilization with the supremacy of the monetary budget on social expenses. With the imposition, through constitutional reform and infraconstitutional legislation, of the orthodox politics of fiscal adjustments and of economics liberalization, there was no demonstration whatsoever that they were "tying" the future governments to a one and only possible policy, without any alternatives. In other words, the directive constitution of public policies is understood as harmful to the country's interest, ultimate responsible for the economic crisis, public shortage and "ungovernability". **The inverted directive constitution, or so, the directive constitution of neoliberal policies of fiscal adjustment, is seen as something positive to the country's credibility and trust joined with the international financial system. This inverted directive constitution is the real directive constitution that attaches all the Brazilian State's policies to the State custody of the capital's financial income and to the guarantee of the gathering of private wealth**". (emphasis added).

form of national citizenship in post-modern times and under the ebbs and flows of *informationalism*⁷.

3 THE CITIZEN CONSUMER

Given the profound and apparently unfavorable consequences of postmodernity exposed in the previous section of this study, we should not prostrate ourselves in fatalism. Every story has, just like the Roman god Janus, two faces. Hence, in fact, the possibility of the very play of expressions that this brief article entitles to demonstrate an acceptance of the imposed realities, but not a prostration before them.

If, on the one hand, the consumerization of the citizen lays roots that even affect the very exercise of political rights, on the other hand, it can, from the empowerment of these new individuals, more consumers and fewer citizens, seek to reverse the trend, even if from a point of observation opposite to that in which T.A. Marshall would be. The recognition of individual consumers, even in their value as such, can, in a next step, lead to the perception of their value beyond mere consumers, which already makes them intuit their condition as citizens.

This is a possible epiphany that may only be possible due to the very conditions of the *Network Society*, but which must be fostered by a Law specifically aimed at rebalancing the expectations and trends of consumption, and which is also equipped with institutional tools that allow its realization in this sense. We believe that this is the Consumer Law as outlined in a courageous and almost avant-garde character by the legislator of the Brazilian Consumer Protection Code (CDC), sanctioned on September 11, 1990.

This citizenship of the consumer that the CDC promotes is its meta-systemic function. If we think of the CDC only formally, as the ordinary law that it is, we will limit ourselves to repeating that it created a microsystem. However, when we reflect more carefully and remember that the Federal Constitution itself raised consumer protection to the level of a fundamental right, it becomes evident the compatibility of the irradiation of consumer protection rules to other branches of law, to consumerize (now invoking the term under a beneficent bias, to launch the protective principles of consumer legislation) to other branches of Law, including Civil and Business Law itself.

Although the Brazilian Federal Constitution of 1988 has, in its not yet so long validity, suffered important neoliberal contributions by several Constitutional Amendments, the

⁷ Castells (1999, p. 51) defines informationalism as: "[...] the emergence of a new social structure, manifested in various forms according to the diversity of cultures and institutions across the planet. This new social structure is associated with the emergence of a new mode of development, informationalism, historically shaped by the restructuring of the capitalist mode of production at the end of the twentieth century."

wisdom of the Brazilian constituent of 1997-1988 was preserved, which, like few others, knew how to understand its moment and glimpse the harbingers of the future, when it inserted in the list of fundamental rights and guarantees of article 5 of the Magna Carta of 1988, that the State would promote, in accordance with the law, consumer protection (item XXXII), also establishing the concurrent competence of the Union, States and the Federal District to legislate on the consumer (art. 24, VIII, FC/88) and, above all, establish consumer protection itself as a principle of the national economic order (art. 170, V, FC/88), without forgetting the obligation in the long term, imposed on the National Congress, in article 48 of the Transitional Constitutional Provisions Act, to prepare, within one hundred and twenty days of the promulgation of the Constitution, a consumer protection code.

All this fortunately came true. Although with a slight delay, the Consumer Protection Code (Federal Law No. 8,078, of September 11, 1990) was enacted and, since then, has become a normative instrument of the first magnitude in the Brazilian legal system. It is important to highlight that the Code is broader than its own scope, as it projects itself beyond itself by organizing a *consumer protection system*, to which are added diplomas and legal mechanisms such as the Popular Economy Law, the Law of Crimes against the Economic Order, Antitrust Law, among others, and even allows us to think of supranational protection, as a regional protection, such as that which is sought to be designed within the scope of Mercosur.

Celso Ribeiro Bastos, quoted by Carlos Alberto Menezes Direito (1999, p. 403) highlights the transcendental importance of elevating consumer rights to the *status* of a fundamental right by recalling that it not only establishes a duty to the State, but authorizes the legislator to establish *disparified* procedural rules and a material right that is not necessarily egalitarian, where the interest of the consumer will prevail, and here we add, in his rescue as a citizen.

It should be noted that we do not want to establish an opposition or dichotomy *tout court* between the consumer and the citizen, because not everything that is consumed is consumed in the mere search for an identity or without freedom of will and conscience.

Although consumption can vary greatly depending on conditions and inequalities of income, there is also, of course, a vital, and even at a certain point voluptuary, but essential consumption. In the capitalist system of production and distribution of wealth, the fulfillment of vital and other needs that make life more comfortable and thus contribute to the concreteness of human dignity, depends on the access to products and services that is made by the act of consuming. It should be remembered that, currently, the promotion of economic activity is a vector of human development and of the very concreteness of fundamental rights

(DOMINQUINI; BENACCHIO, 2016, p. 35). The citizen, in fact, to be so, has to be a consumer (!), but it cannot be just that! That is the question!

The point of free expression of will, in a consumer society, such as the *liquid society*, is one of the most important aspects of the Consumer Protection Code, and so it is with good reason. In fact, it is currently called for new contributions and legal approaches, such as those brought by the Civil Rights Framework for the Internet (Federal Law No. 12,965, of April 23, 2014) and the General Law for the Protection of Personal Data (Federal Law No. 13,709, of August 14, 2018), because the *Network Society* offers technical possibilities of expanding the desire for consumption to infinity, to cloud the free formation and manifestation of will.

The warning that Newton De Lucca (2008, p. 55) brings us is timely:

[...] The asymmetries that already exist between suppliers and consumers in the real world – and which, in the virtual world, not only remain, but in fact are considerably accentuated, further exacerbating the vulnerability of the Internet consumer – are, fundamentally, of three types: economic, informative and technological.

The new means of contracting, provided by the technological revolution of information, so well described by Castells (1999), or rather, the new means for the consumer to consume, have such a significant impact that they end up changing the very essence of the formation of the contract:

In telematic negotiations, in fact, it is no longer appropriate to think about the existence of an agreement of will, as the contract has always been conceived in its classic features. Once the personal character of the relationship has faded, what exists are unilateral declarations that intersect, not exactly in the imbrication of an agreement, but in the identification of the merchandise that was simultaneously offered and acquired. (DE LUCCA, 2008, p. 42)

All of this, therefore, wants to signal the need for legal protection that elevates the dignity of the consumer to that of a citizen, recognizing his rights and granting him legal instruments that allow him, the *consumer-citizen*, to exercise his will, before his compulsion, as an act of affirmation of his citizenship, in addition to protecting himself and being protected, collectively and/or diffusely.

It is precisely this aspect, of the collective and diffuse protection of the consumer, so well worked out in the Consumer Protection Code, that deserves special attention. So much so that Gustavo Filipe Barbosa Garcia (2016) cries out: "Collective judicial protection has already been consolidated as an effective means of pacifying collective conflicts, which are

increasingly present in the current information society". One of the most relevant provisions in this regard are articles 81 and 82 of the Consumer Protection Code.⁸

Interesting questions arise from the description of the hypotheses of diffusivity or collectivity with regard to the indeterminacy of the affected persons, and about the binding situation being in fact or having a basic legal relationship, when, for example, we deal with consumer protection against unfair terms, which proliferate a lot in the wake of the technological revolution. This is because, if the wording of the CDC were to be understood, always under the civilistic bias of the law, it would prevent a preventive collective remedy *in abstracto*, since the basic legal relationship would always be required to do so. In other words, could a standard clause inserted in a contract, to which no consumer has yet adhered, have its abusiveness recognized?

We understand that it is! And this is also a step forward in the transformation of the consumer into a citizen. Let us remember the distinction between act, business and legal act-fact: (a) **the legal act (*lato sensu*)** is the legal fact whose phenomenal support has as its core a conscious exteriorization of will, aimed at obtaining a legally protected or not prohibited and possible result, subdivided into (a1) **legal act *stricto sensu*, legal fact or unilateral declaration of will**, whose legal effects are prefixed; and (a2) **legal transaction**, which consists of the legal fact whose core element of the factual support consists of a declaration or conscious manifestation of will; and (b) **legal act-fact**, that is, of a human volitional activity, in the world of facts, which enters the legal world as a fact, since for the Law, in this situation, The human will is irrelevant because it is not part of the abstract factual support.

The dignification of the consumer-citizen allows us to conclude that an unfair clause, if inserted in a standard contract, for example, will be able to affect, due to the characteristics

⁸ Article 81. The defence of the interests and rights of consumers and victims may be exercised in court individually or **collectively**.

Sole Paragraph. Collective **defense** will be exercised when it comes to:

I - **diffuse interests or rights**, thus understood, for the purposes of this code, **the transindividual ones, of an indivisible nature**, held by indeterminate persons and linked by **factual circumstances**;

II - collective interests or rights, thus understood, for the purposes of this code, trans-individual rights, of an indivisible nature, held **by a group, category or class of persons linked to each other** or to the opposing party by a **basic legal relationship**;

III - homogeneous individual **interests or rights**, thus understood as those arising from **common origin**.

Article 82. For the purposes of article 81, sole paragraph, the following are concurrently legitimated: (Text given by Law No. 9,008, of 3.21.1995)

I - the Public Prosecutor's Office,

II - the Union, the States, the Municipalities and the Federal District;

III – the entities and bodies of the Public Administration, direct or indirect, even if without legal personality, specifically intended for the defense of the interests and rights protected by this code;

IV – associations legally constituted for at least one year and that include among their **institutional purposes the defense of the interests and rights protected by this code**, with the authorization of the assembly being waived.

Paragraph 1 - The requirement of pre-constitution may be waived by the judge, in the actions provided for in arts. 91 et seq., when **there is a manifest social interest evidenced** by the dimension or characteristic of the damage, or by the relevance of the legal interest to be protected. (emphasis added).

of the Information Society, an indeterminate infinity of people, even before any of them adheres to such a contract. In other words, the characteristics of the phenomenal world and the concrete harm that such a potential offer will bring, allows us to see it as an act-fact, allowing the invocation of the diffuse collective protection of the consumer in the abstract.

Corroborating what we have exposed here, it is appropriate to mention Inocência Galvão Telles (*apud* FILOMENO, 2007, pp. 514-515), when he recalls that the control of abusive clauses can be preventive or repressive. The first is of a legal nature, translating into the prohibition by the legislator of terms that it considers unfair or administrative in nature, embodied in the adoption of elaborate models or even a judicial nature, amounting to the prohibition by the courts of clauses predisposed for widespread use, before and regardless of their concrete or effective inclusion in individual contracts. The control will be repressive to the extent that, when a dispute is raised over a certain standardized contract, the court declares certain value or certain clauses of it to be null and void, with effectiveness, it should be added, *erga omnes* and *ultra partes* (art. 103, CDC - "In the collective actions dealt with in this code [...] unless the request is dismissed due to insufficient evidence").

Just as an illustration of what has been exposed here about this preventive mechanism of consumer law, we cite the following judgment of the Court of Appeals of the State of São Paulo:

APPEAL – ANNULMENT ACTION – INFRACTION NOTICE ISSUED BY THE CONSUMER PROTECTION AND DEFENSE FOUNDATION (PROCON-SP) – ABUSIVE PRACTICES – E-COMMERCE – Plaintiff's initial claim for the dismissal of the Infraction Notice No. 18865 Series D8, drawn up against it by the Consumer Protection and Defense Foundation (PROCON-SP), as a result of the finding of practices considered abusive against consumers – first instance judgment that partially annulled the respective infraction notice – maintenance – plaintiff company that included, in the 'terms and conditions of use' of its services, clauses that would exempt it from any responsibilities related to any defects in the sale of its products – company that performs, through a specialized website, the intermediation of ticket sales – abusiveness of the clauses demonstrated – intelligence of article 51, items I and IV, of the CDC – elucidative precedent of the E. STJ (RESP nº 1.444.008/RS) – amount of interest, in addition, that it must be stated to the consumer at the time of purchase – duty to inform the supplier – AMOUNT OF THE FINE – fine calculated based on PROCON Normative Ordinance No. 45/2015 – recalculation considering the infractions kept healthy – sentence partially reformed. Plaintiff's appeal dismissed and defendant's appeal granted in part. (TJSP; Civil Appeal 1051249-52.2016.8.26.0053; Rapporteur: Paulo Barcellos Gatti; Judging Body: 4th Chamber of Public Law; Central Forum - Public Treasury/Accidents - 1st Public Treasury Court; Judgment Date: 08/26/2019; Registration Date: 09/04/2019).

Finally, the consumer protection system, headed by the CDC, is a statute that is a symbol of a public policy and a fundamental right en bloc, which enables the dignity of the

consumer, both through individual and collective protection, impelling the consumer to perceive himself as more than a simple powerless consumer in the face of the suppliers of products and services. but a citizen, who in an economy with capitalist dynamics, consumes and needs to consume, provided, of course, that this consumption does not degrade his condition of citizenship. The experience of the legal system of consumer protection, designed in the CDC, does seem to be a true emancipatory experience, whose enjoyment, when shared and reverberated in a network, can create an important source of political power, that of organized consumers.

This phenomenon, however, as we have already outlined here, could hardly occur spontaneously among us, under the current conditions and due to the historical circumstances of the formation of Brazilian citizenship as a *state* (CARVALHO, 2008, p. 61), or rather, from the spontaneous organization of consumers into groups of interested parties and influence (*stakeholders*), as, for example, occurred in the USA. in the 1960s-1970s.

Hence the even greater relevance of the CDC among us, because it was only after it that, in Brazil, the construction of a citizenship based on the consumer began to be conceived, capable of rebalancing and repositioning the human person in the environment of social relations of *liquid modernity*, valuing it as such.

The consumer is, therefore, a person, with dignity, who consumes. A consumer is a citizen who consumes, and not a person reduced to the figure of a mere consumer. This is the proposal of Néstor García Canclini who states that consumption is the "space that serves to think, and in which a large part of the economic, sociopolitical and psychological rationality in societies is organized". Or at least it should be that way.

4 FINAL CONSIDERATIONS

The liquefaction of modernity, by individualizing people, restricts the idea of citizen to that of the individual and that of the individual to that of consumer. This is a dangerous path, as it seems to subject the content and form of the exercise of all rights, including political ones, to the logic of consumption, eclipsing individual wills, which are incapable of adding up to constitute a collective plan greater than the sum of its parts.

On the contrary, the path engendered by the CDC, and complemented by other supervening norms such as the Civil Rights Framework for the Internet and the still recent General Law for the Protection of Personal Data, of recognizing the consumer as a citizen, in order to try, if not curb, some clearly identifiable trends in *liquid modernity* is salutary, at least equip Brazilian legal practice with collective instruments that allow not only public

agencies (such as the Public Prosecutor's Offices), but also consumer associations to act in their defense.

The indispensability of the CDC and the consumer protection system is even more evident when we remember the historical characteristics of the formation of Brazilian citizenship, always very dependent on state initiative. Thus, the conference, in the CDC, of a dignity proper to the consumer, generates a social synergy that will certainly reinforce his condition as a citizen.

In short, the consumer protection system, given the characteristics of the *network society*, can generate a very beneficial effect on the concreteness of citizenship (here understood in its integrating dimension and the realization of fundamental rights), by not only conferring dignity and identity to individuals (often pursued by them in the act of buying), but also keeping the spark of coordinated action alive, Collaborative and capable of creating an identity beyond the individual one, deceptively conferred by products and services placed on the market. Therefore, the CDC maintains the hope that consumer protection will lead to a conception of a citizen consumer, to prevent the reduction of citizens to consumers.

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